UNITED STATES COURT OF MILITARY COMMISSION REVIEW
before F. Williams, D. Conn, and C. Thompson

UNITED STATES,

Appellee,

-v-

ALI HAMZA AHMAD SULIMAN AL BAHLUL,

Appellant.

BRIEF OF AMICI CURIAE MONTANA PARDON PROJECT, CLEMENS P. WORK, and UNIVERSITY OF MONTANA CRIMINAL DEFENSE CLINIC

CMCR CASE NO. 09-001

Tried at Guantanamo, Cuba on 7 May 2008, 15 August 2008, 24 September 2008, 27 October - 3 November 2008

Before a Military Commission convened by Hon. Susan Crawford

Presiding Military Judge
Colonel Peter Brownback, USA (Ret.)
Colonel Ronald Gregory, USAF

DATE: October 15, 2009

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

On behalf of *Amici Curiae*

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ISSUES PRESENTED

Amici join in the Appellant's statement of issues.

STATEMENT OF STATUTORY JURISDICTION

Amici join in the Appellant's statement of jurisdiction to the extent that it refers to the power of this Court, conferred by statute, to review the decision of a Military Commission. Amici take no position on the question of the jurisdiction of the Military Commissions.

STATEMENT OF THE CASE

Amici join in the Appellant's Statement of the Case.

STATEMENT OF FACTS

Amici join in the Appellant's Statement of Facts.

ARGUMENT

Introduction

> As for the horrifying sentence itself, . . . it, with too many like, goes far to give color, if not justification, to the bitter comment of George Bernard Shaw, satirist and cynic, that during the war the courts in France, bleeding under German guns, were very severe; the courts in England, hearing but the echoes of those guns, were grossly unjust; but the courts of the United States, knowing naught save censored news of those guns, were stark, staring, raving mad.

Ex Parte Starr, 263 F. 145, 146-147 (D. Mont. 1920).

In an attempt to protect its citizens in times of crisis the United States has too often constrained and criminalized a fundamental human right. The United States has responded to threats from the world beyond and to perceived threats from its citizens within by restricting and controlling the unalienable right to free speech expressly protected under the United States Constitution. U.S. Const., Amend. 1 (1791). In times of crisis, our government has reacted to its

citizens' fears by repressing the spread of "inflammatory" ideas that some believed could weaken the country. The repression came in the form of criminal statutes and decrees that resulted in the prosecution and punishment of more prominent speakers and writers. In an attempt to keep the United States free, we denied freedom. It is seen throughout our brief history that our over-reactions resulted in inequality, persecution, hysteria and, in the end, pardon and apology.

Freedom of Speech During the French War Scare of 1798-1800

> When People talk of the Freedom of Writing, Speaking or thinking I cannot choose but laugh. No such thing ever existed. No such thing now exists; but I hope it will exist. But it must be hundreds of years after you and I shall write and speak no more.

Letter, John Adams to Thomas Jefferson, July 15, 1817, in 2 *The Adams-Jefferson Letters* 519 (Lester J. Capon, Ed., Univ. of North Carolina, 1959).

> The tongue is an unruly member. There is no difference between the tongue and the press except every press ought to be considered as a million of tongues, and ought to be guarded with a million of guards.

IX Annals of Congress 2902-2903 (5th Cong. 1799) (Rep. George Thatcher).

In 1798 France, once a great and powerful ally, had become the greatest threat to America and her new-found independence. With Napoleon Bonaparte engaged in battle with the greater part of Western Europe, relations with the French had quickly soured. In the eyes of the French government, America owed France not only a great debt of gratitude for the military resources provided by the French at a pivotal juncture in the American revolution, but also millions of dollars in restitution. France viewed the Jay Treaty between America and Great Britain as a repudiation of the Franco-American alliance and the creation of an Anglo-American alliance.

David McCullough, *John Adams* 474 (Simon & Schuster, New York 2001).

By the time John Adams had taken his place as second president of the United States, the fissure between the two countries had grown to a crevice. As tensions increased French ships began to attack and confiscate American merchant ships. McCullough at 477, 486-487. These open and overt acts of violence and disregard for the autonomy of the United States put the two countries on the brink of war.

