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.

MOTION TO DISMISS

Comes the defendant, by counsel, and moves the Court pursuant to Article I, §1; Article II, §1, and Article III, §1 of and the Fifth Amendment to the Constitution of the United States to dismiss the indictment herein on the ground that 18 U.S.C. §3261, on its face and as applied by the United States in this case, is violative of the separation-of-powers principle; the nondelegation doctrine; and the Due Process Clause of the Fifth Amendment.

One Government, Two Criminal Justice Systems

Because of the unique exigencies inherent in civilian society and the military armed forces, Congress has created two separate, incompatible, and inherently unequal systems of criminal justice—*military*, as embodied in the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. §801, et seq., and *civilian*, as embodied in the federal criminal code and rules. The two systems have vastly different substantive criminal provisions, ranges and types of

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punishment, and adjudicative procedures. For example:

1. There are no mandatory minimum sentences in the military system, while the civilian system is rife with them. For example, premeditated murder in the military system carries no mandatory minimum sentence, while the same crime in the civilian system carries a mandatory minimum sentence of life imprisonment without the possibility of parole.

2. Certain very serious crimes resulting in truly draconian mandatory punishments exist in the civilian system which have no counterpart in the military system. For example, discharging a firearm during a crime of violence is an offense in the civilian system that carries a mandatory consecutive sentence of 10 years for a first instance and mandatory consecutive 25 year sentences for any additional instances. If the crime of violence is murder, the death penalty is authorized. Discharging a firearm during a crime of violence is not even a crime under the Uniform Code of Military Justice.

3. Parole is possible under the military system. It has been abolished in the civilian system.

4. Defendants in the military system have far broader discovery rights than those in the civilian system. The military equivalent of the grand jury (Article 32 hearing) is open to the defendant, who can be present and represented by counsel, compel the attendance of witnesses, cross-examine

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the government's witnesses, and present witnesses in his own defense. In the civilian system, none of this is permitted.

As a result of these and other differences in substantive criminal provisions, ranges and types of punishment, and adjudicative procedures, factually identical crimes committed by defendants with identical backgrounds are subject to greatly disparate charges, sentences, and procedures depending on which system of criminal justice is applied to them.

Which System Applies?

The charges herein arise out of alleged crimes committed on March 12, 2006, by five members of the United States armed forces while in an active combat zone in Yousifiyah, Iraq. Four of the defendants were still in the military when charges were brought. The government maintains that one, the defendant herein, had been discharged from the Army six weeks prior to being charged and was purportedly no longer subject to the UCMJ.

Two statutes govern which of these two systems of criminal justice is applied to crimes committed in the Iraqi combat theater—Article 2 of the Uniform Code of Military Justice, 10 U.S.C. §802, and the Military Extraterritorial Jurisdiction Act of 2000 ("MEJA"), 18 U.S.C. §3261.

Article 2(a)(1) of the Uniform Code of Military Justice, 10 U.S.C. §802(a)(1), extends military criminal jurisdiction to members of the armed forces in the Iraqi theater of war and Article 2(a)(10) of the Uniform Code of Military Justice, 10 U.S.C. §802(a)(10), extends military criminal jurisdiction to civilians in the Iraqi theater of war. UCMJ Article 2(a)(10) provides as follows:

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> The following people are subject to this chapter:
>
> . . . .
>
> (10) In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field . . . .

Id. "Contingency operation" is defined as a military operation that "is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force. . . ." 10 U.S.C. §101(13)(A).

The Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §3261, extends civilian criminal jurisdiction to military personnel in the Iraqi theater of war. It provides in pertinent part as follows:

> Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—
>
> (1) while employed by or accompanying the Armed forces outside the United States; or
>
> (2) while a member of the Armed forces subject to chapter 47 of title 10 (the Uniform code of Military Justice),
>
> shall be punished as provided for that offense.

18 U.S.C. §3261(a). No prosecution may be commenced against a member of the armed forces under this statute unless he is no longer subject to the UCMJ at the time of indictment or information or he committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ. 18 U.S.C. §3261(d).

Venue for prosecutions under the Military Extraterritorial Jurisdiction Act is in the

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district into which a defendant is first brought; or if the government is proceeding by way of indictment, venue would be proper in the district of last known residence or, if last residence is unknown, in the District of Columbia.

The Yousifiyah Offenses

The following is based on the pleadings herein, discovery received from the United States, reports of the investigation of the charged offenses by the Army Criminal Investigation Command (CID), and the court-martial proceedings against the military co-accused.

The United States alleges that on or about March 12, 2006, 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, all active duty Army personnel on combat duty in Yousifiyah, Iraq, conspired to commit and did commit murder, rape, burglary, and obstruction of justice. (R. 1 Complaint; R.36 Indictment; Charge Sheet, Sergeant Paul Cortez [attached hereto as Exhibit 1]; Charge Sheet, Specialist James Barker [attached hereto as Exhibit 2]; Charge Sheet, Private First Class Bryan Howard [attached hereto as Exhibit 3]; Charge Sheet, Private First Class Jesse Spielman [attached hereto as Exhibit 4]). It appears to be the government's position, as reflected in the indictment of PFC Green and the Article 32 findings for the military co-accused, that Sgt. Cortez, Spc. Barker, PFC Spielman, and PFC Green were equally culpable principles.

> SGT Cortez, SPC Barker and PFC Spielman were each a principal in the participation of the house breaking, rape, and murder. The role attributed to SGT Cortez and SPC Barker was certainly major. I believe the role of both PFC Spielman and PFC Howard as lookout/security providers played a major

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> role in the success of committing the crimes of housebreaking, murder and rape.

