

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, HAYES, and MORRIS
Appellate Military Judges

UNITED STATES, Appellee
v.
First Lieutenant MARK C. BASHAW
United States Army, Appellant

ARMY 20220213

ORDER

WHEREAS:

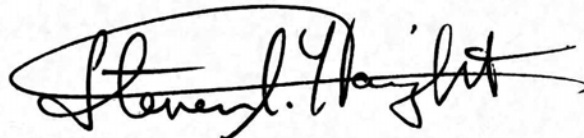
The Court has considered the application for grant of review of the decision of the Judge Advocate General.

NOW THEREFORE, IT IS ORDERED:

The petition is hereby DENIED.

DATE: 30 March 2023

FOR THE COURT:



STEVEN P. HAIGHT
Chief Deputy Clerk of Court

CF: JALS-DA
JALS-GA
JALS-TJ
JALS-CCR
JALS-CCZ
JALS-CR4

SERVED ON: 17
APRIL 2023

Accused

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

**BRIEF ON BEHALF OF
APPELLEE - SPECIFIED AND
GRANTED ISSUES**

v.

Docket No. ARMY 20220213

First Lieutenant (1LT)
MARK C. BASHAW,
United States Army,

Applicant¹

Tried at Aberdeen Proving Ground,
Maryland, on 28-29 April 2022,
before a special court-martial
convened by Commander, US Army
Communication Electronics
Command, Lieutenant Colonel
Robert A. Cohen, military judge,
presiding.

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES ARMY COURT OF
CRIMINAL APPEALS

Specified Issue

**THE APPLICANT MAY APPEAL THE
ARTICLE 69(c) FINDINGS BY THE
JUDGE ADVOCATE GENERAL OF THE
US ARMY PURSUANT TO Article
69(d)(1)(B). THE APPLICANT
REQUESTED REPRIEVE FROM THE
GUILTY RULING BASED ON
DEMONSTRATING THE ORDER TO
RECEIVE UNLICENSED EMERGENCY
USE AUTHORIZED (UNLICENSED)
PRODUCTS IS PATENTLY UNLAWFUL.**

Assignment of Error

¹ The government refers to 1LT Mark Bashaw as the Applicant for the specified issues.

**WHETHER THE ORDER TO
COERCIVELY SUBJECT APPLICANT TO
TAKING UNLICENSED EMERGENCY
USE AUTHORIZED PRODUCTS IS
PATENTLY UNLAWFUL?**

Statement of the Case

On 28 April 2022, a military judge sitting as a special court-martial judge on behalf of the General Courts Martial Convening Authority, convicted Applicant of violating a lawful order under of Article 92, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 892. The military judge found Applicant guilty of violating a lawful order pursuant to Article 92, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 892 on 28 April 2022. (Judgment). The determination of lawfulness was made on 28 April 2022. The military judge ruled against applying further sentencing and recommended the General Courts Martial Convening Authority drop the guilty charge on the basis of witness testimony noted in block 35 of the “Statement of Trial Results.”

Applicant acknowledged his post-trial and appellate rights on 29 April immediately following the sentencing on 29 April 2022 (App. Ex.) and sought to appeal the ruling. The Applicant’s only mechanism to appeal his case is through requesting an Article 69(c) review by the

Judge Advocate General (TJAG).

On 26 May 2022, the General Courts Martial Convening Authority upheld the conviction/findings of the court martial and denied the Judge's motion to dismiss the guilty charge. The General Courts Martial Convening Authority, under his command authority, then moved to involuntarily separate Applicant because Applicant was a probationary officer with a guilty verdict on 27 June 2022. The Applicant issued a formal elimination rebuttal on 17 July 2022 and issued his formal Article 69(c) case review to the TJAG, in writing, on 27 July 2022.

