IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA,
TERRE HAUTE DIVISION

Jane **GRAHAM,** and	§	
V. Z. **LAWTON**	§	
	§	
v.	§	
	§	Cause No. TH 01-104-C-T/H
Harley **LAPPIN**, Warden,	§	
Defendant	§	
	§	
The Honorable Steve **CARTER**,	§	
Attorney General, State of Indiana,	§	
Necessary Party	§	

PLAINTIFFS BRIEF

RESPONSIVE TO SHOW CAUSE ORDER
OF 17 MAY 2001

<u>This court has subject matter jurisdiction of this matter, and</u>
<u>McVeigh s execution must be stopped.</u>

Outline.

Standing and Defendants.
Request per Rule 30(a)(2).
Reasons for maintaining status quo through temporary injunction.

Diversity.
Plaintiffs Objection to Improper Intervention by the United States.
Defendant is an Officer or Employee of a Private Entity.
Diversity.
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Transfer and Waiver.
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Transfer of a Criminal Case.
Part 1 There really is no such thing as transfer of venue of criminal Cases. (Vicinage)
Part 2 But the practice is so prevalent that we can presume transfer a legitimate concept for purposes of this matter.
Part 3 And nothing about transfer changes the State having jurisdiction of the Crime.
Murder Cases do not belong in the U.S. District Court.

McVeigh has, and is, evidence, which evidence is vital and indispensable for claims still viable and for currently pending litigation.

The need for McVeigh s testimony.

Victims Claims Against Government Officials who had a Duty to Speak but who Kept Silent.

Claims against McVeigh and John Does 1 and 2.

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Weighing the Equities.

The admissibility of McVeigh s testimony.

McVeigh as witness.

Common Law Evidentiary Policy Regarding Respect for the Oath.

McVeigh s testimony is admissible.

Foundation for common law exclusion requires court of competent jurisdiction.

Common law exclusion of infamous witnesses ends at the State line.

Oklahoma Rules of Evidence.

Federal Rules of Evidence.

Brief.

Standing.

The court s sua sponte motion[1] focus primarily on the question of standing in Plaintiffs to raise the lack of subject matter jurisdiction issues raised in this proceeding (Claims 1 and 2), and the point of preservation of testimony, evidence, from McVeigh (Claim 3).

Defendant(s).

The court also raises the question as to what the named defendants have done to justify being named as defendants, and, from that basis, characterizes the matters raised as frivolous.

Standing and Defendants.

In sum, the court raises two key questions of subject matter jurisdiction (standing, meritorious claims) in this court regarding these parties and these claims.

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[1]Plaintiffs laud this court s recognition of the motion nature of the sua sponte entry, allowing the party of interest notice and an opportunity to respond.

Standing. To confirm, Plaintiffs are not, in this suit, asserting next friend capacity. That may be a different proceeding, but that is not this one. Nor are Plaintiffs complaining of any past act or omission of the named Defendant, Warden Lappin, or of the Necessary Party, State Attorney General Carter. Plaintiffs primary interest is preserving evidence. There being at least two reasons to challenge the basis for any execution at all, and at least one reason for needing information that only McVeigh has, Plaintiffs do have both standing and meritorious claims to do so, and toward which end Plaintiffs look to Rule 30(a)(2).

Request for leave per Rule 30(a)(2).

In the event the court s determination is that standing is absent in these Plaintiffs to be heard to complain, directly, of the lack of subject matter jurisdiction in the Colorado court regarding the trial of McVeigh, and in any United States trial court over a murder charge, as that, also, stems from the trial of McVeigh, both of which challenge the basis for any execution, at all, and thus are part and parcel of the key end result, preserving McVeigh for his live testimony, and, thus, that these Plaintiffs, through this proceeding, do not have standing to stop the execution outright, then Plaintiffs, in the alternative, rely upon Federal Rule of Civil Procedure 30(a)(2) regarding perpetuating testimony of an individual confined to prison.

Toward this end, Plaintiffs request leave to take an oral deposition of McVeigh, and for temporary injunctive relief for the following reasons.

1. Reasons for maintaining status quo through temporary injunction.
   A. Plaintiffs civil claims
      1. Plaintiffs have claims against government officials and agents who had a duty to speak (to warn) and who failed to fulfill that duty, among other claims.
      2. Plaintiffs have claims against McVeigh, Nichols and John Does 1 and 2, for various

matters, at law and in equity, among them intentional infliction of emotional distress (for which physical injuries also exist) and, as regards books, CD s, videos, movies, and the like, unjust enrichment (for which the statute of limitations period is evaluated per the applicable concepts of equity).

3. Thus, Plaintiffs have standing to request the perpetuation of McVeigh s testimony, and the proper party for service, notice, Orders, etc., is the Warden.

B. Pending publication of the Investigation Committee s Report.

Charles Key, former State Representative, Oklahoma Legislature, has headed the Investigation Committee s efforts of obtaining particulars in this matter that have not been as publicized as some other matters, and many of which facts were not introduced into any judicial proceeding to date. Based on due diligence, good faith inquiry, full recognition of the policy that frowns seriously upon unjustified delay, and the best of Plaintiffs knowledge, that report is expected published sometime in June, 2001. Given that this will be one of the most comprehensive reports of that bombing to date, it just makes sense to have McVeigh respond to any and all issues raised in that Report of which McVeigh may have knowledge.

