United States	)	MOTION FOR DELAY
v.	)	
PFC Damien M. Corsetti Company A 519th Military Intelligence Battalion Fort Bragg, North Carolina 28310	)	March 21, 2006

MOTION FOR DELAY

COMES NOW the accused, by and through counsel, and hereby moves this Court for a delay in the scheduled Article 39(a) session and trial in this case and, as reasons in support thereof, states as follows:

Charges were preferred in this case on 29 September 2005. The undersigned defense counsel was retained on 10 January 2006. This is the first request for a delay in the court date.

This case involves the alleged abuse of two detainees at Bagram Air Base, and several other charges. The accused has plead not guilty to all charges. While both civilian and military defense counsel have been working diligently on this case, the defense is not prepared to go to trial on the currently scheduled date.

The defense has filed several motions to compel discovery, and several discovery requests. The defense is still not in possession of the entire case file, and not in possession of several requested documents and evidence. Much of this has been caused by the inability of the defense and government to resolve issues relating to providing the military defense counsel with a secured AKO account. In addition, the government has refused to provide the defense with "hard" copies of several secure documents, as referenced in the defense's motion to compel.

Many of the potential defense witnesses in this case are represented by counsel, and it will be necessary for the defense to request grants of immunity. In addition, the defense would anticipate the government may refuse to produce several defense witnesses, which would necessitate a separate Article 39 (a) session subsequent to the one already scheduled.

The defense has been diligent in contacting potential witnesses in this case. However, in a deployed environment, with representatives from several governmental agencies as potential witnesses, securing the names and contact information for these witnesses has been extremely time-consuming.

APPELLATE EXHIBIT 4

UNITED STATES	**FORT BLISS, TEXAS**
v.	**RESPONSE TO MOTION FOR APPROPRIATE RELIEF (Abatement)**
CORSETTI, Damien M. **PFC, U.S. Army** **519th Military Intelligence Battalion** **Fort Bragg, North Carolina 28310**	**23 March 2006**

COMES NOW THE GOVERNMENT, by and through its appointed representative, and files this, its Response to the accused's Motion for Appropriate Relief (Abatement), showing the Court as follows:

I. RELIEF SOUGHT

The Government requests that the Court deny the pending Motion.

II. BURDEN

The burden of proof rests with the accused, as the moving party. The appropriate standard is preponderance of the evidence.

III. FACTS

The accused, PFC Damien M. Corsetti, is charged with two specifications of dereliction of duty, in violation of Article 92, UCMJ; one specification of failure to obey a general order, in violation of Article 92, UCMJ; three specifications of maltreatment of a subordinate, in violation of Article 93, UCMJ; one specification of wrongful use of hashish, in violation of Article 112a; three specifications of assault consummated by battery, in violation of Article 128, UCMJ; and three specifications involving indecent acts or language, in violation of Article 134, UCMJ.

In its Motion, the accused asserts that PFC Corsetti is charged with maltreatment "by throwing Omar al-Farouq (BT-179"..... (See, Motion, para. 2.) Presumably in connection with that charge, the defense contends:

> Omar al-Farouq is unquestionably a witness of "central importance". Article 93 requires a showing that the accused's actions resulted in "pain or sufferening" [sic]. DA PAM 27-9, para 3-17-1(d). Without Farouq's testimony, the Government can only present the testimony of a soldier who witnessed the alleged incident from a distance, but claims to know whether Farouq suffered. This is not an adequate substitute to Farouq's testimony. Farouq received no medical

APPELLATE EXHIBIT IX

attention, and made no statements regarding the alleged incident. His statements would provide critical and vital information concerning this alleged incident.

(Motion, para. 11.)

In point of fact, PFC Corsetti is not charged with any such offense: the charges related to BT-179 stem from the accused's having made the detainee remove his pants in the presence of a female interrogator; having assaulted BT-179 by threatening to sodomize him with a water bottle; and having grabbed BT-179 by the head and shoulders. Likewise, the charges in this case are not supported solely by "the testimony of a soldier who witnessed the alleged incident from a distance, but claims to know whether Farouq suffered": the subject actions of PFC Corsetti were witnessed by interpreters or fellow interrogators, who were present in the small interrogation room at the time.

IV. LAW

The following authorities are applicable to the Court's analysis:

Articles 46 and 49 of the Uniform Code of military Justice (UCMJ);
Rule for Court- Martial (RCM) 703(b)3;
Military Rule of Evidence (MRE) 804(a); and
U.S. v. Carson, 57 M.J. 410 (2002).

V. WITNESSES AND EVIDENCE

The Government does not request an evidentiary hearing on the pending motion.

VI. ARGUMENT AND CITATION OF AUTHORITY

Both the accused's misstatement of the facts of this case, and the text of his argument, seem to have been taken, *verbatim*, from an identical motion filed in the matter of U.S. v. Driver. In that case, the accused was charged with assaulting and maltreating the same victim, BT-179, by throwing him against a wall; an isolation cell guard, standing outside the cell, was the lone witness.

In considering that motion, related to the same unavailable witness, the Driver trial court found that neither defense counsel nor trial counsel had access to BT-179 prior to his escape, and held:

> There is no dispute that Mr. al-Farouq is unavailable to testify at the accused's trial or to appear at any other proceeding over which the United States exercises control. RCM 703(b)(3) provides:
>
> > "Notwithstanding subsections (b)(1) and (2) of this rule, a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness

who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party."

Article 93, UCMJ proscribes cruelty toward or oppression or maltreatment of any person subject to ones orders. Maltreatment is further defined as assault, improper punishment and sexual harassment. The defense asserts that the government must prove the pain and suffering of al-Farouq by his personal testimony that he actually was harmed physically, mentally or emotionally in some way. However, The Court of Appeals for the Armed Forces has held that "in a prosecution for maltreatment under Article 93, UCMJ, it is not necessary to prove physical or mental harm or suffering on the part of the victim . . . It is only necessary to show, as measured from an objective viewpoint . . . that the accused's actions reasonably could have caused physical or mental harm or suffering." U.S. v. Carson, 57 M.J. 410 (2002). Thus, Mr. al-Farouq, though he may be able to testify that he was or was not harmed in some way, is not of such central importance to the determination of the objective harm as to be essential to a fair trial. In deed, Mr. Farouq's absence logically works more towards the accused's favor than otherwise.

....Article 46 declares that "The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." The President has prescribed such regulations in the RCM 701-703. While a party is normally entitled to the production of witnesses whose testimony is "relevant and necessary." RCM 703(b)(1). However, a party is not entitled to the presence of a witness who is unavailable within the meaning of Military Rule of Evidence (MRE) 804(a). That rule states that a witness is unavailable as a witness when he is unavailable within the meaning of Article 49(d)(2) UCMJ, which states that a witness is unavailable when "by reason of death, age, sickness, bodily infirmity, imprisonment, . . . nonamenability to process, or other reasonable cause . . ." While Mr. al-Farouq's situation does not fit squarely into the examples set forth in Article 49, it would strain common sense to hold that a witness that no party to these proceedings has any knowledge of the whereabouts of is somehow more available than someone who is sick or in prison. Simply put, if he cannot be found the only witness that would be more unavailable than him would be one who is dead. Finally, though the United States government, in some form, had access to Mr. al-Farouq for two and one-half years, more or less, the trial counsel in this case has had no access to him and has no "opportunity to obtain" him for trial. In these ways they are completely equal to the defense counsel with respect to Mr. al-Farouq. And, this is the equality contemplated by Article 46....The defense motion to continue or abate the proceedings is DENIED.

Essential Findings of Fact, Conclusions of Law and Ruling, Defense Motion for Appropriate Relief – Abatement, U.S. v. Driver, 6 February 2006 (copy of full order attached).

VII. CONCLUSION

The Government submits that the trial court's analysis in U.S. v. Driver, *supra*, should also be applied to the facts in the case at bar. The victim/witness, BT-179, is utterly unavailable, and neither side has had any benefit of unequal access. The accused has not met his burden of proving grounds for abatement of the proceedings, and the pending Motion should be denied.

JOHN B. PARKER
CPT, JA
Assistant Trial Counsel

I hereby certify that the above document was served on counsel for the accused via email to bill@williamcassara.com on 23 March 2006.

JOHN B. PARKER
CPT, JA
Assistant Trial Counsel

CPT Dowdy, the detailed defense counsel, has been out of the office since 13 March, and will not return until 24 March. The undersigned will be on active duty with the US Army Reserves from 8-26 May. In addition, the undersigned is currently scheduled to be in trial from 24-24 April at Fort Polk, LA and from 27-28 April at Fort Benning, Georgia.

Simply put, the defense needs more time to adequately represent their client, due to the slow nature of discovery, and the voluminous amount of material and witnesses. The defense requests that the currently scheduled Article 39 (a) session be delayed until the current trial date, 18 April, and that the trial date be delayed until 8 June.

//Original Signed//

William E. Cassara, Esquire
Civilian Defense Counsel

CERTIFICATE OF SERVICE

I certify that on 5 December 2005, I forwarded this request by e-mail to CPT Christopher Ellis, Trial Counsel.

//Original Signed//

William E. Cassara, Esquire
Civilian Defense Counsel

IN A GENERAL COURT-MARTIAL OF THE UNITED STATES
US ARMY TRIAL JUDICIARY, THIRD JUDICIAL CIRCUIT, FORT BLISS, TEXAS

UNITED STATES **v.**	**Government Response to Defense Motion to Delay**
CORSETTI, DAMIEN **PFC, U.S. Army,** **A Company,** **519TH MI Battalion,** **Fort Bragg, NC**	**24 March 2006**

COMES NOW the Government and opposes a delay in the trial of this case, stating as follows:

Charges were preferred in this case on 29 September 2005. From October to0 December 2005, the Accused was represented by two military Defense counsel, CPT Joe Owens and CPT Ryan Dowdy. In January 2006, the Accused released CPT Owens and retained the services of civilian Defense counsel. CPT Dowdy has remained as military counsel for approximately six months. Contrary to the Defense's assertion, this is not the first request for a delay in a court date in this case.

The Defense was given the entire CID report concerning this case. That CID report contains approximately four thousand pages, a minute percentage of which actually applies to PFC Corsetti and the Military Intelligence interrogators at Bagram. The Defense states in its motion that it has not received the entire case file, but fails to articulate what it lacks. The Government asserts that it has provided the entire case file either on CD-Rom or in paper format. The classified material that the Defense states it cannot access has been available for months either on a SIPR computer or in paper format in a secure location.

