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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 3:12-CR-107
v.	)	
	)	(THAPAR/SHIRLEY)
MICHAEL R. WALLI,	)	
MEGAN RICE, and	)	
GREG BOERTJE-OBED	)	
	)	
Defendant.	)	

OBJECTION TO MAGISTRATE'S REPORT AND RECOMMENDATION DENYING DEFENDANTS' MOTION TO DISMISS NEW SABOTAGE CHARGE IN SUPERSEDING INDICTMENT

Now into Court come Defendants Michael Walli, Sister Megan Rice, and Greg Boertje-Obed who ask the District Court to review and reverse the Magistrate's Report and Recommendation denying the defendants' motion to dismiss the new sabotage charge under 18 U.S.C. §§ 2155(a) and 2152 against them for the reasons set forth below. The Report and Recommendation denying Defendants' Motion to Dismiss New Sabotage Charge should not be followed and Defendants' Motion should be granted.

A. *De Novo* Review

As a preliminary matter, under Federal Rule of Criminal Procedure 59(b), the district judge must consider any objections to a Magistrate's Recommendation *de novo*. *See* Fed. R. Crim. P. 59(b)(3). For the sake of brevity, defendants do not copy and reargue their arguments below but incorporate the prior pleadings into this pleading.

B. Vague and Overbroad

The Magistrate denied the challenge that the charge of sabotage was vague and overbroad without yet addressing defendants request for a Bill of Particulars. Defendants argued that the charge is vague or overbroad unless the court forces the prosecution to respond fully to the Bill of Particulars. Defendants are at a bit of a disadvantage making their argument here since the decision on the Bill of Particulars has not been resolved but will go forward under the current facts where the Bill of Particulars has not been responded to.

The Magistrate concluded that the sabotage charge is neither vague nor overbroad even without explanatory facts from the prosecution, despite the Magistrate finding that the statute must give "relatively clear guidelines as to prohibited conduct." *Posters 'N' Things, Ltd. V. United States* 511 U.S. 513, 525 (1994).

The type of property at issue and the intent necessary are not stated in such a way as to be clear guidelines as to prohibited conduct.

What is the national defense the three are accused of sabotaging? The answer to that question is not defined in the statute. The prosecution wishes to punish the defendants for interfering with national defense without 1) defining what national defense is and without 2) defining what part of their definition of national defense was interfered with by defendants.

The prosecution wants to use the vague sabotage charge as a blunt instrument to prosecute defendants and also as an impregnable shield to avoid admitting that there are preparations for a nuclear war going on at Y-12. The prosecution wants to proceed without admitting that materials for nuclear weapons are prepared, refurbished and stored at Y-12 or allowing defendants to put on any evidence about those weapons. There is a very good reason

for the reluctance of the prosecution – the weapons themselves, thermonuclear warheads produced or refurbished at Y-12 are designed solely to reliably and effectively unleash mammoth amounts of heat, blast and radiation. The uncontested fact is that these weapons, as the prosecution well knows, cannot discriminate between civilian and military and are uncontrollable in space and time. They are designed to cause such massive damage that they necessarily would inflict unnecessary and indiscriminate suffering upon non-combatants and thus violate 18 U.S.C. § 2441. Likewise, the planning, preparations or threat to commit the war crime in 18 U.S.C. § 2441 are crimes in themselves.

This is why the prosecution wants to prosecute defendants for interference with a national defense without explaining that the "national defense" which defendants are claimed to be interfering with is totally based on first-strike thermonuclear weapons.

Prosecutors intend to proceed on the legal fiction that defendants have interfered with national defense but defendants are not entitled to know on the record what that is nor to put on evidence about it. Likewise the jury will not be allowed to know what underlying facts make up the "national defense" which defendants are accused or sabotaging.

Thus the prosecution essentially wishes to prosecute defendants under a strict liability theory – the three people trespassed and cut fences thus they automatically are guilty of sabotage of national defense. The nuclear weapons, which are the basis for the charge, are not allowed to be discussed yet they are the entire basis upon which defendants are to be convicted of sabotage. This is not how due process works.

