

COURT-MARTIAL RECORD

NAME FREDERICK, IVAN L. SSG

SSN [REDACTED] (b)(6)-2

ACTIONS CODED:

INITIAL _____

ACCA _____

FINAL _____

COMPANION(S):

ASSIGNED TO:

PANEL 4

EXAM. DIV. _____

RETURN THIS FILE TO:

OFFICE OF THE CLERK OF COURT

US ARMY JUDICIARY

901 NORTH STUART STREET, SUITE 1200

ARLINGTON, VA 22203-1837

VOL. VIII OF VIII - ARMY 20041129

VOL I OF I VOL(S) ARMY MISC 20040937

~~ARMY MISC 20040037~~

File with ARMY 20041129

JALS-CC FORM 24, 1 OCTOBER 2000

SEP 20 2004

WRIT
to be filed with Gen/Army 019940
20041129

ARMY MISC 20040037

United States Court of Appeals for the Armed Forces
Washington, D.C. 20442-0001

UNITED STATES,)	USCA Misc. Dkt. No. 05-8001/AR
)	Crim. App. Dkt. No. 20040937
Appellee)	
)	
v.)	<u>O R D E R</u>
)	
Ivan L.)	
FREDERICK,)	
Appellant)	

On consideration of the writ-appeal petition, it is, by the
Court, this 14th day of October, 2004,

ORDERED:

That said writ-appeal petition is hereby denied without
prejudice to Appellant's right to raise the matter asserted in
the petition during the course of normal appellate review.

For the Court,

/s/

[REDACTED] Clerk of the Court

(b)(6)-2

cc: The Judge Advocate General of the Army
Appellate Defense Counsel ([REDACTED] Esq.)
Appellate Government Counsel ([REDACTED])

(b)(6)-4

(b)(6)-2

US ARMY JUDICIARY

2004 OCT 15 A 9:59

CLERK OF COURT

019941

United States Court of Appeals for the Armed Forces
Washington, D.C. 20442-0001

UNITED STATES,

Appellee

v.

Ivan L.
FREDERICK,

Appellant

) USCA Misc. Dkt. No. 05-8001/AR
) Crim. App. Dkt. No. 20040937
)
)
)
)
)
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)

DOCKETING NOTICE

Notice is hereby given that a writ-appeal petition for review of the United States Army Court of Criminal Appeals decision on application for extraordinary relief was filed under Rule 27(b) on September 30, 2004, and placed on the docket this 6th day of October, 2004.

For the Court,

/s/

[REDACTED]
Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel [REDACTED] Esc.)
Appellate Government Counsel [REDACTED]

(5)(6)-4

(5)(6)-2

US ARMY JUDICIARY

2004 OCT - 7 A 5:59

CLERK OF COURT

019942

United States Court of Appeals for the Armed Forces
Washington, D.C. 20442-0001

UNITED STATES,)	USCA Misc. Dkt. No. 05-8001/AR
)	Crim. App. Dkt. No. 20040937
Appellee)	
)	
v.)	<u>DOCKETING NOTICE</u>
)	
Ivan L.)	
FREDERICK,)	
Appellant)	

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For the Court,

/s/ [REDACTED]
Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel ([REDACTED] Esq.) (b)(6)-2
Appellate Government Counsel ([REDACTED])

(b)(6)-7

019943

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Staff Sergeant,
Ivan L. Frederick
United States Army,
Appellant

v.

RESPONSE TO WRIT-APPEAL
PETITION FOR REVIEW OF
ARMY COURT OF CRIMINAL
APPEALS DECISION ON
APPLICATION FOR EXTRAORDINARY
RELIEF

Colonel [REDACTED] (b)(6)-2
Military Judge, Fifth
Judicial Circuit; and The
United States Army,
Appellee

Crim.App. No. 20040937

USCA Misc. Dkt. No. _____

PREAMBLE

COMES NOW the appellee, United States Army, pursuant to this Court's Rules of Practice and Procedure 19(e), 27(b), and 28(b), and hereby requests that this Court deny appellant's writ appeal and request to stay the proceedings in this court-martial.

**I
History of the Case**

The appellee concurs with the appellant's recitation of the history of the case with this addition to paragraph 4 (original references to Appendices omitted):

On July 28, 2004, the government filed a responsive pleading to which petitioner replied by e-mail on July 29, 2004. Without oral argument, which both parties agreed was not

RC&A Copy

019944

necessary for his ruling, the military judge denied petitioner's motion by written opinion on August 4, 2004 (Appendix I).

II Issue Presented

WHETHER THE MILITARY JUDGE'S DENIAL OF APPELLANT'S MOTION TO CHANGE THE LOCATION OF SENTENCING PROCEEDINGS CONTRAVENES APPELLANT'S RIGHT TO COMPEL THE ATTENDANCE OF WITNESSES UNDER THE SIXTH AMENDMENT, AND APPELLANT'S RIGHT TO FULL AND FAIR SENTENCING PROCEEDINGS.

III Statement of Facts

The appellee concurs with the appellant's recitation of the facts with the following addition.

On September 28, 2004, ~~civilian trial defense counsel~~ submitted a revised witness list via e-mail to Government (b)(6)-7 counsel. Defense counsel has removed [REDACTED] Inmate [REDACTED] Inmate [REDACTED] Brigadier General Janis Karpinski, Captain [REDACTED], First Sergeant [REDACTED] (b)(6)-2 [REDACTED] Special Agent [REDACTED], Sergeant [REDACTED] (b)(6)-1 [REDACTED] Lieutenant General Ricardo Sanchez, Colonel [REDACTED] and Sergeant [REDACTED] from the original witness list submitted with the motion to change the location of the sentencing proceeding (See Appendix II). In their place, defense counsel added [REDACTED], Major [REDACTED], and First Sergeant [REDACTED] to his witness list. Also, in light of the military judge's ruling, trial defense counsel has requested that the witnesses on his witness list testify via video teleconference (VTC) as opposed to other means of alternative testimony. (b)(6)-2 (b)(6)-4

IV

Reasons Why Writ Should Not Issue

The appellant's writ is cloaked in language decrying deprivation of his VI Amendment, U.S. Constitution protections, but fails to recognize the relevant Constitutional, Codal, and Manual for Courts-Martial provisions, along with this Court's precedent, that operate to provide due process protections to our servicemembers throughout the military justice system. See *United States v. McDonald*, 55 M.J. 173 (2001) (discussion of how Constitutional due process safeguards are applied by Article 46, Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial (RCM) 703 and 1001, and Military Rule of Evidence (MRE) 1101). Under the authority vested in him by Article 36(a), UCMJ, the President has constructed sentencing procedures that provide the sentencing authority with "relevant and reliable" evidence and which allow the accused the right to cross-examination of witnesses and the limited right to witness production. *McDonald*, 55 M.J. at 176-177 (quoting *United States v. Ariail*, 48 M.J. 285, 287 (1998)); RCM 1001(c)(3); RCM 1001(e)(1). Utilizing the applicable provisions of the MCM, the concrete issue facing the trial court in appellant's case is determining whether, given the location of the court-martial and the willingness of the witnesses proffered by the appellant as

relevant to travel to Iraq, it can adjudge a "legal, appropriate, and adequate sentence".¹ *United States v. Combs*, 20 M.J. 441, 442 (C.M.A. 1985). Under both the facts and law as presented in this case, the military judge did not abuse his discretion in concluding that a legal, appropriate, and adequate sentence can be fashioned; by specifically holding the appellant's sentencing proceeding can be in Iraq and using information obtained through means other than the personal appearance of the witnesses at the actual situs of the court-martial. See *McDonald*, 55 M.J. at 178 (employing abuse of discretion standard to military judge's application of RCM 1001(e) determination); see also *Combs*, 20 M.J. at 443 (abuse of discretion standard); *United States v. Briscoe*, 56 M.J. 903, 906 (A.F.Ct.Crim.App. 2002).

In fashioning a sentence, RCM 1001(e) gives "much greater latitude than on the merits" to the court-martial to consider information by means other than live testimony. In fact, RCM 1001(e)(2) places certain limitations on a military judge's discretion when considering whether the production of live witnesses is mandatory during presentencing proceedings. *United States v. Mitchell*, 41 M.J. 512, 514 (A.C.M.R. 1994). In order for a witness to be produced subject to a subpoena or

¹ A significant piece of the analysis in this case is that the appellant has chosen the forum of the court-martial to be military judge alone.

invitational travel orders during sentencing, five criteria must be met: (1) the expected testimony must be necessary for consideration of a matter of substantial significance; (2) the weight or credibility of the testimony is of substantial significance; (3) the other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify (except in an extraordinary case where a stipulation would be insufficient); (4) other forms of evidence (to include oral depositions, written interrogatories, or former testimony) would not be sufficient to meet the needs of the court-martial; and (5) the significance of personal appearance of the witness, when balanced against the practical difficulties of production of the witness, favors production. See RCM 1001(e)(2)(A)-(E); *McDonald*, 55 M.J. at 177. Given the wide latitude R.C.M. 1001(e) affords the military judge to consider alternate forms of evidence in lieu of live testimony during sentencing, there is not one potential witness proffered by the appellant who is necessary to present live testimony in order for the appellant to receive a fair and just hearing.

First, any expected testimony offered by a sentencing witness must be necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact. RCM

1001(e)(2)(A) (emphasis added). Of the witnesses listed by the appellant in his motion at the trial court, there were several who do not meet this first requirement since any testimony they would provide is clearly attenuated at best. The majority of these witnesses have been subsequently removed from the defense witness list of September 28, 2004. The Government continues to object that Major [REDACTED] has any information that is a matter of substantial ^{(b)(6)-2} significance.

Next, in order for a witness to be produced, the weight or credibility of the necessary testimony has to be of substantial significance to the determination of an appropriate sentence. RCM 1001(e)(2)(B). Of the witnesses the accused has identified who can provide necessary evidence on a matter of substantial significance, the credibility of these witnesses is inconsequential. The government has no information that would make the credibility of Dr. ^{(b)(6)-1} [REDACTED], Mr. ^{(b)(6)-1} [REDACTED], Pastor ^{(b)(6)-1} [REDACTED], Mrs. ^{(b)(6)-1} [REDACTED], Ms. ^{(b)(6)-1} [REDACTED], Captain ^{(b)(6)-1} [REDACTED] or First Sergeant ^{(b)(6)-1} [REDACTED] a matter of substantial significance in determining an appropriate sentence for the accused.

The third requirement for mandating witness production is that the other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation

of fact would be an insufficient substitute for the testimony.
RCM 1001(e)(2)(C). The government is willing to enter into a
stipulation of fact with all of the named witnesses who are
unwilling to travel to Iraq with the exception of Dr. (b)(6)-(7)
These alternate means of evidence will allow all relevant
information in adequate and legal forms to be presented to the
Court to ensure an appropriate decision.

In relation to Dr. (b)(6)-(7) his testimony fits squarely
into RCM 1001(e)(2)(D). The military judge clearly stated that
an oral deposition would be sufficient to meet the needs of the
court-martial in determining an appropriate sentence (Petitioner
Writ, Appendix IV, R. 244). While the "efficacy of Dr.
(b)(6)-(7) testimony" may be slightly diminished due to the fact
that he will not be present in the courtroom, that is not the
legal test for witness production. The real question is not
efficacy of testimony, but rather, what testimony, and form of
testimony, is necessary to ensure an appropriate sentence.
Combs, 20 M.J. at 442 ("it is within the sound discretion of the
trial judge to decide whether the personal appearance of a
witness is required, or whether there is an adequate substitute
for the live testimony which would still enable the court-

² The Government refuses to enter into stipulation of fact since his
testimony, since it will be by its nature, opinion, is not conducive to a
stipulation of fact. The Government has maintained this position throughout
these proceedings and has requested the opportunity to cross-examine Dr.
(b)(6)-(7) (Petitioner Writ, Appendix IV, R. 243).

(S)61-4

martial to determine an appropriate sentence"). Dr. [REDACTED] testimony, essentially that of an expert psychologist, is not so unique that the military judge abused his discretion in ruling that his testimony can be sufficiently captured by either oral deposition, as was suggested by the Government during the August 24, 2004, Article 39(a) session, or by VTC, as was requested by the defense on September 28, 2004 (Appendix II).

The final requirement in determining whether a witness must be produced is if the significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production. RCM 1001(e)(2)(E). Some of the factors that a military judge can consider in weighing this balancing test are whether the testimony relates to a disputed matter, whether the government is willing to stipulate to the testimony as fact, whether there is other live testimony available to appellant on the same subject, whether the testimony is cumulative of other evidence, whether there are practical difficulties in producing the witness, whether the credibility of the witness is significant, whether the request is timely, and whether another form of presenting the evidence is available and sufficient. *Combs*, 20 M.J. at 442-443. There are several factors that weigh against having any of the

proffered defense witnesses' personal appearance mandatory for a fair proceeding.

As stated above, the government is willing to enter into stipulations of fact concerning the substance of all the defense witnesses' testimony with the exception of Dr. [REDACTED].

Moreover, the credibility for the majority of the witnesses is not an issue (Dr. [REDACTED] (S)(b)-4, Mr. [REDACTED], Mr. [REDACTED]

[REDACTED], Pastor [REDACTED] (S)(b)-2 Captain [REDACTED] First Sergeant [REDACTED] Mrs. [REDACTED] and Ms. [REDACTED]

[REDACTED] (S)(b)-4. While these witnesses will testify as to their opinion on the accused's rehabilitative potential and, absent their personal appearance, there will be no live testimony on this subject, their opinions of the accused's rehabilitative potential is really not a matter of dispute. The government does not dispute that the accused's spouse, daughter, co-workers, and pastor share the opinion that the accused possesses rehabilitative potential. In relation to the testimony of

(S)(b)-4 [REDACTED] (S)(b)-2 Major [REDACTED] and Captain [REDACTED] the stipulations of fact the government is willing to enter into will be more than a sufficient substitute to present this evidence to the Court. Finally, as demonstrated by the affidavits filed by the accused as part of his motion at trial, there are practical difficulties in producing these witnesses since they refuse to travel to Iraq. When all of these factors


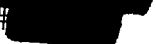

are considered as a whole, it is clear that the personal appearance of these witnesses is not necessary for a fair and just sentencing proceeding.

V

CONCLUSION

In sum, the fact that a number of the accused's desired sentencing witnesses refuse to travel to Iraq should not be an impediment to holding the court-martial in Iraq. The Manual for Courts-Martial allows for a situation such as this to collect all of the relevant and necessary information for the Court to fashion a legal, appropriate, and adequate sentence for the accused. Consequently, the Government asks that this Court deny the appellant's request for an order to stay the proceedings or to change the location of the proceedings.

Respectfully submitted,

 (S)(6)-2
Lead Counsel, # 
CPT, JA
Government Appellate Counsel
U.S. Army Legal Services Agency
901 N. Stuart Street
Arlington, VA 22203
(703) 929-

(S)(6)-2

[REDACTED]
[REDACTED] (5)(6)-2
Bar
LTC, JA
Deputy Chief, Government
Appellate Division

CERTIFICATE OF FILING AND SERVICE

I certify that I served or caused to be served a copy of the foregoing on this Court, Civilian Defense Counsel, and Defense Appellate Division by hand on 4th October 2004.

(5)(6)-2
[REDACTED]
Paralegal Specialist
Government Appellate Division

APPENDIX I

019955

[REDACTED] PT USALSA

From: (b)(6)-2 [REDACTED] PT CJTF7 -Senior Defense Counsel
Sent: Thursday, July 29, 2004 2:53 AM
To: [REDACTED]@us.army.mil; [REDACTED] PT CJTF7 -Senior Defense Counsel
[REDACTED] CPT USALSA; [REDACTED]@hq.c5.army.mil
Cc: [REDACTED]@aol.com; [REDACTED]@vcmain.hq.c5.army.mil
Subject: RE: response to motion to change location of trial

(b)(6)-4

(b)(6)-2

Sir:

The Defense feels that the issues have been properly framed, there is no need for oral argument. The Defense is in a posture, however, to answer any question, in writing, which the court may have prior to a decision.

Respectfully submitted,

CPT [REDACTED] (b)(6)-2
Mr. [REDACTED] (b)(6)-4

Defense Counsel

-----Original Message----- (b)(6)-2

From: [REDACTED] COL (C5 OSJA) [mailto:[REDACTED]@us.army.mil]
Sent: Thursday, July 29, 2004 10:31 AM
To: [REDACTED]@vcmain.hq.c5.army.mil; [REDACTED]@hoda.army.mil;
[REDACTED]@hq.c5.army.mil; [REDACTED] COL (C5 OSJA)
Cc: [REDACTED]@aol.com; [REDACTED]@vcmain.hq.c5.army.mil
Subject: RE: response to motion to change location of trial

(b)(6)-4

All:

Does either side want a hearing on this motion? If not, I will decide on the submitted briefs, and the defense email response to the gov brief, and inform all parties by email. I'll put the ruling on the record at the next session.

COL [REDACTED] (b)(6)-2

-----Original Message-----

From: [REDACTED]@vcmain.hq.c5.army.mil
To: [REDACTED]@hoda.army.mil; [REDACTED]@hq.c5.army.mil; [REDACTED]@us.army.mil
Cc: [REDACTED]@aol.com; [REDACTED]@vcmain.hq.c5.army.mil;
[REDACTED]@vcmain.hq.c5.army.mil
Sent: 7/29/2004 8:36 AM
Subject: RE: response to motion to change location of trial

Sir:

(b)(6)-4

This is a reply to the government's response to the Accused's motion for a change of location. We very briefly wish to point out the following to the court:

1. The deterrence associated with this guilty plea will be known and felt by all soldiers around the world instantly upon its announcement. This is clearly irrespective of where the hearing might occur.
2. The idea that no live witnesses are required is antithetical to the most rudimentary concepts of justice in any system. Such a position is entirely inconsistent with the government's assertion that it seeks justice in this case or the Court's stated position that this case will be tried like any other court-martial case anywhere else in the world.
3. The Government now suggests further that the due process rights of the Accused should somehow be subordinated to an alleged, but unproven, need to appease the Arab world. In a nation which has elevated individual rights to a level unparalleled in all of

civilization, such an assertion should rightly be summarily rejected as a rationale for holding a trial in Baghdad. The Arab world will know the result the moment it occurs, wherever it occurs.

Respectfully submitted,

CPT [REDACTED] (b)(6)-2
Mr. [REDACTED] (b)(6)-4

Defense Counsel

-----Original Message----- (b)(6)-2
From: [REDACTED] CPT USALSA [mailto:[REDACTED]@hqda.army.mil]
Sent: Wednesday, July 28, 2004 4:31 PM
To: [REDACTED]@hq.c5.army.mil'; [REDACTED]@us.army.mil'
Cc: [REDACTED]@ol.com'; [REDACTED] CPT CJTF7 -Senior Defense Counsel;
[REDACTED]@vmain.hq.c5.army.mil'
Subject: response to motion to change location of trial

Sir: (b)(6)-4

Please find attached the government's response to the motion to change location of trial.

v/r

CPT [REDACTED] (b)(6)-2

APPENDIX II

019958

(b)(6)-2

CPT USALSA

From: [REDACTED]@aol.com (b)(6)-7
 Sent: Tuesday, September 28, 2004 9:37 PM
 To: [REDACTED]@vcmain.hq.c5.army.mil
 Cc: [REDACTED] CPT USALSA [REDACTED] CPT CJTF7 -Senior Defense Counsel
 Subject: Witnesses (b)(6)-2

After all we have been through with these witnesses, I don't know how formal you will require this, but here is our witness list.

1. Dr. [REDACTED] Psychologist at Landstuhl. He will testify to the testing done on the Accused and assess the results. We ask that he give VTC testimony from Frankfurt.

2. Dr. [REDACTED] He will give testimony on 21 OCT by VTC from Naples, Italy. The Sixth Fleet Headquarters is there.

3. By VTC from Washington, DC, or wherever you choose the following people will testify. Subpoenas must be issued to all of these people.

a. [REDACTED] 301-766 [REDACTED] He will testify to the 25 OCT 03 incident with Cruz and Krol and will detail Frederick's involvement. He will testify that Cruz and Krol were active participants as MI and that he reported the incident to an officer.

b. Maj [REDACTED], 631-265 [REDACTED] He wrote the JUL 03 memo regarding the gloves coming off. He will testify that it was sent to MI and reflected the concerns of command regarding the insurgency. [REDACTED] was going to give to me the name of the CW2 who received this message. We will probably want him to testify also.

c. Cpt [REDACTED] 804-734 [REDACTED] He will testify to the Accused leadership abilities, the role that Grainer played as a strong personality, and will confirm that nudity existed at Abu when the 372nd arrived. He will also speak to training.

d. 1SG [REDACTED] 04-734 [REDACTED] He will testify to the Accused leadership, the Accused relationship with Grainer, training and conditions at Abu during the releevant time period.

e. Maj [REDACTED], 570-821 [REDACTED] He will testify to conditions at Abu, the role of MI and the interrogators at Abu, the circumstances surrounding the seven detainees on the night of 8 Nov 03 and the death of the ghost detainee.

f. Cpt [REDACTED] by counsel, Cp [REDACTED] at 913-684 [REDACTED] She will testify to the role of LTC [REDACTED] at Abu and the relationship with the MP Command.

g. [REDACTED] Dillwyn, VA. He is the Accused's pastor and will testify to character and community involvement.

h. [REDACTED] Fife Road, Goochland, VA 23063. He is a prison guard and fellow employee of the Accused. He will testify to the Accused work performance in his civilian occupation and his treatment of prisoners in that environment.

i. [REDACTED] Dillwyn, VA. He is the warden of the prison where the Accused worked. He will testify to his work performance, adherence to rules and treatment of prisoners.

j. [REDACTED] is the wife of the Accused.

k. 1SG [REDACTED] He is the Accused current first sergeant and will testify to the Accused's conduct since being charged. (b)(6)-2

019959

10/4/2004

4. The following stipulations will be required:

a. SPC [REDACTED] (b)(6)-2, 66th MI Group, to the effect that she saw the naked pyramid picture in Tier 1A on a screen saver and did not report the fact.

b. MG Miller to the effect that prolonged nudity and handcuffing nude detainees to cells is a violation of the Geneva Conventions.

c. MG Fay to the effect that there was a breakdown of command, an absence of training, a misapplication of personnel, and severe understaffing.

5. Please give me an idea as to how you see all this. As you can see we have no visions of gradiosity here, but feel that each of these witnesses fills in a part of the mosaic. As you know our goal is to define the conditions at Abu and apply them to the individual psychology of the Accused as well as the gross psychology of the total circumstance. We will have no live witnesses in Iraq. All our witnesses will be far more forthcoming by knowing that they will not be forced to go there.

6. [REDACTED] (b)(6)-2 If you could please give me that guy at Bragg, I'd appreciate it.

7. We will also have some documentary evidence. AR 190-8, the Accused awards, decorations, etc, the gloves off e-mail.

8. It is possible that we will add one or two more people, but as you know we cannot get to [REDACTED] (b)(6)-2 Plus several soldiers have engaged in creative thinking or temporary amnesia. Not to worry, I expect they will have a full recovery by February.

9. Please get back to me on this. (b)(6)-2

Many thanks,

[REDACTED]
Weare, NH 03281
USA

1-800-355-[REDACTED]

1-603-529-[REDACTED]

fax 1-603-529-[REDACTED]

D.C. 1-202-857-[REDACTED]

e-mail: [REDACTED]@aol.com (b)(6)-4

019960

10/4/2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Staff Sergeant)	WRIT-APPEAL PETITION FOR REVIEW
Ivan L. Frederick)	OF ARMY COURT OF CRIMINAL
United States Army,)	APPEALS DECISION ON APPLICATION
Petitioner)	FOR EXTRAORDINARY RELIEF
)	
v.)	Crim. App. Misc. Dkt. 20040937
)	
Colonel (b)(6)-2)	USCA Misc. Dkt. No. _____
Military Judge, Fifth)	
Judicial Circuit; and The)	
United States Army,)	
Respondents)	

Preamble

COMES NOW the petitioner, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), and this Court's Rules of Practice and Procedure 4(b)(2), 18(a)(4), 19(e), 27(b) and 28, and hereby prays for an order directing the respondent to abate the proceedings in this court-martial in the country of Iraq until such time as a change of location, to a place other than the country of Iraq, has been designated by the convening authority. Petitioner further requests that this Court stay the proceedings until this Court can take action on this Writ-Appeal Petition.

I

History of the Case

Petitioner is charged with conspiracy, willful dereliction of duty, maltreatment of detainees, assault consummated by a battery, and indecent acts, in violation of the Uniform Code of Military Justice [hereinafter UCMJ], Articles 81, 92, 93, 128,

019961

RCFA

and 134, 10 U.S.C. 881, 892, 893, 928, and 934. The charges stem from petitioner's service in Iraq at the Abu Ghraib prison.

Petitioner entered into a pretrial agreement with the convening authority whereby petitioner agreed to plead guilty and to be sentenced by a military judge alone. The pretrial agreement is silent concerning the location of the court-martial proceedings and alternatives to the actual in-court appearance of witnesses.

On July 21, 2004, petitioner filed a Motion to Change Location of Sentencing Proceedings based upon the inability to have essential civilian sentencing witnesses participate in-person at the proceedings due to safety concerns inherent to the Iraqi combat zone. (Appendix I.)

On July 28, 2004, the government filed a responsive pleading to which petitioner replied by e-mail on July 29, 2004. (Appendices VIII and IX.) Without oral argument, the military judge denied petitioner's motion by written opinion on August 4, 2004. (Appendix II.)

On August 14, 2004, petitioner filed a Motion for Reconsideration of the military judge's written decision to deny petitioner's Motion to Change Location of Sentencing Proceedings. (Appendix III.) The Motion for Reconsideration was argued before the military judge on August 24, 2004, at Mannheim, Germany, at an Article 39(a) session. (Appendix IV.)

The military judge again denied petitioner's Motion to Change Location of Sentencing Proceedings. (Appendix IV, p. 209.)

On September 20, 2004, petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Application for Stay of Proceedings with the United States Army Court of Criminal Appeals [hereinafter Army Court]. On September 27, 2004, the Army Court summarily denied the petition. (Appendix X.)

II

Reasons Relief Not Sought Below

Petitioner has requested the same relief from the Army Court, in compliance with this Court's Internal Rule of Practice and Procedure 4(b)(1), as stated above, which request was summarily denied. (Appendix X.)

III

Relief Sought

Petitioner hereby prays for an order directing the respondent to abate the proceedings in this court-martial in the country of Iraq until such time as a change of location, to a place other than the country of Iraq, has been designated by the convening authority. Petitioner further requests that this Court stay the proceedings until this Court can take action on this Writ-Appeal Petition.

IV

Issue Presented

WHETHER THE MILITARY JUDGE'S DENIAL OF PETITIONER'S MOTION TO CHANGE THE LOCATION OF SENTENCING PROCEEDINGS CONTRAVENES PETITIONER'S RIGHT TO COMPEL THE ATTENDANCE OF WITNESSES UNDER THE SIXTH AMENDMENT, AND PETITIONER'S RIGHT TO FULL AND FAIR SENTENCING PROCEEDINGS.

V

Statement of Facts

On March 20, 2004, petitioner was charged with multiple violations of the UCMJ. Petitioner and the convening authority subsequently entered into a pretrial agreement in August 2004 whereby petitioner agreed to plead guilty and to be sentenced by a military judge alone.

However, on May 10, 2004, prior to entering into the pretrial agreement, petitioner, through counsel, engaged the convening authority in an effort to change the location of the court-martial. (Appendix I, Attachment H - Letter from Mr. (S)16-4 ████████ to Lieutenant General Metz.) The request for a change of location was denied.

On July 21, 2004, petitioner filed a Motion to Change Location of Sentencing Proceedings. (Appendix I.) This motion included declarations from six civilian witnesses who declared that they would testify on behalf of petitioner, but would not

go to the Iraq combat zone due to safety considerations.

(Appendix I, Attachments A-F.) These witnesses included two family members, petitioner's pastor, a co-worker, a prison warden who is both petitioner's superior and an expert on prison management, and the world's renown and foremost expert on the causes and psychology of prison abuse, Dr. (b)(7)(A)-4 Id. Petitioner is employed as a prison guard in his civilian status.

On July 28, 2004, the government filed a responsive pleading to which petitioner replied by e-mail on July 29, 2004. (Appendices VIII and IX.)

On August 4, 2004, the military judge denied the motion declaring that the civilian witnesses were not essential and that, in any event, their choosing not to go to Iraq to testify was an act of free will. (Appendix II, paras. f and j.)

On August 14, 2004, petitioner filed a Motion for Reconsideration of the military judge's written decision to deny petitioner's Motion to Change Location of Sentencing Proceedings. (Appendix III.) On August 24, 2004, oral argument was held on the Motion for Reconsideration before the military judge at Mannheim, Germany, at an Article 39(a), UCMJ, session. The motion was again denied. (Appendix IV, p. 209.)

At the Article 39(a) session, the military judge ordered the government to produce Dr. (b)(7)(A)-4 a civilian requested by the defense, as an expert in the psychology of

prison abuse. (Appendix IV.) The government conceded that they could find no substitute for Dr. [REDACTED] expertise. Id. The military judge said he would take testimony from civilian witnesses, to include Dr. [REDACTED] by video teleconference (VTC) or by deposition. Id. Doctor [REDACTED] refuses to go to Iraq based upon on safety considerations. (Appendix II, Attachment A.) Sentencing proceedings are set for October 20-21, 2004, in Iraq.

On September 20, 2004, petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Application for Stay of Proceedings with the Army Court seeking an abatement of court-martial proceedings by respondent until such time as the convening authority designated a place other than the country of Iraq for the location of the trial. On September 27, 2004, the Army Court summarily denied the petition. (Appendix X.)

VI

Reasons Why Writ Should Issue

This matter derives from the decent into hell that was Abu Ghraib prison during the period October 1, 2003, through January 4, 2004.

Petitioner has accepted responsibility for his personal conduct, and has done so unabashedly and without reservation. Petitioner now asks that his sentencing proceedings be full and

fair and not driven by the political winds sweeping across Iraq and the Arab-Islamic world.

The Sixth Amendment to the Constitution of the United States guarantees the right of an accused to compel the attendance of witnesses. *United States v. Sweeney*, 34 C.M.R. 379 (C.M.A. 1964); *United States v. Thornton*, 24 C.M.R. 256 (C.M.A. 1957). The Army Court has recognized, in its decision in *United States v. McDonagh*, 10 M.J. 698, 710 (A.C.M.R. 1981),

An accused may not be deprived of the right to the testimony of material witnesses on his behalf for the sentencing portion of his trial, although "occasionally some alternate form of testimony [to live testimony] will pass muster under the facts and circumstances of a given case." *United States v. Scott*, 5 M.J. 431, 432 (C.M.A. 1978); accord, *United States v. Courts*, 9 M.J. 285 (C.M.A. 1980).

However, there is a limitation on this compulsion. A United States citizen located in the United States cannot be subpoenaed (compelled) to testify at a court-martial being held in a foreign country. *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982). Accordingly, none of the civilian witnesses named by petitioner can be ordered to go to Iraq to present testimony.

We are left then with the next logical question of whether these civilians will go to Iraq voluntarily. Their collective declarations (Appendix I, Attachments A-F) demonstrate that they will not. Does this really mean, as the military judge

suggests, that they have *chosen* not to participate as witnesses?

The military judge stated in his August 4, 2004, decision:

There are no logistical or operational impediments preventing any civilian defense witness from coming to the trial. In essence, the civilian defense witnesses are *choosing* not to attend for purely personal, albeit not totally unfounded, concerns for personal safety.

(Appendix II, para. f) (emphasis added).

There is, of course, a war going on in Iraq. Hostilities and attacks occur on a daily basis. As the military judge correctly pointed out:

Currently, there is a great deal of violence in Baghdad. Explosions and gunfire are daily occurrences. Fear for one's personal safety is justified by the situation on the ground in Baghdad.

(Appendix II, para. d.)

Although commercial flights into Kuwait occur regularly, transport from Kuwait to Baghdad is on board a C130 military transport plane, which lands using tactics of evasion. Recently, the Camp Victory courthouse was hit with rocket fire. There are dozens of daily insurgent attacks upon United States personnel. Getting into and out of Iraq can include three days of waiting time, each way, for available space upon a military transport plane.

Moreover, the convention center in Baghdad, the situs of the court-martial, and the former *Green Zone*, are not immune

from attack. The question of where civilian witnesses would be housed also remains an open and festering question.

There is no choice here. Only two of the named civilian witnesses are family members. The others are undertaking their roles as witnesses either for professional or personal reasons. They cannot be asked to discharge their civic responsibility of testifying by risking their lives in the middle of hostilities.

The military judge may not see a problem with civilian witnesses going to Iraq, but his view is juxtaposed to the view held by United States Army. The Army's view is captured in a standard "hold harmless" letter that each civilian must sign before traveling into Iraq. (Appendix VI.) The letter was introduced at the Article 39(a) session. (Appendix IV.) The letter warns of the assumption of risk of death, maiming, and uncertainty. (Appendix VI.) Nowhere does the letter mention that "[t]here are no logistical or operational impediments preventing any civilian defense witness from coming to trial," as the military judge seems to believe. (Appendices II and VI.) Instead, the letter provides a litany of "logistical and operational impediments" including bullets, rockets, grenades, and bombs, and chronicles the deaths of several United States Soldiers and at least twenty detainees. (Appendix VI.)

The military courts have not decided the issue raised in this petition directly. There is, however, dicta derived from a

Vietnam era case, which sheds some light on the matter, and concerning the last time a significant number of courts-martial were held in a foreign country combat zone.

In *United States v. Hodge*, 43 C.M.R. 252 (C.M.A. 1971), this Court still assumed that a civilian witness in the United States could be subpoenaed to testify at a court-martial in a foreign country. *United States v. Bennett*, *supra*, ultimately held otherwise. Nonetheless, the *Hodge* Court said, in dicta:

We also assume, without deciding, that attending a trial in a combat zone presents such grave danger to a civilian witness that we can properly compare his situation to one who, because of illness or disease, would be in grave danger if compelled to attend and testify.

Hodge, 43 C.M.R. at 253. This language was recognized in *Bennett*, 12 M.J. at 468.

Reduced to the simplest of terms, a civilian has a rational, founded, justifiable basis for not going into a combat zone, and the petitioner should not be penalized because a civilian will not so do. By requiring petitioner's sentencing proceedings to commence in the danger of a combat zone, the military judge has instituted a *de facto* chilling of petitioner's Sixth Amendment right to compel the attendance of sentencing witnesses and his right to full and fair sentencing proceedings. Under the conditions discussed above, the absence of any single sentencing witness is directly attributable to the military judge not

wanting to move the sentencing proceeding outside Iraq. Blame in this case cannot logically be placed upon any witness for not wanting to enter a combat zone.

The military judge further stated in his order:

The government is willing to enter into stipulations, or other means of presenting testimony, of any witness who refuses to attend.

(Appendix II, para. i.) If, as we have demonstrated, the witnesses' refusal is predicated upon founded and justified concerns for safety, then it is inescapable that by requiring stipulations or other alternatives to live testimony, the military judge and the government are forcing the petitioner to present evidence in that manner or present no evidence at all. See *Bennett*, 12 M.J. at 466-67; *United States v. Daniels*, 48 C.M.R. 655 (C.M.A. 1974); *Thornton*, 24 C.M.R. at 259 ("An accused cannot be forced to present the testimony of a material witness on his behalf by way of stipulation or deposition."); *United States v. Eiland*, 39 M.J. 566, 570 (N.M.C.M.R. 1993). This result appears expressly forbidden. A change of location for the sentencing proceedings removes both the justification for refusal by the witnesses and the forcing of alternative methods of presenting evidence upon petitioner.

Finally, although Rule for Courts-Martial (R.C.M.) 1001(e) may not apply to all the civilian witnesses because their

appearance may not require government expense if the court-martial is held in the continental United States (CONUS), one witness is being produced at government expense; Dr. Philip Zimbardo.

Doctor [REDACTED] (S)(b)-7 as denied as an expert witness by the convening authority. (Appendix IV, p. 236.) The military judge asked the government whether an adequate substitute existed. *Id.* The government could provide no substitute as Dr. [REDACTED] is the foremost authority on prison abuse in the world, but intimated that it thought it might be able to. (Appendix IV, pp. 236, 241; Appendix V - Resume.) The report of the Independent Panel to Review DoD Detention Operations [hereinafter the Schlesinger Report], at its own Appendix G, refers specifically to Dr.

[REDACTED] and his work. (Appendix VII - Psychological Stresses.)

Doctor [REDACTED] is the principally referenced psychologist therein. *Id.* (S)(b)-7

The military judge ordered Dr. [REDACTED] production, or in the alternative, an abatement of proceedings. (Appendix IV, pp. 244-45.)

The trial counsel noted, "[T]here is no doubt that Dr. [REDACTED] testimony will be helpful." (Appendix IV, p. 237.) By ordering Dr. [REDACTED] production, the trial court found his production as an expert witness to be both relevant and necessary. R.C.M. 703(d).

There is also no doubt that Dr. [REDACTED] is an essential witness. His testimony will reveal how decent people under the proper circumstances could resort to doing what was done at Abu Ghraib in Iraq. Doctor [REDACTED] will testify that given the totality of the circumstances at Abu Ghraib, abuse, rather than being unexpected, was inevitable. He will shed light on the psychology behind the events and explain how violations of the law occurred without reporting or protest.

Doctor [REDACTED] is the lynchpin of the defense sentencing case and he is being reduced to a deposition or a virtual VTC image. In petitioner's view, virtual images have virtually no value when compared with a courtroom appearance. Any method other than live testimony will reduce the efficacy of Dr. [REDACTED] testimony and will either eliminate (as by deposition) or limit (as by VTC) the interplay between counsel, the witness, and the military judge who must decide upon an appropriate sentence. This sentence depends upon, in petitioner's view, how Dr. [REDACTED] is able to convey the psychology associated with the hell of Abu Ghraib. This psychology falls far outside the accepted American standards of conduct because circumstances such as those at Abu Ghraib prison seldom arise.

The Fay Report* and the Schlesinger Report refer to "morally corrupt" soldiers. This is a simplistic analysis of an answer to a complex problem. It is the easy way out. Doctor [REDACTED] live testimony will have great weight in debunking that [REDACTED] (b)(6)-4 simplistic response. To be fair to petitioner, Dr. [REDACTED] must be a live witness. In this light, and under the unique circumstances in this case, this Court should feel confident that it will not be opening the flood gates for a litany similar litigation. Doctor [REDACTED] (b)(6)-4 is such an essential and unique witness, testifying about novel and uncommon circumstances, that this Court can satisfactorily find that moving the location to accommodate the witness will prove to be a favorable decision based solely upon the facts of this case.

The additional civilian witnesses are also essential. The government's position at all levels, political and legal, has been, and still is, that petitioner is a monster and an aberration from the norm. The remaining witnesses will debunk that simpleminded assertion as well. They will testify that petitioner has lived an exemplary life of service to country, community, and family. They will demonstrate that his employment as a prison guard has been marked with compassion and caring. These witnesses are essential to convey that reality.

* Army Regulation [AR] 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade conducted by Major General (MG) George R. Fay.

We have said before, and we say again, that no judge, military or civilian, possesses the sagacity or empathy to fully appreciate and equate depositions or VTC testimony with live, in-court, in-person testimony. Nor, we believe, should there be an assumption that somehow a judge can do this. Judges are, after all, human.

Petitioner's sentence will turn in large part upon the military judge's perception of the whole person in the context of these horrible circumstances. Was petitioner taking advantage of the circumstances, or was he inexorably drawn into them by intervening and superceding forces and events? These witnesses will help the military judge make that decision in much the same way that lawyers aid an appellate court by presenting in-person oral argument to enhance their pleadings.

Finally, it would be naïve not to mention the political reality here. The government stated in its response brief that appeasing Iraqi and Arab-Islamic interests is a principal reason for having this court-martial in Iraq. (Appendix VIII, p. 7.)

To that assertion, petitioner replied:

The Government now suggests further that the due process rights of the Accused should somehow be subordinated to an alleged, but unproven need to appease the Arab world. In a nation which has elevated individual rights to a level unparalleled in all of civilization, such an assertion should be rightly summarily rejected as a rationale for holding a trial in Baghdad. The Arab world

will know the result the moment it occurs,
whenever it occurs.

(Appendix IX.) The intrusion of political considerations into this trial, though difficult to avoid, must not be the driving force and must bow to Constitutional considerations. What is fair and right must prevail. If not, whatever short term advantage is achieved by political interests will assuredly serve to destroy the hard-fought-for, current reality that military justice is an honorable and fair system of justice.

In conclusion, essential witnesses are being forced to provide, and petitioner is being forced to accept, sentencing testimony other than a live, in-court presentation of the evidence. And this is so because the military judge will not abate the proceedings and instruct the convening authority to move the location of the sentencing proceedings to a location outside of a combat zone, i.e., outside Iraq. After all, the very Article 39(a) motion session, the transcript of which is attached hereto as Appendix IV, was conducted in Mannheim, Germany. And so to should the sentencing proceeding in this case. Petitioner's Sixth Amendment right to compel the attendance of witnesses, and his right to full and fair sentencing proceedings, are being chilled and contravened.

Petitioner hereby prays for an order from this Honorable Court directing the respondent to abate the proceedings in this

court-martial in the country of Iraq until such time as a change of location, to a place other than the country of Iraq, has been designated by the convening authority. Petitioner further requests that this Court stay the proceedings until this Court can take action on this Writ-Appeal Petition. Sentencing proceedings are set for October 20-21, 2004.

VII

**Respondents' Addresses, Telephone,
And Facsimile Numbers**

(b)(6)-2
Colonel [REDACTED] Military Judge, Fifth Judicial
Circuit, Headquarters, V Corps, Unit 29355, APO AE 09014.
Phone: (49) 6221-57-[REDACTED] (DSN 314-370-[REDACTED]; Fax: DSN 314-370-
[REDACTED] E-Mail: [REDACTED]@hq.c5.army.mil.

Respectfully submitted, (b)(6)-2

(b)(6)-4
for [REDACTED] Esq.
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[REDACTED]
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
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Phone: 703-588-[REDACTED]
Fax: 703-696-[REDACTED]
E-Mail:

[REDACTED]@qda.army.mil

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of
United States v. Frederick, Crim. App. Dkt. No. 20040937,
Dkt. No. _____/AR, was delivered to the Court and
delivered to Government Appellate Division on September 30,
2004.

[REDACTED]
Paralegal Specialist
Defense Appellate Di
(703) 588-[REDACTED]

(b)(6)-2

019978

APPENDIX I

019979

United States

v.

Staff Sergeant Ivan L. Frederick

)
)
) Motion to
) Change Location
) of
) Sentencing Proceeding
)

I. Request for Relief

The Accused, by counsel, hereby moves this Court to change the location of sentencing proceedings in the above styled matter to CONUS or such other place which will meet the ends of justice and provide fairness and the appearance of fairness in the sentencing proceeding.

II. Facts

1. The Accused has voluntarily entered into a pretrial agreement which provides for a guilty plea to certain charged and specified matters.
2. The pretrial agreement is silent on the question of location of the proceedings, alternative methodologies for the appearance of witnesses and testimonial immunity for proposed witnesses.
3. The Accused intends to call the following classes of witnesses:
 - a. Civilians.
 - a. Lay
 - b. Expert
 - c. Government contractor

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- b. Former military personnel not on active duty.
 - c. Active duty personnel located in CONUS and Germany.
 - d. Active duty personnel located in Iraq.
4. For reasons of safety, none of the civilian personnel all of whom are material will agree to appear in Iraq.
 5. One material former military member not now on active duty will not appear voluntarily in Iraq. Others similarly situated but not yet contacted may fall into that category.
 6. Multiple active duty personnel are asserting Article 31 or Fifth Amendment rights. Many of the contemplated military witnesses are in CONUS.
 7. The Accused has yet to receive full discovery; has yet to have named an agreed upon MP investigator; and has not been informed of the whereabouts of certain material military witnesses. A companion motion to compel is being filed.
 8. The Accused's contemplated witness list to date includes:
 - a. Civilians
 1. [REDACTED] Ph.D.,
Stanford University.
(5)(6)-7
Dr. [REDACTED] will testify as an expert on the social psychology of situational forces and group dynamics associated with prisoner abuse. He is a material witness and will provide the Court with invaluable information regarding the implications of lax rules, absence of

leadership, tacit condonation and encouragement in a prison setting relative to prisoner abuse. He will not go to Iraq. See Declaration at Exhibit A.

2.

[REDACTED]

[REDACTED] will testify as an expert on proper prison management techniques to include guard – prisoner interaction. He will also testify as to the Accused's job performance with prisoners while serving as a prison guard at the Buckingham institution. He is a material witness who will give the Court knowledge as to how a proper prison is managed. He will not go to Iraq. See Declaration at Exhibit B.

3.

[REDACTED]

Mr. [REDACTED] is a co-worker of the Accused. He will testify as to the Accused's treatment of prisoners at the Buckingham institution, his job performance and demeanor as well as his character for peacefulness. He is a material witness. He will not go to Iraq. See Declaration at Exhibit C.

4.

[REDACTED]
CACI contractor.

Mr. [REDACTED] was a CACI employee who served as a contract interrogator. He instructed the Accused and gave the Accused encouragement with respect to the Accused "softening up" detainees. He is a material witness as he provides an understanding of the permissive atmosphere which existed at Abu Ghraib and why the Accused would believe that such an atmosphere was condoned and encouraged. His civilian attorney has advised the defense orally that Mr. [REDACTED] will not voluntarily appear in Iraq.

5. Pastor [REDACTED]
Pastor to the Accused and his family.

Pastor [REDACTED] will testify as to the Accused's character, his devotion to family and his demeanor. He is a material witness giving the Court an understanding of the whole man. He will not go to Iraq. See Declaration at Exhibit D.

6. [REDACTED]
Wife of the Accused.

Ms. [REDACTED] will testify as to the Accused's character, his devotion to family and his treatment of others. She is a material witness. She will not go to Iraq. See Declaration at Exhibit E.

7. [REDACTED]
Step-daughter of the Accused.

(b)(6)-4
Ms. [REDACTED] teenager, will testify as to the role her step-father has played and is playing in her life. She is a material witness. She will not go to Iraq. See Declaration at Exhibit F.

8. Inmate [REDACTED] and Inmate [REDACTED]
Buckingham Correctional Center.

These men are prisoners at Buckingham Correctional Center. They will testify as to the manner in which the Accused treated them and other prisoners. They are material witnesses. They cannot go to Iraq.

b. Former military personnel not on active duty:

1. BG Janis Karpinsky,
Commander, 800th MP Brigade.

BG Karpinsky will testify as to her knowledge of command changes which took the Accused out from her control, the involvement of military intelligence at Abu Ghraib, the knowledge of senior personnel regarding the creation of a permissive atmosphere in disregard of international conventions, the involvement of the International Red Cross and the pressure to obtain intelligence created by senior officers and officials. She

is a material witness. She will not go to Iraq as a civilian. See e-mail from counsel at Exhibit G. She is now in CONUS.

2. The following individuals, we believe, also fall into this category, but we have been unable to find them without investigatory help or information from the government.

— Maj [REDACTED]
320th MP Bn.

(b)(6)-(b)(7)(C)
Major [REDACTED] will testify, we believe, as to the identity of the seven detainees who were the subject of humiliation on or about 7 Nov 03. He will say that they were the ringleaders of a riot that resulted in injury to one American female soldier. He is a material witness. He is in CONUS.

— Cpt [REDACTED] Commander,
72nd MP CO, NUN G, 156
[REDACTED]

These soldiers, we believe, will testify that nudity, female panties on men, handcuffing to cells (sometimes while nude) and requests for sleep deprivation existed prior to the 372nd MP

CO arriving at Abu Ghraib. They are material witnesses. They are in CONUS.

c. Active duty personnel located in CONUS and Germany:

1. Cpt [REDACTED] MI.

(b)(6)-(g)
Cpt [REDACTED] is the link between MI and the 372nd MP CO. She will, we believe, testify about posting documents at Abu Ghraib which allowed for conduct by MPs in violation of international conventions. She will also testify as to the permissive atmosphere which existed at Abu Ghraib with regard to the treatment of detainees as well as the interplay between interrogators and MPs. She will also testify as to the stepped up interrogation efforts beginning in September 2003. She is in CONUS, is material and will assert Article 31 rights.

2. CID Agent [REDACTED]

(b)(6)-(g)
Agent [REDACTED] instructed the Accused to soften up [REDACTED] the detainee on the box with wires, because [REDACTED] allegedly knew the whereabouts of the bodies of four United States soldiers and who killed them. We have been unable to reach this man, but we expect an Article 31 invocation.

3. Spec [REDACTED] MI

Spec [REDACTED] we believe, will testify that one of the offending pictures was used as a screen saver within MI. This shows both knowledge and condonation. We have been unable to locate her.

4. Sgt [REDACTED]
205th MI Brigade.

We believe he is in Germany. Sgt [REDACTED] will reportedly testify that MI had knowledge of the techniques of humiliation and condoned them. We have been unable to reach Sgt Samuel Provence.

5. LTG Ricardo Sanchez or Col [REDACTED]

These men have yet to be interviewed, but one or the other will testify that they knew from the International Red Cross in the fall and winter of 2003 that activities in violation of international conventions were occurring at Abu Ghraib and command did nothing to stop those activities, thereby condoning them.

6. MG Geoffrey Miller.

This man has not been interviewed but he will testify as to how and why and what stepped up interrogation methods

were authorized and employed during the period Sep
through Dec 03.

d. Active duty personnel located in Iraq. All of these individuals
may require testimonial immunity.

1. Cpl [REDACTED]
372nd MP CO.

(b)(6)(g)-2
Cpl [REDACTED] will testify as to the absence of training prior to
mobilization and the absence of training prior to and
during the Accused's involvement at Abu Ghraib. He will
further testify to the Accused's inquiries about proper
procedures and rules as well as his own inquiries to MI
personnel regarding nudity, hooding and handcuffing to
cells.

2. 1SG [REDACTED]

1SG [REDACTED] will testify as to the Accused's weak
leadership traits and the aggressive, controlling and
dominating personality of Sgt Grainer. He will also testify
as to the permissive atmosphere with regard to detainee
treatment at tier 1A. He has previously invoked his Article
31 rights.

3. Sgt [REDACTED]
(b)(6)-2
Sgt [REDACTED] will testify as to Sgt Grainer's dominance and
the weak leadership of the Accused. He will further testify
as to Mr [REDACTED] practice of encouraging MP's
(b)(6)-4
soften up of detainees.

Applicable Law

1. Sixth Amendment,
Constitution of the United States.
2. R.C.M. 906(b) (11).
3. U.S. v. Gravitt, 5 C.M.A. 249,
17 C.M.R. 249 (1954).
4. U.S. v. Bennett, 12 M.J.
463 (C.M.A. 1982).
5. U.S. v. Sweeney, 14 C.M.A.
599, 34 C.M.R. 379 (1964).
6. U.S. v. Nivens, 21 C.M.A.
420, 45 C.M.R. 194 (1972).
7. U.S. v. Van Arsdall, 22 C.M.A.
183, 46 C.M.R. (1973).
8. Chenoweth v. Van Arsdall,
22 C.M.A. 183, 46 C.M.R. 183 (1973).
9. U.S. v. Tangpuz, 5 M.J. 426
(C.M.A. 1978).
10. U.S. v. Cary, 1 M.J. 761
(AFCMR 1975).
11. U.S. v. Thornton, 8 C.M.A.
446, 24 C.M.R. 256 (1957).
12. U.S. v. Cox, 23 C.M.R.
535 (A.B.R. 1957).

Argument

This motion facially is a motion for change of location. Buried within it, however, are implications for the public perception of the fundamental fairness of military justice.

In essence the Accused is willing and able to accept responsibility and to spare the government all the burdens associated with a trial on the merits. This provides derivative advantages to the United States in arenas removed from military justice.

The only request the defense is making is to have the sentencing proceeding in a place where the fullest benefit accorded under military law can be achieved. Iraq is not that place.

There is a real danger that a proceeding in Iraq as presently configured will have no civilian witnesses due to safety concerns and the inability to use subpoena power and few military witnesses due to rights invocations. This would be a disastrous result on multiple levels. Such a result can and should be avoided.

There are court imposed incumbencies upon the defense before a motion such as this can be entertained. The defense has discharged those incumbencies. In U.S. v. Carey, 1 M.J. 761 (AFCMR 1975), the Court said that the defense should first submit a change of location request to the convening authority. The defense has done so and was denied. The request is at Exhibit H. The Carey court also said that witnesses should first be contacted so that their status and content of their testimony were known. This, too, has been done to the extent possible.

Accordingly, the Accused's sixth Amendment right to compel witnesses is mature. id. at 766.

R.C.M. 906 (b)(11) is the basis for a change of location motion. It says in part:

"Change of place of trial. The place of trial may be changed when necessary to prevent prejudice to the rights of the accused..."

See also, Analysis of R.C.M. 906 (b)(11) at M.C.M., Appendix A21-54.

