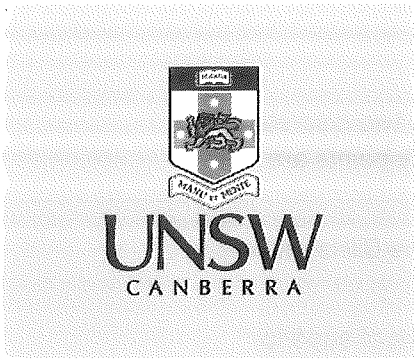

10 July 2018

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Submission to Senate Standing Committee on Legal and Constitutional Affairs
Re: Defence Amendment (Call Out of the Australian Defence Force) Bill 2018

Dear Ma'am / Sir,

1. I am most grateful for the opportunity to provide this submission to the Senate Standing Committee on Legal and Constitutional Affairs. In the interests of full disclosure, I must note at this point that I served for a number of years in the Royal Australian Navy as a legal officer, and in that capacity have been involved in *Defence Act* 1903 Part IIIAAA matters as the Fleet Legal Officer, the Legal Adviser in Military Strategic Commitments, and as the Director of Operations and International Law. I remain an engaged Naval Reservist, however I confirm that I was not involved in the development of this Bill in any Defence capacity. I am therefore free to make this submission in my capacity as an academic who has previously researched, written, and taught on *Defence Act* 1903 Part IIIAAA matters.[1]

Outline

2. At the outset, I must observe that this Bill – which represents the third iteration of the Part IIIAAA scheme - is a most welcome development. The dissolving of operationally artificial stovepipes (such as the limitation of contingent call outs to the air domain), and the simplification and clarity evident in the Bill, will greatly improve the scheme. To this end, I must stress at the outset that my comments relate to three narrow and discrete matters and are proffered only with the aim of suggesting some minor amendments to what is a significant - and welcome -

[1] Rob McLaughlin, 'The Use of Lethal Force by Military Forces on Law Enforcement Operations – Is There a "Lawful Authority"?' (2009) 37:3 *Federal Law Review* 441; David Letts and Rob McLaughlin, 'Call-Out Powers for the Australian Defence Force in an Age of Terrorism: Some Legal Implications' (2016) 85 *Australian Institute of Administrative Law Forum* 63; Rob McLaughlin and David Letts, 'Path needs to be cleared so Defence Force can respond to terror attacks', *The Australian*, 29 March 2016, p10. Courses taught in collaboration with others (since 2011) which include discussion and analysis of Part IIIAAA include: Military Operations Law (PG, ANU), Advanced Military Operations Law (PG, ANU), Comparative Australian and US National Security Law (PG, ANU), Australian National Security Law (UG and PG, ANU).

improvement on the extant (2006) scheme. Specifically, my comments relate to two discrete points of detail in the Bill, and one more general point of policy in relation to the Bill. My points are as follows:

a. Whether the assertion at para 23 of the *Explanatory Memorandum* for the Bill is entirely accurate;

b. Whether the Bill might introduce confusion as to the scope of the defence of superior orders in relation to the conduct of ADF members whilst under Part IIIAAA call out orders; and

c. Whether the Bill might take the opportunity to provide greater clarity around the regulation of, and defences for, ADF members in respect of use of lethal force whilst under Part IIIAAA call out orders.

Whether the assertion at para 23 of the *Explanatory Memorandum* is entirely accurate.

3. Proposed s51N of the Bill concerns the reasonable and necessary use of force and enumerates several important restrictions upon that use of force. In relation to use of force that is 'likely to cause the death of, or grievous bodily harm to, the person' (which I shall refer to as 'use of lethal force' in this submission), proposed s:51N(3)(a) of the Bill outlines (essentially) three exculpatory situations:

a. To protect the member, or others', from serious injury or death[2];

b. To protect declared infrastructure in situations where 'the damage or disruption [to the infrastructure] would directly or indirectly endanger the life of, or cause serious injury to, any person'[3]; and

c. 'in relation to powers exercised under paragraph 46(5)(d) or (e) [the use of force] - is reasonable and necessary to give effect to the order under which, or under the authority of which, the member is acting…'.[4]

4. The *Explanatory Memorandum* asserts, at paragraph 23, that:

> Each of the circumstances in which ADF members may use lethal force is connected with the protection of others' lives… For proposed subparagraph 51N(3)(a)(iii), this is implicit, as the taking of measures against an aircraft or vessel (that may involve the loss of life or grievous bodily harm) would only be reasonable and necessary if that aircraft or vessel posed a significant threat (eg. by causing mass casualties). In these circumstances, the measure is rationally connected to achieving the legitimate objective identified above.

