

Volume 11 of ✓ Volumes
CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

BASHAW Mark C 1549005299 1LT
(Last Name) *(First Name)* *MI* *(DOD ID No.)* *(Rank)*

Headquarters Company, U.S.
Army Public Health Command

U.S. Army

APG, MD

(Unit/Command Name)

(Branch of Service)

(Location)

By

SPECIAL

COURT-MARTIAL

(GCM or SPCM)

Convened by

Commanding General

(Title of Convening Authority)

Headquarters, U.S. Army Communications-Electronics
Command

(Unit/Command of Convening Authority)

Tried at

Aberdeen Proving Ground, MD

On

28-29 April 2022

(Place or Places of Trial)

(Date or Dates of Trial)

Companion and other cases

None

TRANSCRIPT

CERTIFIED RECORD OF TRIAL
of

BASHAW, Mark
(Name: Last, First, Middle Initial)

1549005299
(DOD ID No.)

(O-2)
(Rank)

Headquarters Company, US Army
Public Health Command
(Unit/Command Name)

U.S. Army
(Branch of Service)

APG, MD
(Location)

Aberdeen Proving Ground, MD
(Place or Places of Trial)

on 28-29 April 2022
(Date or Dates of Trial)

		copies of certified record of trial distributed to accused and victim(s)
		copies of certified record of trial forwarded to CCA

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TESTIMONY

in the case of United States v. 1LT Mark C Bashaw

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in the case of United States v. 1LT Mark C. Bashaw

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		OFFERED		ADMITTED/NOT ADMITTED	
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PE 2	FID Email between ACC and CPT McCarthy, dtd 26 Nov 21
PE 6	FID DA Form 4856, 30 Nov 21, Counseling of ACC by CPT McCarthy
PE 7	FID DA Form 4856, 3 Dec 21, counseling of ACC by CPT McCarthy
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APPELLATE EXHIBITS

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AE III	Defense Motion for Extension to File Motions
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AE VII	MJ Ruling – Preliminary Ruling on Lawfulness
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AE XII	Defense Notice of Defenses, dtd 1 Apr 22
AE XIII	CDC Entry of Appearance
AE XIV	MJ Ruling – Motion to Compel Defense Expert Consultants/Witnesses, dtd 12 Apr 22
AE XV	ACDC Entry of Appearance, dtd 15 Apr 22

AE XVI	EO on Protecting the Federal Workforce and Requiring Mask-Wearing, dtd 20 Jan 21
AE XVII	Texas v. Johnson, 491 US 397
AE XVIII	Post-Trial Appellate Rights Advice Form
AE XIX	Amended charge sheet incl Specs 1 and 3 (Specifications 1&2 from original charge sheet merged)
AE XX	Defense Motion to disqualify SJA w/MJ's email in response

Bulavko, Leo M CIV USARMY CECOM (USA)

From: Bashaw, Mark C 1LT USARMY MEDCOM APHC (USA)
Sent: Monday, May 23, 2022 9:06 AM
To: Bulavko, Leo M CIV USARMY CECOM (USA)
Cc: David Willson
Subject: RE: Audio of court-martial (UNCLASSIFIED)

Classification: UNCLASSIFIED

CLASSIFICATION: UNCLASSIFIED

Received. Thank you!

Respectfully,

Mark C. Bashaw

1LT, MS

Entomologist, Entomological Sciences Division

U.S. Army Public Health Center

Entomological Sciences Division Army Public Health Center

8638 40th Street (Bldg. E-5800)

Aberdeen Proving Ground, MD 21010-5403

Phone: (410)-436-5436

Email: mark.c.bashaw.mil@mail.mil <mailto:mark.c.bashaw.mil@mail.mil>

From: Bulavko, Leo M CIV USARMY CECOM (USA) <leo.m.bulavko.civ@army.mil>
Sent: Monday, May 23, 2022 8:24 AM
To: Bashaw, Mark C 1LT USARMY MEDCOM APHC (USA) <mark.c.bashaw.mil@mail.mil>
Cc: David Willson <david@dradvocates.com>

Subject: Re: Audio of court-martial (UNCLASSIFIED)

Attempting to send again now. Let me know if you don't see it.

From: Bashaw, Mark C 1LT USARMY MEDCOM APHC (USA) <mark.c.bashaw.mil@mail.mil <mailto:mark.c.bashaw.mil@mail.mil> >
Sent: Monday, May 23, 2022 7:57 AM
To: Bulavko, Leo M CIV USARMY CECOM (USA) <leo.m.bulavko.civ@army.mil <mailto:leo.m.bulavko.civ@army.mil> >
Cc: David Willson <david@dradvocates.com <mailto:david@dradvocates.com> >
Subject: RE: Audio of court-martial (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Good Morning Mr. Bulavko, I have not seen the DOD Safe link come through yet. Has it been sent? Thank you.

Respectfully,

Mark C. Bashaw
1LT, MS
Entomologist, Entomological Sciences Division U.S. Army Public Health Center

Entomological Sciences Division Army Public Health Center
8638 40th Street (Bldg. E-5800)
Aberdeen Proving Ground, MD 21010-5403

Phone: (410)-436-5436
Email: mark.c.bashaw.mil@mail.mil <mailto:mark.c.bashaw.mil@mail.mil>

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

From: Bulavko, Leo M CIV USARMY CECOM (USA) <leo.m.bulavko.civ@army.mil <mailto:leo.m.bulavko.civ@army.mil> >
Sent: Thursday, May 19, 2022 3:59 PM
To: Bashaw, Mark C 1LT USARMY MEDCOM APHC (USA) <mark.c.bashaw.mil@mail.mil <mailto:mark.c.bashaw.mil@mail.mil> >
Cc: David Willson <david@dradvocates.com <mailto:david@dradvocates.com> >
Subject: Audio of court-martial

Good day, Lieutenant Bashaw

As part of the post-trial process, I'll be forwarding you the audio from your trial via DoD SAFE. Please advise if any questions or concerns. Once you open the SAFE, that'll be your acknowledgement of receipt.

Note that I previously provided the audio to both Mr. Willson and CPT Jackson. Continue to coordinate with them on whatever post-trial submissions or actions you're putting forward.

LEO M. BULAVKO
GS-09

Court Reporter
HQ, CECOM, Office of the SJA
APG, MD 21005
Cell: 443-752-8707

r/lmb

LEO M. BULAVKO
GS-09
Court Reporter
HQ, CECOM, Office of the SJA
APG, MD 21005
Cell: 443-752-8707

CLASSIFICATION: UNCLASSIFIED


CLASSIFICATION: UNCLASSIFIED

MEMORANDUM FOR RECORD

5 May 2022

SUBJECT: Service of Audio Record of Trial and Exhibits on
Civilian Defense Counsel - US v. 1LT Bashaw

1. On 4 May 2022, I sent the audio for the 2 days of the Bashaw case to both Mr. Willson, civilian defense counsel, and CPT Jackson, military defense counsel, via DoD SAFE.
2. I received electronic acknowledgement that CPT Jackson received the audio later on 4 May 2022.
3. On 5 May 2022, I sent via email the admitted trial and defense exhibits to Mr. Willson, who was noted as the counsel responsible for post-trial matters.
4. Mr. Willson received the matters described above as noted:
 - 0937, 5 May 2022 - CDC downloaded audio
 - 1141, 5 May 2022 - CDC received Prosecution and Defense Exhibits, minus Defense Exhibit ~~E~~^D
 - 1142, 5 May 2022 - CDC received Defense Exhibit D.
5. POC is the undersigned.


LEO M. BULAVKO
GS9
Court Reporter

ERRATA SHEET

UNITED STATES v. 1LT Mark C. Bashaw

DATE COMPLETED: 23 May 22

DATE SENTENCE ADJUDGED: 29 April 22

Military Judge: LTC Cohen	Trial Counsel CPT Genrich CPT Jameson	Defense Counsel Mr. Willson Ms. Uballe CPT Jackson	Court Reporter(s) MR. BULAVKO
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LOCATION		CHANGE		INITIALS
PAGE #	LINE #	FROM	TO	TC
37	4	now	how	TCJ
95	20	requirement	require it	TCJ
118	3	he	how he	TCJ
147	8	didn't	did	TCJ
216	5	A>	A.	TCJ
218	12	now	not	TCJ
277	9	6Discipline	Discipline	TCJ
293		Safe	Save	TCJ

Signature of (TC)  DATE 03 June 2022

ERRATA SHEET

UNITED STATES v. 1LT Mark C. Bashaw

DATE COMPLETED: 20 JUNE 22

DATE SENTENCE ADJUDGED: 29 April 22

Military Judge: LTC Cohen	Trial Counsel CPT Genrich CPT Jameson	Defense Counsel Mr. Willson Ms. Uballe CPT Jackson	Court Reporter(s) MR. BULAVKO
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LOCATION		CHANGE		INITIALS
PAGE #	LINE #	FROM	TO	MJ
3	17	and	just	W
7	13	strike "in fact"		W
7	14	concern	issue	W
7	16	issue is	issues are	W
7	20	is not	has not been	W
8	1	were not properly supposed issues	were not properly supported or issued	W
86	18	insert "Chief" before "Executive"		W
86	20	that	on	W
96	12	best	beast	W
326	5	insert "you are" before "trustworthy"		W
		NOTHING FOLLOWS	NOTHING FOLLOWS	.

Signature of Military Judge



DATE 20 June 2022

((

PROCEEDINGS OF A SPECIAL COURT-MARTIAL

1

2

3 The Article 39(a) session was called to order at 1150, 28 April 2022,
4 at Aberdeen Proving Ground, Maryland, pursuant to the following
5 direction:

6

7 The case was referred to a special court-martial on 18 January 2022
8 by Commander, U.S. Army Communications-Electronics Command, pursuant
9 to Article 16(c) (2) (A).

10

[END OF PAGE]

11

1 MJ: This 39(a) session is called to order.

2 Government, would you please put on the record the
3 information concerning this case today.

4 TC: Yes, Your Honor.

5 This court-martial was convened by order of Major General
6 Robert L. Edmonson II, Commander, United States Army Communications-
7 Electronics Command on 18 January 2022, pursuant to Article
8 16(c)(2)(A), UCMJ.

9 The Charge has been properly referred to this court for
10 trial, and was served on the accused on 18 January 2022; the 3-day
11 statutory waiting period has expired.

12 The prosecution is ready to proceed with this arraignment
13 in the case of *United States v. First Lieutenant Mark Bashaw*.

14 The accused and the following persons detailed to this
15 court are present:

16 **LIEUTENANT COLONEL ROBERT COHEN, MILITARY JUDGE;**

17 **CAPTAIN CHRISTOPHER GENRICH, TRIAL COUNSEL;**

18 **CAPTAIN TANNER JAMESON, [ASSISTANT] TRIAL COUNSEL;**

19 **MR. DAVID WILLSON, [CIVILIAN] DEFENSE COUNSEL;**

20 **MS. DAWN UBALLE, [SECOND CIVILIAN] DEFENSE COUNSEL;**

21 **CAPTAIN KIAHHN JACKSON, DEFENSE COUNSEL.**

22 Leo Bulavko has been detailed reporter for this court, and
23 has been previously sworn.

1 All members of the prosecution have been detailed to this
2 court-martial by Colonel Yevgeny Vindman [SJA, USA C-E Command]. All
3 members of the prosecution are qualified and certified under Article
4 27(b) and sworn under Article 42(a), Uniform Code of Military
5 Justice. No member of the prosecution has acted in any manner that
6 might tend to disqualify us in this court-martial.

7 MJ: Thank you, Counsel.

8 Lieutenant Bashaw - first of all, can you hear me clearly?

9 ACC: Yes, sir.

10 MJ: If at any time you don't understand something I'm saying,
11 or you have difficulty hearing what is being said, please immediately
12 get my attention, and the attention of your counsel. Okay?

13 ACC: Yes, sir.

14 MJ: As I told all the attorneys previously, if at any time you
15 need to speak with your counsel privately, away from the microphones,
16 or if you need a recess for any reason, I will grant those liberally,
17 just ensure I'm aware of it.

18 Do you understand that?

19 ACC: Yes, sir.

20 MJ: Lieutenant Bashaw, you have the right to be represented by
21 Captain Jackson, your detailed military defense counsel. She is a
22 lawyer, certified by The Judge Advocate General as qualified to act

1 as your defense counsel, and she is a member of the Army's Trial
2 Defense Service. Her services are provided at no expense to you.

3 You also have the right to be represented by a military
4 counsel of your own selection, provided that the defense counsel you
5 request is reasonably available. If you were represented by military
6 counsel of your own selection, then your detailed defense counsel
7 would normally be excused. However, you could request that your
8 detailed defense counsel continue to represent you, but your request
9 would not have to be granted.

10 Do you understand me?

11 ACC: Yes, sir.

12 MJ: In addition to your military defense counsel, you have the
13 right to be represented by civilian counsel at no expense to the
14 government. Civilian counsel may represent you along with your
15 military defense counsel, or you could excuse your military counsel
16 and be represented only by civilian counsel.

17 Do you understand this?

18 ACC: Yes, sir.

19 MJ: It is my understanding that in addition to Captain Jackson,
20 you have retained the services of two civilian counsel to represent
21 you - Mr. Willson and Ms. Uballe. Is that correct?

22 ACC: Judge, that's correct.

23 MJ: Do you have any questions about your rights to counsel?

1 ACC: No, sir.

2 MJ: By whom do you wish to be represented?

3 ACC: Judge, I'd request to be represented by David Willson, Dawn
4 Uballe, and Captain Kiahhn Jackson.

5 MJ: By them alone?

6 ACC: Yes, sir.

7 MJ: Military defense counsel - that'd be Captain Jackson -
8 would you please announce your detailing and qualifications?

9 DC: I have been detailed to this court-martial by Major Simon
10 Chung, [SDC,] Military District of Washington. I am qualified and
11 certified under Article 27(b) and sworn under Article 42(a), Uniform
12 Code of Military Justice. I have not acted in any manner that might
13 tend to disqualify me in this court-martial.

14 MJ: Thank you.

15 CDC: Your Honor, I am an attorney licensed to practice law in
16 the States of New York, Connecticut and Colorado, and a member of
17 good standing of those bars. I have not acted in any manner which
18 might tend to disqualify me in this court-martial.

19 [The civilian defense counsel was sworn.]

20 MJ: Now, Ms. Uballe?

21 ACDC: Your Honor, I am an attorney, and licensed to practice law
22 in the State of Texas. I am a member in good standing of the Texas

1 Bar. I have not acted in any manner which might tend to disqualify
2 me in this court-martial.

3 [The assistant civilian defense counsel was sworn.]

4 MJ: I'm Lieutenant Colonel Robert Cohen. I have been properly
5 certified and sworn, and have been detailed by Colonel Lanny Acosta,
6 who is the Deputy Chief Trial Judge, United States Army Trial
7 Judiciary, to preside over this court-martial. I am not aware of any
8 matter that might be grounds for challenge against me.

9 Does either side desire to question or challenge me?

10 TC: No, Your Honor.

11 MJ: Defense?

12 CDC: No, Your Honor.

13 MJ: Counsel for both sides appear to have the requisite
14 qualifications, and all personnel required to be sworn have now been
15 sworn.

16 Trial counsel, would you announce the general nature of the
17 charges?

18 TC: The general nature of The Charge in this case is three
19 specifications of failure to obey an order.

20 The Charge was preferred by Captain Alexander McCarthy, and
21 forwarded with recommendations as to disposition by Colonel John
22 Casiano.

1 MJ: Counsel, before we go further, I wanted to put on the
2 record a summary of the somewhat lengthy 802 conference we had this
3 morning.

4 Lieutenant Bashaw, as you are probably aware, I met with
5 counsel starting around 8:30 or 8:40 this morning, and that
6 conversation took well over an hour. During that time, we had
7 conversations about the order of march - how we would be proceeding
8 here today, what the expectations would be with regard to what would
9 be a motions hearing, first, under an Article 39(a) session; we
10 talked about whether or not, should we get to the merits, the issue
11 of a witness not being available until tomorrow for, I believe, the
12 government. I also provided counsel with a number of questions
13 concerning what the issues were, that needed to be addressed and
14 litigated today, as to the issue of lawfulness of the orders.

15 What I was advised - defense and government, you'll have an
16 opportunity to add to this as well - the issues are, as to the
17 underlying issue of lawfulness of the orders, challenging,
18 essentially, two aspects:

19 First is that the element of the offense requiring that the
20 order be related to military duties is not satisfied; and

21 The second aspect of the argument is that the promulgating
22 sources from the Department of Defense, and the Centers for Disease
23 Control, outlining the requirements for mask-wear, testing,

1 concerning COVID-19 were not properly supported or issued, or that
2 they were not, in fact, appropriate, or authorized, and therefore,
3 any orders that followed from them were then illegal.

4 Then we also finally discussed a number of cases. I
5 provided counsel with a number of citations of recent cases, and not
6 so recent cases, concerning the issues of force health protection
7 orders. I also brought to the parties' attention from one of their
8 own exhibits questions concerning the related Executive Orders
9 governing the FDA's determination on the use of certain products, and
10 asked counsel to then review those cases, review the Executive
11 Orders, so they could be prepared to address those issues in court in
12 their motions.

13 I then directed the government, because of the issue the
14 issue of printer capability, so they could review those as well.

15 First, to the government, have I omitted anything that we
16 discussed of significance that you want to add to the record
17 concerning the 802 session held this morning?

18 TC: No, Your Honor.

19 MJ: Defense?

20 CDC: No, Your Honor.

21 MJ: Lieutenant Bashaw, because this case has been referred to a
22 special court-martial consisting of a military judge alone, the

1 military judge will decide whether you are guilty; and if found
2 guilty, the military judge will determine your sentence.

3 Do you understand this?

4 ACC: Yes, Your Honor.

5 MJ: You have the right to object to the trial of any
6 specification by a special court-martial consisting of a military
7 judge alone, if:

8 One, the maximum authorized confinement for the offense
9 alleged in the specification would be greater than 2 years, if the
10 offense were tried by a general court-martial, with the exception of
11 a specification alleging wrongful use or possession of a controlled
12 substance in violation of Article 112a of the Uniform Code of
13 Military Justice, or an attempt thereof under Article 80 of the
14 Uniform Code of Military Justice; or

15 Two, if the specification alleged an offense for which sex
16 offender notification would be required under regulations issued by
17 the Secretary of Defense.

18 In this case, you are charged with three specifications of
19 violating Article 92 of the Uniform Code of Military Justice. The
20 maximum penalty as to each of these specifications, had you been
21 tried by a general court-martial, would've been confinement for up to
22 a period of 6 months.

1 If you objected to trial by special court-martial
2 consisting of a military judge alone for any specification, the
3 Convening Authority will have the option of referring those
4 specifications to a general or special court-martial, at which time,
5 the maximum punishment authorized could be increased.

6 Do you understand what I've said so far?

7 ACC: Yes, Your Honor.

8 MJ: Have you discussed these issues with your defense counsel?

9 ACC: Yes, Your Honor.

10 MJ: Do counsel or accused believe that you have the right to
11 object to any specification being tried at this special court-martial
12 consisting of a military judge alone?

13 TC: No, Your Honor.

14 CDC: No, Your Honor.

15 MJ: The court is assembled.

16 The accused will now be arraigned.

17 TC: All parties to the trial have been furnished with a copy of
18 the charges. Does the accused want them read?

19 CDC: We'll waive reading.

20 MJ: The reading may be omitted.

21 **[THE CHARGE SHEET FOLLOWS AND IS NOT A NUMBERED PAGE.]**

22 **[END OF PAGE]**

23

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED <i>(Last, First, Middle Initial)</i> Bashaw, Mark C. <input type="checkbox"/>		2. SSN [REDACTED]	3. GRADE OR RANK ILT	4. PAY GRADE O-2
5. UNIT OR ORGANIZATION HHC, United States Army Public Health Center, United States Army Medical Command, Aberdeen Proving Ground, MD 21010			6. CURRENT SERVICE	
			a. INITIAL DATE 08 Sep 2019	b. TERM Indef
7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL	N/A	
\$5,399.00 \$ 6,420.60	\$0.00	\$5,399.00 6,420.60		
			9. DATE(S) IMPOSED	

II. CHARGES AND SPECIFICATIONS

10. THE CHARGE: **VIOLATION OF THE UCMJ, ARTICLE 92.**

SPECIFICATION 1 (Failure to Obey Other Lawful Order): In that First Lieutenant Mark C. Bashaw, U.S. Army, having knowledge of a lawful order issued by Captain Alexander McCarthy, HHC, APHC Commander, in accordance with HQDA EXORD 225-21, to provide proof of a negative COVID-19 test before being physically present at his place of duty on 30 November 2021 or alternatively reporting to a specified place between 0730-0830 on 30 November 2021 to have a COVID-19 test administered, an order which it was his duty to obey, did, at or near Aberdeen Proving Ground, Maryland, on or about 30 November 2021, fail to obey the same by wrongfully being physically present at his place of duty without providing proof of a negative COVID-19 test or alternatively being physically present at a specified place to have a COVID-19 test administered prior to reporting to his place of duty.

SPECIFICATION 2 (Failure to Obey Other Lawful Order): In that First Lieutenant Mark C. Bashaw, U.S. Army, having knowledge of a lawful order issued by Captain Alexander McCarthy, HHC, APHC Commander, to leave Aberdeen Proving Ground, Maryland and work remotely until providing proof of a negative COVID-19 test, an order which it was his duty to obey, did, at or near Aberdeen Proving Ground, Maryland, on or about 30 November 2021, fail to obey the same by wrongfully remaining physically present on Aberdeen Proving Ground, Maryland, and not providing proof of a negative COVID-19 test.

SPECIFICATION 3 (Failure to Obey Other Lawful Order): In that First Lieutenant Mark C. Bashaw, U.S. Army, having knowledge of a lawful order issued by Captain Alexander McCarthy, HHC, APHC Commander, to wear a face covering while indoors, an order which it was his duty to obey, did, at or near Aberdeen Proving Ground, Maryland on or about 30 November 2021, fail to obey the same by wrongfully remaining unmasked while indoors.

(END OF CHARGE)

III. PREFERRAL

11a. NAME OF ACCUSER <i>(Last, First, Middle Initial)</i> McCarthy, Alexander, P	b. GRADE O-3	c. ORGANIZATION OF ACCUSER HHC, Army Public Health Center
d. SIGNATURE OF ACCUSER [REDACTED]	e. DATE (YYYYMMDD) 20220112	

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this 12th day of January, 2022, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Tanner C. Jameson
Typed Name of Officer

Headquarters, Army Material Command
Organization of Officer

O-3
Grade

Trial Counsel
*Official Capacity to Administer Oath
(See R.C.M. 307(b) must be commissioned officer)*

[REDACTED]
Signature

12.

On January 12, 2022, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)

CPT Alexander P. McCarthy
Typed Name of Immediate Commander

HHC, Army Public Health Center
Organization of Immediate Commander

0-3
Grade


Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The sworn charges were received at 1600 hours, 12 JAN, 2022 at Aberdeen Proving Ground
Designation of Command or

COL John M. Casiano
Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE 1

COL John M. Casiano
Typed Name of Officer

COMMANDER
Official Capacity of Officer Signing

0-6


Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY

b. PLACE

c. DATE (YYYYMMDD)

Headquarters, CECOM

APG, MD

20220118

Referred for trial to the Special court-martial convened by Uniform Code of Military Justice,
Article 16(c)(2)(A)

, subject to the following instructions: ²

By Order of Major General Robert L. Edmonson II

Command or Order

Yevgeny S. Vindman

Staff Judge Advocate

0-6
Typed Name of Officer

Official Capacity of Officer Signing


Signature

15.

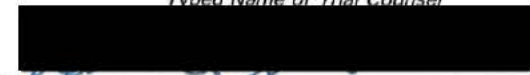
On January 18, 2022, I (caused to be) served a copy hereof on (each of) the above named accused.

TANNER C. JAMESON

0-3

Typed Name of Trial Counsel

Grade or Rank of Trial Counsel


Signature

FOOTNOTES: 1 - When an appropriate commander signs personally, inapplicable words are stricken.
2 - See R.C.M. 601(e) concerning instructions. If none, so state.

1 TC: The Charge is signed by Captain Alexander McCarthy, a
2 person subject to the Code as accuser; is properly sworn to before a
3 commissioned officer of the armed forces authorized to administer
4 oaths; and is properly referred to this court for trial by Major
5 General Robert L. Edmondson II, the Convening Authority.

6 MJ: Lieutenant Bashaw, defense counsel, will you please rise?
7 [The accused and his counsel did as directed.]

8 First Lieutenant Bashaw, how do you plead? Before
9 receiving your plea, I advise you that any motions to dismiss, or to
10 grant other appropriate relief, should be made at this time. Your
11 defense counsel will speak for you.

12 CDC: Your Honor, at this time, we make a motion for - let me
13 figure how to phrase this, Your Honor - that the orders are unlawful,
14 and we would ask the court to rule on that under the specifics that
15 we discussed in the 802 session.

16 MJ: I grant your deferral on entry of plea.

17 Subject to deferral, Lieutenant Bashaw, what has - you can
18 be seated.

19 [The accused and his counsel did as directed.]

20 What has just happened is called an arraignment. An
21 arraignment has certain legal consequences, one of which I'd like to
22 explain to you now.

1 Under ordinary circumstances, you have the right to be
2 present at every session and stage of your trial. However, if you
3 are voluntarily absent at any point in this trial going forward, you
4 may forfeit the right to be present. Future sessions, and the trial,
5 could go forward, even without you being present, up to and including
6 sentencing, if necessary.

7 Do you understand?

8 ACC: Yes, Your Honor.

9 MJ: It is important, therefore, that you keep your defense
10 counsel, and your chain of command, apprised of your whereabouts at
11 all times between now and all future sessions of this court-martial.

12 Do you have any questions about what I've told you?

13 ACC: No, Your Honor.

14 MJ: Counsel, are you ready to proceed now with the motions
15 hearing?

16 CDC: We are, Your Honor.

17 TC: We are, Your Honor.

18 MJ: Defense, given that it is your burden with regard to the
19 issue of lawfulness, you may proceed.

20 CDC: Your Honor, we would call Lieutenant Mark Bashaw to the
21 stand.

22 [END OF PAGE]

23

1 FIRST LIEUTENANT MARK BASHAW, U.S. Army, the accused, was called as a
2 witness by the defense on the motion, was sworn and testified as
3 follows:

4 DIRECT EXAMINATION

5 Questions by the civilian defense counsel:

6 Q. Lieutenant Bashaw, can you state your rank and full name?

7 A. Sir, First Lieutenant Mark Charles Bashaw.

8 Q. Are you the accused in this case?

9 A. Yes, sir.

10 Q. Can you provide the court, just briefly, with your
11 background with regards to your MOS, and your expertise?

12 A. I've been in the military 16 years. My primary MOS is 67C,
13 which is a preventive medicine officer; and my primary AOC, technical
14 ability, as an entomologist, which is 72B - the AOC. Primary duties
15 are the investigation and the risk communication strategy of vector-
16 borne disease, and other animals and arthropods and vertebrate pests
17 that may affect our soldiers, service members, and other non-battle
18 related injuries.

19 Q. Did you have prior service?

20 A. I did. I did 14 years in the Air Force enlisted.

21 Q. What was your role, or your MOS or duties, in the Air
22 Force?

1 A. My duties in the Air Force was Air Force pest management,
2 so my primary job was to communicate risk to service members of
3 disease vectors, vector-borne illness, while also suppressing those
4 threats with various different methods. I also worked various
5 different risk mitigation factors on flight lines for the Bash
6 program - BASH program stands for "Bird Aircraft Strike Hazard"
7 program. What we would do is we would devise programs to implement
8 to reduce the risk from bird-aircraft strike hazards, so we could
9 mitigate the threat to our pilots.

10 Q. In your role or your function in either the Air Force or
11 the Army, did that require you to do research?

12 A. Yes. Yes. I would oftentimes have to go through defense
13 medical publications, and things like that, to properly formulate my
14 risk communication to the service members, depending on the mission
15 set that we were delivering.

16 Q. What we're going to focus on is military function with
17 regards to mask and testing.

18 A. Roger that.

19 Q. Is it your conclusion that the wearing of a mask, or
20 testing, is a military function?

21 TC: Objection, Your Honor.

22 CDC: I'll lay some foundation, Your Honor.

1 Q. Being in the Army, were you required to wear a mask at any
2 point?

3 A. Yes.

4 Q. Do you recall when that requirement came about?

5 A. I believe it was around summertime 2020.

6 Q. Do you know why that requirement came about?

7 A. For the threat of - the narrative was the threat of COVID-
8 19.

9 Q. How often did you have to wear a mask?

10 A. It was whenever we were inside of a government facility.

11 Q. How often was that?

12 A. Whenever we showed up to the facility, so, on a daily
13 basis.

14 Q. Is that where your place of work was?

15 A. Yes. At the time, I was working as the HHC company
16 commander at Army Public Health Center.

17 Q. So, is it safe to say, approximately 8 hours a day, you
18 were in a building wearing a mask?

19 A. Approximately, given the circumstances of individuals and
20 personnel within the building.

21 Q. And at any point since, I'm going to say, summer of 2020,
22 until recently, did you have to have to wear a mask in anywhere other
23 than inside a DoD building?

1 A. Not that I'm aware of.

2 Q. Outdoors?

3 A. Not that I'm aware of.

4 Q. For physical training?

5 A. So, there was instances at the gym, where we were forced to
6 wear masks while we were performing PT.

7 Q. So, inside any building, to include the gym?

8 A. Right, that's correct.

9 Q. Were you required to test at any point?

10 A. Yes.

11 Q. When was that?

12 A. That order came down 23 November.

13 Q. Of 2021?

14 A. Of 2021.

15 Q. In looking at military functions, would you agree that
16 maintaining your weapon would be considered a military function?

17 A. Yes.

18 Q. What other functions would you consider a military
19 function?

20 A. Serviceability of your uniform, and the issues that were
21 properly issued by CIF.

22 Q. How about from a healthcare perspective?

23 A. Not that I'm aware of.

1 Q. Is maintaining your health - would you consider that a
2 proper military function?

3 A. Yes, maintaining your health.

4 Q. How about brushing your teeth?

5 A. Yes.

6 Q. How about having your eyes checked?

7 A. Yes.

8 Q. When I put those into that context, would you consider
9 those unique military functions, or functions of being a human who
10 cares about themselves?

11 A. That's correct, functions of being a human.

12 Q. Do you recall any time when you were in the Air Force, or
13 the Army - let me back up.

14 The military is fairly alert to flu season, would you
15 agree?

16 A. Yes.

17 Q. Were you required, at any point in the military, to get a
18 flu shot?

19 A. Yes.

20 Q. Was that Air Force and Army?

21 A. Air Force and Army.

22 Q. How often was that?

23 A. Annually.

1 Q. That's typically during flu season?

2 A. Yes.

3 Q. Do you now when flu season normally ----

4 A. Typically, September to February, my guess, but not
5 specifically.

6 Q. In your job description or your duties, does that include
7 dealing with viruses like the flu, and other diseases or ailments?

8 A. Diseases or ailments, yes, but not specifically the flu.

9 Q. The mask that you had to wear, that was for COVID-19?

10 A. Supposedly, yes.

11 Q. Did you ever have to wear a mask related to the flu?

12 A. No.

13 Q. Did you ever have to test related to the flu?

14 A. No.

15 Q. Is it correct that when talking about the flu, if you did
16 receive a test, it was typically, you were symptomatic, and you went
17 to the doctor?

18 A. Typically.

19 Q. At some point, when the COVID mandates - specifically, I'm
20 going to talk about masks right now - came out, did you develop a
21 concern with regards to the wearing of a mask?

22 A. Yes.

23 Q. What was that concern?

1 A. Specifically, at the time, for my service members,
2 performing physical activities during physical training inside the
3 gym, was a specific situation.

4 Q. When was that?

5 A. That was February 2021.

6 Q. What steps did you take to address that?

7 A. I contacted the Aberdeen Proving Ground Kirk [Army Health
8 Clinic] - I forget his name, but I contacted the commander first at
9 Kirk, and I brought up the concerns about soldiers wearing masks
10 while performing PT.

11 Q. To clarify, what is Kirk?

12 A. Kirk is a clinic on Aberdeen Proving Ground - a health
13 clinic.

14 Q. So, the clinic commander?

15 A. That's correct, yes, sir.

16 Q. What was - in summary, what was the gist of your complaint
17 and conversation?

18 A. The gist of my complaint was the fact that we could drink
19 water ----

20 TC: Objection, Your Honor.

21 MJ: Basis?

22 TC: The witness is being asked to talk about his complaint to
23 this individual, it's not going to his belief for the military duty.

1 MJ: I'm going to allow the defense some leeway.

2 TC: Yes, Your Honor.

3 CDC: I'll back up a little bit, Your Honor.

4 MJ: Overruled.

5 Q. What was your primary concern with regards to masks and the
6 gym?

7 A. My primary concern is the continuous inhalation of recycled
8 carbon dioxide, and not getting fresh air to the body.

9 Q. Describe for us what brought you to that concern or
10 conclusion - whether it was research, or your own personal knowledge,
11 your background?

12 A. Right, so, the research - there are peer-reviewed studies
13 that I was aware of, and I was tracking on; specifically, out of the
14 international ----

15 TC: Objection, Your Honor.

16 MJ: Sustained.

17 CDC: Don't cite the actual reviews; just give us an overview
18 whether this was research, or personal knowledge, your background ---
19 -

20 TC: Objection, Your Honor.

21 MJ: Counsel, if you're asking him - are you asking him for the
22 sources, or are you asking him for the basis of ----

1 CDC: The basis for his concern, not to cite the specific
2 sources.

3 MJ: The responses he just gave was his research. Was that the
4 answer you were looking for?

5 CDC: Yes, Your Honor.

6 MJ: To the extent that there was a government objection, I will
7 overrule it, subject to limiting the question as to a general
8 statement as to the type of source.

9 Q. Were you able to have that issue resolved?

10 A. No.

11 Q. So, the masks continued?

12 A. The masks continued. However, I adjusted fire with my
13 service members, and we were allowed to - I worked it out to where we
14 moved locations for performance - for physical performance.

15 Q. Did you have concerns about whether or not the masks were
16 promoting health and welfare?

17 A. Yes.

18 Q. As a medical services officer, and the duties that you
19 perform, or have performed, did you, at any point, prior to COVID,
20 wear a surgical mask, or anything along those lines?

21 A. No.

22 Q. In a laboratory environment?

1 A. Depending upon the SOP of the laboratory specifics, I would
2 have, but no, I didn't find myself in that situation.

3 Q. Generally, as a healthcare - do you consider yourself a
4 healthcare provider, as a medical services officer?

5 A. As a medical services officer, I'm not a specific provider,
6 just generally, I'm a preventive medicine officer, worried about the
7 risk communication of factors to our service members.

8 Q. And obviously, healthcare providers wear masks
9 occasionally, depending on their duties?

10 A. Depending on their duties, correct.

11 CDC: Give me one second, Your Honor.

12 MJ: Take your time, counsel.

13 [The defense counsels conferred.]

14 Q. Can you describe - in your research, did you review CDC
15 guidance?

16 A. I did.

17 Q. The orders that came down through the ranks in the
18 military, were those based on CDC guidance?

19 A. More times than not, yes.

20 Q. In your job description, did you have a role or a duty to
21 look at that, and interpret it for the military force?

1 A. Specifically, for certain subsets, for example, insect-
2 borne disease type stuff, yes, that's something I would consider
3 looking at and factoring it in.

4 Q. With some of these orders that were received, obviously,
5 for masks, and potentially tests, did you agree or disagree with some
6 of the CDC guidance, as it applied to the military?

7 A. Disagreed.

8 Q. Why is that?

9 A. Due to our healthy population.

10 Q. What was your understanding of CDC guidance with regards to
11 who the focus was?

12 A. Primarily, it was the elderly and immunocompromised.

13 Q. But they didn't say this was specifically guidance for the
14 military, it was generally the United States?

15 A. Generally - correct.

16 Q. In your opinion, how does the U.S. population differ from
17 the military population?

18 TC: Objection, Your Honor.

19 MJ: Basis?

20 TC: It is asking for an opinion on the difference between the
21 military population.

22 MJ: I'll overrule the objection.

1 A. The military population is a healthy population, due to the
2 fact of the physical rigors and the standards that need to be met to
3 enter the force to begin with.

4 Q. Would you agree - obviously, generally looking at the U.S.
5 population compared to the military, there's a significant age
6 difference; obviously, there's no infants in the military, and no
7 elderly?

8 A. That's correct.

9 Q. In your role that you were describing, you would provide
10 guidance or opinions based on what comes down from above, and how
11 that applies to the military?

12 A. That's correct.

13 Q. Did you have a difference of opinion with regards to masks
14 or tests, when it came to military?

15 A. Yes.

16 Q. What was that?

17 A. That the masks are not effective or necessary for the
18 military population?

19 Q. Because of?

20 A. Because of the fact that we're dealing with a healthy
21 population, and the effects we were seeing, based on the data we were
22 seeing from COVID-19, wasn't severe.

1 Q. Are you able to speak to that comparatively, with regards
2 to the flu?

3 A. Yeah, I mean, it was similar. The flu seemed to have
4 disappeared for the time period during COVID-19, and COVID-19 took
5 its place.

6 Q. Was there a similarity statistically with the military
7 population as far as, I guess, numbers?

8 TC: Objection, Your Honor.

9 MJ: Basis?

10 TC: It's calling for an expert opinion on statistics, and
11 numbers between two different strains of viruses and how they've
12 applied.

13 MJ: Counsel, sustained. You can try to lay a foundation, but
14 that would be expert testimony. It's beyond the scope of what he'd
15 be testifying to.

16 CDC: I will, Your Honor.

17 Q. Did you have the opportunity to make a comparison between
18 flu and COVID?

19 A. Yes.

20 Q. In what context?

21 A. The data we were seeing with the CDC.

22 TC: Objection, Your Honor.

23 MJ: Basis?

1 TC: Again, asking for expert testimony about, 'Could you
2 compare the two ----

3 MJ: Counsel, I will sustain the objection. If he has
4 information that was somehow obtained - I don't know what documents
5 or records he's looked at - whether they were, in fact, accurate
6 numbers, whether they were tentative numbers; I have no information
7 about the source that you've claimed to have relied upon. I will
8 sustain the objection.

9 Q. To circle back a little bit. Would calling the Army Public
10 Health Center the Army's CDC - would that be a fair representation?

11 A. That's correct.

12 Q. You touched on this a little bit - would it be accurate to
13 say that APHC, and more specifically, you, when guidance comes down
14 from either DoD, health preventative medicine, and higher, all the
15 way up to the CDC, that you all would interpret that and give
16 guidance as to how it would apply to the military force?

17 A. That was ----

18 TC: Objection, Your Honor.

19 MJ: Basis?

20 TC: The term "you all would interpret that" doesn't establish
21 that the accused is - that the Army Public Health Center ----

1 MJ: Counsel, I'm going to sustain the objection. I don't know
2 that the accused is an authorized individual to even speak for an
3 agency or organization as to their policy interpretation.

4 CDC: I'll lay some foundation, Your Honor.

5 MJ: The objection is sustained.

6 Q. What is your current duty position?

7 [The court reporter adjusted the military judge's microphone.]

8 MJ: I apologize for interrupting, counsel. Please continue.

9 Q. What is your current duty position?

10 A. Medical entomologist.

11 Q. Where?

12 A. Army Public Health Center.

13 Q. How long have you been there?

14 A. Since January 2020.

15 Q. Are you familiar with the roles Army Public Health Center?

16 A. Yes.

17 Q. And, I guess, the rules and regulations that apply?

18 A. Yes.

19 Q. Their mission?

20 A. Yes.

21 Q. And obviously, on a daily basis, what the function is,
22 certainly, with regards to your section?

23 A. Yes.

1 Q. And within that, give us an overview of the APHC - Army
2 Public Health Center - mission?

3 A. To push down - to aid The Surgeon General of the Army to
4 push down risk communication strategies to the force, and their task
5 forces, to properly communicate risk to our service members,
6 specifically, the Army in this case.

7 Q. That includes interpreting guidance and potentially rules
8 and regs that might have an impact on health and welfare?

9 A. Yes.

10 Q. So, APHC is, would you agree, not just a stepping - they
11 receive guidance and then pass it along, without researching,
12 commenting, or giving any input?

13 TC: Objection, Your Honor.

14 MJ: Basis?

15 TC: Leading.

16 MJ: Sustained. Rephrase the question.

17 Q. Describe for the court the flow of information coming from
18 outside APHC, and then what happens within the organization prior to
19 going out to the force?

20 A. So, specifically, in my certain circumstance, I would reach
21 out to various different units in the field, and around the Army,
22 gather what they're seeing on the ground, what they're experiencing,
23 talking to certain physicians and various different stakeholders, to

1 understand the issues, so I could properly formulate the risk
2 communication, so we could inform our service members of certain
3 risks in certain geographical areas, at certain times.

4 Q. So, at least in your role, you don't receive guidance and
5 blindly follow it and send it out?

6 A. I don't.

7 Q. Again, addressing some of your concerns, certainly, with
8 regards to masks, can you relay to the court an incident that you had
9 in going through the gate to, I'm assuming, Aberdeen Proving Ground
10 at one point? Start with when this occurred, and give us some
11 background and context.

12 TC: Objection, Your Honor.

13 MJ: Basis?

14 TC: Relevancy.

15 MJ: Counsel, how will this inform the court as to the limited
16 issue right now of legality?

17 Give the court a proffer, if you wish.

18 CDC: Sure.

19 Your Honor, obviously, this is going to military function,
20 which includes health and welfare. It does go off on a little bit of
21 a tangent, in that Lieutenant Bashaw was trying to discern the -
22 whether the - certainly, the masks in this case ----

1 MJ: Are you going to establish conditional relevancy at some
2 point?

3 CDC: I am - well, if I can finish my proffer, Your Honor?

4 MJ: Very well.

5 CDC: His concerns, and the implementation of this guidance, and
6 how, in his mind, the harm of the guidance was having a greater
7 impact on him and soldiers, compared to the common sense usage of
8 this guidance. And falling within the framework of military function
9 and health and welfare.

10 MJ: Government?

11 TC: Yes, Your Honor.

12 First, it is "starting off with a little bit of a tangent"
13 is what we have an issue with on relevancy, because if it's a
14 tangent, it's probably not relevant to the underlying issue.

15 Second, being that we're talking about the lawfulness of
16 the three orders that he was given on November 30, 2021. The
17 relevancy of other implementation to other soldiers on other days -
18 and we're talking about - specifically now, we're focusing on the
19 military duty of the orders he was given. Were those related to his
20 military duty, a military duty here, or a definition under military
21 duty.

22 MJ: I understand what the issues are, counsel.

1 Mr. Willson, can you focus the questions as to - again, I
2 don't want him to make generalizations as to what he thinks or
3 believes the impact may be on other individuals, or what they may
4 have thought, or what he thinks they may have thought. If you want
5 to ask a more limited question as to what occurred to him, and how he
6 viewed it as it applied to him, I will allow you to ask the question.
7 But anything broader than that, I think, would be inappropriate.

8 So, I will sustain the objection in part, and overrule it
9 in part. Rephrase the question.

10 CDC: Your Honor, I could avoid him giving his opinion as it
11 impacts others, but the purpose for - not qualifying him as an expert
12 - but having him go through his background and his job description
13 was to show it wasn't just himself that he was concerned about. He
14 had a focus on the health of the force, and that framed his state of
15 mind going forward, and drove him in that regard.

16 MJ: Counsel, you've established that was one of his duties and
17 responsibilities; he answered that question previously about what his
18 job responsibilities were, and how he enacted or followed the mandate
19 of his job. That's been established.

20 If you are asking about a specific incident at the gate,
21 you can have him answer that question as it applies to him.

1 Q. Can you continue with what occurred at the gate, and on
2 that story, how did that continue to help frame your state of mind
3 with regards to the guidance?

4 A. Copy.

5 I believe it was when I was still the HHC commander, and I
6 was doing PT up at Aberdeen Proving Ground-North, and I was driving
7 through the gate. It was around, I want to say, spring 2021, and I
8 drive through the gate, and it says "Masks Mandatory for Entry."
9 When I got to the gate, I realized that I forgot my mask. I showed
10 up at the gate, and I was in my PTs. The gate guard said, 'Sorry, I
11 can't let you on. You can't come on. You don't have a mask.' I
12 said, you know, I apologize. I looked around, and I had a towel on
13 my drivers' seat, and I grabbed my towel, and I held it up to my
14 face, and he said, 'Okay, you're good to go.' So, I thought - just
15 the orders, you know, it wasn't necessarily about - it's never really
16 been about health.

17 CDC: That's all the questions I have for this witness, Your
18 Honor.

19 MJ: Government, do you have cross-examination?

20 TC: Yes, Your Honor.

21 [END OF PAGE]

22

1 **CROSS-EXAMINATION**

2 **Questions by the trial counsel:**

3 Q. You talked on direct about military duties, correct?

4 A. Yes, sir.

5 Q And orders in relation to health, correct?

6 A. Yes, sir.

7 Q. Would you agree a lawful order can restrict a member's
8 personal hygiene?

9 A. Depending.

10 Q. You can be ordered to shave, correct?

11 A. Correct.

12 Q. And if you have a religious accommodation for a beard, you
13 can be ordered to keep it a certain length?

14 A. Correct.

15 Q. And you can have lawful orders that restrict your ability
16 to consume alcohol?

17 A. I'm sorry, say that again?

18 Q. You can be given an order that restricts your ability to
19 consume alcohol?

20 A. Yes.

21 Q. You can be given orders that - they can order you to submit
22 to a blood test, correct?

23 A. Yes.

1 Q. They can issue orders to provide a urine sample?

2 A. Yes.

3 Q. You would agree that all of these are orders you can
4 receive that you might not like, but you'd still have to follow them,
5 correct?