On 5 December 2022, the TJAG made a formal ruling to Applicant's request and stated "Applicant has not established a proper and specific basis for relief under one or more of the enumerated statutory grounds. Accordingly, the Application for Relief is denied."²

The 5 December 2022 letter from the TJAG did not clarify which statutes Applicant did not specifically address nor did the TJAG address any of the exhaustive evidence presented by the Applicant provided as additional evidence to his 29 April 2022 ruling. Applicant received a second letter informing Applicant of the right to appeal to the ACCA

² Action of the Judge Advocate General Application for Relief Article 69 UCMJ; 05 December 2022

pursuant to Article 69(d)(1)(B).

Credentials

The applicant serves in the Army Medical Service Corps in the Preventative Medicine (67C) career field, and applicant's specialty is Entomology (72B). Applicant's official duties include participating in fact-finding inquiries and investigations to determine potential public health risk to DoD personnel from diseases caused by insects and other non-battle related injuries. Applicant received an Associates of Science in Environmental Studies through the Community College of the Air Force (CCAF) in 2010, a Bachelor of Science degree in Management Studies from the University of Maryland, University College in 2013, and a Master of Science in Entomology from the University of Nebraska Lincoln in 2018. The applicant enlisted in the U.S. Air Force on 17 January 2006 and currently has 17 years of total active federal military service (TAFMS). The applicant served tours overseas to include Japan, Republic of Korea, Germany and multiple deployments to Africa, Middle East, and Central America. Applicant directly commissioned in the U.S. Army Medical Service Corps in September 2019. The applicant initially attended the Direct Commission Course at Fort Sill, OK, followed by the Basic Officer Leadership Course at Fort Sam Houston, TX. The applicant was then

stationed at the APHC in January 2020. While at the APHC, the applicant has successfully served as the Headquarters and Headquarters Company (HHC) Commander from May 2020 to July 2021. Currently, applicant serves in the Entomological Science Division as a Medical Entomologist. Applicant's specific duties at the Entomological Science Division within Army Public Health Center (APHC) requires that applicant participates in fact-finding information regarding entomological threats to public health and safety, and properly communicate the risk to our Soldiers. These threats included insect borne diseases, zoological, and other potential non-battle related issues. Applicant also supervised three enlisted Soldiers (Preventative Medicine Specialists, 68S). Additionally, applicant worked in a mosquito insectary to help with quality checks and standard operating procedures (SOPs). Applicant's official duties also include supporting the Army Public Health Program (Army Regulation 40-5) by sustaining the readiness of the force by protecting Army personnel from potential and actual harmful exposures to chemical, biological, radiological, nuclear, and high yield explosive (CBRNE) warfare agents; endemic communicable diseases; food, water, and vector-borne diseases; zoonotic diseases; ionizing and nonionizing radiation; combat and operational stressors; heat, cold, altitude, and other environmental extremes; environmental and

occupational hazards; toxic industrial chemicals and toxic industrial materials.

Statement of Facts

In July 2020 and September 2021, the Applicant addressed his medical concerns with his Army Public Health Center chain of command with visible vaccine safety signals and injuries. Additionally, as a preventative medical officer, the Applicant inquired about therapeutic usage, specifically hydroxychloroquine, Ivermectin, Zinc, Vitamin D, Vitamin C, and Quercetin, regarding treatment and prevention of SARS-CoV-2. The Applicant furthermore pointed to serious safety signals and substantial specific dangers to public health and safety by showing them data from the CDC Vaccine Adverse Event Reporting System (VAERS), which is also the DOD's tool to report adverse events from vaccinations. The Applicant repeatedly requested that the Army change its risk communication strategy to address COVID-19 vaccination safety signals and reliance of using unlicensed EUA products as definitive countermeasures.

On 21 September 2021, 1LT Bashaw submitted a religious accommodation to CPT McCarthy, his company commander, for all vaccinations due to his firmly held religious beliefs. He sought a religious accommodation for all vaccinations even before the Secretary of Defense issued his 24 August 2021

Memo, mandating the FDA Approved COVID19 vaccination directive. The Applicant later found out that the fully FDA Approved COVID19 vaccine labeled “Comirnaty” had not been produced and/or available to DOD Service Members, and the only available COVID19 “vaccinations” are emergency use authorized (EUA) and are subject to 10 U.S.C § 1107a and 21 U.S Code § 360bbb-3. These laws are the same laws that govern all emergency use authorized (EUA) products (masks, tests, and vaccines). Emergency use authorized products are clearly defined in Title 21 U.S.C 360bbb-3 as “a drug, device, or biological product intended for use in an actual or potential emergency” that “is not approved, licensed, or cleared for commercial distribution” by the FDA.

