

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

ROBERT B. BERGDAHL)	WRIT-APPEAL PETITION FOR
Sergeant, U.S. Army,)	REVIEW OF U.S. ARMY COURT OF
)	CRIMINAL APPEALS DECISION ON
<i>Appellant,</i>)	PETITION FOR WRIT OF MANDAMUS
)	
v.)	
)	
PETER Q. BURKE)	
Lieutenant Colonel, AG)	
U. S. Army,)	
in his official capacity as)	
Commander, Special Troops)	
Battalion, U. S. Army Forces)	Crim. App. Misc. Dkt. No.
Command, Fort Bragg, NC, and)	ARMY 20150624
Special Court-Martial)	
Convening Authority,)	USCA Misc. Dkt. No.
)	
and)	
)	
UNITED STATES,)	
)	
<i>Appellees.</i>)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES:

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I

Preamble and Request for Recusal

Pursuant to Rules 4(b)(2), 18(a)(4), and 27(b), the All Writs Act, 28 U.S.C. § 1651, and Article 67(a), UCMJ, Sergeant Robert B. Bergdahl prays that the Court reverse an unpublished decision of the U.S. Army Court of Criminal Appeals that denied a petition for writ of mandamus. Ex. 1. The specific relief appellant sought was and is an order directing the United States and LTC Peter Q. Burke (the special court-martial convening authority) to make public forthwith the unclassified exhibits received in evidence in appellant's preliminary hearing and to modify the protective order to permit SGT Bergdahl to make those exhibits available to the public. Expedited consideration is requested. See Rule 19(e).

One of the Court's commissioners has been nominated to fill the vacancy created by the expiration of Chief Judge Baker's term. That nomination is pending before the Senate Armed Services Committee. Yesterday, in remarks at the VFW hall in Pelham, NH, Chairman John McCain of that committee informed *The Boston Herald* that he'll call a hearing of the Senate Armed Services Committee if SGT Bergdahl "is allowed to avoid prison," . . . "If it comes out that he has no punishment, we're going to have to have a hearing in the Senate Armed Services Committee." "And I am not prejudging, OK, but it is well known that in the

searches for Bergdahl, after — we know now — he deserted, there are allegations that some American soldiers were killed or wounded, or at the very least put their lives in danger, searching for what is clearly a deserter. We need to have a hearing on that.” Laurel J. Sweet, *John McCain Wants Answer If Bowe Bergdahl Avoids Prison: Will Call Hearing If Bergdahl Avoids Prison*, Boston Herald, 12 Oct. 2015, available at http://www.bostonherald.com/news_opinion/us_politics/2015/10/john_mccain_wants_answers_if_bowe_bergdahl_avoids_prison.



Passing over the fact that Sen. McCain’s comments constitute unlawful congressional influence, we respectfully suggest that the nominee to this Court not participate in any way in the disposition of this writ-appeal petition. See *United States v. Curtis*, 40 M.J. 31 (C.M.A. 1994) (mem.) (Wiss, J.); cf. *United States v. Gleason*, 41 M.J. 356 (C.M.A. 1994) (mem.) (Crawford, J.), both noted in EUGENE R. FIDELL & DWIGHT H. SULLIVAN, GUIDE TO THE

RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES § 6.03[7], at 56 (14th ed. 2015).

II

History of the Case

The case is the subject of an Article 32, UCMJ preliminary hearing with respect to charges preferred by appellee Burke on 25 March 2015 under Articles 85 and 99(3), UCMJ. The GCMCA is GEN Robert B. Abrams, Commander, U.S. Army Forces Command. The SPCMCA is LTC Burke, who is Commander, Special Troops Battalion, FORSCOM. He issued a protective order on 25 March 2015.¹

The preliminary hearing was conducted at Joint Base San Antonio on 17-18 September 2015. The preliminary hearing officer was LTC Mark A. Visger. Except for brief conferences with counsel in the nature of R.C.M. 802 conferences, the entire hearing was conducted in public. Members of the public, including representatives of the news media, were in fact present both in the hearing room and in an overflow room to which the proceedings were piped. A copy of the transcript is submitted herewith, Ex. 2, and is cited herein as Art. 32 Tr.

¹ For the reasons set forth in our submissions in earlier writ litigation, including his status as a Type 1 accuser, LTC Burke should not be serving as SPCMCA and should not be permitted to make any recommendation to GEN Abrams. Nothing in this writ-appeal petition should be deemed a waiver of our objection to his doing so. The Court denied our earlier writ-appeal petition on that issue without prejudice. *Bergdahl v. Burke*, 74 M.J. ____ (C.A.A.F. 2015) (mem.).

Among the documents received in evidence was the report of an AR 15-6 investigation conducted by MG Kenneth R. Dahl in 2014 and a 371-page transcript of MG Dahl's 6-7 August 2014 interview of appellant. See Art. 32 Tr. iii. These documents are unclassified and have not been sealed. They were repeatedly referred to in testimony in open court in the presence of spectators.

During the hearing, counsel for appellant asked the preliminary hearing officer if he would permit the release of these two documents. As anticipated, LTC Visger indicated that he lacked authority to authorize their release. Art. 32 Tr. 228.

MG Dahl testified that he had no objection to his report or the interview transcript being made public. Art. 32 Tr. 310.

Sergeant Bergdahl wishes these documents to be made public. If the government refuses to make them public immediately, he wishes to have them made public by his attorneys.

Sergeant Bergdahl's counsel sought a ruling from the Department of the Army's Professional Conduct Council on 24 June 2015 as to whether it would violate the Army's *Rules of Professional Conduct for Lawyers* for the defense to make these documents public. Ex. 3. After 82 days, the Council refused to rule, claiming that counsel should ask LTC Burke. Ex. 4. Even though we had already done so in April, we wrote to FORSCOM. Ex. 5. We have received no answer.

On 21 September 2015, SGT Bergdahl sought a writ of mandamus from the U.S. Army Court of Criminal Appeals. That court directed the government to show cause why the relief sought should or should not be granted. On 8 October 2015, it denied the petition in an unpublished decision. *Bergdahl v. Burke*, Misc. No. 20150624 (Army Ct. Crim. App. 2015).²

LTC Visger submitted his report of preliminary hearing on 5 October 2015 in accordance with R.C.M. 405(j)(1). Sergeant Bergdahl submitted his objections to and comments on the report on 9 October 2015 in accordance with and within the period prescribed by R.C.M. 405(j)(5).

² On 2 October 2015, Hearst Newspapers, LLC and other major national news media filed a separate access-related mandamus petition with the Army Court seeking

the immediate public release of unclassified documents received into evidence during the Article 32 preliminary hearing examining charges against Sgt. Robert ("Bowe") Bergdahl held on September 17 and 18, 2015 at Fort Sam Houston in San Antonio, Texas (the "Article 32 Hearing"), as well as the immediate public release of transcripts of the Article 32 Hearing. Respondents have denied the Press Petitioners contemporaneous access to these documents in violation of the public's First Amendment right of access to judicial records. The Press Petitioners also seek an order requiring Respondents to comply with constitutional requirements of public access to future judicial records that are created, filed, or otherwise received in *United States v. Bergdahl*.

Hearst Newspapers, LLC v. Abrams, Misc. Dkt. No. 2015____ (Army Ct. Crim. App.). Sergeant Bergdahl agrees with the Press Petitioners and immediately moved for leave to intervene. The Army Court has taken no action on either the media petition or his motion. One would have expected the two cases to be consolidated below.

III

Reasons Relief Not Sought Below

[Inapplicable]

IV

Relief Requested

Sergeant Bergdahl seeks a writ of mandamus directing respondents (1) to make public forthwith the unclassified exhibits that were received in evidence in the preliminary hearing and (2) to modify the protective order to permit him to make those exhibits public.

V

Issue Presented

ONCE AN UNCLASSIFIED DOCUMENT HAS BEEN ACCEPTED IN EVIDENCE IN A PRELIMINARY HEARING OPEN TO THE PUBLIC, MAY THE CONVENING AUTHORITY REFUSE TO RELEASE IT OR PERMIT THE ACCUSED TO DO SO?

VI

Statement of Facts

The pertinent facts are set forth in § II above.

VII

Reasons Why Writ Should Issue

A. Jurisdiction

The jurisdictional basis for the relief sought is the Court's potential appellate jurisdiction under Article 66(b)(1), UCMJ, *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966),

since the authorized maximum punishment for the offenses with which SGT Bergdahl has been charged qualifies for mandatory appellate review. MCM §§ 9e, 23e. The All Writs Act applies because the Court was established by Act of Congress. 28 U.S.C. § 1651(a). Together, the Code and the All Writs Act confer jurisdiction. *LRM v. Kastenbergh*, 72 M.J. 364, 367 (C.A.A.F. 2013). The requested writ is in aid of the Court's appellate jurisdiction, as required by that Act.

The dispute underlying this writ-appeal petition, growing directly out of a critical phase of the court-martial process, and pitting appellant against the putative convening authority, lies well within the scope of this Court's authority, and in no way implicates *Clinton v. Goldsmith*, 526 U.S. 529 (1999).

Nor is *United States v. Arness*, 74 M.J. ___, 2015 CAAF LEXIS 720 (C.A.A.F. 2015), an impediment to this Court's exercise of its All Writs Act power. There, the trial had already been conducted and a sub-jurisdictional sentence adjudged. Moreover, the Judge Advocate General had refused to refer the case to this Court. As a result, the case was no longer in the Court's potential appellate jurisdiction, even though it once had been, given the authorized maximum punishment.

Here, in sharp contrast, there has been no trial, much less a sub-jurisdictional sentence, and of course the Judge Advocate General has never had occasion to decide whether it should be

referred here. *Arness* has no impact on a case in this posture, especially where the authorized maximum punishment remains sufficient to bring the case within the Court's normal appellate jurisdiction, without discretionary action by the Judge Advocate General to do so.

The Army Court disclaimed jurisdiction for reasons that are without merit:

First, the decision below treats *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997), as if it were no longer good law. Ex. 1, at 3. While one judge of this Court has evinced a willingness to have the application of the right to a public trial to preliminary hearings under Article 32 briefed and argued, *United States v. Davis*, 64 M.J. 445, 450 (C.A.A.F. 2007), no judge joined her, and the Court has not overruled *ABC*. It is highly improper for a lower court to deviate from binding precedent of its superior court. Nor should *ABC* be overruled. *Goldsmith* dealt with a matter that was entirely outside the parameters of the military justice process. It provides no basis whatever for abandoning *ABC*.

What is more, the President only a few months ago issued a revised regulation that squarely maintains the public-trial principle for preliminary hearings. R.C.M. 405(i)(4). Just as congressional reenactment is deemed to reflect approval of the existing judicial gloss on legislation, so too, presidential re-

affirmation of public access to preliminary hearings should be understood as reflecting approval of the existing judicial gloss - in this instance, the approach manifest in *ABC*.

Second, the Army Court thought it salient that the protective order "is a military order provided by a commander with application far beyond the Article 32, UCMJ." Ex. 1, at 4. We do not understand this. The only thing here at issue is whether exhibits introduced in a preliminary hearing that are not classified must be made public when the hearing itself is open to the public. That the protective order was issued by a military officer adds nothing to the conversation. Orders of military officers are not outside the reach of the All Writs Act.

The Army Court's insistence that relief "should and must be sought" under FOIA, AR 15-6, and Article 138, UCMJ is not only conclusory but also has nothing to do with whether the matter at hand is within the Army Court's (or this Court's) All Writs Act authority. The Army Court has thus confused jurisdiction with the merits. Its reference to these three remedies is wide of the mark in any event because this is not a case in which a party is seeking access to documents. Sergeant Bergdahl has copies of MG Dahl's AR 15-6 report and his own interview transcript. The Army provided them to him. He therefore doesn't need to get copies from the Army. What he needs is to have them made public or to have the road cleared for him to make them public. The Army's

failure to provide a ruling on whether he can do so without violating professional responsibility rules, Exs. 3-4, is in keeping with the litany of irrelevant and time-wasting alternative remedies suggested by the Army Court.³

The Army Court calls this (at 4) "a closer case" than *Goldsmith*. It's not "closer" - it's *clear*. Prompt access to unclassified exhibits admitted in evidence at a public hearing is part and parcel of the hearing. Keeping such records under wraps or thwarting their release is irreconcilable with the public character of the preliminary hearing.

The Army Court engages in a transparent delaying tactic when it claims appellant should wait until there is a military judge assigned. This utterly disregards the concept of potential appellate jurisdiction that is universally accepted in the All Writs Act jurisprudence. It is sufficient that the potential disposition and sentence would bring the case within the Court's appellate jurisdiction. If there were standing trial courts, we would have applied there. But there aren't. The Army Court and this Court are, however, standing courts, and are open and func-

³ Lest the Court be under any illusions about the efficacy of FOIA as administered by the Army, petitioner early this year sought records relating to certain rule changes the Army promulgated or caused DoD to promulgate for the purpose of adversely affecting his rights under various personnel and pay regulations. Those requests are still pending. Moreover, we are reliably informed that various media outlets have repeatedly requested MG Dahl's report and have gotten nowhere.

tioning. Sergeant Bergdahl has no duty to wait until there is a referral any more than the media did when Sergeant Major of the Army McKinney was facing an Article 32 pretrial investigation.

Finally, according to the decision below (at 5), SGT Bergdahl must *now* show potential prejudice to *future* findings and sentence. We disagree. He has a right to have these documents made available to the public now. Whether or not withholding them will have downstream effects is irrelevant. As long as the public discourse in our Nation is polluted by repeated characterizations of SGT Bergdahl as a traitor by the leading contender for the Republican nomination for President of the United States, it is profoundly unfair to deny him the tools to refute those defamatory claims in the court of public opinion. Mr. Trump and the echo chamber that has amplified his voice beyond all reason have a right to free speech. Simple fairness demands that SGT Bergdahl at least be able to defend himself by permitting public access in real time to documents that put the lie to the kind of character assassination to which he is being subjected.

Here, for example, is Mr. Trump speaking at a rally in Las Vegas last week:

Republican presidential front-runner Donald Trump said Thursday that Army Sgt. Bowe Bergdahl should have been executed for leaving his post in Afghanistan.

"We're tired of Sgt. Bergdahl, who's a traitor, a no-good traitor, who should have been executed," Trump said to cheers at a rowdy rally inside a packed Las Vegas theater at the casino-hotel Treasure Island.

"Thirty years ago," Trump added, "he would have been shot."

Associated Press, *Donald Trump says Bowe Bergdahl should have been executed*, 9 October 2015, available at <http://www.foxnews.com/politics/2015/10/09/donald-trump-says-bowe-bergdahl-should-have-been-executed/>



Mr. Trump has made similar remarks on at least seven other occasions. On 11 October 2015, a Fox News commentator who calls herself "judge" based on long past service on the Westchester, N.Y., county court, made equally rabid remarks. See Jeanine Pirro, *White House Wants Deserter Bergdahl to Walk*, Justice with

Judge Jeanine, Fox News, 11 Oct. 2015, available at <http://www.foxnews.com/on-air/justice-jeanine/index.html#/v/4550020035001>.

B. Error

Not content to find a lack of jurisdiction, the Army Court found SGT Bergdahl's petition lacking in merit. In this too it erred.

"Preliminary hearings are public proceedings and should remain open to the public whenever possible." R.C.M. 405(i)(4). It makes an utter mockery of that rule, and the principle that closures should be done wielding a scalpel rather than a meat-axe, if unclassified documents introduced in evidence and referred to in the course of the hearing themselves remain inaccessible in their entirety. This is a particularly appalling outcome given the stringent test (and requirement for particularized written factual findings) the President has prescribed for closing a hearing: there must be "an overriding interest . . . that outweighs the value of an open preliminary hearing." No such interest supports the effective sequestration of these public documents. After all, but for the interest in conserving valuable hearing time, the parties could literally have read them into the record from cover to cover. The conservation of hearing time is not a basis for withholding documents from the public.

In *Center for Constitutional Rights v. United States*, 72 M.J. 126, 130 (C.A.A.F. 2013) (3-2 decision), the Court held that the parties seeking relief had "failed to meet their burden of establishing that [it] or the CCA has jurisdiction to grant [them] the relief they seek." Significantly, the accused there, PFC Manning, did not join the organizations seeking access to documents.

Judge Stucky pointedly wrote for the Court:

Finally, this case differs in a very important respect from [*ABC, Inc. v.*] *Powell*, 47 M.J. 363 [C.A.A.F. 1997)]. In that case, which dealt with the closure of an Article 32 investigation to the press and the public, the accused joined in the proceedings in order to vindicate his right to a public trial. *Id.* Here, the accused has steadfastly refused to join in the litigation, or, despite the Court's invitation, to file a brief on the questions presented. We thus are asked to adjudicate what amounts to a civil action, maintained by persons who are strangers to the court-martial, asking for relief -- expedited access to certain documents -- that has no bearing on any findings and sentence that may eventually be adjudged by the court-martial.

72 M.J. at 129. Equally tellingly, he observed:

More immediately, the accused in *Powell* joined the media as a party in seeking a writ of mandamus to vindicate his constitutional right to a public trial -- something which had immediate relevance to the potential findings and sentence of his court-martial. We are not foreclosing the accused from testing the scope of public access, but he has not done so here.

Id. at 129-30. The decision below inexplicably disregards these critical portions of *CCR*.

This petition presents the very situation the Court found missing in *CCR* (a decision whose correctness we do not concede). Sergeant Bergdahl affirmatively wishes MG Dahl's report and his own interview to be made available to the public - whether by the Army or by himself, but in either case forthwith. Whatever the news media's rights may be (and we believe they too have a judicially enforceable real-time right to these and similar unclassified documents from an Article 32 preliminary hearing), his right to use and disseminate these documents -- of which he lawfully has copies -- as he wishes cannot be constrained by LTC Burke's protective order.

Even though the Army has long known that SGT Bergdahl wished to have the documents at issue made available to the public one way or the other, it wasted time by providing a non-answer to counsel's request for an ethics ruling and has taken none of the transparency measures it belatedly took in the *Manning* case, as recounted in *Center for Constitutional Rights v. Lind*, 954 F. Supp. 2d 389, 403-04 (D. Md. 2013). It has no excuse for having failed to incorporate reading room arrangements in the elaborate preparations for the preliminary hearing. Given the effort and resources expended on building- and hearing-room security, it is a pity this important aspect of the sound administration of justice was disregarded. As we noted below, "[i]f the government were trying to erode public confidence in the ad-

ministration of military justice, it would be hard-pressed to find a more effective way to do so than its response to SGT Bergdahl's petition for a writ of mandamus." Petitioner's Reply to Government Response to Petition for Writ of Mandamus, *Bergdahl v. Burke*, *supra*, at 2.

Only a little more need be said in response to the three reasons advanced by the Army Court (at 5-6) for denying relief on the merits. As we have already explained, the alternative remedies proposed by the Army are inapposite or unreliable or both. Relief from a military judge some time down the road does nothing to cure the unfairness that has impelled SGT Bergdahl to institute this case. Reopening the preliminary hearing is quite simply unresponsive to his claim.

The second prong of this part of the decision below (at 5-6) strings together several theories, none of which withstand scrutiny. Thus, the decision claims that preliminary hearings "are not an apples-to-apples comparison to trials on the merits." But in fact nothing distinguishes these two phases *from the standpoint of public access*. Precisely the same standards apply to public access and closure determinations. The decision below offers no support for the notion that the access-to-documents issue must or may be resolved differently as between these two critical phases of the military justice process.

The Army Court also claims (at 6) that "comparisons to civilian practice are difficult." Not so. The revised Article 32 is plainly inspired by preliminary hearings under Fed. R. Crim. P. 5.1. Probable cause determinations under that rule are public. We know of no authority for the proposition that unclassified evidence submitted at such a hearing would be withheld from public scrutiny, or that the defendant, if she chose to do so, could not make it.

The Army Court refers to the fact that the rules of evidence do not apply at preliminary hearings. But the same is true of preliminary hearings under Fed. R. Crim. P. 5.1. See Fed. R. Evid. 1101(d)(3). Moreover, important evidentiary rules do apply: M.R.E. 301-303, 305, 412, and Section V dealing with privileges. See M.R.E. 1101(d)(2). An Article 32 preliminary hearing is scarcely a "law-free zone."

Nor is the Army Court correct that there is no "judicial officer" in a preliminary hearing. R.C.M. 405(h)(4) states: "In applying these rules to a preliminary hearing, the term 'military judge,' as used in these rules, shall mean the preliminary hearing officer, who shall assume the military judge's authority to exclude evidence from the preliminary hearing. . . ." The Army's own recently-issued guide confirms that preliminary hearing officers exercise quasi-judicial functions. See Dep't of the Army Pamphlet 27-17, *Legal Services: Procedural Guide for the Ar-*

ticle 32 Preliminary Hearing Officer ¶¶ 1-4(a) (18 June 2015) ("As an officer detailed to conduct an impartial hearing, you will be performing a quasi-judicial function"), 2-1(b) ("The Article 32 preliminary hearing is a quasi-judicial proceeding and plays a necessary role in the due process of law in military justice").⁴

As for the Army Court's concern (at 6) about creating "an uneven power dynamic," that has no application where, as here, it is the accused who seeks release of preliminary hearing exhibits. To block such release on the basis that "an accused does not have full access to discovery until after referral" (as appellant knows all too well) is perverse. And as for the suggestion (also at 6) that what we request "would allow a party to introduce into the public sphere information that is inadmissible at trial and whose evidentiary value may be minimal," suffice to say that public discourse under the First Amendment is not and -- thank God -- never has been confined to that which is admissible in evidence in a court of law.⁵

⁴ The Army Court's concern (at 6 n.4) about sensitive matter such as social security numbers, graphic photos, or medical records is misplaced. First, the two documents here at issue contain no such information. The Army previously redacted any such information from the interview transcript. But even if they did, the simple solution would be to direct that the Army make the necessary redactions -- forthwith.

⁵ The Army Court's casual citation to Rule 3.6 of the *Army Rules of Professional Conduct for Lawyers* is perfectchutzpah given the Army's months-long slow-rolling and ultimate refusal to an-

The final paragraph (at 7) of the Army Court's reasons for denying relief shows the desperation of that court's effort. Neither R.C.M. 405(i)(9) (concerning sealing) nor M.R.E. 506(e)(1)(D) (concerning sensitive information) bear on this case in any way. The preliminary hearing officer has power to seal, R.C.M. 1103A(a), but the only exhibits that have been sealed here are the few that are classified. See Art. 32 Tr. Iv. And nothing in the AR 15-6 report or the interview transcript is "sensitive information." We have no objection to the Court's examining these documents *in camera* to satisfy itself on this score.

C. Prudential Considerations

Two salient prudential considerations bear on the exercise of the Court's All Writs Act authority.

First, failing to grant the relief requested at this time will subvert the President's clear directive that preliminary hearings be conducted in public. To permit massive amounts of relevant, material, unclassified information to remain unavailable to the public, even when the accused prefers that these materials be made available, blows a gaping hole in the public hearing requirement and is indefensible. The resulting opacity

swer appellant's counsel's inquiry about the applicability of that rule. The Army Court was aware of that refusal as the pertinent documents had been filed with it.

does not contribute to public confidence in the administration of military justice.

Second, it is perfectly obvious that SGT Bergdahl has been the subject of a record-shattering campaign of vilification in the right-wing media for more than a year. That campaign seriously threatens both his reputation and his right to a fair trial if any charge is referred for trial. He thus has a compelling interest in making MG Dahl's report and his own statement available to those in American society who wish to inform themselves about what actually happened. Forcing him to wait until the military justice process has run its course is unfair and this Court should not, by denying relief, ratify it.

VIII

Respondents' Contact Information

[Inapplicable]

Conclusion

For the foregoing reasons, the decision below should be reversed. A writ of mandamus should issue directing respondents (1) to make public forthwith the unclassified exhibits received in evidence in the preliminary hearing and (2) to modify the protective order to permit SGT Bergdahl to make those exhibits public.