The Defense states that many of the potential Defense witnesses in this case are represented by counsel, and it will be necessary for the Defense to request grants of immunity. However, in the last six months, the Defense has never provided the names of these witnesses so that the Government can begin the immunity process. In addition, the Defense argues that it would anticipate the government may refuse to produce several Defense witnesses, which would necessitate a separate Article 39 (a) session subsequent to the one already scheduled. Again, if the Defense had provided the names of its anticipated witnesses that issue might have been resolved before the Art 39a session on 28 March 2006. The failure to provide these names to the Government means that the Defense is solely responsible for creating the conditions that it seeks to use as a basis for delay.

APPELLATE EXHIBIT XI

The Defense states that it has been diligent in contacting potential witnesses in this case, but is having problems doing so. The Government has never been asked to obtain contact information for any of these witnesses. Not hindered by that fact, trial counsel has taken the proactive step of providing the defense counsel's name to potential witnesses who have never been contacted by the Defense. One witness, in particular, took it upon himself to contact defense counsel as a result of the good will efforts of the trial counsel.

Finally the defense argues that its hectic schedule in the month leading up to trial deprive it of the ability to properly prepare. Taken in the context of the approximately six months that CPT Dowdy has represented the Accused, a 10 day absence from the office is arguably not a powerful reason for delay. Furthermore, the hectic schedule of a civilian practice, while unquestionably difficult, is quite commonplace. It is, very respectfully, a factor that should be taken into account upon entry into representation, rather than at the point when a trial is imminent.

The Defense has had six months to prepare its case. It has not provided the names of any of its potential witnesses for immunity review. It has not asked for any assistance in locating witnesses, and it has had access to all information the Government has available. If a delay seems necessary to the Defense, that delay has not been occasioned by a lack of industry on the part of the Government. The Government would respectfully request that the case go forward as scheduled.

/signed/

DAVID R. TRAINOR
CPT, JA
Trial Counsel

This is to certify that I have served the foregoing on defense counsel and the military judge this 24th day of March 2006.

/signed/

DAVID R. TRAINOR
CPT, JA
Trial Counsel

IN A GENERAL COURT-MARTIAL OF THE UNITED STATES
U.S. ARMY TRIAL JUDICIARY, THIRD JUDICIAL CIRCUIT

UNITED STATES V. DAMIEN M. CORSETTI PFC, U.S. Army A CO, 519TH MI BN, FORT BRAGG, NC	)	MOTION FOR JUDICIAL NOTICE 20 MARCH 2006

I. RELIEF SOUGHT

COMES NOW the Government, and requests that this Honorable Court take judicial notice of Army Field Manual 34-52, Army Regulation 190-8, and White House Memorandum 7 February 2002.

II. BURDEN

The military judge shall take judicial notice if requested by a party and supplied with the necessary information. R.C.M. 201(d). Judicial notice may be taken at any stage of the proceeding. R.C.M. 201(f).

III. FACTS

FM 34-52, "Intelligence Interrogation," promulgated by Headquarters, Department of the Army on 28 September 1992, addresses Army interrogation tactics, techniques, and procedures. Army Regulation 190-8, "Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees," promulgated by Headquarters, Departments of the Army, Navy, Air Force, and Marine Corps on 1 October 1997, is a joint service regulation governing the treatment of personnel captured or detained during military operations. The White House Memorandum of 7 February 2002 was signed by the President and requires humane treatment of detainees.

IV. EVIDENCE

1. The above-referenced documents.

V. LAW

1. M.R.E. 201 and 201A
2. M.C.M. Article 92(3)
3. United States v. Townsend, 49 M.J. 175 (1998)

APPELLATE EXHIBIT XII

VI. ARGUMENT

FM 34-52 qualifies for judicial notice of adjudicative facts, because it is an Army Field Manual not subject to reasonable dispute—"it is generally known in the area pertinent to the event" (Military Intelligence interrogations) (M.R.E. 201(b)). Additionally, it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." (M.R.E. 201 (b)). While the government submits the entire document for the Court's review, the government requests specific judicial notice of at least the information contained on pages 1-6 through 1-15 (prohibiting the use of force and any form of torture), 3-13 through 3-20 (describing proper interrogation procedure), and Appendix D (which reiterates treaty and other legal requirements to humanely treat interrogation subjects).

AR 190-8 and the White House Memo qualify for judicial notice of law under M.R.E. 201A. These documents are "laws and regulations of the United States" within the meaning of United States v. Townsend, 49 M.J. 175 (1998). The government submits these documents in their entirety, while requesting specific judicial notice of at least the AR 190-8 directives contained at sections 1-5 (general protection policy); 3-7(e)(1) (forbidding improper punishment, cruelty, torture); and 6-11 (prohibiting inhumane or brutal punishment); and paragraph 3 of the White House Memo.

VII. CONCLUSION

FM 34-52, AR 190-8, and the White House Memorandum of 7 February 2002 satisfy M.R.E. 201 and 201A requirements for being granted judicial notice. The government respectfully requests that this Honorable Court grant the same.

I have served the foregoing on Mr. William Cassara and CPT Ryan Dowdy via electronic mail, this 20th day of March, 2006.

//SIGNED// Christopher E Ellis

CHRISTOPHER E. ELLIS
CPT, JA
Trial Counsel

[redacted] UNCLASSIFIED

THE WHITE HOUSE
WASHINGTON

February 7, 2002

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR OF CENTRAL INTELLIGENCE
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of al Qaeda and Taliban Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm -- ushered in not by us, but by terrorists -- requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

2. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:

a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.

b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to

[redacted]
Reason: 1.5 (d)
Declassify on: 02/07/12

exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.

c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."

d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.

5. I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

6. I hereby direct the Secretary of State to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach.

[redacted]

United States)
)
v.)
)
PFC Damien M. Corsetti)
Company A)
519th Military Intelligence Battalion)
Fort Bragg, North Carolina 28310)

Response to Request for Judicial Notice

March 22, 2006

COMES NOW the accused, by and through the undersigned counsel and hereby objects, in part, the government request for judicial notice.

The defense opposes the request to have this Court take Judicial Notice of the White House Memorandum. Such a document is clearly outside of the realm of material for which a court can take judicial notice. It is the equivalent of a letter from the President to his advisors.

WHEREFORE, the government request should be denied in part.

William E. Cassara, Esquire
Civilian Defense Counsel

I hereby certify that a copy of this document was served on the Trial Counsel and on the Military Judge on March 22, 2006

William E. Cassara, Esquire
Civilian Defense Counsel

APPELLATE EXHIBIT XIII

IN A GENERAL COURT-MARTIAL OF THE UNITED STATES
U.S. ARMY TRIAL JUDICIARY, THIRD JUDICIAL CIRCUIT

UNITED STATES V. DAMIEN M. CORSETTI PFC, U.S. Army A CO, 519TH MI BN, FORT BRAGG, NC	)	MOTION FOR ADMISSION OF DEPOSITION OF WITNESS 20 MARCH 2006

I. RELIEF SOUGHT

COMES NOW the Government, and requests that this Honorable Court admit into evidence in the case-in-chief the deposition of a witness in the above-styled case, Ahmed al Darbi.

II. BURDEN

The moving party, in this case the Government, must prove any factual issues by a preponderance of the evidence. See Manual for Courts-Martial, R.C.M. 905(c)(1).

III. FACTS

The accused is charged with, inter alia, several specifications of abuse directed against Ahmed al Darbi, a.k.a. BT 264, who was a detainee at the Bagram Collection Point, Afghanistan, during 2002. At the time of the alleged misconduct, the accused served as an interrogator at that facility, while Ahmed al Darbi was a detainee. Later, Ahmed al Darbi was transferred to the US detention facility at Guantanamo Bay, Cuba, where he has remained.

In 2004 and again in 2005, while detained at Guantanamo, Ahmed al Darbi made the accusations of abuse. Ahmed al Darbi stated that the accused, during interrogations conducted in 2002, had: watched his interrogation partner throw articles of garbage and soiled toilet paper onto Ahmed al Darbi's person, without intervening; himself thrown articles of garbage onto Ahmed al Darbi; sat on top of Ahmed al Darbi; put cigarette ash onto Ahmed al Darbi; walked across the handcuffs of Ahmed al Darbi; forcefully pulled hairs out of Ahmed al Darbi's chest; struck Ahmed al Darbi on the leg, chest and groin; showed Ahmed al Darbi a condom and his penis and stated "I'm going to fuck you," or words to that effect. These allegations formed the basis for charges and specifications under Articles 92, 128, and 134 of the UCMJ. (See Charge Sheet for more information).

APPELLATE EXHIBIT XLV

The Convening Authority, BG Lennox, ordered that Ahmed al Darbi's deposition be taken before 10 March 2006. CPT Craig Drummond, Office of the Staff Judge Advocate, Fort Bliss, TX, was appointed as the Deposition Officer. (See attached orders). Government counsel coordinated court reporter support, vehicular support, theater clearances, translator support, and other necessary matters for all personnel. The deposition was in fact held on 8 March 2006, behind "the wire" at Camp Delta, Guantanamo Bay, Cuba, and was in fact the first military deposition held there. (See deposition transcript for more information).

At all times relevant to the trial of this case, Ahmed al Darbi has remained in custody at the maximum security US facility at Guantanamo Bay, Cuba. He is a foreign civilian and currently awaits a hearing before a Military Commission. An USMC O-5 assigned to the Office of Military Commissions informed government trial counsel that this commission would be delayed until such time as the Army completed its investigation of the accused (which had begun after the deaths at the Bagram Collection Point in December 2002). This officer's name is protected information and can be divulged to the Court in any more secure format than that of a motion.

IV. EVIDENCE

1. The deposition transcript (still being authenticated by CPT Drummond)
2. Appointment memorandum/CPT Drummond
3. Order for Deposition of Ahmed al Darbi signed by the Convening Authority

V. LAW

1. R.C.M. 905(c) (1)
2. R.C.M. 702
3. M.R.E. 804
4. M.C.M. Article 49
5. United States v. Vanderwier, 25 M.J. 263 (1987)
6. United States v. Dieter, 42 M.J. 697 (1995)
7. United States v. Cokely, 22 M.J. 225 (1986)
8. California v. Green, 399 U.S. 149, 158 (1970)
9. United States v. Pollard, 38 M.J. 41, 49 (1993)
10. United States v. Graf, 35 M.J. 450, 465 (CMA 1992)
11. United States v. Wellington, 58 M.J. 420 (2003)
12. M.R.E. 807

VI. ARGUMENT

The deposition of Ahmed al Darbi qualifies for admission into evidence in the case in chief because it satisfies both statutory (MCM) and Constitutional requirements.

