

1 [COUNSEL LISTED ON SIGNATURE PAGE]

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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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11 UNITED STATES OF AMERICA,

Case No. 2:07-CR-0266 FCD

12 Plaintiff,

DEFENDANTS' MOTION TO DISMISS COUNT FIVE

13 v.

14 HARRISON ULRICH JACK; LO CHA THAO
15 aka Locha Thao; LO THAO, aka President Lo
16 Thao, aka Xia Lo Thao; YOUA TRUE VANG,
17 aka Joseph Youa Vang, aka Colonel Youa True
18 Vang; HUE VANG, aka Chue Hue Vang;
19 CHONG YANG THAO; SENG VUE; CHUE LO;
20 NHIA KAO VANG; DAVID VANG, aka Dang
21 Vang; JERRY YANG, aka Thao Nou Yang; and
22 THOMAS YANG, aka Pao Yang

Judge: Hon. Frank C. Damrell, Jr.
Date: September 20, 2010
Time: 11:00 a.m.

23 Defendants.

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NOTICE OF MOTION AND MOTION

TO: BENJAMIN B. WAGNER, U.S. ATTORNEY, S. ROBERT TICE-RASKIN,
ELLEN V. ENDRIZZI, AND JILL THOMAS, ASSISTANT U.S. ATTORNEYS:

PLEASE TAKE NOTICE that on September 20, 2010, at 11:00 a.m., or as soon thereafter as the matter may be heard, Defendants jointly, through counsel, will and hereby do move this Court, pursuant to Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure, to dismiss Count Five of the First Superseding Indictment (the “Superseding Indictment”) for failure to state an offense under the Neutrality Act, 18 U.S.C. § 960, because this statute does not reach the conduct alleged in the Superseding Indictment. All Defendants have joined this Motion.

This Motion is based on this Notice of Motion and the attached Memorandum of Points and Authorities, the files and records in this case, and any other evidence or argument that may properly be presented to the Court.

1 **I. INTRODUCTION**

2 The Court should dismiss Count Five of the Superseding Indictment for failure to state an
3 offense under the Neutrality Act, 18 U.S.C. § 960, because the Neutrality Act applies only to a
4 military expedition or enterprise to be carried on from the United States, and the Superseding
5 Indictment fails to allege that any military expedition or enterprise was to be carried on from this
6 country. Count Five should be dismissed for the additional and independent reason that the
7 conduct prohibited by the Neutrality Act — beginning, providing or preparing the means for,
8 furnishing the money for, and taking part in a military expedition or enterprise — must take place
9 “within the United States,” and the Superseding Indictment fails to allege that any such conduct
10 occurred in this country. Accordingly, the Court should dismiss Count Five for failure to state an
11 offense.

12 **II. THE SUPERSEDING INDICTMENT**

13 The Superseding Indictment alleges that Defendants conspired to acquire arms and
14 personnel and supply them to insurgents in Laos to overthrow the government of Laos.
15 (Superseding Indictment at 8.) These insurgents are described in the Superseding Indictment as
16 “a military force of insurgent troops within Laos that were organized into military districts based
17 upon provincial boundaries.” (*Id.* at 9.) According to the Superseding Indictment, Defendants
18 attended various meetings, discussed the acquisition and capabilities of arms and personnel,
19 engaged in fund-raising activities, and created a plan for operations in Laos. (*See, e.g., id.* at 7, 8,
20 11, 13.) Defendants also allegedly discussed and negotiated the acquisition and purchase of
21 various arms with an undercover ATF agent posing as an arms dealer. (*See, e.g., id.* at 9-10.)

22 The Superseding Indictment alleges that, on May 7, 2007, Defendant Lo Cha Thao placed
23 an order with the agent for 125 AK-47 machine guns and related supplies. (*See id.* at 17.)
24 According to the Superseding Indictment, the undercover agent planned to deliver this equipment
25 to Thailand near the border of Laos (*id.* at 15:12-14), where certain Defendants would pay for and
26 acquire the equipment. (*See id.* at 10:23-25, 11:26-12:1, 15:12-14, 18:23-26, 21:16-20.) The
27 Superseding Indictment does not allege that any arms, weapons, or personnel were actually paid
28 for or acquired by any Defendant, or that any other orders were placed with the agent.