On 23 November 2021, CPT McCarthy ordered Applicant to self-procure and self-administer the experimental EUA rapid antigen SARS-CoV-2 tests. According to the FDA emergency use authorized (EUA) agreement letters, these rapid antigen CV19 test kits and masks are both “devices.” According to the legally binding EUA agreements between the FDA and test kit manufacturers, *“Negative results should be treated as presumptive and confirmation with a molecular assay, if necessary, for patient management, may be performed. Negative results do not rule out SARS-CoV-2 infection and should not be used as the sole basis for treatment or patient management decisions including infection control decisions. Negative results should*

be considered in the context of a patient's recent exposures, history and the presence of clinical signs and symptoms consistent with COVID-19." The FDA agreement letters with the manufacturers also go on to waive a manufacturer's requirement to follow good manufacturing practices, which means all test kits are inherently less safe for anyone using them. These letters also state that "**No** *descriptive printed matter, advertising, or promotional materials relating to the use of your product may represent or suggest that this test is safe or effective for the detection of SARS-CoV-2.*"

This testing/screening was to start 30 November 2021 with a negative test result no more than 72 hours prior to accessing my place of duty. On 24 November 2021, the Applicant informed CPT McCarthy that his order was both unlawful and discriminatory. CPT McCarthy then stated in an email "*you are more than welcome to disagree with the order. Does this mean that you will likely refuse the weekly COVID testing?*" Again, the Applicant stated that this order was unlawful and discriminatory based on 21 U.S.C. §360bbb-3 and due to his religious accommodation/unvaccinated status.

On 26 November 2021, the Applicant submitted an Informal Article 138 Inquiry via email to see if CPT McCarthy was aware of the EUA laws and individual rights. The Applicant did not receive a response to the informal inquiry prior to 30 November 2022.

On 30 November 2021, the Applicant reported to his duty location to execute his responsibilities. During this time, 1LT Bashaw chose not to participate with unlicensed EUA testing and masking. Shortly after reporting to work, CPT McCarthy ordered Applicant to attend a counseling in his office later that day. When 1LT Bashaw reported to his office for the counseling, he was notified of the following: his security clearance was suspended by the Army Public Health Center's Director, his security badge and access to all APHC facilities was revoked, he was threatened, his military record flagged, and he was threatened with violations of Article 92, UCMJ charges.

At the end of the counseling, the Applicant hand delivered and verbally read another initial Article 138 complaint even though Applicant already satisfied this requirement IAW AR 27-10 on 26 November 2021. During this process, 1LT Bashaw requested that CPT McCarthy cease and desist discrimination against Applicant and any others under his command. Applicant also provided the EUA laws where it shows that an individual has the absolute right to refuse EUA products (vaccines, masks, and tests), regarding COVID19.

On 18 January 2022, COL Yevgeny Vindman, the Staff Judge Advocate for Major General Edmonson, signed off on Article 92 UCMJ charges against the Applicant for disobeying an order to participate with unlicensed COVID19 EUA masking and testing.

On 19 January 2022, Major General Edmonson dismissed the Applicant's Article 138 complaint UCMJ redress.

On 14 April 2022, CPT McCarthy called to inform Applicant that Applicant would need to have a "go-bag" ready for Fort Leavenworth Correctional Facility. Shortly after the phone call, he sent an email with the packing list for the "go-bag." He later rescinded this Fort Leavenworth "go-bag" order on 16 April 2022.

