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

		BRIEF OF *AMICUS CURIAE* ROBERT DAVID STEELE AND OTHERS IN THE UNITED STATES INTELLIGENCE COMMUNITY
		CMCR CASE NO. 09-001
UNITED STATES		Tried at Guantanamo, Cuba on 7 May 2008, 15 August 2008, 24 September 2008, 27 October – 3 November 2008
	Appellee	
v.		Before a Military Commission convened by Hon. Susan Crawford
ALI HAMZA AHMAD SULIMAN AL BAHLUL		Presiding Military Judge Colonel Peter Brownback, USA (Ret.) Colonel Ronald Gregory, USAF
	Appellant	
		Date: 15 October 2009

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

Amicus Curiae Brief
filed by
McKenzie Livingston, Esq.
on Behalf of
Robert D. Steele, *et al.*

INTEREST OF AMICUS CURIAE

Having sought leave of this Court for permission to file, Amici are prominent members of the United States intelligence community, all having served in government and having expertise on the use of open-source intelligence. They file this brief in support of Appellant because of the vital national security interests served by the First Amendment protection of all speech.

"*A Nation's best defense is an educated citizenry*."

~ Thomas Jefferson

"*Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.*"

~ James Madison

SUMMARY OF ARGUMENT

Open source intelligence, derived from overt non-clandestine sources, is the most significant source of intelligence for our intelligence and law enforcement agents. Recognizing the value of open source intelligence, Congress created the National Open Source Center under the CIA for the collection and analysis of open source intelligence. Contrary to public policy however, Appellant, Ali Hamza Ahmad Suliman al Bahlul ("al Bahlul" or "Appellant"), is being punished for speech that is and should be protected under the First Amendment. Mr. al Bahlul is facing a life sentence for creating in Afghanistan in early 2001 a propaganda video directed towards and widely seen by a U.S. audience, *State of the Ummah*. The video, derived from already publicly available information, expresses the motivations and identifies key figures of al Qaeda, valuable open source intelligence. The future dissemination of valuable intelligence such as this should be encouraged and, at the very least, not prevented. Should First Amendment protections not apply to foreign speech, the foreign speakers providing open source intelligence – the very availability of which is vital to our national security interests – would be deterred from creating and disseminating such information. Chilling foreign speech and Americans receipt thereof undermines intelligence and law enforcement efforts and presents a danger, perhaps worse than the speech itself, to the national security.

ARGUMENT

A. The Value and Use of Open Source Intelligence.

Open source intelligence (OSINT) is commonly understood to be intelligence derived from newspapers, journals, radio, television, and the Internet.[1] In fact, it is much broader and includes virtually all information that can be legally and ethically elicited from humans inclusive of direct and indirect observation as well as direct elicitation. Based upon information derived from overt, non-clandestine collection, open source intelligence is less expensive and less risky than clandestine intelligence.[2] It is the most significant source for U.S. intelligence and law enforcement when trying to understand foreign nations, cultures and movements.[3] An estimated 80-90% of U.S. intelligence comes from open sources.[4]

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[1] Richard A. Best, Jr. and Alfred Cumming, *Congressional Research Service Report for Congress – Open Source Intelligence (OSINT): Issues for Congress*, December 5, 2007, (hereinafter "*CRS Report*") *available at* http://www.fas.org/sgp/crs/intel/RL34270.pdf, at 5-6. *See also*, Phi Beta Iota – Public Intelligence Blog, *available at* http://www.phibetaiota.net (containing *30*,000 pages on open source intelligence from 750 global professionals who trained another 7,500). See also Open Source Solutions website, *available at* http://www.oss.net/ (containing links to number of publications discussing the value of open source intelligence).

[2] *CRS Report* at 5-7.

[3] *CRS Report* at Summary page (stating that OSINT can "provide insights into the types of developments that may not be on the priority list for other systems or may not be susceptible to collection through other intelligence approaches – innovative applications of new technologies, shifts in popular attitudes, emergence of new political and religious movements, growing popular discontent, disillusionment with leadership, etc."). *See also*, Robert David Steele, *Open Source Intelligence*, in Loch Johnson (ed.), HANDBOOK OF INTELLIGENCE STUDIES (NY: Routledge 2007), Chapter 10 (discussing the operational value of open source intelligence as accepted within the North Atlantic Treaty Organization (NATO) and other multinational organizations); Robert David Steele, *Open Source Intelligence*, in Loch Johnson (ed.), STRATEGIC INTELLIGENCE: THE INTELLIGENCE CYCLE (Westport, CT: Praeger 2007), Chapter 6 (discussing the strategic value of OSINT). At page 98, General Tony Zinni, USMC (Ret), then Combatant Commander of the U.S. Central Command (USCENTCOM) states:

> 80% of what I needed to know as CINCENT I got from open sources rather than classified reporting. And within the remaining 20%, if I knew what to look for, I found another 16%. At the end of it all, classified intelligence provided me, at best, with 4% of my command knowledge.

