

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT KNOXVILLE

UNITED STATES OF AMERICA )  
 )  
v. ) No. 3:12-CR-00107  
 )  
MICHAEL R. WALLI, ) Hon. Amul R. Thapar, USDJ  
MEGAN RICE, and ) Hon. C. Clifford Shirley, Jr., USMJ  
GREG BOERTJE-OBED )

**DEFENDANTS RESPONSE TO GOVERNMENT’S SENTENCING MEMORANDUM**

The Government’s sentencing memorandum asks this Court to lock up Sr. Megan Rice for 5 to 7 plus years in prison, Greg Boertje-Obed for 6 to 8 years in prison and Michael Walli for 7 to 9 plus years in prison. In doing so, the Government makes at least four errors.

**ONE: GOVERNMENT ERRS IN CITING KABAT SENTENCE**

On pages 7 and 8 of their Memo (Document 271) the Government points this Court to the decision of the district court in the Kabat case in support for their position that request that this Court impose long years of sentences is reasonable.

However, the Government does not cite the statement by two of the three Eighth Circuit judges which directly questions the reasonableness of that sentence.

The reasonableness of the district court sentence was questioned by two the three Eighth Circuit Court of Appeal judges<sup>1</sup> in their addendum to their opinion:

“Although the severity of sentences imposed by the sentencing judge was not before the court on the appeal, the undersigned note their concern that the sentences imposed on these defendants’ [Father Paul Kabat, Father Carl Kabat, Lawrence Jacob Cloud-Morgan and Helen Woodson] may be heavier than sentences imposed in other cases on somewhat similar offenders.

We are also aware that in subsequent missile protest cases in the Western District of Missouri the prosecution has not charged those defendants, similarly situated to

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<sup>1</sup> The third judge did not join in the statement of the others saying their positions were premature and inappropriate. Kabat, supra, at 797 F2d 802.

these defendants, with sabotage. Additionally, we have received information that in the companion nuclear protestor case, the sentencing judge, Hon. Elmo B. Hunter, has reduced the sentence of Martin John Holladay to time served (seventeen months) from the initial sentence of eight years' imprisonment.

In light of the changed circumstances, we suggest that the sentencing judge consider reduction of the prison sentences previously imposed on these defendants, but add to any reduced sentence a period of probation to be subject to the court's specific order and condition that the defendants may be reincarcerated if they engage in any further unlawful activities." *United States v. Kabat*, 797 F.2d 580, 602 (8th Cir. 1986) (Addendum).

**TWO: GOVERNMENT ERRS IN NOT REMINDING COURT THAT THE SAME GOVERNMENT WAS PERFECTLY HAPPY WITH MUCH LIGHTER SENTENCES FOR DEFENDANTS BEFORE DEFENDANTS EXERCISED THEIR CONSTITUTIONAL RIGHT TO GO TO TRIAL**

In their Sentencing Memo (Document 271), the Government spends many pages urging this Court to treat these peace activists as "serious" criminals whose conduct deserves multi-year sentences consistent with the seriousness of their conduct.

However, the Government does not acknowledge in any way that the record is absolutely clear that the same Government was totally ready for and comfortable with substantially lower sentences for defendants conduct.

What changed and made their conduct so very "serious"? Defendants refused to plead guilty. The Government promised not to charge them with sabotage if they plead guilty to trespass and felony damage to property and promised to seek much more serious consequences against defendants if they chose to exercise their constitutional right to go to trial. When defendants insisted on their constitutional right, the Government decided to recharge them with much more serious charges.

Should these defendants spend extra years in prison just because they exercised their right to trial by jury?

The United States Sentencing Commission reports that 97 percent of all federal criminal defendants pled guilty.<sup>2</sup> This is certainly the outcome that prosecutors want.

But is being in the 3 percent who choose to go to trial so aggravating to the US judicial system that extra years should be added to sentences of those who exercise their constitutional rights?

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<sup>2</sup> Page 4 of OVERVIEW OF FEDERAL CRIMINAL CASES, Fiscal Year 2012. Available online.

The fact that the Government was previously satisfied with much more lenient sentences for the exact same conduct is a factor which should be taken into consideration by this Court when deciding how just the punishment should be.

### **THREE: GOVERNMENT MISCHARACTERIZES THE DAMAGE PROVEN AT TRIAL**

The Government implies that serious damage was caused to the national security of the USA despite contrary evidence given at trial by the Government's own witnesses.

First of all, the government never put on any witness who testified that the national security of the United States was harmed. There is no evidence at all that it was harmed.<sup>3</sup>

Second, claiming defendants caused "massive disruption" to Y-12, the Government omits the opposite facts which came out on cross-examination. Recall that the NNSA Manager, Mr. Erhart, testified that the "three unarmed senior citizens" gave "an important wake-up call" and revealed a "security culture of complacency" that had been in existence at Y-12 for some time prior to the July 28th incident, including "weaknesses in contract and resource management," "a substantial backlog of degraded and/or non-operational security equipment," "inoperative cameras," "periodic testing of security features was not performed," "fractured management structure appeared to have led to conflicting priorities," "contractor governance and federal oversight failed to identify and correct early indicators of the multiple systems breakdowns." See Transcript of Record, Doc. 192, pp. 91, 94-95.

Third, the evidence at trial shows the manifest nonviolent nature of defendants in taking these actions. Throughout the entire incident and their subsequent arrest, they never acted in a way that was violent or dangerous. Defendants did not bring any weapons with them onto the Y-12 facility. See Transcript of Record, Doc. 192, pp. 187-88. They did not make any threats. *Id.* When they met Officer Kirk Garland, the first security officer on the scene, defendants bowed and read to Mr. Garland from the Bible. *Id.* at 183. They did not run or resist arrest. *Id.* at 187. In fact, Mr. Garland described them as "passive." See *id.* at 189. Mr. Garland testified that based on their actions, he immediately knew what he had—peace protestors. *Id.* at 182, 190.

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<sup>3</sup> The Government attempts to raise the false issue of nuclear deterrence as an essential part of the security of the United States. This Court cannot allow the prosecution to ask for long sentences based on the importance of nuclear weapons to the national defense when this Court precluded defendants from putting on evidence of the illegality of nuclear weapons at trial. (See Order, 4-30-13, Document 130, pages 11-14, specifically footnote 6). "The defendants' motion to dismiss on the basis of international law fails because even assuming nuclear weapons are unlawful under international law, the government may still criminalize the destruction of property on which the government carries out its nuclear weapons program." (page 14, Document 130). If this Court assigns the Government's argument on this any weight, defendants are happy to brief this issue.

Fourth, the Government argues that “the negative publicity caused by the defendants’ intrusion damaged Y-12’s credibility, both in the United States and to other countries looking to give up their nuclear materials.”<sup>4</sup> This damage to Y-12’s credibility was self-inflicted and resulted, as the Inspector General of the Department of Energy reported: “...we found that the Y-12 security incident represented multiple systems failures on several levels. For example, we identified troubling displays of ineptitude in responding to alarms, failures to maintain critical security equipment, over reliance on compensatory measures, misunderstanding of security protocols, poor communications, and weaknesses in contract and resource management. Contractor governance and Federal oversight failed to identify and correct early indicators of these multiple system breakdowns. When combined, these issues directly contributed to an atmosphere in which the trespassers could gain access to the protected security area directly adjacent to one of the Nation’s most critically important and highly secured weapons-related facilities.”<sup>5</sup>

Fifth, the same DOE investigation into the security incident at Y-12 characterized defendants as “trespassers” who severed three fences and “defaced the building” housing the highly enriched uranium.<sup>6</sup> This is hardly the type of serious damage which the Government seeks to portray to justify years of imprisonment.

#### **FOUR: GOVERNMENT ACCUSATIONS THAT DEFENDANTS ARE DISINGENUOUS ARE NOT ACCURATE**

The Government, on page 4 of their Sentencing Memo (Document 271) twice accuses defendants of being disingenuous: once for arguing they have accepted responsibility and another time for contending that nuclear operations violate international law.<sup>7</sup>

Defendants have never denied what they did. They have always told the truth about their actions.

Defendants even went back to Y-12 months after their arrests to publicly point out where they crossed the first fence because the government never fixed that breach.<sup>8</sup>

Defendants have contended that nuclear operations at Y-12 violate international law and have offered substantial evidence in the record in support of their position.

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<sup>4</sup> Page 6, Document 271.

<sup>5</sup> Special Report: Inquiry into the Security Breach at the National Nuclear Security Administration’s Y-12 National Security Complex, August 2012, DOE/IG-0868, pages 1 and 2. This report is attached.

<sup>6</sup> Special Report, *supra*, at 1.

<sup>7</sup> “They have disingenuously contended throughout this case that Y-12’s nuclear operations violate international law and that their actions were justified to uphold international law.” and “Any argument by them that they have accepted responsibility for their actions is equally disingenuous.”

<sup>8</sup> Frank Munger, “Unmended fences: Months after Y-12 break-in, hole in barrier remains,” Knoxville News Sentinel, December 20, 2012. Available online.

How can that position be disingenuous when it is supported by the testimony in this court by former US Attorney General Ramsey Clark?<sup>9</sup>

Further, the detailed letter in the record from the Court from Lawyers Committee on Nuclear Policy documents that defendants' actions and statements "are part of a growing awareness, in the United States and worldwide, of the grave humanitarian impacts of nuclear war, the ongoing risks of nuclear detonations in conflict or otherwise, and the urgent need for the global elimination of nuclear weapons."<sup>10</sup> They point out this is a cause with bipartisan support at the highest levels. George Shultz, former Secretary of State under President Reagan and Henry Kissinger, Secretary of State under President Nixon, joined with two prominent Democrats to form the Nuclear Security Project, working together to create a world without nuclear weapons.

Current US actions and inactions are inconsistent with Article VI of the Nuclear Non-Proliferation Treaty, calls from the UN General Assembly, the 1996 Advisory Opinion of the International Court of Justice, and resolutions of the Red Cross/Red Crescent.

Careful reading of this letter and the testimony of former Attorney General Clark shows the inaccuracy of the Government's claim of disingenuousness.

### **CONCLUSION**

Three non-violent and symbolic resisters to nuclear weapons have been in prison for months already. Called "trespassers" by the Government, they cut through several non-functioning fences and "defaced" a building at Y-12 holding highly enriched uranium with peace messages such as "disarm" and "transform." They admitted what they did and even helped the government identify a hole in the fence months later. They acted in accordance with their consciences and the widely held opinion, shared by former Attorney General of the US Ramsey Clark and others that at Y-12 there are illegal weapons of mass destruction.<sup>11</sup>

They have spent enough time in prison already.

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<sup>9</sup> "When it comes to weapons of mass destruction of this magnitude, I think the United States is in clear violation of the purpose and intent of one of the most important treaties we ever signed. And that treaty required us to eliminate these weapons, and we haven't done it, and we've done the opposite, we've continually made them more dangerous, and proliferated. (page 34, testimony of former US Attorney General Ramsey Clark, April 23, 2015.) Full transcript attached.

<sup>10</sup> Letter to Honorable Amul R. Thapar, January 13, 2014 from Lawyers Committee on Nuclear Policy. Copy attached to this memo.

<sup>11</sup> "When it comes to weapons of mass destruction of this magnitude, I think the United States is in clear violation of the purpose and intent of one of the most important treaties we ever signed. And that treaty required us to eliminate these weapons, and we haven't done it, and we've done the opposite, we've continually made them more dangerous, and proliferated. (page 34, testimony of former US Attorney General Ramsey Clark, April 23, 2015.)

Sentencing Sr. Megan Rice to 5 years in prison, Greg Boertje-Obed to 6 years in prison and Michael Walli to 7 years in prison, for these actions, as the Government urges, would be consistent with the definition in Black's Law Dictionary of draconian<sup>12</sup> and inconsistent with the justice this system is pledged to try to embody.

Respectfully submitted,

s/ William P Quigley

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<sup>12</sup> (18c)(Of a law) harsh; severe. • This term derives from Draco, the name of the ancient Athenian lawgiver.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all the parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

s/ William Quigley \_\_\_\_\_



U.S. Department of Energy  
Office of Inspector General  
Office of Audits and Inspections

# Special Report

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## Inquiry into the Security Breach at the National Nuclear Security Administration's Y-12 National Security Complex

DOE/IG-0868

August 2012





## Department of Energy

Washington, DC 20585

August 29, 2012

### MEMORANDUM FOR THE SECRETARY

A handwritten signature in cursive script, appearing to read "Greg Friedman".

FROM: Gregory H. Friedman  
Inspector General

SUBJECT: INFORMATION: Special Report on "Inquiry into the Security Breach at the National Nuclear Security Administration's Y-12 National Security Complex"

### BACKGROUND

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 U.S. nuclear weapons stockpile. Y-12 maintains an extensive security mechanism that relies on a well-trained and extensively equipped protective force, advanced technology, and a variety of physical fortifications. During Fiscal Year 2012, Y-12 plans to devote about \$150 million in taxpayer funds to ensure the security of its uranium inventory and physical plant. Y-12 has long enjoyed a reputation as one of the most secure facilities in the United States.

During the early morning hours of July 28, 2012, three individuals (hereinafter referred to as the trespassers), gained access to the area surrounding the Highly Enriched Uranium Materials Facility (HEUMF) at Y-12 and defaced the building without being interrupted by the security measures in place. In fact, the trespassers were not physically observed by the Y-12 Protective Force until after they had severed three separate fences surrounding the HEUMF. After receiving a call from the Oak Ridge Operations Center, Office of Inspector General (OIG) special agents arrived, arrested the trespassers and transported them to the Blount County Detention Facility. We initiated a joint criminal investigation of the trespass and, at the time of this report, were working closely with the Federal Bureau of Investigation and the U.S. Attorney for the Eastern District of Tennessee on this matter.

Because of the importance of ensuring the safe and secure storage of nuclear materials we commenced a special inquiry into the circumstances surrounding the Y-12 breach within days of the event.

### PRELIMINARY RESULTS

During our review, we conducted interviews with Federal and contractor officials, security personnel, and alarm station operators. We also reviewed supporting information pertinent to the sequence of events on the night of the breach. Based on these inquiries, we found that the Y-12 security incident represented multiple system failures on several levels. For example, we identified troubling displays of ineptitude in responding to alarms, failures to maintain critical

security equipment, over reliance on compensatory measures, misunderstanding of security protocols, poor communications, and weaknesses in contract and resource management. Contractor governance and Federal oversight failed to identify and correct early indicators of these multiple system breakdowns. When combined, these issues directly contributed to an atmosphere in which the trespassers could gain access to the protected security area directly adjacent to one of the Nation's most critically important and highly secured weapons-related facilities.

### Alarm Response

We found that the response to the security breach at Y-12 was inadequate in several material respects. Although immediately aware that a number of alarms had been activated at the HEUMF, a Protective Force officer was not promptly dispatched to assess the situation. When an officer finally arrived, the individual did not immediately secure the scene or neutralize the trespassers. This did not occur until a supervisor arrived and did so. In fact, the first responder remained in the patrol vehicle answering a cell phone call from a supervisor for a brief period. The officer, in a personal interview, told us that he did not notice the trespassers until they approached the vehicle and "surrendered" to the responder. Even when the officer exited the patrol vehicle, the officer did not move to secure the area, did not draw a weapon, and permitted the trespassers to roam about and retrieve various items from backpacks they had apparently brought into the area adjacent to the HEUMF. The responder also did not protect his weapon, thereby hazarding it to control by the trespassers. When the supervisor arrived on the scene, direction was given to the first responder to cover the supervisor until protective gear could be donned. However, the first responder did not provide cover and continued to look away from the trespassers at other areas of the site.

In addition, an officer stationed inside the HEUMF at a post directly adjacent to the trespassers' point of entry did not properly respond to the intrusion. In direct contrast to established policy, the officer used an unauthorized technology (a pan-tilt-zoom camera) to perform an assessment of the security zone that the trespassers penetrated. The officer did not detect the trespassers even though two members of the group had entered the security zone through a hole the group had cut in the outermost fence of the Perimeter Intrusion Detection and Assessment System surrounding the HEUMF and were in the process of cutting an adjacent fence. At the same time, another officer silenced a local alarm without looking out of a gun port or available viewing glass to assess the situation.

In short, the actions of these officers were inconsistent with the gravity of the situation and existing protocols.

After the arrival of a Protective Force supervisor, the Protected Area Sector Lieutenant ordered a lockdown of the entire Protected Area at Y-12. A number of protective measures were then deployed, including vehicle arrest systems, tactical response teams, and patrols by armored vehicles. Searches for other possible trespassers also commenced.

### Maintenance of Security Equipment

Technology features critical to the security of HEUMF and other nuclear related facilities at Y-12 were inoperable and/or not properly maintained. Our inquiry disclosed that both Federal and contractor management officials at the site were aware that a substantial backlog of degraded and/or nonoperational security equipment existed. Gaps between the Department's requirements and NNSA policy for addressing critical security maintenance issues likely contributed to the backlog.

We found that security equipment repairs were not always treated as a priority at Y-12. Inoperative cameras, devices that contributed the delays in assessing alarms and identifying the trespassers in this case, were not considered to be critical security devices by Y-12. Rather, these devices were assigned a priority of "security significant," a rating that permitted repairs to be delayed. At least one other site with a weapons and nuclear material mission, NNSA's Pantex Plant in Texas, had classified cameras as "critical" elements of its security system. We discovered that the Department required that repairs of critical equipment be initiated within 24 hours. However, even if the cameras had been properly prioritized at Y-12, NNSA's policy in this area did not specify repair time requirements.

Although we did not verify the information because of the expedited nature of our review, NNSA Headquarters officials told us that similar NNSA sites appeared to follow the Department's policy in that they had repair rates for critical equipment of less than 24 hours. A senior contractor official at Y-12 told us that critical items were to be repaired within 5-10 days; however, we could not identify regulations/guidance or directives supporting that assertion. The same official later acknowledged that repair timeframes were treated as a goal rather than a requirement. As a consequence, important maintenance actions were significantly delayed and equipment was not returned to service in a timely manner. As it relates to this intrusion, one critical fixed camera that provided coverage of the penetration area had been out of service for approximately 6 months. We found this to be troubling.

Required, periodic testing of security features was also not properly performed. Notably, we learned that when equipment was tested officials only sought to determine that a "feed" was available from the device rather than determining whether all of the device's features were working. In this particular case, it is likely that had one of the device's features been operational, the trespassers would have been detected immediately after entering the security zone surrounding the HEUMF and prior to reaching the facility. When questioned, both security and maintenance told us that they had no idea of how long the feature had been out of service. At least one security officer told us that had this feature been operational, the trespassers would have been detected before they cut the innermost protective fence at the HEUMF.

Federal and contractor officials at Y-12 told us that the cameras had been reclassified as critical security elements within 24 hours of the event and that repairs of all critical equipment had commenced. During our tour of the HEUMF, we observed that the malfunctioning camera and security feature just discussed had been repaired and appeared to be functioning as intended. As a demonstration of the need for continuing vigilance in this area, we noted that a camera repaired after the breach malfunctioned within days of its repair.