Respectfully submitted,

/s/ Eugene R. Fidell
Eugene R. Fidell
CAAF Bar No. 13979
Feldesman Tucker Leifer Fidell LLP
1129 20th Street, N.W., Ste. 400
Washington, DC 20036
(202) 256-8675 (cellphone)
efidell@ftlf.com

Civilian Defense Counsel

/s/ Franklin D. Rosenblatt
Franklin D. Rosenblatt
Lieutenant Colonel, JA
CAAF Bar No. 36564
U.S. Army Trial Defense Service
9275 Gunston Road, Suite 3100
Fort Belvoir, VA 22060
(703) 693-0283
franklin.d.rosenblatt.mil@mail.mil

Individual Military Counsel

/s/ Alfredo N. Foster, Jr.
Alfredo N. Foster, Jr.
Captain, JA
CAAF Bar No. 36628
U.S. Army Trial Defense Service
Ft. Sam Houston
Joint Base San Antonio, TX
alfredo.n.foster.mil@mail.mil
(210) 295-9742

Detailed Defense Counsel

/s/ Jonathan F. Potter
Jonathan F. Potter
Lieutenant Colonel, JA
CAAF Bar No. 26450
Defense Appellate Division
jonathan.f.potter3.mil@mail.mil
(703) 695-9853

Appellate Defense Counsel

Certificate of Filing and Service

I certify that I have, this 12th day of October, 2015 filed and served the foregoing Writ-Appeal Petition by emailing copies to the Clerk of Court, the Government Appellate Division, and counsel for the Center for Constitutional Rights, which was an *amicus curiae* below, at the following email addresses:

efiling@armfor.uscourts.gov

usarmy.pentagon.hqda-otjag.mbx.usalsa-gad@mail.mil

shayana.kadidal@gmail.com

Eugene R. Fidell

Civilian Defense Counsel

Exhibit 1

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before HAIGHT, PENLAND, and WOLFE
Appellate Military Judges

Sergeant ROBERT B. BERGDAHL, Petitioner

v.

**Lieutenant Colonel PETER Q. BURKE, Commander, Respondent
&
The UNITED STATES, Respondent**

ARMY MISC 20150624

For Petitioner: Lieutenant Colonel Jonathan F. Potter, JA; Captain Alfredo N. Foster, JA; Lieutenant Colonel Franklin D. Rosenblatt; Eugene R. Fidell (on brief); Lieutenant Colonel Jonathan F. Potter, JA; Captain Alfredo N. Foster, JA; Lieutenant Colonel Franklin D. Rosenblatt; Eugene R. Fidell (on reply brief).

Amicus Curiae: For the Center for Constitutional Rights: Baher Azmy; J. Wells Dixon; Shayana D. Kadidal (on brief).

For Respondent: Colonel Mark H. Sydenham (JA); Major A.G. Courie III, JA; Captain Jihan Walker, JA (on brief).

8 October 2015

MEMORANDUM OPINION AND ACTION
ON PETITION FOR EXTRAORDINARY RELIEF IN THE
NATURE OF A WRIT OF MANDAMUS

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

WOLFE, Judge:

Petitioner is charged with desertion and misbehavior before the enemy, in violation of Articles 85 and 99, Uniform Code of Military Justice, 10 U.S.C. §§ 885 and 899 [hereinafter UCMJ]. Pursuant to Article 32, UCMJ, a preliminary hearing was conducted in petitioner's case on 17-18 September 2015.

On 17 September 2015, Sergeant Robert Bergdahl petitioned this court for extraordinary relief in the nature of a writ of mandamus. Specifically, petitioner asks this court to direct the respondent, the special court-martial convening authority, to: 1) make public forthwith the unclassified exhibits that have been received in evidence in the accused's preliminary hearing; and 2) modify the protective order to permit the accused to make those exhibits public. For the reasons below, the petition is dismissed.

As an initial matter, it is important to note what this petition does not concern. This court has not been asked to review the appropriateness of the protective order issued by the special court-martial convening authority. Neither petitioner nor the United States has submitted to the court (under seal or otherwise) the documents that are subject to the protective order. The record in front of this court consists solely of the filings by the petitioner and the government, attached exhibits, and a brief submitted by the Center for Constitutional Rights as *amicus curiae*. Even if this court were to try to resolve the issue of whether the protective order is overly broad or infringes on the petitioner's right to a public hearing, as *amicus curiae* suggests, we are unable to do so. Instead, the question presented to this court is the narrow one submitted by petitioner: "Once an unclassified document has been accepted in evidence in a preliminary hearing open to the public, must the convening authority release it and permit the accused to do so?"

Before we can address petitioner's question, however, we must first determine whether we have jurisdiction to issue the writ requested. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) (Jurisdiction must be established as a threshold matter without exception).

The Army Court of Criminal Appeals is a court of limited jurisdiction, established by The Judge Advocate General. UCMJ art. 66(a) ("Each Judge Advocate General shall establish a Court of Criminal Appeals. . . ."). The mandate to establish this court was made pursuant to the authority of Congress to pass laws regulating the Armed Forces. *See* U.S. Const. art. I § 8, cl. 14. While this court has jurisdiction to issue writs under the All Writs Act, 28 U.S.C. § 1651, we must exercise this authority "in strict compliance with [the] authorizing statutes." *Ctr. For Constitutional Rights (CCR) v. United States*, 72 M.J. 126, 128 (C.A.A.F. 2013). Our jurisdiction to issue the requested writ is limited to our subject matter jurisdiction over the case or controversy. *See United States v. Denedo*, 556 U.S. 904, 911 (2009); UCMJ art. 66. "To establish subject matter jurisdiction, the harm alleged must have had 'the potential to directly affect the findings and sentence.'" *LRM v. Kastenber*, 72 M.J. 364, 368 (2013) (quoting *CCR*, 72 M.J. at 129).

In determining whether we have jurisdiction, we are cognizant of the role this court plays in the military justice system. This court does not have jurisdiction to oversee military justice generally. *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999).

The Judge Advocate General, staff judge advocates, and convening authorities are among those with significant duties in overseeing military justice. *See e.g.* UCMJ arts. 26(a), 27(b)(2), 69 and 73 (responsibilities of the Judge Advocate General in designating military judges, certifying the qualifications of counsel, conducting appellate review, and acting on petitions for new trials); UCMJ arts. 32, 34 60, 71, and 138 (responsibilities of convening authorities in appointing preliminary hearings, referring cases to trial, approving and executing sentences, and hearing complaints against commanding officers). In general, while the jurisdiction of this court over the findings and sentence of a case referred to it is broad, *see* UCMJ art. 66(c); *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991) (“a clearer *carte blanche* to do justice would be difficult to express”), the authority of this court to review pre-referral matters is limited and lacks a firm statutory basis.

Although not phrased as such, the relief petitioner seeks is for this court to countermand an order given by a military commander, in a circumstance where there is not yet—and may never be—a court-martial. This would be a broad view of this court’s jurisdiction.

Nonetheless, although it is a broad view, it is not unheard of. In *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997), our superior court granted a writ in a case that is somewhat similar to the issue presented here. In *Powell*, the special court-martial convening authority directed that the *entire* Article 32, UCMJ, hearing be closed. The Court of Appeals for the Armed Forces (C.A.A.F.) granted the writ, ordered that the hearing be open to the public, and directed that the hearing may be ordered closed only as necessary on a case-by-case basis. *Id.* at 365-366. However, since that time, the C.A.A.F. has questioned whether *Powell* continues to be good law. In denying a writ seeking media access to court-martial filings, (as opposed to filings at a pretrial hearing such as the present circumstances), the C.A.A.F. in *CCR* rejected *Powell* as controlling precedent, noting that “(1) *Powell* was decided before *Goldsmith* clarified our understanding of the limits of our authority under the All Writs Act, and (2) we assumed jurisdiction in that case without considering the question.” *CCR*, 72 M.J. at 129.

In *Goldsmith*, the Supreme Court clearly stated that a Court of Criminal Appeals’ jurisdiction extends to reviewing the findings and sentence of courts-martial. 526 U.S. at 535. Under the All Writs Act, this court can issue process “in aid” of that jurisdiction. Thus, for example, the C.A.A.F. had jurisdiction to order the removal of a “biased” military judge as it “had the potential to directly affect the findings and sentence” and was therefore in aid of the court’s jurisdiction. *CCR*, 72 M.J. at 129 (citing *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012)).

Viewing *Powell* in light of *Goldsmith*, we reject the invitation to extend the jurisdiction of this court under the All Writs Act to the pre-referral matter raised in this writ. Furthermore, the matter petitioner desires us to address is not a judicial

order with focused applicability to only the Article 32 preliminary hearing. Rather, the order in question is a military order provided by a commander with application far beyond the Article 32, UCMJ. Specifically, the protection provided the contents of the Army Regulation 15-6 administrative investigation, for example, should and must be sought through administrative channels provided outside the court-martial process, such as the Freedom of Information Act (FOIA) 5 U.S.C. § 552, Army Reg. 15-6, Procedures for Investigating Officers and Boards of Officers, para. 3-18(b) (2 Oct. 2006), and Article 138, UCMJ (Complaints of wrongs).

In *Goldsmith*, the Supreme Court distinguished between “executive actions” (where writ jurisdiction did not exist) and actions effecting the “finding” or “sentence” (where writ jurisdiction does exist). *Goldsmith*, 526 U.S. at 535. Although a closer call than the facts presented in *Goldsmith*, we find a protective order issued by a military commander, intended to cover the public release of government information both before and after a preliminary hearing, to be more akin to an executive action. An Article 32 hearing is “not part of the court-martial.” *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007).¹ An Article 32 hearing, being a hearing conducted before a decision is made to send a case to trial, is unlikely to have “the potential to *directly* affect the findings and sentence” as required for writ jurisdiction. *Kastenberg*, 72 M.J. at 368 (emphasis added).

This is not to say that as an executive action, the protective order is not subject to judicial review. Assuming a proper request, when an agency fails to comply with FOIA, a civil action may be brought against the agency in a United States district court. 5 U.S.C. § 552(a)(4)(B).

Setting aside whether this filing is a FOIA request clothed as a writ petition and whether there are other paths more appropriate to address petitioners claim, the structure of the military justice system assigns to others the initial responsibility of addressing the issue presented by the petitioner. While this includes the military commander, most critically it includes the military judge. Were we to assume that the charges will be referred to a general court-martial in order to arguably find jurisdiction over this writ, we must also assume that a military judge will be detailed to the case. UCMJ art. 26(a) (“A military judge shall be detailed to each general court-martial.”). Not only will the military judge be the structurally appropriate

¹ The charges may be dismissed prior to referral or referred to a summary or special court-martial, in which case, the requirement for a preliminary hearing disappears. *See* Rule for Courts-Martial [hereinafter R.C.M.] 405(a) (“Failure to comply with this rule shall have no effect on the disposition of the charge(s) if the charge(s) is not referred to a general court-martial.”).

person to consider the questions presented by this writ, the military judge, having a more developed record, will also be far better positioned to consider the matter.

Furthermore, in the course of appellate review, in order to receive relief from an error in a preliminary hearing an accused would be required to demonstrate a material prejudice to a substantial right. UCMJ art. 59(a); *Davis*, 64 M.J. at 448. Put differently, if an accused must be prejudiced to receive relief on appeal, at least a similar showing of potential prejudice to the findings or sentence is a threshold requirement for this court to issue the writ.² To the extent that petitioner has identified possible prejudice,³ the petitioner has not demonstrated that the prejudice is incapable of remedy at trial through, for example, the process of liberal voir dire and other available court remedies. *See* R.C.M. 905(b)(1) and 906.

Even assuming we were to find jurisdiction in this case, we would not grant petitioner the relief he seeks. To prevail on his writ of mandamus, petitioner must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances. *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004). We conclude that petitioner has fallen short on all three prongs.

As to the first prong, we again note that the accused retains the full ability to seek relief at trial from any error arising from the Article 32 hearing. If a preliminary hearing did not substantially comply with R.C.M. 405 and Article 32, the military judge may reopen the Article 32 hearing or provide other appropriate relief. R.C.M. 906(b)(3). In this way, this case differs significantly from the issues presented in *Powell* and *CCR*. In *Powell*, the news media petitioners were barred access from the hearing itself, and a remedy given after the hearing had concluded would have been too late. 47 M.J. at 365. In *CCR*, the writ addressed access to trial documents, and not documents submitted during the Article 32 hearing.

With regards to the second prong, petitioner's right to the issuance of the writ is not clear or indisputable. Petitioner requests two forms of relief: (1) the immediate release of all exhibits; and (2) permission to release the documents to the

² Notably, however, an accused who alleges a defect in the Article 32 hearing in a motion to the military judge is *not* required to demonstrate prejudice. *See Davis*, 64 M.J. at 448. Again, the military judge, vis-à-vis this court, is likely to be in a superior position to consider this matter.

³ Petitioner alleges negative media coverage “seriously threatens . . . his right to a fair trial if any charge is referred for trial.”

public himself.⁴ In support of this contention petitioner cites to the public's broad right to access documents admitted at trial. We agree with the brief submitted by *amicus curiae* that public access to trial documents serves important public interests. "[P]ublic scrutiny" does indeed serve as a restraint on government, and openness has a "positive effect on the truth-determining function of the proceedings." Article 32 hearings, however, are not an apples-to-apples comparison to trials on the merits. As an Article 32 preliminary hearing is conducted *before* there has been a decision on whether to send the case to trial, comparisons to civilian practice are difficult. As an Article 32 hearing is created by statute, an accused's rights at such a proceeding generally have a statutory basis. Additionally, Article 32 preliminary hearings are not governed by rules of evidence. Evidence that would be excluded or suppressed at trial may be admitted at an Article 32 hearing. R.C.M. 405(h). An Article 32 preliminary hearing officer cannot ordinarily screen out documents of dubious reliability, that are of questionable authenticity, or whose probative value is substantially outweighed by dangers of unfair prejudice. While an Article 32 hearing is a public proceeding, it is not clear that the public's interest in obtaining documents at a preliminary hearing is viewed through the same lens as the public's right to admitted documents at trial on the merits. Thus, while we find the arguments of *amicus curiae* regarding openness to possess merit, petitioner has not met his burden to establish a "clear and indisputable" right to the requested relief.

As to the last prong, we do not find the relief petitioner seeks would be appropriate. A judge-made rule that such matter is automatically public (as petitioner requests) or is presumptively public (as *amicus curiae* argues) would have secondary effects.

With no rules of evidence, and without a judicial officer, such a rule would allow a party to make public the entire case file so long as the information was relevant to the purposes of the preliminary hearing. *See* R.C.M. 405(a) (purpose of the hearing includes information relevant to disposition). This would allow a party to introduce into the public sphere information that is inadmissible at trial and whose evidentiary value may be minimal. *See* Army Reg. 27-26, Rules of Professional Conduct for Lawyers, Rule. 3.6 (Tribunal Publicity) (1 May 1992). As an accused does not have full access to discovery until after referral, such a rule would result in an uneven power dynamic. *See* R.C.M. 701(a).

⁴ As petitioner seeks the right to release the documents himself without the redaction of sensitive matter (such as social security numbers, graphic photos, or medical records), the relief petitioner seeks goes far beyond the case-by-case evaluation required by *Powell*.

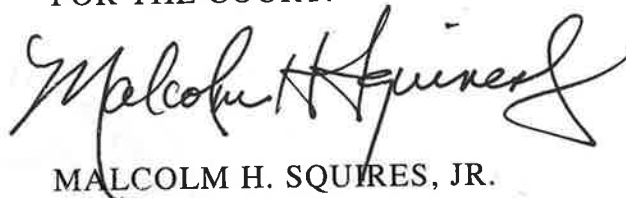
Lastly, a rule that provided for the automatic publication of all matter submitted to an Article 32 hearing appears to be contrary to the Military Rules of Evidence and Rules for Courts-Martial. Military Rule of Evidence 506(e)(1)(D) specifically allows the government to provide sensitive information to the accused before referral subject to a protective order. Additionally, the authority of the preliminary hearing officer under R.C.M. 405(i)(9) to seal exhibits is not limited to classified exhibits. Both rules would be undermined by the outcome that petitioner suggests.

CONCLUSION

Therefore, for the reasons stated above, the petition for extraordinary relief in the nature of a writ of mandamus is DISMISSED.

Senior Judge HAIGHT and Judge PENLAND concur.

FOR THE COURT:

A handwritten signature in black ink, appearing to read "Malcolm H. Squires, Jr.", written in a cursive style.

MALCOLM H. SQUIRES, JR.
Clerk of Court

Exhibit 2

RECORD OF PRELIMINARY HEARING UNDER ARTICLE 32

BERGDAHL, ROBERT BOWDRIE

Sergeant

Headquarters and
Headquarters Company,
Special Troops Battalion,
U.S. Army Forces Command

U.S. Army

Fort Bragg,
North Carolina 28310

Investigated at

Joint Base San Antonio, Texas

on

17 September 2015 and
18 September 2015

PERSONS PRESENT

LIEUTENANT COLONEL MARK VISGER, PRELIMINARY HEARING OFFICER;

MAJOR MARGARET KURZ, TRIAL COUNSEL;

LIEUTENANT COLONEL CHRISTIAN BEESE, ASSISTANT TRIAL COUNSEL;

CAPTAIN MICHAEL PETRUSIC, SECOND ASSISTANT TRIAL COUNSEL;

MR. EUGENE FIDELL, CIVILIAN DEFENSE COUNSEL;

LIEUTENANT COLONEL FRANKLIN ROSENBLATT, DEFENSE COUNSEL;

CAPTAIN ALFREDO FOSTER, ASSISTANT DEFENSE COUNSEL

SERGEANT ROBERT BOWDRIE BERGDAHL, THE ACCUSED;

MS. STACY CRAVER, COURT REPORTER;

MAJOR NATALIE KARELIS, LEGAL ADVISER;

MR. TIMOTHY MERSEREAU, SECURITY ADVISER TO PRELIMINARY HEARING
OFFICER;

MR. DAN THOMPSON, SECURITY ADVISER TO TRIAL COUNSEL;

MR. DON GARDNER, SECURITY ADVISER TO DEFENSE COUNSEL.

TESTIMONY				
Name of Witness (Last, First, Middle Initial)	RANK	Direct and Redirect	Cross and Recross	PHO
PROSECUTION				
BILLINGS, John P.	CPT	18	102	113
SILVINO, Silvino S.	MAJ	117, 181	172, 189	184
BAKER, Clinton J.	COL	191	--	219
DEFENSE				
LEATHERMAN, Gregory S.	CIV	232	240	--
ABERLE, Curtis J.	CIV	248	--	258
DAHL, Kenneth R.	MG	262	--	--
RUSSELL, Terrence D.	CIV	312	--	342

EXHIBITS	
NUMBER OR LETTER	DESCRIPTION
PROSECUTION EXHIBITS	
1	SGT Bergdahl - Sworn Statement, dtd 6 Aug 14 (373 pages)
2	SGT Bergdahl - Attachment Orders to FORSCOM, dtd 9 Jan 15 (1 page)
3	SGT Bergdahl - Deployment Orders, dtd 1 May 09 (2 pages)
4	SGT Bergdahl - DA Form 4187 - Captured to Present for Duty, dtd 30 Mar 15 (2 pages)
5	UNCLASSIFIED - Map of Afghanistan (1 page) (Demonstrative Aid)
DEFENSE EXHIBITS	
A	Letter from Mr. Fidell to General Milley (28 pages)
B	Executive Summary by Major General Dahl (59 pages)
C	Short Form Findings, dated 27 Jul 15 (2 pages)
D	DA Form 3349 - Physical Profile, dated 25 Jun 15 (2 pages)
E	PowerPoint from Defense Closing (22 pages) (Demonstrative Aid)

PRELIMINARY HEARING OFFICER EXHIBITS			
	Date	From	Description
I			CLASSIFIED - Map of Paktika Province - RC East - Afghanistan
II			CLASSIFIED - Map of Mest - RC East - Afghanistan
III	17 Aug 15	Government	CLASSIFIED - Government memo dated 17 Aug 15 entitled "List of Classified Intelligence and Operational Reporting Viewed by Defense in the case of <i>United States v. Robert Bowe (Bowdrie) Bergdahl</i> " (152 pages)
IV	25 Mar 15	Government	DD 458 Charge Sheet (2 pages)
V	25 Mar 15	Convening Authority	Memorandum appointing LTC Washburn as the PHO setting the hearing date for 22 April (3 Pages)
VI	25 Mar 15	PHO	Notification of the hearing date to SGT Bergdahl with ERB and Charge Sheet (5 pages)
VII	30 Mar 15	Defense	Memorandum requesting delay from 22 April to 8 July (1 page)
VIII	31 Mar 15	Government	Memorandum providing notice of evidence the Government intended to introduce at the preliminary hearing (1 page)
IX	1 Apr 15	Convening Authority	Memorandum approving Defense delay request (1 page)
X	15 Apr 15	Government	Memorandum providing notice of Government witness list (1 page)
XI	12 May 15	Defense	Memorandum to PHO requesting investigative assistance (with attachments) (28 pages)
XII	13 May 15	Government	Memorandum responding to Defense request for evidence prior to the Article 32 hearing (5 pages)
XIII	14 May 15	Defense	Memorandum responding to Government's 13 May memorandum regarding investigative assistance (1 page)

XIV	15 May 15	PHO	E-mail from LTC Washburn requesting recusal as PHO: (2 pages)
XV	20 May 15	Convening Authority	Memorandum relieving LTC Washburn of duties as PHO (1 page)
XVI	20 May 15	Convening Authority	Memorandum appointing LTC Visger as the PHO setting the hearing date for 8 July (with attachments) (3 pages)
XVII	27 May 15	Defense	Delay request and RCM 706 request (7 pages)
XVIII	27 May 15	Defense	Memorandum requesting additional evidence (1 page)
XIX	29 May 15	Convening Authority	Memorandum granting Defense delay request (1 page)
XX	1 Jun 15	Government	Memorandum detailing Government position on Defense request for production of witnesses and evidence (2 pages)
XXI	2 Jun 15	Government	Memorandum providing response to the Defense request for evidence dated 27 May (1 page)
XXII	3 Jun 15	PHO	Memorandum providing a summary of the 2 June conference call between PHO and parties (3 pages)
XXIII	5 Jun 15	PHO	E-mail from LTC Visger detailing questions for conference call (2 pages)
XXIV	8 Jun 15	Defense	E-mail from LTC Rosenblatt detailing Defense position in advance of teleconference (including 2 attachments: OER and LTC Burke Protective Order) (13 pages)
XXV	9 Jun 15	Defense	E-mail from LTC Rosenblatt requesting a ruling on jurisdiction of the Convening Authority (11 pages)
XXVI	10 Jun 15	Government	Memorandum detailing Government response to the PHO request for additional information dated 5 June (2 pages)

XXVII	11 Jun 15	PHO	E-mail from LTC Visger regarding conference call on 12 June (1 page)
XXVIII	16 Jun 15	Government	E-mail from MAJ Kurz providing the Government position on the production of two Defense witnesses (Dr. Connell and Dr. Morgan) (2 pages)
XXIX	16 Jun 15	PHO	Memorandum regarding the Defense request for investigative assistance (2 pages)
XXX	17 Jun 15	PHO	Memorandum ruling on the Defense objection to jurisdiction of the Convening Authority (1 page)
XXXI	18 Jun 15	PHO	Memorandum regarding the Defense request for the production of witnesses and evidence (5 pages)
XXXII	22 Jun 15	PHO	Notification of the hearing date to SGT Bergdahl (1 page)
XXXIII	24 Jun 15	Government	E-mail from MAJ Kurz regarding classified recommendations in the AR 15-6 investigation (1 page)
XXXIV	29 Jun 15	Defense	E-mail trail between PHO and LTC Rosenblatt regarding contact information for Mr. Full, the withdrawal of request to call LTG Wiggins as a witness, and requesting Mr. Sean Langan to be produced for testimony (3 pages)
XXXV	29 Jun 15	Government	Memorandum objecting to the PHO order to produce classified discovery (4 pages)
XXXVI	30 Jun 15	Defense	E-mail from LTC Rosenblatt responding to the Government's 29 June objection (5 pages)
XXXVII	1 Jul 15	PHO	E-mail from LTC Visger ruling on the Government's 29 June objection (5 pages)
XXXVII I	1 Jul 15	Defense	E-mail from LTC Rosenblatt regarding the production of Mr. Sean Langan as a witness (attaching Defense e-mail request and accompanying Government memo) (6 pages)