6 A. Depending.

7 Q. So, when you say that you agree that those orders, those
8 examples I just gave you, are lawful, you believe that if you were
9 given those orders, as I just proposed them to you, that it would
10 depend?

11 A. Sir, I'm sorry, let me clarify.

12 Those specific ones, yes.

13 Q. Okay. Even if you didn't like that you couldn't drink
14 alcohol, you'd still have to obey the order?

15 A. I'm at the point to where if an individual needs
16 clarification on an order, they should definitely bring it up with
17 the individual giving the order, so that would be part of the duty of
18 the individual receiving the order - to clarify if they needed
19 clarification, but yes.

20 Q. So, is it yes or no? You would have to obey the order, or
21 you wouldn't?

22 A. Which order was that again?

1 Q. The order about consuming alcohol. You said yes at the
2 end.

3 A. If there was a G-1 in place, a General Order Number 1 in
4 place, and that was the order, yes, you would obey.

5 Q. So, even if you didn't like that order, you'd still have to
6 obey it? You'd have a duty to obey it?

7 A. I, personally, would obey, yes.

8 TC: Thank you.

9 No further questions, Your Honor.

10 MJ: Any redirect, Mr. Willson?

11 CDC: Just briefly, Your Honor.

12 **REDIRECT EXAMINATION**

13 **Questions by the civilian defense counsel:**

14 Q. Lieutenant Bashaw, do you know what EUA stands for?

15 TC: Objection, Your Honor.

16 MJ: Basis?

17 TC: Outside the scope of cross.

18 MJ: Mr. Willson, is there a reason you didn't go into this
19 earlier?

20 CDC: I just forgot, Your Honor. I was focused on the military
21 function aspect.

22 MJ: I'll overrule the objection, but please keep it focused.

23 CDC: I will. I won't use cross-examination.

1 Q. Are you familiar with the term "EUA?"

2 A. Yes.

3 Q. What does that stand for?

4 A. Emergency use authorization.

5 Q. What does, in your opinion - based on your knowledge, what
6 does it apply to?

7 TC: Objection, Your Honor.

8 MJ: Basis?

9 TC: Again, outside the scope. I know you just allowed it, but
10 -----

11 MJ: There's really - do you know what the letters mean, he can
12 say what the letters mean. If you are making reference to a context
13 in establishing the orders itself - well, it's an exhibit in the
14 motions, if you want to introduce it for the purpose of motions -
15 actually, I think it's already been admitted as an appellate exhibit
16 - but I'll let you continue with your line of questioning.

17 CDC: I probably have five questions, tops, Your Honor.

18 MJ: Go ahead.

19 As to the way the question was - I'm going to have you
20 rephrase the question. I'm going to overrule the objection, but
21 please rephrase the question, so I can hear it clearly. If counsel
22 has a continuing objection, you can make the objection in a moment.

23 Q. You said EUA is "emergency use authorization?"

1 A. Correct.

2 Q. When did you become aware of that term?

3 A. Probably - I would say, the beginning of 2021.

4 Q. Why? Or how?

5 A. The masking - the COVID-19 EUA masking, I believe, at the
6 time, and then the testing as well.

7 Q. To put that into context with what you just previously
8 testified about, what was going through your mind that led you to an
9 understanding of that term, and whatever research or discussions you
10 had regarding EUAs?

11 A. My concern was risk communication strategy, and regards the
12 risk benefit analysis, and whether or not individuals were aware that
13 these were, in fact, EUA products.

14 Q. How did you come to that conclusion, or discover that
15 knowledge?

16 A. Looking at the boxes of a lot of the masking devices, and
17 seeing the US Codes on it, and kinda digging in and looking at the
18 Codes themselves.

19 CDC: I'm trying to narrow my questions down now, Your Honor.

20 MJ: Take your time, counsel.

21 Q. In that research, or looking at those codes, did you come
22 across a term "informed consent?"

23 A. Yes.

1 Q. What's your understanding of informed consent?

2 A. The individual has to be informed of the risks and benefits
3 of the products they may be participating in.

4 Q. Based on your job description and experience, why do you
5 think that would be important?

6 A. Because the individual needs to be aware that they bear the
7 sole responsibility of participating in such products.

8 Q. From a medical services, or a scientist perspective, did
9 you have concerns with potential reactions or impact of various
10 devices?

11 A. Yes.

12 Q. What was that?

13 A. Specifically, on the testing, the chemicals that are used
14 within the reagents and the tests themselves ----

15 TC: Objection, Your Honor.

16 MJ: Basis?

17 TC: It's calling for testimony about reagents and testing.
18 Though he has experience in entomology and as a preventive medicine
19 officer, he hasn't established an expertise in the tests or products.

20 MJ: I wasn't taking his testimony as being expert testimony. I
21 think he was only to what was his personal concerns. If it was
22 beyond his personal concerns, as to something more general, I would
23 agree with you, and I would sustain the objection. But if he's only

1 answering as to his personal view as to what his concerns were, I'll
2 overrule the objection.

3 So, will you please restate the question, and clarify what
4 his response actually is?

5 CDC: Yes, Your Honor.

6 Q. Based on the research, and your concerns with regards to
7 EUA products, and you were talking about tests, what did you look at
8 -

9 CDC: Your Honor, I'm intentionally avoiding qualifying him as an
10 expert.

11 MJ: You can ask him what he looked at, that's fine. I'm just
12 advising - I'll advise the accused of the same thing - he can provide
13 his personal concerns, whatever they may or may not have been. He
14 can provide a justification or an answer why they were his concerns.
15 He can't make a general statement as to those concerns being
16 validated or invalidated, or a statement as to some general knowledge
17 - that's beyond the scope - he's not qualified as an expert to do
18 that. He can share what his concerns were. I'll allow you to
19 develop that.

20 Q. So, you said you were testifying that you had looked at the
21 box for tests?

22 A. Yes.

23 Q. What box was that?

1 A. Specifically, the QuickVue.

2 Q. What was it about the box that concerned you?

3 A. It specifically stated the EUA statute on it, and just the
4 fact that the individual, from what I looked at, has the right to
5 refuse these products.

6 Q. Within the law - but on the box itself, you were discussing
7 agents or reagents?

8 A. Yes.

9 Q. What is that?

10 A. Specifically, the reagent is the chemical used, once - from
11 my understanding - once the nose swab was complete, to put that into
12 the reagent for the results, and the finishing of that rapid antigen
13 test.

14 Q. Are you familiar with what that chemical was?

15 A. Yes. Specifically, for QuickVue tests, yes.

16 Q. What was it?

17 A. Proline - there was multiple chemicals listed, but one of
18 the ones - off the top of my head, I can't specifically state the
19 chemical, but I do have - I did print out SDSs and look at these
20 chemicals ----

21 Q. I'm sorry, what is an SDS?

22 A. An SDS is a safety data sheet.

1 So, I printed these off, looked at the chemicals, and then
2 on the SDSs, it usually has your signal word, which is "CAUTION,"
3 "WARNING," "DANGER," things like that, and I want to say two out of
4 the six chemicals that were listed had "DANGER," and one had
5 "WARNING."

6 Q. What concerns did that create for you?

7 A. That was specific personal health concerns with these tests
8 - the fact that potential mitigating factors, to be exposed to the
9 reagent, might not have been in place.

10 Q. That was your concern?

11 A. Yes.

12 CDC: That's all the questions I have, Your Honor.

13 MJ: Government, with regard to the issues that were defense
14 counsel reopened direct, I'll give you the opportunity to cross, as
15 to the EUA-type questions.

16 TC: Yes, Your Honor, we'll be brief.

17 **REXCROSS-EXAMINATION**

18 **Questions by the trial counsel:**

19 Q. I just want to be clear - you stated that you became aware
20 of emergency use authorization at the beginning of 2021?

21 A. I believe, around that timeframe.

22 Q. Do you know a month?

23 A. I don't.

1 Q. You were charged in this case in November 30, 2021,
2 correct?

3 A. That's correct.

4 Q. So you knew about EUAs for less than a year?

5 A. Correct.

6 Q. What Code section did you find the term "EUA" in?

7 A. Specifically?

8 Q. [Affirmative response.]

9 A. USC 10 1107(a), and USC 21, and USC 43.

10 Q. Those all contain emergency use authorization; that's what
11 you used to base your knowledge of emergency use authorization on?

12 A. That's correct.

13 Q. You said your concern was over the QuickVue test?

14 A. My actual concern is with all of them, but the QuickVue
15 specifically; so, the DoD pushed down three ----

16 Q. The QuickVue specifically - that was the test you'd looked
17 at that informed your concern is what you just stated, correct?

18 A. Yes.

19 Q. And you agree that FDA is the one that promulgates the
20 emergency use authorizations for these products?

21 A. That's correct.

1 Q. You're not aware of what procedures and methods the FDA
2 goes through, in complete, for each product that they issue an
3 emergency use authorization for?

4 A. I'm aware that the FDA waived good manufacturing practices
5 for these products.

6 Q. But generally, you don't work at the FDA, correct?

7 A. Correct.

8 Q. You're not a scientist there for the FDA?

9 A. Correct.

10 Q. You don't promulgate policy or procedures, or sign any
11 documents, on behalf of the Secretary of Health and Human Services?

12 A. Correct.

13 TC: Thank you.

14 No further questions, Your Honor.

15 MJ: Any further direct examination?

16 CDC: No, Your Honor.

17 MJ: I have, I believe, one question for you.

18 **EXAMINATION BY THE COURT**

19 **Questions by the military judge:**

20 Q. The reagent that you have made reference to with the EUA,
21 that was contained in the vial that you would then put the swab into
22 for - as I understand it - I want to make sure I understand it
23 correctly - you would take a swab; you would then put it into a

1 reagent, and then that would go into some kind of little kit that
2 would have some kind of marking indicating a test result. Is that
3 correct?

4 A. That's my understanding of it, correct. However, they did
5 push down specific directions on the step-by-step for it.

6 Q. I'm just trying to make sure I understand. But the reagent
7 was what you would take the swab and - let me try to understand the
8 chronology of what you were talking about - you'd have a swab, you'd
9 put it into a reagent, then you'd take the reagent, which had reacted
10 with the swab somehow, and pour that into some type of testing
11 vessel, is that correct?

12 A. I'd have to go back and view and look specifically on the
13 step-by-step to be accurate, Your Honor. That's my understanding,
14 yes.

15 MJ: Based on the court's questions, first, to the defense - do
16 you have any additional redirect, based on the court's question and
17 the accused's answer?

18 CDC: Just briefly, Your Honor.

19 **REDIRECT EXAMINATION**

20 **Questions by the civilian defense counsel:**

21 Q. What was your specific concern with regards to that test
22 and the reagent?

1 A. From my experience in a pesticide holding facility, there
2 was a lot of dangerous chemicals that I was dealing with, and the
3 processes we had in place to deal with, and the standard operating
4 procedures that we had in place to deal with these specific
5 chemicals, you know, to make it abundantly safe for the user of the
6 product, and to effectively target what we needed to target, and then
7 fast-forward to this, where it's pushed down, but there are no safety
8 operating procedures in place. From my understanding, there are no
9 mitigating factors for the end-user, which bears sole responsibility
10 if something were to go wrong.

11 Q. Let me back you up.

12 What I mean is, because you kept referring to the reagent -
13 what was your specific concern with regards to the reagent?

14 A. The dangerous chemical - the chemicals that were contained
15 within the reagent.

16 Q. Within that concern, what did you believe could potentially
17 happen that might create a health risk?

18 A. It could spill; there was inhalation hazards; dermal
19 exposure, where it leeches through your skin, things of that nature -
20 splashes in the eye, stuff like that.

21 CDC: Thank you.

22 MJ: Government?

23

1 **RECROSS-EXAMINATION**

2 **Questions by the trial counsel:**

3 Q. So, I know you answered already that you don't work for the
4 FDA. Were you in any facility a part of the FDA that tested these
5 tests with reagents in them?

6 A. No.

7 Q. So you weren't there when they were making any assessments
8 on the dangerous - themselves, talking about the FDA?

9 A. To my understanding, they never did those tests.

10 TC: No further questions, Your Honor.

11 MJ: Defense, do you have any additional witnesses you'd like to
12 call?

13 CDC: No, Your Honor.

14 [The accused returned to his seat at counsel table.]

15 MJ: Government, do you have any witnesses you'd like to call?

16 TC: No, Your Honor.

17 MJ: Defense, do you wish to make any additional argument that
18 supplements anything you've already provided to the court in writing?

19 CDC: Yes, Your Honor.

20 Your Honor, we're claiming the orders were unlawful, part 2
21 of the five elements under Article 90(c)(2)(A)(iv).

22 First, the requirement to mask and test does not relate to
23 a military duty;

1 Second, the orders are in direct conflict with statutory
2 law.

3 With regards to the military duty, Article 90 states the
4 order must relate to a military duty which includes all activities
5 reasonably necessary to accomplish a military mission, or safeguard
6 or promote the morale, discipline and usefulness of members of a
7 command, and directly connected with the maintenance of good order in
8 the service. The order may not, without such a valid military
9 purpose, interfere with the private rights or personal affairs.

10 First, we would argue that, certainly, in Lieutenant
11 Bashaw's case, he was concerned about the masks and the tests because
12 of the potential harm to himself, as well as other soldiers. I'll
13 get into the EUA standards, but he testified that EUA is an emergency
14 use authorization that is implemented when certain products are
15 needed, and they haven't been approved for that use, or they've been
16 approved for one use, but not approved that they're now being
17 implemented for.

18 His concern was especially based on his knowledge and
19 background, the proper safety protocols and testing had not been
20 implemented for these devices, and therefore, they were not meeting
21 the definition of military duty, or used for military duty, in one
22 regard, because of the potential harm they were going to cause to the
23 force.

1 This created a heightened alert in his mind because his
2 role was to try to protect the force in health-related and insect-
3 borne and airborne viruses and diseases.

4 The mandates for masks and testing were not unique to the
5 military, but were pushed out to the entire country, and in fact, the
6 world.

7 We would argue the testing, and certainly, masks, did not
8 promote morale and discipline, but did interfere with the private
9 rights, or personal affairs, of Lieutenant Bashaw and others, forcing
10 him to wear a mask and test.

11 The point of the story at the gate was the lack of common
12 sense, and forward thought, with regards to these mandates. They
13 came down from the CDC, but they weren't implemented and adjusted for
14 the group that they were mandated to - the military.

15 As he described coming through the gate, he didn't have a
16 mask, so he was told you can't come in because you don't have a mask,
17 but simply putting a towel in front of his face, just to drive
18 through, apparently met the requirement, at least with regards to
19 that gate guard.

20 Lieutenant Bashaw testified as to - although briefly - the
21 potential harms of masks and testing that he learned through his
22 research as a concerned citizen, and as a medical services officer.

1 I know that the court has ruled on this, but these are some
2 of the issues that we would've delved into in more specifics with our
3 experts, had our experts been approved.

4 The government, in their motion, cited purely military
5 duties, and primarily cited duties such as keeping your weapon clean,
6 wearing your battle rattle in combat, instances such as that, and
7 clearly, nobody would argue that that's not a military function, or a
8 military function. But at what point does the military get to say
9 and dictate every single aspect of a soldier? We had a discussion
10 earlier with regards to brushing of teeth. I don't believe there's
11 an instance out there where the military says, 'I'm ordering you to
12 brush your teeth.' Certainly, take care of your dental hygiene by
13 going to the dentist annually. But simple functions like that, and
14 the mask is so intrusive that it requires a person to put that over
15 their face - I apologize, Your Honor, I don't have the exhibit on top
16 of my head. But certainly, one or more of the FRAGOs referred to,
17 you don't have to wear your mask in your on-post government quarters,
18 unless an unvaccinated person comes to your on-post government
19 quarters, then everybody should be wearing a mask. Just the lack of
20 common sense in the implementation of this guidance that came down
21 certainly takes it outside of the military function.

22 Your Honor, I could go on and on comparing what may or may
23 not be a military function, versus what is clearly a military

1 function. We would just argue that the masks and the tests were not
2 military functions. Certainly, when the flu season comes around,
3 people aren't told, 'Wear a mask...test, even though you're
4 asymptomatic.'

5 With regards to the second argument for lawfulness, the
6 emergency use authorization of tests and masks, the order must not
7 conflict with statutory or constitutional rights of the person
8 receiving the order. The government, in their motion, they seem to
9 believe and argue that 10 USC 1107(a)(2) means that the HHS - Health
10 and Human Services - Secretary has not required that an EUA includes
11 informed consent.

12 Your Honor, throughout this, when we refer to informed
13 consent in our argument, we're referring to the requirements for
14 subjects - in this case, military - be informed that the product is
15 an EUA, potential severe reactions and side effects, as well as their
16 absolute right to refuse that product because it is an EUA.

17 The government attempts to reword the statute in their
18 motion - their 8 April motion - by claiming that the HHS Secretary
19 must, in addition to claiming an emergency, authorize products as
20 EUAs, then determine that informed consent is required for each EUA
21 product; if he or she does, then 1107(a) applies, and the President
22 must waive for military members. This is a very unique application
23 and statutory construction, but is not practical.

1 EUA is a status, and nowhere in the law does it say that
2 the HHS Secretary must, in addition to authorizing a product as an
3 EUA, that there must then be a determination that informed consent
4 applies. It would be extremely cumbersome to require the Secretary
5 to make that determination for each and every product in a letter to
6 the manufacture, and the assumption is there's thousands of those.

7 So, the informed consent, which, as I stated, includes the
8 right to refuse because of the potential harms involved, is part of
9 EUA. That's the law. You can't parse out and say, 'Well, this is an
10 EUA product, but we didn't designate informed consent as part of
11 that, therefore, that doesn't apply.' To require such would
12 completely negate the EUA law and informed consent. EUA was designed
13 to put products on the street quickly, in an emergency, to assist.
14 Those products are not licensed, because they have not endured the
15 required rigorous testing and studies to ensure their safety and
16 potential side effects. If the HHS Secretary had to implement
17 informed consent for each, why would he or she do so? As part of the
18 law, they have to incorporate that, thus, negating Congress's intent
19 in protecting the American public, especially in light of the fact
20 that EUA status protects the manufactures and everyone, all the way
21 down the line, up until the user. So, if a user says, 'Yes, I'm
22 willing to accept this EUA product,' or if they do, even without
23 having been given informed consent, everybody who has developed or

1 distributed, manufactured, or ordered, is free from liability. They
2 can't sue those people under an EUA status. It is only when that
3 product becomes licensed that anybody actually has the right to go
4 forward and sue, if they have a significant impact or effect, which
5 is why you see, over the years, all of those law firm commercials,
6 'If you've been harmed by such-and-such product, call our law firm,
7 we can help you.'

8 Thus, negating Congress's intent in protecting the American
9 public, especially in light of the EUA status, protects the
10 manufacturers all the way down the line, thus, leaving the user or
11 subject without recourse, if all goes bad, therefore, the need for
12 that person to be fully informed, and given the option to say, 'Based
13 on that informed consent, I am not accepting this product.'
14 Otherwise, we all potentially become test subjects without knowing
15 the potential harmful effects, and our right to choose.

16 I want to note for the court - I'm not claiming that the
17 court has made this mistake, I just want to point this out, because
18 early on, I made this mistake - that 10 USC 1107 and 10 USC 1107(a)
19 are separate and distinct regulations.

20 In 1107(a)(A)(1), Congress provided for an outlet for the
21 military, in the event of such an emergency. The President, under
22 informed consent, may waive that, and as it states, "may be waived,
23 only by the President, only if the President determines in writing

1 that complying with such requirement is not in the interests of
2 national security." There's no reason why Congress would put that in
3 there, and we would note that that law was implemented - 1107(a) - in
4 October of 2006; much, if not all, of the case law that we were
5 reviewing were all prior to 2006, so the speculation would be that
6 Congress implemented that, based on a lot of that case law.

7 On page 8 of their motion, in the middle, the government
8 cites 1107(a)(2), the word "that" toward the end refers specifically
9 to emergency use products and their authorization. The requirement
10 for informed consent, and the right to accept or refuse, goes
11 directly to the determination by the HHS Secretary.

12 So, the government is basically attempting to artfully
13 change the language of the statute by stating, in plain language, and
14 then providing their own interpretation claiming that the HHS
15 Secretary has to a) - and as the law status - can I have one second,
16 Your Honor - "The Secretary has authorized the emergency use of the
17 product; 2) Provided the significant known and potential benefits and
18 risks of such use," and then the option to accept or refuse. That's
19 within the informed consent.

20 Prior to that - Your Honor, I'm reading from 21 [USC] 360
21 bbb(3); this is (e)(1)(A)(i), "Appropriate conditions designed to
22 ensure that healthcare professionals administering the product are
23 informed that the emergency use of the product, the significant known

1 and potential benefits and risks of the product, and the alternatives
2 to the product," and then it goes down into informed consent,
3 appropriate conditions, designed to ensure that individuals to whom
4 the product is administered are informed, and then have that right to
5 refuse.

6 There's nowhere in the law that it says that once a product
7 becomes EUA, the HHS Secretary then, on top of that, has to implement
8 informed consent. Informed consent is part of the EUA law, again,
9 because the rigorous testing has not been implemented for this
10 product, or this particular use of a product that may be licensed in
11 a different context.

12 I apologize, Your Honor, I have an alarm going off.

13 And then, Your Honor, referring to page 11 of the
14 government's 8 April response regarding lawfulness, in the second
15 paragraph, they seem to introduce a quote - I'm assuming the quote is
16 from 21 USC 360 - "The assumption is that the FDA issued an EUA
17 authorizing - one second, Your Honor.

18 I believe this is Government [sic-Appellate] Exhibit XI-F,
19 it is the 24 April 2020 EUA mask letter. It talks about creating an
20 EUA standard for masks.

21 MJ: Counsel, can you identify which exhibit that is for the
22 record?

1 TC: Yes, Your Honor, that is Appellate Exhibit XI-F, Your
2 Honor.

3 MJ: Thank you, counsel.

4 CDC: Your Honor, I know we were directed to the 21 USC 360bbb,
5 and the executive documents. Our reading of the executive documents
6 portion - it does not - first of all, the case law involved predates
7 the 1107(a) regulation, and we would argue that it was congressional
8 intent to say, as it lays out in 1107(a), that in order for the
9 military specifically to be mandated, they must use or have an EUA
10 product forced on them, the President would have to make a specific
11 designation stating that, because of national security, and with
12 regards to anthrax and those cases, that there is a particular
13 theater, conflict, or something unique to the military requires the
14 President to waive informed consent, and basically say, 'Yes, you can
15 force it,' even though we understand the potential safety concerns,
16 and the military members' rights and constitutional rights to not put
17 something in their body that could potentially be harmful to
18 themselves. Obviously, they can be ordered into combat, but under
19 1107(a), the President has to make that specific decision, and tie
20 that to national security, and be very definitive about it, not just
21 generally waive it for everybody in general.

22 In reading the executive documents, on page 398 of Section
23 360bbb-3, 'Authorization for Medical Products for Use in

1 Emergencies," we read that in the context that masks were allowed to
2 be used as emergency use authorized products because masks were not
3 used by the general public, and in order to try and help protect the
4 U.S. generally, masks were encouraged in certain contexts - people
5 were told, if you want to come in my storefront, if you're a federal
6 employee, if you want to work in this federal building, you have to
7 wear a mask. We don't read that as the President saying, 'In the
8 military context, I am waiving that informed consent aspect, or
9 removing the EUA designation for masks.' Basically, when masks were
10 made EUAs, as the exhibit describes, it included surgical masks - the
11 blue masks that people normally wear; I guess, a towel, bandanas,
12 cotton masks, all sorts of different masks. The concern was that
13 healthcare providers, because everybody would now be - most everybody
14 would now be wearing a mask - healthcare providers won't be able to
15 get the masks that they needed, and then states, in the footnote of
16 this exhibit, "A facemask is a device, with or without a face shield,
17 that covers the user's nose and mouth, and may or may not meet fluid
18 barrier or filtration efficiency levels." It includes cloth face
19 coverings as a subset. It may be for a single or multiple uses, and
20 if for multiple uses, it may be laundered or cleaned. There are many
21 products marketed in the U.S. as facemasks that offer a range of
22 protection against potential hazards.

1 The masks fall into the category of products unapproved for
2 this specific use, and that's why they had to become EUA, because
3 they weren't developed for that particular use, especially a bandana
4 was never intended to be a mask by the manufacturers.

5 One second, Your Honor.

6 [After pause.] The EUA for the masks was distributed by
7 the FDA on 24 April 2020. This is - Manufacturers of Masks, a letter
8 to those people, letting them know, 'We are giving you emergency use
9 authorization to manufacture your masks for these uses that are
10 outside what the normal use was for.'

11 The memo of the President - I believe it's what the
12 executive documents were based on, was from approximately 11 March,
13 so a month later, the EUA came out for masks. The executive document
14 discusses general use, respirators, for healthcare personnel, and
15 concerns for the lack of healthcare masks for those people.

16 As I was stating, on page 11 of the government's 8 April
17 response regarding lawfulness, in the second paragraph, they seem to
18 introduce a quote - again, it's unclear, because there aren't closed
19 quotes, but regardless, in the first part, wherein there appeared a
20 quote, and state, "The FDA issued an EUA authorizing the use of
21 facemasks for use by members of the general public, including
22 healthcare personnel in healthcare settings, as PPE." The government
23 attempts to argue that EUA for masks only applies to use in a

1 healthcare setting, and then referred to the 24 April 2020 EUA, which
2 is the exhibit that I was referring to, to masks used by the general
3 public. The phrase describing healthcare professionals, or HCP, in
4 healthcare settings, wherein protected personnel, is all one phrase.
5 So, it doesn't mean that it applies to military or the general
6 public, and healthcare individuals in a healthcare setting; it is
7 healthcare individuals in a healthcare setting, and then outside of
8 that, the general public. All in one phrase, it does not, in any
9 way, describe the public having to be in a healthcare setting. The
10 24 April letter is simply making a point of clarification, because
11 there were questions from the original EUA issued on 18 April dealing
12 with masks that the EUA also covered healthcare professionals in a
13 healthcare setting, that were wearing personal protective equipment
14 (PPE).

15 Judge, I don't know if you want the exhibit cite for the 18
16 April letter.

17 MJ: Yes, please.

18 TC: [After pause.] I didn't cite it, Your Honor. I don't have
19 the 18 April one.

20 MJ: That's for the executive order?

21 CDC: The 18 April was the initial letter from the FDA, which was
22 then clarified and is more comprehensive in the exhibit that we have.

1 MJ: You can certainly, if you have a copy of it, you can have
2 it marked, if it's not already marked.

3 CDC: We'll have to get a copy, but it's all incorporated into
4 the exhibit - the 24 April.

5 TC: Which would be [AE] XI-F, Your Honor.

6 MJ: Which I have.

7 CDC: I'm just referencing it; I'm not pulling anything directly
8 out of it, Your Honor. It clarifies that healthcare providers were
9 authorized to wear an EUA mask, and were not limited to only wearing
10 authorized surgical masks that - typically, which was the N95 that
11 healthcare providers would wear in surgery or similar.

12 In Footnote 1, which I did read, the FDA goes on to
13 elaborate about facemasks, and that they are devices - and that masks
14 do include cloth masks, and that was part of the EUA for the general
15 public, because again, the major concern was that healthcare
16 providers would not have access to the masks that they needed,
17 because the general public was all now moving to masks.

18 This demonstrates that the EUA is aimed at the general
19 public, because the healthcare providers clearly do not wear cloth
20 masks in healthcare settings, they don't wear bandanas in surgery,
21 and things like that.

22 The 24 April - again, the exhibit XI-F - "The FDA issued an
23 emergency use authorization authorizing the use of face masks for use

1 by members of the general public" - this is the quote that the
2 government has in their motion, "issued an EUA authorizing the use of
3 facemasks for use by members of the general public, including
4 healthcare personnel in healthcare settings." It is our
5 understanding the government is reading that to include, "in
6 healthcare settings by the general public," but it clearly puts it
7 all into "healthcare personnel in healthcare settings..." "To cover
8 their noses and mouths, in accordance with CDC recommendations to
9 prevent the spread of the virus."

10 One second, Your Honor.

11 [After pause.] Your Honor, I believe that's the gist of
12 our argument. Just that 1107 does apply - masks, based on [AE] XI-F,
13 are EUA products. The tests are EUA products, in some regards,
14 certainly as Lieutenant Bashaw testified, that one particular test -
15 and each product receives an EUA status by the FDA to that
16 manufacturer. So, it is generally not an EUA standard or designation
17 that is put out as a broad-blanket designation. It applies to
18 specific products.

19 Again, going back to my argument that, for the HHS
20 Secretary to issue a letter to a manufacturer and say because we need
21 XYZ product for this emergency, we are designating this as an
22 emergency use authorized product, and therefore, it is an EUA.
23 There's no requirement for them to then turn around and say, 'Now,

1 we'll make the determination as to whether or not informed consent is
2 required, or is not required.' Even the EUA letters don't go into
3 that requirement to implement informed consent or not. It is a
4 requirement - it's a requirement of the EUA law; the only exception
5 is for the military, when the President specifically designates,
6 under 1107(a)(A)(1), that, because of national security, and
7 potentially because of a certain conflict or otherwise, that he is
8 waiving informed consent, because he has to have a working, ready
9 military force.

10 Thank you, Your Honor.

11 MJ: Thank you, counsel.

12 Government?

13 TC: (12:44/15:28) Yes, Your Honor.

14 Your Honor, the government is going to address the duty
15 question first, and then move on on the EUA question.

16 First, the government would like to clarify that Article
17 90(c)(4) says - to fully state what that section says, it says, "The
18 order must relate to military duty, which includes all activities
19 reasonably necessary to accomplish a military mission, or safeguard
20 or promote morale, discipline and usefulness of members of a command,
21 and directly connected with the maintenance of good order and
22 discipline."

1 It continues and says, "The order may not, without such a
2 valid military purpose, interfere with the private rights or personal
3 affairs. However, the dictates of a person's conscious religion, or
4 personal philosophy, cannot justify or excuse the disobedience of an
5 otherwise lawful order.

6 So, this question is only a question about military duty if
7 the order is lawful. If the order is unlawful, as defense claims
8 under the statutory section in "5," if it violates the accused rights
9 under the statutory interpretation, then it is an unlawful order, and
10 yes, it could be considered not connected to military duty.

11 However, if you find under the statutory interpretation
12 that the order to test or mask was lawful, then it would seem, based
13 on the plain reading, when Captain McCarthy issued that order -
14 Captain Alexander McCarthy is the company commander, issued those
15 orders per the EXORDs and op orders that came down above him, in
16 order to promote morale, discipline and the health and safety of
17 soldiers within the unit, within the buildings and locations at the
18 Public Health Center in Building E-5800, that would be related to a
19 military duty.

20 Further, I think this question is well-answered in *Schwartz*
21 and *Casala* at length. First, as the accused even stated, lawful
22 orders can restrict service members' personal hygiene, consumption of
23 alcoholic beverages, driving privileges, financial transactions, and

1 the Supreme Court has acknowledged that the military is, by
2 necessity, a specialized society, that we are a different group of
3 people, just by belonging in the military and in the Army.

4 That can go as far as ordering a soldier to provide a blood
5 or urine sample, something that can't be done in the civilian world.
6 That makes us very different.

7 The court also says in *Schwartz*, when they're citing
8 *Womack*, they say, "The military, and society at large, have a
9 compelling interest in having those who defend the nation remain
10 healthy and capable of performing their duty." Wearing a mask and
11 testing before you come into an office with other individuals, at the
12 time, on November 30, 2021, was determined to be something that
13 should be done to keep people healthy, and so that everybody could
14 perform their duties.

15 In this case, there were also - he was given the option of
16 teleworking, right. Also, another option to protect the health and
17 safety of everyone, including himself, because the soldier was
18 unvaccinated.

19 Additionally, when it comes to masks, as defense said, for
20 healthcare providers, the government still holds that wearing a cloth
21 facemask does not fall within the EUA. It logically doesn't make
22 sense that they would fall in there. But, in the alternative, if the
23 court does find that they fall within the EUA, that's why the

1 government went into an EUA analysis. I'm going to safe that for
2 when I go into the testing because I think it will make more sense,
3 as we go through the documents and the statutory regulations as to
4 how this is supposed to be answered and analyzed when we look at
5 products under 10 USC 1107(a), Your Honor.

6 So, to that end, the accused said two things in his
7 testimony. One was that he got his basis for the EUAs from 10 USC
8 1107(a), which is what we're going to start with, Your Honor. The
9 second thing important is that he said he looked at the QuickVue
10 tests. So, the QuickVue tests he's referencing are from the
11 manufacturer of QuickVue - the manufacturer of QuickVue tests is the
12 Quidel Corporation. So, when you look at their EUA, and that would
13 be Appellate Exhibit XI-4 - one moment, Your Honor.

14 [After pause.] That will be Appellate Exhibit XI-D, Your
15 Honor, is the QuickVue test EUA. That's the test that the accused
16 stated he looked at, and that's what caused his concern, and what
17 spurred his concerns about not testing, and the dangerousness of
18 them.

19 To go into the analysis, I think defense misinterprets what
20 the government's explanation - and misinterprets the statute, the
21 plain reading of the statute. The government is going to go through
22 it, Your Honor, and that's 1107(a), Emergency Use Products.

1 Paragraph one, the waiver which defense is talking about,
2 that the President is required, it says, "In the case of the
3 administration of a product authorized for emergency use under
4 Section 564 of the Federal Drug and Cosmetic Act to members of the
5 armed forces, the condition described in Section 564(e)(1)(A)(ii-iii)
6 of such act, and required under paragraph 1a or 2a of such section in
7 564(e), designed to ensure that individuals are informed of an option
8 to accept or refuse administration of a product, may be waived only
9 by the President, only if the President determines, in writing, that
10 complying with such a requirement is not in the interests of the
11 national security." So, that is the basis of where they're getting
12 their informed consent and waiver from the President. That makes
13 sense.

14 But we have to continue reading the statute, and when we go
15 to paragraph two, it specifically says, "The waiver authority
16 provided in paragraph one," the paragraph I just read, "shall not be
17 construed to apply to any case other than a case in which an
18 individual is required to be informed of an option to accept or
19 refuse administration of a particular product, by reason of a
20 determination by the Secretary of Health and Human Services that
21 emergency use of such product is authorized under Section 564 of the
22 Federal Drug and Cosmetic Act."

1 So, unless it's required by the Secretary of Health and
2 Human Services, then there is no waiver required by the President.
3 To do that, we go to the statutory implementation of the Food, Drug
4 and Cosmetic Act, Your Honor; that's what brings use to 21 USC
5 Section 360bbb-3, Your Honor.

6 When we navigate to subsection "e," which mimics the Act,
7 we find, "Conditions of authorization," that is (e)(1), which is
8 unapproved product, and then (A)-Required conditions. So, these are
9 conditions in which, with respect to the emergency use of an
10 unapproved product, "The Secretary, to the extent of the applicable
11 circumstances described in subsection (b)(1) shall, for a person who
12 carries out any activity for which the authorization is issued,
13 establishes such conditions on an authorization under this section,
14 as the Secretary finds necessary or appropriate to protect the public
15 health, including the following..."

16 So, those are the - below that are listed four categories
17 that the Secretary of Health [and Human Services] may include, under
18 their conditions that they're placing on an EUA. When we look at
19 those, those four categories are:

20 Appropriate conditions for healthcare professionals;

21 Appropriate conditions for individuals - that's the one
22 that the accused is citing, as his basis for needing informed
23 consent;

1 Appropriate conditions for monitoring and reporting of
2 adverse effects associated with the emergency use of the product; and

3 The last one, paragraph four, for manufacturers of the
4 product, appropriate conditions concerning record keeping and
5 reporting, including records accessed by the Secretary with respect
6 to the emergency use of the product.

7 So, nowhere does it say there, Your Honor, that there has
8 to be separate determination for individuals, or healthcare
9 professionals, after the fact. This is a determination made by the
10 Secretary of Health and Human Services when they are issuing the EUA.
11 I think it goes without saying to say that the FDA can look at a
12 product prior to giving out an EUA, and conduct this analysis prior
13 to issuing it. There's nothing there that says it has to be after
14 the fact, at least for individuals.

15 MJ: Let me interrupt you there. Because in March of '20, the
16 President issued the EUA - a finding as to facemasks were exempted
17 from the informed consent aspect. Is that what he did with the
18 executive document? He actually did go and do that - if it wasn't
19 required, why do it?

20 TC: I cannot speak on behalf of the President, Your Honor. If
21 his legal team determined that that was a safe option to do, maybe
22 that is something separate that he chose to do - I can say that that
23 executive order preempted the emergency use authorizations for the

1 testing, at a minimum. I believe it also preempts the emergency use
2 authorizations for the masking as well.

3 MJ: It directly addresses masks, at least on its face, but that
4 was a finding by President Trump that there was an emergency
5 situation at hand that warranted exercising the presidential
6 authority to potentially remove all the requirements. Is that not
7 what he did?

8 TC: That is not the government's interpretation of what that
9 order did, Your Honor - that he was not waiving informed consent, at
10 least to service members specifically. He may have waived other
11 authorities to all, but not specifically to the context of
12 individuals under this subsection.

13 MJ: Okay.

14 TC: Your Honor, understanding that the Secretary makes that
15 analysis before issuing the EUA, that brings us to the actual EUAs
16 themselves. When we look at the EUA itself that I just cited for the
17 QuickVue test, we go down to Section IV, "Conditions of
18 Authorization," and it affirmatively states, "Pursuant to Section
19 564(e) of the Act, I am establishing the following conditions to this
20 authorization." So, the Secretary of Health and Human Services is
21 saying, 'I am establishing the following conditions.' That is where
22 they lay out the conditions for the EUA, and they clearly took time
23 to think about what conditions they wanted to apply, because we have

1 almost 2 ½ pages of conditions that relate to manufacturers and
2 distributors of authorized products, for the conditions related to
3 advertising and promotion - nowhere there does it say anything about
4 informed consent. That is not a condition that's applied to
5 individuals; it's not a condition that is applied to even healthcare
6 professionals. But specifically, the Secretary of Health and Human
7 Services does not establish a condition under there. If there is no
8 condition existing under the EUA, then there was nothing for the
9 President to be required to waive.

10 So, even if the President were to come out after the fact
11 and state affirmatively that 'I waive this,' in the event that it
12 exists, the government can only assume that it's a preventative
13 measure made by competent legal minds that advise the President or
14 the White House as to steps he should take in order to prevent legal
15 issues down the road, but that does not inherently create a condition
16 under Section IV of the EUAs.

17 Again, that brings the government back to the question
18 about - if the court finds that, for some reason, Lieutenant Bashaw
19 was required to wear an EUA mask, which the government is not
20 contending, but in the alternative, the government finds that he was
21 required, again, we go to the EUA for - apologies, Your Honor. The
22 EUA I was looking at when I was talking before was actually the one
23 for the masks; there's actually the one for QuickVue in Section IV -

1 it lists the same language, pursuant to Section 564(e) of the Act,
2 "I'm establishing the following conditions on this authorization,"
3 and that is where it discusses the Quidel Corporation, "u," an
4 authorized distributor, and continues with additional conditions, all
5 of which, again, still do not have any conditions for individuals,
6 just to be clear.

7 But that brings the government back, as it's already stated
8 and already read, the EUA for masks also does not establish that
9 condition. The Secretary of Health and Human Services, in creating
10 the lengthy emergency use authorizations, and the thought process
11 that goes through that analysis, it doesn't make sense that they
12 wouldn't be able to conduct that analysis prior to. There's nothing
13 in the rules or the statutes that require them to do it after the
14 fact.

15 MJ: Let me ask you, just so I'm clear. Why would the statute,
16 under 1107(a), where the informed consent rule appears to be written,
17 contain superfluous language, such as "presidential consent?" That
18 is in the statute. I doubt that it was written in for no impact or
19 no purpose. Why would that language be in there, if it didn't at
20 least contemplate that there would be a time or a situation where the
21 President could act, had he or she chosen to do so?

22 TC: I concur, Your Honor. I don't think it's in there
23 unnecessarily or superfluously. It's there for a reason - in the

1 event that that condition is ever actually put in an EUA, we have a
2 method for handling that, because the military are a separate entity
3 of the populace than the general public. So, they put that condition
4 there, in the event that it is actually ever needed. But,
5 unfortunately, in this case, it does not. It doesn't apply to this
6 case. It may apply to a future case, in which an emergency use
7 authorization product comes out. I think that there may be
8 situations, as we've seen with 1107, where there is investigational
9 new drugs that are issued, or issues on that side, and where the
10 presidential waiver comes in and applies. But just because that
11 waiver exists, that doesn't mean the Secretary has put that condition
12 in this case, Your Honor.

13 MJ: What I'd like you to address, and I'll allow the defense to
14 supplement their argument as well - I want you to address two things,
15 if you will, for me.

16 First, for argument's sake, if the EUA did require
17 presidential authority or approval, does that impact whether or not
18 any of the following regulations, guidance, or otherwise, concerning
19 testing or mask wear - again, this is not about vaccines, that's
20 outside the realm of this hearing - would that necessarily make such
21 instructions or orders necessarily illegal or not? Even if the EUA
22 wasn't followed, as far as obtaining presidential waiver?

1 TC: The government's position is no, Your Honor, that it
2 wouldn't.

3 MJ: That's what I want to hear about from the government now.

4 And then the second question I want you address - again,
5 defense, I'll allow you to address this as well - is, when the
6 accused testified, he made a comment that I think warrants further
7 clarification from both sides, which is - I think, in relation to his
8 concern about the efficacy of masks. Along the lines that there was
9 no flu, there was only COVID. And the question, I suppose, that
10 immediately brought to my mind is, is that because everyone was
11 wearing masks, and keeping socially distant? Meaning that the masks
12 were, in fact, doing what they were supposed to do, which is - was it
13 with the absence of transmission of an otherwise infectious disease,
14 in fact, being prevented by the process the accused himself testified
15 as being his observation?

16 If that is what occurred, what, if any, significance should
17 the court place on that, if this process was, in fact preventing
18 people becoming ill from the flu, or otherwise preventing the spread
19 of infectious disease, despite it being, perhaps, inconsistently
20 applied by gate guards? Again, I don't think that guard is
21 indicative of Army policy; it may just be exactly what it sounds like
22 - which is a gate guard not understanding a policy, or not enforcing
23 a policy. That's not really at issue, as far as the court is

1 concerned. It is anecdotal as to why - we don't know why the gate
2 guard did what he did, or she did.

3 But the impact that it had in the mind of the accused, on
4 the absence of the flu, is significant unto itself, as that was his
5 observation, and his testimony.

6 What does that mean as to the efficacy of masks, if
7 anything, or of these orders, or of these policies and processes?

8 TC: Yes, Your Honor.

9 MJ: I pose to you two separate questions, but I'd like you to
10 try to address them in order, and then defense, I'll certainly give
11 you any additional time you wish.

12 TC: Yes, Your Honor.

13 So, addressing whether or not the EUA, if it does require
14 informed consent, it would require presidential waiver, what would be
15 the impact of that? The government's position is it would still -
16 these orders would still be lawful, Your Honor.

17 Again, the government contends that the masks that he was
18 being - the face covering that he was being asked to wear was not an
19 EUA product. So, in that regard, it would still be a lawful order to
20 protect others with a mask.

21 In regards to the testing, if there was informed consent
22 required, it's the government's position that it was known FDA
23 regular policy, or manufacturer policy, that when they provide a

1 testing kit or a drug, in that comes a statement that informs the
2 person taking it of risks associated, and other materials that are
3 inserted in that. And that that insert would then have contained
4 that informed consent material, and he would've seen that.

5 Again, here, the accused didn't even go get a test, Your
6 Honor. So, the accused doesn't know whether or not that material was
7 there, because he never showed up to actually get the test. He
8 didn't arrive and see the box, and see that there was no material
9 contained within, or anything in there that would inform him of any
10 of the risks. He just simply did not go. So, to that end, I think
11 it remains unchanged that he was ordered there, but he never took the
12 test.

13 MJ: I understand that, that's a separate aspect of this. The
14 question is as to the underlying authority, for the purpose of being
15 tested or wearing a face mask, that's what we're talking about -
16 whether arguably - the defense's argument - arguable failure to
17 follow the requirements under 1107(a). Would that necessarily render
18 a DoD policy, or instruction, or order concerning force protection,
19 would that render that illegal? That's what the defense is arguing -
20 that this failure to comply with 1107 requirements has a downhill
21 impact of rendering all follow-on orders, instructions, as
22 fundamentally illegal. That's the question I'm trying to address.
23 I'd ask you to try to focus on that question.

1 TC: Yes, Your Honor.

2 The government's position is that that's a simple
3 misreading of the statute. The statute says that the Secretary of
4 Health and Human Services is the one who promulgates those
5 conditions, and the Secretary, in that statement, does not
6 affirmatively put that in there. So, the absence is the Secretary's
7 choice of not including that informed consent in the EUA.

8 If informed consent is being imputed on the EUA because the
9 Secretary of Health and Human Services didn't say it, I think the
10 question would have to be, then, is - what other conditions apply to
11 EUAs now that we just have to think about and anticipate that the
12 Secretary of Health and Human Services didn't put on EUAs, just
13 because somebody argues that they should be a condition within an
14 EUA.

15 So, that would be the position of the government for that,
16 Your Honor.

17 For the efficacy of masks ----

18 MJ: What about the executive order or presidential finding from
19 1999, that was implementing 1107(a)? It says that all of this is
20 really a management process, and says essentially - that's what the
21 presidential executive order that implemented 1107 said. That was in
22 the last paragraph - I'll review that. I'd like to know - what does
23 that mean? That was what was justified for the anthrax cases.