A. Article 49

The deposition was taken pursuant to all conditions set forth in Article 49, UCMJ, which provides in part:

> (d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence, or in the case of audiotape, videotape, or other similar material, may be played in evidence before any military court or commission in any case not capital...if it appears
>
> (1) that the witness resides or is beyond the State, Territory, Commonwealth, or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing;
>
> (2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing

This deposition was taken in front of a duly appointed deposition officer who is also a JAGC officer. The court reporter was a paralegal NCO (E-7/SFC) who was of course sworn in. (The deposition officer is currently in the process of authenticating the transcript and his proximity to this Court will ensure that an authenticated copy will be provided with the utmost celerity upon his review and completion of the process). The Defense was fully informed about the deposition. Both Defense counsel attended. So did the accused (at which the accused expressly waived his right to personally confront the witness, and instead relied upon his attorneys to cross examine Ahmed al Darbi while the accused observed the proceedings via closed-circuit TV). Thus, the initial procedural concerns were all satisfied.

The unavailability analysis is also satisfied because the witness, Ahmed al Darbi, is unavailable within the meaning of Article 49. He clearly lives outside the 100 mile limit from Fort Bliss and is in fact OCONUS. He is a foreign civilian who is under military custody at Guantanamo Bay, in a state of imprisonment. His confinement cannot change unless and until he is acquitted by a Military Commission; the commission will not hear the matter of Ahmed al Darbi until the case at bar has been fully adjudicated. Further, he is nonamenable to the process of this Court in that he would not be able to come to the United States for reasons of immigration law (he is not American nor eligible for a visa). Finally, it would be unreasonable to require his presence for several very practical reasons, to include massive physical security requirements and complicated media arrangements, all of which would seriously disrupt the trial of this case.

The plain language of Article 49 contemplates that witnesses sometimes become unavailable. Its remedy is to admit a deposition, such as this one that was taken in full compliance with its requirements.

B. MRE 804

This deposition is admissible as former testimony under Military Rule of Evidence 804, which states:

> a. Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness. (1) Former testimony. Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. A record of testimony...is admissible under this subdivision if such a record is a verbatim record.

There is (or shortly will be) a complete verbatim record of this deposition. The deposition is to be used in the present case. Both the government and Defense examined the witness (in fact, the Defense's cross examination is much longer than the government's direct examination).

MRE 804(a)(6) recognizes "unavailability" pursuant to Article 49 (analyzed above). The government submits that this deposition was duly taken from an unavailable witness and is admissible under both Article 49 and MRE 804.

C. RCM 702

This deposition was also properly taken under, and pursuant to, RCM 702, which states:

> b. In general. A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial.

It is self-evident that there are "exceptional circumstances" in this case. The alleged victim is suspected of being a member of a terrorist organization, and is imprisoned in Cuba. The accused supposedly committed indecent acts against him during an interrogation in Afghanistan. The trial is in Texas. The list could easily go on. But the fact remains that a deposition was vital to preserve evidence necessary for the administration of justice, especially when the witness is unavailable to come to court.

RCM 702 has many procedural requirements for taking a deposition. It is not necessary to go through each one in detail, but in short, they were all satisfied. This deposition was taken in a formal setting, pursuant to an order from the Convening Authority (RCM 702(b)). The deposition officer was properly detailed (d) and caused the proceedings to be recorded (e)(6). Defense counsel

had already been assigned (d)(2) and participated, putting objections on the record (e)(7). The witness testified under oath (g)(1)(B).

D. Confrontation Clause

This deposition meets the requirements of applicable case law. Two cases on point provide an outline for meeting admissions requirements for depositions in military criminal cases. They provide the following guidance: "The Confrontation Clause of the Sixth Amendment places additional limitations on the use of depositions...In order for a deposition to be used at trial, the witness must be 'unavailable' both in terms of the hearsay prohibition of MRE 804(b)(1) and in terms of the Confrontation Clause." (United States v. Dieter, 42 M.J. 697 at 699, quoting United States v. Vandermier, 25 M.J. 263 at 265).

Under both MRE 804(b)(1) and Article 49, UCMJ, Ahmed al Darbi is unavailable, as analyzed above. It is not a matter of the government not wanting to bring him to Fort Bliss; it is basically impossible to do so. Thus, his former testimony should be allowed into evidence via deposition, pursuant to the former testimony exception to the hearsay rule.

Concerning the Confrontation Clause, the Dieter court continued:

> "...A witness is not 'unavailable' in terms of the Sixth Amendment 'unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial (citing Barber v. Page, 390 U.S. 719, 724-725 (1968). The government must exhaust every reasonable means to secure the witness' live testimony. (United States v. Ortiz, 35 M.J. 391 (C.M.A. 1992). In determining whether to admit a deposition when a witness is temporarily unavailable, the military judge should consider all the circumstances, including: the importance of the testimony, the amount of delay necessary to obtain the in-court testimony, the trustworthiness of the alternative to live testimony, the nature and extent of earlier cross-examination, the prompt administration of justice, and any special circumstances militating for or against delay." (at 699, quoting Vandermier at 266 and United States v. Cokely, 22 M.J. 225 (C.M.A. 1986).

Applying these standards to the case at bar, the government has fully addressed any Sixth Amendment concerns. First, the government has made a "good faith effort" under the meaning of Barber v. Page to obtain Ahmed al Darbi's presence at trial. In Barber, the prosecutors did not make any effort to avail themselves of the presence of out of state witnesses by utilizing either inter-prison cooperation or by a special law that allowed prosecutors to obtain the attendance of ex-prisoners who had since returned to civilian life.

The Barber set of facts is completely distinguished by those in the present case. Trial counsel has twice traveled to Guantanamo Bay, Cuba and verified the following:

That Ahmed al Darbi is in fact imprisoned there, that he is suspected of being a member of a terrorist organization, that he is waiting for a military commission to hear his case, that he is not an American citizen who can travel to the United States without a visa, and that he has in fact made allegations about detainee abuse during interrogations conducted in Afghanistan by the accused (see attached four sets of statements given by al Darbi concerning these allegations). Further, the US base at Guantanamo Bay is a very secure installation. It requires substantial theater, country, and local clearances to be issued in order to actually meet with a detainee. (And there is no existing cooperative protocol nor statute in place to get a detainee out of Guantanamo and into a stateside court). Not only did the government trial counsels overcome all of these obstacles in order to verify the witness's unavailability, the government went several steps further. The government in this case facilitated Defense access to the witness, culminating with the Defense's lengthy cross-examination in a first-of-its-kind deposition.

Hence, consistent with the case law, the government has exhausted every reasonable means to secure Ahmed al Darbi's presence at trial. He simply cannot come to the United States. Technically, this witness is "temporarily" unavailable only in that he will some day (presumably) get out of the Guantanamo Bay prison facility. However, that day will not come until his military commission is heard, and this is presently on hold pending the outcome of the case at bar. This is of course a "catch 22" situation that makes him arguably more than "temporarily" unavailable.

Nonetheless, under the analysis provided by the above courts, it is the job of the military judge to conduct a balancing test considering the totality of the circumstances as to whether to admit this deposition. Under the factors listed by the Vandermier court, the government again has met the burden. First, this testimony is very important. It directly supports six of the thirteen specifications charged against the accused. Second, the amount of delay necessary to obtain the in-court testimony would be substantially, even indefinitely long. There is basically no way for the Office of Military Commissions to move forward until this case is resolved, and thus no end in sight if this deposition were not to come into evidence. Third, the trustworthiness of the alternative (the deposition) is high. The deposition was taken before an active duty JAGC officer, a sworn court reporter, sworn translator (who put his extensive credentials on the record) and a sworn witness, all in an environment very similar to a courtroom. Fourth, after the government direct examination, the Defense conducted a lengthy cross examination (the "greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158 (1970). Fifth, the only way for the administration of justice to be "prompt" in this case would be to admit the deposition into evidence. Sixth, there are special circumstances militating against delay here—such as the fact that this case is being tried three and a half years after the events took place. Further delay would negatively affect the memories and even the availability of other witnesses, many of whom have returned to civilian life or are getting ready to do so. Plus, the Defense has already received two delays; it's time to try this case.

E. Alternative—MRE 807

This Court could also view the deposition as admissible under the Residual Exception of MRE 807, because it is evidence material to the issues in this case, more probative than any other evidence which can be reasonably obtained, and admission would serve the general purpose of the Military Rules of Evidence and be in the interests of justice.

The accused's charges relevant to this deposition essentially rest upon evidence of offensive touching and conduct toward Ahmed al Darbi. The witness's testimony regarding this conduct is obviously material to the accused's guilt or innocence. Similar analysis should be applied to the other factors. Ahmed al Darbi's testimony is more probative than any other evidence which can be reasonably obtained. It is the only known evidence that supports the charges of abuse that allegedly occurred against this witness by the accused. Admission would serve the interests of justice because a jury would be able to consider all relevant, known evidence and ascertain its truth and its weight, thus enabling a fully-informed decision.

"A military judge has considerable discretion in determining whether to admit residual hearsay." United States v. Pollard, 38 M.J. 41, 49 (1993). Further, the Court in United States v. Kelley, 45 M.J. 275 at 281 provided a succinct review of analyzing residual hearsay:

> "The rules of evidence contemplate that a military judge will be "a real judge," exercising discretion rather than slavishly applying mathematical formulae. See United States v. Graf, 35 M.J. 450, 465 (CMA 1992) ("In our view, the Uniform Code of Military Justice contemplates that a military judge be a real judge as commonly understood in the American legal tradition."). Our holding favors neither prosecution nor defense. It favors the proponent of evidence, either prosecution or defense, by broadening the number of factors that may be considered. A holding favoring admissibility is consistent with the purposes of the rules. See Mil.R.Evid. 102, Manual for Courts-Martial, United States (1995 ed.) ("These rules shall be construed . . . to the end that the truth may be ascertained"); Mil.R.Evid. 402 ("All relevant evidence is admissible, except as otherwise provided . . . .").

United States v. Wellington, 58 M.J. 420 (2003) stands for the proposition that residual hearsay is admissible under circumstances that satisfy both a reliability and a necessity test. There, the original declarant died; here he is unavailable under the meaning of MRE 804/Article 49. CAAF satisfied the first (reliability) prong by analyzing the statements to see if they met or approached the inherent reliability standard of enumerated hearsay exceptions. In this case, Ahmed al Darbi's deposition meets the MRE 804(b)(1) Former Testimony exception, as previously stated and explained above. In satisfying the second (necessity) prong, CAAF concluded that "there is no other more probative evidence of the fact." (at 425). Ahmed al Darbi's Guantanamo incarceration makes him unavailable. Further, there is no other *more* probative evidence of the fact (that Ahmed al Darbi was subjected to unlawful, offensive physical contact) than his own

words, spoken under oath and recorded during a deposition. There is only one person who experienced this alleged abuse. Necessity dictates that Ahmed al Darbi's testimony be admitted.