(Continuation Sheet 2, DD Form 457, pertaining to PFC Spielman, Jesse V.; Continuation Sheet 2, DD Form 457, pertaining to Sgt. Yribe, Anthony W.; Continuation Sheet 2, DD Form 457, pertaining to PFC Howard, Bryan L.; Continuation Sheet 2, DD Form 457, pertaining to Sgt. Cortez, Paul E.; Continuation Sheet 2, DD Form 457, pertaining to Spc. Barker, James P.)

At the time of the offenses charged herein, Sgt. Cortez, Spc. Barker, PFC Howard, PFC Spielman, and PFC Green were all active duty Army personnel on combat duty in Yousifiyah, Iraq, assigned to Traffic Checkpoint Two (TCP2). Sgt. Cortez was in charge, and Spc. Barker was second in command. According to the government, Sgt. Cortez and Spc. Barker both approved the commission of the crimes charged , helped plan the crimes, and directly participated in the commission of the crimes.

According to discovery provided by the United States, the government alleges that on March 12, 2006, Sgt. Cortez, Spc. Barker, PFC Spielman and PFC Green were playing cards and drinking Iraqi whiskey provided by Spc. Barker to his fellow soldiers. They were all under the influence of the whiskey. Conversation arose among the soldiers about going to the nearby home of the Al-Janabi family, raping the young woman that lived there, and killing her family. Spc. Barker, the second in command, testified under oath during the court-martial proceedings herein that the matter was discussed with the superior in charge of the TCP, Sgt. Cortez, who told the others that if they were going to rape the young woman, he got to go first. Spc. Barker then talked with Sgt. Cortez privately about the plan.

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Sgt. Cortez asked Spc. Barker what he thought of the idea, and Spc. Barker told Sgt. Cortez, "It's up to you." At this point, Sgt. Cortez approved the plan for his unit to rape the young woman and kill her and her family— as long as he, Cortez, could be the first one to rape the young woman. Sgt. Cortez's ultimate order to the soldiers under his command was, "Let's go, before I change my mind." Spc. Barker testified in court-martial proceedings that had Sgt. Cortez said "no," the conspiracy would not have proceeded to completion.[1]

Sgt. Cortez and Spc. Barker then led the group to the Al-Janabi home. Spc. Barker led the way by cutting a hole through a fence, then directed the soldiers through a second hole that he had cut earlier, and then to the Al-Janabi house itself. The two senior soldiers, Sgt. Cortez and Spc. Barker, paired off, entered the home, and raped Abeer Al-Janabi. According to the testimony of both Sgt. Cortez and Spc. Barker, it *was* Sgt. Cortez—as he had insisted in approving the commission of the crimes—who first raped the young woman while Spc. Barker held her down. They then switched places so that Spc. Barker could rape her. During the rape, Spc. Barker alleges that PFC Green killed Hadeel Al-Janabi, Kaseem Al-Janabi, and Fakhriya Al-Janabi in another room while PFC Spielman stood lookout.

Spc. Barker testified that after he and Sgt. Cortez raped Abeer Al-Janabi, PFC Green entered the room, raped, and then shot and killed the young woman while Sgt. Cortez continued to hold her down. The soldiers then burned Abeer Al-Janabi's body, left the home, and returned to TCP 2, where Sgt. Cortez ordered PFC Spielman to destroy or

[1] Sgt. Cortez admitted as much in an unsworn statement given to investigators regarding his own responsibility as Squad Leader. He told investigators "I should've been the one to stop the crimes. I know what I did, I did not do my duty as a leader."

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dispose of physical evidence of the crimes. PFC Spielman followed this order.

Later that day, the bodies were discovered by members of the Iraqi Army who reported the incident to United States Army which, in turn, initiated an official investigation by assembling an "investigation team" headed by Sgt. Cortez and a sergeant from another TCP, Sgt. Yribe[2], to go to the Al-Janabi house and investigate the incident. This "investigation team" also included PFC Spielman. PFC Green was *not* part of the "investigation team." The team went to the Al-Janabi house, inspected it, and took photographs of the scene.

In the course of the investigation, Sgt. Yribe found a round of ammunition under a bed that could have tied American troops to the killings. Sgt. Yribe allowed Sgt. Cortez to surreptitiously confiscate and dispose of the round to prevent its discovery by the others and later lied to CID investigators and failed to inform them that U.S. ammunition was found at the scene. The "investigation unit" officially blamed the incident on Iraqi insurgents.

When Sgt. Cortez returned to the TCP 2, he took further steps to cover up the incident by issuing another order telling all of the subordinate soldiers under his charge to never speak of the incident again. However, the United States claims that PFC Green *did* speak of the incident again—immediately reporting his involvement in the crimes to Sgt. Yribe, his direct superior, who he believed to be a non-complicit member of the investigation team. According to discovery provided by the government, Sgt. Yribe has

[2] According to discovery received from the United States, Sgt. Cortez was in charge of TCP 2 and PFC Green on March 12, 2006. However, PFC Green was actually a member of Sgt. Yribe's squad, so Sgt. Yribe was also PFC Green's direct superior.

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testified under oath that PFC Green approached him on March 12, 2006, shortly after the "investigation team" returned from the Al-Janabi house and immediately told him of his involvement in the crime. According to Sgt. Yribe, Spc. Barker was present when PFC Green revealed this information to him. Sgt. Yribe questioned PFC Green in detail about the incident and was convinced that PFC Green was telling the truth about the crimes and his involvement in them.

