

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION**

UNITED STATES OF AMERICA,	*	
	*	
VS.	*	
	*	
CATHERINE M. WEBSTER,	*	CASE NO. 4:06-PO-26,
SHEILA T. SALMON,	*	CASE NO. 4:06-PO-37,
VALERIE A. FILLENWARTH,	*	CASE NO. 4:06-PO-38, and
MELISSA S. HELMAN,	*	CASE NO. 4:06-PO-40,
Defendants.		

**ORDER ON MOTION FOR RULING ON EVIDENCE
FOR DEFENSES OF INTERNATIONAL LAW AND NECESSITY
and MOTION FOR RULING ON EXPERT TESTIMONY**

_____On January 13, 2007, each of the above named Defendants filed in their respective pending cases, a *Motion for (pretrial) Ruling on Evidence of the Defense of International Law, the Defense of Necessity, and a Motion to Allow Expert Testimony* on said defenses, as part of these proceedings. The Defendants are charged with the commission of the Class B Misdemeanor, codified as 18 U.S.C. § 1382 which provides:

Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or

Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof –
Shall be fined under this title or imprisoned not more than six months, or both.

On page 21 of Defendants' Memorandum in Support of Motion for Ruling on Evidence for Defenses of International Law and Necessity, the Defendants plead:

These defendants are not advising this court that they did not have knowledge that they were not supposed to go onto the base. They are advising the court that they went onto the base with the intent to follow their consciences, international law, and to take actions to accelerate the closing of the SOA-WHISC.

DISCUSSION

_____These Defendants admittedly violated 18 U.S.C. § 1382 by trespassing onto the Fort Benning Army installation coincident with their demonstration before Fort Benning's main gate against the former School of the Americas (SOA) and its successor, The Western Hemisphere Institute for Security Cooperation (WHINSEC) located at Fort Benning Military Reservation. The former School of the Americas was maintained and operated under the auspices of Act of the United States Congress codified as Title 10 United States Code, Section 4415, now repealed. The Western Hemisphere Institute for Security Cooperation is, and was at all times relevant to Defendants' alleged trespass violations, maintained and operated under the auspices of Act of Congress codified as Title 10 United States Code, Section 2166.

The Defendants candidly plead that, "they went onto the base with the intent . . . to take actions to accelerate the closing of the SOA-WHISC," and now move the court to receive evidence in defense of their trespass based on International Law and The Law of Necessity. The Defendants argue that they have a right to present expert testimony on

international criminal law and crimes against humanity. This right, according to defendants, is rooted in decisions of the Nuremberg war crimes tribunals as well as the Tokyo war crime tribunals.

International Law Defense

The 11th Circuit and other jurisdictions,¹ have rejected Defendants' argument:

The question is whether what they [defendants] were required to do by domestic law could escape international criminal proscription. The War Crimes Tribunal ruled, however, that in certain circumstances those defendants were charged with a duty not to act in accordance with domestic law to avoid liability under international law. Defendants in the case before us stand this doctrine on its head in arguing that a person charged with no duty or responsibility by domestic law may voluntarily violate a criminal law and claim that violation was required to avoid liability under international law. . . . The attempt to transfer the Nuremberg defense out of context to the case before us was properly rejected.

United States v. Montgomery, 772 F.2d 733, 737-738 (11th Cir. 1985). Similarly, the 1st Circuit, in *United States v. Maxwell*, 254 F.3d 21, 24 (1st Cir. 2001), has more recently addressed the proffered *international law* defense, noting that Maxwell claimed that the Government's perpetration of a "war crime, (gave) him the privilege of breaking domestic law to stop it." Like the Defendants here, he identified the source of this perceived privilege as the decisions by the international tribunals that presided over the trials of Nazi war criminals in Nuremberg after World War II. *See Maxwell*, 254 F.3d at 29.

¹*See also, United States v. Lowe*, 654 F.2d 562, 566-67 (9th Cir. 1981); *United States v. May*, 622 F.2d 1000, 1009 (9th Cir. 1980); *United States v. Shiel*, 611 F.2d 526, 528 (4th Cir. 1979); *United States v. Komsaruk*, 885 F.2d 490, 496-97 (9th Cir. 1989); *United States v. Kabat*, 797 F.2d 580, 590 (8th Cir. 1986); *United States v. Allen*, 760 F.2d 447, 453 (2nd Cir. 1985).

