UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
(Filed Electronically)

CRIMINAL ACTION NO. 5:06CR-19-R
UNITED STATES OF AMERICA, PLAINTIFF,

vs.

STEVEN DALE GREEN, DEFENDANT.

REPLY TO UNITED STATES' RESPONSE TO MOTION TO DISMISS

Comes the defendant, Steven Dale Green, by counsel, and for his reply to the United States' response to his motion to dismiss, states as follows:

Updated Facts

At the heart of defendant's motion is the inequitable prosecution and punishment of the respective conspiracy, murder, rape, burglary, and obstruction of justice charges against Sergeant Paul Cortez, Specialist James Barker, Private First Class Bryan Howard, Private First Class Jesse Spielman, and the defendant herein, Private First Class Steven Green, arising out of the rape of Abeer Al-Janabi and the murders of her and her family in Yousifiyah, Iraq, on March 12, 2006.

Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman were each charged in

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

military court under the UCMJ, while PFC Green has been charged in civilian court under MEJA—all for the same conduct. Although the military murder counts were potentially capital offenses, the United States did not seek the death penalty against any of the military defendants. Unlike the MEJA charges against PFC Green, none of the military charges carried mandatory minimum sentences or requirements that they run consecutively with any other sentence. While the best sentence PFC Green can hope for is life imprisonment in a civilian prison without any possibility of parole, PFC Howard was permitted to plead guilty to accessory after the fact and obstruction of justice and was sentenced to 5 years custody in a military prison with parole eligibility in 27 months. PFC Spielman was found guilty of felony murder, rape, conspiracy to commit rape, and housebreaking and was sentenced to 110 years custody in a military prison with parole eligibility in 10 years. Spc. Barker pled guilty to premeditated murder, conspiracy to commit rape, and obstruction of justice and was sentenced to 90 years custody in a military prison with parole eligibility in 10 years. Sgt. Cortez pled guilty to four counts of felony murder, rape, conspiracy to commit rape, housebreaking, and violating a general order and was sentenced to 100 years custody in a military prison with parole eligibility in 10 years.

While the substance of the MEJA charges against PFC Green is the same as the UCMJ charges brought against Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman, the two prosecutions are fundamentally unequal. The death penalty is being sought on the MEJA premeditated and felony murder charges against PFC Green, while it was not sought on the UCMJ premeditated and felony murder charges against Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman. The MEJA premeditated and felony murder charges against

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

PFC Green carry mandatory minimum sentences of life imprisonment, while the UCMJ premediated and felony murder counts against Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman carried no mandatory minimum sentences. If convicted, PFC Green will never be eligible for parole, while Sgt. Cortez, Spc. Barker, and PFC Spielman will each be eligible for parole in 10 years and PFC Howard in 27 months. The MEJA firearm counts against PFC Green carry a total mandatory minimum sentence of 85 years consecutive to any other sentences, while no such charges were brought against Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman because similar substantive criminal offenses simply do not exist under the UCMJ.

These inequities could be easily eliminated by merely prosecuting PFC Green under the UCMJ instead of MEJA. Even assuming he was properly discharged from the Army—*which defendant denies*—PFC Green is eligible for re-enlistment with the consent of the United States. Once back in the Army, he would again be subject to the UCMJ and could be fully prosecuted and punished in the military system for the Yousifiyah offenses, as were Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman. Defendant has repeatedly and officially offered to re-enter the Army and subject himself to court-martial for the Yousifiyah offenses. While the United States has officially acknowledged that this is possible, it has so far declined to allow it. As a result, the disparate substantive criminal provisions, ranges and types of punishment, and adjudicative procedures applied to PFC Green, as opposed to the similarly situated and equally culpable military co-accused, remain.