1 TC: Yes, Your Honor. As the government reads that, that
2 applies to 1107 itself; it doesn't include 1107(a) in that
3 determination, and that's why we didn't provide the analysis, because
4 though it applies to vaccines, the investigational drug component of
5 10 USC 1107 is distinct from 10 USC 1107(a) in that regard.

6 Speaking to efficacy of masks, Your Honor, it has been the
7 government's position, since this case began, and since the incidents
8 on 30 November 2021 began, that masks do reduce the transmission of
9 COVID-19, and at a minimum, even if that is disputed by some, that
10 was a decision made by the Department of Defense and the Army, and
11 trickled down to local installations and policies, and local
12 commanders, that masks do save lives, or protect the health of
13 others.

14 As to why the accused believes what he believes, the
15 government doesn't have a position on what his basis for that
16 personal belief as to why masks are not effective in combating COVID-
17 19, or why flu numbers were reduced during that time - why he doesn't
18 believe masks may have helped or assisted in reducing those numbers,
19 Your Honor.

20 MJ: Defense, I asked a few questions in there. Would you like
21 to address any of those? You may at this time.

22 CDC: Your Honor, can we take a - I really need a comfort break,
23 I guess that's what I'm looking for.

1 MJ: It is 1310. Counsel, if you'd like to have a brief lunch
2 recess now, and then we can come back and formulate any arguments -
3 any final rebuttal argument, if you'd like, we can come back. What
4 would be the preference?

5 TC: I think the government would prefer a short comfort break,
6 and then finish the 39(a), Your Honor.

7 MJ: Why don't we take a 10-minute recess, and we'll reconvene
8 at 1320.

9 The court will be in a brief recess.

10 [The court-martial recessed at 1311, 28 April 2022.]

11 [The court-martial was called to order at 1322, 28 April 2022.]

12 MJ: This court is again called to order.

13 All parties who were present previously are again present,
14 to include the accused and all counsel.

15 Defense, I was giving you the opportunity to address some
16 of the arguments presented by the government, if you would like to,
17 at this time.

18 CDC: Your Honor, I apologize, I'm going to bounce around a
19 little bit, as I was scratching notes left and right.

20 With regards to 1107(a)(A)(1), whether or not it negates
21 regulations, we believe it does. I'm going to refer to Appellate
22 Exhibit VI-J, the reg that we provided as part of one of our motions,
23 the DODI 6200.02, Application of the FDA Rules to Department of

1 Defense Force Health Protection Programs. And it updates a policy
2 and assigns responsibility for compliance with Reference D, Sections
3 1107, 1107(a) of Title 10. So, the DoD is basically saying, we
4 follow that law, and it will be implemented per that instruction.

5 Again, bouncing around a little bit, first of all, with
6 regards to the flu, it is our understanding that the flu is
7 transmitted via travel - maybe one explanation for it. We don't know
8 scientifically why flu seemed to disappear, but there could be
9 numerous reasons. But everybody was locked down, people weren't
10 really moving around, they weren't interacting the way we all
11 normally do, because of the lockdowns and the mandates. So, that's
12 just potentially one explanation for the lack of the flu.

13 The other one is, potentially, everybody was so hyper
14 vigilant on COVID that - and the testing, testing - and if you get
15 COVID, you have to quarantine. And you could potentially end up in
16 the hospital, and everything COVID-related. There's also discussion
17 out there that, related to the tests, there was false positives, and
18 people could have had the flu, but tested positive for COVID.

19 So, there's a lot of unknowns with regards to this, and it
20 may take years before that is all determined, based on science and
21 statistics, and various investigations.

1 So, it's just too difficult to say, or even draw the
2 conclusions that masks created some sort of protection preventing the
3 flu.

4 Obviously, with a lot of the literature that's coming out,
5 and statements being made by the FDA as well, or the CDC, that the
6 masks did not really have the intended impact or effect that they
7 were expecting them to have.

8 We would agree. Certainly, if you're coughing and
9 sneezing, the standard protocol was put your arm in front of your
10 face, and cough or sneeze into our elbow, because you're trying to
11 prevent the spread of airborne elements. Obviously, the ones big
12 enough to be caught in your arm or your elbow, not microscopic ones
13 that nobody can see.

14 I can put my client back on the stand to discuss this, but
15 it is based on the FDA website, and this was part of the research
16 that he did in looking at the - I'm going to mess up the science or
17 the terminology - sort of the micron-size of the virus, compared to
18 the hole sizes in the masks. There was like a 6-time difference, so,
19 the analogy that I've heard in the past was, wearing a mask to try
20 and prevent the COVID was similar to, or analogous to, taking a
21 handful of marbles and throwing them at a chain-link fence - it was
22 just going right through. Because masks were designed to stop
23 bacteria, not virus, because of the size of the different particles.

1 Bacteria is much larger, whereas, viruses are microscopic. Again, I
2 could put my client back on the stand to discuss what he learned
3 through the FDA and those sizes, which he does know off the top of
4 his head.

5 The government claims that, regardless of the EUA, the
6 orders would still be lawful. What we would say is, in some regard,
7 we would agree with that. If DoD, at some point, on their own, or a
8 virus or health issue was unique to the DoD, and they decided, 'We
9 are going to implement mask mandates because we think that's what's
10 needed to protect the force, potentially, the DoD had the authority
11 to do that. That would get into a whole other argument as to
12 lawfulness regarding masks, and again, back to military function.

13 But the fact that the masks were implemented, or
14 designated, an EUA status, then puts the legal requirement in place
15 under 1107(a)(A)(i-ii), and 21 [USC] 360bbb, and subsequent law under
16 that, that informed consent applies - absolutely applies. And
17 therefore, because of that designation - as 6200 says - the DoD was
18 required to follow that law, and provide soldiers informed consent
19 about the potential harms and potential reactions, as well as
20 potential benefits, and allow the soldier to decide, 'Okay, is that
21 something that I'm willing to take a risk with with my body or not?'

22 If there had been no EUA law, it may be a completely
23 different story with the DoD saying, 'We're doing this for this

1 justification for force health protection, and we're requiring
2 masks.'

3 But with the EUA law in place, they have to follow the law.
4 The DoD doesn't get to say, 'Well, this law applies to us, but that
5 law doesn't.' And as I said, 6200 clearly says 1107(a) does apply.

6 The government tried to make the argument that Lieutenant
7 Bashaw did not show up to test, but he sat here and testified about
8 the QuickVue, because he knew that's what he was going to be ordered,
9 or what was being used by the military. So, he researched it, he
10 looked at the box, he tried to discern what the potential harms were.
11 That's part of his duty description - to look for health-related
12 harms, and then address that in a risk assessment approach, and then
13 put out messaging to let people know, 'Okay, here's the potential
14 concerns with regards to A, B and C.'

15 The stories that we're hearing with regards to EUA and
16 informed consent - in many cases, nobody is being told. Lieutenant
17 Bashaw, in fact, didn't see a product literature that was associated
18 with the test ----

19 TC: Objection, Your Honor.

20 MJ: Sustained.

21 Again, counsel, this is about the issue of the EUAs - it
22 might well be a factual issue as far as what his knowledge was, but
23 that would not impact, at this point, the issue of the lawfulness of

1 the underlying directives, whether or not the issue of providing him
2 with access to the information, that would be a later analysis.
3 Again, that would go to the issue of [inaud], which goes to the more
4 general question of whether the orders themselves were legal.

5 I'll sustain that objection with regard to - I know this is
6 argument, but there's really no evidence before the court - I would
7 suggest that that argument is not going anywhere.

8 CDC: Yes, Your Honor.

9 DoD policy is illegal because it conflicts directly with
10 statutory rights of the individual, as stated under Article
11 90(c)(2)(A)(v). We did look at other EUA letters for masks and
12 testing - especially with regards to testing - and generally, EUA
13 letters don't address informed consent. Why? Because informed
14 consent is part of the law. It is part of the requirement. Again,
15 as I stated earlier, there's nowhere in the law that it says that the
16 Health and Human Services Secretary has to then step back and say,
17 'Okay, as part of my requirement now for this EUA designation, I also
18 have to decide whether informed consent applies.' That doesn't
19 exist, so the government is being very generous with their reading of
20 the law, by believing that the HHS Secretary has to designate an
21 emergency, designate a product as emergency use authorized, and then
22 turn around and say, 'Oh, by the way, informed consent applies,' or,
23 'Informed consent doesn't apply.'

1 TC: Objection, Your Honor, that's mischaracterization of the
2 government's argument.

3 MJ: I've heard the argument, counsel. I'll give it the weight
4 it's due.

5 CDC: I would reemphasize, Your Honor, that based on that, it is
6 primarily a liability issue. EUA means the manufacturer has no
7 liability, and those distributing, those implementing or providing,
8 or mandating, have no liability. It falls upon the individual to be
9 told, 'Here are your risks. Here is our right by law, because you're
10 accepting those risks,' similar to somebody who signs up for
11 experimental drugs and says, 'I am willing to be part of this
12 experiment, and try these drugs. I believe it is to my benefit to do
13 that, and one of those benefits is my own health and/or getting
14 financial payment for it.' They make that decision, and everybody
15 has to have the right to make that decision, unless, with regards to
16 the military, the President says, 'In this case, because of national
17 security, I'm designating this product, the informed consent portion,
18 is waived for the military,' which did not happen.

19 Finally, Your Honor, with regard to the masks in our recent
20 brief session [sic], we were able to find a First Amendment argument
21 - masks limit free communication; the cite to that is *Texas v.*
22 *Johnson*, 491 U.S. 397, and it's an '89 case.

23 MJ: What's the holding?

1 CDC: I didn't get to read the entire thing, but the excerpt that
2 I did read was that forcing someone to wear a mask limits their
3 ability to communicate, show their face and see other people, which
4 was, in this case, considered a First Amendment violation of free
5 speech.

6 MJ: I don't know the context of the case, so, if you want to
7 provide the court a copy of it, I'll be happy to review it.

8 CDC: Thank you, Your Honor.

9 MJ: Counsel, I have a few questions for both sides, before I
10 make a determination on this issue.

11 First, to the government - well, let me start with the
12 defense actually, because it's your burden. Even assuming, for
13 argument sake, that the guidance that came down from on high from the
14 Secretary of Defense, Secretary of the Army, undersecretaries, failed
15 to comply with the rules and regulations under the EUA statute, if
16 that were the case, how does that impact the balance of the
17 allegations in the specifications against your client, the accused in
18 this particular case, as much of what the allegations are don't
19 necessarily directly relate to the issue of the lawfulness of the
20 EUA/COVID protocols, testing, mask wearing, at all; but more to do
21 with whether he was present or not present at a place of duty, of
22 failure to comply with instructions or orders as to where he should
23 be, or how he should be - again, I'm just reading the actual

1 specifications right now. In particular, I'm making reference to
2 Specification 2, not leaving, or Specification 3 - he had other
3 obligations and duties to obey, including given options to work at
4 home if he disagreed with the option of taking the test, and the
5 exhibits you provided as part of the appellate record, as far as the
6 motions you filed, it was clear that he was given, in writing, the
7 opportunity to work from a remote location if he objected to the
8 conditions that were being imposed on him, if he believed them to be
9 unlawful, but that he could work in another location. Again, that
10 would've directly addressed the issues, at least in some of the
11 specifications.

12 What is your position, even if you were to prevail on the
13 issue of the DoD guidance being formulated improperly because of the
14 FDA laws? How would that, in any way, impact the other aspects of
15 the specifications against the accused?

16 CDC: Your Honor, it sounds like ----

17 MJ: I'm just wondering whether you think it has any direct
18 impact on the balance of the charges ----

19 CDC: Yes.

20 MJ: ---- because, again, I'm looking at what he's actually
21 charged with doing, and he's not charged with violating, with any
22 specificity, a DoD guidance or DoD regulation; he's charged violating
23 specific instruction as to location, or where his duty place is.

1 Yes, one aspect of the facemask and/or testing, there's positional
2 information contained in the specifications that, independent of the
3 mask-wearing, or otherwise, would still potentially be legal.

4 So, I'm asking you whether you believe that if the DoD
5 guidance - again, all the various instructions that came down based
6 on the CDC guidance, et cetera - even if that were not valid, does
7 that impact the totality of the charges against the accused?

8 CDC: It does, because the orders to - we're refuting the clarity
9 of the orders to telework - but the orders to telework came directly
10 as a result of not having taken a test that he believed he had a
11 right to refuse.

12 MJ: What is your position, defense, with regard to the
13 Executive Order that was issued, I believe, on January 20th of 2021 by
14 our new President - it's actually one of the policies, where he
15 affirmatively states in an Executive Order that wearing a facemask
16 can promote the safety of the federal workforce. Again, he is doing
17 this - at least from my review of this - in the role both as the
18 Chief Executive for the civilian side, and as the Commander in Chief
19 of the military. What, if anything, does that impact your viewpoint
20 whether there's actually been now, essentially, a presidential
21 finding on the relevance of mask wearing - and it's in the Executive
22 Order itself.

1 CDC: Your Honor, I'm trying to remember exactly what that order
2 pertained to. I believe the ----

3 MJ: The Executive Order issued on the 20th of January of 2021,
4 on protecting the federal workforce, and requirement mask wear -
5 implemented on the 20th of January 2021.

6 CDC: Our understanding was that was not directed at the
7 military; it was directed at the federal workforce, not including ---
8 -

9 MJ: The interpretation - again, I've reviewed the various
10 attachments included, in the FRAGOs and various other things - there
11 was a - it was upheld, other than as to the issue of the OSHA side of
12 it - the civilian workforce was excused from much of it, but the
13 military workforce was not. So, it does not appear it was. That's
14 why I'm asking you for your input, and any argument you want to make,
15 which is why I brought this to your attention earlier - that there
16 is, in fact, a supplemental executive order on the issue of mask
17 wearing, it was issued by the Commander in Chief in January of 2021,
18 finding that the wearing of masks is a significant aspect of
19 preventing COVID-19.

20 CDC: One second, Your Honor.

21 [The defense counsels conferred.]

22 Your Honor, it didn't specifically state the military; as
23 you stated, it says the federal workforce, and under 1107(a)(A)(1),

1 it does say, "To members of the armed forces, the condition described
2 in 564, designed to ensure that individuals are informed, may be
3 waived only by the President, only if the President determines, in
4 writing, that complying with such a requirement is not in the
5 interest in national security." So, he didn't tie that to the
6 interests of national security; he generally stated, in executive
7 orders - typically, a mandate from the President to the DoD does not
8 come through an Executive Order; it comes through an order from the
9 Commander in Chief. In this regard ----

10 MJ: Which would normally be transmitted through the Secretary
11 of Defense.

12 CDC: Correct.

13 MJ: Which is what the policy was. It came from the Secretary
14 of Defense. Again, there was implementation citing back to this
15 executive order.

16 I'm just asking for your input, and any argument you want
17 to make, on whether the Secretary of Defense, as the civilian
18 representative of the President, in the role of Commander in Chief,
19 directs the military, based on an executive order issued by the
20 Commander in Chief - this is the implementation to take. Is that not
21 something that the court should take notice of?

22 CDC: I would say no, Your Honor, because that executive order -
23 our interpretation of it was that was an executive order for the

1 federal workforce. I may be misquoting the citing - 21 USC 360bbb,
2 at some point, I believe it is that citation, states that the
3 Secretary of Defense can ask the President to institute a waiver. He
4 has that authority to ask for that. He can't do it himself, and as I
5 just read in 1107(a)(A)(1), the President has to make a determination
6 based on national security.

7 In our opinion, it's a stretch to say he implemented an
8 executive order to the federal workforce for their protection, and
9 that was the same or similar to, or met the criteria, under
10 1107(a)(A)(1).

11 MJ: Let me interrupt you, counsel.

12 I'm looking at the executive order. I'm looking at Section
13 VII of the Executive Order issued on the 20th of January 2021, and it
14 says, "Scope-Federal employees means employees, including members of
15 the armed forces, and members of the National guard and federal
16 service." It's what it says, right in the Executive Order.

17 Again, my question to you is that there's an Executive
18 Order that identifies, on its face, that it covers the military; and
19 Section VII-Scope says exactly that under subparagraph one, does that
20 not constitute an instruction from the Commander in Chief, as issued
21 through the Secretary of Defense, the normal chain of command, that
22 this is, in fact, applicable to the military? Again, if you want to
23 see a copy of it, I will be glad to have it marked as the next

1 appellate exhibit. I provided at least a reference to it earlier
2 during our 802, and asked you all to review that. Paragraph seven on
3 the last page. Again, this is the Executive Order - it's been in
4 existence for, now, well over a year, governing mask wear. Not about
5 testing, but about mask wear.

6 Again, mask wear is also addressed in President Trump's
7 findings - we've argued that. I want you to look at this, and then I
8 want to hear any supplemental argument. This is limited to the issue
9 of mask wearing; it does not address testing. It does talk about
10 vaccines, but that's because of the now authorization of vaccines,
11 but that's not what we're here for today either.

12 [AE XVI was marked.]

13 Counsel, I'm going to provide this to you. I'll ask you,
14 at our next recess, to make copies, so I can have a copy as well.
15 Why don't you take a moment and review it - it's the last page,
16 subparagraph seven. You can approach.

17 Again, anything you want to add to the issue of the
18 executive order? Where it says "Scope."

19 [The parties reviewed AE XVI.]

20 You can get a copy of that at whitehouse.gov, by the way.
21 It is referenced in your motions, as part of the attachments - when
22 they talk about the annexes on one of the appellate exhibits that was
23 previously put before the court with regard to the FRAGOs. In

1 particular, this is a referenced annex in the documents that you
2 provided.

3 Counsel, why don't we do this? Is there any additional
4 argument you want to make at this time? I want everyone to have a
5 chance to have some lunch. I'll leave it to the government to make
6 copies for both the defense, and to return a copy to me of that
7 document.

8 Is there any other major argument you want to make, other
9 than about the issue of the - potential issue, or impact, of the
10 Executive Order?

11 CDC: Just related to that, Your Honor.

12 MJ: Government, is that satisfactory, or do you want to have
13 any additional argument in regard to anything the defense did in
14 their rebuttal argument to this point?

15 TC: Nothing further from the government, Your Honor.

16 MJ: Why don't we do this? Why don't we have a lunch recess?
17 You all review this executive order, and then we will have any last
18 arguments on that issue, and then I can issue a finding as to the
19 issue of legality of the order, and we'll move on from there as
20 appropriate.

21 The question now is time - how much time do you need? I
22 don't know what's available for you all for lunch, but I want to make
23 sure the court reporter has lunch, the bailiff, any support staff who

1 are here have time to eat, and the accused has a chance to have a
2 meal as well.

3 How much time do you need to do the copying, and to go get
4 a meal, and come back, so we can continue to work?

5 TC: The government doesn't need any more than 30 minutes, Your
6 Honor.

7 MJ: That's not realistic.

8 CDC: I would say an hour.

9 MJ: I appreciate the effort. I'm going to allow them a
10 reasonable amount of time to eat and do everything else.

11 Counsel, I have it at 1354. We're going to reconvene at
12 1500, so an hour and 5 minutes from now. We'll be in recess until
13 then.

14 With your permission, defense, government, please provide
15 me a copy of the Executive Order - would that be satisfactory to just
16 drop a copy off in my chambers? Appellate Exhibit XVI.

17 Thank you.

18 [The court-martial recessed at 1355, 28 April 2022.]

19 [The court-martial was called to order at 1504, 28 April 2022.]

20 MJ: This 39(a) session is called back to order.

21 All parties who were previously present, to include the
22 accused, are again present.

23 Good afternoon, everyone. I hope you had a pleasant lunch.

1 Counsel, where we were was an opportunity to address any
2 last-minute arguments concerning matters of the Executive Order, or
3 any other matters you'd like the court to consider, in making a
4 determination as to the lawfulness of the orders.

5 Defense?

6 CDC: Thank you, Judge, for that break. It was well-needed.

7 Your Honor, in looking at the Executive Order, what we were
8 able to discern is the President mandated masks for the federal
9 workforce which, under the "Scope," as you pointed out, includes
10 military members.

11 But what he didn't do was he did not waive the EUA. He did
12 not waive informed consent.

13 Section II of the Executive Order specifically says,
14 "Immediate action regarding federal employees, contractors, buildings
15 and lands," which, again, includes military members, "The heads of
16 executive departments and agencies shall immediately take action as
17 appropriate and consistent with applicable law to require
18 compliance," and then it goes on.

19 Even down further in Section II(e), "Agencies shall review
20 their existing authorities, to the extent permitted by law."

21 Clearly, the author of the executive order understood that
22 the President could set rules and regulations, or guidance, to the
23 workforce, under his authority, to help with the management of the

1 workforce. But that has to be within applicable law, which goes back
2 to 1107(a) and informed consent.

3 Also, applying the executive order to the federal workforce
4 is one thing. Similar to an employer - let's say, Walmart - who
5 decides, for health reasons, 'We're implementing a mask mandate; if
6 you don't like it, you can quit.' Unfortunately, military members
7 can't just quit, so a mandate against a military member has a -
8 military members, I guess, I'd call them a captive audience. A
9 mandate has a greater requirement, or a greater risk, since they
10 can't just quit due to the fact that they're in the military, and
11 they can't sue, because of the *Feres* doctrine. So, they don't have
12 the options that a civilian would have, who decides, 'Well, you're
13 not allowing me to continue to work here, and refuse this EUA,
14 therefore, I'm just going to quit and move on with my life.'

15 Again, we keep going back to 1107(a)(A), "The President
16 must make a specific finding for waiving informed consent, and tie it
17 to national security."

18 Similarly, if you look at 1107, it says, "The Secretary of
19 Defense can request a waiver," and that refers to drugs or vaccines;
20 whereas, 1107(a) refers to products and EUA products.

21 The Secretary of Defense can make the request to the
22 President, but the President has to officially designate that.

1 Our quick review of the Federal Registry - obviously, it
2 was not extensive - but we didn't find anywhere that there's a waiver
3 for the military, by the President, with regards to masks - just this
4 Executive Order, and the fact that it says that it must comply with
5 applicable law.

6 Thank you, Your Honor.

7 MJ: Government?

8 TC: Yes, Your Honor.

9 Your Honor, briefly, the government just wants to reiterate
10 its position that it believes that the face coverings that Captain
11 McCarthy was ordering, as contained within his order - he was not
12 ordering the accused to wear an EUA mask, or a mask that would fall
13 under EUA. That's our basis on the mask.

14 We reiterate our position on 10 USC 1107(a) and its
15 application that when the Secretary of Health and Human Services
16 issued the EUA for the testing - the QuickVue test, and associated
17 COVID-19 tests- intentionally did not include informed consent. So,
18 informed consent isn't even applicable in this situation, under that
19 analysis, because the Secretary of Health and Human Services did not
20 require it, so no presidential waiver was required.

21 Briefly, just because it was mentioned very quickly before
22 we went out on break, defense had raised a First Amendment issue
23 about masks, and the accused's ability to express his First Amendment

1 - the government just wants to put its position that it opposes that
2 belief that his First Amendments rights were restricted. Even if
3 they were partially restricted, it is well-held within the military
4 and the U.S. Army that your rights, even First Amendment, can be
5 restricted lawfully. For example, you can't disparage the President
6 of the United States when you're in uniform - as a very simple
7 example, Your Honor. That's the government's position.

8 Thank you.

9 MJ: Counsel, what I'm going to do is I'm going to need a few
10 minutes to make some essential findings of fact, and to address some
11 of these issues. I realize that we've had a lot of stop and go, but
12 that's the nature of the beast today.

13 What I'd like to do is - again, we're going to have a
14 recess, so I can go and put this all together, and issue an
15 appropriate ruling, considering all of the arguments from both the
16 government and the defense, applying all of the appropriate criteria,
17 and the citations and various laws that you've all been citing.

18 What I'd suggest we do is - this is going to be a somewhat
19 lengthy process, given just the volume of statutes that have to be,
20 at least, accounted for, fairly, from both sides. I'd suggest that
21 we plan on reconvening in approximately 45 minutes, so I can then
22 have all of that completed.

23 Would that be satisfactory?

1 TC: Yes, Your Honor.

2 CDC: Yes, Your Honor.

3 I failed to address the First Amendment argument, but were
4 you able to get a copy of that case law?

5 MJ: I did not, I was not provided a copy. I did not have
6 access to a printer.

7 CDC: We have a copy we can provide, Your Honor.

8 MJ: Is there any objection?

9 TC: No, Your Honor.

10 MJ: So that the record is very clear, I'll take this copy - we
11 do need a copy provided and marked as an appropriate appellate
12 exhibit, so that there's a record of that case being reviewed.

13 [The case cited was marked AE XVII.]

14 TC: For the record, that case is *Texas v. Johnson*, the citation
15 is 491 U.S. 397.

16 MJ: Thank you very much, counsel.

17 We'll be in recess.

18 [The court-martial recessed at 1515, 28 April 2022.]

19 [The court-martial was called to order at 1604, 28 April 2022.]

20 MJ: This 39(a) session is again called back to order.

21 All parties are again present, to include the accused.

22 I'm getting some assistance, so the record is clear - I
23 don't have a power source up at the bench.

1 Counsel, what I'd like to do is I've tried to address all
2 of the points that have been presented by both the government and
3 defense as to the underlying instructions that came down from the
4 Department of Defense, based on the EUAs from the FDA, as well as
5 taking into account the interpretations contained in the instructions
6 that came from the Department of Defense, Secretary of Defense,
7 Department of the Army, and the executive orders, and put that into a
8 context. Let me try to put that as clearly as I can, by way of some
9 background, and some highlights, as I understand the various relevant
10 statutes.

11 First, on January 31st of 2020, HHS - which is Health and
12 Human Services, from the United States government - issued an initial
13 declaration of a public health emergency related to the COVID-19
14 virus. That declaration has subsequently been renewed, most
15 recently, I believe, in March of last year.

16 On March 13th of 2020, then-President Trump declared a
17 national emergency in response to COVID-19.

18 On February 24th of 2021 - I misspoke - in February of 2021,
19 there was the presidential declaration continuing the national
20 emergency concerning COVID beyond March of 2021.

21 That sets the background of what was happening in the world
22 at that time. There've been these declarations of emergency, and a

1 national emergency declared by the Commander in Chief of the United
2 States.

3 That brings us to the issue of Title 21, Section 360bbb-3,
4 which concerns the issue of authorization for medical products
5 through use in emergencies - this is the EUA statute that we have
6 been discussing. Under those sections - I'm not going to review
7 every aspect of the entire legislation, but there are, under
8 subsection "e," conditions of authorization for unapproved products.
9 And then it outlines various conditions for the approval of
10 "emergency use of an unapproved product." It holds and states that
11 the Secretary of HHS, to the extent practicable, given the applicable
12 circumstances described, shall, for a person who carries out any
13 activity for which the authorization is issued, establishes such
14 conditions on an authorization under this section, as the Secretary
15 finds necessary or appropriate to protect the public health. And
16 then there's a list of what the Secretary may include.

17 Appropriate conditions designed to ensure that healthcare
18 professionals administering the product are informed that the
19 Secretary has authorized emergency use of the product - that's one
20 example. That would also include a list of any significant known and
21 potential benefits and risks of the emergency use of the product, and
22 of the extent to which such benefits and risks are either known

1 and/or unknown, and of any alternatives to the product that are
2 available, and their benefits and risks.

3 It then goes into the next section talking about
4 'appropriate conditions designed to ensure that individuals to whom
5 the product is administered are informed.' Again, this is a "may."
6 "That the Secretary authorized the emergency use of the product of
7 any significant known or potential benefits and risks of such use,
8 and of the extent to which such benefits and risks are unknown, and
9 of the option to accept or refuse administration of the product; of
10 the consequences, if any, of refusing administration of the product;
11 and of the alternative to the product available, and of their
12 benefits and risks."

13 If you then continue through that statute, you come to
14 section "j," which is "Rules of Construction." The following applies
15 with respect to this section - again, that which I just read to you
16 all.

17 Under the rules of construction, "Nothing in this section
18 impairs the authority of the President, as Commander in Chief of the
19 Armed Forces of the United States under Article II, Section II, of
20 the United States Constitution," and then the second point is,
21 "Nothing in this section impairs the authority of the Secretary of
22 Defense, with respect to the Department of Defense, including the
23 armed forces under other provisions of federal law."

1 We then go to Title 10, Section 1107(a), "Emergency Use
2 Products," and there's a section under subsection "a" called "Waiver
3 by the President," Section 1. "In the case of the administration of
4 a product authorized for emergency use, under Section 564 of the
5 Federal Food, Drug and Cosmetic Act, the members of the armed forces,
6 the conditions described in Section 564(e)(1)(A)(ii), and then (III),
7 of such Act, and required under paragraph 1a or 2a of such section of
8 564(e)," and that's designed to ensure that individuals are informed
9 of an option to accept or refuse administration of the product; and
10 then it indicates it may be waived only by the President, only if the
11 President determines, in writing, that complying with such
12 requirement is not in the interest of national security.

13 Then it has a subsection two, "The waiver authority
14 provided in paragraph one," which I just read, "shall not be
15 construed to apply to any case, other than a case in which an
16 individual is required to be informed of an option to accept or
17 refuse administration of a particular product by reason of a
18 determination by the Secretary of Health and Human Services."

19 What does this all mean?

20 For emergency use of unapproved products, which is, again,
21 where we are talking about this issue of EUA products, "The Secretary
22 of Health and Human Services must establish conditions for approval
23 that he or she finds necessary or appropriate to protect the public

1 health, to include appropriate conditions designed to ensure that
2 individuals to whom the product is administered, are informed of the
3 option to accept or refuse administration of the product; of the
4 consequences, if any, of refusing administration of the product; and
5 of the alternatives to the product that are available and their
6 benefits and risks."

7 Stated another way, the Secretary of HHS has the ability to
8 require informed consent before administration of a drug under an
9 EUA; that would've been the case, and that is, in fact, the case with
10 regard to the COVID vaccine - they, in fact, provide for that. The
11 Secretary granted approval to the current COVID EUA upon the
12 condition that the vaccine remained voluntary, and the DoD has been
13 abiding by that condition.

14 But that is limited to the issue of the COVID vaccine; that
15 does not indicate, nor is it contained in the EUA, as to the issue of
16 masks or testing. That was not a requirement contained therein.

17 Then, if you look at, again, 1107(a), at the request of the
18 Secretary of Defense, the Commander in Chief then has the authority
19 to waive the Secretary's voluntary condition, and then require
20 service members to accept the unapproved emergency use vaccine. It
21 is in that type of case - and in such cases only - that the President
22 must determine that complying with the informed consent requirement
23 would not be interest of national security.

1 I believe the government's argument is, in fact, correct
2 when you actually read the statute, and go through the various
3 qualifications, the Secretary of Health and Human Services has an
4 inherent authority to put conditions upon the EUA-type product; that
5 condition, as to informed consent, was, in fact, put on the issue of
6 COVID vaccines. It was not - where the court could find any
7 information - it was not provided for, or required, with regard to
8 other aspects, such as face masks or testing materials - testing
9 devices or products. I think the proper term is "product." Again,
10 there was no suggestion that there was any requirement for the
11 informed consent, implied or put into place, by the Secretary with
12 regard to those two issues.

13 I then reviewed DoD Instruction 6205.2, which the defense
14 pointed out. I would suggest, quite strongly, that the
15 interpretation of the ability of the Secretary of Health and Human
16 Services to have discretion as to what requires, or does not require,
17 informed consent, is in no way contradicted by the language in the
18 DoD Instruction. What the DoD Instruction provides for is,
19 essentially, an establishment of the DoD immunization program. The
20 policy generally directs combatant commands, military departments, to
21 identify and define what is called the 'mandatory immunization
22 requirements for service members.' There is, in fact, a joint
23 regulation that governs that, and it covers specific requirements for

1 service members, as well as service-specific procedures for
2 administering such requirements, including documentation.

3 In general, the DoD vaccination requirements followed the
4 recommendations through the U.S. Centers for Disease Control and
5 Prevention, which is the CDC, as well as an advisory committee on
6 immunization best practices.

7 It is noted that the background of why the DoD administers
8 the variety of force health protection measures, also called FHP, is
9 primarily to promote, protect, improve, conserve and restore the
10 health and wellbeing of the service members. These measures include
11 health promotion, education, periodic health assessments,
12 preventative therapy, medical countermeasures, and vaccinations.

13 By way of historical comment, I would note that, in 1777,
14 General George Washington directed the inoculation of the Continental
15 Army to protect personnel against smallpox that, at that time, was
16 running rampant. Since then, 250-plus years later, the Department of
17 Defense has continued to implement a variety of enduring and
18 situational health protection measures to protect service members
19 from health threats. I would note this is exactly what the accused
20 is, in part, responsible for doing. This is part of the
21 responsibility of the Department of Defense - to ensure the health
22 and wellbeing of the service members. That has included requiring
23 certain vaccines for service members, while others may only be

1 required for those who deploy to particular locations, or facing
2 certain kinds of anticipated threats. That would be more as to the
3 issue of the anthrax threat back in the 1990s.

4 Other vaccines, again, may be provided to service members,
5 either on a voluntary or involuntary basis.

6 I would also note that the January 20, 2021 Executive Order
7 that we've made reference to concerning mask wear - again, I believe
8 it governs - it states on its face that it governs military
9 personnel. I believe that this regulation - this Executive Order -
10 reinforces the court's conclusion that the various DoD instructions
11 concerning mask wear and COVID-19 testing are lawful, and that
12 appropriate orders to comply with their dictates would also be
13 lawful.

14 Military orders, again, are presumed to be lawful. The
15 essential attributes of a lawful order include:

16 Issuance by a competent authority;

17 Words that express a specific mandate; and

18 A nexus to military duty. This has really been the real
19 issue that you've been raising - the nexus to military duty.

20 The military has a compelling interest in ensuring the
21 health of the force. As a result, the military frequently curtails
22 the personal liberty, and physical privacy, of service members, with
23 the goal of ensuring good order and discipline. Orders to take

1 vaccine, with severe documented side effects, have been found in the
2 past to be lawful, and the mandated inoculation of such vaccinations
3 has been upheld by the Supreme Court. I would note that in *Jacobson*
4 *v. Massachusetts*, 197 U.S. 11 from 1905 - going back almost 120 years
5 ago - that has been an established state of the law in the United
6 States.

7 In *Jacobsen*, the defendant was offered the issue of a
8 smallpox vaccine which, at the time, was again running rampant. That
9 vaccination was known to quite often cause serious and permanent
10 injury, and occasionally death, in those who received the vaccine.

11 The court found those offers of proof to be established
12 and, again, upon review, affirmed that the military has a function to
13 care for health and public safety, and those can be ordered to be
14 vaccination - this goes both to the public and the military - when
15 endangered by epidemics of disease.

16 The issue there, again, was more of a civilian evaluation,
17 but the legislative determination, or a statutory determination, of
18 the need is a balancing test. Again, the legislative determination
19 of the need for that has been approved, even when the consequence of
20 taking mandated vaccine has been quite likely to be very, very
21 serious and negative to the people taking it.

22 If you then look at 10 USC Section 890 - the MCM is Part
23 IV, paragraph 16(c)(2)(iv), is the issue of assessing or testing the

1 lawfulness of an order under Article 92 of the Uniform Code of
2 Military Justice. It is clear from the guidance within the MCM that
3 the order must relate to a military duty, which includes all
4 activities reasonably necessary to accomplish a military mission, or
5 safeguard or promote the morale, discipline and usefulness of a
6 member of a command, and directly connected with the maintenance of
7 good order in the service.

8 The order may not, if it's a valid military purpose,
9 interfere with private rights or personal affairs; however, the
10 dictates of a person's conscience, religion or personal philosophy
11 cannot justify or excuse the disobedience to an otherwise lawful
12 order.

13 Fundamental to an effective armed force is the obligation
14 of obedience to lawful orders. Reflecting the authority of this
15 principle, an order is presumed to be lawful, and the subordinate
16 disobeys an order at his own peril. However, a service member may
17 always challenge the lawfulness of an order in the tribunal of a
18 court-martial - that may, of course, always occur.

19 But what's critical in the assessment, at least initially,
20 as to the lawfulness of an order is that the lawful order must
21 include issuance by a competent authority - that means a person
22 authorized by applicable law or authority to give such an order; it
23 must be communicated in words that express a specific mandate to do

1 or not do a specific act; and it must have a nexus or relationship to
2 a military duty, and that would be in *United States v. Deisher*, 61
3 M.J. 313, CAAF 2005.

4 Again, because orders are presumed to be lawful, the
5 accused bears the burden of demonstrating otherwise. *United States*
6 *v. New* at 55 M.J. at 106; additional citations at *United States v.*
7 *Hughley*, 46 M.J. 152 at page 154 from CAAF 1997.

8 Again, as for the issue of safeguarding - and what would be
9 considered an appropriate relationship to military duty - a military
10 duty includes all activities reasonably necessary to accomplish a
11 military mission, safeguard or promote morale, discipline and
12 usefulness of a member of the command - and again, as I noted a
13 moment ago - be related to or connected to good order and discipline.
14 It may not, without such a military purpose, interfere with private
15 rights.

16 I would note the following. What is clear from these
17 directives from DoD and from the President, and from the findings
18 within the states of emergency by the Commanders in Chief, from both
19 President Trump and President Biden, is that the ability to have a
20 healthy, deployable and safe military force is of paramount
21 importance.

22 I would point out - I was looking at the case law that had
23 been presented to the court by both the defense and the government -

1 in *Austin v. Navy Seals*, or *Navy Seals v. Austin*, recently came out
2 from the Supreme Court, and it talks about the significance of having
3 a healthy force that does not - because of the risk of highly
4 contagious disease, does not put at risk mission accomplishment, the
5 ability of the individuals who are highly trained and necessary for
6 our military, and for our national defense, to do their mission when
7 they are instructed to do so. That does, in fact, require the
8 ability to interact with each other in close quarters; to be
9 potentially - at least in the real world - subject to being exposed
10 to highly contagious diseases that could lead to mission failure if
11 they were not able to perform, could lead to death.

12 I would note also - again, this is more from the court's
13 knowledge of recent reports of history, of what's occurred in the
14 last 2 years, and I will take notice of it - there was a United
15 States aircraft carrier when the outbreak of COVID initially started.
16 It was in the Pacific, and it ended up with several hundred people -
17 if not, the vast majority of the entire crew of an aircraft carrier -
18 coming down with COVID. As a result, that ship was no longer a
19 deployable military asset, and one of the most powerful warships in
20 our nation, and the ability to project power overseas, was
21 essentially decommissioned for an extensive period of time, due to
22 the consequence of COVID not being controlled.

1 Clearly, there is an interest in the United States military
2 to have a force that is able to continue in its mission, in the face
3 of what has turned out to be a worldwide pandemic of significant
4 impact, and of great consequence to the ability of those who are in
5 the military - and to the civilians who are subject to interacting
6 with those members of the military as well.

7 I also note the following -

8 It is apparent to the court that the accused has given
9 careful consideration to the legality of the orders at issue. I
10 believe he has formed sincere, deeply-held views about the legal
11 basis for the order to wear a mask, or to be tested.

12 I would note, however, that Congress has provided him with
13 a variety of means to communicate his views to his superiors, and to
14 national policymakers. He may challenge policy through a complaint
15 under Article 138, which I know from the pleadings previously
16 provided, he has, in fact, exercised. He can raise his concerns to
17 the Inspector General. Again, I know from the pleadings that he has,
18 in fact, exercised that right as well. And he may communicate
19 directly with members of congress - again, I don't know if he's done
20 that or not, but that's obviously an option as well. He may do all
21 of the above without interference from his military superiors, and
22 with protection against reprisal.

1 Again, from the motions that I have received - they're in
2 the appellate record at this point as exhibits - the accused has, in
3 fact, exercised many of those rights.

4 Not being satisfied with the results, however, is not a
5 justification for disobedience.

6 The United States Supreme Court in *Parker v. Levy*, 417 U.S.
7 733 from 1974, stated that "The military is, by necessity, a
8 specialized society. Accordingly, the fundamental necessity for
9 obedience, and the consequent necessity for imposition of discipline,
10 may render permissible within the military that which would be
11 constitutionally impermissible outside of it." For that reason, the
12 appellate courts have upheld as lawful orders restricting a service
13 member's personal hygiene, consumption of alcohol, driving
14 privileges, financial transactions, types of sexual relationships,
15 issues concerning relationships between seniors and subordinates.
16 Those military orders have been found permissible, even when they
17 intrude upon an individual service member's physical privacy, such as
18 orders to submit to blood testing, and providing urine samples. It
19 has been upheld that orders restricting sexual or romantic activity
20 are permissible.

21 In *United States v. Chadwell*, which was then reported at 36
22 CMR 741, from the Navy Board of Review in 1965, "Military courts have
23 upheld orders to service members to receive vaccinations, even over

1 religious objection." The finding was - and was noted with approval,
2 "That type of order was justifiable because the military, as a
3 society at large, has a compelling interest in having those who
4 defend the nation remain healthy, and capable of performing their
5 duty." That would be taken from *Womack*, citing *National Treasury*
6 *Employees Union v. Vaughn*, 489 U.S. 656 from 1989.

7 Additionally, citing again to the Supreme Court - excuse me
8 - citing to the Navy Review Board in *Chadwell*, "Whatever medical
9 knowledge which is common to all civilized people, we must conclude,
10 on the basis of common knowledge, that an order to take immunization
11 shots is legal and necessary in order to protect the health and
12 welfare of the military community, and failure would represent a
13 substantial threat to public health, and the safety in the military.
14 This conclusion is inescapable when it is considered, and taken at
15 the departmental level, and it applies to all military personnel."

16 Undoubtedly, many service members would be reluctant to
17 receive vaccines for disease, such as smallpox, where there is a
18 potential for severe side effects, is well-documented. Nonetheless,
19 the order was valid.

20 Even in the civilian sector, the compulsory inoculation
21 against deadly disease was upheld - again, see *Jacobsen v.*
22 *Massachusetts*.

1 Where does that leave us, counsel? Where that leaves us is
2 that the court is making a finding as to the legality of the DoD
3 instructions, or various letters, or what I would call as
4 instructions that came down that were then turned into the various
5 mask-wearing and testing requirements, as articulated - I don't have
6 the exhibit list in front of me right now, so I'm going to have to
7 ask your indulgence as to the three exhibits that we're being asked
8 to rule on. Counsel, could you please clarify that? I didn't bring
9 them out with me. It was Exhibit - I don't want to misspeak - II-A,
10 II-B and - one more?

11 TC: Yes, Your Honor, that's Exhibit II-A, which is HQDA EXORD
12 225 FRAGO 6; Appellate Exhibit II-B, which is Force Health Protection
13 Guidance Supplement 23, Revision 2, Department of Defense Guidance
14 for Coronavirus Disease, 2019 Vaccination Attestation, Screening,
15 Testing and Vaccination Verification ----

16 MJ: Then II-F?

17 TC: And then - yes, [Appellate Exhibit] II-F, Aberdeen Proving
18 Ground Installation for Face Covering Requirements, Your Honor.

19 MJ: I had it as II-A, B and F - I didn't have the full listing
20 of them.

21 The court is making a finding that those instructions that
22 were then for the basis for any further orders to the accused, were
23 lawful.

1 What I am not doing, counsel, is making any determination
2 that the orders, as applied - there may or may not be defenses that
3 you wish to raise, or other issues before the court. But the
4 underlying orders themselves, the court is finding to be lawful. You
5 are, of course, free to present any challenges within that to how the
6 order was issued, or whether it was clear, or whether or not, in a
7 particular case, it was applicable to the accused.

8 Again, the government still bears the burden of proving all
9 of the elements of the offense. All the court is doing is making a
10 finding that the underlying authorities for the order were lawful.

11 Is that clear?

12 TC: Yes, Your Honor.

13 MJ: Very well.

14 Are there any other matters with regard to pretrial
15 litigation, or motions, that you wish to take up at this time?
16 Government?

17 TC: No, Your Honor.

18 MJ: Defense?

19 CDC: Only if - Your Honor - and I need to confer with my client
20 - but only if the court wants to hear other potential defenses which
21 ----

22 MJ: If you choose to raise defenses in trial - by the way, I
23 did review the issue of the First Amendment as well. It is clear

1 that there is a - although service members do have First Amendment
2 rights, within reason, they can be legitimately restricted, based on
3 the nature of the restriction and why. Again, the issue of mask-
4 wearing is not, from my reading of the purpose behind it, and what
5 the justifications were, was done for medical wellbeing of the force,
6 not, in any way, designed - even though it may have had a potential
7 downstream impact as well - again, nothing that I have seen or heard
8 by way of any evidence suggested that the accused, in any way, had
9 any of his constitutional rights - freedom of expression - by way of
10 his First Amendment rights, in any way, impacted.

11 Again, although that could potentially have been an issue,
12 I do not believe it's been presented to the court. To the extent
13 that there are reasonable limitations or medical justification for
14 the wearing of a mask, I would deny that as a defense as to being a
15 defense of any First Amendment right or Due Process rights.

16 Counsel, what I would suggest we do right now is we are now
17 at that that point where it's at that point where it is time to enter
18 pleas.

19 What I'd like to do is have that taken care of. If you
20 need to have a recess to talk to your client about any pleas he would
21 like to do that, we can do that as well.

22 Take a moment just to consult with yourselves, and then we
23 can decide how to proceed from there.

PLEAS

1 [The accused and his counsel conferred.]

2 CDC: Your Honor, we're ready to proceed.

3 MJ: Very well.

4 Defense counsel and the accused, Lieutenant Bashaw, would
5 you please stand.

6 [The accused and his counsel did as directed.]

7 Defense counsel, would you please enter pleas on behalf of
8 the accused.

9 CDC: One moment, Your Honor, let me figure out where we are.

10 MJ: Captain Jackson, what I would suggest, just make sure as to
11 the form of the plea, would you consult with your other counsel?

12 DC: Yes, Your Honor.

13 [The accused and his counsel conferred.]