### Compensatory Measures

Over reliance on the use of compensatory measures to address equipment failures impacted system readiness at Y-12. When questioned as to why action was not taken to address growing maintenance backlogs, Federal officials told us that with the advent of NNSA's contractor governance system (Contractor Assurance System), they could no longer intervene. They contended that as long as the maintenance anomalies were identified and compensatory measures were in place, they could take no action to prompt the contractor to complete needed repairs. In these matters, a compensatory measure is generally defined as an off-setting control such as dispatching an officer to visually assess the situation/inspect an area where a security device had alarmed when the installed technology feature was inoperable. One of these same officials also indicated that they had been instructed not to evaluate and report on "how" the contractors were conducting business, but to focus instead on ensuring that the mission was accomplished. The other Federal official told us that risk management and cost considerations could lead to equipment not being repaired at all, and as a result, cause compensatory measures to become permanent. A senior NNSA Headquarters security official noted that the overuse of compensatory measures, coupled with issues with false alarms, may have led to complacency of the Protective Force and diminished security at Y-12. Our analysis suggested that compensatory measures should be targeted and that, in this particular instance, were not an adequate substitute for critical equipment that is out of service.

### Interpretation of Existing Policy

Protective Force officers misinterpreted established policies regarding the use of technology to perform field assessments of alarm activations. NNSA's procedures in this area required that cameras used for such assessments be fixed in position, with fixed length lenses. Established guidance specifically noted that pan-tilt-zoom cameras, installed in a number of areas at Y-12, may only be used for such assessments if in a locked configuration. At least one reason for this distinction is that it may be possible for an adversary to follow the movement of a camera and out-maneuver it to avoid detection. Protective Force officials, however, told us that they believed that it was acceptable to use non-fixed cameras for assessments of security events. In this particular case, the pan-tilt-zoom camera that was used for the event actually revealed an image of the trespassers as they breached security barriers; one that was unfortunately not detected by the officer operating the camera.

### Communication

We also observed that several troubling communications deficiencies surfaced during the security breach. As one example, security police officers on the night of the incident incorrectly assumed that trespassers who were beating on the external wall of the HEUMF with a hammer were plant maintenance workers. The officers noted that they were often not alerted to scheduled maintenance, and that workers would appear in the security area outside the facility without warning. According to the officers, the arrival of maintenance workers in the hours of darkness and without warning was not unusual. In comments on a draft of this report, NNSA raised questions about the accuracy of this statement. In response, we contacted the Plant Shift Superintendent's office for clarification. Officials within the Superintendent's office confirmed that workers such as roofers, utility repair persons and fire personnel performed work early in the

morning. However, they explained there was an established process for work approval which included involvement from Management and Operating (M&O) and Protective Force contractor personnel. Thus, there appeared to be a breakdown in communications on this point that we could not reconcile.

In addition, Protective Force officers were not advised of equipment outages when they assumed watch. Officers told us that they often did not learn of equipment outages until they tried to access the equipment to do a field assessment of a security event. The officers explained that knowing what equipment was non-operational at the time they assume their posts would be beneficial when they were called on to respond to alarm activations.

The Protective Force relied heavily on communication via cell phones rather than radios. Although generally prohibited by site security plans, both the first and second responders to the July 28 intrusion were dispatched via cell phone. Directives, to which site contractors were required to adhere, mandated that the digital, encrypted radio system for the Oak Ridge Reservation was to be used as the primary means of communication by the Protective Force. Confusion regarding these explicit requirements, however, may have existed because the NNSA policy did not specifically indicate that the reservation's radio system was to be the primary means of communication. Use of the radio system permits all members of a group to share information and provides for recording of conversations for subsequent analysis. Conversely, cell phone communication channels are not encrypted and are subject to eavesdropping, a weakness that could result in the disclosure of classified and/or critical security information. In this particular case, the lack of a complete record of vital communication may have adversely impacted management's ability to objectively and comprehensively analyze the events that unfolded on July 28.

#### Funding and Resource Allocations

Contractor officials expressed concern that constrained Federal funding had negatively impacted security controls at Y-12. For example, NNSA made a decision to eliminate some security features surrounding the HEUMF prior to completion of construction in 2008. Plans to install an additional delaying barrier were abandoned during construction. One official told us that the decision to exclude the delaying/prevention barrier was appropriate because of the security features of the HEUMF. Other officials told us that the feature, in place in the Protected Areas at other sites, was omitted because of budget considerations. The installation of barriers similar to those used in other portions of the Protected Area (as shown in photograph 1) would have complicated, delayed or perhaps even prevented the intrusion by the trespassers.

Photograph 1-Delay Barriers



(Source: NNSA Production Office Public Affairs)

Contractor officials told us that fiscal pressures impacted Protective Force patrols at Y-12. As with the rest of its complex, Y-12 was directed by NNSA in December 2011 to plan for reduced security funding. Headquarters NNSA officials told us that the reductions were primarily being made because of changes in the site footprint and new and enhanced technology. In response, the security contractor eliminated nightly interior patrols and reduced the number of roving patrols. The security contractor had also recently announced its intention to reduce Protective Force personnel levels by 70 people through voluntary and involuntary separations. Protective Force contractor officials indicated that the planned staff reductions were cancelled in response to the recent intrusion.

Officials noted that resources provided for maintenance were not sufficient to ensure that all needs were met. In particular, workers were responsible for maintaining existing facilities as well as completing the installation of technology required for the site's \$85 million Security Improvement Program (SIP). Yet, as we were told, there was no increase in staffing levels. Contractor officials noted that maintenance assets were diverted to install security technology components. As a result, corrective maintenance backlogs grew and equipment repairs could not be completed in a timely manner.

#### Contract Management

NNSA's prime contract structure at Y-12 impeded the integrated management of the safeguards and security function. It also resulted in bifurcated lines of contractor accountability and responsibility. Specifically, NNSA's prime contract with the M&O contractor tasked it with the overall management and operation of safeguards and security activities at Y-12, including physical security systems and systems performance testing. However, Protective Force operations were specifically excluded from the M&O contractor's work scope. Instead, NNSA had a separate prime contract to provide Protective Force staff and training. Thus, physical security systems and security personnel were managed by completely different organizations.

The fractured management structure appeared to have led to conflicting priorities. For example, during implementation of the ongoing Y-12 SIP, the Protective Force contractor told us that it had surfaced a large number of concerns related to implementation of various security features, leading to its recommendation to delay implementation in some cases.

According to the M&O SIP Project Manager, a separate working group comprised of representatives from both the M&O and Protective Force contractors was formed to evaluate the Protective Force's concerns and inform the SIP Project Team of those that needed to be addressed within the project's scope. The working group identified a number of issues it considered to be security significant that required resolution. Nonetheless, the Project Manager determined that many of those issues did not impact the protections of the site's materials and, therefore, should be considered enhancements to be addressed by the M&O contractor's Security Systems group at a later date. The Project Manager was unable to tell us exactly how many items had been addressed at the time of the Y-12 incident.

## Federal Oversight

Contractor governance and Federal oversight failed to identify and correct early indicators of the multiple system breakdowns that contributed to the incident. Specifically, since at least 2010, contractor governance reporting systems and Federal oversight efforts indicated that the site's physical security systems were functioning as intended. For example, site office quarterly reports provided to the Defense Nuclear Security Chief indicated positive performance of site physical security systems and the Protective Force. According to senior NNSA officials, the site office quarterly reports were based on the results of the contractors' self assessments. Similarly, NNSA's assessments of the contractor's physical security and Protective Force performance were rated at high levels based on analyses of the quarterly reports. In fact, senior NNSA officials told us that, prior to the recent incident, the site was considered to be one of the most innovative and higher performing sites in the complex. In commenting on a draft of our report, NNSA noted that a performance assessment performed in May 2012 by the Office of Health, Safety and Security indicated that the systems in place facilitated a high probability of detection of intruders. While we do not disagree with this statement, we noted that the review in question involved only the Y-12 alarm system and did not address the entire site security apparatus.

Despite the positive reports provided by the contractor and endorsements from Federal site managers, there were actually a number of known security-related problems at Y-12. For example, maintenance backlogs of critical security equipment were allowed to increase even though the M&O contractor had not performed any analyses to measure the effect of these problems and repair needs on the overall security posture. In particular, we learned that even though both contractor and Federal officials received a daily report of all degraded equipment, they did not perform the evaluations necessary to determine whether the outages, when considered in aggregate, would have impacted security for a significant segment of a facility or area.

As noted in previous OIG Management Challenges reports, Security and Safeguards across the complex warrant special attention by the Department. Our FY 2012 report found that both the OIG and the Government Accountability Office have identified that the Department's extensive Protective Force contingents were not uniformly managed, organized, staffed, trained or compensated throughout the complex. Given the exposure to risk in this area and the reality of the recent situation at Y-12, we believe that heightened and continued focus on Security and Safeguards is necessary.

### **Favorable Actions**

Following the incident, Y-12 and NNSA took a number of actions designed to improve security at the site. For example, Y-12 implemented features designed to help reduce false alarms. Also, NNSA moved the site Protective Force contract from Federal control to the M&O contractor for Y-12. The site began installing additional fortifications around the HEUMF designed to further delay potential intruders. Finally, the NNSA issued a show cause letter to the M&O contractor

directing it to provide information as to why its contract should not be terminated in response to the demonstrated security weaknesses. As previously noted, the site has also initiated and in many cases completed repairs of most critical security equipment.

NNSA officials indicated they are in the process of completing a formal root cause analysis of the intrusion. They expected the report to be available soon and noted their intent to use it to solidify their overall corrective action approach. Finally, an extensive security evaluation, including performance testing, is scheduled to be conducted in the near future to validate the efficacy of corrective actions taken.

Additionally, officials told us that NNSA has recently established the NNSA Production Office (NPO) in order to provide more consistency in the oversight and administration of the Y-12 and Pantex production sites. Further, officials indicated that as a result of the recent security incident, they were reviewing the current oversight model to determine the reasons the governance model did not identify the weaknesses that contributed to the security incident at Y-12. Finally, management informed us that the NPO believed that approval of compensatory measures should have mirrored the process used at Pantex requiring Federal approval of such measures. For that and other reasons, officials were evaluating the process for reviewing and approving compensatory measures at Y-12 and plan to issue improved guidance in the near future.

### **Impact and Path Forward**

The successful intrusion at Y-12 raised serious questions about the overall security approach at the facility. It also suggested that current initiatives to reduce Federal oversight of the nuclear weapons complex, especially as they relate to security functions, need to be carefully considered. Some observers went so far as to express the view that there were security culture problems at Y-12 creating an environment in which the July 28 intrusion could occur.

We perceived there to be a level of confidence in the quality of the Y-12 security apparatus that was unjustified. This may have led to a sense of complacency that was inconsistent with: (1) the unique status, mission and sensitivity of operations at Y-12 and its vital national security role; and, (2) the enormous investment of funds and resources in the security apparatus at the Y-12 complex to ensure its secure operations.

In addition to the issues described in our report, we provided management with additional, detailed information that was not included in our report due to security considerations. Other than pursuing our on-going criminal investigation activities, we plan to monitor the Department's progress in completing its formal root cause analysis of the event. If the situation warrants, we will issue supplementary reports on this matter.

### **RECOMMENDATIONS**

Ironically, the Y-12 breach may have been an important "wake-up" call regarding the need to correct security issues at the site. Given the unprecedented nature of this security event, prompt



and effective corrective actions are essential. In that respect, in addition to the actions recently initiated, we recommend that the Under Secretary for Nuclear Security/Administrator, National Nuclear Security Administration:

1. Verify that all critical security equipment at Y-12 has been repaired and is operational;
2. Provide additional guidance on prioritizing equipment repairs and maintenance, and on the appropriate use of technology and communications protocols;
3. Determine whether critical security resource allocations are sufficient to meet demonstrated requirements;
4. Perform periodic in-depth reviews of contractor's security performance using a risk-based approach;
5. Evaluate the accuracy, quality, and completeness of information provided by contractors as part of the governance system and effect changes as necessary;
6. Clarify the NPO's authority under the governance model;
7. Ensure that NNSA Headquarters officials have full and complete information on the status of Y-12 security operations; and,
8. Prepare a lessons learned report that can be shared across the complex.

We noted that the senior leadership of both the Department and NNSA, recognizing the gravity of the security event at Y-12, has been personally involved in related fact finding and root cause identification efforts, including seeking solutions to any contributing institutional problems. As of the date of issuance of this report, inquiries concerning the July 28 Y-12 intrusion continue at a number of levels, both Federal and contractor. The Department's security apparatus has been charged with conducting a full scope review of the event and related circumstances and, ultimately, evaluating the status of the security posture at other agency facilities.

#### MANAGEMENT REACTION

NNSA management agreed to implement the report's recommendations. Management outlined a number of corrective actions it had initiated or completed. NNSA also indicated that in light of the problems at Y-12 it was conducting a complex-wide assessment of physical security to identify any corrective measures necessary to protect the Nation's most sensitive nuclear materials.

#### OFFICE OF INSPECTOR GENERAL RESPONSE

Management's comments were responsive to the report and its recommendations. As noted in the report, we will continue to monitor NNSA's progress in completing its analysis of the event and will issue supplementary reports if warranted.

Attachments

cc: Deputy Secretary  
Associate Deputy Secretary  
Administrator, National Nuclear Security Administration  
General Counsel  
Chief of Staff

## RELATED REPORTS

- Special Report on [\*Management Challenges at the Department of Energy – Fiscal Year 2012\*](#) (DOE/IG-0858, November 2011). As part of our annual report to identify the most significant challenges facing the Department of Energy (Department), we identified eight challenges and three areas for the "watch list" for Fiscal Year (FY) 2012. Specifically, the report identified contract and financial assistance award management as a management challenge and safeguards and security as an area that warrants special attention from Department officials. We also noted in our report that there may be significant economy of scale cost benefits associated with protective force contract consolidation that could encourage a more uniform and consistent approach to protective force organization, management, training, and equipment purchases.
- Special Report on [\*Management Challenges at the Department of Energy\*](#) (DOE/IG-0844, November 2010). As part of our annual report, we identified seven challenges and placed three areas on our "watch list" for FY 2011. Specifically, we noted that because of the number of contracts handled by the Department and the complexity and importance of the Department's numerous multi-million dollar projects, combined with new challenges created by the American Recovery and Reinvestment Act, contract and financial assistance award management was a significant management challenge. In addition, it was stated in our report that special emphasis on safeguards and security has remained a vital aspect of the Department's mission. In order to faithfully execute its mission of ensuring the safety of the country's nuclear weapons, the Department employs numerous security personnel, protects various classified materials and other sensitive property, and develops policies designed to safeguard national security and other critical assets. Ensuring that these safeguards are both efficient and effective require continuing focus to address this critical challenge.
- Inspection Report on [\*Y-12 National Security Complex Accountable Classified Removable Electronic Media Program\*](#) (INS-L-09-03, March 2009). The inspection was initiated to determine whether Y-12's accountable classified removable electronic media (ACREM) was managed, protected, and controlled consistent with applicable requirements. This review found that an unmarked hard drive had not been properly marked as Secret/Restricted Data and placed into accountability as ACREM, as required, and that 332 metallic flat discs and data tapes located in an ACREM safe may not have been properly controlled as ACREM. Since corrective actions were taken, no recommendations were made; however, we suggested that the Y-12 Site Office take action to ensure timely destruction of unneeded media was accomplished.
- Inspection Report on [\*Incident of Security Concern at the Y-12 National Security Complex\*](#) (DOE/IG-0785, January 2008). This review was initiated because we received an allegation that unauthorized portable electronic devices (including laptop computers) were introduced into a Limited Area which employs physical controls to prevent unauthorized access to classified matter or special nuclear material at Y-12 and that this breach in security was not properly reported. Our inspection substantiated the allegation and identified additional concerns related to the incident. Specifically, we found that Y-12 personnel discovered that an Oak Ridge National Laboratory employee had brought an unclassified laptop computer

into the Limited Area without following proper protocols, the cyber security staff had not properly secured the laptop, the incident was not reported until six days after it was discovered, and as many as 37 additional laptop computers may have been improperly introduced into the Limited Area. We made several recommendations to further enhance the security of information systems and responses to incidents of security concern. In response, management identified corrective actions taken, initiated, or planned.

- Inspection Report on [\*Review of the Department of Energy's Canine Program at Selected Sites\*](#) (DOE/IG-0755, January 2007). We reviewed the Canine Programs at selected Department sites to determine whether they provided an adequate level of protection for personnel and facilities. During our inspection, we found that half of the canine teams observed failed the explosive detection portion of the operational evaluation, each of the canines observed failed to respond to at least one of the handlers commands, and the canines were not receiving the minimum number of hours of weekly training for explosive detection that were specified in the contractor's standards. Accordingly, we made recommendations to address the issues and enhance security and the comments and planned actions received were responsive to our recommendations.
- Inspection Report on [\*Concerns with Security Barriers at the Y-12 National Security Complex\*](#) (DOE/IG-0741, October 2006). Because we received an allegation that weapon port openings in newly constructed concrete security barriers at Y-12 were designed without the space required to accommodate the sight system of protective force weapons, we initiated an inspection. During our review, we substantiated the allegation and found that the original measurements of weapon ports in 90 concrete security barriers were undersized and unable to adequately accommodate the sight system on the protective force weapons. The weapon ports were subsequently modified. However, we concluded that based on the timing of the available information, the Protective Force contractor had the opportunity to send information to the managing and operating contractor correcting the sizing specification prior to construction, but failed to do so. Also, we found that the managing and operating contractor received payment of \$525,000 for completion of three security upgrades even though two were completed after the date specified in the performance based incentive. We made several recommendations that included recouping amounts paid to the contractors and ensuring the items found in our inspection were addressed.
- Inspection Report on [\*Security Access Controls at the Y-12 National Security Complex\*](#) (DOE/IG-0691, June 2005). We initiated this inspection because we received information that non-U.S. citizens were improperly allowed access to a leased facility at the Y-12 complex. During our inspection we found that 16 foreign construction workers, using false documents, had gained access to the Y-12 site on multiple occasions and that control procedures at Y-12 facilities were not implemented. While we recommended that the Y-12 Site Office ensure that the revised access policy was fully and consistently implemented, we also recommended officials determine actions that may have been warranted Department-wide.
- Inspection Report on [\*Protective Force Training at the Department of Energy's Oak Ridge Reservation\*](#) (DOE/IG-0694, June 2005). This inspection was initiated because we received an allegation that a security police officer was given credit for training that was not received at the Oak Ridge Reservation. The inspection concluded that there were

material shortcomings in the implementation of the protective force training program. Specifically, we found that personnel spent about 40 percent less time on combat readiness refresher training than that specified in the training plan, planned training time was formally reported as actual training time, personnel routinely worked in excess of the maximum threshold for safe operations of 60 hours per week, and personnel signed attendance rosters for training not received. Because of the importance to the Nation's security, several recommendations were made to ensure the protective force is properly trained.