Sgt. Yribe has further testified that on March 13, 2006, he again questioned PFC Green about the incident, and PFC Green again admitted his involvement. Again, Spc. Barker was present for this conversation, as well.

Instead of initiating prosecution of PFC Green for the crimes under the UCMJ—and thereby exposing Sgt. Cortez, Spc. Barker, PFC Howard, PFC Spielman, and perhaps even himself to prosecution as well—Sgt. Yribe told PFC Green that he was going to make sure that PFC Green was discharged from the Army. Sgt. Yribe testified that he told PFC Green to "either get out of the Army or I'm going to help you do it."

PFC Green is alleged to have committed the offenses charged herein with Sgt. Cortez, his supervising superior on March 12, 2006, and then to have immediately reported his involvement in the crimes to his direct superior, Sgt. Yribe. Instead of either Sgt. Cortez or Sgt. Yribe taking the proper steps to have PFC Green prosecuted under the UCMJ, PFC Green was told that by hook or by crook, he was going to be kicked out of the Army—and that is precisely what occurred.[3]

[3] Sgt. Yribe has also testified under oath that he lied and withheld information about the case—such as PFC Green's purported confessions to him—when Sgt. Yribe met with his

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It is clear that PFC Green's superiors considered him a weak link in the conspiracy they had concocted to cover-up the crimes at the Al-Janabi house. Sgt. Cortez, Sgt. Yribe, Spc. Barker, PFC Howard, and PFC Spielman had up to this point successfully hidden evidence of their involvement in the charged crimes with the subsequent cover-up; and it was important that PFC Green be removed from the Army and Iraq where his loose talk could condemn them all. Indeed, PFC Green *was* discharged from the Army on May 16, 2006.[4] A timeline detailing the co-defendants' conspiracy to cover-up the Yousifiyah offenses and the Army's improper discharge of PFC Green is attached hereto as Exhibit 5.

In June, 2006, according to discovery provided by the United States, Sgt. Yribe allegedly told another soldier what PFC Green had told him. That soldier reported the conversation, and an investigation ensued. The cover-up collapsed, and charges were subsequently brought against Sgt. Cortez, Spc. Barker, PFC Howard, PFC Spielman and PFC Green. Ironically, PFC Green, the only soldier the government alleges immediately admitted his involvement in the Yousifiyah offenses to his superiors, now faces prosecution in the civilian justice system while his equally culpable co-accused, who covered-up their involvement for months, have all been prosecuted in the military system. The result—as

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superiors about the investigation. Sgt. Yribe has testified that he met with Sgt. First Class Fenalson; Capt. Goodwin, the Company Commander; and Col. Kunk about the investigation. Each time Sgt. Yribe refused to reveal knowledge of PFC Green's involvement. This was true even in June, 2006, when Col. Kunk interviewed Sgt. Yribe after another soldier had made statements about the offenses.

[4] PFC Green had been and was suffering from Post Traumatic Stress Disorder, a serious mental illness. Instead of retaining him in the Army and properly treating him for this mental illness, Army personnel knowingly and improperly diagnosed him as having antisocial personality disorder as a subterfuge to cause his discharge.

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detailed below—is the grossly disparate treatment of these equally situated defendants with regard to substantive criminal provisions, ranges and types of punishment, and adjudicative procedures.

The Military Charges and Prosecutions Against Sgt. Cortez, Spc. Barker, PFC Howard, PFC Spielman

On July 8, 2006, Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman were each charged under the UCMJ with conspiracy to commit premeditated murder, rape, and obstruction of justice in violation of UCMJ Article 81 (10 U.S.C. §881); four counts of premeditated murder and felony murder in violation of UCMJ Article 118 (10 U.S.C. §918); and rape of a person more than 12, but less than 16 years of age in violation of UCMJ Article 120 (10 U.S.C. §920). In addition Sgt. Cortez, Spc. Barker, and PFC Spielman were charged with arson in violation of UCMJ Article 126 (10 U.S.C. §926); housebreaking in violation of UCMJ Article 130 (10 U.S.C. §930); and multiple counts of impeding an investigation in violation of UCMJ Article 134 (10 U.S.C. §934).[5]

Although the murder counts were potentially capital offenses, the United States did not seek the death penalty against any of the military defendants. None of the charges carried mandatory minimum sentences or requirements that they run consecutively with any other sentence.

PFC Howard was permitted to plead guilty to accessory after the fact and obstruction of justice. He was sentenced to 5 years custody in a military prison and a bad conduct

[5] Sgt. Yribe was charged with dereliction of duty and making a false statement for his role in the cover-up. The charges were ultimately dismissed, and he was discharged.

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discharge. He will be eligible for parole in 27 months.

PFC Spielman was found guilty of felony murder, rape, conspiracy to commit rape, and housebreaking. He was sentenced to 110 years custody in a military prison. He will be eligible for parole in 10 years.

Spc. Barker pled guilty to premeditated murder, conspiracy to commit rape, and obstruction of justice. He was sentenced to 90 years custody in a military prison. He will be eligible for parole in 10 years.

Sgt. Cortez pled guilty to four counts of felony murder, rape, conspiracy to commit rape, housebreaking, and violating a general order. He was sentenced to 100 years custody in a military prison. He will be eligible for parole in 10 years.