Given that the report is expected to be some 500 pages in length, reviewing it meaningfully, once in hand, will take several days. Further, forming the group (of a small number) whose various expertise will be invaluable for such perpetuation of testimony, to sit in on any deposition to be administered for the purposes of perpetuating McVeigh s testimony, may not be fully ascertainable until the details of the Investigation Committee s Report are known. And some of the related travel plans and local accommodations are their most affordable on a 21-day advance purchase discount. Also,

since the report is the length it is expected to be, covering it in a deposition will likely take more than one day s worth of testimony.

Since the execution is still scheduled for 11 June 2001, it is simply not practical to schedule a perpetuation of testimony deposition in the existing time frame. Further, without covering the Investigation Committee s Report, the result of such deposition, while of some value, to be sure, may be largely perfunctory. As of the filing date of this Brief, 30 May 2001, Plaintiffs realistically expect to need at least 90 days to accomplish a meaningful deposition. In addition to allowing time for the publication of the Investigation Committee s Report, review of that Report, and the assembly of a small group of experts to assist in that deposition, plus planning travel schedules and expenses, it is expected that McVeigh s most recently appointed lawyers also may be interested in participating in this deposition, and they no doubt have litigation and travel schedules to work around, as well. Further, the attorneys for the government assigned to the McVeigh case have similar schedule considerations. Plus, there s an off chance that lawyers for Nichols may be interested in participating in this, at least as observers.

In sum, and realistically, to be prepped and ready to begin the depositions near the middle of August, 2001, leaving at least 15 days for the duration of the deposition, would complete the perpetuation of testimony within 90 days from the date of the filing of this brief. Accomplishing that schedule will require the granting of at least a limited temporary injunction staying McVeigh s execution from its currently scheduled 11 June 2001 date.

The court s motion raises some additional points for which the following is responsive. In

general, everything that is possible to do to pursue justice, and to prevent homicide, destruction of evidence and tampering with a witnesses, in the capacity and standing that Plaintiffs have, is what Plaintiffs have in mind to accomplish. There is no authority to destroy this evidence, and this evidence is vital and indispensable for Plaintiffs claims and interests. Equity provides the remedy.

2. Diversity.

   A. Plaintiffs Objection to Improper Intervention by the United States. As this is Plaintiffs very next filing in the Record of this matter, this objection is properly raised here. More will be included on this point in what is expected to be at least one subsequent document detailing Plaintiffs objections to what appears right now, rather than an appearance by counsel, to be an improper intervention (e.g., no petition to intervene, etc.) by a new party, namely the United States. While Plaintiffs raise this now in order to preserve this objection at the first opportunity, and while this brief addresses a few of the key facts on which Plaintiffs base this objection, the priority of this document is to respond to the court s motion.

   B. Defendant is an Officer or Employee of a Private Entity. Regarding this objection, and to summarize briefly what can be confirmed to date, Plaintiffs have found evidence of the sale of approximately 660 acres of land, on which currently sits the United States Penitentiary at Terre Haute, to the United States of America in 1938. However, through extensive research of the vast legislative history materials available through the library at the Notre Dame School of Law, Plaintiffs have yet to find any Consent by the Indiana Legislature of any transfer of title of that same property to the United States Government.

In sum, as a result of a due diligence search, since the requirements set by the Constitution (*see* U.S. CONST. art. I, § 8, cl. 17) to establish ownership of the property in the United States Government are not (yet) satisfied, i.e., (1) deed *and* (2) Consent by the State Legislature of the State in which the property sits (*neither* of which document exists regarding the Murrah Federal Building in Oklahoma City, hence the question in this matter from the outset), it follows that the Penitentiary is a private (non-governmental) business on private (non-governmental) property.

C. Diversity. Therefore, since the title to the prison property is still private, particular results follow. One result is that this matter is a Controversy between citizens of different States, namely between the individuals who reside in Oklahoma and the business entity known as the United States Penitentiary at Terre Haute, whose principle place of business is in Indiana,[2] the responsible party for which private entity, for purposes of this suit, is the Warden.

1. As considered possible from the outset of this suit, the Warden is an officer or employee of a private entity called the United States Penitentiary at Terre Haute. Because Plaintiffs are still investigating into this entity s organizational structure, Plaintiffs still cannot rule out that this private entity is an eleemosynary organization. Because that possibility remains viable, it is still possible that the Indiana State Attorney General is a Necessary Party to this suit, regardless of relief

[2]There being no trademark, copyright or other restriction regarding the use of the name United States, there is no surprise or problem that a private business could or would use that name in its title. For example, in the Greater Dallas Business White Pages (© 1999 Southwestern Bell Telephone Company, Jun. 1999-2000 ed.), over 20 businesses use the name United States as the first part of their name. Among them are these: United States Aircraft Insurance Group, United States Chamber of Commerce, United States Cold Storage, Inc., United States Life Insurance Company, and United States Postal Service. *Id.* at 526 (cols. 3-4).

requested, and even more so for purposes of the equitable relief requested.