14 Your Honor -

15 **To Specification 1 of The Charge: Not Guilty.**

16 **To Specification 2 of The Charge: Not Guilty.**

17 **To Specification 3 of The Charge: Not Guilty.**

18 **To The Charge: Not Guilty.**

19

20 MJ: Thank you very much.

21

22 [The accused and his counsel resumed their seats.]

23 At this time, the Article 39(a) hearing will be terminated.

24 We're now calling this court to order. Again, all parties
25 are again present, to include the accused.

26 Government, do you have an opening statement?

1 Counsel, just so you can plan, I realize it's late, but we
2 have a long day ahead of us. How many witnesses do you have?

3 TC: The government has four witnesses, Your Honor.

4 MJ: Counsel, my plan - it is now 1650. We're going to go for
5 at least another hour, maybe 2, at this point tonight. We can have a
6 recess, we can have dinner, however you want to approach it. But
7 we're going to roll for a little while on this. It has taken a long
8 time on these motions, but we have 2 days.

9 Are your witnesses ready?

10 TC: Yes, Your Honor.

11 MJ: Very well, call your first witness.

12 ATC: Your Honor, with your permission, we'd like to do an
13 opening statement.

14 MJ: Very well.

15 Counsel, can we keep this to about 5 minutes?

16 ATC: Absolutely, Your Honor.

17 Good afternoon, Your Honor.

18 Today is all about choices. The evidence will show that
19 Lieutenant Bashaw chose to violate three orders relating to COVID-19
20 mitigation measures. These measures were designed to protect his
21 fellow service members, as well as protect the Army's ability to
22 carry out its mission.

1 Today, you will hear from Lieutenant Bashaw's commander,
2 Captain Alexander McCarthy. Captain McCarthy will inform the court
3 about how he, as Lieutenant Bashaw's commander, ordered Lieutenant
4 Bashaw to provide proof of a negative COVID-19 test before being
5 physically present at his place of duty on 30 November 2021; or
6 alternatively, ordered Lieutenant Bashaw to report to the Staff Duty
7 desk between 0730 and 0830 on 30 November to have a COVID-19 test
8 administered. In fact, you will see emails between Captain McCarthy
9 and Lieutenant Bashaw, in which Captain McCarthy clearly communicates
10 the order. Still, Lieutenant Bashaw chose to defy.

11 You will hear from Major Wei, who was the OIC of the Staff
12 Duty on 30 November, and he will confirm that Lieutenant Bashaw did
13 not report to the Staff Duty desk to have a COVID-19 test
14 administered.

15 In addition, you'll also see a COVID-19 testing log from
16 that day, on which Lieutenant Bashaw's name is noticeably absent.

17 You'll also hear from Captain McCarthy - my apologies, Your
18 Honor.

19 Instead of reporting to the Staff Duty desk, Lieutenant
20 Bashaw chose to report to what had originally been his normal place
21 of work. This will be confirmed by Lieutenant Bashaw's supervisor,
22 Ms. Radavich, who will state that, one, she saw Lieutenant Bashaw
23 inside her office on Aberdeen Proving Ground; and, two, at no point

1 did Lieutenant Bashaw ever provide her with any proof of a negative
2 COVID-19 test.

3 You will also hear from Captain McCarthy that when he found
4 out Lieutenant Bashaw chose not to comply with either available
5 option to comply with his order, Captain McCarthy then ordered
6 Lieutenant Bashaw to leave Aberdeen Proving Ground, and work remotely
7 until providing proof of a negative COVID test. Again, you'll hear
8 that Lieutenant Bashaw chose to defy the order, and instead remain
9 physically present on Aberdeen Proving Ground.

10 Then, upon learning that Lieutenant Bashaw chose to defy
11 the order and remain physically present, Captain McCarthy then
12 ordered Lieutenant Bashaw to report to Captain McCarthy's office for
13 a counseling. At that counseling, which was indoors, Lieutenant
14 Bashaw reported without a face covering, and refused to put one on
15 throughout the duration of the counseling.

16 When Captain McCarthy saw that Lieutenant Bashaw was not
17 wearing the mandated face covering, he asked him to put one on.
18 Again, Lieutenant Bashaw chose not to comply. At that time, Captain
19 McCarthy then ordered Lieutenant Bashaw to put on the face covering,
20 and again, Lieutenant Bashaw still chose defiance.

21 Simply put, you will hear that Lieutenant Bashaw had many
22 options available to him to express his concern or frustration, and
23 the consistent choice that he made was one of defiance.

1 Thank you, Your Honor.

2 MJ: Thank you.

3 Defense, do you wish to open or reserve?

4 CDC: We would reserve, Your Honor.

5 MJ: Very well.

6 Government, call your first witness.

7 TC: Your Honor, before the government calls its first witness,
8 it's going to ask the court to take judicial notice of a few
9 regulations, Your Honor.

10 MJ: Did you provide those to opposing counsel?

11 TC: They've been provided to opposing counsel, Your Honor.

12 MJ: What are the regulations?

13 TC: That will be Prosecution Exhibit 8 for identification,
14 which is the Aberdeen Proving Ground Installation Policy for Face
15 Coverings; Prosecution Exhibit 9 for identification, which will be
16 the USA MEDCOM Op Order 21-53; Prosecution Exhibit 10 for
17 identification, which is FRAGO 6 to HQDA EXORD 225-21; Prosecution
18 Exhibit 11 for identification, which is - I'm sorry, I apologize,
19 Your Honor, only to Prosecution Exhibit 10 for identification - just
20 those three at this time.

21 MJ: Defense, I'll hear from you; let's go through each one
22 individually, counsel. What's the first one you wish to have the
23 court take notice of?

1 TC: That would be Prosecution Exhibit 8 for identification,
2 Your Honor; that would be the Aberdeen Proving Ground Installation
3 Policy for Face Covering Requirements, the one you just ruled that
4 was lawful.

5 MJ: Defense, is there any objection?

6 CDC: One moment, Your Honor.

7 [After pause.] No objection, Your Honor.

8 MJ: With regard to Prosecution Exhibit 8 for identification -
9 it consists of three pages. Is that correct, counsel? It is
10 captioned Installation Policy for Face Covering Requirements, dated 4
11 August 2021?

12 TC: Yes, Your Honor.

13 MJ: Defense, do you have a copy of that before you?

14 CDC: We have, in our bag here.

15 MJ: There being no objection, it will be admitted.

16 Counsel, Prosecution Exhibit 8 has been admitted.

17 TC: The next document, Your Honor, is Prosecution Exhibit 9 for
18 identification; that was Operation Order 21-53, COVID-19 Steady State
19 Operations, USA MEDCOM.

20 MJ: Defense, this is an 11-page exhibit, captioned "Operation
21 Order 21-53, COVID-19 Steady State Operations, US MEDCOM." It has -
22 I'm looking for a date - 17 September?

23 TC: 7 September 2021, Your Honor.

1 MJ: 7 September of 2021.

2 Again, defense, have you had an opportunity to review this,
3 and is there any objection?

4 CDC: Your Honor, if we could reserve our objection? This was
5 the document that - in looking through all our files, we did not
6 have, and were provided this morning. Due to the motions, we haven't
7 had an opportunity to review ----

8 MJ: Counsel, why don't we reserve, so they have an opportunity
9 to look at it? You can make the motion tomorrow, after they've had a
10 chance to review it. Would that be satisfactory?

11 TC: The government contends we did turn over the document to
12 defense very early on in discovery, Your Honor, but we're fine with
13 waiting. It is Bates 17 of the totality of government exhibits that
14 were turned over, but the government is fine with ----

15 MJ: I understand what you're saying, but counsel has requested
16 an opportunity to review it before responding to whether or not
17 they're objecting. I'm going to give them that opportunity.

18 So, we'll hold any determination as to Government 9 [for
19 ID] at this time.

20 TC: And then the final one for right now, for judicial notice
21 Your Honor, is Prosecution Exhibit 10 for identification, and that
22 was FRAGO 6, HQDA EXORD 225-21, the same document you just ruled was
23 lawful, Your Honor.

1 MJ: And that is a 15-page document, and it appears that this is
2 dated 7 October of '21, is that correct?

3 TC: Correct, Your Honor.

4 MJ: Defense, do you have any objection to
5 Prosecution [Exhibit] 10 [for ID]?

6 CDC: We don't, Your Honor.

7 MJ: Prosecution [Exhibit] 10 is admitted.

8 Counsel, just make a notation for later on about
9 Prosecution Exhibit 9 [for ID], so you can address it at a later
10 point.

11 TC: Yes, Your Honor.

12 The government calls Captain Alexander McCarthy.

13 **CAPTAIN ALEXANDER MCCARTHY, U.S. Army, was called as a witness by the**
14 **prosecution, was sworn and testified as follows:**

15 **DIRECT EXAMINATION**

16 **Questions by the trial counsel:**

17 Q. Can you please state your name and rank for the record?

18 A. Captain Alexander Philip McCarthy.

19 Q. What is your unit of assignment?

20 A. I am the company commander for the HHC element of the Army
21 Public Health Center.

22 Q. What are your responsibilities as the commander for that
23 unit?

1 A. I'm responsible for their daily health and welfare, their
2 administrative and day-to-day needs, and whatever their soldier
3 duties are.

4 Q. About how long have you been in this role?

5 A. Since July 9, 2021.

6 Q. Do you know the accused in this case?

7 A. Yes, I do.

8 Q. How do you know him?

9 A. He was my predecessor in my position.

10 Q. When you say "predecessor," what do you mean by that?

11 A. He was the company commander before myself.

12 Q. So, you relieved him from command, is that correct?

13 A. Yes.

14 Q. When did you assume command from ----

15 A. On July 9, 2021.

16 TC: [Retrieved PE 3 for ID, showed to defense, handed to the
17 witness.]

18 Q. Captain McCarthy, what is this?

19 A. This is my assumption of command.

20 Q. How do you know that's your assumption of - when you say
21 "your assumption of command," what do you mean?

22 A. There is my signature on here, my name, my unit
23 identification code at the top.

1 Q. You said "this is my assumption of command," what do you
2 mean?

3 A. This is the assumption of command of my company that I
4 signed, signifying of when I took over.

5 Q. What type of document is this?

6 A. A memorandum for record.

7 Q. So, it's fair to say an assumption of command memorandum?

8 A. Yes.

9 Q. How do you know that that's your assumption of command?

10 A. It has my name on it, and I digitally signed it.

11 TC: Your Honor, the government moves to admit Prosecution
12 Exhibit 3 for identification into evidence as Prosecution Exhibit 3.

13 MJ: Defense?

14 CDC: No objection, Your Honor.

15 MJ: Prosecution 3 is admitted.

16 Q. Captain McCarthy, after you assumed command from the
17 accused, what became his new role?

18 A. He went to work as an entomologist in your Entomology
19 Department.

20 Q. Is the Entomology Department under - is that all under your
21 responsibilities?

22 A. The soldiers do - yes, they do.

23 Q. So he was still under your command?

1 A. Yes, he was.

2 Q. Did you supervise his day-to-day responsibilities?

3 a. His day-to-day responsibility was given to him from a
4 civilian for the technical aspect, but for his soldierly duties,
5 they'd still come from myself.

6 Q. Who supervised his day-to-day responsibilities that didn't
7 fall under the command?

8 A. Ms. Rosanne Radavich.

9 Q. Turning your attention to 30 November 2021, were you the
10 company commander of the Army Public Health Center at that time?

11 A. Yes, I was.

12 Q. Was the accused still one of your subordinates at that
13 time?

14 A. Yes, he was.

15 Q. In regards to COVID-19, was there anything notable going on
16 in that particular space in time?

17 A. During that timeframe, there was a pretty high level of
18 transmission in our county, in our area, and right before then, the
19 Army started a program where we had to screen unvaccinated
20 individuals prior to them coming into the office, regardless of why
21 they were unvaccinated.

22 Q. How did the Army Public Health Center go about implementing
23 this guidance for screening of unvaccinated soldiers?

1 A. Once we received the order, we were able to order over the
2 counter test kits, so we could have them on hand at our headquarters
3 building, and have them prepositioned, so that when an unvaccinated
4 individual needed to come into the office, they could report to that
5 building first thing in the morning to our Staff Duty desk; they'd be
6 tested, and pending the result - if it was negative, they'd go about
7 their day, go into the office; if it was positive, we'd treat it as
8 any other positive case.

9 Q. Was the accused vaccinated at this time?

10 A. At this time, he was not.

11 Q. You said this new guidance and procedures were put out -
12 were these communicated to unvaccinated personnel in the Army Public
13 Health Command?

14 A. Yes, they were communicated from our Chief of Staff.

15 Q. Was this information communicated to the accused?

16 A. Yes, it was.

17 Q. How was this information communicated to him?

18 A. Originally, it was sent over email, and all the supporting
19 documentations from higher, on how it was to be implemented was sent
20 to him. And then it was also communicated over the telephone.

21 TC: [Retrieved PE 1 for ID, showed to the defense, handed to
22 the witness.]

23 Q. Captain McCarthy, what is this?

1 A. This is a copy of our email traffic between Lieutenant
2 Bashaw and myself.

3 Q. When you say "email traffic," what dates are those emails?

4 A. From Monday, November 29th, as well as Wednesday, November
5 24th, and Friday November 26th.

6 Q. The emails span from November 24th of what year?

7 A. Of 2021.

8 Q. To November 29th of 2021?

9 A. Yes.

10 Q. How do you recognize those emails, and that they're the
11 traffic between you two?

12 A. I remember sending these emails; I remember receiving them.

13 Q. Is there anything unique about the document you have in
14 front of you that helps you identify that those are the emails that
15 you sent?

16 A. It has a "from," and "to," and who it was sent by, and
17 signature blocks on here, and how it was printed. It shows that it
18 was from Lieutenant Bashaw and myself, and to him, with our names on
19 it.

20 Q. When you say "your names," what do you mean by that?

21 A. It has "From: Bashaw, Mark, First Lieutenant, U.S. Army,
22 MEDCOM APHC," and it has, "To: McCarthy, Alexander, Captain, U.S.
23 Army, MEDCOM APHC" on here.

1 Q. As part of those contents, did you have any conversations
2 with Lieutenant Bashaw about what was contained within there that
3 made you believe that these emails - that you were communicating with
4 First Lieutenant Bashaw, based on the content that's in those emails?

5 A. [No response.]

6 TC: Sorry, I'll rephrase.

7 Q. Is there anything about any of the conversations you had
8 with First Lieutenant Bashaw about information contained in there
9 that make you believe that the person you were communicating with in
10 those emails was First Lieutenant Bashaw?

11 A. When I talked to him on the phone, we knew, from what we
12 were talking about with each other in regards to these emails.

13 Q. Would you say that printout is a fair and accurate
14 depiction of your email conversation between 24 November 2021 and 29
15 November 2021, between you and First Lieutenant Bashaw?

16 A. Yes.

17 Q. Have any of the emails, or contents within there, do they
18 appear to be changed or deleted at all?

19 A. No.

20 TC: Your Honor, the government moves to admit Prosecution
21 Exhibit 1 for identification into evidence as Prosecution Exhibit 1.

22 MJ: Defense?

23 ACDC: No objection, Your Honor.

1 MJ: Prosecution 1 is so admitted.

2 TC: [Returned PE 1 to the witness.]

3 Q. Lieutenant [sic] McCarthy, looking at Prosecution Exhibit
4 1, when was your first email sent to the accused?

5 A. [Reviewing PE 1.] On Wednesday, November 24th, at 9:48 AM.

6 Q. What did you tell the accused on November 24, 2021?

7 A. [Reviewing PE 1.] I told him that he either needed to
8 telework, or take an over-the-counter test to provide proof of
9 negative COVID-19 in order to come into the office.

10 Q. Did the accused acknowledge this email?

11 A. Yes, he did, by responding to it.

12 Q. What did he say in response to your 24 November email?

13 A. He said, "Could you please clarify? Am I being ordered to
14 telework? I supervise soldiers and perform duties onsite at Building
15 E-5800."

16 Q. What was your response to that response?

17 A. My response was, "To follow up on the other email about the
18 testing requirements, from Lieutenant Colonel Rufolo and other
19 conversations, you're being ordered to be tested in order to return
20 to work, under certain information that's included in operational
21 order and FRAGOs. If you refuse to be tested, you have to stay at
22 home and telework until you are tested. If you refuse to be tested,
23 we'll treat the situation as such, and handle it from there, with the

1 necessary follow-on actions. For your test, you will report to
2 Building 1930 between 0730-0830 to the Staff Duty desk, and have the
3 Staff Duty Officer contact Lieutenant Colonel Shearer - he'll walk
4 you through the self-test, and supervise completion of it."

5 Q. So, when you mentioned operational order and FRAGOs, which
6 FRAGOs were you referencing there?

7 A. FRAGO 10 of the operational order that was published
8 shortly before that, and I believe Operation Order 21-53.

9 Q. Were there any other orders that you may have been
10 referencing there that were included in that, because it's a general
11 statement of operational order and FRAGOs?

12 A. For showing to take the over-the-counter test, no.

13 Q. If the accused didn't want to submit to testing, did he
14 have any other ways in which to obey the order contained within your
15 email?

16 A. He could have provided his own over-the-counter test, at
17 his own expense, and he could have requested reimbursement through
18 the government for that. But in lieu of having him pay out-of-
19 pocket, I gave him the option of staying home until we procured the
20 test through the proper Army channels, and they arrived into our
21 possession through that. We did not receive them right away, when
22 this op order was given to us; it took time for it to come in, as
23 expected. That was right before Thanksgiving that they were ordered,

1 so they came in a day or two after - we had them before the 30th of
2 November, which is why it was expected of him to come in on the 30th
3 and take that over-the-counter test.

4 Q. To clarify, the order you gave in your email, there were
5 three ways in which he could comply? He could report to Building
6 1930 between 0730-0830 and submit to a test provided by the unit?

7 A. [Affirmative response.]

8 Q. Or he could have provided his own test, and taken his own
9 test ----

10 MJ: The witnesses has nodded in the affirmative to your first
11 question.

12 Do counsel agree with that characterization, or did you not
13 observe it? Or do you need to ask him again, and get it on the
14 record.

15 Q. Is that a yes to the first part of that, Captain McCarthy?

16 A. Yes.

17 Q. The second option was he could provide his own test, take
18 his own test and provide a negative result to yourself or the unit,
19 is that correct?

20 A. Yes.

21 Q. Or he could telework as a third option?

22 A. Correct.

1 Q. All three of those would've obeyed your order that you gave
2 in your email?

3 A. Yes.

4 TC: [Retrieved PE 1 from the witness, returned to the court
5 reporter.]

6 Q. So, after these emails on November 29th, what happens next?

7 A. I was given - he was given the opportunity to come in the
8 following morning on 30 November. Giving him ample time to get
9 there, I called him to see if he was going to make it; he said that
10 he was going to hit traffic, so I extended that timeframe to give him
11 ample time, a reasonable amount of time, to follow through on that
12 order. He did not go in, and he reported to his place of duty
13 instead, to where he would normally conduct his work.

14 Q. Just to be clear, what specific day was the next day?

15 A. This was on 30 November.

16 Q. In what year?

17 A. 2021.

18 Q. When you say he reported to his office, what specific
19 location did he ----

20 A. He showed up to Building 5800.

21 Q. Where is that located physically?

22 A. On APG-South.

23 Q. And you say APG?

1 A. Aberdeen Proving Ground-South, the Edgewood area.

2 Q. What state is that located in?

3 A. Maryland.

4 Q. So, after he reported to work, did he provide any proof of
5 a negative COVID test?

6 A. No, he did not.

7 Q. After he reports to work, what happens next?

8 A. After he reported to work, I confirmed that he did not take
9 that test. I also received a call that he was not wearing a mask ---
10 -

11 ACDC: Objection, hearsay.

12 MJ: Sustained.

13 Q. Did you take any action after he reported to work?

14 A. Yes, I told him to go home.

15 Q. When you say "you told him to go home," how did you tell
16 him to go home?

17 A. I gave Lieutenant Bashaw a phone call, and ordered him to
18 go home.

19 Q. What made you believe -

20 TC: Withdrawn, Your Honor.

21 Q. What did you say when you said to go home? The words.

1 A. I don't remember the exact words that I said, but the
2 conversation was, if he was not going to be tested, then he needed to
3 go home and not stay at work.

4 Q. What was his response?

5 A. No.

6 Q. Were those the exact words he used?

7 A. I don't remember his exact words.

8 Q. Was that the impression that you were given?

9 A. Yes.

10 Q. At any time, did you give the accused a period of
11 opportunity to leave?

12 A. No, it was understood from our conversation that it was
13 supposed to be an immediate action taken on his part to follow that
14 order.

15 Q. Did he leave Aberdeen Proving Ground at that time?

16 A. No.

17 Q. Did he provide you proof of a negative COVID test at that
18 time?

19 A. No.

20 Q. At any point on 30 November 2021, did he provide you proof
21 of a negative COVID test?

22 A. No, he did not.

1 Q. After the accused told you he wasn't going to leave, what
2 happened next?

3 A. I started drafting a counseling statement, because I needed
4 to address him not following a direct order, given from myself as his
5 commanding officer.

6 Q. After you drafted this counseling statement, what did you
7 do?

8 A. I set up a meeting with him to talk to him and give him
9 that counseling, and counsel him that afternoon on 30 November 2021.

10 Q. So, you set up a counseling session with him for later in
11 the day?

12 A. Yes.

13 Q. Was that at Aberdeen Proving Ground?

14 A. Yes, it was at Building 1607 at my company headquarters.

15 Q. Does that not conflict with your original order to tell him
16 to leave?

17 A. No, because when I gave him that original order to go home
18 or take the test, when he said no and did not comply, that order was
19 done, so I gave him a new order to show up at that counseling
20 statement session later in the day.

21 Q. Did the accused report to your office?

22 A. Yes, he did.

23 Q. Around what time did he report to your office?

1 A. I believe it was around 1500 that day.

2 Q. Where is your office located again?

3 A. It is located on Aberdeen Proving Ground-South, Edgewood
4 side, in Maryland.

5 Q. Is there a specific building number?

6 A. Building 1607.

7 Q. Is your office located inside of the building?

8 A. Yes, it is.

9 Q. At this counseling session, was anyone else present?

10 A. Yes, it was myself, my company first sergeant, First
11 Sergeant Tally; the Army Public Health Center Chief of Staff,
12 Lieutenant Colonel Rufolo; and he brought a witness, Sergeant
13 Danenhower.

14 Q. Who is Sergeant Danenhower?

15 A. She's one of our other soldiers in my company - a
16 Preventive Medicine NCO.

17 Q. So, the accused reports to your office, he's with Sergeant
18 Danenhower, and also First Sergeant Tally and Lieutenant Colonel
19 Rufolo are there. What happens next?

20 A. Originally, Lieutenant Bashaw came in. He was ready to
21 provide me a copy of his Article 138, and I told him no, I needed to
22 take another minute to review my counseling and make sure I had all
23 my thoughts in order, so I had him wait outside. I called him back

1 in, told him to hold onto his Article 138 until after this, and did
2 my counseling session with him. We went through the counseling,
3 addressed the concerns, and then ----

4 Q. I just want to stop you there. Was there anything notable
5 that happened before the counseling?

6 A. Yes, he walked in, and he was not wearing a mask. So, I
7 immediately addressed him and told him to put a mask on, and he said
8 no. So, I said, "Put a mask on. This is a direct order," and he
9 said no, something along those lines about it was discrimination
10 against him for having him wear a mask, and it was an EUA, and all
11 that.

12 Q. When you say "a mask," what do you mean?

13 A. One of the approved cloth face coverings that we see and
14 are told to wear in regards to preventing the spread of COVID-19.

15 Q. At any point, did the accused - after you ordered him to
16 put on a mask - put on a mask?

17 A. No, he did not.

18 TC: No further questions, Your Honor.

19 MJ: Defense?

20

1 **CROSS-EXAMINATION**

2 **Questions by the assistant civilian defense counsel:**

3 Q. I just want to maybe back up a little bit, just for
4 clarification. To your understanding, what is Lieutenant Bashaw's
5 job description?

6 A. He is an entomology officer for the United States Army, so
7 his job encompassed a lot of different things with regard to that
8 field.

9 Q. You may have answered this already before, but I just want
10 to clarify - what does he do on a daily basis, in relation to where
11 you work?

12 A. His building is located separately from my building, but I
13 know he has other soldiers and civilians in the building that he
14 works in. At that time, he was responsible for some of the
15 administrative things above his soldiers, and overseeing some of
16 their tasks.

17 Q. Is it true - would you say you did not directly with
18 Lieutenant Bashaw on a day-to-day basis?

19 A. On some aspects, we do, and on some aspects, I don't.

20 Q. In fact, I think you mentioned this - he has a different
21 direct supervisor that he reports to?

22 A. That's right.

1 Q. We've talked about this - you had discussions with
2 Lieutenant Bashaw about him testing prior to coming in - coming into
3 the building, or to telework, correct?

4 A. Yes.

5 Q. At this point, did Lieutenant Bashaw express concerns to
6 you that his duties could not be completed by working remotely?

7 A. He expressed that concern, but that's a concern not - he's
8 told what his duties are.

9 Q. After that point, that was when Lieutenant Bashaw
10 communicated an informal 138 complaint to you before his formal
11 complaint, and he had a list of questions for you?

12 A. Yes.

13 Q. Did you respond to those questions?

14 A. I responded to those questions via email.

15 Q. Did you say - was your response that Lieutenant Bashaw was
16 free to disagree with the order, without any further discussion about
17 his concerns?

18 A. He was free to - we're all free to disagree with an order,
19 but that does not mean that we won't follow the order.

20 Q. Do you believe that was your addressing his concerns about
21 not being able to work remotely?

22 A. Can you repeat the question?

1 Q. Do you believe that was you addressing his concerns about
2 not being - the questions in his informal 138 complaint, and also the
3 concern about not being able to complete his duties by teleworking?

4 A. No, he can complete his duties by teleworking.

5 Q. So, there was no further discussion than that?

6 A. On that day, no. It was not until a later date.

7 Q. Did you communicate with Lieutenant Bashaw's supervisor
8 about him working remotely?

9 A. Yes.

10 Q. Did you communicate to Lieutenant Bashaw that you had
11 communicated with his supervisor about him working remotely?

12 A. No.

13 Q. So, again, he had concerns, and you did not directly
14 address those concerns with him? Correct?

15 A. Not until a later date.

16 Q. Are you aware of what the specific concerns were of
17 Lieutenant Bashaw regarding his working remotely?

18 A. He stated that his concerns were his soldiers in there that
19 were working.

20 Q. Nothing more specific than that?

21 A. Not that I remember right now.

22 Q. Are you aware that Lieutenant Bashaw was having issues with
23 one of his direct reports, because he was not onsite every day?

1 A. No.

2 Q. Supervision of that soldier had actually been given back
3 over to Ms. Radavich?

4 TC: Objection, Your Honor.

5 MJ: Basis?

6 TC: The witness has already stated he doesn't have knowledge of
7 the supervision of this soldier, so it's calling for speculation.

8 MJ: If he knows - overruled - if he knows.

9 Repeat the question, counsel.

10 Q. Are you aware that the supervision of that soldier had been
11 given to Ms. Radavich?

12 A. I do not know.

13 Q. You do have a previous working history with Lieutenant
14 Bashaw, correct?

15 A. I interacted with him a couple of times prior to taking
16 command.

17 Q. In your experience, would you consider Lieutenant Bashaw to
18 be a hands-on type of commander?

19 A. Yes, as much as any commander should be.

20 Q. By that, I mean, he liked to be among and with his
21 soldiers?

22 A. Yes, he took care of his soldiers.

1 Q. After Lieutenant Bashaw communicated to you on 29 November
2 he intended to come into 5800 for work, without testing, you
3 communicated with Captain Jameson that same day to discuss what you
4 should do with Lieutenant Bashaw, correct?

5 A. Yes.

6 TC: Objection, Your Honor.

7 MJ: Basis?

8 TC: We believe any further inquiry is going to go into
9 attorney-client privilege between the attorney and the commander.

10 MJ: Counsel is shaking her head "no," so ----

11 ACDC: There's no further question along those lines.

12 MJ: Very well.

13 TC: To that point, withdrawn, Your Honor.

14 MJ: Why don't we do this? Why don't we instruct the witnesses
15 that if he believes his answer would go into some particular field
16 that you're in agreement not to go into, make that clear to him.

17 ACDC: Yes, Your Honor.

18 MJ: Just tell him what you're going to talk about.

19 Q. Did you believe it was a serious health concern for
20 Lieutenant Bashaw to come to work without being tested?

21 A. Yes.

22 Q. But you were aware that Lieutenant Bashaw was present at
23 5800 on 30 November in the morning, correct?

1 A. Yes.

2 Q. But your only communication to him was in a text message,
3 telling him to come in for a 2:30 counseling, correct?

4 A. If that's what you have record of, but there was also a
5 phone call that morning.

6 Q. Tell me about that phone call. When did you call him?

7 A. At some point before that, in regards to him coming in to
8 test and making sure that was going to meet his deadline. And that's
9 why I mentioned before that if he was not going to make that 0830
10 deadline due to traffic or something, then there was a little bit of
11 leeway.

12 Q. Do you recall making a phone call to him that he did not
13 answer? He did not pick up?

14 A. I don't want to say that with 100 percent certainty that I
15 remember that.

16 Q. If you don't remember that phone call - but he sent you a
17 text message that he had run into traffic, and would be in around
18 9:30. Do you recall that?

19 A. It sounds possible.

20 Q. And then it was almost an hour and a half later, you sent
21 him a text message, saying he needed to come into your office at
22 14:30 - do you recall that?

23 A. It sounds possible.

1 Q. But nowhere in that text message did you say that if he
2 wasn't tested, he should go home?

3 A. I don't remember what I texted 6 months ago.

4 Q. If Lieutenant Bashaw was at the building, did you expect
5 him to go home?

6 A. Yes.

7 Q. Are you aware that Lieutenant Bashaw lives about an hour
8 away?

9 A. Yes.

10 Q. And if he went home, he'd only be there for an hour before
11 he needed to turn around and come back?

12 A. What do you mean?

13 Q. The time it takes to travel home and back, there was only
14 another hour between when he needed to come in for the counseling.

15 A. Okay.

16 Q. So, if Lieutenant Bashaw had a text from you that says, 'Be
17 in my office at 1430,' would it be reasonable for him to just stay
18 here instead of make that commute?

19 A. Yes, but the expectation and understanding is to not stay
20 inside, or stay at work, because there's other places that he can go
21 on-base outside of a building ----

22 Q. Did you see him that day?

1 A. ---- without putting people at risk. When the order was
2 given to go home, and he did not comply - so when I told him to
3 report for the counseling, that superseded that initial order. So,
4 by him staying, he was not going against that order anymore, but he's
5 already went against it.

6 Q. Sure. But what is your knowledge that he did not go home -
7 or did not leave the building? Sorry.

8 A. I was told that.

9 ACDC: Objection, hearsay.

10 TC: Your Honor, counsel asked the question.

11 MJ: I understand. Counsel, you invited a response. I'm
12 overruling.

13 Q. Do you have personal knowledge?

14 MJ: I'm overruling the objection.

15 Q. But do you have personal knowledge ----

16 MJ: The answer stands.

17 TC: Roger, Your Honor.

18 Can the witness restate the answer?

19 MJ: The answer was the answer.

20 Q. So, to clarify, do you have personal knowledge of what he
21 did after you said you told him to go home?

22 A. No

1 Q. When you sent him the text message to come to your office,
2 why didn't you say 'Come to my office right now,' if it was a concern
3 that he was potentially staying on the grounds?

4 A. On that day, I was teleworking due to child care issues, so
5 I needed to ensure my children were taken care of first
6 appropriately, and maintain their safety, so that I could address
7 this issue.

8 Q. But he was told to come to your office and did show up,
9 correct?

10 A. Yes, he did.

11 Q. On time, correct?

12 A. Yes, he did.

13 Q. So he did not violate that order?

14 A. No, not that order.

15 ACDC: [After conferring with CDC.] Just one follow-up
16 question.

17 Q. Based on the answer you just gave, I want to confirm - you
18 were not here on the grounds until 1430?

19 A. Correct.

20 ACDC: No further questions at this time.

21 MJ: Very well.

22 Government, any redirect?

23 TC: Yes, Your Honor.

1 **REDIRECT EXAMINATION**

2 **Questions by the trial counsel:**

3 Q. Captain McCarthy, I want to clarify something. Who
4 dictates what the accused's duties are?

5 A. That'd be his direct supervisor, for the technical director
6 work that he does.

7 Q. Who dictates what his military duties are?

8 A. I do.

9 Q. If you needed the accused to be an OIC of a range, could
10 you detail him to that?

11 A. Absolutely.

12 Q. If you needed him to be the officer in charge of Staff
13 Duty, could you detail him to that?

14 A. Yes, I could.

15 Q. Could Ms. Radavich, his supervisor, overrule you on that
16 and say no?

17 A. No. If she had an issue, then she would come to me, or her
18 supervisor, and talk to me, and we'd come out where both sides are
19 happy.

20 Q. If you'd decided the accused was going to telework, could
21 she overrule you and say, 'No, he's coming in?'

22 A. No, it'd have to be brought to a higher level, to make sure
23 everybody is on the same page.

1 Q. I want to clarify another point. So, there's some dispute
2 about text messages or phone calls. At any point, did you call First
3 Lieutenant Bashaw in the morning of 30 November of 2021?

4 A. We talked that morning on the phone.

5 Q. Was that after or before he had arrived at Aberdeen Proving
6 Ground?

7 A. I believe it was before.

8 Q. Once you believed he arrived, did you talk to him?

9 A. No.

10 Q. So, you didn't talk to him at any point after he may have
11 arrived on 30 November - the morning of 30 November 2021?

12 A. There was a phone call or a text message, as I stated, but
13 I don't remember how many times I called him, or how many times we
14 talked that morning on the phone. Like I said, it was 6-plus months
15 ago, so some of the details are not all there anymore.

16 Q. How would he have known to leave Aberdeen Proving Ground
17 that morning, if you ----

18 A. Our original phone call, and the emails from the night
19 before - that if he's not tested, he should not be at work.

20 Q. If he left Aberdeen Proving Ground and drove an hour home,
21 would you have made him come back to Aberdeen Proving Ground?

22 A. No.

1 Q. Was it acceptable, at that time, to telework under your
2 command?

3 A. Absolutely.

4 Q. Were other soldiers able to telework?

5 A. Yes.

6 Q. And again, was the accused able to telework that day, if he
7 did not want to submit to any testing?

8 A. Yes.

9 TC: No further questions, Your Honor.

10 MJ: Defense, any additional cross-examination?

11 CDC: One second, Your Honor.

12 [The defense counsels conferred.]

13 ACDC: Just a few more questions, Your Honor.

14 **RECROSS-EXAMINATION**

15 **Questions by the assistant civilian defense counsel:**

16 Q. I want to talk a little bit about the informal 138. You
17 mentioned that you did respond by email to his informal questions.
18 Do you have that email?

19 A. No.

20 TC: Objection, Your Honor.

21 MJ: Basis?

22 TC: Outside the scope of government redirect.

1 MJ: Sustained, counsel. You can call him if you wish, but this
2 is recross.

3 ACDC: Okay. Thank you, that's all.

4 MJ: Temporary or permanent, government?

5 TC: Temporary, Your Honor.

6 MJ: Defense, do you agree?

7 CDC: We agree, Your Honor.

8 [The witness was duly warned, temporarily excused and withdrew from
9 the courtroom.]

10 MJ: Counsel, for planning purposes, when the witnesses are done
11 tonight, my intention would be I'll excuse them, and have them here
12 at the time you identify, or available within 15 minutes of that
13 time, if they need to be called. I don't want to cause them to be
14 inconvenienced while other matters are going on.

15 CDC: Your Honor, can we take a brief recess?

16 MJ: We may - it's 1740.

17 ATC: Your Honor, we have Ms. Rosanne Radavich, and Sergeant
18 Dananhower, and I expect the direct on both combined will not last
19 more than 10 minutes. Very short, Your Honor.

20 MJ: Why don't we just take a 10-minute recess now, and we'll
21 reconvene at 1750. Is that about right?

22 TC: Yes, Your Honor.

23 MJ: We'll reconvene at 1750. We're in a brief recess.

1 [The court-martial recessed at 1740, 28 April 2022.]

2 [The court-martial was called to order at 1756, 28 April 2022.]

3 MJ: This court is again called to order.

4 All parties who were previously present are again present,
5 to include the accused.

6 Government, are you ready to proceed with your next
7 witness?

8 ATC: We are, Your Honor.

9 The government calls Ms. Rosanne Radavich.

10 **ROSANNE RADAVIDICH, civilian, was called as a witness by the**
11 **prosecution, was sworn and testified as follows:**

12 **DIRECT EXAMINATION**

13 **Questions by the assistant trial counsel:**

14 Q. Ms. Radavich, can you please state your name for the
15 record?

16 A. Rosanne Marie Radavich.

17 Q. Where are you currently employed?

18 A. The Army Public Health Center.

19 Q. What is your position at the Army Public Health Center?

20 A. I am the Chief of the Product Development, Education and
21 Data Branch.

22 Q. What do your responsibilities in that role include?

1 A. Our branch is responsible for developing information and
2 education products, compiling data and trying to visualize that data
3 to help drive decisions.

4 Q. Ms. Radavich, do you know the accused in this case?

5 A. I do.

6 Q. How do you know the accused?

7 A. I him his supervisor.

8 Q. Were you his supervisor on 30 November 2021?

9 A. Yes, I was.

10 Q. Do you recall seeing the accused that day?

11 A. Yes.

12 Q. Where did you see the accused?

13 A. He came to the office.

14 Q. To be clear, what do you mean when you say "the office?"

15 A. Building E-5800 on Edgewood, where we work.

16 Q. On Aberdeen Proving Ground, is that correct?

17 A. Yes.

18 Q. Ms. Radavich, that morning, did the accused provide you
19 with any sort of documentation?

20 A. No, he did not.

21 Q. At any point that day, did the accused provide you with
22 proof of a COVID-19 test?

23 A. No.

1 ATC: Thank you.

2 I have no further questions, Your Honor.

3 MJ: Defense?

4 CDC: Thank you, Your Honor.

5 Your Honor, I understand some of my questions may be
6 outside the scope of direct, so I'd just ask to adopt Ms. Radavich as
7 one of our witnesses for that purpose.

8 MJ: Very well.

9 **CROSS-EXAMINATION**

10 **Questions by the civilian defense counsel:**

11 Q. How long have you known Lieutenant Bashaw?

12 A. I have known Lieutenant Bashaw since he arrived at the Army
13 Public Health Center. I think that was probably November or December
14 of 2019 timeframe. When he arrived at APHC, I was assigned as his
15 supervisor. There was a 1-year break to take company command, and
16 then he came back to work for me.

17 Q. So, you were aware that he was a company commander for the
18 unit at one point?

19 A. Yes. I definitely endorsed his selection to company
20 command.

21 Q. Can you describe for the court his duty description? What
22 did he do on a daily basis?

1 A. On a daily basis, there were a couple of different pieces -
2 one was on the product development and education side. He has an
3 awesome background in pest management, and was able to help us make
4 information products that were targeted and detailed, and applicable.

5 He also had a responsibility in rating one NCO, and helping
6 to mentor and develop the junior enlisted; that did require being at
7 the office.

8 I had been the rater for that NCO, until he was reassigned
9 to Entomology after company command. That NCO ----

10 Q. I'm sorry, when you say "he," meaning Lieutenant Bashaw?

11 A. Yes.

12 Q. Thank you.

13 He was reassigned, and I think you were saying he was
14 assigned to watch over this NCO?

15 A. Yes. I had been rating him, and it was quite challenging.

16 Q. To rate the NCO?

17 A. Yes.

18 Q. Before I go into some of these other questions, how long
19 have you been working at APG?

20 A. December 2014.

21 Q. What were you doing prior to that?

22 A. Prior to that, I was 7 years active duty, and I had a 5-
23 month break in time between then.

1 Q. So, you're very familiar with the military, and the
2 structure and grade, rank, discipline?

3 A. Yes.

4 Q. Do you recall when we spoke on the phone about a month ago
5 or so?

6 A. Yes - the exact timeframe on that, I'm not sure.

7 Q. In regards to his duty description, you were discussing
8 some of the - you just mentioned products.

9 TC: Objection, Your Honor.

10 MJ: Basis?

11 TC: Leading.

12 MJ: Overruled.

13 Q. You had mentioned that he dealt with creating risk
14 assessments?

15 A. Yes.

16 Q. What do you mean by that?

17 A. The risk assessment that is done in our office is the
18 entomological and zoonotic operational risk assessment. What we do
19 is we compile information on things that transmit diseases, venomous
20 snakes, scorpions - essentially, those things in the environment
21 related to pest management that can cause injury or illness. We
22 compile a report for units that are deploying, so they can go through

1 and look at what those risks are, and take the appropriate
2 countermeasures to protect themselves.

3 Q. What was your opinion of Lieutenant Bashaw's ability to
4 analyze and assess those risks and come up with guidance?

5 A. In our organization, we compile those risks, and the
6 assessment of those risks, from other locations. So, what we do is
7 essentially take a number of different pieces of that risk assessment
8 on different vectors and hazards, and compile them into one.

9 Beyond the basic risk assessment that we are all taught in
10 the military, we don't exceed those levels when we are building those
11 azures.

12 Q. Had you, at any point, before or close to the 30th, have a
13 conversation with Lieutenant Bashaw about any concerns he may have
14 with the COVID mandates?

15 A. On the 29th of November, I called him. I had been told
16 there were concerns, and I wanted to reach out, because I am his
17 supervisor, and it was my responsibility to see if there had been
18 miscommunication, missing information, what those concerns were and
19 why. So, I did. I believe the guidance went out fairly late in the
20 day, and he was scheduled to come into the office the following day,
21 so I reached out.

22 Q. What was your conversation with him?

1 A. It's been 6 months, so I remember asking if there were
2 concerns - the answer was yes. I remember him stating that he needed
3 to come to the office ----

4 TC: Objection, Your Honor.

5 MJ: Basis?

6 TC: Hearsay.

7 MJ: Overruled.

8 A. I remember him stating that he needed to come to the office
9 to be able to do his job, but was uncomfortable being tested. I
10 believe the guidance came down from SecArmy, and I told him that he
11 could not come in if he was not tested; we could go to 100 percent
12 telework, and he told me that he had - he had a responsibility, he
13 had a duty, and to be able to do it, he had to come in, and he would
14 be present to do it.

15 Q. What were his concerns that he conveyed to you about the
16 difficulty with teleworking?

17 A. I don't remember. I can come up with some thoughts on
18 things that might have been discussed; I don't think they would have
19 changed my answer. Ultimately, we had been given the guidance that
20 we had to be tested; if anybody was unvaccinated, they had to be
21 tested. And if that was not going to happen, the answer was - do not
22 come in.

1 Would it make things harder? Possibly, yeah, but do we
2 have to deal with it? Yeah. COVID has been 2 years of figuring out
3 how to deal with things.

4 Q. Did he ever indicate to you, or express concerns, over
5 supervising of this NCO, or overseeing soldiers in the lab?

6 A. I remember having that conversation later, after the 29th -
7 if we had that conversation on the 29th, which is plausible, I don't
8 remember it. Again, it would not have changed my answer about what
9 the course of action needed to be at the time.

10 Q. Do you recall, on the 30th - let me get my date right - on
11 the 30th, having a conversation with Captain McCarthy about Lieutenant
12 Bashaw teleworking, and him possibly attempting to coordinate the
13 responsibilities?

14 A. I don't remember having a call from Captain McCarthy on the
15 30th. I know we've had conversations since then, but I don't remember
16 a call on the 30th. My division chief, who is my direct supervisor, I
17 believe, had handled all communication with higher that day.

18 CDC: That's all the questions I have, Your Honor.

19 MJ: Government, do you have any redirect?

20 ATC: Yes, Your Honor.

21 [END OF PAGE]

22

1
2 **REDIRECT EXAMINATION**

3 **Questions by the assistant trial counsel:**

4 Q. Ms. Radavich, I want to take you back to Lieutenant
5 Bashaw's duties. Did you ever tell Lieutenant Bashaw that his duties
6 were on-site?

7 A. [No response.]

8 ATC: I can rephrase, Your Honor.

9 MJ: Please.

10 Q. Ms. Radavich, were all of Lieutenant Bashaw's duties on-
11 site?

12 A. No.

13 Q. So, was it possible for him to conduct his duties while in
14 a telework status?

15 A. A vast majority of them, I think, could be done through
16 telework.

17 Q. Had he ever teleworked in the past?

18 A. Yes.

19 Q. Is it your understanding that Captain McCarthy had the
20 ability to order Lieutenant Bashaw to telework?

21 A. As the company commander, I would assume so.

22 Q. Did you ever tell Lieutenant Bashaw to not telework?

ATC: I'm sorry, I'll rephrase, Your Honor.

1 Q. Did you ever tell Lieutenant Bashaw to not comply with
2 Captain McCarthy's commands?

3 A. No.

4 ATC: Thank you.

5 No further questions, Your Honor.

6 MJ: Defense, do you have any recross?

7 CDC: I don't, Your Honor.

8 MJ: May this witness be excused, and if so, temporarily or
9 permanently?

10 ATC: Temporarily, Your Honor.

11 MJ: Defense, do you agree?

12 CDC: We would agree. If we end up getting to sentencing, she's
13 a sentencing witness, Your Honor.

14 MJ: Again, without knowing where this will end, what time would
15 you at least like her to be potentially available tomorrow?

16 CDC: Your Honor, if she wants to remain here, that's fine. My
17 understanding, based on what the court has said already, I suspect,
18 if it's south, and she could be here within 15 minutes.