- Inspection Report on [\*Protective Force Performance Test Improprieties\*](#) (DOE/IG-0636, January 2004). The inspection was initiated at the Y-12 Site Manager's request to examine whether there had been a pattern over time of site security personnel compromising protective force performance tests. Our inspection confirmed that the results on a performance test may have been compromised as two protective force personnel were inappropriately permitted to view the computer simulations of four scenarios on the test. In addition, we were provided information that inappropriate actions had occurred going back to the mid-1980s in connection with performance tests at the Department's Oak Ridge complex. NNSA concurred with our findings and recommendations made in our report and provided a series of corrective actions that had been initiated or planned.

**MANAGEMENT COMMENTS**

**Department of Energy**  
 National Nuclear Security Administration  
 Washington DC 20585  
 August 28, 2012

OFFICE OF THE ADMINISTRATOR

MEMORANDUM FOR GREGORY H. FRIEDMAN  
 INSPECTOR GENERAL

FROM: THOMAS D'AGOSTINO  
 ADMINISTRATOR

SUBJECT: Response to the Inspector General's Special Report on "Inquiry into the Security Breach at the National Nuclear Security Administration's Y-12 National Security Complex

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 action 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.

More specifically, in the days following this incident, the General Manager of the plant along with the leaders of the guard force were removed, and the guards who failed to detect the breach were suspended. Security cameras have been fixed, guard patrols have been increased, and the entire workforce is undergoing additional security training.

We have also issued a notice that requires the Y-12 contractor to show cause why termination proceedings should not be instituted for their management and operations contract for Y-12. We have also taken steps to consolidate responsibility for site operations and security under a single contract, so that there can be no more confusion between contractors about who bears responsibility for maintaining and integrating the physical and human security infrastructure that protects this facility.

We believe this incident raises important questions about the security of Category I nuclear materials across the DOE complex. To that end, we are conducting a complex-wide assessment of the physical security measures, personnel training and procedures, and chain of command to determine any corrective measures that may be necessary to protect this Nation's most sensitive nuclear materials.

We appreciate the timely and important work of the Inspector General in this case, fully endorse and will implement all of the recommendations in this report. Some have been acted on already and I will personally hold our team accountable for implementing the remaining items.



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2. What additional information related to findings and recommendations could have been included in the report to assist management in implementing corrective actions?
3. What format, stylistic, or organizational changes might have made this report's overall message more clear to the reader?
4. What additional actions could the Office of Inspector General have taken on the issues discussed in this report that would have been helpful?
5. Please include your name and telephone number so that we may contact you should we have any questions about your comments.

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT KNOXVILLE

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UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	3:12-CR-107
	:	
MICHAEL R. WALLI, MEGAN RICE,	:	
and GREG BOERTJE-OBED,	:	
	:	
Defendant.	:	

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Chattanooga, Tennessee  
April 23, 2013

BEFORE: THE HONORABLE AMUL R. THAPAR  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

JEFFREY E. THEODORE  
MELISSA M. KIRBY  
Assistant United States Attorneys  
Office of the United States Attorney  
800 Market Street, Suite 211  
Knoxville, Tennessee 37902

MOTION HEARING

1 APPEARANCES: (Continuing)

2  
3 FOR DEFENDANT MICHAEL R. WALLI:

4 CHRISTOPHER SCOTT IRWIN  
5 Lewis and Irwin Law Firm  
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8 WILLIAM P. QUIGLEY  
9 Loyola University New Orleans College of Law  
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12 New Orleans, Louisiana 70118

13 FOR DEFENDANT MEGAN RICE:

14 FRANCIS L. LLOYD, JR.  
15 Law Office of Francis L. Lloyd, Jr.  
16 9111 Cross Park Drive, Suite D-200  
17 Knoxville, Tennessee 37923

18 FOR DEFENDANT GREG BOERTJE-OBED:

19 GREG BOERTJE-OBED, PRO SE

20 PAULA VOSS  
21 BOBBY E. HUTSON, JR.  
22 Federal Defender Services  
23 of Eastern Tennessee, Inc.  
24 800 South Gay Street, Suite 2400  
25 Knoxville, Tennessee 37929-9714

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1 THE CLERK: This is --

2 THE COURT: Please call --

3 THE CLERK: I'm sorry, Your Honor.

4 This is Criminal Action 3:12-CR-107, United States  
5 of America versus Michael R. Walli, Megan Rice, and Greg  
6 Boertje-Obed.

7 Jeff Theodore and Melissa Kirby are here on behalf  
8 of the government.

9 Mr. Theodore, is the government ready to proceed?

10 MR. THEODORE: Present and ready, Your Honor.

11 THE COURT: Good morning.

12 THE CLERK: Christopher Irwin and William Quigley are  
13 here on behalf of the defendant Walli.

14 THE COURT: Good morning. Can you give me your name  
15 again?

16 MR. IRWIN: Chris Irwin.

17 THE COURT: Good morning.

18 Mr. Quigley?

19 MR. QUIGLEY: Bill Quigley.

20 THE CLERK: Francis Lloyd is here on behalf of  
21 Defendant Rice.

22 MR. LLOYD: Present and ready, Your Honor.

23 THE COURT: Good morning.

24 THE CLERK: And Paula Voss is here as elbow counsel  
25 for Defendant Boertje-Obed.

1 MS. VOSS: Your Honor, I'm simply filling in for  
2 Mr. Hutson. He's doing a sentencing in another court. And  
3 with your permission, he's going to transition when he gets  
4 done there.

5 THE COURT: As long as that's fine with the  
6 defendant, great.

7 Counsel, before we get to the substance of the  
8 hearing, I want to cover a number of things, just housekeeping  
9 matters for the trial. I received a motion for voir dire as  
10 well as the response. And here is what I've decided to do. I  
11 think what I'll do is, instead of having counsel ask  
12 questions, I'll just ask all of the questions myself. If  
13 anyone wants questions asked, either the United States or the  
14 defendants, by the Court, they should provide the Court with a  
15 list of questions no later than this Friday by 5:00 p.m.,  
16 filed in the record, and soft copies e-mailed to my chambers  
17 e-mail.

18 We won't have a clock. I will grant in part the  
19 defendants' request. Of course I won't have a clock. And I  
20 will ask all the questions that I deem are relevant to secure  
21 a fair and impartial jury. I may allow follow-up, but I'll  
22 retain my discretion to do so until I see how the jury  
23 selection is going. In addition, I'm going to start jury  
24 selection on Monday, May 6th, at 1:30 p.m. All right? That  
25 handles that motion.

1           As to jury instructions, I request that anyone that  
2 wants specific jury instructions provide a copy of any  
3 proposed jury instruction to the chambers by this Friday,  
4 again, at 5:00 p.m., and file them in the record. You don't  
5 have to include any pattern instructions in the Sixth Circuit.  
6 You can assume I will give most of the pattern instructions  
7 that are relevant. The instructions are that critical from  
8 your all's perspective are the substantive instructions, and I  
9 would appreciate those filed in the record no later than  
10 5:00 this Friday, as well as a soft copy served on the Court.

11           Any questions about any of that from the United  
12 States?

13           MR. THEODORE: No, Your Honor.

14           THE COURT: From the defense?

15           MR. IRWIN: Your Honor, to be clear, not just through  
16 the ECF, you'll want us to fax it to your office?

17           THE COURT: E-mail.

18           MR. IRWIN: E-mail.

19           THE COURT: Yeah, to our chambers e-mail, which we  
20 can put in a minute entry so you-all don't have to try and  
21 scratch it down, if that makes sense.

22           MR. IRWIN: Thank you, Your Honor. Thank you.

23           MR. LLOYD: Does Your Honor prefer, as some judges  
24 do, with respect to the proposed charges, there be a charge  
25 with the supporting authority and then a charge to hand to the

1 jury that has no authority on it?

2 THE COURT: You don't need to worry about that. What  
3 I want from you is a charge with the supporting authority.  
4 Then what I'll do is, I'll construct the charge, before the  
5 charge conference, that I think is required by law. And then  
6 what I'll do is, I will read the instructions to the jury. And  
7 they have monitors. We'll get one copy that we will put on the  
8 monitor so the jury can follow along, and that copy will go  
9 back with them. Does that make sense?

10 MR. LLOYD: Yes, Your Honor.

11 THE COURT: Okay. Great. Is any counsel going to  
12 want daily copy transcripts during trial?

13 (Brief pause.)

14 THE COURT: From the United States?

15 MR. THEODORE: We don't anticipate that, Your Honor.

16 THE COURT: Mr. Irwin, Quigley, Lloyd, or Ms. Voss,  
17 or any of the defendants?

18 MR. LLOYD: I believe we do, Your Honor.

19 THE COURT: You will want daily copy?

20 MR. LLOYD: Yes, Your Honor.

21 THE COURT: Okay. We will note that in the minute  
22 entry, that defendants' counsel will be requesting daily copy.

23 Is there-- There were a couple other housekeeping  
24 matters, actually, that were just filed. Let me see if I can  
25 do them kind of on the run. One is a motion to take judicial

1 notice. Let me just pull it out. I had hearings all morning,  
2 so I just glanced at it.

3 Has the United States had an opportunity to review  
4 this?

5 MR. THEODORE: Briefly, Your Honor.

6 THE COURT: Okay. Why don't we do this? Do you mind  
7 by Friday filing a response listing which ones you agree that  
8 the Court can take judicial notice of and which ones you  
9 dispute?

10 MR. THEODORE: Yes.

11 THE COURT: Okay. Is there any problem with that?

12 MR. LLOYD: No, Your Honor.

13 THE COURT: Okay. Great.

14 MR. LLOYD: If I -- and if it helps speed things  
15 along, I'd be happy to sit down with counsel for the government  
16 and go to the websites from which I drew the proposed judicial  
17 notice subjects.

18 THE COURT: I think that'd be -- I mean, if you-all  
19 want to file an agreed -- if it works that you can file an  
20 agreed statement of facts that you want me to take judicial  
21 notice of for purposes of the jury trial, I mean, you and the  
22 government may be able to agree to a number of them, and the  
23 government may have some they want you to agree to, so if that  
24 works, that just makes it easier. And if you-all decide to do  
25 that by Friday, I'd say file an agreed statement of facts you



1 want judicial notice of, and then any that are disputed. Does  
2 that make sense?

3 MR. LLOYD: Yes, Your Honor.

4 THE COURT: Does that make sense from the  
5 government's perspective?

6 MR. THEODORE: Yes. That's fine, Your Honor.

7 THE COURT: Great. Then the only other thing we have  
8 to do, unless counsel tells me otherwise, is hear from the  
9 witnesses. Is there anything else from the defense perspective  
10 we need to cover?

11 MR. IRWIN: A brief housekeeping matter, Your Honor.  
12 I talked with the federal marshals this morning, and they  
13 wanted to make it clear to all parties, with 70 jurors in this  
14 room, that means supporters and the media will not be present  
15 in this room. They just want to make it clear that -- asked  
16 that I make it clear to everybody it's not excluding the  
17 supporters or media, it's just mechanics here.

18 THE COURT: And we don't have a bigger courtroom in  
19 this building?

20 MR. IRWIN: I asked about that, and Judge Phillips'  
21 is, and they said it would be a similar problem, with 70  
22 jurors, we're just going to have that mechanical -- so many  
23 bodies, they don't want them mixing with the general public  
24 during the jury selection. So I told them I would bring it to  
25 your attention just so it's on the table.

1 THE COURT: Mr. Irwin?

2 MR. IRWIN: Yes, Your Honor.

3 THE COURT: I think what we can try and do, although  
4 I can't promise because you know how government and technology  
5 is, but we can try and set up a closed-circuit area where  
6 people can watch just the jury selection, because after that I  
7 don't anticipate, and I'm sure you don't either, that it will  
8 be a problem. And then as soon as jury selection is over, the  
9 back of the courtroom will be open and available to both the  
10 public and the media. And that way I'm not concerned about--  
11 My concern is, while-- My concern for the public, obviously,  
12 is significant, for the media as well. And so it's only fair  
13 if there's a mechanism by which they can follow along. And I  
14 think if we have closed-circuit, that would handle it.

15 MR. IRWIN: I think that's an elegant solution, Your  
16 Honor.

17 THE COURT: Okay. Thank you.

18 MR. LLOYD: Your Honor, I was just going to urge the  
19 Court, at the request of my client, for that accommodation. I  
20 remember about two years ago I was trying a case in Greeneville  
21 where the Supreme Court decided -- Your Honor probably  
22 remembers the style, I don't, but there was a ruling that jury  
23 selection is a part of the trial for the purposes of the  
24 constitutional mandate that a trial be public.

25 THE COURT: Yeah, it's a significant proceeding in

1 the trial, there's no question, and I think it's important that  
2 it be public. Obviously we've got space limitations that we  
3 have to deal with. But as long as we can set up  
4 closed-circuit, I think, as you said, that would be a perfect  
5 accommodation. So thank you.

6 MR. THEODORE: Your Honor, if I could just get  
7 clarification on the jury selection process. I think I  
8 understand the method you're using. And cocounsel has kind of  
9 informed me, basically. I was out of town at the status  
10 conference.

11 THE COURT: That's right. I'm sorry. Go ahead.

12 MR. THEODORE: But I've also talked to defense  
13 counsel about this, and we were a little unsure about-- I  
14 understand the prospective jurors are going to be in the back,  
15 in the gallery area. And I was wondering, will there be a  
16 seating chart? I'm trying to understand how we will correlate  
17 potential jurors with their-- You know, the way it's done, you  
18 know, the practice here, they're in a particular chair, so we  
19 know exactly where they're seated, who we're talking to. And I  
20 wondered, will there be --

21 THE COURT: Explain that to me. So you know, what I  
22 do-- Let me walk you through what I do. And you tell me how  
23 we can do it differently or how we should do it differently, if  
24 at all. I follow a case out of the Sixth Circuit for the  
25 method in which I select a jury. I think it's called the

1 *United States v. Delgado*, but you're taxing my memory. We  
2 bring all the jurors in. We call them, in Kentucky, by number,  
3 not by name. Do you all use names here?

4 MR. THEODORE: No. Now we've gone to using numbers,  
5 yes.

6 THE COURT: Okay. So we take a roll call. And I  
7 don't mind seating them, if it's not too difficult for the  
8 clerk, in numerical order; but, otherwise, we just do a roll  
9 call, and the lawyers make their own chart if they want to  
10 remember where everyone is seated. And then I ask questions.  
11 I'll ask questions of the entire venire, and we will do jury  
12 selection that way unless anyone wants to approach or I  
13 instruct someone to approach because I'm worried what they say  
14 could be prejudicial to the remainder of the jury pool, and  
15 then we'll conduct voir dire of that person related to that  
16 question at the bench, which will be the lawyers and myself,  
17 then they will go back.

18 And once we're done with jury selection -- I mean,  
19 done with all the questions, we'll complete the questions,  
20 we'll excuse them for maybe 45 minutes or an hour, we'll then  
21 do challenges for cause. So you're going to have to know in  
22 your notes which number said what. And I'll be taking notes  
23 as well.

24 MR. THEODORE: Okay.

25 THE COURT: And -- or maybe I won't be taking that

1 many notes, if I'm asking all the questions. So I'll count on  
2 you-all and my clerk to take the notes. And then what we'll do  
3 is, we will go through challenges for cause. They won't be in  
4 the courtroom. Then we'll draw the first 32, the first 28 and  
5 the next 4. The first 28 will be the pool for the jury. The  
6 next four will be the pool for the alternates. So we'll all  
7 know who the jury is and the alternates; they won't. We'll  
8 randomly seat the alternates in the box with the jury.

9 Does that answer your question?

10 MR. THEODORE: Yes. What I was trying to understand  
11 is, when we have the gallery filled up and -- let's say  
12 somebody is -- so we don't know how many, obviously, will be in  
13 each row right now.

14 THE COURT: Right. Correct.

15 MR. THEODORE: We'll just have to try to keep track,  
16 I guess, like I said, through our own seating chart, who is  
17 sitting where, to identify a name with a face and everything  
18 else.

19 THE COURT: Right, because we'll do a roll call at  
20 the outset.

21 MR. THEODORE: And they'll have a number card,  
22 obviously, for which juror they are.

23 THE COURT: Right. And every time they get up to  
24 answer a question, I'll say, "Please state your number and the  
25 answer." So by the end of jury selection, any challenges for

1 cause or any peremptories, both sides will definitely know.

2 I've never had a problem with it before. I've  
3 probably done 50 to 60 trials this way.

4 MR. THEODORE: Thank you.

5 THE COURT: Thank you.

6 Any other questions about it?

7 MR. QUIGLEY: I realize you've done it. Have you  
8 done it with 70 people? Have you done it with a very large  
9 number of people, and it work?

10 THE COURT: It may tax your memory, but if you're  
11 taking notes, it won't be a problem. And we excluded the  
12 county surrounding Oak Ridge—correct?—from the pool, which  
13 should make it easier.

14 All right. Is there anything else we need to take  
15 up before up call your first witness?

16 MR. LLOYD: Is Your Honor planning to hear argument  
17 on the dispute we have about the particularization of Count 1,  
18 or is that something --

19 THE COURT: Let's -- let's talk about that just for a  
20 minute.

21 And, Mr. Lloyd, why don't you start. And tell me --  
22 because I'm not sure that I follow the dispute in full. And I  
23 can explain to you why, but it might be helpful if you go  
24 first and try and tell me what the dispute is about the  
25 particularization of Count 1, because I think I read it

1 differently, the language, than the parties.

2 MR. LLOYD: Your Honor, maybe I can --

3 THE COURT: And let me ask you this --

4 MR. LLOYD: I'm sorry.

5 THE COURT: -- does it make sense to do this before  
6 we hear the witnesses? What I don't want to do is keep the  
7 witnesses waiting a long time if they're here and you want them  
8 to testify. But it's your call. I'm happy to do it in any  
9 order you choose.

10 MR. LLOYD: Your Honor, I would defer to the witness  
11 in this case, because I -- I think that it's important that you  
12 hear Mr. Clark.

13 THE COURT: Okay. And what is he-- Just give me a  
14 proffer, two minutes, as to what-- He's going to testify as to  
15 Count 1? Is that my understanding?

16 MR. LLOYD: Your Honor, I'm deferring to Professor  
17 Quigley on this. We're dividing our roles.

18 THE COURT: That's good. Divide and conquer, that's  
19 the way to do it.

20 MR. LLOYD: Well, we're coping.

21 THE COURT: Okay.

22 MR. QUIGLEY: Bill Quigley for the defense, Your  
23 Honor. We are going to have one witness this morning.

24 THE COURT: That's fine.

25 MR. QUIGLEY: The other witness is unavailable, and

1 we may do it on paper, as we did with the other people who were  
2 unavailable. So the witness is Ramsey Clark, former Attorney  
3 General of the United States. And he is going to testify  
4 about, the proffer is, the reasonableness of the belief of the  
5 defendants as to the principles, effects, and the issues that  
6 we outlined in the paper that we sent to the -- sent to the  
7 Court. He's offered as an expert on the factual inquiry as to  
8 the reasonableness of their beliefs about -- that they were  
9 authorized to do what they did. There is a specific prong in  
10 the Sixth Circuit justification jury instruction.

11 THE COURT: So this goes-- That's where I was trying  
12 to head. This goes to the justification defense that the  
13 defendants are offering, not to their motive.

