IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 16 CR 181
	)	Judge Sara L. Ellis
AWS MOHAMMED YOUNIS AL-JAYAB,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS THE INDICTMENT BASED ON COMBATANT IMMUNITY

Defendant, **AWS MOHAMMED YOUNIS AL-JAYAB**, by and through his attorneys, **THOMAS ANTHONY DURKIN, ROBIN V. WATERS,** and **JOSHUA G. HERMAN**, respectfully replies to the Government's Response to Defendant's Motion to Dismiss Based on Combatant Immunity and Supporting Memorandum of Law. (Dkt. #102, "Response").

I. INTRODUCTION.

The ongoing horrors of the Syrian War, instigated by President Bashar al-Assad and his allies, are undeniable. Nor can we deny the involvement of the United States in the conflict. Our government has called for the ouster of Assad; it has recognized opposition forces as the legitimate representatives of the Syrian people; our military and intelligence agencies have armed, trained, and equipped rebel forces, including with lethal assistance; and, as recently as one month ago, our military launched missiles into Syria that were televised to our nation.

Mr. Al-Jayab's Memorandum painstakingly detailed many of these facts with references to public sources and the words of our own government officials. (*See* Memorandum, pp. 6-21). In its Response, the government nevertheless manages to dodge these indisputable facts by claiming that "even if true," they would not be relevant to the issue before the Court. (Response,

p. 14). Quite to the contrary, the realities of the Syrian War are fundamentally important to these unique legal questions before the Court. Specifically, the United States' role in Syria not only shows that our government has lethally supported Syrian opposition groups in their struggle against the Assad regime both before, during, and after Mr. Al-Jayab's time in Syria;[1] but it also shows that the United States' involvement along with a number of other nations on both sides of the Syrian War has created an international armed conflict.

Rather than acknowledge the import of that background, the prosecution attempts to recast this as a "terrorism" case involving "violent jihad" (Response, pp. 1, 15), proving once more the old adage that "one man's terrorist is another's freedom fighter." It does so, of course, to delegitimize Mr. Al-Jayab's decision to stand up to the Assad regime and defend others. But the prosecution knows full well that this is not a "terrorism" case in any real sense of the word.

[1] Indeed, during a September 3, 2013 hearing before the Senate Committee on Foreign Relations, Secretary of Defense Chuck Hagel confirmed President Obama's "decision to support lethal assistance to the opposition" and also referenced an ongoing "covert action." The transcript of this hearing is available at: https://bit.ly/2FapvIa (last visited May 20, 2018). The relevant portion of the exchange, which occurs on p. 18 of the hearing transcript is as follows:

> Senator CORKER. I am very aware of all those things. What I am unaware of is why it is so slow in actually helping them with lethal support? Why has that been so slow?
>
> Secretary KERRY. I think, Senator, we need to have that discussion tomorrow in classified session. We can talk about some components of that. Suffice it to say that it is increasing significantly. I want General Dempsey to speak to this, maybe Secretary Hagel as well. It has increased in its competency. I think it has made leaps and bounds over the course of the last few months. Secretary Hagel, do you, or General, do you want to?
>
> Secretary HAGEL. I would only add that it was June of this year that the President made the decision to support lethal assistance to the opposition. As you all know, we have been very supportive with hundreds of millions of dollars of nonlethal assistance. The vetting process, as Secretary Kerry noted, has been significant, but I will ask General Dempsey if he wants to add anything. But we, the Department of Defense, have not been directly involved in this. This is, as you know, a covert action and as Secretary Kerry noted, to go into much more detail would require a closed or classified hearing

General Martin Dempsey then replied to Senator Corker's question by stating: "To your question about the opposition, moderate opposition, the path to the resolution of the Syrian conflict is through a developed, capable, moderate opposition, and we know how to do that."

Muting that rhetoric is essential to understand how Mr. Al-Jayab's conduct was legally privileged, and, in any event, done in good faith.

Finally, counsel would be remiss in failing to address the prosecutors' flippant footnote comment at the end of its pleading suggesting that our arguments are but a "shell game designed to play one part of American governance against another." (Response, p. 32, note 26 (quoting *United States v. Hamidullin*, 2018 WL 1833604 (4th Cir. April 18, 2018) (Wilkinson, J., concurring). The only shell game being played here is the government's selective use of the federal criminal justice system to prosecute whomever it selectively deems to be a terrorist. Unlike Irek Hamidullin or Yaser Hamdi, Aws al-Jayab is not being charged with conspiring to kill Americans, only the supposed enemy of America, the Syrian regime of Bashar al-Assad. Mr. Al-Jayab is not an unlawful enemy combatant or an American POW to be shipped to Guantanamo. Nor is he a criminal.

II. ARGUMENT.

A. The Government's Response Ignores Background That is Relevant to the Combatant Immunity Defense and Injects the Rhetoric of "Terrorism."

Mr. Al-Jayab's Memorandum extensively detailed the history of the Syrian War. (Memorandum, pp. 6-20). It also discussed the role of the United States in Syria, which dates back at least to 2012 prior to Mr. Al-Jayab's return in late 2013. (*Id.*, pp. 8-14; 17-20; 38-39). This background was drawn from multiple credible sources. Given that the government does not specifically deny the relevant factual and historical background, it will not be repeated here.

Contrary to the prosecution's suggestion, however, there is nothing "speculative" whatsoever about the fact that our government was involved in Syria. (Response, p. 27). The only thing speculative is the extent of that involvement and assistance, which the prosecution refuses to disclose. As noted above, rather than address the background facts, the prosecutors

take a qualified "even if true" approach. (*See* Response, p. 14). This response may very well have come straight from an intelligence agency, as it mirrors the "Glomar" response that neither confirms nor denies. The problem with such a response here is that the factual record is clear that the United States supported, trained, and armed rebels directly and through regional allies. The Court can and should draw its own reasonable inferences from the prosecution's conspicuous "even if true" response.