19 MJ: What are your duty hours for tomorrow?

20 WIT: They are to be here the whole day, unless otherwise stated.

21 [After a brief colloquy on the witness's availability and duty
22 location, the witness was duly warned, temporarily excused and
23 withdrew from the courtroom.]

1 MJ: Counsel, if we have any other witnesses who you potentially
2 envision needing, think this through about when you would need them,
3 so we don't cause a backup of time. Again, you may not need them at
4 all, I recognize that.

5 CDC: The witnesses that we may need for, potentially, rebuttal,
6 are also character witnesses. So, they haven't testified yet.

7 MJ: I just don't want to see people waiting and milling, when
8 there's no reason for it. That's all.

9 Government, call your next witness.

10 TC: Your Honor, the government calls Sergeant Alexis
11 Danenhower.

12 **SERGEANT ALEXIS DANENHOWER, U.S. Army, was called as a witness by the**
13 **prosecution, was sworn and testified as follows:**

14 **DIRECT EXAMINATION**

15 **Questions by the assistant trial counsel:**

16 Q. Sergeant Danenhower, can you please state and spell your
17 name for the record?

18 A. My name is Sergeant Alexis Danenhower - it is D-A-N-E-N-H-
19 O-W-E-R.

20 Q. Sergeant Danenhower, what is your unit of assignment?

21 A. I am at Army Public Health Center.

22 Q. What is your role in that unit?

23 A. I'm a Preventive Medicine NCO.

1 Q. How long have you been in that role?
2 A. I've been in that role for about 3 months.
3 Q. Sergeant Danenhower, do you know the accused in this case?
4 A. Yes, sir.
5 Q. I'd now like to turn your attention to 30 November 2021.
6 Did you see the accused that day?
7 A. Yes, sir.
8 Q. Where did you see the accused?
9 A. I saw Lieutenant Bashaw at the company.
10 Q. Do you recall where in the company you saw Lieutenant
11 Bashaw?
12 A. Yes, we met outside in the parking lot, and then we were
13 told to go in the building, we went inside.
14 Q. So you saw Lieutenant Bashaw indoors ----
15 A. [Affirmative response.]
16 Q. Do you recall what time this was about - approximately?
17 A. I think it was around 1400.
18 Q. You mentioned that you walked inside. When you walked
19 inside, who was present?
20 A. It was the commander, Captain McCarthy; the first sergeant;
21 Colonel Rufolo; Lieutenant Bashaw and myself.
22 Q. While you were inside, did everyone have a mask on?
23 A. Everyone besides Lieutenant Bashaw.

1 Q. So, Lieutenant Bashaw was the only one out of those, I
2 believe, it was five people you just mentioned, that did not have a
3 mask on?

4 A. Yes, sir.

5 Q. Did you ever - do you recall ever hearing Captain McCarthy
6 tell the accused anything?

7 A. [No response.]

8 ATC: I'll rephrase.

9 Q. Did you hear Captain McCarthy tell the accused anything
10 related to the accused walking in without a mask?

11 A. Yes, Captain McCarthy told Lieutenant Bashaw to put on a
12 mask.

13 Q. Did you interpret this to be an order?

14 A. Yes.

15 Q. Did the accused comply with Captain McCarthy's order?

16 A. He explained his rights when using an EUA product, and then
17 - I don't really remember what happened after that moment.

18 Q. Okay, but do you recall Lieutenant Bashaw ever putting on a
19 mask?

20 A. No, sir.

21 Q. I believe it was your testimony that even though you heard
22 Captain McCarthy order Lieutenant Bashaw to wear a mask, he did not,
23 is that correct?

1 A. Yes, sir.

2 Q. At any point during that counseling, did the accused put on
3 a face covering?

4 A. No, sir.

5 ATC: No further questions, Your Honor.

6 MJ: Defense?

7 CDC: One second, Your Honor.

8 [After pause.] Again, Your Honor, I would ask for the same
9 latitude - I'm going to go outside the direct.

10 MJ: Granted.

11 **CROSS-EXAMINATION**

12 **Questions by the civilian defense counsel:**

13 Q. Sergeant Danenhower, what happened after the counseling?

14 A. After the counseling - it's a little bit fuzzy - after the
15 counseling, Captain McCarthy, what I remember ----

16 ATC: Objection, Your Honor.

17 MJ: Basis?

18 ATC: Relevance.

19 MJ: I'm going to overrule the objection. Again, I'll hear the
20 responses, and if it's not relevance, we'll strike it at that time.
21 If it's relevant, I'll give it consideration.

22 Q. Did you leave after the counseling?

23 A. After we were told to leave, yes, sir, I left.

1 Q. Did Lieutenant Bashaw leave?

2 A. Yes, sir.

3 Q. Did you - did he say where he was going?

4 A. I don't remember, sir.

5 Q. In the counseling, or during the counseling, did Captain
6 McCarthy retrieve Lieutenant Bashaw's badge?

7 A. Yes, sir.

8 Q. And tell him to go home?

9 ATC: Objection, Your Honor.

10 A. Yes, sir.

11 MJ: Basis?

12 ATC: Again, relevance.

13 MJ: Overruled.

14 Q. Did he tell him to go home?

15 A. Yes, sir.

16 Q. As far as you know, when you left, is that what Lieutenant
17 Bashaw did?

18 A. I don't know what he did after I left, sir, but that's what
19 he said - I'm pretty sure that's what he said.

20 Q. You left the area with him though?

21 A. We weren't in the same vehicle, so I was not paying
22 attention to where he was going.

1 Q. You said Lieutenant Bashaw expressed his rights. Can you
2 give us a little more detail about what he said?

3 A. He explained his rights when using an EUA product, and that
4 it was an EUA product, and he had the choice whether he wanted to use
5 it or not.

6 Q. Do you recall what Captain McCarthy - I'm not asking what
7 he said - do you recall what he said?

8 A. No, sir.

9 Q. Or if he said anything?

10 A. No, sir.

11 Q. Did Lieutenant Bashaw provide or read at any point his
12 Article 138?

13 A. Yes, sir.

14 Q. The people in the room, did they listen quietly, or tell
15 him 'We don't care,' or, 'That's not relevant?'

16 A. No, sir. From what I remember, he read his whole Article
17 138.

18 Q. Did he mention a religious exemption?

19 A. Yes, sir.

20 Q. Was it your understanding, when the two of you left, that
21 he was not to return to the installation?

22 A. Yes, sir.

23 Q. Have you seen him since?

1 A. No, sir.

2 CDC: That's all the questions I have, Your Honor.

3 MJ: Redirect?

4 ATC: Yes, Your Honor, real quick.

5 **REDIRECT EXAMINATION**

6 **Questions by the assistant trial counsel:**

7 Q. Sergeant Danenhower, just to clarify, did you hear Captain
8 McCarthy order Lieutenant Bashaw to put on this mask?

9 A. Yes, sir.

10 Q. At any point, did Lieutenant Bashaw comply?

11 A. No, sir.

12 ATC: Thank you.

13 No further questions, Your Honor.

14 MJ: Anything further, defense?

15 CDC: No, Your Honor.

16 MJ: Temporary or permanent?

17 ATC: Temporary, Your Honor.

18 MJ: Defense, do you agree?

19 CDC: We agree, Your Honor.

20 [The witness was duly warned, temporarily excused and withdrew from
21 the courtroom.]

22 MJ: Call your next witness.

23 TC: Yes, Your Honor.

1 Our last witness is Major Wei - Hans Wei - who, as we
2 informed the court ahead of time, he's not available until tomorrow.

3 MJ: What time will he be available?

4 TC: He will be available at 0830 tomorrow, Your Honor.

5 We're happy to make a proffer to the court as to what his
6 expected testimony is going to be.

7 MJ: I don't know what that would be at this point. It seems
8 realistic that he can be here tomorrow at 0830. If you want to keep
9 driving on, I'll accommodate however you wish to go. If you want to
10 go out of order - I don't know if the defense wishes to proceed out
11 of order or not.

12 TC: Yes, Your Honor.

13 After Major Wei, the government is prepared to rest. We
14 can talk with defense as to whether or not they want to stipulate to
15 the single fact that he's going to testify to.

16 MJ: Take just a moment, speak with counsel to see if you're in
17 agreement, and then we'll go from there.

18 Taking a recess in place.

19 [The TC and CDC conferred.]

20 TC: Your Honor, the government would just request a brief 10-
21 minute recess to speak with opposing counsel about a potential
22 stipulation of Major Wei's testimony, so, the government may rest
23 this evening.

1 MJ: That makes sense, defense?

2 CDC: It does, Your Honor.

3 MJ: I have it now as 1820. If we reconvene at 1830, will that
4 be sufficient time?

5 TC: Yes, Your Honor.

6 MJ: Very well, we'll be in a brief recess.

7 [The court-martial recessed at 1820, 28 April 2022.]

8 [The court-martial was called to order at 1825, 28 April 2022.]

9 MJ: This court is again called to order.

10 All parties who were previously present, to include the
11 accused, are again present.

12 Counsel?

13 TC: Your Honor, as discussed, government and defense spoke in
14 the recess, and the government is prepared to proffer a stipulation
15 between the parties as to what Major Hans Wei would have testified
16 tomorrow, if the court is prepared to accept that stipulation.

17 MJ: Let me do this - let me ask Lieutenant Bashaw about what he
18 wishes to do as to the stipulation, and then, depending on his
19 response, we'll go from there.

20 Lieutenant Bashaw, I have been advised that there is a
21 stipulation that you are in agreement with that would be introduced
22 as evidence concerning the nature or testimony of - please repeat the
23 name again.

1 TC: Of Major Hans Wei, sir.

2 MJ: Of Major Hans Wei. Is that correct?

3 ACC: Yes, Your Honor.

4 MJ: Have you drafted - government, have you reached a written
5 stipulation as to the contents of that testimony, or what that
6 information is?

7 TC: We have a handwritten one, but not typed, Your Honor.

8 MJ: That's fine. Let me ask Lieutenant Bashaw this.

9 Lieutenant Bashaw, have you had a chance to review fully
10 the handwritten stipulation concerning this testimony?

11 ACC: No, Your Honor.

12 MJ: Why don't you take a moment with your counsel, read it
13 thoroughly to yourself with your counsel, and make sure you
14 understand its contents, and that you are in agreement with its
15 contents, so I can then ask you the next level of questions. If
16 you're not, advise your counsel what issues you may or may not have
17 with it. Okay?

18 ACC: Yes, Your Honor.

19 [The accused reviewed the proposed stipulation of testimony, later
20 marked as PE 13 for ID.]

21 Your Honor, I've reviewed it, and I accept it.

1 MJ: What I'd like you to do is, I'm going to ask you some
2 questions about it, to make sure of your understanding of it, and
3 what it means, and the significance of it.

4 First of all, is there a place for him to sign the
5 stipulation, counsel?

6 TC: Yes, Your Honor.

7 MJ: What I'd like you to do before you sign it, have you read
8 the stipulation thoroughly?

9 ACC: Yes, Your Honor.

10 MJ: Do you understand the contents of the stipulation?

11 ACC: Yes, Your Honor.

12 MJ: Do you agree with the contents of the stipulation?

13 ACC: Yes, Your Honor.

14 MJ: Before you signed the stipulation, have you had a chance
15 with your defense counsel, and have them explain to you what the
16 stipulation is and what it means?

17 ACC: Yes, Your Honor.

18 MJ: Do you understand that by signing this stipulation - first
19 of all, let me phrase it this way - do you understand that you have
20 the absolute right to refuse to stipulate to the contents of that
21 document? Do you understand that?

22 ACC: Yes, Your Honor.

1 MJ: And you should only enter into a stipulation if you believe
2 that it's in your interest to do so. Do you understand that?

3 ACC: Yes, Your Honor.

4 MJ: I want to make sure that you understand how the stipulation
5 will be used.

6 Do you understand that when counsel for both sides, and
7 you, agree to the facts that are contained in that stipulation, the
8 parties are bound by the stipulation, and the stipulations are
9 matters of fact in evidence to be considered along with all other
10 evidence in this case.

11 Do you understand that?

12 ACC: Yes, Your Honor.

13 MJ: When counsel for both sides, and you, agree to a
14 stipulation of expected testimony, you're agreeing that if Major Wei
15 were present in court and testifying - Major Hans Wei - you're
16 agreeing that if Major Hans Wei were present in court and testifying
17 under oath, that he would testify substantially as set forth in the
18 stipulation. The stipulation does not admit the truth of that
19 person's testimony, and the stipulation can be contradicted, attacked
20 or explained in the same way as if the person was testifying in
21 person.

22 Do you understand that?

23 ACC: Yes, Your Honor.

1 MJ: Lieutenant Bashaw, knowing now what I've told you, and what
2 your defense counsel earlier has told you about this stipulation, do
3 you still desire to enter into the stipulation?

4 ACC: Yes, Your Honor.

5 MJ: And do counsel for both sides concur in the contents of the
6 stipulation? Defense?

7 CDC: We do, Your Honor.

8 MJ: And government?

9 TC: One amendment, Your Honor - we'd like to write Major Hans
10 Wei's name on ----

11 MJ: You can do that, and make sure that all the parties are in
12 agreement exactly what you would like it to say.

13 [The parties amended and reviewed PE 13 for ID and amended it.]

14 Again, do counsel concur in the contents of the
15 stipulation? Government?

16 TC: Yes, Your Honor.

17 MJ: And defense?

18 CDC: Yes, Your Honor.

19 MJ: And Lieutenant Bashaw, do you also concur with those
20 contents?

21 ACC: Yes, Your Honor.

22 MJ: If you concur, would you please sign it?

23 ACC: [Signing PE 13 for ID.]

1 MJ: Counsel, what I'd like you to do, just so we have a clear
2 appellate record, if necessary, that you ensure that before you leave
3 this evening, we have, of course, the copy for the court, and that
4 you provide copies also to the defense.

5 TC: Yes, Your Honor.

6 [The parties signed and dated PE 13 for ID, and the TC handed it to
7 the military judge.]

8 MJ: Counsel, so we're all clear, I'm looking now at what's been
9 marked as Prosecution Exhibit 13 for identification; this is the
10 handwritten stipulation concerning the testimony of Major Hans Wei,
11 who would have testified - I'm going to read this out loud -
12 testified that testing was conducted at Staff Duty; people would do
13 self-tests; and he'd report the results via a logbook; as evident
14 from the logbook, very few people showed up to test over a 2-3 month
15 period. Other than to test, there was no medical instructions
16 provided to the individuals. PPE wasn't provided to test recipients.

17 Is that the content that you've agreed to? Counsel?

18 TC: Yes, Your Honor.

19 MJ: Defense?

20 CDC: Yes, Your Honor.

21 MJ: Is there any objection to Prosecution 13?

22 CDC: No, Your Honor.

23 MJ: Prosecution 13 is admitted.

1 Government?

2 TC: Your Honor, the government moves Prosecution Exhibit 4 for
3 identification into evidence as Prosecution Exhibit 4; that would be
4 the logbook that Major Wei would've kept. We're moving it in under
5 803(6), and it contains a 902(11) certification.

6 MJ: Defense, any objection to Prosecution 4? There's three
7 pages. It has a cover sheet, containing what's captioned as a
8 certificate of authenticity of domestic business records, pursuant to
9 M.R.E. 902(11); and then a two-page Xerox of a logbook entry. Any
10 objection?

11 CDC: No objection, Your Honor.

12 MJ: Very well, Prosecution 4 is admitted.

13 Government, that leaves, by my notes, one exhibit that you
14 had identified previously - I believe it was Prosecution 9 [for ID],
15 I believe? The one the defense wished to review.

16 TC: Yes, Your Honor.

17 MJ: I advised that we would hold that matter until they've had
18 an opportunity.

19 Defense, during the recess, have you had a chance to look
20 this over? Or after you've looked at it this evening, to introduce
21 it tomorrow, even though they may rest, subject to that being
22 admitted?

23 CDC: We would ask to be able to review it tonight, Your Honor.

1 MJ: I'm going to say, counsel, why don't you reserve on
2 resting.

3 Do you have anymore witnesses at this point?

4 TC: No more witnesses, Your Honor.

5 MJ: Subject to any issues as to Prosecution 9 [for ID], that'll
6 be the only matter to take up as far as the prosecution's case in the
7 morning?

8 TC: We have one more request for judicial notice, Your Honor,
9 and that would be for Prosecution Exhibit 12 for identification; that
10 is a selection of Chapters 4-1 to 4-6 of the Army Command Policy
11 regulation, which is 600-20.

12 MJ: Defense, have you had a chance to review this?

13 CDC: Not those particular chapters, Your Honor.

14 MJ: Counsel, why don't you do this, so that they have a chance
15 to review them - I understand that this is an Army Command Policy,
16 but if there's any issues, they would like to be able to review it to
17 note whether they have objections, whatever the reasons may be. I
18 would encourage you all to make sure that any exhibits you may have
19 have been shared ahead of time. I know this was addressed in my
20 pretrial order, so everyone can have a chance to note any objections
21 or concerns.

22 Defense, what I'm going to instruct you to do is, before we
23 leave this evening, get a copy of Prosecution 9 and Prosecution 12.

1 We will address both of those first thing in the morning. There's
2 been a motion by the government to introduce both; be prepared to
3 address whether you're objecting or not. If you are, be able to
4 provide any justification as to why the court should not admit either
5 of these documents.

6 CDC: Yes, Your Honor.

7 MJ: Is there anything else we can take up this evening prior to
8 recessing for the night?

9 TC: I don't believe - no, Your Honor.

10 MJ: Defense?

11 CDC: No, Your Honor.

12 MJ: Let's talk about scheduling for just a moment.

13 Other than addressing these two exhibits, which are two
14 items that may become exhibits, which will take, I would imagine,
15 only a minute or two in the morning, does the defense anticipate
16 putting on any evidence by way of witnesses tomorrow?

17 CDC: Potentially, our client.

18 MJ: Other than that, do you have any additional witnesses you
19 would identify for the defense at this time?

20 CDC: Potentially, one - he's also a character witness, but I
21 would need to think about it and discuss it with Lieutenant Bashaw.

22 MJ: So, one or two witnesses for the defense in the morning, it
23 sounds like, is a possibility?

1 CDC: Correct.

2 MJ: Government, do you have any anticipated potential rebuttal
3 witnesses?

4 TC: Not at this time, Your Honor, but obviously, pending
5 defense's case, potentially - but until we see it, we won't know for
6 sure. Not at this time, Your Honor.

7 MJ: I'm trying to get a sense of timing from you all, as to
8 when would be appropriate - are we talking about 8:30 or 9 o'clock?
9 I don't want to have another morning where we're spending hours
10 addressing things that - if they need to be addressed, but we're now
11 in the midst of the trial, so I'd like to be able to move.

12 Do you believe 8:30 is a good starting time? Do you want
13 to start earlier? Can we start later? I'm listening to what your
14 recommendations are.

15 TC: The government recommends 0830 start time, Your Honor.

16 MJ: Defense, would that work for you?

17 CDC: It does, Your Honor. I can say, if Lieutenant Bashaw takes
18 the stand, I can't speak to cross, but potentially an hour, no more,
19 for his testimony. The rebuttal, maybe 10 minutes.

20 MJ: Let's plan on starting tomorrow morning at 0830. If there
21 are issues, I know counsel has my contact information, you can reach
22 me. Please use a text, so I can actually get it as I'm driving. If
23 you need to reach me in an emergency, you have my email address. I

1 think you all have all of them, actually. Use all of them, and I'll
2 be able to respond to something, should you need to reach me prior to
3 8:30 in the morning.

4 Is there anything else we can take up tonight before we
5 recess? Anything additional?

6 CDC: No, Your Honor.

7 MJ: Are there any concerns or issues from the security
8 perspective that I need to be aware of? If there are, please speak
9 with the government and with any court security personnel, to make
10 sure that there are no issues or concerns.

11 We will now be in a brief recess, and we'll reconvene
12 tomorrow at 0830. Have a good evening.

13 [The court-martial recessed at 1839, 28 April 2022.]

14 [END OF PAGE]

15

1 [The court-martial was called to order at 0837, 29 April 2022.]

2 MJ: This court is called to order.

3 I'd note for the record that all parties who were present
4 yesterday are again present this morning.

5 My notes indicate that we left off yesterday with the
6 government identifying two prosecution exhibits that it sought to
7 introduce. The defense requested an opportunity to review or re-
8 review those documents.

9 Have you had that opportunity, defense?

10 CDC: We have, Your Honor.

11 MJ: I'm making reference to Prosecution 9 and 12 [for ID].
12 Government?

13 TC: Yes, Your Honor.

14 MJ: I guess the question is more as to the defense - as to
15 Prosecution 9 [for ID], which was the Operation Order 21-53, Steady
16 State Operations, it was an 11-page document, identified as
17 Prosecution Exhibit 9 [for ID], with a date of 7 September 2021.

18 Is there any objection, defense?

19 CDC: We do have an objection, Your Honor.

20 We were having this discussion of whether or not this
21 document has to go in as a complete document, or we can actually
22 remove a page. Our objection is to the first paragraph, "Situation."
23 We disagree with some of the information that's in there, so, if it

1 could be cropped, then it would be just removing page one. It does
2 include the name at the top of each page.

3 MJ: You're talking about paragraph 1a?

4 CDC: The entire "Situation" paragraph.

5 MJ: Counsel, the statement in 1a is consistent with FRAGO 5,
6 which is the finding of a steady state, with the COVID operational
7 environment, and that was ongoing. So, I don't believe there's any
8 basis to object to subparagraph 1a - that's a statement that is
9 established in a variety of FRAGOs.

10 Is there any factual basis you would raise objecting why
11 that would be incorrect legally or otherwise?

12 CDC: It would be more 1b, and it also is not relevant to this
13 case. It talks about vaccines, and we're not discussing vaccines.

14 TC: Your Honor, the government would not object if - obviously,
15 we're asking for the whole document to be judicially noticed, but to
16 the extent that it talks about vaccinations, the government is fine
17 with the court redacting or not considering that information.

18 MJ: Subject to - let me make sure I understand where the
19 defense stands on this.

20 If the court were to admit this document, but strike from
21 any consideration the paragraph captioned 1(U), underline
22 "Situation;" and then subparagraph (b), that described the 23 August

1 2021 FDA approval of vaccines - if I were to simply strike that
2 subparagraph from consideration, would there be any objection?

3 CDC: No, Your Honor.

4 MJ: Government, I assume you'd have no objection to having that
5 redacted?

6 TC: No, Your Honor, the government concurs that vaccinations is
7 not relevant.

8 MJ: What I'm going to do is I'm going to return the exhibit;
9 I'm going to have you strike out and initial subparagraph (b) -
10 redact it. You don't have to do anything as far as blacking it; just
11 strike it, and agree for it to be redacted.

12 Counsel, while you're doing that, I just also want to bring
13 to your attention - since these charges were referred in 2021, there
14 has been a change in pay grade information on the charge sheet. You
15 will need to - it's been taken care of? Never mind. You've now made
16 those corrections already. Thank you.

17 Finally, counsel, during one of our email exchanges over
18 the process of pretrial prior to coming into court, there was an
19 indication, I believe, from the defense, acknowledging that the
20 accused's ORB that was provided as part of the charging packet was
21 incomplete or inaccurate in some regards, in that it did not show or
22 reflect his enlisted service in the ORB - it did not contain any of

1 his prior service information. I think I brought that to the
2 parties' attention when I was initially preparing the pretrial order.

3 For record-keeping purposes, do you have a correct and
4 updated ORB?

5 TC: Your Honor, the government can answer that, at least in
6 part. We did receive a certified copy of the accused's ORB. Again,
7 in talking with defense and the accused, the difficulty seems to be
8 getting his Air Force awards on the ORB, as they translate to the
9 Army system. The government is prepared to stipulate to the awards
10 that are not contained within his ORB.

11 MJ: It's not for any potential future aspect of the case; it's
12 more I also need the information administratively, regardless of
13 whatever the outcome is. I will need - if not verified, then agreed
14 to ORB, regardless of whatever occurs today.

15 Is the court okay with submitting - we can submit a written
16 stipulation of what is missing for the court?

17 MJ: That would be fine.

18 Defense?

19 CDC: Judge, my client is saying we have the DD 214 from his
20 enlisted time.

21 MJ: I just need to have it - I just want to verify that all the
22 relevant information is available, because this is part of the
23 record-keeping process. Thank you.

1 Again, as to Prosecution Exhibit 9, it is now admitted,
2 subject to the redaction of subparagraph 1b on page 1, as agreed to
3 by the parties.

4 The next exhibit that was pending review by the defense was
5 a four-page document, identified as Prosecution Exhibit 12 [for ID];
6 it is a number of paragraphs taken from - Chapter 4 - let me rephrase
7 this.

8 The cover sheet; an explanation 'Command Policy Titling' on
9 page 2; and then it goes into the issue of Chapter 4, "Military
10 Discipline and Conduct" - it contains paragraph 4-1 up through 4-7,
11 which is incomplete.

12 Have you reviewed that document, counsel?

13 CDC: We have, Your Honor.

14 MJ: Is there any objection?

15 CDC: I'm going to say generally, no, but I question the
16 relevance, since it basically states, as a soldier, you have to do X,
17 Y and Z, which is sort of begging the question - it's obvious.

18 I'm not sure of the relevance.

19 MJ: To the extent of what's in paragraph 4-2?

20 CDC: Certainly, 4-2, but all of those paragraphs are sort of
21 stating the obvious with regards to ----

1 MJ: Certainly, it would be subsumed with the - in this case,
2 the nature of the offense, as to whether or not any of those matters
3 were of relevance.

4 To the extent that the prosecution wants to have it, that
5 the obeying orders is part and parcel of military duty, which is
6 established, is there any objection to the content?

7 CDC: No, Your Honor.

8 MJ: Prosecution 12 is admitted. I'm going to limit that,
9 simply to acknowledging that which is, again, obvious on its face,
10 which is, compliance with lawful orders, to the extent that orders
11 are lawful - either as generally stated, or as applied - there would
12 be an obligation to follow from the subordinate.

13 Prosecution Exhibit 12 is admitted for the purpose
14 indicated.

15 Government, do you have anything further?

16 TC: No, Your Honor.

17 MJ: Does the government rest?

18 TC: The government rests, Your Honor.

19 MJ: Defense?

20 CDC: Your Honor, we would call Lieutenant Mark Bashaw to the
21 stand.

1 MJ: Mr. Willson, you did defer your opening statement. If
2 you'd like to make that opening statement prior to putting on this
3 witness?

4 CDC: We would waive that, Your Honor.

5 MJ: Very well.

6 CDC: Your Honor, before we begin, we would just like to
7 reiterate to the court, we're going to include in his testimony
8 evidence and make a claim of mistake of law, as a defense, as well as
9 justification, and, I guess, necessity. We'll cover that through his
10 testimony.

11 **FIRST LIEUTENANT MARK C. BASHAW, U.S. Army, the accused, was called**
12 **as a witness by the defense, was reminded he was still under oath,**
13 **and testified as follows:**

14 **DIRECT EXAMINATION**

15 **Questions by the civilian defense counsel:**

16 Q. Lieutenant Bashaw, you've given us some background; let's
17 cover a little bit more.

18 Give me one second - I want to make sure we flow through
19 this properly.

20 You stated on the motions that you had done your own
21 research. Why were you doing research?

1 A. I was - it's my job as a medical officer to look at medical
2 issues in general that affect service members, and specifically, army
3 soldiers.

4 Q. Have you read through the charge sheet?

5 A. I have.

6 Q. So, you're familiar with the charges against you?

7 A. Yes.

8 Q. Essentially, at least the first specification is somewhat
9 confusing - essentially, the government is saying you were ordered to
10 show a negative test, or show up at a test site to take a test to
11 show a negative test. Do you agree with that?

12 TC: Objection, Your Honor.

13 MJ: Basis?

14 TC: Leading, and a very lengthy question - leading, Your Honor.

15 MJ: Overruled.

16 Q. Do you agree that that was the order?

17 A. Yes.

18 Q. And then Specification 2 was - I apologize - provide proof
19 of a negative test.

20 A. That was Specification 2.

21 Q. Yes.

22 A. On the charge sheet?

23 Q. Correct.

1 A. I believe so, if I recall correct.

2 Q. And then the third, wear a mask or a face covering.

3 A. That's correct.

4 Q. So, let's back up and go to Specification 3, the mask
5 issue. You heard testimony about the counseling session on 30
6 November at about 1430. Do you recall that?

7 A. Yes.

8 Q. On that day, Captain McCarthy - he testified that he told
9 you to put your mask on.

10 A. that's correct.

11 Q. And that you refused?

12 A. Correct, that's what he testified.

13 Q. Did you refuse to put on your mask?

14 A. I said no, these are unlawful orders, and I cited the EUA
15 references that I had with me.

16 Q. Do you recall off the top of your head what those
17 references were?

18 A. 1107(a), USC 10; USC 21; and those are the references.

19 Q. Were you respectful when you were refusing?

20 A. I was.

21 Q. Would you consider the whole process of the counseling
22 contentious at all, at least ----

23 TC: Objection, Your Honor.

1 MJ: Basis?

2 TC: Counsel is attempting to elicit character evidence about
3 his character on that day. The government has not attacked his
4 character of how he acted ----

5 MJ: This isn't character testimony. He's describing the
6 context or tone, as perceived by the accused. That's not character
7 evidence. If the accused has an opinion as to the tone of the
8 counseling session, to the extent it may be relevant or not, I'll
9 allow him to answer the question.

10 A. I perceived it as a very logical situation, a process.

11 Q. Were you aware of any orders or regulations or policies
12 that required masks?

13 A. I was aware of the basic op-ords that were being pushed
14 down generally, not specifically.

15 Q. In your mind, was the order from Captain McCarthy - was
16 that coming directly from him, based on his intent? Or was he
17 reiterating to you what you understood as the mask policy?

18 A. No, I believe Captain McCarthy was simply a messenger of
19 the orders. However, in the process of going through and challenging
20 these orders, I have a duty to start at the lowest level, and give
21 the individual - the first-line commander - the opportunity to listen
22 to what I have to say. That's my duty to do that.

1 Q. So, is it a fair assumption that your refusal wasn't really
2 to Captain McCarthy; it was the orders that he was reiterating to
3 you?

4 A. That's correct.

5 Q. Did you agree with the orders, the FRAGO, op ord, whichever
6 it was, regarding the wearing of a mask?

7 A. I didn't agree with it.

8 Q. Had you worn a mask before?

9 A. I have.

10 Q. And you stated that you told him you were not going to
11 because you believed it was unlawful?

12 A. That's correct.

13 Q. We'll go into more detail about your reasoning behind that,
14 but let's cover the tests.

15 Real quick, though - on the masks, do you know what EUA is?

16 A. Yes - emergency use authorization.

17 Q. What's your understanding of what that means?

18 A. My understanding of that is the FDA gives manufacturers of
19 these certain products - specifically, in this case, COVID-19
20 mitigation products is what they're supposedly used for - gives them
21 an authorization to push out the products to help get it into
22 suppliers, to the general populace, to be able to utilize as a
23 mitigation tool, if they so choose.

1 Q. Was it your understanding that masks were EUA?

2 A. Yes.

3 Q. Based on what?

4 A. Based on the FDA guidance, the FDA EUA letter.

5 Q. So, you read that letter?

6 A. Yes.

7 Q. I'm going to - I'm not going to refer to specifications,
8 because it'll get confusing, but with regards to testing, on or
9 before reporting for duty on the 30th, were you ordered to show a
10 negative test prior to reporting for work?

11 A. Yes.

12 Q. By who?

13 A. Captain McCarthy.

14 Q. Again, with regard to that order, did you have an opinion
15 or an understanding as to where that originated from?

16 A. Yes, it was my understanding that he was the messenger of
17 the order from higher - coming down from higher.

18 Q. What documents, regs, pamphlets, policies, were you aware
19 of?

20 A. I was aware of FRAGO 10, after our phone conversation the
21 day prior on the 23rd.

22 Q. Similar to masks, was your refusal to Captain McCarthy, or
23 to the orders he was reiterating?

1 A. The orders he was reiterating.

2 Q. Were you also ordered to report to a certain place to be
3 tested, if you hadn't done your own test?

4 A. Yes, on the 30th, they started testing, and that location
5 was the Staff Duty office on Edgewood, Aberdeen Proving Ground-South.
6 That was the supposed location of where the testing would've taken
7 [sic] place.

8 Q. Explain for us your understanding of the two different
9 orders - show a negative test, or report for a test.

10 A. It was pretty confusing to me, and that's the reason why I
11 wanted to clarify, one, my intentions, and have that kind of dialogue
12 with him about the situation.

13 Q. How did you accomplish that, or attempt to accomplish that?

14 A. I attempted to accomplish that, initially, when he called
15 me on the 23rd, I made it clear that I had issues with the orders that
16 were coming down. I felt they were discriminatory, one; and then at
17 the same time, unlawful, because I was aware of the EUA laws, and I
18 was aware of the fact that these tests are emergency use authorized
19 tests. Given the law, specifically, 1107(a) and 21 USC, that the
20 service member has the absolute right to refuse participation in
21 these products, given the fact that they are experimental, and given
22 the fact that the liability rests solely with the individual
23 participating with those tests, based on USC 43 247(d), because

1 everybody prior to the individual participating with that test,
2 whether it's the manufacturer, whether it's a distributor, whether
3 it's a potential commander that's trying to carry out the orders from
4 higher, they are not liable for potential adverse actions that may
5 occur with the chemicals contained within those products, or the
6 adverse reactions to those products.

7 Q. With regards to the tests, were you able to determine
8 whether the tests you would've had to take, on your own or at a test
9 site, were under an EUA status?

10 A. Yes.

11 Q. What was the tests?

12 A. The DoD - the order, specifically the FRAGO that was pushed
13 down to Captain McCarthy, and then on to me, the DoD used three
14 tests, which was Binaxnow, Intelliswab, and QuickVue, and they're all
15 emergency use authorized tests.

16 Q. How did you determine that?

17 A. I looked at the FDA emergency use authorization letters,
18 and then their direction for use specifically states, in the
19 direction for use - and then, specifically, on the labeling box
20 themselves, a lot of them have the reference, because it's by law
21 they have to have reference to the U.S. Code referencing emergency
22 use authorized products - statute law.

1 Q. More specifically, with regards to the masks, what was your
2 health concern?

3 A. My health concern - and I brought it up numerous times, as
4 a commander - and specifically, with the gym situation, with my
5 service members, and service members in general - I'll just give my
6 personal testimony on this. When the first sergeant is trying to
7 smoke me with burpees, and I can't breathe because all I'm breathing
8 in is recycled carbon dioxide, and then I pull down my mask to try to
9 get fresh air, and the gym staff flips out on me, because I pulled it
10 down to get fresh air, but pulling it down to get a drink of water is
11 okay with them. That was my issue - one, there was no logical sense
12 to it, but it was a safety hazard. I want my soldiers, and myself,
13 to breathe oxygen, to get proper nutrients to the muscles we're
14 working out. It's a common-sense health approach, and a safety thing
15 I was trying to bring up, and see if I could work with them to, you
16 know, to flex on their rules inside the gym, to a more logical health
17 approach - holistic health approach.

18 Q. At that point, with regards to the gym issue, you weren't
19 specifically fighting removal of masks completely? You were
20 addressing that particular issue.

21 A. Right.

1 Q. Did you, in your research, or in your expertise or
2 knowledge, were you able to determine what, if any, specific health
3 concerns the masks might have, certainly for yourself?

4 TC: Objection, Your Honor.

5 MJ: Basis?

6 TC: He's asking for the witness to talk about expertise in
7 masks and risks. That's been litigated.

8 MJ: I'll sustain it as to a question for expert testimony. If
9 you'd like to rephrase the question, I will permit it.

10 Q. So, based on your background, what were your health
11 concerns for yourself with regards to wearing a mask?

12 A. The fact that your body need oxygen, and recycled carbon
13 dioxide is probably not a good thing for your body to be operating
14 with. Just basically, that's one of the main things.

15 Then on a more - another point to make is the fact that the
16 mask pore size, and the micron size of the supposed COVID - SARS COV-
17 2 virus is - the SARS COV-2 virus is so incredibly small, these masks
18 - like you mentioned yesterday, it's like throwing marbles through a
19 chain-link fence. The masks don't work.

20 Q. Do you have examples of other instances where you
21 personally felt inhibited or struggled to breathe, or where you were
22 assisting other soldiers that were in a similar situation?

1 A. Not specifically, but that time at the gym speaks out.
2 After getting smoked with burpees and trying to breathe - even
3 walking fast, or a fast-paced exercise, getting your heart rate up at
4 any point, you're impeding your breathing. It is having an effect.
5 At least personally, I have an issue with that. My body wants fresh
6 air; it doesn't want recycled carbon dioxide.

7 Q. With regards to tests, what were your health concerns
8 related to tests?

9 A. Specifically, the reagent chemical within the tests are
10 deadly and dangerous.

11 Q. Does that include any chemicals on the swab itself?

12 A. So, I'm aware that some of the test kits have ethyl oxide
13 impregnated into the swab, which is a carcinogen.

14 Q. Was that - were those issues some of the things that helped
15 you decide to push back on tests?

16 A. Correct, and it helped me understand why the EUA laws are
17 written to begin with, and why the individual is covered by these EUA
18 laws.

19 Q. Before we move on to the other specification with regards
20 to being at work or not being at work, what efforts did you take to
21 push back on these mandates? Obviously, you had the gym issue.

22 A. When it came down, some of the other issues I was dealing
23 with was seriously, deadly adverse events, and deaths, from EUA

1 products. I was pushing that messaging through official requests for
2 information to the COVID-19 task force, in an attempt to change the
3 risk communication strategy that was going out to the force on the
4 safety and efficacy of certain EUA products. My intent was, I was
5 seeing data, and had knowledge of data - concrete data - that there
6 were deaths and adverse events happening from EUA products,
7 specifically, the experimental emergency use authorized products,
8 regarding COVID-19, and to communicate that over to the COVID-19 task
9 force, to change the messaging to include that messaging of adverse
10 events, and danger, and death, are possible, for the individual who
11 chooses to participate in these products.

12 Q. Why did you feel a need to - well, what was the messaging
13 that you were hearing or seeing that you felt was objectionable or
14 not adequate?

15 A. Safe and effective, over and over again.

16 Q. Safe and effective.

17 A. Safe and effective.

18 Q. What was it - you were referring to adverse events? Was
19 there a specific document or database that you were looking at?

20 A. Yes, I was referencing CDC's - Centers for Disease Control
21 - VAERS database - Vaccine Adverse Event System database.

22 Q. We were talking about the efforts you took to push back.
23 Did you get a response from the COVID-19 task force?

1 A. I got a response, and my next response to that was, what
2 does the DoD use to track the potential adverse events that our
3 service members might be having with such EUA products. That was
4 sent to the DHA - Defense Health Agency. When I got a response from
5 the Defense Health Agency, they confirmed that the DoD, in fact, uses
6 VAERS to track death and adverse events from emergency use,
7 experimental, COVID-19 products.

8 Q. What timeframe was all that?

9 A. That was, specifically, between - the month of October was
10 that. If you want specific dates, I have that in documentation; it
11 is specifically referenced in the Article 138.

12 Q. This continued to form your state of mind with regards to
13 meaning to push back against mandates?

14 A. Yes, sir.

15 Q. Prior to October, was there anything that you had done,
16 other than research, but reaching out, or trying to speak to people
17 that we haven't discussed already?

18 A. Yes. Back in July of 2020, I did - at the time, message --
19 --

20 Q. Let me stop you. 2020 or 2021?

21 A. July of 2020.

22 I messaged the Director of the Army Public Health Center,
23 and another doctor from the Army Public Health Center, and I simply

1 asked if the DoD - Department of Defense - was looking into any sort
2 of prophylaxis-type treatments for our service members specifically
3 regarding hydroxychloroquine.

4 Q. Between that timeframe and October 2021, any other
5 instances that we haven't covered?

6 A. Yes, so, September 2021, again, I reached out to, at this
7 time, the Deputy Director in a town hall forum ----

8 Q. Deputy Director of ----

9 A. Army Public Health Center, in a town hall forum, and asked
10 if the Department of Defense was looking into any prophylaxis for
11 service members regarding COVID-19, specifically, ivermectin,
12 hydroxychloroquine, zinc, quercetin, and Vitamin D and Vitamin C, for
13 the treatment of SARS COV-2.

14 Q. I just want to make sure we've covered all your efforts
15 regarding, certainly masks and tests, but it sounds like it's fallen
16 into a group of mandates.

17 A. Yes.

18 Q. Are there any that you haven't mentioned? We'll get into
19 the 138 in a minute.

20 A. Not that I can think of at this time.

21 Q. Since the 30th, what were the efforts you took to sort of
22 raise the flag and say, 'Hey, we've got an issue here?'

23 A. Since the 30th?

1 Q. Since 30 November of 2021.

2 A. Since 30 November 2021, I've been included as a named
3 whistleblower on ----

4 TC: Objection, Your Honor.

5 MJ: Basis?

6 TC: Outside the scope. He's specifically saying "after 30
7 November." He's charged with violating orders on 30 November 2021,
8 and nothing thereafter.

9 MJ: Counsel, what's the relevance to this line of questioning?

10 CDC: Your Honor, just to show that his level of efforts
11 continued, even after the 30th. Although he was not officially
12 charged on the 30th; it was the incidents occurred on the 30th. He
13 wasn't aware that he was being charged or accused until well after
14 that.

15 MJ: Counsel, to the extent that he continued to act in whatever
16 manner he chose to act, until the time he was made aware of any
17 preferral or referral of charges, it is appropriate for examination,
18 for whatever weight it may have on his intent or his knowledge.

19 Overruled.

20 CDC: Thank you, Your Honor ----

21 MJ: I can tell you, the date as I understand it, it was
22 preferred on 12 January of '22, correct?

23 TC: Yes, Your Honor.

1 MJ: So, anything prior to that, I'll allow you to inquire.

2 Your objection is overruled.

3 CDC: Your Honor, for time and efficiency, some of the
4 information I'm going to cover will certainly be relevant, if we get
5 to sentencing. So, rather than ----

6 MJ: I understand. I'll give you, I think, reasonable leeway.

7 CDC: Thank you.

8 Q. What date are we talking about that you were just
9 testifying to?

10 A. After 30 November 2021?

11 Q. Correct.

12 A. Correct.

13 Q. What efforts did you take? You filed an affidavit or
14 something? A declaration or something?

15 A. I filed a declaration with Senator Ron Johnson's office.

16 Q. What date did you say that was?

17 A. That was on March 6th.

18 Q. What else had you done?

19 A. Up until that point, I was ----

20 TC: Your Honor, a clarification - March as of what year? The
21 court has given leeway to ----

22 MJ: Counsel, can you clarify the date with some specificity?

23 CDC: Yes.

1 Q. March of what year?

2 A. 2022.

3 TC: Objection, Your Honor.

4 MJ: Counsel, I'm aware - I'll ask you to direct him, for this
5 line of inquiry, as to the post-alleged incident dates, for relevance
6 purposes, that'd stop at the 12th of January 2022.

7 CDC: Yes, Your Honor.

8 Q. So, keep the efforts within that timeframe up to 12 January
9 of 2022. Did you file anything within December of 2021?

10 A. An Article 138 - a formal Article 138, with the GCMCA, was
11 filed.

12 Q. Anything else? Were there any IG complaints?

13 A. Yes. After I submitted a formal Article 138 to the GCMCA,
14 I attempted to submit an MEO complaint, which immediately got
15 dismissed ----

16 MJ: What's an MEO?

17 ACC: Military equal opportunity.

18 Q. When did you file that?

19 A. I attempted to file that on the 16th of December 2021.

20 Q. What happened with that?

21 A. That immediately got dismissed via email. I asked a
22 subsequent question to the dismissal, and I was ignored - it was
23 never responded to.

1 Q. Anything else?

2 A. I also submitted two IG complaints - one to Department of
3 the Army, and one to CECOM-Aberdeen Proving Ground Inspector General.

4 Q. Any response to those?

5 a. Yes. I got a response from the Army IG at CECOM, and it
6 was then - he took a DA Form 1559; I filled it out, provided the
7 Article 138, and subsequent exhibits, to that Article 138, and then
8 he then determined that it was a MEDCOM responsibility, given the
9 fact that I was in a MEDCOM unit. So, he forwarded it over to the
10 MEDCOM IG.

11 I then got a response from the Department of Army IG, who
12 then said this is a MEDCOM IG sort of realm of responsibility, so he
13 then forwarded it to the MEDCOM as well. And then the MEDCOM
14 eventually reached out - the MEDCOM Inspector General reached out.

15 Q. Did they address your concerns?

16 A. Not the concerns - no, there was no addressing of the
17 concerns within the Article 138. There was only a mere - to help
18 ensure that the Article 138 was going through the proper process. It
19 was then rerouted to the CECOM GCMCA. So, initially, it might've
20 been going through the MEDCOM channels, and then he confirmed that
21 the GCMCA at CECOM was the governing authority, and that he did, in
22 fact, have it. That confirmation was on January 4, 2022.

1 Q. Have you missed anything in that December/early-January
2 timeframe?

3 A. Not that I can think of at this time.

4 Q. You keep referencing your official 138, which you said, I
5 believe, was 15 December 2021?

6 A. That's correct - the formal Article 138, in accordance with
7 Army regulation.

8 Q. Per AR 27-10, did you file an informal 138?

9 A. Per Army Regulation 27-10, I filed an informal Article 138
10 with the commander, after I attempted ----

11 Q. Captain McCarthy?

12 A. Captain McCarthy, company commander, after I attempted to
13 redress my issues I was having with the orders I was receiving from
14 him, specifically regarding EUA products - emergency use authorized
15 products; specifically, the order to test.

16 Q. When did you submit the informal to him?

17 A. The informal Article 138 was submitted on 26 November 2021.

18 Q. You heard him testify that he responded. Did you ever get
19 a response from him?

20 A. I never got a response from him via email leading up to the
21 day I was due to show up and perform my duties on the 30th.