[4] *CRS Report* at 4.

Open source intelligence is considered particularly valuable when dealing with borderless terrorist groups. Jihadist groups, like al Qaeda, use the Internet to raise money and communicate.[5] In a 1997 Open Source Solutions Network, Inc. (OSS.Net) project commissioned by the U.S. Special Operations Command (USSOCOM), the Internet was surveyed for identifying and evaluating terrorist, insurgent, and opposition websites. Ultimately 396 such websites, in 29 languages, were identified and evaluated. The material present across all of these sites was helpful in determining whether the site was in relation to active terrorism, an emergent insurgency, or legitimate opposition.

The U.S. Government and Intelligence Community have focused more and more on the value of open source intelligence. After Government Commissions criticized the Intelligence Community for failing to make greater use of open source intelligence and recommended that it be used more,[6] Congress passed the Intelligence Reform and Terrorism Protection Act of 2004.[7] The Act recognized the value of open source intelligence and called for the creation of a National Open Source Center. In November 2005, the Office of the Director of National Intelligence established the National Open Source Center under the management of the Central Intelligence Agency.

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[5] *CRS Report* at 3 (citing the as-Sahab Institute – al Qaeda's Internet-based messaging and propaganda multimedia production facility – as an example of why OSINT is so important in today's technology-driven and globalized world).

[6] Commission on the Roles and Capabilities of the United States Intelligence Community (the "Aspin-Brown Commission"), *Preparing for the 21st Century: An Appraisal of U.S. Intelligence*, March 1, 1996, at p. 88; National Commission on Terrorist Attacks upon the United States (the "9/11 Commission"), *The 9/11 Commission Report*, July 22, 2004, at pp. 399-400 and 413. *See also*, The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, *Report to the President of the United States*, March 31, 2005, at p. 389.

[7] 118 STAT. 3638, P.L. 108-458, December 17, 2004, *available at* http://www.nctc.gov/docs/pl108_458.pdf. In particular, see Section 1052.

Because OSINT relies on foreign speech, any restraint placed upon such speech negatively affects the collection, reliability, and use of such intelligence by the U.S. Intelligence Community as well as the media, the public, and Congress.

B. *State of the Ummah* Is Valuable Open Source Intelligence.

Mr. al Bahlul was captured by Pakistani forces who turned him over to U.S. custody in December 2001 and transferred to Guantanamo Bay in January 2002.[8] The foundation of the central charge in the government's case[9] against Mr. al Bahlul was his production of a propaganda video called *State of the Ummah* in early 2001.[10]

State of the Ummah is an hour-and-forty-five minute documentary. It contains information that is freely available on the Internet such as news footage of the Saudi royal family, conflicts involving Muslims (e.g., the Israeli-Palestinian conflict), as well as broadcast speeches of Bin Laden and other al Qaeda members regarding the moral necessity of holy war. There is nothing in *State of the Ummah* that is not readily available in hundreds of other forms. The documentary is essentially a "re-mix" of open source intelligence, including the repeated use of dated sources.

While the material in *State of the Ummah* may be offensive and repugnant to viewers, especially in a post-9/11 world, nothing in the video represents a direct threat to the United States of America or to any U.S. citizen. Indeed, the film is actually helpful to the U.S. Intelligence Community, Congress (and other policy and decision makers), and citizens in

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[8] Brief on Behalf of Appellant, dated September 1, 2009, ("Appellant's Brief"), *available at* http://www.defenselink.mil/news/6%20%20%20United%20States%20v%20%20al%20Bahlul%20-%20Brief%20for%20Appellant%20(1%20September%202009).pdf, at pp. 5-6.

[9] Appellant's Brief, at pp. 5.