The threat was real and imminent. As one response, Adams and Congress passed the Alien and Sedition Acts in 1798. The Sedition Act was directed at speech "harmful" to the government. The Sedition Act criminalized any false, scandalous or malicious writing against the government, Congress, or the President or any attempt to excite against them the hatred of the citizens of the United States. An Act for the Punishment of Certain Crimes against the United States, ch. 74, 1 Stat. 596, July 14, 1798. Although the Sedition Act was recognized as a violation of the First Amendment, President Adams justified it as a necessary wartime measure.

The first American arrested for violating the Sedition Act was a Republican member of Congress who vehemently opposed President Adams. Matthew Lyon, a Representative from Vermont, was indicted, convicted, and jailed for arguing that under President Adams, "every consideration of the public welfare was swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice" and for having printed a letter that suggested that Congress commit the President to the madhouse. His poignant political viewpoints cost him $1,060.96 in fines and four months in jail. John C. Miller, *Crisis in Freedom*, 106-108 (Little, Brown, Boston, 1951).

Federalist Secretary of State Timothy Pickering was in charge of enforcing the Sedition

Acts. His chief targets were not the enemies plotting without, but influential Republican editors and leaders. He began reading as many Republican newspapers as possible, looking for evidence of sedition. In all, fourteen indictments were brought under the Sedition Act, mostly against editors and publishers of Republican newspapers. Some of these papers were closed down, while others silenced their voices for fear of the repercussions. James Morton Smith, *Freedom's Fetters* 182-184 (Cornell Univ. Press, Ithaca, 1956).

William Duane was an Irishman who ascended the ranks to become editor of the Philadelphia *Aurora*. Recognized as a vehement and often sarcastic advocate of the Jeffersonian cause, he was naturally hated by the Federalists. In 1800, he published the text of a Federalist Bill that would alter how disputed Presidential elections would be decided and followed it with a number of scathing editorials. *Crisis in Freedom* at 199-200. In response the Federalist controlled Senate charged him with making "false, scandalous, defamatory, and malicious assertions." *Crisis in Freedom* at 201. Summoned before the Senate to explain his writings, the Senate gave Duane was given permission to leave and consult counsel. He never returned. The Senate held him in contempt for his actions. *Freedom's Fetters* at 296-297. He was then charged with sedition. *Crisis in Freedom* at 200; *Freedom's Fetters* at 301-302. Duane was to be tried in 1801. He was never tried. President Jefferson directed that all sedition prosecutions were to be discontinued. *Freedom's Fetters* at 305.

The hapless Luther Baldwin met the Sedition Act when President Adams paid a visit to his town of Newark, New Jersey. The people were in the streets celebrating the arrival of Adams with the customary cheers and firing of the cannon. As they watched the spectacle from the local tavern Baldwin's drinking partner noted, "There goes the President...and they are firing at his

arse." Baldwin, in a moment of drunken candor further added that "he did not care if they fired thro' his arse." *Crisis in Freedom* at 113. These comments were overheard by the tavern's owner who promptly turned Baldwin into the authorities. The unfortunate drunk was arrested, convicted and imprisoned for uttering "seditious words tending to defame the President and the Government of the United States."

America and her citizens found out first hand and in short order the folly of criminalizing and severely punishing their exercise of their freedom of speech. The intrusion could not last and it did not as Jefferson defeated Adams in the 1800 election. One of President Jefferson's first acts was to pardon and give a formal apology to every person convicted of violating the Sedition Act of 1798. In doing so he noted, "[The essential principles of our Government] form the bright constellation which has gone before us and guided our steps through an age of revolution and reformation... [S]hould we wander from them in moments of error or of alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty and safety." Thomas Jefferson, *First Inaugural Address*, March 4, 1801.

In 1840, Congress approved a bill to refund the full amount of the fine levied against Matthew Lyon, with interest. 6 Stat. 802 (1840). Although the bill demonstrated the sincerity of the apology and public distaste for the Sedition Act, for Matthew Lyon this gesture was empty. Lyon died in 1822.

The speech criminalized under the Sedition Act of 1798 was not harmful, yet in time of crisis fear overrides rule of law. In this case, once the fear passed, America composed herself and returned to her senses. Pardons were given, apologies made, and the America people developed a renewed devotion to their principles. Memories, however, are short, and history is

bound to repeat itself.