5. The linkage to what is in effect a use of lethal force in self-defence or defence of others[5] is correctly noted in the *Explanatory Memorandum* to be either implicit (for proposed s:51N(3)(a)(ii) – the 'downstream' likelihood of death or serious injury as a consequence of the damage or disruption of declared infrastructure), or explicit (proposed s:51N(3)(a)(i) – to prevent serious injury

[2] Proposed s:51N(3)(a)(i).
[3] Combined effect of proposed s:51N(3)(a)(ii) and s:51H(2)(b) – see also *Explanatory Memorandum*, paras 397-398.
[4] Proposed s:51N(3)(a)(iii).
[5] See s:10.4 *Criminal Code Act* 1995 (Cth).

or death). However, as noted above, the *Explanatory Memorandum* specifically states that 'Each of the circumstances in which ADF members may use lethal force is connected with the protection of others' lives'. This point is again reiterated at paragraphs 428-430 of the *Explanatory Memorandum*. However, in relation to the last of these exculpatory circumstances the *Explanatory Memorandum* (in my view) incorrectly asserts that the linkage to protection of life is similarly implicit.

6. Proposed s:46(5)(d) and (e) relate to taking or ordering 'measures (including the use of force) against an aircraft (whether or not the aircraft is airborne) or vessel, up to and including destroying the aircraft or vessel'. Proposed s:46(6) explicitly links the ordering or taking of such measures to the justification of superior orders.[6] Similarly, proposed s:46(3) provides that the Minister may only authorise proposed s:46(5)(d) or (e) measures where 'the Minister is satisfied that taking the measure…is reasonable and necessary'. There is no express or directly implied linkage – as with the other justifications – to self-defence or defence of others from likely serious injury or death. Additionally, there is nothing in the text of proposed s:51N(3)(a)(iii) that explicitly or implicitly links this justification to protection of life.

7. The *Explanatory Memorandum* states that this implicit linkage is evident as follows: 'the taking of measures against an aircraft or vessel (that may involve the loss of life or grievous bodily harm) would only be reasonable and necessary if that aircraft or vessel posed a significant threat (eg. by causing mass casualties).' This is reiterated at paragraphs 301-308 of the *Explanatory Memorandum*, which note (at para 307) the 'devastating consequences' that might flow from the targeting of a vessel or aircraft. With great respect, the claimed linkage to the protection of life is not at all clear – or, as the *Explanatory Memorandum* claims 'rationally connected' to the proposed power. This is evident on three levels.

8. First, when the originating powers in proposed s:46(5)(d) and (e) are cross-referenced, the only clear linkage that is either explicit or implicit is that the measures must be considered by the Minister to be 'reasonable and necessary'. The parameters of what constitutes 'reasonable and necessary' in relation to use of force in particular (including use of lethal force) is then established (as noted above) in proposed s:51N. However, the linkage is effectively circular, because for proposed s:46(5)(d) and (e) situations, proposed s:51N(3)(iii) states that use of lethal force is to be considered reasonable and necessary where 'in relation to powers exercised under paragraph 46(5)(d) or (e) – [that use of force] is reasonable and necessary to give effect to the order under which, or under the authority of which, the member is acting…'. There is no clear linkage to the purpose of protection of life; the primary linkage evident on the face of the provisions when assessed cumulatively is in fact to 'give effect to the [relevant] order' to use force that can (ultimately) destroy the vessel or aircraft.