On 29 April 2022, 1LT Bashaw received a guilty conviction in a special court martial for not participating with the experimental EUA COVID19 masking/testing (United States v 1LT Mark Bashaw). The judge sentenced him to "No Additional Punishment" and made a recommendation to MG Edmonson to drop the conviction/findings. During the court martial, 1LT Bashaw went into detail about the dangers associated with the rapid antigen test kits that the DoD was mandating, and the masking, and Applicant also highlighted the deaths and injuries associated with the experimental EUA COVID19 "mRNA" injections, which are a substantial and specific danger to public health.

On 26 May 2022, MG Edmonson upheld the conviction/findings of the court martial and denied the Judge's motion to dismiss the guilty charge.³

On 27 June 2022, MG Edmonson initiated involuntary separation

³ Appendix 1, United States v. 1LT Mark Bashaw Case Number 20220213

elimination against 1LT Bashaw.

On 17 July 2022, 1LT Bashaw submitted a rebuttal to MG Edmonson's initiation of elimination, in accordance with Army regulation AR 600-8-24.⁴

On 27 July 2022, 1LT Bashaw petitioned the Army Judge Advocate General (TJAG) to review his case and to set aside the findings and conviction in whole from U.S. v 1LT Mark Bashaw court martial.⁵ He requested a case review under Article 69(c) of the Uniform Code of Military Justice because the SPCM did not qualify for an appeal from the Army Court of Criminal appeal at the time. The Applicant's packet further cited all applicable laws, the EUA letters, legal liability protections that all that manufacture, distribute, make policy, and administer an EUA product receive. The Applicant presented extensive evidence to overturn the guilty verdict and to demonstrate that any order to receive an unlicensed product is patently unlawful as defined by Article 92 of the UCMJ.

On 8 August 2022, MG Edmonson rescinded his original 27 June 2022 initiation of elimination memo, and reissued a new initiation of elimination. His new initiation of elimination memo was not based on the 29 April 2022 court martial conviction, but rather conduct unbecoming of an officer, failure to obey

⁴ Appendix 2, 1LT Bashaw Elimination Rebuttal Base MFR

⁵ Appendix 3, 1LT Mark Bashaw Article 69(c) Review to the Judge Advocate General, dated 27 July. Also with 5 December 2022 TJAG response letter.

orders, and the court martial conviction. Conduct unbecoming of an officer and failure to obey orders are charges against Applicant due to Applicant exercising his legal right according to 21 U.S.C. §360bbb-3(e)(1)(A)(ii)(III) to exercise the option to refuse administration of experimental emergency use authorized (EUA) products.

Additionally, on 12 August 2022, MG Edmonson certified the appellate review (Applicant's right to appeal the conviction of the court martial) and finalized the court martial conviction.

On 15 August, while pending an Article 69(c) review from the TJAG, the Applicant signed as one of nine signatories to a DoD Whistleblower report requesting a Congressional review of unlawful EUA vaccine (and EUA product) mandates. Senator Ron Johnson⁶ issued a letter to the SECDEF, Secretary of Health and Human Services, Commissioner of the FDA, and Director of the CDC with a requested response date of 1 September 2022. To date, none of these senior leaders/agencies responded to Senator Johnson's inquiry in writing.⁷

On 5 December 2022 the TJAG formally responded to the Applicant's

⁶ Appendix 4. Senator Ron Johnson's Letter to the Secretary of Defense, Commissioner of the FDA, and Director of the CDC. Dated 18 August 2022.

⁷ Appendix 5. Memorandum to Members of Congress: Whistleblower Report of Illegal Department of Defense Activity, dated 15 August 2022.

Article 69(c) case review and stated in writing that “I find that the Applicant has not established a proper and specific basis for relief under one or more of the enumerated statutory grounds. Accordingly, the Application for Relief is denied.” The Applicant also received notification that pursuant to Article 69(d)(1)(B), the Applicant can request an appeal through the United States Army Court of Criminal Appeals.