To meet due process and not be void for vagueness, the statute must define the criminal offense 1) with sufficient definiteness that ordinary people can understand what conduct is

prohibited and 2) in a manner which does not encourage arbitrary and selective enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

This statute in this case does not meet the first criteria and the unusual way it surfaced and was used to punish the exercise of a fundamental constitutional right shows it does not meet the second criteria either.

C. The Government's Reindictment of Defendants with the More Serious Sabotage Charge Constitutes Unconstitutional Vindictive and Selective Prosecution

In denying the Defendants' Motion to Dismiss the New Sabotage Charge, the Magistrate held that (1) Defendants were not subject to prosecutorial vindictiveness; and (2) that Defendants did not make a prima facie showing of selective prosecution. In so holding, the Magistrate validated the potential addition of twenty years in prison simply for exercising their constitutional right to a jury trial. As set forth below, Defendants reassert that such action by the prosecution in adding the significantly more serious charge and possible prison sentence is disproportionate and arbitrary, and thus is unconstitutional as vindictive and selective prosecution. As such, the Magistrate's ruling on these issues should not be followed.

Defendants Michael Walli, Sister Megan Rice, and Greg Boertje-Obed, were originally charged by a Grand Jury on August 7, 2012 on three counts: (1) depredation against government property under 18 U.S.C. § 1361 [punishable by up to ten years imprisonment]; (2) attempting to injure property in the special maritime and territorial jurisdiction of the United States under 18 U.S.C. § 1363 [punishable by up to five years imprisonment]; and (3) misdemeanor trespass under 42 U.S.C. §2278a(c), 10 C.F.R. §§ 860.3 and 860.5(b) [punishable by up to one year imprisonment]. *See* Indictment [Doc. 2].

In an attempt to persuade defendants to plead guilty to two of these three charges, the prosecution threatened to charge defendants with a more serious crime, that of sabotage under 18 U.S.C. § 2155(a),[1] if they refused to plead guilty and instead chose to exercise their constitutional right to a jury trial. Sabotage of national defense carries a prison sentence of up to twenty years. *See* 18 U.S.C. § 2155(a). Despite such threats, defendants elected to plead not guilty and to exercise their Sixth Amendment right to a trial before a jury of their peers.

Consequently, on December 4, 2012, as retaliation against defendants for exercising their constitutional right to a trial, the prosecution charged defendants with the additional, more serious crime of sabotage under 18 U.S.C. § 2155(a).[2] *See* Superseding Indictment [Doc. 55]. This action of seeking the new and significantly more serious charge against Defendants for refusing to plead guilty and instead electing to exercise their Sixth Amendment right to trial constituted both vindictive and selective prosecution.

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[1] 18 U.S.C. § 2155(a) reads as follows:

> (a) Whoever, with intent to injure, interfere with, or obstruct the national defense of the United States, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any national-defense material, national-defense premises, or national-defense utilities, shall be fined under this title or imprisoned not more than 20 years, or both, and, if death results to any person, shall be imprisoned for any term of years or for life.

[2] Specifically, the Superseding Indictment charges that the defendants:

> aiding and abetting each other, with the intent to injure, interfere with, and obstruct the national defense of the United States, did willfully injure, destroy, and contaminate, and attempt to injure, destroy and contaminate national-defense premises, specifically, buildings and grounds of the Y-12 National Security Complex, in violation of Title 18, United States Code, Sections 2155(a), 2151 and 2.

See Superseding Indictment, Count One [Doc. 55]. Note that this charge replaced the charge of misdemeanor trespass under 42 U.S.C. §2278a(c), 10 C.F.R. §§ 860.3 and 860.5(b) in the original indictment [Doc. 2]. Conviction under § 2155(a) for damage to national security defense materials carries a prison sentence of up to twenty years. A conviction under § 2152 carries an additional prison term of up to five years. Thus, the prosecution in effect potentially added a possible twenty-five years to defendants' sentences by indicting them with the new charge under the sabotage statute for exercising their right to a trial.

1. Vindictive Prosecution

In holding that the prosecution's actions did not constitute vindictive prosecution, the Magistrate undermined the longstanding and fundamental principle in our justice system which provides: "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *See Bordenkircher v. Hayes,* 434 U.S. 357, 363 (1978) (citing *North Carolina v. Pearce,* 395 U.S. 711, 738 (1969); *Chaffin v. Stynchcombe,* 412 U.S. 17, 32-33, n. 20, (1973); *United States v. Jackson*, 390 U.S. 570 (1968)).