VII. CONCLUSION

This deposition is admissible under all relevant law, both statutory and Constitutional. There are only two ways to hear Ahmed al Darbi's testimony; either by admitting the deposition, or by convening the necessary portion of the court-martial at Guantanamo Bay, Cuba. The government respectfully requests that in light of all the circumstances in this case, that the legally sufficient deposition proceeding taken from an unavailable witness be admitted into evidence.

I have served the foregoing on Mr. William Cassara and CPT Ryan Dowdy via electronic mail, this 21st day of March, 2006.

//SIGNED// Christopher E. Ellis

CHRISTOPHER E. ELLIS
CPT, JA
Trial Counsel

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

DETERMINATION OF THE DEPUTY SECRETARY OF DEFENSE

Ahmed al Darbi is an alien who is currently detained by the Department of Defense as an enemy combatant at Guantanamo Bay, Cuba. Due to his status as a detained enemy combatant, I will not authorize Mr. Al-Darbi to travel to Fort Bliss for the court-martial of Private First Class Damien Corsetti. Accordingly, I have determined that he is unavailable under the meaning of Military Rule of Evidence 804 and Article 49 of the Uniform Code of Military Justice.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed: March 28, 2006

Gordon England
Deputy Secretary of Defense

Encl 1

United States	)	
	)	Response to Government Motion for
	)	Admission of Deposition
v.	)	
	)	
PFC Damien M. Corsetti	)	March 21, 2006
Company A	)	
519th Military Intelligence Battalion	)	
Fort Bragg, North Carolina 28310	)	

1. Nature of Response: The defense moves to prevent the Government from using deposition testimony of one of the alleged victims in lieu of producing him at trial.

2. Summary of Facts:

a. The defense accepts the government's statement of facts in their motion, with the following exceptions:

b. The defense is unaware of whether this the first deposition taken at Guantanamo Bay, Cuba.

c. The defense has no knowledge of whether Mr. al Darbi will stand trial before a commission.

d. Upon the defense and government arriving at the prison at GTMO, the alleged victim refused to come out of his cell, and refused to speak to anyone. It was not until after he spoke with an unnamed person over several hours that the alleged victim agreed to give testimony.

e. When interviewed by the defense, Mr. al Darbi answered a few cursory questions from the defense, and then refused to answer any further questions. Mr. al Darbi stated he would not answer any questions about his background, why he was detained, his activities upon arriving at Bagram, or other relevant matters.

APPELLATE EXHIBIT XV

f. When deposed, Mr. al Darbi again refused to answer salient questions from the defense.

3. Discussion:

The Deposition Was Taken in Violation of R.C.M. 702

The Court of Military Appeals has held that a deposition may be required under circumstances other than to preserve the testimony of a necessary witness when that witness is likely to be unavailable for trial. R.C.M. 702, Analysis. See United States v. Killebrew, 9 M.J. 154 (C.M.A. 1980); United States v. Cumberledge, 6 M.J. 203, 205, n.3 (C.M.A. 1979) (deposition may be appropriate means to compel interview with the witness when government improperly impedes defense access to a witness); United States v.Chuculate, 5 M.J. 143, 145 (C.M.A. 1978) (deposition may be appropriate means to allow cross-examination of an essential witness who was unavailable at the Article 32 hearing); United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976) (deposition may be an appropriate means to cure error where witness was improperly found unavailable at Article 32 hearing).

R.C.M. 702(g)(1)(A)(ii) provides that an accused has the right to be represented at an oral deposition by counsel "as provided in R.C.M. 506." R.C.M. 506 states an accused has the right to be represented by civilian counsel at no expense to the government, and by detailed military counsel or military counsel of his own selection. The right to civilian counsel is grounded in Article 38(b), UCMJ, and the right to be effectively represented by counsel is, of course, guaranteed by the Sixth Amendment to the U.S. Constitution. United States v. Hamilton, 36 M.J. 927 (1993.)

Article 47, MCM, guarantees all parties to a trial the equal access to witnesses. In the instant case, the defense was not provided equal access to Mr. al Darbi, as he refused to answer salient questions both prior to the deposition, and at the deposition itself. In addition, as noted in the defense's Motion to Abate, the government has failed to provide the defense with discovery of matters that would have been relevant to the taking of Mr. al Darbi's deposition. The defense was unable to interview Mr. al Darbi prior to the date of the deposition, due to logistical and security problems.

As a result of the above, what occurred here was not a deposition but, rather, a question and answer period for the government. The government asked all of their questions, and got answers to all of them. The defense, on the other hand, was estopped from asking those questions necessary to adequately defend their client.

The deposition was not videotaped and, as a result, it appears the government will simply move to admit the written deposition into evidence. This will deny the panel the right to judge Mr. al Darbi's credibility, and to see for themselves his refusal to answer relevant questions.

Finally, the interpreter in this case did not meet the qualifications of MRE 604, which provides that "an interpreter is subject to the provisions of these rules relating qualifications as an expert and the administration of an oath or affirmation that the interpreter will make a true translation." Rule for Courts-Martial 502(e)(1) similarly provides that "the qualifications of interpreters and reporters may be prescribed by the Secretary concerned." Article 28, UCMJ, enunciates the same requirement.

The authors of the MREM explain that MRE 604 "establishes specific procedures for using an interpreter. *First, the interpreter must be qualified in the same manner as any*

expert witness. This includes proof that the interpreter is competent to translate the foreign language into English." (MREM, supra, at 715.)

In the instant case, the interpreter was not qualified as an interpreter. In the colloquy leading up to his being sworn in, it is obvious from the transcript that the interpreter not only was not a certified translator, but did not even understand the defense counsel's questions regarding his qualifications. He had never interpreted in a court proceeding before, and could not provide any documentation as to his abilities. This is akin to picking someone off the street, asking them if they are bilingual, and then having them server as a translator in an important court proceeding.

Neither the accused nor his counsel speaks Arabic. As such, it was impossible for us to know whether the proceedings were being properly translated. However, it became apparent at several times during the proceedings that the interpreter was having difficulty with the process. While his skills may be adequate for detainee interrogations, they are certainly not adequate for the court room. The defense does not oppose the admission of a deposition in this case. The defense objects to the admission of this deposition.

4. Relief Requested: Denial of the government's motion to admit the deposition of Mr. al Darbi.

5. Evidence: Transcript of deposition, Order of the Convening Authority, and related e-mail traffic.

6. Oral Argument: Requested.

William E. Cassara, Esquire
Civilian Defense Counsel

UNITED STATES	)	
	)	
v.	)	Motion to Suppress
	)	Eyewitness Identifications
	)	
CORSETTI, DAMIEN	)	
PFC, U.S. Army,	)	March 20, 2006
A Company,	)	
519TH MI Battalion,	)	
Fort Bragg, NC	)	

I. MOTION

COMES NOW the accused, by and through counsel, pursuant to Military Rule of Evidence 321(c)(2), moves the Court to exclude the unlawful pre-trial identifications of PFC Corsetti, and prevent the use of his identification at photographic line up at trial.

II. BURDEN OF PROOF/STANDARD OF PROOF

In accordance with M.R.E. 321(d)(2) the government bears the burden of demonstrating by a preponderance of the evidence that the identification was reliable under the circumstances. If the Court finds the identification unreliable, the government is prohibited from admitting any subsequent identifications, including in-court identifications, unless it can demonstrate by clear and convincing evidence that the later identifications were not derived from the unreliable identification.

III. FACTS

The accused is charged with abusing a detainee, Ahmed Al Darbi, and with sexually assaulting Ahmed al Darbi. When first questioned by authorities about possible abuse, Mr. al Darbi denied being abused. When questioned again, he detailed salacious allegations of abuse against the accused and others. He initially referred to the accused as the "Fat, Italian guy." Later, he was shown a photographic line up of six individuals, the first of whom was the accused. He identified the accused as his primary assailant.

Mr. al Darbi was immediately shown a second set of six pictures. Again, the accused was the first picture in the line up. Again, Mr. al Darbi allegedly identified the accused.

During a deposition in this case at Guantanamo Bay, Cuba, the trial counsel showed Mr. al Darbi, the exact same two sets of pictures, and Mr. al Darbi again identified the accused.

APPELLATE EXHIBIT XVI

The Defense is willing to stipulate to the above facts for the purposes of the motion.

IV. LAW

The Defense relies on the following authorities in support of its motion:

a. Amend V, U.S. Const.
b. Mil. R. Evid. 321
c. Mason v. Brathwaite, 432 U.S. 98 (1977)
d. Stovall v. Denno, 388 U.S. 293 (1967)
e. Neil v. Biggers, 409 U.S. 188 (1972)
f. United States v. Rhodes, 42 M.J. 287 (1995)

V. ARGUMENT

The Due Process Clause of the Fifth Amendment mandates the exclusion of any pretrial identification that is so unnecessarily suggestive as to create a substantial likelihood of a mistaken identification. *See Manson v. Brathwaite, 432 U.S. 98 (1977) and Stovall v. Denno, 388 U.S. 293 (1967).* In furtherance of this constitutional directive, Military Rules of Evidence 321(a) and (d)(2), mandate the exclusion of unreliable pre-trial identifications.

The Rule has incorporated a two-prong test based on the Supreme Court case law for determining the admissibility of eyewitness identification:

1) Was the pre-trial identification unnecessarily suggestive? *See Stovall v. Denno, 388 U.S. 293 (1967).*

2) If the pretrial identification was "unnecessarily suggestive", was it conducive to a substantial likelihood of misidentification? *See Manson v. Brathwaite, 432 U.S. 98 (1976).*

In assessing the first prong of the analysis, whether the pretrial identification was unnecessarily suggestive, the Supreme Court laid out five factors in *Neil v. Biggers, 409, U.S. 188 (1972),* to be considered for whether an identification is unnecessarily suggestive:

1. Did the witness have an opportunity to view the criminal at the time of the crime?

2. What was the witness' degree of attention?

3. What was the accuracy of the witness' prior description of the alleged criminal?

4. What was the level of certainty demonstrated by the witness at that confrontation?

5. What was the length of time between the crime and the confrontation?

Id. at .