[10] *State of the Ummah*, *available at* http://video.google.com/videoplay?docid=2881554347384416020 (first part) and http://video.google.com/videoplay?docid=-435140218278297028 (second part), is also known as *The Destruction of the American Destroyer the U.S.S. COLE* and the *COLE Video*. *State of the Ummah* is the original name by which it is popularly known and is the name used throughout this amicus brief.

understanding and appreciating those grievances that may motivate extreme and fervent Muslims to join al Qaeda and other jihadist groups.

State of the Ummah is not a bomb-making video or instructional training video that could pose a security problem in and of itself. The content contained in the documentary – religious and political propaganda – is well within the types of political videos commonly made inside and outside the United States.[11] In 1994, for example, Steve Emerson made a Public Broadcast Service (PBS) one-hour documentary showing imams in the U.S., on U.S. soil, calling for the murder of Americans. Even after being displayed across the nation, this film failed to arouse concern. However, it was an important reflection on the depth of grievance and anger towards the U.S. some Muslims harbor. Similarly, *State of the Ummah* was an excellent window into the ideologies and purpose of the al Qaeda organization prior to 9/11.

State of the Ummah, readily available on the Internet prior to 9/11, exemplified the motivations of al Qaeda and identified several key figures in the jihadist movement. A low-level but valuable collage of images and articulations, *State of the Ummah* is exactly the type of intelligence the Government would have paid for before technological advances made such information so widely and publicly available. The Intelligence Community readily relies upon materials falling into the same category as *State of the Ummah* – political or religious propaganda – to analyze foreign groups and political movements. If materials similar to *State of the Ummah* were not available, the amount of information available for intelligence purposes would be significantly reduced. Indeed, the material present across all of the websites analyzed in the 1997 Open Source Solutions Network survey was similar to that presented in *State of the Ummah*.

[11] Many books, such as *American Jihad: The Terrorists Living Among Us* and *Why the Rest Hates the West: Understanding the Roots of Global Rage*, are no different in substance – only in tone and form – from *State of the Ummah*.

C. The Imposition of Liability Without the Protections of the First Amendment Will Harm National Security by Chilling the Availability of Open Source Intelligence in the United States.

Imposition of liability, whether civil or criminal, without regard to the protections afforded by the First Amendment will have a chilling effect on the availability of open source intelligence. This in turn will diminish the U.S. Intelligence Community's and the public's (including the media and Congress') sensitivities to and understanding of certain foreign political and religious movements, harming our national security.

Since the 1960s, the U.S. Supreme Court has recognized the value of foreign speech to Americans and the right of Americans to receive such speech. Accordingly, the Court has afforded foreign speech, including foreign political propaganda, the protections of the First Amendment.[12] If First Amendment protections did not apply, prospective foreign speakers – fearing criminal prosecution or civil suit – would be deterred from expressing certain viewpoints.[13] This, of course, would limit the availability of open source intelligence.

State of the Ummah is undeniably political propaganda that must be afforded the protections of the First Amendment. Though the video was produced abroad, the Government's expert witness testified that *State of the Ummah* was directed towards a U.S. audience and, in fact, was viewed widely in the U.S. Moreover, *State of the Ummah* does not lose its First Amendment protections because it advocates violence. While the views expressed in *State of the*

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[12] *See*, *Lamont v. Postmaster General of the United States*, 381 U.S. 301, 85 S.Ct. 1493 (1965); and *Meese v. Keene*, 481 U.S. 465, 107 S.Ct. 1862 (1987) (discussing the Court's decision in Lamont).

[13] Credentialed and accomplished foreign journalists and reporters working for news organizations who produce films and articles could also be deterred. Foreign reporting is often a vital source of open source intelligence. One example is the Al Jazeera reporter Yosri Fouda, who tracked down two al Qaeda leaders, Khalid Sheikh Mohammed and Ramzi Bin AlShibh, on his own before they were captured by U.S. forces. Although al Qaeda's contacted and provided Mr. Fouda with information to help their own cause, Mr. Fouda's openly published book *Masterminds of Terror* was an enormous benefit to U.S. intelligence officials.