The Military Commission Trial of Congressman Clement L. Vallandigham

> We reverence Freedom of Discussion--by which we mean Freedom to uphold perverse and evil theories, since nobody ever doubted the right to uphold the other sort.

N.Y. Daily Tribune 5 (May 18, 1863), *in* Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-war Speech in the Civil War*, 7 Wm. & Mary Bill Rts. J. 105, 145 (1998).

The South was in rebellion from President Lincoln's point of view. On September 17, 1862, the Army of Virginia invaded the North, and fought the bloodiest battle in American history at Sharpsburg, Maryland. Rebellion and invasion are the two key events that trigger the limitation on the privilege of habeas corpus. U.S. Const. Art. I, §9, cl.2 (1789). For Clement L. Vallandingham, a northwest Copperhead, the former Congressman from Ohio, and the putative Democratic nominee for governor, those two events would bring about much more.

On March 16, 1863, President Lincoln appointed MG Ambrose Burnside as commanding general of the Department of the Ohio, which included Ohio, Indiana, and Illinois. Burnside promptly issued General Order No. 38. Order No. 38 provided, among other things:

> The habit of declaring sympathies for the enemy will not be allowed in this department. Persons committing such offences will be at once arrested, with a view to being tried as above stated, or sent beyond our lines into the lines of their friends. It must be distinctly understood that treason, expressed or implied, will not be tolerated in this department.

Ex parte Vallandigham, 2 Fed. Cas. 874 (S.D. Ohio, 1863).

On May 1, 1863, at a political rally in Mount Vernon, Ohio, Vallandigham, an opponent of the war, said, in the course of a two-hour speech, that the war was "a wicked, cruel, and

unnecessary war;" "a war not being waged for the preservation of the Union;" "a war for the purpose of crushing out liberty and erecting a despotism;" "a war for the freedom of the blacks and the enslavement of the whites;" "the Government of the United States was about to appoint military marshals in every district, to restrain the people of their liberties, to deprive them of their rights and privileges;" and "characterizing general orders No. 38, from headquarters department of the Ohio, as 'a base usurpation of arbitrary authority.'" *Id*.

Without consulting his superiors, Burnside promptly ordered Vallandigham's arrest and trial before a military commission. President Lincoln, probably viewing Vallandigham's words as advocacy of unlawful conduct, *see* Geoffrey Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*, 115 (New York : W.W. Norton & Co., 2004), approved Vallandigham's arrest.

The military commission found Vallandigham guilty of uttering most of the alleged words and sentenced him to be confined for the duration of the war. Lincoln "commuted" the sentence to exile to the Confederacy, where Vallandigham was unwanted. 7 Wm. & Mary Bill Rts. J. at 131; *Perilous Times*, at 118. Vallandigham made his way back to the North and participated in the 1864 Democratic Convention, continuing to advocate against the war. This time, however, Lincoln, having been pilloried in both the Democratic and Republican press for Vallandigham's arrest, ignored him, although the commutation of Vallandigham's sentence was conditional and he could have been confined at any time. 7 Wm. & Mary Bill Rts. J. at 136.

In the month following Vallandingham's arrest, Burnside issued an order shutting down the *Chicago Times* newspaper. District Judge Thomas Drummond issued a temporarily enjoined the order but Burnside ignored the injunction. Soldiers entered the newspaper office and

destroyed copies of the paper. Burnside justified the paper's suppression saying, "That freedom of discussion and criticism which is proper in the politician and the journalist in time of peace, becomes rank treason when it tends to weaken the confidence of the soldier in his officers and his Government." 7 Wm. & Mary Bill Rts. J. at 133. This triggered a storm of protest across the North. Lincoln revoked the order and the *Chicago Times* continued to publish throughout the war. *Id*. at 134.

During the Civil War, the time of our greatest national crisis, some acted hastily to punish and suppress words and publications that undoubtedly gave encouragement to the Confederacy. Nevertheless, with the passage of some time and the reminders that the Constitution is not repealed during time of war, cooler heads would prevail. The *Chicago Times* was re-opened; Clement Vallandigham returned to continue his advocacy against the war and for a peaceful settlement and was not arrested. The Union was restored. Yet this was not to be the last reaction to worrisome wartime words.

Thousands Convicted; Thousands Pardoned

"[E]very man's conscience should determine as to his attitude on this war."