A. The Photographic Line-Up was Unnecessarily Suggestive

The photographic lineup conducted in this case was unnecessarily suggestive. The accused was the first person in both photographic lineups, both times they were shown to Mr. al Darbi.

Although the primary method of description by the witness was the accused height and weight, the photographs were taken with no reference point for the height of the individual. In addition, all of the photographs were taken of an individual from the shoulders up, so there is no indication as to build in the photographs.

Mr. al Darbi further indicated as the existence of several tattoos his alleged assailant had. None of the photographs depicts tattoos. The photos in question were in the direct and sole possession of the government at all times, yet there is no indication of whether these photos were shown to Mr. al Darbi prior to the line up.

Hair and mustache was another feature that was cited by the witness. He stated that his assailant wore a beard. However, instead of focusing in on individuals with hair and a mustache cited by the witness, the CID agents chose individuals with no facial hair.

Mr. al Darbi admits that the majority of the time he was assaulted he was wearing a hood. He also admits that the accused is the first person he saw at the Bagram prison, and that the accused frightened him greatly.

The length of time between the alleged assault, and the photographic line-up was substantial. There is a significant probability that the alleged victim would not have been able to identify anyone outside of the unduly suggestive line-up.

B. The Pretrial Identification was Conducive to a Substantial Likelihood of Misidentification

The pretrial identification was conducive to a substantial likelihood of misidentification. PFC Corsetti's photograph was the first one in both line-ups, and the alleged victim was only shown two photographic line-ups. At no time has he made a personal identification of the accused. As noted, there is no indication as the circumstances surrounding the photographic line-up, and whether Mr. al Darbi was shown other photos of the accused or anyone else.

C. The Unduly Suggestive Photographic Lineup would Taint any In-Court Identification

The Government intends on using Mr. al Darbi's photographic line-up identification at the deposition in lieu of his live testimony. As such, this Court already has his "in-court" identification. The circumstances surrounding the first photographic line-up to CID, and the second line-up identification at the deposition, create a significant chance of a misidentification.

VI. CONCLUSION

Based upon the foregoing, the Defense respectfully moves the Court to exclude all pre-trial identifications in this case and to preclude them from making an in-court identification of PFC Corsetti.

William E. Cassara, Esquire
Civilian Defense Counsel

I hereby certify that a copy of this document was served on the Trial Counsel and on the Military Judge on March 20, 2006

William E. Cassara, Esquire
Civilian Defense Counsel

IN A GENERAL COURT-MARTIAL OF THE UNITED STATES
US ARMY TRIAL JUDICIARY, THIRD JUDICIAL CIRCUIT, FORT BLISS, TEXAS

UNITED STATES	)	Govt Response to
	)	**Motion to Suppress**
v.	)	**Eyewitness Identifications**
	)	
CORSETTI, DAMIEN	)	
PFC, U.S. Army,	)	**24 March 2006**
A Company,	)	
519TH MI Battalion,	)	
Fort Bragg, NC	)	

COMES NOW the Government, and requests that this court deny the Defense Motion to Suppress Eyewitness identifications, stating as follows:

I. BURDEN OF PROOF/STANDARD OF PROOF

In accordance with M.R.E. 321(d)(2) the Government bears the burden of demonstrating by a preponderance of the evidence that an out of court identification was reliable under the circumstances. If the Court finds the identification unreliable, the government is prohibited from admitting any subsequent identifications, including in-court identifications, unless it can demonstrate by clear and convincing evidence that the later identifications were not derived from the unreliable identification.

II. FACTS

A. Out of Court identification during June 2004 CID interview

On June 28, 2004, CID agents CW4 Angela Birt and CW3 Daniel Carton traveled to Guantanamo Bay, Cuba and questioned Mr. Ahmad Al-Dharbi about the deaths of two detainees at the Bagram Collection Point, Afghanistan in December 2002. As part of that investigation, they showed Mr. Al-Dharbi 66 photographs of male soldiers and 18 photographs of female soldiers and asked him if he recognized any of the soldiers. (Attachment "1") The photographs were shown to Mr. Al-Dharbi in the order of the letters shown on the bottom of the pages (A-N). Mr. Al-Dharbi identified more than fifteen soldiers who were present at the BCP in 2002, PFC Corsetti being only one of those he identified.

Mr. Al-Dharbi spoke to the CID agents about the interaction between detainees and the soldiers he recognized. He was not restricted to talking about PFC Corsetti alone, or about events that had happened to himself. During the CID interview, without being shown any

APPELLATE EXHIBIT XVII

pictures of PFC Corsetti's body, Mr. Al-Dharbi told CID agents that PFC Corsetti had a tattoo of the Virgin Mary on his forearm. He then identified PFC Corsetti as having committed the acts with which he is presently charged. The CID agents did not coerce or suggest to Mr. Al-Dharbi that he choose PFC Corsetti or any of the other approximately 15 soldiers he described.

B. In Court identification during March 2004 deposition

On 8 March 2006, Mr. Al-Dharbi was deposed at Guantanamo Bay, Cuba, in order to use his testimony at trial in this case. PFC Corsetti traveled to Guantanamo Bay, ostensibly to be present during the deposition. A few minutes before the deposition, defense counsel informed trial counsel that PFC Corsetti would not be taking present in the deposition room, a move clearly designed to deprive the Government of the ability to have Mr. Al-Dharbi identify him.

During the deposition, Mr. Al-Dharbi described a soldier who performed various lewd and violent acts with which PFC Corsetti is charged. Before being shown any photographs, Mr. Al-Dharbi stated that his torturer was a big, fat, Italian guy with a tattoo of the Virgin Mary on his forearm. At the end of direct examination, Mr. Al-Dharbi looked at 2 sets of six photographs and identified PFC Corsetti twice. These twelve photographs were 2 out of the 14 sets of photographs that Agents Birt and Carton had shown Mr. Al-Dharbi in June 2004. Contrary to the Defense assertions in its motion, PFC Corsetti's photos were not the first in each set; they were the second and sixth respectively.

III. LAW

Neil v. Biggers, 409 U.S. 188 (1972)

IV. ARGUMENT

The defense correctly cites to Neil v. Biggers, 409, U.S. 188 (1972), as proper authority for the analysis used to determine whether a pretrial identification was unnecessarily suggestive. The Government, through the deposition transcript and the testimony of a CID agent can show that each of the elements has been met. A synopsis of that evidence is set out below.

1. **Did the witness have an opportunity to view the criminal at the time of the crime?** Mr. Al-Dharbi was in a wooden isolation room at the Bagram Collection point with PFC Corsetti for a "long time". (Depo. P. 11) PFC Corsetti kicked Mr. Al-Dharbi in the groin and stomach, and poked him in the chest and neck with a finger - presumably being less than an arm and a leg length away. (Depo. P. 12) PFC Corsetti pulled Mr. Al-Dharbi's chest hairs – presumably being an arms length away. (Depo. P. 14) PFC Corsetti placed his penis against Mr. Al-Dharbi's face, an exercise that would normally requires close proximity to the victim. (Depo. P. 14) PFC Corsetti performed simulated sexual acts in Mr. Al-Dharbi's anal area and threatened to rape him (Depo. P. 14-16). (It should be noted that Mr. Al-Dharbi testified that he was hooded during the simulated sex) Finally, PFC Corsetti stepped on Mr. Al-Dharbi's handcuffed hands and sat on Mr. Al-Dharbi's chest. (Depo. P. 17) Clearly Mr. Al-Dharbi had an intimate opportunity to see and hear PFC Corsetti on various occasions.

2. **What was the witness' degree of attention?** Being kicked, beaten, stepped on, and having genitalia placed in one's face are attention-focusing periods in the life of a detainee. It is highly probable that Mr. Al-Dharbi was keenly aware of the identities of those who were inflicting these acts on his body.

3. **What was the accuracy of the witness's prior description of the alleged criminal?** The description was highly accurate as it contained an element of detail that was theretofore unknown to the CID agents. In the June 2004 CID interview Mr. Al-Dharbi identified PFC Corsetti as having a tattoo of the Virgin Mary on his forearm. PFC Corsetti, in fact, had such a tattoo while stationed in Afghanistan.

4. **What was the level of certainty demonstrated by the witness at the June 2004 CID interview?** Mr. Al-Dharbi did not seem uncertain at all about his identification of PFC Corsetti or his tattoo.

5. **What was the length of time between the crime and the confrontation?** Approximately 1 ½ to 2 years had elapsed between the time of the abuse and the June 2004 CID interview. The length of time is not a significant factor in this case because the lineup contained 80+ photographs and Mr. Al-Dharbi's identification of PFC Corsetti was certain. Furthermore, identification of the Virgin Mary tattoo could not have been the result of a suggestive lineup or failed memory.

The Neil v. Biggers factors have been met, and the June 2004 identification was not unnecessarily suggestive.

B. The Pretrial Identification was not Conducive to a Substantial Likelihood of Misidentification

The defense argues that: "[t]he pretrial identification was conducive to a substantial likelihood of misidentification. PFC Corsetti's photograph was the first one in both line-ups, and the alleged victim was only shown two photographic line-ups. At no time has he made a personal identification of the accused." These assertions are untrue.

The one *pretrial* identification of PFC Corsetti was done during CID questioning of MR. Al-Dharbi in June 2004. In the June 2004 lineup, Mr. Al-Dharbi was shown 14 panels of photographs, each with six pictures (total 84 photographs). PFC Corsetti was not the first photo in any of these panels. His was the 2nd and 6th photograph in the first two panels. Eleven of the panels had male soldiers (66 photos) and 3 panels had female soldiers (18 photos).

The purpose of the 2004 showing was to determine if Mr. Al-Dharbi recognized any soldiers *who had mistreated the two detainees who had died at Bagram*. Mr. Al-Dharbi recognized, for various reasons, more than fifteen of the soldiers in the lineup and described his contact with them, some good and some bad. Contrary to the defense assertions, the identification of soldiers who had abused Mr. Al-Dharbi was not something the CID agents were seeking. The purpose of the lineup was to determine who had assaulted the two dead detainees.

The March 2006 deposition was not a "pre-trial identification". As defense counsel acknowledges in the last portion of his *Motion to Suppress Eyewitness Identifications*, the deposition was an in-court identification, at which the defense had an opportunity to cross-examine the witness as to his ability to observe PFC Corsetti and the surety of his memory.