14 MR. QUIGLEY: Exactly.

15 THE COURT: Okay. And go ahead. The prong in the  
16 justification defense to which he will testify?

17 MR. QUIGLEY: Well, I submitted a memo to the Court  
18 last night.

19 THE COURT: Last night's tough for me.

20 MR. QUIGLEY: No, I understand. I was just going to  
21 secure it. So --

22 THE COURT: Is this the memo? Tell me which one it  
23 is.

24 MR. QUIGLEY: This is Document 118.

25 THE COURT: Okay. I got it. I've got it.



1 MR. QUIGLEY: I have a copy if you don't have it.

2 THE COURT: No, I've got it.

3 (Brief pause.)

4 THE COURT: Go on.

5 MR. QUIGLEY: I was going to let you read it. It  
6 will be easier. And then I can --

7 THE COURT: Now --

8 MR. QUIGLEY: And so we expect about 45 minutes with  
9 this witness as a proffer that will go to a number of the  
10 defenses that are still pending before the Court, to show  
11 what -- if allowed to testify about those, what he would  
12 testify to.

13 THE COURT: That's great. Okay. Well, let's hear  
14 from him, and then we can get into the substance of it if  
15 necessary. Obviously after he testifies we can get into any  
16 argument on it. Go ahead.

17 MR. THEODORE: Your Honor, as an initial matter, not  
18 going into the substance, but I just did want to put an  
19 objection on the record here that they were supposed to provide  
20 us with summaries of their witnesses by, I believe, last  
21 Wednesday. We received a very sketchy summary. And, to me,  
22 this should have been provided then, this summary that was  
23 provided late last night, and didn't give us a lot of time to  
24 go over this.

25 THE COURT: I think that's a fair point, but I think,

1 the same nature, this is a preliminary hearing. And I agree  
2 that this summary looks more thorough, I would say, but I think  
3 I asked them only for a paragraph. So the fault is mine, not  
4 theirs, at the time. I could have asked for more, but I  
5 didn't.

6 MR. QUIGLEY: And I apologize to the Court. We did--  
7 For those who couldn't testify, we provided their -- a written  
8 statement. And because Attorney General Clark can testify, we  
9 thought that would be the best way.

10 THE COURT: That's fine. Go ahead.

11 MR. QUIGLEY: So at this point, Your Honor, we call  
12 to the Court's attention and ask for the testimony of Ramsey  
13 Clark.

14 (Brief pause.)

15 RAMSEY CLARK,  
16 called as a witness at the instance of the defendants,  
17 having been first duly sworn, was examined, and testified as  
18 follows:

19 THE CLERK: Please be seated. Please speak into the  
20 microphone. State and spell your name for the record, please.

21 THE WITNESS: My name is Ramsey Clark. R-A-M-S-E-Y.  
22 C-L-A-R-K.

23 THE COURT: General Clark, I take notes  
24 electronically; in other words, I type them. So if it bothers  
25 you, please let me know, and I've got a pad here. My

1 handwriting is terrible. So I'm better off doing it this way.

2 THE WITNESS: Fine.

3 THE COURT: You may proceed.

4 DIRECT EXAMINATION

5 BY MR. QUIGLEY:

6 Q Okay. Tell the Court where you live right now,  
7 Mr. Clark.

8 A I live in New York.

9 Q Okay. And I want to ask you a couple of questions  
10 about your background. You were a member of the armed forces?

11 A I was in the Marine Corps.

12 Q And what years was that?

13 A '45 and '46. Joined at 17, and got out at 18.

14 Q And your educational background?

15 A Well, I went to the University of Texas and got a  
16 B.A. and University of Chicago and got an M.A. in American  
17 history and a J.D. in law.

18 Q Okay. And you were a member of the Department of  
19 Justice, originally going in in 1961 as an Assistant Attorney  
20 General. Is that correct?

21 A That's correct. I was there from the first day of  
22 Kennedy to the last day of Johnson, eight years.

23 Q Okay. Was there a time during President Johnson's  
24 tenure that you became the Attorney General of the United  
25 States?

1 A There was.

2 Q Okay. And you served in that position for about how  
3 long?

4 A I became acting Attorney General 8 September of '66,  
5 and was sworn in as the Attorney General in -- I think  
6 February of '67.

7 Q Okay. And you served until January of '69?

8 A Twelve noon, January 20.

9 Q And you've been a practicing lawyer since 1950?

10 A Licensed in '51.

11 Q Licensed in '51?

12 A Finished law school in '50.

13 Q And you have practiced extensively in the United  
14 States and across the world. Is that correct?

15 A Pretty much so.

16 Q Okay. You held a position with the United Nations  
17 General Assembly in 2008 as a key adviser to the President of  
18 the United Nations General Assembly. Is that correct?

19 A I've worked extensively at the UN with many people,  
20 and then I worked with -- the President of the General  
21 Counsel -- of the General Assembly that year was Father Miguel  
22 D'Escoto from Nicaragua.

23 Q And you've held more traditional positions with the  
24 bar, including the president of the Federal Bar Association,  
25 the National Bar Association, and others. Is that correct?

1 A That's correct.

2 Q And aren't you the recipient of the 2008 United  
3 Nations Human Rights Award, an award that's only given every  
4 five years?

5 A That's right. It's given to a bunch of people every  
6 five years.

7 Q Okay. But the other people include Eleanor  
8 Roosevelt, Nelson Mandela, Reverend Martin Luther King, and  
9 Amnesty International. Is that correct?

10 A Those are some of the recipients.

11 Q And you've written over 15 books and many, many  
12 articles about international law and human rights and nuclear  
13 weapons and the like?

14 A Well, I think of only two books that I consider to  
15 have exclusively authored, one on crime and one on peace.

16 Q You've --

17 A I've written -- or organized many books.

18 Q Yes. As the editor or coeditor?

19 A Yes.

20 Q Okay. I would like to switch at this time to get  
21 the background for your opinion, the questions that I'm going  
22 to ask. And I'm going ask you to assume that the following  
23 facts are true. The first set of facts is about Oak Ridge  
24 Y-12. Oak Ridge Y-12 is one of the largest nuclear weapons  
25 production and refurbishment facilities in the United States

1 and consequently in the world. It produces and processes and  
2 stores over 400 metric tons of enriched uranium, enough  
3 material to provide for 10,000 nuclear weapons.

4 THE COURT: Is he aware of any of this, or are you  
5 just telling him this?

6 MR. QUIGLEY: I am posing these as the facts upon  
7 which he's going to-- Yes, he does know this. We have  
8 discussed this. But I want to make that clear in the record.

9 MR. THEODORE: Your Honor --

10 MR. QUIGLEY: These are the facts that are part of  
11 the judicial notice we've asked the Court to take, and is part  
12 of the discovery that is before the Court. So we're just going  
13 through that as part of this as posing that as the foundation  
14 for the questions that he's going to answer.

15 THE COURT: Okay. Yes.

16 MR. THEODORE: Your Honor, we would object and ask  
17 perhaps he can ask the witness if he knows of these facts, or  
18 even that -- or just put it in a purely hypothetical form.

19 THE COURT: Yeah, I'd say you have to do one or the  
20 other. You have to ask him if he knows them, which he very  
21 well may, or you can pose them -- only because, Mr. Quigley, it  
22 may be different at trial, but right now I haven't taken  
23 judicial notice of anything.

24 MR. QUIGLEY: Right. I understand.

25 THE COURT: I'm only going to treat it as a

1 hypothetical, otherwise.

2 MR. QUIGLEY: Right. Perhaps I wasn't clear. I  
3 started by saying, "I ask you to assume the following were  
4 true." "As a hypothetical question," let's add that for the  
5 clarity of the record.

6 THE COURT: Okay. That's fine. I just want to be  
7 clear. Go ahead.

8 BY MR. QUIGLEY:

9 Q Okay. That Y-12 is also the main production  
10 facility for thermonuclear secondaries, which are the  
11 components of, technology, and materials needed to initiate  
12 the fusion—I'm sorry, I'll go a little slower—of the  
13 thermonuclear reaction, that Y-12 has produced materials and  
14 components for thermonuclear weapons since 1943, and that the  
15 materials produced at Y-12 were used in the bomb Little Boy  
16 that was dropped on Hiroshima and caused thousands of civilian  
17 deaths. Currently Y-12 is performing Life Extension Program  
18 refurbishment on the W6 -- W76 warhead, and is scheduled to do  
19 the same on the B61 nuclear warhead. W76 is a two-stage  
20 thermonuclear warhead used primarily in Navy nuclear  
21 submarines. And there are more than 2000 of those warheads.

22 The Y-12 has the capacity to produce 80 warheads a  
23 year, and each warhead has many, many times the explosive  
24 power of the bombs dropped on Hiroshima and Nagasaki. Each  
25 one has a yield of 100 kilotons. And part of the assumption

1 or hypothetical is the declaration that we did put in of  
2 Dr. Ira Helfand about the catastrophic effects of nuclear  
3 explosions—physical, individual, infrastructure, and  
4 environmental.

5           And I would ask you to assume the following facts  
6 are true in this hypothetical about the defendants: That on  
7 July 28th, 2012, these three individuals, Sister Megan Rice,  
8 Greg Boertje-Obed, and Michael Walli, went onto the grounds at  
9 Y-12 and cut through several chain-link fences, with -- during  
10 a several-hour walk onto the facility. They called themselves  
11 the Transform Now Plowshares, and they arrived at the highly  
12 enriched uranium materials nuclear facility where they  
13 symbolically disarmed the building and its surroundings, put  
14 Bibles, prayed, put up banners, wrote peace slogans, and  
15 peacefully waited to be arrested. The defendants carried with  
16 them an indictment, which the jury will see, accusing the  
17 United States, at Y-12, of being engaged in an ongoing  
18 criminal endeavor in violation of international law. They  
19 accused the folks at Y-12 of creating an opportunity for a  
20 program of genocide. They accused the United States of  
21 creating and preparing and activating a program that will  
22 result in war crimes. They accused the United States of  
23 crimes against humanity, crimes against peace. And they  
24 described their actions as civil resistance against criminal  
25 law, authorized by the Nuremberg Principles. That's the



1 assumption. Now the questions.

2 First question, Mr. Clark: The defendants believe  
3 that the thermonuclear weapons that are refurbished and  
4 modernized at Y-12 create such heat, blast, radiation, and  
5 damage that they are inherently uncontrollable weapons and  
6 indiscriminate weapons that put large numbers of civilians at  
7 risk and are thus illegal under U. S. law. Is that a  
8 reasonable belief?

9 A I believe it to be so. Tragically reasonable.

10 THE COURT: Can you explain to me why? I'm sorry,  
11 can you explain to me why you believe it to be reasonable?

12 THE WITNESS: Yes, because the underlying facts on  
13 which it's based seem to be publicly established, and it  
14 exposes a condition that's unacceptable to those who seek  
15 furtherance of human existence.

16 THE COURT: I guess, can you explain to me-- So the  
17 last part of his question was that they are refurbished and  
18 modern and inherently -- okay, so he went through all that and  
19 said they are inherently uncontrollable weapons and  
20 indiscriminate weapons. And I guess "indiscriminate" I think  
21 everyone would agree with. But "uncontrollable," I guess -- do  
22 you have the scientific background to judge that they are  
23 uncontrollable? Does that make sense?

24 In other words, the way I view "uncontrollable" is  
25 that someone does not have control of the weapon itself. And

1 so do you have a scientific background under which you can  
2 explain to me why they're uncontrollable from a scientific  
3 perspective?

4 THE WITNESS: I hadn't thought of it as  
5 scientifically. I thought of it more as a physical matter,  
6 that the bombs are of uncertain -- what happens when you  
7 release them is uncertain. You can't-- You've got very little  
8 precedent for them, because we haven't, even with our  
9 testing --

10 THE COURT: So you're meaning if you drop them, like  
11 Hiroshima, whatever, if you drop them, you can't control who  
12 they harm, in other words, you're going to the harm both  
13 enemies and civilians, so to speak.

14 THE WITNESS: Certainly, yes. Everything in its  
15 path, certainly, yes.

16 THE COURT: You don't mean they're uncontrollable at  
17 the site. You mean they're uncontrollable when they are  
18 released. Is that a fair-- Do you understand what I'm trying  
19 to ask?

20 THE WITNESS: They're dangerous. The issue of  
21 control is dangerous at all times, because if someone  
22 intercepted one of those, came in and stole it, they walked  
23 in --

24 THE COURT: Absolutely. If a terrorist-- Excuse me.  
25 That concerns the Court, but-- If a terrorist got ahold of

1 them, there's no question. But I guess my question is, they're  
2 uncontrollable when released, correct?

3 THE WITNESS: Certainly that, yes.

4 THE COURT: But they're not uncontrollable when  
5 contained and when the government does an adequate job of  
6 securing them, which obviously, for the reasons you just gave,  
7 may be debatable in this case, but --

8 THE WITNESS: Well, if you assume that they are  
9 secure, then you've answered the question of controllability  
10 where they are. But just the facts of this case shows that  
11 they're -- you can't assume they're controlled, because if  
12 people can walk in there like in these -- and these people are  
13 not well-equipped to do that as, say, well, Army Rangers or  
14 Marine Corps Raiders -- walk in and try and steal one, take  
15 one --

16 THE COURT: How easy would it be, in your experience,  
17 to steal a nuclear weapon? What would you have to do?

18 THE WITNESS: Well, I think if you just look at the  
19 facts of this case, and you assume that there were nuclear  
20 weapons in there, that they had done 75 to 90 percent of what  
21 would be necessary to steal one, they'd gotten right up to  
22 where they are, all you've got to do is grab it and have a  
23 truck and leave.

24 THE COURT: Maybe that's where I'm misunderstanding.  
25 Would you have to go into the building to get them, in other

1 words, or were they standing-- In other words, I didn't  
2 understand them to be standing next to a weapon.

3 THE WITNESS: I don't think they were, either, but if  
4 you got into the building, is there any -- if you got into the  
5 property there, is there any reason to think that professional  
6 artists at breaking and entering couldn't get in and get one of  
7 the weapons?

8 THE COURT: But-- Okay. And so --

9 THE WITNESS: They're dangerous. The way they were  
10 controlled was dangerous. And I think it would be fair to call  
11 them uncontrollable.

12 THE COURT: Okay. But they're not scientifically  
13 uncontrollable. What you're saying is, the government hasn't  
14 done an adequate job of securing their facility, from your  
15 perspective.

16 THE WITNESS: I would say this is evidence -- what  
17 happened here is evidence of it, yes.

18 THE COURT: Okay. Thank you.

19 Go ahead. I'm sorry to interrupt.

20 MR. QUIGLEY: No, thank you, Your Honor.

21 BY MR. QUIGLEY:

22 Q I'd like to go back to the "uncontrollable" in terms  
23 of how they are used.

24 A Uh-huh.

25 Q That the defendants believe that that, the lack of

1 control about how they are used, when they are used, makes  
2 these weapons illegal under U. S. law. And my question to you  
3 is, is that a reasonable belief, that weapons which cannot  
4 discriminate between civilians and noncivilians are illegal  
5 under U. S. law?

6 A I think almost by definition that follows that they  
7 are illegal, because their power of destruction is so great  
8 and so incapable of precise control and limitation and  
9 direction that you're inherently going to destroy lives that  
10 are protected under the rules of law, of war.

11 Q Second question: Defendants believe that these  
12 weapons, by their very design, not by accident, but by their  
13 design, create the risk of present -- of present imminent and  
14 impending threats of death or serious bodily injury to  
15 generations not yet born, because of the environmental damage  
16 that they intend to inflict. In your opinion, is that a  
17 reasonable belief?

18 A Sadly, it's more than reasonable. It's highly  
19 probable.

20 THE COURT: Can we stop there again? Just because  
21 I'm not sure I'm following. And I apologize. But so--  
22 "Generations not yet born," you're -- again, this isn't -- just  
23 so I'm clear, General Clark, you're not giving a scientific  
24 opinion; you are giving a -- your perspective. Is that a fair  
25 statement by me?

1 THE WITNESS: I'm not a scientist. And it's my  
2 judgment, yes --

3 THE COURT: Okay.

4 THE WITNESS: -- my opinion.

5 THE COURT: Thank you.

6 BY MR. QUIGLEY:

7 Q Third question: Is it a reasonable opinion of the  
8 defendants that they have reason to believe that these weapons  
9 pose a threat of death or serious injury?

10 A That's what the weapons are made for, so it's more  
11 than reasonable. If they're ever used, it's disastrous.

12 Q The defendants believe that the threat of death or  
13 serious bodily injury by these weapons is present. Is that a  
14 reasonable belief?

15 A I'm afraid so. It's happened before.

16 Q Would you explain?

17 A You don't build them just to store them.

18 THE COURT: But, again, you mean when used, correct?  
19 You mean when the weapon is used --

20 THE WITNESS: Yes.

21 THE COURT: -- it poses -- Okay. Thank you.

22 THE WITNESS: If and when, yes.

23 BY MR. QUIGLEY:

24 Q And defendants believe that the threat of use is  
25 imminent. Is that a reasonable belief?

1 A The risk is enormous, and the threat is omnipresent.

2 THE COURT: But that's different than imminent. Do  
3 you have any knowledge maybe that President Obama or someone of  
4 his stature has said that the use of the nuclear weapons by the  
5 United States is imminent? In other words, are you somehow  
6 tied in to the President of the United States such that you  
7 would know that?

8 THE WITNESS: Well, you have to assume that where you  
9 have continued the policy of building and improving the power  
10 of destruction of these things, keep on doing it, and used them  
11 in the past, that the possibility at any time of their use  
12 is -- it's not an academic activity.

13 THE COURT: And that's a fair point, General. And so  
14 my question is-- The last time I recall—and maybe my history  
15 is bad—the United States using a nuclear weapon was World War  
16 II. Is that accurate, or am I missing --

17 THE WITNESS: Except for testing. Test is usage,  
18 too, yeah.

19 THE COURT: That's a fair point. But you're not  
20 aware of any imminent threat such that the President currently  
21 has his hand on the button, so to speak, to use a linguistic  
22 phrase?

23 THE WITNESS: Well, they walk that box around with  
24 him, but it's in reach. It's not on -- in his hand.

25 THE COURT: Okay.

1 THE WITNESS: It's too close.

2 BY MR. QUIGLEY:

3 Q And the defendants believe that the threat of  
4 nuclear weapons is impending, which this is another part of  
5 the Sixth Circuit jury instruction. So the question is  
6 whether their belief that this threat of the use of nuclear  
7 weapons is impending, is that a reasonable belief or not?

8 A Well, I-- It's more than reasonable. It's  
9 something that's gone on for years and years. It's something  
10 that causes proliferation. If we do it, others have to do it.  
11 It's-- The magnitude of our expenditures and the commitment  
12 that we have to it makes it a clear and present danger to life  
13 on Earth.

14 Q And the defendants believe that they really had no  
15 reasonable legal alternative to their efforts to enter onto  
16 the Y-12 to try to symbolically disarm these weapons and bring  
17 them, yet again, to the attention of people. Do you believe  
18 that their belief they had no legal alternative is reasonable?