While not addressing the realities of the Syrian War as detailed in Mr. Al-Jayab's pleading, the prosecution repeatedly references "terrorism" and even suggests that Mr. Al-Jayab was motivated by what it calls "violent jihad." It apparently does so to squeeze these facts into its traditional national security/terrorism prosecutorial narrative.[2] These allegations are deeply ironic in light of the fact that Mr. Al-Jayab was motivated to oppose the Assad regime, just as *our* government has done—from demanding that Assad to step down, to firing missiles into Syria, which according to the International Committee of the Red Cross created "an international armed conflict…expanding both sides' humanitarian obligations to cover any prisoners of war."[3]

Moreover, the prosecution accusations are not well taken given how the Indictment does not allege that Mr. Al-Jayab provided material support to a Designated Foreign Terrorist Organization (FTO) or specific terrorists, as is typically the case in prosecutions brought under 18 U.S.C. § 2339A or § 2339B. Nor does the prosecution argue that Mr. Al-Jayab is an unlawful

[2] For instance, the prosecution writes: "From the moment he arrived in the U.S., defendant began to plot his return to Syria to fight on behalf of terrorist groups there," (Response, p. 1) and "Beginning as early as mid-October 2012, via his Facebook accounts, defendant told multiple family members and associates that he intended to travel to Syria to support violent jihad…" (*id.*). In the end, the prosecution's misplaced rhetoric only confirms counsel's previous comment that this case, involving a young man who suffered personal loss at the hands of Assad "has now wound its way absurdly into a U.S. criminal court as part of our endless War on Terror."

[3] Stephanie Nebehay, *Exclusive: Situation in Syria constitutes international armed conflict - Red Cross*, REUTERS, Apr. 7, 2017, available at: https://bit.ly/2IBMHRE (last visited May 20, 2018).

combatant or categorically precluded from raising the immunity defense simply due to his association with a particular group, as seen in the cases upon which it principally relies.[4] To the contrary, the proscution acknowledges that Ansar al-Sham was not an FTO. (Response, p. 6, note 6). Indeed, Mr. Al-Jayab is no more a terrorist than others who travelled to Syria to fight against al-Assad's regime, and have returned, only to be interviewed on network television, not prosecuted as "terrorists." (*See* Memorandum, p. 6, note 6). No matter how many times the prosecution says so, the fact remains that this case simply does not fit within its prosecutorial narrative, notwithstanding its monotonous references to "terrorism" and "violent jihad."[5]

B. Mr. Al-Jayab is Entitled to Receive Lawful Combatant Immunity.

The complexities of the doctrine of combatant immunity have been described in great detail in the parties' initial pleadings, and they need not be reiterated. The Response, however, does raise several points that must be addressed.

1. Mr. Al-Jayab is Entitled to Combatant Immunity Under Common Law.

According to the prosecution, common law combatant immunity no longer exists, and has been replaced by international treaty law, specifically the Geneva Convention ("GPW III"). (Response, pp. 11-18). The prosecution then argues that Mr. Al-Jayab raises a public authority defense, for which there has been no notice and he is not entitled to receive. This is wrong.

The defense advanced by Mr. Al-Jayab under the common law does not turn on the public authority defense that is made under Rule 12.3. Nor is the defense raised simply that

[4] *See*, *e.g.*, *United States v. Hamidullin*, 114 F. Supp. 3d 365 (E.D. Va. 2015) *aff'd* No. 15-4788, -- F.3d -, 2018 WL 1833604 (4th Cir. April 18, 2018) (Taliban not entitled to raise combatant immunity); *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) (same).

[5] The Response references snippets of online conversations with several other individuals from 2012 and 2013, prior to his departure to Syria. Mr. Al-Jayab does not admit the veracity of the substance of those conversations. Moreover, the prosecution's references to electronic communications from 2012 and 2013 only confirm counsel's ongoing concerns that Mr. Al-Jayab's communications were subject to collection and surveillance even before he travelled to Syria in November 2013.

"President Obama told [him] to do it," as the prosecution glibly suggests (Response, p. 14). Rather, the claim is that Mr. Al-Jayab was privileged under the common law because he associated with an organized party that acted lawfully during a time of war. *The Three Friends*, 166 U.S. 1, 63-64 (1897). The U.S. government publicly announced that similar groups were the legitimate representatives of the Syrian people before Mr. Al-Jayab returned to Syria. (*See supra* note 1). Moreover, during the time Mr. Al-Jayab was in Syria, the United States and other ally countries supported the rebel forces that opposed Assad. Importantly, the common law defense raised here also takes into account the very salient fact that Mr. Al-Jayab himself *lived in Syria and personally experienced the Assad regime's atrocities against its own people*.

This common law defense is deeply rooted and does not depend on the status of the individual or the characterization of the conflict. (*See* Memorandum, p. 25). Nor was this historical doctrine abrogated or replaced by GPW Art. 3. *See Johnson v. Eisentrager*, 339 U.S. 763, 793 (1950) (Black, J., dissenting) ("It must be remembered that legitimate 'acts of warfare,' however murderous, do not justify criminal conviction. In *Ex parte Quirin*, 317 U.S. 1, 30-31, we cautioned that military tribunals can punish only 'unlawful' combatants; it is no 'crime' to be a soldier."); Wayne R. LaFave, Substantive Criminal Law § 10.2 (2d ed. 2003) ("if a soldier intentionally kills an enemy combatant in time of war and within the rules of warfare, he is not guilty of murder."). Thus, the common law variant of the public authority defense applies to, and protects, combatants who act "within the rules of warfare."

Next, and contrary to the prosecution's argument, the OLC "Drone Memo" does support combatant immunity outside of international law; *i.e.*, it provides immunity to those who may not qualify for Geneva prisoner of war status. (*See* Memorandum, pp. 37-38; Response, p. 14). In discussing whether the public authority/duty defense would "render lethal action carried out

by a governmental official lawful in some circumstances," the OLC relied on a Model Penal Code provision that considers deadly force to be lawful when it "occurs in the lawful conduct of war." *See* OLC Drone Memo, p. 16, available at Appendix A to *New York Times Co. v. United States DOJ*, 756 F.3d 100, 129 (2d Cir. 2014) (citing Model Penal Code § 3.03(2)(b)); *see also* Memorandum, pp. 37-38, quoting OLC Drone Memo, p. 33, footnote 44. These references to the "laws of war" and "lawful conduct of war" draw on the common law understanding that legitimate acts taken during war are not subject to criminal prosecution. *See* OLC Drone Memo, p. 20 ("In light of the combination of circumstances that we understand would be present, and which we describe below, we conclude that the justification would be available because the operation would constitute the "lawful conduct of war"—a well-established variant of the public authority justification."). This "well-established variant of the public authority justification" defense need not be interpreted as a public authority defense under Rule 12.3. Thus, common law combatant immunity should be considered on its merits. (Memorandum, pp. 23-26, 37-38).