An in-court identification is usually composed of a verbal identification of the Accused sitting at the defense table. Because the defense counsel chose not to have PFC Corsetti physically present in the deposition room, he made it impossible to conduct this type of personal in-court identification. However, the defense's tactical move made Mr. Al-Dharbi's deposition identification all the more strong. Rather than looking at PFC Corsetti alone at the counsel table, Mr. Al-Dharbi was able to identify him twice out of two sets of 6 photographs (Exhibit "2"), a feat statistically more difficult than physically pointing a finger at the lone Accused. Again, contrary to the defense assertion, PFC Corsetti was not the first photo in any of these panels.

V. CONCLUSION

The June 2004 lineup was not unreasonably suggestive. It did not the taint in-court identification at the March 2006 deposition. Both identifications should be submitted to the panel. For the foregoing reasons, the Government requests that the Court admit the identifications of PFC Corsetti by Ahmad Al-Dharbi done at Guantanamo Bay in June 2004 and March 2006.

/signed/

DAVID R. TRAINOR
CPT, JA
Trial Counsel

This is to certify that I have served the foregoing on defense counsel and the military judge this 24th day of March 2006.

/signed/

DAVID R. TRAINOR
CPT, JA
Trial Counsel

OFFICE OF THE CLERK OF COURT
US ARMY JUDICIARY
ARLINGTON, VIRGINIA 22203-1837

THE RECORD OF TRIAL HAS BEEN REVIEWED FOR RELEASE UNDER THE PROVISIONS OF THE FREEDOM OF INFORMATION ACT. THE DOCUMENT[S] DESCRIBED AS FOLLOWS HAVE BEEN REMOVED FROM THIS COPY OF THE RECORD BECAUSE THE RELEASE WOULD BE IN VIOLATION OF THE DOD FREEDOM OF INFORMATION ACT PROGRAM, DOD 5400.7-R, EXEMPTION (b)(6) 5 U.S.C. 552(b)6):

Photographs

UNITED STATES	)	**FORT BLISS, TEXAS**
v.	)	
CORSETTI Damien M.	)	**NOTICE UNDER MRE 404**
PFC, U.S. Army	)	
519th Military Intelligence Battalion	)	
Fort Bragg, North Carolina 28310	)	**21 March 2006**

COMES NOW THE GOVERNMENT, by and through its appointed representative, and files this, its Notice of matters to be introduced pursuant to Military Rule of Evidence 404, showing the Court as follows:

1.

The accused, PFC Damien M. Corsetti, is charged with two specifications of dereliction of duty, in violation of Article 92, UCMJ; one specification of failure to obey a general order, in violation of Article 92, UCMJ; three specifications of maltreatment of a subordinate, in violation of Article 93, UCMJ; one specification of wrongful use of hashish, in violation of Article 112a; three specifications of assault consummated by battery, in violation of Article 128, UCMJ; and three specifications involving indecent acts or language, in violation of Article 134, UCMJ.

2.

The Military Rules of Evidence provide:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:...evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a pertinent trait of character of the alleged victim of the crime is offered by an accused and admitted under Mil. R. Evid. 404(a)(2), evidence of the same trait of character, if relevant, of the accused offered by the prosecution....

Mil. R. Evid. 404(a), (a)(1). Further:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident....

Mil. R. Evid. 404(b). "While providing that evidence of other crimes, wrongs, or acts is not admissible to prove a predisposition to commit a crime, the Rule expressly permits use of such evidence on the merits when relevant to another specific purpose. Rule 404(b) provides

APPELLATE EXHIBIT XVIII

examples rather than a list of justifications for admission of evidence of other misconduct." *Analysis of the Military Rules of Evidence*, App. 22, M.R.E. 404(b).

3.

The following crimes, wrongs, or acts of PFC Damien M. Corsetti may be offered in evidence against him, at the trial of the case at bar:

a) Between on or about 1 August 2002 and on or about 1 February 2003, the accused made unlawful physical contact with a detainee during an interrogation at the Bagram Collection Point, Bagram Airfield, Afghanistan, by lying across the chest of the detainee, while said detainee was lying, face-up, on the floor of an interrogation room. A fellow interrogator witnessed the incident, and counseled the accused as to his improper physical contact with the detainee. Evidence of the incident is admissible under Mil. R. Evid. 404(b) to demonstrate a lack of mistake on the part of the accused, with regard to the impermissibility of physical violence against detainees, and to demonstrate the accused's motive, intent and/or plan with regard to his unlawful physical contact with detainees. Additionally, in the event the accused offers evidence of the violent character of any victim, evidence of the incident would be admissible under Mil. R. Evid. 404(a)(1), as evidence of the same trait of character.

b) Between on or about 17 November 2002 and on or about 10 December 2002, the accused made unlawful physical contact with BT 414 during an interrogation at the Bagram Collection Point, Bagram Airfield, Afghanistan, by kicking said detainee in the buttocks. Evidence of this incident is admissible under Mil. R. Evid. 404(b) to demonstrate the accused's motive, intent and/or plan with regard to his unlawful physical contact with BT 414. Additionally, in the event the accused offers evidence of the violent character of any victim, evidence of the incident would be admissible under Mil. R. Evid. 404(a)(1), as evidence of the same trait of character.

c) Between on or about 1 August 2002 and on or about 1 February 2003, the accused made unlawful physical contact with a detainee during an interrogation at the Bagram Collection Point, Bagram Airfield, Afghanistan, by placing his (the accused's) foot against the detainee's groin. Evidence of this incident is admissible under Mil. R. Evid. 404(b) to demonstrate the accused's motive, intent and/or plan with regard to his unlawful physical contact with detainees. Additionally, in the event the accused offers evidence of the violent character of any victim, evidence of the incident would be admissible under Mil. R. Evid. 404(a)(1), as evidence of the same trait of character.

d) On divers occasions between on or about 1 August 2002 and on or about 1 February 2003, the accused made unlawful physical contact with various detainees during interrogations at the Bagram Collection Point, Bagram Airfield, Afghanistan, by grabbing the beards of said detainees and pulling violently, jerking the heads of the detainees back and forth. Evidence of these incidents is admissible under Mil. R. Evid. 404(b) to demonstrate the accused's motive, intent and/or plan with regard to his unlawful physical contact with detainees. Additionally, in the event the accused offers evidence of the violent character of any victim, evidence of these

incidents would be admissible under Mil. R. Evid. 404(a)(1), as evidence of the same trait of character.

e) Between on or about 17 November 2002 and on or about 10 December 2002, the accused attempted to assault a detainee during an interrogation at the Bagram Collection Point, Bagram Airfield, Afghanistan, by directing an interpreter to tell the detainee that, if the detainee refused to cooperate, U.S. Military Intelligence personnel would bring the detainee's wife into the room and sexually assault her, repeatedly, in the detainee's presence. Evidence of this incident is admissible under Mil. R. Evid. 404(b) to demonstrate the accused's motive, intent and/or knowledge with regard to the vulnerability of detainees to coercion by means of sexual duress, and to demonstrate an absence of mistake on the part of the accused, with regard to nature of the subject approach. Additionally, in the event the accused offers evidence of the violent character of any victim, evidence of the incident would be admissible under Mil. R. Evid. 404(a)(1), as evidence of the same trait of character.

f) On divers occasions between on or about 1 August 2002 and on or about 1 February 2003, the accused made unlawful physical contact with various detainees during interrogations at the Bagram Collection Point, Bagram Airfield, Afghanistan, by caressing the heads of said detainees, and cradling the detainees' heads against his (the accused's) chest. Evidence of these incidents is admissible under Mil. R. Evid. 404(b) to demonstrate the accused's motive, intent and/or knowledge with regard to the vulnerability of detainees to coercion by means of sexual duress, and to demonstrate an absence of mistake on the part of the accused, with regard to nature of the subject conduct.

g) On divers occasions between on or about 1 August 2002 and on or about 1 February 2003, the accused made frequent, inappropriate comments of a graphically sexual nature, to include detailed descriptions of his interests in both oral and anal sodomy. Evidence of these incidents is admissible under Mil. R. Evid. 404(b) to demonstrate the accused's motive, intent and/or knowledge with regard to the subject practices, and to demonstrate an absence of mistake on the part of the accused, with regard to nature of the subject practices.

FOR CHRISTOPHER E. ELLIS
CPT, JA
Trial Counsel

I hereby certify that the above document was served on counsel for the accused via email to bill@williamcassara.com on 21 March 2006.

FOR CHRISTOPHER E. ELLIS
CPT, JA
Trial Counsel

United States	)	
	)	Response to Government Motion to
	)	Admit Evidence Under MRE 404 (b)
v.	)	
	)	
PFC Damien M. Corsetti	)	March 21, 2006
Company A	)	
519th Military Intelligence Battalion	)	
Fort Bragg, North Carolina 28310	)	

COMES NOW the accused, by and through the undersigned counsel, and hereby moves this Court to deny the government's motion to admit evidence of other acts under MRE 404 (b.)

The government moves to admit several alleged acts in order to purportedly show mistake of fact or, in the alternative, that the accused is a violent person. In reality, this is the classic case of attempting to show the accused is a bad person who abused detainees once and, therefore, did it again. Such a reason is clearly impermissible.

Several things are worth noting about the allegations raised by the government in this motion.

1. Several of the acts appear to be *charged* misconduct, not uncharged misconduct.

2. Several of the incidents do not appear to allege *misconduct* at all. Rather they appear to allege permissible actions on the part of the accused.

3. The government fails to allege, with any specificity, when the alleged incidents occurred, where they occurred, and who allegedly witnessed them. As such, the defense in not in a position to respond directly to the accusations without more information. By. way of further answering, the defense requests the equivalent of a bill of particulars for the alleged bad acts.

Addressing each of the allegations separately, the defense responds as follows:

a. As the defense does not intend on raising the defense of mistake of fact, this evidence is clearly impermissible. This evidence is clearly being used to show that the accused is a bad man, and should be punished. Further, the defense requests the name of the detainee, and the alleged witness in order to further respond.

b. This allegation seems to be encompassed by Specification 1 of Charge IV, and could be found by exceptions and substitutions. To allow the government to further raise

this allegation as uncharged misconduct is to essentially allow them two bites at the apple, and to reward the government for splicing the actions of the accused into two separate allegations. As further response, see a, supra.

c. The defense has no way of knowing what the government alleges, without more specificity. We do not know the name of the detainee, or who allegedly witnessed the event. As such, it is possible that the accused is already charged with this act. As further response, see a, supra.

d. There is no evidence that such contact, if it occurred, is impermissible. As further response, see a-c, supra.

e. See a-d, supra.

f. See a-d, supra.

g. Said comments, even if made, are clearly outside the ambit of 404 (b) as they do not even remotely relate to the allegations at bar.