Due Process of law dictates that a person charged with a crime is entitled to exercise his constitutional rights to plead not guilty and to have a jury trial, "without apprehension that the state will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." *See Blackledge v. Perry,* 417 U.S. 21 (1974) (citing *United States v. Jackson*, 390 U.S. 570 (1968)). If a prosecutor initially makes a discretionary determination that the interests of the state are best served by not seeking more serious charges against a particular defendant, then changes his mind after the defendant decides to exercise his right to trial, due process requires that the prosecution justify its action on some other basis than as punishment for defendant's exercise of his right to trial. *Id. See also North Carolina v. Pearce*, 395 U.S. 711, 725 (1969).

In finding that the prosecution's actions in this case do not constitute vindictive prosecution, the Magistrate cited to the U.S. Supreme Court case of *Bordenkircher v. Hayes,* 434 U.S. 357 (1978), in which the Court held in a 5-4 decision that the Due Process Clause is not violated when a prosecutor carries out a threat made during plea negotiations to have the accused

reindicted on more serious charges if he does not plead guilty to the offense with which he was originally charged. As such, the Magistrate continues to perpetuate a line of cases which break with previous Supreme Court precedent (for example, *Blackledge v. Perry,* 417 U.S. 21 (1974) and *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969)) and contradict the longstanding principle of our justice system that punishing a person for doing what the law allows him to do is a constitutional violation—all in the name of the unique nature of plea-bargaining.

When charged with the task of revisiting the justice dimensions of the majority's holding in *Bordenkircher*, the Magistrate simply stated that "it is the job of this Court to divine and apply Supreme Court and Sixth Circuit precedent." However, Defendants assert that it is also the job of the courts to act as a check on government abuses of constitutionally guaranteed rights and to seek to institute justice. Though plea-bargaining is the bedrock upon which the current criminal law system is built, that does not make it a just practice, especially when it infringes upon a defendant's constitutional rights, as it does here.

It is completely illogical and unjust that a person has a constitutionally guaranteed right to a jury trial, but also that the government is allowed to punish them and put them in jail for twenty years for exercising that right. It would not make sense for a person to have a First Amendment right to speak out or to publish, but the government also has the right to put them in jail for exercising such a right. If this would not make sense in the First Amendment context, then it should not in the Sixth Amendment context either.

Courts have certainly found long-accepted practices to be unconstitutional before in the name of justice and protecting individual's constitutional rights. For example, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Supreme Court found the long-accepted practice of criminally prosecuting people without representation to be unconstitutional as violative of their

due process rights. Thus, the Defendants urge the District Court to find that the Prosecution's vindictive prosecution in this case to be unconstitutional.

2. Selective Prosecution

The Magistrate made a critical factual error in the analysis of this section which undercuts the recommendation.

The Magistrate's Report held that Defendants were unable to make a *prima facie* case to show selective prosecution in the instant case, noting the broad discretion of the prosecution to charge defendants. However, it is well established that there are well-defined constitutional constraints on prosecutorial discretion which are implicated by this case:

> [A]lthough prosecutorial discretion is broad, it is not unfettered. Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints. In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, *including the exercise of protected statutory and constitutional rights.*

Wayte v. United States, 470 U.S. 598, 609 (1985) (internal citations omitted) (emphasis added).

In order to establish a selective prosecution claim, a defendant must show that the prosecution had both a discriminatory effect and that it was motivated by a discriminatory purpose. *See id.* Defendants in the present case assert that their reindictment under the sabotage statute constitutes selective prosecution because (1) other non-violent, nuclear protestors engaged in symbolic actions are not generally prosecuted under the sabotage statute for similar conduct; and (2) these defendants have been intentionally and deliberately singled out for prosecution under these very serious sabotage charges simply for exercising their Sixth Amendment rights to a trial by jury.

The Magistrate erroneously found that Defendants did not establish a *prima facie* case of discriminatory effect because they failed to show that similarly situated nuclear protestors were

not also prosecuted under the Sabotage Act. To support this decision, the Magistrate relied on the fact that defendants' alleged actions in this case were different than that of the nuclear protestors in two prior cases brought in this Court where the defendants were not charged with sabotage.[3] Defendants do not disagree that the activities alleged in this case are factually different than the two cases the Magistrate cites to. However, just because the Defendants' alleged actions in this case differ from two previous cases in which a sabotage charge was not brought in no way justifies the bringing of a sabotage charge here.