Further, while counsel disagree that a claim under common law combatant immunity is automatically transformed into a public authority defense that depends on authorization from U.S. officials, they reserve the right to raise such a defense pending further investigation and discovery. Counsel are well aware of the notice requirements under Rule 12.3, and have attempted to develop the factual predicate for that notice and the defense itself. For instance, on October 11, 2017, counsel sent a discovery request to the prosecution requesting, among other things, records regarding President Obama's "intelligence finding" as well as records related to the U.S. support for Syrian rebel groups. A copy of that discovery request is attached hereto as Exhibit A. The prosecution responded on December 11, 2017, and declined to provide any additional discovery because Rule 12.3 notice had not been provided and the specific public

officials had not been identified. A copy of the prosecution's letter is also attached hereto as Exhibit B. Needless to say, the prosecution's response has stymied counsel's ongoing inquiry into this potentially viable defense.[6]

2. Mr. Al-Jayab is Entitled to Combatant Immunity Under International Law.

In addition to the common law immunity, Mr. Al-Jayab is also entitled to combatant immunity under international law. This determination must be made on an individual basis. *See United States v. Khadr*, 717 F. Supp. 2d 1215, 1229 n.21 (Ct. Mil. Comm'n Rev. 2007). As noted above, the general provisions of the treaty have been detailed in the parties' pleadings, and this Reply will focus on the points of disagreement.

a. The Syrian War Was an International Armed Conflict in Late 2013 to Early 2014 and Thus Qualifies Under GPW Art. 2.

The prosecution argues that combatant immunity is categorically unavailable because the Syrian War, particularly in late 2013 and early 2014, does not qualify as an international armed conflict. It makes this argument even though it acknowledges how "one or more international armed conflicts may have now arisen in Syria, particularly after direct U.S. military intervention against the Assad regime in April 2017." (Response, p. 26). This very statement exposes the underlying flaws in the prosecution's position on the Syrian War.

Put simply, if the U.S. military intervention in Syria in 2017 against the Assad regime creates an international armed conflict, then U.S. military intervention in prior years that directly supported rebels fighting against the Assad regime would also create an international armed conflict. The same logic would hold true with multiple other countries—not just the United

[6] Notably, the government has refused to disclose an Office of Legal Counsel (OLC) memorandum that purportedly served as the basis for the missile attacks into Syria that President Trump ordered in April 2017, and also in April 2018. This OLC memorandum is the subject of ongoing FOIA litigation brought by the Protect Democracy Project. (Case No. 1:17-cv-00842, D.D.C.).

States—which have had a physical presence in Syria in addition to providing support for rebel groups on the one side, and the Syrian regime on the other. The presence of these countries, particularly Iran and Russia, which have an actual military presence in Syria, also contribute to the existence of an international armed conflict. (Memorandum, pp. 8-14), Moreover, Assad himself recognized in 2012 that the war was a "regional and global war," not just an isolated, internal conflict.[7] Further, the indirect involvement of foreign countries vis-à-vis rebel groups can also lead to an "internationalized" armed conflict. (*See* Memorandum, pp. 41-43).

The prosecution's recognition that U.S. military intervention in 2017 contributed to "one or more international armed conflicts" in Syria underscores the importance of disclosure of U.S. involvement in Syria, at the very least, in a classified setting. It was of course al-Assad's use of chemical weapons that lead to the "redline" drawn by President Obama in 2012, and also to the U.S. airstrikes in 2017 and 2018 ordered by President Trump. The prosecution should not be able to refuse to provide information regarding the U.S. involvement in Syria when it acknowledges at the same time that such conduct could create an international armed conflict.

Put another way, the Court cannot conclude that the Syrian War is not an international armed conflict based on the self-serving classifications of the government, especially when it does not provide the bases for its military intervention, including the 2012 "intelligence finding." Indeed, the prosecution's reliance on the 2016 White House *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security*

[7] Associated Press, *Syria needs time to win 'regional, global' battle, Assad says: Turkey wants UN to set up safe havens in Syria for refugees*, CBC News, Aug. 29, 2012, available at: https://bit.ly/2ENHIuM (last visited May 20, 2018).

Operations ("2016 White House Report"[8]) surely does not provide the final word on whether the Syrian War was an international armed conflict. (Response, p. 26-27).

The prosecution claims that Mr. Al-Jayab only "speculates" about U.S. involvement in Syria and refers to the 2016 White House report. But the record itself dispels any notion of speculation. Indeed, the 2016 White House Report only raises more questions concerning the presence of the U.S. military in Syria than it answers. Specifically, while the 2016 White House Report frames the United States' involvement "as part of the campaign against ISIL," it still confirms prior U.S. military operations in Syria when it states as follows: "small teams of U.S. special operations forces have also deployed to Syria to help coordinate U.S. operations with some of these indigenous ground forces." (2016 White House Report, p. 16). This type of coordination directly resembles the "overall control" standard discussed by the international criminal court in *Tadic* that may render a conflict international. (*See* Memorandum, pp. 42-43).

Several other points must be made that call into question the prosecution's conclusions that the 2016 White House Report proves that Syria is a non-international armed conflict. First, it is an academic exercise to argue that direct U.S. military support for "indigenous forces" in Syria was limited only to anti-ISIL (*i.e.*, non-state) actors, and did not conflict with state actors, namely Syria. Indeed, in early February 2018, the United States and "the Coalition" conducted airstrikes against "Syrian pro-regime forces" that attacked "Syrian Democratic Forces."[9]

Second, the 2015 National Defense Authorization Act (NDAA), which is cited in the 2016 White House Report, is not just limited to anti-ISIL campaigns. Specifically, Section 1209

[8] A copy of this Report is available at: https://bit.ly/2IwRjfT.

[9] *Unprovoked attack by Syrian pro-regime forces prompts Coalition defensive strikes*, CENTCOM, Feb. 7, 2018, available at: https://bit.ly/2IvBm9A (last visited May 20, 2018); Anne Barnard and Richard Pérez-Peña, *U.S.-Backed Coalition in Syria Strikes Pro-Assad Forces*, N.Y. TIMES, Feb. 8, 2018, available at: https://nyti.ms/2rWdqln (last visited May 20, 2018).

of the 2015 NDAA, entitled, "Authority to Provide Assistance to The Vetted Syrian Opposition," provides, in relevant part that the Secretary of State is authorized to "provide assistance, including training, equipment … to appropriately vetted elements of the Syrian opposition" for purposes that include "Promoting the conditions for a negotiated settlement to end the conflict in Syria."[10] The 2015 NDAA thus authorizes broad support for "vetted elements of the Syrian opposition," not just for anti-ISIL campaigns, and also for promoting an end to the "conflict in Syria" itself, which clearly contemplates the Assad regime.[11]

Also, the legal framework cited in the 2016 White House Report may very well be incomplete.[12] For one thing, it makes no reference to President Obama's 2012 "intelligence finding" and the authority that provided for U.S. assistance and intervention. Nor does it reference Article II of the Constitution when it explains the grounds for the United States' role in Syria. Interestingly, Article II was later cited to justify the 2017 airstrikes in Syria.[13]

The bottom line is that the 2016 White House Report not only confirms the presence of the U.S. military in Syria, but also raises questions as to the purported authority for that presence

[10] The 2015 NDAA is available at: https://bit.ly/2IAHvxp (last visited May 20, 2018). Section 1209, cited above, begins on page 623.