19 A I think it's more than reasonable. I guess about  
20 the only way that people have-- "You shall know the truth,  
21 and the truth shall set you free." The truth is that we keep  
22 manufacturing these things, that their capacity for  
23 destruction approaches total, and we're working on bigger ways  
24 of doing it all. And attention has to be paid. And attention  
25 isn't paid. And that calls attention to it. That's about all



1 a person can do, an individual, to try to cause our government  
2 and our public to pay attention to something that threatens  
3 life on the planet.

4 Q The defendants believe that the continuing threat of  
5 use of the nuclear weapons refurbished and modernized at Y-12  
6 is illegal because these are weapons of mass destruction and  
7 thus unlawful and criminal under U. S. law. Is that a  
8 reasonable belief?

9 A I think it's a reasonable belief. And it involves,  
10 also, the realization that we are in continued violation of  
11 Article III of The Non-Proliferation Treaty, which imposed  
12 upon us a duty to stop what we were doing and erase what we've  
13 done. And yet we go on, decades later, 45 years after the  
14 treaty we signed while I was Attorney General, July 1st of  
15 1968, that imposed an obligation on the United States to take  
16 steps to stop the nuclear arms race and eliminate them from  
17 the planet and go on beyond that to general arms.

18 Q So it's their belief that the United States is not  
19 in compliance with that treaty which we signed and the  
20 obligations that we assumed under that. Is that a  
21 reasonable --

22 MR. THEODORE: Your Honor, I hate to keep objecting  
23 on the same ground, but as far as the form, every question is  
24 assuming facts not in evidence. And I know this is just a  
25 preliminary hearing, but if he could just put it an if or some

1 type of --

2 THE COURT: Well, I think I'm treating every fact he  
3 states as stating a hypothetical. So he doesn't have to state  
4 it again, if that's okay with the U. S.

5 MR. THEODORE: That's fine.

6 THE COURT: Unless the witness testifies to a  
7 specific fact, I understand the witness is also assuming the  
8 facts and giving an answer. So everything is based on  
9 hypothetical facts. Is that fair, from the United States'  
10 perspective?

11 MR. THEODORE: Yes, Your Honor.

12 THE COURT: Okay. Thank you.

13 BY MR. QUIGLEY:

14 Q Going back, then, the defendants believe that what's  
15 being refurbished, renewed, and modernized at Y-12 are weapons  
16 of mass destruction. Is that a reasonable belief?

17 A It's a reasonable belief and an obvious fact.

18 Q And that weapons of mass destruction are illegal  
19 under U. S. law. That is also their belief. Is that a  
20 reasonable belief?

21 A That's a reasonable belief. And under the Nuclear  
22 Non-Proliferation Treaty, we agreed to eliminate, rather than  
23 continue the expansion of, our nuclear arms capacity.

24 Q And I believe that the United States government just  
25 indicted the survivor of the Boston -- the alleged instigator

1 of the Boston bombings as creating, planning the use of, and  
2 using a weapon of mass destruction. So that is a part of the  
3 criminal code of the United States. That's a fair belief. Is  
4 that correct?

5 A Live in a pressure cooker.

6 THE COURT: General, can I ask you something?  
7 Because a weapon-- You would agree, I think, having been  
8 former Attorney General, that a weapon in the hands of a  
9 terrorist or even a citizen is different than a weapon in the  
10 hands of the government. In other words, the U. S. Army can  
11 possess machine guns, as you know, or the Marine Corps, or a  
12 tank, whereas Mr. Quigley or myself may not be entitled to  
13 without specific permits, and us -- he or I possessing it may  
14 be unlawful, whereas the military possessing it is not  
15 unlawful. Is that a fair statement by me, or am I wrong?

16 THE WITNESS: No, I think that's a fair statement,  
17 limiting it to the types of arms that you mentioned—tanks and  
18 machine guns and rifles. But when it comes to weapons of mass  
19 destruction of this magnitude, I think the United States is in  
20 clear violation of the purpose and intent of one of the most  
21 important treaties we ever signed. And that treaty required us  
22 to eliminate these weapons, and we haven't done it, and we've  
23 done the opposite, we've continually made them more dangerous,  
24 and proliferated.

25 THE COURT: Thank you.

1 BY MR. QUIGLEY:

2 Q And, General Clark, the defendants believe that the  
3 use-- Excuse me. The defendants believe that the continuing  
4 threat of use of the nuclear weapons that are created and  
5 maintained and modernized at Y-12 can constitute a war crime,  
6 in violation of U. S. law. Is that a reasonable belief?

7 A I think it's a reasonable belief and a fair  
8 statement of the law.

9 Q And is-- They believe that even soldiers and  
10 members of the military, under the statute, can commit war  
11 crimes. Is that a reasonable belief?

12 A Certainly.

13 Q Okay. And that using or continuing to prepare and  
14 threaten the use of illegal weapons of mass destruction could  
15 be a war crime. That's their belief. Is that reasonable?

16 A That's reasonable.

17 Q Okay. Next question: Defendants believe that  
18 the -- what's going on at Y-12 is preparations for genocide.  
19 Genocide is a specific crime in the U. S. Criminal Code that  
20 can be committed by civilians or members of the armed service.  
21 And they believe that the preparation for the use of weapons  
22 at Y-12 and any work on them is preparation for genocide, and  
23 is a violation of U. S. law. Is that a reasonable belief on  
24 their part?

25 A That's a reasonable belief. And the magnitude of

1 the harm that is threatened by the continuation of the  
2 program, by the very magnitude of the program at this time, is  
3 omnicidal—one submarine with close to a hundred of these  
4 warheads, eight in the Pacific, Trident II submarine fleet  
5 alone, at sea, on alert at all times, nearly 800 nuclear  
6 warheads in a position to strike. Just think of a map, 800  
7 places against Europe that you'd hit, 800 places against the  
8 continent of South America, or Asia. The magnitude of the  
9 destructive capacity is criminally insane.

10 Q And I believe you said that this is not homicidal  
11 but omnicidal?

12 A Omnicidal.

13 Q Would you explain what you mean by that?

14 A Well, can life on the planet endure if you have  
15 nuclear explosions of the order that are capable from the  
16 production of this one plant here in beautiful Tennessee?

17 Q The defendants believe that there is actually no  
18 legal or authorized use of the thermonuclear weapons that are  
19 refurbished and modernized at Oak Ridge Y-12. Is that a  
20 reasonable belief?

21 A That's more than a reasonable belief. It has to be  
22 the aspiration of civilization if it wants to hang around.

23 Q Would you explain that a little bit, please?

24 A Yes. These weapons are a threat to life on the  
25 planet, and yet we continue to proliferate them. The

1 nuclear-- One of the most important-- Maybe I was too close  
2 to it, but -- not that I was involved in -- in the drafting of  
3 it, but we lived through Hiroshima and Nagasaki, and here we  
4 came up in 1968 when we signed The Non-Proliferation Treaty  
5 and realized that we let these things spread to the magnitude  
6 that threatens life on Earth. So the nuclear powers agreed  
7 that they would -- in Article I, they would contain and seek  
8 to eliminate, and the non-nuclear powers would agree not to  
9 try to obtain by any means, nuclear weapons. And Article  
10 VI gave the obligation on us to act not only to eliminate  
11 nuclear weapons, the treaty went beyond nuclear weapons and  
12 finally all military weapons. It was a highly idealistic  
13 treaty that we put on the shelf and didn't read.

14 Q And you say you were Attorney General when the  
15 United States signed that treaty?

16 A I was.

17 Q And the defendants believe that the United States is  
18 in violation of that treaty right now. Is that a reasonable  
19 belief?

20 A Sadly, it's -- it's an -- an informed person, it's  
21 the only belief you could have.

22 Q I want to ask you a couple of questions, if I could,  
23 about the Nuremberg Principles that the defendants believe in.  
24 And you have personal knowledge of the Nuremberg trials. Is  
25 that correct?

1 A Well, I was there one day.

2 Q So limited, but --

3 A Fairly awesome scene.

4 Q -- but more than the rest of us in the room was  
5 there.

6 A I read about it after that, too.

7 Q The defendants believe that the Nuremberg  
8 Principles, principles that came out of the prosecution of the  
9 war criminals at World War II, that these principles are  
10 binding U. S. law. Is that a reasonable belief?

11 A Yeah, they were principles that were drafted before  
12 the trials, and they were, you know, part of the supreme law  
13 of the land.

14 Q And the defendants believe that the Nuremberg  
15 Principles outlaw crimes against humanity. Is that a  
16 reasonable belief?

17 A It's a reasonable belief and a highly desirable end.

18 Q And the defendants believe that these Nuremberg  
19 Principles not only outlaw the actual killing of thousands of  
20 people but that they outlaw the planning and supporting and  
21 preparation for the killing of large numbers of people. Is  
22 that a reasonable belief?

23 A It's the only way you can prevent the end result  
24 that you're seeking to avoid. It's more than reasonable.

25 Q And the defendants believe that these principles do

1 not obligate people to wait until after thousands of people  
2 are actually killed, but that citizens and governments have  
3 the right, indeed the obligation, to act to prevent the  
4 preparations for killing under the authority of the Nuremberg  
5 Principles. Is that a reasonable belief on the defendants'  
6 behalf?

7 A If laws can't prevent, they can only punish, then  
8 they're not sufficient for human survival, are they? So it's  
9 more than a reasonable belief.

10 Q The defendants believe that they -- that they have  
11 seen preparations for a war crime, and that they had the  
12 right, under the Nuremberg Principles, to try to stop the  
13 preparations for a war crime. Is that a reasonable belief?

14 A Yes.

15 Q And the defendants, in general, believe that their  
16 conduct was authorized --

17 THE COURT: But --

18 MR. QUIGLEY: Go ahead. I'm sorry.

19 THE COURT: No, go ahead. I'm sorry I interrupted  
20 you.

21 MR. QUIGLEY: No, I have it written down. That's  
22 okay.

23 THE COURT: Could the defendants be convicted of a  
24 war crime for what they did?

25 THE WITNESS: No, I don't see a war crime for what



1 they did. If they did anything, it was trespass. But I don't  
2 see it as trespass under these circumstance.

3 THE COURT: But they couldn't be convicted of a war  
4 crime?

5 THE WITNESS: I think of no war crime that they could  
6 be reasonably charged with having committed.

7 BY MR. QUIGLEY:

8 Q The defendants' position is that the government is  
9 the one committing the war crime. Is it -- is that a  
10 reasonable belief?

11 A The conduct of the government and its nuclear arms  
12 program is a violation of important treaties that we initiated  
13 and we signed and we should be the first to respect and insist  
14 everyone else does, because they were designed to bring peace  
15 to Earth. And I hope it's reasonable to believe that those  
16 obligations are real and serious and must be obeyed.

17 Q General, these terms, genocide, war crimes,  
18 omnicide, they are very serious, some would say inflammatory,  
19 terms. But the defendants believe that they have the right  
20 and the privilege under the Nuremberg Principles to act to try  
21 to stop genocide, war crimes, omnicide, preparations that are  
22 occurring at Y-12. Is that a reasonable belief?

23 A Sadly, extremely reasonable belief, if you look at  
24 the threat to life on the planet that the atomic bombs that we  
25 were capable of building in 1945 compared to what we have now,

1 other countries have now, to some degree, and others are  
2 seeking them, because the sad fact is, if there are two  
3 countries that have a controversy or dispute or different  
4 ambitions and one has the nuclear weapon and the other  
5 doesn't, the other has to acquire a nuclear weapon to exist or  
6 to be free --

7 THE COURT: General --

8 A -- because they can't risk war with a nuclear power  
9 when they don't have a nuclear weapon.

10 THE COURT: Sorry to interrupt. Would you agree,  
11 while less, maybe, significant than nuclear weapons, there are  
12 many people who have reasonable beliefs, and it's still not a  
13 defense to a United States criminal act, as a former Attorney  
14 General?

15 In other words, there are people that believe it's  
16 reasonable that they shouldn't have to pay taxes, or they  
17 should be allowed to smoke marijuana, or that they should be  
18 able to speak in certain locations, like the Capitol. All of  
19 those beliefs may very well be reasonable but still could be  
20 criminal. Is that a fair statement?

21 THE WITNESS: Well, I-- You know, it's-- As a moral  
22 matter, I don't like to think that something that's reasonable  
23 can be criminal. I find difficulty with that equation.

24 THE COURT: And-- Okay. But that's a moral matter  
25 versus a legal matter, and you agree those are two different

1 things. So you can commit, unfortunately or fortunately -- and  
2 you and I may agree it's unfortunate in our personal lives, but  
3 you can commit moral -- what may be adjudged as morally  
4 favorable, morally proper, but still illegal; you agree with  
5 that? The United States has the ability to criminalize things  
6 that maybe you and I may view as morally proper—you agree with  
7 that—as a matter of law, correct?

8 THE WITNESS: Well, certainly as a matter of law the  
9 government can criminalize conduct that many people think is  
10 righteous.

11 THE COURT: Right. Okay.

12 BY MR. QUIGLEY:

13 Q I want to ask you just a few more questions, please.  
14 Sort of a foundation question: The defendants believe very  
15 strongly that international treaties entered into by the  
16 United States are binding law under the U. S. Constitution.  
17 Is that a reasonable belief?

18 A It's a reasonable belief. And it's a correct  
19 statement of the meaning and purpose of the Constitution,  
20 which makes our treaties part of the supreme law of the land.

21 Q And the Nuclear Non-Proliferation Treaty which you  
22 talked about was signed by the United States when you were the  
23 Attorney General, that is the binding law of the land. Is  
24 that correct?

25 A It's part of the supreme law of the land.

1 Q Defendants believe that the program at Y-12 which  
2 modernizes and refurbishes these nuclear weapons is in  
3 violation of international law. Is that a reasonable belief?

4 A It's the only reasonable belief.

5 Q Will you explain why, please?

6 A Because survival of life on the planet is the  
7 purpose of all law, as Hugo Grotius wrote in his great book  
8 Laws of War and Peace, in which he said, "Its care to preserve  
9 society is the source of all law." And that's why our laws  
10 have to seek to preserve society. And the conduct of these  
11 defendants was intended to preserve society from destruction  
12 by nuclear warfare.

13 Q The defendants also believe that the International  
14 Court of Justice entered an advisory opinion which found that  
15 all threats of use of nuclear weapons are presumptively  
16 illegal. Is that a reasonable belief?

17 A That's what the law is and ought to be, yes. A  
18 threat to commit such a crime is a crime itself.

19 Q And defendants believe that their actions, which  
20 were taken to enforce law and taken in the name of peace, did  
21 not harm the national security of the United States. Is that  
22 a reasonable belief?

23 A It's more than a reasonable belief. I think it was  
24 justified, because it intended to preserve society from  
25 destruction by nuclear weaponry.

1 MR. QUIGLEY: Let me check and see if I have any  
2 other questions, please.

3 (Off-the-record discussion.)

4 BY MR. QUIGLEY:

5 Q Just a few more, if that's okay. The defendants  
6 believe that the nuclear materials which are refurbished and  
7 modernized at Y-12 provide -- actually are causes of imminent  
8 harm even if they are never used, that the nuclear materials  
9 themselves are sources of imminent harm. Would you think that  
10 that's a reasonable belief?

11 A I think we have to have such reasonable beliefs if  
12 we want to protect society, because we don't know the capacity  
13 of radiation or the meaning of radiation on the human body  
14 sufficiently to take chances.

15 THE COURT: Do you know that -- do you know that  
16 scientists don't know the impact of a nuclear bomb or a  
17 nuclear -- of the radioactive material? I would assume  
18 scientists would know that.

19 THE WITNESS: Well, the scientists know a lot, but I  
20 don't think -- I think every day we realize that they don't  
21 know a lot that we have assumed they know.

22 THE COURT: But --

23 THE WITNESS: I don't think they claim to know the  
24 effect of amassing radioactive materials, purifying them,  
25 storing them, on human genes and --

1 THE COURT: But you would agree that they know more  
2 than you or I?

3 THE WITNESS: I hope so. I don't know about you, but  
4 me, yes.

5 BY MR. QUIGLEY:

6 Q The defendants believe that the materials processed  
7 and stored at Y-12 have, according to published environmental  
8 impacts, depleted uranium, have extensive poisoning of the  
9 area around Y-12, and that in itself would be a criminal act  
10 as well. Is that a reasonable belief?

11 A I think it's a more-than-reasonable belief. And on  
12 the subject of the scientists, we ought to remember  
13 Oppenheimer's statement about -- speaking of nuclear weaponry,  
14 that "We scientists have known sin," by which he meant that we  
15 have sinned in bringing forth these capacities for destruction  
16 that we cannot guarantee the control of.

17 Q The Judge asked you whether in fact the government  
18 has the right to criminalize trespass, damage to property, and  
19 the like. Would you agree with the defendants' belief that  
20 their damage to property and trespass, even if those are  
21 crimes, are miniscule compared to the crimes that they are  
22 trying to prevent? Is that a reasonable belief?

23 A Well, they're obviously miniscule. And I think  
24 they're justified under, you know, the long history of  
25 justification of minor infractions to prevent grave injury.

1 The only requirement is a little courage if you want to do  
2 what's right, to expose. It was really an effort at education  
3 of the public to -- "Look what we're doing." And if you have  
4 to cut through a fence to show it, so be it. It's a minor  
5 infraction to try to help prevent calamity.

6 Q And, in comparison, the alleged trespass, alleged  
7 damage to property, compared with the humanitarian law  
8 violations that the defendants allege the United States is  
9 committing, would you agree that the proportionality question  
10 would favor the defendants, as they believe?

11 A Overwhelmingly. By a googol to one.

12 Q By a?

13 A A googol.

14 Q Okay. Googol. Thank you.

15 And in fact since the using of the weapons on the  
16 civilians and others in Japan in the 1940s, there have been  
17 thousands of thermonuclear explosions in testing these devices  
18 in the United States and all over the world. Is that correct?

19 A That's correct. And there's still a race,  
20 proliferation. And we're the leader.

21 Q And in those tests, is it-- The defendants believe  
22 that those tests have caused harm to thousands and thousands  
23 of individuals in the Bikini Islands, the Marshall Islands,  
24 the Nevada area, and the like, and those actions are  
25 violations of the proliferation treaty and the international

1 laws that we've talked about. Would you think that that's a  
2 reasonable belief on their part?

3 A It's based upon clear knowledge. And there's a lot  
4 more to it than you described.

5 Q And just to be clear, at the start, going all the  
6 way back to the beginning when I was unclear, the issue of  
7 controllability, do the laws of armed conflict, the  
8 internationally accepted understanding of armed conflict --  
9 the defendants believe that those laws prohibit the use of  
10 weapons which either target civilians or disregard the effects  
11 on civilians. That is their belief. Is that a reasonable  
12 belief?

13 A It's the way the law ought to be, and, in my  
14 opinion, is, because they're not only reasonable, they're  
15 right.