Importantly, the constitutional requirement that the trial of a crime occur in the district in which the crime was committed does not apply in the military. Chenoweth v. Van Arsdall, 22 C.M.A. 183, 46 C.M.R. 183 (1973). This motion should not be denied merely because the government represents that the crime was committed in Iraq.

Further, R.C.M. 906 (b)(11) contemplates more than adverse publicity as a basis for granting relief. The Court must consider as well the convenience of the parties and witnesses as well as the inconvenience to the government. U.S. v. Bennett, 12 M.J. 463 (C.M.A. 1982).

Civilian witnesses in CONUS cannot be subpoenaed to testify in a foreign country. U.S. v. Bennett, 12 M.J. 463 (C.M.A. 1982). Nor can the government force the accused to present evidence by way of stipulation or deposition. id. at 466. As noted every civilian who is a contemplated witness for the Defense refuses to go to Iraq. See Declarations at Exhibit A through G and the representation regarding Mr. [REDACTED] (b)(6) 4 in the "Facts" section.

The Defense has a right to secure the attendance of witnesses. id. at 466. This is, however, not an absolute rule and judicial discretion is available. This Court must

consider the issues involved, the importance of witnesses, whether the proceeding is sentencing or on the merits, whether the testimony is merely cumulative and whether alternatives exist. U.S. v. Sweeney, 14 C.M.A. 599, 34 C.M.R. 379 (1964).

The burden of proof by a preponderance of evidence is upon the defense to show that an alternative location is preferable. U.S. v. Gravitt, 5 C.M.A. 249, 17 C.M.R. 249 (1954).

The essence of the court decisions is that for a change of location to occur unavailable witnesses in the existing location must be essential to the Accused's case. U.S. v. Thornton, 8 C.M.A. 446, 24 C.M.R. 256 (1957); U.S. v. Tangpuz, 5 M.J. 426, 429 (C.M.A. 1978). To be essential the testimony must not be cumulative. U.S. v. Nivens, 21 C.M.A. 420, 45 C.M.R. 194 (1972); U.S. v. Van Arsdall, 22 C.M.A. 183, 46 C.M.R. (1973.)

Of the 24 witnesses named by the defense, 13 are civilians or believed to be civilians at this date:

1. [REDACTED] Ph.D.

2. [REDACTED]

3. [REDACTED]

4. [REDACTED]

5. [REDACTED]

6. [REDACTED]

7. [REDACTED]

8. [REDACTED]

(b)(6)-4

9. [REDACTED] (b)(6)-7

10. Janis Karpinsky

11. [REDACTED]

12. [REDACTED] (b)(6)-2

13. [REDACTED]

Of the remaining ten military witnesses six are not in Iraq. Only four are in Iraq.

The military judge is in Germany.

We are left with the Accused, Accused's military defense counsel, prosecutors, four defense witnesses and the prosecution witnesses in Iraq. The government aggravation witnesses are unknown. We will respond in our reply brief to that listing but we doubt they are location dependant.

The defense civilian witnesses are not cumulative. They are essential to understand the Accused, the dynamic that was Tier 1A at Abu Ghraib, what role the interrogators played and how real prisons are run.

Neither depositions nor high tech hook-ups will equal a judge hearing their live testimony.

In fact the sentencing proceeding in this case is far more important than the merits phase. What occurred has never been an issue. Why and how it occurred has always been the issue. The focus, therefore, is rightly upon the sentencing proceeding. It must not be dismissed as an afterthought.

There is no undue burden placed upon the government by changing location.

- The England case, a coconspirator case, is at Fort Bragg, Abu Ghraib cases can be done in CONUS and will be done in CONUS.
- General officer interviews are being conducted in CONUS.
- Virtually all the witnesses are in CONUS.
- Safety and comfort for all participants is greatly enhanced in CONUS. This is a trial, not a test of willingness to enter combat or a willingness to submit to war zone conditions. It is witnesses not warriors that make a fair trial.
- Reluctant civilian witnesses can be subpoenaed in CONUS.

In fact there is no rational basis in law or fact to keep this proceeding in Iraq. There may be political needs, but neither this Court nor the parties should be affected or influenced by these extraneous considerations.

If the Court concludes that additional evidence is required before this motion can be ruled upon, the defense would support that conclusion. We have through no fault of our own been unable to interview identified relevant witnesses because they have not been located by the government and no MP investigator has been named. Trial

preparation due to military counsel's and the Accused's presence in Iraq has been greatly impaired.

Respectfully submitted,

(b)(6)-4

[REDACTED]

Civilian Defense Counsel

/s/ (b)(6)-2

[REDACTED]

Cpt, USA

Military Defense Counsel

Certificate of Service

(b)(6)-4

I, [REDACTED] hereby certify that a copy of the foregoing motion was sent by e-mail to Maj [REDACTED] Trial Counsel, this ___ day of July 2004.

(b)(6)-2

[REDACTED]

(b)(6)-4

ATTACHMENT A

019997

United States

v.

SSG Ivan L. Frederick

)
)
)
)
)
)
Declaration

(b)(6)-4

I, [REDACTED] Ph.D., hereby declare:

1. I am a member of the faculty of Stanford University in the Department of Psychology.
2. I am considered an expert on the social psychology of situational forces and group dynamics associated with prisoner abuse.
3. I am prepared to testify as an expert for the defense in the above styled matter, but I will not travel to Iraq to so testify due to safety considerations.

I declare under the pain and penalty of perjury that the foregoing statement is true to the best of my knowledge.

Dated: July 5, 2004

[REDACTED]
[REDACTED] Ph.D.

(b)(6)-4

019993

A

ATTACHMENT B

019999

United States

v.

SSG Ivan L. Frederick

)
)
)
)
)

Declaration

(S)(C)-4
I, [REDACTED] Dillwyn, VA 23936, hereby declare:

1. I am the [REDACTED]
2. The Accused has worked for me as a prison guard and I am aware of his
(S)(C)-4
demeanor with prisoners and his job performance. I further possess expertise
in prison management techniques.
3. If subpoenaed to testify by the defense I would testify on behalf of the accused
and as an expert in prison management.
4. I will, however, not go to Iraq to do so for reasons of safety.

I declare under the pain and penalty of perjury that the foregoing statement is true
to the best of my knowledge.

Dated:

7/8/04

[REDACTED]

(S)(C)-4

020000

R

ATTACHMENT C

020001

United States

v.

SSG Ivan L. Frederick

)
)
)
)
)

Declaration

I, ^{(S)(b)-4} [REDACTED] Goochland, VA 23063, hereby
declare:

1. I am a prison guard in the rank of lieutenant at the Buckingham Correctional Center in Virginia.
2. The accused is a co-worker of mine.
3. If subpoenaed to testify by the defense I would testify as to the Accused's treatment of prisoners and his demeanor.
4. I will not go, however, to Iraq to do so for safety reasons.

I declare under the pain and penalty of perjury that the foregoing statement is true to the best of my knowledge.

Dated: 7/7/04

Signed: 7/7/04

Notary: [REDACTED]

Exp: July 31, 2007

(S)(b)-4

020002

C

ATTACHMENT D

020003

United States

v.

SSG Ivan L. Frederick

)
)
) Declaration
)
)

(S)(b)(1)-(4)
I, [REDACTED] Dillwyn, VA 23936, hereby declare:

1. I am the Pastor of the church attended by the Accused in the United States. I know his family quite well.
2. I am willing to testify as to the Accused's character, his devotion to family and his demeanor.
3. I will not go to Iraq to do so out of obvious safety considerations.

I declare under the pain and penalty of perjury that the foregoing statement is true to the best of my knowledge.

Dated: July 7, 2004

[REDACTED]
(S)(b)(1)-(4)

020004

ATTACHMENT E

020005

United States

v.

SSG Ivan L. Frederick

)
)
)
)
)

Declaration

(b)(4)-y
I, [REDACTED] Buckingham, VA 23921 hereby

declare:

1. I am the wife of the accused in the above-styled matter.
2. I desire to testify on behalf of my husband, but will not go to Iraq to do so.

We have two daughters at home and having their mother and father in a war zone creates far too many safety issues.

I declare under the pain and penalty of perjury that the foregoing statement is true to the best of my knowledge.

Dated:

July 6, 2004

[REDACTED]

(b)(6)-y

020006

E.

ATTACHMENT F

020007

United States

v.

SSG Ivan L. Frederick

)
)
) Declaration
)
)

(S)(41-4

I, [REDACTED] Buckingham, VA 23921 hereby declare:

1. I am the elder daughter of the Accused.
2. I will testify as to the Accused's role in my life, his fathering skills and his demeanor.
3. I want very much to testify, but I will not go to Iraq for safety reasons to do so.

I declare under the pain and penalty of perjury that the foregoing statement is true to the best of my knowledge.

Dated:

July 11, 2004

[REDACTED]

(S)(41-4

020008

F

ATTACHMENT G

020009

Subj: (no subject)
Date: 6/30/2004 10:38:48 AM Eastern Daylight Time
From: [REDACTED]@mmslaw.com
To: [REDACTED]@aol.com

[REDACTED] (b)(6)-7

Because of safety concerns, BG Karpinski will not voluntarily travel to Iraq in a civilian status. Of course, if ordered and placed on active duty, she would comply with such. On the otherhand, she would consider appearing by VTC, but that may be something that one side, or the other, may object to.

020010 G

ATTACHMENT H

020011

Reply to:

Weare, NH 03281

800-355- [REDACTED]

603-529- [REDACTED]

fax 529- [REDACTED]

Admitted in the
District of Columbia

(b)(6)-7

Washington, D.C.

202-857- [REDACTED]

800-355- [REDACTED]

email [REDACTED]@aol.com

[REDACTED] & Associates
Attorneys-at-Law

BY ELECTRONIC MAIL:

10 May 04

Memorandum for: LTG Thomas Metz
Commander, III Corps
Camp Victory
Baghdad, IraqSubject: Change of Venue
U.S. v. Frederick

1. I represent SSG Ivan Frederick as civilian defense counsel.
2. This is a private communication from me to you through your SJA. There is no dissemination either orally or in writing to any other person or entity. Please acknowledge receiving this.
3. I am asking you point blank to change the venue of this trial to either CONUS or Europe before arraignment. You have the capacity to do this and it is the morally, legally and politically correct course to follow.
4. I do not expect nor want a written response to this request. Action will suffice.
5. This should not be dumped in the lap of a military judge. You should take preemptive action to demonstrate that true transparency exists in this case.
6. Before I articulate the reasons for the unequivocal need for a venue change, may I engage in a brief historical excursus. The My Lai trials were held at the height of the Viet Nam War in 1971. I had the privilege of wearing an Army uniform then and participated in those trials as a judge advocate. The trials were not held in Viet Nam. They were held in CONUS. The principal trials were at Fort Benning and Fort McPherson. There was total access to witnesses in a safe and open environment. These were truly public trials and became one of the noblest moments

020012

H

of self examination in the difficult circumstance that was Viet Nam. No one questioned their validity.

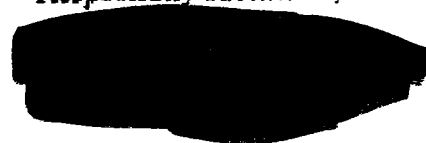
7. Iraq is the wrong place to try these cases for the following reasons:

- a. Safety of civilian witnesses and civilian counsel cannot be assured. We will have multiple civilian expert witnesses as well as civilian witnesses for other purposes. Where will they be housed? How will they be protected? Will they even be willing to come? Announcing that the convention center in the Green Zone will be the site for the trial is like giving targeting coordinates to the enemy. The Green Zone, the site of multiple violent incursions, is no place to have a trial. How am I supposed to concentrate on a defense if I am in continuous fear of bodily harm? I know that Justice Department lawyers in the Green Zone have acquired their own weapons. Do you expect me to do that? Such a trial, given the impact upon Arabs, is a natural target for an act of terrorism in this most unstable environment.
- b. It will be impossible to find a jury pool within Iraq which has not been tainted by the daily denunciation of my client by command at every level. It does not take a lawyer to understand this.
- c. All meaningful witnesses are outside Iraq. That includes virtually all CID agents, the chain of command, MI elements, OGA elements, private contractors, civilian witnesses and government officials. Given the witness locations CONUS is far more appropriate.
- d. The alleged victims, as in My Lai, are not meaningful witnesses. The pictures, as in My Lai, tell what happened. If a victim is necessary, they can easily be transported to CONUS or Europe.
- e. The Military Judge is in Germany. Even he has to come to Iraq.
- f. Communication between myself and military defense counsel and the client is greatly impaired. I cannot phone in. This circumstance is completely unacceptable. Trial preparation is greatly impaired.
- g. There is nothing public about a trial that is steeped in security and surrounded by fear of bodily harm.
- h. The only tie to Iraq at this moment is that it is the situs of the alleged crimes. Since the situs is essentially irrelevant, as it was in My Lai, it does not form a basis for keeping the trial there. If your motivation is

that such a trial in Iraq will serve to appease the Iraqi population, may I say that such a consideration has no place in the justice system.

8. A trial in Iraq under existing circumstances is neither transparent nor public. It is instead a mockery of justice and presents a circumstance in which any defense counsel may rightfully decide not to participate so as to avoid the appearance of complicity.
9. It is with the deepest respect for the position you hold and for the heavy burden you bear, that I ask that you change venue. I believe such a decision will be applauded by the world.

Respectfully submitted,



(b)(6)-9

APPENDIX II

020015

**Office of the Chief Circuit Judge
5th Judicial Circuit
Unit #29355
APO AE 09014**

UNITED STATES)

v.)

SSG Ivan L. Frederick II)
215-56-8739)
US Army)

Order Denying Motion to
Move Trial

4 August 2004

1. The defense has moved to change the location of the accused's trial (Motion at Encl 1). The Government response is at Encl 2. The defense reply to the government response is contained in an email message at Enclosure 3. Both sides agreed that this motion could be decided on the submitted briefs and that no hearing was required (See email at Encls 3 and 4).

2. For purposes of this motion the court makes the following findings:

a. The defense motion for a change of the place of trial is fundamentally based on the fact that "no civilian witnesses (will attend the trial in Baghdad) due to safety concerns...." (Encl 1, page 12, para 4).

b. The military justice system has worldwide applicability including combat zones (Art 5, UCMJ).

c. All of the alleged misconduct in this case occurred at or near Baghdad, Iraq. All of the alleged victims were in Iraq at the time of the alleged misconduct. The current place of trial is Baghdad, Iraq. The current posture of the case is that the accused intends to plead guilty with all the requested witnesses to be called for presentencing proceedings only.

d. Currently, there is a great deal of violence in Baghdad. Explosions and gunfire are daily occurrences. Fear for one's personal safety is justified by the situation on the ground in Baghdad.

e. A number of civilian defense witnesses apparently will refuse to attend the trial if held in Baghdad for reasons of personal safety. (See declarations attached to Encl 1.) The court does not have subpoena power to compel civilian witnesses to come to Iraq.

020016

II

f. The court takes judicial notice that civilians are routinely brought into Iraq on US government business. The government has indicated it will make the appropriate travel arrangements for any relevant civilian defense witness. There are no logistical or operational impediments preventing any civilian defense witness from coming to the trial. In essence, the civilian defense witnesses are *choosing* not to attend for purely personal, albeit not totally unfounded, concerns for personal safety.

g. Defense has also listed witnesses who will not testify because they will invoke their Art 31b, UCMJ, and/or their 5th Amendment right against self-incrimination. The court fails to see any relevance of these witnesses refusal to testify to the motion at hand.

h. The government has indicated that it intends to call Iraqi witnesses at trial.

i. The government is willing to enter into stipulations, or other means of presenting testimony, of any witness who refuses to attend.

j. The defense has made no showing that any proffered witness is essential to presentation of the accused case. There is no showing that the weight or credibility of any witnesses testimony is of substantial significance to the determination of an appropriate sentence.

k. There are alternatives to live testimony available to the defense, i.e., affidavits, letters, memoranda, email, DVDs, videotapes, etc, which would be sufficient to meet the needs of the court-martial in determining an appropriate sentence.

l. The defense has failed to show the accused would be prejudiced by the trial occurring in Iraq.

3. Accordingly, the defense motion to change the place of trial in this case is denied.

//original signed//

COL, JA
Military Judge

(b)161-2

020017

APPENDIX III

020018

**In the 5th Judicial Circuit
Unit #29355
APO AE 09014**

United States

v.

SSG Ivan L. Frederick, II

) Motion for
) Reconsideration
) of
) The Court's
) Decision
) Denying Motion
) To Move Trial

I. Request for Relief

The Accused, by counsel, hereby moves this Court under R.C.M. 905(f) to reconsider its decision of 4 August 2004 denying the Accused Motion to Change Location of Sentencing Proceeding. Oral argument is required and is requested by the Accused in Mannheim on or about 23 or 24 August 2004.

II. Facts

The facts as portrayed in the Accused original motion are incorporated by reference herein except that the following exceptions and substitutions are noted based upon the defense's ongoing investigations.

- Cpt [REDACTED] will not assert her Article 31 rights. To the contrary she has been totally forthcoming upon interview by civilian counsel. (b)(6)-2
- Cpt [REDACTED] 1SG [REDACTED] and Sgt [REDACTED] are no longer in Iraq. They are in CONUS. The government has advised the defense that they will be kept on active duty for these proceedings and, therefore, can be ordered to return to Iraq. The practical effect of return to Iraq upon their willingness to

020019 III

cooperate is unknown. It is reasonable to conclude that such an order would not induce pleasure in these witnesses who served on the ground in Iraq for more than a year.

- The government has informed the defense that it will not recall witnesses to active duty for the purpose of recalling such persons to Iraq to testify in a sentencing proceeding.
 - The government has informed the defense that it will not agree to testimonial immunity to multiple witnesses who may yet face court-martial charges.
 - The Accused, by counsel, has requested that Dr. [REDACTED] be appointed as an expert. That request remains outstanding with the convening authority. (b)(6)-9
 - The Accused, by counsel, has requested that LTC [REDACTED] be given testimonial immunity in the face of his invocation of Article 31 rights. He is now a named witness with material sentencing evidence. He is in Germany. We have requested testimonial immunity for multiple other individuals within MI and MP. (b)(6)-2
- These requests remain outstanding with the convening authority.

III. Applicable Law

The Applicable Law section of the underlying motion is incorporated by reference herein.

IV. Argument

In its opinion this Court has failed to apply case law standards and more importantly has failed to provide reasons for keeping this court-martial in Iraq.

The military justice system is worldwide. That rudimentary statement from the Court, however, ignored the body of case law which has held that the proper location of a trial is fact dependant. If Article 5, UCMJ, were a foreclosing Article, there would be no case law respecting location of trial. Fortunately for the interests of justice there is such case law.

As the defense has pointed out Chenoweth v. Van Arsdall, 22 C.M.A. 183 (1973), held that trial need not occur where the offense was committed.

The Court initially relied upon three factors in denying change of location:

1. "The misconduct occurred in Iraq." This, as Chenoweth provides, is not dispositive.
2. "All of the alleged victims were in Iraq at the time of the alleged misconduct." This is saying nothing more than the misconduct occurred in Iraq. The crimes alleged could not have had absented victims. This element of the opinion has, the defense submits, no probative value.
3. "The current place of trial is Baghdad, Iraq." This is a statement of fact and has nothing whatsoever to do with a change of location. It is, in fact, a non sequitur for purposes of this motion. No case law has said location is proper because that is where the case started.
4. "The Accused intention to plead guilty" invokes R.C.M. 1001(e). The mere fact that the Accused intends to plead guilty does not in and of itself justify a denial of change of location. It does invoke R.C.M. 1001 (e).

020021

In other words the Court has failed to provide one judicially recognized reason as to why remaining in Iraq serves the interests of justice through paragraph c. of its opinion.

Paragraphs d., e. and f. of the opinion address the refusal of civilian witnesses to go to Iraq for the sentencing proceeding. The Court's reasoning is again faulty.

The Court said that violence is a daily event in Baghdad and that fear for one's personal safety is justified. The Court failed to mention that getting to Baghdad is also fraught with peril.

The Court then took judicial notice that civilians are routinely brought into Iraq on U.S. government business. Is the Court suggesting that these civilian witnesses are overreacting? The civilians brought into Baghdad are generally government employees on official business or private businessmen driven by economic gain. It is a contradiction not an analogy to treat these persons as the same or similar to the witnesses whose sole purpose is to contribute to a full and fair hearing.

The Court then said that these individuals were choosing not to attend for purely personal reasons. There is no choice here. Witnesses should not have to be heroes to assist in obtaining justice when with the stroke of a pen they could safely testify in multiple locations. To shift the burden to the witnesses by blaming them for their absence rather than recognizing reality offends justice and is a defacto forcing of the Accused to utilize depositions and stipulations.

Finally the Court was unable to affirmatively recognize that these witnesses concerns for safety were "founded". Instead the Court chose to use the convoluted double negative in

defining concerns for personal safety as "not unfounded". The defense presumes that means their concerns are "founded".

As the Court noted the government is willing to provide alternative means of presenting evidence. Anything that waters down the impact of personal testimony is in the interest of the government. Further, one or two detainee witnesses for the government, if they can be found, can be taken anywhere as they will be in England. The Court notes that it does not have subpoena power over civilians in Iraq. This is a reason to move the trial out of Iraq, not to keep it there. Knowingly rejecting live testimony due to this procedural defect offends justice.

What is most concerning about the Court's decision is the statement that, "The defense has made no showing that any preferred witness is essential to presentation of the Accused case."

Perhaps the defense has not adequately described its case, although we offered to provide additional evidence if asked to do so by the Court.

The sentencing portion of a trial is not an appendix. It is an essential ingredient of justice that the sentence adjudged reflect the totality of the circumstances which gave rise to the crime and to the personal circumstances of the Accused.

The sentencing portion must not be treated lightly. Because there is no formula or guideline for a sentence, the military judge must be possessed of all nuances and facts which result in a fair sentence, stripped of political considerations or bias.

(5)(b)-2
Captain [REDACTED] o-counsel here, has advised civilian counsel that in Iraq there is seldom live civilian testimony in a sentencing proceeding. This appears to be commonplace or policy, but it offends justice. Because it is seldom done, does not make it right.

Perhaps an explanation from the government as to why this is done would be helpful. It cannot be the exigencies of war with Iraq, for we are not at war with Iraq. It cannot be the exigencies of being an occupying force, for since 28 Jun 04 we have not been an occupying force. In fact, it is unclear what status we hold in Iraq which would justify a blanket denial of live witnesses in a sentencing proceeding. Surely concern for the safety of witnesses is an essential ingredient of this pervasive misapplication of justice in cases where essential extraterritorial witnesses do not provide live testimony.

No judge, military or otherwise, has the right or should have the right to believe that he or she is possessed of such sagacity or empathy that the human factor in the testimony of sentencing witnesses can be ignored. Further, no judge, military or otherwise, should willingly deny himself or herself the opportunity to question sentencing witnesses directly.

It is difficult to understand how this Court in applying R.C.M. 1001(e) could say, "The defense has made no showing that any proffered witness is essential to presentation of the Accused case."

The Court has provided no reasoned substantiation of this sweeping comment which seemingly serves to dismiss out of hand the importance of sentencing witnesses. We ask this Court:

1. Is it not essential to understand on a first hand and direct basis the existing violations of law and regulation that the Accused came upon when he was first

assigned to Abu Ghraib or the strains under which the undermanned and untrained 320th MP BN to include the Accused endured the chaos of Abu Ghraib to include substandard food, intolerable hours, overcrowded prison conditions and endless attack by RPG and mortar fire? BG Karpinsky, Major (S)(b)-2 Cpt (S)(b)-2 and Sg (S)(b)-2 will tell you in person if you will allow them to, but not in Iraq.

2. Is it not essential to know the psychology of prison abuse as it relates to the intolerable conditions at Abu Ghraib and the Accused? Do you not wish to know the impact of nonreporting of abuse, of the tolerance for palpable violations of law and regulation and the acceptance of abusive conduct by most at Abu Ghraib, be they MI, MP, civilian contractor or OGA? We are giving you the world's foremost authority. He is 71 years old. He will not go to Iraq and therefore, you will never question him. Think what you could learn to render a fair result from such discourse. Yet you eschew it as not essential.
3. Is it not essential to know, contrary to the protestations of those acting out of self interest that the Accused is not a rogue soldier? Rather, the truth is that he was a good soldier, a good husband and father, a good prison guard and a good man until the chaos of Abu Ghraib corrupted him. Do you believe that you can gain that flavor from a stipulation or a video tape? We think not. Mrs. Frederick, the warden of his civilian prison, his pastor, his stepdaughter, his coworker and, yes, even prisoners who he has overseen at the prison in Virginia where he works will tell you.

4. Is it not essential to know that MI approved violations of law and regulation to include ghost detainees, nudity, handcuffing nude detainees to cells and the use of dogs; or that OGA killed a man in Tier 1A and tried to cover it up? These transgressions were known to the Accused. Cpt (S)(b)(2) will tell you as will Maj (S)(b)(2) and 1SC (S)(b)(2) So will most assuredly, LTC (S)(b)(2) he is granted immunity. How can these people not be essential to your full understanding of this case in extenuation and mitigation?
5. Is it not essential to know that MI knew of abuse and participated in it with the full knowledge of the MPs to include the Accused lending the imprimatur of legitimacy to violation of law and regulation? SPC (S)(b)(2) Cruz and Krol will tell you. Such graphic testimony cannot come from a deposition or stipulation.
6. Is it not essential to know that the Accused was encouraged to harshly treat the detainees? Mr (S)(b)(2) is an essential witness who will never testify in Iraq as he is a civilian contractor and not subject to subpoena power.
7. Is it not essential for you to know how a normal prison is run against the horror and chaos that was Abu Ghraib? The warden of Buckingham Correctional Institution is prepared to tell you, but all questions you might have will go unanswered if he is not before you.

What strikes the defense about the Court's decision is the absence of reasons. This decision is a series of unsupported conclusions which provide no insight into the Court's thinking. At the very least the Court has an obligation to provide a rationale for its decision for appellate purposes

The Court did not even touch upon alternate sites. This Court sits regularly in Kuwait, a safe location a couple of hundred miles from Baghdad. We believe the Court has an obligation to tell the defense why Kuwait or Germany is not acceptable since both locations are within this Court's purview. We note that this Court kept all the Abu Ghraib cases within its chambers even though other judges function within the Court's judicial circuit. This should increase, not decrease, your ability to be flexible as to location given this Court's total control over all these complex cases.

The unvarnished reality is there is no good reason to hold this proceeding in Iraq other than the Army wants it there for political purposes. The government has essentially admitted that fact by telling the Court that it should be in Iraq to satisfy Iraqi and Arab interests.

This Court can not subscribe to that approach nor can this Court create transparently artificial reasons for keeping these proceedings in Iraq. This case will come and this case will go. Military justice will endure. The question is in what state of grace will it endure?

Respectfully submitted,

Dated: 14 August 2004

/s/ [REDACTED] (S)(G)-4
Civilian Defense Counsel

/s/ [REDACTED] (S)(G)-2
Cpt [REDACTED]
Military Defense Counsel

CERTIFICATE OF SERVICE

(b)(6)-4
I, [REDACTED] civilian defense counsel in the above-styled matter hereby
certify that the foregoing motion was served upon the government by e-mail to
Major [REDACTED] and the military judge on 14 August 2004.

(b)(6)-2

/s/

[REDACTED]
(b)(6)-4

020028

APPENDIX IV

020029

1 [Court was called to order at 1355, 24 August 2004, at Mannheim,
2 Germany.]

3 MJ: Court is called to order. All parties are again present
4 that were present when the court recessed with the exception of the
5 civilian defense counsel, who has now joined us.

6 (S)(b)(1) Mr. [REDACTED] can you put your qualifications on the record?

7 CDC: Yes, Your Honor. I'm a member of the bar of the District
8 of Columbia in good standing. I know of nothing to disqualify me
9 with the representation of this case.

10 MJ: Please raise your right hand. [Civilian defense counsel
11 was sworn.]

12 MJ: I would note for the record that this hearing is being
13 conducted in Mannheim, Germany, at the request of the defense because
14 they would be in Germany at this time to conduct further discovery in
15 this case. The movement of this hearing to Germany in no way
16 indicates a movement of the trial itself or any further hearings
17 outside of Baghdad, Iraq, subject to a granting of a motion for a
18 change of venue.

19 At the last hearing, I denied a defense request to reopen
20 the Article 32 hearing. I have reduced additional findings to
21 writing as I said I would. Major (S)(b)(2) [REDACTED] here's a copy for you and

1 the defense, and I believe that's Appellate Exhibit XI. [MJ handed
2 both counsel a copy of Appellate Exhibit XI.]

3 Furthermore, the defense filed a motion for a change of
4 venue, that would be to change the location of this trial. Defense,
5 the government filed a response to the sentence to change the
6 location of the trial. For the agreement, the parties had decided
7 the motion without conducting a hearing; we did it by email on the
8 4th of August. I denied the motion and provided copies of my denial
9 to both sides and at this time, I will make my ruling, defense
10 motion, government motion and the relevant email traffic as Appellate
11 Exhibit XIX.

12 Defense, you indicated that you wish to file a motion for
13 me to reconsider that motion I just referred to?

14 CDC: That's correct, Your Honor.

15 MJ: Do you have a copy of the motion for the court reporter?

16 CDC: We've provided it to the court reporter, Your Honor.

17 MJ: That will be Appellate Exhibit XX. [Reporter handed
18 document to MJ.]

19 Trial counsel, do you have a written response?

20 ATC: No, Your Honor.

21 MJ: Defense, what is new in your motion for reconsideration
22 that I did not have before me when I decided the original motion?

1 CDC: What is new, Your Honor, are the discussions with respect
2 to the witnesses and their import. And additionally, we have noted
3 one other witness, Lieutenant Colonel (S)(b)(1-2) and we have indicated
4 in the motion for reconsideration that the court's interpretation of
5 the law in this area was in error.

6 MJ: What part was in error?

7 CDC: If I may, Your Honor, approach the podium. There were
8 multiple areas, Your Honor, where we respectfully disagreed with the
9 court. Allow me to enumerate them if I can.

10 MJ: Sure.

11 CDC: Firstly, with respect to the civilian witnesses who we
12 identified as being material witnesses, that is to say the civilian
13 expert, Dr. (S)(b)(1-4) the warden of the Buckingham Prison, the prison
14 guard who worked with Staff Sergeant Frederick, his wife, his
15 stepdaughter and the local pastor, all of these persons wish to
16 testify and provide material evidence to the court. They have,
17 however, advised the court by way of declaration and the pain of
18 penalty and perjury, that they are unwilling to travel to Iraq. Now,
19 the court, in responding to their declaration said that they were
20 choosing not to go to Iraq. In other words, the court imposed a
21 burden upon the witnesses as thought going to Iraq were somehow----

22 MJ: What was the legal error?

1 CDC: The legal error was that, I can suggest to you, United
2 States versus Nivens, which is a case that cites United States versus
3 Hodge, Hodge being a Vietnam-era case. There, the court said that
4 not going into a war zone is not a matter of choice, that it is
5 tantamount to the equivalent of a witness who is diseased or near
6 death. And therefore, the court's ruling that this was over a choice
7 on the part of these civilians we believe to be legal error.

8 MJ: Well, let me ask you, there is nothing physically
9 preventing them from flying to Iraq, true?

10 CDC: Yes, Your Honor.

11 MJ: The government will provide resources and transportation
12 that they've done for other cases and for other civilians, true?

13 CDC: Well, not true.

14 MJ: Well, you're saying the government will physically prevent
15 them from showing up?

16 CDC: No, other civilians, I do not believe are analogous to
17 these witnesses. The civilians who go into Iraq do so either at the
18 behest of the government because they're government employees or
19 because they have an interest in financial gain and are willing to
20 subordinate their personal interests to that.

21 MJ: Mr. (b)(4) would it surprise you to know in a case held in
22 Tikrit, Iraq, that the family members of both the accused and the

1 victim voluntarily came to Tikrit and testified in the trial and sat
2 the whole time?

3 CDC: Nothing in the law surprises me.

4 MJ: So what I'm simply saying is, there is the physical
5 capability of transporting them to Iraq if they so chose to go.

6 CDC: Yes, Your Honor, but the case law is otherwise.

7 MJ: I'm not talking about the case law. I'm talking about,
8 they can get on a plane in CONUS, fly commercial to Kuwait to get
9 picked by MILAIR in Kuwait and go to Baghdad. There is nothing
10 physically preventing them from doing that, true?

11 CDC: True, but it's not the legal test.

12 MJ: I didn't ask you that. Now, they're choosing not to come
13 because they say it's not safe.

14 CDC: Well, true. They say it's not safe because common sense
15 dictates that, Your Honor.

16 MJ: And therefore, I should move the trial out of Baghdad to
17 someplace that they're willing to come to.

18 CDC: That's one of the reasons you should move the trial out of
19 Baghdad, yes.

20 MJ: And so, where should I move it to to accommodate their
21 desires?

1 CDC: Well, you can move it anywhere, and if you intend to keep
2 the case, Your Honor, you could move it to Kuwait. You were there
3 with great regularity. It's just across the border. It's far safer
4 than Iraq. We can get many more witnesses there in person, and
5 you're there on a regular and recurring basis.

6 MJ: But you would agree with me that the court has no subpoena
7 power over civilians to go to any place outside of the continental
8 United States.

9 CDC: United States versus Bennett.

10 MJ: Is that a "yes"?

11 CDC: Yes.

12 MJ: Okay. And then, so what happens if it goes to Kuwait and
13 they say, "Well, I'm not going to show up there because I don't want
14 to"? Isn't this, at the end of the day, is that this case was
15 started in Baghdad, Iraq, and I know that's not dispositive, and then
16 the court posture of the case, these are sentencing witnesses, and
17 they will be provided transportation if they wish to come, and
18 they're choosing not to come because in their view, it's not safe to
19 come. At the end of the day, what is wrong with that analysis?

20 CDC: Here's is what is wrong, Your Honor, is it's contradictory
21 to United States versus Hodge, where the court said that attending a
22 trial in a combat zone presents such grave danger to a civilian

1 witness that we can properly compare his situation, namely, the
2 witness, to one who, because of illness or disease, would be in grave
3 danger to compel to attend.

4 MJ: I'm not compelling them to attend. If they want to come,
5 they come, if they don't, they don't.

6 CDC: The point of that language, Your Honor, is that it is not a
7 question of whether they are willing to come. It is a recognition
8 that no one need to go into a combat zone to discharge their
9 responsibilities as a witness if there is an alternative that can
10 meet the ends of justice.

11 MJ: Mr. (b)(6)-7, wouldn't that apply to every case in a forward
12 and deployed environment?

13 CDC: I don't represent people in every case, Your Honor.

14 MJ: I didn't ask you that. What you're telling me is that
15 because these witnesses choose not to go to Iraq because they believe
16 it's too unsafe, therefore, they've now chosen where the trial is
17 going to be. And my answer to you is, what happens when they say--
18 under your analysis, you're letting defense sentencing witnesses
19 dictate the place of trial based on choice. They're choosing, "I
20 don't want to go to Iraq," maybe they won't, I don't know. They may
21 go to Germany. But the bottom line is, they can't be forced to go
22 anywhere outside the continental United States, which tells me is the

1 end result of this logic that you're giving me is that when defense
2 sentencing witnesses don't want to come to a particular location,
3 therefore, we move the trial to where they will come.

4 CDC: No, Your Honor, it's far more complex than that, far more
5 complex than that. We are in a place where there are no witnesses.
6 All the witnesses are going to come to Iraq in this trial, in this
7 sentencing proceeding. And here is what these civilians, Your Honor,
8 are going to have to sign, if I may, may the indulgence of the court.

9 MJ: Go ahead.

10 CDC: "You will be traveling into a combat zone in a dangerous
11 part of the world. By agreeing to come to Iraq, you assume several
12 risks, including, but not limited to, serious injury or death. You
13 will again be potential targets of enemy insurgents who have been
14 known to fire weapons, rifles and rocket propelled grenades and to
15 plant improvised explosive devices alongside roads traveled by
16 coalition forces. Before allowing you to enter Iraq, you must agree
17 to hold the United States harmless, assume the risks set forth above
18 and affirmatively waive your right to sue the Army or any other
19 government agency for injury or death."

20 Now, I suggest to you respectfully, Your Honor----

21 MJ: And what is that piece of paper?

1 CDC: This is the hold harmless document that every civilian is
2 required to sign going into the country of Iraq by the United States
3 if they are to be transported into Iraq.

4 MJ: You need to make that an appellate exhibit. It will be
5 XXI.

6 CDC: I will be happy to do so. Your Honor, I can give you a
7 better copy eventually. We had difficulty taking this down off of
8 the computer.

9 MJ: Government, do you take any issue of this document as it
10 purports to be?

11 ATC: No, Your Honor.

12 MJ: I'll consider it.

13 CDC: I'm not trying to dictate terms of the arrangement, because
14 this is a frivolous claim, Your Honor. The United States recognizes
15 the danger, implicit danger associated with entering into the country
16 of Iraq, and in so doing, has held itself harmless. We don't do that
17 in Korea. We don't do that in Germany. We don't do that in Kuwait.
18 It's completely reasonable for you, as a bare minimum, to have this
19 trial in Kuwait. I can't tell you that people won't come to Kuwait,
20 but I can tell you with great certainty that they are far more likely
21 to come to Kuwait than they are willing to go into Iraq, and that's
22 not unreasonable. In fact, I would say with some certainty, Your

1 Honor, that to suggest that they're unwillingness to go to Iraq is a
2 volitional act on their part, which therefore, conveys some sense of
3 blame, is inconsistent with the reality of the marketplace there.

4 MJ: That's not blame that's consistent with a choice.

5 CDC: I don't believe they have a choice, Your Honor.

6 MJ: We'll have to agree to disagree.

7 CDC: Well, I do so respectfully, of course.

8 MJ: No, I understand, that's fine.

9 CDC: But with respect to those civilian witnesses, I believe
10 that the Vietnam case of Hodge says it all. And you know, also,
11 Judge, with regard to travel these days and times, this isn't
12 Vietnam. This is a country that is surrounded by non-combative
13 circumstances where the Army has a significant presence at Camp Doha
14 where you try cases on a regular basis just south of there. We are
15 all here today. We can be in the United States as is evidenced by
16 the England case, and that case is moving at a pace without
17 difficulty. Well, it's moving at a pace.

18 MJ: It's moving.

19 CDC: I perhaps was excessive in my use of the language, Your
20 Honor. It's moving a pace and it is there and will remain there.
21 So, it's not as though things can't be done in CONUS or in Kuwait.
22 It is rather that conscious choices are being made to keep it there.

1 Now, may I say with all due respect to the court that the decision to
2 initiate the case in Iraq was perhaps reasonable given the fact that
3 the incident arose in Iraq. However, the case has become
4 substantially politicized since then, Your Honor. And in fact, now,
5 we are told 2 days ago by General Kimmitt that these trials must be
6 held in Iraq because the Iraqis are a people who are slightly
7 paranoid and would feel there was a conspiracy if we moved it from
8 there. Even the government suggested that one of the reasons----

9 MJ: Just so that I--A, I've never heard that remark, and B,
10 with all due respect to General Kimmitt, I don't care what he thinks.

11 CDC: Very well.

12 MJ: It's not his decision.

13 CDC: Understood.

14 MJ: He can want to have it on the moon for all I care, which I
15 don't at all. So whatever his view of this case is is fine, but his
16 personal views have nothing to do with the decision of this court.
17 Go ahead.

18 CDC: But there is, Your Honor, implicit in these proceedings, an
19 impression that is meant to be left by bringing this case to Iraq.
20 And what I am suggesting to you respectfully, that there is a
21 political component to this case. Even the government in their
22 response to our initial brief said that one of the principal reasons

1 for keeping the case in Iraq was to demonstrate to the Arab world in
2 General and the Iraqis, specifically, that we had a transparent
3 system of justice. Now, there is a paradox here, Your Honor, because
4 if all these witnesses do not attend, we're going to demonstrate a
5 transparency of justice to people who have not known it for decades,
6 will we at the same time deny the individual American justice that
7 would normally be accorded to an American elsewhere all because we
8 have this compelling need to maintain this trial in Iraq. I can
9 perceive of no operational necessity which requires this trial to be
10 in Iraq.

11 MJ: On your motion for reconsideration, you indicate the
12 civilian witnesses are the ones, I'm saying "choose," you're saying
13 "being forced," and then there's a number of military witnesses. You
14 would agree with me that they will not get this option. The military
15 witnesses are going to be told where they need to be.

16 CDC: Absolutely.

17 MJ: So that part of your argument doesn't apply to them.

18 CDC: You're quite right, obviously, yes.

19 MJ: And for those in your earlier brief that invoked their
20 31(b) rights, absent a grant of immunity, they are unavailable for at
21 least legal reasons unconnected with the locus of trial.

22 CDC: And we're trying to address that later on.

1 MJ: But what we're talking about here, is you're saying is
2 they're no operational necessity to try this case in Iraq, but isn't
3 the default place of trial where the convening authority puts it and
4 that you have the burden to show it should be moved?

5 CDC: Yes.

6 MJ: And therefore, the burden is you, not to show why it needs
7 to be moved, not them to show it is operational necessity.

8 CDC: Quite agree, and by a preponderance of the evidence
9 standard, we have to do that.

10 MJ: And what basically, what I'm hearing you tell me is the
11 primary reason to move this trial location is the civilian witnesses'
12 lack of attendance, and you won't say why. That's what you're
13 telling me, the primary reason is because civilian witnesses will not
14 attend the trial in Iraq.

15 CDC: Civilian witnesses will not attend the trial in Iraq, that
16 is correct.

17 MJ: Government, what's wrong with moving this thing to Kuwait?

18 ATC: Your Honor, it's the government's position that it is the
19 default position of where the convening authority puts it, and the
20 defense has to meet the burden. On top of the burden of, they have
21 to show why it needs to be moved, you also have to take a look at the
22 posture of the case which is a sentencing case, so it's under R.C.M.

1 1001 which clearly points to the fact that of the preference of
2 alternative forms of testimony as opposed to necessarily having live
3 witnesses. When the Rules of Court-Martial were set up, it's clear
4 from the wording of 1001 that unless there's a showing of necessity
5 of why this person needs to be taken as a live witness, that other
6 forms are actually the preferred means of taking that evidence. So,
7 as far as...two things, one, the default position of where the
8 convening authority puts it, and second, the posture of the case
9 dictates that unless they can show why this--there's a particular
10 civilian witness that needs to be taken live, other than that, it
11 should default to Baghdad, Iraq.

12 MJ: What do you say to that, Mr. Myers?

13 CDC: Well, I say, Your Honor, that----

14 MJ: You would agree, we're talking about a sentencing case
15 here.

16 CDC: Oh yes, of course, we are. I've disclosed that, too.

17 MJ: No, I'm with you. And the rules do permit alternative
18 forms of testimony that the government indicated they're perfectly
19 willing to participate in. Doesn't that somewhat obviate any
20 prejudice suffered by the lack of personal attendance?

21 CDC: Well, it depends on how you interpret 1001(e). The
22 foundation upon which 1001(e) is built is a notion is that it's an

1 indigent status kind of language. That is to say, it reflects
2 witnesses brought at government expense. That's what it says. And
3 the government is spending hundreds and hundreds of thousands of
4 dollars for these cases, and they are hanging their hat on 1001(e),
5 which is really an economic section of the Code. It says that you
6 are limited in what you can do as a judge with respect to your
7 discretion, if the witnesses come at government expense. So, the
8 purpose of that Code section is to ameliorate costs associated with
9 the production of witnesses. That's the underpinning of that
10 section.

11 MJ: But in this case, there's no issue about them paying for
12 the witness to show up. It's simply saying if the witnesses don't
13 show up...it's one thing to say, the government says, "I'm not going
14 to produce these witnesses because it costs too much money," which is
15 I think is what you're saying, and therefore, use these other means.
16 That's where the government is unwilling to pay. And assuming that's
17 a justified position, then you say, use alternate means. But the
18 government is perfectly willing to pay in this case. And so you are
19 choosing, not you, but the defense says, "I want these witnesses
20 here. They won't come, therefore, move the trial to them." And I
21 come back to the idea is, that when this trial was started, it
22 started in Baghdad. The expectation was, because as you're well

1 aware, the default is it usually ends where it starts. I'm not aware
2 of any trial that moves sua sponte somewhere else. Be all that as it
3 may, it started in Baghdad. The offenses occurred in Baghdad. The
4 convening authority has directed Baghdad as a site, and so
5 everybody's on notice that this is where it's going to be. And now
6 you want it to be moved somewhere else, even though the Rule permits
7 and the government has done nothing to prevent you from bringing
8 these witnesses in, and has both agreed to stipulate if they won't
9 come in or pay if they do. And you're saying I----

10 CDC: They haven't agreed to stip--excuse me, Judge, I didn't
11 mean to interrupt you.

12 MJ: They don't agree to stipulate? I thought they did agree?

13 CDC: Stipulation of fact.

14 ATC: In our brief, we offered alternative forms of testimony, to
15 include depositions and stipulations of fact, if that's agreeable to
16 the parties.

17 CDC: Only if it's agreeable. And the stipulations of fact that
18 we would anticipate coming from people may not be satisfactory to the
19 government.

20 MJ: Mr. (b)(6) let me ask you this. If a witness testifies and
21 we move this somewhere where the witness shows up and testifies,
22 that's testimonial evidence, true?

1 CDC: Sure.

2 MJ: And then their opinion, they'll give whatever their opinion
3 is, true?

4 CDC: Of course.

5 MJ: And so, the government says, we're going to stipulate to
6 their expected testimony. Are they supposed to stipulate to what
7 they say is fact?

8 CDC: Well, I think the Rule suggests that it has to be a
9 stipulation of fact, Your Honor.

10 ATC: Under 1001, that is correct, that you have to stipulate
11 that it's fact as opposed to expected testimony if----

12 MJ: Well, I understand what the Rule says, but what you're
13 saying the fact would be what? Give me an example of what you want
14 them to stipulate to as a fact?

15 CDC: Well, I certainly want them to stipulate to the fact that
16 the warden from Buckingham is going to testify that the procedures
17 employed at Abu Ghraib were simply so far out of bounds of what
18 normal prison conduct is that----

19 MJ: But that sounds to me like your stipulation of fact of what
20 he would say.

21 CDC: What are you going to do in a stipulation of fact except
22 say what he is going to say?

1 MJ: Okay, but then I think we're parsing the terms here, but
2 okay. And government, do you have any objections--

3 ATC: I have no objection, Your Honor.

4 MJ: ----to stipulating as fact of what these people would say?

5 ATC: That's correct, Your Honor.

6 CDC: Well, is that carte blanche, that we just simply give the
7 government whatever we want our witnesses to say?

8 MJ: Well, no, then they call the witness up and see what the
9 witness will say then. I mean, don't you think that's the way the
10 system works?

11 CDC: No.

12 MJ: No, wait a minute, are you telling me that you think you
13 ought to make them sign something that they can't confirm as true?

14 CDC: No, not at all, not at all. I'm simply saying that they
15 may find that the stipulation of fact is unsatisfactory for their
16 purposes, and then I'm left with what? A stipulation of fact is not
17 a solution in this case, I do not believe, Your Honor, because it's
18 too high a standard. If it were a stipulation of expected testimony,
19 I think I would be on a lot shakier ground. But a stipulation of
20 fact----

(b)(6)-7

1 MJ: Mr. [REDACTED] as you define "stipulation of fact" in this
2 case, it strikes to me as the government would have no problem, am I
3 wrong?

4 ATC: You're not wrong, Your Honor.

5 MJ: Draft them up, give it to them, and they'll sign it.

6 CDC: That doesn't get us----

7 MJ: I know, we've done a digression, I understand that.

8 CDC: That really doesn't get us anywhere.

9 MJ: So I mean, the bottom line is, the Rule does contemplate in
10 sentencing proceedings alternative forms of testimony.

11 CDC: Oh, it does, indeed, but the preface to it is that the
12 government--the reason for that is that the government is going to
13 pay for it, you see. I mean, the idea is, under 1001(e), if you'll
14 look at the prefatory remarks, Your Honor.

15 MJ: Go ahead.

16 CDC: So if you'll look at the prefatory remarks, it refers to
17 the initiation of this particular provision only in those cases where
18 the government is paying for the expense. You know, John Kerry and
19 George Bush's kids never have to worry about 1001(e), Your Honor.

20 MJ: I'm not sure what relevance that has, Mr. [REDACTED] But if
21 you read the Rule, it says, "A witness may be produced to testify
22 during pre-sentence proceedings through a subpoena or travel orders

1 at government expense only if....," and then they have all these
2 requirements, other forms aren't acceptable. But what I'm saying is,
3 that's not being triggered because the government is going to pay for
4 this.

5 CDC: Well, it is being triggered, it's being triggered because
6 the government's paying for it.

7 MJ: Okay, but you're saying is that the subparagraph Delta,
8 "Other forms of evidence would not be sufficient to meet the needs of
9 the court-martial to determine an appropriate sentence," doesn't
10 apply because the government is willing to pay.

11 CDC: No, I'm not, Your Honor, at all. What I'm suggesting to
12 you, if the government were not paying for these witnesses, that
13 section would have no application to this accused. We're not paying.
14 That section would have no application. If, for example, the accused
15 were to pay for his own witnesses, your standard of review would not
16 be----

17 MJ: Well, there is no standard of review because I don't review
18 it.

19 CDC: Well, your standard of analysis with respect to what
20 witnesses will be produced by you is a different standard than the
21 1001(e) standard.

1 MJ: But if the government is not paying and you're not asking
2 me to make the government pay, then I don't review how the witness
3 got there. They just show up, right?

4 CDC: Well, no, not really. You still, if you'll look at the
5 preceding paragraph of that section, 1001(e), you still have an
6 obligation to order production, but the accused pays for it.

7 MJ: What I'm simply saying is that if you don't want the
8 government to pay for a witness, how that witness gets there is not
9 my call.

10 CDC: Correct.

11 MJ: That's all I'm saying. Now, the witness may show up and
12 have irrelevant testimony, then that is my call. But that's a non-
13 issue. What I'm simply saying here, is that they're willing to pay.
14 The witnesses are not willing to come. That's the starting point.

15 CDC: At the moment.

16 MJ: You say, "At the moment," well, that's what I got.

17 CDC: Right.

18 MJ: And then they've said they'll enter into a stipulation of
19 fact containing the matters to which the witness is expected to
20 testify. They said they'll do that, okay. They've also said they'll
21 introduce whatever else, alternative forms of testimony you want to

1 do. But all that being said, you still think the trial needs these
2 live witnesses for someplace else.

3 CDC: Well, I do, and I do for several reasons. And if we do
4 apply at the moment, 1001(e), Article 46 provides for equal access to
5 witnesses and I believe the Hodge case changes the status of these
6 civilians from choosing not to be there to giving them a right not to
7 be there. In addition to that, Your Honor, these are essential
8 witnesses for venue purposes.

9 MJ: But Mr. (S)(4-7) they would also have a right not to be there
10 in Germany, true, or Kuwait?

11 CDC: They would, Your Honor, but they have told you specifically
12 the reason they're not going to Iraq is because of safety
13 considerations.

14 MJ: No, but I'm saying is, under your analysis, is that they
15 cannot be forced to be there. They cannot be forced to be there,
16 therefore you have a right to move the trial to someplace they can be
17 forced to be at.

18 CDC: No, I am saying that in their declarations, I want to
19 testify, but I will not go to Iraq.

20 MJ: That's their choice.

21 CDC: Of course, but it also is the court's choice as to whether
22 or not that conveys the justice necessary for this accused. And I'm

1 respectfully submitting to you that it does not, and that in fact, it
2 is playing into a political as to rather than a justice center
3 decision.

4 MJ: But Mr. (S)(b)(1)-(4) let me ask you this, in your list here, you
5 have all sorts of people, not just the ones you're talking about.
6 Now, Mr. (S)(b)(1)-(4) is he going to show up?

7 CDC: No, he won't.

8 MJ: Anywhere?

9 CDC: The only way I'm going to get Mr. (S)(b)(1)-(4) is if you
10 move it to CONUS and is subpoenaed and testimonial immunity. But I
11 need him, he's a material witness.

12 MJ: Let me ask this, how about these two inmates? Will they
13 ever come to Kuwait?

14 CDC: No, they are not going to come to Kuwait, obviously.

15 MJ: Well, now are you telling me that you want this moved to
16 CONUS?

17 CDC: I want it moved anywhere the people who are coming to serve
18 justice don't have to worry about being dead to do it. That's where
19 I want it. And it's entirely up to the convening authority where
20 that happens. All you need to say is, "Convening authority, I don't
21 want it in Iraq." It's not, as I read the Rule, Your Honor,
22 respectfully, not your call as to----

1 MJ: You're right. I simply say where it can't be. And the
2 convening authority has got to make some----

3 CDC: Some adjustment based upon his view of the world.

4 MJ: And if I say, "Well, let's not do it in Iraq because I want
5 it in a more secure location," and then we decide to go to Kuwait,
6 but Kuwait is not secure, there's terrorists there. So then, we
7 start on a road trip, and unless you go to CONUS, of course, the
8 people in the World Trade Center probably thought that was safe that
9 day, too.

