MATTHEW SCHINDLER, OSB# 964190
501 Fourth Street #324
Lake Oswego, OR 97034
Phone: (503) 699-7333
FAX: (503) 345-9372
e-mail: mattschindler@comcast.net

HYBRID COUNSEL FOR DEFENDANT KENNETH MEDENBACH

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, vs. KENNETH MEDENBACH, Defendant(s).	Case No. 3:16-CR-00051-16-BR **MOTIONS IN LIMINE (ORAL ARGUMENT REQUESTED)**

Defendant, Kenneth Medenbach, through hybrid counsel, Matthew Schindler, offers the following Trial Memorandum and moves the Court for an order *in limine* excluding certain of the government's evidence as described below.

A. Introduction – Trial Memorandum:

United States v. Bundy et al. is the government's flawed attempt to aggregate individual protestors, with individual goals and beliefs, into a fictional conspiracy to obstruct employees of the Malheur Wildlife Refuge. Instead of a trial based on relevant evidence, the government envisions a Spaghetti Western. The forces of Good (the Fish Biologist, the FBI, and the kind folks of Burns) versus the forces of Evil (the Bundys and their henchmen like Ken Medenbach) all epically played out in the remote Eastern Oregon desert town of Burns. Actually, first, the government wants to show an unrelated short about Bunkerville before it gets around to proving

anything about this case. While dramatic and certainly fantastic, the government's screenplay ignores its responsibility to present only evidence relevant to the charges in the indictment.

The extraordinary scope of the trial government envisions is encapsulated by the factual summary it provided to all defendants per the Court's order:

> The government also intends to introduce general information regarding the scope, impact, and aftermath of the occupation to the affected federal employees and surrounding community. Employees from the Department of Fish and Wildlife and the Bureau of Land Management will testify regarding the necessity of closing the Refuge and about the impact the occupation had on their personal and professional lives. Relatedly, members of the community may testify to the activities of all co-conspirators and their impact on the daily life of Burns residents. Lastly, law enforcement will testify about the physical condition of the Refuge after the conclusion of the occupation and the government will introduce evidence related to this testimony. Witnesses will describe the damage to the Refuge and its ground as well as evidence seized from the Refuge, including over 20,000 rounds of ammunition, over 40 firearms, supplies, food, and other physical evidence demonstrating the scope of the conspiracy.

The defendants invite the Court to reject this grandiose and self-serving trial narrative and instead force the government to focus on relevant evidence. The Court must demand, as it always does, to know the relevant purpose for which evidence is being proffered. This trial is neither a referendum on whether these men were right nor a trial about how the government's extreme response to its belief that these men were wrong impacted the people of Burns.

The government's idea is that we have weeks' worth of little trials on tangential issues of minimal or no relevance all within the penumbra of a fictional multi-objective conspiracy it invented just for this trial. It wants the jury to focus

not on what witnesses saw but what they felt. The government's evidence suggests a guilty verdict is justified because the citizens in Burns were inconvenienced by the protest or the government's response. It wants to have a civil damages and restitution trial beginning September 7. It wants to litigate who put what empty chip bag where and whether a toilet was broken. It seeks to convict these men and women of conspiracy to obstruct employees of the MNWR because the FBI decided to stop traffic in town. It wants to stack one lawfully purchased and lawfully possessed firearm on top of another in the Courtroom, look over the top of the pile at the jury, and yell "Convict these men!" Whether these guns belonged to any of the defendants does not matter to it. It wants to take protected political speech and substitute it for evidence.

The Court cannot allow the government to turn this trial into a morality play. For every witness the government will call to provide an irrelevant opinion that this protest was "bad" for the community, the defense will be forced to call two that say the only threatening aspect of the entire experience was to have the FBI point assault rifles at them on the way home. They would testify this protest was "good" for the community.

The fundamental question before the Court is whether it envisions a trial that ends by Christmas as the government proposes in its grossly overdone screenplay or whether it intends to restrict this trial to relevant evidence and finish by Halloween. A Halloween ending requires the Court to limit the government to proof of the defendants' specific intent to commit acts in furtherance of a specific unlawful

objective (obstructing the federal officers in the Indictment) and then the undertaking of an act in furtherance of that objective. Hurt feelings are neither actionable under § 372 nor part of a Halloween trial. That someone missed school because the FBI staged an armed occupation of it has nothing to do with proof of a conspiracy to obstruct employees of the MNWR through force, violence, and intimidation at least not in a trial that ends by Halloween.

To the extent these men and women on trial did anything collectively "right or wrong," it was only intended to attract attention to the injustices done to the Hammonds by federal government and the federal government's tyrannical death grip over Western public lands. Not one of these defendants ever considered preventing a fish counter or a janitor working for the Refuge from doing their job.