Ummah are deplorable, repugnant, and offensive to some, this is not a reason to find those views as unprotected by the First Amendment.[14]

Despite advocating violence, *State of the Ummah* was not capable of producing imminent lawless action and, thus, it constitutes protected speech.[15] The Government cannot "saddle political speakers with implications their words do not literally convey but are later 'discovered' by judges and juries with the benefit of hindsight and by reference to facts over which the speaker has no control." [16]

This is exactly what happened to Mr. al Bahlul. He produced a political propaganda video from readily available sources on the Internet in support of al Qaeda in early 2001. Based upon events subsequent to the production of the video, namely the 9/11 terrorist attacks on the United States, what is traditionally protected speech is now in hindsight found to be not only unprotected speech but grounds for criminal charges of conspiracy, solicitation, and material

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[14] *Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."). *See also*, *Boyd v. U.S.*, 116 U.S. 616, 635, 6 S.Ct. 524, 535 (1886), *abrogated on other grounds*; and *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642 (1967), stating:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

[15] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409 (1982) (holding that despite express calls for violence, and the context of actual violence, statements were protected because they were political statements publicly made, rather than made directly at the speakers' targets); *Hess v. Indiana*, 414 U.S. 105, 108, 94 S.Ct. 326 (1973) (advocating 'illegal action at some indefinite future time' is protected); *Brandenberg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827 (1969) (holding that the First Amendment protects speech that encourages others to commit violence, unless the speech is capable of "producing imminent lawless action").

[16] *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 244 F.3d 1007, 1019 (9th Cir. 2000).

support for terrorism carrying a sentence of life imprisonment. The imposition of such liability on Mr. al Bahlul has a chilling effect on foreign speech and other forms of expression, the bases of open source intelligence – a vital component of our nation's intelligence apparatus.

The application of the First Amendment in this case is not to protect a terrorist but rather to ensure the continuing free flow of information and exchange of ideas in the United States.[17] In a globalized, digital world, the marketplace of ideas has become ever more borderless. The protection of the free exchange of ideas, whether those ideas or expressions are homegrown or generated abroad, is necessary for our national security as open source intelligence is based upon Americans' receipt of ideas and expressions. It is because the U.S. has so stringently protected the free flow of information and exchange of ideas, that our national security is so strong. To maintain the marketplace of ideas, and in the interest of our national security, *State of the Ummah* must be provided the same First Amendment protections as any other political propaganda before subjecting the speakers of such propaganda to criminal prosecution or civil liability.

The free flow of information in the U.S. has enabled law enforcement to monitor radical movements more closely and, in some cases, has allowed these movements to "blow off steam." It allows potential recruits to see what those organizations are really about and takes away some of their mystique – both capable of precluding new membership. Indeed, two of the three government witnesses testified that, after watching *State of the Ummah*, they were *less* likely to

[17] *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 128 S.Ct. 791, 801 (2008) ("The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference (citing *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173 (1919)"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390, 89 S.Ct. 1794 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . .. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.")

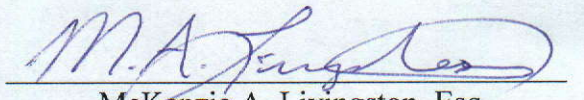
join al Qaeda on ideological grounds.[18] Censorship and prosecution therefore tend to foster radicalization and make more difficult the efforts of law enforcement and intelligence agents to nip the threats of radical groups in the bud.

Although Mr. al Bahlul's beliefs and affiliations are deplorable, the principles applied to him will be applied to all speakers abroad. A conviction solely on the basis of the open source intelligence presented in *State of the Ummah* could cause open sources to hide behind multiple levels of security screening (damaging intelligence efforts) or to go "dark." Anything that chills the availability of open source materials necessarily makes the country less safe.

CONCLUSION

For the foregoing reasons, the video produced by Appellant, *State of the Ummah*, is protected speech under the First Amendment. Failure to protect such speech under the First Amendment negatively impacts the collection, use and reliability of open source intelligence. To limit the free flow of information traditionally protected under the First Amendment is not only contrary to public policy but also necessarily detrimental to the nation's national security.

Respectfully submitted on behalf of the Amicus Curiae,



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[18] Appellant's Brief, at pp. 18.