10 CDC: I mean, we can reduce any argument to the absurd.

11 MJ: But you're the one that keeps changing the argument. You
12 say, "On one hand, I want (b)(6)-(b)(7) there, but he's not coming
13 anywhere without a subpoena." That limits it to CONUS, right?

14 CDC: Well, this is a very difficult setting that we're all in
15 here, Judge, because by keeping it in Iraq, you effectively have
16 denied material witnesses. Mr. (b)(6)-(b)(7) in my case for example,
17 we believe can provide very material information, and his credibility
18 is at issue. And therefore, the only place the trial can be is in
19 the United States.

20 MJ: So, now you're telling me to move it to the United States,
21 not Kuwait.

22 CDC: Your Honor....

1 MJ: You're suggesting.

2 CDC: I would never tell you anything.

3 MJ: Understand, but I'm saying----

4 CDC: I hope I haven't conveyed that.

5 MJ: No, I understand, but now basically what you're saying,

6 it's got to go to the United States where there's subpoena power.

7 CDC: Let me put it to you this way, Your Honor, the best place,

8 as is evidenced by the hoards attending this 32 in the England trial,

9 to bring people in, to meet the ends of justice is the United States,

10 yes. But, on a scale of 1 to 10, 10 being the United States....

11 MJ: And 1 being Iraq.

12 CDC: Or zero being Iraq.

13 MJ: Zero, okay.

14 CDC: Kuwait's at 6, Germany's at 8, the United States is at 10,

15 and there's a big gap between zero and 6, and the reason is, we'll

16 get the people there in a safe and secure environment. They won't

17 have to worry about bombs falling on their heads or rocket propelled

18 grenades or anything else, the logistics of getting in there. I

19 mean, I just can't wait for the first civilian to spiral into Baghdad

20 in a C-130 just to be a witness.

21 MJ: If you attend, you won't be the first.

1 CDC: I understand. I understand. I'm talking about civilian
2 witnesses in this trial.

3 MJ: They won't be the first, either.

4 CDC: And I understand that, and I can't account for other's
5 decisions, but I can tell you what my witnesses are going to do in
6 this trial, and we have to be fact specific with regard to this
7 trial.

8 MJ: But isn't there a certain amount of this though, is that if
9 other people can come in, that it is some indication of choice?

10 CDC: Your Honor, that's sue generous and the law, it just
11 doesn't work. Just because 10 guys weren't prosecuted and you were
12 is not a reason to have your conviction overturned.

13 MJ: But you're telling me is that I should move this trial
14 because these people are being forced not to come by the conditions
15 in Iraq. What you're telling me----

16 CDC: The words are important, judge----

17 MJ: What you're telling me, it's not their choice. It's like,
18 you equated your case and Vietnam, it's not their choice, that it
19 would be like that to somebody on their death bed to go to a trial,
20 which therefore, you're saying, by placing the trial in Baghdad, we
21 are affirmatively...let me rephrase that, the conditions are

1 affirmatively preventing them from coming in to testify on behalf of
2 Staff Sergeant Frederick.

3 CDC: That's correct.

4 MJ: At the end of the day, that's what you're----

5 CDC: And I'll tell you why, when you're talking about a mom or a
6 dad coming in, that's one thing. Parents do a lot of things for
7 their kids. But am I supposed to ask the warden of this prison to
8 zip into Iraq so that his family can be exposed to that? Or the
9 prison guard, do I tell him this meets the ends of justice, sir? "I
10 know that you could be dead. Tell your wife and kids that you'll be
11 back in 5 days?" I mean, what do I say to these people, Your Honor,
12 that they're making a bad choice? This isn't a choice. This is an
13 opposite choice. These are material and essential witnesses, and
14 I've watched you interact with witnesses. I know you ask questions,
15 and I know that you're probative. You're not going to get that
16 chance, Your Honor, with this entire cadre of witnesses. And
17 assuming we get Dr. (b)(6)-7 in this case, he will provide
18 insights that are not available anywhere else. And you need to hear
19 that this man is not some rogue. You need to hear that for his
20 entire life he's been a good and decent person, that he was corrupted
21 in a corrupt circumstance and is willing to admit it, that this takes

1 a form of courage. I'm not trying to elevate him to a higher status
2 than he deserves, but he does deserve to have these people who have
3 cared about him and loved him there to tell you these things in
4 something other than a deposition. There is no way you can take the
5 written word and convey the sense of a lifetime friend or an employer
6 who was aghast that this could have happened. It can't be done, and
7 it can't be done with this expert, either, who will explain to all of
8 us what the whole world has asked, how could this have happened with
9 a guy like Chip Frederick? And that inquiry is relevant, and it's
10 not going to come from a deposition in any meaningful way because
11 it's not interactive with you and you won't share that experience.

12 And judges are good at cutting to the chase, but they're
13 not divorced from emotion or from compassion or from understanding
14 what witnesses say. And I simply believe that the cadre of witnesses
15 we've put together with regard to this case are essential, material
16 witnesses. And that is the test under 1001(e) under the case law,
17 the Thornton case, I believe, or Sweeney, one of the two, for moving
18 a trial. It doesn't matter that there are 20 other witnesses that
19 are coming. The question becomes, is there a material, essential
20 witness? And I submit to you respectfully, Your Honor, that in this
21 case, because it is sentencing, that the material question you must
22 ask yourself and answer is, what does all this mean in terms of a

1 sentence? And we submit to you that these are essential witnesses
2 within the meaning of the Rule and that their absence would be a
3 fatal flaw in the proceedings, and therefore, we ask you to abate
4 these proceedings in Iraq and cause the convening authority to move
5 them elsewhere. The convening authority may choose Kuwait. I have
6 no control over that. He may choose CONUS. He may choose Germany.
7 I don't know what he would choose because that has not been
8 propounded to him.

9 I'd just say this to you, Your Honor, this is a good system
10 of justice. I've believed in it for 37 years, and it works. And it
11 would be a tragedy if we did anything to make it appear that it
12 doesn't work. And I humbly suggest to you that the best way to do
13 that is balance the interests, the political interests against the
14 interests of the individual, move it out of Iraq, create the
15 transparency that you need, and have a fair sentencing proceeding.
16 And that is the position we have adopted for the reasons I have
17 indicated. Whether you do or don't apply 1001(e) is up to you
18 because here is what I believe. I believe that under the Rule, if
19 you don't have 1001(e), you were then left with broad discretion.
20 And that broad discretion has been summarized in United States versus
21 Combs, 20 M.J. 441 at page 442. And its, "Irrespective of 1001(e),
22 among the factors to be considered by the trial judge or whether the

1 testimony relates to disputed matter, whether the government is
2 willing to stipulate to the testimony as fact, whether there is other
3 live testimony available to appellant on the same subject, whether
4 the testimony is cumulative, whether there are practical difficulties
5 in producing the witnesses, whether the credibility of the witness is
6 significant, whether the request is timely." Well, as you know,
7 since May I've been asking for a change of venue, you have that
8 document before you with the convening authority.

9 We have no disagreement with what we're doing here. My
10 client has made a determination that he is, in fact, guilty of
11 certain charges and specifications. We simply ask, Your Honor, that
12 we go to a place that is consistent with American justice. Many with
13 M-16s in a courtroom in a convention center that has been jury-rigged
14 to look like a court with perils of death coming in and out. Your
15 Honor, I also have worn the uniform in this country a long time ago.
16 I'm very proud, I might add. But we cannot ask our citizens who are
17 civilians to go into a war zone and subject themselves to the pain
18 and penalty of death merely to discharge their responsibilities, and
19 I hope that you will take that into account as you rule on this
20 motion. I view this motion as critically important, not only for the
21 near term, but also for the long term, and I want to thank you for
22 allowing me to take the time to talk with you.

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1 MJ: Trial counsel, do you have anything to add?

2 ATC: No, Your Honor, other than what we stated before, that the
3 posture of 1001 allows for all kinds of forms of testimony, and the
4 government is more than willing to work with the court and with the
5 defense to provide alternative forms of testimony, whether that be in
6 the forms of written stipulations, depositions, or even possibly
7 VTCs. Thank you, Your Honor.

8 MJ: After listening to the defense position and reading the
9 brief, the court concludes that the motion for reconsideration in
10 essence is a repeat of the previous motion for appropriate relief,
11 and therefore denies the request to reconsider the court's original
12 ruling, meaning the court's original ruling denying the motion to
13 move the trial remains in effect.

14 Defense, do you have any further motions at this time?

15 CDC: We do, Your Honor. Actually, we have three in number. I
16 think we can dispose of the motion to compel discovery rather
17 quickly, since we actually have an agreement in that regard.

18 MJ: Rather than cutting another tree down, during an 802, we
19 discussed the outstanding discovery issues in this case. Correct me
20 if I'm wrong, trial counsel, but there's the Schlessinger, Church and
21 Fay investigations pending, which you will provide copies to the
22 defense not later than 10 September.

1 ATC: That's correct, Your Honor.

2 MJ: Defense, your understanding?

3 CDC: Yes, sir.

4 MJ: There's that issue about the classified server being
5 viewed. I believe the previous suspense date of that was 1 December.

6 ATC: That's correct, Your Honor.

7 MJ: But of course in this case, the potential trial date that
8 we talked about in the 802 was 20 October.

9 ATC: That's correct, Your Honor.

10 MJ: And you indicated at the 802 that keeping that trial date,
11 that it is within the realm of something that could happen, that
12 knowing that, that perhaps that will encourage a more expeditious
13 review of said material and that you can provide relevant said
14 material from that server to the defense not later than the 1st of
15 October, rough and dirty?

16 ATC: That's correct. The government will do everything to
17 expedite the searching of that computer server.

18 MJ: We'll come back to the trial date issue.

19 Are those the outstanding discovery issues that we have
20 had?

21 CDC: As I see it, yes.

22 ATC: Yes, Your Honor.

1 MJ: And I'll note to--this is while we're on the subject of the
2 trial date, assuming the trial date stays 20 October in Baghdad, at
3 the 802, we discussed witness production. Mr. ^{(S)(U-7)} [REDACTED] anybody who is
4 a potentially, is a Reserve component soldier, that you want to have
5 as a witness at the trial, and of course, nobody knows whether
6 they're actually on active duty or if they've reverted to Reserve
7 status, you supply that list within one week of today to the
8 government. And at this point, I'm not going to require a summary of
9 their testimony. Government, any of those you're going to provide,
10 make sure they're on active duty in time to be ordered to appear in
11 Baghdad. If you're going to deny any, deny them within 24 hours.
12 Provide them the summary, defense, and then if you deny it again,
13 send it to me. If both sides agree, I can decide about reasonable
14 availability based on email?

15 ATC: Yes, Your Honor.

16 CDC: Right, Your Honor.

17 MJ: And I'm just talking about this issue because of the
18 difficulty of ordering Reservists back on active duty.

19 ATC: That's correct, Your Honor.

20 MJ: All that being said, at the 802, we also discussed General
21 Karpinski, and defense, you indicated that you wanted General
22 Karpinski at the trial.

1 CDC: That's correct.

2 MJ: And government, you allege that currently General Karpinski
3 appears to be in her civilian status.

4 ATC: That's correct, Your Honor.

5 MJ: At least not in Title 10 status.

6 ATC: That's correct.

7 MJ: Is she National Guard?

8 ATC: No, I believe she's Reserve, Your Honor.

9 MJ: Okay, so you're on notice that she's to be produced, and
10 that means whatever it takes to make it happen.

11 ATC: October 20th, Your Honor.

12 MJ: And I would strongly suggest to the government that despite
13 representations that people may be willing to come, making them on
14 active duty and ordering them to come will ensure they're there, and
15 there may not be a last minute, perhaps, change of plans.

16 ATC: Yes, Your Honor.

17 MJ: So, General Karpinski is on your list now.

18 ATC: Yes, Your Honor.

19 MJ: Any other out-of-theater witnesses that are willing to
20 come, understanding the issue we just got done discussing, provide to
21 the government not later than 2 October, because that would be
22 assuming that the 1 October date means that you've provided that

1 information on the discovery issue on the server in such a time that
2 the 20 October date is still good. If for some reason the 20 October
3 date won't work because defense, you've not received the materials
4 that you need, I'll litigate that. Again, I can do that by email and
5 we can shuffle the trial date if necessary.

6 CDC: Your Honor, one small point that we haven't discussed.

7 MJ: Okay.

8 CDC: In light of your ruling, depositions will have to be worked
9 out with the government, as well, and we'll have to extenuate that
10 into the thought processes.

11 ATC: The government will have a representative in the United
12 States to facilitate that.

13 MJ: Well, it would seem to the court that...you're talking
14 about the video depositions?

15 CDC: Well, I think so, Your Honor. I want to convey more than
16 just the written word.

17 MJ: And the government has also offered to set up a VTC. I
18 thought I heard you say that, Captain ⁽⁵⁾⁽⁶⁾⁻² [REDACTED]

19 ATC: That's correct, Your Honor.

20 MJ: So they would be available----

21 ATC: If that's amenable to the----

22 MJ: ----live in that sense.

1 CDC: I didn't know that the court would be amenable to a VTC.

2 MJ: For sentencing, when the defense doesn't object to it, I
3 don't have a problem with that. Quite frankly, I'm not sure whether
4 you need to object or not, but that's a separate issue which we
5 didn't get into.

6 CDC: No, no.

7 MJ: I'm assuming you'd prefer a VTC to----

8 CDC: I want this to be a coherent presentation, Your Honor.

9 MJ: I understand. And what I might suggest though, is
10 that...you have options. Obviously, you can do the deposition route
11 with a deposing officer, or you simply could have witnesses present a
12 videotape, CD tape, stand alone document of what they want the court
13 to consider without going through the cross-examination and that
14 type, because I consider that no different than, for example, an
15 email on sentencing. So, I've thrown that out to you that I don't
16 necessarily...you have all the options available, obviously.

17 CDC: Very well.

18 MJ: But I'm not sure a formal deposition with a deposing
19 officer is necessarily necessary, and perhaps, I'm not trying your
20 case for you, Mr. Myers, but a CD or DVD of what they want the court
21 to consider as a stand alone document would also, obviously, be
22 acceptable.

1 CDC: Right, fair enough. I understand, and we've been working
2 well together, there's no problem there.

3 MJ: Anything else on discovery?

4 ATC: No, Your Honor.

5 MJ: And we're all clear on the trial dates?

6 ATC: Yes, Your Honor.

7 MJ: Okay.

8 CDC: Moving, if I could, along, Your Honor?

9 MJ: And I also want to clarify, we got a little ahead of
10 ourselves because there's still outstanding stuff that could impact
11 on the trial dates, and if it does, we'll----

12 CDC: I understand. It's not fixed on concrete, I understand
13 that, Judge, and I understand it will be a nice Christmas, though.

14 Your Honor, I'm moving on now to the request for
15 testimonial immunity, and that would be the appellate exhibit next in
16 order, which is a motion for appropriate relief.

17 MJ: It will be Appellate Exhibit XXII.

18 CDC: Your Honor, we have requested the testimonial immunity of
19 the convening authority, and it was denied for Lieutenant Colonel
20 (S)(b)-2 Major [REDACTED] Specialist Cruz, Specialist Kroll, Captain
21 [REDACTED] Specialist [REDACTED] and (S)(b)-7 [REDACTED] Now, I understand
22 that's a little different drill because it has to go to the United

1 States attorney. We are withdrawing Specialist (S)(61-7) from
2 consideration because we have found that the collateral testimony of
3 his suffices for our purposes in another proceeding. (S)(61-7)

4 MJ: And do I have any jurisdiction over Mr. (S)(61-7)

5 TC: No, Your Honor, however, the convening authority, if
6 they----

7 MJ: If he wanted to request the U.S. Attorney----

8 TC: Yes, sir, and in this event, the convening authority is not
9 going to recommend immunity and therefore is not required to forward
10 this to the Department of Justice. Your Honor, I also would provide
11 the government's denial----

12 MJ: I believe the denial was part of the brief, or am I
13 misreading?

14 TC: You may very well----

15 CDC: No, Your Honor, I think actually you got the SJA advice----

16 MJ: I got the SJA's and General Metz's denial, dated 17 August,
17 so let me just back up, just make sure we're all...and government,
18 you don't have any further paper on this issue?

19 TC: That's correct, Your Honor.

20 MJ: Paragraph 3 of the applicable law, where the Staff Judge
21 Advocate summarizes R.C.M. 704 Echo, does anybody disagree that

1 that's not the correct standard? Let me rephrase that, does
2 everybody agree that is the correct standard?

3 TC: Yes, sir.

4 MJ: Mr. [REDACTED] (b)(6)-(7)

5 CDC: Yes, that's right out of 704, that's the exact language.

6 MJ: Okay, yeah, it appears to verbatim, okay.
(b)(6)-(7)

7 CDC: The [REDACTED] matter is addressed in that paragraph, as
8 well, Your Honor. [Pause.] Is the government suggesting that you
9 can't order the convening authority to forward this document on to
10 the United States attorney?

11 MJ: Or are you suggesting that I can do that, but it's not the
12 convening authority's decision?

13 TC: Yes, sir, that's the accurate statement.

14 CDC: And I understand that part.

15 TC: Yes, sir.

16 CDC: It will be the United States attorney's decision.

17 TC: Right, yes, sir.

18 MJ: It's just a matter of whether they want to do it.

19 TC: Right, yes, sir.

20 MJ: Now, I do understand that part. Certainly, I can do
21 something with the military, but I'm not sure I can do much with Mr.

22 [REDACTED] (b)(6)-(7)

1 CDC: I don't think you can, frankly, but I do think the
2 procedure is for the convening authority to give a pre-advice to the
3 United States attorney, who in turn makes an independent justice
4 decision on the question of immunity. But that's what we're looking
5 for, Your Honor, in his case.

6 MJ: Let me just go through the...so the ones--you pulled some
7 out, but the ones you have, Colonel [REDACTED] Major [REDACTED]...
(S)(G)-2

8 CDC: Yes. I've spoken personally with Major [REDACTED]

9 MJ: No, just let me know which ones are still here.

10 CDC: Oh, okay.

11 MJ: Who, you said....

12 CDC: [REDACTED] (S)(G)-2 I pulled off. I was able to get collateral evidence
13 that was sufficient.

14 MJ: And trial counsel, the only person that has been given
15 immunity in this case is Specialist Sivits?

16 TC: That's correct, Your Honor.

17 MJ: And that was after his guilty plea.

18 TC: That's correct, Your Honor.

19 MJ: Any issue that these listed witnesses, and now I'm looking
20 at paragraph 2 Alpha, I'm going to the SJA's piece of paper.

21 TC: Yes, sir.

22 MJ: 2 Alpha through 2 Echo will invoke? Any issue about that?

1 TC: Major [REDACTED] we don't believe he will invoke.

2 CDC: He told me he would.

3 MJ: Everybody else will invoke?

4 TC: Obviously, Specialist [REDACTED] has been taken off. But yes,
5 sir, I believe that's an accurate statement. Everyone else would
6 invoke, at best.

7 MJ: Okay, reading Colonel [REDACTED]--and I'm going to come back to
8 Colonel [REDACTED] but let me just go through each one. Now, you say
9 Major [REDACTED] trial counsel, one of the reasons you turned this down
10 was that what he says several other people can say.

11 TC: Yes, sir, and again----

12 MJ: Defense, what is Major [REDACTED] going to say?

13 CDC: Well, I believe he's going to talk about messages that he
14 would forward up to Brigade, the deplorable conditions that existed
15 at Abu Ghraib for his troops, that he was 70 percent manned, that the
16 food he was receiving was tainted, that people were working around
17 the clock, basically, and that all in all, it was a nightmare. And
18 he will testify specifically to the death of the one Iraqi that has
19 gained some notoriety. He will testify to the role of Lieutenant
20 Colonel [REDACTED] he was the XO of the battalion.

21 MJ: Any issue that he would say those things?

(S)(b)(7)

1 TC: I am not certain about Major [REDACTED] knowledge of or even
2 relevancy of an individual that died within the hard site. With
3 regard to the other facts, sir, the government is willing to
4 stipulate as fact that the food was bad, the manning was lacking,
5 those issues.

6 MJ: Who else is going to say this stuff? You have in here that
7 Colonel [REDACTED] (S)(b)(7) says all sorts of people can say the same thing.

8 TC: Yes, sir.

9 MJ: And who are those people?

10 TC: Anyone that was assigned to the battalion at that time.
11 There are a number of individuals, individuals that we've extended on
12 active duty. Members of the 372d MP Company would be able to say any
13 of those things. In fact, they'd be more likely to have better
14 information since they were actually----

(S)(b)(7)

15 MJ: And where's your information of what Major [REDACTED] would
16 say?

17 CDC: In the conversation that I had with him.

18 MJ: But now he's talked to you, and now he wants to invoke.

19 CDC: That's what he told me.

20 TC: I'm sorry, Your Honor, I missed that last statement.

(b)(6)-7
1 MJ: Well, he said apparently he talked to Mr. [REDACTED] and then
2 says, "I'm not going to talk to anybody else. I want a lawyer," or
3 something to that effect.

4 CDC: Fair comment, Your Honor, I don't know the exact words, but
5 that's the import. As the XO of the battalion, you see, Your
6 Honor----

7 MJ: Whose XO was he?

8 CDC: Whose XO was he?

9 TC: Lieutenant Colonel [REDACTED]

(b)(6)-2
10 CDC: [REDACTED] yeah, right. He merely was a pivotal player
11 between himself, the 800th Brigade, the 205th Brigade, and he knows
12 about the ghost detainees and Lieutenant Colonel [REDACTED] role with
13 the ghost detainees. He will also testify that he protested the use
14 of ghost detainees vigorously.

(b)(6)-4
15 MJ: What's the relevance of that? I mean, Mr. [REDACTED], let me
16 just back up a second. There appears to have been a lot of problems,
17 I'm using that term generically because there hasn't been decisions
18 or judgments, in this entire prison system of Abu Ghraib, other
19 places in Iraq and other places.

20 CDC: Fair enough.

21 MJ: But how are these other problems relevant to this case on
22 sentencing?

1 CDC: With regard to, what I'm talking about, what happened at
2 Abu Ghraib with him. He's going to lay a foundation for why these
3 men, for example, the ghost detainees at Abu Ghraib. What happened
4 here, Your Honor, basically, was because there were no rules and
5 because these younger people, or lower enlisted, "younger" is
6 inappropriate because some people were older. These lower enlisted
7 guys who were used to some form of discipline, began to see that
8 there was nudity and men wandering around with women's panties and
9 men chained and handcuffed to cells and guys dying and being rolled
10 out the door with IVs in their arms and ghost detainees who they were
11 told not to talk about, it became pretty much a laissez-faire
12 environment. Now, I'm not suggesting that that necessarily excuses
13 conduct, but it was an incubator for it, and that's why I want him to
14 talk about it.

15 MJ: But he appears to have some culpability, true?

16 CDC: He was given a letter or...given a letter of reprimand, or
17 given a GOMOR or was recommended for a GOMOR.

18 TC: Your Honor, may I interject just very briefly?

19 MJ: Sure. (S) (b) 7

20 TC: Mr. [REDACTED] points out that this information doesn't excuse.

21 The standard is, it must be clearly exculpatory. The government is

(b)(6)-7

1 not ready to concede that Major [REDACTED] information is clearly
2 exculpatory.

3 MJ: Because we're talking about sentencing here again, right?

4 TC: Yes, sir.

5 MJ: So I mean, doesn't the term "exculpatory" somewhat----

6 TC: Yes, sir, what would be necessary for an appropriate
7 sentence.

8 CDC: I think "exculpatory" is broad enough to----

9 MJ: I think of "exculpatory" in terms of findings much more
10 than in mitigating and extenuating in terms of sentencing, okay.

11 Okay, and I know it's not the standard, but let me ask you
12 a practical question. What harm does it give to have Major [REDACTED]
13 come in here and testify?

14 TC: Sir, I'm certain----

15 MJ: And again, I understand, I know that's not the standard,
16 I'm just asking.

17 TC: No, I understand, sir.

18 MJ: It's a practical question, that's all.

19 TC: I don't know that it does us a great harm, unless there's
20 some incident that we aren't aware of. And believe me----

21 MJ: Of course, if you're not aware of it, it's hard to
22 prosecute.

1 TC: It is more difficult than you might imagine, sir. The
2 individuals who need the Fay report most are the defense counsel,
3 second to that is the prosecution. We expect to have that in the
4 next few days that might answer these questions. But to answer your
5 question, Your Honor, right now, I don't think there would be harm to
6 the government's interests. And we did----

7 MJ: And I know each case stands on its own. Colonel [REDACTED]
8 what's he going to say?

9 CDC: Well, that's interesting, Your Honor. We believe that he
10 possesses significant amounts of information regarding the creation
11 of this environment, and I think that he can tell us, if he's
12 immunized, just how all this got started because he came on very
13 early on in the game. He was there just right along with the 72d
14 when the 72d was there, and we know that there was prolonged nudity
15 and panties and all that stuff before the 372d ever arrived on the
16 scene. So someone was planting the seeds for this and we believe
17 that Lieutenant Colonel [REDACTED] can provide significant information on
18 the point. (b)(6)-2

19 TC: Yes, sir, if I may interject briefly.

20 MJ: Go ahead.

21 TC: The defense proffer was that Colonel [REDACTED] was responsible
22 for creating an environment violative of the law. Obviously, we

1 would be interested in that, interested in that behavior and would
2 seek to hold Colonel [REDACTED] accountable.

3 MJ: But you would agree with me, Major [REDACTED] (b)(6)-2 and I understand
4 that we're at sentencing proceedings, so these people are not going
5 to come in there and say, for example, I'm going to use him for an
6 example, I don't know what he will say, but let me just throw this
7 out, that Colonel [REDACTED] comes in and says, "I told these guys to
8 soften them up for interrogation, and they took that and they did
9 this." Now, since he's pleading guilty somewhere along this line,
10 the obedience to order doesn't apply, because it has to be a
11 reasonable and honest standard that a soldier has to believe the
12 order, an average soldier...I'm paraphrasing here.

13 TC: Yes, sir.

14 MJ: And so, it's certainly not a--it could be, well, if one is
15 pleading guilty to it, it's not a defense, but it certainly would be
16 a mitigating factor.

17 TC: Yes, sir, I agree with that, sir, I concede that readily.
18 I guess the harm would be, the harm for immunizing any witness that
19 we are targeting for prosecution in that it does complicate the
20 prosecution of that individual, and the government has an interest in
21 holding everyone responsible.

1 MJ: I understand that, and I know that the standard isn't what
2 harms the government.

3 TC: Yes, sir.

4 MJ: I mean, I understand what the standard is.

5 TC: Yes, sir.

6 MJ: But fundamentally, it comes down to that there still is an
7 overarching military due process that an accused gets a fair trial.

8 TC: Yes, sir.

9 MJ: And if the government has to have--if I'm weighing the
10 difficulty of immunization and subsequent prosecution of the
11 immunized witness versus one's ability to get a fair trial, both
12 those interests can be satisfied. They're not usually exclusive
13 unless you deny the immunity request.

14 TC: Well, if I could address another individual, but they would
15 be related to the point we're making, Specialist Cruz and Specialist
16 Kroll. I expect that when I return to Iraq, shortly after that,
17 there will be charges preferred against those individuals.

18 MJ: Are they MPs, MI or something else?

19 TC: They are MI and we believe are co-conspirators along with
20 the accused and other co-accused in this case to abuse detainees.
21 Obviously, the court could order the immunization of those
22 individuals, but that would significantly complicate our----

1 MJ: Okay, let's talk about those two.

2 TC: And I say this for the larger point. (b)(6)-7

3 MJ: Just a second, I'm looking at...Mr. [REDACTED] on your motion,

4 you indicated that Cruz and Kroll participated in the abuse of

5 detainees?

6 CDC: Yes.

7 MJ: So their testimony would simply be as a fellow, well, maybe

8 not co-conspirator, but co-actor.

9 CDC: Well, actually, Your Honor, the principal point with regard

10 to those two men from our perspective comes from an interview we did

11 through our MPI with [REDACTED] And [REDACTED] said....

12 MJ: Who's [REDACTED] (b)(6)-2

13 DC: He is the individual who was with the 372d and is a

14 Reservist and is now off of active duty.

15 MJ: Okay, have you provided this to the government?

16 TC: Sir, we've provided that to the defense.

17 MJ: Okay, I thought you said it was him.

18 TC: We gave them the initial statement.

19 MJ: Okay, what's Mr. [REDACTED] have to say?

20 CDC: Question, "Did MI or any other interrogator tell you these

21 practices were acceptable?" "Yes." "Who told you?" "The MI guy

22 that stated, 'We know what we are doing,' who I later know as

1 Specialist Cruz and Specialist Kroll." Now why is that important?
2 That's important because, "We know what we are doing," suggests that
3 I can go to the next level and find out who was involved with them.
4 It could've been unilateral action on their part, but the language
5 suggests that there was somebody above them.

6 MJ: And how is [REDACTED] connected to your client?

7 CDC: Well, he just served.

8 MJ: No, I'm just saying is, [REDACTED] says, "I talked to Kroll
9 and..."

10 CDC: Cruz.

11 MJ: "...Cruz, and they tell me this stuff," okay, so [REDACTED]
12 knows that.

13 CDC: Yes.

14 MJ: Well, does [REDACTED] say in that statement that your client was
15 there or that information was related to your client?

16 CDC: No, the client was not there, but this information became
17 generally known amongst the 372d in conversation and the like.

18 MJ: Had it become generally known then, of course, then you
19 have other witnesses who are not criminally involved that would say
20 the same thing.

21 CDC: Well, I don't know that they would have the same kind of
22 information that Kroll and Cruz would have----

1 MJ: You've got to tie it in with your client.
2 CDC: I do.
3 MJ: And what you're telling me is that your client didn't hear
4 this conversation.
5 CDC: No, my client specifically did not hear this conversation.
6 MJ: Okay, then there's nothing in the world that would prevent
7 you from calling Davis as a witness to relay the conversation on
8 sentencing, since the rules of evidence are relaxed.
9 CDC: The point is, Your Honor, that I believe Cruz and Kroll can
10 point to the next higher level given the language that they employed.
11 MJ: At this point, you're speculating on that.
12 CDC: Well, of course, because they invoked. You know, there's
13 always the Gordian notch you have to cut in these settings.
14 MJ: I understand that, I understand that.
15 TC: Yes, sir, and following this reasoning, Mr. (b)(6)-9 could
16 also ask for the immunity of Charles Graner, Sergeant Davis, other
17 individuals involved. It's the government's position these are co-
18 conspirators.
19 CDC: Well, I think that, you know, that's not likely, Judge.
20 MJ: Not likely, but do you disagree with his analysis?
21 CDC: All things are possible, of course.

1 MJ: Well, let me just deal with...you don't dispute that Cruz
2 and Kroll are...I mean, you say in--they participated in detainee
3 abuse?
4 CDC: Yes.
5 MJ: And going back to the real test here is, other than
6 Specialist Sivits, that's the only person who has been given a grant
7 of immunity, and that was post trial after his....
8 TC: Yes, sir.
9 MJ: Any evidence of government overreaching or discriminatory
10 use of immunity to obtain a tactical advantage?
11 CDC: Oh, no, I never even suggested that.
12 MJ: Well, then you don't even meet the standard then.
13 CDC: No, no----
14 MJ: Except by overall due process, what's barely the standard.
15 CDC: Right, exactly, but the standard is, I don't think they're
16 conjunctive, Your Honor. Those three criteria----
17 MJ: You don't think the word "and" means conjunctive?
18 CDC: No, I think it can be disjunctive, I think. I don't think
19 the government is using----
20 MJ: Well, then Mr. (b)(6)-(b)(7) I'm only reading your brief, and
21 you're the one who put the "and" there.

1 TC: Your Honor, the case law is absolutely clear. All three
2 requirements must be met.

3 CDC: Well, there's nothing they've done with Sivits that would
4 suggest overreaching by them.

5 MJ: Okay, so what you're simply telling--if I understand this--
6 of course, we are again talking the sentence case here.

7 CDC: Yes.

8 MJ: Really, what you're telling me is, under the letter of the
9 Rule, that there's no showing the government did any of these three
10 things, and that the issue really comes down to a more generic due
11 process and fair trial that I articulated earlier.

12 CDC: Oh, right, exactly.

13 MJ: Which is something that may not even be the law, but
14 sounded good. Anyway....

15 CDC: Well, due process is a rather large net, Your Honor.

16 MJ: Okay, but it seems to the court that, okay, first of all,
17 through your own words, you've not met the standard.

18 CDC: No.

19 MJ: So it would strike to the court that there's no requirement
20 to order immunity in any of these cases on the literal reading of the
21 Rule, and specifically, I will not order immunity with Cruz and
22 Kroll. And at this time for this case, I'm not going to order

1 immunity in any of these cases based on the evidence provided to me
2 and the plain reading of R.C.M. 704.

3 CDC: If I could suggest, Your Honor, that the inability to have
4 these four men now, (S)(d-2) and (S)(d-4) come
5 forward, is a significant intrusion into our ability to demonstrate
6 the tactical circumstances at the prison during that time.

7 MJ: Mr. (S)(b1-4) first of all, (S)(b1-4) is somewhat a moot
8 point. Since he's beyond the subpoena power of the court, even if he
9 got immunity, and if a guy's not going to cooperate to give a
10 statement, do you think he's going to then, "Oh, now I've got
11 immunity, now I'm going to fly to Iraq and...."

12 CDC: No, Your Honor, but we can subpoena him to depose and see
13 if that would go and do that in the United States.

14 MJ: But you agree with me, though, is you just said, you don't
15 meet the requirement of the Rule. So what authority do I have
16 except....

17 CDC: Well, I understand, Your Honor, that the Sivits matter has
18 not caused any overreaching in any case in my mind because he's such
19 a nominal player. But in truth, the requirements of due process and
20 the ends of justice are best met with the fullest possible
21 disclosure. Now, the government has told us that they intend to
22 prosecute all these people, all well and good.

1 MJ: Actually, the government said, as I recall, they intend to
2 prosecute Kroll and Cruz. They appear to be next on the list.

3 TC: Yes, sir.

4 MJ: And there's a possibility of [REDACTED]
5 TC: Yes, sir. (b)(4)-2

6 MJ: Based on the Fay report.

7 TC: Yes, sir.

8 MJ: Well, let me ask you this, Major [REDACTED] is a lot of this
9 outstanding prosecution is predicated on the fact when the Fay report
10 comes out?

11 TC: Yes, sir.

12 MJ: And again, separate issue, but if an individual is no
13 longer going to be subject to prosecution, then you would agree with
14 me for these offenses, the only prosecutorial authority for military
15 is the military.

16 TC: Yes, sir, I believe----

17 MJ: I mean, I'm not sure of any extraterritorial, territorial----

18 TC: No, sir, I think that's the correct state of the law.

19 MJ: So, if at the time the Fay comes out and these people are
20 no longer suspects, then perhaps, although it's not really a formal
21 grant of immunity, the issue becomes moot.

22 TC: Yes, sir.

1 MJ: And therefore, the implication becomes moot and the
2 government represents----

3 CDC: Well, I wonder, Your Honor, if the government could provide
4 a no-target letter to these men.

5 MJ: Well, that's kind of what I--the problem is, of course,
6 well, maybe not of course, is that different GCMCA's own these people,
7 although any GCMCA may impart immunity if, for example, well, Colonel
8 [REDACTED] you think is still in Iraq, right, Major [REDACTED]

9 (5)(4)-2
TC: I do, sir.

10 MJ: But some of these other people may belong to other
11 jurisdictions. I understand what you're saying, but a no-target
12 letter would be basically a grant of immunity because we're not going
13 to do anything to you anyway, the same effect, but technically, I
14 think that's the only rule that would apply.

15 TC: Yes, sir.

16 CDC: Well, justice is bound by no-target letters.

17 MJ: Well, I know, but I'm kind of bound by what the President
18 and the Congress tell me I can do.

19 CDC: I'm with you on that entirely. I'm just trying to come up
20 with a way that it works, that's all.

21 MJ: What I'm saying though, but that may also moot their
22 invocation.

1 TC: Yes, sir.

2 MJ: By that, I mean, they may be ordered to testify by me

3 because they don't have grounds to invoke. All that being said,

4 that's a separate issue, because again, I don't find the requirements

5 of the Rule being met compelling me to order immunity for any of

6 these people in this case. Now, of course, as you're aware, Mr.

7 Myers, there's other cases, there's other facts in those cases. And

8 of course, whatever comes out of those cases, the government's,

9 that's relevant to your case, the government must turn over to you.

10 I'm not saying that solves the problem, but different cases may have

11 different rulings. I merely put that out that, something to tell you

12 which you already know. But this time, I'm not going to order

13 immunity basically because of the self-admitted failure to meet the

14 requirements of the Rule.

15 Okay?

16 CDC: Very well.

17 MJ: Anything else?

18 CDC: The expert witness motion, Your Honor.

19 MJ: That's marked as Appellate Exhibit XXIII.

20 Trial counsel, do you have a....

21 TC: Sir, again, we have the Staff Judge Advocate's advice and

22 CG action that may be attached to----

1 MJ: Before you give that to me, no, they already gave it to me.
2 TC: Yes, sir.
3 MJ: Now, on General Metz's denial of 17 August, he indicates
4 that he will provide a suitable replacement.
5 TC: Yes, sir.
6 MJ: Has such a suitable replacement, at least in the
7 government's opinion, been identified and provided to the defense?
8 TC: Sir, what we have at this point is actually two categories
9 of witnesses that the defense may choose from, and from that point,
10 we will identify an individual. And if I may, just very briefly----
11 MJ: As I understand the Rule of this, Mr. (S)(b)-7 if the
12 government proffers an adequate substitute, you first have to
13 consider the...and again, decide whether or not it is an adequate
14 substitute.
15 CDC: Right, and we would submit to you, Your Honor, with no
16 intent to be facetious, but quite honestly, if there were someone as
17 qualified as (S)(b)-7 Dr. (S)(b)-7, in the United States Army
18 with regard to prison abuse, there's a real chance we wouldn't be
19 here today. He is the foremost authority in the world on this
20 subject. He is unparalleled in his knowledge of this area, in his
21 study of this area. We have provided you two things with regard to
22 him, one, his curriculum vitae. And secondly, a document which he

1 wrote responding to certain inquiries so that you could get a flavor
2 for proffered testimony from him. Some of it is irrelevant. Much of
3 it gives you the sense of how valuable he will be to you in
4 understanding the psychological factors that gave rise to this
5 horrible circumstance at Abu Ghraib. Basically, he can explain to
6 you how thoroughly decent people can, with the right ingredients
7 become the morally corrupted. And his testimony is of tremendous
8 significance for the court to have a background in this area, and
9 there is no one who possesses his depth of understanding. He's been
10 teaching and working and studying for 46 years in this area. He is
11 the go-to guy. There isn't anybody else who equals him in this area.

12 MJ: Trial counsel, what do you say?

13 TC: Sir, there is no doubt that Dr. (b)(6)-(7) testimony will
14 be helpful. However, that is not the legal test. The test is
15 whether his testimony would be necessary. And, there are three
16 prongs to that, Your Honor. We concede that the defense has
17 explained to us or was satisfied what this particular expert might
18 accomplish for the accused, but we don't concede that the expert
19 assistance is needed. We don't concede that the expert assistance,
20 that the defense is unable to present the same type of evidence on
21 their own with the assistance of other professionals.

22 MJ: Mr. (b)(6)-(7)

1 CDC: Well, the evidence is needed, Judge.

2 MJ: No, I hear what you're saying. I'm just asking you, can he
3 add much more than what you provided in your brief?

4 CDC: Oh, yes, he can provide a lot more than we provided in our
5 brief, a lot more.

6 TC: Your Honor, I would also highlight the fact that this
7 denial of an expert was based upon basically a half page document by
8 the defense which had very little information.

9 MJ: Do you want to take it back and ask the convening authority
10 again?

11 TC: Sir, we can certainly do that. I think the recommendation
12 will be the same.

13 MJ: So, an observation, not a request.

14 TC: Yes, sir, I believe that's right.

15 MJ: Got it.

16 TC: But when you look at the CG's advice, that was based on
17 that request, not the motion.

18 CDC: Perhaps we were slightly anticipatory. He, Your Honor,
19 will be able to particularize his testimony to the Chip Frederick
20 circumstances and to give you insights as to the conduct of Staff
21 Sergeant Frederick on an individualized rather than a generic basis,
22 as well.

1 MJ: Now, he's not willing to go to Iraq, true?

2 CDC: No, regrettably, he will not be in Iraq.

3 MJ: So, he will not be able to see the prison or personally
4 talk to your client?

5 CDC: Well, he can personally talk to my client.

6 MJ: Not in person.

7 CDC: Not in person, no, not in person. But he isn't rendering a
8 psychiatric or psychological opinion with respect----

9 MJ: Well, I'm just trying to figure out, what's the 5 days of
10 preparation, other than just reading stuff he apparently has already
11 read.

12 CDC: That's out the window if he's not going somewhere to be
13 with us, so on and so forth, we're going to do this by way of VTC or
14 whatever. I think the 5 days is too much.

15 MJ: Now, I know this isn't a grounds for denying an expert
16 witness, by that, I mean, the cost.

17 CDC: Right.

18 MJ: That's not the legal standard, but I suspect it somehow
19 plays sometimes by the convening authority. I'm not saying that
20 General Metz considered that. But are you saying that this is, and
21 we're talking about a one-day deposition here?

1 CDC: Oh, yes, but we're talking a couple days of preparation,
2 and there's a lot to read. He's a thorough man. And I think we can
3 reduce this to 3 days very realistically, because we can go to
4 California.

5 MJ: And \$5,000 day.

6 CDC: Your Honor....

7 MJ: I'm just saying, is that's what he----

8 CDC: I hate to think of what it cost to get everybody here out
9 of Iraq, many, many (b)(6)-7

10 MJ: Again, that's not typically--legally relevant, so I'm not
11 going to pursue how much it cost to sit around and read papers. But,
12 at this point, it would appear to the court that the trial counsel
13 has offered you a substitute which you've yet to consider, so don't I
14 have to wait until you do that?

15 CDC: I know I do, but I'm simply suggesting that I think that
16 you can shortcut----

17 MJ: There's no adequate substitute in the entire world to one
18 guy?

19 CDC: There's no adequate substitute in the United States Army
20 for this guy.

21 MJ: How do you know that?

22 CDC: Because...well....

1 MJ: The government says there is.

2 CDC: Well, the government, respectfully, is wrong.

3 MJ: But they say it every time.

4 CDC: Of course, I mean, I expect them to say that. I mean,

5 that's standard operating procedure. The Army goes to [REDACTED]

6 for advice, Your Honor. And I don't want to get involved with who he

7 talks to and what he talks to, but the Army, I can say this with

8 great certainty, the Army goes to [REDACTED] (b)(6)-4 for advice.

9 MJ: Trial counsel, do you have an adequate substitute?

10 TC: Yes, sir, I believe we do.

11 MJ: Who's that?

12 TC: Sir, we can get one of two, again, categories of people, if

13 I may. We can get a psychiatrist or psychologist with about 8 years

14 of experience, not clinical, but a practitioner.

15 MJ: In Iraq.

16 TC: In theater, a psychiatrist or psychologist, generally. Or,

17 we can get a comparable individual with forensic experience.

18 MJ: What's their background in the psychology of prison

19 environment?

20 TC: Sir, we are not going to have a prison psychologist.

21 MJ: Isn't that what they're asking for?

1 TC: That's what they're asking for, sir, but I don't believe
2 that's----

3 MJ: And I know you guys have not conceded necessity and
4 relevance, I understand that. And so, you're simply offering a
5 substitute without conceding----

6 TC: A mental health professional who can identify the stressors
7 on a particular individual in a stressful environment and testify
8 accordingly, using the information----

9 MJ: But you concede though, that we're talking about a
10 specialized subcategory of psychology here.

11 TC: I concede that the defense is requesting that, yes, sir. I
12 don't concede that that's necessary for----

13 MJ: Oh, I understand that, I understand what you're saying.

14 TC: Yes, sir. (b)(6)-(7)

15 MJ: And Mr. [REDACTED], you are amending your request to 3 days?

16 CDC: Yes, based upon what's going on here, I think 3 days is now
17 adequate.

18 MJ: I mean, unfortunately, what you end up with though, is that
19 if we say 3 days today, it's 3 days. Do you understand what I'm
20 saying? What I'm saying is, that the convening authority, first of
21 all----

22 CDC: Some of that was travel time---

1 MJ: ----you understand, it's not my money.

2 CDC: I understand, but some of it was travel time, Your Honor.

3 MJ: But whenever these are, anytime, approved, the convening
4 authority approves at a certain rate, and not higher. Otherwise, you
5 have an Anti-deficiency Act violation. You know all this.

6 CDC: I know all this, but it's okay.

7 MJ: But just so that--I think I know this, I want to make
8 sure----

9 CDC: I had travel time in there, you know, I had....

10 MJ: So you simply----

11 CDC: I've eliminated him going anywhere.

12 MJ: So he can sit down before a camera in Palo Alto and talk
13 all he wants and then put it on a disk and then mail it to you, and
14 that would--you wouldn't even need, necessarily a deposition. That
15 would meet your requirements.

16 CDC: I would like a give and take. I would like a give and
17 take. I would prefer that.

18 MJ: Government, what's your position?

19 TC: Yes, sir, well, obviously, we'd want to cross-examine this
20 witness.

21 MJ: You're going to send somebody out to Palo Alto?

1 TC: Absolutely, sir. I'm sure Captain [REDACTED] would be happy
2 to.
3 CDC: We might be able to do it at the Presidio, Judge, of
4 Monterey, that is.
5 MJ: I direct the production of this witness. You'll do the
6 mechanics, trial counsel, of setting up a deposition?
7 TC: Yes, sir, we will.
8 MJ: You were saying, just so there's no confusion about the
9 money here, Mr. (S)(b)(4) [REDACTED] 3 days.
10 CDC: Three days is fine with me, and based upon what I've been
11 told, that will give him time----
12 MJ: Again, technically, it's a produce or abate order, but you
13 understand where I'm going here, Major (S)(b)(2) [REDACTED]
14 TC: Yes, sir, I do.
15 MJ: I direct that the government produce this witness in the
16 context of the motion, i.e. make him available for a deposition. And
17 pursuant to the defense representation, that would be 3 days at his
18 proffered rate. And, whether you choose to depose him or whatever
19 way you choose to present the testimony, that's up to you. But if
20 you're going to do a deposition, the convening authority will direct
21 a deposing officer.

1 TC: All right, sir, so you have ordered the employment of this
2 expert----

3 MJ: Well, it's a produce or abate, technically, but yes.

4 TC: Yes, sir.

5 MJ: But understand, we're talking about the rate of 3 days
6 here, just because I know you deal with the money issue.

7 TC: Yes, sir.

8 MJ: And what I'm hearing from the defense, they're modifying
9 the request to the convening authority to 3 days at the \$5,000 a day
10 rate, which would be, if the convening authority approved it, flat
11 out, that's what he would approve and he could approve no more.

12 TC: Yes, sir, and I apologize....

13 MJ: No, go ahead.

14 TC: This individual is to be detailed to the defense team, or
15 is just as an expert----

16 MJ: Well, the problem is, is that you want him as a witness.

17 CDC: No, we asked him as a defense expert witness, Your Honor.
18 It was the convening authority that converted it to a consultant.

19 MJ: Okay, he's talking about as a witness, which means is that
20 once he gets done with his material, then he can be interviewed by
21 the government prior to the deposition, and then take the deposition.

22 TC: Yes, sir, I just want to make sure----

1 CDC: No, absolutely clear on that point.

2 MJ: You're treating him as an expert witness.

3 CDC: No, we jumped right over the consultancy.

4 TC: And we did that out of an abundance of caution is why we've

5 treated it that way.

6 MJ: Okay, I understand that.

7 CDC: We appreciated the caution.

8 MJ: But now, understand, just so there's no lack of clarity

9 here, if he's employed as an expert witness and he bases some of his

10 opinion on things that came from your client, that's discoverable by

11 the defense--or by the government.

12 CDC: No, I understand the rules.

13 MJ: I know, we all do, but it's easier if we make sure we all

14 do, because that may change.

15 CDC: Okay, very well.

16 MJ: Okay, good. Anything else?

17 CDC: Nothing further from the defense.

18 MJ: But one outstanding issue that I don't think has relevance

19 to this case, is that dealt with an issue we discussed in the 802

20 that certain third parties who have employed private contractors,

21 which I think include your Mr. (b)(6)-9 and I'm sure I'm

22 mispronouncing his name. And again, we talked about at the 802 that

1 there is a third party pleading from Titan Corporation, CACI, and SOS
2 Corporation dealing with a motion to quash any subpoenas dealing with
3 these people. But as indicated at the 802, Mr. [REDACTED] you indicate
4 this is a non-issue in this case. (b)(6)-7

5 CDC: In this case, it's a non-issue.

6 MJ: Okay, therefore, it would appear to the court no reason to
7 make those a part of the record or to rule on it since it's a non-
8 issue and you don't intend to pursue that in any way, shape or form.

9 CDC: No.

10 MJ: Any other matters to take up before the court? (b)(6)-7

11 CDC: Our sole concern is Mr. [REDACTED]

12 MJ: But I believe I've addressed that with the other ruling,
13 and then consequently, this ruling becomes somewhat moot.

14 CDC: It's mooted.

15 TC: Sir, nothing further, Your Honor.

16 CDC: Nothing from the defense.

17 MJ: The court is in recess.

18 [Court recessed at 1521, 24 August 2004.]

19 [END OF PAGE.]