2. Since we are not talking about the United States Government as a direct party in this litigation, the question arises as to whether the U.S. Attorneys have authority to represent this private business entity. If no authority to represent this private entity exists, whether due to, among the possible reasons preventing such representation, waiver or estoppel of some alleged United States interest, or due to conflict of interest, the question arises whether the United States should even be involved in this suit, and if so, whether it should participate by and through the sound, and long-standing, rules that govern intervention by *any* originally unnamed but interested parties; hence Plaintiffs objection to improper intervention.

3. Arising under. This paragraph and the next paragraph are closely related. Claims 1 and 2 in the Original Complaint identify matters that arise under Article III, Article IV, and the Sixth Amendment of the Constitution. Claim 3, which seeks to preserve evidence, doesn t directly arise under the Constitution, but it does arise under diversity, as indicated above. Further, Claim 3 arises under (evidence) Law of the United States. And in Claim 3, as part and parcel of Plaintiffs interests in preserving evidence, Plaintiffs have, above, detailed the request pursuant to Rule 30(a)(2) to perpetuate McVeigh s testimony. In sum, the Constitution, its judicial construction, and Law of the United States are so closely intertwined in the basis of these Claims that it is difficult to eliminate arising under jurisdiction as a basis for subject matter jurisdiction in this matter. Arising under jurisdiction is not necessary, diversity having been established; however, arising under jurisdiction arguably applies for this matter, as well.

4. Meritorious claims in this litigation.

A. Relief in equity exists. In the event this matter proves to be a case of first impression, Plaintiffs suggest that a reasonable extension, modification or reversal of current laws regarding relief in equity provides for the relief here requested.

1. Do you solemnly swear or affirm that the testimony you are about to give in this cause is the truth, the whole truth, and nothing but the truth, so help you God?
2. We have asked it of every witness that has ever taken the stand Tell us everything you know about this case (when asked, of course). If that s the micro level, we need to be able to support that concept at the macro level, namely the level of the parties. We esteem ourselves to promote and preserve the adversarial process. However, if the judicial process consciously and deliberately impedes a party s ability to put on all of the relevant and pertinent evidence available, how in the world can the adversarial process function? Is it because McVeigh actually may be a tremendous source of evidence against officers or agents of government who had a duty to warn that some in government are in such a hurry to see the execution carried out?
3. Relief in equity must exist in this matter in order to promote and preserve one of our judicial system s most foundational concepts: the adversarial process. It is in the competition among differing, opposing, views that the decision-maker, whether judge, administrative jury panel or common law venire, has the widest exposure to the information available upon which to base that decision. It is the very notion of the adversarial process that compels the preservation of McVeigh, not merely through a perpetuation of testimony, which the Rules address directly, but for every trial, and every new trial that may result from appellate review, for so long as any civil or criminal matter may arise. Since murder has no statute of limitations, that act of

preservation of evidence may need to extend for quite some time.

4. Would that same rule apply for all capital crime cases, so as to preempt, as a practical matter, the notion of execution? Possibly, but this *is* a rather unique case.

   a. If it turns out that in every capital crime case, which involves federal agents, that documents suddenly appear at the 11th hour, then there s no question that we need to preserve the defendant(s), at least long enough to find out what *else* has been found, or discovered as inadvertently destroyed.[3]

   b. If it is the case that currently pending criminal litigation exists, arising from the same transaction or occurrence and for which the defendant is a prospective witness, especially if for the defense, then there s no question that we need to preserve the defendant(s), for at least the duration of any possible new trial. How in the world can one defendant s ability to compel evidence in his favor prevail (Sixth Amendment), as a practical matter, if that defendant s best evidence just got executed?

   c. If it turns out that common sense prevails, and the people who serve us in their capacity as Grand Jurors recognize that it s impossible for this devastating act of destruction and of violence against the American people, in particular our family, friends and neighbors in Oklahoma City, to have been carried out solely by one or two people, and one, solitary truck bomb, then there s no question we need to preserve the defendant(s), for so long as it takes to investigate the matter. The more evidence that gets destroyed, e.g., the Murrah Federal Building, the longer

[3]We gratefully acknowledge, and owe a tremendous debt of gratitude to, the archivist(s) who still respect the difference between right and wrong.

the investigation. Further, since this matter involves murder, and since that crime against the Citizens of the State of Oklahoma has no expiration time period, that investigation could take a while, during which investigation *all* possible evidence must be preserved.

5. As stated from the outset, Plaintiffs suit isn t a matter about McVeigh[4] or about the death penalty.[5] It s about limited government, respect for the Constitution, respect

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[4]If the prosecution s theory to date is reliable, i.e., that there s only one explosion, and if that sole explosion, an ANFO truck bomb, detonated some 50 feet from the curb, is attributable to McVeigh, but that one bomb is *all* that is attributable to McVeigh, then, in light of Gen. Partin s studies at Eglin AFB, Florida, which established the factual impossibility for that ANFO explosion to have collapsed the Murrah Federal Building, it follows that it s legally impossible for McVeigh to have committed murder. The gigantic causation problem is this. This is a building collapse case, not an explosion case. Those 168 deaths were caused by the collapsing building. However, because it s factually impossible for McVeigh s truck bomb to cause that building to collapse, it s legally impossible for McVeigh to have committed murder.

[5]But those who are concerned about the death penalty, as such, do raise a question worth noting. Do we have a federal drug law issue?