XXXIX	1 Jul 15	Government	Memorandum responding to Defense request for production of Mr. Sean Langan as a witness (1 page)
XL	8 Jul 15	Convening Authority	Memorandum regarding protective order for classified information (6 pages)
XLI	21 Jul 15	PHO	Decision memorandum regarding the Defense request for Mr. Sean Langan as a witness (1 page)
XLII	22 Jul 15	Defense	E-mail from Mr. Fidell to the Convening Authority requesting a TS-SCI clearance (2 pages)
XLIII	29 Jul 15	Defense	E-mail from LTC Rosenblatt regarding Defense request for Mr. Curtis Aberle as a witness (1 page)
XLIV	3 Aug 15	Government	Memorandum responding to Defense request for Mr. Curtis Aberle as a witness (2 pages)
XLV	7 Aug 15	Defense	E-mail from LTC Rosenblatt regarding Defense request for consideration of classified exhibits as evidence and further detailing its position on the need to obtain operational/intelligence reporting regarding SGT Bergdahl's whereabouts (2 pages)
XLVI	7 Aug 15	Defense	E-mail from LTC Rosenblatt regarding Defense's position on Government's request for the production of the long-form RCM 706 report (4 pages)
XLVII	10 Aug 15	Government	Memorandum responding to Defense request for Mr. Curtis Aberle as a witness (1 page)
XLVIII	13 Aug 15	Government	Memorandum regarding the Defense request for consideration of classified evidence (3 pages)
XLIX	17 Aug 15	Defense	E-mail from LTC Rosenblatt detailing the Defense position on the production of documents regarding operational/intelligence reporting on SGT Bergdahl's whereabouts (3 pages)

L	17 Aug 15	PHO	Memorandum documenting teleconference of 14 August (3 pages)
LI	17 Aug 15	PHO	E-mail from LTC Visger regarding the scope of "wrongfully caused search and recovery operations", the Defense request for operational/intelligence reporting regarding SGT Bergdahl's whereabouts, and discovery issues (4 pages)
LII	20 Aug 15	Government	E-mail from LTC Beese regarding the status of Mr. Fidell's security clearance request (3 pages)
LIII	24 Aug 15	Government	Memorandum regarding reasonable efforts to procure behavioral health policies (1 page)
LIV	25 Aug 15	Government	E-mail from MAJ Kurz regarding DA G-2 action on Defense security clearance request (with attached memorandum from DA G-2) (2 pages)
LV	25 Aug 15	PHO	E-mail from LTC Visger regarding Defense security clearance request and Defense request for behavioral health policy letters (2 pages)
LVI	28 Aug 15	Government	E-mail from MAJ Kurz regarding the status of disclosure of classified documents to the Defense (1 page)
LVII	28 Aug 15	Defense	E-mail from LTC Rosenblatt detailing the status of Defense's request for operational/intelligence reporting regarding SGT Bergdahl's whereabouts (2 pages)
LVIII	28 Aug 15	PHO	E-mail from LTC Visger regarding the status of classified evidence on operational/intelligence reporting regarding SGT Bergdahl's whereabouts (2 pages)
LIX	31 Aug 15	PHO	E-mail from LTC Visger regarding legal issues to resolve in advance of conference call on 2 September (2 pages)

LX	2 Sep 15	Defense	E-mail from Mr. Fidell requesting a delay in the hearing (2 pages)
LXI	2 Sep 15	Defense	E-mail from LTC Rosenblatt requesting consideration of RCM 706 short form and FBI letter as Defense evidence with two attachments (5 pages)
LXII	2 Sep 15	Defense	E-mail from LTC Rosenblatt noting the Defense position regarding disclosure of classified documents in advance of the 3 September conference call (with attachments) (7 pages)
LXIII	3 Sep 15	Defense	E-mail from LTC Rosenblatt providing reasons in support of Defense delay request (4 pages)
LXIV	3 Sep 15	Government	Memorandum opposing the Defense request for a delay (3 pages)
LXV	4 Sep 15	PHO	Memorandum detailing resolution of current outstanding issues (6 pages)
LXVI	4 Sep 15	Defense	E-mail from LTC Rosenblatt objecting to limitations placed on access to witnesses (with attachments) (6 pages)
LXVII	5 Sep 15	Defense	Memorandum to Convening Authority requesting delay of preliminary hearing (13 pages)
LXVIII	6 Sep 15	Convening Authority	Memorandum denying Defense delay request (1 page)
LXIX	8 Sep 15	Government	Memorandum requesting closure of certain portions of the Article 32 hearing (1 page)
LXX	8 Sep 15	Defense	E-mail from LTC Rosenblatt objecting to Government request for closure (5 pages)
LXXI	8 Sep 15	PHO	E-mail from LTC Visger noting the Defense objections regarding access to witnesses (3 pages)
LXXII	9 Sep 15	PHO	E-mail from LTC Visger setting a conference call for discussing closure of the hearing (4 pages)

LXXIII	10 Sep 15	PHO	E-mail from LTC Visger to LTC Rosenblatt regarding the defense request that closure hearing be on the record (6 pages)
LXXIV	14 Sep 15	Defense	E-mail from Mr. Fidell to Convening Authority regarding the Protective Order (1 page)
LXXV	21 Sep 15	PHO	E-mail from LTC Visger to convening authority requesting a delay to submit Article 32 report (1 page)
LXXVI	22 Sep 15	Convening Authority	Memorandum granting the extension to submit written report (1 page)

1 The Article 32 hearing was called to order at 0901,

2 17 September 2015, with the following parties present:

3 LIEUTENANT COLONEL MARK VISGER, PRELIMINARY HEARING OFFICER;

4 MAJOR MARGARET KURZ, TRIAL COUNSEL;

5 LIEUTENANT COLONEL CHRISTIAN BEESE, ASSISTANT TRIAL COUNSEL;

6 CAPTAIN MICHAEL PETRUSIC, SECOND ASSISTANT TRIAL COUNSEL;

7 MR. EUGENE FIDELL, CIVILIAN DEFENSE COUNSEL;

8 LIEUTENANT COLONEL FRANKLIN ROSENBLATT, DEFENSE COUNSEL;

9 CAPTAIN ALFREDO FOSTER, ASSISTANT DEFENSE COUNSEL

10 SERGEANT ROBERT BOWDRIE BERGDAHL, THE ACCUSED;

11 MS. STACY CRAVER, COURT REPORTER;

12 MAJOR NATALIE KARELIS, LEGAL ADVISER;

13 MR. TIMOTHY MERSEREAU, SECURITY ADVISER TO PRELIMINARY HEARING
14 OFFICER;

15 MR. DAN THOMPSON, SECURITY ADVISER TO TRIAL COUNSEL;

16 MR. DON GARDNER, SECURITY ADVISER TO DEFENSE COUNSEL.

1 PHO: Let's go ahead and get started.

2 Sergeant Bergdahl, I am Lieutenant Colonel Mark A. Visger.
3 By order of Lieutenant Colonel Peter Q. Burke, I have been appointed
4 preliminary hearing officer under Article 32 of the Uniform Code of
5 Military Justice to inquire into certain charges against you. The
6 charges allege, in general:

7 One specification of desertion with intent to avoid
8 hazardous duty and shirk important service in violation of Article
9 85, UCMJ; and

10 One specification of misbehavior before the enemy,
11 endangering the safety of the unit in violation of Article 99, UCMJ.

12 The name of the accuser is Lieutenant Colonel Peter Q.
13 Burke.

14 The names of the witnesses thus far known to me who will be
15 called to testify at this hearing are:

16 Colonel Clinton Baker,
17 Major Silvino Silvino,
18 Captain John Billings,
19 Major General Kenneth Dahl,
20 Mr. Terrance Russell,
21 Mr. Greg Leatherman, and
22 Mr. Curtis Eberle.

1 Sergeant Bergdahl, I am now going to advise you of your
2 rights at this preliminary hearing.

3 You have the right to be present throughout the taking of
4 evidence so long as your conduct is not disruptive. You will have
5 the right, at the proper time, to cross-examine the witnesses who
6 testify against you at the hearing, to present evidence in defense
7 and mitigation on your own behalf, to make a statement in any form at
8 the proper time, to remain silent, or to refuse to make any statement
9 regarding any offense you are accused or suspected of committing. In
10 addition, you are advised that any statement made by you might be
11 used as evidence against you in a trial by court-martial.

12 Do you understand what I've said?

13 ACC: Yes, sir. I do.

14 PHO: As the preliminary hearing officer, it is my duty to
15 ascertain and impartially weigh the evidence presented in support of
16 the charges against you that are relevant to the limited scope and
17 purpose of this hearing. This preliminary hearing will include
18 inquiries as to whether there is probable cause to believe offenses
19 have been committed under the UCMJ and whether you committed the
20 offenses, whether a court-martial would have jurisdiction over the
21 offenses and you, the form of the charges, and to make a
22 recommendation as to the disposition of the charges.

1 You and your counsel will be given full opportunity to
2 cross-examine witnesses who testify against you at the preliminary
3 hearing and to present additional evidence either in defense or
4 mitigation relevant to the limited scope and purpose of the hearing.

5 I can recommend that the charges against you be referred
6 for trial to general court-martial or to a different type of
7 court-martial or that charges against you be dismissed or disposed of
8 other than trial by court-martial. It is not my purpose during this
9 preliminary hearing to act as a prosecutor but only as an impartial
10 fact finder.

11 Do you understand?

12 ACC: Yes, sir. I do.

13 PHO: Before I begin the preliminary hearing and examination of
14 any of the witnesses in this case, I must inform you that you have
15 the right to be represented at all times by legally qualified
16 counsel. This means that you have the right to be represented by a
17 civilian lawyer of your own choice but at no expense to the United
18 States, by military counsel of your own selection if that counsel is
19 reasonably available, or by counsel detailed by Trial Defense Service
20 to represent you at the preliminary hearing. There is no cost to you
21 for military counsel.

22 Do you wish to be represented by counsel? If so, state the
23 type of counsel you want to represent you.

1 ACC: Civilian counsel and JA counsel.

2 PHO: Okay. At this point, Mr. Fidell, if you could just state
3 the names and qualifications of the defense for the record.

4 CDC: Yes, Your Honor [sic]. And is it acceptable if I remain
5 seated?

6 PHO: You may remain seated. I am not a judge, and this is not a
7 court-martial; so I will not require the parties to stand.

8 CDC: Force of habit. Eugene Fidell. I'm a member of the Bar of
9 Connecticut.

10 PHO: Okay. Go ahead and just state the names of the other
11 parties or the other parties can state their own names and
12 qualifications.

13 CDC: With me is Lieutenant Colonel Franklin Rosenblatt, who is a
14 member of the Judge Advocate General's Corps, who is certified in
15 accordance with the UCMJ as trial and defense counsel in general
16 courts-martial; and Captain Alfredo Foster, also Judge Advocate and
17 also certified and sworn.

18 PHO: Okay. Thank you.

19 Let's go ahead and open the formal investigation. This is
20 a formal preliminary hearing into certain charges against Sergeant
21 Robert "Bowe" Bowdrie Bergdahl, ordered pursuant to Article 32, UCMJ,
22 by Lieutenant Colonel Peter Q. Burke, commander of the Special Troops
23 Battalion, U.S. Army Forces Command.

1 Sergeant Bergdahl, on 22 June 2015 and earlier this
2 morning, I informed you of your right to be represented by civilian
3 counsel at no expense -- I'm not sure why we're doing this again but
4 I'll go ahead and do it because it's in the script -- at no expense
5 to the United States, military counsel of your own selection if
6 reasonably available, or military counsel detailed by the Trial
7 Defense Service.

8 You have present with you Mr. Fidell, Lieutenant Colonel
9 Rosenblatt, and Captain Foster.

10 Do you want these three individuals to represent you at
11 this hearing?

12 ACC: Yes, sir. I do.

13 PHO: Okay. All right. Sergeant Bergdahl, I want to remind you
14 that my sole function as the Article 32 preliminary hearing officer
15 in this case is to determine all the relevant facts of this case, to
16 weigh and evaluate those facts, and to determine whether an offense
17 under the UCMJ has been committed and whether you committed it. I
18 shall also consider whether a court-martial would have jurisdiction
19 over the offenses and the form of the charges and make a
20 recommendation concerning the disposition of the charges that have
21 been preferred against you.

22 I will now read the charges unless you choose to waive the
23 reading.

1 CDC: We'll waive the reading, Colonel.

2 PHO: Okay. Thank you.

3 All right. I will now show you the charges and
4 specifications. And have you seen this particular charge sheet?

5 ACC: Yes, sir. I have.

6 PHO: Okay. I advise you that you do not have to make any
7 statement regarding the offenses you are accused of and that any
8 statement you do make may be used as evidence against you in a trial
9 by court-martial. You have the right to remain silent concerning the
10 offenses with which you are charged. You may, however, make a
11 statement, either sworn or unsworn, and present evidence in defense
12 and mitigation so long as it is relevant to the limited scope and
13 purpose of this hearing. If you do make a statement, whatever you
14 say will be considered and weighed as evidence by me just like the
15 testimony of the other witnesses.

16 You have been previously given a copy of the documents the
17 government intends to introduce in this case. I will not consider
18 any of this material in making my decisions unless I give you the
19 opportunity to object to it and I decide on the record to admit it
20 into evidence for this preliminary hearing.

21 It is my understanding that the government intends to call
22 three witnesses at this preliminary hearing and their names are:
23 Colonel Clinton Baker, Major Silvino Silvino, and Captain John

1 Billings. After these three witnesses testify, you or your attorneys
2 will have the right to cross-examine them.

3 You also have the right to produce other evidence on your
4 behalf in defense or mitigation for the limited scope and purpose of
5 the hearing. I have coordinated through the government counsel for
6 the appearance of those witnesses previously requested by you that I
7 have determined to be relevant, not cumulative, and necessary to the
8 limited scope and purpose of the hearing.

9 Before proceeding any further, I now ask you whether you
10 have any questions concerning your right to remain silent, concerning
11 the offenses of which you are accused, your right to make a statement
12 either sworn or unsworn, the use that can be made of any statement
13 that you shall make, your right to cross-examine witnesses against
14 you, or your right to present evidence in your own behalf or defense
15 and mitigation. Do you have any questions at this point?

16 ACC: No, sir. I don't.

17 PHO: All right. Okay. And for members of the gallery: During
18 portions of this preliminary hearing, it may be necessary for me to
19 consider classified testimony from a witness or to discuss classified
20 evidence. If that occurs, I will conduct a short discussion with
21 counsel to determine whether the requirements to close the Article 32
22 preliminary hearing to spectators have been met in accordance with
23 Rule for Court-Martial 405(i)4. Per this rule, I may close portions

1 of the hearing to spectators if I determine that an overriding
2 interest exists that outweighs the value of an open preliminary
3 hearing, the closure is narrowly tailored to achieve that overriding
4 interest that justifies the closure, and no lesser method short of
5 closing the preliminary hearing can be used to protect the overriding
6 interest in this case.

7 If I decide to close a portion of this preliminary hearing
8 to spectators, I will first make findings of fact regarding the
9 necessity of closure and read those into the record for the members
10 of the public to hear. All personnel not previously cleared to hear
11 classified evidence will be directed to leave the hearing room area
12 and the closed-circuit television feed will be disconnected until the
13 hearing is reopened. All personnel in the hearing room will be
14 escorted to a waiting area and will be informed when the hearing has
15 been reopened. Please take all of your belongings with you before
16 leaving the hearing room. Or the other option that will probably
17 happen if this were to happen is the hearing will move to a secure
18 area approved for the handling and discussion of classified material
19 and only personnel previously approved to hear classified evidence
20 will be admitted to that room.

21 And then when the hearing does reopen to spectators, I
22 will, if possible, provide a brief, unclassified summary of what went
23 on during the classified proceedings.

1 All right. Are there any other preliminary matters that we
2 need to take up before we begin the substantive part of the hearing?

3 Defense?

4 CDC: I think you've covered the field, Colonel.

5 PHO: Okay. Government?

6 TC: Yes, sir.

7 PHO: All right. Does government counsel desire to make an
8 opening statement at this time?

9 TC: Yes, sir.

10 PHO: Proceed.

11 TC: Deliberate and knowing disregard. On 30 June 2009, the
12 accused acted with deliberate disregard for the consequences of his
13 actions when, under the cover of darkness, he snuck off Observation
14 Post Mest, Paktika, Afghanistan, to make the approximately
15 30 kilometer hike to FOB Sharana so he could draw enough attention to
16 himself to merit a personal audience with a general officer to air
17 his grievances with the Army. The facts themselves are
18 straightforward, and they are undisputed.

19 Robert Bowdrie Bergdahl -- or Bowe Bergdahl as he wished to
20 be known enlisted in the Army on 12 June 2008. He completes basic
21 training and AIT at the end of October 2008 and reports to Blackfoot
22 Company, 1st of the 501st Parachute Infantry Regiment at Fort
23 Richardson, Alaska. Here he's assigned to 2nd Platoon. 2nd Platoon

1 is on its way to NTC -- or the National Training Center at Fort
2 Irwin, California, for training. After the exercise, 2nd Platoon and
3 the accused return home for Christmas and block leave; and in March
4 of 2009, 1st of the 501st deploys to Paktika Province in Afghanistan.
5 The accused deploys with his unit, although he's several weeks behind
6 the main body due to an infection in his heel. He arrives in
7 Afghanistan on 11 May 2009, and he joins his unit in the rotation
8 schedule between Forward Operating Base Sharana and Observation Post
9 Mest in Afghanistan.

10 Observation Post Mest was established in March or April of
11 2009 based on discussions between U.S. forces in the area and local
12 village leaders and elders. Observation Post Mest is located at a
13 crucial intersection in between the towns of Mest and Malak on the
14 two crucial routes in Paktika Province, one that runs north/south and
15 east/west. The observation post is designed to provide overwatch
16 over those two routes, to serve as a traffic control point, to stop
17 the flow of arms and fighters coming in from Pakistan; and it's part
18 of 2nd platoon's duty to build and man this remote outpost in
19 southeast Paktika.

20 I'd like to describe the observation post. It's very
21 austere. It consists simply of a flat area in front of a hill and
22 then the hill itself. On top of the hill are several bunkers. One
23 is manned by U.S. forces. Several others are manned by the Afghan

1 National Police that U.S. forces are partnering with at this
2 observation post. At the bottom of the hill, which is no bigger than
3 a football field, maybe a little smaller, U.S. forces align their
4 trucks in the vehicle marshalling area. It's very austere. It
5 consists really of nothing more than dirt, scrub, and rocks. There's
6 no trees, no plumbing, no electricity, no water, no shade.

7 Conditions are primitive. Soldiers sleep on cots or on the
8 ground on the side of their trucks. The latrine is merely a hole in
9 the side of the hill surrounded by a bunker. Food is MREs or the
10 occasional offerings from the Afghan National Police. And shade is
11 poncho liners only.

12 The duties of the Soldiers at Observation Post Mest are
13 construction of the OP. They spend their days filling sandbags;
14 laying concertina wire; building HESCOs; and building the bunkers;
15 and, at the bottom of the hill, manning guard positions on their
16 trucks, all while partnered with the ANP, the Afghan National Police.

17 They also conduct combat patrols in the surrounding towns
18 and villages. They man a TCP, searching traffic and vehicles coming
19 through the intersection. They assist with infrastructure development
20 in the villages; and they assist in building the local governments by
21 conducting KLEs, or key leader engagements, with village elders.

22 2nd Platoon and 3rd Platoon rotate about every 3 or 4 days
23 in between FOB Sharana and Observation Post Mest. And back at

1 Sharana, the platoons also have duties. They pull QRF duties and
2 also conduct refit and patrols.

3 I'd like to move forward to the end of June 2009. It's
4 29 June 2009. 2nd Platoon is at Observation Post Mest. The accused
5 is on his third rotation out to Observation Post Mest, and the
6 platoon is due to rotate back to FOB Sharana the next day on
7 30 June 2009. The platoon, for the most part, has completed its work
8 -- its construction work at Observation Post Mest; and the accused
9 believes that this is the last rotation his platoon will be doing at
10 Observation Post Mest. 3rd Platoon is coming out the next day to
11 relieve them. And after that, the accused believes the observation
12 post will turned over to the ANP and it will become their mission.

13 However, on the morning of 30 June 2009, before daybreak,
14 PFC Austin Lanford completes his guard shift in the turret of MRAP 4
15 on the corner of Observation Post Mest. The accused is his
16 replacement, next on the guard duty rotation; but the accused does
17 not show up for his shift. A search ensues. The entire platoon
18 scours the OP, latrines, ANP bunkers, everywhere a Soldier might be
19 found. But the accused is not found.

20 His tent -- his sleeping area is in order, his gear lined
21 up carefully as the platoon sergeant has required. His weapon is
22 laid out in his tent. There are no signs of a scuffle inside the
23 tent or around it. The platoon leader, Second Lieutenant John

1 Billings, gathers and meets with his platoon sergeant and his NCOs --
2 his noncommissioned officers, his leaders. And Lieutenant Billings
3 makes the decision PFC Bergdahl is missing. He is DUSTWUN, Duty
4 Status and Whereabouts Unknown. Lieutenant Billings has to take a
5 moment to compose the words to send this message to his company.
6 He's never had to write a message like this before. On the morning
7 of June 30, 2009, he sends a message to his company CP, "I have a
8 missing Soldier."

9 The company commander, Captain Silvino, receives the
10 message immediately. He's already in his company command post
11 reviewing the morning traffic. He writes back, "Check again. This
12 must be a mistake." But Lieutenant Billings is already out,
13 searching again, going over those same spots on the tiny observation
14 post. He confirms back, "Not a mistake."

15 Captain Silvino sends the DUSTWUN alert up. This triggers
16 search and recovery operations. The platoon begins to search.
17 Lieutenant Billings immediately kicks out an unplanned, 9-man foot
18 patrol outside the wire. That morning they scour the local villages
19 in the relentless heat looking for the accused -- a sign, a dropped
20 personal belonging, a body, anything. They ask the villagers for
21 intel. They do not find the accused.

22 But this is just the beginning. Task-force-wide search and
23 recovery operations launch that day. COIN operations -- efforts to

1 win the hearts and minds of the people of Afghanistan -- cease
2 immediately. The military launches search and recovery operations.
3 And for 45 days the only U.S. forces operations in Paktika is out of
4 Task Force Yukon Recovery to find the accused. For 45 days,
5 thousands of Soldiers toil in the heat, dirt, misery and sweat with
6 almost no rest, little water, and little food to find the accused.
7 Fatigued and growing disheartened, they search for the accused
8 knowing he left deliberately.

9 It is the elections at the end of August 2009 that slow the
10 main search and recovery effort. Task Force Yukon must assist in
11 securing the democratic presidential nationwide elections or those
12 elections could fail.

13 On 30 June 2009, Lieutenant Billings did not find the
14 accused. He left deliberately and knowingly. And on that day he put
15 into action a plan weeks in the making. Weeks before, he mailed home
16 his computer, his Kindle, his journals. He e-mailed his godmother,
17 his girlfriend, his family, "Be prepared. Expect something. Stay
18 strong." He tried to divert his pay to his godmother so the Army
19 couldn't take it.

20 And then, on 30 June 2009, sometime after midnight, he
21 cleaned up his tent, and wearing only his Army pants, his t-shirt,
22 and carrying his water, compass, knives, snacks, a notebook, his
23 camera, Afghan national currency, and a local garment meant for a

1 disguise, he snuck out, leaving his sleeping area, creeping up the
2 hill over the top of the observation post and down the north side
3 into the village of Malak, intending to begin the northward hike to
4 FOB Sharana, intending to cause a DUSTWUN, intending to cause the
5 alert, to bring attention to himself so he could have a personal
6 audience with the general.

7 But that day he is captured and for 5 years he is held in
8 captivity by enemy forces until, on 31 May 2014, government
9 negotiations bring the accused home and back to military control.
10 These are the facts, and they are undisputed.