20

21

APPENDIX V

020099

January 2003

VITA

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PERSONAL INFORMATION

Born: March 23, 1933, New York City, NY
Married: Christina Maslach, Ph.D., Psychologist, U. C. Berkeley
Children: [REDACTED]
Licensed: Psychologist, State of California PL 4306 (since 1975)

EDUCATION AND HONORARY DEGREES

Brooklyn College, A.B. (Summa) Honors in Psychology, Sociology/Anthropology, 1954,
Phi Beta Kappa, 1953.
Yale University, M.S. 1955; Ph.D., 1959

Honorary Degree, Doctor of Humane Letters in Clinical Psychology, Pacific Graduate
School of Psychology, 1996
Honorary Degree, Doctor Honoris Causa, National University of San Martin, Peru, 1996
Honorary Degree, Doctor Honoris Causa, Aristotle University, Thessalonika, Greece, 1998

PROFESSIONAL EXPERIENCE

Post Doctoral Trainee - West Haven Veteran's Hospital, Clinical Psychology Dept., 1959-1960
Co-Director (with Dr. S. Sarason), Children's Test Anxiety Research Project, Yale University,
1959-1962
Created, Directed The Harlem Summer Program, "A Head Start-Black Pride" Daily Program
Staffed by NYU and CCNY Students in Harlem (1965)
Training and research consultant in hypnosis, Morton Prince Clinic, New York, 1963-1967
Co-Director (with Dr. E. Hilgard), Stanford Hypnosis Research Lab, 1969-1980
Director, Stanford University Social Psychology Graduate Research Training Program
Founder, Co-Director (with Dr. L. Henderson), Shyness Clinic/ Shyness Institute, 1975-present
Senior Scientific Advisor, writer, narrator, *Discovering Psychology*, PBS-TV/ Annenberg Corp
Video series (1989, updated 2001)

TEACHING

Instructor/Assistant Professor, Yale University, 1957-1960
Assistant Professor, New York University, 1960-1967
Professor, Stanford University, 1968 to present
Visiting Professor: Yale (1962), Stanford (Summer 1963), Barnard College (1966), University of
Louvain (Belgium) Part-time (Summer 1966), University of Texas (1967), Columbia University
(1967-68; Klingenstein Professor of Race Relations), University of Hawaii (Summer 1973),
International Graduate School of Behavioral Sciences, Florida Institute of Technology at Lugano,
Switzerland (Summer, 1978), University of Warsaw (Summer 2000)

020100

[REDACTED] (b)(6)-9

HONORS

TEACHING

- *Distinguished Teaching Award, New York University, 1965
- *Distinguished Teaching Award for Outstanding Contributions to Education in Psychology, American Psychological Foundation, 1975
- *Phoenix Award for Outstanding Teaching, Stanford Psychology Department Faculty, 1984
- *California Magazine, Best Psychology Teacher in California, 1986
- *The Walter Gores Distinguished Teaching Award, Senior Faculty, Stanford University, 1990
- *Bing Fellow Outstanding Senior Faculty Teaching Award, Stanford University, 1994-1997
- *WPA Recipient of the annual Outstanding Teaching Award, 1995
- *Distinguished Teaching Award, Phi Beta Kappa (Northern California Chapter), 1998
- *Robert S. Daniel Teaching Excellence Award, APA Division 2, Society for the Teaching of Psychology, 1999
- *Dean's Award for Distinguished Teaching, Stanford University 1999-2000

RESEARCH

- *Peace Medal from Tokyo Police Dept., 1972 (special recognition of a foreign national whose research and ideas significantly contributed to improving criminal justice administration)
- *Fellow, Center for the Advanced Study in the Behavioral Sciences, 1972
- *Gordon Allport Intergroup Relations Prize (honorable mention), 1974, Society for Psychological Study of Social Issues (for the Stanford Prison Experiment)
- *Distinguished Research Contributor Award, California State Psychological Association, 1977
- *Psi Chi Award for contributions to the Science of Psychology, 1986
- *Guze Award (Society for Clinical & Experimental Hypnosis), Best Research in Hypnosis, 1989
- *Selected as one of ten major contributors to *Social Psychology*, Yosemite Conference on 100 Years of Experimental Social Psychology, 1997
- *Ernest R. and Josephine R. Hilgard Award for the Best Theoretical hypnosis paper for Society for Clinical and Experimental Hypnosis, published 1999
- *Distinguished Lifetime Contributions to General Psychology (APA, Division 2, 2000)
- *Distinguished Contributions to Scientific Hypnosis (APA, Division 30, 2001)
- *Psychology Today Magazine, Mental Health Award for Research and Treatment of Shyness, 2001
- *Distinguished Lifetime Contributions to Psychology, California Psychology Association, 2003

WRITING

- *National Media Award (honorable mention), American Psychological Foundation, 1973 (for popular writing on vandalism)
- *William Holmes McGuffey Award for *Psychology and Life*, for Excellence and Longevity, (Textbook Authors Association) 1995

GENERAL

- *President, Western Psychological Association, 1983, again in 2001
- *Who's Who in America, 1982 to present
- *Ugliest Man on Campus (Most Popular Stanford Faculty/ Administrator), Alpha Phi Omega, 1983
- *Chosen by Editors of *The Sciences* to represent psychology in its 35th year celebration reflecting on the contributions in each field of science, November, 1996
- *Phi Beta Kappa, Distinguished Visiting Lecturer, 1989-1990
- *Distinguished Contribution to Psychology as a Profession, California Psychological Association, 1998
- *APA Division 1 award, Ernest Hilgard Award for Lifetime Contributions to General Psychology, 2000
- *Los Angeles County Psychological Association: Psyche Award for lifetime contributions to Psychology as a science and art (2000)
- *Fulbright Scholar at U. Rome (2001)
- President of the American Psychological Association, 2002

MEDIA

- *Selected to be Senior Academic Advisor, Host, Writer and Narrator of *Discovering Psychology*, (A 26-part PBS TV series on psychology, Annenberg/CPB project, 1986-1989)

(b)(6)-4
[REDACTED]
*London Weekend Television (Granada Media), "Human Zoo" Three Programs, Chief Scientific Advisor and On-Screen Expert

- *STC (Society for Technical Communication) International Audiovisual Competition Award of Excellence for "The Power of the Situation" (*Discovering Psychology* video series), 1991
- *Columbus International Film & Video Festival Bronze Plaque Award for "The Developing Child" (*Discovering Psychology* video series), 1992
- *International Film & TV Festival of New York Finalist Certificate for "Past, Present and Promise" (*Discovering Psychology* video series), 1992
- *WPA Film Festival Award of Excellence for "The Responsive Brain" and "Social Psychology" (*Discovering Psychology* video series), 1992
- *WPA Spring Festival first place award for *Quiet Rage: The Stanford Prison Study* video, 1993
- *WPA Spring Festival first place award for *Candid Camera Classics in Social Psychology* Video, 1993
- *APA Presidential Citation for outstanding contributions to psychology for the *Discovering Psychology* video series, 1994
- *Psychological Consultant, New Programming for NBC TV, 2002.
- *Emmy Award, New England Instructional Television, Host, Cognitive-Neuroscience (*Discovering Psychology* Video Series), 2002
- *WPA Spring Festival, First Place Award for Cultural Psychology (*Discovering Psychology* Video Series), 2002
- *Sagan Award for Promoting Public Understanding of Science, Awarded by Council of Scientific Society Presidents, 2002.

PROFESSIONAL MEMBERSHIPS

American Psychological Association (APA), Fellow; Div. 1(F), 2(F), 3(F), 8(F), 9(F), 13(LM), 15(F), 26(LM), 35, 45, 46(LM), 48(F), 52(F)
Association for Advancement of Psychology (AAP)
American Psychological Society (APS), Fellow
Charter Fellow Canadian Psychological Association (CPA)
Western Psychological Association (WPA), Fellow
Eastern Psychological Association (EPA), Fellow
California State Psychological Association (CSPA)
International Association of Applied Psychology (IAAP)
International Congress of Psychology (ICP)
Society for Inter-American Psychology
Society for Psychological Study of Social Issues (SPSSI)
American Association for Advancement of Science (AAAS), Fellow
Society for Experimental Social Psychology (SESP)
Society for Advancement of Social Psychology (SASP)
Society for Personality and Social Psychology (SPSP)
Phi Beta Kappa, Sigma Xi, Psi Chi
American Association of University Professors (AAUP)
Psychologists for Social Responsibility

CONSULTATIONS AND BOARDS

Research Consultant, Morton Prince Clinic for Hypnotherapy (New York City)
Asthma Research Unit, Cornell Medical School (New York City)
Tokyo Police Department
Wake Up! Louisiana (New Orleans Citizens' Group)
Public Advocates Law Offices (San Francisco)
Charles Garry Law Offices—expert witness, prison litigation, Senate subcommittee on prisons and juvenile delinquency
Japanese internment reparations hearings (San Francisco)
San Francisco Newspaper Agency (Senior Project Research Consultant)

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Cristaldi Films, Rome, Italy (Consultant on "Control" film)
SRI International Consultant to PSI Phenomena Project (Oversight Committee)
San Francisco Exploratorium, Consultant to APA Traveling Museum Exhibit, and Memory Project
Executive Board for the Holocaust Study Center, Sonoma State University
Advisory Panel for the Center on Postsecondary Learning, Teaching and Assessment
Board of Advisors, *Psychology Today* Magazine
Consulting Editor, McGraw Hill Publishers, Social Psychology Series
Historian, Western Psychological Association (1984-2000)
Editorial Board, *Journal of Social Behavior and Personality*
Editorial Board, *Journal of Social Issues*
Institute for Research on Social Problems
Contributing Editor, *Healthline*
Advisory Board, The Foundation for Grand parenting
Advisory Board, End Violence Against the Next Generation (California)
Advisory Board, North American Journal of Psychology
Honorary Member, Italian Inter-university Center for the Study and Research on the Origins and Development of Prosocial and Antisocial Motivations
Consultant, Live Entertainment, Hollywood, "Stanford Prison Experiment" film
Advisory Council, Resources for Independent Thinking
Advisor, London Weekend Television, "Human Zoo" 3 programs on group behavior Discovery Channel
Advisor, BBC, Human Rights, Human Wrongs Program: "Five Steps to Tyranny,"
Founder, Scientific Advisor, RealPsychology.com
Consultant, NBC TV
Consultant, Maverick Films, Hollywood, "Stanford Prison Experiment" film
Board of Directors, Council of Scientific Society Presidents

INTERNATIONAL INVITED ADDRESSES, WORKSHOPS, PRESENTATIONS

Conventions and Associations

International Congress of Psychology (in Bonn, London, Tokyo, Mexico City, Brussels, Stockholm);
International Congress of Applied Psychology, International Social Psychology Conference (in Majorca, Spain, and Budapest); Canadian Psychological Association, Japanese Psychological Association, Japanese Social Psychological Association, German Psychological Society, Greek Psychological Association, Spanish Social Psychological Association, European Association of Experimental Social Psychology, European Association of Personality Psychology, World Congress on Eclectic Hypnotherapy in Psychology (Ixtapa), International Conference on Time (San Marino, Italy);
International Convention on Shyness and Self Consciousness (Cardiff, Wales), Mexican Psychological Society

Universities

University of Salamanca, University of Barcelona; The Sorbonne; University of Paris (Ecole des Hautes Etudes), University of Rome, University of Bologna, Catholic University of Milan, University of Naples, University of Parma; Oxford University, East London University, Central London University, University of Cardiff, Open University-Birmingham, England; University of Thessalonika, University of Athens; University of Louvain; Hamburg University; Tokyo University, Kyoto University, Okinawa University, Osaka University; University of Sao Paulo, University of Rio de Janeiro; Guanajuato University; University of British Columbia, Calgary University, University of Alberta, Toronto University, McGill University, University of New Foundland; Chinese University of Hong Kong, Deree College, (Athens).

DOMESTIC LECTURES, WORKSHOPS, PRESENTATIONS

Conventions and Associations

American Psychological Association, American Psychological Society, Eastern Psychological Association, Western Psychological Association, Midwestern Psychological Association, South Eastern Psychological Association, Rocky Mountain Psychological Association, New England Psychological Association, American Psychiatric Association, American Ortho-psychiatric Association, American Association for the Advancement of Science, New York Academy of Sciences, Society for

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Experimental Social Psychology, Federation of Behavioral, Cognitive and Social Sciences, Nebraska Symposium on Motivation, Society for Clinical and Experimental Hypnosis, National Conference on Law Enforcement, Smithsonian Institute, Annenberg Foundation, American Association of Behavior Therapy, Anxiety Disorders Association of America, California School of Professional Psychology (Fresno and Berkeley), Pacific Graduate School of Psychology, Eriksonian Conference on New Developments in Therapy, National Conference on Teaching, Texas Junior College Convention, Veteran's Administration Hospital Psychology Programs in Palo Alto, Menlo Park, CA., Bronx, NY, Society for Research in Child Development, California Psychological Association, Midwest Institute for Teachers of Psychology.

Colleges, High Schools

University of Virginia Visiting Scholar (lectured at VMI, Virginia Tech, George Mason, William & Mary Colleges); University of California: at Berkeley, Davis, La Jolla, Los Angeles, Riverside, Santa Barbara, Santa Cruz, San Francisco (Extension Program), San Francisco (Langley Porter Institute); California State University: at Fresno, Long Beach, San Diego, San Marino, Sonoma; Claremont-McKenna College, Claremont College, Cal Tech, University of Southern California, San Francisco State University, College of San Mateo, Foothill College, D'Anza College, NYU, Columbia University, Yeshiva University, New School for Social Research, Queens College, Hunter College, Brooklyn College, Lehman College, City University of New York, Einstein Medical School, West Point Military Academy, University of Vermont, Dartmouth College, Cornell University, Harvard University, Boston University, Wesleyan University, Yale University, Brandies University, MIT, Pennsylvania University, Temple University, St. Joseph's University, Princeton University, Rutgers University, Montclair State College, University of Delaware, Emory University, Pittsburgh University, University of Cincinnati, Duke University, North Carolina University, University of Florida, Broward Community College, Baton Rouge College, LSU, University of Texas (Austin), Sam Houston Community College, University of Houston, Texas Tech University (Lubbock), McNeese State College, Arkansas University, University of Northern Arizona, Arizona State University, Arizona University, Michigan University, Northwestern University, University of Chicago, University of Illinois- Chicago, St. Louis University, Oregon University, Washington University, University of Central Washington, University of Eastern Washington, Chemmetkita College (Washington), University of Hawaii (Manoa Campus), Central Oklahoma University, University of Puget Sound, Reed College, University of South Carolina, Claremont Graduate School, California State University, Long Beach, Ohio State University, Devry University, College of DuPage, Holy Names College, Baldwin Wallace (Harrington Distinguished Lecturer), Temple University (Uriel Foa Distinguished Lecturer), Tufts University, Prince Georges CC.

Jordan Junior High School (Palo Alto), Crittenden Middle School (Mountain View), Lick-Wilmerding High School (S.F.), Lincoln High School (S.F.), Gunn High School (Palo Alto), Loudin County High School (Virginia), Walt Whitman High School, (Bethesda, Maryland)

Non-Academic Lectures, Presentations

Commonwealth Club (San Francisco), Comstock Club (Sacramento), IBM, Maritz Corporation, Xerox Corporation, New Orleans Chamber of Congress, Harper Collins Publisher, Scott, Foresman Publisher, National College Textbook Publishers Conference, Lucas Arts (Industrial Light and Magic Company), George Lucas Workshop on Creativity, Local PTA Groups, Prison Reform Groups, Peace Group Associations (New York and California).

MEDIA PRESENTATIONS (TV AND RADIO)

"Discovering Psychology" Series, 26 episodes shown nationally on PBS and Internationally in 10 Countries (from 1989 to Present), The Today Show, Good Morning America, 20/20, Night Line, and The Phil Donahue Show (each several times), That's Incredible, Not For Women Only, To Tell The Truth, Tom Snyder Show, Charlie Rose Show, NBC Chronolog, People Are Talking, AM and Late Night TV Shows in NYC, LA, Chicago, Seattle, Washington, DC, Atlanta, Detroit, Philadelphia, Pittsburgh, Boston, Vancouver, Canadian Broadcasting Company, BBC, CNN, National Public Radio, KGO Radio, Live 105 San Francisco Radio, Milt Rosenberg Radio Interview Program (Chicago), Italian TV-RAI (Shyness Program on Quark), Stanford Television Network, The Discovery Channel Program on Torture. 60 Minutes, and, London Weekend TV/ Discovery Channel

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program on the "Human Zoo." Only Human", NBC/Discovery Channel.

INTERVIEWER/ ON STAGE CONVERSATION SERIES

Public interviews/conversations for California Academy of Sciences and S. F. City Arts & Lecture Series) with:

Anna Deveare Smith, Oliver Sachs, Jonathan Miller, Robert Coles, Andrew Weil,
Frank Sulloway, Sarah Lawrence Lightfoot, Elizabeth Marshall Thomas,
Mary Catherine Bateson, Peter Funt (son of Allen Funt), Frank Sulloway, Michael Gazzaniga.

CAREER GOALS

The joys of psychology have come from blending teaching, research, and applications of psychological knowledge as basic career goals. I love to teach and have done it extensively and intensively for nearly 50 years, trying to communicate what we know and how we know it to the next generation of citizens and psychologists. But my training as a research psychologist has prepared me to take much delight in contributing to the basic knowledge about how the mind and behavior works. Publishing that information is not only essential to career advancement, but to sharing with colleagues and the public these new ideas. Finally, it has always been a central goal for me academically and personally to "give psychology away" to the public, to the media, and to those who could use it in ways that enhance the human condition. I like to think of myself as a social change agent--able to use my experience, training, and insights as a psychologist to make a difference in the lives of many people.

TEACHING CAREER

The year 2003 marks my 46th year as an educator, the sixth decade of continually teaching Introductory Psychology.

I began teaching in 1957 as a part-time instructor at Yale, in charge of a class of 25 freshmen in Introductory Psychology, and continued this wonderful experience for several more years until my first full-time appointment as assistant professor at New York University, Heights Campus in the Bronx. That was teaching in the raw: 12 semester courses a year, including summer school, all lecture courses, including 3 large Introductory Psychology courses per year. Living in New York on semi-starvation wages forced me to add a 13th course for several years, moonlighting up at Yale, teaching the Psychology of Learning to master's level students in the Education School, and another year teaching Social Psychology at Barnard College. Some years I taught summer school at Stanford, in Louvain, Belgium, and Lugano, Switzerland.

I love to teach large lecture classes where I am on the "performing center," doing demonstrations, class experiments, and integrating novel AV materials, but it is more challenging to be intimately connected to students in seminars where I learn from our interaction. In addition to this in-class teaching, I have always mentored students in individual study, undergraduate honors research, and thesis research of masters and doctoral students.

Another dimension of teaching for me has been to develop teaching materials, and course supplements that make teaching both more effective and easier. To this end, I have not only written many basic texts and primers in Introductory and Social Psychology, but pioneered the new breed of Instructor's Manual that helps teachers with every aspect of course preparation and curriculum design. I have also developed Student Guides and Workbooks, and a variety of demonstrations and AV resources for teachers. Among the later are: the "Discovering Psychology" PBS - video series of 26 programs covering all of general psychology, "Candid Camera Classics," one for Introductory and another for Social Psychology courses (with teacher's manuals for each), "Quiet Rage," the video documentary of the Stanford Prison Experiment, and a public web site slide show of my experiment (www.prisonexp.org).

In the past decade, about 70,000 students in Tele-Courses have received full credit for Introductory Psychology by passing a standard test based on the "Discovering Psychology: video series and a basic textbook. For me, that represents an ideal in "outreach teaching."

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Another dimension of teaching in my career has been training teachers also to discover the joys of teaching by helping them to do their job really well. I regularly give workshops on teaching throughout the country, at professional meetings (APA, APS, WPA, National Conference on Teaching, and others); in many universities and colleges; organize my own workshops at Stanford (for local area teachers at all levels of psychology education), and have given many teaching workshops internationally as well. I also contribute to teaching by training my own teaching associates to become experts through working closely with them in an intensive Practicum in Teaching course, that I innovated in 1960 at NYU, and have developed over the years into a training program that includes undergraduate TAs as well as graduate students. Many of these students have gone on to become distinguished, prize-winning teachers in colleges across the country and in national competitions.

STANFORD TEACHING: I believe that I have taught more students, for more credits, in a greater variety of courses, than any other Full Professor in the history of Stanford University. Since 1968, I have regularly taught large lectures in **Introductory Psychology**, one of the most popular courses in the University, typically to about 325 students, but have taught this course to as many as 1000 students, and as few as 10 students in a special seminar format with computerized daily interaction on written assignments, in addition to lectures.

Unit Mastery Instruction: For several years, I taught about 600 students in a Unit Mastery System with Personalized Instruction that included taking individual testing on each of 18 chapters of the text, and oral exams on an additional reading. Proctors, 200 of them, administered all testing in their dorms separately to each of their 3 students, and met weekly with me to discuss issues relevant to this form of teaching. About 50 other undergraduate teaching assistants worked in pairs to lead their weekly discussion section component of the course.

Practicum in Teaching is a seminar I designed to train graduate and undergraduate teaching assistants to become effective teachers, first by helping them to develop engaging weekly sections that are coordinated with my lecture course, **Introductory Psychology**, based on original experiments, demonstrations and exercises that I designed and are available in my Instructor's Manual for this course. In addition, this course is designed to teach students to value the honor of being able to teach and guide them toward successful careers in teaching.

Lecture Courses:

Introductory Psychology
The Psychology of Mind Control
Social Psychology (taught solo and also as a co-teacher)
Social Psychology In Action
Social Alienation
The Nature of Madness
The Psychology of Hypnosis
Sex Roles in the U.S. and Italy (During Florence teaching term)
Cross-Cultural Psychology (During Florence teaching term)
Psychology and Drama (Co-taught with Patricia Ryan, Drama Department)

Seminar Courses:

The Psychology of Imprisonment (Co-taught with Carlo Prescott, former inmate)
The Dynamics of Shyness (general students and Freshman, Co-taught with Lynne Henderson)
The Psychology of Time Perspective (Sophomore Seminars)
On Becoming a Professional Psychologist (for advanced graduate students)
Effective Teaching (Co-taught with David Rosenhan)
Research Methods in Social Psychology (Graduate Course)
Research Issues in Social-Cognitive Pathology (Graduate Course)
Graduate Pro-seminar in Social Psychology (Weekly Area Meetings, Faculty & Graduate Students)
Practicum in Teaching for Graduate and Undergraduate Teaching Associates

Individual Study, Reading and Laboratory Projects:

I usually have several undergraduate Honors students working under my direction each year, and also supervise 5 to 20 undergraduates and graduate students doing individual study with me, either in special laboratory projects or independent reading.

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RESEARCH INTERESTS

My research has always focused on trying to understand basic psychological phenomena, from early research on exploratory and sexual behavior (in rats) to test anxiety (in school children), prejudice, affiliation, dissonance, persuasion, motivation, deindividuation, aggression, memory, shyness, pro-social and anti-social behavior, time perspective, madness and more.

The research issues in which I am currently interested center on several fundamental human concerns: time, madness, shyness, and evil.

TIME PERSPECTIVE

The psychological study of temporal perspective investigates the ways in which our learned sense of partitioning experience into the three frames of past, present and future exerts profound influences upon how we think, feel and act. Because of learned biases in over emphasizing one of these three temporal modes, or de-emphasizing one or more or the other time zones, we may distort reality, reduce our personal effectiveness or happiness, create problems in our social relationships, and lead others to misattribute our performance to ability or motivational factors rather than to the subtle, pervasive, and non-obvious operation of our temporal perspective. This issue is studied with a multi-method approach that includes a new assessment instrument (Zimbardo Time Perspective Inventory), large-scale surveys, field studies, interviews, and laboratory experiments. The emerging results have important implications for educational practice, family dynamics, group conflict, creativity, and social problems such as addiction and unwanted teenage pregnancies. Both a sociological and economic level of social class level of analysis supplements the psychological level of analysis of individual behavior. This area of research (begun in 1971 with an original experiment that manipulated time perspectives by transforming future-oriented students into present-oriented hedonists using hypnotic manipulations) advances Time Perspective as a "foundational" process in psychology. My theorizing (elaborated in a Dec., 1999 *JPSP* article) proposes that Time Perspective exerts profound influences across a wide range of human experiences and actions, yet is unrecognized in its power. I argue that TP is the foundation upon which many psychological and social constructs are erected, such as achievement motivation, commitment, responsibility, guilt, goal seeking, planning, and many more. Going beyond experimental and correlational research, I (with John Boyd) have developed a new reliable, valid index of time perspective profiles that give promise of organizing much of the research in this area, while stimulating new research on risk taking, health decisions, and addictive behavior.

THE DISCONTINUITY THEORY OF THE ORIGINS OF MADNESS

A similar concern for integrating individual psychology with social analysis is seen in my long-term interest in discovering the process by which "ordinary, normal" people are "recruited into madness." The conceptual model here seeks to clarify our understanding of the first stages in the process of "going mad," that is, of beginning to think, feel, or act in ways that the person (as actor) or observers judge to be pathological. This research utilizes a social-cognitive approach to understanding how a person's attempt to explain a perceived significant discontinuity initiates a search process, which if misdirected because of the operation of specific cognitive biases, can result in "symptomatic" explanations. These attributions are diagnostic of non-rational thinking.

This work, though conducted over the past 25 years, has been published only recently (in *Science*, *JAP*) and featured in an invited chapter for the 1999 (Vol. 31) issue of *Advances in Experimental Social Psychology*. The research first began by clarifying Schachter's findings on unexplained arousal, then went on to explore the dynamics of emotional arousal without awareness of its source or origins (using hypnosis to induce the physiological arousal and source amnesia). Now its scope is broadened with a new theory about the perception of a significant personal discontinuity in one's functioning that triggers either a cognitive search for causal meaning (seeking rationality) or a social search (seeking normality). The research offers a new paradigm for studying the origins of psychopathological symptoms and makes provocative and proven predictions about how individual explanatory biases in utilizing certain search frames for meaning of the discontinuity can lead to specific forms of pathology, such as environmental search frames leading to phobias, while people-based search frames are more likely to result in paranoid thinking, and body-related search frames to

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hypochrodisis. This research is a creative synthesis of many lines of thinking, combines cognitive, social, personality and clinical psychology in novel ways, and integrates aspects of them into a new integrated whole that promises to stimulate a renewal of research in experimental psychopathology. It also draws parallels between processes that contribute to individual psychopathology and social forms of pathology in ways never articulated previously

THE ROLE OF TECHNOLOGY IN CREATING A SHYNESS EPIDEMIC

My early research on the dynamics of shyness in adults, adolescents, and children opened this area of research to many new investigators in social and personality psychology, as well as in clinical psychology. My current interest now is in the psychological processes that sustain and exacerbate shyness in clinical populations that we treat in our Shyness Clinic.

But my most recent revival of interest in shyness comes from new data that the prevalence of reported shyness is steadily increasing over the past decade to reach epidemic proportions of 50% or more. One hypothesis being explored is that technology is creating an A-Social environment for heavy users of electronic technology, a self-imposed social isolation that contributes to social awkwardness in "face situations," thus promoting avoidance, and thereby feelings of shyness.

POWER OF THE SITUATION AND THE PSYCHOLOGY OF EVIL

The research demonstration of the power of social situations over individual dispositions is highlighted in the now classic Stanford Prison Experiment, along with Milgram's Obedience research (see www.prisonexp.org). This research advances a conceptual view of how ordinary citizens can be transformed into aggressors, into people who act in evil ways. By focusing on social situational variables the can influence or seduce good people to do evil deeds, we move the analysis away from traditional dispositional trait approaches to studying evil. The underlying conception of the transformation of human nature by social forces has led me to new investigations of the nature of the training of young men to become torturers for the State in Brazil, during the reign of the military junta (see Violence Workers, U.C. Berkeley Press, 2002, with co-investigators, Martha Huggins and Mika Haritos-Fatouros). In addition, this analysis has been used to understand how German men, ordinary men, could be made into perpetrators of evil for the Nazi state and help to create the ultimate evil of the holocaust. I also maintain an on-going interest in cults and mind control, under this general rubric of the psychology of evil.

APPLICATIONS OF PSYCHOLOGY

My attempts to enhance the human condition by "giving psychology away to the public" have taken many forms over the years, a few examples of which give a flavor of the old and the new instances. I organized "The Harlem Summer Project" in 1965 that provided "Head Start" type educational opportunities for pre-school and elementary school children in New York's Harlem area, along with an introduction to college life for high school students from this area, and a Black Pride program for all 100 children in our center. My work on police interrogation tactics, vandalism, and prisons led to changes in public and government policy. Consulting with a community organization in New Orleans led to many neighborhood programs to reduce crime and vandalism and increase jobs for qualified black citizens. **The Shyness Clinic** and **The Shyness Institute** (with Dr. Lynne Henderson) has directly applied our research findings and theories on shyness to help treat shy clients, and to train therapists to work with shy clients, as well as to disseminate information and research on shyness to the general public (via our web site, www.shyness.com). The Internet now provides the ideal way to give psychology away to millions of people for free, so my colleagues, Lee Ross and Sabrina Lin, and I have developed a content-intensive web site that provides in depth information from experts about a range of psychological topics related to improving one's self in personal, social and career domains

February 03

STANFORD UNIVERSITY EXTRAMURAL LECTURES, PRESENTATIONS

Sloane Foundation Fellows in Business, Frequent Guest Lecturer
Knight Foundation Fellows in Journalism, Frequent Guest Lecturer
Alumni College Lecturer, Frequently
Alumni Club Invited Lecturer: New York, Los Angeles, Hawaii, Denver, Washington, Portland, Napa, San Francisco, Cincinnati, Chicago, Rome
Stanford Community Lecture Series

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Stanford Distinguished Teachers Lecture Series
Sierra Camp Invited Guest Lecturer, several times
Cowell Student Health Staff Program
Psychiatry Department Rounds
Frosh Orientations
Prospective Donor Lecturer, New Student Admit Expo
President's Reception for Parents of New Students
Roundtable Discussant on Technology, Reunion Homecoming
Lecturer, Stanford Graduate School of Business
Continuing Education Program Lecturer

STANFORD UNIVERSITY 'CITIZENSHIP' ACTIVITIES

Departmental Service

Director of Summer School Program (1984-2001)
Founder, Co-Advisor to Stanford Undergraduate Psychology Association (SUPA)
Reactivated, Advisor to Psychology Honor Society (PSI CHI)
Head, Social Psychology Graduate Training Program
Director, Committee Member, Undergraduate Education Committee
Chair, Colloquium Committee
Chair, Member, Various Faculty Search Committees
Major Area Advisor to about 20 students annually
Sophomore Mentor to 12 students

University Service

Faculty Dormitory Resident and Fellow, Cedro Dormitory
Organized, Directed about 2000 students engaged in constructive anti-war activities as part of our Political Action Coordinating Committee centered in the Psychology Dept., spring 1969
Member, Faculty Senate Steering Committee
Residential Education Guest Presenter, frequently
Human Subjects Research Committee Member
Dean Thomas' Committee on Improving Undergraduate Education
Member, Committee on University and Departmental Honors (subcommittee on Academic Appraisal and Achievement)
Co-Directed Summer Teaching Program to Improve Quality of High School Psychology
Teaching held at Stanford University (Funded by National Science Foundation)
Organized Several Teaching Workshops in Psychology for California teachers at 4-year colleges, Community Colleges, Junior Colleges and High Schools, held at Stanford University.
Presenter to Prospective Donors to Stanford University
Faculty Representative to Committee to Renovate Audio-Visual Facilities in Lecture Halls
Professor, Residential Supervisor, Stanford-in-Florence Program, 1983
Liaison, Scholar Exchange and Research Program between University of Rome and Stanford University

APPENDIX VI

020110



DEPARTMENT OF THE ARMY
HEADQUARTERS, IN CORRS
VICTORY BASE, IRAQ
APO AE 09342-1400

REPLY TO
ATTENTION OF

April 25, 2004

Criminal Law Division

Mr. [REDACTED]
Washington, DC 20005

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Dear Mr. [REDACTED]

The purpose of this letter is to summarize the arrangements made for you to travel to Iraq for the Article 32 hearing in U.S. v. Specialist Megan M. Ambuhl, as well as explain the risks associated with travel to Iraq, a combat zone.

You previously notified our office that you had been retained by Specialist Ambuhl to represent her at her pending court-martial and pretrial investigation conducted under Article 32, Uniform Code of Military Justice (UCMJ). As per your e-mail on April 24, 2004, you will arrive in Kuwait City, Kuwait on Thursday, April 29, 2004, and depart Kuwait on May 2, 2004, to return to the States.

(S)(C)-2 We are making arrangements for you to be flown into Baghdad International Airport (BIAP) after you arrive in Kuwait. From BIAP, you will convoy to Victory Base, Iraq for the Article 32 hearing. We are making arrangements for you to stay in temporary lodging on Victory Base. Like visiting military defense counsel, you will be staying in a climate-controlled tent with a cot and outdoor showers and latrines. Due to the high threat conditions, we cannot transport you to local hotels. Please bring all personal hygiene products for your stay in country as well as suitable clothing for a hot, dry environment (long-sleeved shirts and trousers, a sun hat, sturdy shoes or light-weight boots). Captain [REDACTED] the detailed defense counsel, will coordinate with Trial Defense Service at Victory Base for transportation on the compound; there is also a shuttle bus system that travels from your living area to the courthouse.

You will be traveling into a combat zone in a dangerous part of the world. By agreeing to come to Iraq, you assume several risks including, but not limited to, serious injury or death. First, by flying on a Government aircraft, you will be a potential target of enemy insurgents. Enemy forces have been known to fire missiles or rocket-propelled grenades (RPGs) at aircraft, which can cause substantial injuries or death if successful. Second, by convoying from BIAP to Victory Base, you will again be a potential target of enemy insurgents who have been known to fire weapons (rifles and rocket-propelled grenades) and to plant improvised explosive devices (IEDs) alongside roads traveled by Coalition Forces. Third, by staying on Victory Base, you assume the risk of being killed by mortar, rocket or other attacks. Fourth, if you plan on traveling to the Baghdad Central Confinement Facility in Abu Ghraib to interview any of the alleged victims who are still detained there, the convoy route is extremely dangerous and the facility is routinely subjected to mortar and rocket attacks. Last week, over 20 detainees were killed in a

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rocket attack at the prison. United States soldiers have also been killed defending the prison from attacks by insurgents.

Pursuant to Rule for Court-Martial (RCM) 506(a), a military accused is entitled to civilian counsel "if provided at no expense to the Government." We have created fund cites for your travel into Iraq and will require reimbursement for travel, lodging, and meals after you arrive in country. This may cost approximately \$2,000.

Before allowing you to enter Iraq, you must agree to hold the United States harmless, assume the risks set forth above, and affirmatively waive your right to sue the Army or any other governmental agency for injury or death. You must also agree to reimburse the Government for expenses incurred for travel and lodging during this visit. Please sign this letter upon receipt and e-mail a scanned copy (with your signature) to our office. We cannot complete your travel orders without your acknowledgement of the costs and risks of this travel.

If you have any questions or concerns, please contact me at [REDACTED] or vcmain.hq.c5.army.mil or (914) 360-[REDACTED]

Sincerely,

(b)(6)-2

CF:
Detailed Defense Counsel
Trial Counsel

[REDACTED]
Captain, U.S. Army
Chief, Criminal Law Division

Hold Harmless Agreement:

I hereby acknowledge receipt of this letter. I further acknowledge that I will be traveling into a war zone and that the Army cannot guarantee my safety. I also acknowledge that I may be killed or injured while traveling to, from, or in Iraq. I knowingly assume these risks and waive any right I (or my heirs) might otherwise have to sue the Army or any other governmental organization for my injuries or death. I acknowledge that I will be required to reimburse the Government for expenses incurred by my travel and lodging in Iraq. I further agree that I, my heirs, executors, administrators or assigns agree to indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims or interests incident to or resulting from litigation of claims relating to travel to Iraq, including wrongful death claims.

[REDACTED]
Civilian Defense Attorney

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APPENDIX VII

020113

INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS

PSYCHOLOGICAL STRESSES

The potential for abusive treatment of detainees during the Global War on Terrorism was entirely predictable based on a fundamental understanding of the principle of social psychology principles coupled with an awareness of numerous known environmental risk factors. Most leaders were unacquainted with these known risk factors, and therefore failed to take steps to mitigate the likelihood that abuses of some type would occur during detainee operations. While certain conditions heightened the possibility of abusive treatment, such conditions neither excuse nor absolve the individuals who engaged in deliberate immoral or illegal behaviors.

The abuse the detainees endured at various places and times raises a number of questions about the likely psychological aspects of inflicting such abuses. Findings from the field of social psychology suggest that the conditions of war and the dynamics of detainee operations carry inherent risks for human mistreatment, and therefore must be approached with great caution and careful planning and training.

The Stanford Prison Experiment

In 1973, (b)(6)(3) published their landmark Stanford study, "Interpersonal Dynamics in a Simulated Prison." Their study provides a cautionary tale for all military detention operations. The Stanford Experiment used a set of tested, psychologically sound college students in a benign environment. In contrast, in military detention operations, soldiers work under stressful combat conditions that are far from benign.

The Stanford Prison Experiment (SPE) attempted to "create a prison-like situation" and then observe the behavior of those involved. The researchers randomly assigned 24 young men to either the "prisoner" or "guard" group. Psychological testing was used to eliminate participants with overt psychopathology, and extensive efforts were made to

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INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS

simulate actual prison conditions. The experiment, scheduled to last two weeks, was cancelled after only six days due to the ethical concerns raised by the behaviors of the participants. The study notes that while guards and prisoners were free to engage in any form of interpersonal interactions, the "characteristic nature of their encounters tended to be negative, hostile, affrontive and dehumanizing."

The researchers found that both prisoners and guards exhibited "pathological reactions" during the course of the experiment. Guards fell into three categories: (1) those who were "tough but fair," (2) those who were passive and reluctant to use coercive control and, of special interests, (3) those who "went far beyond their roles to engage in creative cruelty and harassment." With each passing day, guards "were observed to generally escalate their harassment of the prisoners." The researchers reported: "We witnessed a sample of normal, healthy American college students fractionate into a group of prison guards who seemed to derive pleasure from insulting, threatening, humiliating, and dehumanizing their peers."

Because of the random assignment of subjects, the study concluded the observed behaviors were the result of situational rather than personality factors:

The negative, anti-social reactions observed were not the product of an environment created by combining a collection of deviant personalities, but rather, the result of an intrinsically pathological situation which could distort and rechannel the behaviour of essentially normal individuals. The abnormality here resided in the psychological nature of the situation and not in those who passed through it.

The authors discussed how prisoner-guard interactions shaped the evolution of power use by the guards:

The use of power was self-aggrandizing and self-perpetuating. The guard power, derived initially from an arbitrary label, was intensified whenever there was any perceived threat by the prisoners and this new level subsequently became the baseline from which further hostility and harassment would begin. The most hostile guards on each shift moved spontaneously into the leadership roles of

INDEPENDENT PANEL TO REVIEW DoD DETENTION OPERATIONS

giving orders and deciding on punishments. They became role models whose behaviour was emulated by other members of the shift. Despite minimal contact between the three separate guard shifts and nearly 16 hours a day spent away from the prison, the absolute level of aggression as well as the more subtle and "creative" forms of aggression manifested, increased in a spiraling function. Not to be tough and arrogant was to be seen as a sign of weakness by the guards and even those "good" guards who did not get as drawn into the power syndrome as the others respected the implicit norm of never contradicting or even interfering with an action of a more hostile guard on their shift.

In an article published 25 years after the Stanford Prison Experiment, Haney and Zimbardo noted their initial study "underscored the degree to which institutional settings can develop a life of their own, independent of the wishes, intentions, and purposes of those who run them." They highlighted the need for those outside the culture to offer external perspectives on process and procedures. (2)

Social Psychology: Causes of Aggression and Inhumane Treatment

The field of social psychology examines the nature of human interactions. Researchers in the field have long been searching to understand why humans sometimes mistreat fellow humans. The discussions below examine the factors behind human aggression and inhumane treatment, striving to impart a better understanding of why detainee abuses occur.

Human Aggression

Research has identified a number of factors that can assist in predicting human aggression. These factors include:

INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS

- **Personality traits.** Certain traits among the totality of an individual's behavioral and emotional make-up predispose to be more aggressive than other individuals.
- **Beliefs.** Research reveals those who believe they can carry out aggressive acts, and that such acts will result in a desired outcome, are more likely to be aggressive than those who do not hold these beliefs.
- **Attitudes.** Those who hold more positive attitudes towards violence are more likely to commit violent acts.
- **Values.** The values individuals hold vary regarding the appropriateness of using violence to resolve interpersonal conduct.
- **Situational Factors.** Aggressive cues (the presence of weapons), provocation (threats, insults, aggressive behaviors), frustration, pain and discomfort (hot temperatures, loud noises, unpleasant odors), and incentives can all call forth aggressive behaviors.
- **Emotional factors.** Anger, fear, and emotional arousal can heighten the tendency to act out aggressively.

The personality traits, belief systems, attitudes, and values of those who perpetrated detainee abuses can only be speculated upon. However, it is reasonable to assume, in any given population, these characteristics will be distributed along a bell curve, which will predispose some more than others within a group to manifest aggressive behaviors. These existing traits can be affected by environmental conditions, which are discussed later.

Abusive Treatment

Psychologists have attempted to understand how and why individuals and groups who usually act humanely can sometimes act otherwise in certain circumstances. A number of psychological concepts explain why abusive behavior occurs. These concepts include:

INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS

Deindividuation. Deindividuation is a process whereby the anonymity, suggestibility, and contagion provided in a crowd allows individuals to participate in behavior marked by the temporary suspension of customary rules and inhibitions. Individuals within a group may experience reduced self-awareness which can also result in disinhibited behavior.

Groupthink. Individuals often make very uncharacteristics decisions when part of a group. Symptoms of groupthink include: (1) Illusion of invulnerability—group members believe the group is special and morally superior; therefore its decisions are sound; (2) Illusion of unanimity in which members assume all are in concurrence, and (3) Pressure is brought to bear on those who might dissent.

Dehumanization. Dehumanization is the process whereby individuals or groups are viewed as somehow less than fully human. Existing cultural and moral standards are often not applied to those who have been dehumanized.

Enemy Image. Enemy image describes the phenomenon wherein both sides participating in a conflict tend to view themselves as good and peace-loving peoples, while the enemy is seen as evil and aggressive.

Moral Exclusion. Moral exclusion is a process whereby one group views another as fundamentally different, and therefore prevailing moral rules and practices apply to one group but not the other.

Abuse and Inhumane Treatment in War

(S)(b)(7)
Socialization to Evil and Doubling. Dr. [REDACTED] has extensively examined the nature of inhumane treatment during war. Dr. [REDACTED] suggested that ordinary people can experience "socialization to evil," especially in a war environment. Such people often experience a "doubling." They are socialized to evil in one environment and act accordingly within that environment, but they think and behave otherwise when removed from that environment. For example, doctors committed unspeakable acts while working in Auschwitz, but would go home on weekends and behave as "normal" husbands and fathers.

INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS

Moral Disengagement. Moral disengagement occurs when normal self-regulatory mechanisms are altered in a way that allows for abusive treatment and similar immoral behaviors. Certain conditions, identified by Bandura and his colleagues (3), can lead to moral disengagement, such as:

- **Moral Justification.** Misconduct can be justified if it is believed to serve a social good.
- **Euphemistic Language.** Language affects attitudes and beliefs, and the use of euphemistic language such as "softening up" (and even "humane treatment") can lead to moral disengagement.
- **Advantageous Comparison.** "Injurious conduct can be rendered benign" when compared to more violent behaviors. This factor is likely to occur during war. Essentially, abusive behaviors may appear less significant and somehow justifiable when compared to death and destruction.
- **Displacement of Responsibility.** "People view their actions as springing from the social pressures or dictates of others rather than as something for which they are socially responsible." This is consistent with statements from those under investigation for abuses.
- **Diffusion of Responsibility.** Group decisions and behaviors can obscure responsibility: "When everyone is responsible, no one really feels responsible."
- **Disregarding or Distorting the Consequences of Actions.** Harmful acts can be minimized or ignored when the harm is inflicted for personal gain or because of social inducements.
- **Attribution of Blame.** "Victims get blamed for bringing suffering on themselves."

Detainee and interrogation operations consist of a special subset of human interactions, characterized by one group which has significant power and control over another group which must be managed, often against the will of its members. Without proper oversight

INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS

and monitoring, such interactions carry a higher risk of moral disengagement on the part of those in power and, in turn, are likely to lead to abusive behaviors.

Environmental Factors

The risk of abusive behaviors is best understood by examining both psychological and environmental risk factors. A cursory examination of situational variables present at Abu Ghraib indicates the risk for abusive treatment was considerable. Many of the problematic conditions at Abu Ghraib are discussed elsewhere in this report, to include such factors as poor training, under nearly daily attack, insufficient staffing, inadequate oversight, confused lines of authority, evolving and unclear policy, and a generally poor quality of life. The stresses of these conditions were certainly exacerbated by delayed troop rotations and by basic issues of safety and security. Personnel needed to contend with both internal threats from volatile and potentially dangerous prisoners and external threats from frequent mortar fire and attacks on the prison facilities.

The widespread practice of stripping detainees, another environmental factor, deserves special mention. The removal of clothing interrogation technique evolved into something much broader, resulting in the practice of groups of detainees being kept naked for extended periods at Abu Ghraib. Interviews with personnel at Abu Ghraib indicated that naked detainees were a common sight within the prison, and this was understood to be a general part of interrogation operations.

While the removal of clothing may have been intended to make detainees feel more vulnerable and therefore more compliant with interrogations, this practice is likely to have had a psychological impact on guards and interrogators as well. The wearing of clothes is an inherently social practice, and therefore the stripping away of clothing may have had the unintended consequence of dehumanizing detainees in the eyes of those who interacted with them. As discussed earlier, the process of dehumanization lowers the moral and cultural barriers that usually preclude the abusive treatment of others.

INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS

- (1) Haney, C., Banks, C., and Zimbardo, P., Interpersonal Dynamics in a Simulated Prison, *International Journal of Criminology and Penology*, 1973, 1, 69-97.
- (2) Haney, C. and Zimbardo, P., The Past and Future of U.S. Prison Policy, Twenty-Five Years after the Stanford Prison Experiment, *American Psychologist*, July 1998, 709-27.
- (3) Bandura, A., Barbaranelli, C., Caprara, G., and Pastorelli, C., Mechanisms of Moral Disengagement in the Exercise of Moral Agency, *Journal of Personality and Social Psychology*, Vol. 71(2), August 1996, 364-74.

APPENDIX VIII

020122

UNITED STATES

Y.

FREDERICK, Ivan L.
SSG, U.S. Army
HHC, 16th MP BDE (ABN),
III Corps
Victory Base, Iraq,
APO AE 09342

HHC, 16th MP BDE (ABN),

III Corps

Victory Base, Iraq,

APO AE 09342

GOVERNMENT'S RESPONSE
TO DEFENSE MOTION TO
CHANGE LOCATION OF
SENTENCING PROCEEDING

CHANGE LOCATION OF

SENTENCING PROCEEDING

28 JULY 2004

***** 28 JULY 2004 *****

RELIEF SOUGHT

The accused requests that this Court change the place of the sentencing proceeding to forestall any lack of fairness or appearance of the same from the court-martial due to the unwillingness of certain defense witnesses to travel to Iraq. The government objects to this request and maintains that the accused will be afforded a fair sentencing hearing at the current place of trial, Iraq.

appearance of the same from the court-martial due to the unwillingness of certain defendants to testify.

unwillingness of certain defense witnesses to travel to Iraq. The government objects to this.

The government objects to this request and maintains that the accused will be afforded a fair sentencing hearing at the current place of trial.

accused will be afforded a fair sentencing hearing at the current place of trial, Iraq.

current place of trial, Iraq.

BURDEN OF PROOF AND PERSUASION

The defense has the burden of persuasion since it is the moving party. R.C.M. 905(c)(2). The burden of proof that the defense must meet is a preponderance of the evidence. R.C.M. 905(c)(1).

defense must meet is a preponderance of the evidence. R.C.M. 905(c)(1).

905(c) (1).

FACTS

The accused, a military police noncommissioned officer, along with a number of other co-accused, maltreated and assaulted numerous foreign national detainees while acting as prison guards at the Baghdad Central Correctional Facility, Abu Ghraib, Iraq. On one particularly appalling night, the accused, along with a number of co-accused, stripped seven detainees naked except for the sand bags on their heads, stacked the naked detainees in "human pyramid", forced several of the detainees to masturbate, and then punched one detainee so violently that immediate medical attention was needed as the detainee went into seizure.

assaulted numerous foreign national detainees while acting as prison guards at the Facility.

prison guards at the Baghdad Central Correctional Facility, Abu Ghraib, Iraq. On one occasion, [redacted]

Ghraib, Iraq. On one particularly appalling night, the accused, along with a number of others, were taken to the Baghdad Central Correctional Facility, Abu

along with a number of co-accused, stripped seven detainees naked except for the sandal straps.

naked except for the sand bags on their heads, stacked the naked detainees in "human pyramids".

detainees in "human pyramid", forced several of the detainees to masturbate, and then punched one detainee in the face.

masturbate, and then punched one detainee so violently that immediate medical attention was required.

immediate medical attention was needed as the detainee went into seizure.

seizure. The assistance was needed as the detainee went into

Charges against the accused were preferred on 20 March 2004 and referred on 28 April 2004. LTG Metz, the convening authority, has determined the court-martial will be held in

authority, has determined the court-martial will be held in

VIII

020123

Baghdad, Iraq. Subsequent to the referral of charges and his arraignment, the accused has submitted an offer to plead guilty. It is anticipated that the convening authority will take action on this offer to plead this upcoming weekend. However, prior to his presentencing hearing, the accused has elected to file a motion to change the place of his sentencing hearing.

LAW

While Rule for Courts-Martial (R.C.M.) 906(b)(11) provides "the place of trial may be changed when necessary to prevent prejudice to the rights of the accused", the real issue behind the accused's motion is determining the best way to adjudge a "legal, appropriate, and adequate sentence". *United States v. Combs*, 20 M.J. 441, 442 (C.M.A. 1985). In fashioning such a sentence, R.C.M. 1001(e) gives "great latitude" to the court-martial to consider information by means other than live testimony. In fact, R.C.M. 1001(e)(2) places certain limitations on a military judge's discretion when considering whether the production of live witnesses is mandatory during presentencing proceedings. *United States v. Mitchell*, 41 M.J. 512, 514 (A.C.M.R. 1994). In order for a witness to be produced subject to a subpoena or invitational travel orders during sentencing, five criteria must be met: (1) the expected testimony must be necessary for consideration of a matter of substantial significance; (2) the weight or credibility of the testimony is of substantial significance; (3) the other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify (except in an extraordinary case where a stipulation would be insufficient); (4) other forms of evidence (to include oral depositions, written interrogatories, or former testimony) would not be sufficient to meet the needs of the court-martial; and (5) the significance of personal appearance of the witness, when balanced against the practical difficulties of production of the witness, favors production. See R.C.M. 1001(e)(2)(A)-(E); *United States v. McDonald*, 55 M.J. 173, 177 (2001).

ARGUMENT

The real substance behind the accused's motion for change of location is witness attendance/production for his presentencing proceeding. While the situation before the Court is not a true issue of witness production since the government is willing to produce any witness who possesses relevant testimony that can assist in fashioning a legal, appropriate,

and adequate sentence for the accused,¹ the balancing test set up by R.C.M. 1001(e) (2) is useful for determining whether the presence of the proffered witnesses is necessary for a fair presentencing hearing. As shown in the following analysis, there is not one potential witness proffered by the accused who is necessary to a fair hearing especially considering that the President has given wide latitude under R.C.M. 1001(e) for this Court to consider alternate forms of evidence in lieu of live testimony during sentencing. Consequently, the accused's change of location motion should be denied.

First, any expected testimony offered by a sentencing witness must be necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact. R.C.M. 1001(e) (2) (A) (emphasis added). Of the witnesses listed by the accused in his motion, there are several who do not meet this first requirement since any testimony they would provide is clearly attenuated at best. Specifically, the following witnesses do not have testimony that is necessary for consideration of a matter of substantial significance:

(S)(b)(7) Inmates [REDACTED] - the accused represents that these witnesses will testify as to the way he treated them while they were prisoners under his charge. However, these witnesses' testimony can hardly be characterized as necessary to a matter of substantial significance. First, the accused has already identified two other witnesses, [REDACTED] who are familiar with his previous conduct as a prison guard in Virginia. See *Combs*, 20 M.J. at 442 (factor to be weighed in determining whether personal appearance is required is testimony is cumulative of other evidence). Moreover, any knowledge of the accused's character for rehabilitative potential by these two witnesses is clearly limited since their relationship to the accused is one of guard/prisoner who can hardly speak

(S)(b)(7) (S)(b)(7)-2 (S)(b)(7)-7
¹ The government does object to the production of Doctor [REDACTED], inmate [REDACTED], inmate [REDACTED], Major [REDACTED], Captain [REDACTED], Specialist [REDACTED], Sergeant [REDACTED], Lieutenant General Ricardo Sanchez, Colonel [REDACTED] and Major General Geoffrey Miller since their testimony is marginally relevant at best and would not assist the Court in any meaningful way in fashioning an appropriate and adequate sentence for the accused. (S)(b)(7)-1

to the accused's character, moral fiber, determination of the accused to be rehabilitated, and the nature and severity of the offenses. See R.C.M. 1001(b)(5)(B).

(b)(6)-7
Doctor (Dr.) [REDACTED] the accused has not demonstrated any direct correlation between Dr. Zimbardo's expertise and the accused's misconduct that would make Dr. Zimbardo's testimony necessary in fashioning an appropriate sentence for this particular accused.

Major (MAJ) [REDACTED] the accused represents to the Court that this witness will testify as to the identity of the seven detainees who were the victims of the accused's abuse. The identity of these victims is not a matter of substantial significance in the accused's sentencing proceeding. Moreover, the government intends to call at least one of these Iraqi victims in its case in aggravation where defense counsel can question this witness in how he and the other detainees arrived in Tier 1A the night of 7 November.²

2 (b)(6)-2
(b)(6)-9
Captain (CPT) [REDACTED] the accused's summary of these two witnesses' expected testimony is entirely speculative. However, if they would testify as represented, calling both witnesses would be cumulative and unnecessary since they would testify to the same information.

(b)(6)-1
CPT [REDACTED] and SA [REDACTED] - while the government does not have any specific information that these two witnesses would invoke their Article 31, UCMJ rights, any invocation would make their personal appearance unnecessary since they would not provide any necessary information that would assist the Court in determining an appropriate sentence for the accused. At this time, the government does not intend to extend either CPT Wood or SA Romero immunity.³

Specialist (SPC) [REDACTED] - assuming that the witness would testify that a certain offensive picture was used as a screen saver within the military

² The government anticipates calling between 1-3 Iraqi nationals who were the victims of the accused's abuse.

³ At this time, the government does not intend to extend immunity to any of the potential witnesses identified by the accused.

intelligence unit stationed at Abu Ghraib, this fact is hardly necessary in determining a matter of substantial significance. Taken at face value, this testimony does not establish whose computer this screen saver was used on, that anyone in the military intelligence chain of command knew of this screen saver, or that the accused knew that it was being used as a screen saver, thus somehow justifying his criminal misconduct.

Sergeant (SGT) [REDACTED] the accused's representation of this witness' testimony is again speculative at best. However, taken at face value, the accused has already identified [REDACTED] (S)(G)-7 as a member of the intelligence community that can testify as its knowledge of the accused's actions. See *Combs*, 20 M.J. at 442. SGT [REDACTED] testimony would be cumulative and unnecessary. (S)(G)-2

Lieutenant General (LTG) Sanchez and Colonel (COL) [REDACTED] the accused's representation of these witnesses' testimony is speculative and would be contrary to statements already made by these two officers. Moreover, any action or inaction taken by either LTG Sanchez or COL [REDACTED] is entirely attenuated to fashioning an appropriate sentence for this particular accused.

Major General (MG) Geoffrey Miller - the accused's representations of this witness' testimony is once again speculative.