Herman Bausch, *State of Montana v. Bausch*, Trial Transcript 49 (Cause No. 1441, Yellowstone County, 1918).

From 1917 to 1920, in response to America's involvement in World War I, 20 U.S. States and two territories adopted similar or identical legislation criminalizing words or acts that were perceived to undermine the war effort. In February 1918, the Montana Legislature enacted the first such law, the Montana Sedition Act. The Act prohibited "disloyal, profane, violent,

scurrilous, contemptuous, slurring or abusive language" about the government, "language calculated to bring" the United States or its armed forces "into contempt, scorn, contumely or disrepute," "any language calculated to incite or inflame resistance" to authority, exhortations to strike, and language that causes disaffection among the armed forces. Sedition was punishable by fines up to $20,000 and 20 years in prison. 1918 Mont. L. 1918, Ch. 11, § 1.

Seventy-nine men and women, including a newspaper editor, the pastor of the pacifist Church of the Brethren, and Herman Bausch, were convicted. The law fell most heavily on those who had emigrated from Germany and the Austro-Hungarian Empire and on members of the Industrial Workers of the World. Like all laws that punish speech and other communication the Sedition Act was applied capriciously. In Butte, Montana, the largest jurisdiction, for example, there was no shortage of Irishmen who were ready to cheer on the enemies of the British, following the brutal suppression of the 1916 Easter Rebellion. Yet only seven people were charged and only two defendants were convicted.

Caprice marked the sedition trials. Similar words led to prison sentences or led to acquittals. The statements, "This is a rich man's war and we have no business in it;" "this is a rich man's war and a poor man's fight;" that "the rich men rule the country. . . ." resulted in the acquittal of O.O. Odekirk in Terry, Montana. *State of Montana v. Odekirk*, (Cause No. 37, Prairie County 1918). In contrast, "This is a rich man's war and we have no business in it; they talk about Hooverism--it's a joke. Nobody pays any attention to it. It don't amount to anything; The Lusitania was warned not to sail. They were carrying munitions and wheat over to the Allies. The poor man has no show in this war. The soldiers are fighting the battles of the rich," earned Ben Kahn 20 years in prison. *State of Montana v. Kahn*, 182 P. 107 (Mont. 1919).

The law was applied to newspapers as well as careless speakers. William F. Dunn was the publisher of the *Butte Daily Bulletin*. He wrote an editorial that said of the Montana Council of Defense, "Fortunately they have no legal status or authority. They can fulminate to their heart's content against anything and everything that menaces their master's interest, but no one need pay any attention to them." He was convicted of sedition and fined $5,000. *State of Montana v. Dunn* (Cause No. 1465, Lewis and Clark County, 1918).

J.S. Geiser was the Pastor of the Church of the Brethren, a pacifist congregation, in Froid, Montana. He said, "All war is wrong. It is all wrong to buy liberty bonds or thrift stamps. * * * I believe that one who buys Liberty Bonds and Thrift Stamps to aid in the support of the war is as bad as those who hire gunmen in the City of New York to kill their fellow man." Pastor Geiser uttered those words on a Sunday, apparently from the pulpit. Within days, he was in the dock, charged, and then convicted of sedition. *State of Montana v. Geiser* (Cause No. 244, Sheridan County, 1918).

On May 3, 2006, however, Montana Governor Brian Schweitzer pardoned everyone who had been accused or convicted of sedition under the Montana Sedition Act. Before then, President Wilson's successors, through President Franklin D. Roosevelt, had pardoned those who had been convicted under the federal Espionage and Sedition Acts. Franklin D. Roosevelt, Proclamation 2068 - Christmas Amnesty Proclamation for Certain War-Time Offenders Who Have Completed Their Prison Sentences (Dec. 23, 1933) (http://www. presidency. ucsb.edu/ws/index.php?pid=14588&st=&st1=# (accessed March 6, 2006).

In 1918, the Montana Legislature had impeached and convicted District Judge Charles Crum for "disloyal" statements but in particular for acting as a witness for Ves Hall, who had

been accused and acquitted of violating the federal Espionage Act. On January 25, 1991, the Montana Legislature noted "the emotional fervor surrounding the United States' entry into World War I" had led to Crum's impeachment "and the people of Montana in a reavowal of the principles of free speech and responsive democratic government, desire to right a historical wrong," absolved and exonerated Judge Crum posthumously. 1991 Mont. Laws 3437.