22 Q. So, you don't know what his position was, with regards to
23 the 138?

1 A. I don't.

2 Q. Did that drive your need to file the formal 138?

3 A. I do understand that he had a timeframe, given the Army
4 Regulation 27-10, to address the informal, which was 15 days.

5 Q. Did you remind him of that?

6 A. I did remind him of that.

7 Q. How did you do that?

8 A. On the 29th of November 2021, it was a Monday; after I
9 received an email from him - he sent an email with a reminder about
10 the need to test or telework, and I sent a reminder to the 138, and a
11 reminder of the fact that my duties are on-site, and I had soldiers
12 that I'm supervising and my duties are on-site. And I specified the
13 buildings in which I worked at, because previous to that, I don't
14 believe he was aware, since we do work in separate buildings at
15 Aberdeen.

16 Q. Did he respond to that email regarding the 138 and the
17 timeframe?

18 A. No.

19 Q. Since we're discussing it, can you tell the court - we
20 won't have time to go through word for word, but generally, what did
21 you include in your Article 138?

22 A. My complaint, which was initially - basically, the
23 unlawfulness of the order itself; the discriminatory nature of the

1 order; the damage and the deadly effects from the EUA COVID-19
2 experimental products; and the - at this time, I can't recall what
3 else I included in it, but along those lines.

4 Q. Did you attach exhibits to it?

5 A. Yes.

6 Q. What did those include?

7 A. Those included the email exchanges between him and I; the
8 email exchanges between ----

9 Q. Let me stop you there. Email exchanges reference the
10 informal 138?

11 A. That's correct.

12 Email exchanges between - what I was doing in regards to
13 risk communication with the COVID-19 task force; the email exchanges
14 - various different exhibits to what I was saying in the 138 - the
15 laws reference to the EUA laws that I cited in the 138; and various
16 different things along those lines.

17 CDC: [Retrieved DE A and A-1 for ID, which had been previously
18 shown to the prosecution; handed DE A and A-1 for ID to the accused.]

19 Lieutenant Bashaw, I've handed you what have been
20 previously marked as Defense Exhibit A and Defense Exhibit A-1 [for
21 ID].

22 Q. Are you familiar with those documents? Let's start with
23 Defense Exhibit A.

1 A. Yes.

2 Q. What is it?

3 A. This is my formal Article 138 that was submitted on 15
4 December 2021.

5 Q. Do you recall approximately how many pages that is?

6 A. The actual written portion of the formal is three, and then
7 the exhibits go on to be a total of, I would say, close to 50 pages
8 total - 42, sorry - 42 total pages, the completed document.

9 Q. Can you describe for us what Defense Exhibit A-1 [for ID]
10 is?

11 A. Yes ----

12 TC: Objection, Your Honor.

13 MJ: Basis?

14 TC: The witness is reading from the document.

15 MJ: Sustained.

16 Ask him questions - first, lay the foundation.

17 Q. Without reading the document.

18 A. Yes, I'm aware of A-1. It's an affidavit of fact of
19 chronological events that happened from January 2020 to up until 6
20 December 2021, at Army Public Health Center.

21 Q. What did you do with Defense Exhibit A-1 [for ID]?

22 A. It was an exhibit - it was a reference to some of the
23 information I included in my formal Article 138.

1 Q. So, it was part of the 138?

2 A. That's correct.

3 Q. Sort of an unattached exhibit to the 138?

4 A. That's correct.

5 Q. Who did you file the official 138 with?

6 A. The official 138 was filed with the GCMCA - the formal, I'm
7 sorry.

8 CDC: Your Honor, at this time, we would offer Defense Exhibit A
9 and A-1 into evidence.

10 MJ: Government?

11 TC: The government objects on two grounds, Your Honor. First,
12 relevancy - I know the court has given leeway between the date of the
13 offense and after, up until the date of preferral. But a large
14 majority of this 138 complaint relates to vaccinations, which
15 opposing counsel has already agreed is not relevant. So, to the
16 extent that any statement in here, or any claim contained within that
17 mentions vaccinations, or relates to his beliefs about why he doesn't
18 have to be vaccinated, we would oppose that.

19 Additionally ----

20 MJ: One second, let's address one thing at a time.

21 Mr. Willson, do you agree that any - that for the purposes
22 of the trial, there is not before the court an allegation of him not
23 being vaccinated, or refusing the vaccine. His concerns about the

1 vaccine are not relevant to the issue of what he is charged with
2 doing.

3 Do you agree that if the court were to admit the exhibit, I
4 would disregard any aspects contained therein concerning the
5 vaccination, or his concerns about vaccination for COVID-19?

6 CDC: Absolutely, Your Honor.

7 But his concerns with mandates, generally, not vaccines
8 specifically, because there are some issues in there that he
9 discusses that don't directly relate to vaccines, but mandates
10 generally.

11 MJ: To the extent that they may or may not be relevant to the
12 issue of masks and testing - I would agree that that would be
13 relevant. But the question, again, is if it is not broad enough to
14 cover those, or relates exclusively to the issue of vaccination, the
15 court would be inclined to admit it, but not to give consideration to
16 anything concerning vaccination.

17 CDC: We would agree with that, Your Honor.

18 MJ: Government, does that address your concern?

19 TC: In that part, yes, Your Honor.

20 MJ: The second basis?

21 TC: The second basis, Your Honor, is to hearsay. Almost the
22 entirety of the document is hearsay, or hearsay within hearsay.

1 MJ: As to his opinion - the accused's information he's
2 providing?

3 TC: Including the accused's statements. The accused also
4 attaches within the 138, Your Honor, statements of others via emails,
5 unsigned documents ----

6 MJ: Any of them directly addressing either the issue of the
7 mask wear, or the testing process, or the testing agents - the EUA of
8 testing products, a better way to phrase it. Do any of the
9 attachments address those limited grounds?

10 TC: Parts of it, yes, Your Honor. We'll have to significantly
11 redact it.

12 MJ: The court can view it, subject to limitation. Counsel,
13 we've had motions and we're now in trial.

14 TC: Yes, Your Honor.

15 MJ: Counsel, you've provided all of this to me prior to this,
16 as a fact-finder for other matters.

17 TC: Yes, Your Honor.

18 MJ: So, to the extent it has any relevance to his beliefs as to
19 mask wear, or testing methodologies, or testing kits, or EUA - being
20 relevant to his questions or concerns, the court would admit it for
21 that limited purpose.

22 To the extent that it contains information that is either
23 solely limited to vaccination, I would give that - I would simply

1 disregard it and not review it; or if it is reviewed in the course of
2 reviewing the exhibit, I would not give it any consideration.

3 The only thing the court would give consideration to is to
4 that which is articulated, or could be reasonably identified as
5 relating to his concerns about either mask wear or the testing kits.

6 Again, what the defense has told us in its explanation,
7 they are raising issues as to mistake of fact, mistake of law, and/or
8 necessity or duress, I'm going to allow them the opportunity to
9 present their defense, and we'll address it accordingly at the
10 conclusion - you will be free to make arguments as to relevance or
11 not, but I will admit it, subject to those limitations.

12 Can you identify the exhibit one more time, please?

13 CDC: Defense Exhibit A [for ID].

14 MJ: It'll be admitted for the limited purpose, and subject,
15 again, being relevant to the issues that the court has identified.

16 I have an [DE] A and an [DE] A-1 [for ID]? Are these
17 separate? I was given two exhibits.

18 How do you want me to characterize this? Government and
19 defense?

20 CDC: Judge, A-1 ----

21 MJ: Let's do A first.

22 CDC: [DE] A is the 138, and the shorter exhibit.

23 MJ: And then A-2 [for ID] ----

1 RPTR: A-1.

2 MJ: A-1, I apologize, is the formal then?

3 CDC: A-1 [for ID] is the larger exhibit, part of A.

4 TC: Your Honor, I wasn't able to actually view the document
5 before it was handed to the witness, so the government would need a
6 moment to clarify what we're looking at.

7 [Reviewed DE A and A-1 for ID.]

8 MJ: Counsel, and I assume, and perhaps this is my error, that
9 you have premarked exhibits; you have shared your exhibits ahead of
10 time; and you've reviewed them.

11 Mr. Willson, was a copy of this exhibit provided to the
12 prosecution ahead of time?

13 CDC: Yes, Your Honor. It was part of the motions as well.

14 MJ: I'm aware of that, but again, we're now in trial.

15 TC: [After reviewing.] Your Honor, the government would admit
16 both as A, as the attachments in the exhibits, are included in the
17 138 - so, it is all one document, though large. They are all
18 together as one piece of evidence.

19 MJ: Just for recordkeeping, and so that we're clear, they're
20 marked now, currently, as A and A-1. What the government is saying
21 is that A-1 is essentially part and parcel - that A is part of A-1,
22 essentially.

23 TC: Correct, Your Honor.

1 MJ: The court will admit both of them; you've clarified what it
2 is, but because they're separately marked, I'm not going to have that
3 addressed at this time.

4 [DE] A will be admitted, for the purposes indicated; the
5 same will be true for A-1; then, the government's objection is noted.

6 Mr. Willson, subject to the limitations the court has
7 placed on them, and the issues of relevancy being limited - being
8 limited only to issues of mask wear and for testing. The court will
9 disregard matters not related to those two issues.

10 Q. Lieutenant Bashaw, let's move to Specification 2, which was
11 the - being at work, teleworking, those subjects. What was the day
12 that you were told that testing was or was about to become a
13 requirement?

14 A. On 30 November 2021.

15 Q. Was there a conversation you had with Captain McCarthy on
16 the 23rd of November?

17 A. Yes.

18 Q. What was the gist of that conversation?

19 A. The gist was he called and informed me about this new order
20 of now having to test. I then informed - it was an exchange; and
21 then the next day, after I requested where this order was coming
22 from, he sent the FRAGO related to the order.

1 Q. Between the 23rd and the 30th, do you recall how many times
2 you reiterated to him that you felt the order to test was unlawful?

3 A. Once in a phone call; twice in an email; and a third time,
4 with an informal 138. So, four times total.

5 Q. You heard Captain McCarthy talk about your conversations on
6 the 30th. Can you tell us what happened on the 30th?

7 A. Yes.

8 So, on the 30th - if I can go back to the night prior - just
9 informing him of the reminder of the informal 138; the fact that my
10 duties were, in fact, on-site - I supervise soldiers, and the
11 building number. The next day, as I was on my way to work, I
12 informed him of - that I was running a little bit late, via text
13 message. And I said I would be at Building E-5800, which is my place
14 of duty. At 0930, I believe it was. So, once I got to my place of
15 duty, I started accomplishing the mission - I did receive a phone
16 call from Captain McCarthy. From what I recall, it was kind of a
17 confirmation phone call. "Are you at your place of duty, or where
18 are you at?" I reiterated I'm at Building 5800 ----

19 Q. Let me stop you there and back you up. Had you received a
20 phone call from him prior to that that morning?

21 A. I believe there was a phone call. However, I don't think I
22 was able to answer it. I think I missed it.

23 Q. Why do you think you missed?

1 A. Just because of the travel between Fort Meade - where I
2 live on Fort Meade - and then Aberdeen Proving Ground.

3 Q. Did you respond - did you notice that he had called, or
4 attempted to call?

5 A. I did, and I think that's why I think there was a text, and
6 I fired off a text message, give him a heads-up on what my status
7 was.

8 Q. What did you say?

9 A. I said, you know, I'm on my way, I ran into a little bit of
10 traffic, and I'll be at Building E-5800, I believe is what I said,
11 something along those lines.

12 Q. At that point, when you were headed into work, what was
13 your understanding of the test issue, and whether or not you were
14 required to test?

15 A. My understanding was I was required to test. However, my
16 intent was to have a dialogue, have a conversation, try to kind of
17 have an exchange via the 138, or a discussion via my informal 138, to
18 maybe clarify some issues, and then we could press forward from
19 there.

20 Q. When did you intend on having that discussion?

21 A. I would've assumed it would've been any day, or moment by
22 moment. I don't know - whenever he decided to ----

23 Q. So you were waiting on him to?

1 A. That's correct.

2 Q. And you were just talking about he called you, while you
3 were at your place of duty?

4 A. That's correct.

5 Q. About what time was that?

6 A. That was about - almost as soon after I showed up, maybe
7 about 9:45, give or take.

8 Q. What did you learn from that conversation?

9 A. He was confirming that I was at my place of duty, I
10 believe.

11 Q. Was there an order to go test, or go home?

12 A. No, not in that phone call.

13 Q. Did you have any communication with him after that?

14 A. Yes. Soon after that, around 10:51, I believe - exactly
15 10:51 - I received a text message from him, stating that, 'Hey, meet
16 me in my office at 1430.'" And I said, "For what?" He said,
17 "Counseling." I said, "Copy." At that time, it was 1051, and the
18 counseling was scheduled for 1430.

19 Q. Where is his office in comparison to your place of duty?

20 A. It's about a 5-minute drive.

21 Q. Did he say what the purpose of the meeting or counseling
22 was for?

23 A. No.

1 Q. Did you have any reason to believe there was any issue or
2 problem?

3 A. At that point, I mean, I guess I could've assumed, but no.

4 Q. You went in - what were the responsibilities you were
5 concerned about accomplishing while you were at work that morning?

6 A. I was tasked with specific laboratory duties. I had to
7 certify the insectary - mosquito species - on a monthly basis, and I
8 was scheduled on the 30th to conduct that mission.

9 Q. You mentioned soldiers on-site. Could you clarify?

10 A. Soldiers on-site - so, I supervised the enlisted soldiers,
11 a staff sergeant, a corporal, and, at the time, a private.

12 Q. Were there any concerns with, in your mind, of not being
13 there?

14 A. Yeah, so, the staff sergeant I was working with, he needed
15 a bit of mentorship, I would say, and that face-to-face interaction,
16 and level of leadership to help him, to work with him, and to get him
17 where he needs to be.

18 Q. How far is it from your place of duty to where you live?

19 A. Forty-five minutes.

20 Q. Essentially, an hour and a half to 2-hour round trip, based
21 on traffic, obviously?

22 A. That's correct.

23 Q. You said the meeting was at 1430?

1 A. That's correct.

2 Q. Were you at that meeting?

3 A. Yes - 15 minutes early.

4 Q. What happened at that meeting?

5 A. At that meeting, I recall Captain McCarthy showed up first
6 at 1430, followed by Lieutenant Colonel Rufolo, and then First
7 Sergeant Philip Tally. I also asked if Sergeant Danenhower to be a
8 witness, because, at that time, I was going to again read off my
9 informal 138, just because there wasn't any communication to my four
10 previous interactions about my redress issues and/or complaint.

11 Q. Was the 138 discussed at all at that counseling?

12 A. At the end of the counseling, I then read off the hand-
13 delivered 138, even though the informal 138 was already satisfied, in
14 accordance with AR 27-10 via email transmission.

15 Q. What happened at the end of the counseling?

16 A. He told me to turn in my badge, and he informed me -
17 throughout the counseling - he informed me that they suspended my
18 security clearance, they were looking to restrict me from the base,
19 and flag my record. At the end of it, I left.

20 Q. Where did you go from there?

21 A. Home.

22 Q. Did you make any calls or communication with anybody?

23 A. On the way home, no.

1 Q. Who is your supervisor?

2 A. Rosanne Radavich.

3 Q. Did you speak to her at any point?

4 A. Yes. Earlier in the day, I informed her that I had a
5 counseling session at 1430 at the company commander's office, and
6 afterwards, she said, just go home, because at that point, we're
7 already looking at around 3 or 4.

8 Q. Which would've been after the counseling?

9 A. After the counseling.

10 Q. Did you keep her updated or informed as to your status?

11 A. I did.

12 Q. When was that?

13 A. Later on that evening, I believe, I gave her a call, and
14 let her know that I'd been restricted from the base, I lost access to
15 all Army Public Health Center facilities, my security clearance was
16 suspended, and that was the gist of that phone call.

17 Q. In addition to what you've already testified to, were there
18 any other concerns or more detail you want to convey about not being
19 able to be present at your place of duty?

20 A. Yes. So, I can't perform my job, if I'm not at my place of
21 duty. I'd been assigned certain tasks, certain responsibilities and
22 duties. Yes, there is an option to where I can telework at times,
23 and handle some administrative things, or some product development

1 things. But I'm the type of individual that I want to see my
2 soldiers face-to-face; I want to see how they're doing; I want to
3 look them in the eyes. I want to serve alongside them, figure out
4 what they need, and support them the best I can - in person.

5 Q. Do you know whether Captain McCarthy knew what your
6 specific duties were?

7 A. No, I don't know.

8 Q. Had he ever come over and asked you to work him through
9 what it was you did on a daily basis?

10 A. No.

11 Q. In your opinion, based on your knowledge of him, and his
12 knowledge of your work, would he have any understanding of potential
13 issues that concerned you with not being present?

14 A. I'm sorry, say that again.

15 Q. Yeah, that was a little convoluted.

16 In your mind, would Captain McCarthy understand your
17 concerns about you're not being physically present at your place of
18 duty?

19 A. Yes, if there was a potential opportunity for conversations
20 about the issues I was trying to redress, possibly, yes.

21 Q. But you never had that conversation?

22 A. That never happened.

1 Q. Had you told him, at any point, that you needed to be at
2 work in person?

3 A. Yes.

4 Q. Had you teleworked prior to the 30th?

5 A. At times, yes.

6 Q. What was the reason for that?

7 A. Certain administrative issues that I could handle at a
8 telework location, or certain product development that I was tasked
9 to do, I could potentially handle it at a telework location.

10 Q. Why were you teleworking in those periods?

11 A. To handle those matters.

12 Q. Why wouldn't you go into the office and do it?

13 A. Well, it just - depending on - it was kind of - it was
14 open, it was a flexible kind of deal.

15 My main thing, and my main intent - take care of my
16 soldiers, ensure that's the number one priority; take care of my
17 assigned laboratory duties - that's my number two priority; and then
18 my number three priority is, if there's a telework availability,
19 where I could potentially stay home and knock out some of this stuff,
20 versus going into the office - that's a potential, and I'd
21 potentially exercise it. Or, at times, I would show up and just
22 perform those duties on-site, at my duty location.

1 Q. What is the mix of personnel that work in your place of
2 duty?

3 A. It is mostly Department of the Army civilians, I would say.
4 There was a total of six soldiers, I believe - yeah, six soldiers.

5 Q. Was that the soldiers you mentioned you were supervising?

6 A. No - one officer, Lieutenant Colonel McNeely, he's head of
7 the branch; and then a staff sergeant, a corporal, and a private.

8 Q. So, the enlisted you were supervising?

9 A. Yeah, that's correct.

10 Q. Did the civilians telework?

11 A. At times.

12 Q. How about the enlisted?

13 A. Not usually.

14 Q. So, was that part of your concern - which they were there
15 and you weren't?

16 A. Right. From a previous company commander standpoint, and
17 just from witnessing at that duty location, the enlisted soldiers,
18 throughout the last 2 years, have always had to show up, depending on
19 the mission set. They would always show up, while a large majority
20 of the other individuals in that same area, in that same duty
21 location, with some of the same assigned duties, were teleworking.
22 So, they were there through and through, and I wanted to ensure that
23 I was present to support them.

1 Q. You understood, sort of, the dilemma that you were putting
2 yourself in by not testing, but also wanting to be at your place of
3 duty?

4 A. I did.

5 Q. Describe some of that, at least in your mind, that
6 struggle.

7 A. The struggle was challenging what I perceived - what I
8 still perceive - to be an unlawful order, and having the duty to do
9 that, I have a duty to do that. If I so feel strongly that an order
10 is unlawful, I have a duty and an obligation to challenge that, per
11 ADP 6-22, Ethical Orders; it specifically lays it out. It's our code
12 of conduct, it's our code of ethics. It's how we operate. I
13 understood the risk, I understood the challenge, but my hope and my
14 intent was there would be open dialogue, there would be
15 communication, there would be a back and forth, there would be a
16 working together as a team to push these issues up the chain of
17 command, and to hopefully try to get some resolution.

18 Q. Do you know what ADP stands for?

19 A. Army Department Pamphlet, I believe, and I could have just
20 botched that. I apologize if I did. I just largely am familiar with
21 the acronym ADP 6-22.

22 Q. That's a regulation or policy?

23 A. Right.

1 MJ: Counsel, one moment.

2 [The court reporter adjusted the microphones briefly.]

3 Q. If you chose to telework versus testing, was that an
4 unlimited option for the rest of your career? You would've been able
5 to just stay home and telework?

6 A. No.

7 Q. Why not?

8 A. In my opinion, in my view, that's not a thing.

9 Q. Were you led to believe or informed that the telework was
10 going to be a temporary ----

11 A. Honestly, I don't know, and that's why I attempted to
12 perform a redress, in accordance with Army Regulation; and even
13 before that, just a conversation or dialogue. When I understood that
14 wasn't really going anywhere, to officially get this down and try to
15 go through a process.

16 Q. Based on conversations with Captain McCarthy, did you
17 expect your refusal to be dealt with at any point?

18 A. The refusal to test?

19 Q. To test, and mask.

20 A. I assumed - again, I go back to I assumed there would be a
21 dialogue. I assumed there would be a conversation.

22 CDC: One second, Your Honor.

1 Q. [After pause.] Were you familiar with where the test site
2 was supposed to be?

3 A. Specifically, no. The building in general, yes.

4 Q. Were you familiar with the test procedures or policies?

5 A. I was familiar with certain things that had to be in place,
6 protective measures, potentially, according to safety data sheets
7 regarding specific chemicals within those test kits.

8 CDC: I don't remember - I don't think we covered it.

9 Your Honor, does the court want us to go through some of
10 the issues that he covered in the motions?

11 MJ: Counsel, again, this is your witness, and your defense -
12 whatever you require of your witness. I don't know how to answer
13 your question.

14 CDC: Your Honor, I guess the question is - are those matters
15 that he testified during motions before the court for consideration
16 on the merits, or, if not, then I need to go through those again.

17 MJ: Can you identify with some specificity what you're talking
18 about?

19 CDC: The chemical agents, with regards to tests; the safety
20 equipment that he believes needed to be included; and the cautions,
21 as part of using those tests.

22 MJ: Government, do you have any objection to the court giving
23 consideration to the testimony that was provided by Lieutenant Bashaw

1 in the motions hearing concerning his understanding of the various
2 chemical compounds - I believe it was a testing reagent - for the
3 test kits?

4 TC: No, Your Honor.

5 MJ: If there is no objection, I will take judicial notice of
6 his previous testimony. You do not need to reinquire as to that
7 line.

8 That information that is before the court, I will take
9 notice of what was testified to yesterday.

10 CDC: Thank you. One second, Your Honor.

11 TC: A quick question, Your Honor. Are you taking judicial
12 notice to his entire testimony from the motions yesterday, or just
13 that specific portion of his testimony?

14 MJ: Right now, what's been identified as his testimony
15 concerning the chemicals, and the concerns he had about the chemicals
16 contained - I believe that was about the reagents, the chemicals in
17 the reagents in the test kits.

18 TC: Yes, Your Honor.

19 MJ: I'll double-check my notes. Give me one second.

20 [After pause.] His testimony yesterday, counsel, concerned
21 his concerns about potential harm to himself and others, and concerns
22 about safety protocols not being implemented, or not properly
23 implemented, as to the test kits; and then he made reference to a

1 number of chemicals that he identified as being potentially
2 dangerous, if they were handled. He identified - I don't have notes
3 as to the specific chemical names. I wrote down "chemicals." And
4 that he had expressed, also, his concerns when he testified yesterday
5 in the motions about the continuous inhalation of CO2 - he testified
6 to that previously - and that he felt that those issues, and his
7 concerns, had not been fully resolved, or not resolved to his
8 satisfaction; and - my notes indicate that his worries were about the
9 tests, if the chemicals were to spill, or somehow to come into
10 contact either with skin, or be inhaled, they could pose a danger to
11 the individual who was either exposed to, or inhaled, whatever those
12 chemicals may have been.

13 TC: Yes, Your Honor.

14 MJ: That was the extent of my specific notes. I don't have the
15 names of those chemicals. I understood what his concern was, as he
16 articulated it.

17 If you want to verify the chemicals, you're welcome to, but
18 again, that's up to you.

19 TC: That's fine, Your Honor. Thank you.

20 CDC: Thank you, Your Honor.

21 Your Honor, I guess I'm wondering if the court would just
22 take judicial notice of his testimony from the motions. I can go
23 through some of that information again.

1 MJ: Again, there was no objection to it, with regard to his
2 concerns as to the chemicals; he's testified, essentially, as to what
3 his concerns were about the masks.

4 What else are you asking me to take notice of?

5 CDC: Yesterday, we had gone through his duty description, his
6 background, his education ----

7 MJ: I understand.

8 Government, do you have any objection to the court, again,
9 taking note of his previous testimony concerning his military
10 background, his training, his experience, his MOS, which I noted that
11 he had 16 years of military service; 67C, I believe, which is a
12 preventive medicine officer, and then a subset was 72B - entomology,
13 infectious disease transmission being a primary focus; and that he
14 had 14 years of enlisted service in the Air Force, pest management,
15 disease vectors, suppression of threats, bird strike mitigation
16 programs - I don't have the acronym down for that, but he had an
17 acronym for the bird strikes. That he did research, based on his
18 mission sets. That he'd done medical research, based on his mission
19 sets. He testified about masks and testing. He testified about his
20 prior time as HHC commander. He talked about being inside of the
21 gym, his concerns he had raised. He testified about the issue at the
22 gate, with a gate guard and a towel. He had testified that he had
23 raised his concerns to the clinic commander about inhalation of CO2,

1 and that the basis for his objection, primarily, was based on his
2 understanding - I think the words he used was, 'a healthy military
3 population,' and he believed the guidance was focused, or that the
4 risks were posed primarily, to elderly individuals, and/or the
5 immune-compromised. That's what my notes indicate.

6 And then he concluded, essentially, by saying that the
7 military population is in better health, based on age and other
8 reasons, like physical fitness. That was a large part about what he
9 testified to.

10 He went into the chemicals, and his concerns about that.

11 Do you have any objection to the court - if you want to
12 expand on that, counsel, you're welcome to do so, if you're not
13 satisfied with the nature of my recollection and the notes that I
14 have on it.

15 TC: No objection, Your Honor. The government just requests
16 equal latitude, based on the additional information from that
17 testimony, and this testimony, for any questions that might expand
18 the scope ---

19 MJ: If you desire to cross-examine him about testimony that he
20 provided yesterday that is relevant to the issues before the court
21 for trial, you are welcome to do so.

22 TC: Yes, Your Honor.

1 CDC: Judge, just to expand on it, it would be his comparison of
2 guidance from the CDC to the general population, as you said, versus
3 the military population.

4 MJ: Again, I had it more shorthand than that. If you want to
5 direct more questions beyond what I was able to recite to you a few
6 minutes ago, please feel free to go down that line of questioning.
7 Again, my notes I read to you, essentially, verbatim, concerning he
8 characterizes, from my notes, as being the primary basis for concern
9 was about ages, immunocompromised, the distinction between his
10 perspective between the general population, and that of the military
11 population, generally speaking.

12 CDC: Thank you, Your Honor.

13 TC: The government would just reaffirm its objection on any
14 status that the accused is an expert, and to the extent that his
15 testimony would elicit expert testimony ----

16 MJ: He is not admitted as an expert; the court does not
17 consider him an expert. Again, this was based on what he testified
18 to yesterday. Counsel, if you want to expand on that information
19 into what you feel is necessary, please feel free to ask.

20 I did not hear an objection from the government as to the
21 court taking judicial notice of his testimony from yesterday. The
22 court will do so.

1 Q. Lieutenant Bashaw, what were the - do you recall the names
2 of the specific chemicals you were concerned about?

3 A. Specifically, no. I printed out the safety data sheets and
4 went through them, but specifically, I can't rattle off the names at
5 this point in time.

6 Q. So, your focus was potential harm to yourself and your
7 soldiers?

8 A. That's correct.

9 Q. And globally, as part of your job to put out messaging, to
10 make sure people are aware?

11 A. Right, that's correct.

12 Q. We covered some of this yesterday, but briefly, can you
13 just summarize some of the research that you did?

14 A. Regarding the test, after getting the product labels, and
15 looking at the products that were being used, the rapid antigen
16 testing, and the PCR testing, and looking at PCR testing as well,
17 which is kind of off-topic here - but specifically, the rapid antigen
18 testing, printing out the MSTs, looking at it, trying to understand
19 the chemicals that were used in these things, why it was being used,
20 and what sort of risk the individual - in this case, I am going to
21 have to accept by participating in these experimental emergency use
22 authorized products.

1 Q. You testified about it yesterday. Is there anything else
2 you want to add with regards to concerns from CDC guidance, as it
3 applies, compared to Army guidance or DoD guidance?

4 A. Specifically, off the top of my head, there's nothing I can
5 think of at this point in time.

6 Q. Have you read the FRAGOs and the EXORDs?

7 A. Skimmed through - more or less, skimmed through them.

8 Q. Do they reference CDC guidance?

9 A. I believe they do, but I'd have to look at them again to
10 reference - I am under the impression that - excuse me - all these
11 measures are kind of a trickle-down effect of the recommendations of
12 the CDC, HHS-type stuff, without, in my opinion, without any sort of
13 Department of Defense-type medical insertion, or type - you know,
14 that's my thought process. It just seemed like it was coming down
15 from CDC, and it was just regurgitated out.

16 Q. What was your understanding, based on your research, with
17 regards to requirements for the use of the EUAs?

18 A. I'm sorry, say that again.

19 Q. What was - based on your research, what was your
20 understanding of the requirements with regards to use of EUA
21 products?

22 A. The requirements? So, when you mean ----

23 Q. Required conditions.

1 A. The required conditions - it goes back to - for me, my
2 understanding - it goes back to the EUA authorization letters that
3 the FDA issued, and then the laws. Just understanding that the
4 individual takes sole responsibility for participating in these
5 products. If there's some sort of safety-adverse event, it's on the
6 individual. Nobody else is held liable for that.

7 Q. Are you the type of person to disobey orders?

8 A. No.

9 Q. You said, at one point, you were the commander. What were
10 the dates of that?

11 A. That was from 28 May 2020 to July 9, 2021.

12 Q. At that time, was Captain McCarthy within your command?

13 A. Yes.

14 Q. So, your roles flipped at one point?

15 A. Yes.

16 Q. You've talked about it a little bit, but what was your
17 attitude or position toward your soldiers?

18 A. My attitude?

19 Q. Generally, how did you deal with soldiers?

20 A. Yeah, I make it known, and I've kinda had this ethos
21 throughout my time in service, if you've got a problem with somebody,
22 whether I'm the commander - and I would tell my soldiers this - if
23 you have a problem with me, if you have an issue with something I'm

1 saying or something I'm doing, or an order that needs clarification
2 or something I'm pushing down, please come to me, talk to me, be
3 straight up. Obviously, be respectful in that manner, and let's try
4 to hash this out. When I use that ethos, and I expect them to use
5 that ethos, while at the same time, I'm also going to practice that,
6 and essentially, with my 138, and the steps I took up to that point,
7 and through that point and process, that's what I believe I was
8 trying to do.

9 I understood Captain McCarthy was getting these orders from
10 higher. However, for me to redress a complaint, starting at the
11 lowest level, and using the chain of command, I had to start with the
12 first commander within the chain of command, which was Captain
13 McCarthy. So, going up that process, and you'll see from my initial
14 Article 138 that, in that process, I asked, 'Are you merely conveying
15 these orders, or are they your orders alone?' I'm giving him the
16 opportunity to have a dialogue on where they came from, what his
17 thought process was, and then kind of have a back and forth or a
18 discussion.

19 Q. Is it safe to say that, based on your job title, duty
20 description, and how you conduct yourself, you were trying to convey
21 that there was a serious issue with all this?

22 A. Yes.

23 CDC: That's the questions I have.

1 MJ: Counsel, what I propose we do - it is now 10 minutes after
2 10. I would imagine that you would have some cross-examination.

3 Do you intend to cross-examine the accused?

4 TC: Yes, Your Honor.

5 MJ: Why don't we take about a 15-minute mid-morning recess now,
6 and reconvene at 1025 - so, in 15 minutes, 1025. Will that be
7 sufficient time?

8 CDC: Yes, Your Honor.

9 TC: Yes, Your Honor.

10 MJ: And then, government, you can proceed with cross-
11 examination.

12 We'll be in a brief recess.

13 [The court-martial recessed at 1010, 29 April 2022.]

14 [The court-martial was called to order at 1033, 29 April 2022.]

15 MJ: This court is again called to order.

16 All parties are again present, to include the accused.

17 Government, you may proceed.

18 **CROSS-EXAMINATION**

19 **Questions by the trial counsel:**

20 Q. On November 30, 2021, prior to going there, you were told
21 you could've teleworked that day?

22 A. Yes, sir.

23 Q. That was the order from Captain McCarthy?

1 A. That was the order, yes, sir.

2 Q. To be clear, on November 30, 2021, you never submitted to
3 any testing?

4 A. That's correct.

5 Q. You did not go home until after the counseling session,
6 correct?

7 A. Correct.

8 Q. I know you talked about FRAGOs and OPORDs - specifically,
9 when you talk about FRAGO, it's the DA EXORD 225-21, correct?

10 A. That's the main, and then ----

11 Q. That's the main one - there are FRAGOs off of that?

12 A. Correct.

13 Q. When you - you said earlier that you didn't know what
14 building you were supposed to report to for testing - you knew the
15 building, but you didn't know the specific place?

16 A. Right. I knew the building, I just didn't know the
17 specific room, or where they had the tests, per se.

18 Q. Captain McCarthy didn't say it was at the Staff Duty desk?

19 A. Yeah, at the time, I can't recall where that exactly was.
20 I know they kinda move it around or shifted it. But I'm sure, if I
21 walked in the building, I could probably figure out where exactly it
22 was.

23 Q. E-5800 is your regular place of duty, correct?

1 A. Yes, sir, regular building location.

2 Q. Going back to the phone call with Captain McCarthy, you
3 stated, 'I'm in Building E-5800,' correct?

4 A. What - in the morning?

5 Q. When he asked if you were there.

6 A. Yes. So, in the morning on 30 November 2021, he called me,
7 once I had already showed up. I believe it was around 9:30-9:45
8 timeframe.

9 Q. At that time, you hadn't submitted to any testing at that
10 point, correct?

11 A. That's correct.

12 Q. Your understanding was that prior to coming to the
13 building, you were required to test - that's what you said on direct,
14 correct?

15 A. Correct.

16 Q. I want to talk a little bit about your duties - I may not
17 get this exactly correct - inspecting the insectary, is that correct?

18 A. Yes, so, inspecting the insectary, making sure there's no
19 cross-breeding between species of genre of mosquito, whether it is
20 Aedes aegypti, Aedes albopictus. And also, working with my soldiers,
21 creating SOPs - standard operating procedures - for the laboratory
22 itself.

23 Q. What goes into inspecting the insectary?

1 A. Specifically, on that day, yes, sir, it was for the
2 mosquitos, to verify the species, and make sure we had no cross-
3 breeding going on.

4 Q. And you're not the sole one doing the inspecting on that?

5 A. No, sir.

6 Q. Other people in the office could've done that?

7 A. They had the ability to. However, I was specifically
8 tasked, on a month-by-month basis, to do that. That was my
9 responsibility. However, there are mother entomologists that are
10 certified and have the knowledge to be able to conduct that
11 procedure.

12 Q. If you were unavailable or unable to - let's say, Captain
13 McCarthy could go in and inspect that, correct?

14 A. Yes, Kevin could do it.

15 Q. When it comes to your duty, you'd say Ms. Radavich was your
16 supervisor, correct?

17 A. Yes.

18 Q. So, Ms. Radavich could decide if somebody else could be
19 assigned inspecting the mosquitoes to somebody else, correct?

20 A. Yes, for sure.

21 Q. You acknowledge Captain McCarthy as your company commander,
22 correct?

23 A. Yes.

1 Q. And he could assign you military duties, is that correct?

2 A. Yes.

3 Q. Those, sometimes, would take away from your regular duties
4 in the Entomology Department, is that correct?

5 A. Potentially, yes, for sure.

6 Q. I know it's a little bit before, but prior to 30 November
7 2021, had you ever, at any point, teleworked for a day?

8 A. Yeah, here or there, for sure.

9 Q. So you were able to conduct some duties in a telework
10 status for an entire day?

11 A. Yes.

12 Q. I want to turn your attention to the counseling session. I
13 want to clarify - when you - was the counseling inside, or indoors?

14 A. Yes.

15 Q. And when you entered the building, did you put a mask on at
16 that time?

17 A. No.

18 Q. Captain McCarthy did address this with you?

19 A. Yes.

20 Q. I think had expanded, but you did say you responded no,
21 that you weren't going to put on a mask?

22 A. I said no, these are unlawful orders, based on the
23 emergency use authorized [sic] on masking, in regards to COVID-19.

1 Q. Your response was no?

2 A. I told him no.

3 Q. And you did not put a mask on after that?

4 A. That's correct.

5 Q. And you said your refusal wasn't to Captain McCarthy, but
6 to the orders that were above him, and he was just kind of the voice
7 - the person delivering the orders. But Captain McCarthy was the one
8 that ordered you to test, and was the one that ordered you to mask,
9 and was the one that ordered you to go home, correct?

10 A. For sure, yeah, at that point, for sure.

11 Q. You were able to go home during the day, correct? Nobody
12 was preventing you from going home - nobody said you have to stay
13 here, correct?

14 A. That's correct.

15 Q. You didn't raise the concern to Captain McCarthy that if
16 you had left APG about the issue of driving back for the counseling,
17 correct?

18 A. I tried to raise many concerns ----

19 Q. But the specific issue - 'Captain McCarthy, you're telling
20 me to go home, but I'm going to have to be back for this counseling,'
21 you did not raise a concern about that, correct?

1 A. Let me confirm - at no point in time did Captain McCarthy
2 order me to go home prior to the counseling session that I had
3 knowledge of, or that I have record of.

4 TC: The government moves to strike that answer as non-
5 responsive. The question specifically ----

6 MJ: That was his response. Move on, counsel.

7 Q. To be clear, you didn't leave APG, correct?

8 A. That's correct.

9 Q. And you did not reach out to Captain McCarthy and express
10 any concern about going home, and then having to come back for the
11 counseling, regardless about whether you believe he did or did not
12 order you to go home, you didn't express a concern to him about, 'I
13 have to drive an hour home, and I'll have to drive an hour back for
14 this counseling at 1400,' correct?

15 A. I had no knowledge of an order to go home once I was
16 already there, and he was knowledgeable of my presence at Building E-
17 5800.

18 Q. So that's a no, you didn't raise any concern about having
19 to drive home, and then drive back for the counseling, correct?

20 A. Correct.

21 Q. When you were talking about the orders, you understood the
22 risk of disobeying the orders of Captain McCarthy, correct?

23 A. I understood the risk.

1 Q. So, when you say you understood the risk, you understood
2 that you could be court-martial for disobeying, correct?

3 A. Absolutely.

4 Q. Even as you sit here today, you still believe that the
5 orders were unlawful, is that correct?

6 A. A hundred percent.

7 Q. Despite the judge telling you that the orders themselves
8 were lawful, you still believe they were unlawful?

9 A. Based on the EUA laws, yes - unlawful.

10 Q. You still believe they're unlawful?

11 A. In my opinion, yes.

12 Q. You're the type of person to obey orders, correct?

13 A. I am.

14 Q. Lawful orders?

15 A. Lawful.

16 TC: No further questions, Your Honor.

17 MJ: Defense, do you have any redirect?

18 CDC: One second, Your Honor.

19 **REDIRECT EXAMINATION**

20 **Questions by the civilian defense counsel:**

21 Q. Lieutenant Bashaw, is there anything that we didn't cover,
22 or anything you wanted to address that ----

23 TC: Objection, Your Honor.

1 MJ: Sustained.

2 Counsel, this is redirect.

3 CDC: I understand.

4 We don't have any questions, Your Honor.

5 MJ: Lieutenant Bashaw, thank you. You may step down.

6 [The accused returned to his seat at counsel table.]

7 Defense, do you have any additional witnesses?

8 CDC: We don't, Your Honor.

9 MJ: Is the defense resting at this time?

10 CDC: We are, other than to reiterate the defenses that we
11 mentioned prior to his testimony.

12 MJ: You can address those in argument, if you wish.

13 Are you ready to present argument now, or do you want to
14 have a brief recess before you do closing argument? Right now, I
15 have it as 1045. How long would you anticipate your closing argument
16 to be, counsel?

17 TC: Not longer than everybody to get to lunch, Your Honor. If
18 we could have a brief recess until 11 o'clock, I think we could be
19 complete prior to the lunch break.

20 MJ: Defense, how much time will you need for closing argument?

21 CDC: 10-15 minutes tops.

22 MJ: Do you agree with the government that a 15-minute recess
23 now, so you can prepare that, would be appropriate?

1 CDC: Yes, Your Honor.

2 MJ: What we will do is we will have a 15-minute recess, and
3 then we will begin with closing argument from the government, and
4 then from the defense.

5 We are in a brief recess.

6 [The court-martial recessed at 1046, 29 April 2022.]

7 [The court-martial was called to order at 1210, 29 April 2022.]

8 MJ: This court is called to order.

9 I'd note for the record, again, all parties who were
10 present previously are again present, to include the accused.

11 After the last recess, I requested an 802 session with
12 counsel. The basis for that request was I was reviewing not only the
13 charge sheet, but also the government's response to the bill of
14 particulars. Giving consideration to the most recent testimony that
15 we had heard from the accused, I wanted to verify with counsel the
16 understanding of each of the specifications - Specification 1 and
17 Specification 2 of the Charge, as far as they were going forward, so
18 the court could understand what the issue was before it with both the
19 language in the Charge, as originally drafted, and in the bill of
20 particular response; and because the defense has, in fact, put on
21 notice to the government that it was raising certain defenses, I
22 wanted to ensure that that opportunity was fairly provided, so they
23 knew which exact language they were defending against.

1 Based on that conversation with counsel, I asked for their
2 input on the best and fairest methodology to go forward, to ensure
3 that both that the government, with the latitude to present its
4 version of the events, its evidence, subject, of course, to meeting
5 its burden of proof; and that the defense was able to present all
6 applicable defenses they wished to raise. I offered the parties, of
7 course, the opportunity, after this conversation they had, if they
8 felt the need to reopen their cases-in-chief, that would also be
9 permitted.

10 What the court and counsel came to was the following, which
11 is that with regard to Specification 1 and Specification 2 of The
12 Charge, that they would essentially be merged to read as follows; and
13 then upon the merger of the two specifications into one single
14 specification, that Specification 2 would be conditionally dismissed.
15 I instructed the parties that over the lunch break, they would
16 provide to each side, and to the court reporter, the language of the
17 amended - of the merged super-specification of what was then
18 Specification 1 and 2, but will now be captioned as Specification 1.
19 And then the charge sheet would then read Specification 1 and
20 Specification 3. I've asked the parties to provide a hardcopy,
21 initialed and approved by the accused, his counsel, and the
22 government, to the reporter during the lunch recess.

1 The language that was agreed to for the new Specification 1
2 - counsel, please, you'll be allowed to make any additions that you
3 deem appropriate - would read, essentially, as follows:

4 In that First Lieutenant Mark C. Bashaw, United States
5 Army, having knowledge of a lawful order issued by Captain Alexander
6 McCarthy, HHC company commander, to work remotely until providing a
7 negative COVID-19 test, an order it was his duty to obey, did, at or
8 near Aberdeen Proving Ground, Maryland, on or about 30 November 2021,
9 fail to obey the same by wrongfully being physically present at his
10 place of duty without providing proof of a negative COVID-19 test.

11 First, to the government, do you agree that's the language
12 that was agreed to?

13 TC: Yes, Your Honor.

14 MJ: Defense, do you agree that was the language that was agreed
15 to?

16 CDC: Yes, Your Honor.

17 MJ: Would anyone like to take up any other matters that were
18 discussed during the 802? Government?

19 TC: No, Your Honor.

20 MJ: Defense?

21 CDC: No, Your Honor.

22 MJ: Defense, are you in agreement with the merged offense - the
23 proposed new Specification 1?

1 CDC: We are, Your Honor. Although we haven't shown, physically,
2 our client the language, we've ----

3 MJ: Take a moment, I think ----

4 ACDC: I did.

5 CDC: I'm sorry, we did.

6 MJ: Again, I want to make sure you have all the opportunity -
7 so, after having the opportunity, Lieutenant Bashaw, to have spoken
8 with your counsel, do you agree to what I will call the merged
9 Specification 1? Are you in agreement?

10 ACC: Yes, Your Honor.

11 MJ: Very well.

12 Again, counsel, you will be instructed, as I told you in
13 chambers, to draft a supplemental charge sheet page one, to include a
14 Specification 1, as dictated onto the record a moment ago;
15 Specification 3, as it reads currently - and there will be no
16 Specification 2, for clarity, for any appellate record, should that
17 become necessary.

18 I've also instructed counsel that they should provide that
19 to the court reporter for review as to form, and to make sure that it
20 is drafted accurately into proper form. And I've instructed counsel
21 that, on the new charge sheet, the one that will be the next
22 appellate exhibit, to include the current pay grade information for
23 pay, in the various administrative boxes that are a part of the

1 charge sheet. There's no reason to have that pen-and-ink; that can
2 be put in correctly at this point in time. And then have all
3 parties, including the accused, initial that, and date it, and that
4 will then become the next appellate exhibit. That can be
5 accomplished during the lunch recess.