Next, in order for a witness to be produced, the weight or credibility of the necessary testimony has to be of substantial significance to the determination of an appropriate sentence.

R.C.M. 1001(e) (2) (B). Of the witnesses the accused has identified who can provide necessary evidence on a matter of substantial significance, the credibility of these witnesses is insignificant. The government has no information that would make the credibility of Mr. [REDACTED] (S)(G)-4

[REDACTED] Pastor [REDACTED], Mrs. [REDACTED] Ms. [REDACTED] Brigadier General (BG) Janis Karpinski, CPT [REDACTED] First Sergeant (1SG) [REDACTED] or SGT [REDACTED] a matter of substantial (S)(G)-2

significance in determining an appropriate sentence for the accused.⁴

The third requirement for mandating witness production is that the other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony. R.C.M. 1001(e)(2)(C). The government is willing to enter into a stipulation of fact with the above named witnesses who are unwilling to travel to Iraq.⁵ These alternate means of evidence will allow all relevant information in adequate and legal forms to be presented to the Court to ensure an appropriate decision.

The final requirement in determining whether a witness must be produced is if the significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production. R.C.M. 1001(e)(2)(E). Some of the factors that a military judge can consider in weighing this balancing test are whether the testimony relates to a disputed matter, whether the government is willing to stipulate to the testimony as fact, whether there is other live testimony available to appellant on the same subject, whether the testimony is cumulative of other evidence, whether there are practical difficulties in producing the witness, whether the credibility of the witness is significant, whether the request is timely, and whether another form of presenting the evidence is available and sufficient. Combs, 20 M.J. at 442-443. After the government produces BG Karpinski, CPT [REDACTED], 1SG [REDACTED] and SGT [REDACTED] to testify live at the court-martial, the only witnesses with necessary evidence on a matter with substantial significance who will not be present would be Mr. [REDACTED] Mr. [REDACTED] Pastor [REDACTED] and MS. [REDACTED]. (S)(b)-2

However, there are several factors that weigh against making their personal appearance mandatory for a fair proceeding. (S)(b)-2

⁴ Of these witnesses, the government is willing to produce the following military witnesses on behalf of the accused in Baghdad during the presentencing hearing: BG Karpinski, CPT [REDACTED], 1SG [REDACTED] and SGT [REDACTED]. (S)(b)-2

⁵ Furthermore, if the Court deems Dr. [REDACTED] testimony necessary, in recognition of the difference between fact and expert witnesses, the government will request that the convening authority order the deposition of Dr. [REDACTED]. (S)(b)-4


As stated above, the government is willing to enter into stipulations of fact concerning the substance of these witnesses' testimony and their credibility as witnesses is not an issue. Moreover, as demonstrated by the affidavits filed by the accused, there are practical difficulties in producing these witnesses since they refuse to travel to Iraq. While these witnesses will testify as to their opinion on the accused's rehabilitative potential and, absent their personal appearance, there will be no live testimony on this subject, their opinions of the accused's rehabilitative potential is really not a matter of dispute. The government does not dispute that the accused's spouse, daughter, co-workers, and pastor share the opinion that the accused possesses rehabilitative potential. However, the stipulations of fact the government is willing to enter into will be more than a sufficient substitute to present this evidence to the Court. When all of these factors are considered as a whole, it is clear that the personal appearance of these witnesses is not necessary for a fair and just sentencing proceeding.

Finally, throughout his motion, the accused makes consistent mention of the safety situation in Iraq and that the government is seeking to keep the court-martial there for mere political reasons. However, the command has a strong interest in holding a fully public trial in Iraq. Under R.C.M. 806, courts-martial shall be open to the public, to include both members of the military and civilian communities. Iraqi nationals and the Arab community on the whole have a keen interest in how justice will be pursued in the accused's case. An open and public hearing in Iraq will send a strong message that our military justice process is thorough, reliable, and provides justice for those who come into contact with it. Holding this court-martial in Iraq also carries a strong deterrence effect on our soldiers who will have a very proximate example of accounting that must be given for similar misconduct. Lastly, the convening authority will take all necessary steps to ensure the safety of all the participants.

CONCLUSION

In sum, the fact that a number of the accused's desired sentencing witnesses refuse to travel to Iraq should not be an impediment to holding the court-martial in Iraq. The Manual for Courts-Martial allows for a situation such as this to collect all of the relevant and necessary information for the Court to fashion a legal, appropriate, and adequate sentence for the accused. Consequently, the government asks that this Court find that the witnesses listed in footnote 1, supra, are unnecessary for consideration of a matter of substantial significance and, therefore, should not be produced. Secondly, given the government's willingness to enter into stipulations of fact for the other proffered witnesses thus putting any necessary evidence before this Court, the government requests that the accused's motion for change of the location of the trial be denied.


//original signed//


CPT, JA
Trial Counsel

(b)(6)-2

Delivered to defense counsel, by email, this 28th day of July 2004.

//original signed//


CPT, JA
Trial Counsel

APPENDIX IX

020131

AOL.COM | Message View

Page 1 of 1

Subj: RE: response to motion to change location of trial

Date: 7/29/2004 2:36:48 AM Eastern Daylight Time

From: [REDACTED]@vcmain.hq.c5.army.mil

To: [REDACTED]@hqda.army.mil, [REDACTED]@hq.c5.army.mil,

[REDACTED]@us.army.mil

Cc: [REDACTED]@aol.com, [REDACTED]@vcmain.hq.c5.army.mil,

[REDACTED]@vcmain.hq.c5.army.mil

Sent from the Internet (Details)

Sir:

This is a reply to the government's response to the Accused's motion for a change of location. We very briefly wish to point out the following to the court:

1. The deterrence associated with this guilty plea will be known and felt by all soldiers around the world instantly upon its announcement. This is clearly irrespective of where the hearing might occur.
2. The idea that no live witnesses are required is antithetical to the most rudimentary concepts of justice in any system. Such a position is entirely inconsistent with the government's assertion that it seeks justice in this case or the Court's stated position that this case will be tried like any other court-martial case anywhere else in the world.
3. The Government now suggests further that the due process rights of the Accused should somehow be subordinated to an alleged, but unproven, need to appease the Arab world. In a nation which has elevated individual rights to a level unparalleled in all of civilization, such an assertion should rightly be summarily rejected as a rational for holding a trial in Baghdad. The Arab world will know the result the moment it occurs, wherever it occurs.

Respectfully submitted,

CP [REDACTED]
M [REDACTED]

Defense Counsel

-----Original Message-----

From: [REDACTED] PT USALSA [mailto:[REDACTED]@hqda.army.mil]

Sent: Wednesday, July 28, 2004 4:31 PM

To: [REDACTED]@q.c5.army.mil, [REDACTED]@us.army.mil

Cc: [REDACTED]@aol.com, [REDACTED] PT CJTF7 -Senior Defense Counsel;

[REDACTED]@vcmain.hq.c5.army.mil

Subject: response to motion to change location of trial

Sir:

Please find attached the government's response to the motion to change location of trial.

v/r

CP [REDACTED]

<http://webmail.aol.com/fmsgview.adp?folder=SU5CT1g=&uid=10688698>

7/29/2004 020132

APPENDIX X

020133

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MERCK, JOHNSON, and MOORE
Appellate Military Judges

Staff Sergeant IVAN L. FREDERICK
U.S. Army
Petitioner

v. (b)(6)-2

Colonel [REDACTED] Military Judge,
Fifth Judicial Circuit; and
The United States of America
Respondents

ARMY MISC 20040937

ORDER

On consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Application for a Stay of Proceedings filed by Petitioner in the above cause on 20 September 2004, the Petition is DENIED.

DATE: 27 September 2004

FOR THE COURT:

[REDACTED]
Clerk of Court

CF: JALS-DA
JALS-GA
JALS-CCZ
JALS-CCR
JALS-CCO
JALS-CR4
Petitioner
Respondents

(b)(6)-4
[REDACTED] Esquire
Weare, NH 03281

Captain [REDACTED] (b)(6)-2

020134

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MERCK, JOHNSON, and MOORE
Appellate Military Judges

Staff Sergeant IVAN L. FREDERICK
U.S. Army
Petitioner
v. (b)(6)-2
Colonel [REDACTED] Military Judge,
Fifth Judicial Circuit; and
The United States of America
Respondents

ARMY MISC 20040937

ORDER

On consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Application for a Stay of Proceedings filed by Petitioner in the above cause on 20 September 2004, the Petition is DENIED.

DATE: 27 September 2004

FOR THE COURT:

[REDACTED]
Clerk of Court (b)(6)-2

CF: JALS-DA
JALS-GA
JALS-CCZ
JALS-CCR
JALS-CCO
JALS-CR4
Petitioner
Respondents

(b)(4)-7
[REDACTED] Esquire
Weare, NH 03281
Captain [REDACTED]

020135

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MERCK, JOHNSON, and MOORE
Appellate Military Judges

Staff Sergeant IVAN L. FREDERICK

U.S. Army

Petitioner

v. (b)(6)-2

Colonel [REDACTED] Military Judge,

Fifth Judicial Circuit; and

The United States of America

Respondents

ARMY MISC 20040937

ORDER

On consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Application for a Stay of Proceedings filed by Petitioner in the above cause on 20 September 2004, the Petition is DENIED.

DATE: 27 September 2004

FOR THE COURT:

[REDACTED]
Clerk of Court

(b)(6)-4
[REDACTED] Esquire

Weare, NH 03281

Captain [REDACTED]

CF: JALS-DA
JALS-GA
JALS-CCZ
JALS-CCR
JALS-CCO
JALS-CR4
Petitioner
Respondents

020136

*** TX REPORT ***

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U.S. ARMY COURT OF CRIMINAL APPEALS

901 North Stuart Street

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TO: Mr. (S)(b)-7 Esq.

FAX: (603) 529- (S)(b)-7

FROM: (S)(b)-2 DEPUTY CLERK OF COURT

FAX: (703) 696- (S)(b)-2 OR DSN 426- (S)(b)-2

VOICE: (703) 588- (S)(b)-2 OR DSN 426- (S)(b)-2

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Mr. (S)(b)-7

Attached is a copy of the U.S. Army Court of Criminal Appeals decision on the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Application for a Stay of Proceedings filed by Petitioner in the case of U.S. v. Frederick. The date of the decision is 27 September 2004.

020137

U.S. ARMY COURT OF CRIMINAL APPEALS

901 North Stuart Street

Arlington, VA 22203-1837



TO: Mr. (b)(6)-4 Esq.

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Mr. (b)(6)-4

Attached is a copy of the U.S. Army Court of Criminal Appeals decision on the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Application for a Stay of Proceedings filed by Petitioner in the case of U.S. v. Frederick. The date of the decision is 27 September 2004.

ADDITIONAL PAGES, IF ANY: 1

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DEPARTMENT OF THE ARMY
US ARMY JUDICIARY
901 NORTH STUART STREET
ARLINGTON, VA 22203-1837



JALS-CCO

20 September 2004

Staff Sergeant IVAN L.
FREDERICK, U.S. Army,

Petitioner

v.

ARMY MISC 20040937

(b)(6)-2
Colonel [REDACTED] Military
Judge, Fifth Judicial Circuit; and
THE UNITED STATES OF AMERICA,

Respondents

A Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Application for a Stay of Proceedings in the above-entitled cause having been received for filing with the U.S. Army Court of Criminal Appeals, the petition is hereby referred to Panel 4 for consideration.

The Chief, Government Appellate Division, U.S. Army Legal Services Agency, or other such appellate government counsel as that officer may detail, shall represent the Respondents before the Army Court of Criminal Appeals and in any subsequent proceedings before the U.S. Court of Appeals for the Armed Forces.

The Chief, Defense Appellate Division, U.S. Army Legal Services Agency, or such other appellate defense counsel as that officer may detail, shall, unless excused by the Petitioner, represent the Petitioner before the Army Court of Criminal Appeals and in any subsequent proceedings before the U.S. Court of Appeals for the Armed Forces.

[REDACTED]
Clerk of Court (b)(6)-2

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Respondents

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DEPARTMENT OF THE ARMY
US ARMY JUDICIARY
901 NORTH STUART STREET
ARLINGTON, VA 22203-1837



JALS-CCO

20 September 2004

Staff Sergeant IVAN L.
FREDERICK, U.S. Army,

Petitioner

v.

ARMY MISC 20040937

Colonel [REDACTED] Military
Judge, Fifth Judicial Circuit; and
THE UNITED STATES OF AMERICA,

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The Chief, Defense Appellate Division, U.S. Army Legal Services Agency, or such other appellate defense counsel as that officer may detail, shall, unless excused by the Petitioner, represent the Petitioner before the Army Court of Criminal Appeals and in any subsequent proceedings before the U.S. Court of Appeals for the Armed Forces.

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Respondents

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020140

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Staff Sergeant
Ivan L. Frederick
United States Army,
HHC, 16th Military Police BDE,
III Corps, Victory Base, Iraq,
Petitioner

PETITION FOR EXTRAORDINARY
RELIEF IN THE NATURE OF A WRIT
OF MANDAMUS AND APPLICATION FOR
A STAY OF PROCEEDINGS

v.

~~CRIM APP.~~

~~MISC DKT NO.~~ _____

(5)(6)-2
Colonel [REDACTED]
Military Judge, Fifth Judicial
Circuit; and The United States
Army,

ARMY MISC 20040937

Respondents

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
ARMY COURT OF CRIMINAL APPEALS

PREAMBLE

COME NOW the undersigned defense counsel on behalf of
petitioner and, pursuant to Rules 2(b) and 20 of this Court's
Internal Rules of Practice and Procedure, and request that this
Court grant extraordinary relief in the nature of a writ of
mandamus by ordering the military judge to abate the proceedings
in this court-martial in the country of Iraq until such time as a
change of location, to a place other than the country of Iraq,
has been designated by the convening authority. Petitioner
further requests that the Court stay the proceedings until the
Court can take action on the Petition.

020141

HISTORY OF THE CASE

Petitioner is charged with conspiracy, willful dereliction of duty, maltreatment of detainees, assault consummated by a battery, and indecent acts, in violation of the Uniform Code of Military Justice (UCMJ), Articles 81, 92, 93, 128, and 134, 10 U.S.C. 881, 892, 893, 928, and 934. (Charge Sheet.) The charges stem from petitioner's service in Iraq at the Abu Ghraib prison.

Petitioner entered into a pretrial agreement with the convening authority whereby he agreed to plead guilty and be sentenced by military judge alone. The pretrial agreement is silent concerning the location of the court-martial proceedings and alternatives to the actual in-court appearance of witnesses.

On 21 July 2004, petitioner filed a Motion to Change Location of Sentencing Proceedings based upon the inability to have essential civilian witnesses participate in-person at the proceedings due to safety concerns inherent to the Iraqi combat zone. (Appendix I.)

On 28 July 2004, the government filed a responsive pleading to which petitioner replied by e-mail on 29 July 2004.

(Appendices VIII and IX.) Without oral argument, the military judge denied petitioner's motion by written opinion on 4 August 2004. (Appendix II.)

On 14 August 2004, petitioner then filed a Motion for Reconsideration of the military judge's written decision to deny

petitioner's Motion to Change Location of Sentencing Proceedings. (Appendix III.) The Motion for Reconsideration was argued before the military judge on 24 August 2004 at Mannheim, Germany, at an Article 39(a) session. (Appendix IV.)

The military judge again denied Petitioner's Motion to Change Location of Sentencing Proceedings. (Appendix IV, p. 31.)

STATEMENT OF FACTS

Those facts necessary for disposition of the issue are contained within the brief in support of this petition which was filed contemporaneously with this petition.

ISSUE

WHETHER THE MILITARY JUDGE'S DENIAL OF PETITIONER'S MOTION TO CHANGE THE LOCATION OF SENTENCING PROCEEDINGS CONTRAVENES PETITIONER'S RIGHT TO COMPEL THE ATTENDANCE OF WITNESSES UNDER THE SIXTH AMENDMENT, AND PETITIONER'S RIGHT TO FULL AND FAIR SENTENCING PROCEEDINGS.

RELIEF SOUGHT

Petitioner seeks to have this Court order the military judge to abate the proceedings in this court-martial in the country of Iraq until such time as a change of location, to a place other than the country of Iraq, has been designated by the convening authority, and to stay the proceedings until the Court can take action on the petition.

JURISDICTIONAL STATEMENT

Jurisdiction for this Petition is the All Writs Act; 28 U.S.C. § 1651 (1992), and Article 66(b), UCMJ. This Court has explained further that it has supervisory jurisdiction, as the "highest judicial tribunal in the Army's court-martial system," to issue extraordinary writs. *Dew v. United States*, 48 M.J. 639, 645 (Army Ct. Crim. App. 1998). The granting of an extraordinary writ is a drastic remedy reserved for truly extraordinary cases. See *Clinton v. Goldsmith*, 526 U.S. 529 (1999).

REASONS FOR GRANTING WRIT

Extraordinary relief is necessary to prevent immediate harm from befalling petitioner resulting from the denial of petitioner's motion to change the location of sentencing proceedings. As a direct result of the denial of that motion, petitioner's constitutional right to compel the attendance of witnesses and to full and fair sentencing proceedings suffers.

The current hostilities in the country of Iraq necessitate changing the location for sentencing proceedings so as to foster participation by essential sentencing witnesses. As this Court has recognized in *United States v. McDonagh*, 10 M.J. 698, 710 (A.C.M.R. 1981):

An accused may not be deprived of the right to the testimony of material witnesses on his behalf for the sentencing portion of his trial, although "occasionally some alternate form of testimony [to live testimony] will

pass muster under the facts and circumstances of a given case." *United States v. Scott*, 5 M.J. 431, 432 (C.M.A. 1978); accord, *United States v. Courts*, 9 M.J. 285 (C.M.A. 1980).

For further discussion of this issue, see petitioner's brief in support of this petition, filed contemporaneously herewith.

CONCLUSION

This Court should not allow this case to proceed to sentencing where petitioner's right to compel attendance of witnesses and right to a full and fair sentencing hearing are being denied. Accordingly, based on the arguments detailed in the brief in support of this petition, petitioner respectfully requests that this Court order the military judge to abate the proceedings in this court-martial in the country of Iraq until such time as a change of location, to a place other than the country of Iraq, has been designated by the convening authority, and to stay the proceedings until the Court can take action on the petition.

Respectfully submitted,

(b)(6)-2

for [REDACTED] Esq.
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CPT, JA
Appellate Defense Counsel

CERTIFICATE OF SERVICE

(b)(6)-2
Frederick v. [REDACTED]

Petition for Extraordinary
Relief in the Nature of a Writ
of Mandamus and Application for
a Stay of Proceedings

I certify that the original and two copies of the foregoing was
delivered to the Army Clerk of Court on 17 September 2004.

(b)(6)-2
[REDACTED]
Paralegal Specialist
Defense Appellate Division
U.S. Army Legal Services Agency

020146

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Staff Sergeant
Ivan L. Frederick
United States Army,
HHC, 16th Military Police BDE,
III Corps, Victory Base, Iraq,
Petitioner

BRIEF IN SUPPORT OF PETITION FOR
EXTRAORDINARY RELIEF IN THE
NATURE OF A WRIT OF MANDAMUS AND
APPLICATION FOR A STAY OF
PROCEEDINGS

v.

~~CRIM APP.~~

~~MISC DKT NO.~~ _____

(b)(6)-2

Colonel [REDACTED]
Military Judge, Fifth Judicial
Circuit; and The United States
Army,

ARMY MISC 20040937

Respondents

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
ARMY COURT OF CRIMINAL APPEALS

PREAMBLE

COME NOW the undersigned defense counsel on behalf of
petitioner and, pursuant to Rules 2(b) and 20 of this Court's
Internal Rules of Practice and Procedure, and request that this
Court grant extraordinary relief in the nature of a writ of
mandamus by ordering the military judge to abate the proceedings
in this court-martial in the country of Iraq until such time as
a change of location, to a place other than the country of Iraq,
has been designated by the convening authority. Petitioner
further requests that the Court stay the proceedings until the
Court can take action on the Petition.

020147

STATEMENT OF THE CASE

Petitioner is charged with conspiracy, willful dereliction of duty, maltreatment of detainees, assault consummated by a battery, and indecent acts, in violation of the Uniform Code of Military Justice (UCMJ), Articles 81, 92, 93, 128, and 134, 10 U.S.C. 881, 892, 893, 928, and 934. The charges stem from petitioner's service in Iraq at the Abu Ghraib prison.

Petitioner entered into a pretrial agreement with the convening authority whereby he agreed to plead guilty and be sentenced by military judge alone. The pretrial agreement is silent concerning the location of the court-martial proceedings and alternatives to the actual in-court appearance of witnesses.

On 21 July 2004, petitioner filed a Motion to Change Location of Sentencing Proceedings based upon the inability to have essential civilian sentencing witnesses participate in-person at the proceedings due to safety concerns inherent to the Iraqi combat zone. (Appendix I.)

On 28 July 2004, the government filed a responsive pleading to which petitioner replied by e-mail on 29 July 2004.

(Appendices VIII and IX.) Without oral argument, the military judge denied petitioner's motion by written opinion on 4 August 2004. (Appendix II.)

On 14 August 2004, petitioner filed a Motion for Reconsideration of the military judge's written decision to deny

petitioner's Motion to Change Location of Sentencing Proceedings. (Appendix III.) The Motion for Reconsideration was argued before the military judge on 24 August 2004 at Mannheim, Germany, at an Article 39(a) session. (Appendix IV.)

The military judge again denied Petitioner's Motion to Change Location of Sentencing Proceedings. (Appendix IV, p. 209.)

STATEMENT OF FACTS

On 20 March 2004, petitioner was charged with multiple violations of the UCMJ. Petitioner and the convening authority subsequently entered into a pretrial agreement in August 2004 whereby petitioner agreed to plead guilty and be sentenced by military judge alone.

However, on 10 May 2004, prior to entering into the pretrial agreement, petitioner, through counsel, engaged the convening authority in an effort to change the location of the court-martial. (Appendix I, Attachment H - Letter from Mr. (S)(b)-7 [REDACTED] to Lieutenant General Metz.) The request for a change of location was denied.

On 21 July 2004, petitioner filed a Motion to Change Location of Sentencing Proceedings. (Appendix I.) This motion included declarations from six civilian witnesses who declared that they would testify on behalf of petitioner, but would not go to the Iraq combat zone due to safety considerations.

(Appendix I, Attachments A-F.) These witnesses included two family members, petitioner's pastor, a co-worker, a prison warden who is both petitioner's superior and an expert on prison management, and the world's renown and foremost expert on the causes and psychology of prison abuse, Dr. (b)(6)-(b)(7) Id. Petitioner is employed as a prison guard in his civilian status. On 28 July 2004, the government filed a responsive pleading to which petitioner replied by e-mail on 29 July 2004. (Appendices VIII and IX.)

On 4 August 2004, the military judge denied the motion declaring that the civilian witnesses were not essential and that, in any event, their *choosing* not to go to Iraq to testify was an act of free will. (Appendix II, paras. f and j.)

On 14 August 2004, petitioner filed a Motion for Reconsideration of the military judge's written decision to deny petitioner's Motion to Change Location of Sentencing Proceedings. (Appendix III.) On 24 August 2004, oral argument was held on the Motion for Reconsideration before the military judge at Mannheim, Germany, at an Article 39(a), UCMJ, session. The motion was again denied. (Appendix IV, p. 209.)

At the Article 39(a) session, the military judge ordered the government to produce Dr. (b)(6)-(b)(7) a civilian requested by the defense, as an expert in the psychology of prison abuse. (Appendix IV.) The government conceded that they

could find no substitute for Dr. [REDACTED]'s expertise. *Id.* The military judge said he would take testimony from civilian witnesses, to include Dr. [REDACTED] (b)(6)-(b)(7)(C) by video teleconference (VTC) or by deposition. *Id.* Doctor [REDACTED] refuses to go to Iraq on safety grounds. (Appendix II, Attachment A.) Sentencing proceedings are set for 20-21 October 2004 in Iraq.

ISSUE

WHETHER THE MILITARY JUDGE'S DENIAL OF PETITIONER'S MOTION TO CHANGE THE LOCATION OF SENTENCING PROCEEDINGS CONTRAVENES PETITIONER'S RIGHT TO COMPEL THE ATTENDANCE OF WITNESSES UNDER THE SIXTH AMENDMENT, AND PETITIONER'S RIGHT TO FULL AND FAIR SENTENCING PROCEEDINGS.

ARGUMENT

This matter derives from the decent into hell that was Abu Ghraib prison during the period 1 October 2003 through 4 January 2004.

Petitioner has accepted responsibility for his personal conduct. He has done so unabashedly and without reservation. He now asks that his sentencing proceedings be full and fair and not driven by the political winds sweeping across Iraq and the Arab-Islamic world.

The Sixth Amendment to the Constitution of the United States guarantees the right of an accused to compel the attendance of witnesses. *United States v. Sweeney*, 34 C.M.R. 379 (C.M.A. 1964); *United States v. Thornton*, 24 C.M.R. 256

(C.M.A. 1957). This Court has recognized in its decision in *United States v. McDonagh*, 10 M.J. 698, 710 (A.C.M.R. 1981), that:

An accused may not be deprived of the right to the testimony of material witnesses on his behalf for the sentencing portion of his trial, although "occasionally some alternate form of testimony [to live testimony] will pass muster under the facts and circumstances of a given case." *United States v. Scott*, 5 M.J. 431, 432 (C.M.A. 1978); accord, *United States v. Courts*, 9 M.J. 285 (C.M.A. 1980).

However, there is a limitation on this compulsion. A United States citizen located in the United States cannot be subpoenaed (compelled) to testify at a court-martial being held in a foreign country. *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982). Accordingly, none of the civilian witnesses named by petitioner can be ordered to go to Iraq to present testimony.

We are left then with the next logical question of whether these civilians will go to Iraq voluntarily. Their collective declarations (Appendix I, Attachments A-F) demonstrate that they will not. Does this really mean, as the military judge suggests, that they have **chosen** not to participate as witnesses? The military judge stated in his 4 August 2004 decision:

There are no logistical or operational impediments preventing any civilian defense witness from coming to the trial. In essence, the civilian defense witnesses are *choosing* not to attend for purely personal,

albeit not totally unfounded, concerns for personal safety.

(Appendix II, para. f) (emphasis added).

There is, of course, a war going on in Iraq. Hostilities and attacks occur on a daily basis. As the military judge correctly pointed out:

Currently, there is a great deal of violence in Baghdad. Explosions and gunfire are daily occurrences. Fear for one's personal safety is justified by the situation on the ground in Baghdad.

(Appendix II, para. d.)

Although commercial flights into Kuwait occur regularly, transport from Kuwait to Baghdad is on board a C130 military transport plane, which lands using tactics of evasion. Recently, the Camp Victory courthouse was hit with rocket fire. There are dozens of daily insurgent attacks upon United States personnel. Getting into and out of Iraq can include three days of waiting time, each way, for available space upon a military transport plane.

Moreover, the convention center in Baghdad, the situs of the court-martial, and the former *Green Zone*, are not immune from attack. The question of where civilian witnesses would be housed also remains an open and festering question.

There is no *choice* here. Only two of the named civilian witnesses are family members. The others are undertaking their

roles as witnesses either for professional or personal reasons. They cannot be asked to discharge their civic responsibility of testifying by risking their lives in the middle of hostilities.

The military judge may not see a problem with civilian witnesses going to Iraq, but his view is juxtaposed to the view held by United States Army. The Army's view is captured in a standard "hold harmless" letter that each civilian must sign before traveling into Iraq. (Appendix VI.) The letter was introduced at the Article 39(a) session. (Appendix IV.) The letter warns of the assumption of risk of death, maiming, and uncertainty. (Appendix VI.) Nowhere does the letter mention that "[t]here are no logistical or operational impediments preventing any civilian defense witness from coming to trial," as the military judge seems to believe. (Appendices II and VI.) Instead, the letter provides a litany of "logistical and operational impediments" including bullets, rockets, grenades, and bombs, and chronicles the deaths of several United States Soldiers and at least twenty detainees. (Appendix VI.)

The military courts have not decided the issue raised in this petition directly. There is, however, dicta derived from a Vietnam era case, which sheds some light on the matter, and concerning the last time a significant number of courts-martial were held in a foreign country combat zone.

In *United States v. Hodge*, 43 C.M.R. 252 (C.M.A. 1971), the court still assumed that a civilian witness in the United States could be subpoenaed to testify at a court-martial in a foreign country. *United States v. Bennett*, *supra*, ultimately held otherwise. Nonetheless, the *Hodge* Court said, in dicta:

We also assume, without deciding, that attending a trial in a combat zone presents such grave danger to a civilian witness that we can properly compare his situation to one who, because of illness or disease, would be in grave danger if compelled to attend and testify.

Hodge, 43 C.M.R. at 253. This language was recognized in *Bennett*, 12 M.J. at 468.

Reduced to the simplest of terms, a civilian has a rational, founded, justifiable basis for not going into a combat zone, and the petitioner should not be penalized because a civilian will not so do. By requiring petitioner's sentencing proceedings to commence in the danger of a combat zone, the military judge has instituted a *de facto* chilling of petitioner's Sixth Amendment right to compel the attendance of sentencing witnesses and his right to full and fair sentencing proceedings. Under the conditions discussed above, the absence of any single sentencing witness is directly attributable to the military judge not wanting to move the sentencing proceeding outside Iraq. Blame in this case cannot logically be placed upon any witness for not wanting to enter a combat zone.

The military judge further stated in his order:

The government is willing to enter into stipulations, or other means of presenting testimony, of any witness who refuses to attend.

(Appendix II, para. i.) If, as we have demonstrated, the witnesses' refusal is predicated upon founded and justified concerns for safety, then it is inescapable that by requiring stipulations or other alternatives to live testimony, the military judge and the government are forcing the petitioner to present evidence in that manner or present no evidence at all. See *Bennett*, 12 M.J. at 466-67; *United States v. Daniels*, 48 C.M.R. 655 (C.M.A. 1974); *Thornton*, 24 C.M.R. at 259 ("An accused cannot be forced to present the testimony of a material witness on his behalf by way of stipulation or deposition."); *United States v. Eiland*, 39 M.J. 566, 570 (N.M.C.M.R. 1993). This result appears expressly forbidden. A change of location for the sentencing proceedings removes both the justification for refusal by the witnesses and the forcing of alternative methods of presenting evidence upon petitioner.

Finally, although Rule for Courts-Martial (R.C.M.) 1001(e) may not apply to all the civilian witnesses because their appearance may not require government expense if the court-martial is held in the continental United States (CONUS), one

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witness is being produced at government expense; Dr. [REDACTED]

(S)(6)-4

Doctor [REDACTED] was denied as an expert witness by the convening authority. (Appendix IV, p. 236.) The military judge asked the government whether an adequate substitute existed. *Id.* The government could provide no substitute as Dr. [REDACTED] is the foremost authority on prison abuse in the world, but intimated that it thought it might be able to. (Appendix IV, pp. 236, 241; Appendix V - Resume.) The report of the Independent Panel to Review DoD Detention Operations [The Schlesinger Report], at its own Appendix G, refers specifically to Dr. [REDACTED] and his work. (Appendix VII - Psychological Stresses.) Doctor [REDACTED] is the principally referenced psychologist therein. *Id.*

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The military judge ordered Dr. [REDACTED] production, or in the alternative, an abatement of proceedings. (Appendix IV, pp. 244-45.)

The trial counsel noted that, "[T]here is no doubt that Dr. [REDACTED] testimony will be helpful." (Appendix IV, p. 237.) By ordering Dr. [REDACTED] production, the Court found his production as an expert witness to be both relevant and necessary. R.C.M. 703(d).

There is also no doubt that Dr. [REDACTED] is an essential witness. His testimony will reveal how decent people under the proper circumstances could resort to doing what was

done at Abu Ghraib in Iraq. Doctor [REDACTED] will testify that given the totality of the circumstances at Abu Ghraib, abuse, rather than being unexpected, was inevitable. He will shed light on the psychology behind the events and explain how violations of the law occurred without reporting or protest.

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Doctor [REDACTED] is the lynchpin of the defense sentencing case and he is being reduced to a deposition or a virtual VTC image. In petitioner's view, virtual images have virtually no value when compared with a courtroom appearance. Any method other than live testimony will reduce the efficacy of Dr.

[REDACTED] testimony and will either eliminate (as by deposition) or limit (as by VTC) the interplay between counsel, the witness, and the military judge who must decide upon an appropriate sentence. This sentence depends upon, in petitioner's view, how Dr. [REDACTED] is able to convey the psychology associated with the hell of Abu Ghraib. This psychology falls far outside the accepted American standards of conduct because circumstances such as those at Abu Ghraib prison seldom arise.

The Fay Report and the Schlesinger Report refer to "morally corrupt" soldiers. This is a simplistic analysis of an answer to a complex problem. It is the easy way out. Doctor [REDACTED] live testimony will have great weight in debunking that (b)(6)-(b)(7) simplistic response. To be fair to petitioner, Dr. [REDACTED] must be a live witness. In this light, and under the unique

circumstances in this case, this Court should feel confident that it will not be opening the flood gates for a litany similar litigation. Doctor (b)(6)-(7) is such an essential and unique witness, testifying about novel and uncommon circumstances, that this Court can satisfactorily find that moving the location to accommodate the witness will prove to be a favorable decision based solely upon the facts of this case.

The additional civilian witnesses are also essential. The government's position at all levels, political and legal, has been, and still is, that petitioner is a monster and an aberration from the norm. The remaining witnesses will debunk that simpleminded assertion as well. They will testify that petitioner has lived an exemplary life of service to country, community, and family. They will demonstrate that his employment as a prison guard has been marked with compassion and caring. These witnesses are essential to convey that reality.

We have said before, and we say again, that no judge, military or civilian, possesses the sagacity or empathy to fully appreciate and equate depositions or VTC testimony with live, in-court, in-person testimony. Nor, we believe, should there be an assumption that somehow a judge can do this. They are, after all, human.

Petitioner's sentence will turn in large part upon the military judge's perception of the whole person in the context of

these horrible circumstances. Was petitioner taking advantage of the circumstances, or was he inexorably drawn into them by intervening and superceding forces and events? These witnesses will help the military judge make that decision.

Finally, it would be naïve not to mention the political reality here. The government stated in their response brief that appeasing Iraqi and Arab-Islamic interests is a principal reason for having this court-martial in Iraq. (Appendix VIII, p. 7.) To that assertion, petitioner replied:

The Government now suggests further that the due process rights of the Accused should somehow be subordinated to an alleged, but unproven need to appease the Arab world. In a nation which has elevated individual rights to a level unparalleled in all of civilization, such an assertion should be rightly summarily rejected as a rationale for holding a trial in Baghdad. The Arab world will know the result the moment it occurs, whenever it occurs.

(Appendix IX.) The intrusion of political considerations into this trial, though difficult to avoid, must not be the driving force and must bow to Constitutional considerations. What is fair and right must prevail. If not, whatever short term advantage is achieved by political interests will assuredly serve to destroy the hard-fought-for, current reality that military justice is an honorable and fair system of justice.

CONCLUSION

Essential witnesses are being forced to provide, and petitioner is being forced to accept, sentencing testimony other than a live, in-court presentation of the evidence. And this is so because the military judge will abate the proceedings and instruct the convening authority to move the location of the sentencing proceedings to a location outside of a combat zone, i.e., Iraq. After all, the very Article 39(a) session, the transcript of which is attached hereto as Appendix IV, was conducted in Mannheim, Germany. And so to should the sentencing proceeding in this case. Petitioner's Sixth Amendment right to compel the attendance of witnesses, and his right to full and fair sentencing proceedings, are being chilled and contravened.

Petitioner respectfully requests that this Court grant extraordinary relief in the nature of a writ of mandamus by ordering the military judge to abate the proceedings in this court-martial in the country of Iraq until such time as a change of location, to a place other than the country of Iraq, has been designated by the convening authority facilitating civilian witness attendance in safety. Petitioner further requests that this Court stay the proceedings until the Court can take action on the Petition.

Sentencing proceedings are set for 20-21 October 2004. If this Court does not wish to take action favorable to the

petitioner, we ask for expedited treatment of this petition so that a timely filing can be made with the Court of Appeals of the Armed Forces.

Respectfully submitted,

(b)(6)-7

for [REDACTED] Esq.
Civilian Defense Counsel

[REDACTED]
CPT, JA
Appellate Defense Counsel

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Weare, New Hampshire 03281

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APPENDIX I

020163

United States

v.

Staff Sergeant Ivan L. Frederick

)
)
) Motion to
) Change Location
) of
) Sentencing Proceeding
)

I. Request for Relief

The Accused, by counsel, hereby moves this Court to change the location of sentencing proceedings in the above styled matter to CONUS or such other place which will meet the ends of justice and provide fairness and the appearance of fairness in the sentencing proceeding.

II. Facts

1. The Accused has voluntarily entered into a pretrial agreement which provides for a guilty plea to certain charged and specified matters.
2. The pretrial agreement is silent on the question of location of the proceedings, alternative methodologies for the appearance of witnesses and testimonial immunity for proposed witnesses.
3. The Accused intends to call the following classes of witnesses:
 - a. Civilians.
 - a. Lay
 - b. Expert
 - c. Government contractor

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- b. Former military personnel not on active duty.
 - c. Active duty personnel located in CONUS and Germany.
 - d. Active duty personnel located in Iraq.
4. For reasons of safety, none of the civilian personnel all of whom are material will agree to appear in Iraq.
5. One material former military member not now on active duty will not appear voluntarily in Iraq. Others similarly situated but not yet contacted may fall into that category.
6. Multiple active duty personnel are asserting Article 31 or Fifth Amendment rights. Many of the contemplated military witnesses are in CONUS.
7. The Accused has yet to receive full discovery; has yet to have named an agreed upon MP investigator; and has not been informed of the whereabouts of certain material military witnesses. A companion motion to compel is being filed.
8. The Accused's contemplated witness list to date includes:
 - a. Civilians
 1. [REDACTED] n.D.,
Stanford University.
(S)(a)-4
Dr. [REDACTED] will testify as an expert on the social psychology of situational forces and group dynamics associated with prisoner abuse. He is a material witness and will provide the Court with invaluable information regarding the implications of lax rules, absence of

leadership, tacit condonation and encouragement in a prison setting relative to prisoner abuse. He will not go to

Iraq. See Declaration at Exhibit A.

2. [REDACTED]
Warden, Buckingham Correctional Center

Warden [REDACTED] will testify as an expert on proper prison management techniques to include guard – prisoner interaction. He will also testify as to the Accused's job

performance with prisoners while serving as a prison guard at the Buckingham institution. He is a material witness who will give the Court knowledge as to how a proper prison is managed. He will not go to Iraq. See Declaration at Exhibit B.

3. [REDACTED]
Prison Guard Lieutenant, Buckingham Correctional Center.

Mr. [REDACTED] is a co-worker of the Accused. He will testify as to the Accused's treatment of prisoners at the Buckingham institution, his job performance and demeanor as well as his character for peacefulness. He is a material witness. He will not go to Iraq. See Declaration at Exhibit C.

4. [REDACTED]
CACI contractor.

Mr. [REDACTED] was a CACI employee who served as a contract interrogator. He instructed the Accused and gave the Accused encouragement with respect to the Accused "softening up" detainees. He is a material witness as he provides an understanding of the permissive atmosphere which existed at Abu Ghraib and why the Accused would believe that such an atmosphere was condoned and encouraged. His civilian attorney has advised the defense orally that Mr. [REDACTED] will not voluntarily appear in Iraq.

(b)(6) 4
5. Pastor [REDACTED]
Pastor to the Accused and his family.

Pastor [REDACTED] will testify as to the Accused's character, his devotion to family and his demeanor. He is a material witness giving the Court an understanding of the whole man. He will not go to Iraq. See Declaration at Exhibit D.

6. [REDACTED]
Wife of the Accused.

Ms. [REDACTED] will testify as to the Accused's character, his devotion to family and his treatment of others. She is a material witness. She will not go to Iraq. See Declaration at Exhibit E.

7. [REDACTED]
Step-daughter of the Accused.

(b)(6)-(7)
Ms. [REDACTED], a teenager, will testify as to the role her step-father has played and is playing in her life. She is a material witness. She will not go to Iraq. See Declaration at Exhibit F.

8. Inmate [REDACTED] and Inmate [REDACTED]
Buckingham Correctional Center.

These men are prisoners at Buckingham Correctional Center. They will testify as to the manner in which the Accused treated them and other prisoners. They are material witnesses. They cannot go to Iraq.

b. Former military personnel not on active duty:

1. BG Janis Karpinsky,
Commander, 800th MP Brigade.

BG Karpinsky will testify as to her knowledge of command changes which took the Accused out from her control, the involvement of military intelligence at Abu Ghraib, the knowledge of senior personnel regarding the creation of a permissive atmosphere in disregard of international conventions, the involvement of the International Red Cross and the pressure to obtain intelligence created by senior officers and officials. She

is a material witness. She will not go to Iraq as a civilian. See e-mail from counsel at Exhibit G. She is now in CONUS.

2. The following individuals, we believe, also fall into this category, but we have been unable to find them without investigatory help or information from the government.

— Maj [REDACTED]
320th MP Bn.

Major [REDACTED] will testify, we believe, as to the identity of the seven detainees who were the subject of humiliation on or about 7 Nov 03.

(b)(6)-2
He will say that they were the ringleaders of a riot that resulted in injury to one American female soldier. He is a material witness. He is in CONUS.

— Cpt [REDACTED] Commander,
72nd MP CO, NUN G, 156
[REDACTED]

These soldiers, we believe, will testify that nudity, female panties on men, handcuffing to cells (sometimes while nude) and requests for sleep deprivation existed prior to the 372nd MP

CO arriving at Abu Ghraib. They are material witnesses. They are in CONUS.

c. Active duty personnel located in CONUS and Germany:

1. Cpt [REDACTED] MI.

(b)(6)-2
Cpt [REDACTED] the link between MI and the 372nd MP CO.

She will, we believe, testify about posting documents at Abu Ghraib which allowed for conduct by MPs in violation of international conventions. She will also testify as to the permissive atmosphere which existed at Abu Ghraib with regard to the treatment of detainees as well as the interplay between interrogators and MPs. She will also testify as to the stepped up interrogation efforts beginning in September 2003. She is in CONUS, is material and will assert Article 31 rights.

2. CID Agent [REDACTED]

(b)(6)-1
Agent [REDACTED] instructed the Accused to soften up

"Gilligan," the detainee on the box with wires, because Gilligan allegedly knew the whereabouts of the bodies of four United States soldiers and who killed them. We have been unable to reach this man, but we expect an Article 31 invocation.

3. Spc [REDACTED] MI

Spc [REDACTED] we believe, will testify that one of the offending pictures was used as a screen saver within MI. This shows both knowledge and condonation. We have been unable to locate her.

4. Sgt [REDACTED] 205th MI Brigade. (9)(6)-2

We believe he is in Germany. Sgt [REDACTED] MI reportedly testify that MI had knowledge of the techniques of humiliation and condoned them. We have been unable to reach Sgt Samuel Provence.

5. LTG Ricardo Sanchez or Col [REDACTED]

These men have yet to be interviewed, but one or the other will testify that they knew from the International Red Cross in the fall and winter of 2003 that activities in violation of international conventions were occurring at Abu Ghraib and command did nothing to stop those activities, thereby condoning them.

6. MG Geoffrey Miller.

This man has not been interviewed but he will testify as to how and why and what stepped up interrogation methods

were authorized and employed during the period Sep
through Dec 03.

- d. Active duty personnel located in Iraq. All of these individuals
may require testimonial immunity.

1. Cpt [REDACTED]
372nd MP CO.
(b)(6)-2

Cp [REDACTED] will testify as to the absence of training prior to
mobilization and the absence of training prior to and
during the Accused's involvement at Abu Ghraib. He will
further testify to the Accused's inquiries about proper
procedures and rules as well as his own inquiries to MI
personnel regarding nudity, hooding and handcuffing to
cells.

2. 1SC [REDACTED]
(b)(6)-2

1SC [REDACTED] will testify as to the Accused's weak
leadership traits and the aggressive, controlling and
dominating personality of Sgt Grainer. He will also testify
as to the permissive atmosphere with regard to detainee
treatment at tier 1A. He has previously invoked his Article
31 rights.

3. Sgt [REDACTED]

(S)(b)-2
Sgt [REDACTED] will testify as to Sgt Grainer's dominance and
the weak leadership of the Accused. He will further testify
as to Mr. [REDACTED] practice of encouraging MP's
(S)(b)-7
soften up of detainees.

Applicable Law

1. Sixth Amendment,
Constitution of the United States.
2. R.C.M. 906(b) (11).
3. U.S. v. Gravitt, 5 C.M.A. 249,
17 C.M.R. 249 (1954).
4. U.S. v. Bennett, 12 M.J.
463 (C.M.A. 1982).
5. U.S. v. Sweeney, 14 C.M.A.
599, 34 C.M.R. 379 (1964).
6. U.S. v. Nivens, 21 C.M.A.
420, 45 C.M.R. 194 (1972).
7. U.S. v. Van Arsdall, 22 C.M.A.
183, 46 C.M.R. (1973).
8. Chenoweth v. Van Arsdall,
22 C.M.A. 183, 46 C.M.R. 183 (1973).
9. U.S. v. Tangpuz, 5 M.J. 426
(C.M.A. 1978).
10. U.S. v. Cary, 1 M.J. 761
(AFCMR 1975).
11. U.S. v. Thornton, 8 C.M.A.
446, 24 C.M.R. 256 (1957).
12. U.S. v. Cox, 23 C.M.R.
535 (A.B.R. 1957).

Argument

This motion facially is a motion for change of location. Buried within it, however, are implications for the public perception of the fundamental fairness of military justice.

In essence the Accused is willing and able to accept responsibility and to spare the government all the burdens associated with a trial on the merits. This provides derivative advantages to the United States in arenas removed from military justice.

The only request the defense is making is to have the sentencing proceeding in a place where the fullest benefit accorded under military law can be achieved. Iraq is not that place.

There is a real danger that a proceeding in Iraq as presently configured will have no civilian witnesses due to safety concerns and the inability to use subpoena power and few military witnesses due to rights invocations. This would be a disastrous result on multiple levels. Such a result can and should be avoided.

There are court imposed incumbencies upon the defense before a motion such as this can be entertained. The defense has discharged those incumbencies. In U.S. v. Carey, 1 M.J. 761 (AFCMR 1975), the Court said that the defense should first submit a change of location request to the convening authority. The defense has done so and was denied. The request is at Exhibit H. The Carey court also said that witnesses should first be contacted so that their status and content of their testimony were known. This, too, has been done to the extent possible.

Accordingly, the Accused's sixth Amendment right to compel witnesses is mature. id. at 766.

R.C.M. 906 (b)(11) is the basis for a change of location motion. It says in part:

"Change of place of trial. The place of trial may be changed when necessary to prevent prejudice to the rights of the accused..."

See also, Analysis of R.C.M. 906 (b)(11) at M.C.M., Appendix A21-54.

Importantly, the constitutional requirement that the trial of a crime occur in the district in which the crime was committed does not apply in the military. Chenoweth v. Van Arsdall, 22 C.M.A. 183, 46 C.M.R. 183 (1973). This motion should not be denied merely because the government represents that the crime was committed in Iraq.

Further, R.C.M. 906 (b)(11) contemplates more than adverse publicity as a basis for granting relief. The Court must consider as well the convenience of the parties and witnesses as well as the inconvenience to the government. U.S. v. Bennett, 12 M.J. 463 (C.M.A. 1982).

Civilian witnesses in CONUS cannot be subpoenaed to testify in a foreign country. U.S. v. Bennett, 12 M.J. 463 (C.M.A. 1982). Nor can the government force the accused to present evidence by way of stipulation or deposition. id. at 466. As noted every civilian who is a contemplated witness for the Defense refuses to go to Iraq. See Declarations at Exhibit A through G and the representation regarding Mr. [REDACTED] in the "Facts" section. (b)(6)-7

The Defense has a right to secure the attendance of witnesses. id. at 466. This is, however, not an absolute rule and judicial discretion is available. This Court must

consider the issues involved, the importance of witnesses, whether the proceeding is sentencing or on the merits, whether the testimony is merely cumulative and whether alternatives exist. U.S. v. Sweeney, 14 C.M.A. 599, 34 C.M.R. 379 (1964).

The burden of proof by a preponderance of evidence is upon the defense to show that an alternative location is preferable. U.S. v. Gravitt, 5 C.M.A. 249, 17 C.M.R. 249 (1954).

The essence of the court decisions is that for a change of location to occur unavailable witnesses in the existing location must be essential to the Accused's case. U.S. v. Thornton, 8 C.M.A. 446, 24 C.M.R. 256 (1957); U.S. v. Tangpuz, 5 M.J. 426, 429 (C.M.A. 1978). To be essential the testimony must not be cumulative. U.S. v. Nivens, 21 C.M.A. 420, 45 C.M.R. 194 (1972); U.S. v. Van Arsdall, 22 C.M.A. 183, 46 C.M.R. (1973.)

Of the 24 witnesses named by the defense, 13 are civilians or believed to be civilians at this date:

1. [REDACTED] Ph.D.
 2. [REDACTED]
 3. [REDACTED]
 4. [REDACTED]
 5. [REDACTED]
 6. [REDACTED]
 7. [REDACTED]
 8. [REDACTED]
- (5)(6)-4

9. [REDACTED]
10. [REDACTED]
11. [REDACTED]
12. [REDACTED]
13. [REDACTED]
- (4)(61-2)

Of the remaining ten military witnesses six are not in Iraq. Only four are in Iraq.

The military judge is in Germany.

We are left with the Accused, Accused's military defense counsel, prosecutors, four defense witnesses and the prosecution witnesses in Iraq. The government aggravation witnesses are unknown. We will respond in our reply brief to that listing but we doubt they are location dependant.

The defense civilian witnesses are not cumulative. They are essential to understand the Accused, the dynamic that was Tier 1A at Abu Ghraib, what role the interrogators played and how real prisons are run.

Neither depositions nor high tech hook-ups will equal a judge hearing their live testimony.

In fact the sentencing proceeding in this case is far more important than the merits phase. What occurred has never been an issue. Why and how it occurred has always been the issue. The focus, therefore, is rightly upon the sentencing proceeding. It must not be dismissed as an afterthought.

AUG-18-84 09:55 PM
There is no undue burden placed upon the government by changing location.

- The England case, a coconspirator case, is at Fort Bragg, Abu Ghraib cases can be done in CONUS and will be done in CONUS.
- General officer interviews are being conducted in CONUS.
- Virtually all the witnesses are in CONUS.
- Safety and comfort for all participants is greatly enhanced in CONUS. This is a trial, not a test of willingness to enter combat or a willingness to submit to war zone conditions. It is witnesses not warriors that make a fair trial.
- Reluctant civilian witnesses can be subpoenaed in CONUS.

In fact there is no rational basis in law or fact to keep this proceeding in Iraq. There may be political needs, but neither this Court nor the parties should be affected or influenced by these extraneous considerations.

If the Court concludes that additional evidence is required before this motion can be ruled upon, the defense would support that conclusion. We have through no fault of our own been unable to interview identified relevant witnesses because they have not been located by the government and no MP investigator has been named. Trial

preparation due to military counsel's and the Accused's presence in Iraq has been greatly impaired.

Respectfully submitted,

(S)(d)-7
[Redacted]
Civilian Defense Counsel

/s/ (S)(d)-2
[Redacted]
Cpt, USA
Military Defense Counsel

Certificate of Service

(S)(d)-4
I, [Redacted], hereby certify that a copy of the foregoing motion was sent by e-mail to Maj [Redacted] Trial Counsel, this ___ day of July 2004.

(S)(d)-2

[Redacted] (S)(d)-7

ATTACHMENT A

020181

United States

v.

SSG Ivan L. Frederick

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)
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)
)

Declaration

(S)(b)-4

I, [REDACTED] h.D., hereby declare:

1. I am a member of the faculty of Stanford University in the Department of Psychology.
2. I am considered an expert on the social psychology of situational forces and group dynamics associated with prisoner abuse.
3. I am prepared to testify as an expert for the defense in the above styled matter, but I will not travel to Iraq to so testify due to safety considerations.

I declare under the pain and penalty of perjury that the foregoing statement is true to the best of my knowledge.

Dated: July 5, 2004

(S)(b)-4
[REDACTED]
[REDACTED] h.D.

020182

A

ATTACHMENT B

020183

United States

v.

SSG Ivan L. Frederick

)
)
) Declaration
)
)

(b)(6)-7
I, [REDACTED]wyn, VA 23936, hereby declare:

1. I am the Warden of Buckingham Correctional Center in Virginia.
2. The Accused has worked for me as a prison guard and I am aware of his demeanor with prisoners and his job performance. I further possess expertise in prison management techniques.
3. If subpoenaed to testify by the defense I would testify on behalf of the accused and as an expert in prison management.
4. I will, however, not go to Iraq to do so for reasons of safety.

I declare under the pain and penalty of perjury that the foregoing statement is true to the best of my knowledge.