B. Motions in Limine:

Based on a review of discovery, the government's trial memo, factual summary, witness list, and exhibit list, the defendant moves to exclude evidence and testimony relating to the four general categories addressed below.

1. Testimony by employees of the refuge about their generalized or subjective fears should be excluded as irrelevant or unfairly prejudicial.

a. The government's proof must be confined to true threats.

The First Amendment issues with the government's proposed evidence are addressed in a separate concurrently filed Motion in Limine.

b. The refuge employee's subjective fear is irrelevant.

None of these defendants directed a threat, violence, or any other intimidating conduct towards any employee of the Refuge. Had anyone assigned to work at the MNWR actually showed up for work, they would have been met by numerous people volunteering to help maintain the refuge for the benefit of the Harney County including Mr. Medenbach. These Refuge employees were told to stay home by the FBI or their managers. *GTM* at 2. Because their individualized fear could not have contributed to their inability to perform their official duties it is irrelevant. Such testimony is intended to urge the jury to convict based on emotion rather than proof of the elements.

The elements of a § 372 conspiracy do not include deciding whether a federal officer was subjectively afraid. The government must prove that the *objective* of the defendant's conspiracy was to prevent federal officers who were employees of the MNWR from conducting their official duties through threats, violence, and intimidation. The government's burden does not require that anyone actually be afraid, actually be obstructed, or actually be intimidated just as it does not have to prove intent to harm or cause a loss for a fraud or to prove that drugs were actually sold in a drug conspiracy.

It is unclear why the government is proffering evidence that the court has already held is not relevant: "[B]y its terms § 372 cannot apply …to circumstances in which an official feels incidentally intimidated or threatened because the conspiracy element of § 372 requires that an individual have the intent to prevent

the officer from discharging his or her duties and to accomplish that objective by using force, intimidation, or threats." *United States v. Bundy*, No. 3:16-CR-00051-BR, 2016 WL 3156310, at *5 (D. Or. June 3, 2016).

Testimony or evidence that employees of the Refuge or the people of Burns generally feared the hundreds of protestors who were lawfully armed and expressing constitutionally protected political views is not relevant to this trial. The government seems to think that any innuendo it can scrape up about anyone, anywhere disagreeing with the viewpoint of these defendants is relevant. It is wrong. This evidence is irrelevant.

2. Testimony or evidence from others about fears, threats, intimidation, or any other subjective impressions concerning the defendants should be excluded as irrelevant and unfairly prejudicial.

The government's trial memo indicates that it believes the feelings of the local community are relevant to this matter:

> "Meanwhile, many local residents were harassed and felt threatened because of the increased militia presence in Burns that was brought about by the occupation….,defendants' presence was fundamentally disruptive to the community."
>
> *GTM* at 3.

How any of this is tethered to the elements of the crime is left unanswered by the government's trial memo.

Consistent with the government's epic intentions, this kind of evidence creates the need for a trial substantially longer than necessary. The government obviously wants to end at Christmas not Halloween. Because if the community

sentiment as interpreted by the government is relevant then certainly the community sentiment as reflected in dozens of witnesses the defense will call in response will also be relevant. Suddenly this trial becomes about who was more popular in Burns instead of proof of the defendant's specific intent to conspire to impede federal officers performing their official duties at the MNWR. Perhaps the Court should appoint a special master to crowdsource opinions on the occupation.

Defendants will of course also be forced to call responsive witnesses to testify that it was the FBI that was disruptive and threatening, not the defendants. It was the FBI that took over the airport and the school, not the defendants. It was the FBI that told employees not to work and grossly exaggerated the danger these protestors represented based on false rumors. It was these employees' bosses who told them to stay home based on misinformation and FBI exaggeration. It was the FBI that pointed guns at people not these men and women. If the Court indulges enough of these government sponsored diversions into irrelevance this becomes a trial that will finish with Egg Nog instead of Candy Corn.

As to Mr. Medenbach, the only crime this could possibly have relevance to is a conspiracy to obstruct federal officers – Count I. Mr. Medenbach does not contest that a hypothetical non-federal officer witness could provide relevant evidence to support the conspiracy if, for example, he saw Mr. Medenbach stand in front of a federal officer with a gun and deny that person access to their workplace. That is conduct they witnessed that furthered the alleged conspiracy's objective: the obstruction of the federal officers covered by this indictment.

But that is not what the government wants to show. It wants these witnesses to talk about how the occupation made them feel. That is irrelevant here just as it is in a fraud or drug case. Witnesses cannot testify to their subjective impressions of defendants or their intentions. They cannot speak of their fears. They cannot discuss the broader impacts on the community or themselves. They may not speak of statements defendants made about "the federal government" or the FBI since that is not the charged conspiracy and is protected speech anyway. That the witness had nightmares or lost sleep is not relevant. That the school play was cancelled is not evidence of a conspiracy.