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

A recent development underscores the fundamental unfairness of this situation—the military prosecution of Marine Sgt. Ryan Weemer for murder committed while on active duty in Iraq. The government alleges that in November, 2004, Sgt. Weemer, Sgt. Jermaine Nelson, and Squad Leader Jose Nazario participated in a murder during combat operations in Falluja, Iraq. Like PFC Green, Sgt. Weemer and Squad Leader Nazario had allegedly completed their active military duty *before* the incidents were discovered. Squad Leader Nazario was charged under MEJA. Sgt. Nelson was charged under the UCMJ. Because Squad Leader Nazario, was being tried under MEJA for the Falluja killing, the government could have prosecuted Sgt. Weemer under MEJA as well, regardless of his military status.[1] Instead, the United States decided to reactivate Sgt. Weemer so that he could be tried by a military court under the UCMJ rather than a civilian court under MEJA.[2] The Weemer case further illustrates the inequities that arise in prosecuting similarly situated and equally culpable military personnel for crimes occurring during combat when the government can pick and choose whether to proceed under MEJA or the UCMJ, with all of the radically different substantive criminal provisions, ranges and types of punishment, and adjudicative procedures attendant to each.

Defendant's Motion to Dismiss

Defendant has argued that 18 U.S.C. §3261, is unconstitutional for three basic reasons: the statute, on its face and as applied in this case, 1) violates the separation-of-

[1] 18 U.S.C. §3261(d)(2)—just as the government threatened to prosecute Spc. Barker under MEJA in this case in order to secure venue in the Western District of Kentucky.

[2] See *news.bbc.co.uk/go/pr/fr/-/2/hi/americas/7304002.stm*.

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

powers principle and the nondelegation doctrine; 2) denies equal protection of the laws; and 3) denies due process.

As set forth in detail in defendant's motion, the United States alleges that Sergeant Paul Cortez, Specialist James Barker, Private First Class Bryan Howard, Private First Class Jesse Spielman, and Private First Class Steven Green, all active duty Army personnel on combat duty in Yousifiyah, Iraq, conspired to commit and did commit murder, rape, burglary, and obstruction of justice. It appears to be the government's position, that Sgt. Cortez, Spc. Barker, PFC Spielman, and PFC Green were equally culpable principles in these crimes.

Congress has created two separate, incompatible, and inherently unequal systems of criminal justice—military, as embodied in the UCMJ and civilian, as embodied in the Federal Rules of Criminal Procedure and the federal criminal code—in this case, MEJA. The two systems have vastly different substantive criminal provisions, ranges and types of punishment, and adjudicative procedures. Accordingly, the accused in the Yousifiyah crimes are subject to greatly disparate charges, sentences, and procedures depending on which system of criminal justice is applied to them.

Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman were prosecuted in the military system under the UCMJ. PFC Green is being prosecuted in the civilian system under MEJA. The government alleges that this is necessary because PFC Green was not subject to the UCMJ at the time of his indictment herein and that, therefore, jurisdiction to try him exists only in the civilian system under MEJA. However, as outlined in detail in

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

defendant's motion, PFC Green could have been and still can be prosecuted in the military system under the UCMJ like Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman—but the United States has so far declined to allow it.

As a result, the United States has chosen to subject PFC Green to the grossly disparate substantive criminal provisions, ranges and types of punishment, and adjudicative procedures of MEJA, while it chose to subject the similarly situated and equally culpable military co-accused to prosecution under the UCMJ.

Defendant argues in his motion that MEJA, on its face and especially as applied in this case, is unconstitutional because:

1. **Nondelegation Principle—**MEJA grants the Executive Branch unfettered discretion to prosecute crimes committed outside the United States by members of the Armed Forces under either the federal criminal code and Federal Rules of Criminal Procedure or the UCMJ. Granting the Executive Branch unguided and unreviewable discretion to determine at its whim which of the two disparate jurisdictional systems to apply violates the separation-of-powers principle and constitutes an unconstitutional delegation by the Congress to the Executive Branch of the exclusive power and responsibility of Congress to determine what conduct is subject to criminal sanction, fix the sentence for crimes, and set forth the procedures for the adjudication of criminal cases.