Argument

The judge ruled the Applicant was guilty of two counts of disobeying a direct, lawful order as defined by Article 92, 10 U.S.C. § 892. The standards to determine lawfulness in this case are found in sections (c) (2) (a) (i-g) Article 90 “Willfully disobeying a superior commissioned officer”, UCMJ (10 U.S.C. § 890). Article 92, UCMJ (10 U.S.C. § 892) defines lawfulness as the following: “A general order or regulation is lawful **unless it is contrary** to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it.” (MCM, IV-27). The presiding judge in the case made the basis of each guilty charge by ruling the military intent of the law was lawful because ordering Applicant to take an EUA mask or test kit did not violate federal statutes within 21 U.S.C. § 360bbb-3 and thus 10 U.S.C. § 1107a did not apply.

The basis of this ruling stemmed from the fact the prosecutor’s misrepresentation that EUA products can receive conditions that the Secretary

of Health and Human Services can selectively apply through delegated legal authorities granted within 21 U.S.C. § 360bbb-3 and 42 U.S.C. §247d-6d.

The prosecutor mis-applied and misrepresented the fact that all EUA products are in fact unlicensed, that they are protected by full liability immunity for their scopes of use within the issued emergency use authorization, that an individual accepts all the medical and legal risks using a covered countermeasure (EUA product), and that all EUA products come with *required conditions* to be informed of the right to accept or refuse. The prosecution misapplied that the secretary “may” apply the condition to accept or refuse and stated that masks and test kits did not have these conditions listed in their respective “Fact Sheets”, a document that is not legally binding.⁸ On this basis alone, the prosecution stated that since the option to refuse is not explicitly stated in the product “Fact Sheet,” then the basis of the order is lawful under Article 90, UCMJ, section (c) (2) (a) (iv-v). The prosecutors completely avoided the legal fact that all “unapproved products” (which means unlicensed

⁸ The FDA Emergency Use Authorization Letter is the legally binding agreement between the FDA and the Manufacturer of an EUA (unlicensed product). Without this letter, the manufacturer cannot sell an unlicensed product in the US market for the medical purpose of preventing, diagnosing, or treating a disease; COVID-19 within the context of this case and the declared Public Health Emergency. EUA Letters direct a manufacturer to provide a Fact Sheet, which is part of the overall authorization process. Both the FDA and EUA product manufacturer are covered persons as defined by 42 U.S.C. §247d-6d(i)(2) receiving full liability immunity for all forms of loss as defined by 42 U.S.C. §247d-6d(a)(2).

products)” granted an EUA by the FDA come with “required conditions” for an individual’s own health protection for accepting use of an unlicensed product devoid of long-term clinical data. This legal fact that these conditions are “required” is because an EUA product is unlicensed for the medical purpose it is in the US market in the first place due to an emergent health issue (medical purpose is to treat, diagnose, or prevent a disease). The standards used to introduce an unlicensed product to the US market under an EUA do not follow the normal clinical trial, new drug application, or new device application processes and are scientifically weaker and far less rigorous which means an unlicensed EUA product comes with much more risks by bypassing these processes.

In fact, the basis of introducing an unlicensed EUA product into the US market are that there are no licensed alternatives, the fact that it “*may*” work [it may not too], and based on the totality of the scientific evidence, *if available* (21 U.S.C. § 360bbb-3 (2)(c). Furthermore, by virtue of the Public Health Emergency declaration by the Secretary of Health and Human Services, *all* EUA products are legally considered “covered countermeasures” and receive full liability immunity (as do covered persons) under 42 U.S.C. §247d-6d (i)(C-D). If an individual suffers an injury from using a covered countermeasure, then their only method of recompense is through the Countermeasure Injury

Compensation Program (CICP)⁹ as governed by 42 U.S.C. §247d-6e. An individual cannot sue a covered person for any form of loss or injury and can only seek recompense through the CICP, which is an underfunded, centrally managed program with a total budget of \$5million. Furthermore, a doctor must certify that an injured person's claim is caused by the countermeasure. The CICP is administered by Health Resource and Services Agency (HRSA) of the Department of Health and Human Services. There are currently 10,899 claims filed for COVID-19 countermeasures (masks, shots, test kits, drugs, and ventilators). Of these 10,899, only *one* claim has been partially compensated.¹⁰ Under the current budget of \$5million, the HRSA can only afford to pay out 12 claims per year at the maximum rate of \$365,000.