Lethal injection has been sold as just about the most soothing way to go. Not so: like many a Benthamite vision of Progress, it has serious flaws. Edward Brunner, MD, PhD, is the Eckenhoff professor and chairman emeritus of anesthesia at Northwestern University Medical School and at Northwestern Memorial Hospital. He gave a chilling interview to Charles Madigan of the Chicago Tribune, published April 22, in which he described how lethal injection, as administered in death chambers across the country by nonmedical personnel, actually works.

"The thiopental will cause the patient to look like he is falling asleep. The second drug will paralyze him. If the drugs are not given properly, the sleep drug can wear off, allowing the patient to be aware but unable to move, even to breathe. He undergoes suffocation and asphyxiation in a horribly painful way, even though he looks completely calm as he is lying on the table. Then he experiences that deep burning sensation as the potassium courses through his veins on the way to his heart."

Brunner says that in about 40 percent of cases where lethal injection has been used, there has been misuse in one way or another, and it has taken as long as 45 minutes for the person to die. "The chemistry of the drugs is such that thiopental and succinylcholine, when they react to each other, cause a precipitation of a white, flaky substance that will block up the needle from the IV. What has happened in a number of cases is that they give the thiopental and follow with the succinylcholine, then they get this precipitate which blocks the needle. The thiopental wears off.

for our Armed Forces, and the search for the reality that motivated and carried out this particular act of devastation and destruction, which search is at the heart of the claims asserted by the victims (Plaintiffs). At present, the Article III-based judicial process, as exhibited by and through the trial and appeals of Timothy McVeigh, is the epitome of a sad commentary. From the Minutemen to our modern Armed Forces, this is *not* the concept of limited government for which they have fought and many have died. Memorial Day, a holiday recognized during the time period of preparation of this Brief, still means something to a great many of us, and seeing the fruits of those sacrifices of history (some of which is not so distant) given away in the courtroom is, let s call it, excruciatingly unpleasant.

The patient is partly paralyzed and partly not, and begins to move around. In a number of circumstances, they have to close the curtains so that people can't see the struggling. Sometimes they have to start all over again."

Since no doctor will perform these injections, the job goes to people who are untrained and who have no business using these drugs. "Thiopental is a controlled substance. To use it you need a special license, which the executioner doesn't have and the warden doesn't have. So they are in violation of federal and state regulations when they use these things. More than that, the drugs have been tested for safety in therapeutic uses. They have never been tested for use in killing people. What they are really doing is experimenting on humans, much like the German doctors did in concentration camps. What they are doing is inhumane. The subjects end up with a strong possibility of being subjected to excruciating suffering."

Excerpt from A Really Nasty Way To Go
Crime/Corruption Editorial
Source: New York Press
Published: 5/22/01 Author: Alexander Cockburn

http://www.freerepublic.com/forum/a3b0bc4bd6169.htm

It is difficult to overlook the timing of the original interview and subsequent publication dates of this article. Further, if this federal drug law issue has substance, then one solution is fairly straight forward. If the executioner or warden is the party to be licensed, then such execution should proceed only after the appropriate license is obtained. For most, medical school takes four years, which starts sometime after one is admitted to the program.

a. There is no authority in Colorado to try one single Case against McVeigh (unless Oklahoma is not a State), and

b. murder simply has no business being tried in any court exercising the Article III judicial Power.

6. Therefore, there being no judicial authority behind any execution in the first place, there being a direct and personal interest in the Plaintiffs for the information McVeigh has, and there being a great number of third-party beneficiaries to Plaintiffs Claims, Plaintiffs requests in equity must exist, even without a need to extend the notion of private Attorney General beyond the Title II context. In all fairness, to the victims (Plaintiffs), to the survivors, to legitimate law enforcement, to our Armed Forces personnel, even to McVeigh and to Nichols, not to leave out self-respect by and for our judicial process, McVeigh s testimony must be available, now, and for every change that comes along until even new evidence will be insufficient grounds for a new trial. In short, the execution must be stopped.

B. Transfer and waiver.

Did McVeigh s Motion to Transfer Venue waive one or more Claims or arguments raised in this proceeding? No, it did not.

Key Facts.

1. Based, in part, on what the district court judge in Oklahoma City accurately described as demonizing publicity, the defense requested a change of venue of that trial.
2. That request was honored, and the Cases were transferred.
3. The transferee court was not in Oklahoma, but rather across the Oklahoma State line

in Denver, Colorado.

Discussion.

To detail here, although briefly, the substance of Claims 1 and 2, is to simplify the discussion for Claim 3.

Controversy v. Case. The Constitution, in particular in Article III, distinguishes between civil Controversies and criminal Cases. For a transfer of venue to occur in a civil Controversy is a routine, perhaps daily, matter for the United States District Courts. To transfer a Controversy from one end of the nation to the other, e.g., California to New York, is not even a second thought for a great many Controversies that sound in contract or tort.

McVeigh s Case was/is a criminal matter, not a civil one. It is a Case, or perhaps more particularly, a group of Cases; it is not a Controversy. In that difference exists all the difference in the world regarding transfer of venue at all, even more so transfer that crosses the State line. The Constitution places no bar on transfer of Controversies with respect to the State line. However, where it is a good idea to have the trial of *civil* matters in the State in which the claim arose, it s a mandatory requirement when it comes to *criminal* matters. The Constitution places three (arguably four) clear and specific absolute prohibitions to the exercise of judicial Power, whether in a State trial court or in a United States trial court, regarding the trial of criminal Cases. These absolute prohibitions on the exercise of judicial Power are found in Article III, section 2, Article IV, section 2, and in the Sixth Amendment. (The fourth is found in Article IV, section 2, cl. 3, and is now obsolete in practice, but it is just as clear regarding the significance of the State line.)