2. **Equal Protection—**The UCMJ extends *military* criminal

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

jurisdiction to members of the armed forces in the Iraqi theater of war and civilians "serving with or accompanying an armed force in the field . . . ." MEJA extends *civilian* criminal jurisdiction to members of the armed forces in the Iraqi theater of war if—even though they were subject to the UCMJ at the time of the offense—they are no longer subject to the UCMJ at the time of the commencement of prosecution. In short, civilians, like Blackwater employees, committing crimes in Iraq may be prosecuted under the criminal provisions, ranges and types of punishment, and adjudicative procedures of the UCMJ, but soldiers, like PFC Green, may be prosecuted under the more onerous criminal provisions, ranges and types of punishment, and adjudicative procedures of the federal criminal code and Federal Rules of Criminal Procedure merely because the government chose to discharge them before prosecution commenced. Like the "similarly circumstanced" Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman, PFC Green was subject to the UCMJ when the Yousifiyah offenses were committed. PFC Green did not apply for discharge, nor could he have resisted or declined when the government—for whatever reason, benign or sinister—chose to discharge him; and it was this discharge—a discretionary act of the government—that gave the government the power to prosecute PFC Green in the civilian system. Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman could have just as easily been discharged by the government before commencing prosecution. But, for its own reasons, the government did not do

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

so. Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman—even though still subject to the UCMJ—could nevertheless have been joined in PFC Green's MEJA indictment and forced to stand trial in the civilian system—indeed the government threatened to do just that in order to gain a mere tactical advantage over PFC Green. But, for its own reasons, the government chose not to do so. This grossly disparate treatment by the United States of similarly situated individuals is the epitome of a denial of equal protection of the law.

3. **Due Process—**PFC Green was not prosecuted under the UCMJ like his co-defendants for the *sole* reason that his military superiors committed independent crimes to cover up the offenses charged in the indictment until he could be discharged from the Army. Also, The government had no civilian jurisdiction over PFC Green when the offenses at issue were committed. MEJA permitted the government to *create* civilian jurisdiction over PFC Green *after those offenses had occurred* based solely on the *government's* decision to discharge him—a purely discretionary act that it is free to apply or not apply in cases such as these as suits its whim. Allowing government to create jurisdiction after the fact where none existed at the time of the charged offense simply by volitionally changing a person's status from soldier to civilian deprives that person of life and liberty without due process of law. Such an after-the-fact change in status cannot constitutionally form the basis

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

> of a creation of jurisdiction where none existed before, particularly in this case where the consequences—a change from military to civilian jurisdiction with the concomitant change in substantive criminal provisions, ranges and types of punishment, and adjudicative procedures—are so dire and it is the government itself that changes the defendant's status.

The Government's Response

The government's response addresses the defendant's arguments regarding delegation of congressional authority and equal protection, and the governmental misconduct component of the due process argument, *but largely ignores the defendant's due process argument regarding ex post facto creation of jurisdiction after an offense has been committed.*

The overarching principle on which the Government predicates its response to the non-delegation argument is that this is essentially a routine case and that MEJA provides adequate guidance for and restraint on the Executive branch. Relying on United States v. Batchelder, 442 U.S. 114 (1979), the government argues that "this case does not involve any delegation of legislative function to the Executive branch" because MEJA defines the offenses and the punishment and defendants prosecuted under it are subjected to the Federal Rules of Criminal Procedure. (United States' Response pp. 5-8). As shown below, this is *not* a routine case because the Executive branch has virtually unfettered discretion in deciding the forum in which to prosecute the defendant.

The government further argues that there can be no equal protection violation

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

because MEJA is being applied to a single individual in a single case and that there is no evidence that the prosecution of Green in federal court has either a discriminatory purpose or effect. The case law cited below, however, refutes the government's contention and the underlying facts establish the discriminatory purpose or effect in prosecuting Green in federal court.