1 Based on these allegations, Count Five charges all Defendants with a substantive violation
2 of the Neutrality Act, 18 U.S.C. § 960, alleging that “in the Eastern District of California and
3 elsewhere, defendants herein did knowingly begin, provide a means for, prepare a means for,
4 furnish the money for, and take part in, a military expedition and enterprise to be carried on from
5 the United States against the territory and dominion of the foreign nation of Laos, with which the
6 United States was at peace.” (Superseding Indictment at 26-27.)

7 **III. ARGUMENT**

8 The Court has discretion to determine which acts are prohibited by the Neutrality Act.
9 *See, e.g., United States v. Lumsden*, 26 F. Cas. 1013, 1014 (S.D. Ohio 1856) (construing
10 predecessor to 18 U.S.C. § 960). However, “[t]his discretion . . . is to be controlled by known and
11 well-settled rules of construction,” including the rule that all penal statutes “must be construed
12 strictly, and not be so extended in their scope as to include cases not clearly within their terms.”
13 *Id. at* 1014-15. If there is any doubt as to the precise reach of the statute, that doubt should be
14 resolved in favor of the defendants. *See, e.g., United States v. Granderson*, 511 U.S. 39, 54
15 (1994) (where text, structure, and history of a statute fail to establish that the government’s
16 position is “unambiguously correct,” courts must “apply the rule of lenity and resolve the
17 ambiguity in [the defendant’s] favor”).

18 The Neutrality Act provides:

19 Whoever, within the United States, knowingly begins or sets on
20 foot or provides or prepares a means for or furnishes the money for,
21 or takes part in, any military or naval expedition or enterprise to be
22 carried on from thence against the territory or dominion of any
 foreign prince or state, or of any colony, district, or people with
 whom the United States is at peace, shall be fined under this title or
 imprisoned not more than three years, or both.

23 18 U.S.C. § 960. As discussed below, Count Five fails to state an offense under the Neutrality
24 Act for two independent reasons: (1) the Superseding Indictment alleges that a military
25 expedition or enterprise was to be carried on, not from the United States, but from Laos; and
26 (2) the Superseding Indictment fails to allege acts taken by Defendants within the United States
27 that violate the Neutrality Act.

1 **A. The Neutrality Act Applies Only To A Military Expedition Or Enterprise**
2 **To Be Carried On From The United States.**

3 The Neutrality Act on its face requires that the military expedition or enterprise be
4 “carried on from thence” — *i.e.*, from the United States. 18 U.S.C. § 960. Courts have long held
5 that this language means what it says: “The meaning of the statute undoubtedly is, that the
6 expedition shall be intended to be carried on from the territory or jurisdiction of the United
7 States.” *United States v. O’Sullivan*, 27 F. Cas. 367, 372 (S.D.N.Y. 1851) (construing
8 predecessor to section 960); *United States v. Trumbull*, 48 F. 99, 103 (S.D. Cal. 1891) (stating
9 that “the military expeditions or enterprises thereby prohibited are such as originate within the
10 limits of the United States, and are to be carried on from this country”).

11 This requirement makes sense in light of the purpose of the Neutrality Act, which is to
12 ensure that the United States remains neutral in respect of foreign powers. *See Wiborg v. United*
13 *States*, 163 U.S. 632, 647 (1896) (“The statute was undoubtedly designed in general to secure
14 neutrality in wars between two other nations, or between contending parties recognized as
15 belligerents . . .”). If a military expedition or enterprise is not to be carried on from the United
16 States, but rather from a foreign country, it cannot be said that the neutrality of the United States
17 with respect to foreign powers has been compromised.

18 For example, in *Trumbull*, the indictment alleged that the defendants violated the
19 Neutrality Act when they began, set on foot, provided the means for, and prepared the means for
20 a military expedition to be carried on from the United States against the republic of Chile. 48 F.
21 at 100-01. One of the defendants had come to the United States and purchased and acquired arms
22 and ammunition in New York for the purpose of sending them to insurgents in Chile known as
23 the “Congressional Party” for use in their ongoing rebellion against the government of Chile. *Id.*
24 at 101. A ship controlled by the Congressional Party, after taking on board soldiers in Chile,
25 traveled to the United States, picked up the arms and ammunition, and returned with them to
26 Chile. *Id.* at 101-02. The court found that if these facts demonstrated that there was a military
27 expedition or enterprise, it originated in Chile and “was to be carried on from Chil[e], and not
28 from the United States.” *Id.* at 103. Because the “very terms of [the Neutrality Act] imply that

1 the military expeditions or enterprises thereby prohibited are such as originate within the limits of
2 the United States, and are to be carried on from this country,” the court directed the jury to return
3 a verdict of not guilty. *Id.*