While the Magistrate looked at dissimilar actions in this district, the prosecutors know full well there are other prosecutions by DOJ of similar actions where sabotage was not charged when people cut fences and went onto nuclear weapons sites.

That fact is not contested by the prosecution. The prosecutor does not contest that they usually do not charge people with sabotage. The most recent example is the trespass onto the nuclear submarine base at Bangor Washington where the protesters cut through fences and wandered on the base for four hours challenging the storage and existence and use of nuclear weapons in the Trident submarine systems. The DOJ charged those protesters with trespass and criminal damage to property not sabotage. There are many more examples if the prosecution wants to contest the facts of this assertion.

To repeat, it is a fact that defendants accused of similar peaceful and symbolic actions as these three are often not prosecuted for sabotage. A fact not accurately addressed by the Magistrate.

[3] The cases the Magistrate cites to are *United States v. Gump*, et al, No. 3:10-CF-94 (E.D. Tenn. May 6, 2011) and *United States v. Mellen, et al*, No. 3:02-CR-47 (E.D. Tenn. Sept. 4, 2002), in which defendant nuclear protestors crossed a perimeter boundary at Y-12 and were immediately apprehended.

Combine that uncontested fact with the constitutional rights at issue here and the Magistrate's decision does not hold up.

Importantly, defendants are among just a handful of civilians who have *ever* been prosecuted under 18 U.S.C. § 2155(a) in its seventy-three years of existence. The statute is overwhelmingly applied to military personnel, not civilians engaged in nonviolent and symbolic civil disobedience. In fact, the Eighth Circuit in *United States v. Kabat*, noted that: "The Government's attorney at oral argument advised us that to his knowledge the present cases represent the first civilian prosecutions under section 2155." 797 F.2d 580, 599 (8th Cir.) (J. Bright, dissenting).

As such, the Magistrate's Report cites to a mere two cases in which a sabotage charge was brought against peaceful protestors—*United States v. Kabat*, 797 F.2d 580 (8th Cir. 1986) and *United States v. Platte*, 401 F.3d 1176 (10th Cir. 2005)—as support for the position that other similarly situated defendants have been charged with sabotage and therefore there was no selective prosecution in this case. Just because sabotage charges have been brought in two other cases against peaceful protestors does not in itself defeat Defendants' argument that similarly situated defendants are not charged with sabotage.

This is especially true since the two cases cited by the Magistrate are factually distinguishable from the present case. For example, in *Kabat*, the defendants not only cut through fences and entered a missile site where they engaged in peaceful, symbolic activity, but they also used the tools they had brought to damage multiple radar devices, various electrical cable, two locks controlling access to the missile for maintenance, and the concrete launch lid over the missile. This type of damage to the actual functioning of the missile site is not present in the case at hand.

Based on the foregoing, Defendants assert that the Magistrate's determination that the prosecution's reindictment of Defendants with the additional charge of sabotage which carries with it a potential additional twenty year prison sentence did not constitute wrongful or selective prosecution was clearly wrong and urges the District Court not to follow it.

D. Y-12 Is Not a Military Base Within the Definition of § 2155(a)

In denying Defendants' Motion to Dismiss New Sabotage Charge, the Magistrate's Report rejected Defendants' assertion that because Y-12 is not a military base within the definition of 18 U.S.C. § 2155(a), defendants were improperly charged under the Sabotage Act. Defendants continue to assert that because Y-12 is run by private contractors, specifically, B&W Y-12, a partnership of the Babcock & Wilcox Company and Bechtel Corporation, it is not a military establishment under § 2155(a). Thus, Count One charging Defendants with sabotage fails to state a violation of § 2155(a) as a matter of law because the alleged activity did not occur on a military or naval establishment.