That the government has glossed over Green's due process argument reflects a fundamental weakness in its position. The Government is content to summarily conclude that there cannot be either a procedural or substantive denial of due process because it maintains that Green cannot point to any specific procedural or substantive unfairness in the prosecution against him. What the government fails to acknowledge is that its arbitrary decision to prosecute Green differently than similarly situated individuals is the epitome of procedural and substantive unfairness. Beyond that, it is the conduct of the government and its agents in separating Green from the military that placed the government in position to pick and choose where to prosecute him. The Government claims that there is no due process violation because Green has no *liberty* interest at stake. (United States' Response pp. 12-13). The differences between the military and civilian systems of criminal justice that were highlighted in the defendant 's Motion to Dismiss (pp. 1-3) and on pp. 1-2 of this reply demonstrate that Green not only has a significant liberty interest in the case but also has a *life* interest at stake. It is no answer to Green's due process argument for the Government to simply claim that the prosecution in a civilian court is permitted by MEJA. The due process violation which the Government ignores stems from the arbitrary manner in which this case evolved into a federal court prosecution. As shown below, the inescapable fact

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

which underlies the due process violation is that PFC Green's case is before the Court only as a result of misconduct by government agents and the arbitrary actions of the Executive branch to treat Green differently than other similarly situated military personnel.

Defendant's Reply

Equal Protection Analysis Can Be Applied to a Single Person in a Single Case

The government complains on p. 8 of its response that "Green apparently considers himself a class of one denied equal protection . . . ." This petulance ignores the fact that a consistent pattern of official equal protection denial against large numbers of similarly situated individuals is not a necessary predicate to a violation of the Equal Protection Clause. "A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions." Batson v. Kentucky, 476 U.S. 79, 95 (1986) (other citation omitted). See also United States v. David, 803 F.2d 1567, 1571 (11th Cir.1986) ("under Batson, the striking of one black juror for a racial reason violates the Equal Protection Clause ...") and Walker v. Girdich, 410 F.3d 120, 123 (2 nd Cir. 2005) ("under Batson and its progeny, striking even a single juror for a discriminatory purpose is unconstitutional ..."). Thus, for equal protection purposes, the Constitution does not tolerate even a single instance of discrimination.

The government's argument is built on the assumption that equal protection analysis requires some kind of system-wide violation of law. However, in Bush v. Gore, 531 U.S. 98 (2000), the Supreme Court famously rejected such an assertion. The Court made clear

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

that it intended its equal protection analysis in that case to be a one shot deal—applicable only to a single State on a single issue. Despite the majority opinion's insistence (for motives pure or otherwise) that it was limiting its ruling to the Florida situation, the ruling undeniably has precedential value in this case.

> The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. *Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities*.

Id., at 109 (emphasis added). Although the Supreme Court attempted to restrict the scope of its ruling, the legal principle underlying Bush v. Gore has obvious implications any time a law vests discretion in the hands of a government official. If equal protection analysis can be applied to a single State in a single instance, it must necessarily apply to a single individual in a single case.

MEJA Does Not Simply Grant the Executive a Permissible Degree of Discretion

In its discussion of Touby v. United States, 500 U.S. 160 (1991), the government on pp. 5-6 of its response argues that MEJA is not an unconstitutional delegation of power because it merely grants "a certain degree of discretion to [the] executive . . . ." Green's case, however, makes clear that MEJA actually bestows on the Executive unfettered discretion to pick and choose which judicial system—and, therefore, which greatly disparate system of charges, sentences, and procedures—should be used for PFC Green's prosecution.

Touby also left open the issue of whether something more than an "intelligible

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

principle" is required when Congress authorizes another Branch of government to promulgate regulations that contemplate criminal sanctions. PFC Green's case addresses this unresolved issue because it involves a wholesale delegation of an exclusive legislative function to the Executive Branch, i.e. to determine criminal jurisdiction. The government argues that MEJA merely defines elements, punishments, and procedures (United States' Response p. 7) but it is the indisputable fact of this case that the statute also delegates to the Executive Branch Congress' power to choose which jurisdiction to apply in a given case—and there are no limits or constraints whatsoever on the exercise by the Executive of this delegated legislative power.

The United States also overstates the impact of United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955). As the government shows on p. 4, fn. 1 of its response (R. 107) to defendant's Motion to Dismiss for Lack of Jurisdiction (R. 99), presumably discharged persons (civilians) can be subjected to court martial and military jurisdiction under the Rules from the Manual for Courts Martial (RCM) in certain situations. See RCM 202(a)(2)(B)(iii)(a)(1), RCM 202(a)(2)(B)(iii)(c) and RCM 202(a)(2)(B)(iii)(d). Furthermore, Green's eligibility for re-enlistment shows that the ruling in Quarles is not etched in stone and the Weemer case (see p. 4, fn.2, of this reply) likewise reflects that Quarles is not an inviolate rule of law.