9. Second, in relation to vessels and aircraft in the Australian offshore area, there is nothing within either the proposed s:33(1)(ii) or proposed s:34(1)(a)(ii) preconditional circumstance - that 'there is [or would be, or it is likely there would be] a threat in the Australian offshore area to Commonwealth interests (whether those interests are in that area or elsewhere)' - that necessarily

[6] Proposed s:46(6)(b).

or obviously links this threat to a likely mass casualty event. Yet this is the linkage the *Explanatory Memorandum* draws and leverages in its assertion that the 'use lethal force is connected with the protection of others' lives' is 'implicit [in proposed s:51N(3)(a)(iii)], as the taking of measures against an aircraft or vessel (that may involve the loss of life or grievous bodily harm) would only be reasonable and necessary if that aircraft or vessel posed a significant threat (eg. by causing mass casualties).' Again, with respect, I do not think that this claimed linkage is clearly implicit.

10. Third, I humbly submit that the jurisprudence on how 'reasonable and necessary' interacts with state agent use of lethal force is effectively bound by the parameters of self-defence and protection of others from death or serious injury.[7] Again, I do not think the underpinning law is as clear or forgiving as the *Explanatory Memorandum* perhaps assumes.

11. This uncertainty could be readily remedied relatively easily, and the linkage to protection of life - which the *Explanatory Memorandum* clearly endorses and claims - made more plain and clear. One possible remedy would be to employ the same device used in relation to proposed s:51N(3)(a)(ii), so as to make the implicit linkage to protection of life clear in relation to proposed s:51N(3)(a)(iii). Thus proposed s:46(5)(d) and (e) could each simply include the additional phrase used in relation to infrastructure declarations (proposed s:51H(2)(b)) and amended to the requirements of proposed s:46(5)(d) and (e): For example, by adding to each of these sub-sections the caveat that 'the damage or disruption *expected to be caused by the vessel or aircraft* would directly or indirectly endanger the life of, or cause serious injury to, any person.'

Whether the Bill might introduce confusion as to the scope of the defence of superior orders in relation to the conduct of ADF members whilst under Part IIIAAA call out orders.

12. There are three matters that relate to the proposed s:51Z defence of superior orders that the Committee may wish to consider for the purposes of promoting greater concision and clarity in the Bill. First, and more generally, the defence of 'superior orders' set out in proposed s:51Z applies across the whole of *Defence Act* 1903 Part IIIAAA. That is, it is available as a defence to any 'criminal act done, or purported to be done, by a member of the Defence Force under' Part IIIAAA. This appears to provide – prima facie - that the defence of superior orders applies to any use of lethal force by an ADF member acting under call out orders, regardless of the limitations on such use of lethal force that are manifested in more specific and detailed provisions of Part IIIAAA.

13. It is possible that the element of the defence expressed in proposed s:51Z(2)(c) – that 'the order was not manifestly unlawful' – may be considered as providing the necessary level of discrimination required between permissible and prohibited uses of lethal force; however, the jurisprudence on this point – and the implications to be drawn as to what is 'manifestly unlawful' when dealing with use of lethal force - is relatively sparse. Chief Justice Gibbs in the High Court of Australia quite stridently observed in *A v Hayden* (1984)[8] (the ASIS exercise gone wrong case) that: 'It is fundamental to our legal system that the executive has no power to authorize a breach

[7] Rob McLaughlin, 'The Use of Lethal Force by Military Forces on Law Enforcement Operations – Is There a "Lawful Authority"?', at 449-463 in relation to the UK, and 463-467 in relation to Australia, including in respect of the 2006 iteration of Part IIIAAA.
[8] 156 CLR 532.

of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.[9] Justice Mason agreed, arguing that:

> It is possible that the promise was given, and the arrangements for the training exercise made, in the belief that executive orders would provide sufficient legal authority or justification for what was done. It is very difficult to believe that this was the Commonwealth's view - superior orders are not and never have been a defence in our law...[10]

Justice Deane similarly agreed that 'The criminal law of this country has no place for a general defence of superior orders or of Crown or executive fiat.'[11] And finally, Justice Murphy described how:

> The Executive power of the Commonwealth must be exercised in accordance with the Constitution and the laws of the Commonwealth. The Governor-General, the Federal Executive Council and every officer of the Commonwealth are bound to observe the laws of the land... I restate these elementary principles because astonishingly one of the plaintiffs asserted through counsel that it followed from the nature of the executive government that it is not beyond the executive power, even in a situation other than war, to order one of its citizens to kill another person. Such a proposition is inconsistent with the rule of law. It is subversive of the Constitution and the laws. It is, in other countries, the justification for death squads.[12]

14. The present Bill proposes that the extant s:51WB defence of superior orders will continue as proposed s:51Z. This will ensure the continuity of a legislative defence of superior orders in a sufficiently narrow context, and thus should continue to avoid the problem to which the HCA drew our attention in *A v Hayden* – the insurmountable rule of law challenge that would be posed by any more generalised defence of superior orders. However, this particular continued formulation of the defence in its Part IIIAAA context remains problematic for two reasons.