[11] Further, the 2016 White House Report makes clear that this supported for "vetted" groups includes military arms: "The United States has also made monitoring the use of the U.S. military equipment, ammunition, and other assistance provided to these groups part of the mission of U.S. forces in Syria to help ensure that any assistance is used appropriately by recipients." (2016 White House Report, p. 13).

[12] To justify U.S. military involvement in Syria, the 2016 White House Report cites only the 2001 and 2002 Authorizations for Use of Military Force Against Terrorists (AUMF) and principals of individual and collective self defense. (2016 White House Report, pp. 16-17).

[13] A copy of this report, entitled, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*, is available at: https://bit.ly/2IvGria (last visited May 20, 2016). Importantly, the report states as follows: "Article II of the Constitution provides authority for the use of military force in certain circumstances even without specific prior authorization of Congress. For example, on April 6, 2017, the President directed a military strike against the Shayrat military airfield in Syria pursuant to his authority under Article II of the Constitution to conduct foreign relations and as Commander in Chief and Chief Executive." (*Id.*, pp. 3-4).

and the nature of the support for "vetted" Syrian opposition groups. Contrary to the prosecution's argument, the report certainly does not foreclose the existence of an international or internationalized armed conflict in Syria. If anything, it infers the opposite.

b. Mr. Al-Jayab's Proffered Association with Ansar al-Sham Qualifies him to Combatant Immunity Under GPW Art. 4.

After properly classifying the Syrian War as an international armed conflict under GPW Art. 3, the next inquiry is whether the individual's group qualifies under GPW Art. 4. If so, then the individual is immune from criminal prosecution. Mr. Al-Jayab's Memorandum proffered his association with Ansar al-Sham, which was part of a coalition of forces under the Islamic Front. (Memorandum, pp. 14-17, 20-21). As previously discussed, the Islamic Front was estimated to have 40,000 to 50,000 members, a hierarchy and structure including military and political organization, distinct banners, and a united opposition to topple the Assad regime and establish a new government for the Syrian people.[14] In response, the prosecution acknowledges that Mr. Al-Jayab stated, in December 28, 2013, that he had joined Ansar al-Sham and was in Aleppo. (Response, p. 6). The prosecution also recognizes that Ansar al-Sham was, and is not an FTO. (Response, p. 6, note 6). It nevertheless argues that Mr. Al-Jayab cannot satisfy the criteria of GPW Art. 4. There are a number of problems with this analysis.

First, the prosecution primarily relies on two cases: *Hamidullin* and *Lindh*. (See Response, pp. 16, 23, 29-30). In each of those cases the defendants who sought combatant immunity were members of the *Taliban and were accused of direct hostilities against United*

[14] Due to its size and political and military structure, the Islamic Front could even be said to qualify under Article 4(A)(3), which covers "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining power." To obtain prisoner of war status under Article 4(A)(3), an individual need not meet the four criteria set forth in Article 4(A)(2)(a)-(d).

States forces. Neither defendant could claim combatant immunity due to a 2002 finding by President Bush that members of the Taliban were unlawful combatants. In stark contrast, here the prosecution does not claim that Mr. Al-Jayab is an unlawful combatant, a member of an FTO, or participated in hostilities against U.S. forces. For those reason alone, *Hamidullin* and *Lindh* are of little utility for the GPW Art. 4 inquiry in this case.

Turning to the GPW Art. 4 analysis, the prosecution appears to concede that the second factor of the four-part Article 4(A)(2) standard is met, in that the Islamic Front and Ansar al-Sham had fixed and distinctive signs. But it criticizes Mr. Al-Jayab for not attaching any images of himself either with a commander, or carrying arms openly. These arguments are not persuasive. Article 4(A)(2) does not require photographic proof of an individual with a commander. Nor would one require an infantryman in a U.S. Army squadron to show a photograph of himself next to his company's captain to prove he is in the U.S. Army. This demand for photographic evidence is all the more comical given that Mr. Al-Jayab was in Syria for a short period of time before he left due to the increasing violence, as reflected by some of the messages included in the Response. Further, Mr. Al-Jayab's Memorandum describes how the Islamic Front and its sub-groups had hierarchies, specific leaders, and distinct emblems (as the prosecution concedes), which evidence the existence of a command structure.

The prosecution also faults Mr. Al-Jayab for not including photographs of himself carrying arms openly. (Response, p. 30). However, Mr. Al-Jayab's Memorandum included numerous images of Islamic Front members carrying arms openly. That should be enough, unless the world has reached the point that "selfies" are now required to prove any statement made by a litigant. Moreover, the prosecution's argument on this point is questionable to begin with as it is contrary to the very allegations against Mr. Al-Jayab and the prosecution's

anticipated evidence, which not only include photographs but also statements that it may seek to introduce at trial, some of which are reflected in the Response, such as "I have m16"—which is, of course, a standard rifle used by the U.S. military. (Response, p. 5).

Lastly, the prosecution argues that Mr. Al-Jayab is not entitled to combatant immunity because he cannot show that the Islamic Front and Ansar al-Sham complied with the laws of war. (Response, p. 30 - 31). Essentially, the prosecution contends that Mr. Al-Jayab cannot prove a positive with a negative. However, here the best evidence of compliance with the laws of war is the lack of proof, even anecdotal, of violations of the laws of war. Indeed, Justice Black suggested this very approach: "[t]here is not the slightest intimation that the accused were spies, or engaged in cruelty, torture, or any conduct other than that which soldiers or civilians might properly perform when entangled in their country's war." *Johnson*, 339 U.S. at 793 (Black, J., dissenting). Surely, if the prosecution had evidence that there were violations of the laws of war, then it would be quick to cite them. The absence of such evidence should be seen as proof of compliance—or at least the absence of non-compliance.

c. Even if the Syrian War is Seen as a Non-International Armed Conflict, Mr. Al-Jayab Is Still Entitled to Combatant Immunity.