The government's reliance on United States v. Batchelder, 442 U.S. 114 (1979) is misplaced because Green's case does not involve a *routine* exercise of the authority delegated by Congress to the Executive, since the latter has essentially the unrestricted

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

discretion to choose the legal system in which to prosecute the case. The government claims that if it had a choice to prosecute Green under MEJA or UCMJ that it is not a legislative responsibility and would not be prohibited by the non-delegation doctrine (United States' Response, p. 8). First of all, the government did have a choice to prosecute Green under the UCMJ when he told Sergeant Yribe on March 12, 2006, what he had done. If military jurisdiction under the UCMJ was defeated, it was through the misconduct of a government agent (Yribe) who did not report Green's admission to his superiors. Second, even accepting the government's argument that "the Executive is simply choosing how best to enforce the laws of the United States" (United States' Response, p. 8), those laws must be enforced equally. The government's disparate treatment of Green and his fellow soldiers reflects that the law is *not* being applied equally to similarly situated defendants. The effect is discriminatory not only because Green could be prosecuted in a military court if the Government allowed him to re-enlist, but he is being treated differently than other equally culpable participants in the offenses. The fact that Green alone is being prosecuted in a civilian court is sufficient to establish an equal protection violation—especially since MEJA would have allowed Cortez, Barker, Howard, and Spielman to be joined with Green as defendants in federal court. 18 U.S.C. §3261(d)(2). *Cf.* Bush v. Gore and Batson v. Kentucky. both, supra. Third, Green's case, unlike Batchelder, is not simply a matter of applying criminal statutes in a given case. The fundamental question here is which one of the two systems of justice created by Congress—each with markedly different rules, procedures, and punishments—will be the forum in which Green is ultimately prosecuted. A simple example underscores the arbitrariness of Green's treatment. If Green and the other

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

soldiers had been jointly indicted in federal court, surely the government would not think there would have been any legitimate basis on which to grant a separate trial to any defendant. Thus, the decision to prosecute Green in federal court is unjustifiable because the option of a military prosecution is still viable.

The government also argues in its response (p.11) that the Army is not required to accept Green's re-enlistment so that he may be tried by court-martial and that he has no discretion whether he is tried by that forum. That argument ignores two, basic facts. First, although Green is eligible for re-enlistment the government has not given him the chance to exercise that choice. Second, even if Green does not have discretion in the matter, the government certainly does and that discretion is not in the least shaped or restricted by any objective standards. The United States' refusal to allow Green to re-enlist and be treated equally as the other defendants shows the discriminatory effect and purpose of the present prosecution and amounts to a denial of equal protection and due process.[3]

[3] The government argues on p. 11 of its response that PFC Green is not suitable for re-enlistment in the Army—even for the sole purpose of being tried under the UCMJ—because he "has not provided grounds for a waiver by providing evidence that his personality disorder has been rehabilitated." The transparency and disingenuousness of this position is underscored by recent revelations that the Army granted 511 felony waivers in 2007 allowing *convicted* felons to enlist. CNN reported on April 21, 2008 (*http://www.cnn.com/2008/US/04/21/military.waivers/index.html*), that "The Army and Marine Corps are allowing convicted felons to serve in increasing numbers, newly released Department of Defense statistics show. Recruits were allowed to enlist after having been convicted of crimes including assault, burglary, drug possession and making terrorist threats. . . . Pentagon statistics show the Army granted 511 felony waivers in 2007, just over twice the 249 granted the year before. . . ." The Associated Press further reported that some of the waivers were for those convicted of sex crimes, manslaughter, aggravated assault, and robbery, including crimes involving weapons. Louisville Courier-Journal, April 22, 2008, p. A7. PFC Green, of course, has not been convicted of anything.