To address this here, because this comes up in a later paragraph in this context, we are not discussing venue, or an individual right, or a privilege, that can be waived on a case-

by-case basis. We are talking about an absolute bar to, a complete prohibition of, the exercise of the judicial Power in criminal Cases, i.e., one of the limitations on government documented in the Constitution. Thus, when it comes to a question of the State line regarding subject matter jurisdiction of any court that purports to exercise judicial Power to try a criminal Case, either we re in the State having jurisdiction of the Crime, or we re not.

And, when we are not in the State having jurisdiction of the Crime, there s nothing any individual can do to amend the Constitution to grant judicial Power that doesn t exist. Amendment (enlargement) of the judicial Power does not occur on a case-by-case basis. *See* U.S. CONST. art. V. Given the clearly, and repeatedly, stated State line limit regarding the trial of criminal Cases, we can study into this transfer to evaluate waiver.

Transfer of Venue of a Criminal Case.

Part 1. There really is no such thing as transfer of venue of criminal Cases. To accept the language found in the Constitution as true and reliable, there isn t really any such thing as transfer of venue of a criminal Case. The common law concept is that of vicinage, and each vicinage has the authority, and the duty, to uphold its end of the local and national interests. *See* Drew L. Kershen, *Vicinage* 29 OKLA. L. REV. 801 (1976) (Parts I and II), 30 OKLA. L. REV. 3 (1977) (Parts III and IV).

The proper (i.e., only) remedy for what McVeigh experienced is dismissal of the Case(s), it having been determined that there was no possible way in the world he could expect to receive a speedy, fair, impartial and public trial by jury in the vicinage. Further, where such monstrous journalistic activities cause such result, one is hard pressed not to consider possible application of obstruction of justice laws. To placate the media (encouraging

misconduct that goes so far as to become judicially disruptive), rather than indict those particular journalists (commanding respect for our judicial process, by discouraging judicially disruptive conduct), we ve come up with transfer, but that transfer practice, as a concept, has no real foundation. Allowing publicity-based transfer gives the media full veto power over jury, or venire, selection from the vicinage of the crime. Yet there is no mention of egregious media conduct as a basis for amendment. *See* U.S. CONST. art. V.

In sum, for Part 1, as per the Constitution, there really is no such thing as a transfer of venue of a criminal Case. The relief is not available, because any legislative language that purports otherwise runs into challenge by the Supreme Law of the Land, meaning that such transfer language is simply not admissible evidence of Law. Therefore, there can be no transfer of venue, nor waiver of that venue interest, as regards trial of criminal Cases.

<u>Part 2. But the practice is so prevalent that we can presume transfer a legitimate concept for purposes of this matter.</u> What about that language in the Sixth Amendment that discusses ascertainment of the district by Law? Doesn t that arguably allow transfer of venue of a criminal Case?

Apparently so, at least in the minds of some, because provisions regarding transfer of venue of criminal Cases abound. However, to leave venue open (subject to change) is hardly to ascertain, ahead of time, the State and district for trial.

Having said that, and while it seems clear that the ascertainment of the district (i.e., County, vicinage) ahead of time, is the County-level notion that tracks *directly* after the ascertainment of the State, ahead of time, e.g., as stated in Article III, section 2, and Article IV, section 2, of which there is one, and only one, it s also the reality that the generally

accepted notion at present is that transfer of venue of a criminal Case is not only possible, but also is an accepted remedy. Therefore, while Plaintiffs have serious questions as to whether transfer of venue in a criminal Case is even possible, such transfer of venue of a criminal Case, as a concept, is presumed legitimate for this discussion.

Part 3. And nothing about transfer changes the State having jurisdiction of the Crime. Even when we presume as legitimate the notion of transfer of venue of a criminal Case, that transfer authority is necessarily limited. It ends at the State line. U.S. CONST. art. III, § 2, art. IV, § 2, and amend. 6.

If transfer of venue of a criminal Case exists at all, then two conclusions must follow. First, and as the court s motion noted, if venue in a criminal Case is subject to change, as is venue in a civil Controversy, for a defendant to request a transfer of venue is tantamount to a waiver of venue. Even still, and secondly, such transfer *must* comply with all applicable provisions of Law regarding criminal Cases, starting with the prohibitions documented in the Constitution, in particular that the Case be tried in the State in which it occurred.

To discuss the first necessary conclusion, where the defendant requests a transfer of venue, it must follow that the mere request constitutes waiver of venue in the current location. Therefore, and on the one hand, to raise an argument complaining of venue, or of transfer, after such transfer request has been made does raise the question as to substance of such argument. For example, if transfer had located McVeigh s trial in Tulsa, this would be an entirely different matter. In Tulsa, the trial would at least still be in the State having jurisdiction of the Crime. And, where the defense requested that transfer relief, it follows that such request waived venue in Oklahoma County and that any subsequent complaint regarding such defense-initiated transfer would be of questionable merit and a proper subject

of close scrutiny.