WHEREFORE, the defense respectfully requests that the government's motion be denied.

5. Evidence-As the defense is unaware as to the substance of these allegations, it can not present evidence.

6. Oral Argument-Only in rebuttal.

William E. Cassara, Esquire
Civilian Defense Counsel

I hereby certify that a copy of this document was served on the Trial Counsel and on the Military Judge on March 22, 2006

William E. Cassara, Esquire
Civilian Defense Counsel

WILLIAM E. CASSARA
ATTORNEY AT LAW
918 HUNTING HORN WAY
EVANS, GEORGIA 30809
706-860-5769
706-868-5022 (fax)

PRACTICE LIMITED TO MILITARY LAW

March 22, 2006

MEMORANDUM THRU Office of the Staff Judge Advocate, HQ, U.S. Army Air Defense Artillery Center and Fort Bliss, Fort Bliss, Texas 79916

FOR Commander, HQ, U.S. Army Air Defense Artillery Center and Fort Bliss, Fort Bliss, Texas 79916

SUBJECT: Request for Production of Expert Consultant – U.S. v. PFC Damien Corsetti, Company A, 519th MI Battalion, Fort Bragg, NC 28310.

1. PFC Corsetti, by and through his counsel and pursuant to RCM 703, Manual for Courts-Martial, 2005 and MRE 706, the accused in the above pending court-martial, requests the appointment of Dr. Jerrold Post as a member of the Defense team under U.S. v. Toledo, 25 MJ 270 (CMA 1987).

2. A military accused has, as a matter of Equal Protection and Due Process, a right to expert assistance when necessary to present an adequate defense. U.S. v. Garries, 22 MJ 288 (CMA 1986); U.S. v. Robinson, 39 MJ 88 (CMA 1994), citing Britt v. North Carolina, 404 U.S. 226 (1971) and Ake v. Oklahoma, 470 U.S. 68 (1985). Failure to employ this expert would effectively deprive PFC Corsetti of his ability to present a defense in this case and would deny him a "[m]eaningful access to justice." Ake v. Oklahoma, 470 U.S. 68 (1985).

3. The reasons why expert assistance is relevant and necessary are as follows:

a. This case involves an allegation of detainee abuse. One of the alleged victims is Ahmed al Darbi, a purported member of the Al Qaeda terror network. Dr. Post has done extensive research into the Al Qaeda network, and can assist the defense in understanding how the network works and, more importantly, their use of false allegations of abuse to obtain their freedom.

b. Among other things, Dr. Post can educate the defense as to the existence and contents of the "Manchester Document" an Al Qaeda "handbook" outlining the use of false claims of abuse. Dr. Post has also done extensive research on the issue of crimes of obedience, and how Al Qaeda members will not deviate from their "handbook." The existence of the manual is not a matter for debate, as the government acknowledges its

APPELLATE EXHIBIT XX

existence in a June 29, 2005 press release, in which Secretary of Defense Donald Rumsfeld states "These detainees are trained to lie, they're trained to say they were tortured, and the minute we release them or the minute they get a lawyer, very frequently they'll go out and they will announce that they've been tortured."

c. Dr. Post's expertise will assist the defense in preparing for any further cross-examination of Ahmed al Darbi. It will also assist the defense in cross-examining CID/OGA agents who will testify as to their conversations with Mr. al Darbi, and will assist the defense in formulating a theory of the case that centers around the issue of Al Qaeda members fabricating allegations of abuse to further their political causes.

c. Dr. Post can also assist the defense in understanding how PFC Corsetti, a lower enlisted soldier, would react to being told by superiors that his methods of interrogation were not only permissible, but acceptable, and the effect of his lack of training on him.

4. What the expert would accomplish for the defense and why the defense cannot obtain this evidence on their own:

a. Dr. Post is a political psychologist with considerable experience in the psychology of terrorist organizations.

b. Without such expertise, the defense will be unable to adequately cross-examine the government expert, and unable to even remotely understand the terminology he will employ.

c. The defense has investigated, examined and gathered certain evidence it believes is helpful to their case but quite obviously lacks the expertise to apply that evidence to the case at hand in a meaningful way. All of the theories and diagnostic tools used by Dr. Post are well beyond the understanding of the defense. It takes years of training to understand general psychology, let alone a special field such as political psyqhcology.

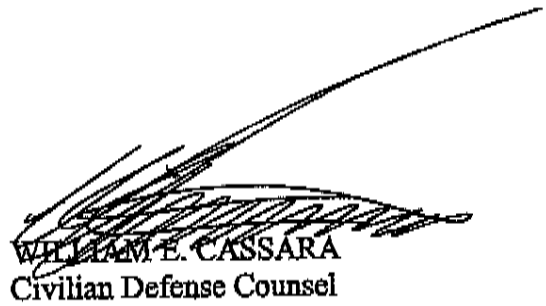
5. At this time, the defense expects Dr. Post to be used as an expert consultant; however we reserve the right to have him testify as an expert witness, in order to potentially educate the panel on the inner workings of Al Qaeda, and the role false claims of abuse plays in their actions.

5. Dr. Post charges $500 per hour case review and $5,000 per day for a jury trial, plus expenses. The government has basically had a "blank check" in prosecuting this case, with blanket travel orders. The employment of Dr. Post is necessary to assist the defense and to put it on a level playing field with the government.

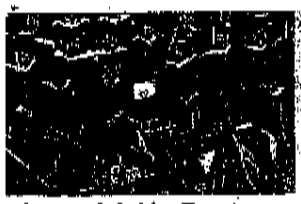
Dr. Post's CV and contact information is attached.

6. For the above reasons, failure to provide the requested assistance will result in a fundamentally unfair trial.

7. POC is the undersigned at 706-860-5769.



WILLIAM E. CASSARA
Civilian Defense Counsel



THE GEORGE WASHINGTON UNIVERSITY
THE ELLIOTT SCHOOL OF INTERNATIONAL AFFAIRS

Jerrold M. Post

Jerrold M. Post

Professor of Psychiatry, Political Psychology and International Affairs

Director, Political Psychology Program

1957 E Street, NW Suite 502

Washington, D.C. 20052

Telephone: (202) 994-7386
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Education:
M.D., Yale University

Expertise:
Political psychology, psychiatry

Background:
Dr. Jerrold Post is Professor of Psychiatry, Political Psychology and International Affairs and Director of the Political Psychology Program at The George Washington University.

Dr. Post has devoted his entire career to the field of political psychology. Dr. Post came to George Washington after a 21 year career with the Central Intelligence Agency where he founded and directed the Center for the Analysis of Personality and Political Behavior, an interdisciplinary behavioral science unit which provided assessments of foreign leadership and decision making for the President and other senior officials to prepare for Summit meetings and other high level negotiations and for use in crisis situations. He played the lead role in developing the "Camp David profiles" of Menachem Begin and Anwar Sadat for President Jimmy Carter and initiated the U.S. government program in understanding the psychology of terrorism. In recognition of his leadership of the Center, Dr. Post was awarded the Intelligence Medal of Merit in 1979, and received the Studies in Intelligence Award in 1980. He received the Nevitt Sanford Award for Distinguished Professional Contributions to Political Psychology in 2002.

A founding member of the International Society of Political Psychology, Dr. Post was elected Vice-President in 1994, and has served on the editorial board of Political Psychology since 1987. A Life Fellow of the American Psychiatric Association, he has been elected to the American College of Psychiatrists and is currently Chair, Task Force for National and International Terrorism and Violence for the APA.

Dr. Post has published widely on crisis decision-making, leadership, and on the psychology of political violence and terrorism, and recently has been addressing weapons of mass destruction terrorism: psychological incentives and constraints, as well as information systems terrorism. He is the co-author of a study of the politics of illness in high office, *When Illness Strikes the Leader: The Dilemma of the Captive King*, Yale University Press, 1993, and *Political Paranoia: The Psycho-politics of Hatred*, Yale, 1997. His other books include: *The Psychological Evaluation of Political Leaders, With profiles of Saddam Hussein and Bill Clinton* (University of Michigan Press, 2003); with Barry Schneider, *Know Thy Enemy: Profiles of Adversary Leaders and their Strategic Cultures* (Air Force Counter Proliferation Center, 2003); and *Leaders and Their Followers in a Dangerous World: The Psychology of Political Behavior* (Cornell University Press, 2004).

Dr. Post received his B.A. magna cum laude and M.D. from Yale. He received his post-graduate training in psychiatry at Harvard Medical School and the National Institute of Mental Health. He has also received graduate training at the Johns Hopkins School of Advanced International Studies.

After the invasion of Kuwait, Dr. Post developed a political psychology profile of Saddam Hussein. His analysis of Saddam has been featured prominently in the national and international media. He provided his analysis of Saddam's personality and political behavior in testimony at the hearings on the Gulf crisis before the House Armed Services Committee and the House Foreign Affairs Committee. He served as a psychiatric expert on terrorist psychology for the Department of Justice in the 1997 trial of an Abu Nidal terrorist, and in July, 2001 testified as an expert witness in the federal trial in New York of one of the Osama bin Laden terrorists responsible for the bombing of the US embassy in Tanzania. Since 9/11. he has testified before the House National Security subcommittee hearings on bio-terrorism, before the Senate Armed Services Committee on terrorist motivation, and before the UN International Atomic Energy Agency on the psychology of nuclear terrorism. He recently presented a keynote address to the Europe conference of international police on counter-terrorism in Copenhagen, and delivered an address to a terrorist expert meeting in Oslo, Norway in June 2003. He is a frequent commentator on national and international media on such topics as leadership, leader illness, treason, the psychology of terrorism, Slobodan Milosevic, Yasir Arafat, Osama bin Laden, Saddam Hussein and Kim Jong Il.

Courses Taught:
PPsy 201 Fundamentals of Political Psychology
PPsy 205 Political Violence and Terrorism
PPsy 291 Applied Political Psychology

Last update: 3/3/2006

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This site is maintained by the Elliott School. Please send questions and comments to elliott@gwu.edu.

JERROLD M. POST, M.D.

Dr. Jerrold Post is Professor of Psychiatry, Political Psychology and International Affairs and Director of the Political Psychology Program at The George Washington University. At GW, Dr. Post teaches a graduate course on terrorism and political violence, as well as a course on leadership and decision making. He is Co-Founding Director of the George Washington University Institute of Crisis, Disaster and Risk Management.