Dated: 7/8/04

(b)(6)-7
[REDACTED]

020184

R

ATTACHMENT C

020185

United States

v.

SSG Ivan L. Frederick

)
)
)
)
)

Declaration

(b)(6)-4
I, [REDACTED], Goochland, VA 23063, hereby
declare:

1. I am a prison guard in the rank of lieutenant at the Buckingham Correctional Center in Virginia.
2. The accused is a co-worker of mine.
3. If subpoenaed to testify by the defense I would testify as to the Accused's treatment of prisoners and his demeanor.
4. I will not go, however, to Iraq to do so for safety reasons.

I declare under the pain and penalty of perjury that the foregoing statement is true to the best of my knowledge.

Dated: 7/7/04

Signed: 7/7/04

Notary: [REDACTED]

Exp: July 31, 2007

(b)(6)-4

020186

C

ATTACHMENT D

020187

United States

v.

SSG Ivan L. Frederick

)
)
) Declaration
)
)

(S)(61-4

I, [REDACTED] Dillwyn, VA 23936, hereby declare:

1. I am the Pastor of the church attended by the Accused in the United States. I know his family quite well.
2. I am willing to testify as to the Accused's character, his devotion to family and his demeanor.
3. I will not go to Iraq to do so out of obvious safety considerations.

I declare under the pain and penalty of perjury that the foregoing statement is true to the best of my knowledge.

Dated: July 7, 2004

(S)(61-4

[REDACTED]

D

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ATTACHMENT E

020189

United States

v.

SSG Ivan L. Frederick

)
)
) Declaration
)
)

(b)(6)-7
I, [REDACTED] Buckingham, VA 23921 hereby

declare:

1. I am the wife of the accused in the above-styled matter.
2. I desire to testify on behalf of my husband, but will not go to Iraq to do so.

We have two daughters at home and having their mother and father in a war zone creates far too many safety issues.

I declare under the pain and penalty of perjury that the foregoing statement is true to the best of my knowledge.

Dated:

July 6, 2004

(b)(6)-7
[REDACTED]

020190
E.

ATTACHMENT F

020191

United States

v.

SSG Ivan L. Frederick

)
)
) Declaration
)
)

(S)(A)-4
I, [REDACTED] Buckingham, VA 23921 hereby declare:

1. I am the elder daughter of the Accused.
2. I will testify as to the Accused's role in my life, his fathering skills and his demeanor.
3. I want very much to testify, but I will not go to Iraq for safety reasons to do so.

I declare under the pain and penalty of perjury that the foregoing statement is true to the best of my knowledge.

Dated:

July 11, 2004

[REDACTED]

(S)(A)-7

020192
F

ATTACHMENT G

020193

Subj: (no subject)
Date: 6/30/2004 10:38:48 AM Eastern Daylight Time
From: [REDACTED]@mmslaw.com
To: [REDACTED]@aol.com

(b)(6)-7

Because of safety concerns, BG Karpinski will not voluntarily travel to Iraq in a civilian status. Of course, if ordered and placed on active duty, she would comply with such. On the otherhand, she would consider appearing by VTC, but that may be something that one side, or the other, may object to.

020194

G

ATTACHMENT H

020195

Reply to:

Weare, NH 03281

800-355

603-529

fax 529

Washington, D.C.

202-857

800-355

email @aol.com

(b)(6)-7

& Associates
Attorneys-at-LawAdmitted in the
District of Columbia

BY ELECTRONIC MAIL:

10 May 04

Memorandum for: LTG Thomas Metz
Commander, III Corps
Camp Victory
Baghdad, IraqSubject: Change of Venue
U.S. v. Frederick

1. I represent SSG Ivan Frederick as civilian defense counsel.
2. This is a private communication from me to you through your SJA. There is no dissemination either orally or in writing to any other person or entity. Please acknowledge receiving this.
3. I am asking you point blank to change the venue of this trial to either CONUS or Europe before arraignment. You have the capacity to do this and it is the morally, legally and politically correct course to follow.
4. I do not expect nor want a written response to this request. Action will suffice.
5. This should not be dumped in the lap of a military judge. You should take preemptive action to demonstrate that true transparency exists in this case.
6. Before I articulate the reasons for the unequivocal need for a venue change, may I engage in a brief historical excursus. The My Lai trials were held at the height of the Viet Nam War in 1971. I had the privilege of wearing an Army uniform then and participated in those trials as a judge advocate. The trials were not held in Viet Nam. They were held in CONUS. The principal trials were at Fort Benning and Fort McPherson. There was total access to witnesses in a safe and open environment. These were truly public trials and became one of the noblest moments

020196

H

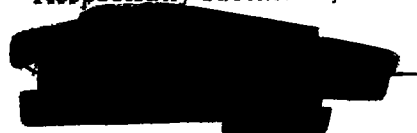
of self examination in the difficult circumstance that was Viet Nam. No one questioned their validity.

7. Iraq is the wrong place to try these cases for the following reasons:
- a. Safety of civilian witnesses and civilian counsel cannot be assured. We will have multiple civilian expert witnesses as well as civilian witnesses for other purposes. Where will they be housed? How will they be protected? Will they even be willing to come? Announcing that the convention center in the Green Zone will be the site for the trial is like giving targeting coordinates to the enemy. The Green Zone, the site of multiple violent incursions, is no place to have a trial. How am I supposed to concentrate on a defense if I am in continuous fear of bodily harm? I know that Justice Department lawyers in the Green Zone have acquired their own weapons. Do you expect me to do that? Such a trial, given the impact upon Arabs, is a natural target for an act of terrorism in this most unstable environment.
 - b. It will be impossible to find a jury pool within Iraq which has not been tainted by the daily denunciation of my client by command at every level. It does not take a lawyer to understand this.
 - c. All meaningful witnesses are outside Iraq. That includes virtually all CID agents, the chain of command, MI elements, OGA elements, private contractors, civilian witnesses and government officials. Given the witness locations CONUS is far more appropriate.
 - d. The alleged victims, as in My Lai, are not meaningful witnesses. The pictures, as in My Lai, tell what happened. If a victim is necessary, they can easily be transported to CONUS or Europe.
 - e. The Military Judge is in Germany. Even he has to come to Iraq.
 - f. Communication between myself and military defense counsel and the client is greatly impaired. I cannot phone in. This circumstance is completely unacceptable. Trial preparation is greatly impaired.
 - g. There is nothing public about a trial that is steeped in security and surrounded by fear of bodily harm.
 - h. The only tie to Iraq at this moment is that it is the situs of the alleged crimes. Since the situs is essentially irrelevant, as it was in My Lai, it does not form a basis for keeping the trial there. If your motivation is

that such a trial in Iraq will serve to appease the Iraqi population, may I say that such a consideration has no place in the justice system.

8. A trial in Iraq under existing circumstances is neither transparent nor public. It is instead a mockery of justice and presents a circumstance in which any defense counsel may rightfully decide not to participate so as to avoid the appearance of complicity.
9. It is with the deepest respect for the position you hold and for the heavy burden you bear, that I ask that you change venue. I believe such a decision will be applauded by the world.

Respectfully submitted,



(b)(6)-7

APPENDIX II

020199

**Office of the Chief Circuit Judge
5th Judicial Circuit
Unit #29355
APO AE 09014**

UNITED STATES

v.

SSG Ivan L. Frederick II
215-56-8739
US Army

Order Denying Motion to
Move Trial

4 August 2004

1. The defense has moved to change the location of the accused's trial (Motion at Encl 1). The Government response is at Encl 2. The defense reply to the government response is contained in an email message at Enclosure 3. Both sides agreed that this motion could be decided on the submitted briefs and that no hearing was required (See email at Encls 3 and 4).

2. For purposes of this motion the court makes the following findings:

a. The defense motion for a change of the place of trial is fundamentally based on the fact that "no civilian witnesses (will attend the trial in Baghdad) due to safety concerns...." (Encl 1, page 12, para 4).

b. The military justice system has worldwide applicability including combat zones (Art 5, UCMJ).

c. All of the alleged misconduct in this case occurred at or near Baghdad, Iraq. All of the alleged victims were in Iraq at the time of the alleged misconduct. The current place of trial is Baghdad, Iraq. The current posture of the case is that the accused intends to plead guilty with all the requested witnesses to be called for presentencing proceedings only.

d. Currently, there is a great deal of violence in Baghdad. Explosions and gunfire are daily occurrences. Fear for one's personal safety is justified by the situation on the ground in Baghdad.

e. A number of civilian defense witnesses apparently will refuse to attend the trial if held in Baghdad for reasons of personal safety. (See declarations attached to Encl 1.) The court does not have subpoena power to compel civilian witnesses to come to Iraq.

020200

II

f. The court takes judicial notice that civilians are routinely brought into Iraq on US government business. The government has indicated it will make the appropriate travel arrangements for any relevant civilian defense witness. There are no logistical or operational impediments preventing any civilian defense witness from coming to the trial. In essence, the civilian defense witnesses are *choosing* not to attend for purely personal, albeit not totally unfounded, concerns for personal safety.

g. Defense has also listed witnesses who will not testify because they will invoke their Art 31b, UCMJ, and/or their 5th Amendment right against self-incrimination. The court fails to see any relevance of these witnesses refusal to testify to the motion at hand.

h. The government has indicated that it intends to call Iraqi witnesses at trial.

i. The government is willing to enter into stipulations, or other means of presenting testimony, of any witness who refuses to attend.

j. The defense has made no showing that any proffered witness is essential to presentation of the accused case. There is no showing that the weight or credibility of any witnesses testimony is of substantial significance to the determination of an appropriate sentence.

k. There are alternatives to live testimony available to the defense, i.e., affidavits, letters, memoranda, email, DVDs, videotapes, etc, which would be sufficient to meet the needs of the court-martial in determining an appropriate sentence.

l. The defense has failed to show the accused would be prejudiced by the trial occurring in Iraq.

3. Accordingly, the defense motion to change the place of trial in this case is denied.

(5)(6)-2
//original signed//

COL, JA
Military Judge

020201

APPENDIX III

020202

**In the 5th Judicial Circuit
Unit #29355
APO AE 09014**

United States

v.

SSG Ivan L. Frederick, II

) Motion for
) Reconsideration
) of
) The Court's
) Decision
) Denying Motion
) To Move Trial

I. Request for Relief

The Accused, by counsel, hereby moves this Court under R.C.M. 905(f) to reconsider its decision of 4 August 2004 denying the Accused Motion to Change Location of Sentencing Proceeding. Oral argument is required and is requested by the Accused in Mannheim on or about 23 or 24 August 2004.

II. Facts

The facts as portrayed in the Accused original motion are incorporated by reference herein except that the following exceptions and substitutions are noted based upon the defense's ongoing investigations.

- Cpt [REDACTED] will not assert her Article 31 rights. To the contrary she has been totally forthcoming upon interview by civilian counsel. (b)(6)-2
- Cpt [REDACTED] 1SG [REDACTED] and Sgt [REDACTED] are no longer in Iraq. They are in CONUS. The government has advised the defense that they will be kept on active duty for these proceedings and, therefore, can be ordered to return to Iraq. The practical effect of return to Iraq upon their willingness to

020203 III

cooperate is unknown. It is reasonable to conclude that such an order would not induce pleasure in these witnesses who served on the ground in Iraq for more than a year.

- The government has informed the defense that it will not recall witnesses to active duty for the purpose of recalling such persons to Iraq to testify in a sentencing proceeding.
- The government has informed the defense that it will not agree to testimonial immunity to multiple witnesses who may yet face court-martial charges.
- The Accused, by counsel, has requested that Dr. [REDACTED] be appointed as an expert. That request remains outstanding with the convening authority. (b)(6)-(7)
- The Accused, by counsel, has requested that LTC [REDACTED] be given testimonial immunity in the face of his invocation of Article 31 rights. He is now a named witness with material sentencing evidence. He is in Germany. We have requested testimonial immunity for multiple other individuals within MI and MP. These requests remain outstanding with the convening authority.

III. Applicable Law

The Applicable Law section of the underlying motion is incorporated by reference herein.

IV. Argument

In its opinion this Court has failed to apply case law standards and more importantly has failed to provide reasons for keeping this court-martial in Iraq.

The military justice system is worldwide. That rudimentary statement from the Court, however, ignored the body of case law which has held that the proper location of a trial is fact dependant. If Article 5, UCMJ, were a foreclosing Article, there would be no case law respecting location of trial. Fortunately for the interests of justice there is such case law.

As the defense has pointed out Chenoweth v. Van Arsdall, 22 C.M.A. 183 (1973), held that trial need not occur where the offense was committed.

The Court initially relied upon three factors in denying change of location:

1. "The misconduct occurred in Iraq." This, as Chenoweth provides, is not dispositive.
2. "All of the alleged victims were in Iraq at the time of the alleged misconduct." This is saying nothing more than the misconduct occurred in Iraq. The crimes alleged could not have had absented victims. This element of the opinion has, the defense submits, no probative value.
3. "The current place of trial is Baghdad, Iraq." This is a statement of fact and has nothing whatsoever to do with a change of location. It is, in fact, a non sequitur for purposes of this motion. No case law has said location is proper because that is where the case started.
4. "The Accused intention to plead guilty" invokes R.C.M. 1001(e). The mere fact that the Accused intends to plead guilty does not in and of itself justify a denial of change of location. It does invoke R.C.M. 1001 (e).

In other words the Court has failed to provide one judicially recognized reason as to why remaining in Iraq serves the interests of justice through paragraph c. of its opinion.

Paragraphs d., e. and f. of the opinion address the refusal of civilian witnesses to go to Iraq for the sentencing proceeding. The Court's reasoning is again faulty.

The Court said that violence is a daily event in Baghdad and that fear for one's personal safety is justified. The Court failed to mention that getting to Baghdad is also fraught with peril.

The Court then took judicial notice that civilians are routinely brought into Iraq on U.S. government business. Is the Court suggesting that these civilian witnesses are overreacting? The civilians brought into Baghdad are generally government employees on official business or private businessmen driven by economic gain. It is a contradiction not an analogy to treat these persons as the same or similar to the witnesses whose sole purpose is to contribute to a full and fair hearing.

The Court then said that these individuals were choosing not to attend for purely personal reasons. There is no choice here. Witnesses should not have to be heroes to assist in obtaining justice when with the stroke of a pen they could safely testify in multiple locations. To shift the burden to the witnesses by blaming them for their absence rather than recognizing reality offends justice and is a defacto forcing of the Accused to utilize depositions and stipulations.

Finally the Court was unable to affirmatively recognize that these witnesses concerns for safety were "founded". Instead the Court chose to use the convoluted double negative in

defining concerns for personal safety as "not unfounded". The defense presumes that means their concerns are "founded".

As the Court noted the government is willing to provide alternative means of presenting evidence. Anything that waters down the impact of personal testimony is in the interest of the government. Further, one or two detainee witnesses for the government, if they can be found, can be taken anywhere as they will be in England. The Court notes that it does not have subpoena power over civilians in Iraq. This is a reason to move the trial out of Iraq, not to keep it there. Knowingly rejecting live testimony due to this procedural defect offends justice.

What is most concerning about the Court's decision is the statement that, "The defense has made no showing that any preferred witness is essential to presentation of the Accused case."

Perhaps the defense has not adequately described its case, although we offered to provide additional evidence if asked to do so by the Court.

The sentencing portion of a trial is not an appendix. It is an essential ingredient of justice that the sentence adjudged reflect the totality of the circumstances which gave rise to the crime and to the personal circumstances of the Accused.

The sentencing portion must not be treated lightly. Because there is no formula or guideline for a sentence, the military judge must be possessed of all nuances and facts which result in a fair sentence, stripped of political considerations or bias.

(b)(6)-7
Captain [REDACTED] co-counsel here, has advised civilian counsel that in Iraq there is seldom live civilian testimony in a sentencing proceeding. This appears to be commonplace or policy, but it offends justice. Because it is seldom done, does not make it right.

Perhaps an explanation from the government as to why this is done would be helpful. It cannot be the exigencies of war with Iraq, for we are not at war with Iraq. It cannot be the exigencies of being an occupying force, for since 28 Jun 04 we have not been an occupying force. In fact, it is unclear what status we hold in Iraq which would justify a blanket denial of live witnesses in a sentencing proceeding. Surely concern for the safety of witnesses is an essential ingredient of this pervasive misapplication of justice in cases where essential extraterritorial witnesses do not provide live testimony.

No judge, military or otherwise, has the right or should have the right to believe that he or she is possessed of such sagacity or empathy that the human factor in the testimony of sentencing witnesses can be ignored. Further, no judge, military or otherwise, should willingly deny himself or herself the opportunity to question sentencing witnesses directly.

It is difficult to understand how this Court in applying R.C.M. 1001(e) could say, "The defense has made no showing that any proffered witness is essential to presentation of the Accused case."

The Court has provided no reasoned substantiation of this sweeping comment which seemingly serves to dismiss out of hand the importance of sentencing witnesses. We ask this Court:

1. Is it not essential to understand on a first hand and direct basis the existing violations of law and regulation that the Accused came upon when he was first

assigned to Abu Ghraib or the strains under which the undermanned and untrained 320th MP BN to include the Accused endured the chaos of Abu Ghraib to include substandard food, intolerable hours, overcrowded prison conditions and endless attack by RPG and mortar fire? BG Karpinsky, Major [REDACTED] Cpt [REDACTED] (b)(6)-2 and Sgt [REDACTED] will tell you in person if you will allow them to, but not in Iraq.

2. Is it not essential to know the psychology of prison abuse as it relates to the intolerable conditions at Abu Ghraib and the Accused? Do you not wish to know the impact of nonreporting of abuse, of the tolerance for palpable violations of law and regulation and the acceptance of abusive conduct by most at Abu Ghraib, be they MI, MP, civilian contractor or OGA? We are giving you the world's foremost authority. He is 71 years old. He will not go to Iraq and therefore, you will never question him. Think what you could learn to render a fair result from such discourse. Yet you eschew it as not essential.
3. Is it not essential to know, contrary to the protestations of those acting out of self interest that the Accused is not a rogue soldier? Rather, the truth is that he was a good soldier, a good husband and father, a good prison guard and a good man until the chaos of Abu Ghraib corrupted him. Do you believe that you can gain that flavor from a stipulation or a video tape? We think not. Mrs. [REDACTED] (b)(6)-4 the warden of his civilian prison, his pastor, his stepdaughter, his coworker and, yes, even prisoners who he has overseen at the prison in Virginia where he works will tell you.

4. Is it not essential to know that MI approved violations of law and regulation to include ghost detainees, nudity, handcuffing nude detainees to cells and the use of dogs; or that OGA killed a man in Tier 1A and tried to cover it up? These transgressions were known to the Accused. Cpt Wood will tell you as will Maj (b)(6)-2 [REDACTED] Cpt [REDACTED] Cpt [REDACTED] and 1SC [REDACTED]. So will most assuredly, LTC [REDACTED] if he is granted immunity. How can these people not be essential to your full understanding of this case in extenuation and mitigation?
5. Is it not essential to know that MI knew of abuse and participated in it with the full knowledge of the MPs to include the Accused lending the imprimatur of legitimacy to violation of law and regulation? SPCs (b)(6)-2 [REDACTED] Cruz and Krol will tell you. Such graphic testimony cannot come from a deposition or stipulation.
6. Is it not essential to know that the Accused was encouraged to harshly treat the detainees? Mr. (b)(6)-4 [REDACTED] is an essential witness who will never testify in Iraq as he is a civilian contractor and not subject to subpoena power.
7. Is it not essential for you to know how a normal prison is run against the horror and chaos that was Abu Ghraib? The warden of Buckingham Correctional Institution is prepared to tell you, but all questions you might have will go unanswered if he is not before you.

What strikes the defense about the Court's decision is the absence of reasons. This decision is a series of unsupported conclusions which provide no insight into the Court's thinking. At the very least the Court has an obligation to provide a rationale for its decision for appellate purposes

The Court did not even touch upon alternate sites. This Court sits regularly in Kuwait, a safe location a couple of hundred miles from Baghdad. We believe the Court has an obligation to tell the defense why Kuwait or Germany is not acceptable since both locations are within this Court's purview. We note that this Court kept all the Abu Ghraib cases within its chambers even though other judges function within the Court's judicial circuit. This should increase, not decrease, your ability to be flexible as to location given this Court's total control over all these complex cases.

The unvarnished reality is there is no good reason to hold this proceeding in Iraq other than the Army wants it there for political purposes. The government has essentially admitted that fact by telling the Court that it should be in Iraq to satisfy Iraqi and Arab interests.

This Court can not subscribe to that approach nor can this Court create transparently artificial reasons for keeping these proceedings in Iraq. This case will come and this case will go. Military justice will endure. The question is in what state of grace will it endure?

Respectfully submitted,

/s/ (b)(6)-4

Dated: 14 August 2004

[REDACTED]
Civilian Defense Counsel

/s/ (b)(6)-2
Cp [REDACTED]
Military Defense Counsel

CERTIFICATE OF SERVICE

(S)(b)-7
I, [REDACTED] civilian defense counsel in the above-styled matter hereby
certify that the foregoing motion was served upon the government by e-mail to
Major [REDACTED] and the military judge on 14 August 2004.
(S)(b)-7

/s/

[REDACTED]
(S)(b)-7

020212

APPENDIX IV

020213

1 [Court was called to order at 1355, 24 August 2004, at Mannheim,
2 Germany.]

3 MJ: Court is called to order. All parties are again present
4 that were present when the court recessed with the exception of the
5 civilian defense counsel, who has now joined us.

6 Mr. (b)(6)-7 can you put your qualifications on the record?

7 CDC: Yes, Your Honor. I'm a member of the bar of the District
8 of Columbia in good standing. I know of nothing to disqualify me
9 with the representation of this case.

10 MJ: Please raise your right hand. [Civilian defense counsel
11 was sworn.]

12 MJ: I would note for the record that this hearing is being
13 conducted in Mannheim, Germany, at the request of the defense because
14 they would be in Germany at this time to conduct further discovery in
15 this case. The movement of this hearing to Germany in no way
16 indicates a movement of the trial itself or any further hearings
17 outside of Baghdad, Iraq, subject to a granting of a motion for a
18 change of venue.

19 At the last hearing, I denied a defense request to reopen
20 the Article 32 hearing. I have reduced additional findings to
21 writing as I said I would. Major (b)(6)-7 here's a copy for you and

(b)(6)-7

1 the defense, and I believe that's Appellate Exhibit XI. [MJ handed
2 both counsel a copy of Appellate Exhibit XI.]

3 Furthermore, the defense filed a motion for a change of
4 venue, that would be to change the location of this trial. Defense,
5 the government filed a response to the sentence to change the
6 location of the trial. For the agreement, the parties had decided
7 the motion without conducting a hearing; we did it by email on the
8 4th of August. I denied the motion and provided copies of my denial
9 to both sides and at this time, I will make my ruling, defense
10 motion, government motion and the relevant email traffic as Appellate
11 Exhibit XIX.

12 Defense, you indicated that you wish to file a motion for
13 me to reconsider that motion I just referred to?

14 CDC: That's correct, Your Honor.

15 MJ: Do you have a copy of the motion for the court reporter?

16 CDC: We've provided it to the court reporter, Your Honor.

17 MJ: That will be Appellate Exhibit XX. [Reporter handed
18 document to MJ.]

19 Trial counsel, do you have a written response?

20 ATC: No, Your Honor.

21 MJ: Defense, what is new in your motion for reconsideration
22 that I did not have before me when I decided the original motion?

1 CDC: What is new, Your Honor, are the discussions with respect
2 to the witnesses and their import. And additionally, we have noted
3 one other witness, Lieutenant Colonel (b)(6)-2 and we have indicated
4 in the motion for reconsideration that the court's interpretation of
5 the law in this area was in error.

6 MJ: What part was in error?

7 CDC: If I may, Your Honor, approach the podium. There were
8 multiple areas, Your Honor, where we respectfully disagreed with the
9 court. Allow me to enumerate them if I can.

10 MJ: Sure.

11 CDC: Firstly, with respect to the civilian witnesses who we
12 identified as being material witnesses, that is to say the civilian
13 expert, Dr. (b)(6)-7 the warden of the Buckingham Prison, the prison
14 guard who worked with Staff Sergeant Frederick, his wife, his
15 stepdaughter and the local pastor, all of these persons wish to
16 testify and provide material evidence to the court. They have,
17 however, advised the court by way of declaration and the pain of
18 penalty and perjury, that they are unwilling to travel to Iraq. Now,
19 the court, in responding to their declaration said that they were
20 choosing not to go to Iraq. In other words, the court imposed a
21 burden upon the witnesses as though going to Iraq were somehow----

22 MJ: What was the legal error?

1 CDC: The legal error was that, I can suggest to you, United
2 States versus Nivens, which is a case that cites United States versus
3 Hodge, Hodge being a Vietnam-era case. There, the court said that
4 not going into a war zone is not a matter of choice, that it is
5 tantamount to the equivalent of a witness who is diseased or near
6 death. And therefore, the court's ruling that this was over a choice
7 on the part of these civilians we believe to be legal error.

8 MJ: Well, let me ask you, there is nothing physically
9 preventing them from flying to Iraq, true?

10 CDC: Yes, Your Honor.

11 MJ: The government will provide resources and transportation
12 that they've done for other cases and for other civilians, true?

13 CDC: Well, not true.

14 MJ: Well, you're saying the government will physically prevent
15 them from showing up?

16 CDC: No, other civilians, I do not believe are analogous to
17 these witnesses. The civilians who go into Iraq do so either at the
18 behest of the government because they're government employees or
19 because they have an interest in financial gain and are willing to
20 subordinate their personal interests to that.

21 MJ: Mr. (b)(6) would it surprise you to know in a case held in
22 Tikrit, Iraq, that the family members of both the accused and the

1 victim voluntarily came to Tikrit and testified in the trial and sat
2 the whole time?

3 CDC: Nothing in the law surprises me.

4 MJ: So what I'm simply saying is, there is the physical
5 capability of transporting them to Iraq if they so chose to go.

6 CDC: Yes, Your Honor, but the case law is otherwise.

7 MJ: I'm not talking about the case law. I'm talking about,
8 they can get on a plane in CONUS, fly commercial to Kuwait to get
9 picked by MILAIR in Kuwait and go to Baghdad. There is nothing
10 physically preventing them from doing that, true?

11 CDC: True, but it's not the legal test.

12 MJ: I didn't ask you that. Now, they're choosing not to come
13 because they say it's not safe.

14 CDC: Well, true. They say it's not safe because common sense
15 dictates that, Your Honor.

16 MJ: And therefore, I should move the trial out of Baghdad to
17 someplace that they're willing to come to.

18 CDC: That's one of the reasons you should move the trial out of
19 Baghdad, yes.

20 MJ: And so, where should I move it to to accommodate their
21 desires?

1 CDC: Well, you can move it anywhere, and if you intend to keep
2 the case, Your Honor, you could move it to Kuwait. You were there
3 with great regularity. It's just across the border. It's far safer
4 than Iraq. We can get many more witnesses there in person, and
5 you're there on a regular and recurring basis.

6 MJ: But you would agree with me that the court has no subpoena
7 power over civilians to go to any place outside of the continental
8 United States.

9 CDC: United States versus Bennett.

10 MJ: Is that a "yes"?

11 CDC: Yes.

12 MJ: Okay. And then, so what happens if it goes to Kuwait and
13 they say, "Well, I'm not going to show up there because I don't want
14 to"? Isn't this, at the end of the day, is that this case was
15 started in Baghdad, Iraq, and I know that's not dispositive, and then
16 the court posture of the case, these are sentencing witnesses, and
17 they will be provided transportation if they wish to come, and
18 they're choosing not to come because in their view, it's not safe to
19 come. At the end of the day, what is wrong with that analysis?

20 CDC: Here's is what is wrong, Your Honor, is it's contradictory
21 to United States versus Hodge, where the court said that attending a
22 trial in a combat zone presents such grave danger to a civilian

1 witness that we can properly compare his situation, namely, the
2 witness, to one who, because of illness or disease, would be in grave
3 danger to compel to attend.

4 MJ: I'm not compelling them to attend. If they want to come,
5 they come, if they don't, they don't.

6 CDC: The point of that language, Your Honor, is that it is not a
7 question of whether they are willing to come. It is a recognition
8 that no one need to go into a combat zone to discharge their
9 responsibilities as a witness if there is an alternative that can
10 meet the ends of justice.

11 MJ: Mr. (b)(6)-(b)(7)(C) wouldn't that apply to every case in a forward
12 and deployed environment?

13 CDC: I don't represent people in every case, Your Honor.

14 MJ: I didn't ask you that. What you're telling me is that
15 because these witnesses choose not to go to Iraq because they believe
16 it's too unsafe, therefore, they've now chosen where the trial is
17 going to be. And my answer to you is, what happens when they say--
18 under your analysis, you're letting defense sentencing witnesses
19 dictate the place of trial based on choice. They're choosing, "I
20 don't want to go to Iraq," maybe they won't, I don't know. They may
21 go to Germany. But the bottom line is, they can't be forced to go
22 anywhere outside the continental United States, which tells me is the

1 end result of this logic that you're giving me is that when defense
2 sentencing witnesses don't want to come to a particular location,
3 therefore, we move the trial to where they will come.

4 CDC: No, Your Honor, it's far more complex than that, far more
5 complex than that. We are in a place where there are no witnesses.
6 All the witnesses are going to come to Iraq in this trial, in this
7 sentencing proceeding. And here is what these civilians, Your Honor,
8 are going to have to sign, if I may, may the indulgence of the court.

9 MJ: Go ahead.

10 CDC: "You will be traveling into a combat zone in a dangerous
11 part of the world. By agreeing to come to Iraq, you assume several
12 risks, including, but not limited to, serious injury or death. You
13 will again be potential targets of enemy insurgents who have been
14 known to fire weapons, rifles and rocket propelled grenades and to
15 plant improvised explosive devices alongside roads traveled by
16 coalition forces. Before allowing you to enter Iraq, you must agree
17 to hold the United States harmless, assume the risks set forth above
18 and affirmatively waive your right to sue the Army or any other
19 government agency for injury or death."

20 Now, I suggest to you respectfully, Your Honor----

21 MJ: And what is that piece of paper?

1 CDC: This is the hold harmless document that every civilian is
2 required to sign going into the country of Iraq by the United States
3 if they are to be transported into Iraq.

4 MJ: You need to make that an appellate exhibit. It will be
5 XXI.

6 CDC: I will be happy to do so. Your Honor, I can give you a
7 better copy eventually. We had difficulty taking this down off of
8 the computer.

9 MJ: Government, do you take any issue of this document as it
10 purports to be?

11 ATC: No, Your Honor.

12 MJ: I'll consider it.

13 CDC: I'm not trying to dictate terms of the arrangement, because
14 this is a frivolous claim, Your Honor. The United States recognizes
15 the danger, implicit danger associated with entering into the country
16 of Iraq, and in so doing, has held itself harmless. We don't do that
17 in Korea. We don't do that in Germany. We don't do that in Kuwait.
18 It's completely reasonable for you, as a bare minimum, to have this
19 trial in Kuwait. I can't tell you that people won't come to Kuwait,
20 but I can tell you with great certainty that they are far more likely
21 to come to Kuwait than they are willing to go into Iraq, and that's
22 not unreasonable. In fact, I would say with some certainty, Your

1 Honor, that to suggest that they're unwillingness to go to Iraq is a
2 volitional act on their part, which therefore, conveys some sense of
3 blame, is inconsistent with the reality of the marketplace there.

4 MJ: That's not blame that's consistent with a choice.

5 CDC: I don't believe they have a choice, Your Honor.

6 MJ: We'll have to agree to disagree.

7 CDC: Well, I do so respectfully, of course.

8 MJ: No, I understand, that's fine.

9 CDC: But with respect to those civilian witnesses, I believe
10 that the Vietnam case of Hodge says it all. And you know, also,
11 Judge, with regard to travel these days and times, this isn't
12 Vietnam. This is a country that is surrounded by non-combative
13 circumstances where the Army has a significant presence at Camp Doha
14 where you try cases on a regular basis just south of there. We are
15 all here today. We can be in the United States as is evidenced by
16 the England case, and that case is moving at a pace without
17 difficulty. Well, it's moving at a pace.

18 MJ: It's moving.

19 CDC: I perhaps was excessive in my use of the language, Your
20 Honor. It's moving a pace and it is there and will remain there.
21 So, it's not as though things can't be done in CONUS or in Kuwait.
22 It is rather that conscious choices are being made to keep it there.

1 Now, may I say with all due respect to the court that the decision to
2 initiate the case in Iraq was perhaps reasonable given the fact that
3 the incident arose in Iraq. However, the case has become
4 substantially politicized since then, Your Honor. And in fact, now,
5 we are told 2 days ago by General Kimmitt that these trials must be
6 held in Iraq because the Iraqis are a people who are slightly
7 paranoid and would feel there was a conspiracy if we moved it from
8 there. Even the government suggested that one of the reasons----

9 MJ: Just so that I--A, I've never heard that remark, and B,
10 with all due respect to General Kimmitt, I don't care what he thinks.

11 CDC: Very well.

12 MJ: It's not his decision.

13 CDC: Understood.

14 MJ: He can want to have it on the moon for all I care, which I
15 don't at all. So whatever his view of this case is is fine, but his
16 personal views have nothing to do with the decision of this court.
17 Go ahead.

18 CDC: But there is, Your Honor, implicit in these proceedings, an
19 impression that is meant to be left by bringing this case to Iraq.
20 And what I am suggesting to you respectfully, that there is a
21 political component to this case. Even the government in their
22 response to our initial brief said that one of the principal reasons

1 for keeping the case in Iraq was to demonstrate to the Arab world in
2 General and the Iraqis, specifically, that we had a transparent
3 system of justice. Now, there is a paradox here, Your Honor, because
4 if all these witnesses do not attend, we're going to demonstrate a
5 transparency of justice to people who have not known it for decades,
6 will we at the same time deny the individual American justice that
7 would normally be accorded to an American elsewhere all because we
8 have this compelling need to maintain this trial in Iraq. I can
9 perceive of no operational necessity which requires this trial to be
10 in Iraq.

11 MJ: On your motion for reconsideration, you indicate the
12 civilian witnesses are the ones, I'm saying "choose," you're saying
13 "being forced," and then there's a number of military witnesses. You
14 would agree with me that they will not get this option. The military
15 witnesses are going to be told where they need to be.

16 CDC: Absolutely.

17 MJ: So that part of your argument doesn't apply to them.

18 CDC: You're quite right, obviously, yes.

19 MJ: And for those in your earlier brief that invoked their
20 31(b) rights, absent a grant of immunity, they are unavailable for at
21 least legal reasons unconnected with the locus of trial.

22 CDC: And we're trying to address that later on.

1 MJ: But what we're talking about here, is you're saying is
2 they're no operational necessity to try this case in Iraq, but isn't
3 the default place of trial where the convening authority puts it and
4 that you have the burden to show it should be moved?

5 CDC: Yes.

6 MJ: And therefore, the burden is you, not to show why it needs
7 to be moved, not them to show it is operational necessity.

8 CDC: Quite agree, and by a preponderance of the evidence
9 standard, we have to do that.

10 MJ: And what basically, what I'm hearing you tell me is the
11 primary reason to move this trial location is the civilian witnesses'
12 lack of attendance, and you won't say why. That's what you're
13 telling me, the primary reason is because civilian witnesses will not
14 attend the trial in Iraq.

15 CDC: Civilian witnesses will not attend the trial in Iraq, that
16 is correct.

17 MJ: Government, what's wrong with moving this thing to Kuwait?

18 ATC: Your Honor, it's the government's position that it is the
19 default position of where the convening authority puts it, and the
20 defense has to meet the burden. On top of the burden of, they have
21 to show why it needs to be moved, you also have to take a look at the
22 posture of the case which is a sentencing case, so it's under R.C.M.

1 1001 which clearly points to the fact that of the preference of
2 alternative forms of testimony as opposed to necessarily having live
3 witnesses. When the Rules of Court-Martial were set up, it's clear
4 from the wording of 1001 that unless there's a showing of necessity
5 of why this person needs to be taken as a live witness, that other
6 forms are actually the preferred means of taking that evidence. So,
7 as far as...two things, one, the default position of where the
8 convening authority puts it, and second, the posture of the case
9 dictates that unless they can show why this--there's a particular
10 civilian witness that needs to be taken live, other than that, it
11 should default to Baghdad, Iraq.

12 MJ: What do you say to that, Mr. (b)(6)-7

13 CDC: Well, I say, Your Honor, that----

14 MJ: You would agree, we're talking about a sentencing case
15 here.

16 CDC: Oh yes, of course, we are. I've disclosed that, too.

17 MJ: No, I'm with you. And the rules do permit alternative
18 forms of testimony that the government indicated they're perfectly
19 willing to participate in. Doesn't that somewhat obviate any
20 prejudice suffered by the lack of personal attendance?

21 CDC: Well, it depends on how you interpret 1001(e). The
22 foundation upon which 1001(e) is built is a notion is that it's an

1 indigent status kind of language. That is to say, it reflects
2 witnesses brought at government expense. That's what it says. And
3 the government is spending hundreds and hundreds of thousands of
4 dollars for these cases, and they are hanging their hat on 1001(e),
5 which is really an economic section of the Code. It says that you
6 are limited in what you can do as a judge with respect to your
7 discretion, if the witnesses come at government expense. So, the
8 purpose of that Code section is to ameliorate costs associated with
9 the production of witnesses. That's the underpinning of that
10 section.

11 MJ: But in this case, there's no issue about them paying for
12 the witness to show up. It's simply saying if the witnesses don't
13 show up...it's one thing to say, the government says, "I'm not going
14 to produce these witnesses because it costs too much money," which is
15 I think is what you're saying, and therefore, use these other means.
16 That's where the government is unwilling to pay. And assuming that's
17 a justified position, then you say, use alternate means. But the
18 government is perfectly willing to pay in this case. And so you are
19 choosing, not you, but the defense says, "I want these witnesses
20 here. They won't come, therefore, move the trial to them." And I
21 come back to the idea is, that when this trial was started, it
22 started in Baghdad. The expectation was, because as you're well

1 aware, the default is it usually ends where it starts. I'm not aware
2 of any trial that moves sua sponte somewhere else. Be all that as it
3 may, it started in Baghdad. The offenses occurred in Baghdad. The
4 convening authority has directed Baghdad as a site, and so
5 everybody's on notice that this is where it's going to be. And now
6 you want it to be moved somewhere else, even though the Rule permits
7 and the government has done nothing to prevent you from bringing
8 these witnesses in, and has both agreed to stipulate if they won't
9 come in or pay if they do. And you're saying I----

10 CDC: They haven't agreed to stip--excuse me, Judge, I didn't
11 mean to interrupt you.

12 MJ: They don't agree to stipulate? I thought they did agree?

13 CDC: Stipulation of fact.

14 ATC: In our brief, we offered alternative forms of testimony, to
15 include depositions and stipulations of fact, if that's agreeable to
16 the parties.

17 CDC: Only if it's agreeable. And the stipulations of fact that
18 we would anticipate coming from people may not be satisfactory to the
19 government.

20 MJ: Mr. (b)(6)-7 let me ask you this. If a witness testifies and
21 we move this somewhere where the witness shows up and testifies,
22 that's testimonial evidence, true?

1 CDC: Sure.

2 MJ: And then their opinion, they'll give whatever their opinion
3 is, true?

4 CDC: Of course.

5 MJ: And so, the government says, we're going to stipulate to
6 their expected testimony. Are they supposed to stipulate to what
7 they say is fact?

8 CDC: Well, I think the Rule suggests that it has to be a
9 stipulation of fact, Your Honor.

10 ATC: Under 1001, that is correct, that you have to stipulate
11 that it's fact as opposed to expected testimony if----

12 MJ: Well, I understand what the Rule says, but what you're
13 saying the fact would be what? Give me an example of what you want
14 them to stipulate to as a fact?

15 CDC: Well, I certainly want them to stipulate to the fact that
16 the warden from Buckingham is going testify that the procedures
17 employed at Abu Ghraib were simply so far out of bounds of what
18 normal prison conduct is that----

19 MJ: But that sounds to me like your stipulation of fact of what
20 he would say.

21 CDC: What are you going to do in a stipulation of fact except
22 say what he is going to say?

1 MJ: Okay, but then I think we're parsing the terms here, but
2 okay. And government, do you have any objections--
3 ATC: I have no objection, Your Honor.
4 MJ: ----to stipulating as fact of what these people would say?
5 ATC: That's correct, Your Honor.
6 CDC: Well, is that carte blanche, that we just simply give the
7 government whatever we want our witnesses to say?
8 MJ: Well, no, then they call the witness up and see what the
9 witness will say then. I mean, don't you think that's the way the
10 system works?
11 CDC: No.
12 MJ: No, wait a minute, are you telling me that you think you
13 ought to make them sign something that they can't confirm as true?
14 CDC: No, not at all, not at all. I'm simply saying that they
15 may find that the stipulation of fact is unsatisfactory for their
16 purposes, and then I'm left with what? A stipulation of fact is not
17 a solution in this case, I do not believe, Your Honor, because it's
18 too high a standard. If it were a stipulation of expected testimony,
19 I think I would be on a lot shakier ground. But a stipulation of
20 fact----

(b)(6)-7

1 MJ: Mr. [REDACTED] as you define "stipulation of fact" in this
2 case, it strikes to me as the government would have no problem, am I
3 wrong?

4 ATC: You're not wrong, Your Honor.

5 MJ: Draft them up, give it to them, and they'll sign it.

6 CDC: That doesn't get us----

7 MJ: I know, we've done a digression, I understand that.

8 CDC: That really doesn't get us anywhere.

9 MJ: So I mean, the bottom line is, the Rule does contemplate in
10 sentencing proceedings alternative forms of testimony.

11 CDC: Oh, it does, indeed, but the preface to it is that the
12 government--the reason for that is that the government is going to
13 pay for it, you see. I mean, the idea is, under 1001(e), if you'll
14 look at the prefatory remarks, Your Honor.

15 MJ: Go ahead.

16 CDC: So if you'll look at the prefatory remarks, it refers to
17 the initiation of this particular provision only in those cases where
18 the government is paying for the expense. You know, John Kerry and
19 George Bush's kids never have to worry about 1001(e), Your Honor.

20 MJ: I'm not sure what relevance that has, Mr. [REDACTED] But if
21 you read the Rule, it says, "A witness may be produced to testify
22 during pre-sentence proceedings through a subpoena or travel orders

(b)(6)-7

1 at government expense only if....," and then they have all these
2 requirements, other forms aren't acceptable. But what I'm saying is,
3 that's not being triggered because the government is going to pay for
4 this.

5 CDC: Well, it is being triggered, it's being triggered because
6 the government's paying for it.

7 MJ: Okay, but you're saying is that the subparagraph Delta,
8 "Other forms of evidence would not be sufficient to meet the needs of
9 the court-martial to determine an appropriate sentence," doesn't
10 apply because the government is willing to pay.

11 CDC: No, I'm not, Your Honor, at all. What I'm suggesting to
12 you, if the government were not paying for these witnesses, that
13 section would have no application to this accused. We're not paying.
14 That section would have no application. If, for example, the accused
15 were to pay for his own witnesses, your standard of review would not
16 be----

17 MJ: Well, there is no standard of review because I don't review
18 it.

19 CDC: Well, your standard of analysis with respect to what
20 witnesses will be produced by you is a different standard than the
21 1001(e) standard.

1 MJ: But if the government is not paying and you're not asking
2 me to make the government pay, then I don't review how the witness
3 got there. They just show up, right?

4 CDC: Well, no, not really. You still, if you'll look at the
5 preceding paragraph of that section, 1001(e), you still have an
6 obligation to order production, but the accused pays for it.

7 MJ: What I'm simply saying is that if you don't want the
8 government to pay for a witness, how that witness gets there is not
9 my call.

10 CDC: Correct.

11 MJ: That's all I'm saying. Now, the witness may show up and
12 have irrelevant testimony, then that is my call. But that's a non-
13 issue. What I'm simply saying here, is that they're willing to pay.
14 The witnesses are not willing to come. That's the starting point.

15 CDC: At the moment.

16 MJ: You say, "At the moment," well, that's what I got.

17 CDC: Right.

18 MJ: And then they've said they'll enter into a stipulation of
19 fact containing the matters to which the witness is expected to
20 testify. They said they'll do that, okay. They've also said they'll
21 introduce whatever else, alternative forms of testimony you want to

1 do. But all that being said, you still think the trial needs these
2 live witnesses for someplace else.

3 CDC: Well, I do, and I do for several reasons. And if we do
4 apply at the moment, 1001(e), Article 46 provides for equal access to
5 witnesses and I believe the Hodge case changes the status of these
6 civilians from choosing not to be there to giving them a right not to
7 be there. In addition to that, Your Honor, these are essential
8 witnesses for venue purposes.

9 MJ: But Mr. (b)(6)-7 they would also have a right not to be there
10 in Germany, true, or Kuwait?

11 CDC: They would, Your Honor, but they have told you specifically
12 the reason they're not going to Iraq is because of safety
13 considerations.

14 MJ: No, but I'm saying is, under your analysis, is that they
15 cannot be forced to be there. They cannot be forced to be there,
16 therefore you have a right to move the trial to someplace they can be
17 forced to be at.

18 CDC: No, I am saying that in their declarations, I want to
19 testify, but I will not go to Iraq.

20 MJ: That's their choice.

21 CDC: Of course, but it also is the court's choice as to whether
22 or not that conveys the justice necessary for this accused. And I'm

1 respectfully submitting to you that it does not, and that in fact, it
2 is playing into a political as to rather than a justice center
3 decision.

4 MJ: But Mr. (S)(b)(1)-(7), let me ask you this, in your list here, you
5 have all sorts of people, not just the ones you're talking about.

6 Now, Mr. (S)(b)(1)-(7) is he going to show up?

7 CDC: No, he won't.

8 MJ: Anywhere?

9 CDC: The only way I'm going to get Mr. (S)(b)(1)-(7) is if you
10 move it to CONUS and is subpoenaed and testimonial immunity. But I
11 need him, he's a material witness.

12 MJ: Let me ask this, how about these two inmates? Will they
13 ever come to Kuwait?

14 CDC: No, they are not going to come to Kuwait, obviously.

15 MJ: Well, now are you telling me that you want this moved to
16 CONUS?

17 CDC: I want it moved anywhere the people who are coming to serve
18 justice don't have to worry about being dead to do it. That's where
19 I want it. And it's entirely up to the convening authority where
20 that happens. All you need to say is, "Convening authority, I don't
21 want it in Iraq." It's not, as I read the Rule, Your Honor,
22 respectfully, not your call as to----

1 MJ: You're right. I simply say where it can't be. And the
2 convening authority has got to make some----

3 CDC: Some adjustment based upon his view of the world.

4 MJ: And if I say, "Well, let's not do it in Iraq because I want
5 it in a more secure location," and then we decide to go to Kuwait,
6 but Kuwait is not secure, there's terrorists there. So then, we
7 start on a road trip, and unless you go to CONUS, of course, the
8 people in the World Trade Center probably thought that was safe that
9 day, too.

10 CDC: I mean, we can reduce any argument to the absurd.

11 MJ: But you're the one that keeps changing the argument. You
12 say, "On one hand, I want [REDACTED] there, but he's not coming
13 anywhere without a subpoena." (5)16-4 That limits it to CONUS, right?

14 CDC: Well, this is a very difficult setting that we're all in
15 here, Judge, because by keeping it in Iraq, you effectively have
16 denied material witnesses. Mr. [REDACTED] in my case for example,
17 we believe can provide very material information, and his credibility
18 is at issue. And therefore, the only place the trial can be is in
19 the United States.

20 MJ: So, now you're telling me to move it to the United States,
21 not Kuwait.

22 CDC: Your Honor....

1 MJ: You're suggesting.

2 CDC: I would never tell you anything.

3 MJ: Understand, but I'm saying----

4 CDC: I hope I haven't conveyed that.

5 MJ: No, I understand, but now basically what you're saying,

6 it's got to go to the United States where there's subpoena power.

7 CDC: Let me put it to you this way, Your Honor, the best place,

8 as is evidenced by the hoards attending this 32 in the England trial,

9 to bring people in, to meet the ends of justice is the United States,

10 yes. But, on a scale of 1 to 10, 10 being the United States....

11 MJ: And 1 being Iraq.

12 CDC: Or zero being Iraq.

13 MJ: Zero, okay.

14 CDC: Kuwait's at 6, Germany's at 8, the United States is at 10,

15 and there's a big gap between zero and 6, and the reason is, we'll

16 get the people there in a safe and secure environment. They won't

17 have to worry about bombs falling on their heads or rocket propelled

18 grenades or anything else, the logistics of getting in there. I

19 mean, I just can't wait for the first civilian to spiral into Baghdad

20 in a C-130 just to be a witness.

21 MJ: If you attend, you won't be the first.

1 CDC: I understand. I understand. I'm talking about civilian
2 witnesses in this trial.

3 MJ: They won't be the first, either.

4 CDC: And I understand that, and I can't account for other's
5 decisions, but I can tell you what my witnesses are going to do in
6 this trial, and we have to be fact specific with regard to this
7 trial.

8 MJ: But isn't there a certain amount of this though, is that if
9 other people can come in, that it is some indication of choice?

10 CDC: Your Honor, that's sue generous and the law, it just
11 doesn't work. Just because 10 guys weren't prosecuted and you were
12 is not a reason to have your conviction overturned.

13 MJ: But you're telling me is that I should move this trial
14 because these people are being forced not to come by the conditions
15 in Iraq. What you're telling me----

16 CDC: The words are important, judge----

17 MJ: What you're telling me, it's not their choice. It's like,
18 you equated your case and Vietnam, it's not their choice, that it
19 would be like that to somebody on their death bed to go to a trial,
20 which therefore, you're saying, by placing the trial in Baghdad, we
21 are affirmatively...let me rephrase that, the conditions are

1 affirmatively preventing them from coming in to testify on behalf of
2 Staff Sergeant Frederick.

3 CDC: That's correct.

4 MJ: At the end of the day, that's what you're----

5 CDC: And I'll tell you why, when you're talking about a mom or a
6 dad coming in, that's one thing. Parents do a lot of things for
7 their kids. But am I supposed to ask the warden of this prison to
8 zip into Iraq so that his family can be exposed to that? Or the
9 prison guard, do I tell him this meets the ends of justice, sir? "I
10 know that you could be dead. Tell your wife and kids that you'll be
11 back in 5 days?" I mean, what do I say to these people, Your Honor,
12 that they're making a bad choice? This isn't a choice. This is an
13 opposite choice. These are material and essential witnesses, and
14 I've watched you interact with witnesses. I know you ask questions,
15 and I know that you're probative. You're not going to get that
16 chance, Your Honor, with this entire cadre of witnesses. And
17 assuming we get Dr. ^{(b)(5)} [REDACTED] in this case, he will provide
18 insights that are not available anywhere else. And you need to hear
19 that this man is not some rogue. You need to hear that for his
20 entire life he's been a good and decent person, that he was corrupted
21 in a corrupt circumstance and is willing to admit it, that this takes

1 a form of courage. I'm not trying to elevate him to a higher status
2 than he deserves, but he does deserve to have these people who have
3 cared about him and loved him there to tell you these things in
4 something other than a deposition. There is no way you can take the
5 written word and convey the sense of a lifetime friend or an employer
6 who was aghast that this could have happened. It can't be done, and
7 it can't be done with this expert, either, who will explain to all of
8 us what the whole world has asked, how could this have happened with
9 a guy like Chip Frederick? And that inquiry is relevant, and it's
10 not going to come from a deposition in any meaningful way because
11 it's not interactive with you and you won't share that experience.

12 And judges are good at cutting to the chase, but they're
13 not divorced from emotion or from compassion or from understanding
14 what witnesses say. And I simply believe that the cadre of witnesses
15 we've put together with regard to this case are essential, material
16 witnesses. And that is the test under 1001(e) under the case law,
17 the Thornton case, I believe, or Sweeney, one of the two, for moving
18 a trial. It doesn't matter that there are 20 other witnesses that
19 are coming. The question becomes, is there a material, essential
20 witness? And I submit to you respectfully, Your Honor, that in this
21 case, because it is sentencing, that the material question you must
22 ask yourself and answer is, what does all this mean in terms of a

1 sentence? And we submit to you that these are essential witnesses
2 within the meaning of the Rule and that their absence would be a
3 fatal flaw in the proceedings, and therefore, we ask you to abate
4 these proceedings in Iraq and cause the convening authority to move
5 them elsewhere. The convening authority may choose Kuwait. I have
6 no control over that. He may choose CONUS. He may choose Germany.
7 I don't know what he would choose because that has not been
8 propounded to him.