However, and on the other hand, the reason it s impossible for what happened in McVeigh s Case to constitute waiver, is that we are not talking about mere transfer of venue, i.e., mere transfer of County. We re not even talking about a transfer to Tulsa. We are talking about wholesale transfer of State, which transfer turns extradition on its ear. *See* U.S. CONST. art. IV, § 2.

The Constitution prohibits the exercise of judicial Power in a criminal Case by a court sitting outside the State in which the crime arose. U.S. CONST. art. III, § 2, art. IV, § 2, and amend. 6. The phrase Treason, Felony, and other Crime, found in Article IV, section 2, covers everything. It covers the one crime defined in the Constitution, namely Treason, every possible common law crime, and every legislative enactment of proscribed conduct, whether by Congress or by the State Legislature. Because that list is exhaustive, any trial court that sits outside the State in which the Case arose simply has no authority to try the Case; hence the provisions for extradition. And this list makes it clear that it matters not at all whether the court exercises the State judicial power or the United States judicial Power, because even the trial of Treason Cases, a Case that arises under the Constitution, and therefore is properly tried in the United States District Courts, is limited to those U.S. trial courts situated in the State in which the Treason occurred.

Transfer that crosses the State line doesn t trigger venue questions; it triggers lack of subject matter jurisdiction questions. Unless Oklahoma is not a State, the transfer relief awarded is not based on the applicable and controlling supreme authority, namely the Constitution. Therefore, it follows that the transfer was void, from the outset, because it transferred a criminal Case *out of* the State having jurisdiction of the Crime, which is the

exact antithesis of the purpose of extradition. Because this transfer crossed the State line, the result was a complete bar (for all courts sitting outside Oklahoma) to the exercise of judicial Power over these Oklahoma-based criminal Cases.

Ultimately, no conviction or judgment from the Colorado court has authority, and the execution must be stopped.

C. Murder Cases do not belong in the U.S. District Court.

The court is quite correct in asserting that the authority of the United States District Court is not limited to just the District of Columbia and the property of the United States Government. Plaintiffs have never said otherwise. What Plaintiffs have said, and assert here, again, is that the subject matter jurisdiction of the Article III judicial Power is completely barred from entertaining Cases that are based on legislation that is geographically limited to the District of Columbia and property owned by the United States Government. Said another way, the Article III judicial Power does not extend to Cases that arise under the Law of the District. How those ideas got that crossed is unknown, but to attempt to get that issue straightened back out, Plaintiffs again review that analysis briefly. The longer discussion is in Plaintiffs Brief (of 11 May 2001).

Key Facts.

1. Congress has no authority to define or punish murder for purposes of Law of the United States.
2. Congress does have authority to define and punish murder for purposes of Law of the District and of property of the United States Government.
3. These murder Cases didn t arise in the District.

4. These murder Cases didn t arise on property owned by the United States Government.
    i. There is no receipt or deed showing transfer of title to the United States Government of the property on which stood the Murrah Federal Building.
    ii. There is no Consent by the Oklahoma Legislature to the transfer of title of that property to the United States Government. *See* U.S. Const. art. I, § 8, cl. 17 (regarding exclusive Legislation).
5. Therefore, the language found in the indictment for these murder charges is not admissible evidence of Law for these Cases, and the indictment is void on its face regarding those murder charges.
6. Even if these murder Cases had occurred on United States Government property, Article III does not extend to Cases that arise under Law of the District. Not that such Cases can t be tried, as indicted, but simply that such Cases must be tried in the judicial Power of the State Government, rather than of the United States Government.

<u>Discussion.</u>

Let s say that Oklahoma isn t really a State, after all, in the eyes of the Constitution, and, therefore, that transfer to Colorado passes constitutional muster. Can the U.S. District Court try the murder Cases?

No court exercising the Article III judicial Power can try these murder Cases. These murder Cases don t arise under the Constitution (murder is not found in the Constitution), or the Laws of the United States (Congress has zero authority to address

murder for purposes of Law of the United States), or any Treaty (which Treaty language would be limited by both the Constitution and the Laws of the United States, neither of which allow Congress to define or punish murder for purposes of Law of the United States). These murder Cases don t affect any Ambassador, other public Minister or Consul. And, they don t involve any ship, vessel, inland waterway, coastal waterway or the high Seas, meaning they aren t admiralty or maritime claims. And those are the only bases for Cases under Article III; everything else deals with Controversies.

In sum, the transferee trial court had no authority to try the murder Cases. What follows is that the convictions of the murder Cases, from which convictions stem the death penalty, are void, starting from the moment they appeared in the indictment. Further, if this had been United States Government property, thus making applicable the indictment language, such Cases still must be sued out in the State judicial system (in Oklahoma County, Oklahoma), because Article III doesn t extend judicial Power to Cases arising under Law of the District.

Ultimately, no conviction or judgment from the Colorado court regarding the murder Cases has authority, and the execution must be stopped.

D. McVeigh has, and is, evidence, which evidence is vital and indispensable for claims still viable and for currently pending litigation.

1. The need for McVeigh s testimony.

As mentioned in the Brief that accompanied the initial motions in this matter, arguably, both of the preceding two bases, taken alone, constitute collateral attack. Therefore, such arguments ordinarily would be best asserted on appeal, or by a Writ of Habeas Corpus, by

McVeigh, or a next friend, and Plaintiffs here arguably don t have standing or capacity, as the case may be, to assert claims in either of such proceedings.