Dr. Post has devoted his entire career to the field of political psychology. Dr. Post came to George Washington after a 21 year career with the Central Intelligence Agency where he founded and directed the Center for the Analysis of Personality and Political Behavior, an interdisciplinary behavioral science unit which provided assessments of foreign leadership and decision making for the President and other senior officials to prepare for Summit meetings and other high level negotiations and for use in crisis situations. He played the lead role in developing the "Camp David profiles" of Menachem Begin and Anwar Sadat for President Jimmy Carter and initiated the U.S. government program in understanding the psychology of terrorism in the late 1970s. In recognition of his leadership of the Center, Dr. Post was awarded the Intelligence Medal of Merit in 1979, and received the Studies in Intelligence Award in 1980. He received the Nevitt Sanford Award for Distinguished Professional Contributions to Political Psychology in 2002, and the Jean Knutson Award for Distinguished Service to the International Society of Political Psychology in 2004.

A founding member of the International Society of Political Psychology, Dr. Post was elected Vice-President in 1994, and has served on the editorial board of Political Psychology since 1987. He has been nominated as a candidate for President, ISPP, 2005. A Distinguished Life Fellow of the American Psychiatric Association, he is a Diplomate of the American Board of Psychiatry and Neurology (1967). Dr. Post has been elected to Fellowship in the American College of Psychiatrists. He is a member of the American Association of Psychiatry and the Law. After serving as Chair, Taskforce for National and International Terrorism of the APA, (1994-2000), he was appointed (2004) Chair, Workgroup for Terrorism and Political Violence.

Dr. Post has published widely on crisis decision-making, leadership, on the psychology of political violence and terrorism, with special reference to terrorist group dynamics. He has authored eight book chapters on terrorist psychology and of the entry on terrorism and counter-terrorism in the Oxford Companion to Military History. .In his writings, he recently has been addressing weapons of mass destruction terrorism: psychological incentives and constraints, suicide terrorism, and information systems terrorism (cyber terrorism.). He is the co-author of a study of the politics of illness in high office, When Illness Strikes the Leader: The Dilemma of the Captive King, Yale University Press, 1993, and Political Paranoia: The Psycho-politics of Hatred, Yale, 1997. He is editor and author of The Psychological Assessment of Political Leaders, With Profiles of Saddam Hussein and Bill Clinton, Univ. of Michigan Press, 2003 and (with Barry Schneider) of Know Thy Enemy: Profiles of Adversary Leaders and their Strategic Cultures, Air Force Counter Proliferation Center, 2003, is author of Leaders and Their Followers in a Dangerous World: The Psychology of Political Behavior, Cornell Univ. Press, 2004, and is editor of The Al-Qaeda terrorism Manual Air Force Counter Proliferation Center, 2005. He is currently developing a book on The Mind of the Terrorist, under contract with St. Martin's Press.

Dr. Post received his B.A. *magna cum laude* and M.D. from Yale. He received his post-graduate training in psychiatry at Harvard Medical School and the National Institute of Mental Health. He has also received

graduate training at the Johns Hopkins School of Advanced International Studies.

After the invasion of Kuwait, Dr. Post developed a political psychology profile of Saddam Hussein. His analysis of Saddam has been featured prominently in the national and international media. He provided his analysis of Saddam's personality and political behavior in testimony at the hearings on the Gulf crisis before the House Armed Services Committee and the House Foreign Affairs Committee. He served as a psychiatric expert on terrorist psychology for the Department of Justice in the 1997 trial of an Abu Nidal terrorist, and in July 2001 testified as an expert witness in the federal trial in New York of one of the Osama bin Laden terrorists responsible for the bombing of the US embassy in Tanzania.

In the spring of 2000, Dr. Post was invited on two occasions to brief the Defense Science Board on the psychology of terrorism, with implications for CBW terrorism. In 1999-2000 he served as consultant to the USG Y2K Commission. He has received foundation support for research on terrorist psychology from the Harry Frank Guggenheim Foundation, the United States Institute of Peace, and the Carnegie Corporation of New York, and for a study of the psychology of weapons of mass destruction terrorism involving interviews with incarcerated Middle East terrorists from the Smith-Richardson Foundation.

Since 9/11, he has testified before the House National Security subcommittee hearings on bio-terrorism, before the Senate Armed Services Committee on terrorist psychology and motivation, and before the UN International Atomic Energy Agency in Vienna, Austria at a specially convened session on nuclear terrorism on the psychology of nuclear terrorism. In 2002 he presented a keynote address to the Europe conference of international police on counter-terrorism in Copenhagen, presented to the terrorism experts' conference in Haifa, Israel in January 2003, and was asked to brief the Israel military leadership on current concepts of counter-terrorism. He was a member of the Terrorism Expert panel that met in Oslo in June 2003 to prepare a white paper for the UN General Assembly, and served as a member of a terrorism expert panel convened by the Sandia National Laboratory. He served as chair of the committee on the Psychological Roots of Terrorism for the March, 2005 Madrid International Summit on Terrorism and Democracy. He is a frequent commentator on national and international media on such topics as leadership, leader illness, treason, the psychology of terrorism, suicide terrorism, Slobodan Milosevic, Yasir Arafat, Osama bin Laden, Saddam Hussein and Kim Jong Il.

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DEPARTMENT OF THE ARMY
HEADQUARTERS, U.S. ARMY AIR DEFENSE ARTILLERY CENTER
AND FORT BLISS
FORT BLISS, TX 79916-6816

REPLY TO
ATTENTION OF:

March 24, 2006

Commanding General

Mr William E. Cassara, Esq.
918 Hunting Horn Way
Evans, Georgia 30809

Dear Mr. Cassara:

By memorandum dated March 22, 2006, the defense requested that I appoint Dr. Jerrold Post as an expert assistant to the defense team in *United States v. PFC Damien Corsetti.*

I have read and considered the defense request. I find that the defense has failed to make a showing of relevance and necessity sufficient to warrant the appointment of Dr. Post in accordance with the rules announced in *United States v. Garries* and Rule for Court-Martial 703(d). I have considered the fact that it does not appear that the government will be presenting evidence or calling an expert witness such that Dr. Post's expertise would be either relevant or necessary.

The request to have Dr. Post appointed as an expert member of the defense team is denied.

Sincerely,

Robert P. Lennox
Brigadier General, U.S. Army
Commanding

ATC EXHIBIT XXI

United States	)	
	)	Motion to Abate and Motion to Compel Discovery
v.	)	
	)	
PFC Damien M. Corsetti	)	27 February 2006
Company A	)	
519th Military Intelligence Battalion	)	
Fort Bragg, North Carolina 28310	)	

COMES NOW the accused, by and through the undersigned counsel and hereby moves to abate the proceedings in his general court-martial until such time as discovery has been provided. As reasons in support thereof, the accused states as follows:

The accused is charged with abuse of detainees, including Ahmed al Darbi, who is detained at Guantanamo Bay, Cuba. The Convening Authority has ordered a deposition of Ahmed al Darbi, which is scheduled to take place on 8 March 2006.

The government is in possession of numerous classified documents relevant to this case which are being stored at Fort McPherson, Georgia, and Fort Bliss, Texas. The defense has requested on numerous occasions that a copy of these documents be made available to defense at Fort Gordon, Georgia, where civilian counsel is located, or Fort Bragg, North Carolina, where military counsel is located. The defense has made arrangements with the Command Judge Advocate of the 513th MI Battalion at Fort Gordon to receive and store the documents.

In spite of these accommodations, the government has refused to make a copy of the classified material for the defense. In its reply of 27 February 2006, the government stated "The concerns are these: that there are already two hard copies, that one of these is already in Georgia, and that we would have to send the materials to an office that we have no control over."

The possession of these documents by the government and not the defense places the defense at a significant disadvantage. While the government has had ample access to these documents, the defense has never seen them. The defense believes that, among these documents, are prior statements of Ahmed al Darbi, which will be relevant in taking his deposition.

Furthermore, the defense has requested copies of numerous other documents in a supplemental discovery request. That request and the government's response thereto are attached. Among these documents is the disciplinary record of Ahmed al Darbi while a detainee and all investigations done regarding Ahmed al Darbi. Such documentation will

be necessary to cross examine Ahmed al Darbi. The government has refused production of these documents in their entirety.

Without these documents, a deposition of Ahmed al Darbi is fruitless. It is the defense's understanding that the government may later move to have the deposition admitted at trial in lieu of Ahmed al Darbi's live testimony. As such, this may be the only opportunity the defense has to cross examine and confront Ahmed al Darbi. To do so without full access to the materials listed above will deny the accused his right to confront this witness.

WHEREFORE, the defense respectfully requests that this court abate these proceedings until such time as full discovery is supplied.

Respectfully Submitted,

William E. Cassara, Esquire
Civilian Defense Counsel

WEC/pc
Enc. as

Also, the government possesses some recently acquired classified material in electronic format. The government offered more than once to send these files to the Defense upon receipt of a valid AKO-S account address. None has been provided, so they too remain available for inspection at either Fort Bliss or Fort McPherson.

II. Ahmed al Darbi

Apparently, the Defense is under the impression that the classified materials may contain "prior statements of Ahmed al Darbi, which will be relevant in taking his deposition" (Defense Motion, page one). There are no such statements contained in the classified materials. In fact, and consistent with every response ever given to the Defense, all statements made by Ahmed al Darbi have long since been turned over to the Defense. This occurred prior to the Article 32 hearing. Thus, defense has had all statements made by al Darbi that are under the government's control for over four months. There are simply no preparation or confrontation issues here, as the Defense knows exactly as much as the government about the nature of al Darbi's expected testimony at the deposition.

Regarding the other Defense requests concerning Ahmed al Darbi, such as his investigatory record and his disciplinary record for the time he has been a detainee, the government objects on the grounds that this is overbroad, irrelevant and beyond the scope of permissible discovery. The detainee's records simply have no relevance to whether or not the accused committed various acts of maltreatment and assault against him. Surely the Defense does not suggest that al Darbi deserved to be assaulted.

III. Conclusion and Relief Sought

The Defense has asserted no authority to support their motion. The government has satisfied R.C.M. 701 by granting Defense the opportunity to inspect the classified materials any time they choose to show up. Further, the reason asserted for the alleged necessity of having these documents delivered to Fort Gordon is moot—there are no statements by Ahmed al Darbi in the classified file. For these reasons, the government respectfully requests this Court to deny the Defense Motion.

Original signed Christopher E. Ellis
Christopher E. Ellis
CPT, JA
Trial Counsel

I certify that on this 27th day of February 2006 I served a copy of this Response to the Military Judge and to Defense Counsels via electronic mail.

Original signed Christopher E. Ellis
Christopher E. Ellis
CPT, JA
Trial Counsel