To be prosecuted under 18 U.S.C. § 2155(a), a defendant must, "with intent to injure, interfere with, or obstruct the national defense of the United States, willfully injure[ ], destroy[ ], contaminate[ ] or infect[ ], or attempt[ ] to so injure, destroy, contaminate or infect any national-defense material, national-defense premises, or national-defense utilities." *See* 18 U.S.C. § 2155(a). The term "national defense" is not defined in the Sabotage Act itself. Instead, it has been interpreted by the courts as a "generic concept of broad connotations referring to *military and naval establishments* and the related activities of national preparedness." *See Gorin v. United States,* 312 U.S. 19, 28 (1941)) (emphasis added).

Again, the prosecution is proceeding under a strict liability theory accusing defendants of

sabotaging the national defense by cutting fences and causing damage to property managed by private contractors at Y-12 who are making materials and components for nuclear weapons which defendants are not allowed to present evidence about. Under the prosecution theory, trespass and damage to contractor's property equals sabotage to the national defense and no evidence can be introduced to challenge whether nuclear weapons manufacturing and use are actually part of the national defense. Defendants are being prosecuted under a circular argument from which they are not allowed to escape.

If the property of private contractors has been damaged, that is a much different situation than the national defense has been sabotaged. Prosecutors cannot be allowed to proceed without proof of what the national defense is, how these private contractors fit into the national defense, and how the national defense was injured by the fence cutting and symbolic actions. Otherwise, defendants are prima facie guilty of whatever crime the prosecutor chooses to charge them with.

E. The Production, Processing, and Storage of Nuclear Weapons Violates Both the United States and International Law

Finally, the Magistrate's Report rejected Defendants' arguments that the new charges under the Sabotage Act must be dismissed because the production, processing, and storage of nuclear weapons is illegal under both United States and international law. As set out in great detail in Defendants' original motion to dismiss the charges against them [Docs. 44 and 49], the United States should not be involved in upgrading and refurbishing weapons of mass destruction like the nuclear weapons being worked on at Y-12 for active use/threat of use.

It is not contested that Y-12 produces, refurbishes and stores nuclear weapons materials which can only be used to inflict acute and long-term and widespread damage and death from radiation. Likewise, there are bounteous official government materials which document that the

US knowingly and intentionally deploys these nuclear weapons as part of what is wrongfully called national defense but which is actually national offense. The US international threat to use these weapons is based on their readiness and a stated willingness to use them.

Defendants object to the Magistrate's avoidance and denial of the grim realities of these weapons as well as that each warhead is designed and prepared at Y-12 for use in armed conflict. Defendants further specifically object to the Magistrate's conclusion that we are dealing in this case with generalized "nuclear weapons policy." (Doc. 85, Page ID #692).

The particular rules of armed conflict that are directly relevant to this case involving plans, preparations of particular thermonuclear warheads for armed conflict are of greater legal authority than the charges against these Defendants which the prosecutor is unwisely and incorrectly using to deny or abrogate the laws which strictly and universally limit armed conflict.

The fundamental laws of armed conflict, which are accepted and understood by the U.S., necessarily prohibit weapons such as the ones produced and refurbished at Y-12 that 1) are incapable of distinguishing between civilians and combatants and 2) cause superfluous or unnecessary suffering. The international community has for over 100 years recognized the principle called the Martens Clause which the International Court of Justice restated as "These fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law." (ICJ Opinion, §§ 78-79).

The US stated before the International Court of Justice that: "The United States has long held the view that the law of armed conflict governs the use of nuclear weapons -- just as it governs the use of conventional weapons" (USA, CR 95/34, p.85, as cited in §86 International

Court of Justice Advisory Opinion "Legality of the Threat or Use of Nuclear Weapons," (ICJ Reports), 8 July 1996, General List No.95).

The law as expressed by the International Court of Justice (contrary to the Magistrate's conclusion, Doc. 85, Page ID#692) expressly prohibits under any circumstance the use or threat of the thermonuclear warheads produced, prepared or refurbished for threat or use at Y-12 because they ipso facto violate the laws of war. (At the very least the burden of proof is on the prosecutor to show that these particular Y-12 weapons can be used within the laws of war as expressed by the ICJ.)

Defendants also reiterate their objection to the Prosecutor's and Court's misplacement of criminal intent in this case. The Defendants necessarily pointed out that the U.S. knows that the US violates our nuclear disarmament obligation at Y-12. By refurbishing nuclear warheads at Y-12 and preparing new weapons production facilities (Uranium Processing Facility) at Y-12 the U.S. violates a central conclusion of the ICJ: "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." (ICJ Opinion, 1996, §015 (2) F).