As the Montana Supreme Court noted, laws such as the Sedition Act are enacted for "for the peace and safety of society." *State of Montana v. Smith*, 190 P. 107, 111 (Mont. 1920). Of course they are, but such laws are enacted only when the country faces an emergency and fears words–or movies. During these periods such laws are applied severely for the peace and safety of society. But when the emergency passes, we realize our mistake. And so it was with respect to the World War I sedition laws and so it would be in 1945.

The Propaganda Films of Leni Riefenstahl

> Although *Triumph of the Will* fired no gun and dropped no bombs, as a psychological weapon aimed at destroying the will to resist, it was just as lethal.
>
> Frank Capra, *The Name Above the Title* 328 (MacMillan, New York, 1971).

Leni Riefenstahl, "Hitler's videographer," was one of the most renowned producers of political propaganda. Leni Riefenstahl was an actress, dancer, and director who gained notoriety in Germany in the early 1930s. She first heard Adolph Hitler speak at a rally in 1932 and, like many Germans, she was overcome by his talent and vision. Jurgen Trimborn, *Leni Riefenstahl: A Life* 212, 225 (Edna McCown Transl., Faber & Faber, New York 2007). She was asked and agreed to film the Nazi Party rallies at Nuremberg in 1933 and 1934. The films, *Victory of Faith*

(1933) and *Triumph of the Will* (1934), were powerful pieces of political propaganda which solidified the ideals of the Nazi Party. These films portray Hitler addressing the masses preaching messages of purification, a message promoting the eradicating of those 'inferior' people to restore Germany to its once prideful and powerful former self. The messages advocating removal of all those who did not conform to a certain Nazi ideal were a characteristic of the following decade of mass prejudice and extermination promulgated by the Nazi Party. Capra at 328-329. *Triumph of the Will* was shown throughout the world and continued to show at every German movie theater until 1945. Trimborn at 124. The film assisted in gaining mass support for the Nazi movement and garnered sympathy and support from countries world-wide.

Following these two films Riefenstahl created an 18-minute film, *Day of Freedom: Armed Forces and the German Army.* This film captured the 1935 Nazi Party rally at Nuremberg and is recognized as the beginning of the Nuremberg Laws which stripped German Jews of citizenship and property. The films Leni Riefenstahl created were tremendously successful and are widely regarded by the film industry the most effective pieces of propaganda ever produced. Although she did not directly contribute to the cause as a leader or organizer of these rallies, she possessed the ability to arrange the images and speech in a manner which brought credibility and legitimacy to the Nazi Party. These films were largely responsible for uniting the Nazi Party and bringing hundreds of thousands its cause. The United States banned the documentaries as Nazi propaganda. Trimborn at 120 - 122.

Victory of Faith, *Triumph of the Will*, and *Day of Freedom*, like *State of Ummah*, are widely and deservedly criticized as a spectacular use of film-making to promote a system that is widely seen as both evil and profoundly reprehensible. Unlike the *State of Ummah*, however,

Riefenstahl's films did not lead to a sentence of life in prison.

As the war came to an end, Riefenstahl was arrested and imprisoned by American authorities. After several weeks of questioning, she was released. Leni Riefenstahl, *A Memoir* 311-315 (New York 1992). French authorities placed Riefenstahl under arrest after the control of the western zone of Austria passed to them. She remained in their custody (in jail or under house arrest) until 1948. Unlike Mr. al Bahlul, and despite her significant and well documented role in the production of three films deemed to be Nazi propaganda, Leni Riefenstahl was never tried or convicted for the production of her films. By 1952 she had been officially cleared of any collaboration. *Memoir*, 386-387.

In Riefenstahl's case the WWII emergency had ended. Riefenstahl, despite her protestations that *Triumph of the Will* and *Day of Freedom* were documentaries, was Nazi Germany's superb propagandist. With the end of the war and the end of fears generated by war, however, we gave her the benefit of the doubt.