Mr. Al-Jayab's Memorandum provides additional reasons why he should be immune from prosecution even if the Syrian War is classified as a non-international armed conflict during late 2013 and early 2014. (Memorandum, pp. 49-54). In response, the prosecution cites precedent that primarily focuses on the nature of the group involved (*i.e.*, unlawful combatants or FTOs), not the nature of the conflict itself. *See* Response, pp. 31-32 (citing *Hamidullin*, *supra* (Taliban member charged with attack U.S. forces).[15] Moreover, not one of these cases analyzes

[15] The prosecution also cites the following cases: *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006) (associate of al Qaeda captured in Afghanistan, enemy combatant); *United States v. Ahmed*, *et al.*, Case

the complex dynamics of the Syrian War itself.[16] If that conflict is deemed to be a non-international armed conflict, then, importantly, combatant immunity extends to belligerent acts of legitimate warfare. *See Ford v. Surget*, 97 U.S. 594, 602 (1878). Mr. Al-Jayab has proffered sufficient evidence showing that the Islamic Front was an organized entity that held territory and commenced hostilities against the Syrian government. These and other factors show that Mr. Al-Jayab is entitled to lawful combatant immunity even if Syria is seen to be a non-international armed conflict in late 2013 and early 2014.

The prosecution concludes with a policy argument that extending combatant immunity to non-international armed conflicts would extend protections to terrorists that violate the law. (Response, p. 32). The Court should not fear this unlikely outcome. For one thing, those who fail to comply with the laws of war would not be beyond punishment. Further, extending combatant immunity to non-international armed conflicts could just incentivize compliance with international norms. Finally, extending combatant immunity to Mr. Al-Jayab's participation in the Syrian War—even if deemed non-international in 2013 or 2014—simply reflects an honest appraisal of the ambiguousness of the Syrian War, in which numerous foreign nation states, including the United States, have a real direct and indirect presence that has continued to fuel the war and its tragic loss of life and devastating relocation of millions of refugees.

No. 15 CR 49 (D. Minn) (Dkt. No. 371, p. 6, ruling that, "Based on the record before it, the Court finds that defendants have not met this burden as they have not demonstrated that ISIL meets any of the criteria set forth in Article 4 that would extend them lawful combatant status"); *Hamlily v. Obama*, 616 F. Supp. 2d 72-73 (D.D.C. 2009) (U.S. conflict with al Qaeda is non-international); *United States v. Pineda*, 2006 WL 785287, *2 (D.D.C. Mar. 28, 2006) (noting that Fuerzas Armadas Revolucion Arias De Colombia (FARC) member could not claim combatant immunity, in part because United States was not involved in Columbian conflict); *Lindh*, 212 F. Supp. 3d at 553 (Taliban member, declared unlawful combatant).

[16] In *United States v. Ahmed*, the government argued that combatant immunity was not available because Syria was a non-international armed conflict. The district court did not reach this issue, as it found that the defendants, associated with ISIS, could not meet the Article 4(A)(2) criteria. (Case No. 15 CR 49 (D. Minn.) (Dkt. No. 371, p. 6)).

III. CONCLUSION.

For the foregoing reasons, as well as those set forth in Mr. Al-Jayab's Motion to Dismiss and supporting Memorandum of Law, counsel respectfully request that the Court grant Mr. Al-Jayab's motion and dismiss the indictment. And, in any event, due to the complexities of this case, even if the matters submitted do not require dismissal of the indictment at this stage, counsel submit they have been more than adequate to preserve the affirmative defense for trial.[17]

Respectfully submitted,

/s/ Thomas Anthony Durkin
THOMAS ANTHONY DURKIN,

/s/ Robin V. Waters
ROBIN V. WATERS,

/s/ Joshua G. Herman
JOSHUA G. HERMAN.

DURKIN & ROBERTS
2446 North Clark Street
Chicago, Illinois 60614
Tel: 312-981-0123
tdurkin@durkinroberts.com

LAW OFFICE OF JOSHUA G. HERMAN
53 W. Jackson, Blvd., Suite 1650
Chicago, IL 60604
Tel: (312) 909-0434
jherman@joshhermanlaw.com

[17] This was, in fact, the recent conclusion reached by a magistrate judge in *United States v. Hodzic*, *et al.*, 4:15 CR 49 (E.D. Mo.). (Dkt. #429). In *Hodzic*, the defendants raised a combatant immunity defense in response to charges brought under 18 U.S.C. § 2339A and 18 U.S.C. § 956. The charges primarily related to money and other property provided to another individual who was in Syria and fought for various rebel groups before he was killed. The government brought federal criminal charges against others who allegedly provided supported the individual prior to his death. Unlike Mr. Al-Jayab's case, the government alleged that individual fought for FTOs. (*See* 4:15 CR 49, Dkt. #2, Count I). While the magistrate declined to dismiss the indictment based on combatant immunity, he did conclude that the defendants "be permitted to submit the lawful combatant immunity affirmative defense at trial." (Case No. 4:15 CR 49, Dkt. #429, p. 21).

CERTIFICATE OF SERVICE

Joshua G. Herman, Attorney at Law, hereby certifies that the foregoing Defendant Aws Mohammed Younis Al-Jayab's Reply in Support of Motion to Dismiss the Indictment Based on Combatant Immunity was served on May 21, 2018, in accordance with Fed.R.Crim.P.49, Fed.R.Civ.P.5, LR 5.1, and LCrR 49.2, pursuant to the district court's system as to ECF filers.

/s/ Joshua G. Herman
JOSHUA G. HERMAN
53 W. Jackson, Blvd., Suite 1650
Chicago, IL 60604
Tel: (312) 909-0434
jherman@joshhermanlaw.com

EXHIBIT A

DURKIN & ROBERTS
ATTORNEYS AND COUNSELORS

THOMAS ANTHONY DURKIN
tdurkin@durkinroberts.com

2446 NORTH CLARK STREET
CHICAGO, ILLINOIS 60614

TELEPHONE (312) 981-0123
FACSIMILE (312) 913-9235

October 11, 2017

BY U.S. & ELECTRONIC MAIL
Barry Jonas
Assistant United States Attorney
219 S. Dearborn, 5th Floor
Chicago, IL 60604
(*Email: barry.jonas@usdoj.gov*).