These facts alone are why all individuals have the legal right to refuse. Coercing individuals to give up these rights because a "Fact Sheet" did not explicitly state an individual has a right to refuse is a form of coercion as defined in 18 U.S.C. § 2331. Misrepresentation by officials, leaders, medical providers, or other covered persons asserting that unlicensed EUA products are legally on par with an FDA licensed product that underwent the full rigors of scientific and medical scrutiny constitutes fraud as defined in 18 U.S.C. § 1038.

⁹ <https://www.hrsa.gov/cicp/cicp-data#table-1>

¹⁰ <https://www.hrsa.gov/cicp/cicp-data#table-1>

Furthermore, in every EUA issuing letter from the FDA to the manufacturer, it states that the EUA is issued in pursuant to 21 U.S.C. § 360bbb-3 meaning a required condition to administer the unapproved EUA product is to inform individuals of their option to refuse administration of the (all) EUA product in accordance with 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III).

The defense and Applicant presented that the order is “patently unlawful” in both the SPCM and extensively in the Applicant’s Article 69(c) review packet. Applicant’s Article 69(c) does an extensive crosswalk for masks, test kits, and even vaccines for the purpose of COVID-19, all of which are still under an FDA EUA. All EUA letters represent the legally binding agreements governed by 21 U.S.C. § 360bbb-3 and allow a manufacturer to introduce an unlicensed product into the US market without going through the formal new device/drug/biologic application process. These letters are all publicly available via the FDA Covid19 EUA website.¹¹

The Applicant demonstrated that the orders to force individuals to accept unlicensed EUA products is patently unlawful as defined by Article 90, UCMJ. Especially for masks and test kits, the Article 69(c) package included examples

¹¹ Appendix 3, 1LT Mark Bashaw Article 69(c) Review to the Judge Advocate General, dated 27 July and <https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/in-vitro-diagnostics-euas-antigen-diagnostic-tests-sars-cov-2>.

of surgical mask and test kit EUA letters that show the FDA waived good manufacturing practices for all EUA masks and test kits. This waiver to follow good manufacturing practices shows a deliberate choice the FDA made when allowing a “covered person” manufacturer to sell an unlicensed product into the US market and is also why the FDA states in every EUA letter that mask and test kit manufacturers cannot advertise that their product is safe or effective for preventing/diagnosing SARS-COV-2. Secondly, to make the claim that accepting these products is a matter of safety, is demonstrably false and is patently unlawful when one reviews the EUA issuance letters.

The Applicant has exhausted all administrative and legal avenues in order to communicate that all products used for the legal purpose of treating, preventing, or diagnosing Covid-19 are unlicensed products granted an emergency use authorization pursuant to 21 U.S.C. § 360bbb-3 and 10 U.S.C. § 1107a (Emergency Use Products). The Applicant presented extensive evidence in the Article 69(c) packet to the TJAG presenting that none of the current countermeasures to combat Covid-19 are licensed for their purpose and are in fact all under an FDA granted EUA. This means all vaccines, masks, test kits, ventilators, and even PPE (e.g. protective medical clothing, face shields) remain unlicensed and are protected with full liability immunity from any form of loss through 42 U.S.C. §247d-d. Additionally using unlicensed products means all

individuals accept an enormous, asymmetric amount of risk when using any EUA product because the product is *unlicensed* and is why every unapproved (unlicensed) EUA product comes with “Required Conditions” to be informed of the right to refuse these products and of the risks both known and unknown.¹² Leaders coercively directing and fraudulently misrepresenting EUA products to be legally and scientifically the same as an FDA licensed product violates at criminal statutes with 18 U.S.C (21 U.S.C. § 360bbb-3, and 10 U.S.C. § 1107a and makes any order to forcibly direct use of an unlicensed EUA product patently unlawful as defined in Article 90 of the UCMJ because it is violating multiple United States Codes and the US Constitution.