We Should Not Set Aside the Ideals that We Cherish in Order to Punish Those Who do Not Cherish Them

> It is a truism that the risk of government overreaching peaks during periods of national crisis, especially wartime. It is also a truism that risks associated with the full-fledged enjoyment of certain constitutional rights increase during wartime. Thus, in time of war or national crisis, federal judges have the daunting responsibility of balancing a heightened risk of government overreaching against a heightened risk created by enforcing certain constitutional rights against the government.

Burt Neuborne, *The Role of Courts in Time of War*, 29 N.Y.U. Rev. L. & Soc. Change 555 (2004).

Some judges and prosecutors have shown extraordinary wisdom during times of crisis. United States District Attorney, and later four-term Senator, Burton K. Wheeler refused to seek indictments under the Espionage Act in 1917 and 1918 against those who expressed seditious opinions. When the political pressure on Wheeler increased, United States District Judge George Bourquin, whose quote begins this brief, advised Wheeler to bring the indictments. Burton K. Wheeler, *Yankee From the West* 152 (Doubleday, New York 1962). Judge Bourquin either dismissed the indictments for insufficient evidence or directed not guilty verdicts in every case. Not all judges are so wise. Associate Justice Samuel Chase earned the title, "foremost symbol of judicial tyranny," after giving inflammatory charges to the jury, ham-stringing defense counsel, and ensuring that the jury was stacked with Federalists in sedition trials over which he presided. Irving Brant, *Impeachment, Trials and Errors* 59 (1972). In 1804, the House of Representatives impeached Chase for his actions but he was acquitted by the Senate.

The United States had every right under the laws of war to attack and destroy al Qaeda's propagandizing ability. *See* Additional Protocol I, Article 52(2) to 1949 Geneva Convention (June 8, 1977). It could, as an adversary in this conflict, seize and destroy every copy of *State of Ummah*, if it felt that the video helped the enemy. It could treat al Bahlul as an enemy combatant. It may silence him as a prisoner of this war. What the United States cannot do, what it should not do, is impose a criminal sanction in the courts of the United States for al Bahlul's advocacy "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

Brandenburg was a member of the Ku Klux Klan and advocated the expulsion of Blacks

and Jews. *Brandenburg*, 395 U.S. at 446-447. In contrast to Brandenburg and those who were jailed in 1798, 1863, and 1918, Ardith McPherson and Robert Watts advocated the assassination of the Commander-in-Chief. *Rankin v. McPherson*, 483 U.S. 378, 381, *rehearing denied*, 483 U.S. 1056 (1987); *Watts v. U.S.*, 394 U.S. 705, 706 (1969) (*per curiam*). Watts uttered his words in time of war. (Watts said, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id*.) The United States Supreme Court held that Watts's speech was protected. The Supreme Court held that McPherson was entitled to sue for damages when her employer, the Harris County, Texas, Constable, fired her for what she said. *McPherson*, 483 U.S. at 392. (McPherson said, upon hearing of an attempt on the life of President Ronald Reagan, "shoot, if they go for him again, I hope they get him." 483 U.S. at 381.)

In the case before this Court, a key issue presented is whether the United States may criminalize the production of the video, *State of Ummah*.[1] The United States has asserted that the *State of Umma* "is propaganda, a political argument and indoctrination of solicitation." (R. at 316-17). Mr. al Bahlul is a member of al Qaeda and has sworn allegiance to Osama bin Laden, two names that incite strong feelings in many Americans. Mr. al Bahlul traveled to Afghanistan in the early 1990s to fight the Soviet Union and its Afghan allies. He returned to Afghanistan in 1999 to join al Qaeda. (R. 177-178). He eventually became Bin Laden's personal secretary. (R. 179). He wrote speeches, pledges of *bayat,* and wills for al Qaeda recruits. (R. 193-194).

According to the United States, *State of Ummah* is Mr. al Bahlul's most significant contribution to al Qaeda. (R. at 316-322). Among other things, *State of Ummah* depicts the 12

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[1]The state of Umma is its own political concept, that of the Islamic community over-arching nation-states.

October 2000 sneak attack on the U.S.S. Cole that resulted in the deaths of 17 American sailors and the wounding of another 39. Ali Hamza Ahmad Suliman al Bahlul did not participate in the attack. He did not shoot the videotape. Mr. al Bahlul, rather, used footage of the bombing in his production of *State of Ummah*.