The Civilian Charges and Prosecution Against PFC Green

On June 30, 2006, a sealed criminal complaint was filed in the Western District of Kentucky charging defendant with numerous violations of the Military Extraterritorial Jurisdiction Act for his role in the Yousifiyah offenses. (R. 1 Complaint). The United States had planned to arrest defendant on the sealed complaint in the Western District of Kentucky, which would have established venue in this district. However, fearing that premature news of the charges had been released by government personnel, the defendant was arrested and made initial appearance on July 3, 2006, in the Western District of North Carolina, establishing venue in that district. Over objection of his counsel in North Carolina, defendant was removed to the Western District of Kentucky. The Federal Defender was appointed to represent him in this district on July 6, 2006, and immediately confronted the

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Assistant United States Attorneys assigned to the case regarding the improper venue. The prosecutors responded that under the Military Extraterritorial Jurisdiction Act, even active members of the military can be prosecuted in civilian court if they are joined with one not subject to the UCMJ. They specifically threatened to indict Spc. Barker with PFC Green in the Western District of Kentucky and arrange for Spc. Barker to be arrested here—in order to establish venue—if defendant did not agree to waive any venue challenge. An agreement was reached to waive venue with the understanding that the case would be brought in the court division that included Fort Campbell.

An indictment was returned against defendant on November 7, 2006, charging 17 counts of violating the Military Extraterritorial Jurisdiction Act with the following underlying federal offenses:

§3261 Charges Against Defendant

Ct.	Underlying Offense	Underlying Offense Statutes
1	Conspiracy to Commit Murder	§§1111, 1117
2	Conspiracy to Commit Aggravated Sexual Abuse	§§371, 2241(a), 2241(c)
3	Premeditated Murder (Abeer Al-Janabi)	§§1111, 2
4	Premeditated Murder (Hadeel Al-Janabi)	§§1111, 2
5	Premeditated Murder (Kaseem Al-Janabi)	§§1111, 2
6	Premeditated Murder (Fakhriya Al-Janabi)	§§1111, 2
7	Felony Murder (Abeer Al-Janabi)	§§1111, 2
8	Felony Murder (Hadeel Al-Janabi)	§§1111, 2
9	Felony Murder (Kaseem Al-Janabi)	§§1111, 2

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10	Felony Murder (Fakhriya Al-Janabi)	§§1111, 2
11	Aggravated Sexual Abuse	§§2241(a), 2
12	Aggravated Sexual Abuse with Children	§§2241(c), 2
13	Use of Firearm During Crime of Violence	§§924(c)(1)(A), 924(j)(1), 2
14	Use of Firearm During Crime of Violence	§§924(c)(1)(A), 924(j)(1), 2
15	Use of Firearm During Crime of Violence	§§924(c)(1)(A), 924(j)(1), 2
16	Use of Firearm During Crime of Violence	§§924(c)(1)(A), 924(j)(1), 2
17	Obstruction of Justice	§1512(c)(1)

While these civilian charges against PFC Green under 18 U.S.C. §3261 roughly parallel those military charges brought against Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman under the Uniform Code of Military Justice and are premised on the same offense conduct, there are very significant differences in the two prosecutions:

1. The United States is seeking death on the civilian premeditated and felony murder counts against PFC Green. The United States did not seek death on the military premeditated and felony murder counts against Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman.

2. The civilian premeditated and felony murder counts against PFC Green carry mandatory minimum sentences of life imprisonment without the possibility of parole. The military premediated and felony murder counts against Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman carried no mandatory minimum sentences.

3. There is no parole in the civilian system. Sgt. Cortez, Spc. Barker,

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and PFC Spielman will each be eligible for parole in 10 years. PFC Howard will be eligible in 27 months.

4. The civilian firearm counts against PFC Green carry a total mandatory minimum sentence of 85 years consecutive to any other sentences. No such military 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.

The United States Could Prosecute PFC Green in the Military System

The government claims that PFC Green was not subject to the UCMJ at the time of his indictment herein and that, therefore, jurisdiction to try him in the civilian system exists under MEJA. Assuming, *arguendo*, that this is true[6], it remains that PFC Green could have been and still can be prosecuted in the military system under the Uniform Code of Military Justice like Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman.

Even if PFC Green has been properly discharged from the Army, he is eligible for re-enlistment with the consent of the United States. Once back in the Army, PFC Green would again be subject to the Uniform Code of Military Justice 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. To this end, defendant offered to re-enter the Army and subject himself to court-martial for the Yousifiyah offenses. (Exhibits 6 and 7). The United States acknowledged that this was permitted, but declined to allow it.

[6] Defendant does not concede and may, in fact, contest the point.

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(Exhibit 8).

In short, the grossly 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, are solely the result of the Executive's decision to apply the civilian system of justice to PFC Green and the military system of justice to Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman.

Summary of Argument

The Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §3261, on its face and especially as applied in this case, 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 Uniform Code of Military Justice. Choosing to prosecute in the civilian criminal justice system a defendant who is or could be made subject to the military justice system denies that defendant equal protection of the law and due process. Also, granting the Executive Branch unguided and unreviewable discretion to determine at its whim which of the two disparate 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.

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Argument

I.

Allowing the Executive Unfettered Discretion to Proceed under 18 U.S.C. §3261 or the Uniform Code of Military Justice in Prosecuting Extraterritorial Offenses by Members of the Armed Forces Constitutes an Unconstitutional Delegation by the Congress to the Executive 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 with the Result That Disparate Sentences May Be Imposed and Adjudicative Procedures Applied in Factually Identical Cases Involving Identically Situated Defendants at the Whim of the Executive

a.