The *Maxwell* court continued:

Maxwell is not the first to attempt to import the Nuremberg defense into our criminal law. Confronted with such an attempt, the Eighth Circuit explained that the Nuremberg defendants undertook acts that were required by domestic law but violated international law. (*United States v. Kabat*, 797 F.2d (580) at 590. The Nuremberg tribunal held that the defendants could not escape responsibility for their acts by pointing to their domestic law obligations; they had a privilege under international law to violate domestic law in order to prevent the ongoing crimes against humanity that their country was perpetrating through them. *Id.* We echo this explanation. . . . Because Maxwell was under no compulsion to violate international law, his attempt to cloak himself in the Nuremberg mantle fails. . . . In our view, an individual cannot assert a privilege to disregard domestic law in order to escape liability under international law unless domestic law forces that person to violate international law. *See id.*; *see also Montgomery*, 772, F.2d at 737-38; *United States v. Brodhead*, 714 F. Supp. 593, 597-98 (D.Mass. 1989); *cf. United States v. Allen*, 760 F.2d 447, 453 (2d Cir. 1985) (rejecting international law defense on standing grounds); (*United States v. May*, 622 F.2d (1000) at 1009-10 (similar).

Id. at 29-30. The Defendants here cannot be distinguished from Defendant Maxwell:

He asserts that the district court should have allowed him to introduce the proffered expert testimony because of its relevance to section 1382's "purpose" requirement. . . . In Maxwell's view, this testimony would have shown that his purpose in entering (the camp) – preventing a violation of international law – was lawful (and, therefore, could not constitute the prohibited purpose that the statute requires). . . . [T]his argument misconstrues the level of purpose that need be shown under section 1382. Where, as here, unauthorized entry is prohibited by duly promulgated regulations, the only state of mind that section 1382 requires is a purpose to enter. (citations omitted). Since Maxwell does not dispute that he had such a purpose . . . his specific reason for trespassing is irrelevant. *See Parrilla Bonilla*, 648 F. 2d at 1377 (explaining that no specific intent to violate the law need be shown to satisfy section 1382);

Mowat, 582 F.2d at 1203-04 (similar).

Id. at 25.

The Necessity Defense

_____ Defendants assert, quoting *United States v. Duclos*, 214 F.3d 27, 33 (1st Cir. 2000), “The essence of the [necessity] defense is that otherwise criminal conduct may be excused when the defendant commits the acts in order to avoid a greater evil.”

_____ To invoke the necessity defense, the defendants colorably must show that:

(1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) they had no legal alternatives to violating the law. *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 751 (1991).

_____ The Defendants wish to call their actions “civil disobedience,” but “civil disobedience” involves protesting the existence of a law by breaking *that law* or by preventing the execution of that law in a specific instance in which a particularized harm would otherwise follow. The SOA Watch protestors engaged in *indirect civil disobedience*, because they were not challenging the law prohibiting their entry upon the military installation under which they are charged. “Indirect civil disobedience involves violating a law or interfering with a government policy that is not, itself, the object of the protest.” *United States v. Schoon*, 971 F.2d 193, 196 (9th Cir. 1992). The *Schoon* Court found, “[a] complete absence of federal case law recognizing a necessity defense in an indirect civil

disobedience case,” and concluded, “the necessity defense is inapplicable to cases involving indirect civil disobedience.” *Id.* The *Schoon* Court continued at page 197:

Indirect civil disobedience seeks first and foremost to bring about the repeal of a law or a change of governmental policy, attempting to mobilize public opinion through typically symbolic action. These protestors violate a law, not because it is unconstitutional or otherwise improper, but because doing so calls public attention to their objectives. Thus, the most immediate “harm” this form of protests targets is the *existence* of the law or policy. However, the mere existence of a constitutional law or governmental policy cannot constitute a legally cognizable harm.

The 9th Circuit found in *United States v. Dorrell*, 758 F.2d 427, 432 (1985), “The law should not excuse criminal activity intended to express the protestor’s disagreement with positions reached by the lawmaking branches of the government.” “As a matter of law, the mere existence of a policy or law validly enacted by Congress cannot constitute harm.” *Schoon*, 971 F.2d at 198. “[The] exercise of a moral judgment based upon individual standards does not carry with it legal justification or immunity from punishment for breach of the law . . . toleration of such conduct would [be] inevitably anarchic.” *United States v. Moylan*, 417 F.2d 1002, 1008-09 (4th Cir. 1969), *cert. denied*, 397 U.S. 910, 90 S.Ct. 908 (1970). See also *United States v. Seward*, 687 F.2d 1270, 1276 (10th Cir. 1982) (“[Necessity] is obviously not a defense to charges arising from a typical protest.”).