The inherent legal right to refuse is a “Required Condition” for all unapproved products pursuant to 21 U.S.C. § 360bbb-3 and 10 U.S.C. § 1107a (Emergency Use Products). This means none of the products the DoD or even the United States (devices-masks/test kits, drugs, biologics-shots, or even personal protective equipment) are licensed by the FDA. The DoD lacks the statutory authority to declare any product EUA and cannot simply treat an EUA product as a licensed product. All masks, test kits, shots, and drugs for treating, preventing, or diagnosing unlicensed products under an EUA which legally means they *must* be unlicensed products. This legal fact has not changed since

¹² 21 U.S.C. § 360bbb-3(e)(1)(A)

the Applicant's court martial, Article 69(c) review, and now. This means all EUA products legally come with an inherent right to refuse administration of the product because EUA products (also legally known as "Covered Countermeasures" via 42 U.S.C §247d-6d) carry full liability immunity through 42 U.S.C §247d-6d for any scope of loss suffered (e.g. death, injury).

The Applicant's judgment came from the prosecutor's misrepresentation that the secretary of HHS (really the FDA) did not provide the optional condition to accept or refuse EUA masks and test kits. This assertion is demonstrably false and is the core reason Applicant received a guilty verdict that he disobeyed a lawful order though he exercised his legal right to refuse any and all unlicensed EUA products. After requesting a review of the case and dismissal of the charges, the TJAG simply stated that the Applicant did not provide the "proper and specific basis for relief under listed statutory grounds." The TJAG did not address any of the additional legal documents presented, the significance that no product is licensed to prevent, treat or diagnose SARS-COV-2, or the liability protections all EUA products and "covered persons (e.g. DoD/Services, the United States Government). The Applicant fully demonstrates that there are no licensed products in the US market. The Applicant demonstrates that all EUA products receive full liability immunity for being allowed into the US market under an EUA and for bypassing all forms of

thorough licensing processes and scientific scrutiny.

The Applicant humbly requests the ACCA reviews Applicant's case and all applicable appendices to overturn the guilty ruling on the basis that being ordered to receive unlicensed EUA products is a patently unlawful violation of US federal statutes and the US Constitution as defined by both Articles 90 and 92 of the UCMJ (10 U.S.C. §§ 890, 892). If our military cannot follow our nation's own laws, then we as a nation are in dire straits and all of our oaths of office are effectively meaningless.

Additional Facts.

The DoD Understands the Difference Between FDA

Approved/Licensed/Cleared vs Investigations (IND) vs Emergency Use

Authorization (EUA). In the early 2000s, the DoD has already lost a court case

*Doe vs Rumsfeld*¹³ trying to coerce military members to be administered the

Investigational (IND) Anthrax Vaccines (NOT FDA

approved/licensed/cleared). What came out of it was DoDI 6200.02. After the

PREP Act passed, DoDI 6200.02 was updated to include the EUA provisions

(DoD Instruction 6200.02, February 27, 2008 - POSTED 2/28/2008 (whs.mil)).

It states in paragraph "5.2. The Heads of DoD Components:...5.2.3. Shall,

when using medical products under a force health protection program pursuant

¹³ *Doe v. Rumsfeld*, 341 F. Supp. 2d 1 (D.D.C. 2004)

to an EUA, comply with Enclosure 3, Federal Food Drug and Cosmetic Act section 564 (Reference (d)), section 1107a of Reference (e) and applicable FDA requirements.” Section 564 of the FD&CA has been codified into 21 U.S.C. § 360bbb-3. Section 1107a this document is referring to 10 U.S.C. § 1107a.

In paragraph E3.4. of Department of Defense Instruction (DoDI) 6200.02, it states the following and it’s a misrepresentation of the laws, both 21 U.S.C. § 360bbb-3 and 10 U.S.C. § 1107a. It states the following: “Request to the President to Waive an Option to Refuse. In the event that an EUA granted by the Commissioner of Food and Drugs includes a condition that potential recipients are provided an option to refuse administration of the product, the President may, pursuant to section 1107a of Reference (e), waive the option to refuse for administration of the medical product to members of the armed forces. Such a waiver is allowed if the President determines, in writing, that providing to members of the armed forces an option to refuse is not in the interests of national security. Only the Secretary of Defense may ask the President to grant a waiver of an option to refuse.”