9 I'd just say this to you, Your Honor, this is a good system
10 of justice. I've believed in it for 37 years, and it works. And it
11 would be a tragedy if we did anything to make it appear that it
12 doesn't work. And I humbly suggest to you that the best way to do
13 that is balance the interests, the political interests against the
14 interests of the individual, move it out of Iraq, create the
15 transparency that you need, and have a fair sentencing proceeding.
16 And that is the position we have adopted for the reasons I have
17 indicated. Whether you do or don't apply 1001(e) is up to you
18 because here is what I believe. I believe that under the Rule, if
19 you don't have 1001(e), you were then left with broad discretion.
20 And that broad discretion has been summarized in United States versus
21 Combs, 20 M.J. 441 at page 442. And its, "Irrespective of 1001(e),
22 among the factors to be considered by the trial judge or whether the

1 testimony relates to disputed matter, whether the government is
2 willing to stipulate to the testimony as fact, whether there is other
3 live testimony available to appellant on the same subject, whether
4 the testimony is cumulative, whether there are practical difficulties
5 in producing the witnesses, whether the credibility of the witness is
6 significant, whether the request is timely." Well, as you know,
7 since May I've been asking for a change of venue, you have that
8 document before you with the convening authority.

9 We have no disagreement with what we're doing here. My
10 client has made a determination that he is, in fact, guilty of
11 certain charges and specifications. We simply ask, Your Honor, that
12 we go to a place that is consistent with American justice. Many with
13 M-16s in a courtroom in a convention center that has been jury-rigged
14 to look like a court with perils of death coming in and out. Your
15 Honor, I also have worn the uniform in this country a long time ago.
16 I'm very proud, I might add. But we cannot ask our citizens who are
17 civilians to go into a war zone and subject themselves to the pain
18 and penalty of death merely to discharge their responsibilities, and
19 I hope that you will take that into account as you rule on this
20 motion. I view this motion as critically important, not only for the
21 near term, but also for the long term, and I want to thank you for
22 allowing me to take the time to talk with you.

1 MJ: Trial counsel, do you have anything to add?

2 ATC: No, Your Honor, other than what we stated before, that the
3 posture of 1001 allows for all kinds of forms of testimony, and the
4 government is more than willing to work with the court and with the
5 defense to provide alternative forms of testimony, whether that be in
6 the forms of written stipulations, depositions, or even possibly
7 VTCs. Thank you, Your Honor.

8 MJ: After listening to the defense position and reading the
9 brief, the court concludes that the motion for reconsideration in
10 essence is a repeat of the previous motion for appropriate relief,
11 and therefore denies the request to reconsider the court's original
12 ruling, meaning the court's original ruling denying the motion to
13 move the trial remains in effect.

14 Defense, do you have any further motions at this time?

15 CDC: We do, Your Honor. Actually, we have three in number. I
16 think we can dispose of the motion to compel discovery rather
17 quickly, since we actually have an agreement in that regard.

18 MJ: Rather than cutting another tree down, during an 802, we
19 discussed the outstanding discovery issues in this case. Correct me
20 if I'm wrong, trial counsel, but there's the Schlessinger, Church and
21 Fay investigations pending, which you will provide copies to the
22 defense not later than 10 September.

1 ATC: That's correct, Your Honor.

2 MJ: Defense, your understanding?

3 CDC: Yes, sir.

4 MJ: There's that issue about the classified server being
5 viewed. I believe the previous suspense date of that was 1 December.

6 ATC: That's correct, Your Honor.

7 MJ: But of course in this case, the potential trial date that
8 we talked about in the 802 was 20 October.

9 ATC: That's correct, Your Honor.

10 MJ: And you indicated at the 802 that keeping that trial date,
11 that it is within the realm of something that could happen, that
12 knowing that, that perhaps that will encourage a more expeditious
13 review of said material and that you can provide relevant said
14 material from that server to the defense not later than the 1st of
15 October, rough and dirty?

16 ATC: That's correct. The government will do everything to
17 expedite the searching of that computer server.

18 MJ: We'll come back to the trial date issue.

19 Are those the outstanding discovery issues that we have
20 had?

21 CDC: As I see it, yes.

22 ATC: Yes, Your Honor.

1 MJ: And I'll note to--this is while we're on the subject of the
2 trial date, assuming the trial date stays 20 October in Baghdad, at
3 the 802, we discussed witness production. Mr. (S)(b)(7) anybody who is
4 a potentially, is a Reserve component soldier, that you want to have
5 as a witness at the trial, and of course, nobody knows whether
6 they're actually on active duty or if they've reverted to Reserve
7 status, you supply that list within one week of today to the
8 government. And at this point, I'm not going to require a summary of
9 their testimony. Government, any of those you're going to provide,
10 make sure they're on active duty in time to be ordered to appear in
11 Baghdad. If you're going to deny any, deny them within 24 hours.
12 Provide them the summary, defense, and then if you deny it again,
13 send it to me. If both sides agree, I can decide about reasonable
14 availability based on email?

15 ATC: Yes, Your Honor.

16 CDC: Right, Your Honor.

17 MJ: And I'm just talking about this issue because of the
18 difficulty of ordering Reservists back on active duty.

19 ATC: That's correct, Your Honor.

20 MJ: All that being said, at the 802, we also discussed General
21 Karpinski, and defense, you indicated that you wanted General
22 Karpinski at the trial.

1 CDC: That's correct.

2 MJ: And government, you allege that currently General Karpinski
3 appears to be in her civilian status.

4 ATC: That's correct, Your Honor.

5 MJ: At least not in Title 10 status.

6 ATC: That's correct.

7 MJ: Is she National Guard?

8 ATC: No, I believe she's Reserve, Your Honor.

9 MJ: Okay, so you're on notice that she's to be produced, and
10 that means whatever it takes to make it happen.

11 ATC: October 20th, Your Honor.

12 MJ: And I would strongly suggest to the government that despite
13 representations that people may be willing to come, making them on
14 active duty and ordering them to come will ensure they're there, and
15 there may not be a last minute, perhaps, change of plans.

16 ATC: Yes, Your Honor.

17 MJ: So, General Karpinski is on your list now.

18 ATC: Yes, Your Honor.

19 MJ: Any other out-of-theater witnesses that are willing to
20 come, understanding the issue we just got done discussing, provide to
21 the government not later than 2 October, because that would be
22 assuming that the 1 October date means that you've provided that

1 information on the discovery issue on the server in such a time that
2 the 20 October date is still good. If for some reason the 20 October
3 date won't work because defense, you've not received the materials
4 that you need, I'll litigate that. Again, I can do that by email and
5 we can shuffle the trial date if necessary.

6 CDC: Your Honor, one small point that we haven't discussed.

7 MJ: Okay.

8 CDC: In light of your ruling, depositions will have to be worked
9 out with the government, as well, and we'll have to extenuate that
10 into the thought processes.

11 ATC: The government will have a representative in the United
12 States to facilitate that.

13 MJ: Well, it would seem to the court that...you're talking
14 about the video depositions?

15 CDC: Well, I think so, Your Honor. I want to convey more than
16 just the written word.

17 MJ: And the government has also offered to set up a VTC. I
18 thought I heard you say that, Captain ^{(S)/b-2} [REDACTED]

19 ATC: That's correct, Your Honor.

20 MJ: So they would be available----

21 ATC: If that's amenable to the----

22 MJ: ----live in that sense.

1 CDC: I didn't know that the court would be amenable to a VTC.

2 MJ: For sentencing, when the defense doesn't object to it, I

3 don't have a problem with that. Quite frankly, I'm not sure whether

4 you need to object or not, but that's a separate issue which we

5 didn't get into.

6 CDC: No, no.

7 MJ: I'm assuming you'd prefer a VTC to----

8 CDC: I want this to be a coherent presentation, Your Honor.

9 MJ: I understand. And what I might suggest though, is

10 that...you have options. Obviously, you can do the deposition route

11 with a deposing officer, or you simply could have witnesses present a

12 videotape, CD tape, stand alone document of what they want the court

13 to consider without going through the cross-examination and that

14 type, because I consider that no different than, for example, an

15 email on sentencing. So, I've thrown that out to you that I don't

16 necessarily...you have all the options available, obviously.

17 CDC: Very well.

18 MJ: But I'm not sure a formal deposition with a deposing

19 officer is necessarily necessary, and perhaps, I'm not trying your

20 case for you, Mr. ^{(b)(7)(D)-4} [REDACTED] but a CD or DVD of what they want the court

21 to consider as a stand alone document would also, obviously, be

22 acceptable.

1 CDC: Right, fair enough. I understand, and we've been working
2 well together, there's no problem there.

3 MJ: Anything else on discovery?

4 ATC: No, Your Honor.

5 MJ: And we're all clear on the trial dates?

6 ATC: Yes, Your Honor.

7 MJ: Okay.

8 CDC: Moving, if I could, along, Your Honor?

9 MJ: And I also want to clarify, we got a little ahead of
10 ourselves because there's still outstanding stuff that could impact
11 on the trial dates, and if it does, we'll----

12 CDC: I understand. It's not fixed on concrete, I understand
13 that, Judge, and I understand it will be a nice Christmas, though.

14 Your Honor, I'm moving on now to the request for
15 testimonial immunity, and that would be the appellate exhibit next in
16 order, which is a motion for appropriate relief.

17 MJ: It will be Appellate Exhibit XXII.

18 CDC: Your Honor, we have requested the testimonial immunity of
19 the convening authority, and it was denied for Lieutenant Colonel
20 (b)(6)-2 Major [REDACTED] Specialist Cruz, Specialist Kroll, Captain
21 [REDACTED] Specialist [REDACTED] and (b)(6)-7 [REDACTED] Now, I understand
22 that's a little different drill because it has to go to the United

1 States attorney. We are withdrawing Specialist (b)(4)-2 from
2 consideration because we have found that the collateral testimony of
3 his suffices for our purposes in another proceeding. (b)(4)-7
4 MJ: And do I have any jurisdiction over Mr. [REDACTED]
5 TC: No, Your Honor, however, the convening authority, if
6 they----
7 MJ: If he wanted to request the U.S. Attorney----
8 TC: Yes, sir, and in this event, the convening authority is not
9 going to recommend immunity and therefore is not required to forward
10 this to the Department of Justice. Your Honor, I also would provide
11 the government's denial----
12 MJ: I believe the denial was part of the brief, or am I
13 misreading?
14 TC: You may very well----
15 CDC: No, Your Honor, I think actually you got the SJA advice----
16 MJ: I got the SJA's and General Metz's denial, dated 17 August,
17 so let me just back up, just make sure we're all...and government,
18 you don't have any further paper on this issue?
19 TC: That's correct, Your Honor.
20 MJ: Paragraph 3 of the applicable law, where the Staff Judge
21 Advocate summarizes R.C.M. 704 Echo, does anybody disagree that


1 that's not the correct standard? Let me rephrase that, does
2 everybody agree that is the correct standard?

3 TC: Yes, sir.

4 MJ: Mr. Myers?

5 CDC: Yes, that's right out of 704, that's the exact language.

6 MJ: Okay, yeah, it appears to verbatim, okay.

7 CDC: The  matter is addressed in that paragraph, as
8 well, Your Honor. [Pause.] Is the government suggesting that you
9 can't order the convening authority to forward this document on to
10 the United States attorney?

11 MJ: Or are you suggesting that I can do that, but it's not the
12 convening authority's decision?

13 TC: Yes, sir, that's the accurate statement.

14 CDC: And I understand that part.

15 TC: Yes, sir.

16 CDC: It will be the United States attorney's decision.

17 TC: Right, yes, sir.

18 MJ: It's just a matter of whether they want to do it.

19 TC: Right, yes, sir.

20 MJ: Now, I do understand that part. Certainly, I can do
21 something with the military, but I'm not sure I can do much with Mr.

22  (S)(b)-7

1 CDC: I don't think you can, frankly, but I do think the
2 procedure is for the convening authority to give a pre-advice to the
3 United States attorney, who in turn makes an independent justice
4 decision on the question of immunity. But that's what we're looking
5 for, Your Honor, in his case.

6 MJ: Let me just go through the...so the ones--you pulled some
7 out, but the ones you have, Colonel ^{(S)/61-2} [REDACTED] Major [REDACTED]...
8 CDC: Yes. I've spoken personally with Major [REDACTED]
9 MJ: No, just let me know which ones are still here.
10 CDC: Oh, okay.
11 MJ: Who, you said....
12 CDC: ^{(S)/61-7} [REDACTED] I pulled off. I was able to get collateral evidence
13 that was sufficient.

14 MJ: And trial counsel, the only person that has been given
15 immunity in this case is Specialist [REDACTED] Sivits?

16 TC: That's correct, Your Honor.

17 MJ: And that was after his guilty plea.

18 TC: That's correct, Your Honor.

19 MJ: Any issue that these listed witnesses, and now I'm looking
20 at paragraph 2 Alpha, I'm going to the SJA's piece of paper.

21 TC: Yes, sir.

22 MJ: 2 Alpha through 2 Echo will invoke? Any issue about that?

1 TC: Major [REDACTED] we don't believe he will invoke.

2 CDC: He told me he would.

3 MJ: Everybody else will invoke?

4 TC: Obviously, Specialist [REDACTED] has been taken off. But yes,
5 sir, I believe that's an accurate statement. Everyone else would
6 invoke, at best.

7 MJ: Okay, reading Colonel [REDACTED] and I'm going to come back to
8 Colonel [REDACTED] but let me just go through each one. Now, you say
9 Major [REDACTED] trial counsel, one of the reasons you turned this down
10 was that what he says several other people can say.

11 TC: Yes, sir, and again----

12 MJ: Defense, what is Major [REDACTED] going to say?

13 CDC: Well, I believe he's going to talk about messages that he
14 would forward up to Brigade, the deplorable conditions that existed
15 at Abu Ghraib for his troops, that he was 70 percent manned, that the
16 food he was receiving was tainted, that people were working around
17 the clock, basically, and that all in all, it was a nightmare. And
18 he will testify specifically to the death of the one Iraqi that has
19 gained some notoriety. He will testify to the role of Lieutenant
20 Colonel [REDACTED] he was the XO of the battalion.

21 MJ: Any issue that he would say those things?

(b)(6)-2

1 TC: I am not certain about Major [REDACTED] knowledge of or even
2 relevancy of an individual that died within the hard site. With
3 regard to the other facts, sir, the government is willing to
4 stipulate as fact that the food was bad, the manning was lacking,
5 those issues.

6 MJ: Who else is going to say this stuff? You have in here that
7 Colonel (b)(6)-2 [REDACTED] says all sorts of people can say the same thing.

8 TC: Yes, sir.

9 MJ: And who are those people?

10 TC: Anyone that was assigned to the battalion at that time.
11 There are a number of individuals, individuals that we've extended on
12 active duty. Members of the 372d MP Company would be able to say any
13 of those things. In fact, they'd be more likely to have better
14 information since they were actually----

15 MJ: And where's your information of what Major (b)(6)-2 [REDACTED] would
16 say?

17 CDC: In the conversation that I had with him.

18 MJ: But now he's talked to you, and now he wants to invoke.

19 CDC: That's what he told me.

20 TC: I'm sorry, Your Honor, I missed that last statement.

(b)(6)-4
1 MJ: Well, he said apparently he talked to Mr. [REDACTED] and then
2 says, "I'm not going to talk to anybody else. I want a lawyer," or
3 something to that effect.

4 CDC: Fair comment, Your Honor, I don't know the exact words, but
5 that's the import. As the XO of the battalion, you see, Your
6 Honor----

7 MJ: Whose XO was he?

8 CDC: Whose XO was he?

9 TC: Lieutenant Colonel [REDACTED] (b)(6)-2

10 CDC: [REDACTED] Yeah, right. He merely was a pivotal player
11 between himself, the 800th Brigade, the 205th Brigade, and he knows
12 about the ghost detainees and Lieutenant Colonel [REDACTED] role with
13 the ghost detainees. He will also testify that he protested the use
14 of ghost detainees vigorously.

(b)(4)-7
15 MJ: What's the relevance of that? I mean, Mr. [REDACTED] let me
16 just back up a second. There appears to have been a lot of problems,
17 I'm using that term generically because there hasn't been decisions
18 or judgments, in this entire prison system of Abu Ghraib, other
19 places in Iraq and other places.

20 CDC: Fair enough.

21 MJ: But how are these other problems relevant to this case on
22 sentencing?

1 CDC: With regard to, what I'm talking about, what happened at
2 Abu Ghraib with him. He's going to lay a foundation for why these
3 men, for example, the ghost detainees at Abu Ghraib. What happened
4 here, Your Honor, basically, was because there were no rules and
5 because these younger people, or lower enlisted, "younger" is
6 inappropriate because some people were older. These lower enlisted
7 guys who were used to some form of discipline, began to see that
8 there was nudity and men wandering around with women's panties and
9 men chained and handcuffed to cells and guys dying and being rolled
10 out the door with IVs in their arms and ghost detainees who they were
11 told not to talk about, it became pretty much a laissez-faire
12 environment. Now, I'm not suggesting that that necessarily excuses
13 conduct, but it was an incubator for it, and that's why I want him to
14 talk about it.

15 MJ: But he appears to have some culpability, true? /

16 CDC: He was given a letter or...given a letter of reprimand, or
17 given a GOMOR or was recommended for a GOMOR.

18 TC: Your Honor, may I interject just very briefly?

19 MJ: Sure. (b)(6)-7

20 TC: Mr. [REDACTED] points out that this information doesn't excuse.
21 The standard is, it must be clearly exculpatory. The government is

(b)(6)-2

1 not ready to concede that Major [REDACTED] information is clearly
2 exculpatory.

3 MJ: Because we're talking about sentencing here again, right?

4 TC: Yes, sir.

5 MJ: So I mean, doesn't the term "exculpatory" somewhat----

6 TC: Yes, sir, what would be necessary for an appropriate
7 sentence..

8 CDC: I think "exculpatory" is broad enough to----

9 MJ: I think of "exculpatory" in terms of findings much more
10 than in mitigating and extenuating in terms of sentencing, okay.

11 Okay, and I know it's not the standard, but let me ask you
12 a practical question. What harm does it give to have Major [REDACTED]
13 come in here and testify? (b)(6)-2

14 TC: Sir, I'm certain----

15 MJ: And again, I understand, I know that's not the standard,
16 I'm just asking.

17 TC: No, I understand, sir.

18 MJ: It's a practical question, that's all.

19 TC: I don't know that it does us a great harm, unless there's
20 some incident that we aren't aware of. And believe me----

21 MJ: Of course, if you're not aware of it, it's hard to
22 prosecute.

1 TC: It is more difficult than you might imagine, sir. The
2 individuals who need the Fay report most are the defense counsel,
3 second to that is the prosecution. We expect to have that in the
4 next few days that might answer these questions. But to answer your
5 question, Your Honor, right now, I don't think there would be harm to
6 the government's interests. And we did----

7 MJ: And I know each case stands on its own. Colonel (S)61-2
8 what's he going to say?

9 CDC: Well, that's interesting, Your Honor. We believe that he
10 possesses significant amounts of information regarding the creation
11 of this environment, and I think that he can tell us, if he's
12 immunized, just how all this got started because he came on very
13 early on in the game. He was there just right along with the 72d
14 when the 72d was there, and we know that there was prolonged nudity
15 and panties and all that stuff before the 372d ever arrived on the
16 scene. So someone was planting the seeds for this and we believe
17 that Lieutenant Colonel (S)61-2 can provide significant information on
18 the point.

19 TC: Yes, sir, if I may interject briefly.

20 MJ: Go ahead.

21 TC: The defense proffer was that Colonel (S)61-2 as responsible
22 for creating an environment violative of the law. Obviously, we

1 would be interested in that, interested in that behavior and would
2 seek to hold Colonel [REDACTED] accountable.

3 MJ: But you would agree with me, Major [REDACTED] (b)(6)-2 and I understand
4 that we're at sentencing proceedings, so these people are not going
5 to come in there and say, for example, I'm going to use him for an
6 example, I don't know what he will say, but let me just throw this
7 out, that Colonel [REDACTED] comes in and says, "I told these guys to
8 soften them up for interrogation, and they took that and they did
9 this." Now, since he's pleading guilty somewhere along this line,
10 the obedience to order doesn't apply, because it has to be a
11 reasonable and honest standard that a soldier has to believe the
12 order, an average soldier...I'm paraphrasing here.

13 TC: Yes, sir.

14 MJ: And so, it's certainly not a--it could be, well, if one is
15 pleading guilty to it, it's not a defense, but it certainly would be
16 a mitigating factor.

17 TC: Yes, sir, I agree with that, sir, I concede that readily.
18 I guess the harm would be, the harm for immunizing any witness that
19 we are targeting for prosecution in that it does complicate the
20 prosecution of that individual, and the government has an interest in
21 holding everyone responsible.

1 MJ: I understand that, and I know that the standard isn't what
2 harms the government. *

3 TC: Yes, sir.

4 MJ: I mean, I understand what the standard is.

5 TC: Yes, sir.

6 MJ: But fundamentally, it comes down to that there still is an
7 overarching military due process that an accused gets a fair trial.

8 TC: Yes, sir.

9 MJ: And if the government has to have--if I'm weighing the
10 difficulty of immunization and subsequent prosecution of the
11 immunized witness versus one's ability to get a fair trial, both
12 those interests can be satisfied. They're not usually exclusive
13 unless you deny the immunity request.

14 TC: Well, if I could address another individual, but they would
15 be related to the point we're making, Specialist Cruz and Specialist
16 Kroll. I expect that when I return to Iraq, shortly after that,
17 there will be charges preferred against those individuals.

18 MJ: Are they MPs, MI or something else?

19 TC: They are MI and we believe are co-conspirators along with
20 the accused and other co-accused in this case to abuse detainees.
21 Obviously, the court could order the immunization of those
22 individuals, but that would significantly complicate our----

1 MJ: Okay, let's talk about those two.

2 TC: And I say this for the larger point.

3 MJ: Just a second, I'm looking at...Mr. [REDACTED] on your motion,
4 you indicated that Cruz and Kroll participated in the abuse of
5 detainees?

6 CDC: Yes.

7 MJ: So their testimony would simply be as a fellow, well, maybe
8 not co-conspirator, but co-actor.

9 CDC: Well, actually, Your Honor, the principal point with regard
10 to those two men from our perspective comes from an interview we did
11 through our MPI with [REDACTED] And [REDACTED] said....
12 MJ: Who's [REDACTED] (S)(6)-2

13 DC: He is the individual who was with the 372d and is a
14 Reservist and is now off of active duty.

15 MJ: Okay, have you provided this to the government?

16 TC: Sir, we've provided that to the defense.

17 MJ: Okay, I thought you said it was him.

18 TC: We gave them the initial statement.

19 MJ: Okay, what's Mr. [REDACTED] have to say?

20 CDC: Question, "Did MI or any other interrogator tell you these
21 practices were acceptable?" "Yes." "Who told you?" "The MI guy
22 that stated, 'We know what we are doing,' who I later know as

(S)(6)-1
4

1 Specialist Cruz and Specialist Kroll." Now why is that important?
2 That's important because, "We know what we are doing," suggests that
3 I can go to the next level and find out who was involved with them.
4 It could've been unilateral action on their part, but the language
5 suggests that there was somebody above them.

6 MJ: And how is [REDACTED] connected to your client?

7 CDC: Well, he just served.

8 MJ: No, I'm just saying is, [REDACTED] (b)(6)(b)(7)(D) says, "I talked to Kroll
9 and..."

10 CDC: Cruz.

11 MJ: "...Cruz, and they tell me this stuff," okay, so [REDACTED]
12 knows that.

13 CDC: Yes.

14 MJ: Well, does Davis say in that statement that your client was
15 there or that information was related to your client?

16 CDC: No, the client was not there, but this information became
17 generally known amongst the 372d in conversation and the like.

18 MJ: Had it become generally known then, of course, then you
19 have other witnesses who are not criminally involved that would say
20 the same thing.

21 CDC: Well, I don't know that they would have the same kind of
22 information that Kroll and Cruz would have----

1 MJ: You've got to tie it in with your client.

2 CDC: I do.

3 MJ: And what you're telling me is that your client didn't hear
4 this conversation.

5 CDC: No, my client specifically did not hear this conversation.

6 MJ: Okay, then there's nothing in the world that would prevent
7 you from calling (S)(b)(7) as a witness to relay the conversation on
8 sentencing, since the rules of evidence are relaxed.

9 CDC: The point is, Your Honor, that I believe Cruz and Kroll can
10 point to the next higher level given the language that they employed.

11 MJ: At this point, you're speculating on that.

12 CDC: Well, of course, because they invoked. You know, there's
13 always the Gordian notch you have to cut in these settings.

14 MJ: I understand that, I understand that.

15 TC: Yes, sir, and following this reasoning, Mr. (S)(b)(7) could
16 also ask for the immunity of Charles Graner, Sergeant (S)(b)(7) other
17 individuals involved. It's the government's position these are co-
18 conspirators.

19 CDC: Well, I think that, you know, that's not likely, Judge.

20 MJ: Not likely, but do you disagree with his analysis?

21 CDC: All things are possible, of course.

1 MJ: Well, let me just deal with...you don't dispute that Cruz
2 and Kroll are...I mean, you say in--they participated in detainee
3 abuse?
4 CDC: Yes.
5 MJ: And going back to the real test here is, other than
6 Specialist Sivits, that's the only person who has been given a grant
7 of immunity, and that was post trial after his....
8 TC: Yes, sir.
9 MJ: Any evidence of government overreaching or discriminatory
10 use of immunity to obtain a tactical advantage?
11 CDC: Oh, no, I never even suggested that.
12 MJ: Well, then you don't even meet the standard then.
13 CDC: No, no----
14 MJ: Except by overall due process, what's barely the standard.
15 CDC: Right, exactly, but the standard is, I don't think they're
16 conjunctive, Your Honor. Those three criteria----
17 MJ: You don't think the word "and" means conjunctive?
18 CDC: No, I think it can be disjunctive, I think. I don't think
19 the government is using----
20 MJ: Well, then Mr. [REDACTED] I'm only reading your brief, and
21 you're the one who put the "and" there.

1 TC: Your Honor, the case law is absolutely clear. All three
2 requirements must be met.

3 CDC: Well, there's nothing they've done with Sivits that would
4 suggest overreaching by them.

5 MJ: Okay, so what you're simply telling--if I understand this--
6 of course, we are again talking the sentence case here.

7 CDC: Yes.

8 MJ: Really, what you're telling me is, under the letter of the
9 Rule, that there's no showing the government did any of these three
10 things, and that the issue really comes down to a more generic due
11 process and fair trial that I articulated earlier.

12 CDC: Oh, right, exactly.

13 MJ: Which is something that may not even be the law, but
14 sounded good. Anyway....

15 CDC: Well, due process is a rather large net, Your Honor.

16 MJ: Okay, but it seems to the court that, okay, first of all,
17 through your own words, you've not met the standard.

18 CDC: No.

19 MJ: So it would strike to the court that there's no requirement
20 to order immunity in any of these cases on the literal reading of the
21 Rule, and specifically, I will not order immunity with Cruz and
22 Kroll. And at this time for this case, I'm not going to order

1 immunity in any of these cases based on the evidence provided to me
2 and the plain reading of R.C.M. 704.

3 CDC: If I could suggest, Your Honor, that the inability to have
4 these four men now, (b)(6)-7 (b)(6)-7 come
5 forward, is a significant intrusion into our ability to demonstrate
6 the tactical circumstances at the prison during that time.

7 MJ: Mr. (b)(6)-7 first of all, (b)(6)-7 is somewhat a moot
8 point. Since he's beyond the subpoena power of the court, even if he
9 got immunity, and if a guy's not going to cooperate to give a
10 statement, do you think he's going to then, "Oh, now I've got
11 immunity, now I'm going to fly to Iraq and...."

12 CDC: No, Your Honor, but we can subpoena him to depose and see
13 if that would go and do that in the United States.

14 MJ: But you agree with me, though, is you just said, you don't
15 meet the requirement of the Rule. So what authority do I have
16 except....

17 CDC: Well, I understand, Your Honor, that the Sivits matter has
18 not caused any overreaching in any case in my mind because he's such
19 a nominal player. But in truth, the requirements of due process and
20 the ends of justice are best met with the fullest possible
21 disclosure. Now, the government has told us that they intend to
22 prosecute all these people, all well and good.

1 MJ: Actually, the government said, as I recall, they intend to
2 prosecute Kroll and Cruz. They appear to be next on the list.

3 TC: Yes, sir.

4 MJ: And there's a possibility of Jordan.

5 TC: Yes, sir.

6 MJ: Based on the Fay report.

7 TC: Yes, sir.

8 MJ: Well, let me ask you this, Major (b)(6) is a lot of this
9 outstanding prosecution is predicated on the fact when the Fay report
10 comes out?

11 TC: Yes, sir.

12 MJ: And again, separate issue, but if an individual is no
13 longer going to be subject to prosecution, then you would agree with
14 me for these offenses, the only prosecutorial authority for military
15 is the military.

16 TC: Yes, sir, I believe----

17 MJ: I mean, I'm not sure of any extraterritorial, territorial----

18 TC: No, sir, I think that's the correct state of the law.

19 MJ: So, if at the time the Fay comes out and these people are
20 no longer suspects, then perhaps, although it's not really a formal
21 grant of immunity, the issue becomes moot.

22 TC: Yes, sir.

1 MJ: And therefore, the implication becomes moot and the
2 government represents----

3 CDC: Well, I wonder, Your Honor, if the government could provide
4 a no-target letter to these men.

5 MJ: Well, that's kind of what I--the problem is, of course,
6 well, maybe not of course, is that different GCMCA's own these people,
7 although any GCMCA may impart immunity if, for example, well, Colonel
8 (b)(4)-2 you think is still in Iraq, right, Major Holley?

9 TC: I do, sir.

10 MJ: But some of these other people may belong to other
11 jurisdictions. I understand what you're saying, but a no-target
12 letter would be basically a grant of immunity because we're not going
13 to do anything to you anyway, the same effect, but technically, I
14 think that's the only rule that would apply.

15 TC: Yes, sir.

16 CDC: Well, justice is bound by no-target letters.

17 MJ: Well, I know, but I'm kind of bound by what the President
18 and the Congress tell me I can do.

19 CDC: I'm with you on that entirely. I'm just trying to come up
20 with a way that it works, that's all.

21 MJ: What I'm saying though, but that may also moot their
22 invocation.

1 TC: Yes, sir.

2 MJ: By that, I mean, they may be ordered to testify by me
3 because they don't have grounds to invoke. All that being said,
4 that's a separate issue, because again, I don't find the requirements
5 of the Rule being met compelling me to order immunity for any of
6 these people in this case. Now, of course, as you're aware, Mr.
7 (b)(6-4) there's other cases, there's other facts in those cases. And
8 of course, whatever comes out of those cases, the government's,
9 that's relevant to your case, the government must turn over to you.
10 I'm not saying that solves the problem, but different cases may have
11 different rulings. I merely put that out that, something to tell you
12 which you already know. But this time, I'm not going to order
13 immunity basically because of the self-admitted failure to meet the
14 requirements of the Rule.

15 Okay?

16 CDC: Very well.

17 MJ: Anything else?

18 CDC: The expert witness motion, Your Honor.

19 MJ: That's marked as Appellate Exhibit XXIII.

20 Trial counsel, do you have a....

21 TC: Sir, again, we have the Staff Judge Advocate's advice and
22 CG action that may be attached to----

1 MJ: Before you give that to me, no, they already gave it to me.
2 TC: Yes, sir.
3 MJ: Now, on General Metz's denial of 17 August, he indicates
4 that he will provide a suitable replacement.
5 TC: Yes, sir.
6 MJ: Has such a suitable replacement, at least in the
7 government's opinion, been identified and provided to the defense?
8 TC: Sir, what we have at this point is actually two categories
9 of witnesses that the defense may choose from, and from that point,
10 we will identify an individual. And if I may, just very briefly----
11 MJ: As I understand the Rule of this, Mr. (b)(6)-(b)(7) if the
12 government proffers an adequate substitute, you first have to
13 consider the...and again, decide whether or not it is an adequate
14 substitute.
15 CDC: Right, and we would submit to you, Your Honor, with no
16 intent to be facetious, but quite honestly, if there were someone as
17 qualified as (b)(6)-(b)(7) Dr. (b)(6)-(b)(7) in the United States Army
18 with regard to prison abuse, there's a real chance we wouldn't be
19 here today. He is the foremost authority in the world on this
20 subject. He is unparalleled in his knowledge of this area, in his
21 study of this area. We have provided you two things with regard to
22 him, one, his curriculum vitae. And secondly, a document which he

1 wrote responding to certain inquiries so that you could get a flavor
2 for proffered testimony from him. Some of it is irrelevant. Much of
3 it gives you the sense of how valuable he will be to you in
4 understanding the psychological factors that gave rise to this
5 horrible circumstance at Abu Ghraib. Basically, he can explain to
6 you how thoroughly decent people can, with the right ingredients
7 become the morally corrupted. And his testimony is of tremendous
8 significance for the court to have a background in this area, and
9 there is no one who possesses his depth of understanding. He's been
10 teaching and working and studying for 46 years in this area. He is
11 the go-to guy. There isn't anybody else who equals him in this area.

12 MJ: Trial counsel, what do you say? (S)(b1-7)

13 TC: Sir, there is no doubt that Dr. [REDACTED] testimony will
14 be helpful. However, that is not the legal test. The test is
15 whether his testimony would be necessary. And, there are three
16 prongs to that, Your Honor. We concede that the defense has
17 explained to us or was satisfied, what this particular expert might
18 accomplish for the accused, but we don't concede that the expert
19 assistance is needed. We don't concede that the expert assistance,
20 that the defense is unable to present the same type of evidence on
21 their own with the assistance of other professionals.

22 MJ: Mr. [REDACTED] (S)(b1-7)

1 CDC: Well, the evidence is needed, Judge.

2 MJ: No, I hear what you're saying. I'm just asking you, can he
3 add much more than what you provided in your brief?

4 CDC: Oh, yes, he can provide a lot more than we provided in our
5 brief, a lot more.

6 TC: Your Honor, I would also highlight the fact that this
7 denial of an expert was based upon basically a half page document by
8 the defense which had very little information.

9 MJ: Do you want to take it back and ask the convening authority
10 again?

11 TC: Sir, we can certainly do that. I think the recommendation
12 will be the same.

13 MJ: So, an observation, not a request.

14 TC: Yes, sir, I believe that's right.

15 MJ: Got it.

16 TC: But when you look at the CG's advice, that was based on
17 that request, not the motion.

18 CDC: Perhaps we were slightly anticipatory. He, Your Honor,
19 will be able to particularize his testimony to the Chip Frederick
20 circumstances and to give you insights as to the conduct of Staff
21 Sergeant Frederick on an individualized rather than a generic basis,
22 as well.

1 MJ: Now, he's not willing to go to Iraq, true?

2 CDC: No, regrettably, he will not be in Iraq.

3 MJ: So, he will not be able to see the prison or personally
4 talk to your client?

5 CDC: Well, he can personally talk to my client.

6 MJ: Not in person.

7 CDC: Not in person, no, not in person. But he isn't rendering a
8 psychiatric or psychological opinion with respect----

9 MJ: Well, I'm just trying to figure out, what's the 5 days of
10 preparation, other than just reading stuff he apparently has already
11 read.

12 CDC: That's out the window if he's not going somewhere to be
13 with us, so on and so forth, we're going to do this by way of VTC or
14 whatever. I think the 5 days is too much.

15 MJ: Now, I know this isn't a grounds for denying an expert
16 witness, by that, I mean, the cost.

17 CDC: Right.

18 MJ: That's not the legal standard, but I suspect it somehow
19 plays sometimes by the convening authority. I'm not saying that
20 General Metz considered that. But are you saying that this is, and
21 we're talking about a one-day deposition here?

1 CDC: Oh, yes, but we're talking a couple days of preparation,
2 and there's a lot to read. He's a thorough man. And I think we can
3 reduce this to 3 days very realistically, because we can go to
4 California.

5 MJ: And \$5,000 day.

6 CDC: Your Honor....

7 MJ: I'm just saying, is that's what he----

8 CDC: I hate to think of what it cost to get everybody here out
9 of Iraq, many, many (b)(6)-(b)(7)

10 MJ: Again, that's not typically--legally relevant, so I'm not
11 going to pursue how much it cost to sit around and read papers. But,
12 at this point, it would appear to the court that the trial counsel
13 has offered you a substitute which you've yet to consider, so don't I
14 have to wait until you do that?

15 CDC: I know I do, but I'm simply suggesting that I think that
16 you can shortcut----

17 MJ: There's no adequate substitute in the entire world to one
18 guy?

19 CDC: There's no adequate substitute in the United States Army
20 for this guy.

21 MJ: How do you know that?

22 CDC: Because...well....

1 MJ: The government says there is.

2 CDC: Well, the government, respectfully, is wrong.

3 MJ: But they say it every time.

4 CDC: Of course, I mean, I expect them to say that. I mean,
5 that's standard operating procedure. The Army goes to [REDACTED]
6 for advice, Your Honor. And I don't want to get involved with who he
7 talks to and what he talks to, but the Army, I can say this with
8 great certainty, the Army goes to [REDACTED] for advice. (b)(6)-(b)(7)

9 MJ: Trial counsel, do you have an adequate substitute?

10 TC: Yes, sir, I believe we do.

11 MJ: Who's that?

12 TC: Sir, we can get one of two, again, categories of people, if
13 I may. We can get a psychiatrist or psychologist with about 8 years
14 of experience, not clinical, but a practitioner.

15 MJ: In Iraq.

16 TC: In theater, a psychiatrist or psychologist, generally. Or,
17 we can get a comparable individual with forensic experience.

18 MJ: What's their background in the psychology of prison
19 environment?

20 TC: Sir, we are not going to have a prison psychologist.

21 MJ: Isn't that what they're asking for?

1 TC: That's what they're asking for, sir, but I don't believe
2 that's----

3 MJ: And I know you guys have not conceded necessity and
4 relevance, I understand that. And so, you're simply offering a
5 substitute without conceding----

6 TC: A mental health professional who can identify the stressors
7 on a particular individual in a stressful environment and testify
8 accordingly, using the information----

9 MJ: But you concede though, that we're talking about a
10 specialized subcategory of psychology here.

11 TC: I concede that the defense is requesting that, yes, sir. I
12 don't concede that that's necessary for----

13 MJ: Oh, I understand that, I understand what you're saying.

14 TC: Yes, sir. (b)(6)-(7)

15 MJ: And Mr. [REDACTED] you are amending your request to 3 days?

16 CDC: Yes, based upon what's going on here, I think 3 days is now
17 adequate.

18 MJ: I mean, unfortunately, what you end up with though, is that
19 if we say 3 days today, it's 3 days. Do you understand what I'm
20 saying? What I'm saying is, that the convening authority, first of
21 all----

22 CDC: Some of that was travel time---

1 MJ: ----you understand, it's not my money.

2 CDC: I understand, but some of it was travel time, Your Honor.

3 MJ: But whenever these are, anytime, approved, the convening
4 authority approves at a certain rate, and not higher. Otherwise, you
5 have an Anti-deficiency Act violation. You know all this.

6 CDC: I know all this, but it's okay.

7 MJ: But just so that--I think I know this, I want to make
8 sure----

9 CDC: I had travel time in there, you know, I had....

10 MJ: So you simply----

11 CDC: I've eliminated him going anywhere.

12 MJ: So he can sit down before a camera in Palo Alto and talk
13 all he wants and then put it on a disk and then mail it to you, and
14 that would--you wouldn't even need, necessarily a deposition. That
15 would meet your requirements.

16 CDC: I would like a give and take. I would like a give and
17 take. I would prefer that.

18 MJ: Government, what's your position?

19 TC: Yes, sir, well, obviously, we'd want to cross-examine this
20 witness.

21 MJ: You're going to send somebody out to Palo Alto?

1 TC: Absolutely, sir. I'm sure Captain [REDACTED] would be happy
2 to.
3 CDC: We might be able to do it at the Presidio, Judge, of
4 Monterey, that is.
5 MJ: I direct the production of this witness. You'll do the
6 mechanics, trial counsel, of setting up a deposition?
7 TC: Yes, sir, we will.
8 MJ: You were saying, just so there's no confusion about the
9 money here, Mr. (b)(6)-2 [REDACTED] 3 days.
10 CDC: Three days is fine with me, and based upon what I've been
11 told, that will give him time----
12 MJ: Again, technically, it's a produce or abate order, but you
13 understand where I'm going here, Major (b)(6)-2 [REDACTED]
14 TC: Yes, sir, I do.
15 MJ: I direct that the government produce this witness in the
16 context of the motion, i.e. make him available for a deposition. And
17 pursuant to the defense representation, that would be 3 days at his
18 proffered rate. And, whether you choose to depose him or whatever
19 way you choose to present the testimony, that's up to you. But if
20 you're going to do a deposition, the convening authority will direct
21 a deposing officer.

1 TC: All right, sir, so you have ordered the employment of this
2 expert----

3 MJ: Well, it's a produce or abate, technically, but yes.

4 TC: Yes, sir.

5 MJ: But understand, we're talking about the rate of 3 days
6 here, just because I know you deal with the money issue.

7 TC: Yes, sir.

8 MJ: And what I'm hearing from the defense, they're modifying
9 the request to the convening authority to 3 days at the \$5,000 a day
10 rate, which would be, if the convening authority approved it, flat
11 out, that's what he would approve and he could approve no more.

12 TC: Yes, sir, and I apologize....

13 MJ: No, go ahead.

14 TC: This individual is to be detailed to the defense team, or
15 is just as an expert----

16 MJ: Well, the problem is, is that you want him as a witness.

17 CDC: No, we asked him as a defense expert witness, Your Honor.
18 It was the convening authority that converted it to a consultant.

19 MJ: Okay, he's talking about as a witness, which means is that
20 once he gets done with his material, then he can be interviewed by
21 the government prior to the deposition, and then take the deposition.

22 TC: Yes, sir, I just want to make sure----

1 CDC: No, absolutely clear on that point.

2 MJ: You're treating him as an expert witness.

3 CDC: No, we jumped right over the consultancy.

4 TC: And we did that out of an abundance of caution is why we've

5 treated it that way.

6 MJ: Okay, I understand that.

7 CDC: We appreciated the caution.

8 MJ: But now, understand, just so there's no lack of clarity

9 here, if he's employed as an expert witness and he bases some of his

10 opinion on things that came from your client, that's discoverable by

11 the defense--or by the government.

12 CDC: No, I understand the rules.

13 MJ: I know, we all do, but it's easier if we make sure we all

14 do, because that may change.

15 CDC: Okay, very well.

16 MJ: Okay, good. Anything else?

17 CDC: Nothing further from the defense.

18 MJ: But one outstanding issue that I don't think has relevance

19 to this case, is that dealt with an issue we discussed in the 802

20 that certain third parties who have employed private contractors,

21 which I think include your Mr. (b)(6)-(7) and I'm sure I'm

22 mispronouncing his name. And again, we talked about at the 802 that

1 there is a third party pleading from Titan Corporation, CACI, and SOS
2 Corporation dealing with a motion to quash any subpoenas dealing with
3 these people. But as indicated at the 802, Mr. (b)(6)-(b)(7) you indicate
4 this is a non-issue in this case.

5 CDC: In this case, it's a non-issue.

6 MJ: Okay, therefore, it would appear to the court no reason to
7 make those a part of the record or to rule on it since it's a non-
8 issue and you don't intend to pursue that in any way, shape or form.

9 CDC: No.

10 MJ: Any other matters to take up before the court?

11 CDC: Our sole concern is Mr. (b)(6)-(b)(7)

12 MJ: But I believe I've addressed that with the other ruling,
13 and then consequently, this ruling becomes somewhat moot.

14 CDC: It's mooted.

15 TC: Sir, nothing further, Your Honor.

16 CDC: Nothing from the defense.

17 MJ: The court is in recess.

18 [Court recessed at 1521, 24 August 2004.]

19 [END OF PAGE.]

20

21

APPENDIX V

020283

January 2003

VITA

Office:

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Jordan Hall, [REDACTED]
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(5)16-7

PERSONAL INFORMATION

Born: March 23, 1933, New York City, NY
Married: Christina Maslach, Ph.D., Psychologist, U. C. Berkeley
Children: Adam, Zara, Tanya
Licensed: Psychologist, State of California PL 4306 (since 1975)

EDUCATION AND HONORARY DEGREES

Brooklyn College, A.B. (Summa) Honors in Psychology, Sociology/Anthropology, 1954,
Phi Beta Kappa, 1953.
Yale University, M.S. 1955; Ph.D., 1959

Honorary Degree, Doctor of Humane Letters in Clinical Psychology, Pacific Graduate
School of Psychology, 1996
Honorary Degree, Doctor Honoris Causa, National University of San Martin, Peru, 1996
Honorary Degree, Doctor Honoris Causa, Aristotle University, Thessalonika, Greece, 1998

PROFESSIONAL EXPERIENCE

Post Doctoral Trainee - West Haven Veteran's Hospital, Clinical Psychology Dept., 1959-1960
Co-Director (with Dr. S. Sarason), Children's Test Anxiety Research Project, Yale University,
1959-1962
Created, Directed The Harlem Summer Program, "A Head Start-Black Pride" Daily Program
Staffed by NYU and CCNY Students in Harlem (1965)
Training and research consultant in hypnosis, Morton Prince Clinic, New York, 1963-1967
Co-Director (with Dr. E. Hilgard), Stanford Hypnosis Research Lab, 1969-1980
Director, Stanford University Social Psychology Graduate Research Training Program
Founder, Co-Director (with Dr. L. Henderson), Shyness Clinic/ Shyness Institute, 1975-present
Senior Scientific Advisor, writer, narrator, *Discovering Psychology*, PBS-TV/ Annenberg Corp
Video series (1989, updated 2001)

TEACHING

Instructor/Assistant Professor, Yale University, 1957-1960
Assistant Professor, New York University, 1960-1967
Professor, Stanford University, 1968 to present
Visiting Professor: Yale (1962), Stanford (Summer 1963), Barnard College (1966), University of
Louvain (Belgium) Part-time (Summer 1966), University of Texas (1967), Columbia University
(1967-68; Klingenstein Professor of Race Relations), University of Hawaii (Summer 1973),
International Graduate School of Behavioral Sciences, Florida Institute of Technology at Lugano,
Switzerland (Summer, 1978), University of Warsaw (Summer 2000)

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[REDACTED] (b)(6)~4

HONORS

TEACHING

- *Distinguished Teaching Award, New York University, 1965
- *Distinguished Teaching Award for Outstanding Contributions to Education in Psychology, American Psychological Foundation, 1975
- *Phoenix Award for Outstanding Teaching, Stanford Psychology Department Faculty, 1984
- **California Magazine*, Best Psychology Teacher in California, 1986
- *The Walter Gores Distinguished Teaching Award, Senior Faculty, Stanford University, 1990
- *Bing Fellow Outstanding Senior Faculty Teaching Award, Stanford University, 1994-1997
- *WPA Recipient of the annual Outstanding Teaching Award, 1995
- *Distinguished Teaching Award, Phi Beta Kappa (Northern California Chapter), 1998
- *Robert S. Daniel Teaching Excellence Award, APA Division 2, Society for the Teaching of Psychology, 1999
- *Dean's Award for Distinguished Teaching, Stanford University 1999-2000

RESEARCH

- *Peace Medal from Tokyo Police Dept., 1972 (special recognition of a foreign national whose research and ideas significantly contributed to improving criminal justice administration)
- *Fellow, Center for the Advanced Study in the Behavioral Sciences, 1972
- *Gordon Allport Intergroup Relations Prize (honorable mention), 1974, Society for Psychological Study of Social Issues (for the Stanford Prison Experiment)
- *Distinguished Research Contributor Award, California State Psychological Association, 1977
- *Psi Chi Award for contributions to the Science of Psychology, 1986
- *Guze Award (Society for Clinical & Experimental Hypnosis), Best Research in Hypnosis, 1989
- *Selected as one of ten major contributors to *Social Psychology*, Yosemite Conference on 100 Years of Experimental Social Psychology, 1997
- *Ernest R. and Josephine R. Hilgard Award for the Best Theoretical hypnosis paper for Society for Clinical and Experimental Hypnosis, published 1999
- *Distinguished Lifetime Contributions to General Psychology (APA, Division 2, 2000)
- *Distinguished Contributions to Scientific Hypnosis (APA, Division 30, 2001)
- **Psychology Today* Magazine, Mental Health Award for Research and Treatment of Shyness, 2001
- *Distinguished Lifetime Contributions to Psychology, California Psychology Association, 2003

WRITING

- *National Media Award (honorable mention), American Psychological Foundation, 1973 (for popular writing on vandalism)
- *William Holmes McGuffey Award for *Psychology and Life*, for Excellence and Longevity, (Textbook Authors Association) 1995

GENERAL

- *President, Western Psychological Association, 1983, again in 2001
- *Who's Who in America, 1982 to present
- *Ugliest Man on Campus (Most Popular Stanford Faculty/ Administrator), Alpha Phi Omega, 1983
- *Chosen by Editors of *The Sciences* to represent psychology in its 35th year celebration reflecting on the contributions in each field of science, November, 1996
- *Phi Beta Kappa, Distinguished Visiting Lecturer, 1989-1990
- *Distinguished Contribution to Psychology as a Profession, California Psychological Association, 1998
- *APA Division 1 award, Ernest Hilgard Award for Lifetime Contributions to General Psychology, 2000
- *Los Angeles County Psychological Association: Psyche Award for lifetime contributions to Psychology as a science and art (2000)
- *Fulbright Scholar at U. Rome (2001)
- President of the American Psychological Association, 2002

MEDIA

- *Selected to be Senior Academic Advisor, Host, Writer and Narrator of *Discovering Psychology*, (A 26-part PBS TV series on psychology, Annenberg/CPB project, 1986-1989)

[REDACTED] (b)(6)-(b)(7)
*London Weekend Television (Granada Media), "Human Zoo" Three Programs, Chief Scientific Advisor and On-Screen Expert

- *STC (Society for Technical Communication) International Audiovisual Competition Award of Excellence for "The Power of the Situation" (*Discovering Psychology* video series), 1991
- *Columbus International Film & Video Festival Bronze Plaque Award for "The Developing Child" (*Discovering Psychology* video series), 1992
- *International Film & TV Festival of New York Finalist Certificate for "Past, Present and Promise" (*Discovering Psychology* video series), 1992
- *WPA Film Festival Award of Excellence for "The Responsive Brain" and "Social Psychology" (*Discovering Psychology* video series), 1992
- *WPA Spring Festival first place award for *Quiet Rage: The Stanford Prison Study* video, 1993
- *WPA Spring Festival first place award for *Candid Camera Classics in Social Psychology* Video, 1993
- *APA Presidential Citation for outstanding contributions to psychology for the *Discovering Psychology* video series, 1994
- *Psychological Consultant, New Programming for NBC TV, 2002.
- *Emmy Award, New England Instructional Television, Host, Cognitive-Neuroscience (*Discovering Psychology* Video Series), 2002
- *WPA Spring Festival, First Place Award for Cultural Psychology (*Discovering Psychology* Video Series), 2002
- *Sagan Award for Promoting Public Understanding of Science, Awarded by Council of Scientific Society Presidents, 2002.