6 I then advised counsel that we will now do closing
7 arguments; we'll have a lunch recess; and we'll go from there.

8 Government?

9 TC: Yes, Your Honor.

10 Your Honor, as we told you at the start of this case, this
11 case is about choices - choices that were made by First Lieutenant
12 Bashaw on 30 November 2021. Choices, in which he came in here this
13 morning and admitted to you were his own; choices he made that were
14 informed; choices in which he told you today, even after hearing your
15 ruling that the orders were lawful, he still would not obey - he
16 still believes were are unlawful.

17 On 30 November 2021, he violated those orders. He does not
18 contest that he did not wear a mask. He does not contest that he did
19 not test on 30 November 2021. But he tries to justify his actions.
20 He tries to justify his actions, in that he misunderstood the law at
21 the time.

22 But we have rules, which talk about mistake of law in that
23 defense, Your Honor. In R.C.M. 916(1)(1) tells us that, "Ignorance

1 or mistake of law, including general orders or regulations,
2 ordinarily is not a defense." The Discussion states, in part, "If
3 the accused disobeyed an order under the actual, but mistaken, belief
4 that the order was unlawful, this would not be a defense because the
5 accused's mistake was as to the order itself, and not as to the
6 separate non-penal law."

7 That's what we have here, Your Honor. He was mistaken as
8 to the orders - the orders he was given on 30 November 2021 that were
9 lawful. They were lawful orders that he had a duty to obey on that
10 day.

11 Now, Your Honor, the government moves to the next point -
12 that First Lieutenant Bashaw had to do what he had to do; that it was
13 necessary to take the actions that he took. He had no other option.
14 For that, the court can turn to *Rockwood*, 52 M.J. at 112. The court
15 held that "The accused's belief that his actions were necessary must
16 have been reasonable, and there must have been no alternative that
17 would have caused lesser harm." The accused must have had no choice,
18 other than to do as he did.

19 It's clear he did have another choice, Your Honor. He
20 could have stayed home, and he would not to have submitted to a
21 negative COVID-19 test. Ms. Radavich and Captain McCarthy both came
22 in here and told you that he could have teleworked. Now, the accused
23 may believe that he had no choice; he may believe that he had to

1 conduct his duties on-site, but both of his supervisors - both
2 military and his technical chain - told you he did not, that he could
3 have teleworked.

4 And as far as wearing a mask, again, he could have
5 teleworked. He could have not had to be at Aberdeen Proving Ground,
6 and he would not have had to have be in a DoD building, and been
7 indoors. He would not have had to wear a mask, and he could have
8 avoided that.

9 He also could have, reasonably, requested to be outside.
10 He never stated that he asked Captain McCarthy to hold the counseling
11 session outside, so he wouldn't have to don a mask.

12 But, Your Honor, as CAAF has affirmed, "A military accused
13 cannot justify his disobedience of a lawful order by asserting that
14 his health would be jeopardized. Putting one's life on the line for
15 the sake of the mission is the very essence of military duty. If
16 military personnel were able to refuse the lawful orders of their
17 superiors, because of the risk of injury or death, we would no longer
18 have a cohesive military organization able to perform the military
19 mission - just a group of individuals who may decide, on their own,
20 personal wellbeing comes before that of their unit or their country."
21 That's from *Washington*, 54 M.J. at 940.

22 So, Your Honor, the accused made choices on 30 November
23 2021 - choices that he does not regret; choices that he stated that

1 he knew what the risk was. He knew the risk could be that he would
2 be in this court-martial here today.

3 For that, Your Honor, the government believes the facts are
4 clear - First Lieutenant Bashaw is guilty beyond a reasonable doubt,
5 and the government respectfully requests that you make a finding of
6 guilty of The Charge and its specifications. Thank you.

7 MJ: Thank you, counsel.

8 Defense?

9 CDC: Thank you, Your Honor.

10 May it please the court, this case is about choices. Based
11 on principle, to protect himself, and to protect his soldiers, based
12 on Lieutenant Bashaw's belief that the orders were unlawful, as they
13 were based on CDC guidance, the various FRAGOs, EXORDs and Op Orders.

14 Did he have alternatives? He did, but the alternative
15 would not allow him to try and push this issue up the chain, and get
16 notice to what he was trying to portray. He could have stayed home,
17 he could have teleworked, he could have just put his mask on. But,
18 as he testified, he made multiple attempts to try and raise these
19 issues. It wasn't just a soldier saying, 'Hey, I don't like these
20 orders or these mandates. I'm just not going to obey them.' This
21 was part of his job and his duty description. He was required to
22 look at potential threats, particularly health threats, analyze
23 those, and message out to the force, 'How do those impact the force,

1 myself and my soldiers?' That was his goal - to continue to do his
2 job, as he went through that.

3 This was not about teleworking, not teleworking - he knew
4 exactly what he was doing, but his justification was, 'I need to
5 raise this up the chain.' He testified, 'I sent a letter to Senator
6 Johnson. I filed two IG complaints. I filed an MEO complaint. I
7 raised it to the COVID task force.' He filed an informal 138, a
8 formal 138. He did everything that he felt he could possibly do. He
9 talked to the clinic commander about masks in gyms. His concern
10 throughout was - orders are unlawful, they're having a health impact,
11 and Lieutenant Bashaw doesn't go around challenging all the orders
12 that he sees, or all the laws that he disagrees with. This was
13 particular to his duty description and his job - the health and
14 welfare of the force.

15 Your Honor, he did admit that he refused to wear a mask.
16 He admitted he did not provide a negative test. And he admitted that
17 he was at work on the 30th. He even told Captain McCarthy, 'I will be
18 at work in Building E-5800.' His understanding, though, was that
19 this guidance that came down that was the driving force behind these
20 orders to mask when in DoD buildings, and test if not vaccinated, and
21 show a negative test before going into a DoD building; or, in the
22 alternative, telework, were unlawful, based on 10 USC and 21 USC, and
23 that the fact - and as he testified - the masks and tests were EUA

1 products. His understanding of researching and reading that all, all
2 from a health perspective context, was to push back on those, and let
3 people know, 'Hey, I believe there's some potential harm here with
4 all of this. Let's clarify.' And he testified. 'I tried numerous
5 times. Let's have a conversation.' Instead, he hit deaf ears and
6 walls. 'No, just do it. This is an order - just do it. We're not
7 going to talk to you about this,' or as the hospital commander said,
8 'This is from DoD - we have no option.'

9 So, nobody was willing to push it up the chain, address
10 these issues, discuss them with him. He was put between a rock and a
11 hard place, and he took the avenue which most would not take, and he
12 put himself out there and decided, 'I have to take a stand. I have
13 to do something,' and he testified, 'I'm willing to deal with the
14 consequences to get my message across, and help people understand I
15 have serious concerns about these orders, and the guidance that
16 they're based on.'

17 One thing we would note, Your Honor, is the government
18 introduced - or had it stipulated to - at some point referenced FRAGO
19 6. If the court reviews FRAGO 6, nowhere in there does it talk about
20 testing; it talks about vaccination, but it doesn't talk about
21 testing.

22 Was he justified in his response? We would argue he was.
23 It was months and months and months of trying to push this down, and

1 tell people, 'I have concerns.' It would've been different if it was
2 an average soldier who didn't have the background that he had, didn't
3 have the duty description and responsibilities that he had. That's
4 like telling a pilot, 'You can't raise safety concerns with the
5 aircraft people are flying, or other people are flying.' That was
6 his job. That was what he was supposed to do, and his hands were
7 tied, so he took the extreme alternative and said, 'I'm going to push
8 this. I understand the risks, but I've got to do it. This is
9 something that I feel so strongly about,' and he sat here and he
10 didn't deny it.

11 Thank you, Your Honor.

12 MJ: Thank you.

13 Government, do you have any rebuttal argument?

14 TC: Brief, Your Honor.

15 Your Honor, frustration about disagreement with your
16 opinion, no matter how much you value your opinion, is not a legal
17 justification to the charged offenses. It may be a justification in
18 the court of public opinion, but not in a court of law.

19 The orders were lawful. The accused received those orders
20 from his company commander, and he willfully disobeyed those orders.
21 He understood the risks, and he understood that those risks could
22 result in a finding of guilty.

23 Thank you, Your Honor.

1 MJ: Thank you, counsel.

2 Before we close for deliberation and lunch, I want to
3 review on the record, just to ensure that I have all of the exhibits
4 that the parties wish the court to consider. I'm going to go through
5 them in order, to make sure we're in agreement.

6 Prosecution Exhibit 1 was admitted;

7 Prosecution Exhibit 3 was admitted;

8 Prosecution 4 was admitted;

9 Prosecution 8 was admitted;

10 Prosecution Exhibit 9 was admitted in part; Prosecution 9
11 is the Operation Order 21-53, which there was some agreed-to
12 redactions under subsection 1(b) concerning vaccines, and information
13 about the vaccines was not to be considered by the court, but
14 information concerning either testing or mask wear was appropriate
15 for the court to consider under Prosecution 9;

16 Prosecution 10 was admitted;

17 Prosecution 12 was admitted, insofar as it went to the
18 paragraph 4-2, considering obedience to orders;

19 Prosecution 13 was the stipulated report or document that
20 was initialed and signed by the parties concerning the testimony of
21 Major Hans Wei, and that was admitted.

22 There was then two large exhibits that were admitted -
23 Defense Exhibit A, which is the formal 138 complaint; and then

1 there's Defense Exhibit A-1, which is - if I have it correct - that
2 would have been the informal 138 complaint, that was also then
3 incorporated into Defense Exhibit A, when it went formal. Both of
4 them had been marked separately, so they were admitted as defense
5 exhibits.

6 Have I omitted any exhibits that have admitted, or that I
7 should not have included? Government?

8 TC: No, Your Honor.

9 MJ: Have I misstated, from the government's perspective, any of
10 the limitations in some of the documents that were agreed to, either
11 by redaction, or agreement as to what would be considered relevant or
12 not relevant?

13 TC: Only for Defense Exhibits A and A-1, Your Honor. I believe
14 the limitation was that any references to the vaccination was going
15 to be admitted.

16 MJ: One more time.

17 TC: Any mentions or references to vaccinations, Your Honor, I
18 believe the court acknowledged that they would not consider that.

19 MJ: That is accurate. Again, this is not a case about
20 vaccinations.

21 TC: Yes, Your Honor.

22 MJ: And the court was not going to give consideration to that
23 aspect of any argument, as this is not a vaccination case.

1 Defense, you have heard the court indicate what it has
2 received and has been admitted, as well as the limitations, as the
3 court understands them, as to what should be considered, as further
4 added to by the government. Do you agree or disagree, or anything
5 you want to add?

6 CDC: We agree.

7 MJ: Counsel, here's what I propose - these are significant and
8 lengthy documents I need to review. I also would like to have some
9 lunch. It is 1230. I think we're going to need some time for me to
10 review this, and I can then evaluate all of this, and then come back
11 for findings. I would suggest, so that we all have a chance to eat,
12 and I can do proper review, that we plan on reconvening - again, I
13 would suggest about an hour and a half, so we all get something to
14 eat, and I can do what I need to do.

15 Would reconvening at 1400 work for all the parties?

16 TC: Yes, Your Honor.

17 MJ: Defense?

18 CDC: Yes.

19 MJ: In that timeframe, I would ask you also to draft up the
20 document for the amended Charge, and we will then plan on reconvening
21 - again, when I return from lunch, I will then begin deliberations.

22 Is that agreeable?

23 TC: Yes, Your Honor.

1 CDC: Yes, Your Honor.

2 MJ: Very well. The court is now closed.

3 [The court-martial closed at 1234, 29 April 2022.]

4 [The court-martial opened at 1417, 29 April 2022.]

5 MJ: This court is again called to order.

6 All parties are again present who were present previously,
7 to include the accused.

8 The court has been presented with the following factual
9 situation -

10 On or about the 30th of November of 2021, the accused, First
11 Lieutenant Bashaw, appeared at his duty station. At the time he did
12 this, he was unvaccinated, and aware that he had received an order
13 from Captain McCarthy, who was his military commander, and whose
14 orders the accused was subject to and obligated to follow. The order
15 from Captain McCarthy was perhaps inartful, but the accused
16 understood it; he testified that he understood it. He was not to
17 physically go to his duty station, absent a negative COVID-19 test,
18 and that he was to telework instead. Based on his testimony, this
19 did not sit well with him. His concerns, as he articulated them
20 quite eloquently, were based on his research, his understanding of
21 various chemicals, and the risks they posed, potentially, to humans
22 and others, as well as based on his interpretation of applicable law.

1 The defense has argued that several legal defenses would
2 apply to his conduct. Duress, to the extent that this was not a
3 situation that was life-threatening immediately, or posed a risk of
4 bodily harm, or serious injury to himself, or death, to others, that
5 is not a recognizable defense in this context to disobeying an order.

6 The court, again, has previously found that the underlying
7 basis for the orders that were given in this case were lawful - they
8 were for the military purpose of ensuring a fit and deployable
9 military force, and a number of reasons I articulated yesterday on
10 the record.

11 What the accused has done - again, the next question was
12 the issue of necessity. The question to the court, when I reviewed
13 the issue of necessity, defense, was - was there truly a choice
14 between two evils? That is sort of the litmus test to be applied.
15 In considering whether there alternatives available, there were. He
16 had a number of alternatives available. He had the alternative of
17 working from home, telecommuting; he had the ability to wait until
18 there was an approved non-EUA - an approved test kit. Again, that
19 was something that was coming down the pike, perhaps not, but that
20 was a possibility; that was, certainly, at that time, an alternative
21 that was available. He could have waited - again, I don't know if
22 Bio - I don't have the correct name - I don't know if Binax - I don't
23 know, nor was there testimony, of whether or not that had the ethyl

1 oxide on the swab or not, or whether that was a plain swab; whether,
2 because it would have been administered by someone else, for the
3 issue of testing, whether they would have had proper protective
4 equipment or not. That's purely speculation, so I can't address
5 whether there were other methodologies that would have allowed that
6 kind of testing or not. Again, it does appear that there were many
7 other alternatives, one of which was given to him directly - simply
8 work and telecommute from home.

9 The next issue presented to the court was the issue of
10 mistake of law as to the issue of the underlying order. That
11 requires, essentially, two elements:

12 First, there can, in fact, be a mistake of law, if the
13 mistake of law is one that is based truly on an honest and reasonable
14 interpretation; and to suggest that an order that was given would
15 have to be palpably illegal on its face. In this case, the court
16 does not find that the order was palpably illegal on its face, and
17 that the accused has unacceptably substituted his personal judgment
18 for that of his superiors, and the federal government, as to the
19 interpretation and lawfulness of the order coming down from the
20 Department of Defense, the various FRAGOs as described that formed
21 the basis for the orders.

22 The accused - the court does believe that the accused has
23 strong and legitimate and honest religious beliefs that posed - which

1 he based his actions on in part, and generally, that he explained in
2 his 138 complaint, and was consistent for the length of time - from
3 the information I was provided - that his beliefs do appear to be
4 sincere. But the methodology he had available to him did not warrant
5 the behavior that he elected to pursue.

6 In this case, the situation that he faced, and he talked
7 about - I'm going on about this because I want to be clear - I wasn't
8 requested to do a specific finding of fact, but I wanted to be clear
9 what the facts are that I considered in making this analysis.

10 The fact that, sometime previously, he had gone onto post
11 to do PT, and a gate guard, for example, allowed him to pass by
12 wearing a face towel - a towel over his face - does not reflect on
13 the legality of that type of order. That judgment, or lack of
14 judgment, on the part of a gate guard does not justify behavior on
15 the part of the accused to disregard a direct and clear order to wear
16 a face mask, or to engage in behavior to ensure the safety not only
17 of himself, but for those who he's in charge of, for those he
18 interacts with, because, again, as pointed out in *Washington*, and in
19 a number of other cases, the obligation - and I know from hearing him
20 testify, he does understand - his obligation is to the larger, not
21 just to himself. Although he professes this was being done for the
22 greater good, the behavior put any number of other individuals into
23 direct harm's way. If you think about it, not wearing a face mask in

1 a meeting with others, at the time of what he himself recognizes is
2 COVID, a highly contagious disease - that is, again, a historical
3 fact - that that behavior was not reasonable or justified, given the
4 orders that he received, and the options that he had.

5 The court also recognizes that the language about EUAs is
6 convoluted in many ways, but it has been interpreted consistently,
7 throughout military jurisprudence, as regardless of the source, the
8 federal government, and the military in particular, has a fundamental
9 interest in a fit and able fighting force, and that has always been
10 understood to include, the ability to demand and necessitate - or
11 mandate, as the case may be - necessary vaccinations to ensure to the
12 health of the force, even at the extent that those vaccinations or
13 immunizations, can, in fact, themselves be a great personal danger to
14 the people receiving it - again, that was the smallpox vaccine; that
15 is a consequence of serving in the military, and serving our nation,
16 and the choice that individuals make when they subsume themselves to
17 the ethos of serving in the military.

18 The accused had other options as well. At the time he
19 chose to disregard the order, he had filed a 138 complaint. As I
20 understood it, from reviewing what was provided to the court in
21 Defense A and A-1, at the time, this was still an ongoing 138 that
22 had not been resolved. There was still the ability for him to pursue
23 action through his members of congress, which he did, in fact,

FINDINGS

1 testify he pursued later, and the options he had available to make
2 his command aware or to make the military as a whole aware, still lay
3 ahead of him. The fact that it may or may not have been successful
4 after the fact is not a justification for the conduct that took place
5 at the time.

6 Based on all of the testimony I've heard, all of the
7 documentary evidence that I've been provided with and have fully
8 reviewed, the court makes the following finding -

9 With regard to the amended - we'll call it "merged"
10 Specification 1 of Charge I - please rise.

11 [The accused and his counsel did as directed.]

12 Lieutenant Bashaw and counsel, regarding the amended -

13 **Specification 1 of the Charge, the court finds you: Guilty.**
14 **As to Specification 3 of the Charge, the court finds you: Guilty.**

15 Please be seated.

16
17
18 [The accused and his counsel did as directed.]

19 **As to The Charge, the court finds you: Guilty.**

20 Counsel, are you ready to proceed to sentencing?

21 TC: Yes, Your Honor.

22 MJ: Before we proceed, counsel, do you - have you, I should ask
23 - reviewed and prepared an amended charge sheet, and what's it marked
24 as, please? Has defense counsel had a chance to review it?

1 TC: Yes, Your Honor. All parties have reviewed it, including
2 the accused; all parties have initialed and dated the amended charge
3 sheet, Your Honor, and it is with the court reporter.

4 MJ: [After reviewing AE XIX.] Lieutenant Bashaw, we are now
5 entering the sentencing phase of the trial, where you have the right
6 to present matters in extenuation and mitigation; that is, matters
7 about the offense, or yourself, which you want me to consider in
8 deciding your sentence.

9 In addition to the testimony of witnesses, and the offering
10 of documentary evidence, you may testify under oath as to these
11 matters, or you may remain silent, in which case, I will not draw any
12 adverse inference from your silence.

13 On the other hand, if you desire, you may make an unsworn
14 statement. Because the statement is unsworn, you cannot be cross-
15 examined on it. However, the government may offer evidence to rebut
16 any statement of fact contained in an unsworn statement.

17 An unsworn statement may be made orally, in writing or
18 both; it may be made by you, by your counsel on your behalf, or by
19 both.

20 Do you understand these rights?

21 ACC: Yes, Your Honor.

22 MJ: Counsel, is the personal data now, on the amended charge
23 sheet, which is Appellate Exhibit XIX, is that information correct?

1 TC: Yes, Your Honor.

2 MJ: Defense, do you agree?

3 CDC: We agree.

4 MJ: Defense counsel, has the accused been punished in any way
5 that would constitute illegal punishment under Article 13?

6 CDC: No, Your Honor.

7 MJ: First Lieutenant Bashaw, is that correct?

8 ACC: Yes, Your Honor.

9 MJ: Has there been any pretrial confinement, counsel?

10 TC: No, Your Honor.

11 MJ: So, there is zero days of pretrial confinement credit.

12 Counsel, I don't believe there would be a crime victim per
13 se, but is there any crime victim who is present at presentencing who
14 has the right to be reasonably heard?

15 TC: No, Your Honor.

16 MJ: Trial counsel, do you have any other evidence you wish to
17 present at this time?

18 TC: Your Honor, the government would submit, first, Lieutenant
19 Bashaw's officer record brief, which has been certified; but in
20 addition to that, to supplement, as was stated earlier on the record,
21 due to issues with moving things over from the Air Force, the
22 government would submit his DD 214 from the Air Force, Your Honor,
23 and then a Meritorious Service Medal, which was earned while he was

1 in the Air Force, that did not make it to his DD 214, because it was
2 issued as he was exiting, so it did not make it to this document.
3 There were issues with reflecting all of the awards that the earned
4 while in the Air Force onto his Army Officer Record Brief, Your
5 Honor.

6 MJ: Understood.

7 Defense, have you had an opportunity to review the both the
8 record brief, the DD 214 with the addendum of the new award, and are
9 you satisfied that, in combination, those three documents reflect
10 correctly what would normally be a single document of an ORB?

11 CDC: We are, yes.

12 MJ: First Lieutenant Bashaw, have you had a chance to actually
13 review these documents?

14 ACC: Yes, Your Honor.

15 MJ: Do you agree that they are complete, and not missing any
16 information concerning any awards or medals that you'd be entitled to
17 wear, or anything about your service history?

18 ACC: Yes, Your Honor.

19 MJ: Is there any objection to this being admitted?

20 CDC: No, Your Honor.

21 MJ: This is going to be Prosecution 5 - it's been admitted.

22 Anything further?

23 TC: No, Your Honor. The government rests.

1 MJ: Defense?

2 CDC: Your Honor, we would call First Sergeant Tally as a
3 witness.

4 **FIRST SERGEANT PHILIP TALLY, U.S. Army, was called as a witness by**
5 **the defense, was sworn and testified as follows:**

6 **DIRECT EXAMINATION**

7 **Questions by the civilian defense counsel:**

8 Q. First Sergeant, can you state your name and rank, and spell
9 your last name?

10 A. Philip Rashawn Tally, First Sergeant, APHC; T-A-L-L-Y.

11 CDC: Since we haven't met in person, I'm Dave Willson; I'm one
12 of Lieutenant Bashaw's defense attorneys. We're going to go over -
13 we're in the sentencing phase of this trial, and we're going to
14 discuss his character.

15 Q. Do you know Lieutenant Bashaw?

16 A. Yes.

17 Q. How do you know him?

18 A. He was my commander at APHC for a year.

19 Q. In what timeframe?

20 A. I arrived here June 2021 - October 2021 - he was commander
21 to June of the next year, 2022.

22 Q. You were his first sergeant?

23 A. Yes.

1 MJ: Counsel, I think you need to look at the dates on that,
2 because we haven't gotten to June of '22 yet.

3 CDC: That's correct. Thank you, Your Honor.

4 Q. June of 2021?

5 A. I apologize, okay. Thank you, Your Honor.

6 Q. How much contact during that timeframe did you have with
7 him?

8 A. Every day, all day.

9 Q. How many soldiers were in that command?

10 A. I think we fluctuated between 100-115, so, give and take -
11 so, our IMAs, which we had 13, and 105 soldiers on our TDA.

12 Q. Were they all centrally located or spread out?

13 A. Our IMA or reserve soldiers, they're spread out. We have
14 some people stationed at the Pentagon and USHUS, so we have some
15 onsies and twosies spread out, but for the most part, they're
16 consolidated here.

17 Q. Kept you relatively busy?

18 A. Real busy. Every day, all day.

19 Q. Based on - let me ask you this. How long have you served
20 in the Army?

21 A. Fifteen years.

22 Q. How many commanders have you served for?

23 A. Two - three, I apologize.

1 Q. Including Lieutenant Bashaw?

2 A. Roger.

3 Q. Could you rank those commanders, based on your experience?

4 You don't have to give names, but where would you put Lieutenant
5 Bashaw within that?

6 A. Probably 1 or 2.

7 Q. How would you characterize him as a commander?

8 A. Two different ways - from a commander, who takes care of
9 their people, amazing, probably the best in the aspect of taking care
10 of soldiers, empathy, compassion, just being somebody the soldiers
11 can trust; transparent, talking about his previous struggles in life,
12 and the soldiers were comfortable, and they wanted to come to him.
13 They loved him.

14 But from a military aspect, since he came from the Air
15 Force to the Army, there was a lot of phone calls between me and him,
16 just to get him adjusted to Army lingo, and the way we did things in
17 the Army, from an admin standpoint.

18 But he worked hard, he asked questions on things he didn't
19 know. He was never scared to ask a question, even if it was "A" for
20 what COA stands for, 'Sir, this is something that we learned in PLC.'
21 So, he was never scared to ask those questions.

22 Q. You two worked well together?

23 A. Yeah, we worked well together.

1 Q. Was he passionate?

2 A. Yes, very passionate - very passionate about what he
3 believes in. Most times, that was taking care of the soldiers in his
4 formation. Even after command, he continued to do the same thing -
5 he was still as passionate about taking care of the people that
6 served under him. I could often call him, after his command, 'Hey,
7 sir, can you help me with this?' And, 'First Sergeant, I've got it.'
8 Even to this day, even until last week, we were discussing an NCOER
9 for one of my staff sergeants, how to do it right, how to take care
10 of him the right way.

11 Q. Has your opinion changed of him since he's been charged,
12 and going through this process?

13 A. No. The way I lead is, I look at people first, so I know
14 him as a person, and to me, he's the same person he was when he was
15 in command.

16 Q. Was he empathetic?

17 A. Yes, very.

18 Q. Can you give one or more examples of times where he went
19 above and beyond what he needed to do?

20 A. Yeah, one of my soldiers - I won't say his name, unless you
21 want me to - he arrived to the unit, and within the first week, his
22 parents died in a fire. So, when the soldier came in shaking,
23 letting me know, 'Hey, First Sergeant, I just found out my parents

1 passed away. I need to get back to home - Kansas.' So me - I think
2 it was a Friday afternoon, AER is not open, the soldier can't afford
3 to get there. The first thing I did, I pulled out my credit card,
4 put it on my credit card; not the right thing to do, not by
5 regulations - call AER, emergency - we should've did all that, yeah,
6 I've got it. But, take care of the soldier, right?

7 So, I get it - he pays the \$600 for a flight, and I'm done
8 with it, 'Just pay me back when you can.' I get in the car, halfway
9 home, I see a PayPal message, and Lieutenant Bashaw sent me about
10 \$400 for the flight, for the soldier. I didn't ask him, I just told
11 him what I was doing, so if somebody, 'Hey, First Sergeant, you
12 shouldn't have paid for it,' that he knew what was going on. But the
13 money hit my account, and I guess that's one of the best examples I
14 could give you.

15 Q. Others, regarding taking care of soldiers?

16 A. It was all the time. I guess I mentioned his struggles
17 early on in life with alcohol and addiction, so he was very open,
18 because we had other soldiers going through similar things about how
19 he overcame that, what he did. I know people usually look at those
20 in mental health as something that makes people weak, but he didn't
21 have those things. He let them know, 'Hey, this is what I went
22 through, this is how I overcame it, and this is how you can overcome

1 it.' I think that was one of the biggest things - another example I
2 could use.

3 Q. Did he have an open-door policy for soldiers?

4 A. Yeah, I think our open-door policy is more than open-door,
5 because we both allowed soldiers to text us at any time. Usually,
6 the first sergeant, 'Oh, you can't talk to the first sergeant or
7 commander.' My soldiers - and I'm sure they did it to him - would
8 send us texts at like 10 o'clock at night, anytime they wanted to,
9 anytime they had a problem. It's as open as possible, wide open.

10 Q. What's your opinion of his loyalty?

11 A. He's really loyal. He believes, and I'm sure he said that,
12 in defending the Constitution of the United States is something that
13 he'd say that he was doing this to serve his country. I've never
14 seen him not be loyal to the soldiers in this formation. He's always
15 been loyal to me - anything I ever needed, I could call him, and he
16 would give me the shirt off his back, I'm sure.

17 Q. What are some of the things that you've seen him do for or
18 with soldiers since all the charges and everything began?

19 A. I spoke already about the NCOER. I've called him on a
20 couple of occasions, and he's called me, when there was issues with
21 soldiers going on. Maybe they were not doing the right thing, or
22 their performance was diminishing. And he'd call me, 'First

1 Sergeant, how do we fix this? Let's get together and figure out the
2 way to help this soldier.' So, he's continued to do that.

3 Q. How about reenlistments?

4 A. Two reenlistments. It's a testament to how much the
5 soldiers love him, because even though this is going on, Sergeant
6 First Class Eskrich and Specialist Chingulani, both asked him to be
7 their reenlistment officers. So, 2 or 3 weeks ago, we were at the
8 Lincoln Memorial, and before that, we were in Washington, and he
9 performed both of those.

10 CDC: One moment, Your Honor.

11 [After conferring with ACC.]

12 Q. First Sergeant, is there anything else you want to add?

13 A. No - for myself, I tell Lieutenant Bashaw, we're really,
14 really close, and he's somebody I respect and care about deeply.
15 He's more than just my commander, he was my friend. He was a great
16 commander, and I appreciate him taking care of the soldiers in our
17 formation. He did a hell of a job.

18 CDC: Thank you. That's all, Your Honor.

19 MJ: Government, do you have any cross?

20 TC: Briefly, Your Honor.

21 [END OF PAGE]

22

1 **CROSS-EXAMINATION**

2 **Questions by the trial counsel:**

3 Q. Just a couple questions - soldiers could trust First
4 Lieutenant Bashaw, is that correct?

5 A. Yes, that's correct.

6 Q. He leads by example?

7 A. Yes.

8 Q. Sets the standard, you could say?

9 A. [Affirmative response.]

10 Q. You said two soldiers just recently asked him to perform
11 reenlistments?

12 A. That's correct.

13 Q. That's after the incidents on 30 November of '21, correct?

14 A. That's correct.

15 Q. Is it a fair characterization to say that soldiers who have
16 served underneath him look up to him?

17 A. That's correct.

18 Q. They look at him to set that standard?

19 A. That's correct.

20 Q. Do you think an officer who willfully disobeys orders
21 should be setting that example?

22 A. To disobey an order?

1 Q. Correct. Do you think an officer who willfully disobeys
2 orders should be setting an example for those young soldiers?

3 A. Can you rephrase - so, do you want him not to set examples
4 for soldiers?

5 Q. An officer, right? Who junior soldiers are looking at up,
6 correct, as First Lieutenant Bashaw - correct, he disobeyed orders.

7 A. Yeah.

8 Q. Do you think that has a negative impact on those soldiers
9 who look up to him?

10 A. Yeah, I think it can have a negative effect, because it's
11 somebody they look up to, so they might look at it as something they
12 can do now.

13 Q. That's what right looks like?

14 A. Yeah, this is what right looks like, or maybe 'I can get
15 away with the same thing.'

16 Q. Yeah, if you disagree with an order by your commander,
17 disobey it ----

18 A. No, a hundred percent.

19 Q. How important is discipline to the unit? As a first
20 sergeant, you can testify to this better than anybody else in here.

21 A. My time at 3rd Group - I'm going to try to - discipline, I
22 think, is needed to ensure that soldiers are ready to go deploy,
23 right? A hundred percent. I guess with my time at 3rd Group, looking

1 at a lot of undisciplined professional - but the best soldiers in the
2 word, SF guys are. A lot of times, they could be undisciplined - no
3 haircuts, no beards, no standing in formation, no parade rest. But
4 as professionals, and technically and tactically, they are the
5 epitome of what soldiers should be like. They do their job better
6 than anybody else in the whole world.

7 Q. We can probably agree to disagree maybe on the discipline
8 nature of Special Forces units ----

9 A. Discipline in training, but I think when you're talking
10 about discipline, when it comes from me, 'Is your uniform perfect?
11 Is your hair cut right? Are you abiding by the things in 670-1 AR
12 and DA Pam? Is my ribbons 1/8 above my pocket?' What form of
13 discipline are we speaking of? The discipline to go out and be the
14 best soldier you can be? Or the discipline to stand in formation,
15 stand at parade rest when you're talking to somebody who is not an E5
16 or E6?

17 Q. Discipline within the mission of the United States Army.

18 A. I think it's two-fold, but that's my opinion. If I walk
19 across the grass, some sergeant major will say, 'Don't walk across my
20 grass,' does that help me take care of somebody's family? Does that
21 help me take care of the soldier? Does it help me when they go
22 downrange? No. But I think some would consider that as discipline.

23 Q. Being undisciplined isn't a problem for you?

1 A. In some areas.

2 Q. That's fine.

3 How important is readiness to a unit?

4 A. Readiness is everything. MEDPROS to 350-1 - I think
5 readiness is important. Units that are on PTDO - coming from 1st Med
6 Brigade, with units on a 90-day call, we had to be ready; your
7 equipment had to be ready, you had to be ready, everything at the
8 ready.

9 Q. To be deployable?

10 A. To be deployable.

11 But then you come to a TDA unit, and I have onesies and
12 twosies that may deploy. I think I'd dial it back a little bit. Am
13 I keeping you on a Friday night, because you're read on MEDPROS?
14 We're not a med unit that's ready to deploy in 90 days? No. I'm
15 giving you, 'Go take care of it on Monday or Tuesday when you get a
16 chance.'

17 I guess it's different.

18 Q. So, having a healthy unit isn't that important, if you're
19 in a TDA unit?

20 A. No, but you're more flexible. Flexibility - from what I'm
21 saying, you have to be ready all the time, because it can impact the
22 mission, today, tomorrow, you can be out the door. It's happened to
23 me, when I heard I had to be out the door the next day.

1 When I'm sitting at a TDA unit, and I'm like, 'You're red
2 on your PHA.' When I have 75 majors and above, and I'm trying to
3 convince them, 'Hey, please, sir, when you have time, take care of
4 your PHA,' it's very different across the board.

5 Q. You still need all those soldiers to be healthy?

6 A. Correct, a hundred percent - their family and themselves.

7 Q. I kinda want to switch gears a little bit, going back to -
8 you spent significant time with Lieutenant Bashaw while he was a
9 commander, correct?

10 A. [Affirmative response.]

11 Q. While he was overseeing soldiers?

12 A. Yup.

13 Q. In your opinion, during that time, any issues with him as a
14 commander?

15 A. No, that's my side of him calling me a thousand times a day
16 with a question.

17 Q. One of the best, you said, right?

18 A. Yeah, one of the best - I guess, for a first sergeant, when
19 you get brand-new commanders, it's a teaching thing. Do you take
20 that time to teach? How important is that time to teach, versus all
21 your administration and other things? I was okay taking the time,
22 even though sometimes, it could be like, 'Sir, I really don't have
23 time to teach you how to do this. I've got all this going on.' But

1 that's my job. It's one of the roles that I fulfill as a first
2 sergeant and sergeant major for APHC.

3 Q. For Lieutenant Bashaw specifically, you talked about his
4 loyalty to the United States - his soldiers' loyalty to him, because
5 of that?

6 A. They were loyal to him, a hundred percent.

7 TC: Thank you.

8 MJ: Defense, do you have any more redirect of this witness?

9 CDC: No, Your Honor.

10 MJ: May he be excused, and if so, temporarily or permanently?

11 CDC: Permanent, Your Honor.

12 TC: Permanent, Your Honor.

13 [The witness was duly warned, permanently excused and withdrew from
14 the courtroom.]

15 MJ: Defense?

16 CDC: Your Honor, we would call Ms. Radavich.

17 **ROSANNE RADAVIDICH, civilian, was called anew by the defense, was**
18 **reminded she was still under oath, and testified as follows:**

19 **DIRECT EXAMINATION**

20 **Questions by the civilian defense counsel:**

21 Q. Just to give you an update, we are in the sentencing phase,
22 and we're going to discuss Lieutenant Bashaw's character.

23 Again, how long have you known Lieutenant Bashaw?

1 A. Since late 2019, I believe.

2 Q. You know him from a work relationship?

3 A. Correct.

4 Q. What is your relationship to him at work?

5 A. I am his supervisor.

6 Q. Have you been his supervisor the entire time?

7 A. The entire time he was here at APHC, no; other than when he
8 was a company commander, yes.

9 Q. Let's break those two time periods up. How often did you
10 see him when he was company commander?

11 A. I didn't see him often - it was COVID. We did call
12 occasionally, and just discuss how things were going, and talk about
13 some of the challenges of leading, just making sure how we had
14 thought processes. To some extent, I am a little bit of a mentor;
15 I'm not going to claim tons of credit there, but I remember when he
16 was considering the company commander position, and we definitely
17 talked about that, and what some of the challenges might be. We did
18 stay in touch after.

19 Q. During company commander time, is it safe to say his calls
20 to you, or with you, related to the soldiers that were within his
21 command?

22 A. Yes, sir, just being a commander in general, or leading
23 others. It may not have been about a specific person, and sometimes,

1 it was about specific people - but talking about the best way to lead
2 others.

3 Q. What was your impression of his leadership qualities?

4 A. I've always admired what I see. He's very engaged. He is
5 serving alongside people - I've never seen him ask somebody do
6 something that he wouldn't go out and do with them. I always felt
7 like, when I saw him address issues, he was fair and forthright, he
8 would do it in a timely manner, he did it in an appropriate manner,
9 and it was with the intent to get people back on track, to doing
10 their jobs well, and accomplishing them.

11 Q. What was your impression of him as his supervisor?

12 A. It has been a pleasure to work with Mark. From the time
13 that he got to APHC - I guess I've tried to think how I would explain
14 what it is like to work with him in a way that I can convey
15 adequately.

16 There are many tangibles. He's reliable - if I need to
17 know something, I know he's gonna tell me. I'm not going to have to
18 go ask for it. If I need something done, I can count on him to do
19 it.

20 As a previous NCO, I think one of the things that made him
21 very attractive for company command was his ability to understand
22 what the soldiers needed, and within our division, he was an
23 incredible bridge between the officers, the enlisted, and the very

1 civilian-heavy Army Public Health Center. He helped both me, and my
2 other civilian supervisor, make sure that we were adequately
3 employing our soldiers, that we were allowing them time to build
4 their capabilities as soldiers, maintain their readiness, and still
5 be available to support the mission we have from the technical side
6 of the house. It's something we do very poorly, and are still
7 working on improving. Soldiers very often get caught in the middle
8 of that, and sometimes, I think the company command experience is
9 part of what let him do that - understanding how you balance the
10 needs of the company and the technical sides.

11 I will tell you that he has a great wealth of technical
12 expertise that we have in very short supply in Army entomology. We
13 typically do not do the pest management, but the Air Force does, so
14 finding an Army officer with that expertise and experience, who is
15 not selfish, and is willing to share that and help train, teach and
16 build others is rare.

17 When he is in the office, it is a better place. We have
18 higher morale; we are more effective and efficient, and we just get
19 more done. He has been missed while he has been gone.

20 I really appreciate, at our level, where we are working
21 strategically, that we get given challenges that there are times I
22 don't know what to do with them. They are big problems; they are
23 far-reaching problems. They are not easy to solve. Whenever I would

1 bring him something, instead of complaining about it, he would take
2 it on with enthusiasm. And very often, he could get that project
3 done in a way that pulls everybody else along with him. People that
4 I struggle to engage - when I had underperformers that I would
5 struggle to get up to the level they needed to be at, working with
6 him ----

7 Q. Lieutenant Bashaw?

8 A. ---- was something that - working with Lieutenant Bashaw
9 was one of the things that helped them figure out what they needed to
10 do, and start to make progress again, where I had not been able to
11 get them there.

12 Q. Is he passionate?

13 A. Yes.

14 Q. In what regard?

15 A. So, when he makes decisions, I have not seen him make
16 decisions out of anger or on the spur of the moment. I've always
17 seen him take information in, and then try and make the best decision
18 he can, based on what information he has.

19 But he is enthusiastic. He is willing to reach out to
20 others. And when it comes to our level, collaboration is huge, and
21 his ability to pull others in and help us move toward a solution to,
22 often, a very complex problem has been huge.

1 I talk about intangibles - having been interviewing for
2 things recently, they like to throw this term out a lot - I can
3 describe a lot of things about him that make him good to work with.

4 I guess the best way I can explain the intangibles is, I
5 guess, to say this - if today ends, and he is found guilty of all
6 charges ----

7 Q. Which has happened already.

8 A. Okay - so, today ends, this is all decided; and tomorrow,
9 the Army calls me up and says, 'We are recalling you to active duty.
10 Here is your uniform, and I am sending you to the Balkans, or the
11 Horn of Africa, or Afghanistan or Iraq,' and you told me I could pick
12 the person I wanted to go with me. He would be one of the people I
13 would take - even now, and even today, because I know that he will
14 help me get that mission done, and he will take care of our people,
15 and that when it comes to the people you deploy with, I have learned
16 they can send you to God's garden, and if they send you there with
17 rotten people, it will be the worst deployment you will ever have.
18 And they can send you to the armpit of the world, but if they send
19 you there with good people, your deployment will be solid. I say
20 that, and I would still take him with me.

21 Q. There's been some questions regarding or insinuation that
22 his acts were selfish, and have or potentially have had a negative

1 impact on the soldiers that look up to him. What would be your
2 impression of that?

3 A. Captain Genrich asked me how I kind of reconciled the
4 actions leading to this court-martial with the man that I described.
5 And that was a great question, and I have thought about this, and my
6 answer is that I have seen Lieutenant Bashaw comply with a lot of
7 orders that didn't necessarily make sense - they weren't the best way
8 to do something, and sometimes, it is frustrating. But I do firmly
9 believe that if he did not believe something to be illegal, immoral
10 or unethical, he would believe that it was still his duty to comply.

11 So, if he did not, it was a perception that it was one of
12 those things, and as an officer, I have seen him try to take a stand
13 on things that he felt were not right, and I have never seen him be
14 selfish. That's not been one of my experiences. I have seen people
15 make decision out of greed, and spite, and selfishness, and laziness,
16 and I have never seen those things from him.

17 Is it possible to make the wrong choice for the right
18 reasons? I don't know. But I have absolutely seen people make the
19 wrong choice for all the wrong reasons, and that is not something I
20 have seen from him.

21 Q. Anything else you'd like to add?

22 A. No, sir.

1 Q. Real quick, you touched on this a little bit - I'm
2 assuming, based on what you've just said, that he has been missed
3 since all of this has been going on?

4 A. He has.

5 Q. Will he continue to be missed?

6 A. I have been asked when and if he will be able to come back.
7 Yes, he has been missed.

8 CDC: That's all the questions I have, sir.

9 MJ: Cross?

10 ATC: Yes, Your Honor.

11 **CROSS-EXAMINATION**

12 **Questions by the assistant trial counsel:**

13 Q. Ms. Radavich, just a few questions.

14 Would you say that soldiers in your organization do look up
15 to Lieutenant Bashaw?

16 A. Yes, I've seen that.

17 Q. Since all this occurred on 30 November, have you had to
18 take on any extra roles or responsibilities in your organization?

19 A. I have had to take over the direct supervision of one NCO -

20 ---

21 MJ: Counsel, the impact on military performance or jobs that
22 occurred because the government chooses to initiate a prosecution is

1 not appropriate evidence for consideration. I will not hear it.
2 I'll strike any response; it is inappropriate for questioning.

3 The government chose to initiate the prosecution of the
4 accused. The consequence to the military mission because of that is
5 irrelevant for the purpose of sentencing at this point. Nothing
6 further.

7 ATC: Yes, Your Honor. Understood.

8 MJ: Continue with your questions.

9 ATC: No further questions, Your Honor.

10 CDC: No follow-up, Your Honor.

11 MJ: May I excuse her temporarily or permanently?

12 CDC: Permanent.

13 [The witness was duly warned, permanently excused and withdrew from
14 the courtroom.]

15 MJ: Counsel?

16 CDC: Judge, Ms. Kalyn Slye.

17 **KALYN SLYE, civilian, was called as a witness by the defense, was**
18 **sworn and testified as follows:**

19 **DIRECT EXAMINATION**

20 **Questions by the civilian defense counsel:**

21 Q. Ms. Slye, can you state your full name, spelling your last
22 name?

23 A. Kalyn Nicole Slye - S-L-Y-E.

1 Q. Do you know Lieutenant Bashaw?

2 A. Yes, sir.

3 Q. How do you know him?

4 A. I actually met Lieutenant Bashaw in August of 2020, when I
5 first arrived at APG. I was a former sergeant; he was, honestly, my
6 commander, and one of the best people I know.

7 Q. How long had you been in the Army when you first met him?

8 A. For about 5 years, sir.

9 Q. So you had been through numerous company commanders?

10 A. Yes, sir.

11 Q. What was your work relationship with him?

12 A. I actually worked along with him during the UPL - I was the
13 UPL for the unit.

14 Q. Can you tell us what UPL stands for?

15 A. It is the unit prevention leader, so I did all the drug
16 testing within the unit. There is probably 100 soldiers, which is
17 really a lot - it was just me. And it was really nice, because
18 Lieutenant Bashaw actually, even though it is the commander's
19 program, he let me - he knew I was the subject matter expert on it,
20 he wanted to know my advice. With this unit being primarily higher-
21 ups and officers, whenever there was backlash, because a Major versus
22 an E5 at the time, that's kinda like child's play, and he had my
23 back, no matter what. There was numerous times when people would

1 come and defy me. He would go after them, and he would use his
2 authority. Even though he was just a first lieutenant and stuff, it
3 didn't matter what rank - he stood up for his enlisted soldiers.

4 Q. How much contact would you have - let me ask you this.

5 How long did you serve under him?

6 A. For about a year, sir.

7 Q. How much contact did you have? Was it daily?

8 A. It was, really, daily. He was actually always the first
9 one to be at PT, and even though he would drive an hour and a half,
10 like I said, he was the first one there. It wasn't mandatory for
11 officers to be at PT at all. So, for him to be there, and just spend
12 time with the enlisted soldiers, it really showed a lot of character
13 on his part.