4 Here, as in *Trumbull*, the alleged military expedition and enterprise was to be based in a
5 foreign country and was to be carried on from that country, not from the United States. Although
6 the portions of the Superseding Indictment describing the statutory violations of the Neutrality
7 Act allege that the military expedition and enterprise was to originate in the United States and
8 was to be carried on from the United States (Superseding Indictment at 26-27), it is apparent from
9 the allegations in the Superseding Indictment that the military expedition or enterprise was to be
10 organized in Laos and carried on from that country. The Superseding Indictment alleges that
11 Defendants’ goal was “the acquisition and transfer of military arms, munitions, material,
12 personnel, and money to insurgents *in Laos* to conduct armed operations against the government
13 of Laos and to attempt to overthrow the government of Laos.” (*Id.* at 8 (emphasis added).) Those
14 insurgents are described in the Superseding Indictment as “a military force of insurgent troops
15 *within Laos* that were organized into military districts based upon provincial boundaries.” (*Id.* at
16 9 (emphasis added).) Thus, according to the Superseding Indictment, the plan was to have
17 insurgents *in Laos* carry on the military expedition and enterprise *from Laos*. However, as
18 *Trumbull* teaches, the Neutrality Act does not apply to a military expedition or enterprise that
19 originates in, and is to be carried on from, a foreign country. 48 F. at 103. The Court should
20 therefore dismiss Count Five for failure to state an offense under the Neutrality Act.

21 **B. The Neutrality Act Does Not Apply To The Conduct Alleged In The**
22 **Superseding Indictment.**

23 Even if the Superseding Indictment alleged a military expedition or enterprise to be
24 carried on from the United States, it fails to allege that Defendants took any action within this
25 country constituting a violation of the Neutrality Act. The Neutrality Act punishes a person who,
26 “within the United States, knowingly begins or sets on foot or provides or prepares a means for or
27 furnishes the money for, or takes part in, any military or naval expedition or enterprise to be
28 carried on from thence” against a country with whom the United States is at peace. 18 U.S.C.

1 § 960. As the very terms of the statute make clear, for any act to constitute a violation of the
2 Neutrality Act, it must have been done “within the United States.” *Id.*

3 Here, the Superseding Indictment does not allege any act taken “within the United States”
4 that constitutes a beginning, providing or preparing the means for, furnishing the money for, or
5 taking part in a military expedition or enterprise. The Superseding Indictment does not allege, for
6 example, that Defendants themselves took part in any military expedition or enterprise within the
7 United States, assembled troops in this country, or ever intended to do so. *See, e.g., United States*
8 *v. Khan*, 309 F. Supp. 2d 789, 824 (E.D. Va. 2004) (finding defendants not guilty of Neutrality
9 Act where they did not “participate[] in operations against India” or intend for an overseas trip to
10 be directed at “waging war against India”); *United States v. Lumsden*, 26 F. Cas. 1013, 1017 (S.D.
11 Ohio 1856) (“nothing short of a previously-concerted agreement or arrangement, or for an actual
12 enrollment or engagement of men, for the purpose of a military invasion of Ireland, will sustain
13 the charge”). Instead, the Superseding Indictment alleges that insurgent troops would be
14 organized in Laos, and the plan was for those insurgent troops to conduct the military operations
15 from Laos against its government. (*See* Superseding Indictment at 7, 8, 9.)

16 Nor does the Superseding Indictment allege that Defendants intended to, or actually did,
17 pay for or acquire arms in the United States. *See Lumsden*, 26 F. Cas. at 1018 (finding that
18 evidence failed to make out a probable case of guilt where “there was a good deal of talk about
19 raising money and procuring arms, but nothing was ever accomplished in regard to those
20 objects”). To the contrary, the Superseding Indictment makes clear that the alleged plan was to
21 purchase and acquire arms in Thailand — *not* the United States. (*See, e.g.,* Superseding
22 Indictment at 10 (“Defendant Lo Cha THAO and other defendants made arrangements to
23 personally deliver \$50,000 to the undercover agent *in Bangkok, Thailand*, on June 11, 2007.”)
24 (emphasis added); *id.* at 11-12 (“Defendants Harrison JACK, Lo Cha THAO, Lo THAO, Chong
25 Yang THAO, Seng VUE, Nhia Kao VANG indicated that they would *travel overseas to*
26 *effectuate the first contemplated exchange of arms and money.*”) (emphasis added); *id.* at 18
27 (“Defendant Lo Cha THAO indicated that . . . they would be *abroad* on the appointed date with
28 the necessary funds for acquisition of the weapons.”) (emphasis added).)