16 MR. QUIGLEY: I think that's the questions that I  
17 have. Thank you very much.

18 THE COURT: Cross.

19 DEFENDANT BOERTJE-OBED: I just had a couple of  
20 questions about something.

21 THE COURT: Yes, you may.

22 DEFENDANT BOERTJE-OBED: Should I do it here? Do it  
23 here, or there? (Indicating.) Just a couple questions.

24 THE COURT: If it's a couple questions, you can do it  
25 there.



## 1 CROSS-EXAMINATION

2 BY DEFENDANT BOERTJE-OBED:

3 Q I'm thankful most of the questions for you have  
4 dealt with nuclear weapons, but I want to just ask about drone  
5 warfare. In our statement we wrote one sentence, "We come to  
6 the Y-12 facility because our very humanity rejects the  
7 confines of nuclearism, empire, and war." Would you say it's  
8 a reasonable belief that drone warfare is illegal?

9 A I think that drone warfare is -- as it's been used  
10 in time of peace and in areas where there is no declaration of  
11 war, there's no ground war, is clearly illegal, because it's  
12 indiscriminate, and the probability is that noncombatants --  
13 that civilians will be killed, and the proportion is higher  
14 than the intended victim. It's also lawless. It's first the  
15 execution and then the trial.

16 Q Thank you. And then I guess this will be my last  
17 question. Do you know of any judges that have taken a stand  
18 to witness against nuclear weapons?

19 A Any judges?

20 Q Yes. Have they taken a stand to witness against  
21 nuclear weapons?

22 A You mean actual judicial officers?

23 Q Yes.

24 A If I do, I've forgotten it.

25 Q Well, I believe we spoke a little bit about Judge

1 Miles Lord. Would you interpret --

2 A Judge Miles Lord was a long-time friend of mine,  
3 yes. We were in the Department together almost eight years.  
4 He left to be a judge. I remembered him, just before he  
5 retired from the bench, in a case involving the Dalkon Shield,  
6 which he-- They consolidated all those Dalkon Shield trials  
7 in Minnesota from all over the country. And he was pretty  
8 fierce on them, but... Great judge and a great human being.  
9 But I didn't remember him being against war or something like  
10 that. Is that what you said?

11 Q Well, it's my understanding he was the judge in a  
12 Plowshares case in Minnesota; Minneapolis, Minnesota, the  
13 Sperry software pair, and he made some statements against  
14 nuclear weapons at that time.

15 A Uh-huh. Well, that's the man. I don't remember the  
16 trial.

17 Q Okay.

18 A I don't remember a Plowshares case up there while he  
19 was on the court.

20 Q Yes. John LeFore was the defendant in that.

21 A That's good to know. I'd like to hear more about  
22 it.

23 DEFENDANT BOERTJE-OBED: Okay.

24 THE COURT: Are you ready for cross? Okay. Cross.

25 MR. THEODORE: Yes, Your Honor. Thank you.

1 CROSS-EXAMINATION

2 BY MR. THEODORE:

3 Q Good morning, Attorney General Clark. I think it's  
4 still morning here.

5 A Good morning still.

6 Q General Clark, you mentioned about -- you talked  
7 about international law just a bit. It's not your contention  
8 that just the possession of nuclear weapons violates  
9 international law, is it?

10 A Well, it could be. I haven't analyzed it carefully,  
11 but it ought to be --

12 Q You're not aware of whether it is or not?

13 A -- because -- well, it hasn't been established,  
14 certainly, that it is, but if you analogize it to private  
15 possession of inherently dangerous substances, you could say  
16 that it ought to be. And you can say it under the Nuclear  
17 Non-Proliferation Treaty, our failure to meet our obligations.  
18 We promised the non-nuclear countries that in return for their  
19 not seeking to develop nuclear weapons, that we would act to  
20 eliminate ours. And not only did we fail to do that, we  
21 proliferated continuously and radically.

22 Q Well, there has actually been a reduction in the  
23 nuclear weapons, warheads, in this country. Is that correct?

24 A I didn't -- I didn't hear --

25 Q There's actually been a reduction in the amount of

1 nuclear warheads that our country possesses now, as opposed to  
2 a couple decades ago.

3 A Well, we may have gotten rid of some old ones, but  
4 I'd say that our power of destruction and capacity for  
5 delivery is at an all-time high, you've just got to look at  
6 the new Trident II nuclear fleets, and they're unbelievable.

7 Q The Non-Proliferation Treaty you're talking about,  
8 which treaty are you talking about?

9 A That's the treaty we signed simultaneously on July  
10 the 1st, as I recall, 1968, in Washington, London, and Moscow,  
11 but generally called The Non- -- The Nuclear Non-Proliferation  
12 Treaty, but then, in Article VI, really goes beyond that, and  
13 should have had the -- at least the subtitle "and Elimination  
14 of Nuclear Weapons," because that's what it contemplated.

15 Q But it did not -- that treaty by itself did not even  
16 require the relinquishment or abandonment of nuclear weapons  
17 by the United States, did it?

18 A It contemplated that that would be done, definitely,  
19 yes.

20 Q Didn't expressly require that, did it?

21 A Well, it-- There was not express language, but if  
22 you followed the mandate of the treaty, it would have  
23 happened, because that was -- we wanted these other  
24 countries -- and it went beyond nuclear weapons and weapons of  
25 war, in Article VI. So it was the most specific treaty

1 probably ever signed on the most dangerous subject of  
2 self-destruction that humanity's ever confronted.

3 But at that time there were not so many nuclear  
4 powers, and the non-nuclear powers were virtually all the  
5 countries. There was maybe eight or ten, we don't know  
6 exactly how many, in '68, nuclear powers. And they couldn't  
7 rely on us not meeting our obligation under Article VI to  
8 eliminate our weapons. If we didn't do it, that would induce  
9 them to try to have weapons. If we'd gone ahead and others  
10 had gone ahead, we might not have nuclear weapons on Earth  
11 today. But I don't think any country has spent as much money  
12 or built as many nuclear weapons as the United States, or even  
13 close to it.

14 Q Are you familiar with the International Court of  
15 Justice advisory opinion entered on July 8th, 1996, titled  
16 "The Legality of Threat or Use of Nuclear Weapons"? Are you  
17 familiar with that?

18 A Sure.

19 Q And are you aware that in an 11-to-3 decision at the  
20 conclusion of that opinion it states that there is no  
21 universal prohibition of the use or threat of nuclear weapons  
22 under international law? Are you aware of that?

23 A I'm aware of that language. I'm not sure that they  
24 had considered The Nuclear Non-Proliferation Treaty when they  
25 wrote it.

1 Q Are you contending here that the operations at the  
2 Y-12 National Security Complex as they relate to nuclear  
3 weapons components and whatnot, that those are criminal acts,  
4 what -- the operations there amount to criminal acts?

5 A Well, they're certainly unlawful acts, in the sense  
6 that had we met our obligations under The Non-Proliferation  
7 Treaty, they couldn't be committed. But there's no criminal  
8 statute that makes them a crime.

9 Q So you don't believe they're engaging in any type of  
10 war crime or crimes, again, criminal offenses, by doing what  
11 they're doing there?

12 A I can imagine courts in the future holding them  
13 guilty of that, yes.

14 Q Well, but do you-- You don't believe that, do you?

15 A No, I believe that -- I believe that our violation  
16 of The Non-Proliferation Treaty is violated by them in  
17 continuing to be involved in the production of new nuclear  
18 weapons.

19 Q You're aware that Congress is not bound by  
20 international law when it enacts criminal statutes, are you  
21 not?

22 A No, I can't agree with that entirely. I think the  
23 supremacy clause makes all of our treaties, including those  
24 that deal with criminal matters, part of the supreme law of  
25 the land.

1 Q So to the extent that there are federal cases,  
2 federal opinions, saying that, *United States v. Allen*, for  
3 example, that Congress is not bound -- I'm sorry, Congress is  
4 not bound by international law when it enacts criminal  
5 statutes, you say those opinions are wrong, then?

6 A Well, I think you have to read the opinions and  
7 you'll see what they're saying is that there's no specific  
8 provision that prohibits the enactment of the statute in  
9 question.

10 THE COURT: Well, okay, but I'm not sure I follow you  
11 on the supremacy clause. So maybe you have to explain to me.  
12 So you're saying that Congress cannot disregard international  
13 law in passing statutes regulating the conduct of American  
14 citizens?

15 THE WITNESS: No, they can -- Congress can certainly,  
16 and does constantly, enact such laws. But when we sign a  
17 treaty, it becomes a part of the supreme law of the land.

18 THE COURT: Well, does it? So a treaty-- Let's talk  
19 about that for a second, because a treaty -- are -- you're not  
20 saying it trumps, obviously, the Constitution, correct?

21 THE WITNESS: It's the Constitution that makes the  
22 treaty a part of the supreme law of the land.

23 THE COURT: Where in the Constitution does -- where  
24 in the Constitution does it make a treaty the supreme law of  
25 the United States versus a contract that the United States has

1 entered into with other countries?

2 THE WITNESS: It says the Constitution of the laws of  
3 the United States and treaties entered into thereunder are part  
4 of the supreme law of the land.

5 THE COURT: Well, but, okay, that's a different--  
6 Where, I guess-- So are you familiar with the case of *Bond v.*  
7 *United States* that has to do with the Chemical Weapons  
8 Convention Act?

9 THE WITNESS: Yes, I do.

10 THE COURT: And currently before the Supreme Court --  
11 or may be the Supreme Court—I'm not sure of the specific issue  
12 presented—is whether or not the Congress can -- even if they  
13 agree, the President agrees, to something in a treaty and a  
14 treaty is passed, Congress -- that empowers Congress to pass a  
15 law in accordance with that treaty independently absent another  
16 basis? Are you familiar with that?

17 THE WITNESS: In accordance with that treaty, I  
18 think, yeah. That's my understanding of it, anyway.

19 THE COURT: So, okay, it is clear-- Let's say in  
20 international law there was some international prohibition  
21 against making marijuana illegal. Can Congress not pass a law  
22 still making marijuana illegal?

23 THE WITNESS: If the United States ratified that  
24 treaty, then under the supremacy clause we would be bound by  
25 it.



1 THE COURT: So if, as the U. S. was saying, as many  
2 circuits have said -- for example, I'll just quote from the  
3 D.C. Circuit, "Statutes inconsistent with principles of  
4 international law may well lead to international law  
5 violations. But within the domestic legal realm, that  
6 inconsistent statute simply modifies or supersedes customary  
7 international law to the extent of the inconsistency." You  
8 would say --

9 THE WITNESS: No, they're talking about customary  
10 international law, not about treaties.

11 THE COURT: Okay. Go on. I think I understand what  
12 you're saying.

13 Go ahead. I'm sorry to interrupt.

14 THE WITNESS: The treaty clause would-- You know, if  
15 there was such a treaty, it would make it part of the-- But  
16 customary international law is not directly binding on the  
17 Congress. It can make laws inconsistent with it --

18 THE COURT: Okay.

19 THE WITNESS: -- and has.

20 THE COURT: Go ahead.

21 BY MR. THEODORE:

22 Q Attorney General Clark, you are aware, of course,  
23 obviously, the Congress is bound by -- must provide for the  
24 common defense, under the Constitution?

25 A Sure. That's its power.

1 Q And are you aware that when the courts have been  
2 asked to balance the representative branches of government,  
3 both executive and the legislative branches of government, on  
4 their domestic and international obligations, they generally  
5 have found those questions to be nonjusticiable political  
6 questions? Are you aware of that?

7 A I got lost in the --

8 Q Yeah, I'm sorry. That was a long question. When  
9 courts have been asked to balance the representative branches  
10 of governments, their obligations, both domestic and  
11 international, under the Constitution, they have usually found  
12 those to be political questions, have they not, that they  
13 would not address because they were political questions?

14 A Well, the question is too general for me to answer,  
15 if I understand the question. But the courts are not going to  
16 address political questions, obviously. Those are left to the  
17 political branches. But where there are rights involved,  
18 which, you know, all legislation is political, I think it  
19 becomes relevant for courts to address them.

20 Q Let me move on to a different topic here. Are you  
21 familiar with the statutes under which the defendants are  
22 charged here in this case?

23 A Yes.

24 Q All right. And Count 1 of the superseding  
25 indictment charges a violation of 18, United States Code,

1 Section 2155, which is essentially injuring or damaging  
2 national defense premises with the intent to injure, obstruct,  
3 or interfere with the national defense. You're familiar with  
4 that statute. Is that correct?

5 A Yes.

6 Q Now, are-- You have, I think, in your summary of  
7 your -- of what your testimony would be, you talked about  
8 civil disobedience, did you not?

9 A Today?

10 Q Yes, and in your statement that you gave, the  
11 summary of what your testimony would be.

12 A I don't remember discussing civil disobedience as  
13 such.

14 Q Okay.

15 A I'm not sure about the summary.

16 Q Well, you would agree that the defendants' conduct,  
17 according to them, would be basically an act of civil  
18 disobedience, in their view, for a greater good? You would  
19 agree with that, right?

20 A Well, they can-- It can certainly be that. It can  
21 also be an affirmative duty of a citizen.

22 Q But clearly, since it's a violation of law, it would  
23 be an act of civil disobedience?

24 A That would seem to be right, yeah.

25 Q I guess what I was trying to ask—and I'm not sure

1 if you can answer this or not—would you perceive that as  
2 being indirect civil disobedience, or direct civil  
3 disobedience?

4 A I think, at most, it would be indirect civil  
5 disobedience, because their motivation was purely an  
6 affirmative desire to prevent destruction of life.

7 Q Okay. And you're not saying that the statute under  
8 which they're charged in Count 1 is invalid in all instances,  
9 are you?

10 A In all instances?

11 Q Yes.

12 A No, I don't think so.

13 Q I mean, you can imagine a military base that -- if  
14 somebody entered and destroyed property on a military base  
15 with the intent to interfere with the military, that could be  
16 a violation of that. Is that right?

17 A Sure. You can imagine all kinds of crimes against a  
18 military base.

19 Q Isn't there -- when you're talking about indirect  
20 civil disobedience, isn't -- and haven't the courts recognized  
21 that there's always alternatives to just violating the law in  
22 order to accomplish your goal; there's always the political  
23 process or other alternatives?

24 A It doesn't mean that you are restricted to the other  
25 alternatives, particularly when they don't seem to work.

1 Q Well, no, isn't that what you have to do? Isn't  
2 that-- You can't meet a justification defense if there are  
3 reasonable alternatives. And in indirect civil disobedience,  
4 the political process is always a reasonable alternative.  
5 There's a case, *United States v. Schoon*, that the defendants  
6 actually mention in one of their -- not yours, but one of  
7 their witness summaries. Isn't that what they say? Isn't  
8 that what the courts have said uniformly?

9 A There may always be alternatives, but the  
10 alternatives may not be adequate. And I think it's pretty  
11 obvious that the alternatives have not been adequate on the  
12 subject of U. S. nuclear arms policy, because we keep doing it  
13 bigger and better, bigger and worse.

14 Q Well, just because the defendants don't get the  
15 result they want right away, that doesn't mean that there is  
16 no reasonable alternatives, does it?

17 A No, of course there's still reasonable alternatives.

18 Q Okay. I mean, the democratic process does work,  
19 don't you believe?

20 A Well, it hasn't worked. And they have devoted a big  
21 part of their lives to try to save ourselves from ourselves.

22 Q Well, I mean, people's views in this country have  
23 changed on a lot of different controversial issues just  
24 over -- in recent years and decades, have they not?

25 A Our militarism seems to have grown steadily. Our

1 nuclear weapons policy seems to have grown steadily. I  
2 haven't seen any improvement in it.

3 Q And you're not aware that there's been a reduction  
4 in the actual nuclear warheads?

5 A Not in the destructive capacity.

6 Q What about on other issues?

7 A Our Trident nuclear submarine fleet is unbelievable.

8 Q Clearly the democratic process works, though. There  
9 are some would-be issues in this country, are there not?

10 A Works pretty darn well for most of our problems. It  
11 hasn't solved poverty and crime and things like that yet, but  
12 we're working at it. That just means we have to try harder,  
13 and particularly to things that are most dangerous to life on  
14 Earth.

15 Q Let me ask you some specific questions. You talked  
16 about the conduct at Y-12 and how you perceive it. Have you  
17 ever been to the Y-12 facility?

18 A No. Driven by there from time to time, but --

19 Q You've never been inside?

20 A Never went inside, no.

21 Q Okay. And are you aware that there are -- you have  
22 to have certain levels of clearance to even go into that  
23 facility?

24 A I would assume that. I'd be sure of it, yeah.

25 Q So, again, you're not basing your opinion on any

1 personal knowledge of what occurs at Y-12?

2 A Well, I have quite a bit of personal knowledge about  
3 what happens at secure military and military arms production  
4 plants around the country, but I haven't specialized in that  
5 subject.

6 Q Are you familiar -- you're certainly not familiar  
7 with the security protocols at Y-12?

8 A No. I hoped they were high. But they were  
9 obviously lax. And, in fact, if security of the plant is  
10 important to the public, then you'd have to say that there had  
11 been a grave failure to carry out security measures adequate  
12 to protect the facility from invasion by people that would do  
13 harm rather than good.

14 Q You were asked some questions about the Nuremberg  
15 Principles. But the Nuremberg Principles, that defense is  
16 when -- basically it's when -- it only applies to crimes of  
17 commission, that means when the government is compelling  
18 people to act in a certain way that could be perceived as that  
19 would violate, like, international principles. That's when--  
20 That's how that defense works. Are you aware of that?

21 A I'm not sure I'm aware that it's that clear. I  
22 think it's-- History has been directed primarily at crimes of  
23 commission, for obvious reasons. They're what's out there,  
24 for the most part. But I think it's broad enough to cover any  
25 subject that might arise, either way.

1 Q You're not aware, of course-- I mean, the  
2 defendants in this case were not compelled to engage in any  
3 conduct at Y-12, any of their operations, they weren't  
4 required to do that, were they?

5 A No, that's -- that's the admirable thing about it.  
6 Somebody ought to do it, and they did it.

7 Q Just a couple more questions here. You've talked  
8 about The Non-Proliferation Treaty back when you were Attorney  
9 General. Are you against any policy of deterrence, nuclear  
10 deterrence, of the United States?

11 A Well, I'm all for deterrence --

12 Q Nuclear deterrence.

13 A -- of wrongful conduct, aren't you?

14 Q Yeah, nuclear deterrence as -- having nuclear  
15 weapons as a deterrence policy.

16 A Deterrence is not enough. I think abolition is the  
17 only acceptable result, finally, and hopefully soon. And  
18 that's what The Nuclear Non-Proliferation Treaty specifically  
19 intended in Article VI.

20 Q Are you for unilateral disarmament by the United  
21 States, nuclear disarmament?

22 A I don't -- I don't think that's realistic or about  
23 to happen. But I don't think that the magnitude of our  
24 armaments, or even 20 percent of it, is justifiable. It far  
25 exceeds any need for protection of the lives and property of



1 the American people.

2 Q You've testified that you believe the operations at  
3 Y-12 are unlawful?

4 A Yes.

5 Q So do you -- you would believe, then, of course that  
6 all the people who work there are also part of that, that  
7 they're conspirators or aiders and abettors to that unlawful  
8 conduct?