As it states in 21 U.S.C. § 360bbb-3(e) a required condition for **all** unapproved EUA products is that individuals to whom the EUA product is being administered to are informed of the option to accept of refuse EUA product, in this case specifically the test kit and facemask. The first thing wrong

with paragraph E3.4. is that the condition that “potential recipients” (individuals being administered the EUA product) are INFORMED of the option to refuse administration of the EUA product is not an event the FDA Commissioner can arbitrarily pick and choose to “include” or not include a condition providing an option to refuse administration. That “Required Condition” comes with all EUA products. All EUA products or countermeasures come with full liability protection; therefore, of course all EUA products come with the requirement to inform individuals of the option to refuse administration of the EUA product.

10 U.S.C. § 1107a titled “Emergency use products”, it states the following: “In the case of the administration of a product authorized for emergency use under section 564 of the Federal Food, Drug, and Cosmetic Act to members of the armed forces, the condition described in section 564(e)(1)(A)(ii)(III) of such Act and required under paragraph (1)(A) or (2)(A) of such section 564(e), designed to ensure that individuals are **informed of an option to accept or refuse administration of a product**, may be waived only by the President only if the President determines, in writing, that complying with such requirement is not in the interests of national security.” What can be waived? The actual right to accept or refuse administration of a product? No. Not at all. The only thing the President can waive in writing is the right for the individuals to be INFORMED of an option to accept or refuse administration of an EUA product,

not the actual right.

The DOD already has policy that makes a clear distinction between FDA approved/licensed/cleared products and EUA issued products. Although DoDI 6200.02 makes it appear as if only some EUA products come with the option to accept or refuse, the law in 21 U.S.C. § 360bbb-3 and 10 U.S.C. § 1107a is very clear. All EUA products come with the required conditions for individuals being administered any EUA product that the individual is supposed to be informed of the option to accept or refuse administration of the EUA product.

Appendices

Appendix 1-*United States v. 1LT Mark Bashaw*, Court Martial Findings
(Page 26-30)

Appendix 2-1LT Bashaw Elimination Rebuttal to MG Edmonson, base
MFR dated 8 September 2022 (Page 31-56)

Appendix 3-1LT Mark Bashaw Article 69(c) Review package to the Judge
Advocate General (TJAG), dated 27 July. Complete with all enclosures and 5
December TJAG response. (Page 57-78)

Appendix 4-Senator Ron Johnson's Letter to the Secretary of Defense,
Commissioner of the FDA, and Director of the CDC. Dated 18 August 2022.
(Page 79-82)

Appendix 5-Memorandum to Members of Congress: Whistleblower Report of
Illegal Department of Defense Activity, dated 15 August 2022. (Page 83-129)

Appendix 6-Certificate of Service (Page 130)

In Vitro Rapid Antigen Test Kit EUA Letters posted at
<https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/in-vitro-diagnostics-euas-antigen-diagnostic-tests-sars-cov-2>, accessed 23 January 2023.

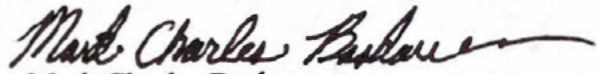
In Vitro Molecular Test EUA Letters posted at <https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/in-vitro-diagnostics-euas-molecular-diagnostic-tests-sars-cov-2>, accessed 23 January 2023.

Surgical Mask EUA Letter posted at
<https://www.fda.gov/media/140894/download>, accessed 23 January 2023.

Appendix 6-Certificate of Service

Certificate of Service

I certify that a copy of the foregoing was sent via electronic submission to usarmy.pentagon.hqda-otjag.mbx.clerk-of-court-efiling@army.mil at 2111EST on the 03 day of February, 2023.



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