15. The first reason is the imprecision and contested jurisprudence – or rather, perhaps, the interpretive contest likely in the absence of sufficient jurisprudence - regarding the pivotal condition that the order not be 'manifestly unlawful'. I have argued elsewhere[13] that the general statutory and common law limitation imposed upon use of lethal force by state agents in law enforcement (non-Law of Armed Conflict governed) situations is that use of lethal force is only permissible in the protection of self or others from the likelihood of death or really serious injury. This fundamental constraint therefore sets the parameters of what is lawful. If this is the state of the law (as I think it is), then any order to use lethal force, and any use of lethal force, that did not fall within the confines of self-defence / protection of others (in so far as they relate to use of lethal force), would by definition be 'manifestly unlawful'. Indeed, the entire trajectory of the evidence and findings from the Lindt Café Coronial Inquest[14], and the De Menezes[15] series of inquests and

[9] Gibbs CJ at para 2.
[10] Mason J at para 2.
[11] Deane J at para 3.
[12] Murphy J at para 3.
[13] For example, in the articles noted in footnote 1.
[14] State Coroner of New South Wales, Inquest into the deaths arising from the Lindt Café siege, May 2017, for example, the conclusions at paras 151-153, and the recommendation at para 154; the detailed analysis is in Chapter 14 of the Report.

cases from the UK, emphasises the general understanding of law enforcement agents that they may only use lethal force in such critical situations when they are satisfied in their own mind of the need to do so in order to protect life.

16. However, the defence as expressed in proposed s:51Z remains one of general application, and applies consequently to all uses of lethal force, including (as observed in the previous section) where the linkage to protection of life is far from clear, or is in fact arguably absent. Thus, in the case of a proposed s:46(5)(d) or (e) use of lethal force where there is no clear link to protection of life, the generally accepted nexus to self-defence / defence of others is broken. In this case it then becomes arguable that the use of lethal force in such a situation, where there was no threat to life, is consequently 'manifestly unlawful' given the weight and trajectory of jurisprudence on use of lethal force by state agents. This is an unsatisfactory position for ADF members to be left in: Their ability to rely (or not) upon the defence of superior orders in a situation where they used lethal force to destroy a vessel or aircraft upon being ordered to take that measure, where they did not personally believe that this was necessary to protect life, could leave them in legal jeopardy. This potential problem for ADF members seeking to rely on the defence of superior orders in such situations would be resolved by making it clear (as noted in the previous section) that the measures authorised under proposed s:46(5)(d) and (e) are preconditioned on each of the Minister, the giver of the order, and the taker of the measure, all reasonably believing that the measures are necessary for the protection of life.

17. The second point which the Committee may consider warrants clarification is whether the inclusion of the caveat 'criminal' is necessary in element (a) of the defence of superior orders.[16] This language (and that in the extant s:51WB) is similar - in an appropriately altered form – to the more limited s:268.116(3) defence of superior orders in Division 268 of the *Criminal Code Act* 1995, as applied in relation to war crimes. In s:268.116 however, the inclusion of the limiting term 'war crime' in the first element of the s:268.116(3) defence is necessary given that other sub-sections of s:268.116 make it clear that the defence does not apply to other conduct (such as genocide). Thus, a generally formulated defence would have created confusion in the specific context of Division 268. Proposed s:51Z, however, does not need to make such fine points as it is a general defence. Indeed, the inclusion of 'the criminal act…' (as defined in proposed s:31) in both the proposed s:51Z(2) chapeau, and then again in the proposed s:51Z(2)(a) element, could be seen as unnecessarily limiting the scope of the defence to criminal offences as narrowly defined, as opposed to (for example) disciplinary or territory offences charged via s:61 of the *Defence Force Discipline Act.*[17]

18. In the interests of clarity for ADF members, and to ensure the scope of the defence is not narrowly interpreted as unavailable for disciplinary or territory offences when charged out of a Part

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[15] See, for example, European Court of Human Rights, Armani Da Silva v the United Kingdom (Application no. 5878/08) (Merits) 30 March 2016, at (inter alia) para 60, 78, 83, 148-155, 192, 207-208, 224, 245-256.