11 In this hearing, you will hear from three witnesses from
12 the government. Captain John Billings, who in 2009 was the platoon
13 leader of 2nd Platoon, Bravo Company, Blackfoot Company, 1st of the
14 501st, and the accused's platoon leader. You will hear from Major
15 Silvino, who in 2009 was the company commander for Blackfoot Company,
16 1st of the 501st, and the accused's company commander. You will hear
17 from Colonel Clint Baker, who in 2009 was commander of the 1st of the
18 501st PIR and the accused's battalion commander in 2009. All of
19 these commanders were a part of the brigade, 4/25 or Task Force
20 Yukon. These witnesses will take you through the time encompassing
21 these charges.

22 And, sir, you will have as evidence the sworn statement of
23 the accused given to the investigating officer in August of 2014

1 after his return, admitting to these facts. You will have his
2 deployment orders to Afghanistan from 2009 and the orders assigning
3 him to FORSCOM in 2015 for the administration of military justice.
4 And you will have the DA Form 4187, the personnel action returning
5 him to Present for Duty on 31 May 2014.

6 At the end of the government case, the evidence will show
7 probable cause that the accused deserted in violation of Article 85
8 and that he committed misbehavior before the enemy in violation of
9 Article 99.

10 Thank you.

11 CDC: Colonel, if we might have a moment to confer?

12 PHO: Certainly.

13 [Pause.]

14 CDC: Colonel, I previously indicated that I was going to waive
15 the opening statement. I want to make a one sentence opening
16 statement.

17 PHO: The floor is yours.

18 CDC: Thank you.

19 The government should make Sergeant Bergdahl's statement
20 available to the public and not just to you.

21 PHO: Thank you.

22 Government, please call your first witness.

23 TC: The government calls Captain John Billings.

1 [Pause.]

2 PHO: How far away is the witness waiting room?

3 TC: It's at the other end of the building, sir.

4 PHO: Okay.

5 [Pause.]

6 PHO: You might want to check the door.

7 TC: The MPs should be out there.

8 [Pause.]

9 **CAPTAIN JOHN P. BILLINGS, U.S. Army, was called as a witness for the**
10 **government, was sworn, and testified as follows:**

11 **DIRECT EXAMINATION**

12 **Questions by the trial counsel:**

13 Q. And, Captain Billings, I'd like to advise you that while
14 you are testifying if you are asked any question which you may
15 believe requires a response containing classified information, you
16 have a personal responsibility to notify the preliminary hearing
17 officer prior to answering. At no time should you disclose any
18 classified information while this hearing is in session. Do you
19 understand?

20 A. Yes, ma'am. Yes, ma'am.

21 PHO: And before you proceed, is the microphone picking up Major
22 Kurz' voice?

1 [Audio-visual personnel in the back of the room indicated a negative
2 response.]

3 PHO: That's what I thought. From the members of the audience
4 here, I'm getting some no's in the back. So if you could either
5 adjust the microphones or adjust where you're standing so that you
6 can be heard. I think the court reporter is -- because I would have
7 heard from the court reporter, but I don't know if it's being picked
8 up by the members here in the audience.

9 TC: Roger, sir.

10 Captain Billings, could you please state your full name,
11 rank, and unit of assignment?

12 A. John Paul Billings, Captain. I'm currently assigned to the
13 41st Engineer Battalion, HHC Company Commander.

14 Q. Do you have prior enlisted service?

15 A. Yes, ma'am. I do.

16 Q. How many years of prior enlisted service?

17 A. Just over 13 years, ma'am.

18 Q. How many times have you deployed?

19 A. Three times to Afghanistan and Iraq and then a couple
20 peacekeeping operations, ma'am.

21 Q. When were you commissioned?

22 A. March 2008.

1 Q. I'd like to direct your attention back to 2008. Where were
2 you assigned after receiving your commission?

3 A. Yes, ma'am. In October of 2008, I received orders
4 assigning me to the 4th Brigade, 25th, at Fort Richardson, Alaska.

5 Q. When was that?

6 A. In October of 2008. And then I arrived shortly thereafter
7 upon getting those orders. I PCS'd straight from Fort Benning.

8 Q. And what company were you assigned to?

9 A. Originally, I started off in HHC, ma'am. I worked in the
10 S-3 shop as a targeting officer; and then subsequently -- later on, I
11 was assigned to Blackfoot Company on or about 14 April 2009.

12 Q. Did you deploy with the 1st of the 501st?

13 A. Yes, ma'am. I sure did. January 2009 after coming back
14 from block leave on the 17th of January, I deployed as part of the
15 ADVON for the brigade. They called it the Torch Element. So I was a
16 Container Control Officer for the brigade going in a few months
17 before everybody else got there.

18 Q. And that was part of your duties with the S-3 shop?

19 A. Yes, ma'am.

20 Q. Where did you deploy to in Afghanistan?

21 A. Paktika Province, ma'am.

22 Q. And what was the task force called when you deployed to
23 Afghanistan?

1 A. Task Force Yukon, ma'am.

2 Q. Did that consist of 4/25?

3 A. Yes, ma'am. There were some attached elements as well,
4 kind of a robust brigade going into that deployment to Afghanistan.

5 Q. So that was roughly a brigade-plus size element?

6 A. Yes, ma'am.

7 Q. And at this time I'd like to bring up Prosecution Exhibit
8 Number 5.

9 [Prosecution Exhibit 5 was displayed next to the witness.]

10 Q. Captain Billings, if you could stand -- and the witness has
11 been presented with Prosecution Exhibit Number 5, which is a map of
12 Afghanistan.

13 [The witness did as directed.]

14 Q. Captain Billings, could you show me where Paktika Province,
15 Afghanistan, is on that map?

16 A. Yes, ma'am. So, on the eastern side of Paktika Province
17 over by Pakistan, it comes up like this [pointing], wraps around like
18 this [pointing], and then it comes up like that [pointing], just
19 stopping short of Kabul and then coming back around.

20 Q. Okay.

21 A. Oh, I'm sorry. Right here [pointing]. Not all the way up.

22 Q. And you said on the eastern border of Paktika is what
23 country?

1 A. Pakistan, ma'am.

2 Q. And to the south?

3 A. Pakistan as well.

4 Q. Where is Ghazni Province?

5 A. Just north of it, sir -- or ma'am. Or -- correction --

6 just to the northwest of Paktika Province is Ghazni.

7 Q. And where in Paktika were you located with FOB Sharana

8 approximately?

9 A. Approximately right here [pointing] where it's annotated by

10 the black dot and says "Sharana" on it.

11 Q. Okay. How many miles to the Pakistan border is it from FOB

12 Sharana as the crow flies?

13 A. As the crow flies, I'd say probably 25 or 30 miles, ma'am.

14 Q. Okay. Thank you. You can take your seat.

15 [The witness did as directed.]

16 Q. Retrieving Prosecution Exhibit 5.

17 At some point you were assigned to 2nd Platoon?

18 A. Yes, ma'am.

19 Q. When was that?

20 A. On or about 14 April 2009, I was notified by my battalion

21 commander that I was being given the opportunity to go be a platoon

22 leader down in Blackfoot Company.

23 Q. And that's a prestigious assignment?

1 A. Absolutely, ma'am.

2 Q. How many Soldiers were in 2nd Platoon?

3 A. At the time deployed forward, I had 33 Soldiers.

4 Q. And generally, what was the mission of 2nd Platoon?

5 A. Generally, ma'am, we were there to increase the populace's

6 -- or correction, the host nation security forces' ability to conduct

7 their mission and bolster the local populace's confidence in those

8 forces to do that mission.

9 Q. Have you ever heard of the phrase, "winning the hearts and

10 minds"?

11 A. Yes, ma'am.

12 Q. Does that sort of encompass what your mission was?

13 A. It does. Absolutely.

14 Q. And I'd like to talk a little bit about Observation Post

15 Mest. Was that part of your mission in 2nd Platoon?

16 A. It was. Yes, ma'am.

17 Q. How big is Observation Post Mest?

18 A. I don't know about its current state, ma'am; but at the

19 time when we first got there, its entire circumference would fit

20 within the parameters of, like, a football field -- not nearly as

21 long and not quite as wide but about the same dimensions as that.

22 Q. Was it austere or developed?

1 A. Very austere, ma'am. We didn't have running water. There
2 was no AC or buildings to live in, sleep out of, stuff like that.

3 Q. Where was Observation Post Mest located in terms of roads?

4 A. At the intersection of Route Audi and Dodge, ma'am, the two
5 major north/south running road and east/west running road that kind
6 of bisect Paktika Province.

7 Q. Were they located near any towns?

8 A. Yes, ma'am. You had the town of Malak that was on the
9 northern edge of it, and then the town of Mest which was the southern
10 edge of that intersection.

11 Q. What was the terrain of Observation Post Mest?

12 A. So in and around the immediate portion of Mest OP, on the
13 southern side you had obviously the village of Mest, so you had a
14 semi-urbanized built up area. Off to the east, you had some
15 irrigation and farm fields that kind of ran up to the north east
16 towards Sharana. Farther off to the east, you had some undulating
17 terrain and some mountain ranges. And then the eastern side of the
18 Mest OP -- or correction, the western side of the Mest OP was some
19 rolling terrain; and then they went up into some mountain ranges as
20 well.

21 Q. And within the boundaries of Observation Post Mest, what
22 did it consist of in terms of terrain?

1 A. Yes, ma'am. So the lower half, kind of where we staged our
2 vehicles building the actual OP for the ANP, very flat, usable
3 terrain that they could set up, you know, some sort of building or
4 structure to work out of; and then just to the north of that was a
5 hilltop that we occupied and created an OP or a bunker position
6 around.

7 Q. And that was with U.S. forces and Afghan National Police?

8 A. Yes, ma'am. It was.

9 Q. And did you have a partnership mission?

10 A. Yes, ma'am. We did.

11 Q. What was the purpose of Observation Post Mest?

12 A. Yes, ma'am. So Mest OP was established in order to put an
13 ANA or ANP or host nation security force presence there. The reason
14 why it was important is because of Route Audi and Dodge. So the two
15 routes -- Route Dodge ran east and west, and it cut all the way
16 through Paktika Province and ran to the border of Pakistan. It was a
17 known infiltration route for supplies, IEDs, weapons. It was the
18 route that the Taliban used to come in after the winter surge. Same
19 thing with the north running Route Audi. It completely ran the
20 entire perimeter of Paktika Province all the way down to the southern
21 border again into Pakistan. But more importantly, it fed up to north
22 allowing them to run supplies as far north as Kabul.

1 So it was key because we knew, based on what the ANP and
2 the local nationals were telling us was that those two routes were
3 used by the Taliban almost at free will. So the battalion, brigade -
4 - whoever it was, decided to establish this OP, help the ANP build
5 it. And then we'd also train them and say, "Hey, this is how you
6 need to do this. This is how you do operations -- blah, blah, blah."
7 And so that's why we're building it there.

8 Q. So it was like an overwatch position?

9 A. Yes, ma'am.

10 Q. Were there enemy in the area when you moved into the
11 Observation Post Mest area?

12 A. I believe off to the east, yes, ma'am. In the town of
13 Malak there were some reports that there were a couple little areas
14 that may have had some insurgents locally living in that area but
15 nothing could be confirmed as well as Mest. On the farther eastern
16 side towards Yahya Khel and going into Omnah, there was absolutely
17 some Taliban presence there. But nothing could be solidified in the
18 immediate vicinity of Mest-Malak that we were getting.

19 Q. Did the observation post provide you overwatch -- physical
20 overwatch over these roads and these towns?

21 A. It did. Yes, ma'am.

22 Q. And what did you gain by being able to see the roads and
23 the towns?

1 A. So, on the northern edge looking north, if you're sitting
2 at the OP, was the town of Malak. A few thousand meters out was an
3 IED hotspot, and the Taliban would travel from the far east and come
4 in using the wadis and low-lying terrain to infill and place IEDs
5 along that route on Route Audi.

6 So, by putting an observation post up there, we were
7 allowed to observe almost the entire IED hotspot with the exception
8 of about 300 meters just because of the way the buildings did not
9 enable you to see that portion.

10 During that time period, I believe that the IEDs -- the
11 number of IEDs significantly decreased because of the overwatch that
12 we were able to provide. Obviously, they could still sneak in there,
13 but I think it definitely deterred them.

14 Q. Did you have a nickname for that IED hotspot?

15 A. IED alley, ma'am.

16 Q. I'd like to talk about the construction of the observation
17 post. When you arrived -- when Task Force Yukon arrived, had you
18 started the construction of the OP?

19 A. Say that again, ma'am?

20 Q. When the task force arrived, had construction of the OP
21 begun yet?

22 A. No, ma'am. It did not begin -- initially when we got to
23 Afghanistan, we were doing local patrols around Sharana. The actual

1 construction of the Mest OP, I believe, didn't actually begin until
2 like mid-May. Something like that is when we started sending people
3 out there.

4 Q. Okay. When you began building it, could you describe what
5 defensive measures you used and how you constructed the OP?

6 A. Yes, ma'am. So, based on where they wanted to establish
7 this OP, the battalion had gone through an MTMV process and
8 determined, hey, we'd really like to put some sort of bunker or
9 observation post on top of the hilltop. One, it'll allow us and
10 afford us an opportunity to oversee IED alley and the IED hotspots to
11 the north. In addition, too, it allowed us to overwatch Route Dodge
12 off to the east. That was really the only real piece of high terrain
13 that was in the immediate area of Mest OP that allowed us any
14 advantageous point from there.

15 On the ground, you'd arrange your vehicles in a position to
16 where they could, as much as possible, cover each other; but it was
17 almost impossible to have interlocking sectors of fire based on the
18 range spans of the weapons that were mounted on them.

19 Q. So what -- and I'm sorry -- what construction measures did
20 you use? When you started building the OP, physically how did you
21 build it?

22 A. Yes, ma'am. So we went out there and we strung
23 single-strand concertina wire and then triple-strand concertina wire

1 for an inner perimeter. And it went all the way around the base
2 about halfway up on the northern side and around on that hilltop
3 where we had the bunker at. And then we moved out some containers or
4 -- for them to use at the ANP headquarters building. And then
5 eventually some HESCOs were brought out, and they started filling
6 HESCOs as well.

7 Q. How many bunkers were at the top of the hill?

8 A. Just the one initially, ma'am. At some point, we did push
9 out one a little bit farther. Again, it wasn't as dug in. And then
10 you had another ANP -- not really a bunker but a location or, you
11 know, guard post up there.

12 Q. Okay. What was the purpose of the bunker at the top of the
13 hill?

14 A. It afforded the guys who were up there, one, some shade to
15 get out of the immediate heat; and then in the event that they were
16 to take any sort of fire, they weren't exposed and had somewhere to
17 get in behind cover.

18 Q. How many Soldiers were in the bunker?

19 A. It ranged -- that time period, sometimes an actual guard
20 shift would be about three to four guys. Potentially you could have,
21 you know, five or six up there. If a team leader or squad leader
22 were up there -- like went up there to do a guard check and check on
23 their men or something like that.

1 Q. And there were trucks at the base of the hill?

2 A. Yes, ma'am.

3 Q. How many trucks?

4 A. Four to five trucks, just depending on the mission that day
5 and how many people we were taking out. You went out with no less
6 than four. Usually, we'd go out with about five though.

7 Q. Trucks?

8 A. Yes, ma'am.

9 Q. And by trucks -- they weren't actually trucks. What kind
10 of vehicle were they?

11 A. The MRAP vehicles, ma'am. Mine-Resistant Armored [sic]
12 Protected vehicles.

13 Q. Now, you mentioned you went outside. Did you do patrols
14 from Observation Post Mest?

15 A. Yes, ma'am. We actually did. Moving north and south along
16 Route Audi or paralleling Route Audi, and then off to the east and
17 west up around Route Dodge as well. Primarily focused on the two
18 villages of Mest and Malak, getting the local populace to understand
19 why were there and that the U.S. -- you know, it wasn't the U.S.
20 mission to be there. So again, winning the hearts and minds and
21 getting them to understand, "Hey, we're here to help the ANP secure
22 your area. This is your land. All we're doing is helping them do
23 that."

1 Q. Did you treat these -- were these treated as presence
2 patrols? Combat patrols? How would you describe them?

3 A. Every mission outside the wire is a combat patrol, ma'am.
4 There is no such thing in my book as a presence patrol.

5 Q. So for every patrol did you do a briefing?

6 A. Yes, ma'am.

7 Q. What did that briefing generally consist of?

8 A. So if we were moving out mounted, ma'am, you know, you'd do
9 a patrol brief, talk about the route.

10 Q. And by mounted, you mean on trucks?

11 A. On trucks, yes, ma'am. Dismounted, you'd do the same
12 thing. You would do a brief to your guys.

13 Q. And dismounted is on foot?

14 A. On foot, yes, ma'am.

15 So you would do a brief letting the guys know, "Hey, this
16 is the route we're going to take. These are the checkpoints we're
17 going to take. This is the approximate time that it's going to
18 take." In addition to known enemy hotspots, places where other units
19 had taken contact from, actions to take on contact in the event that
20 we're engaged either by direct fire or we were to hit an IED.

21 And it's just -- all you're doing is it's not your --
22 you're just reiterating to those men so, you know, just prior to

1 going out of the wire it's the last thing they hear, "Hey, this is
2 what we need to do." I hope that -- I think that's...

3 Q. Now, you're out there for a 3 or 4-day rotation. During
4 those rotations, how many patrols did you try to do?

5 A. You generally plan on doing at least one during the day and
6 then one sometime that night period.

7 Q. And what was that dependent on?

8 A. It depended on the work cycle of the men. Obviously, I
9 wasn't going to have the guys out there filling sandbags and trying
10 to build HESCOs and doing work all day long and then, on top of that,
11 do a patrol in the blazing heat -- you know, heat and sun and
12 everything else and then also, you know, piggyback on top of that one
13 and do another one at night.

14 Q. So weather, pace?

15 A. Absolutely everything. OPTEMPO, whatever was going on that
16 time period strictly played a role in whether we went on a patrol
17 that day.

18 Q. I'd like to talk a little bit more about the vehicles you
19 had staged at the bottom of the hill. How were they staged?

20 A. So we had them in a 360 perimeter, ma'am, with the weapons
21 and the engines facing out. The backs of the vehicles and the ramps
22 were facing towards the inner portion of the perimeter.

23 Q. Why was that?

1 A. It afforded us two things: One, because the armored glass
2 -- a guy could sit behind the vehicle or sit behind and monitor the
3 radio and he still had the armored protected front, as well as the
4 vehicle weapons systems would be oriented out over the front edge of
5 the weapon. And then people could get into the vehicle from the back
6 side affording them cover from the vehicle towards the front.

7 Q. Did you have other defensive measures in addition to the
8 bunkers laid around Observation Post Mest?

9 A. Yes, ma'am. We had ran Claymores to cover our dead space
10 or spaces that we couldn't actually physically see at all times.

11 Q. And Claymores are?

12 A. It's a molded ----

13 Q. It's a mine?

14 A. Yes, ma'am, a molded mine -- anti-personnel mine.

15 Q. Did you have any outside assets for defense, or were you
16 working with what was within the platoon?

17 A. As always, we could always call up to our higher
18 headquarters in the event something was happening and they would push
19 something to us; but for planning purposes and just general
20 day-to-day operations, we -- I mean, we had what we had on the ground
21 with us to defend.

22 Q. So your assets at that point were your physical assets you
23 brought with you and your Soldiers?

1 A. Yes, ma'am.

2 Q. What was the expectation that you had of your Soldiers if
3 the observation post was attacked?

4 A. Absolutely that they would move to their positions, get
5 accountability, and then report as necessary.

6 Q. And defend the observation post?

7 A. And defend the observation post.

8 Q. Did you have a mission when you were back at FOB Sharana?

9 A. We did. Yes, ma'am.

10 Q. What was that mission?

11 A. When we were back at FOB Sharana coming off the Mest OP --
12 so priority went to restaging the vehicles, getting everything
13 refitted in the vehicles, and then planning for any subsequent
14 patrols that may happen in and around Sharana. You know, it could be
15 an escort patrol going out with the battalion commander or just
16 something locally, going to engage one of the local imams or village
17 elders or something. But priority went to restaging those vehicles
18 and then getting everything else for the next patrol, whatever it may
19 be.

20 Q. Were you also on call for QRF or Quick Reaction Force duty?

21 A. Yes, ma'am. That was, again, strictly depending on the
22 number of patrols that were out and then the number of patrols that

1 we had back. Whether we immediately assumed that role or had a few
2 hours or even a day -- it just depended on the OPTEMPO.

3 Q. How long were your rotations out to Observation Post Mest?

4 A. They varied, ma'am. In order to not set a pattern and let
5 the enemy identify that, "Hey, these guys are always going to the
6 same location every 3 days," we rotated out. I mean, you could go
7 out there for 2 days. You could go out there for 3 days. You could
8 go out there for 4 days. And it was a projected pattern for us, and
9 we'd know. But without letting the enemy know what we were doing
10 from day to day or every 2 days or every 3 days, that rotation
11 changed.

12 Q. Who did you share the rotation with?

13 A. 3rd platoon, ma'am.

14 Q. Of Blackfoot Company?

15 A. Of Blackfoot Company.

16 Q. What was your combat posture during your movement in
17 between FOB Sharana and Observation Post Mest?

18 A. So combat posture was we had weapons mounted and they were
19 ready to go in the vehicles moving out. Obviously, the gunners were
20 more alert than everybody else because they were really the eyes and
21 ears of everything that's going on with the local populace. And then
22 gunners and -- drivers and TCs are also observing the natures of the
23 local populace, whatever they may be.

1 Q. So this was a tactical movement?

2 A. Yes, ma'am, absolutely.

3 Q. Why was that?

4 A. Just like I said before, ma'am. Every patrol outside the
5 wire, to me, is a combat operation. So you need to plan for it
6 accordingly, establishing TCPs along the way, which are tactical or
7 traffic control points; checkpoints along the way so you can call
8 higher headquarters so that they can track your movement; as well as
9 establishing and identifying potential HLZs if you need to call in
10 for a MEDEVAC, extraction points, whatever it may be. But every
11 operation was a planned combat operation.

12 Q. Now, when you and the Soldiers were at Observation Post
13 Mest, they were -- I think you described some of the duties --
14 pulling guard, conducting patrols, building the bunkers and the
15 infrastructure. Did Soldiers keep busy?

16 A. It just -- again, it depended, ma'am, based on it -- but,
17 yes, they were -- on a day-to-day activity, you could say they put in
18 more than their fair share.

19 Q. I'd like to focus on the guard shifts. Soldiers had to
20 pull guard on the vehicles that you brought ----

21 A. Yes, ma'am.

22 Q. ---- and then up on the bunker? Could you describe -- how
23 did you arrange the guard shift?

1 A. So running a guard shift or deciding on how long they go,
2 really it's kind of, like, the noncommissioned officer's role; but I
3 provided some insight and guidance on, like, what my expectations
4 were for that. So the vehicles were manned, and then we had the
5 bunker on top of the hill. My expectation was that no guy, you know,
6 goes in or around that little area by himself, you know, within it.

7 But for the guard shifts themselves, I said, "Hey, you
8 know, during the day, in the heat of the day, let's not put a guy on
9 guard for like 5 or 6 hours. You know, let's be smart about this.
10 Put it in a 2- or 3-hour shift. Rotate it more often than not so
11 that way the guys can get out of the heat and get some shade,
12 rehydrate, and continue to do work on the OP or whatever it may be."
13 Obviously, if, for whatever reason, we weren't doing a lot of work on
14 that OP that day, we could rotate more guys more often and then
15 lengthen those guard shifts out a little bit more at nighttime when
16 it's a lot cooler.

17 Q. And physically down at the vehicles at the base of the
18 hill, what does a guard shift consist of? How many Soldiers and what
19 were they doing?

20 A. And so every vehicle would be manned with a gunner or
21 somebody manning the crew-served weapon on top. A crew-served
22 weapon, you know, is a 240, belt-fed weapon. The same thing with the
23 Mark 19. It's a grenade launcher, and it's belt fed.

1 I considered those our crew-served weapons. So each one of
2 the vehicles had one of those on it, and those were our most
3 casualty-producing weapons. So those were the weapons that were
4 manned.