9 A They're involved in a criminal enterprise, yes.

10 MR. THEODORE: Nothing further, Your Honor.

11 THE COURT: Anything further for this witness?

12 MR. QUIGLEY: Just two clarifications, please.

13 REDIRECT EXAMINATION

14 BY MR. QUIGLEY:

15 Q The clarification between -- the difference between  
16 treaties and customary international law as it applies to  
17 Congress, would you explain that a little bit more, please?

18 A Well, a treaty is a specific agreement that the  
19 United States has made with other nations that under our  
20 Constitution becomes a part of the supreme law of the land.

21 Q What part of the Constitution is that? Do you  
22 remember?

23 A Pardon?

24 Q What part of the Constitution is that?

25 A It's in Article VI.

1 Q Okay.

2 THE COURT: Let me ask the follow-up, again, that I  
3 don't think was answered, is, if the treaty and the law,  
4 statute, conflicts, who gets to decide whether the law or the  
5 treaty controls? Do you --

6 THE WITNESS: It's a very broad hypothetical.

7 THE COURT: Okay. I'll give it specifically.

8 THE WITNESS: It's hard to generalize about it.

9 THE COURT: If -- you think 2155 conflicts with the  
10 nuclear proliferation treaty, correct? Who decides that?

11 THE WITNESS: Well, it can conflict, yeah.

12 THE COURT: Okay. Well, as applied.

13 THE WITNESS: If it's applied to punish people for  
14 peacefully seeking to end a far greater threat to life, it  
15 would -- the treaty would prevail.

16 THE COURT: So -- no, but who decides?

17 THE WITNESS: Well, decisions like that are left to  
18 Article III officials of the Constitution.

19 THE COURT: Go ahead.

20 BY MR. QUIGLEY:

21 Q When you were the Attorney General, was it necessary  
22 for African-American citizens to engage in civil disobedience  
23 to try to force you and your Department to achieve justice?

24 A Well, I think, without it, that, sadly, it wouldn't  
25 have happened. We couldn't feel their pain. We couldn't

1 understand the misery of their lives. I think we came to feel  
2 it and to understand it. But without their initiative, there  
3 would not have been a '64 Act, there wouldn't have been a  
4 Voting Rights Act, or '66 or '68 Acts, all of which vastly  
5 expanded the civil rights of the American people. I would --

6 THE COURT: You would agree-- I'm sorry. I'm sorry.  
7 You may finish.

8 THE WITNESS: I would have to give credit to  
9 visionaries like Dr. Martin Luther King, and not to a bunch of  
10 lawyers in the Department of Justice.

11 THE COURT: You would agree that Martin Luther King  
12 is a perfect example; he may -- civil disobedience, while it  
13 may be honorable, can still be illegal under our laws?

14 THE WITNESS: Well, he was a prisoner in a  
15 neighboring state, in Birmingham, but I don't think his  
16 arrest --

17 THE COURT: You would agree-- That's a different  
18 question, right?

19 THE WITNESS: Yeah.

20 THE COURT: But you would agree that civil  
21 disobedience, while it can be honorable, can both effect change  
22 and be illegal at the same time under the laws of the United  
23 States?

24 THE WITNESS: Yes. And I -- we always hope, under  
25 those circumstances, that the law understands the moral value

1 of the conduct for which the restrictions on freedom have been  
2 imposed.

3 THE COURT: But isn't it-- As the Attorney General  
4 of the United States, you would agree that that is a  
5 prosecutorial discretion call and not a justification to commit  
6 crimes?

7 THE WITNESS: I wouldn't agree that it's entirely  
8 within the discretion of the prosecutor, because that would be  
9 intolerable.

10 THE COURT: Well, let me flip it on you from one that  
11 you think is sympathetic to one that you think is  
12 unsympathetic, at least I would think and hope you think is  
13 unsympathetic. Let's say the Klan wants to engage in civil  
14 disobedience and the prosecutor decides to prosecute them and  
15 they get a judge that's sympathetic to the Klan. The judge  
16 does not have the liberty to ignore the law and say, "What you  
17 did isn't criminal," correct? That's ultimately -- it's a  
18 discretion call, and if the prosecutor decides to bring it, and  
19 the law provides for it, then the consequences flow as they  
20 may, even though in some instances the disobedience may be  
21 morally justified, in another they may not. Or you can use a  
22 tax protester, a draft card burner. You can use whoever you  
23 want. But at the end of the day, civil disobedience, just  
24 because it may be morally justified does not make it legally  
25 justified. Is that a fair statement?

1 THE WITNESS: That's a fair statement. But the final  
2 call is with the judiciary, not with the prosecution, of  
3 course.

4 THE COURT: So you would --

5 THE WITNESS: The prosecution may initiate, but the  
6 judiciary disposes.

7 THE COURT: True. But the judiciary disposes in  
8 accordance with our laws and not our personal opinions.

9 THE WITNESS: That's true, yes.

10 THE COURT: Okay.

11 BY MR. QUIGLEY:

12 Q In the Nuremberg trials, did they prosecute any  
13 judges?

14 A My recollection is that they may have. I'm not  
15 clear exactly, but I think there was a German judge or two  
16 that may have been in there.

17 Q Did they prosecute any prosecutors?

18 A I think they did. Not the major trial, but in the  
19 subsequent trials. Major trial was just the leaders that --  
20 the surviving leaders, a couple of businessmen in there.

21 Q Does the preparations and planning of nuclear  
22 weapons at Y-12 violate the bedrock fundamental limits of  
23 constitutional war powers?

24 A You would have to state that question again. I  
25 didn't follow it.

1 THE COURT: I think you're going to have to state it  
2 more specifically, because, that alone, I don't think he can  
3 answer it.

4 BY MR. QUIGLEY:

5 Q I guess I'm trying to reask this question about  
6 "indiscriminate and uncontrollable." Under the war powers of  
7 the United States, does the United States have the legal  
8 authority to launch and use and prepare to use weapons that  
9 are indiscriminate in terms of how they impact civilians on  
10 the other end?

11 A No, in my opinion.

12 Q Do you have anything else-- I've interrupted you a  
13 couple of times. Anything else that you'd like to say?

14 A Well, I could make a speech, but I'll restrain  
15 myself.

16 MR. QUIGLEY: Well, thank you.

17 THE WITNESS: It's a pleasure and honor to be here.

18 MR. QUIGLEY: Thank you.

19 Attorney General Clark had a problem flying in,  
20 didn't get in until almost midnight last night. He's here on  
21 a pro bono basis, and just celebrated his  
22 eighty-fifth birthday.

23 So thank you for participating in this. And thank  
24 you for sharing your thoughts, your opinions, and your wisdom  
25 with us.

1 THE WITNESS: Thank you.

2 MR. QUIGLEY: Appreciate it.

3 THE COURT: May this witness be excused?

4 MR. QUIGLEY: Yes.

5 THE COURT: Any objection?

6 MR. THEODORE: Yes, Your Honor.

7 THE COURT: He may be excused?

8 MR. THEODORE: Yes.

9 THE COURT: Okay. Thank you very much, and Happy  
10 Birthday if it is your eighty-fifth.

11 THE WITNESS: Thank you, Your Honor.

12 (Witness excused.)

13 THE COURT: Do you have any further witnesses?

14 MR. QUIGLEY: No, Your Honor.

15 THE COURT: Okay. Does the U. S-- The U. S. isn't  
16 calling any witnesses?

17 MR. THEODORE: No, Your Honor.

18 THE COURT: All right. Is there-- I think I  
19 promised Mr. Lloyd that he could argue something about the  
20 first count. I can't remember. It's been a while. Do you  
21 want to do it now, or do you want to take a lunch break?  
22 What's your preference?

23 MR. LLOYD: Your Honor, I'm entirely at the  
24 Court's --

25 THE COURT: No, I'm at your-- You tell me. You know

1 how long it's going to take.

2 MR. QUIGLEY: We should do it now.

3 MR. LLOYD: Your Honor, I'll be brief.

4 THE COURT: Okay.

5 MR. LLOYD: That's not a promise that I'll speak  
6 quickly, because I can't do that.

7 THE COURT: That's all right. That's better for the  
8 court reporter.

9 MR. LLOYD: Your Honor, the first count of the  
10 superseding indictment in this case charges the three  
11 individuals, the three defendants, with a violation of the  
12 Anti-Sabotage Act codified in Title 18 of the Criminal Code at  
13 Section 2155(a). The elements are -- include "intent to  
14 injure, interfere with, or obstruct the national defense of the  
15 United States." And then the conduct prohibited is "willful  
16 injury, destruction, contamination, or infecting," or an  
17 attempt to do one of those things, "any national-defense  
18 material, national-defense premises, or national-defense  
19 utilities." And those three terms, "national-defense  
20 premises," "national-defense utilities," "national-defense  
21 material," are all defined in Chapter 105 entitled "Sabotage,"  
22 and specifically in the definitional section in the code,  
23 Section 2151.

24 The government-- Well, I thought this morning when  
25 the Court first invited me to address my motion that one thing



1 I might say to the Court is that in moving for a bill of  
2 particulars with respect to this criminal charge I was  
3 concerned that the United States intends to present, but is  
4 hiding or not being up front about, some damage to the  
5 national defense that I'm unaware of. This has been an  
6 unusual case in which many of the facts are not in dispute.  
7 We know that the gravamen of the case is that three  
8 individuals crossed onto Y-12.

9 THE COURT: Why do you-- I guess I'm different than  
10 you in the sense -- or I don't see what you see. But I do see  
11 something that you don't at least seem to bring up, and maybe  
12 we can talk about that, because I understand what you wrote in  
13 your briefs and I understand what the bill of particulars  
14 request is, but you never ask for what the evidence is that --  
15 and maybe you're conceding this, that the defendants intended  
16 to injure, interfere with, or obstruct the national defense, in  
17 other words, the first portion. I mean, the facilities seems,  
18 at least as applied to your clients -- the premises, I mean,  
19 the fence, the blood on the wall, all of that could be at  
20 least -- a jury could conclude is, as -- in the statute as  
21 applied, is the premises, and so -- but I guess the question  
22 is, you never asked for what evidence there is the government  
23 has of your clients' intent to injure, interfere, or obstruct  
24 the national defense of the United States. How come?

25 MR. LLOYD: Well, Your Honor, I believe that's what

1 the Court ordered the government to provide in the --

2 THE COURT: Well, look at your request. Let me grab  
3 your-- I've got to find it. If you look at the magistrate  
4 judge's memorandum and order and discovery motions, you have  
5 the request for all that, and then somewhere in here --

6 MR. LLOYD: I was looking, Your Honor, at Record  
7 Entry 90, which is the memorandum and order that contains --

8 THE COURT: The bill of particulars, right?

9 MR. LLOYD: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. LLOYD: And in particular, in response to the  
12 bill of particulars provided, I filed the motion, which is  
13 Record Entry 102, and it, on its second page, quotes the  
14 Court's order that -- as to what is to be particularized.

15 THE COURT: Right. But if you look at your bill of  
16 particulars, you're asking at -- as to Count 1, and you look at  
17 your Number 2 particular, how the conduct charged injured,  
18 interfered with, or obstructed the national defense, right?

19 MR. LLOYD: Yes, Your Honor.

20 THE COURT: That relates -- it's got to relate --  
21 well, let's say it relates to the first part. It's  
22 irrelevant-- The government doesn't have to prove, for the  
23 first part the intent part, that it actually did; they just  
24 have to prove that your client had the intent. To me, that's a  
25 little more difficult, actually, for the government.

1 MR. LLOYD: I agree, Your Honor. All I'm focusing  
2 on -- Your Honor will note I did not file an objection to the  
3 magistrate judge's ruling, nor did the government. All I've  
4 argued in my most recent motion is that the Court ordered the  
5 government to provide particularization in accordance with the  
6 quotation from the memorandum and order, Record Entry 90, which  
7 is quoted at the top of Record Entry 102, same page.

8 THE COURT: Wait. Where in 90 is what you're talking  
9 about? Just so we're on the same page.

10 MR. LLOYD: "The Court finds --"

11 THE COURT: No, what page? I'm sorry.

12 MR. LLOYD: Oh.

13 THE COURT: You're talking about with regards to the  
14 bill of particulars, correct?

15 MR. LLOYD: Yes, Your Honor. That's Page ID Number  
16 733, is the magistrate judge's ruling.

17 THE COURT: Right: "The Court finds the government  
18 should particularize the harm or attempted harm to related  
19 activities of national preparedness in order to prevent  
20 surprise at trial."

21 MR. LLOYD: Correct, Your Honor. And I guess where I  
22 have a disagreement with the government, perhaps with Your  
23 Honor, is, I don't believe the bill of particulars itself,  
24 which is Record Entry 98, does that. I understand that the  
25 magistrate judge used "related activities of national

1 preparedness" as being what the unlawful intent to injure,  
2 interfere with, or obstruct is.

3 THE COURT: I guess-- Let me ask you this.

4 MR. LLOYD: Uh-huh.

5 THE COURT: Let's just go over the statute.

6 MR. LLOYD: Okay.

7 THE COURT: The government has to prove that your  
8 clients intended to injure, interfere with, or obstruct the  
9 national defense.

10 MR. LLOYD: Yes, Your Honor.

11 THE COURT: Okay. So that's Point 1. And I think  
12 Mr. Quigley stated this earlier. And then they have to show  
13 that they "willfully injured, destroyed, contaminated, or  
14 infected, or attempted to injure, destroy, contaminate, or  
15 infect any material, premises, or utilities."

16 MR. LLOYD: Correct, Your Honor.

17 THE COURT: So what is-- "The Court finds the  
18 government should particularize the harm or intended harm of  
19 related activities of national preparedness." Where-- I'm not  
20 sure I follow where that falls in the statute.

21 MR. LLOYD: If you -- if you read above that, Your  
22 Honor, in the memorandum and order, as quoted from Record Entry  
23 90, Page ID Number 733, the government proposes -- the  
24 magistrate judge was basing his ruling in part on what the  
25 government proposed. "And this Court has employed the

1 following broad definition of national defense," and that's  
2 referring to the term national defense used in the opening  
3 clause of the statute to define what the specific intent has to  
4 be to be guilty of this violation.

5 THE COURT: No, one-- You're talking-- When  
6 national defense-- I mean, *Goren* is, I guess, the preeminent  
7 case that involved the Espionage Act, that defined national  
8 defense, correct?

9 MR. LLOYD: Yes, Your Honor.

10 THE COURT: But my question is more specific, I  
11 guess. What exactly are you looking for from the United  
12 States?

13 MR. LLOYD: Well, I -- and that gets me back to what  
14 I feared I was looking at from the United States, which is some  
15 evidence to the effect that three people walk into Y-12, commit  
16 symbolic acts, and somebody, perhaps with stars on his or her  
17 shoulder, says, "Oh, by the way, for five minutes we had no  
18 national defense." Now --

19 THE COURT: But that's-- See, I'm not going to allow  
20 that in unless -- that latter part in, because -- unless the  
21 government ties it to one of the elements, because that seems  
22 more prejudicial than probative. So I guess I'm curious as to  
23 why the government has to provide it if they're not going to  
24 introduce it at trial.

25 MR. LLOYD: If they're not, Your Honor, I am -- I

1 don't disagree with you.

2 THE COURT: Well, let me ask the United States.

3 You are going to -- you're going to prove, for 2155,  
4 two things, right? You're going to prove the defendants had  
5 the intent to -- as we've been talking about, to interfere,  
6 injure, or obstruct with—I'm sorry for mixing them up—the  
7 national defense of the United States, correct?

8 MR. THEODORE: Yes. Yes, Your Honor.

9 THE COURT: And that has nothing to do with whether  
10 or not they actually interfered with the national defense of  
11 the United States, correct?

12 MR. THEODORE: Well, I think that is some evidence of  
13 it. We would say that they-- We will prove that they  
14 certainly contemplated, and they knew when they engaged in  
15 their acts, that there would be an institutional type of  
16 response from Y-12, and that it would cause a disruption to the  
17 operations of Y-12. The operations, of course, deal with  
18 national defense. That's what we would prove. Also, there  
19 have been -- they have made statements, and of course  
20 statements they left there, regarding nuclear disarmament.

21 THE COURT: So you're going to prove they had the  
22 specific intent, when they went on the premises, to interfere  
23 with the operations of Y-12?

24 MR. THEODORE: Yes.

25 THE COURT: Okay. And so, Mr. Lloyd, I guess what

1 are you looking for with regards to that? I'm not clear. Or  
2 are you looking for the second element? That's where I'm  
3 trying to --

4 MR. LLOYD: No, Your Honor, I'm sticking with what  
5 the magistrate judge ruled, which is, he required the  
6 government to particularize or -- to quote the magistrate  
7 judge, "The government should particularize the harm or  
8 attempted harm to related activities of national preparedness."

9 THE COURT: So I see what you're asking for. What  
10 you're asking for is how specifically are they going to prove  
11 the specific intent, because the government says your client  
12 knew that by coming on the premises it would affect national  
13 defense or national preparedness, and you want to know, "What  
14 exactly would it affect, and how would my clients know it?" Is  
15 that -- Am I --

16 MR. LLOYD: I think that's fair, Your Honor. And I  
17 ask the Court to keep in mind that until this moment all I had  
18 in response to the magistrate judge's order was the bill of  
19 particulars that is Record Entry 98.

20 THE COURT: Hold on. Let me get to it.

21 (Brief pause.)

22 THE COURT: I haven't figured out how to navigate  
23 your CM-ECF. So I've got it all printed.

24 MR. LLOYD: I'm embarrassed, Your Honor, to have a  
25 lot of paper spread out in front of me. I'm not-- My

1 daughters laugh at my technical skills.

2 (Brief pause.)

3 (Off-the-record discussion.)

4 MR. LLOYD: Your Honor, if I may approach, I'd be  
5 happy to hand it --

6 THE COURT: Yeah, that's okay.

7 (Off-the-record discussion.)

8 THE COURT: Can I write on this?

9 MR. LLOYD: Yes, Your Honor. Of course.

10 (Brief pause.)

11 THE COURT: Okay.

12 MR. LLOYD: From memory, Your Honor, I think what the  
13 government told me, in an attempt to particularize, I believe  
14 in the second sentence of the second paragraph, the entry  
15 onto—all we're talking about is the entry, the  
16 trespass—disrupted operations and, if I remember the language  
17 well, caused institutional and security responses. I believe  
18 that's --

19 MR. QUIGLEY: (Indicating.)

20 MR. LLOYD: Thank you, Professor. That's it.

21 "These actions caused a significant institutional  
22 and security response which did disrupt operations at Y-12."  
23 That doesn't tell me anything, Your Honor, respectfully. And,  
24 in fact, it does not comply with the court's order, to which  
25 no objection was interposed. It tells me that these three



1 accused persons walked into Y-12, and I'll --

2 THE COURT: What's wrong with telling the defendants  
3 what the institutional and security response was that they  
4 caused to occur, and why they knew it would be caused?

5 MR. THEODORE: Well, first, Your Honor, I think that  
6 the order from Magistrate Judge Shirley, it's in two parts, as  
7 far as the order, it's Page 13 of his order which talks about  
8 "should particularize the harm or attempted to harm to related  
9 activities of national preparedness in order to prevent  
10 surprise at trial," then follows that up with, "The government  
11 does not have to state what evidence it will use to prove this  
12 harm."