Defendants actions exposed the failures of the corporations and contractors at Y-12, tragic failures considering the enterprise was dealing with nuclear weapons materials.

Defendants have outstanding discovery requests which document the fact that Y-12 produces, refurbishes and stores nuclear weapons materials for thermonuclear warheads such as W76, W76-1, B61, W78 and W88. Y-12 openly describes these activities in public documents and on public websites, so that activity is hardly contestable. These discovery requests, which the government objected to as irrelevant and or immaterial, have not yet been ruled on by the Magistrate. If these discovery requests are denied by the Magistrate and upheld as improper in

form, defendants will advance the same facts for judicial notice. Defendants reserve the right to bring further proofs of these conclusions of fact and law which are directly relevant to particular elements of the crimes charged.

Such activities are criminal under U.S. law, as the use and threat of use of nuclear weapons constitute genocide and the commission of a war crime in violation of 18 U.S.C. § 2441. Furthermore, U.S. international law and the laws of war prohibit the use of these weapons of mass destruction being produced and processed at Y-12. Thus, criminal charges against non-violent symbolic actions to expose and disarm such illegal activity (for which the United States would call heroic in Iran, North Korea, or Pakistan) must be dismissed under U.S. and U.S.-based international law. It is particularly absurd to allow Defendants to be charged with the crime of nuclear sabotage in light of the gross illegality of Y-12's production and processing of nuclear weapons. As the Human Rights Committee has also said "it is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure."

The Magistrate contends that the Court already addressed this argument with regard to the new, superseding charge of sabotage under 18 U.S.C. § 2155(a) in its first Report and Recommendation [Doc. 63], filed on January 2, 2013, and merely adopts the reasoning from that first Report to address Defendants' arguments here. As Defendants argued in their Objection to the Magistrate's first Report and Recommendation [Doc. 71], the Magistrate's first Report wrongfully decided matters never presented to him, never briefed to him by either side, nor

argued before him by anyone.[4] As such, the Magistrate's ruling in the first Report and Recommendation that Defendants' arguments under U.S. and international law did not support dismissal of the new charge against them without giving defendants the opportunity to specifically address the new charges in their Motion to Dismiss or at the Motions Hearing was clearly premature and violative of their due process rights. Therefore, it was wrong of the Magistrate to merely adopt his decision from his first ruling in this Report and Recommendation regarding the sabotage charge.

Conclusion

Defendants peaceably pointed out the ongoing serious crimes being committed at Y-12 by contractors and the government. For this action, they originally faced up to sixteen years in prison - a punishment already completely out of proportion to their actions. Then, after refusing to plead guilty to the original charges and electing to exercise their constitutional right to a jury trial, defendants were reindicted with sabotage under § 2155(a) and now face an additional twenty years in jail for merely exercising their constitutional rights. The prosecution intends to use the vague sabotage charge as a club against defendants for exercising their constitutional right to a trial. At the same time, the government resists efforts to spell out what evidence there is that defendants harmed the national interest and pushes forward with efforts to gag defendants from putting on evidence about the first strike nuclear weapons at Y-12. (See Prosecution Motion to Preclude).

[4] Defendants timely filed their Motion to Dismiss the original indictment on November 2, 2012 [Doc. 44] and argued the motion to dismiss at the Motions Hearing before Magistrate Shirley on November 20, 2012. Both of these events preceded the filing of the Superseding Indictment on December 4, 2012. Defendants, therefore, did not have the opportunity to respond to the new charges filed against them at the Motion to Dismiss hearing.

This Court must also look not only at the individual constitutional and statutory problems pointed out by defendants but the impact of all of these together which undercut the constitutional rights of defendants to notice and a fair trial.

The Magistrate's Report and Recommendations issued on March 11, 2013 upholds the prosecution's charge of sabotage under § 2155(a) against defendants. As set forth above, this Report is erroneous. For these reasons, the Magistrate's Report denying Defendants' Motion to Dismiss New Sabotage Charge this matter should not be followed and Defendants' Motion should be granted.

Respectfully submitted,

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/s/ William P. Quigley