14 Q. Was your experience - did you notice that was the same
15 experience other soldiers had with him?

16 A. Yes, sir. In fact, actually, every single time he saw
17 anybody, he would always try to stop to say hello, and you know, how
18 are you, and stuff. It was more than that, because he remembered
19 little things, like a soldier, 'How have you been doing with the
20 restaurant...how is your brother been doing?' I've been gone for about
21 8 months now, and yet, he still calls me to see how my brother is
22 recovering - stuff like that. You don't see that in a lot of leaders
23 nowadays. He is one of the greatest people I've ever met, and the

1 fact that I came out here for him, on my own time, on my own money,
2 that shows a great of an impact he made on my life.

3 Q. Where did you come from?

4 A. Colorado, sir.

5 Q. When we discussed your testimony, you mentioned that he
6 trusted you in your duties?

7 A. Yes, sir.

8 Q. What do you mean by that?

9 A. When I first got here, especially because a lot of people
10 think that NCOs in general, when you first get here, they're like,
11 'Okay, you're kind of weird about it.' I had six soldiers underneath
12 me, and there was one particular soldier that has had the off-the-
13 wall problems and situations. Not once did he ever try to think,
14 'We're going about this the wrong way.' He was always there to help
15 guide me. He would always call up and check upon them, to make sure
16 how they're doing, even though he could've called First Sergeant. He
17 allowed me to do whatever I needed to do for the UPL. He understood
18 what I needed, what I wanted. Overall, there was no question about
19 it - he trusted me. A relationship with anybody, even if it's a
20 commander, a peer, co-worker or anything, you need trust, and he
21 trusted all of his soldiers.

22 Q. You also mentioned in our discussion that the other
23 enlisted and NCOs really respected him. Can you give us an example?

1 A. Yes, sir. In APHC, we don't have to pull Staff Duty or
2 AOD, or anything like that, very often. Whenever the arms room would
3 go down late at night or anything, he was always the first one to try
4 and either take a shift, or take one of the worst shifts - if it was
5 2-4, or anything, he would do that, so a soldier could be able to
6 sleep in or go to work, or go to a training on his - to try to better
7 themselves. For him to do that, especially drive an hour and a half
8 to show up for a 2-hour shift, it does show a lot of character.

9 Q. You also mentioned that he would never endanger or put
10 others at ease [sic]. What do you mean by that?

11 A. Lieutenant Bashaw is the type of person that he would
12 literally give the shirt off of his back. He would go hand-in-hand
13 with someone to make sure that those soldiers are okay. With
14 everything, even though I wasn't there for that - yes, I didn't wear
15 a mask or anything - he would never deliberately go and put himself
16 in harm's way, or put another soldier in harm's way. If he felt that
17 you were uncomfortable, he would never be around you. I do generally
18 think he would never do something, especially if all the soldiers -
19 if they weren't uncomfortable, they were never forced to do anything.

20 Q. So, he was very sensitive to the needs of others?

21 A. Yes, sir.

22 Q. You also mentioned that if you came back on active duty -
23 what did you mean by that comment?

1 A. In my time, I've had a lot of toxic leadership, and he was
2 the best commander, and one of the greatest people I've ever met.
3 Even though I was med boarded and everything, if I was called back to
4 Ukraine, and Lieutenant Bashaw was still my commander, I would go in
5 a heartbeat, and I couldn't say the same about the rest of the
6 leadership here.

7 Q. Also, you had mentioned promotions and reenlistments? In
8 our discussion, you mentioned promotions and reenlistments. I'm
9 assuming meant of NCOs and enlisted?

10 A. [Affirmative response.] At the time when I was here, every
11 single promotion, reenlisted, or anything, the commander was always
12 there. A lot of people think that's kind of their job, to show face
13 and eat a piece of cake. But in reality, when I was just talking and
14 catching up with First Sergeant and Captain McCarthy, they have a
15 group farewell as a whole, because it's easier for them. At the time
16 when Lieutenant Bashaw was still in command, that wasn't a thing - it
17 was just because it was easier, and would save time. But he would
18 make time for that person, and he would go to each section and attend
19 every baby shower, promotion, everything - going away, farewell, even
20 if it was at Sunset Cove, and you'd have to drive 30 minutes. He was
21 always there.

22 Q. Finally, he's family oriented?

23 A. Yes, sir. Very.

1 Q. What do you mean by that?

2 A. Even attending every single farewell - if it was at the
3 Greene Turtle or anything, he would always bring his kiddo - you've
4 probably been hearing him out in the hallway. He was always bringing
5 him, always bringing his oldest. They were always around, and it
6 really shows. Even though they had other opportunities, or he
7 could've left them at home, he brought them, and we definitely
8 accepted them into our platoon. His son was our mascot. He's still
9 there. Even if he's not the commander, we still represent that, and
10 we still see him.

11 CDC: Thank you. That's all.

12 MJ: Government?

13 TC: Briefly, Your Honor.

14 **CROSS-EXAMINATION**

15 **Questions by the trial counsel:**

16 Q. I just want to ask about one little point that you'd said.
17 You had said that First Lieutenant Bashaw would never deliberately
18 put others in harm's way, is that correct?

19 A. Yes, sir.

20 Q. You're aware that he was just convicted of not wearing a
21 mask, and refusing to test before coming to work, is that correct?

22 A. Yes, sir.

23 Q. This was during the COVID pandemic?

1 A. Yes, sir.

2 Q. So, you'd agree that that does put others in harm's way,
3 correct?

4 A. Yes, sir.

5 TC: Thank you.

6 MJ: Any redirect?

7 CDC: No, Your Honor.

8 MJ: Temporary or permanent?

9 CDC: Permanent.

10 [The witness was duly warned, permanently excused, and the telephone
11 connection was terminated.]

12 We would call, except for Lieutenant Bashaw, Colonel
13 Carmichael.

14 **LIEUTENANT COLONEL DONALD CARMICHAEL, U.S. Army, was called a witness**
15 **by the defense, was sworn and testified as follows:**

16 **DIRECT EXAMINATION**

17 **Questions by the civilian defense counsel:**

18 Q. Colonel Carmichael, can you state your rank, name and spell
19 your last name?

20 A. Lieutenant Colonel Donald Carmichael - C-A-R-M-I-C-H-A-E-L.

21 Q. Are you on active duty?

22 A. Yes.

23 Q. Where are you stationed?

1 A. Walter Reed.

2 Q. How long have you been there?

3 A. I boarded in January of 2020.

4 Q. How many years do you have in service?

5 A. Less than 3. I was a reservist in the 90s, and came back
6 to serve at 60.

7 Q. What is your AOC now - your MOS?

8 A. General surgeon - 61J.

9 Q. Do you know Lieutenant Bashaw?

10 A. Yes.

11 Q. How do you know him?

12 A. We first met - for military officers and direct
13 commissioning officers, there's two parts now in getting us on-
14 boarded. The first part is a direct commissioning course, which is
15 at Fort Sill, Oklahoma. We did that in September of 2019. It's
16 about 4 weeks. The second part of BOLC - AMEDD BOLC, which is in San
17 Antonio, Texas. That went from October until the end of December.

18 Q. Of?

19 A. 2019.

20 Q. You were with, or in the same course, with Lieutenant
21 Bashaw the entire time?

22 A. Yes.

23 Q. How well did you get to know him?

1 A. Fairly well. Obviously, in a training environment, both at
2 Fort Sill and in San Antonio, you're in platoons. We were in the 1st
3 Platoon; he was in 1st Squad, I was usually in 3rd Squad or 4th Squad.
4 At Fort Sill, it was mostly almost AIT stuff - a lot of marching.
5 But we got to know each other in academic periods in classrooms,
6 things like that.

7 In San Antonio, it was mostly classroom opportunities. We
8 shared the same classroom.

9 Q. Would you say you became friends?

10 A. Yes.

11 Q. When you left San Antonio, what timeframe was that?

12 A. We graduated the last week, I think, the 20th of December,
13 and on-boarded in January in Washington, DC.

14 Q. In what year?

15 A. That would've been January of 2020.

16 Q. Have you kept in touch with him since then?

17 A. Yes.

18 Q. Did you go directly to Walter Reed?

19 A. Yes.

20 Q. And he came to APG?

21 A. To APG?

22 Q. To this installation here?

23 A. Yes.

1 Q. You said you kept in touch. In what respect did you keep
2 in touch?

3 A. Basically, he was always excited about my career, and was
4 always seeing how I was doing. He personally brought - I can't
5 remember how many - two, three or four soldiers down from APG to
6 Walter Reed that needed medical attention. So, he personally
7 escorted them down, and many times, he would give me a call and say,
8 'I'll be done.' I'd say, 'What are you coming down for?' 'I'm
9 bringing a soldier down that needs help.'

10 Also, his wife had her child there.

11 Then he came down personally to see me before I deployed in
12 May of that year - 2020.

13 Q. Where did you deploy to?

14 A. The Horn of Africa.

15 Q. What's your impression of his character?

16 A. An amazing individual. I think it's been summarized by the
17 prior witnesses, but basically, an honest, hard-working leader that
18 puts, in my situation, the fellow students first. So, in our
19 training, you're at student status, so whether I'm a lieutenant
20 colonel, or a second lieutenant, basically, we're all the same.
21 There's opportunities for the students to get into leadership
22 positions. Lieutenant Bashaw, obviously, when he was leading a squad
23 or platoon, was an obvious leader.

1 But the other thing was, standing in 1st Squad, he would
2 always help that were put in as a platoon leader, whether as an NCO
3 or an officer, and he would give them help with formation, with
4 commands, with marching and everything else.

5 It was something always something that he was doing. He
6 had a knack of always - obviously, in a training situation, whether
7 it was a ruck march in the middle of the morning, the middle of the
8 night, night land nav, combatives, PRT in the mornings, he was always
9 positive. He exuded positivity. So, people standing information for
10 an hour or an hour and a half, somehow, he made that formation time
11 go like that [snapping fingers], and created a great esprit de corps,
12 a great positivity, sort of 'embrace the suck, let's all do this
13 together,' kind of embodiment.

14 Q. What's your impression of his loyalty?

15 A. I can't imagine a more loyal individual.

16 Q. Passion?

17 A. Obviously, yeah. Passion for his country, passion for his
18 now Army and the military, passion for his soldiers.

19 Q. There's been testimony, or there's been questions, about
20 selfishness with his actions of refusing to wear a mask, refusing to
21 test, and the potential that could cause to others, or the impact it
22 could have on soldiers that worked with him for him. What's your
23 impression of that?

1 A. I wasn't there. Obviously, wearing a mask was the CDC
2 guideline, but whether he isolated himself, he made a decision based
3 on what he felt was necessary and important, and it obviously was a
4 wrong decision. But I don't think he did it out of willingness to
5 harm his soldiers.

6 Q. So, has that changed your opinion of him at all?

7 A. No.

8 CDC: That's all the questions I have at this time, Your Honor.

9 MJ: Government, do you have any cross?

10 ATC: No, Your Honor.

11 MJ: May this witness be excused, and if so, temporarily or
12 permanently?

13 ATC: Permanently, Your Honor.

14 MJ: Defense?

15 CDC: Permanent, Your Honor.

16 [The witness was duly warned, permanently excused and withdrew from
17 the courtroom.]

18 Your Honor, we would call Lieutenant Bashaw.

19 **[END OF PAGE]**

20

1 FIRST LIEUTENANT MARK C. BASHAW, U.S. Army, the accused, was recalled
2 as a witness by the defense, reminded he was still under oath, and
3 testified as follows:

4 DIRECT EXAMINATION

5 Questions by the civilian defense counsel:

6 Q. Lieutenant Bashaw, can you tell the court, where were you
7 born?

8 A. Newburyport, Massachusetts.

9 Q. In what year?

10 A. 1986.

11 Q. Are you married?

12 A. Married.

13 Q. For how long?

14 A. Twelve years.

15 Q. Kids?

16 A. Three.

17 Q. What ages?

18 A. 11, 9 and 2.

19 Q. You have prior military service?

20 A. Yes.

21 Q. In the Air Force?

22 A. Yes.

23 Q. How long was that?

1 A. Close to 14 years.

2 Q. Beginning when?

3 A. January 17, 2006.

4 Q. And ending when?

5 A. September 8, 2019.

6 Q. What was your role in the Air Force?

7 A. I was in civil engineering; test management was my
8 specialty.

9 Q. What was the rank you attained?

10 A. Senior NCO - E7, master sergeant in the Air Force.

11 Q. Why did you separate from the Air Force?

12 A. I applied for a commission in the Army to become a medical
13 entomologist, and it was a conditional release from the Air Force,
14 pending the selection to the Army Medical Service Corps.

15 Q. So, more of a transition from the Air Force to the Army?

16 A. A direct transition, yes, sir.

17 Q. Did you go to school during that timeframe, or after the
18 transition?

19 A. During the past 14 years of my enlisted service, I
20 continued my education, and worked throughout my active duty on my
21 personal time to get an Associates through the University of
22 Maryland, and an Associates through the Community College of the Air
23 Force, on to a Bachelors, and then onto a Masters.

1 Q. When did you finish your Masters?

2 A. That was summer of 2018.

3 Q. I apologize - that was while you were still in the Air
4 Force?

5 A. While I was still in the Air Force.

6 Q. And then you heard Colonel Carmichael, you then went into
7 the medical program?

8 A. Yes, so, the Medical Service Corps; I commissioned as a
9 medical entomologist.

10 Q. So, you went through the school in Oklahoma, and then San
11 Antonio?

12 A. That's correct.

13 Q. When did you arrive here?

14 A. I arrived here in January of 2020.

15 Q. When did you become company commander?

16 A. That was May of '21.

17 Q. Were you the only person up for that position? Were you
18 selected? How did that come about?

19 A. I was selected to do an interview; then I was interviewed,
20 and then I was selected after that interview process.

21 Q. Who was the interviewee [sic] - or what position were they
22 in?

1 A. They were the Army Public Health Center Director, and a
2 couple other senior individuals at Army Public Health Center - the
3 first sergeant at the time, and the Sergeant Major of Army Public
4 Health Center.

5 Q. Do you know how many people you were competing against for
6 that?

7 A. I don't.

8 CDC: Lieutenant Bashaw, I'm handing you what's been marked as
9 Defense Exhibit D [for ID].

10 Q. DO you recognize that document?

11 A. Yes.

12 Q. What is it?

13 A. It's 16 years of achievement - a good soldier book.

14 Q. Can you highlight for the court some of the - at least in
15 your mind - some of the more important awards, promotions,
16 achievements, that are listed in there?

17 A. Yes, sir.

18 So, a promotion to Captain, U.S. Army; a congratulation
19 letter from the Chief Medical Services Corps ----

20 TC: Your Honor, clarification from the government. The
21 government has not seen this document. I'm just wondering if the
22 witness is reading from the document right now, or from memory, Your
23 Honor.

1 MJ: Counsel, do you have a copy of this for opposing counsel to
2 review? Are you going to seek to introduce it?

3 CDC: Yes, Your Honor.

4 MJ: Are you seeking to relax the rules to permit it to be
5 admitted?

6 CDC: Yes.

7 TC: Then no objection, Your Honor.

8 MJ: So admitted.

9 CDC: I don't believe he's reading from it.

10 MJ: Again, I'm just trying to address this procedurally.

11 Continue.

12 Q. You say "promotion," but you haven't pinned on, correct?

13 A. That's correct. I'm still in promotable status.

14 Q. Next?

15 A. The Meritorious Service Medal.

16 Q. When did you receive that?

17 A. October - I believe it was October 19, 2019, as I was
18 leaving the United States Air Force.

19 Q. That's when you received your DD 214 from the Air Force?

20 A. I'd received a DD 214 about a month prior, so that didn't
21 make it onto the DD 214 and onto iPerms.

22 Q. And next?

1 A. An Air Force Commendation Medal - I have three of those;
2 and the Air Force Achievement medals - four.

3 Q. Okay. Any other awards, achievements, that you want to
4 highlight?

5 A. Senior NCO of the Quarter of Barksdale Air Force Base.

6 Q. When was that?

7 A. It was 2018, I believe, the third quarter.

8 Q. And anything else?

9 A. That's all at this time.

10 Q. What was your - do you recall - let me back up.

11 How many OERs have you had since being in the Army?

12 A. Two.

13 Q. Generally, how were you graded?

14 A. On the first one, I was graded at the highest, and the
15 second one was the second highest.

16 [The court reporter adjusted the accused's microphone.]

17 Q. Is your wife in the service?

18 A. Yes.

19 Q. What service is she in?

20 A. The U.S. Air Force.

21 Q. How long has she been in the Air Force?

22 A. Fifteen years.

23 Q. Do you consider yourself soldier-oriented?

1 A. Yes.

2 Q. Can you explain that a little bit?

3 A. Upholding the standards, and the orders that are given to
4 me, and following orders, following regulations, working with my
5 leaders, working with subordinates, military bearing, customs and
6 courtesies.

7 Q. What do you recall that you did to try to help out the
8 soldiers that worked with you or for you?

9 A. Just being available for them, working with them,
10 communicating with them, clarifying issues, solving problems, things
11 like that.

12 Q. And you heard the testimony of First Sergeant and Colonel
13 Carmichael, and now Ms. Slye; their characterization of you in
14 helping others, that was just you being you?

15 A. That's correct.

16 CDC: Your Honor, I would ask to introduce Defense Exhibit D for
17 ID at this point.

18 MJ: Government?

19 TC: Just a brief moment for the government to review it, Your
20 Honor.

21 [Reviewing DE D for ID.] No objection, Your Honor.

22 MJ: That's Defense D for identification?

23 CDC: It is Defense Exhibit D [for ID], Your Honor.

1 MJ: I'll admit it - just one moment.

2 [Reviewed DE D.] Defense D is admitted.

3 Q. So, obviously, you've been convicted of failure to obey
4 orders. Was it your intent to cause controversy in your actions?

5 A. No.

6 Q. What was your intent?

7 A. Clarification to work through something I strongly believed
8 in, to pursue it, and to understand that - personal accountability at
9 the end of the day, I will always be responsible for my words and my
10 actions, no matter the outcome.

11 Q. You've accepted that?

12 A. Yes.

13 Q. There's been testimony, or questions, about the impact of
14 your choices on the unit, the mission, and soldiers. What would you
15 have to say about that?

16 A. I don't agree with that.

17 Q. Why do you say that?

18 A. Just because of my broad knowledge of the situation, and
19 kind of a birds eye view of it. At the end of the day, I'm just -
20 you know, I'm just carrying out what I believe in. I have a faith-
21 based system, and glory to God, Jesus Christ is my Lord and Savior.

22 Q. You did hear Ms. Radavich explain that she had to now
23 supervise this NCO who was - could be difficult at times, let's put

1 it that way. Obviously, you not being there did have an impact,
2 would you agree?

3 A. Yes.

4 Q. If you had to do it all over again, would you have changed
5 anything?

6 A. No.

7 Q. What is your goal moving forward? Is it your desire to
8 continue serving in the Army?

9 A. I would absolutely love to, sure.

10 Q. Do you have anything else that you want to say to the
11 court, or add?

12 A. No, I just want to reiterate the fact that - and I said it
13 earlier - I take sole responsibility for my words and my actions, and
14 I always will.

15 CDC: That's all I have at this time, Your Honor.

16 MJ: Cross?

17 TC: Briefly, Your Honor.

18 **CROSS-EXAMINATION**

19 **Questions by the trial counsel:**

20 Q. I have two very brief questions.

21 A. Yes, sir.

22 Q. Acknowledging, after this case, you'll go back to continue
23 serving in the United States Army, as you leave this courtroom here

1 today, correct? That's a statement, right? You're going to continue
2 serving in the United States Army, after today, when you walk out of
3 here, you'll still be in the United States Army.

4 A. That's correct.

5 Q. So, when you walk out of this courtroom, understanding
6 that, in the current environment, a new strain of COVID is spreading,
7 rates are rising. If you're required to test to return to work, will
8 you obey that requirement?

9 A. If -

10 Q. If you're required to test to return to work, let's say,
11 tomorrow, will you obey an order to test for COVID-19, in order to
12 return to work?

13 A. I would definitely have to clarify. Based on what was
14 delivered today, and the fact that this was deliberated as a lawful
15 order, then [pause] - an EUA product - no.

16 Q. After leaving here today, if you're required to wear a
17 mask, would you obey that order?

18 A. No.

19 TC: Thank you.

20 MJ: May I ask a brief question, counsel, just for
21 clarification?

22 [END OF PAGE]

23

1 **EXAMINATION BY THE COURT**

2 **Questions by the military judge:**

3 Q. I just want to make sure I understand your answer, because
4 you asked for clarification. I want to just make sure that you
5 actually have that clarification, and you have your opportunity say
6 what you wish to say.

7 A. Yes, sir.

8 Q. The court has made a determination, as you are well aware
9 now, that the underlying authorities for the order are lawful.

10 That's not a matter that you get to debate further at this point in
11 time. I made that finding.

12 If you receive an order consistent with that finding, that
13 those underlying authorities are, in fact, lawful, from your superior
14 or someone who is authorized to give you that instruction or order
15 for you to do your military duties, or a prerequisite for you doing
16 your military duties - such as, as counsel just asked you - if you
17 need to provide a negative test, or if you have to wear a mask, if
18 you are in a certain type of environment, whatever that environment
19 may be, are you advising the court that you would not abide by that
20 order?

21 A. I respect the court's ruling, and yes, I would obey that
22 order.

1 Q. You do understand that whatever - you may not even agree
2 with my order, and I gather you don't - that's my finding, I should
3 say, and that is your right. Don't misunderstand. Your counsel will
4 certainly review with you any appellate rights you may have, but
5 until such a time as - I believe that I am correct, and I might prove
6 to be mistaken, but until such a time, my finding is, in fact, my
7 finding. I just want to make sure that you have no misunderstanding
8 about what that means, if you are to receive a similar order - that's
9 all.

10 Do you understand that?

11 A. I understand, Your Honor.

12 MJ: Based on the court's questioning and clarification to the
13 accused, government, you may ask any follow-up - actually, first, to
14 the defense, then to the government.

15 Defense, would you like to ask any follow-up questions,
16 based on the court's questions? Or any further clarification or
17 instruction you would like to discuss with him? If you need a recess
18 to do so, that would be more than adequate. Just let me know.

19 CDC: If we could do that, that would help, Your Honor.

20 MJ: Very well - a 5-minute recess.

21 [The court-martial recessed at 1541, 29 April 2022.]

22 [The court-martial was called to order at 1547, 29 April 2022.]

23 MJ: This court is again called to order.

1 All parties who were present previously, including the
2 accused, are again present.

3 [The trial counsel reminded the accused he remained under oath.]

4 Mr. Willson?

5 CDC: Thank you, Judge.

6 **REDIRECT EXAMINATION**

7 **Questions by the civilian defense counsel:**

8 Q. Lieutenant Bashaw, let's clarify. If they reinstated the
9 mask mandate, and the testing mandate today, and you were ordered to
10 show a negative test or telework, would you obey and show a negative
11 test or telework?

12 A. Yes, I respect the ruling. Absolutely.

13 Q. That doesn't negate your strongly-held concerns, especially
14 with regard to health, correct?

15 A. Right. I mean, I would continue to do research and studies
16 - just part of being a medical officer.

17 Q. But your strongly-held beliefs are not going to go away?

18 A. Right.

19 Q. But do you agree that you would continue to be the soldier
20 that these people portrayed you as?

21 A. Absolutely. One hundred percent.

22 Q. Depending on what happens, potentially, you could turn
23 around tomorrow, and be headed back to work. Do you agree with that?

1 A. Yes.

2 Q. And if you were told, 'We've now reinstated the mask
3 mandates,' would you wear a mask?

4 A. I'll always obey lawful orders.

5 Q. Anything else you want to add?

6 A. No, sir.

7 Q. Do you now believe that maybe your timing wasn't perfect?

8 A. Yes. You know, there's always hindsight, and looking back,
9 could I have done some things different, and communicated a little
10 bit better, and worked a little bit harder with the individuals
11 within the situation, and potentially avoided putting myself and
12 others in a bad situation - absolutely. I do look back at that, and
13 I always take things like that into consideration, for sure. That
14 way, moving forward, I can adjust fire, as need be, and to properly
15 carry myself as a United States soldier.

16 Q. As the court stated, you had not fully exhausted all your
17 avenues of redress, correct?

18 A. Correct.

19 Q. And so, is that one part you would've changed, if you could
20 go back and ----

21 A. Yes.

22 CDC: I believe that's all, Your Honor.

23 MJ: Government, do you have any follow-up questions?

1 TC: Yes, Your Honor.

2 **RECROSS-EXAMINATION**

3 **Questions by the trial counsel:**

4 Q. Lieutenant Bashaw, I just want to be really clear. I asked
5 you two separate questions about whether or not, when you left here,
6 you would obey the orders, and you said no. The judge posed a very
7 similar question to you 10 seconds after, and you said yes. So,
8 which one were you being honest about?

9 A. Yes.

10 Q. Okay, with the judge, you were being honest?

11 A. Yes, sir.

12 Q. Earlier, you told me that you felt these orders were still
13 unlawful, is that correct?

14 CDC: Your Honor, I'm going to object. Asked and answered.

15 MJ: This is cross-examination, counsel. Again, the court had
16 posed questions concerning the need for clarity; I'm going to allow
17 the government the same leeway I provided to the defense earlier.

18 You may want to repeat the question.

19 Q. After the judge, yesterday, stated and ruled, that the
20 orders were lawful, this morning, you stated that you still felt the
21 orders were unlawful. Is that correct?

22 A. I felt that way, and I - I mean, I have my certain beliefs.
23 But at the same time, I respect Your Honor's ruling, and absolutely.

1 He ruled lawful, and I respect it, and I will absolutely carry out
2 lawful orders.

3 Q. So, you agree now that the orders are lawful, even though
4 earlier today, which was after the judge had already stated the
5 orders were lawful, you said you felt they were still unlawful.
6 Because that was your testimony just this morning - that even though
7 the judge had said the orders are lawful, you said, 'Nope, I feel
8 these still are unlawful.'

9 MJ: Counsel, in fairness, I not going to - I don't want have
10 this getting into a rabbit hole. He doesn't have to agree.

11 TC: Correct, Your Honor.

12 MJ: I'm not asking him to agree with me, because he isn't
13 welcome to disagree. Again, I've made the determination. The
14 question is, simply, whether or not he personally agrees, but whether
15 he's going to follow - however you want to phrase the question.

16 TC: Correct. Your Honor, the government's point is this -

17 Q. Lieutenant Bashaw, you still felt the order was unlawful,
18 after the judge had told you that he ruled that it was lawful. So,
19 now you're stating that you're willing to follow what you believe to
20 believe to be an unlawful order. Isn't that correct?

21 A. I'm willing to follow the judge's ruling, and the
22 lawfulness that he ruled on this order.

23 Q. Even if you believe it's unlawful?

1 A. Yes. Yes.

2 TC: Thank you.

3 No further questions, Your Honor.

4 MJ: Mr. Willson, you were standing. I didn't mean to not
5 address you. Do you have anything you want to add, or were you
6 objecting to the line of questioning?

7 CDC: It was going to be an objection, if we kept going down that
8 road.

9 MJ: He's your witness, this is his sentencing proceeding. I'm
10 going to give you the last word. Do you have anything you want to
11 add or ask him at this point?

12 CDC: No, Your Honor.

13 [The accused returned to his seat at counsel table.]

14 MJ: Defense, do you have any additional witnesses or evidence
15 you wish to introduce?

16 CDC: We don't, Your Honor.

17 MJ: Defense, are you now resting regarding sentencing?

18 CDC: Yes, Your Honor.

19 MJ: Trial counsel, do you have any rebuttal evidence you wish
20 to offer?

21 TC: No, Your Honor.

22 MJ: Trial counsel, are you prepared to present any argument as
23 to sentencing?

1 TC: Yes, Your Honor.

2 MJ: Government, please proceed.

3 TC: Your Honor, just shy of 247 years ago, General George
4 Washington, at the time, stated, "Discipline is the soul of the
5 Army."

6 As you've heard from the witnesses today, or this
7 afternoon, Lieutenant Bashaw is essentially what can be considered
8 the standard-bearer for an officer in the United States Army.
9 Although counsel is impartial to a soldier who has spent enlisted
10 time, and then becomes an officer, we can all agree that a soldier
11 who has significant time, both as a commissioned officer, and a
12 noncommissioned officer, whether it be in the Air Force or the Army,
13 has significant benefits. We heard those today. We heard those from
14 First Sergeant, from Colonel Carmichael, from other junior soldiers
15 that served under him, from his now civilian supervisor.

16 Lieutenant Bashaw is the epitome of an officer, and a
17 leader. People look up to him. They trust him.

18 As Ms. Slye said, he's one of the greatest leaders that
19 she's ever met. He inspires a loyalty to those who serve under him.
20 To those who serve around him. To those who are even above him.
21 They look at him as that standard bearer.

22 That's exactly why the court needs to hold him accountable
23 with a sentence today, because he knew better. We've heard his

1 experience in entomology. Ms. Radavich told you that he brings
2 experience and knowledge to the United States Army that it hasn't
3 possessed in a very long time - that other branches admittedly do
4 better than the United States Army.

5 He himself has told you about his experience and medical
6 training, and research, and data.

7 When you have soldiers who look up to a commissioned
8 officer like that, and who trust his judgment and opinion, that
9 willfully disobeys orders of his superior officers, that's a recipe
10 for disaster, Your Honor. That's directly against why we have rules
11 and laws in the Army about obeying orders, because obeying orders is
12 fundamental to serving in the United States military. It is
13 fundamental to serve in the United States Army.

14 The United States Army's mission, essentially, is to
15 deploy, fight our win our Nation's wars. The moment we allow
16 soldiers to take their personal judgment, and put themselves before
17 the Army, before we can say 'Well, if you're at risk, then you can
18 say no. You can just opt out and refuse at will,' is the moment the
19 United States Army will not be able to fight its wars, and the moment
20 officers start inspiring junior soldiers to do the same, discipline
21 goes out the window.

22 The only logical conclusion at this moment is that
23 Lieutenant Bashaw will obey unlawful orders now, as he stated; even

1 though you said that they were lawful, he still believes it's
2 unlawful today.

3 The only voice is that of this court that can send him a
4 clear message for anyone who would seek to emulate his actions and
5 disobey the order of their commander, even for the most closely held
6 beliefs that, if they are wrong, is to adjudge him a reprimand, and
7 forfeitures of two-thirds pay for 6 months, and tell those people -
8 tell those soldiers - that the behavior of First Lieutenant Bashaw on
9 November 30, 2021, is unacceptable in the United States Army.

10 Thank you, Your Honor.

11 MJ: Thank you, counsel.

12 Defense?

13 CDC: Thank you, Your Honor.

14 Your Honor, we're asking that Lieutenant Bashaw not be
15 given any punishment.

16 Trial counsel just talked about sending a message.
17 Obviously, there's a number of service members in the courtroom.
18 This has, from what we've heard, gotten some pretty high visibility.
19 The fact that he was court-martialed, and now will carry a
20 conviction, is a message.

21 As Lieutenant Bashaw testified, ADP 6-22, Chapter 2, says
22 every soldier has an ethical duty to challenge the lawfulness of an
23 order that they believe is unlawful, or an order that they believe is

1 unlawful. But in doing that, they understand that they're putting
2 themselves at peril. He testified to that. He understands, and he
3 said, 'I take responsibility for my words and my actions,' and he
4 absolutely did that. He's willing to accept the consequences, which
5 he's already been accepting. He hasn't been able to go back to work,
6 and based on what you heard from Ms. Radavich and the other
7 witnesses, he loves what he does, and he loves the people he works
8 with. He goes out of his way to help those people. So, even that
9 has been a punishment to him - just joking around, but he's been
10 sentenced already to spending all his time at home with a 2-year old.

11 But he loves people. He loves his family, his soldiers -
12 Ms. Radavich said she would go to war with him. Ms. Slye said, 'I
13 would come back on active duty for him.' His first sergeant is good
14 friends with him. This is not somebody who is just going to
15 carelessly take what happened and go off half-cocked. He understands
16 that his messaging may have not been appropriate, and as he said, in
17 hindsight, there's things he would've done differently. But he was
18 trained to deal with health concerns and health issues. His mindset
19 is protection - 'I need to protect me. I need to protect my
20 soldiers.' He still believes that, and he said he will continue to
21 research and try to put out the messages that are appropriate, in
22 line with the guidance and the orders that he receives.

1 He truly believed that the orders were unlawful. Trial
2 counsel says he knew better. He's not a lawyer, and to say that he
3 should've known - again, his timing may have been poor, but we
4 literally spent three-quarters of a day, and multiple motions, and
5 multiple pages of law, trying to figure this out. So, it wasn't
6 clearly like, the law says you can't go over 55 miles an hour, you
7 did 56. This is very complicated legally, and for somebody who is
8 not an attorney, it is even more complicated and convoluted.

9 He obviously is a very passionate person. He believes what
10 he believes. He believes very strongly, and that's how he approached
11 his command, his work, and the people he deals with.

12 Taking away pay - obviously, he has a conviction. I'm not
13 sure what a reprimand would do at this point. Taking away pay will
14 only have an impact on his family, and his wife and his three kids.
15 So, we would ask for no punishment.

16 Thank you, Your Honor.

17 MJ: Thank you very much, counsel.

18 Defense counsel, have you advised the accused, orally and
19 in writing, of his post-trial and appellate rights, including the
20 rights contained in Rule for Courts-Martial 1010?

21 CDC: We have, Your Honor.

1 MJ: I am looking at what's been marked as Appellate Exhibit
2 XVIII, which is captioned "Post-Trial and Appellate Rights
3 Advisement." It is dated the 27th of April 2022.

4 Does the accused have a copy in front of him?

5 CDC: He does, Your Honor.

6 MJ: Again, this is the appellate rights form. Lieutenant
7 Bashaw, I'm going to ask you to please look at page four. Is that
8 your signature on the appellate rights form?

9 ACC: Yes, Your Honor.

10 MJ: Defense counsel, is that also your signature on Appellate
11 Exhibit XVIII?

12 CDC: It is, Your Honor.

13 MJ: Lieutenant Bashaw, did your defense counsel explain to you
14 your post-trial and appellate rights?

15 ACC: Yes, Your Honor.

16 MJ: Do you have any questions about your post-trial and
17 appellate rights?

18 ACC: No, Your Honor.

19 MJ: Because there is more than one named defense counsel here,
20 which counsel will be responsible for any post-trial actions in this
21 case?

22 ACC: Mr. Willson.

1 MJ: As far as looking at any exhibits for deliberation, it
2 would just be Defense Exhibit D, and there should be one from the
3 government, Prosecution 5. Is that correct?

4 TC: Yes, Your Honor.

5 MJ: Counsel, are we in agreement that those are the two
6 exhibits?

7 CDC: Yes, Your Honor.

8 MJ: I'm going to have a brief recess so I can review this
9 information, then we will come back for sentencing.

10 Counsel, I have it now as 1605. I'd ask that we could
11 reconvene at approximately 1630.

12 [The court-martial closed at 1605, 29 April 2022.]

13 [The court-martial opened at 1638, 29 April 2022.]

14 MJ: This court again called to order.

15 All parties who were previously present, to include the
16 accused, are again present.

17 Counsel, before I pass sentence - first of all, I'm
18 returning Defense Exhibit D, as well as Prosecution 5.

19 I just wanted to make a few observations that I think are
20 relevant prior to sentencing.

21 Lieutenant Bashaw, I have reviewed carefully your good
22 soldier book, your DD 214, your ORB. Some of the accolades you've
23 received in the last 16 years would suggest nothing but being a

1 water-walker. Some of the language that I saw in there includes
2 "hard charger." You were selected for promotion despite having a
3 pending court-martial. You have awards for outstanding volunteer
4 service, contributions to success of numerous MSGs - I'm not sure
5 what that means in the Air Force, but I gather it is something to do
6 with flights or support groups. You had them overseas in Korea, the
7 Horn of Africa, and when deployed in support of Iraqi Freedom, and in
8 the UAE.

9 Your OER describes you as a "force multiplier," that you
10 possess exemplary leadership skills. You are intelligent and
11 thoughtful.

12 Your witnesses came and testified today in the sentencing
13 phase - First Sergeant Tally described that you were amazing at
14 taking care of soldiers. You were willing to go above and beyond.
15 You're loved by soldiers, you were loyal, hardworking, and much more.

16 Ms. Radavich testified that she admired your leadership,
17 that you were always engaged, you were forthright. You were able to
18 find solutions to very difficult issues and challenges. That you
19 were good for morale. You take care of people. That you were vital
20 to mission accomplishment. You were effective, efficient, and you
21 promoted those characteristics in others. She described you as
22 having a great wealth of expertise that was largely unique, because

SENTENCE

1 of your Air Force background. You were reliable, and she would
2 absolutely deploy with you, if the situation required.

3 Ms. Slye, who came on her own dime, I believe she said,
4 said that you're the best person she knows. You're the first to
5 volunteer, a great leader, you're not toxic, and you are trustworthy.

6 Colonel Carmichael described you as an amazing individual,
7 honest, hardworking, an obvious leader, always positive, someone who
8 created esprit de corps, and you're willing to help others.

9 It's not my job do disabuse you, Lieutenant, of your
10 opinions, or to say that your concerns are right or wrong. Your
11 concerns are your concerns. I simply hope that your conduct going
12 forward allows all those wonderful things that all of your witnesses
13 said about you to continue to happen.

14 Therefore, will you please rise.

15 [The accused and his counsel did as directed.]

16 This court sentences you as follows:

17 **To no additional punishment.**

18 Please be seated.

19 [The accused and his counsel did as directed.]

20 Counsel, are there any other matters that need to be taken
21 up before this court adjourns?

22 TC: No, Your Honor.

23 CDC: [Negative response.]

1 MJ: Counsel, I'd like to see all of you very briefly back in
2 chambers right away when we're done.

3 This court is now adjourned.

4 [The court-martial adjourned at 1642, 29 April 2022.]

5 [END OF PAGE]

PRECERTIFICATION OF THE RECORD OF TRIAL

IN THE CASE OF

**First Lieutenant Mark C. Bashaw
Headquarters Company, U.S. Army Public Health Command
Aberdeen Proving Ground, Maryland 21005**

In accordance with Army Regulation 27-10, paragraph 5-56d, I have reviewed the record of trial and attachments in the case of United States v. First Lieutenant Mark C. Bashaw for compliance with R.C.M. 1112(b) and R.C.M. 1112(f) and affirm that the record contains no substantive errors in the transcription of a military judge's ruling, testimony of any witness, pleas, findings, or sentence.



TANNER C. JAMESON
CPT, JA
Trial Counsel
DATE: 7 June 2022

AUTHENTICATION OF THE RECORD OF TRIAL


IN THE CASE OF

FIRST LIEUTENANT MARK C. BASHAW
Headquarters Company, U.S. Army Public Health Command
Aberdeen Proving Ground, Maryland 21005

I received the precertified record of trial and attachments for authentication on 7 JUNE 2022. My signature below indicates the following:

a. The record of trial and attachments are in compliance with R.C.M. 1112(b), R.C.M. 1112(f), and Interim Army Regulation 27-10, para 5-56(d) (1 Jan 19).

b. Any necessary corrections to render the written transcript of the proceedings substantially verbatim in accordance with Army Regulation 27-20, para 5-56e (1 Jan 19) have been submitted to the court reporter. Once any necessary corrections are made, the record of trial and the transcript may be certified by the court reporter.


ROBERT A. COHEN
LTC, JA
Military Judge

DATE: 20 June, 2022

COURT REPORTER CERTIFICATION OF
RECORD OF TRIAL AND TRANSCRIPT

I certify that the record of trial in the case of United States v. First Lieutenant Mark C. Bashaw contains all of the items required pursuant to RCM 1112(b) and RCM 1112(f), and that this record of trial was prepared in accordance with the instructions in the CCA Certified ROT Template and Instructions, and any service regulation. I further certify that the written transcript of the court-martial proceedings reflects any necessary corrections made by the military judge during authentication, and that the transcript is a true, accurate, and complete copy of the audio recording of the court-martial proceedings.



LEO M. BULAVKO
GS09
Court Reporter

DATE: _____ 2022

Arrange and bind the record of trial with allied papers in the sequence indicated below. A court reporter is responsible for certifying the record of trial, prior to transmittal to CCA, in accordance with RCMs 1112, 1116, and AR 27-10.

1. Pages 1 (Cover page) and 2 (Chronology Sheet) of this template. MJO will calculate the dates on Chronology Sheet for you. See AR 27-10, para 12-7, for guidance on companion and other cases.

2. Substantially verbatim recording of court-martial proceedings. Segregate open and closed sessions of the court-martial in accordance with RCM 1113 and the following guidance:^{*}

a. Ensure that each closed session of the court-martial is recorded on a separate DVD marked CLOSED SESSION, placed in its own envelope marked CLOSED SESSION, and sealed.

b. Label all DVD(s) and envelopes with the information on page 1 of this template.

c. Mark all DVDs and envelopes with "1 of X," as necessary (for example, the second DVD of six DVDs and its envelope should be marked, 2 of 6). All DVDs of open sessions may be in one envelope.

d. Mark all DVDs with their beginning and ending timestamps. The timestamps for closed sessions should match those shown on the Index.

3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate review under RCM 1115, if applicable.

4. All transfer orders, confinement orders, and excess leave orders or a copy of DA Form 31, Request and Authority for Leave.

5. Briefs of counsel submitted after trial, if any.

6. Entry of Judgment and all attached documentation, including Statement of Trial Results, in 5 copies.

7. When required, signed advice of staff judge advocate or legal officer, together with all clemency papers, including clemency recommendations by court members.

8. Any requests for copies of the court-martial record pursuant to RCM 1106 or 1106A (attach written requests, and any certificates of service).

9. Matters submitted by the accused and/or victim under RCM 1106 or 1106A, or any written waiver of the right to submit such matters.

10. Any deferment request and the action on it (including any request to waive automatic forfeitures under Article 58b).

11. Conditions of suspension and proof of service on probationer under RCM 1107, if any.

12. Copy of convening order and any amending order (unless included in the transcript).

13. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the transcript).

14. Congressional inquiries and replies, if any.

15. DD Form 457, "Preliminary Hearing Officer's Report," pursuant to Article 32, if such hearing was conducted, followed by any other allied papers which accompanied the charges when referred for trial (including any matters submitted under RCM 405(k), unless included elsewhere in the record of trial.^{*}

16. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

17. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses, and depositions).

18. Records of former proceedings (Article 30a) and/or trials, (e.g., electronic/digital record of former proceeding, including audio recording and any scanned documentation/transcripts, CD/DVD format).^{*}

19. Printed transcript of the court-martial proceedings in the following order:

a. Request/Certificate of Service for Certified Record of Trial for Accused/Victim/Qualifying/Non-qualifying victim.

b. Military judge errata.

c. The Index containing both page numbers from the transcript (if included), and timestamps from the audio recording.

d. The first page of the written transcript should begin with: "Proceedings of a [General/Special] Court-Martial. The military judge called the Article 39(a) session to order. The court met at [location] at [time] on [date] pursuant to CMCO [number]."^{*}

e. Substantially verbatim transcript of proceedings in court, including Article 39(a) sessions, if any.^{*}

f. Signed military judge authentication of Record of Trial.

g. Signed court reporter certification statement, attesting that the transcript is a true, accurate, and complete copy of the audio recording of the court-martial.

20. Action of convening authority, if any, including any action pursuant to RCM 1109(e)(3)(B) (Reduction in sentence by recommendation of trial counsel), if applicable.

21. Exhibits admitted in evidence (Prosecution and Defense Exhibits, in that order).^{*} Include the transcript page number and the timestamp in the audio record where the evidence was offered and admitted.

22. Exhibits offered and not admitted in evidence. Include the transcript page number and the timestamp in the audio record where the evidence was offered and not admitted. (Prosecution and Defense Exhibits, in that order).^{*}

23. Exhibits pre-marked for identification, but not offered or admitted. (Prosecution and Defense Exhibits, in that order).^{*}

24. Appellate exhibits, including but not limited to, proposed instructions, written offers of proof or preliminary evidence (real or documentary), briefs of counsel submitted at trial, request to be tried by military judge alone (if any), the accused election of members under RCM 903 (if any), any statement by convening authority required under RCM 503(a)(2), and the election for sentencing by members in lieu of sentencing by military judge under RCM 1002(b).^{*}

25. Redaction. The following information shall be redacted from the record of trial prior to releasing it to any accused or victim, (including any transcript made pursuant to RCM 1114 and attached to the record of trial), unless the information establishes an element of an offense, or is otherwise required:

a. Any recordings of closed sessions, any transcripts of closed sessions, and any sealed exhibits.

b. Names of minor victims, and names of minor witnesses; if an identifier is used, use only the initials.

c. Social Security Numbers. If an individual's social security number is relevant, use only the last four digits.

d. Financial account information. If financial account numbers are relevant, use only the last four digits.

e. Home addresses. If a home address is relevant, use only the city and state.

f. Telephone numbers. If a telephone number is relevant, use only the last four digits.

g. Personal e-mail addresses. If a personal e-mail address is relevant, use only the first two characters and domain separated by asterisks (e.g., a2***@msn.com).

h. Dates of birth. If a named individual's date of birth is relevant, use only the year, unless birth month is relevant to the charged offense.

i. Any other information that could be used to identify a specific person other than the accused.

^{*}If the report of preliminary hearing or record of trial contains exhibits, proceedings, or other materials ordered sealed by the preliminary hearing officer or military judge, counsel for the Government, the court reporter, or trial counsel shall cause such materials to be sealed so as to prevent unauthorized examination or disclosure, pursuant to RCM 1113. Sealed material shall be properly marked, individually placed in separate envelopes with a copy of the preliminary hearing officer or military judge sealing order affixed to it, and inserted at the appropriate place in the record of trial. Do not duplicate sealed material for purposes of including in any copy of the record of trial. Instead, insert a copy of the sealing order in lieu of any sealed material, in any copies of the record of trial.