5 In addition to that, somebody in my vehicle -- the gunner
6 would be monitoring the radio for comms with the guys up on top of
7 the bunker. And then every hour as they're coming off guard, you
8 needed to check the Blue Force Tracker and ensure that there -- you
9 know, no messages came from battalion or company or whatever.

10 Q. And Blue Force Tracker was the main method of communication
11 back and forth between your higher headquarters?

12 A. Yes, ma'am. It's a digital, satellite-based system that
13 basically sends and receives, you know, like mIRC chat texts.

14 Q. Messages?

15 A. Messages.

16 Q. Did every vehicle change guard shifts at the same time?

17 A. They didn't, ma'am. It was staggered. So as the guys are
18 coming off one vehicle, you don't have all four guys, you know,
19 dropping security to come off a vehicle. So it was a one-for-one.
20 That guy would get changed out, and then the next vehicle would go
21 down. They would change out that guy who was on guard, and it would
22 make its way all the way around.

1 The guys on the bunker -- because you'd have three or four
2 guys up there, it was a matter of that guy waking up his next buddy,
3 "Hey, it's time for you to pull guard." He'd wake him up, make sure
4 he's awake, and then the rotation would continue on.

5 Q. How many times a day -- just generally, how many times a
6 day would a Soldier be pulling guard shift?

7 A. I'd say on average one, maybe two during the day; and then,
8 you know, if they're -- just depending on how the rotation went, you
9 know, you might have one that night, you might not. You know, it
10 just depends.

11 Q. So multiple times a day generally?

12 A. Absolutely.

13 Q. And night shifts were longer because it was cooler?

14 A. Sometimes they were, yeah. It just depends, again, like on
15 the work/rest cycle, whatever that Soldier had during the day.

16 Q. Did you also pull guard shifts?

17 A. Absolutely, ma'am.

18 Q. Why was the guard shift schedule and the work schedule
19 important to a Soldier on the observation post?

20 A. It provided them some predictability. So Soldiers, you
21 know, they want to know what's going on. And it's our responsibility
22 as leaders to keep them informed. So if I'm going to expect a
23 Soldier to, "Hey, you know, we're going to need you to pull 4 hours

1 of guard; but in those 4 hours of guard, you know -- know that after
2 that, I'm going to give you a couple hours to kind of like dress down
3 a little bit, kind of relax, get some water, not really think about
4 anything and just take some time for yourself." Without doing that,
5 I mean, you're going to mentally and physically just drain Soldiers.

6 Q. So who established the guard shifts?

7 A. It's the NCOs primarily. I just provided a little bit of
8 oversight and guidance as the platoon leader, saying, "Hey, these are
9 my expectations, you know, for guard." And then the NCOs establish
10 and post the guard shift.

11 Q. How are the Soldiers briefed on the guard shift?

12 A. So it trickles down. So the platoon sergeant sits down
13 with the squad leaders. They establish the guard shift for those
14 guys during that day because nobody knows how much those guys work
15 better than the NCOs in charge of them.

16 Once that's done, then the NCOs -- the squad leaders, and
17 the team leaders would go back and brief their guys and say, "Hey,
18 this is the time period that you have guard." In addition to that,
19 the guard shift would be posted in the vehicle.

20 Q. How often were guard shifts briefed?

21 A. At the beginning of the guard shift that night and then
22 usually -- or that following morning coming off or going into the
23 daylight operations, they would again brief the guard shift.

1 Q. So at least twice a day by the noncommissioned officer ----
2 A. Yes, ma'am.
3 Q. ---- for that vehicle?
4 A. Yes, ma'am.
5 Q. Was it also written out?
6 A. Yes, ma'am. It was written on a -- you know, whatever
7 piece of paper or write-in-the-rain piece of paper and posted in the
8 vehicle.
9 Q. So posted in the vehicle for every Soldier assigned to that
10 vehicle?
11 A. Yes, ma'am.
12 Q. Was it your observation that every Soldier knew his shift?
13 A. Yes, ma'am.
14 Q. I'd like you just to describe the sleeping arrangements
15 Soldiers had at the observation post?
16 A. They were less than favorable.
17 Q. Where were Soldiers directed to sleep?
18 A. When we initially got out there, Soldiers were sleeping,
19 you know, off to the left and right of the vehicles. I told the NCOs
20 -- I said, "Hey, look, the last thing we need is a guy sleeping
21 underneath, in front of, or behind a vehicle." I was like so, you
22 know, "To afford yourself some shade, you know, absolutely, tie a

1 poncho to the side of the vehicle. Sleep off to the sides of the
2 vehicle, but nothing under, behind, or in front of."

3 Q. Why is that?

4 A. Just because anything can happen with a vehicle. I mean,
5 if it rolls -- I mean, if a Soldier -- you know, more Soldiers are
6 killed every day from vehicles rolling over them than, you know, the
7 Army would probably like to have. So it's just not a smart thing to
8 do. It's not a smart practice. I mean, it just makes sense.

9 Q. Okay. So Soldiers were -- Soldiers slept close to their
10 vehicles that they were assigned to?

11 A. They did sleep close to them; but they did not sleep in
12 front of, behind, or underneath them.

13 Q. Okay. Were Soldiers generally allowed to go set up a
14 sleeping area in some remote section of the OP, or were they required
15 to stay close?

16 A. No, ma'am. They were required to stay in proximity to
17 either their squad, their team, or the vehicle that they were
18 sleeping with.

19 Q. And what is proximity?

20 A. I mean within 3 to 5 feet, you know, hand-shot range where
21 a guy could physically grab a guy if he needed to and say, "Hey, are
22 you okay?" or whatever.

23 Q. Why is that?

1 A. It's important. I mean, through my entire career I've
2 always grown up with the buddy concept. So everywhere you went, you
3 know, you had a buddy. And this kind of ties into that. You know, I
4 can't enforce that policy in saying, "Hey, you know, everywhere you
5 go you have a buddy," if guys are off doing their own thing, sleeping
6 by themselves, or whatever may be.

7 So it allows two things. It allows a team leader to look
8 at his men every day and say, "Hey, man, why is Billings more tired
9 than everybody else? Did he work longer today?" or whatever else.
10 And then it allows them to bond. It creates that cohesive bond by
11 sleeping right next to each other, building that esprit de corps that
12 everybody wants.

13 Q. But also a force protection measure?

14 A. Absolutely.

15 Q. Did you have a buddy rule while your platoon was at the
16 observation post?

17 A. Yes, ma'am. I did just like I talked about. Within the
18 internal perimeter of the bottom portion of the OP, it was absolutely
19 fine for a guy to walk from his vehicle and, you know, go use the
20 latrine or something like that. But if they were going to go engage
21 the ANA or ANP or move up to the top of the OP to the bunker, they
22 absolutely had to have a battle buddy with them. It was just the
23 right thing to do. Again, it enforces -- you know, every time I went

1 to go talk to my ANP counterpart, you know, I took somebody with me
2 to go talk to that guy.

3 Q. Why was that?

4 A. Again, it's just a security thing. It's a force protection
5 thing. I can't have a guy going to talk to these guys or walking up,
6 you know, outside to the bunker position without a battle buddy going
7 with him.

8 Q. And generally, did Soldiers stay close to their trucks
9 either when they were off shift or reading or eating?

10 A. Yes, ma'am. Generally, they always stayed in the vicinity
11 of those vehicles.

12 Q. How often did you brief the buddy rule?

13 A. Every time we went out on a combat patrol, leaving Sharana
14 to Mest OP, it was briefed that the guys would go as a buddy team
15 everywhere they went during actions on at Mest OP.

16 Q. What was the morale of the platoon before 30 June 2009?

17 A. I'd like to think it was pretty good, ma'am. I had no
18 inklings or belief to think otherwise.

19 TC: At this time, sir, we'd like to move into a classified
20 portion of the hearing.

21 PHO: Okay. Defense, do you need a few minutes to review your
22 documents for this argument as we discussed in the preliminary
23 discussion?

1 DC: Well, the question is, as per our discussion before in the
2 sort of 802 conference that we had before, the question is whether
3 Major Kurz now wishes to demonstrate the need to close by testimony
4 from this witness. In other words, closure as to this witness by
5 testimony from this witness; and I guess that has to be done in a
6 closed session. But until we hear --

7 I guess what I'm asking, Colonel, is have we now heard
8 everything the government has to say about whether any testimony now
9 has to be in closed session?

10 PHO: Government?

11 TC: Sir, I'd be happy to run through the reasons of why we
12 asked to close this hearing.

13 DC: No, I mean by way of evidence. I don't mean argument.

14 PHO: Let me go ahead and hear her argument, and then I will be
15 able to assess whether there is evidence to support it or whether
16 evidence needs to be brought forward. Go ahead.

17 TC: Certainly. Sir, as we discussed previously, we would like
18 to use this witness with two classified maps to show testimony
19 generally of the topography, the enemy situation, the routes, and
20 other defensive measures which are classified on that map. And as we
21 laid out in our proposed ----

22 PHO: And before -- you said topography. What were the others?

23 TC: As we laid out in our proposed findings of fact ----

1 PHO: Okay. Correct.

2 TC: The location of Observation Post Mest in relation to other

3 ISAF forces, villages ----

4 DC: Slow, please.

5 TC: ---- villages, main routes ----

6 DC: Hold. Location of OP Mest in relation to ----

7 TC: Sir, I'm just reading from the proposed findings of fact

8 that were provided to you this morning.

9 DC: Yeah, but other people don't have that so...

10 TC: The location of Observation Post Mest in relation to other

11 ISAF posts, local villages, main routes, the location of routes ----

12 CDC: Slow.

13 TC: ---- and how they were used by insurgents.

14 DC: Hold on, please.

15 PHO: I'm still trying to write this as well. I mean, I've got

16 it but I'm also taking notes.

17 TC: Sure.

18 DC: In relation to other ----

19 TC: Villages, main routes, how these routes were used by

20 insurgents, the topography of the area, areas of IEDs and other

21 significant enemy activities in relation to the observation post, the

22 observation lines and fields of fire from Observation Post Mest.

23 PHO: Okay. And can you provide me -- why is this necessary?

1 TC: Because we intend to use a classified map, sir. Now, when
2 you look at the standard ----

3 PHO: Okay. Why is it necessary to use a classified map?

4 TC: Because the classified map shows points related to
5 particular routes and location of U.S. forces which is classified
6 both in and of itself and on the map.

7 PHO: Okay.

8 TC: And as we demonstrated in our memo, there are no lesser
9 means because off the sheer character of that information.

10 PHO: Okay. And as you also mentioned in your memo, this map was
11 to be used as a demonstrative aid only.

12 TC: Yes.

13 PHO: In order to assist me as the fact finder in understanding
14 the situation.

15 TC: Yes, sir. The enemy situation and the geography and layout
16 are key facts that we would like the hearing -- to understand in this
17 case, and there is no better way to do that than using a map.

18 PHO: Okay. And so, if I feel that, based on what the witness is
19 saying and the witness's layout -- I guess my next question before I
20 get there is: Captain Billings has described some of the features of
21 OP Mest and its location and enemy lines of infiltration and other
22 TTPs -- tactics, techniques, and procedures. Are you going to go

1 into new areas, or are these going to be demonstrative of what
2 Captain Billings has previously testified to?

3 TC: There are going to be some new, but he's going to
4 demonstrate them using the map. And, again, this is subject to the
5 government exigencies of proof. So we believe this would far better
6 demonstrate to the hearing -- some of the elements of the offenses.

7 PHO: What particular elements? Again, understanding exigencies
8 of proof but also understanding, as I've been reminded many times,
9 that this is a probable cause hearing.

10 TC: Right. Roger, sir. So before the enemy, endangerment, and
11 then a little bit about the search and recovery operations.

12 PHO: Okay. And Captain Billings has testified as to the enemy
13 activity. Is that not enough right there to get to probable cause?

14 TC: Well, I believe that's the government's call, sir. I mean,
15 if you feel that we've met our burden of proof in terms of presenting
16 probable cause in those elements, that's where we are. But I would
17 like to use this testimony. It is the government's burden, and this
18 is how we would like to demonstrate it for the hearing.

19 PHO: All right. Defense, I'm going to give you an opportunity
20 to comment on the government's argument.

21 DC: Well, what I think we should do at that point -- it sounds
22 like the introduction of -- well, let me back up.

1 Counsel mentioned some new areas beyond the ones that this
2 witness has already testified about. And now is the time for us to
3 know about what those new areas are so that we can have an exhaustive
4 target here so we know what the reason is for this motion to close.
5 So if counsel can tell us what those new areas are, then we can
6 digest that and evaluate them. If counsel is unwilling or unable to
7 tell us what those areas are, then the record is closed on this.

8 PHO: Okay. Here's what I'm going to do: At this point, I am
9 not going to close the hearing. Basically, what you've laid out for
10 me is that this is necessary as a demonstrative aid for my
11 understanding in order for me to determine probable cause.

12 Now, I am not making a final ruling at this point. I want
13 to hear the witness's testimony.

14 TC: Uh-huh [indicating an affirmative response].

15 PHO: I want to hear defense cross-examination. And if, at that
16 point, I feel that it is necessary for me as the fact finder to
17 understand and have a better situational awareness in order to make
18 the fact finding, I will make the requisite findings of fact to do
19 so. Otherwise, I will go ahead and also afford you an opportunity at
20 the close of questioning, if you think it's still necessary, to
21 re-present your motion to close the hearing so that he can review the
22 classified maps.

1 But at this point, I'm tracking. I understand everything
2 that's going on. I've reviewed the maps yesterday so they are
3 roughly -- I'm tracking with everything the witness is saying. So I
4 don't see a need for me to have any demonstrative aids at this point.

5 Mr. Fidell?

6 DC: Just I think it's implicit in what you said, Colonel, but
7 we'll reserve the right to file proposed findings if the need arises.

8 PHO: Certainly.

9 DC: Thank you.

10 PHO: Okay.

11 TC: Thank you, sir.

12 PHO: Do you need a moment -- I know I mentioned earlier to be
13 prepared to go forward without closure. Do you need a moment to
14 review your notes, or are you ready to go?

15 TC: Negative, sir. I'm ready.

16 PHO: Okay.

17 **Questions by the trial counsel continued:**

18 Q. Captain Billings, I'd like to take a few moments to
19 describe -- to have you talk about the geography surrounding
20 FOB Sharana and Observation Post Mest. How far was it between
21 FOB Sharana and Observation Post Mest?

22 A. I recollect about 20 to 25 kilometers, ma'am.

23 Q. Now, was that as the crow flies?

1 A. Straight line distance, yes, ma'am.

2 Q. Well, what is the terrain like, though? Can you travel as
3 the crow flies?

4 A. You cannot, ma'am.

5 Q. Why?

6 A. So you're going to be taking routes -- either a long route,
7 Audi, running northeast to southwest from Sharana to the Mest area;
8 or you're going to take some of the -- what we called rat lines or IV
9 lines.

10 Q. What is an IV line?

11 A. It is a small micro-piece of terrain as the terrain kind of
12 rolls along and it allows you to get into those small little snippets
13 of terrain.

14 Q. Does that stand for intra-visibility?

15 A. Intra-visibility, yes, ma'am.

16 Q. Okay.

17 A. Or you'll take some of the unimproved farmer trails that
18 kind of parallel the more hardball packed surface of Route Audi to
19 get from Sharana to Mest OP. If you were to stay on Route Audi the
20 whole way, you know, without, you know, graciously beating the speed
21 limit, you know, you could probably make it there in under an hour.
22 But we're not afforded that based on the vehicles, the size, max

1 speed limit. And we never -- or hardly ever took Route Audi the
2 entire distance.

3 Q. Why is that?

4 A. Just because we stayed away from the culverts, which was
5 known for enemies to put in place IEDs ----

6 Q. Uh-huh [indicating an affirmative response].

7 A. And then I just didn't like it. It set too much of a
8 pattern. So we would take farmer trails as much as possible,
9 intercrossing Route Audi the whole way down to Mest OP.

10 Q. And to be clear, Route Audi -- is it paved or not paved?

11 A. There are portions of it that are paved. The majority of
12 it is paved or hard packed like gravel. Very few portions of it --
13 you know, in and around the IED hotspot where the gravel and the
14 pavement obviously get blown out -- get backfilled with dirt or sand
15 or whatever. So it's kind of potted in those areas.

16 Q. So you couldn't just drive straight down Route Audi to get
17 to Observation Post Mest as if you were traveling from, say, JBSA to
18 Fort Hood?

19 A. You could, ma'am. I just chose not to because of the risk
20 to my men and the risk to my mission and my equipment. I didn't want
21 to take that risk.

22 Q. Okay. Can you describe the village of Mest?

1 A. Yes, ma'am. A lot of farmers, a built up population of
2 about, you know, probably I'd say 90 percent farmers. There is a
3 huge marketplace that runs north and south on the main street of
4 Route Audi.

5 Q. And when you say population, are we talking thousands,
6 hundreds of thousands, dozens?

7 A. Thousands, ma'am, on the low end of the thousands.

8 Q. Okay.

9 A. Mest and Malak, combined I think population-wise, maybe
10 5- or 6,000. Maybe a little bit more than that now if it's grown up
11 a little bit.

12 Q. And you mentioned the village of Yahya Khel. Why was that
13 significant to your platoon?

14 A. Yahya Khel was a known enemy safe haven and stronghold. So
15 they moved into Yahya Khel from the east coming out of Pakistan
16 during the spring runoff and in preparation for the fighting season,
17 which generally happens during the summer months.

18 Q. Where was Yahya Khel in relation to the village of Mest and
19 Malak and the observation post?

20 A. It was off to the east, ma'am, about 5 -- 5 or 6 kilometers
21 or so.

22 Q. So not far?

23 A. Not far, ma'am.

1 Q. Was Yahya Khel also the district center?

2 A. Yes, ma'am.

3 Q. Were there mountains in the area of the village of Malak?

4 A. Yes, ma'am. There were some rolling hills just to the
5 north and south of Mest and Malak that kind of paralleled Route Audi.
6 And as you pushed more towards the west there was a more prominent
7 ridgeline of mountains.

8 Q. Prior to 30 June 2009, had you ever taken a foot patrol or
9 a patrol into the village of Yahya Khel?

10 A. No, ma'am.

11 Q. 2nd Platoon had not gone in?

12 A. No, ma'am.

13 Q. Now, we've described Route Dodge and Route Audi, and they
14 were paved and not paved. And we talk about them in terms of being
15 main routes, but would you consider them a highway like we have in
16 the United States?

17 A. I wouldn't consider them a highway. No, ma'am. I mean,
18 it's a single lane, you know, single-car wide -- you know, at best
19 two-car wide in some locations. So definitely not highway standards
20 by any means.

21 Q. So very primitive?

22 A. Permissive but nonetheless still a very high-speed avenue
23 of approach for a motorcycle or a small compact car.

1 Q. What was the terrain like immediately surrounding the
2 observation post?

3 A. The terrain immediately surrounding it, ma'am, to the
4 north, you obviously had that major hilltop that we had the bunker
5 on. And then kind of rolling hills off of that that kind of spread
6 off to the northwest. And then off to the east immediately across
7 Route Audi, it goes right into some wadi systems, dried up riverbeds,
8 and irrigation that fed into some farm fields ----

9 Q. Now ----

10 A. ---- spreading all the way to the northeast.

11 Q. In May and June of 2009 were they dry, or did they have
12 water in them?

13 A. They were dry for the most part, ma'am.

14 Q. So dry riverbeds surrounding the observation post?

15 A. Yes, ma'am. As the spring runoff, any snowfall that year
16 kind of comes down, March-April time period. That eventually dries
17 off, you know, end of April to May time period and there is no more
18 water.

19 Q. What was the tactical significance of the wadis surrounding
20 the observation post?

21 A. Tactically, it was harder for us because we couldn't always
22 see or identify easy avenues of approach or areas for the enemy to
23 infill, whether it be to emplace an IED or construct a hasty attack.

1 For them, it afforded them an avenue to sneak in and out of
2 places almost undetected, and that was key for them as they used
3 those to their advantage a lot.

4 Q. Do you know the accused, Sergeant Bergdahl?

5 A. Yes, ma'am. I do.

6 Q. How do you know him?

7 A. He was a member of my platoon in Blackfoot -- 2nd Platoon,
8 Blackfoot Company, ma'am.

9 Q. When?

10 A. From the time I got there, 14 April 2009 until he went
11 missing, 30 June 2009, ma'am.

12 Q. What was your first impression of the accused?

13 A. Ma'am, great Soldier from all accounts. I men, had a great
14 PT score, always did everything he was asked to do, never complained.
15 For the most part, you know, he did every task that he was asked to
16 do and he took honor in doing that task and accomplishing it to the
17 best of his ability.

18 Q. Respectful?

19 A. Yes, ma'am.

20 Q. No issues?

21 A. No issues, ma'am.

22 Q. Do you see the person here in the hearing room that you
23 just described as PFC Bowe Bergdahl in the room today?

1 A. Yes, ma'am. I do.

2 Q. Could you point him out, please?

3 A. Yes, ma'am. He's sitting right there, behind [pointing].

4 TC: The witness has identified the accused, Sergeant Bergdahl.

5 I'd like to take you to 29 June 2009, before the incident.

6 What was the state of Observation Post Mest on 29 June 2009?

7 A. 29 June, the state with respect to us or kind of us and the
8 ANP, ma'am?

9 Q. The construction state. It was somewhat built up at that
10 point?

11 A. Yes, ma'am. So, at this point, construction-wise, we had
12 moved in two containers that they were going to use -- the ANP were
13 going to use, one as a headquarters and the other one was going to be
14 used as a bed-down area for the Soldiers who were going to be working
15 out of that area. Constructed a portion of kind of like a
16 vehicle-borne IED ditch or a VBIED ditch. Had C-wire strung up; had
17 an entrance and an exit now so vehicles would come in one way and
18 exit through another way. HESCOs were starting to be filled at this
19 time to use as cover for those buildings and some of the positions in
20 and around Mest OP.

21 Q. And eventually when construction was finished, was the OP
22 going to be turned over to the ANP?

1 A. I don't think it ever actually got finished under my watch,
2 ma'am; but the intent was we would help them build this location, and
3 they lived there with us while we were building it. One, so they'd
4 take ownership in it instead of us just, like, building it for them
5 and then forcing them to go there. So they got to know the local
6 population. But the intent was, when it was all said and done, "Here
7 you go. Here's your outpost. Here's your OP. You guys occupy and
8 secure your populace."

9 Q. Now, on 29 June 2009, was the accused with you on this
10 rotation out to Observation Post Mest?

11 A. Yes, ma'am. He was.

12 Q. What truck was he assigned to?

13 A. I think he was in Sergeant Komes' truck for the movement
14 out.

15 Q. And was he pulling guard duty with you on your truck?

16 A. Yes, ma'am.

17 Q. What was going to happen in terms of rotation on
18 30 June 2009?

19 A. Originally, we were going to kick out a patrol that
20 following morning. That night prior, I had cancelled it based on the
21 heat and how much the guys had been working that day. It was a
22 really hot day, so we made the call that night to cancel that patrol
23 the next morning.

1 Q. Were you expecting 3rd Platoon on 30 June?

2 A. Yes, ma'am. They were going to come out and rotate out
3 with us.

4 Q. And after they did the handover with you, would you go back
5 to FOB Sharana?

6 A. Yes, ma'am. So they would come out and their vehicles
7 would flow into the OP; and we'd rotate our vehicles out, stage on
8 the vehicle -- or on Route Audi for preparation for movement north.
9 And then that morning sometime -- I mean, you could plan but based on
10 travel times, whatever it may be -- you only had, like, a window
11 really. You didn't have an exact time of when they'd be up there.

12 Q. Did all the Soldiers in your platoon know that 3rd Platoon
13 was coming out that day?

14 A. I should hope so. Yes, ma'am.

15 Q. It was a big part of their day?

16 A. They looked forward to it. Yes, ma'am.

17 Q. And what preparations did you take on the 29th in
18 anticipation of relief from 3rd Platoon?

19 A. So we would obviously police up our areas, burn any trash
20 that we'd accumulated over the time period that we were out there in
21 addition to -- we'd reset the latrines.