[16] Proposed s:51Z(2)(a) – 'the criminal act was done by the member under an order of a superior…'.

[17] 'Territory offence' is defined in DFDA s:3: 'Territory offence means: (a) an offence against a law of the Commonwealth in force in the Jervis Bay Territory other than this Act or the regulations; (b) an offence punishable under any other law in force in the Jervis Bay Territory (including any unwritten law) creating offences or imposing criminal liability for offences.' Furthermore, 'relevant Territory offence, in relation to an offence against section 61, means the Territory offence on which the offence against section 61 is based.'

IIIAAA context, the Committee might consider the current review as an opportunity to achieve greater clarity and refined scope. To this end, the chapeau of the defence set out in s:14 of the *Defence Force Discipline Act* 1982 ('Act or omission in execution of law etc') may provide a useful guide. This defence – which applies across the DFDA as a whole - provides that:

> A person is not liable to be convicted of a service offence by reason of an act or omission that:
> (a) was in execution of the law; or
> (b) was in obedience to:
> (i) a lawful order; or
> (ii) an unlawful order that the person did not know, and could not reasonably be expected to have known, was unlawful.

19. I recommend that the Committee give consideration to replacing the phrase 'It is a defence to a criminal act' in the proposed s:51Z(2) chapeau with the alternative phrase 'An ADF member is not liable to be convicted of an offence by reason of an act or omission…'. Likewise, the reference to 'the criminal act' in proposed s:51Z(2)(a) could be replaced with 'the act or omission…'. This would allow the proposed s:51Z defence of superior orders to incontrovertibly apply across charges for criminal, disciplinary, and territory offences arising out of a Part IIIAAA-governed operational situation.

20. the final point I would seek to make in relation to proposed s:51Z is that the inclusion of the 'criminal act' terminology creates a potentially unnecessary need to repeat the proposed s:51Z defence in slightly different terms in proposed s:46(6). The purpose of this repetition of the elements of the defence of superior orders as components of the proposed s:46(6) limitation on the taking or ordering of measures against vessels or aircraft under s:46(5)(d) and (e)[18])' is described in the *Explanatory Memorandum* thus:

> 307… In light of the potentially devastating consequences of taking measures against aircraft and vessels, particularly if they are carrying a large number of people, taking these actions is subject to a number of safeguards. Proposed subsection 46(3)… imposes additional authorisation requirements for the exercise of these powers. Proposed subsection 46(6) places limits on the circumstances in which an ADF member can take a measure, or give an order in relation to taking a measure, against an aircraft or vessel. Proposed section 51N also imposes limitations on the use of force against aircraft and vessels.
>
> 308. Proposed subsection 46(6) provides that proposed paragraphs 46(5)(d) and (e) do not authorise taking a measure against an aircraft or vessel, or the giving of an order in relation to taking such a measure, unless the conditions in proposed paragraphs 46(6)(a) to (f) have been met. These conditions place significant emphasis upon maintaining strict control over the engagement of any vessel or aircraft due to the significance of such an action. Broadly speaking, these conditions ensure that an ADF member does not take action against an aircraft or vessel on the basis of a manifestly unlawful order, or where circumstances have changed in a way that is material to taking an action or giving an

[18] '…take measures (including the use of force) against an aircraft (whether or not the aircraft is airborne) or vessel, up to and including destroying the aircraft or vessel (subject to subsection (6))…'.

order. These conditions are particularly important in the context of aviation threats, where circumstances may change quickly.

21. It is appropriate to ask, consequently, whether proposed s:46(6) is even necessary, if proposed s:51Z applies across the entirety of Part IIIAAA at any rate. There is a modicum of risk in employing proposed s:46(6) to characterise the elements of the superior orders defence, for the particular situation encompassed in proposed s:46(5)(d) and (e), as positive requirements of conduct. This risk relates to confusing or complicating the application of what should be simple and independent proactive conduct prescriptions, with the simultaneous general application of a very similar – indeed functionally identical – defence of superior orders that also applies in relation to that prescriptive provision. It is not clear how this double-trigger of legality would operate in practice, or in terms of legal assessment/analysis of conduct.