It is the Exclusive Power and Responsibility of Congress to Define Crimes, Ranges and Types of Punishment, and Adjudicative Procedures

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., Art. I, Sec. 1. It is settled that this provision bestows upon Congress the exclusive power to define crimes, determine the range and types of punishment, and regulate the practice and procedure of courts. Mistretta v. United States, 488 U.S. 361, 364 (1989); Sibach v. Wilson & Co., 312 U.S. 1, 9 (1941); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Williams v. Powers, 135 F.2d 153 (6th cir. 1943).

b.

The Exclusive Power and Responsibility of Congress to Define Crimes, Ranges and Types of Punishment, and Adjudicative Procedures Cannot Be Delegated To the Executive Branch of Government.

The Constitution divides the delegated powers of the federal government into three

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defined categories: Legislative, Executive, and Judicial. INS v. Chadha, 462 U.S. 919, 951 (1983).

> The declared purpose of separating and dividing the powers of government, of course, was to "diffus[e] power the better to secure liberty." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). Justice Jackson's words echo the famous warning of Montesquieu, quoted by James Madison in The Federalist No. 47, that " 'there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates'...." The Federalist No. 47, p. 325 (J. Cooke ed. 1961).

Bowsher v. Synar, 478 U.S. 714, 721-722 (1986). The Supreme Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." Mistretta v. United States, 488 U.S., at 380. The Court has consistently guarded against the exercise by one branch of any power assigned to another.

> It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power." . . . . Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch. For example, just as the Framers recognized the particular danger of the Legislative Branch's accreting to itself judicial or executive power, so too have we invalidated attempts by Congress to exercise the responsibilities of other Branches or to reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch. Bowsher v. Synar, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986) (Congress may not exercise removal power over officer performing executive functions); INS v. Chadha, supra (Congress may not control execution of laws except through Art. I procedures); Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (Congress may not

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confer Art. III power on Art. I judge).

Mistretta v. United States, 488 U.S., at 382. Likewise, one branch is not allowed to impair another's exercise of its constitutionally delegated powers.

> [I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another. See Plaut v. Spendthrift Farm, 514 U.S. ----, ---- - ----, 115 S.Ct. 1447, 1456-1457, 131 L.Ed.2d 328 (1995) (Congress may not revise judicial determinations by retroactive legislation reopening judgments); Bowsher v. Synar, 478 U.S. 714, 726, 106 S.Ct. 3181, 3188, 92 L.Ed.2d 583 (1986) (Congress may not remove executive officers except by impeachment); INS v. Chadha, 462 U.S. 919, 954-955, 103 S.Ct. 2764, 2785-2786, 77 L.Ed.2d 317 (1983) (Congress may not enact laws without bicameral passage and presentment of the bill to the President); United States v. Klein, 13 Wall. 128, 147, 20 L.Ed. 519 (1872) (Congress may not deprive court of jurisdiction based on the outcome of a case or undo a Presidential pardon). Even when a branch does not arrogate power to itself, moreover, the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties. Mistretta v. United States, supra, at 397-408, 109 S.Ct., at 668-674 (examining whether statute requiring participation of Article III judges in the United States Sentencing Commission threatened the integrity of the Judicial Branch); Nixon v. Administrator of General Services, 433 U.S. 425, 445, 97 S.Ct. 2777, 2791, 53 L.Ed.2d 867 (1977) (examining whether law requiring agency control of Presidential papers disrupted the functioning of the Executive).
>
> Deterrence of arbitrary or tyrannical rule is not the sole reason for dispersing the federal power among three branches, however. By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable. Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking. See Chadha, supra, at 951, 103 S.Ct., at 2784. Ill suited to that task are the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control. The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.

Loving v. United States, 517 U.S. 748, 757-758 (1996).

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Just as neither the Executive nor the Judiciary may arrogate unto itself the power of the Legislative Branch, Congress is forbidden by the separation of powers doctrine from voluntarily abdicating its responsibility to another branch of government. "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. . . . [W]e long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch. . . ." Mistretta v. United States, 488 U.S., at 371-72.

> Another strand of our separation-of-powers jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its duties. . . . The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity. Field v. Clark, 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294 (1892).…

Loving v. United States, 517 U.S., at 758. In short, "Congress may not constitutionally delegate its legislative power to another branch of Government." Touby v. United States, 500 U.S. 160, 165 (1991).

c.

18 U.S.C. §3261 Constitutes an Unconstitutional Delegation by the Congress to the Executive of the Exclusive Power and Responsibility of Congress to Define Crimes, Ranges and Types of Punishment, and Adjudicative Procedures

It is not an unconstitutional delegation of legislative power for Congress to legislate "in broad terms leaving a certain degree of discretion to executive or judicial actors." Touby v. United States, 500 U.S., at 165, 111 S.Ct., at 1756. So long as Congress "lay[s] down by

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legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); Touby v. United States, 500 U.S., at 165; Mistretta v. United States, 488 U.S., at 372.

> The nondelegation doctrine is easy to state: "Congress may not constitutionally delegate its legislative power to another branch of Government." Touby v. United States, 500 U.S. 160, 165, 111 S.Ct. 1752, 1755, 114 L.Ed.2d 219 (1991) (citation omitted). It is difficult to apply. A court must inquire whether Congress "has itself established the standards of legal obligation, thus performing its essential legislative function." Schechter Poultry, 295 U.S. at 530, 55 S.Ct. at 843. But the court must be mindful that the doctrine does not prevent Congress from obtaining the assistance of its coordinate Branches. Therefore, so long as Congress "lay[s] down by legislative act an intelligible principle" governing the exercise of delegated power, it has not unlawfully delegated its legislative power. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409, 48 S.Ct. 348, 352, 72 L.Ed. 624 (1928), quoted in Touby, 500 U.S. at 165, 111 S.Ct. at 1755, and Mistretta v. United States, 488 U.S. 361, 372, 109 S.Ct. 647, 655, 102 L.Ed.2d 714 (1989). A delegation is overbroad "[o]nly if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." Yakus v. United States, 321 U.S. 414, 426, 64 S.Ct. 660, 668, 88 L.Ed. 834 (1944).