22 Q. And by reset the latrines, what do you really mean?

1 A. We had the bottom half of a 50-gallon drum, ma'am; and we'd
2 pour diesel fuel into it and light it on fire and stir it up. And it
3 dissolved or disintegrated, you know, the remainder of whatever was
4 in there.

5 Q. So you had to burn latrine waste?

6 A. Yes, ma'am.

7 Q. What did the Soldiers do with their personal items?

8 A. So this was where the guys would start packing up, you
9 know, any personal belongings they had, getting stuff ready, getting
10 the rucksacks strapped to the vehicles or staged inside. And all
11 that would be readily accessible -- well, obviously it would be their
12 combat kit or an assault pack with probably some chow and some water
13 in it. Everything else would be staged and ready to go. And that
14 would happen throughout the night going into the next morning.

15 Q. And you cleaned up the -- you said you were doing
16 construction. You cleaned up construction debris?

17 A. Yes, ma'am. So we had moved whatever was thrown in the
18 middle portion or laid around in the middle portion, whether it be
19 four-by-fours, concertina wire -- you name it. You know, we'd get
20 all that stuff staged and set aside. So it allowed the vehicles
21 freedom to maneuver in and around the OP to assume positions and swap
22 out vehicles.

1 Q. Now, is there something particular you remember doing on
2 the 29th in anticipation of the RIP in terms of -- because you
3 described your latrine duty. How do you remember the 29th?

4 A. I was standing out, you know, burning poop with my medic.
5 And a good way to, like, get to know Soldiers and bond with them is,
6 you know, share a common bond, share something in common with them.
7 So Doc was burning -- doing his burn duty. And I went out there and
8 I was like, "Hey, Doc, let me get a smoke." And it was like one of
9 my last good memories of Doc was, you know, we were out there burning
10 crap and smoking a cigarette, you know.

11 Q. Now, on 29 June 2009, was the accused, Private Bergdahl,
12 present for duty?

13 A. Yes, ma'am.

14 Q. Did you have a -- do you have a personnel report in your
15 platoon?

16 A. Yes, ma'am. It's required by higher headquarters that we
17 would send a Green Two report or a Green Up on personnel and
18 equipment, just meaning that you're good. You have all your
19 personnel, and you have all your equipment

20 Q. So no issues on 29 June 2009?

21 A. No, ma'am.

22 Q. And do you actually remember seeing the accused on
23 29 June 2009?

1 A. I do. Yes, ma'am. I was walking across the OP to go
2 utilize the latrine, and I remember seeing Sergeant Bergdahl with
3 another member of the platoon. I don't remember who it was. But I
4 remember like waving hi to the boys as I was walking over to utilize
5 the latrine.

6 Q. I'd like to move forward to the early hours of
7 30 June 2009. Did you have guard duty that morning?

8 A. I did. Yes, ma'am.

9 Q. Do you recall the hours that you were pulling guard?

10 A. I think I had guard around about two or three o'clock to
11 that morning, probably around four or five.

12 Q. Was it still dark out?

13 A. Starting to get light. You know, the sun wasn't all the
14 way up yet, but it was kind of cresting a little bit.

15 Q. So did you come off guard duty when the sun was about to
16 come up?

17 A. Yes, ma'am.

18 Q. And what did you do when you came off guard duty?

19 A. I looked at the driver of the vehicle and I said, "Hey, you
20 know" -- or the guy who was getting ready to come on guard and the
21 driver because he was now up and I said, "Hey, I'm going to lay down
22 for like an hour and get an hour of shuteye. Just make sure that I'm

1 up," you know no issues. And then I was going to go lay down in my
2 cot.

3 Q. Who was that Soldier that you talked to?

4 A. I believe it was my driver -- man, I can't remember his
5 name, ma'am.

6 Q. Was it Private Lanford?

7 A. Lanford, yes, ma'am. PFC Lanford.

8 Q. Did you, in fact, go try to get an hour of sleep?

9 A. I did. Yes, ma'am.

10 Q. And what is your next -- what happened next?

11 A. I was woken up, ma'am, by Soldiers who said, "Hey, sir, we
12 need you to get up. We can't find Bergdahl."

13 Q. What was your initial reaction?

14 A. Initially, I was just, you know, kind of, shaking the
15 cobwebs. I'm like, "Well, what do you mean you can't find Bergdahl?"

16 Like, "Sir, we can't find him. He's missing."

17 I said, "Okay."

18 Q. Did you think they were serious?

19 A. Not initially. You know, because as a young lieutenant
20 platoon leader, you expect the guys to kind of like, you know, rub
21 you a little bit, mess with you, and play games and stuff. So I
22 thought for about a half second or so, I'm like, "These guys are
23 messing with me. They just want to see me get all spazzed out, freak

1 out, you know, call higher headquarters." And that, you know, only
2 lasted a very short time period until I realized, hey -- as I got the
3 squad leaders together and platoon sergeant and we were talking, I
4 said, "Hey, this is what I want you to do. Systematically go search
5 the latrines, check all the vehicles, make sure he's not stuck under
6 a vehicle -- blah, blah, blah -- whatever it may be. Send two guys
7 and a team to go on top of the bunker. Double check the bunker.
8 Check with our ANA counterparts." I went and talked to my
9 counterpart.

10 After we disseminated, dispersed, and had done those, we
11 came back. We all met back at my vehicle. That's when it was like,
12 it really sunk in. It was like, "Man, this is happening. You know,
13 he's not here."

14 Q. You gave direction, and did they search every part of the
15 observation post?

16 A. They did. Yes, ma'am.

17 Q. Did the accused have a tent or a sleeping area?

18 A. Yes, ma'am. The sleeping area in the vicinity of his
19 vehicle, which was mine at the time.

20 Q. Was everything in order in his sleeping area?

21 A. Yes, ma'am. It was.

22 Q. Any signs of a disruption or a fight or anything?

1 A. No, ma'am. As I recall, his weapon and all his sensitive
2 items were laid out on top of his cot, ma'am.

3 Q. So they could be accounted for?

4 A. Yes, ma'am.

5 Q. After your leaders -- your NCOs reported back to you, what
6 did you do next?

7 A. I moved up into the TC -- or the passenger side of the
8 vehicle -- of my vehicle. And I began writing a BFT message to the
9 company, basically outlining the time line for that morning and then
10 advising them that we had a DUSTWUN and that one of our Soldiers was
11 missing.

12 Q. And what is BFT?

13 A. Blue Force Tracker, ma'am.

14 Q. Did you know immediately what to say, or what did you have
15 to do first?

16 A. I didn't really know what to say. You know, I just needed
17 to inform my higher headquarters that I had a Soldier that was
18 unaccounted for at this time period.

19 Q. What were you thinking at this time?

20 A. I was in shock, ma'am. In absolute, utter disbelief that,
21 you know, I couldn't find one of my own men. It's a hard thing to
22 swallow.

23 Q. Were you with -- who was your platoon sergeant?

1 A. Sergeant First Class Larry Hein, ma'am.

2 Q. And what was his demeanor while you were conferring and
3 writing the message?

4 A. So I was writing the message and, you know, in the back of
5 my mind, there's still, like, a little hope that like the guys are
6 just messing with me, you know. And so I looked over at Sergeant
7 Hein; and I said, "Hey, all right, I'm getting ready to send this
8 message. Is there anything else I need to say?"

9 And he goes, "Go ahead and send it, sir. You should have
10 sent it 10 minutes ago."

11 Q. How did you feel when he said that?

12 A. My heart absolutely just fell. It was, like, just -- the
13 realization that everything that you've talked about or been doing
14 for like the last 10-15 minutes or however long it was -- because it
15 just seemed like it never ended -- slapped you in the face. And it
16 was real. It was reality now. Even though you just lived it, it
17 didn't really hit in until he'd said those words to me.

18 Q. Did you send the message?

19 A. I did. Yes, ma'am.

20 Q. What did you do after you sent the message?

21 A. This is where everything kind of runs together, ma'am. But
22 we had established a patrol and conducted a dismounted patrol locally
23 around the Mest OP.

1 Q. So after you sent the message, did you gather your leaders?
2 A. I did. Yes, one more time, ma'am.
3 Q. And did you brief them about a patrol?
4 A. I did. I pulled them together and I said, "Hey, this is
5 what we're going to do. I need to get a nine-man squad together to
6 go execute a patrol outside the wire, focusing, you know, in and
7 around the Mest OP. And then, you know, since there's a school up
8 there, maybe we can catch one of the schools or, off to the east,
9 catch one of the farmers. Maybe they saw something or heard
10 something."
11 Q. Had you planned this patrol?
12 A. Very hastily, yes, ma'am.
13 Q. Was it the patrol that you had ----
14 A. No, ma'am. It is not the patrol that we had planned the
15 day before at all.
16 Q. The one that you had cancelled?
17 A. Yes, ma'am.
18 Q. Did you take that patrol out?
19 A. I did. Yes, ma'am.
20 Q. Was it on foot or in vehicles?
21 A. It was on foot, ma'am.
22 Q. And could you describe where you went with the nine-man
23 patrol?

1 A. Yes, ma'am. We went up to the top portion of where the
2 bunker was at, walked down to the northeast, down the backside of
3 that hill, kind of skirted around the edge between Audi and the
4 rolling hills to the west of Route Audi, making our way up towards
5 what was a boys' school that was there in hopes that somebody saw
6 something or they could tell us something or anything at which point
7 we ran into a boy and we started talking to him about it.

8 Q. And what did you learn?

9 A. He had pointed to his watch and said, yeah, he'd seen an
10 American. And he gave a time, you know, 8:06 I think or something
11 like that. I can't remember the exact time. But he -- what stuck in
12 my head was -- I was like, "Well, how do you know the time?" And he
13 pulled up his sleeve; and he had, like, an American, like, Casio
14 watch on so...

15 Q. Is that unusual for a child to have a watch?

16 A. It's unusual for an Afghan to have a watch. I mean, they
17 just don't have those luxuries. So I found it weird that he had
18 that, but it was also kind of enlightening that, hey, this guy just
19 gave me a time and said he's seen an American. Whether it was true
20 or not, it was still, you know, in my eyes, some sort of hope.

21 Q. Okay. Where did you go after that?

22 A. We circled back around, going off to the east and then came
23 through the farm fields to the northeast and then back down through

1 the wadi system that led to the intersection of Dodge and Audi,
2 taking us back up to the OP.

3 Q. Did you find any other sign of the accused during your
4 patrol?

5 A. No, ma'am.

6 Q. Do you recall was it daylight by now?

7 A. Yes, ma'am.

8 Q. What part of the morning was it?

9 A. Early morning, ma'am, before noon. It was starting to get
10 warm out, but it was that time period.

11 Q. And this was 30 June 2009?

12 A. Yes, ma'am.

13 Q. Would you have conducted this dismounted patrol if the
14 accused had not left?

15 A. No, ma'am. This was strictly going to be -- that morning
16 was going to be a time for our guys to pull guard and kind of get a
17 little break from the day before because they had really busted their
18 butts on the OP, made significant, huge gains going forward. So that
19 morning was going to be strictly to just kind of rest up a little
20 bit, ensure that we had everything packed up, ready to roll, so the
21 transition with 3rd Platoon, when they came to relieve out with us,
22 would go seamlessly and we could get the boys back to Sharana.

1 Q. Did taking out that unplanned nine-man foot patrol decrease
2 your ability to defend Observation Post Mest?

3 A. It absolutely did. Yes, ma'am.

4 Q. When you came back to the OP with your patrol, what
5 happened next?

6 A. This is really where everything kind of bleeds in. I
7 remember being talked and told to go occupy a blocking position off
8 to the east of Mest-Malak.

9 Q. And by this time, you were receiving directions and orders
10 from the company and the battalion?

11 A. Yes, ma'am. So we're getting BFT messages -- Blue Force
12 Tracker messages from the company saying, "Hey, you know, give us
13 updates. If you hear this, anything from this..." And then, at that
14 point, that's when they started directing us to go out and establish
15 these blocking positions.

16 Q. Did you take your vehicles when you set up the blocking
17 positions?

18 A. Yes, ma'am. We did.

19 Q. How many vehicles did you leave back at Mest?

20 A. So this was a split operation. So I took three vehicles
21 off to the east going in the vicinity of the cemetery to the east of
22 Mest and Malak, and I left two vehicles back at the Mest OP or vice

1 versa. I can't remember the exact details of those, but it was two
2 and three. It was a split patrol, though.

3 Q. Would you normally leave just two vehicles back at the
4 observation post?

5 A. Absolutely not, ma'am.

6 Q. Why?

7 A. You can maneuver sets of vehicles -- you know, two vehicles
8 and three vehicles -- so they're mutually supporting each other. But
9 I would never in a million years just say, "Hey, here's two vehicles.
10 Go on your own," which is -- because of the space and we were close
11 enough -- I felt comfortable assuming a little risk and saying, hey,
12 if something happens, I can beat feet back down the road or one of
13 these trails and get back to them and mutually support them within a
14 minute or so. But anything farther than that, I absolutely would not
15 have left them by themselves.

16 Q. Had the company started arriving at the OP with assets yet?

17 A. Not at this point, ma'am. While I was out there in the
18 blocking position to the east by the cemetery, I believe, is when the
19 vehicles and the helicopters started arriving on site.

20 Q. And those are vehicles from the company and the battalion?

21 A. The company and the battalion, yes, ma'am.

22 Q. And your company commander at some point, Captain Silvino,
23 arrived?

1 A. Yes, ma'am. He either came by himself or rode with the
2 battalion staff -- the S-3, but he did show up on site. Yes, ma'am.

3 Q. So basically leadership from the task force started showing
4 up at your tiny OP?

5 A. Absolutely, yes, ma'am.

6 Q. And you mentioned other assets coming in. What assets
7 began arriving at the observation post?

8 A. At some point, you could hear helicopters coming in. And a
9 helicopter landed and a guy runs over to me, and he was from the
10 101st Pathfinders. You know, I don't know what rank he was; but he
11 came over and started talking to me and said, "Hey, we're going to be
12 going over here, doing this." I don't remember the specifics. I
13 mean, I could barely hear the guy. But then he ran back to his
14 helicopter and, like, flew away to do whatever he was going to go do.

15 Q. Was it normal for a Pathfinder unit to arrive at your OP?

16 A. No, ma'am. Those are, like, division-directed assets that
17 are controlled by the CG. So interaction at my level is only when
18 something's going on.

19 Q. Had any assets like that -- the helicopters, the
20 Pathfinders -- had they ever been to Observation Post Mest before?

21 A. No, ma'am, not during my time period or that I can recall.

22 Q. Were there communications platforms on the top of the --
23 did communications platforms arrive?

1 A. Yes, ma'am. We had these teams that would intercept radio
2 signals and translate those and let us know what the Taliban or
3 enemies in the area were talking about.

4 Q. Were those normally on your hilltop?

5 A. They were not. No, ma'am.

6 Q. Did you do a RIP or relief with 3rd Platoon that day?

7 A. Not a formal one, ma'am. By the time the battalion showed
8 up and then all their vehicles -- I mean, down at the base of this
9 hill, you know, you've got 10 vehicles. So as we pulled our vehicles
10 out in preparation to continue operations looking for Sergeant
11 Bergdahl, there was no formal RIP and/or relief in place of those
12 guys.

13 Q. Now, you're describing this very calmly. What was the tone
14 and tenor of what was going on at the observation post that day?

15 A. A little bit of, I would think, kind of internal
16 franticness for myself. I mean, I was absolutely emotional. You
17 know, here's one of my guys missing, and I don't know where he's at.

18 Q. And you had a lot of assets that you'd never seen before
19 ----

20 A. Absolutely.

21 Q. ---- arriving suddenly?

22 A. Yes, ma'am.

23 Q. Had you planned for this?

1 A. No, ma'am.

2 Q. What were your Soldiers -- were you able to observe what
3 your Soldiers were feeling?

4 A. Some of them, yes, ma'am. You know, a lot of them -- just,
5 like, disbelief. Like, "Man, I can't believe this is happening."
6 And like, you know, "What's going on?" "Where's Bergdahl?"

7 You know, nobody knows, you know. Did he walk off? Did he
8 get kidnapped? I mean, nobody knows. I mean, everybody's got a
9 million things going through their head, their own little theories or
10 thoughts or ideas or anything. So all of these guys -- they're just
11 doing that. They're running it over.

12 Like the last time -- you know, for me, I just kept playing
13 the image of the last time I saw Bergdahl when I was walking to the
14 latrine. And, you know, it's, "Hey, what's up guys?" I mean, that
15 was, like, my last interaction with this guy.

16 Q. And he seemed perfectly normal on 29 June when you saw him?

17 A. Yes, ma'am.

18 Q. So the Soldiers -- 30 June, the Soldiers are in complete
19 disbelief?

20 A. Absolutely.

21 Q. Now, I'd like to break down -- the search went on from
22 30 June until about the end of August?

23 A. Yes, ma'am.

1 Q. And I'd like to break that down into some blocks of time
2 just for ease. Three blocks of time. The first is 1 July -- or
3 30 June or 1 July up to 20 July.

4 A. Yes, ma'am.

5 Q. And why was 20 July a significant date for you?

6 A. Because that was the first time we got to go back to FOB
7 Sharana.

8 Q. Okay. And then the second block of time would be 20 July
9 through 15 August?

10 A. Thereabouts, yes, ma'am.

11 Q. And then the week before the elections at the end of
12 August?

13 A. Yes, ma'am.

14 Q. Let's move into the first block of time that you recall,
15 the beginning of July to about 20 July. What was your mission?

16 A. To find Bergdahl, ma'am.

17 Q. How did you accomplish that mission? What were some of the
18 tasks that you were sent out to do?

19 A. We got a myriad of associated tasks, you know, that
20 infantry companies and platoons do on a day-to-day basis,
21 establishing traffic control points with our ANA partners.

22 Q. And what do you do at a traffic control point?

1 A. It's basically where you set up a barricade and a
2 serpentine so it slows the traffic so vehicles have to flow through,
3 have some sort of discussion with the ANP. And the ANP can say,
4 "Hey, this guy -- he's legit. He's good to go forward." Or, "Hey,
5 this guy, you know, seems kind of shady," and they can continue to
6 search his vehicle.

7 These were set up in the event that Bergdahl was being
8 smuggled in the trunk of a vehicle, whatever. Those guys would help
9 us intercept that vehicle, and then we'd find him.

10 In addition to that, we'd go and set up blocking positions
11 as special operations guys were going in and hitting target areas or
12 just setting up a blocking position because that was a known enemy
13 infill route or ex-fill route going either to the east or the west,
14 in addition to conducting cordon-and-searches or cordon-and-knocks
15 with our ANP and ANA counterparts, you know, going to a village
16 and/or a qalat and you -- you know, you secured the area. And then
17 what it is, is once the area is secured, then you do a call out. All
18 the military-aged males come to one side. You segregate the females
19 and the kids. And then you go in with the elder and the ANP and the
20 ANA counterparts, and you conduct a search of the -- you know, the
21 compound.

22 Q. And that's what you referred to as a cordon-and-search or a
23 cordon-and-knock?

1 A. Yes, ma'am.

2 Q. And what's a qalat?

3 A. A qalat is a -- it's their form of a house. So it's -- you
4 know, it's a mud wall -- mud-based building with walls 2 or 3 feet
5 thick. And that's the actual house, and then you've got a wall
6 around it. And historically or traditionally, we just call them
7 compounds.

8 Q. And during this block of time, were you also conducting air
9 assaults?

10 A. Absolutely, yes, ma'am.

11 Q. Could you describe an air assault?

12 A. Some of them were a little bit more planned, in depth.
13 During this time period it was, "Hey, go here. Drive down to KKC to
14 a village down in the south where we had some embedded U.S. Army and
15 Navy trainers for the ANA and ANP." You know, we'd link up at KKC.
16 They would give us an element, whether it be ANA or ANP, sometimes
17 both. And we'd stage and go on the HLZ and get into PZ posture,
18 which is, you know, if I know I'm riding on this helicopter, I'm
19 staged in a line, getting ready to load this helicopter up. If I'm
20 in this helicopter, I'm staged in a line on this side. So all the
21 guys are over here ready to -- in PZ posture, ready for when the
22 helicopters land.

1 You would think that normally this would be a time period
2 where, you know, hey, you know, you'd get a little break waiting for
3 the helicopters. And that's true for, like, the lower guys -- the
4 lower-enlisted guys. But during this time period, you know, all the
5 leaders are, hey, you know, filling up MREs, making kicker boxes or
6 whatever to take along with us, making sure everybody's got enough
7 water, filling up CamelBaks so that way the guys that need the most
8 rest are getting the most rest, which is the Soldiers.

9 Q. Now, you get on a helicopter. The helicopter would fly
10 somewhere, and then what would happen?

11 A. Several things. Again, it goes back into any one of those
12 operations. We could end up moving to a hilltop or a piece of
13 terrain and establishing a blocking position ----

14 Q. Uh-huh [indicating an affirmative response].

15 A. ---- or a traffic control point with our counterparts,
16 moving to a village and doing a cordon-and-search or a
17 cordon-and-knock.

18 Q. Why would you insert by helicopter as opposed to walking or
19 driving?

20 A. Based on distance and/or if the terrain was not navigable
21 by vehicles.

22 Q. So there's no other way to get in?

23 A. No other way to get in there.

1 Q. Now, normally you have a deliberate planning process when
2 you can brief your Soldiers. Briefly, prior to 30 June 2009, what
3 was that planning process?

4 A. I would get the operation or the mission from the company.
5 You know, so I would know, hey, on 25 June, as an example date, we're
6 going to go do a movement to Mest OP. So, on or about sometime on
7 the 24th, the day prior, I'd give the guys the final operations order
8 or FRAGO and say, "Hey, we're going to Mest OP on the 25th. You guys
9 are already tracking. This is the time line for tomorrow morning.
10 This is where we're going to do SP. Here's kind of like some implied
11 tasks that I need you guys to make sure you accomplish. One squad, I
12 need you to make sure you have extra wire" -- blah, blah, blah --
13 whatever it may be. And that was done the day before, prior to the
14 execution of an operation.

15 Q. Did that change after 30 June 2009?

16 A. Yes, ma'am. It did.

17 Q. How did it change?

18 A. It changed -- instead of having, like, a more deliberate
19 process to plan -- at my level, you know, my process of planning
20 entails me being able to look at it, decipher some sort of enemy
21 situation, and then come up with a plan of, if something was to
22 happen, this is how I would do it or these are the actions that I

1 would take. And usually, I'm given some time to think about that and
2 develop a plan and then brief that to the subordinates.

3 After 30 June, you really didn't get a lot of time to think
4 about it. So it was a little bit of planning of the fly. "Hey, this
5 is where we're going to. This is the name of the objective we're
6 going to hit. Or, hey, this is the compound we're going to," giving
7 them a grid. Very implied. Very specific. "Hey, 1st Squad, you're
8 going to do this, this, and this." And then continue down on that
9 process. Sometimes briefing that plan right in PZ posture waiting
10 for a helicopter.

11 Q. You gave me an airborne analogy for this planning process.
12 What was that airborne analogy?

13 A. It's kind of like rigging and conducting JMPI in flight in
14 an aircraft.

15 DC: JMPI?

16 PHO: Yeah, you're going to have to explain.

17 A. Jumpmaster Pre-Inspection.

18 Q. And that's the safety checks, right?

19 A. The safety checks a jumpmaster of a helicopter -- when he's
20 got his Paratroopers in them, they do these checks on everybody to
21 make sure that all their gear is working properly.

22 So I said earlier, it was very similar to that because it
23 felt like we were getting ready to load the helicopters and, as we're

1 doing that, you know, I'm checking these guys and making sure that
2 they have everything that they need to do to operate safely during
3 this mission.

4 Q. And to be clear, on-board JMPI is very unusual?

5 A. It almost never happens that I know of, ma'am.

6 Q. Roger.

7 A. Combat operations only.

8 Q. Now, before 30 June 2009, you described the planning
9 process. You do a combat patrol. You do an engagement. Was this
10 particular OPTEMPO -- before 30 June 2009 with that planning process,
11 was that demanding or not demanding?

12 A. I don't think -- it was planning intensive. It required
13 myself to spend a little bit more time in the office thinking about
14 plans and routes and stuff like that, but it was not more demanding
15 physically for the Soldiers. No.