Victims Claims Against Government Officials who had a Duty to Speak but who Kept Silent. However, what Plaintiffs do have is a direct and specific need to preserve evidence, and what better reason to preserve evidence than the absence of any authority to destroy it? Some more specifically, what Plaintiffs do have is a claim against those who caused the building to collapse, as well as those who had a duty to speak and who remained silent. Those claims arise from the same transactions and occurrences as the criminal Cases tried against McVeigh, making McVeigh a key witness, whose testimony is vital and indispensable, in those proceedings involving these Plaintiffs.[6]

Claims against McVeigh and John Does 1 and 2. What Plaintiffs also have is a claim against McVeigh, and the two alleged accomplices in the truck, John Does 1 and 2, for intentional infliction of emotional distress, among other claims.[7]

Third-party beneficiaries of the preservation of evidence from McVeigh. Also currently pending is additional criminal litigation against Terry Nichols. The State officials in Oklahoma County trying that case would definitely benefit from having testimony directly from McVeigh, rather than merely through what his former defense counsel and current medical doctors can recall McVeigh s having said.

Weighing the Equities. The country has yet to recover from all the doubts and

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[6] Should there be a problem concerning the limitations applicable to such claims, it s still the case that establishing a professional claim depends upon establishing the underlying claim, and, again, the testimony from McVeigh would still be required.

[7] These include remedies in equity for which the limitations period determination is different. For example, unjust enrichment, as regards the proceeds from book sales, can t accrue until the book is published. The same applies to movies, videos, CD s, etc.

questions that still exist surrounding the Kennedy Assassination. So much evidence was altered and destroyed, including the mysterious deaths of several eye witnesses on the grassy knoll, that the reality of who did what has been difficult to track. This bombing case is described as the worst act of terrorism in America in our nation s history, thus indicating the national significance of the event. Yet, we have already witnessed the razing of the Murrah Federal Building, which building could have told us *volumes* about what caused it to collapse. And now we have a key player, McVeigh, talking (through former defense counsel, medical doctors and journalists) about his role in the matter and other vital items pertinent to that horrific event.

If everything about the death penalty sentence were beyond question and fully supportable by Law, in other words, if Claims 1 and 2 in this matter didn t exist, it is still the case that the nation s interest in obtaining all possible evidence about this matter, certainly for at least as long as any litigation exists, or could exist, outweighs the interest in being in such a rush to carry out the death sentence.[8] And, if McVeigh has evidence that *does* show agents knew of the bombing ahead of time and that those officials remained silent, for those officials then to participate in, or allow to happen, the carrying out of the execution, especially in light of the questionable judicial authority on which it is currently based, raises the potential for a serious witness tampering matter, in addition to the other problems already mentioned in this and prior documents filed in this matter.

2. <u>The admissibility of McVeigh s testimony.</u>

<u>McVeigh as witness.</u> In criminal Cases, the government is prohibited from compelling

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[8]Meaning, that if the United States intervenes, then it should intervene as a party Plaintiff, to preserve the evidence; meaning that the United States, having appeared as a party Defendant, is already conflicted out of this matter.

someone to be a witness against himself. U.S. CONST. amend. 5. However, a defendant may become a witness in his own criminal matter, and once such role of witness is entered into, it is no longer a matter of governmental prohibition.[9] Once having entered, voluntarily, the role of witness, that individual becomes a witness, and evidence from that witness is most certainly available.

Through the numerous statements made through his representatives, whether his former defense counsel, his medical doctor, or the journalists who have published letters and books based on communications with McVeigh, McVeigh has assumed, voluntarily, the role of witness, and his testimony is vital and indispensable to these current and pending claims and suits, civil and criminal. It is difficult to see how the prohibitions found in the Fifth Amendment would allow, at this point, his assertion of a non-witness role, which non-

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[9] While the contemporary nomenclature uses the terms rights and waiver regarding this Fifth Amendment provision, both terms are rather misplaced. It s not a right not to be compelled to be a witness against oneself. It is an absolute prohibition of governmental authority to compel someone to be a witness against himself. Therefore, waiver is misplaced, as well, because it s impossible, through waiver or any other individual means, to grant governmental authority that can only exist by way of amendment to the Constitution. The Constitution recognizes the evidentiary value in Confession evidence, for it is identified as admissible for Cases of Treason. U.S. CONST. art. III, § 3. The confessor steps into the role of witness, which role necessarily involves all the applicable Laws for any witness. Statements against interest even are excepted from the hearsay rule, by being declared not hearsay. FED. R. EVID. 801(d)(2). Thus, once a defendant becomes a witness (whether against himself or otherwise), there is no waiver of the prohibition on government. It is inconceivable that an individual could *ever* waive the prohibition against governmental authority of any kind. Once the role of witness is undertaken, there is simply no difference in acquiring evidence from that individual (the defendant) than any other prospective witness, because one key purpose of trial is to make decisions based on all available evidence. The practical result is the same, i.e., the testimony is admissible evidence once it is originally offered by a defendant, but the concepts that get us there are *quite* different. The Fifth Amendment establishes no rights. Our rights are found at common law, which long predates the United States Government. What the Fifth Amendment does is establish additional prohibitions on government. No act by any individual can ever waive a prohibition on government. No act by any individual serves as a grant of otherwise prohibited authority.

witness role he asserted in his original trial.[10]

Further, the matters of interest for Plaintiffs are civil in nature, not criminal. McVeigh still could not be forced to answer deposition questions, to be sure, but the prohibition found in the Fifth Amendment is designed for criminal matters.