PROFESSIONAL MEMBERSHIPS

American Psychological Association (APA), Fellow; Div. 1(F), 2(F), 3(F), 8(F), 9(F), 13(LM), 15(F), 26(LM), 35, 45, 46(LM), 48(F), 52(F)
Association for Advancement of Psychology (AAP)
American Psychological Society (APS), Fellow
Charter Fellow Canadian Psychological Association (CPA)
Western Psychological Association (WPA), Fellow
Eastern Psychological Association (EPA), Fellow
California State Psychological Association (CSPA)
International Association of Applied Psychology (IAAP)
International Congress of Psychology (ICP)
Society for Inter-American Psychology
Society for Psychological Study of Social Issues (SPSSI)
American Association for Advancement of Science (AAAS), Fellow
Society for Experimental Social Psychology (SESP)
Society for Advancement of Social Psychology (SASP)
Society for Personality and Social Psychology (SPSP)
Phi Beta Kappa, Sigma Xi, Psi Chi
American Association of University Professors (AAUP)
Psychologists for Social Responsibility

CONSULTATIONS AND BOARDS

Research Consultant, Morton Prince Clinic for Hypnotherapy (New York City)
Asthma Research Unit, Cornell Medical School (New York City)
Tokyo Police Department
Wake Up! Louisiana (New Orleans Citizens' Group)
Public Advocates Law Offices (San Francisco)
Charles Garry Law Offices—expert witness, prison litigation, Senate subcommittee on prisons and juvenile delinquency
Japanese internment reparations hearings (San Francisco)
San Francisco Newspaper Agency (Senior Project Research Consultant)

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Cristaldi Films, Rome, Italy (Consultant on "Control" film)
SRI International Consultant to PSI Phenomena Project (Oversight Committee)
San Francisco Exploratorium, Consultant to APA Traveling Museum Exhibit, and Memory Project
Executive Board for the Holocaust Study Center, Sonoma State University
Advisory Panel for the Center on Postsecondary Learning, Teaching and Assessment
Board of Advisors, *Psychology Today* Magazine
Consulting Editor, McGraw Hill Publishers, Social Psychology Series
Historian, Western Psychological Association (1984-2000)
Editorial Board, *Journal of Social Behavior and Personality*
Editorial Board, *Journal of Social Issues*
Institute for Research on Social Problems
Contributing Editor, *Healthline*
Advisory Board, The Foundation for Grand parenting
Advisory Board, End Violence Against the Next Generation (California)
Advisory Board, North American Journal of Psychology
Honorary Member, Italian Inter-university Center for the Study and Research on the Origins and Development of Prosocial and Antisocial Motivations
Consultant, Live Entertainment, Hollywood, "Stanford Prison Experiment" film
Advisory Council, Resources for Independent Thinking
Advisor, London Weekend Television, "Human Zoo" 3 programs on group behavior Discovery Channel
Advisor, BBC, Human Rights, Human Wrongs Program: "Five Steps to Tyranny,"
Founder, Scientific Advisor, RealPsychology.com
Consultant, NBC TV
Consultant, Maverick Films, Hollywood, "Stanford Prison Experiment" film
Board of Directors, Council of Scientific Society Presidents

INTERNATIONAL INVITED ADDRESSES, WORKSHOPS, PRESENTATIONS

Conventions and Associations

International Congress of Psychology (in Bonn, London, Tokyo, Mexico City, Brussels, Stockholm);
International Congress of Applied Psychology, International Social Psychology Conference (in Majorca, Spain, and Budapest); Canadian Psychological Association, Japanese Psychological Association, Japanese Social Psychological Association, German Psychological Society, Greek Psychological Association, Spanish Social Psychological Association, European Association of Experimental Social Psychology, European Association of Personality Psychology, World Congress on Eclectic Hypnotherapy in Psychology (Ixtapa), International Conference on Time (San Marino, Italy);
International Convention on Shyness and Self Consciousness (Cardiff, Wales), Mexican Psychological Society

Universities

University of Salamanca, University of Barcelona; The Sorbonne; University of Paris (Ecole des Hautes Etudes), University of Rome, University of Bologna, Catholic University of Milan, University of Naples, University of Parma; Oxford University, East London University, Central London University, University of Cardiff, Open University-Birmingham, England; University of Thessalonika, University of Athens; University of Louvain; Hamburg University; Tokyo University, Kyoto University, Okinawa University, Osaka University; University of Sao Paulo, University of Rio de Janeiro; Guanajuato University; University of British Columbia, Calgary University, University of Alberta, Toronto University, McGill University, University of New Foundland; Chinese University of Hong Kong, Deree College, (Athens).

DOMESTIC LECTURES, WORKSHOPS, PRESENTATIONS

Conventions and Associations

American Psychological Association, American Psychological Society, Eastern Psychological Association, Western Psychological Association, Midwestern Psychological Association, South Eastern Psychological Association, Rocky Mountain Psychological Association, New England Psychological Association, American Psychiatric Association, American Ortho-psychiatric Association, American Association for the Advancement of Science, New York Academy of Sciences, Society for

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Experimental Social Psychology, Federation of Behavioral, Cognitive and Social Sciences, Nebraska Symposium on Motivation, Society for Clinical and Experimental Hypnosis, National Conference on Law Enforcement, Smithsonian Institute, Annenberg Foundation, American Association of Behavior Therapy, Anxiety Disorders Association of America, California School of Professional Psychology (Fresno and Berkeley), Pacific Graduate School of Psychology, Eriksonian Conference on New Developments in Therapy, National Conference on Teaching, Texas Junior College Convention, Veteran's Administration Hospital Psychology Programs in Palo Alto, Menlo Park, CA., Bronx, NY, Society for Research in Child Development, California Psychological Association, Midwest Institute for Teachers of Psychology.

Colleges, High Schools

University of Virginia Visiting Scholar (lectured at VMI, Virginia Tech, George Mason, William & Mary Colleges); University of California: at Berkeley, Davis, La Jolla, Los Angeles, Riverside, Santa Barbara, Santa Cruz, San Francisco (Extension Program), San Francisco (Langley Porter Institute); California State University: at Fresno, Long Beach, San Diego, San Marino, Sonoma; Claremont-McKenna College, Claremont College, Cal Tech, University of Southern California, San Francisco State University, College of San Mateo, Foothill College, D'Anza College, NYU, Columbia University, Yeshiva University, New School for Social Research, Queens College, Hunter College, Brooklyn College, Lehman College, City University of New York, Einstein Medical School, West Point Military Academy, University of Vermont, Dartmouth College, Cornell University, Harvard University, Boston University, Wesleyan University, Yale University, Brandies University, MIT, Pennsylvania University, Temple University, St. Joseph's University, Princeton University, Rutgers University, Montclair State College, University of Delaware, Emory University, Pittsburgh University, University of Cincinnati, Duke University, North Carolina University, University of Florida, Broward Community College, Baton Rouge College, LSU, University of Texas (Austin), Sam Houston Community College, University of Houston, Texas Tech University (Lubbock), McNeese State College, Arkansas University, University of Northern Arizona, Arizona State University, Arizona University, Michigan University, Northwestern University, University of Chicago, University of Illinois- Chicago, St. Louis University, Oregon University, Washington University, University of Central Washington, University of Eastern Washington, Chemmetkita College (Washington), University of Hawaii (Manoa Campus), Central Oklahoma University, University of Puget Sound, Reed College, University of South Carolina, Claremont Graduate School, California State University, Long Beach, Ohio State University, Devry University, College of DuPage, Holy Names College, Baldwin Wallace (Harrington Distinguished Lecturer), Temple University (Uriel Foa Distinguished Lecturer), Tufts University, Prince Georges CC.

Jordan Junior High School (Palo Alto), Crittenden Middle School (Mountain View), Lick-Wilmerding High School (S.F.), Lincoln High School (S.F.), Gunn High School (Palo Alto), Loudin County High School (Virginia), Walt Whitman High School, (Bethesda, Maryland)

Non-Academic Lectures, Presentations

Commonwealth Club (San Francisco), Comstock Club (Sacramento), IBM, Maritz Corporation, Xerox Corporation, New Orleans Chamber of Congress, Harper Collins Publisher, Scott, Foresman Publisher, National College Textbook Publishers Conference, Lucas Arts (Industrial Light and Magic Company), George Lucas Workshop on Creativity, Local PTA Groups, Prison Reform Groups, Peace Group Associations (New York and California).

MEDIA PRESENTATIONS (TV AND RADIO)

"Discovering Psychology" Series, 26 episodes shown nationally on PBS and Internationally in 10 Countries (from 1989 to Present), The Today Show, Good Morning America, 20/20, Night Line, and The Phil Donahue Show (each several times), That's Incredible, Not For Women Only, To Tell The Truth, Tom Snyder Show, Charlie Rose Show, NBC Chronolog, People Are Talking, AM and Late Night TV Shows in NYC, LA, Chicago, Seattle, Washington, DC, Atlanta, Detroit, Philadelphia, Pittsburgh, Boston, Vancouver; Canadian Broadcasting Company, BBC, CNN, National Public Radio, KGO Radio, Live 105 San Francisco Radio, Milt Rosenberg Radio Interview Program (Chicago), Italian TV-RAI (Shyness Program on Quark), Stanford Television Network, The Discovery Channel Program on Torture. 60 Minutes, and, London Weekend TV/ Discovery Channel

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program on the "Human Zoo." Only Human", NBC/Discovery Channel.

INTERVIEWER/ ON STAGE CONVERSATION SERIES

Public interviews/conversations for California Academy of Sciences and S. F. City Arts & Lecture Series) with:

Anna Deveare Smith, Oliver Sachs, Jonathan Miller, Robert Coles, Andrew Weil,
Frank Sulloway, Sarah Lawrence Lightfoot, Elizabeth Marshall Thomas,
Mary Catherine Bateson, Peter Funt (son of Allen Funt), Frank Sulloway, Michael Gazzaniga.

CAREER GOALS

The joys of psychology have come from blending teaching, research, and applications of psychological knowledge as basic career goals. I love to teach and have done it extensively and intensively for nearly 50 years, trying to communicate what we know and how we know it to the next generation of citizens and psychologists. But my training as a research psychologist has prepared me to take much delight in contributing to the basic knowledge about how the mind and behavior works. Publishing that information is not only essential to career advancement, but to sharing with colleagues and the public these new ideas. Finally, it has always been a central goal for me academically and personally to "give psychology away" to the public, to the media, and to those who could use it in ways that enhance the human condition. I like to think of myself as a social change agent--able to use my experience, training, and insights as a psychologist to make a difference in the lives of many people.

TEACHING CAREER

The year 2003 marks my 46th year as an educator, the sixth decade of continually teaching Introductory Psychology.

I began teaching in 1957 as a part-time instructor at Yale, in charge of a class of 25 freshmen in Introductory Psychology, and continued this wonderful experience for several more years until my first full-time appointment as assistant professor at New York University, Heights Campus in the Bronx. That was teaching in the raw: 12 semester courses a year, including summer school, all lecture courses, including 3 large Introductory Psychology courses per year. Living in New York on semi-starvation wages forced me to add a 13th course for several years, moonlighting up at Yale, teaching the Psychology of Learning to master's level students in the Education School, and another year teaching Social Psychology at Barnard College. Some years I taught summer school at Stanford, in Louvain, Belgium, and Lugano, Switzerland.

I love to teach large lecture classes where I am on the "performing center," doing demonstrations, class experiments, and integrating novel AV materials, but it is more challenging to be intimately connected to students in seminars where I learn from our interaction. In addition to this in-class teaching, I have always mentored students in individual study, undergraduate honors research, and thesis research of masters and doctoral students.

Another dimension of teaching for me has been to develop teaching materials, and course supplements that make teaching both more effective and easier. To this end, I have not only written many basic texts and primers in Introductory and Social Psychology, but pioneered the new breed of Instructor's Manual that helps teachers with every aspect of course preparation and curriculum design. I have also developed Student Guides and Workbooks, and a variety of demonstrations and AV resources for teachers. Among the later are: the "Discovering Psychology" PBS - video series of 26 programs covering all of general psychology, "Candid Camera Classics," one for Introductory and another for Social Psychology courses (with teacher's manuals for each), "Quiet Rage," the video documentary of the Stanford Prison Experiment, and a public web site slide show of my experiment (www.prisonexp.org).

In the past decade, about 70,000 students in Tele-Courses have received full credit for Introductory Psychology by passing a standard test based on the "Discovering Psychology: video series and a basic textbook. For me, that represents an ideal in "outreach teaching."

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Another dimension of teaching in my career has been training teachers also to discover the joys of teaching by helping them to do their job really well. I regularly give workshops on teaching throughout the country, at professional meetings (APA, APS, WPA, National Conference on Teaching, and others); in many universities and colleges; organize my own workshops at Stanford (for local area teachers at all levels of psychology education), and have given many teaching workshops internationally as well. I also contribute to teaching by training my own teaching associates to become experts through working closely with them in an intensive Practicum in Teaching course, that I innovated in 1960 at NYU, and have developed over the years into a training program that includes undergraduate TAs as well as graduate students. Many of these students have gone on to become distinguished, prize-winning teachers in colleges across the country and in national competitions.

STANFORD TEACHING: I believe that I have taught more students, for more credits, in a greater variety of courses, than any other Full Professor in the history of Stanford University. Since 1968, I have regularly taught large lectures in **Introductory Psychology**, one of the most popular courses in the University, typically to about 325 students, but have taught this course to as many as 1000 students, and as few as 10 students in a special seminar format with computerized daily interaction on written assignments, in addition to lectures.

Unit Mastery Instruction: For several years, I taught about 600 students in a Unit Mastery System with Personalized Instruction that included taking individual testing on each of 18 chapters of the text, and oral exams on an additional reading. Proctors, 200 of them, administered all testing in their dorms separately to each of their 3 students, and met weekly with me to discuss issues relevant to this form of teaching. About 50 other undergraduate teaching assistants worked in pairs to lead their weekly discussion section component of the course.

Practicum in Teaching is a seminar I designed to train graduate and undergraduate teaching assistants to become effective teachers, first by helping them to develop engaging weekly sections that are coordinated with my lecture course, **Introductory Psychology**, based on original experiments, demonstrations and exercises that I designed and are available in my Instructor's Manual for this course. In addition, this course is designed to teach students to value the honor of being able to teach and guide them toward successful careers in teaching.

Lecture Courses:

Introductory Psychology
The Psychology of Mind Control
Social Psychology (taught solo and also as a co-teacher)
Social Psychology In Action
Social Alienation
The Nature of Madness
The Psychology of Hypnosis
Sex Roles in the U.S. and Italy (During Florence teaching term)
Cross-Cultural Psychology (During Florence teaching term)
Psychology and Drama (Co-taught with Patricia Ryan, Drama Department)

Seminar Courses:

The Psychology of Imprisonment (Co-taught with Carlo Prescott, former inmate)
The Dynamics of Shyness (general students and Freshman, Co-taught with Lynne Henderson)
The Psychology of Time Perspective (Sophomore Seminars)
On Becoming a Professional Psychologist (for advanced graduate students)
Effective Teaching (Co-taught with David Rosenhan)
Research Methods in Social Psychology (Graduate Course)
Research Issues in Social-Cognitive Pathology (Graduate Course)
Graduate Pro-seminar in Social Psychology (Weekly Area Meetings, Faculty & Graduate Students)
Practicum in Teaching for Graduate and Undergraduate Teaching Associates

Individual Study, Reading and Laboratory Projects:

I usually have several undergraduate Honors students working under my direction each year, and also supervise 5 to 20 undergraduates and graduate students doing individual study with me, either in special laboratory projects or independent reading.

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RESEARCH INTERESTS

My research has always focused on trying to understand basic psychological phenomena, from early research on exploratory and sexual behavior (in rats) to test anxiety (in school children), prejudice, affiliation, dissonance, persuasion, motivation, deindividuation, aggression, memory, shyness, pro-social and anti-social behavior, time perspective, madness and more.

The research issues in which I am currently interested center on several fundamental human concerns: time, madness, shyness, and evil.

TIME PERSPECTIVE

The psychological study of temporal perspective investigates the ways in which our learned sense of partitioning experience into the three frames of past, present and future exerts profound influences upon how we think, feel and act. Because of learned biases in over emphasizing one of these three temporal modes, or de-emphasizing one or more or the other time zones, we may distort reality, reduce our personal effectiveness or happiness, create problems in our social relationships, and lead others to misattribute our performance to ability or motivational factors rather than to the subtle, pervasive, and non-obvious operation of our temporal perspective. This issue is studied with a multi-method approach that includes a new assessment instrument (Zimbardo Time Perspective Inventory), large-scale surveys, field studies, interviews, and laboratory experiments. The emerging results have important implications for educational practice, family dynamics, group conflict, creativity, and social problems such as addiction and unwanted teenage pregnancies. Both a sociological and economic level of social class level of analysis supplements the psychological level of analysis of individual behavior. This area of research (begun in 1971 with an original experiment that manipulated time perspectives by transforming future-oriented students into present-oriented hedonists using hypnotic manipulations) advances Time Perspective as a "foundational" process in psychology. My theorizing (elaborated in a Dec., 1999 *JPSP* article) proposes that Time Perspective exerts profound influences across a wide range of human experiences and actions, yet is unrecognized in its power. I argue that TP is the foundation upon which many psychological and social constructs are erected, such as achievement motivation, commitment, responsibility, guilt, goal seeking, planning, and many more. Going beyond experimental and correlational research, I (with John Boyd) have developed a new reliable, valid index of time perspective profiles that give promise of organizing much of the research in this area, while stimulating new research on risk taking, health decisions, and addictive behavior.

THE DISCONTINUITY THEORY OF THE ORIGINS OF MADNESS

A similar concern for integrating individual psychology with social analysis is seen in my long-term interest in discovering the process by which "ordinary, normal" people are "recruited into madness." The conceptual model here seeks to clarify our understanding of the first stages in the process of "going mad," that is, of beginning to think, feel, or act in ways that the person (as actor) or observers judge to be pathological. This research utilizes a social-cognitive approach to understanding how a person's attempt to explain a perceived significant discontinuity initiates a search process, which if misdirected because of the operation of specific cognitive biases, can result in "symptomatic" explanations. These attributions are diagnostic of non-rational thinking.

This work, though conducted over the past 25 years, has been published only recently (in *Science*, *JAP*) and featured in an invited chapter for the 1999 (Vol. 31) issue of *Advances in Experimental Social Psychology*. The research first began by clarifying Schachter's findings on unexplained arousal, then went on to explore the dynamics of emotional arousal without awareness of its source or origins (using hypnosis to induce the physiological arousal and source amnesia). Now its scope is broadened with a new theory about the perception of a significant personal discontinuity in one's functioning that triggers either a cognitive search for causal meaning (seeking rationality) or a social search (seeking normality). The research offers a new paradigm for studying the origins of psychopathological symptoms and makes provocative and proven predictions about how individual explanatory biases in utilizing certain search frames for meaning of the discontinuity can lead to specific forms of pathology, such as environmental search frames leading to phobias, while people-based search frames are more likely to result in paranoid thinking, and body-related search frames to

(S)(b)-4

hypochondriasis. This research is a creative synthesis of many lines of thinking, combines cognitive, social, personality and clinical psychology in novel ways, and integrates aspects of them into a new integrated whole that promises to stimulate a renewal of research in experimental psychopathology. It also draws parallels between processes that contribute to individual psychopathology and social forms of pathology in ways never articulated previously

THE ROLE OF TECHNOLOGY IN CREATING A SHYNESS EPIDEMIC

My early research on the dynamics of shyness in adults, adolescents, and children opened this area of research to many new investigators in social and personality psychology, as well as in clinical psychology. My current interest now is in the psychological processes that sustain and exacerbate shyness in clinical populations that we treat in our Shyness Clinic.

But my most recent revival of interest in shyness comes from new data that the prevalence of reported shyness is steadily increasing over the past decade to reach epidemic proportions of 50% or more. One hypothesis being explored is that technology is creating an A-Social environment for heavy users of electronic technology, a self-imposed social isolation that contributes to social awkwardness in "face situations," thus promoting avoidance, and thereby feelings of shyness.

POWER OF THE SITUATION AND THE PSYCHOLOGY OF EVIL

The research demonstration of the power of social situations over individual dispositions is highlighted in the now classic Stanford Prison Experiment, along with Milgram's Obedience research (see www.prisonexp.org). This research advances a conceptual view of how ordinary citizens can be transformed into aggressors, into people who act in evil ways. By focusing on social situational variables that can influence or seduce good people to do evil deeds, we move the analysis away from traditional dispositional trait approaches to studying evil. The underlying conception of the transformation of human nature by social forces has led me to new investigations of the nature of the training of young men to become torturers for the State in Brazil, during the reign of the military junta (see *Violence Workers*, U.C. Berkeley Press, 2002, with co-investigators, Martha Huggins and Mika Haritos-Fatouros). In addition, this analysis has been used to understand how German men, ordinary men, could be made into perpetrators of evil for the Nazi state and help to create the ultimate evil of the holocaust. I also maintain an on-going interest in cults and mind control, under this general rubric of the psychology of evil.

APPLICATIONS OF PSYCHOLOGY

My attempts to enhance the human condition by "giving psychology away to the public" have taken many forms over the years, a few examples of which give a flavor of the old and the new instances. I organized "The Harlem Summer Project" in 1965 that provided "Head Start" type educational opportunities for pre-school and elementary school children in New York's Harlem area, along with an introduction to college life for high school students from this area, and a Black Pride program for all 100 children in our center. My work on police interrogation tactics, vandalism, and prisons led to changes in public and government policy. Consulting with a community organization in New Orleans led to many neighborhood programs to reduce crime and vandalism and increase jobs for qualified black citizens. **The Shyness Clinic** and **The Shyness Institute** (with Dr. Lynne Henderson) has directly applied our research findings and theories on shyness to help treat shy clients, and to train therapists to work with shy clients, as well as to disseminate information and research on shyness to the general public (via our web site, www.shyness.com). The Internet now provides the ideal way to give psychology away to millions of people for free, so my colleagues, Lee Ross and Sabrina Lin, and I have developed a content-intensive web site that provides in depth information from experts about a range of psychological topics related to improving one's self in personal, social and career domains

February 03

STANFORD UNIVERSITY EXTRAMURAL LECTURES, PRESENTATIONS

Sloane Foundation Fellows in Business, Frequent Guest Lecturer

Knight Foundation Fellows in Journalism, Frequent Guest Lecturer

Alumni College Lecturer, Frequently

Alumni Club Invited Lecturer: New York, Los Angeles, Hawaii, Denver, Washington, Portland, Napa, San Francisco, Cincinnati, Chicago, Rome

Stanford Community Lecture Series

(b)(6) (b)(7)(C)

Stanford Distinguished Teachers Lecture Series
Sierra Camp Invited Guest Lecturer, several times
Cowell Student Health Staff Program
Psychiatry Department Rounds
Frosh Orientations
Prospective Donor Lecturer, New Student Admit Expo
President's Reception for Parents of New Students
Roundtable Discussant on Technology, Reunion Homecoming
Lecturer, Stanford Graduate School of Business
Continuing Education Program Lecturer

STANFORD UNIVERSITY 'CITIZENSHIP' ACTIVITIES

Departmental Service

Director of Summer School Program (1984-2001)
Founder, Co-Advisor to Stanford Undergraduate Psychology Association (SUPA)
Reactivated, Advisor to Psychology Honor Society (PSI CHI)
Head, Social Psychology Graduate Training Program
Director, Committee Member, Undergraduate Education Committee
Chair, Colloquium Committee
Chair, Member, Various Faculty Search Committees
Major Area Advisor to about 20 students annually
Sophomore Mentor to 12 students

University Service

Faculty Dormitory Resident and Fellow, Cedro Dormitory
Organized, Directed about 2000 students engaged in constructive anti-war activities as part of our
Political Action Coordinating Committee centered in the Psychology Dept., spring 1969
Member, Faculty Senate Steering Committee
Residential Education Guest Presenter, frequently
Human Subjects Research Committee Member
Dean Thomas' Committee on Improving Undergraduate Education
Member, Committee on University and Departmental Honors (subcommittee on Academic Appraisal and Achievement)
Co-Directed Summer Teaching Program to Improve Quality of High School Psychology
Teaching held at Stanford University (Funded by National Science Foundation)
Organized Several Teaching Workshops in Psychology for California teachers at 4-year colleges, Community Colleges, Junior Colleges and High Schools, held at Stanford University.
Presenter to Prospective Donors to Stanford University
Faculty Representative to Committee to Renovate Audio-Visual Facilities in Lecture Halls
Professor, Residential Supervisor, Stanford-in-Florence Program, 1983
Liaison, Scholar Exchange and Research Program between University of Rome and Stanford University

APPENDIX VI

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DEPARTMENT OF THE ARMY
HEADQUARTERS, IN CORPS
VICTORY BASE, IRAQ
APO AE 09342-1400

REPLY TO
ATTENTION OF

April 25, 2004

Criminal Law Division

Mr. [REDACTED] sq.

Washington, DC 20005 (b)(6)-9

Dear Mr. [REDACTED]

The purpose of this letter is to summarize the arrangements made for you to travel to Iraq for the Article 32 hearing in U.S. v. Specialist Megan M. Ambuhl, as well as explain the risks associated with travel to Iraq, a combat zone.

You previously notified our office that you had been retained by Specialist Ambuhl to represent her at her pending court-martial and pretrial investigation conducted under Article 32, Uniform Code of Military Justice (UCMJ). As per your e-mail on April 24, 2004, you will arrive in Kuwait City, Kuwait on Thursday, April 29, 2004, and depart Kuwait on May 2, 2004, to return to the States.

(b)(6)-2 We are making arrangements for you to be flown into Baghdad International Airport (BIAP) after you arrive in Kuwait. From BIAP, you will convoy to Victory Base, Iraq for the Article 32 hearing. We are making arrangements for you to stay in temporary lodging on Victory Base. Like visiting military defense counsel, you will be staying in a climate-controlled tent with a cot and outdoor showers and latrines. Due to the high threat conditions, we cannot transport you to local hotels. Please bring all personal hygiene products for your stay in country as well as suitable clothing for a hot, dry environment (long-sleeved shirts and trousers, a sun hat, sturdy shoes or light-weight boots). Captain [REDACTED] the detailed defense counsel, will coordinate with Trial Defense Service at Victory Base for transportation on the compound; there is also a shuttle bus system that travels from your living area to the courthouse.

You will be traveling into a combat zone in a dangerous part of the world. By agreeing to come to Iraq, you assume several risks including, but not limited to, serious injury or death. First, by flying on a Government aircraft, you will be a potential target of enemy insurgents. Enemy forces have been known to fire missiles or rocket-propelled grenades (RPGs) at aircraft, which can cause substantial injuries or death if successful. Second, by convoying from BIAP to Victory Base, you will again be a potential target of enemy insurgents who have been known to fire weapons (rifles and rocket-propelled grenades) and to plant improvised explosive devices (IEDs) alongside roads traveled by Coalition Forces. Third, by staying on Victory Base, you assume the risk of being killed by mortar, rocket or other attacks. Fourth, if you plan on travelling to the Baghdad Central Confinement Facility in Abu Ghraib to interview any of the alleged victims who are still detained there, the convoy route is extremely dangerous and the facility is routinely subjected to mortar and rocket attacks. Last week, over 20 detainees were killed in a

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rocket attack at the prison. United States soldiers have also been killed defending the prison from attacks by insurgents.

Pursuant to Rule for Court-Martial (RCM) 506(a), a military accused is entitled to civilian counsel "if provided at no expense to the Government." We have created fund cites for your travel into Iraq and will require reimbursement for travel, lodging, and meals after you arrive in country. This may cost approximately \$2,000.

Before allowing you to enter Iraq, you must agree to hold the United States harmless, assume the risks set forth above, and affirmatively waive your right to sue the Army or any other governmental agency for injury or death. You must also agree to reimburse the Government for expenses incurred for travel and lodging during this visit. Please sign this letter upon receipt and e-mail a scanned copy (with your signature) to our office. We cannot complete your travel orders without your acknowledgement of the costs and risks of this travel.

If you have any questions or concerns, please contact me at [REDACTED] or vcmain.hq.c5.army.mil or (914) 360-[REDACTED]

Sincerely, (b)(6)-2

CF:
Detailed Defense Counsel
Trial Counsel

[REDACTED]
Captain, U.S. Army
Chief, Criminal Law Division

Hold Harmless Agreement:

I hereby acknowledge receipt of this letter. I further acknowledge that I will be traveling into a war zone and that the Army cannot guarantee my safety. I also acknowledge that I may be killed or injured while traveling to, from, or in Iraq. I knowingly assume these risks and waive any right I (or my heirs) might otherwise have to sue the Army or any other governmental organization for my injuries or death. I acknowledge that I will be required to reimburse the Government for expenses incurred by my travel and lodging in Iraq. I further agree that I, my heirs, executors, administrators or assigns agree to indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims or interests incident to or resulting from litigation of claims relating to travel to Iraq, including wrongful death claims.

[REDACTED] (b)(6)-4
Civilian Defense Attorney

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APPENDIX VII

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INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS

PSYCHOLOGICAL STRESSES

The potential for abusive treatment of detainees during the Global War on Terrorism was entirely predictable based on a fundamental understanding of the principle of social psychology principles coupled with an awareness of numerous known environmental risk factors. Most leaders were unacquainted with these known risk factors, and therefore failed to take steps to mitigate the likelihood that abuses of some type would occur during detainee operations. While certain conditions heightened the possibility of abusive treatment, such conditions neither excuse nor absolve the individuals who engaged in deliberate immoral or illegal behaviors.

The abuse the detainees endured at various places and times raises a number of questions about the likely psychological aspects of inflicting such abuses. Findings from the field of social psychology suggest that the conditions of war and the dynamics of detainee operations carry inherent risks for human mistreatment, and therefore must be approached with great caution and careful planning and training.

The Stanford Prison Experiment

In 1973, [REDACTED], [REDACTED] and [REDACTED] (1) published their landmark Stanford study, "Interpersonal Dynamics in a Simulated Prison." Their study provides a cautionary tale for all military detention operations. The Stanford Experiment used a set of tested, psychologically sound college students in a benign environment. In contrast, in military detention operations, soldiers work under stressful combat conditions that are far from benign.

The Stanford Prison Experiment (SPE) attempted to "create a prison-like situation" and then observe the behavior of those involved. The researchers randomly assigned 24 young men to either the "prisoner" or "guard" group. Psychological testing was used to eliminate participants with overt psychopathology, and extensive efforts were made to

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simulate actual prison conditions. The experiment, scheduled to last two weeks, was cancelled after only six days due to the ethical concerns raised by the behaviors of the participants. The study notes that while guards and prisoners were free to engage in any form of interpersonal interactions, the "characteristic nature of their encounters tended to be negative, hostile, affrontive and dehumanizing."

The researchers found that both prisoners and guards exhibited "pathological reactions" during the course of the experiment. Guards fell into three categories: (1) those who were "tough but fair," (2) those who were passive and reluctant to use coercive control and, of special interests, (3) those who "went far beyond their roles to engage in creative cruelty and harassment." With each passing day, guards "were observed to generally escalate their harassment of the prisoners." The researchers reported: "We witnessed a sample of normal, healthy American college students fractionate into a group of prison guards who seemed to derive pleasure from insulting, threatening, humiliating, and dehumanizing their peers."

Because of the random assignment of subjects, the study concluded the observed behaviors were the result of situational rather than personality factors:

The negative, anti-social reactions observed were not the product of an environment created by combining a collection of deviant personalities, but rather, the result of an intrinsically pathological situation which could distort and rechannel the behaviour of essentially normal individuals. The abnormality here resided in the psychological nature of the situation and not in those who passed through it.

The authors discussed how prisoner-guard interactions shaped the evolution of power use by the guards:

The use of power was self-aggrandizing and self-perpetuating. The guard power, derived initially from an arbitrary label, was intensified whenever there was any perceived threat by the prisoners and this new level subsequently became the baseline from which further hostility and harassment would begin. The most hostile guards on each shift moved spontaneously into the leadership roles of

INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS

giving orders and deciding on punishments. They became role models whose behaviour was emulated by other members of the shift. Despite minimal contact between the three separate guard shifts and nearly 16 hours a day spent away from the prison, the absolute level of aggression as well as the more subtle and "creative" forms of aggression manifested, increased in a spiraling function. Not to be tough and arrogant was to be seen as a sign of weakness by the guards and even those "good" guards who did not get as drawn into the power syndrome as the others respected the implicit norm of never contradicting or even interfering with an action of a more hostile guard on their shift.

In an article published 25 years after the Stanford Prison Experiment, Haney and Zimbardo noted their initial study "underscored the degree to which institutional settings can develop a life of their own, independent of the wishes, intentions, and purposes of those who run them." They highlighted the need for those outside the culture to offer external perspectives on process and procedures. (2)

Social Psychology: Causes of Aggression and Inhumane Treatment

The field of social psychology examines the nature of human interactions. Researchers in the field have long been searching to understand why humans sometimes mistreat fellow humans. The discussions below examine the factors behind human aggression and inhumane treatment, striving to impart a better understanding of why detainee abuses occur.

Human Aggression

Research has identified a number of factors that can assist in predicting human aggression. These factors include:

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- **Personality traits.** Certain traits among the totality of an individual's behavioral and emotional make-up predispose to be more aggressive than other individuals.
- **Beliefs.** Research reveals those who believe they can carry out aggressive acts, and that such acts will result in a desired outcome, are more likely to be aggressive than those who do not hold these beliefs.
- **Attitudes.** Those who hold more positive attitudes towards violence are more likely to commit violent acts.
- **Values.** The values individuals hold vary regarding the appropriateness of using violence to resolve interpersonal conduct.
- **Situational Factors.** Aggressive cues (the presence of weapons), provocation (threats, insults, aggressive behaviors), frustration, pain and discomfort (hot temperatures, loud noises, unpleasant odors), and incentives can all call forth aggressive behaviors.
- **Emotional factors.** Anger, fear, and emotional arousal can heighten the tendency to act out aggressively.

The personality traits, belief systems, attitudes, and values of those who perpetrated detainee abuses can only be speculated upon. However, it is reasonable to assume, in any given population, these characteristics will be distributed along a bell curve, which will predispose some more than others within a group to manifest aggressive behaviors. These existing traits can be affected by environmental conditions, which are discussed later.

Abusive Treatment

Psychologists have attempted to understand how and why individuals and groups who usually act humanely can sometimes act otherwise in certain circumstances. A number of psychological concepts explain why abusive behavior occurs. These concepts include:

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Deindividuation. Deindividuation is a process whereby the anonymity, suggestibility, and contagion provided in a crowd allows individuals to participate in behavior marked by the temporary suspension of customary rules and inhibitions. Individuals within a group may experience reduced self-awareness which can also result in disinhibited behavior.

Groupthink. Individuals often make very uncharacteristics decisions when part of a group. Symptoms of groupthink include: (1) Illusion of invulnerability—group members believe the group is special and morally superior; therefore its decisions are sound; (2) Illusion of unanimity in which members assume all are in concurrence, and (3) Pressure is brought to bear on those who might dissent.

Dehumanization. Dehumanization is the process whereby individuals or groups are viewed as somehow less than fully human. Existing cultural and moral standards are often not applied to those who have been dehumanized.

Enemy Image. Enemy image describes the phenomenon wherein both sides participating in a conflict tend to view themselves as good and peace-loving peoples, while the enemy is seen as evil and aggressive.

Moral Exclusion. Moral exclusion is a process whereby one group views another as fundamentally different, and therefore prevailing moral rules and practices apply to one group but not the other.

Abuse and Inhumane Treatment in War

(S) 161-5
Socialization to Evil and Doubling. Dr. [REDACTED] as extensively examined the nature of inhumane treatment during war. Dr. [REDACTED] suggested that ordinary people can experience "socialization to evil," especially in a war environment. Such people often experience a "doubling." They are socialized to evil in one environment and act accordingly within that environment, but they think and behave otherwise when removed from that environment. For example, doctors committed unspeakable acts while working in Auschwitz, but would go home on weekends and behave as "normal" husbands and fathers.

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Moral Disengagement. Moral disengagement occurs when normal self-regulatory mechanisms are altered in a way that allows for abusive treatment and similar immoral behaviors. Certain conditions, identified by Bandura and his colleagues (3), can lead to moral disengagement, such as:

- **Moral Justification.** Misconduct can be justified if it is believed to serve a social good.
- **Euphemistic Language.** Language affects attitudes and beliefs, and the use of euphemistic language such as "softening up" (and even "humane treatment") can lead to moral disengagement.
- **Advantageous Comparison.** "Injurious conduct can be rendered benign" when compared to more violent behaviors. This factor is likely to occur during war. Essentially, abusive behaviors may appear less significant and somehow justifiable when compared to death and destruction.
- **Displacement of Responsibility.** "People view their actions as springing from the social pressures or dictates of others rather than as something for which they are socially responsible." This is consistent with statements from those under investigation for abuses.
- **Diffusion of Responsibility.** Group decisions and behaviors can obscure responsibility: "When everyone is responsible, no one really feels responsible."
- **Disregarding or Distorting the Consequences of Actions.** Harmful acts can be minimized or ignored when the harm is inflicted for personal gain or because of social inducements.
- **Attribution of Blame.** "Victims get blamed for bringing suffering on themselves."

Detainee and interrogation operations consist of a special subset of human interactions, characterized by one group which has significant power and control over another group which must be managed, often against the will of its members. Without proper oversight

INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS

and monitoring, such interactions carry a higher risk of moral disengagement on the part of those in power and, in turn, are likely to lead to abusive behaviors.

Environmental Factors

The risk of abusive behaviors is best understood by examining both psychological and environmental risk factors. A cursory examination of situational variables present at Abu Ghraib indicates the risk for abusive treatment was considerable. Many of the problematic conditions at Abu Ghraib are discussed elsewhere in this report, to include such factors as poor training, under nearly daily attack, insufficient staffing, inadequate oversight, confused lines of authority, evolving and unclear policy, and a generally poor quality of life. The stresses of these conditions were certainly exacerbated by delayed troop rotations and by basic issues of safety and security. Personnel needed to contend with both internal threats from volatile and potentially dangerous prisoners and external threats from frequent mortar fire and attacks on the prison facilities.

The widespread practice of stripping detainees, another environmental factor, deserves special mention. The removal of clothing interrogation technique evolved into something much broader, resulting in the practice of groups of detainees being kept naked for extended periods at Abu Ghraib. Interviews with personnel at Abu Ghraib indicated that naked detainees were a common sight within the prison, and this was understood to be a general part of interrogation operations.

While the removal of clothing may have been intended to make detainees feel more vulnerable and therefore more compliant with interrogations, this practice is likely to have had a psychological impact on guards and interrogators as well. The wearing of clothes is an inherently social practice, and therefore the stripping away of clothing may have had the unintended consequence of dehumanizing detainees in the eyes of those who interacted with them. As discussed earlier, the process of dehumanization lowers the moral and cultural barriers that usually preclude the abusive treatment of others.

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INDEPENDENT PANEL TO REVIEW DoD DETENTION OPERATIONS

- (1) Haney, C., Banks, C., and Zimbardo, P., Interpersonal Dynamics in a Simulated Prison, *International Journal of Criminology and Penology*, 1973, 1, 69-97.
- (2) Haney, C. and Zimbardo, P., The Past and Future of U.S. Prison Policy, Twenty-Five Years after the Stanford Prison Experiment, *American Psychologist*, July 1998, 709-27.
- (3) Bandura, A., Barbaranelli, C., Caprara, G., and Pastorelli, C., Mechanisms of Moral Disengagement in the Exercise of Moral Agency, *Journal of Personality and Social Psychology*, Vol. 71(2), August 1996, 364-74.

APPENDIX VIII

020306

UNITED STATES

y.

FREDERICK, Ivan L.
SSG, U.S. Army
HHC, 16th MP BDE (ABN),
III Corps
Victory Base, Iraq,
APO AE 09342

**GOVERNMENT'S RESPONSE
TO DEFENSE MOTION TO
CHANGE LOCATION OF
SENTENCING PROCEEDING**

28 JULY 2004

***** 28 JULY 2004 *****

RELIEF SOUGHT

The accused requests that this Court change the place of the sentencing proceeding to forestall any lack of fairness or appearance of the same from the court-martial due to the unwillingness of certain defense witnesses to travel to Iraq. The government objects to this request and maintains that the accused will be afforded a fair sentencing hearing at the current place of trial, Iraq.

BURDEN OF PROOF AND PERSUASION

The defense has the burden of persuasion since it is the moving party. R.C.M. 905(c)(2). The burden of proof that the defense must meet is a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

The accused, a military police noncommissioned officer, along with a number of other co-accused, maltreated and assaulted numerous foreign national detainees while acting as prison guards at the Baghdad Central Correctional Facility, Abu Ghraib, Iraq. On one particularly appalling night, the accused, along with a number of co-accused, stripped seven detainees naked except for the sand bags on their heads, stacked the naked detainees in "human pyramid", forced several of the detainees to masturbate, and then punched one detainee so violently that immediate medical attention was needed as the detainee went into seizure.

Charges against the accused were preferred on 20 March 2004 and referred on 28 April 2004. LTG Metz, the convening authority, has determined the court-martial will be held in

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Baghdad, Iraq. Subsequent to the referral of charges and his arraignment, the accused has submitted an offer to plead guilty. It is anticipated that the convening authority will take action on this offer to plead this upcoming weekend. However, prior to his presentencing hearing, the accused has elected to file a motion to change the place of his sentencing hearing.

LAW

While Rule for Courts-Martial (R.C.M.) 906(b)(11) provides "the place of trial may be changed when necessary to prevent prejudice to the rights of the accused", the real issue behind the accused's motion is determining the best way to adjudge a "legal, appropriate, and adequate sentence". *United States v. Combs*, 20 M.J. 441, 442 (C.M.A. 1985). In fashioning such a sentence, R.C.M. 1001(e) gives "great latitude" to the court-martial to consider information by means other than live testimony. In fact, R.C.M. 1001(e)(2) places certain limitations on a military judge's discretion when considering whether the production of live witnesses is mandatory during presentencing proceedings. *United States v. Mitchell*, 41 M.J. 512, 514 (A.C.M.R. 1994). In order for a witness to be produced subject to a subpoena or invitational travel orders during sentencing, five criteria must be met: (1) the expected testimony must be necessary for consideration of a matter of substantial significance; (2) the weight or credibility of the testimony is of substantial significance; (3) the other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify (except in an extraordinary case where a stipulation would be insufficient); (4) other forms of evidence (to include oral depositions, written interrogatories, or former testimony) would not be sufficient to meet the needs of the court-martial; and (5) the significance of personal appearance of the witness, when balanced against the practical difficulties of production of the witness, favors production. See R.C.M. 1001(e)(2)(A)-(E); *United States v. McDonald*, 55 M.J. 173, 177 (2001).

ARGUMENT

The real substance behind the accused's motion for change of location is witness attendance/production for his presentencing proceeding. While the situation before the Court is not a true issue of witness production since the government is willing to produce any witness who possesses relevant testimony that can assist in fashioning a legal, appropriate,

and adequate sentence for the accused,¹ the balancing test set up by R.C.M. 1001(e)(2) is useful for determining whether the presence of the proffered witnesses is necessary for a fair presentencing hearing. As shown in the following analysis, there is not one potential witness proffered by the accused who is necessary to a fair hearing especially considering that the President has given wide latitude under R.C.M. 1001(e) for this Court to consider alternate forms of evidence in lieu of live testimony during sentencing. Consequently, the accused's change of location motion should be denied.

First, any expected testimony offered by a sentencing witness must be necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact. R.C.M. 1001(e)(2)(A) (emphasis added). Of the witnesses listed by the accused in his motion, there are several who do not meet this first requirement since any testimony they would provide is clearly attenuated at best. Specifically, the following witnesses do not have testimony that is necessary for consideration of a matter of substantial significance:

Inmates [REDACTED] and [REDACTED] - the accused represents that these witnesses will testify as to the way he treated them while they were prisoners under his charge. However, these witnesses' testimony can hardly be characterized as necessary to a matter of substantial significance. First, the accused has already identified two other witnesses, [REDACTED] and [REDACTED], who are familiar with his previous conduct as a prison guard in Virginia. See Combs, 20 M.J. at 442 (factor to be weighed in determining whether personal appearance is required is testimony is cumulative of other evidence). Moreover, any knowledge of the accused's character for rehabilitative potential by these two witnesses is clearly limited since their relationship to the accused is one of guard/prisoner who can hardly speak

(b)(6) (b)(7)
¹ The government does object to the production of Doctor [REDACTED] inmate [REDACTED] inmate [REDACTED] Major [REDACTED] Captain [REDACTED] Captain [REDACTED] Specialist [REDACTED] Sergeant [REDACTED] Lieutenant [REDACTED] General Ricardo Sanchez, Colonel [REDACTED] and Major General Geoffrey Miller since their testimony is marginally relevant at best and would not assist the Court in any meaningful way in fashioning an appropriate and adequate sentence for the accused. (b)(6) (b)(7)

to the accused's character, moral fiber, determination of the accused to be rehabilitated, and the nature and severity of the offenses. See R.C.M. 1001(b)(5)(B).

(b)(6)-7
Doctor (Dr.) [REDACTED] the accused has not demonstrated any direct correlation between Dr. [REDACTED] expertise and the accused's misconduct that would make Dr. [REDACTED] testimony necessary in fashioning an appropriate sentence for this particular accused.

(b)(6)-2
Major (MAJ) [REDACTED] the accused represents to the Court that this witness will testify as to the identity of the seven detainees who were the victims of the accused's abuse. The identity of these victims is not a matter of substantial significance in the accused's sentencing proceeding. Moreover, the government intends to call at least one of these Iraqi victims in its case in aggravation where defense counsel can question this witness in how he and the other detainees arrived in Tier 1A the night of 7 November.²

Captain (CPT) [REDACTED] - the accused's summary of these two witnesses' expected testimony is entirely speculative. However, if they would testify as represented, calling both witnesses would be cumulative and unnecessary since they would testify to the same information. (b)(6)-2

CPT [REDACTED] while the government does not have any specific information that these two witnesses would invoke their Article 31, UCMJ rights, any invocation would make their personal appearance unnecessary since they would not provide any necessary information that would assist the Court in determining an appropriate sentence for the accused. At this time, the government does not intend to extend either CPT [REDACTED] SA [REDACTED] immunity.³

Specialist (SPC) [REDACTED] assuming that the witness would testify that a certain offensive picture was used as a screen saver within the military

² The government anticipates calling between 1-3 Iraqi nationals who were the victims of the accused's abuse.

³ At this time, the government does not intend to extend immunity to any of the potential witnesses identified by the accused.

intelligence unit stationed at Abu Ghraib, this fact is hardly necessary in determining a matter of substantial significance. Taken at face value, this testimony does not establish whose computer this screen saver was used on, that anyone in the military intelligence chain of command knew of this screen saver, or that the accused knew that it was being used as a screen saver, thus somehow justifying his criminal misconduct.

Sergeant (SGT) [REDACTED] - the accused's representation of this witness' testimony is again speculative at best. However, taken at face value, the accused has already identified [REDACTED] as a member of the intelligence community that can testify as its knowledge of the accused's actions. See *Combs*, 20 M.J. at 442. SGT [REDACTED] testimony would be cumulative and unnecessary. (b)(6)-2

Lieutenant General (LTG) Sanchez and Colonel (COL) [REDACTED] - the accused's representation of these witnesses' testimony is speculative and would be contrary to statements already made by these two officers. Moreover, any action or inaction taken by either LTG Sanchez or COL [REDACTED] entirely attenuated to fashioning an appropriate sentence for this particular accused. (b)(6)-2

Major General (MG) Geoffrey Miller - the accused's representations of this witness' testimony is once again speculative.

Next, in order for a witness to be produced, the weight or credibility of the necessary testimony has to be of substantial significance to the determination of an appropriate sentence.

R.C.M. 1001(e)(2)(B). Of the witnesses the accused has identified who can provide necessary evidence on a matter of substantial significance, the credibility of these witnesses is insignificant. The government has no information that would make the credibility of Mr. [REDACTED]

[REDACTED] Pastor [REDACTED], Mrs. [REDACTED] Ms. [REDACTED] Brigadier General (BG) Janis Karpinski, CPT [REDACTED] First Sergeant (1SG) [REDACTED] or SGT [REDACTED] matter of substantial (b)(6)-2

significance in determining an appropriate sentence for the accused.⁴

The third requirement for mandating witness production is that the other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony. R.C.M. 1001(e)(2)(C). The government is willing to enter into a stipulation of fact with the above named witnesses who are unwilling to travel to Iraq.⁵ These alternate means of evidence will allow all relevant information in adequate and legal forms to be presented to the Court to ensure an appropriate decision.

The final requirement in determining whether a witness must be produced is if the significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production. R.C.M. 1001(e)(2)(E). Some of the factors that a military judge can consider in weighing this balancing test are whether the testimony relates to a disputed matter, whether the government is willing to stipulate to the testimony as fact, whether there is other live testimony available to appellant on the same subject, whether the testimony is cumulative of other evidence, whether there are practical difficulties in producing the witness, whether the credibility of the witness is significant, whether the request is timely, and whether another form of presenting the evidence is available and sufficient. *Combs*, 20 M.J. at 442-443. After the government produces BG Karpinski, CPT [REDACTED] 1SG [REDACTED] and SGT [REDACTED] to testify live at the court-martial, the only witnesses with necessary evidence on a matter with substantial significance who will not be present would be Mr. [REDACTED] (b)(6)-2

Mr. [REDACTED] Pastor Mrs. [REDACTED] and Ms. [REDACTED] (b)(6)-9

However, there are several factors that weigh against making their personal appearance mandatory for a fair proceeding.

⁴ Of these witnesses, the government is willing to produce the following military witnesses on behalf of the accused in Baghdad during the presentencing hearing: BG Karpinski, CPT [REDACTED] 1SG [REDACTED] and SGT [REDACTED] (b)(6)-2

Furthermore, if the Court deems Dr. [REDACTED] testimony necessary, in recognition of the difference between fact and expert witnesses, the government will request that the convening authority order the deposition of Dr. [REDACTED] (b)(6)-9

As stated above, the government is willing to enter into stipulations of fact concerning the substance of these witnesses' testimony and their credibility as witnesses is not an issue. Moreover, as demonstrated by the affidavits filed by the accused, there are practical difficulties in producing these witnesses since they refuse to travel to Iraq. While these witnesses will testify as to their opinion on the accused's rehabilitative potential and, absent their personal appearance, there will be no live testimony on this subject, their opinions of the accused's rehabilitative potential is really not a matter of dispute. The government does not dispute that the accused's spouse, daughter, co-workers, and pastor share the opinion that the accused possesses rehabilitative potential. However, the stipulations of fact the government is willing to enter into will be more than a sufficient substitute to present this evidence to the Court. When all of these factors are considered as a whole, it is clear that the personal appearance of these witnesses is not necessary for a fair and just sentencing proceeding.

Finally, throughout his motion, the accused makes consistent mention of the safety situation in Iraq and that the government is seeking to keep the court-martial there for mere political reasons. However, the command has a strong interest in holding a fully public trial in Iraq. Under R.C.M. 806, courts-martial shall be open to the public, to include both members of the military and civilian communities. Iraqi nationals and the Arab community on the whole have a keen interest in how justice will be pursued in the accused's case. An open and public hearing in Iraq will send a strong message that our military justice process is thorough, reliable, and provides justice for those who come into contact with it. Holding this court-martial in Iraq also carries a strong deterrence effect on our soldiers who will have a very proximate example of accounting that must be given for similar misconduct. Lastly, the convening authority will take all necessary steps to ensure the safety of all the participants.

CONCLUSION

In sum, the fact that a number of the accused's desired sentencing witnesses refuse to travel to Iraq should not be an impediment to holding the court-martial in Iraq. The Manual for Courts-Martial allows for a situation such as this to collect all of the relevant and necessary information for the Court to fashion a legal, appropriate, and adequate sentence for the accused. Consequently, the government asks that this Court find that the witnesses listed in footnote 1, supra, are unnecessary for consideration of a matter of substantial significance and, therefore, should not be produced. Secondly, given the government's willingness to enter into stipulations of fact for the other proffered witnesses thus putting any necessary evidence before this Court, the government requests that the accused's motion for change of the location of the trial be denied.

//original signed//
[REDACTED]

CPT, JA

Trial Counsel (b)(6)-2

Delivered to defense counsel, by email, this 28th day of July 2004.

//original signed//
[REDACTED]

CPT, JA

Trial Counsel

APPENDIX IX

020315

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Page 1 of 1

(S)1612

Subj: RE: response to motion to change location of trial
 Date: 7/29/2004 2:36:48 AM Eastern Daylight Time
 From: [REDACTED]@vcmain.hq.c5.army.mil
 To: [REDACTED]@hqda.army.mil [REDACTED]@hq.c5.army.mil,
 [REDACTED]@us.army.mil
 Cc: [REDACTED]@aol.com [REDACTED]@vcmain.hq.c5.army.mil,
 [REDACTED]@vcmain.hq.c5.army.mil
 Sent from the Internet (Details)
 Sir:

This is a reply to the government's response to the Accused's motion for a change of location. We very briefly wish to point out the following to the court:

1. The deterrence associated with this guilty plea will be known and felt by all soldiers around the world instantly upon its announcement. This is clearly irrespective of where the hearing might occur.
2. The idea that no live witnesses are required is antithetical to the most rudimentary concepts of justice in any system. Such a position is entirely inconsistent with the government's assertion that it seeks justice in this case or the Court's stated position that this case will be tried like any other court-martial case anywhere else in the world.
3. The Government now suggests further that the due process rights of the Accused should somehow be subordinated to an alleged, but unproven, need to appease the Arab world. In a nation which has elevated individual rights to a level unparalleled in all of civilization, such an assertion should rightly be summarily rejected as a rationale for holding a trial in Baghdad. The Arab world will know the result the moment it occurs, wherever it occurs.

Respectfully submitted,

CPT [REDACTED]
 Mr. [REDACTED]

Defense Counsel

-----Original Message-----

(S)1612

From: [REDACTED] USALSA (mailto:[REDACTED]@hqda.army.mil)
 Sent: Wednesday, July 28, 2004 4:31 PM
 To: [REDACTED]@hq.c5.army.mil [REDACTED]@us.army.mil
 Cc: [REDACTED]@aol.com [REDACTED] CPT CJTF7 -Senior Defense Counsel;
 [REDACTED]@vcmain.hq.c5.army.mil
 Subject: response to motion to change location of trial

Sir:

Please find attached the government's response to the motion to change location of trial.

v/r

CPT [REDACTED] (S)1612

<http://webmail.aol.com/fmsgview.adp?folder=SU5CT1g=&uid=10688698>

7/29/2004 020316

CERTIFICATE OF SERVICE

Frederick v. [REDACTED] (b)(6)-2

Brief in Support of Petition for
Extraordinary Relief in the
Nature of a Writ of Mandamus and
Application for a Stay of Proceedings

I certify that the original and two copies of the foregoing was
delivered to the Army Clerk of Court on 17 September 2004.

(b)(6)-2
[REDACTED]
Paralegal Specialist
Defense Appellate Division
U.S. Army Legal Services Agency

020317