Unless the government's percipient witness can connect the evidence with the specific *objective* of a conspiracy to obstruct federal officers responsible for the MNWR, the evidence is irrelevant. That someone was wandering around the refuge with a firearm thinking they are "guarding" the place from the "feds" is relevant only if the "feds" that person was thinking of is the Refuge Information Tech Specialist or a fish biologist. If he is thinking of an FBI sniper, it is not relevant because that is not the charged conspiracy.

The government undoubtedly will respond with one of its favorite clichés: "It goes to weight, not admissibility." The problem here is that the relative "weight" is so negligible the prosecutor's incantation threatens the defendants' right to a fair trial free from unfairly prejudicial evidence.

3. **Testimony or evidence about collateral harms the government falsely attributes to the defendants and unrelated to the objectives of the charged conspiracy are not relevant.**

The government trial memo and its factual summary to defendants suggest that damage to the refuge not attributable to these defendants is relevant evidence:

> There was also a massive amount of trash and personal property scattered throughout the Refuge. The property also sustained significant damage….However, to this day the Refuge headquarters buildings remain closed because of damage caused by defendants.
>
> *GTM* at 4.

Evidence about trash and broken toilets and damaged buildings that the defendants did not cause should not be admitted. The government freely acknowledges that numerous people came and went from the Refuge. *GTM* at 2. Damage to the Refuge is relevant only if was caused or directed by these defendants in order to specifically obstruct its employees. That garbage was left behind by dozens or perhaps hundreds of dispossessed people passing through the refuge as tourists with their own agendas is not evidence of a conspiracy.

It is difficult to imagine that the Court would allow the government to waste a jury's time by requiring us to litigate whether these defendants were part of a conspiracy to illegally dump trash because that is a trial that ends at Christmas. It is also improperly intended to persuade the jury to convict because they dislike what was done to the Refuge without any connection to the charged conspiracy to obstruct employees of that Refuge.

The Department of the Interior's puffed up damages claim is also not relevant to the charged conspiracy. As with much of the government's proposed evidence, it invites a vastly expanded trial where the defendants have to litigate bogus damage

claims and conduct a restitution hearing in front of the jury. This too is part of the government's grand Christmas trial plan.

Beyond that, trashing the Refuge is completely inconsistent with these defendants' reasons for being there in the first place. They wanted to protest the Hammond's suffering at the hands of the federal government and return to the people of Harney County hundreds of square miles of public lands unlawfully claimed by the federal government. In Mr. Medenbach's mind, that land is sacred. The Holy Spirit directed him and likely others charged in this case to help care for it until Oregonians rose up and reclaimed the land for themselves. When Mr. Medenbach was arrested on January 15, 2016 the Refuge he left behind was being well taken care of and repairs were being undertaken to resolve maintenance issues that the Refuge workers had apparently ignored for years.

Trashing the Refuge makes little sense if the object of the alleged conspiracy was to obstruct employees of the MNWR as is charged. The Interior Department's "damages" claim convincingly establishes that all damaging the Refuge accomplished was put the employees of the Refuge to work, double time.

Evidence about school closures or other collateral impacts on the community is irrelevant. *See GTM* at 8. The conspiracy charged is not to prevent grade schoolers from attending math 30 miles from the Refuge. The situation in Burns was largely a result of the FBI's military style response to lawful protests about the injustices done to the Hammonds. It proves nothing about a conspiracy to obstruct specific federal officers employed at the Refuge. The government instead invites a verdict

based on sympathy or anger and not a reasoned evaluation of properly admitted evidence. It also apparently wants to hang stockings before closing arguments.

4. Guns and ammunition not attributable to the defendants on trial should not be admitted.

The government proposes to admit 361 exhibits comprising guns, ammunition, or photographs of guns and ammunition. The Court may need to revise its 9th floor Courtroom expansion to house all the legal guns the government intends to offer that have no connection to the defendants. Firearm evidence is only relevant in this case if the government can establish a connection between the firearm or ammunition, the defendants, and a specific intent to obstruct employees of the Refuge. The government has already conceded that none of these were illegal firearms. *See Ammon Bundy Detention Hearing* – July 18, 2016 Tr. 58:18-21. The litter of a random militia tourist who decided to treat the Refuge as his airbnb is not proof of this conspiracy and should not be admitted.

C. Conclusion:

The government's massively overwritten tale of dead ends and pointless diversions should be rejected by the Court and all evidence within these categories should be excluded. A trial restricted to relevant evidence of the charged conspiracy will end at Halloween instead of Christmas.

Respectfully submitted on August 10, 2016.

Matthew A. Schindler, OSB#964190
Hybrid counsel for Kenneth Medenbach