16 Q. Did the OPTEMPO increase after 30 June 2009?

17 A. Yes. It did, ma'am.

18 Q. A little bit? A lot? Describe how it increased.

19 A. It increased from us doing, you know, maybe a patrol a day
20 to conducting several patrols a day. And what I mean by that is we
21 would move to -- you know, for instance, move to an established
22 blocking position on top of a hilltop or a piece of terrain ----

23 Q. And by move ----

1 A. We could be mounted or dismounted at this time. I'm just,
2 as a scenario, "Hey, Lieutenant Billings, I need you to move to and
3 establish a blocking position."

4 Q. Uh-huh [indicating an affirmative response].

5 A. I could sit there with my men for as little as an hour, a
6 couple hours, or a day, and then immediately get the FRAGO to change.
7 So, "Hey, into whatever saying whatever -- we need you to move from
8 this block position and go establish two TCPs and, in addition to
9 that, while you have those two TCPs established, I want you to move
10 into this qalat or engage the local elders in the vicinity of this
11 village and see if they've heard anything about Bergdahl."

12 And it would historically just go like that from one
13 mission to the next mission to the next mission where the only real
14 time that a guy had to re-set or re-think about the new mission was
15 when we were getting ready to go execute the next mission.

16 Q. And by move -- if you're dismounted, move actually means
17 hike, right?

18 A. Absolutely, ma'am. You're walking on your feet going from
19 one point to the next.

20 Q. Miles upon miles?

21 A. Absolutely, ma'am.

22 Q. What kind of load was each Soldier carrying?

1 A. It varied between -- I mean, a guy could have 60 pounds to
2 all the way up to 100 pounds if he was, you know, a machine gunner or
3 a radio -- an RTO that had to carry extra batteries for the radio.

4 Q. And during this block of time, you're living completely
5 outside the wire?

6 A. Yes, ma'am.

7 Q. And everything that the Soldier had, where does he carry
8 that?

9 A. He carried it either in the vehicle or on his person,
10 ma'am.

11 Q. How were you feeling during this first block of time?

12 A. I was exhausted, ma'am. Mentally and physically, I had --
13 you know, for the first time in my career that I'd ever lost
14 accountability of a Soldier. I didn't know if, you know, it was
15 something I did, if it was something I failed to do. I mean, there
16 were a myriad of emotions that were just crushing me inside because I
17 couldn't find my guy.

18 But, I mean, during that first time period, you know, I'd
19 gotten a run of dysentery or something and, you know, with all other
20 terms, you know, I'd shit my pants. And I could not change that
21 uniform or out of another uniform because I didn't have one to change
22 into. So I ended up wearing that whole entire uniform during that
23 first 19-day period.

1 Q. And was that the same situation that your Soldiers had?

2 A. For the most part, yes, ma'am. I mean, you have a packing
3 list that you establish; and you go out with an extra set of uniforms
4 and everything else. But, you know, when you're working around
5 concertina wire, pickets, and stuff like that, things are going to
6 happen to those uniforms.

7 Specifically, in my situation, the reason I couldn't change
8 was concertina wire had grabbed a portion of my inside leg; and it
9 ripped it all the way up. So knowing that I was going to be going
10 out and talking to locals, potentially females and whatever, in
11 villages, I couldn't necessarily have an exposed region like that on
12 my pants. So I had to wear my dirty pants.

13 Q. So you had one set of uniforms for this 20-day period?

14 A. Yes, ma'am.

15 Q. Outside the wire the entire time?

16 A. Yes, ma'am.

17 Q. How hot was it in Afghanistan during this time period?

18 A. It was very hot, ma'am. Especially taking into
19 consideration with the weight and the body armor and everything else
20 on, it was very hot.

21 Q. What is very hot?

22 A. 90, 95, 100 degrees some days. It just depends on if
23 you've got a little bit of shade to stand in or not.

1 Q. And you were living outside this entire time?

2 A. Yes, ma'am. We were.

3 Q. What happened to your -- what happened to the Soldiers'

4 socks and t-shirts during this period?

5 A. A lot of them got re-used, were falling apart. T-shirts

6 were ripping. We didn't have, you know, a store where we could go

7 buy toilet paper at. So some guys were cutting off the tops of their

8 socks, the bottoms of their t-shirts, to use as toilet paper as they

9 ran out of toilet paper, you know, from the MREs or whatever they

10 had.

11 Q. And the t-shirts ----

12 DC: Colonel, excuse me ----

13 PHO: Please stand by for a moment.

14 DC: I think this would be a good time to take a break.

15 PHO: A comfort break?

16 DC: Yes, sir.

17 PHO: That's a good idea.

18 I've got 1045 by my clock. Ten or fifteen minutes?

19 DC: I would say eleven o'clock.

20 PHO: Yeah. Why don't we shoot for eleven o'clock?

21 About how much longer do you have with your questions?

22 TC: We still do have a fairly significant amount of time with

23 this witness.

1 PHO: Okay. And how long are we anticipating for cross?

2 DC: I'd say 20 or 30 minutes.

3 PHO: All right. So let's go ahead and break. I'm going to work
4 off the clock in the back until 1100 hours.

5 **[The Article 32 hearing recessed at 1045, 17 September 2015.]**

6 **[The Article 32 hearing was called to order at 1103,**
7 **17 September 2015.]**

8 Pho All right. So the same parties that were present at the
9 recess are again present, to include Captain Billings, who is sitting
10 at the witness stand.

11 Major Kurz, you may continue.

12 **The direct examination of Captain Billings continued by the trial**
13 **counsel:**

14 Q. Captain Billings, before we took a break, we had started
15 discussing the operations tempo, or OPTEMPO, before 30 June and
16 after ----

17 A. Yes, ma'am.

18 Q. ---- June -- after 30 June 2009.

19 A. Yes, ma'am.

20 Q. And you described some of the operations that you did
21 before 30 June 2009 with your platoon: guard duty, combat patrols,
22 QRFs. Was that a physically demanding schedule before 30 June 2009?

1 A. It is. Yes, ma'am. I mean, you're taking a guy who's, you
2 know, working in the blazing heat, you know, doing whatever may be --
3 and then you're asking him to put on an additional 70 to 100 pounds
4 worth of gear, conduct a dismounted patrol for 3 to 4 hours, and then
5 come back to the OP, and go -- potentially go back on another guard
6 shift before that nighttime even hits, and then go into another
7 nighttime guard rotation. That was pre-30 June. So I mean, it was
8 still very physically demanding. It takes wear and tear on the body
9 as you go, progress throughout; but as leaders, we can kind of offset
10 that, you know, and hopefully tailor it a little bit.

11 Q. After 30 June 2009, how did the OPTEMPO change -- if any?

12 A. It changed significantly, ma'am, and what I mean ----

13 Q. And by "significantly," what do you mean?

14 A. What I mean by that is: Operations just continued to -- it
15 seemed like it just never ended. So, emotionally, the guys are
16 getting worn down. They have no idea where one of their comrades are
17 at ----

18 CDC: Uhm ----

19 A. ---- it's a Soldier ----

20 CDC: Mr. Presiding Officer, could we have an 802 conference
21 or whatever it's ----

22 PHO: An informal ----

23 CDC: An "informal, informal."

1 PHO: Okay. Can we do it here, or do we need to step ----

2 CDC: It may be ----

3 PHO: ---- into the side room?

4 CDC: ---- easier if those who have to be at that step out rather
5 than annoy everybody else. Or we can just do it at your place.

6 PHO: Let's go ahead and step out. The parties can remain in
7 place. It should be no longer than ----

8 CDC: Correct.

9 PHO: ---- 5 ----

10 CDC: Oh, if that.

11 PHO: ---- 5 minutes, if that. Okay. So we're just going to
12 step out, and then we'll be back to continue.

13 **[The Article 32 hearing recessed at 1105, 17 September 2015.]**

14 **[The Article 32 hearing was called to order at 1108,**

15 **17 September 2015.]**

16 PHO: Okay. Before we begin, I will just note that the parties
17 are again present. The same parties who were present when we went
18 into an informal hearing are again present.

19 Just for the record: I would note that during the --
20 during the informal conference, defense objected to the repetitive
21 nature of questioning and the length of time that it took. And I
22 noted that objection but did not issue a formal ruling at this point.

23 You may continue, Major Kurz.

1 TC: Thank you.

2 **The direct examination of Captain Billings continued by the trial**
3 **counsel:**

4 Q. Captain Billings, I'd like to sum up this first block of
5 time that you described. Was the operations tempo slower or faster
6 than prior to 30 June 2009?

7 A. Much faster, ma'am. It's -- one day bled into the next
8 day. I mean, from a Soldier's perspective who's down at the user
9 level executing these tasks every day, you know, he's getting very
10 little information. You know, like I said before, Soldiers like to
11 be informed. So, if you can give them a little bit of predictability
12 as to what they're going to be doing, they can plan some downtime and
13 kind of recuperate. During this time period, they didn't have
14 downtime. I mean, they were continuously going. We afforded them
15 some opportunity to get a little bit a rest or downtime, you know,
16 sitting in PZ posture when the leaders did things like filling up
17 their CamelBaks with water.

18 But I mean, continuously during this whole time period,
19 emotionally and physically they're getting drained. Emotionally,
20 because they have -- you know, intelligence is telling them to go
21 here, telling us to go there, telling us to go do this, telling us to
22 go do that -- just one thing after another to another to another to
23 another. And at some point, these guys had to look at themselves and

1 says, "When is it going to end?" Because I know I did. I mean, I
2 absolutely was like, "Man, you know -- you know, are we going to find
3 this guy or what? I mean, we're going and going and going and going.
4 Is it ever going to end, or is the cycle just going to continue to go
5 this entire deployment?"

6 And then physically, because you're not getting sleep or
7 what sleep you are getting, you know, is in the back of an MRAP or on
8 the ground out in the middle of the desert somewhere -- you know, you
9 don't have a sleeping bag, you don't have anything to help keep
10 yourself warm or cool during the day when you're walking in
11 100-degree temperatures carrying 100 pounds of gear. So physically
12 and mentally demanding much more so than it was prior to that.

13 Q. Thank you.

14 Now, on 20 July 2009, you recall a break at Sharana. Why
15 were you called back to FOB Sharana?

16 A. I believe we went back, ma'am, to do some sworn statements
17 and answer some questions during that time period.

18 Q. Initially, how long did you anticipate your period of refit
19 at Sharana to be?

20 A. I was anticipating a day, if not hopefully 2 days.

21 Q. How long did you actually get?

22 A. A couple hours, ma'am. I think it was about 4 or 5 hours.
23 It was very short.

1 Q. Were you able to clean up at this point?

2 A. We were able to shower, ma'am -- yes, ma'am -- and change
3 uniforms. We didn't get quite the refit that we would have liked to
4 have gotten, you know. Obviously, we would have liked to have got
5 the guys on the beds, get some sleep for good solid hours, you know,
6 get them some hot chow, restock on some of the necessities, tobacco
7 -- you know, lickies and chewies and stuff like that.

8 Q. I'd like to move into the second block of time,
9 approximately 20 July to middle of August.

10 A. Yes, ma'am.

11 Q. On 20 July, you completed a few hours of refit at Sharana.
12 Did you receive a mission after that?

13 A. Yes, ma'am. We were going to go back out and again support
14 operations of looking for Sergeant Bergdahl. It came, you know, like
15 I said, very, very soon. I was not expecting to go out immediately
16 after that.

17 Q. And what were the -- again what were the -- were the types
18 of operations you were conducting during the second block of time the
19 same or different than the types of operations you were conducting
20 during the first block of time?

21 A. From our -- I mean, tactically, they were the still the
22 same operations. The execution time lines, you know, from day to day
23 to day, as you progress and get farther away from 30 June --

1 obviously planning time lines get a little bit more lengthened. But
2 during that time period, even still, you know, immediately after the
3 4 hours, your planning time line is still restricted and condensed as
4 they, you know, are action-ing this intelligence as quickly as
5 possible. So they're getting boots on the ground as quickly as
6 possible.

7 Q. Was the operations tempo during the second block of time
8 the same or different than the first block of time?

9 A. It was different. It slowed down just a little bit at
10 points. It was not continuous, you know, just beat you down -- go,
11 go, go ----

12 Q. Okay ----

13 A. ---- as bad as the first block of time.

14 Q. How were your noncommissioned officers feeling during this
15 period of time?

16 A. The NCOs are absolutely are -- they beared [sic] the weight
17 of the platoon. I mean, they were the ones who went without sleep,
18 who went without water, or went without chow in order for their
19 Soldiers to be able to eat, sleep, and drink water if that be the
20 case during the time period. You know, not every day was that the
21 case. But they absolutely were the ones that, you know, would pick
22 up an extra guard shift so a Soldier who, you know, looked tired and
23 wore out and beaten up -- because you could see it in their faces --

1 an NCO would, you know, be the guy who would step in there and let
2 that guy get some sleep when he needed it, knowing that, you know,
3 the guys who should be getting some sleep themselves are the leaders
4 because they're the ones that need to make those key decisions in a
5 record [sic] of time.

6 Q. During this block of time, how are your Soldiers feeling?

7 A. Again, they're still beat down physically and mentally, you
8 know ----

9 Q. Describe that for me.

10 A. So we went back for a 4-hour break, and the guys thought,
11 hey, you know, at this time, I'm going to get an opportunity to buy
12 tobacco, buy, you know, Copenhagen, lickies and chewies -- whatever
13 it may be. We gave them some tasks. We refit the vehicles, and then
14 immediately, bam, you're thrown back into it. "All right, guys.
15 Let's go." So now, I've taken what was or should have been a
16 morale-building event for them -- some time to R&R, recoup, sleep,
17 eat -- and now, I've just told them, hey, in 4 hours -- 3 hours,
18 we're getting ready to get back in the vehicles and we'll go right
19 back after it.

20 And they were -- I mean, emotionally busted. I mean, think
21 about it: We just spent 19 -- 20 days going 20 -- 19 to 20 hours a
22 day, continuous operations from all hours -- daylight, nighttime --
23 from one mission to the next, with ANA, with ANP, without either one

1 of them. Continuous operations damn near every day. Come back for a
2 4-hour refit, "Hey, you guys get a break." And then it's only 4
3 hours long, and you have to go right back into the hornet's nest, and
4 they have no idea why.

5 They're like, "Hey, sir, why?" Like, "Why are we getting
6 screwed over on this?"

7 And I had to pull them aside and -- I had to pull the NCOs
8 aside, and say "Hey, look, I need you guys to make -- you know,
9 articulate to the men that it is absolutely our responsibility to go
10 out and exhaust all means and do everything we have to do to find
11 Sergeant Bergdahl. Everything. And I got it, man. I know you guys
12 are tired. I didn't get to sleep on the 4-hour break." Lots of my
13 NCOs and lots of my leaders didn't get to sleep at all. I mean, I
14 got it. But I told them, I was like, "I need you to go back there
15 and talk to the boys and get them to understand that this is
16 absolutely the most important thing that they'll probably ever do in
17 their entire lives."

18 Q. Could you physically describe what the -- what your
19 Soldiers looked like at the end of this block of time, their skin and
20 their appearance?

21 CDC: I'm going to object.

22 PHO: Yeah, I think we can move on to the next question. I think
23 we understand.

1 Q. What was your state by the end of this block of time?

2 CDC: Same objection.

3 PHO: The end of which block of time?

4 TC: The second block of time, sir.

5 PHO: By the end?

6 TC: By the middle of August 2009.

7 The witness has talked about his state at the beginning of
8 the search. They've gone through 45 days. This is my last question
9 concerning this block of time. I'd like him to describe for the
10 hearing how he was feeling as the platoon leader at the end of this
11 block of time.

12 PHO: Okay. Let me make sure I understand this. Let me ask a
13 question. So this second block of time goes through, roughly,
14 15 August?

15 WIT: Yes, sir.

16 PHO: And what was the break? What changed that you would say
17 that there is a break at this point?

18 WIT: At that time period, sir, is when we kind of began to
19 transition and get ready for the elections. So that's why ----

20 PHO: Okay. So you had a change of mission?

21 WIT: Yes, sir.

22 PHO: Okay. And did you go back to FOB Sharana?

23 WIT: Yes, sir. We did.

1 PHO: Okay. So as you were going back to FOB Sharana, then -- I
2 will allow that question in terms of "What was your state of mind as
3 you were finishing that second block?"

4 WIT: So as we were beginning -- finishing up that second time
5 period, we got the change of mission, obviously, to transition and
6 begin preparations for the upcoming elections. You know, I can't
7 speak for everybody else. For me, I was defeated. You know, for the
8 first time in my military career I'd ever [sic] lost a Soldier and I
9 didn't know where he was at; and that's a hard pill to swallow. You
10 know, was it something that I had done? Was it something I failed to
11 do? Was it a decision I didn't make? Was it -- you know, you just
12 don't know. You know, so physically and mentally, I was defeated
13 inside. You know, was I worthy to be a leader in the United States
14 Army because I had lost one of my Soldiers? All these questions are
15 running in my head. I mean, I don't know. I mean, nobody knows
16 anything -- you know, I mean, why he did what he did. But for me,
17 you know, dealing with it --

18 And then we get the change of mission and we're heading
19 back to go to elections and, you know, I remember thinking to myself
20 and talking to the platoon sergeant, I said -- you know what -- when
21 we got the change of mission, I'd felt almost as if I had failed the
22 men, because we didn't bring one of our boys home.

23 Q. Were you proud of your Soldiers?

1 A. Absolutely, ma'am.

2 Q. I'd like to talk about the elections period. Elections
3 happened on or about 20 August 2009.

4 A. Yes, ma'am.

5 Q. What did you do for the week before the elections?

6 A. We moved to an ANA station base or OP where they worked out
7 of, ma'am, and we staged at that OP. So the directive that was given
8 to us was we were the local QRF for any of the local polling sites in
9 the event that a spectacular attack happened -- so a VBIED or attack
10 on a polling site. We would be the U.S. forces that immediately
11 reinforced those areas. However, what they didn't want is they
12 didn't want to put an American face on any portion of the election.
13 So we were supposed to stay out of sight, out of sound, away from
14 these areas as far as possible but still be able to reinforce them if
15 necessary.

16 So we were given this ANA COP to go live at and stage for a
17 week. In that time period, in order to also keep the U.S. presence
18 down, my guys only had sporadic guard shifts up in the towers; and we
19 only did it at night, because we knew that the enemy had limited
20 capability with NVGs. So my guys could go up in the towers and pull
21 guard at night when I felt it was probably the most dangerous for us.
22 But during the daytime, we did not have any presence up in the
23 towers.

1 Q. Did they get a little bit of rest during this period?

2 A. They absolutely did, ma'am. This was, I mean, a huge
3 relief for the guys at this time period. Dealing with, you know, the
4 burden of not having found Bergdahl but knowing that, hey, finally
5 there's, like, a reprieve. You know, we're going into elections, it
6 should be a good event; you know, hopefully it's eventless. And it
7 was absolutely a time period for them to, you know, get underneath
8 some shade and get some sleep and catch up on some much needed rest
9 and recovery.

10 Q. After the elections, just briefly, did you receive a
11 follow-on mission?

12 A. Yes, ma'am.

13 Q. And where was that?

14 A. We were to move to the northern portion of Mota Khan and
15 establish a combined outpost with the ANP there.

16 Q. After you moved to Mota Khan, did intel collection -- or
17 finding intelligence on the location of the accused, did that
18 continue to be one of your tasks?

19 A. Yes, ma'am. It was pushed down from higher headquarters
20 all the way down to the battalion and the company and then,
21 subsequently, down to the Soldiers within my platoon.

22 Q. How long did that continue?

23 A. Until we left, ma'am.

1 Q. You described briefly what the platoon was like before
2 30 June 2009. Did they ever get back to that state before you
3 redeployed?

4 A. I don't think you can ever get back to a state of where you
5 were at before, having lived what they lived through. I just think
6 it's impossible. You know, without actually going to an objective
7 somewhere or finding Bergdahl alive and bringing him home -- that
8 would be the only thing that would probably get them close to that.

9 Were they close to that? Absolutely. I mean, we went to
10 Mota Khan and were hugely successful up there, and it was a tribute
11 to all those guys' hard work.

12 Q. During this whole period, did you get to talk to your
13 family?

14 CDC: Objection.

15 PHO: Yeah, I'm going to go ahead and sustain.

16 Q. Was the accused present for duty on 29 June 2009?

17 CDC: Objection, asked and answered.

18 PHO: I'll allow it.

19 A. No [sic], ma'am.

20 Q. 29 June 2009?

21 A. Or -- yes, ma'am. He was. I'm sorry.

22 Q. Was he present on 30 June 2009?

23 A. No, ma'am. He was not.

1 Q. Did he report for his guard shift on the morning of
2 30 June 2009?

3 A. No ----

4 CDC: Objection, asked and answered.

5 PHO: I'll allow it.

6 A. No. He did not, ma'am.

7 Q. Did he return to OP Mest or Sharana to your knowledge on
8 30 June 2009?

9 A. Not that I know of, no, ma'am.

10 Q. Did he have your authority or any person in the chain of
11 command that you're aware of to leave Observation Post Mest alone on
12 30 June 2009?

13 A. No, ma'am.

14 Q. Did any Soldier have the authority to leave Observation
15 Post Mest alone?

16 CDC: Objection, irrelevant.

17 PHO: Sustained.

18 Q. When did you redeploy?

19 CDC: Objection, irrelevant.

20 PHO: I'll allow it.

21 Q. When did you redeploy?

22 A. March two thousand -- I can't remember the month [sic] now.

23 PHO: Ten?

1 Q. March of 2010?

2 A. Yeah. March of 2010. I'm sorry, ma'am.

3 Q. To your knowledge, did the accused return to your unit,
4 Mest, Sharana, or U.S. military control before that date?

5 A. No, ma'am.

6 Q. When did you PCS or leave Fort Richardson?

7 CDC: Objection, irrelevant.

8 TC: I'm laying a foundation, sir.

9 PHO: Overruled.

10 A. I left out April of 2010, ma'am, to head to RTB.

11 Q. Did the accused return to Fort Richardson or military
12 control before you left Fort Richardson?

13 A. No, ma'am.

14 Q. Have you followed the news in this case since 2009?

15 CDC: Objection, irrelevant.

16 TC: I'm laying the foundation ----

17 PHO: Overruled.

18 A. Yes, ma'am. I have.

19 Q. To your knowledge, did the accused return to military --
20 when did the accused return to military control?

21 A. I believe it was 31 May 2015, ma'am.

22 Q. How did you become aware of this?

23 CDC: Objection, irrelevant.

1 PHO: I'll allow it for what it's worth.

2 A. I received a message from my wife to get on the news,
3 because they had found Bergdahl.

4 Q. How did you feel?

5 CDC: Objection, irrelevant.

6 PHO: Sustained.

7 TC: Thank you. No further questions.

8 PHO: Defense?

9 **CROSS-EXAMINATION**

10 **Questions by the defense counsel:**

11 Q. Captain Billings, you were scheduled to leave Mest on
12 June 30th, correct?

13 A. Yes, sir. I believe so.

14 Q. And that would eventually be handed over to the Afghan
15 National Security Forces?

16 A. The OP? Yes, sir. It would be.

17 Q. Your platoon wasn't going back there?

18 A. That's to be -- undetermined, whether the amount of work
19 that 3rd Platoon could get accomplished during that time period to
20 finish it up would really be the foundation of whether they could
21 turn it over or not.

22 Q. Okay. And you were scheduled to head back to FOB Sharana
23 on the 30th, correct?

1 A. Yes, sir.

2 Q. FOB Sharana has MWR, internet, buildings, basketball
3 courts, Burger King, Pizza Hut, a 24-hour dining facility?

4 A. I believe so. Yes, sir.

5 Q. COP Mest was never attacked while you were there, correct?

6 A. Not while we were there. No, sir -- 2nd Platoon.

7 Q. And while at COP Mest, your platoon was never in a tactical
8 engagement before the enemy, correct?

9 A. Not located at Mest, no, sir.

10 Q. How many Soldiers were there at Mest on the 29th of June?

11 A. I believe 33, sir.

12 Q. How many Afghan National Police?

13 A. It varied in number, sir. We had an ANA counterpart and an
14 ANP counterpart. The ANP were tasked to give us the equal numbers of
15 about 30, or a platoon-sized element; and then we had about 15 ANA
16 that rotated in, because they were from the local villages.