State of South Dakota v. United States Department of Interior, 69 F.3d 878 (8th Cir. 1995).

In a criminal context, such as the case at bar, more than an "intelligible principle" is necessary. In Touby v. United States, 500 U.S. 160 (1991), the Supreme Court considered the delegation by Congress to the Attorney General of the power, upon compliance with specified procedures, to add new drugs to five "schedules" of controlled substances, the manufacture, possession, and distribution of which are regulated or prohibited by federal criminal law. The Court acknowledged that "something more than an 'intelligible

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principle'" may be necessary "when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions." The Court concluded that "[o]ur cases are not entirely clear as to whether more specific guidance is in fact required. . . . We need not resolve the issue today. We conclude that Sec. 201(h) passes muster even if greater congressional specificity is required in the criminal context." Touby v. United States, 500 U.S., at 165-66. The Court found that Congress had set forth in the enabling legislation "an 'intelligible principle' to constrain the Attorney General's discretion to schedule controlled substances on a temporary basis" and the "Attorney General's discretion to define criminal conduct." Touby v. United States, 500 U.S., at 165-66, 111 S.Ct., at 1756. A comparison between the "intelligible principles" in Touby and the absolute lack of same here is enlightening.

> Sec. 201(h) meaningfully constrains the Attorney General's discretion to define criminal conduct. To schedule a drug temporarily, the Attorney General must find that doing so is "necessary to avoid an imminent hazard to the public safety." Sec. 201(h)(1), 21 U.S.C. Sec. 811(h)(1). In making this determination, he is "required to consider" three factors: the drug's "history and current pattern of abuse"; "[t]he scope, duration, and significance of abuse"; and "[w]hat, if any, risk there is to the public health." Secs. 201(c)(4)-(6), 201(h)(3), 21 U.S.C. Secs. 811(c)(4)-(6), 811(h)(3). Included within these factors are three other factors on which the statute places a special emphasis: "actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution." Sec. 201(h)(3), 21 U.S.C. Sec. 811(h)(3). The Attorney General also must publish 30-day notice of the proposed scheduling in the Federal Register, transmit notice to the Secretary of HHS, and "take into consideration any comments submitted by the Secretary in response." Secs. 201(h)(1), 201(h)(4), 21 U.S.C. Secs. 811(h)(1), 811(h)(4).
>
> In addition to satisfying the numerous requirements of Sec. 201(h), the Attorney General must satisfy the requirements of Sec. 202(b), 21 U.S.C. Sec. 812(b). This section identifies the criteria for adding a substance to each of the five schedules. As the United States acknowledges in its brief, Sec. 202(b)

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> speaks in mandatory terms, drawing no distinction between permanent and temporary scheduling. With exceptions not pertinent here, it states that "a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance." Sec. 202(b), 21 U.S.C. Sec. 812(b). Thus, apart from the "imminent hazard" determination required by Sec. 201(h), the Attorney General, if he wishes to add temporarily a drug to schedule I, must find that it "has a high potential for abuse," that it "has no currently accepted medical use in treatment in the United States," and that "[t]here is a lack of accepted safety for use of the drug ... under medical supervision." Sec. 202(b)(1), 21 U.S.C. Sec. 812(b)(1).
>
> It is clear that in Secs. 201(h) and 202(b) Congress has placed multiple specific restrictions on the Attorney General's discretion to define criminal conduct. These restrictions satisfy the constitutional requirements of the nondelegation doctrine.

Touby v. United States, 500 U.S., at 166-67, 111 S.Ct., at 1756-1757.

Here, Congress has created two separate, incompatible, and inherently unequal systems of criminal justice—*military*, as embodied in the Uniform Code of Military Justice, 10 U.S.C. §801, et seq., and *civilian*, as embodied in the federal criminal code and rules. As outlined above, the two systems have vastly different substantive criminal provisions, ranges and types of punishment, and adjudicative procedures. This may be within Congress' exclusive power and responsibility to define crimes, determine the range and types of punishment, and regulate the practice and procedure of courts; but it is *not* within the power of Congress to delegate to the Executive discretion to choose which of these two systems to apply to those accused of criminal conduct while members of the armed forces. The Executive, not the Congress, has decided which system of substantive criminal provisions, ranges and types of punishment, and adjudicative procedures apply to Sgt. Cortez, Spc. Barker, PFC Howard, PFC Spielman, and PFC Green for the Yousifiyah murders and rape.

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Under 18 U.S.C. §3261, all could have been prosecuted in the military system; all could have been prosecuted in the civilian system; and some could have been prosecuted in one and some in the other—all at the unfettered and unreviewable discretion of the Executive for whatever reason—including in this case, mere tactical advantage—or no reason at all. While the "intelligible principle" test has been generally resolved in favor of delegation, "the most extravagant delegations of authority, those providing no standards to constrain administrative discretion, have been condemned by the Supreme Court as unconstitutional." Humphrey v. Baker, 848 F.2d 211, 217 (D.C. Cir. 1988), *cert. den.* 488 U.S. 966 (1988). Clearly, this is one such case.

II.