Common Law Evidentiary Policy Regarding Respect for the Oath. The common law of evidence places a high value on the witness ability to understand the significance of the oath. *See* JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 519-24, 519 (vol. 3A, pp. 725-34, 726) (James H. Chadbourn rev. 1979) (1940) (hereinafter 3A WIGMORE, EVIDENCE § ___), SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE §§368 and 372-77, 368 and 372 (pp. 412, 417-22, 412 and 417) (Gaunt, Inc. photo. reprint 1997) (1842) (hereinafter GREENLEAF, EVIDENCE § ___), and BURR W. JONES, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES §§ 716-18, 716 (vol. IV, pp. 335-46, 335) (L. Horwitz rev. 1914) (hereinafter 4 JONES, EVIDENCE § ___). When one is unable to appreciate the oath, it has been the law that such witnesses were simply not allowed to testify, at all. One basis for such complete exclusion is infamy. 3A WIGMORE, EVIDENCE § 519 (pp. 725-26), GREENLEAF, EVIDENCE § 368 (p. 412), and 4 JONES, EVIDENCE § 716 (pp. 335-36). Thus, one convicted of an infamous crime was simply not allowed to testify, period. *Id.*

Since McVeigh has been convicted of an infamous crime, this rule applies, and the question arises as to whether his testimony, whether preserved or at least perpetuated, is

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[10]One is tempted to list judicial opinion citations in support of this concept, but these are so permeated with language of rights, and privileges, and waiver, as to miss the point. Either the defendant has assumed the role of witness or he hasn t. The government is prohibited from forcing a defendant to assume the role of witness. U.S. CONST. amend. 5.

admissible at all.

McVeigh s testimony is admissible.

a. Foundation for common law exclusion requires court of competent jurisdiction.

Wigmore and Greenleaf point out that one of the elements necessary in the common law that renders inadmissible the testimony of a infamous individual is the judgment. And it must appear that the judgment was rendered by a Court of competent jurisdiction. 3A WIGMORE, EVIDENCE § 521 (p. 731) (footnote omitted), GREENLEAF, EVIDENCE § 375 (p. 421) (footnote omitted). Thus, those who would otherwise seek to exclude McVeigh s testimony would have to show that Oklahoma is not a State, because that s the one fact that might actually justify that transfer across the State line. Otherwise, the judgment was not rendered by a Court of competent jurisdiction, as discussed above, and in Claim 1 in the Original Complaint, as discussed in Plaintiffs Brief (of 11 May 2001).

b. Common law exclusion of infamous witnesses ends at the State line.

In *Logan v. United States*, 144 U.S. 263, 12 S. Ct. 617, 36 L. Ed. 429 (1892), two witnesses called to testify in the criminal proceeding had felony convictions. *Id.* at 298. Defendants objected on the grounds of competence. After discussing the details of the applicable legislative history, both of the United States legislative acts, and those of Texas, the Court determined that the Texas legislation, which would bar the testimony, did not apply to criminal cases. Rather, the common law (of Texas) applied.

> At common law, and on general principles of jurisprudence, when not controlled by express statue giving effect within the State which enacts it to a conviction and sentence in another State, such conviction and sentence can have no effect, by way of penalty, or of personal disability or disqualification, beyond the limits of the State in which the judgment is rendered.

Id. at 303 (citations omitted).

Therefore, since the convictions against McVeigh were rendered in Colorado, his testimony would not be barred in civil or criminal proceedings in Oklahoma, even under the common law.

c. Oklahoma Rules of Evidence.

Not knowing exactly how the proceedings in Oklahoma will move forward, it is presumed that the Oklahoma Rules of Evidence will apply. According to those rules, the evidence of a conviction is not a bar to testimony, but such conviction can be admissible for purposes of evaluation of credibility. OK. R. EVID. § 2609. In short, the preserved, or perpetuated, testimony is admissible.

d. Federal Rules of Evidence.

In the U.S. District Courts, the same concept applies. *See* FED. R. EVID. 609.

Conclusion.

This court has subject matter jurisdiction over these parties and these claims, and the execution of McVeigh must be stopped. There is no authority to destroy this evidence, and this evidence is vital and indispensable to Plaintiffs. Alternatively, if this court cannot enter a temporary injunction to stop the execution outright, this court can at least interpose a temporary injunction to allow a reasonable time to prepare for and take the deposition allowed per Rule 30(a)(2).

Prayer for Relief

Plaintiffs reassert their relief requested in the Motion for Temporary Injunction, and here also assert the relief requested per Rule 30(a)(2), and for any and all relief in equity (or at law,

should such remedies apply) that supports the request per Rule 30(a)(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this the 30th day of May, 2001, I certify that I have served upon the following parties, by certified mail, return receipt requested, the foregoing Plaintiffs Brief, Responsive to Show Cause Order of 17 May 2001. The reason for separating out the United States from the Warden is Plaintiffs objection to improper intervention by the United States, as outlined in this Brief.

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