Re: ***United States v. Al-Jayab,***
Case No. 16 CR 181

Dear Mr. Jonas:

On behalf of Aws Mohammed Younis al-Jayab ("al-Jayab"), we submit this formal written request for discovery. This letter supplements our initial discovery letter dated June 30, 2016. We recognize that the government's discovery productions have been voluminous in this case, but believe that additional documents and information that are significantly material to the defense exist and should be produced. The documents and information requested below are discoverable under the Fifth and Sixth Amendments to the United States Constitution, *Brady v. Maryland*, 373 U.S. 83 (1963), Federal Rule of Criminal Procedure 16, USAM 9-5.001, and the January 4, 2010 Ogden memorandum ("Ogden Memo") (reprinted at Criminal Resource Manual 165), and other provisions of federal law set forth below. We ask that you provide the discovery requested in this letter and advise us in writing of any specific requests for which the government declines to comply, so that we may consider filing the appropriate discovery motions before the Court. If any of the requested materials have already been reproduced, then we are not seeking that they be re-produced, but would request that you identify where those records can be located in the productions.

The documents[1] and information requested include not only documents and information in the possession, custody, or control of your office, but also documents and information in the possession, custody, or control of any agency allied with the prosecution, including the Federal Bureau of Investigation, the Department of Homeland Security, the Office of the Director of National Security, the National Security Agency, the Department of Defense, and the National Security Division of the Department of Justice (collective, "the government").

[1] The word "documents" includes all books, papers, letters, correspondence, e-mails, notebooks, reports, memoranda, studies, diaries, notes, messages, computer facilitated or transmitted materials, images, photographs, information in any computer database, audio and video tapes, recordings, transcripts, ledgers, printouts and all copies or portions thereof, and any other written, recorded, or memorialized material of any nature whatsoever. As used in this letter, the words "and" and "or" mean "and/or," and the words "includes" and "including" mean "includes (or including)" without limitation.

As set forth more detail in the specific requests identified below, the documents and information we seek pertain to the U.S. government's involvement and participation in the armed conflict in Syria. We make this request after, among other things, our ongoing review of the discovery material produced thus far, as well as our review of publicly disclosed information concerning the U.S. government's role in the Syrian conflict from 2012 through 2017. The government's involvement in the Syrian conflict thus covers the time period alleged in the indictment (*i.e.,* October 2012 through January 23, 2014).

As set forth in numerous public news articles and reports, the U.S. government, specifically through its Central Intelligence Agency, has funded, trained, and armed individuals and groups that participated in the Syrian conflict.[2] This program was reportedly first proposed in the summer of 2012 by then C.I.A. director David H. Petraeus. President Obama implemented it through a formal finding that authorized the C.I.A. to covertly arm and train groups of rebels at bases in Jordan. It was given the code-name "Timber Sycamore." Some news reports indicate that President Obama's formal finding was made no later than the summer of 2012.[3] Through this formal finding and public statements, President Obama and other officials recognized the Syrian opposition and legitimacy of its fight against the al-Assad regime. *See* Mark Landler and Michael R. Gordon, *Obama Says U.S. Will Recognize Syrian Rebels*, N.Y. Times, Dec. 11, 2012.

President Trump's administration abruptly terminated U.S. government support for Syrian rebels through the C.I.A. program. Indeed, on July 24, 2017 at 9:23 pm, President Trump tweeted as follows: "The Amazon Washington Post fabricated the facts on my ending massive, dangerous, and wasteful payments to Syrian rebels fighting Assad...." The termination of the program was corroborated in numerous public news sources. [4]

In short, it is beyond dispute that the U.S. government was funding, training, arming, and otherwise supporting Syrian rebel groups who were aligned against Bashar al-Assad. Moreover, these U.S. government activities occurred squarely during the time period covered in the indictment, October 2012 through January 23, 2014, and more specifically the time period during

---

[2] *See, e.g.*, Mark Mazzetti, Adam Goldman, Michael S. Schmidt, *Behind the Sudden Death of a $1 Billion Secret C.I.A. War in Syria*, N.Y. Times, Aug. 2, 2017.

[3] *See* Mark Hosenball, *Obama authorizes secret support for Syrian rebels*, Reuters, Aug. 1, 2012 ("Obama's order, approved earlier this year and known as an intelligence "finding," broadly permits the CIA and other U.S. agencies to provide support that could help the rebels oust Assad.").[3] Indeed, news articles from the spring and summer of 2013 reported how the C.I.A. was arming Syrian rebels. *See* dam Entous & Julian E. Barnes, *U.S. to Arm Syrian Rebels*, Wall St. J., June 14, 2013; C.J. Chivers & Eric Schmitt, *Arms Airlift to Syria Rebels Expands, With Aid from C.I.A.*, N.Y. Times, Mar. 24, 2013.

[4] *See* Faysal Itani, *The End of American Support for Syrian Rebels Was Inevitable*, The Atlantic, July 21, 2017 (describing fighters being on the "U.S. payroll" and stating "Without U.S. support, the rebels cannot survive continued war against the Assad regime and its allies."); Greg Jaffe and Adam Entous, *Trump ends covert CIA program to arm anti-Assad rebels in Syria, a move sought by Moscow*, Wash. Post, July 19, 2017.

which Mr. al-Jayab is alleged to have been in Syria: in or around November/December 2013 through January 2014.[5]

As is apparent from the public disclosures and news reports discussed herein and also available elsewhere, while the government's support for Syrian rebels is clear, many details of that support are not so clear. Accordingly, we are seeking additional documents and information concerning the government's involvement in Syria, most specifically before and during the time period in which Mr. al-Jayab was allegedly in Syria. This information is directly relevant and material to a defense that Mr. al-Jayab was a lawful combatant under United States law, and is thus immune from prosecution under 18 U.S.C. § 2339A. Such discovery is also necessary for Mr. al-Jayab to raise a public-authority defense pursuant to Fed. R. Crim. P. 12.3. Additionally, the mere fact that the U.S. government was, in fact, funding, training, arming, and supporting Syrian rebels aligned against Bashar al-Assad while Mr. al-Jayab was allegedly in Syria is highly material to Mr. al-Jayab's state of mind. Disclosure of the information set forth below should also consider being made under *Brady* and its progeny.