1 The majority of the conduct that allegedly did take place within the United States
2 consisted of words.¹ However, “[m]ere words, written or spoken, though indicative of the
3 strongest desire and the most determined purpose to do the forbidden act, will not constitute the
4 offense.” *United States v. Lumsden*, 26 F. Cas. 1013, 1014 (S.D. Ohio 1856) (construing
5 predecessor to section 960); accord *United States v. Burr*, 25 F. Cas. 187, 198 (Circuit Court, D.
6 Va. 1807) (Marshall, C.J., sitting by designation) (“The formation of the plan in the mind is not
7 the commencement of the expedition, within the act. . . . The disclosure of the plan does not
8 begin it.”). In *Lumsden*, the defendants were members of a secret society who were required to
9 take an oath pledging that they would “persevere in [their] endeavors to uproot and overthrow
10 English government in Ireland.” 26 F. Cas. at 1016. The organization’s constitution “avow[ed],
11 as one purpose of the organization, the subversion of the British power in Ireland.” *Id.* At one
12 meeting, a defendant “stated the object to be to form societies, and to collect aid and arms to
13 uproot and overthrow the British government in Ireland, and that some arms and men had already
14 gone.” *Id.* at 1017. The court found this and other evidence insufficient. *Id.* at 1019. Similarly,
15 here, the Superseding Indictment’s allegations of discussions, meetings, and written plans and
16 agreements do not constitute acts prohibited by the Neutrality Act. (*See* Superseding Indictment
17 at 13, 14, 19.)

18 The Superseding Indictment also alleges that certain Defendants pledged funds for the
19 alleged insurgency in Laos and paid fees to join the “Hmong Homeland Supreme Council.” (*See*
20 *id.* at 8, 14, 15.) The court in *Lumsden* found no violation of the Neutrality Act despite the
21 payment of an initiation fee to join a military company and money towards buying a uniform. 26
22 F. Cas. at 1018. *Lumsden* also found that a defendant’s pledge to contribute money to a fund to
23 raise money in aid of those fighting for the independence of Ireland did not violate the Neutrality
24 Act. *Id.* at 1018.²

25 _____
26 ¹ (*See* Superseding Indictment at 8:2-3; 9:19-20; 9:27-28; 10:14-16; 12:9-10; 12:16-20; 13:1-2;
13:7-10; 13:21-23; 14:1-3; 14:24-26; 15:27-28; 16:3-4; 16:8-10; 16:18; 18:16-20; 19:21-24;
19:26-20:2; 21:8-13; 21:15-20.)

27 ² The Superseding Indictment alleges that three Defendants wired money to Thailand, but there is
28 no allegation that these transfers were made “knowingly” — *i.e.*, with the purpose and intent of

(Footnote continues on next page.)

1 In sum, because the only acts alleged in the Superseding Indictment that could constitute
2 conduct prohibited by the Neutrality Act were intended to take place outside of the United States,
3 and because the Neutrality Act does not prohibit the conduct that allegedly occurred in the United
4 States, the Court should dismiss Count Five for failure to state an offense.

5 **IV. CONCLUSION**

6 For the foregoing reasons, the Court should dismiss Count Five of the Superseding
7 Indictment for failure to state an offense under the Neutrality Act, 18 U.S.C. § 960.

8
9 Dated: May 19, 2010

Respectfully submitted,

MORRISON & FOERSTER LLP

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11 By: /s/ James J. Brosnahan
12 JAMES J. BROSNAHAN
13 GEORGE C. HARRIS
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YOUA TRUE VANG

15 Dated: May 19, 2010

16 By: /s/ Daniel J. Broderick
17 DANIEL J. BRODERICK
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20 Dated: May 19, 2010

21 By: /s/ Mark J. Reichel
22 MARK J. REICHEL
23 Attorney for Defendant
LO CHA THAO

24 _____
(Footnote continued from previous page.)

25 furnishing money to a military expedition or enterprise — and not for a lawful purpose such as
26 providing food and medicine to Hmong civilians. 18 U.S.C. § 960. Although one Defendant is
27 alleged to have placed an order for AK-47s while within the United States (Superseding
28 Indictment at 17-18), the Superseding Indictment alleges that the terms of that order specifically
called for the payment for and acquisition of those items in Thailand, not within the United
States. (*See id.* at 10, 11-12, 17-18.)

1 Dated: May 19, 2010

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