Mr. al Bahlul is a less than a sympathetic defendant. He represents much of what we in America find disturbing, if not outright appalling. So does his production. *State of Ummah* is an 105 minute documentary. It begins with bin Laden:

> [Y]our brothers in the East have prepared their selves and Kabul got equipped. And in Najd the youths sprang for jihad, and in Aden they rose and set out to destroy a destroyer bringing awe. It fills you with fright whenever it is anchored or set to sea.
>
> *State of Ummah*, 1:19.[2]

It complains of wrongs against Muslims. It argues that Muslims should join jihad, relying on surahs of the Koran.[3] Bin Laden exhorts "the Muslims in Afghanistan and abroad to support these Talaba." *Id*. 48:30. Yet we must ask, what is the imminent incitement? Is it, "We encourage the youths to follow the teachings of Muhammad (peace be upon him) and to learn from him and act upon his teachings and head to the lands that prepare for them the path of jihad. Let them come to these bleak mountain passes so that their hearts may be purified, and faith be rooted in their chests." *Id*. 55: 40. Or is the incitement a truism, "It is better to die to save our honor than live in dishonor"? *Id*. 1:10:00. Or is it the reference to an al Qaeda training camp,

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[2]Commencing at one minute:19 seconds into the video.

[3]"If you march not forth, He will punish you with a painful torment. .. and will replace you by another people; and you cannot harm Him at all." *State of Ummah*, 29:30. (Quoting Koran, 9:39).

"The outcome of this training is jihad for the cause of God. Indeed, your brothers in Palestine are eagerly waiting for you. They are waiting for our youths to annihilate America and Israel." *Id*. 1:18:56. *State of Ummah* also justifies the attacks on the U.S. Embassies in Nairobi and Dar es Salaam. *Id*. 1:35:57. But such apologetics cannot be criminal. In the end, it praises the attack on the U.S.S. Cole. "There, the promised victory was reached. The heads of the infidels flew in every direction, surrounded by their body parts." *Id*. 1:36:52. Yet this point of view cannot be a crime under American law. Whatever *State of Ummah* does, it does not incite or produce "imminent" lawless action. *Brandenburg*, 395 U.S. at 447.

Again we are faced with an opportunity to set a precedent for freedom. The United States is again confronted with fears both prevalent and tangible. The prosecution of Mr. al Bahlul for producing *State of Ummah* would have us give in to fear, suspend the First Amendment, and thereby ignore history. As we continue to criminalize our fears and suppress ideas that do not conform to our own, we renew the cyclical process that begins with repression, leads to an embarrassing realization, and ends in apology.

As we have in Afghanistan, we should take the more difficult path. The present change in strategy and in rules of engagement in the Afghanistan theater is designed to reduce harm to civilians. It is seen as necessary to bring about their co-operation in the prosecution of the war. It is seen as necessary to bring them onto the side of a national government that, although not yet democratic, may yet restore their liberties. At the international level, a change in the manner in which we prosecute those we hold responsible for al Qaeda's violence must have a similar result. When an Article I court extends the protections of the First Amendment to Mr. al Bahlul's

production, it communicates two things to the world: we are not afraid of what he has said;[4] and we adhere, even in an emergency, to constitutional principles that incorporate internationally recognized human rights. We tell the world and all of those who wonder with whom they should side, you may emulate us.

CONCLUSION

For the foregoing reasons, Amici Curiae urge this honorable Court to reverse and vacate those convictions that are based on the claim that Mr. Al Bahlul's production of *State of Umma*, was a criminal act.

RULE 14(i) CERTIFICATE OF COMPLIANCE

1. This Amicus Brief complies with the type-volume limitation of Rule 14(g)(3), (i) because it contains 5,343, words.

2. This brief complies with the typeface and type style requirements of Rule 14(e) because this brief has been prepared in double-spaced, Times New Roman, 12 point font, using Wordperfect 14.

DATED: October 15, 2009

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[4] *See The Arrest of Vallandigham*, 7 HARPER'S WEEKLY 338 (1863) (stating, "Arresting seditious talkers implies a fear that the people have not sense or strength of mind enough to resist the appeals of sedition; just as the suppression or retention for a time of intelligence of a defeat implies a doubt whether the people have courage enough to bear bad news."); at http://www.sonofthesouth.net/leefoundation/civil-war/1863/may/vallandigham-arrested.htm (accessed October 13, 2009).