Thus, for all the above reasons, we request that the government provide discovery regarding the following documents and information:

i. Any and all documents, records, and information related to any presidential order, executive order, "intelligence finding" authorizing the involvement of the U.S. government and its agencies, including but not limited to the C.I.A., the Office of the Director of National Intelligence, and the Department of Defense, to fund, train, arm, or otherwise support any rebel group located in Syria;

ii. Any and all documents, records, and information related to any presidential order, executive order, "intelligence finding" withdrawing the authorization of the involvement of the U.S. government and its agencies, including but not limited to the C.I.A., the Office of the Director of National Intelligence, and the Department of Defense to fund, train, arm, or otherwise support any rebel group located in Syria;

iii. Any and all documents, records, and information concerning the providing of funds, arms, training, and any other support by the U.S. government and its agencies, including but not limited to the C.I.A., the Office of the Director of

---

[5] Ernesto Londoño and Greg Miller, *CIA begins weapons delivery to Syrian rebels*, Wash. Post, Sept. 11, 2013; Greg Miller, *CIA ramping up covert training program for moderate Syrian rebels*, Wash. Post, Oct. 2, 2013; Mark Mazzetti and Ali Younes, *C.I.A. Arms for Syrian Rebels Supplied Black Market, Officials Say*, N.Y. Times, June 26, 2016 ("The training program, which in 2013 began directly arming the rebels under the code name Timber Sycamore, is run by the C.I.A. and several Arab intelligence services and aimed at building up forces opposing President Bashar al-Assad of Syria. The United States and Saudi Arabia are the biggest contributors, with the Saudis contributing both weapons and large sums of money, and with C.I.A. paramilitary operatives taking the lead in training the rebels to use Kalashnikovs, mortars, antitank guided missiles and other weapons.").

National Intelligence, and the Department of Defense, made pursuant to any authorization noted in request (i) above, and to any Syrian rebel group, including but limited to the Free Syrian Army, the Islamic Front, Jabhat al-Nusra, the Nusra Front, Ansar al-Islam, Ahrar al-Sham, ISIL/ISIS or any forces in Syria that were affiliated with aforesaid groups; and,

iv. Any and all documents, records, and information concerning the association, including through joint military operations and the sharing of arms and equipment, between any Syrian rebel group, supported by the C.I.A., the Office of the Director of National Intelligence, and the Department of Defense, and the Islamic Front, Jabhat al-Nusra, the Nusra Front, Ansar al-Islam, Ahrar al-Sham, ISIL/ISIS or any forces in Syria that were affiliated with aforesaid groups.

These requests are not intended to be all-inclusive, and may be supplemented upon further investigation into these matters. Should any of the documents and information be classified, we would have no objection to their production in a classified setting.

Please feel free to call us about this at your convenience as we would be happy to discuss these requests further.

Sincerely yours,

Thomas Anthony Durkin

Joshua G. Herman

TAD/smb

cc: AUSA Shoba Pillay
Andrew Sigler
Ben Galloway
Sean Riordan

EXHIBIT B

U.S. Department of Justice

United States Attorney
Northern District of Illinois

Barry Jonas
Assistant United States Attorney

Dirksen Federal Courthouse
219 South Dearborn Street, Fifth Floor
Chicago, IL 60604

Direct Line: (312)886-8027
Fax: (312)353-4322
E-mail: Barry.Jonas@usdoj.gov

December 11, 2017

Thomas A. Durkin
Durkin & Roberts
2446 North Clark St.
Chicago, Illinois 60614

Joshua G. Herman
53 West Jackson Blvd.
Suite 1650
Chicago, Illinois 60604

Re: *United States v. Aws Al-Jayab*, No. 16 CR 181

Dear Messrs. Durkin and Herman:

We are in receipt of your October 11, 2017 discovery letter. In your letter you request "additional documents and information concerning the government's involvement in Syria," specifically, in sum, documents and information related to the U.S. government's involvement or association with "rebel" groups in Syria, to include the provision of funds, arms, training and other support, as well as documents pertaining to the U.S. government's withdrawal of support for said groups. You state that the information is relevant to a lawful combatant defense, as well as a public authority defense pursuant to Federal Rule of Criminal Procedure 12.3. You also argue that the U.S. government's support for "Syrian rebels aligned against Bashar al-Assad while Mr. al-Jayab was allegedly in Syria is highly material" to the defendant's state of mind.

The government has and will continue to comply with its actual discovery obligations. That said, your October 11, 2017 discovery request is unfounded in the law and overly broad. Therefore, without confirming or denying whether the requested items are within the government's possession, generally, or the possession of the prosecution team, specifically, they will not be produced.

Lawful Combatant Immunity

The defendant bears the burden to establish the affirmative defense of combatant immunity. *See United States v. Lindh*, 212 F. Supp. 2d 541, 557 (E.D. Va. 2002) (holding that "it is Lindh who bears the burden of establishing the affirmative

defense that he is entitled to lawful combatant immunity," (citing i *Mullaney v. Wilbur*, 421 U.S. 684, 697-99 (1975)); *see also* Mem. Op. and Order at 6, *United States v. Ahmed et al.*, No. 15-CR-00049 (D. Minn. Feb. 10, 2016), Doc. #368 ("[I]t is the defendant's burden to establish that they are entitled to lawful combatant immunity").

Lawful combatant immunity is a doctrine reflected in international law, including the law of war (or law of armed conflict). In an international armed conflict, lawful combatants, also known as prisoners of war (POWs), may not be prosecuted for lawful acts of war. *See Lindh*, 212 F. Supp. 2d at 553. However, the mere existence of a common law affirmative defense of combatant immunity in federal court does not mean that a defendant is immunized for criminal acts simply because he subjectively believes he has justly taken up arms in a conflict. *Id.* at 554.

The affirmative defense of combatant immunity incorporates the standards of the *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, 1956 WL 54809 (U.S. Treaty 1956) ("GPW"), to which the United States is a party. The GPW reflects two overarching requirements for a valid assertion of combatant immunity. In particular, under the GPW, "this immunity can be invoked only by members of regular or irregular armed forces who fight on behalf of a state and comply with the requirements for lawful combatants." *See Lindh*, 212 F. Supp. 2d at 554. Defendant satisfies neither condition.

First, combatant immunity only applies in the context of an international armed conflict within the meaning of GPW Article 2. Under the GPW, an international armed conflict is a conflict between States, not merely a conflict that takes place on a global stage or that straddles a border. If the United States supports one side of a non-international armed conflict, such support does not transform the conflict into an international one within the meaning of the GPW. Likewise, as a legal matter, it is incorrect and dangerously overbroad to say that combatant immunity flows to a defendant fighting in an armed group simply because the United States supports that group or any groups fighting alongside that group. Here, there is no evidence that defendant was a member of the armed forces of a State engaged in armed conflict with another State—i.e., that defendant was a participant in an international armed conflict.