Prosecution of PFC Green in the Civilian Justice System While Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman Were Prosecuted in the Military System Constitutes a Denial of PFC Green's Right to Equal Protection of the Law

Defendant is entitled to equal protection of the law under the Due Process Clause of the Fifth Amendment to the Constitution of the United States. Bolling v. Sharpe, 347 U.S. 497 (1954). Statutes or governmental actions that discriminate against some and favor others are violative of equal protection. Government must treat all persons similarly situated alike. Barbier v. Connolly, 113 U.S. 27, 32 (1885). This has been held to require any statute or government action creating classifications of individuals to have a reasonable basis for such distinction and avoid arbitrariness.

> [T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated

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alike.

F.S. Royster Guano Co. V. Virginia, 253 U.S. 412, 415 (1920). *See also* Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910).

When government legislates or acts with regard to a "fundamental right", a stricter scrutiny is justified. Government classifications adversely affecting fundamental liberties must be justified by a compelling interest necessitating the classification and a showing that the distinction is required to further a legitimate governmental purpose. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942).

As detailed above, Congress has enacted legislation to provide for the prosecution and punishment of individuals who commit crimes in the Iraqi war zone—Article 2 of the Uniform Code of Military Justice, 10 U.S.C. §802, and the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §3261.

Article 2(a) of the Uniform Code of Military Justice, 10 U.S.C. §802(a), extends *military* criminal 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 . . . ." Id. The Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §3261, 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. 18 U.S.C. §§3261(a) & 3261(d). 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

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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 so. Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman could have been joined in PFC Green's 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 with regard to fundamental rights.

III.

Prosecution of PFC Green in the Civilian Justice System Constitutes a Denial of PFC Green's Right to Due Process

The Due Process Clause of the Fifth Amendment to the Constitution "embodies a

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system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just." Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Justice Frankfurter dissenting). The Due Process Clause is violated if government conduct "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). The Due Process Clause establishes a required minimum of protection for a person's right to life, liberty, and property which the government may not withhold. Truax v. Corrigan,257 U.S. 312, 331 (1921).

In DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989) the Court discussed the underlying purpose of the Due Process Clauses of the Fifth and Fourteenth Amendments.

> Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression," Davidson v. Cannon, *supra*, 474 U.S., at 348, 106 S.Ct., at 670; see also Daniels v. Williams, *supra*, 474 U.S., at 331, 106 S.Ct., at 665 (""to secure the individual from the arbitrary exercise of the powers of government,"" and "to prevent governmental power from being 'used for purposes of oppression'") (internal citations omitted); Parratt v. Taylor, 451 U.S. 527, 549, 101 S.Ct. 1908, 1919, 68 L.Ed.2d 420 (1981) (Powell, J., concurring in result) (to prevent the "affirmative abuse of power"). ***Its purpose was to protect the people from the State***, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S., at 196 (other citations

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omitted) (emphasis added). The Supreme Court has also recognized that

> the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952), or interferes with rights "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325-326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). This requirement has traditionally been referred to as "procedural" due process.

United States v. Salerno, 481 U.S. 739, 746 (1987). The Court explained in Mathews v. Eldridge, 424 U.S. 319, 332 (1976), "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Since the essence of due process is that it protects the individual from the actions of the government, a due process violation exists not only when the government's conduct unreasonably hinders a fundamental right, but also when the government's action is "arbitrary" or "irrational." Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 83-84 (1978). At the core of due process is the integrity of the criminal justice system. Thus, substantively and procedurally, due process requires that the criminal justice system be fundamentally fair. Under the circumstances presented by PFC Green's case, a prosecution of Green in a civilian court amounts to a violation of either substantive or procedural due process because all of the post-crime events that enabled the United States to acquire jurisdiction in federal court were initiated by military or civilian personnel—not by defendant Green. .

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As for substantive due process, the Court in Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992), equated the "shocks the conscience" test with a test for "arbitrariness . . . in a constitutional sense." In the context of PFC Green's case, his prosecution in a civilian court under the facts presented is the height of arbitrariness because all of the specific post-crime acts that led to his civilian prosecution (as shown by above established facts) were matters over which he had no control or volition because they were orchestrated by military or civilian governmental personnel. To persist in a civilian prosecution under these circumstances constitutes a denial of substantive due process. At the very least, PFC Green is being denied procedural due process which allows a deprivation of liberty only if the government has acted "in a fair manner." United States v. Salerno, 481 U.S. at 746; Mathews v. Eldridge, 424 U.S. at 335. As noted above, all of the post-crime events that enabled the United States to acquire civilian jurisdiction in federal court were initiated by military or civilian governmental personnel—not by defendant Green. Thus, it can hardly be claimed that the government is treating him "in a fair manner" when he—and he alone—is subjected to different and more onerous substantive criminal provisions, ranges and types of punishment, and adjudicative procedures than his military co-accused.

Under 18 U.S.C. §3261, the United States had no jurisdiction to charge, let alone try, PFC Green in the civilian system for the Yousifiyah offenses *at the time they were committed*. Jurisdiction was created *after the fact* by the government itself when it chose—for its own reasons or no reason—to discharge PFC Green. The government could just as easily have discharged Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman

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and then used the newly bestowed jurisdiction of §3261 created by their discharges to prosecute them in the civilian system as well. The United States chose not to violate their rights to due process of law, but this largesse does not diminish the seriousness of the constitutional violation visited on PFC Green.

Simply put, the government had no civilian jurisdiction over PFC Green when the offenses at issue were committed. 18 U.S.C. §3261 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 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.