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

The Prosecution of Pfc Green in a Civilian Court Violates Due Process

The government's decision to prosecute Green in a civilian court results not only in a deprivation of liberty, but may ultimately deprive him of his life. That decision is arbitrary and has a discriminatory effect because the discovery provided by government outlines how Green immediately and directly informed his superiors of his involvement in the underlying offenses, thus following the chain of command to submit himself to prosecution under the UCMJ. Green, however, was not prosecuted under the UCMJ like his co-defendants for the *sole* reason that his superiors committed independent crimes to cover up the offenses charged in the indictment.

Green is alleged to have committed the crimes along with two of his superiors—Sgt. Cortez and Spec. Barker—on March 12, 2006. On the day the crimes were committed, Green confessed his involvement in them to his direct superior, Sgt. Yribe. These superiors (Yribe, Cortez, and Barker) engaged in a conspiracy and committed criminal offenses to cover up the Yousifiyah crimes while Green was in the process of being discharged from the Army. The government does not come into this case with clean hands because Green's prosecution in a civilian court is the direct result of a cover-up by Government agents (Yribe, Cortez, and Barker). The road to discharge was begun by the misconduct (illegal acts) of Green's superiors.

The discovery also shows that on March 12, 2006, after the alleged crimes were committed, Sgt. Yribe led an investigating team that included Cortez and Barker to the scene. On the same day, Green confessed his involvement to Yribe while they were in the

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

presence of Barker. The following day, Green again confessed to Yribe in the presence of Barker. By not reporting Green's actions, Sgt. Yribe, Sgt. Cortez, and Spec. Barker violated Article 134 of the UCMJ, *Misprision of serious offense*.[4] Green arguably proceeded in a manner that would have immediately subjected him to the UCMJ but it was the criminal acts of Yribe, Cortez, and Barker that led to the failure to prosecute Green under the UCMJ at or near the time of the charged offenses. The criminal conduct of other persons *cannot* be the decisive factor in determining in which of two criminal justice systems a defendant is to be prosecuted. Such an anomalous result is a clear violation of due process.

Lastly, the post-crime events that enabled the United States to acquire jurisdiction in federal court were initiated by military personnel—not by defendant Green. Thus, it can hardly be claimed that the government is treating him fairly when he—and he alone—is subjected to a much harsher judicial system than that faced by his co-defendants. The cover-up by Yribe, Cortez, and Barker is a blatant manipulation of the military justice system. It created a jurisdictional hook that did not exist when the crimes where committed and is the sole predicate for federal court jurisdiction. Unlike his superiors, PFC Green took no affirmative steps to avoid prosecution under the UCMJ. It is therefore inconsistent with fundamental fairness and due process for the government to benefit from the wrongdoing of Yribe, Cortez, and Barker. Accordingly, the indictment must be dismissed.

---

[4] Article 134 of the UCMJ, *Misprision of serious offense*.requires proof "(1) that a certain serious offense was committed by a certain person; (2) that the accused knew that the said person had committed the serious offense; (3) that, thereafter, the accused concealed the serious offense and failed to make it known to civilian or military authorities as soon as possible; (4) that the concealing was wrongful; and (5) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces."

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

Conclusion

For the reasons set forth in his original motion and this reply, 18 U.S.C. §3261, on its face and as applied by the United States in this case, violates the separation-of-powers principle, the non-delegation doctrine, the Due Process Clause of the Fifth Amendment, and the Equal Protection Clause of the Fourteenth Amendment, as embodied in the Fifth Amendment. Accordingly, the indictment should be dismissed.

/s/ Scott T. Wendelsdorf
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, Kentucky 40202
(502) 584-0525

/s/ Patrick J. Bouldin
Assistant Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, Kentucky 40202
(502) 584-0525

/s/ Darren Wolff
Attorney at Law
2615 Taylorsville Road
Louisville, KY 40205
(502) 584-0525

Counsel for Defendant.

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

Certificate of Service

I hereby certify that on April 22, 2008, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following: Marisa J. Ford, Esq., Assistant United States Attorney; James R. Lesousky, Esq., Assistant United States Attorney; and Brian D. Skaret, Esq., Attorney at Law.

/s/ Scott T. Wendelsdorf

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808