Second, even if the relevant conflict were international in nature, the defendant must still be part of a group that satisfies the requirements set forth in GPW Article 4 before he could be entitled to lawful combatant/POW status and therefore combatant immunity. Under those requirements, the group must act under the authority of a State that is a party to the conflict, and its members must (1) be commanded by a person responsible for his or her subordinates; (2) display a fixed distinctive sign recognizable at a distance; (3) carry arms openly; and (4) conduct operations in accordance with the laws and customs of war. In assessing these four

requirements, federal courts that have addressed combatant immunity claims have focused on whether the overall military organization, not the individual defendant or his particular unit, satisfied them. *See* Mem. Op. and Order at 6, *United States v. Ahmed et al.*, No. 15-CR-00049 (D. Minn. Feb. 10, 2016), Doc. #368; *Lindh*, 212 F. Supp. 2d at 558 n.39 ("What matters for determination of lawful combatant status is not whether Lindh personally violated the laws and customs of war, but whether the Taliban did so."). Here, the defendant has made no such showing that the group with which he fought satisfied these criteria.

In sum, unless the conflict is international *and* the group with which defendant fought satisfies the Article 4 criteria, he may not validly assert the combatant's privilege from domestic criminal sanction. *See Lindh*, 212 F. Supp. 2d at 554; *see also United States v. Khadr*, 717 F. Supp. 2d 1215, 1222 (USCMCR 2007). Because you have failed to make either showing, the lawful combatant affirmative defense is unavailable to you and therefore the discovery materials you seek cannot be relevant to such a defense.

Public Authority Defense

As with the lawful combatant defense, the defendant bears the burden to establish the affirmative defense of public authority.

Rule 12.3 states that "if a defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency," the defendant must provide notice to the government. The notice must identify the law enforcement or intelligence agency involved, the particular agency member the defendant claims to have acted on behalf of and the time during which the defendant acted with public authority. To date, no such notice has been provided.

Beyond the notice requirement, in order to prevail on the public authority affirmative defense, the defendant must establish that the following three things are more likely true than not true:

1. An [agent; representative; official] of the United States government [requested; directed; authorized] the defendant to engage in the conduct charged against the defendant; and

2. This [agent; representative; official;] had the actual authority to grant authorization for the defendant to engage in this conduct; and

3. In engaging in this conduct, the defendant reasonably relied on the [agent's; representative's; official's] authorization.

See Pattern Instruction 6.06, Seventh Circuit Pattern Federal Jury Instructions—Criminal (2012). "In other words, the public-authority defense requires reasonable reliance by a defendant on a public official's directive to engage in behavior that the defendant knows to be illegal." *United States v. Strahan*, 565 F.3d 1047, 1051 (7th Cir. 2009). More succinctly, a defendant must establish that someone in the government must have authorized his actions. *See United States v. Stallworth*, 656 F.3d 721, 727 (7th Cir. 2011).

You have not offered any indication of what public official, law enforcement agency, or intelligence agency authorized the defendant to engage in the criminal conduct set forth in the indictment or, at the very least, was allegedly relied upon by the defendant to support his belief that his conduct was lawful. Nor have you identified any particular supporting directive issued by the U.S. government to any organization or group with which the defendant fought. Your proposed defense cannot be supported if you cannot cite to any U.S. government official or component that sanctioned the defendant's conduct. *See United States v. Kashmiri*, No. 09 CR 830-4, 2011 WL 1326373, at *3 (N.D. Ill. Apr. 1, 2011).

Moreover, without making any representations regarding the government's willingness or ability to provide any of the requested material, the lack of specifics prevents the government from even being able to conduct a search for the relevant material as it relates to the defendant. In order to first conduct a search the government would need to know, at a minimum, what group the defendant was fighting with that he alleges was supported by the United States Government, what United States agency was supporting the group, and the time frame this occurred. As it currently stands, your request appears to be nothing more than an attempt to gather information in an effort to support an unsubstantiated theory. *United States v. Tokash*, 282 F. 3d 962, 971 (7th Cir. 2002) ("Rule 17(c) is not a discovery device to allow criminal defendants to blindly comb through government records in a futile effort to find a defense to a criminal charge. Instead, it allows only for the gathering of specifically identifiable documents which a defendant knows to contain relevant evidence to an admissible issue at trial.").

The Constitution "does not grant criminal defendants the right to embark on a 'broad or blind fishing expedition among documents possessed by the government.'" *United States v. Mayes*, 917 F.2d 457, 461 (10th Cir. 1990) (quoting *Jencks v. United States*, 353 U.S. 657, 667 (1957)). "[To] establish a violation of *Brady*, a defendant must provide the court with some indication that the materials to which he . . . needs access contain material and potentially exculpatory evidence." *United States v. Brandon*, 17 F.3d 409, 456 (1st Cir. 1994). *See United States v. Caro-Muniz*, 406 F.3d 22, 29-30 (1st Cir. 2005) (denying discovery of tape recordings which the defense alleged "may" contain *Brady* materials); *Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000) ("Allegations that are merely 'conclusionary' [*sic*] or are purely speculative cannot support a *Brady* claim."); *United States v. Gonzalez*, 466 F.2d 1286, 1288 (5th

Cir. 1972) (denying discovery of the "names and addresses of all persons having knowledge pertaining to the facts of this case" as essentially "asking the government to simplify [the defendant's] task of evidence-gathering"); *United States v. Clay*, 2006 WL 2265254, at *15 (E.D. Ark. 2006) ("[The defendant] is asking for sweeping discovery, but has provided no basis for the Court to determine that his requests are anything more than a grand 'fishing expedition' to see if something exculpatory turns up.").

It should be noted that the defendant will be able to present admissible evidence of a good faith belief that his conduct was lawful. *See United States v. Anderson*, 872 F.2d 1508, 1517-1518 (11th Cir. 1989).

In conclusion, the government will not be producing any of the requested documents or information in response to your October 11, 2017 request.

Please call us if you have any questions.

Very truly yours,

JOHN R. LAUSCH, JR.
United States Attorney

By: _____
Barry Jonas
Shoba Pillay
Assistant United States Attorneys

Andrew Sigler
Trial Attorney
National Security Division