INTEREST OF AMICI

Robert David Steele. Mr. Steele is 30-year veteran of the U.S. Government who held Top Secret/Sensitive Compartmented Clearances during that time (1976-2006). He served as a Marine Corps infantry officer, a joint military intelligence officer, a clandestine case officer for the Central Intelligence Agency (one of the first to be assigned the terrorist target full-time in the 1980's), and is the founding senior civilian of the Marine Corps Intelligence Center, today a global command. He is the Chief Executive Officer (CEO) of Open Source Solutions Network, Inc. and of Earth Intelligence Network. He has trained over 7,500 mid-career intelligence professionals from over 40 countries, and written the Open Source Intelligence (OSINT) Handbooks for the Defense Intelligence Agency, the North Atlantic Treaty Organization and the Partnership for Peace, and the Special Operations Forces (Civil Affairs). Among his publications are *ON INTELLIGENCE: Spies and Secrecy in an Open World* (Foreword by Senator David Boren (D-OK), past Chairman of the Senate Select Committee on Intelligence (SSCI)); *THE NEW CRAFT OF INTELLIGENCE: Personal, Public, & Political* (Foreword by Senator Pat Roberts (R-KS), then Chairman of the SSCI); *THE SMART NATION ACT: Public Intelligence in the Public Interest* (Foreword by Congressman Rob Simmons (R-CT-02)); and as contributing publisher, *COLLECTIVE INTELLIGENCE: Creating a Prosperous World at Peace*.

Philip Giraldi. Mr. Giraldi is a twenty-year veteran of US intelligence who held Top Secret/Sensitive Compartmented Clearances from between 1968 and 2002. He is a former CIA counter-terrorism specialist and military intelligence officer who served eighteen years overseas in Turkey, Italy, Germany, and Spain. Since 1992, Phil has been engaged in security consulting for a number of Fortune 500 corporate clients. Phil was awarded an MA and PhD from the University of London in European History and holds a Bachelor of Arts with Honors from the University of Chicago. He is a recognized authority on international security and counterterrorism issues who is a member of the American Conservative Defense Alliance and of Veteran Intelligence Professionals for Sanity. He is a Contributing Editor who writes a column called "Deep Background" on terrorism, intelligence, and security issues for The American Conservative magazine. He has written numerous op-ed pieces and has appeared frequently on television and radio. He prepares and edits a nationally syndicated subscription service newsletter on September 11th issues for corporate clients.

Raymond L. McGovern. Mr. McGovern served as an Army infantry/intelligence officer in the early sixties and then as a CIA all-source analyst from the administration of John F. Kennedy to that of George H. W. Bush. His degrees were in Russian studies and his analytical work depended heavily on non-classified, open sources. In the eighties he headed the Analysis Group of the Foreign Broadcast Information Service (FBIS), which published studies based on the open-source material collected by FBIS, a service of common concern to the entire US government. Mr. McGovern's duties included chairing National Intelligence Estimates (NIEs). In addition, under Presidents Nixon and Ford, he prepared the President's Daily Brief (PDB); and under President Reagan, he conducted one-on-one early morning briefings based on the PDB for the Vice President and four other senior advisers.

Coleen Rowley. Ms. Rowley is a retired FBI Special Agent (1981-2004) who spent most of her early career investigating a range of crimes, but mostly "organized criminal groups" such as Italian LCN and drug trafficking groups, the investigation of which depended upon lengthy

intelligence collection. From 1990 to 2003, she served as the Minneapolis FBI's Chief Division Counsel and later she was assigned to intelligence matters and oversight of the Minneapolis Division's informant and confidential source program. After 9-11 she provided testimony to the joint Senate-House Intelligence Committee Inquiry, the Senate Judiciary Committee and to the Department of Justice Inspector General, all of whom where investigating pre 9-11 lapses and intelligence failures. Rowley also made "whistleblower" complaints regarding what she saw as a series of post 9-11 illegal and abusive actions that she saw and remains concerned were counter-productive to reducing terrorism in the world. She is the author of a chapter in the book PATRIOTISM, DEMOCRACY AND COMMON SENSE: RESTORING AMERICAN'S PROMISE AT HOME AND ABROAD (published by the Eisenhower Foundation in 2004) on "Civil Liberties and Effective Investigation."

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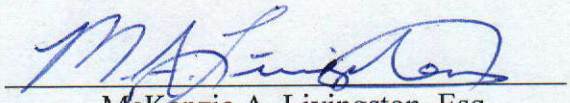
Dated: October 15, 2009



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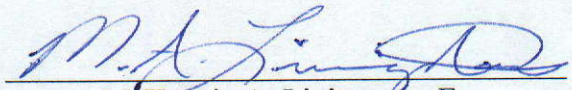
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Amicus Curiae Brief was delivered via email to CAPT Edward White on the 15th day of October 2009, as well as Michel Paradis, Esq. on the 15th day of October 2009.

Dated: October 15, 2009



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