Take, for example, the juvenile justice system. All states and the federal government have different criminal justice systems for dealing with crimes by juveniles and adults. Like the military and civilian systems of justice, the juvenile and adult systems of justice each have their own—usually very different—substantive criminal provisions, ranges and types

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of punishment, and adjudicative procedures. A person committing an offense before they turn 18, is subject to juvenile criminal jurisdiction. A person 18 or older is subject to adult criminal jurisdiction.

If a person commits an offense while a juvenile, but is arrested or charged after he becomes an adult—a change in status occurring after-the-fact—the government cannot bypass juvenile criminal jurisdiction and prosecute him in the adult criminal system because, as an adult, he is not subject to juvenile criminal jurisdiction at the time of his arrest or formal charging. Because he was subject only to juvenile criminal jurisdiction when he committed the offense, he cannot now be made subject to adult criminal jurisdiction merely because his status has changed from being under 18 years old to being over 18 years old.[7]

In State v. Skakel, 276 Conn. 633, 658, 888 A.2d 985, 1007 (Conn. 2006), the defendant was 40 years old when he was arrested and charged with a crime that occurred when he was 15 years old. Notwithstanding the defendant's current age, adult court could not acquire jurisdiction over the case until the State complied with the mandatory and jurisdictional juvenile court proceedings. In short, the case had to proceed in the criminal justice system that had jurisdiction at the time of the *completion of the crime*. A post-crime event (the defendant becoming an adult) could not trigger the change of jurisdiction from one criminal justice system to another. As to this point, the Connecticut Supreme Court

[7] Obviously, juvenile courts can, under certain circumstances, waive juveniles to adult court. No such power exists in the civilian and military systems of justice. The point is that the defendant is subject to juvenile, not adult, jurisdiction, despite his change in status. PFC Green, likewise, should only be subject to military, not civilian, jurisdiction, despite his change in status.

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stated in Skakel, "'[A] juvenile in whom a liberty interest in his or her juvenile status has vested, has a substantial liberty interest in the continuation of that juvenile status and that the juvenile cannot and should not be deprived of that status without [proper] procedural protections ....' see also Kent v. United States, 383 U.S. 541, 557 (1966) (juvenile court's failure to conduct full investigation, as required by statute, prior to juvenile's transfer to regular criminal docket resulted in deprivation of liberty without due process of law)." Skakel, Id., citing State v. Angel C., 245 Conn. 93, 103, 715 A.2d 652 (1998).

In State v. Griffith, 675 So.2d 911, 912 (Fla. 1996), the defendant was 22 years old when he was charged with multiple offenses that occurred while he was a juvenile. The Florida Supreme Court rejected the State's arguments that an adult court prosecution was proper notwithstanding a bypass of juvenile court proceedings. The court recognized that "[t]he Juvenile Justice Act vests the juvenile division with exclusive jurisdiction over all proceedings in which a child allegedly violates the law unless, in compliance with the Act, juvenile jurisdiction is waived or the juvenile falls under a statutory exception." Id. at 913. It was "irrelevant" that the defendant "was charged when he was an adult for offenses occurring when he was a child. If [he] had been charged at the time of the offenses, he would have received the benefit of the 'firm layer of protection for juveniles' as intended by the legislature. Troutman v. State, 630 So.2d 528, 531 (Fla. 1993)]. The state's delay in charging him with these crimes cannot waive him into criminal court in violation of the legislature's clear jurisdictional mandate." Griffith, 675 So.2d at 913.

Similarly, had PFC Green been charged at or near the time of the offenses (such as

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when he reportedly confessed to his direct superior), he would have received the "firm layer of protection" the UCMJ has afforded his co-defendants. The government's delay in charging Green until after his discharge—for whatever reason—cannot constitutionally result in a waiver or denial of his rights and vested liberty interests under the UCMJ and subject him to the more onerous civilian criminal justice system in Federal court.

An analogy can also be made to cases where the adult court was belatedly informed that the defendant was a juvenile at the time of the offense. For example, the Washington Court of Appeals has held that a juvenile did not waive jurisdiction of juvenile court although she misrepresented to arresting officers that she was an adult and did not reveal that she was actually a juvenile until the first day of her trial in superior court. State v. Anderson, 83 Wash.App. 515, 516, 922 P.2d 163, 164 (Wash.App. Div. 1, 1996), review denied by State v. Anderson, 131 Wash.2d 1009, 932 P.2d 1255 (Wash. 1997). Thus, the case demonstrates that jurisdiction cannot be constitutionally waived or defeated even by defendant's deception. See also Whittington v. State, 543 So.2d 317, 318 (Fla.App. 1 Dist.,1989) (State had to comply with mandatory, juvenile proceedings even though juvenile misrepresented his age and had been prosecuted in adult court).

As in the cases above where an adult charged with crimes committed as a juvenile cannot be subjected to adult jurisdiction because of a post-crime change of status (from juvenile to adult), PFC Green, who is charged with crimes committed as member of the Armed Forces subject to the UCMJ, should not be subjected to civilian jurisdiction because of a post-crime change of status (from military member to civilian) . This is particularly true

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in PFC Green's case where the post-crime change of status was not an inevitable event like aging, but instead was a volitional action taken by the very government that is prosecuting him.

Conclusion

For the reasons set forth above, 18 U.S.C. §3261, on its face and as applied by the United States in this case, is violative of the separation-of-powers principle; the nondelegation doctrine; and the Due Process Clause of the Fifth Amendment. Accordingly, it should be dismissed.

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CERTIFICATE

I hereby certify that on February 15, 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

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