13 Then on the next page, the magistrate judge, again,  
14 in the order, says -- orders us to provide a bill of  
15 particulars "stating the harm or attempted harm to the  
16 national defense." And "harm," I think, is just being used as  
17 a standard term for the scienter requirement of the statute  
18 there as far as injury.

19 THE COURT: Right.

20 MR. THEODORE: I don't know how-- I think Mr. Lloyd  
21 is really overcomplicating this. We have a facility that  
22 according to -- as defined by statute in your pleadings is a  
23 nuclear weapons production facility, and they went in there  
24 intentionally, and as a result of that conduct -- they went in  
25 there as part of their anti-nuclear protest, and they certainly

1 knew, could be practically certain, and intended to, disrupt  
2 their facilities. Now, the disruption -- we've described the  
3 disruption. We went as far as a shutdown of the facility as a  
4 direct result of their intrusion. And it was shut down for  
5 approximately two weeks, and maybe a little bit longer than  
6 that. But all of their operations-- Y-12 deals with another  
7 facility. Pantex, it's called. And they're shipping and  
8 receiving. These operations are going on every day. We kind  
9 of tried to define that a little bit in the bill of  
10 particulars. But obviously in their motions for judicial  
11 notice they obviously believe they know a lot of the operations  
12 there. But that's --

13 THE COURT: Well, I think they know a lot of the  
14 operations there. What they don't know is exactly what was --  
15 what do you mean by "significant institution and security  
16 response," which you've just given, which is that as a result  
17 of their actions, the facility was shut down for two weeks.  
18 But it seems to me-- When you say "security response," is that  
19 what happened, or are you talking about -- I thought it was  
20 just one guard that stopped them.

21 MR. THEODORE: Well, that's when they were arrested.  
22 And then, as a result of the breach, of course—I mean, fences  
23 were cut, secure fences were cut—the operations just shut down  
24 so that they could rectify the security breach and rectify the  
25 situation. But, I mean, the end result was, it was -- the

1 facility -- all operations as described there, their normal  
2 operations, came to a halt.

3 THE COURT: Mr. Lloyd, why isn't that sufficient,  
4 what he just said?

5 MR. THEODORE: And that that's been stated before in  
6 court, so the defendants were aware we've made that statement,  
7 which I think is contained in one of the judge's rulings, that  
8 we did state that.

9 THE COURT: Well, he just gave you what  
10 "institutional and security response" means, which I agree on  
11 its face is vague.

12 MR. LLOYD: And that's why I'm here today, Your  
13 Honor. I --

14 THE COURT: But he just gave you the more  
15 particularized, which was that, as a result of the breach, the  
16 facility, at least the government alleges, was shut down for  
17 two weeks.

18 MR. LLOYD: And if that is all that he is saying is  
19 comprehended by "a significant institutional and security  
20 response," then I, today, but not with the bill of particulars,  
21 have the answer to my question, I believe.

22 THE COURT: Okay.

23 MR. LLOYD: I do, of course, anticipate that the  
24 government will, as is so often true in cases, attempt to prove  
25 specific intent by proving conduct that the government will

1 argue indicates intent, in as much as this is not a  
2 brain-reading exercise, and I want to make sure I understand  
3 that the government is telling the Court that to particularize  
4 the specific intent element of the charge under The Sabotage  
5 Act, that the government has limited itself to what was done in  
6 response to breaches of security --

7 THE COURT: Well, the government can --

8 MR. LLOYD: -- at Y-12.

9 THE COURT: The government can correct me if I'm  
10 wrong, but I think what they're saying is that the defendants  
11 knew at the time they breached the security that their breach  
12 would cause a shutdown of the premises.

13 MR. LLOYD: And I'm hearing "the premises" only, Your  
14 Honor. Again, I don't want -- in asking for and convincing the  
15 Court to grant at least a limited bill of particulars, I'm  
16 understandably, I hope, concerned that I not later hear the  
17 testimony from -- from somebody with stars on his or her  
18 shoulder that due to this Japan could have been invaded by  
19 China. So --

20 THE COURT: The government isn't intending to do  
21 something like that, correct?

22 MR. THEODORE: No.

23 THE COURT: You're going to show through testimony  
24 that the defendants knew that by breaching the security it  
25 would result in a shutdown, temporary shutdown, of the Y-12

1 facility.

2 MR. THEODORE: Well, we're going to prove that they  
3 knew that there would be some major -- there would be a  
4 disruption of their operations there—I mean, certainly they  
5 couldn't have known exactly what level of shutdown, or, you  
6 know, that there would be a two-week shutdown, necessarily—but  
7 that there would be a significant institutional response to  
8 that type of an intrusion.

9 THE COURT: And that that resulted in injury,  
10 interference with, or obstruction of the national defense.

11 MR. THEODORE: Well, that they intended to do that.

12 THE COURT: Yeah, not it-- I'm sorry. That's right.  
13 And that such a shutdown, though, is the, at least-- So you're  
14 claiming that by intending to shut it down, they were intending  
15 to harm the national defense of the United States.

16 MR. THEODORE: Yes. And I don't want to be so  
17 absolute and get frozen. And I think that's one of the things  
18 I think it comes down to, looking at the case law, as far as  
19 the purpose of bill of particulars. I don't want to get frozen  
20 into that term, just "shutdown." We think it was anticipated,  
21 certainly a goal, to disrupt the operations there. And that  
22 was their -- that was their intent. That would be a harm to a  
23 facility like that, a disruption to that facility, which of  
24 course did result in a shutdown here. But the intent was a  
25 disruption of that facility. That's what --

1 THE COURT: Which is a national defense facility.

2 MR. THEODORE: Yes. And, Your Honor, it's also not  
3 just -- you know, they also caused disruption. And, again,  
4 used "shutdown," but there was disruption caused by all the  
5 injury and destruction to the property, that had to be cleaned  
6 up, that had to be repaired, again, high-level security fences,  
7 things like that.

8 THE COURT: But you agree that they have to intend  
9 that. They have to intend that by cutting the fence, for  
10 example, that they would injure, interfere, or obstruct the  
11 national defense of the United States.

12 MR. THEODORE: Yes, that's the mens rea requirement  
13 we have to prove.

14 THE COURT: Right.

15 MR. THEODORE: So we're prepared to produce evidence  
16 on that.

17 THE COURT: Okay.

18 MR. LLOYD: And, Your Honor, part of my problem is,  
19 every time my learned colleague stands up, the particulars  
20 expand. Am I understanding that the government's proof of the  
21 specific intent required by the statute will consist of a  
22 shutdown and disruption of operations at Y-12 only?

23 THE COURT: Yeah, you understand what he's saying?  
24 What he's saying is that you're not alleging that they intended  
25 to injure, interfere with, or obstruct any other facility, but

1 only the Y-12 facility.

2 MR. THEODORE: Yes, but inevitably there would be  
3 testimony that since Y-12 engages with other facilities, as I  
4 mentioned Pantex, and they're exchanging nuclear secondary  
5 parts where they're disassembled at Pantex—this is more  
6 information, Mr. Lloyd—and shipped to Y-12 where they're  
7 refurbished and shipped back.

8 THE COURT: Well, of course they're collateral  
9 consequences.

10 MR. THEODORE: Yes.

11 THE COURT: But you're not alleging they intended to  
12 effect those collateral consequences. You're alleging that  
13 they intended to affect the Y-12 facility. And if the defense  
14 puts at issue, obviously, that Y-12 has nothing to do with  
15 national defense, then you can prove it to the -- until the  
16 cows come home.

17 MR. THEODORE: Right.

18 THE COURT: But, absent that, I don't hear them to be  
19 saying that, then you can -- your intention is just to show  
20 that they intended to -- for the intent element, all they  
21 intended to do is disrupt or shut down the Y-12 facility --

22 MR. THEODORE: Yes.

23 THE COURT: -- and not that they intended to have  
24 some effect in China, to steal Mr. Lloyd's word.

25 MR. THEODORE: This was all done with the goal of

1 nuclear disarmament. Obviously they're nuclear protesters.  
2 But, yes, that was their specific intent with regard to this  
3 incident.

4 THE COURT: Is that it?

5 MR. LLOYD: Your Honor, if there is no further use of  
6 the conjunction "but," I think that answers the --

7 THE COURT: Right. I won't let him say "but."  
8 Anything else?

9 MR. LLOYD: No, Your Honor.

10 THE COURT: Mr. Quigley?

11 MR. QUIGLEY: No, Your Honor.

12 THE COURT: Mr. Irwin?

13 MR. IRWIN: No, Your Honor.

14 THE COURT: Okay. And from the United States?

15 MR. THEODORE: No, Your Honor. Thank you. No, Your  
16 Honor. Thank you.

17 THE COURT: Okay. Thank you--all very much. We'll  
18 get an opinion out in a week so you'll have it a week before  
19 trial, and all the issues before us. And then we will see you  
20 May 6th. Counsel here at 1:00. We'll start with the jury at  
21 1:30. If, as I said, by Friday, questions and proposed jury  
22 instructions, this Friday, which I don't know the date, but  
23 you--all do. April 26th, maybe? That sounds reasonable. The  
24 26th is what we'll call it.

25 MR. LLOYD: The 26th, Your Honor.



1 THE COURT: Good. Okay. Thank you-all. Have a nice  
2 day. I'll see you in a couple of weeks.

3 END OF PROCEEDINGS

4 I, Elizabeth B. Coffey, do hereby certify that I  
5 reported in machine shorthand the proceedings in the  
6 above-styled cause, and that this transcript is an accurate  
7 record of said proceedings.

8

9

10

s/Elizabeth B. Coffey  
Elizabeth B. Coffey,  
Official Court Reporter

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January 13, 2014

The Honorable Amul R. Thapar  
United States District Judge  
U.S. District Court  
35 West Fifth Street  
Covington, KY 41011

Re: Sentencing of Sr. Megan Rice, Michael Walli, and Greg Boertje-Obed

Dear Judge Thapar:

We write on behalf of the Lawyers Committee on Nuclear Policy to urge great leniency in the sentencing of Sister Megan Rice and veterans Michael Walli and Greg Boertje-Obed.

We share the concern expressed in your decision on the Rule 29 motion about inferring an intent to injure the national defense from a trespass that disrupts operations at a military facility. We respectfully suggest that defendants' statements such as "beginning the work of disarmament" referred to their actions as symbolic ones aimed at awakening the conscience of those in the executive and legislative branches of the U.S government who have the capacity and the legal obligation, under Article VI of the Nuclear Non-Proliferation Treaty (NPT), to begin negotiations in good faith toward nuclear disarmament. As you indicated in your decision, in any event the nature of defendants' actions and statements is to be taken into account in sentencing.

The actions and statements of the defendants were prompted by their desire to draw attention to the enormity of the potential humanitarian consequences of the U.S. nuclear weapons program and the imperative of undertaking disarmament. Their actions and statements are part of a growing awareness, in the United States and worldwide, of the grave humanitarian impacts of nuclear war, the ongoing risks of nuclear detonations in conflict or otherwise, and the urgent need for the global elimination of nuclear weapons.

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In the United States, there has been bipartisan support of Global Zero, an organization of world leaders devoted to the abolition of nuclear weapons, and the Nuclear Security Project, which works toward a world free of nuclear weapons.<sup>1</sup> Globally, a consensus on the incompatibility of nuclear weapons with humanitarian values and law is crystallizing.

In the Final Document of the quinquennial NPT Review Conference held in May 2010, the Conference “expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirms the need for all States at all times to comply with applicable international law, including international humanitarian law.”<sup>2</sup> The Final Document was approved by all participating states parties (172), including the United States and the other NPT nuclear weapon states.

In a November 2011 resolution,<sup>3</sup> the Council of Delegates of the International Red Cross and Red Crescent Movements:

- “1. emphasizes the incalculable human suffering that can be expected to result from any use of nuclear weapons, the lack of any adequate humanitarian response capacity and the absolute imperative to prevent such use;
2. finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law, in particular the rules of distinction, precaution and proportionality;
3. appeals to all States:
  - a. to ensure that nuclear weapons are never again used, regardless of their views on the legality of such weapons,
  - b. to pursue in good faith and conclude with urgency and determination negotiations to prohibit the use of and completely eliminate nuclear weapons through a legally binding international agreement, based on existing commitments and international obligations, ....”

In March 2013, the government of Norway hosted an international conference on the humanitarian impact of nuclear weapons attended by 128 governments, preceded by a civil society forum organized by the International Campaign to Abolish Nuclear Weapons. At those meetings and elsewhere, physicians and scientists have presented updated analyses of the devastating blast, heat,

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<sup>1</sup> U.S. supporters of Global Zero among many others include General (Ret.) James E. Cartwright, former commander, U.S. Strategic Command, who served during both the George W. Bush and Obama administrations; former Senator (R-NE) Chuck Hagel, before he became the current Secretary of Defense; Frank E. Carlucci, Secretary of Defense under President Ronald Reagan; and Strobe Talbott, journalist and Deputy Secretary of State under President Bill Clinton. The Nuclear Security Project was formed by two Republicans and two Democrats, *i.e.* George Shultz, Secretary of State under President Reagan; Henry Kissinger, Secretary of State under President Richard Nixon; William Perry, Secretary of Defense under President Clinton; and former Senator (D-GA) Sam Nunn.

<sup>2</sup> <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/revcon2010/FinalDocument.pdf>, p. 19.

<sup>3</sup> <http://www.icrc.org/eng/resources/documents/resolution/council-delegates-resolution-1-2011.htm>.

radiation, and firestorm effects of even one nuclear explosion in an urban area,<sup>4</sup> as well as the global cooling effects – and accompanying very large-scale famine resulting from decreased agricultural production – of the use of numerous (*e.g.*, 100) nuclear weapons in urban areas.<sup>5</sup>

In the most recent of a series of joint statements, at the United Nations General Assembly in October 2013, 124 states declared in part:

“We welcome the renewed resolve of the international community, together with the ICRC [International Committee of the Red Cross] and international humanitarian organisations, to address the catastrophic humanitarian consequences of nuclear weapons. By raising awareness about this issue, civil society has a crucial role to play side-by-side with governments as we fulfil our responsibilities.”<sup>6</sup>

These developments indicate not only an emerging consensus about the absolutely unacceptable humanitarian impacts of nuclear weapons, but also the crucial role of civil society in raising consciousness about the dangers of these weapons to further a world free of nuclear weapons. The defendants have played their own significant role by drawing attention to the incompatibility of nuclear weapons with humanitarian and religious values and with law, a contribution that supports leniency in sentencing.

We emphasize that it is not only humanitarian and religious values that come into play in assessing the actions of defendants. International humanitarian law, also known as the law of armed conflict, is highly relevant, as the 2010 NPT Review Conference outcome and the Red Cross/Red Crescent resolution indicate, as is the nuclear disarmament obligation under NPT Article VI.

In June 2013, the Department of Defense released a Report to Congress on U.S. Nuclear Employment Strategy.<sup>7</sup> It says: “The new guidance makes clear that all plans must also be consistent with the fundamental principles of the Law of Armed Conflict. Accordingly, plans will, for example, apply the principles of distinction and proportionality and seek to minimize collateral damage to civilian populations and civilian objects.” Defendants’ view is that use of nuclear weapons in compliance with such fundamental principles is impossible. That view at a minimum is entirely reasonable; in the view of the Lawyers Committee on Nuclear Policy it is correct. Defendants’ view is also in accord with the thrust of the 1996 Advisory Opinion of the International Court of Justice, in which the Court stated that use of nuclear weapons is “scarcely reconcilable”

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<sup>4</sup> See Dr. Tillman Ruff, “The health consequences of nuclear explosions,” in Beatrice Fihn, ed., *Unspeakable Suffering – the humanitarian impact of nuclear weapons*, Reaching Critical Will, 2013, available online at <http://www.reachingcriticalwill.org/resources/publications-and-research/publications/7422-unspeakable-suffering-the-humanitarian-impact-of-nuclear-weapons>.

<sup>5</sup> See Dr. Ira Helfand, “The Humanitarian Consequences of Nuclear War,” *Arms Control Today*, November 2013, online at [http://armscontrol.org/act/2013\\_11/The-Humanitarian-Consequences-Of-Nuclear-War](http://armscontrol.org/act/2013_11/The-Humanitarian-Consequences-Of-Nuclear-War).

<sup>6</sup> [http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com13/statements/21Oct\\_Joint.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com13/statements/21Oct_Joint.pdf).

<sup>7</sup> [http://www.defense.gov/pubs/ReporttoCongressonUSNuclearEmploymentStrategy\\_Section491.pdf](http://www.defense.gov/pubs/ReporttoCongressonUSNuclearEmploymentStrategy_Section491.pdf).

with the “principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity”.<sup>8</sup>

The United States also claims to be in compliance with NPT Article VI. The International Court of Justice construed Article VI in unanimously concluding: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>9</sup> Again, defendants’ view that the United States is not in compliance with Article VI is entirely reasonable, and in our view correct. Among other things, the plans to maintain and modernize nuclear forces for decades to come, plans in motion at the Y-12 complex, evidence a lack of good faith in meeting the obligation.

It is now well established under international law that individuals are accountable for the commission of or complicity in war crimes, crimes against humanity, and genocide. The principle of individual responsibility animated the Nuremberg trials and judgments, and is fully set forth in the Rome Statute of the International Criminal Court. Defendants in effect seek to extend and build upon the principle of individual responsibility to hold that citizens have the right and the duty to act reasonably to prevent the commission of international crimes and to extinguish their own at least political complicity in such crimes. This extension at this time may be viewed as more a moral argument than a legal one cognizable in U.S. courts. But its moral seriousness and reasonableness should be taken into account in sentencing, as should the reasonableness of defendants’ views regarding the incompatibility of the U.S. nuclear weapons program with international legal obligations whose bindingness the United States accepts.

Also to be taken into account, as you indicated in your Rule 29 decision, is the nonviolent approach of defendants. A spirit of nonviolence infuses the statement that defendants prepared and read when arrested. It declares: “Brothers and Sisters, powers that be, we come to you today as friends in love.”

In a recent speech to the Ploughshares Fund, an organization advocating for a nuclear weapons free world, Secretary of State John Kerry said that when he was in the Navy he was sent to Nuclear, Chemical and Biological Warfare school and there he learned enough about “throw weights and circles of damage and radiation and the consequences” to say to himself, “This is insanity.” He also said: “Realizing a world that is free from the threat of weapons too terrible for any of us to comprehend is really hard for some people to grab onto. It’s a big concept. But ... I think it’s so essential that we do grab onto it ...”<sup>10</sup> These three defendants should be thanked for doing their part to help the public and the government grab onto the concept of the prompt realization of a nuclear

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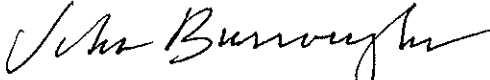
<sup>8</sup> Para. 95.

<sup>9</sup> Para. 105(2)F.

<sup>10</sup> <http://www.state.gov/secretary/remarks/2013/10/215951.htm>.

weapons free world. But if they must be sentenced we respectfully urge that they receive the absolute minimum.

Sincerely,

  
John Burroughs, Executive Director

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