_____ Could the defendants reasonably have anticipated a direct causal relationship between their criminal conduct, (trespassing on military installation property), and their targeted *harm to be averted*, (the continuation of WHINSEC)? In the sense that the likelihood of

abatement is required in the traditional necessity cases, can there ever be such likelihood in indirect political protest cases such as defendants cases? Defendants' trespass upon Fort Benning Army Installation property in violation of 18 U.S.C. § 1382 will not cause the Army to close WHINSEC, because the Army is under the mandate of Act of Congress, codified as Title 10 United States Code, Section 2166, to operate and maintain that Institute.

Likewise, defendants' trespass upon Fort Benning Army Installation property in violation of 18 U.S.C. § 1382, will not immediately cause Congress to repeal the enabling Act authorizing the Department of Defense to operate and maintain WHINSEC at Fort Benning. The defendants' conduct has less reasonably anticipated causal relationship to the closure of the school than petitioning Congress to repeal the law through democratic processes. In either event, it is Congress that must act for the defendants' objective to be realized. This inescapable conclusion leads to another reason the necessity defense does not apply to indirect civil disobedience cases like the defendants. The necessity defense requires the absence of any legal alternative to the contemplated illegal conduct which reasonably could be expected to abate an imminent harm. The legal alternatives will never be deemed futile or exhausted so long as the perceived harm can be mitigated only by Congressional action. "As noted, the harm indirect civil disobedience aims to prevent is the continued existence of a law or policy. Because congressional action can *always* mitigate this 'harm', lawful political activity to spur such action will always be a legal alternative. Thus, indirect civil disobedience can never meet the necessity defense requirement that there be a lack of legal alternatives." *Schoon*, 971 F.2d at 198, 199. The wisdom of the *Schoon* decision is

summarized in its ultimate conclusion:

As have courts before us, we could assume, as a threshold matter, that the necessity defense is conceivably available in these cases, but find the elements never satisfied. Such a decision, however, does not come without significant costs. First, the failure of the federal courts to hold explicitly that the necessity defense is unavailable in these cases results in district courts expending unnecessary time and energy trying to square defendants' claims with the strict requirements of the doctrine. Second, such an inquiry oftentimes requires the courts to tread into areas constitutionally committed to other branches of government. For example, . . . to consider defendants' argument [that trespassing was justified by the nefariousness of the (Act authorizing the operation and maintenance of WHINSEC)] would put us in the position of usurping the functions that the Constitution has given to the Congress and to the President. . . . What these cases are really about is gaining notoriety for a cause – the defense allows protestors to get their political grievances discussed in a courtroom. . . . It is precisely this political motive that has left some courts, like the district court in this case, uneasy. . . . [T]his courtroom is not the proper venue for deciding political questions. (citations omitted) Because these attempts to invoke the necessity defense “force the courts to choose among causes they should make legitimate by extending the defense of necessity,” *Dorrell*, 758 F.2d at 432, and because the criminal acts, themselves, do not maximize social good, they should be subject to a *per se* rule of exclusion.

Indirect protests of congressional policies can never meet all the requirements of the necessity doctrine. Therefore, we hold that the defense is not available in such cases.

Schoon, 971 F.2d at 199, 200.

The Defendants have cited no relevant change in the law, nor have they so distinguished the pre-existing law, to authorize their violation of the prohibition Congress imposed upon the unlawful trespass upon military installations, 18 U.S.C. § 1382.

WHEREFORE, after full consideration of Defendants' *Motion for Ruling on Evidence for Defenses of International Law and Necessity*, and upon all of the foregoing authority, the defenses of international law and necessity are found to be unavailable in Defendants' cases. Therefore, evidence for defenses of international law and necessity will not be admitted.

HAVING FOUND EVIDENCE OF DEFENSES OF INTERNATIONAL LAW AND NECESSITY INADMISSABLE, expert testimony in regard thereto and evidence of linkage and similarity in nature and purpose between the School Of The Americas and The Western Hemisphere Institute For Security Cooperation, for the same reasons, will also be refused admission.

SO ORDERED this 16th day of January 2007.

S/ G. MALLON FAIRCLOTH
UNITED STATES MAGISTRATE JUDGE