22. Alternatively, if the purpose of proposed s:46(6) is simply to ensure that attention is specifically drawn to proposed s:51Z in this context, then one way to avoid confusion may be to amend proposed s:46(6) to simply reiterate the importance of proposed s:51Z in relation to orders and conduct authorised under proposed s:46(5)(d) and (e).

Whether the Bill might take the opportunity to provide greater clarity around the regulation of, and defences for, ADF members in respect of use of lethal force whilst under Part IIIAAA call out orders.

23. In this submission I have noted some matters of detail to which the Committee may wish to turn its mind. I have done so animated by an over-riding interest in ensuring that ADF members who place themselves at the mercy of Part IIIAAA and its legal protections and consequences, when employing lethal force in call out situations, are provided with the clearest possible scheme of regulation. Such clarity is vital in respect of an issue so fundamental to the rule of law, but also to the protections afforded and limitations imposed in respect of the authority of state agents to use lethal force. Understanding where the legal risk for each ADF member who orders or who takes a lethal measure lies, how it is mitigated, and what conduct falls outside of these protections, is essential.

24. To this end, I raise one final issue of general approach, which the Committee may of course consider or discard at its leisure. Indeed, it may be that case that the Commonwealth has considered this proposal and determined that it is not useful; if this is indeed the case, please disregard this final section of the submission.

25. The issue of use of lethal force by state agents in law enforcement operations is characterised by a difficult legal balancing act that must account simultaneously for:

a. The needs of disciplined service required to act on commands;

b. The centrality of the independent 'mind of the user of force' focussed assessments that govern the justifications of self-defence / defence of others in respect of use of lethal force; and

c. The challenges this interaction can inevitably create for defining and operationalising the concepts of lawful and manifestly unlawful orders.

26. One way of balancing these often-competing legal pressures is to consider the permissibility of use of lethal force in a single further, very narrowly defined, counter terrorism context - one which falls outside the imminence requirements of self-defence. This situation is where the killing of hostages by terrorist perpetrators is reasonably considered to be (effectively) inevitable, even if it is not at that moment considered imminent. In response to the Lindt Café Coronial Inquest, for example, the NSW Parliament legislated an alternative mode of authorisation for use of lethal force in certain critical counter-terrorism situations. The *Terrorism (Police Powers) Act* 2002 (NSW) now provides, at s:24A, that (inter alia):

> 24A Police Commissioner may declare this Part applies to terrorist act to which police are responding
>
> (1) If the Commissioner of Police is satisfied that:
>
> (a) an incident to which police officers are responding is or is likely to be a terrorist act, and
>
> (b) planned and coordinated police action is required to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty,
>
> the Commissioner may declare that it is a terrorist act to which this Part applies…

27. In such cases, once the relevant declaration has been made, the responding Police Officers are authorised to use lethal force not only to defend people at immediate threat of death or serious harm (self-defence / defence of others) but also 'to prevent or terminate their unlawful deprivation of liberty' – a situation that does not necessarily require the Police Officer who is about to use the lethal force to be satisfied that life is imminently in danger:

> 24B Use of force in relation to declared terrorist act
>
> (1) The police action that is authorised by this section when police officers respond to any incident that is declared to be a terrorist act to which this Part applies is authorising, directing or using force (including lethal force) that is reasonably necessary, in the circumstances as the police officer perceives them, to defend any persons threatened by the terrorist act *or to prevent or terminate their unlawful deprivation of liberty*… (my italics).

28. One means of overcoming the legally difficult relationship that will always complicate interactions between the institutional and situational imperative for coordination and operation of the chain of command, and the intensely personalised (mind of the user of force) requirements of the legally prescribed defence of self-defence, may thus be to consider a similar provision in Part IIIAAA. Any such provision should require specific authorisation/declaration by the Minister, and its availability should be narrowly limited to the release of hostages in situations where their death or serious injury appears to be inevitable, albeit not necessarily imminent.

29. Please do not hesitate to contact me if I may provide any further details as to my submission or provide any further assistance to the Committee.

Yours aye,

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