17 Q. Thank you.

18 Is there a personnel report for 29 June, for example,
19 something that shows the number of Soldiers who were present, who
20 were on leave, who were sick, who were detailed to other duties?

21 A. Yes, sir.

22 Q. Do you have that report?

23 A. I don't physically have it on me. No, sir.

1 Q. Has that been turned over to the government?

2 A. I don't know what you're asking me ----

3 Q. Do we know if this still exists?

4 A. I don't, sir. I have no idea.

5 Q. And because sometimes you would have to account for
6 different Soldiers who weren't present for duty. For example, at one
7 point, you -- there was a Soldier in your platoon who shot himself in
8 the foot, and he was out of commission for a while, right?

9 A. Yes, sir.

10 Q. Around COP Mest, that was covered in concertina, at one
11 point, there was a plywood board that would stay generally
12 permanently fixed over part of the plywood [sic], right?

13 A. Yes, sir.

14 Q. And ----

15 CDC: You mean over the concertina wire?

16 DC: Yes, over the concertina wire.

17 And so that would allow your Soldiers, as long as they were
18 traveling in buddy teams, to go outside the wire; and they could walk
19 up to duty on the bunker or go socialize with the Afghans there
20 nearby?

21 A. Yeah. So they weren't necessarily outside the wire. The
22 way the perimeter was set up was: We had the main concertina around
23 the lower portion of the hill, and then there was another portion of

1 concertina wire that went around the OP or where the bunker was at.
2 So the concertina wire was set over a single strand -- or the board
3 was set over a piece of single-strand concertina wire that went from
4 the lower OP right behind the ANP location. That allowed the guys to
5 go up the hilltop right there. In the event that we were overrun or
6 whatever coming from the hilltop, which was the least likely avenue
7 of approach, we could just simply pull back that piece of wood and
8 then close it up. But it did stay there almost permanently during
9 that time period to allow the guys to traverse back and forth.

10 Q. So that actual platoon position -- the Soldiers could leave
11 that for limited purposes if they stayed in buddy teams? They could
12 go outside that wire?

13 A. It wasn't "the wire" though. I mean, when you say "go
14 outside the wire," I'm thinking, like, outside the wire, like on a
15 combat patrol.

16 There was a piece of concertina wire that dissected our
17 little outpost; but when they went across to, like, the bunker, that
18 wasn't "outside the wire" in my eyes. They were still within the
19 defensive perimeter of the bunker and the vehicle. So there was
20 vehicles and/or a posture that allowed them to be defended
21 accordingly based on the weapons systems in place.

22 Q. Okay. Thank you. Sergeant Bergdahl's job at COP Mest was
23 to help construct the site and pull security?

1 A. Yes, sir.

2 Q. When dismounted patrols did go outside from COP Mest, they
3 never encountered any enemy contact?

4 A. Not that I can remember, no, sir.

5 Q. You had just arrived to COP Mest on about the 28th of June,
6 I think is right, correct?

7 A. Yes, sir.

8 Q. You had just returned from the States where you had been on
9 leave?

10 A. Yes, sir. I got back on or about, like, the 25th,
11 somewhere in there -- the 26th -- and then linked up with my platoon
12 and went out to Mest OP.

13 Q. You remember Sergeant Bergdahl being somewhat frustrated
14 and bored with the mission? That he wanted to be really more kicking
15 in doors and pursuing the Taliban?

16 A. I don't personally remember that, sir. Some of the stories
17 that the guys had told me, you know, after the fact of Bergdahl going
18 missing, was that, yeah, he very much, you know, had these ideas of
19 what he would be doing in Afghanistan and his image of what he would
20 be doing wasn't necessarily what it was.

21 Q. You remember that he was really wanting to specifically get
22 after the guys who were planting the IEDs in the road?

23 A. I don't recall specifically. No, sir.

1 Q. Sergeant Bergdahl never gave you any disciplinary issues?

2 A. Not while I was the platoon leader, no, sir.

3 Q. Never had any alcohol or drug issues?

4 A. Not while I was the platoon leader, no, sir.

5 Q. Safe to say he was dedicated to the mission?

6 A. Absolutely, sir. And like I said before, he was -- you
7 know, I had no reason to think otherwise. You know, he was a good
8 performer.

9 Q. Would you say he had an outstanding record of performance
10 in the time he served with you?

11 A. Up until 30 June, yes, sir.

12 Q. Moving on to the searches you conducted: Your platoon was
13 effective, and you accomplished the mission under your leadership,
14 right?

15 A. I don't think it was necessarily my leadership but their
16 ability to accomplish huge tasks in a short amount of time given
17 limited assets and resources.

18 Q. But your platoon was able to pursue the Taliban and
19 eventually form some successful partnerships with Afghan units
20 and ----

21 A. Absolutely, yes, sir.

1 Q. ---- it's not every platoon leader that gets visited by
2 four stars; but, you know, towards the end of your platoon's mission,
3 you were doing very well. Tell us some of the VIPs who came down to
4 check on your good work.

5 A. So, at Mota Khan, sir, we went into this thing that was
6 called CAP or Combined Action Platoon. It was a philosophy that was
7 developed during the Vietnam War where U.S. forces or Soldiers would
8 cohabitate with the host nation's security forces, a concept that
9 they said, hey, it may or may not work. And now it's the foundation
10 of what a lot of special operations do today.

11 But we moved up to Mota Khan. Not a lot there for
12 infrastructure other than, you know, a building. So the guys
13 immediately got after it, started back-filling the towers, building
14 the towers, putting a cover on, moving rice so we could move in,
15 building bunkbeds so the guys had a place to live. We had a guy who
16 was very good at plumber work and went in and helped, you know, fix
17 up the latrine.

18 And partnership-wise, I mean, my guys were doing PT every
19 day with the ANP, you know, so we had a squad out there dedicated
20 with them; squad doing PT, squad training and ----

21 Q. And General McChrystal came ----

22 A. ---- ultimately ----

1 Q. ---- and checked on you?

2 A. ---- yeah, it ended up leading to, like, you know, Major
3 General Scaparrotti came out and visited us. Admiral Mullen came to
4 visit us, and ----

5 Q. The Chairman of the Joint Chiefs?

6 A. Chairman of the Joint Chiefs of Staff.

7 And then General Stanley McChrystal came out and visited
8 and served chow to the guys, you know, on Thanksgiving Day.

9 Q. Three days ago, a national news network mentioned to a
10 national audience that seven Soldiers from your platoon died looking
11 for Sergeant Bergdahl. Is that news to you?

12 A. From my platoon?

13 Q. Yes.

14 A. Yeah. None of my men physically died looking for Sergeant
15 Bergdahl.

16 Q. Okay. I'd like to talk briefly about leadership. We had a
17 good talk the other day about this.

18 How important is it for an Army leader to know and
19 understand the problems or issues that are going on with their
20 Soldiers?

21 A. I think it's what we get paid to do. So, as a leader, you
22 know, like I talked about earlier with the -- having a cigarette with
23 one of my guys by the burn pit -- so, traditionally, Soldiers are

1 naturally going to be -- they're going to put up a barrier, you know.
2 Not many times do they get an opportunity to talk to their platoon
3 leader one on one. Not many times do they get to talk to their
4 company commander on a one-on-one basis. So, in order to get those
5 guys to kind of drop their guard and feel comfortable, you know, I'll
6 go out there and have a cigarette with them or, you know, a cigar
7 now, because I'm a big cigar smoker. But it allows them to kind of
8 drop their guard, and you can get to know them. And you'd be
9 surprised some of the things you can find out from these Soldiers
10 just by having a conversation with them in an environment where they
11 feel comfortable.

12 Q. And, you know, that's a good way to get that; but how
13 important is it for an Army leader to know about the red flags of
14 Soldiers who show up to their unit?

15 A. I think it's very important. I mean, we use a myriad of
16 tools to help us make assessments. As a company commander, you know,
17 I go on the Company Commander's Risk Reduction Dashboard, and it will
18 tell me if a Soldier's ever done anything bad. It allows me to make
19 a formulated decision based on past risk that he potentially showed
20 and say, "Hey, do I really want to sign this guy's leave form or pass
21 form or whatever to send him on leave?" So -- but that's --

1 Q. How -- in your experience during that time, how effective
2 is the Army at really giving commanders and platoon leaders the
3 information they need to properly supervise their folks?

4 A. Well, there's lots of tools out there. I think the problem
5 is that there's so many tools that none of them kind of feed into one
6 place where a guy can get a single outlet to get all that
7 information.

8 Q. Okay. So, for example, when Sergeant Bergdahl shows up,
9 what you noticed was, you know, a pretty good Soldier who listened to
10 orders and, you know, was a good 11 Bravo, right?

11 A. Yes, sir.

12 Q. When he showed up, you were not aware that the U.S.
13 Army [sic] Coast Guard had discharged him for a psychological
14 discharge?

15 A. No idea, sir.

16 Q. And when he showed up, you were not aware that the Army
17 waived their enlistment standards for mental health in order for him
18 to come in?

19 A. No, sir.

20 Q. And at the time back then, you were not aware that -- you
21 know, what a neutral Army psychiatry board has now concluded that
22 back in June 2009 that Sergeant Bergdahl possessed a severe mental
23 disease or defect?

1 A. No, sir.

2 Q. Had you known those things about Sergeant Bergdahl, how
3 would you have handled him differently?

4 A. Well, I mean, I guess you have to look at it in two
5 contexts. You know, if I was in a leadership position prior to
6 deploying, I probably would have made an assessment and said, hey,
7 you know, I know these things. And I would send him off to a
8 specialist who deals with that, because I'm not a psychiatrist. So
9 I'd absolutely make a recommendation through the chain of command
10 that, hey, we probably need to get this guy looked at.

11 Post-deployment, I mean, there's a myriad of tools now
12 where, as guys develop these symptoms, you know, you can send them to
13 behavioral health or you can send them to a psychologist. There's
14 all these tools that are available for even platoon leaders now that
15 I didn't have back when I was a platoon leader. But you send them to
16 the guys who that's their job, you know, not an infantry lieutenant
17 or company commander who makes a decision on whether a guy's mentally
18 stable or not. You send him off and make a referral for him to go
19 see the right specialist.

20 Q. Thank you, Captain Billings.

21 How did you end up at Fort Drum after your last assignment?

1 A. I was by-name requested by General Milley, who was then the
2 10th Mountain Division CG.

3 Q. Is the same General Milley who's now the Chief of Staff of
4 the Army?

5 A. Yes, sir.

6 Q. And the same General Milley who just before this was the
7 Commander of FORSCOM?

8 A. Yes, sir.

9 DC: No more questions.

10 PHO: Government, do you have any redirect?

11 TC: No redirect.

12 PHO: I have two questions.

13 **EXAMINATION BY THE PRELIMINARY HEARING OFFICER**

14 **Questions by the preliminary hearing officer:**

15 Q. You mentioned while you were doing burn duty with Doc, you
16 said -- your words were those were your last good memories of Doc.
17 Can you explain what you mean by that?

18 A. Yes, sir. I had explained this to the prosecution earlier,
19 too. It's not that it was a good memory. It was, like, one of my --
20 the last time I really enjoyed, like, having -- you know, enjoyed my
21 time. As with any deployment, like, deployments to Afghanistan and
22 Iraq, you have good times and bad times.

1 Q. Sure.

2 A. So that was one of the last times where I really enjoyed or
3 remembered, like, enjoying myself. And it was ironic that we
4 happened to be burning shit while doing it.

5 Q. Okay. Thank you.

6 The other question I had was: You mentioned that when you
7 -- when it was reported to you that Sergeant Bergdahl was missing,
8 that his weapon and his sensitive items were laid out. Can you,
9 please, describe that in greater detail for me?

10 A. Yes, sir. So, I never physically saw the layout, but the
11 way it was described was on top of his cot was his weapon, his NODs,
12 and then I think a ----

13 CDC: NODs?

14 Q. His night vision goggles?

15 A. Night observation devices or night vision goggles. You
16 mount them at night so you can see at night.

17 Q. Mr. Fidell keeps us straight on the acronym alert.

18 A. Yes, sir. I apologize.

19 Q. No. That's okay. It was my fault, too.

20 A. But -- so his sensitive items -- you know, his weapon and
21 those things were laid out on top of his cot.

22 Q. And would it be similar to what you would expect during a
23 layout -- a sensitive items layout inspection?

1 A. It would be similar in the fact that while you're -- you
2 know, so you don't ever, like, untie your NODs unless you're actually
3 mounting them to your helmet ----

4 Q. I understand.

5 A. ---- so having them not attached or tied down is not how
6 we did things in our platoon. It wasn't part of our SOP so ----

7 Q. I see.

8 A. Out for the layout; you know, the team leader comes and
9 looks at it. He gets hands-on. He reads the serial number, and then
10 it immediately goes right back in the pouch, whether it be on your
11 kit or in the assault pack.

12 PHO: I Understand.

13 All right. I don't have any further questions. Any
14 questions based on mine?

15 TC: No, sir.

16 PHO: Okay. Anything from the defense?

17 DC: None.

18 PHO: Okay. Is it -- can we temporarily or permanently excuse
19 the witness?

20 TC: Temporarily, sir.

21 [The witness was temporarily excused, duly warned, and withdrew.]

1 PHO: Mr. Fidell?

2 CDC: Well, currently looking at my watch, I'm going to recommend
3 that we break at this point. It's a little bit earlier but ----

4 PHO: It is a little bit early.

5 CDC: But I think, you know, to start another witness, knowing
6 that, you know, we want to break within half an hour, I don't think
7 makes sense so ----

8 PHO: Are you good with that, Major Kurz?

9 TC: Yes, sir.

10 PHO: Okay. I've got 1138. Actually, on the back clock it looks
11 closer to 1140. Although, I think the clock's been set back an hour.
12 So anyway, let's shoot for -- we will go back on the record at 1245.

13 Major Kurz, be ready with your next witness.

14 TC: Roger, sir.

15 PHO: Okay. We're in recess.

16 **[The Article 32 hearing recessed at 1139, 17 September 2015.]**

17 **[The Article 32 hearing was called to order at 1246,**

18 **17 September 2015.]**

19 PHO: The hearing is called back to order. The same parties
20 present at the lunch recess are again present.

21 Government, go ahead and call your next witness.

22 [Pause.]

23 PHO: I saw him standing by instead of -- good call.

1 [Pause.]

2 **MAJOR SILVINO S. SILVINO, U.S. Army, was called as a witness for the**
3 **government, was sworn, and testified as follows:**

4 **DIRECT EXAMINATION**

5 **Questions by the trial counsel:**

6 Q. And before I begin, Major Silvino, I need to give you a
7 caution: Please be advised that while you are testifying, if you are
8 asked any question that you believe may require a response containing
9 classified information, you have a personal responsibility to notify
10 the preliminary hearing officer prior to answering. At no time
11 should you disclose any classified information while this hearing is
12 in an open session. Do you understand?

13 A. I do.

14 Q. Could you, please, state your full name, rank, and unit of
15 assignment?

16 A. Silvino S. Silvino; Major. I'm with HHB -- or HH Battalion
17 -- Headquarters and Headquarters Battalion, U.S. Army Pacific,
18 Honolulu, Hawaii -- or Fort Shafter, Hawaii.

19 Q. What is your current duty position?

20 A. I am a Southeast Asia foreign area officer.

21 Q. And, very briefly, what do the duties of a foreign area
22 officer, or a FAO, involve?

1 A. Well, my primary duties is to manage portfolios for our
2 Southeast Asian partners, primarily Vietnam, Philippines, Thailand,
3 Malaysia. That so, we work with our counterpart militaries and work
4 bilateral engagements, visits, staff talks, and anything that we can
5 further our cooperation with our partners in the Pacific.

6 Q. I'd like to direct your attention back to 2007 to 2009.
7 What unit were you assigned to back in 2007?

8 A. I was with Blackfoot Company, 1st of the 501st.

9 Q. Parachute Infantry Regiment?

10 A. Correct, Parachute Infantry Regiment.

11 Q. What location were they based out of?

12 A. We were from Fort Richardson, Alaska.

13 Q. What was your duty position within Blackfoot Company?

14 A. I was their company commander.

15 Q. When did you take command?

16 A. It was September 24th, 2007.

17 Q. Where did you take command?

18 A. I took command at -- well, it's Iskandiriyah, Iraq, just
19 south of Baghdad.

20 Q. Was your company already deployed to Iraq when you took
21 command?

22 A. Yes.

23 Q. How many months did you stay in Iraq as company commander?

1 A. Three months after I took command.

2 Q. And how many months -- how long were you in command total
3 of Blackfoot Company?

4 A. About 33-34 months.

5 Q. So almost 3 years?

6 A. Almost.

7 Q. When did you leave command?

8 A. I left command July, I believe, in 2010.

9 Q. Now, the Iraq deployment in 2007, was that your first
10 deployment?

11 A. No, ma'am.

12 Q. Do you have a prior deployment?

13 A. I have -- I've had ----

14 CDC: Objection, irrelevant.

15 PHO: It's background. I'll allow it.

16 A. I was deployed with 3rd Battalion, 21st Infantry, at Mosul,
17 Iraq, in 2004 and 2005.

18 Q. And did you have the occasion to go on a second deployment
19 with Blackfoot Company?

20 A. I did. I was able to deploy with Blackfoot Company to
21 Afghanistan in 2008-2009 -- or 2009-2010.

22 Q. Was that your deployment to Paktika Province?

23 A. Yes.

1 Q. What was the company mission in Paktika, Afghanistan?

2 A. Our mission was to partner with the Afghanistan National
3 Security Forces -- primarily, at the time, it was the Army -- to
4 conduct security stability operations in support of the government of
5 Afghanistan.

6 Q. And how did you -- how did you conduct this mission?

7 A. Well, we were able to position ourselves at FOB Sharana --
8 initially working off of FOB Sharana. And we partnered with our ANSF
9 partners from a base right outside of FOB Sharana. We conducted
10 these patrols. We conducted HADR. We conducted ----

11 CDC: HADR?

12 A. Humanitarian Assistance Disaster Relief.

13 Q. Thank you.

14 A. And we worked really security operations for the provincial
15 capital and the areas close to FOB Sharana.

16 Q. And you mentioned ANSF. Do you know what that stands for?

17 A. Afghanistan National Security Forces.

18 Q. So their army and police?

19 A. Yes.

20 Q. Could you describe Blackfoot Company's area of operation in
21 Paktika?

22 A. Well, Blackfoot Company -- we were -- we were, again,
23 situated in FOB Sharana. We had five districts that we were

1 responsible for -- that I was responsible for. They were Mota Khan,
2 Yahya Khel, Yousef Khel, Omnah, and Sarhowsa.

3 Q. Do you know approximately the square mileage or footprint?
4 Was this a small area or a large area?

5 A. It was a very large area.

6 Q. Were these district centers fairly spread out?

7 A. Yes. They were fairly spread out all across northern
8 Paktika.

9 Q. And how many observation posts do you recall having in your
10 area of operation?

11 A. The one we have is Mest -- OP Mest.

12 Q. And what was the purpose for creating Observation Post
13 Mest?

14 CDC: Objection, cumulative.

15 PHO: Overruled.

16 A. Observation Post Mest is supposed to -- well, it was with
17 the Afghan National Security Forces -- with the police at the time.
18 Our main job is to -- or main purpose at that OP is to overwatch an
19 intersection vicinity of that location. It's the -- I can't speak of
20 the route; but it's pretty much overwatching this intersection that
21 is a high-traffic area for weapons, IEDs, and insurgent activities,
22 coming from Pakistan going through and up and down Paktika and
23 through Ghazni.

1 Q. Thank you. Was your company responsible for the
2 construction of Observation Post Mest?

3 A. Yes.

4 Q. I'd like to talk a little bit about the structure of
5 Blackfoot Company. How many platoons did Blackfoot Company have
6 prior to June 2009?

7 A. We had three organic platoons, 1st, 2nd, and 3rd; and we
8 also had a headquarters section.

9 Q. Just a section?

10 A. Just a section.

11 Q. Now, what happened to 1st Platoon when you deployed?

12 A. Once we arrived in Sharana, I received an order from my
13 battalion that I am to re-task 1st Platoon -- or a platoon to move
14 over to conduct operations for the brigade at FOB Salerno in Khost
15 Province in support of force -- targeting force operations.

16 Q. So did -- was 1st Platoon detached from Blackfoot Company?

17 A. Yes.

18 Q. So it was gone?

19 A. Yes.

20 Q. Now, you said you had a headquarters element. What did you
21 do with that headquarters element after 1st Platoon was detached?

22 A. Well, with the large area that I was responsible for, I
23 created a platoon -- meaning, I conducted -- or I re-trained my commo

1 NCO, my senior medic, my RTO for myself and my first sergeant, and
2 our company intel support team, which is about four personnel, my
3 armorer. And we were able to put together an ad hoc platoon in order
4 to support the company. That platoon was working primarily the
5 Sharana area -- the Sharana proper area.

6 Q. So before June of -- so you created a platoon out of hide
7 so to speak?

8 A. Yes, I did.

9 TC: Sir, at this time, the government would like to move into a
10 classified session to have the witness testify from a classified map.

11 PHO: All right. Can you explain to me the reasons why you
12 believe this witness -- it's necessary to testify from a classified
13 map?

14 TC: Yes, sir. Using a classified map, I would like the witness
15 to describe the unit's area of operations before and after
16 30 June 2009, specifically related back to classified routes, and do
17 it district by district ----

18 CDC: Slow down. I'm taking notes.

19 Area of operations?

20 TC: Yes, before or after 30 June -- before and after
21 30 June 2009, specifically related to routes, markings of which are
22 classified. And I would like the witness to do a

1 district-by-district description of the enemy situation in the unit's
2 area of operation.

3 CDC: Hold on. Enemy operations where?

4 TC: In his area of operation.

5 PHO: Okay. So area of operations specifically relating to
6 routes?

7 TC: And the enemy situation in each of his district centers.

8 PHO: Okay. I'm going to go ahead and ask my -- I'm going to
9 consult with my security manager. I think I'm going to go ahead and
10 do that on the record and -- just to make sure that I understand
11 classification.

12 My question specifically to Mr. Mersereau is: Can the
13 witness describe the area of operations specifically relating to
14 routes? If he were to do it with a classified map, that would
15 obviously be classified. If he were to speak of the routes and
16 generally of that, without reference to a classified map, would that
17 be classified?

18 MR. MERSEREAU: Sir, as long as we keep it in general ----

19 CDC: Can't hear you.

20 PHO: Why don't you step up to the ----

21 MR. MERSEREAU: As long as we keep it in general terms, then
22 that's okay.

23 PHO: And when you say "general terms," what do you mean by that?

1 MR. MERSEREAU: A general direction, not specific about where it
2 goes from, where it goes to, and the broader scope of what it's used
3 for.

4 PHO: Okay. Next question: Is the witness -- the other thing
5 that Major Kurz mentioned was a district-by-district description of
6 the enemy situation, enemy activity.

7 I guess my first question is: It seems to me that he could
8 do that without reference to a map, but is that description
9 classified?

10 MR. MERSEREAU: Sir, if that information is derived from
11 classified reports, then certainly it would be classified.

12 PHO: Okay. To your knowledge, is that -- is that the case?

13 WIT: Yes, sir.

14 PHO: Okay. Thank you. You can --

15 [Mr. Mersereau resumed his seat.]

16 PHO: Defense, your position?

17 CDC: We object to this closure as we objected to the last
18 closure. I think the hearing officer has to have a -- well, let me
19 back up. And this is without prejudice to our submitting formal ----

20 PHO: Potentially ----

21 CDC: ---- on this if we need to.

22 The test -- the onus is on the government to demonstrate a
23 need for closure. The onus is on the government to show it is

1 necessary in light of the standard that governs this entire
2 proceeding, which his merely probable cause. And I think we are a
3 very far distance from that kind of demonstration.

4 PHO: Okay. Major Kurz, explain to me ----

5 CDC: And, of course, alternatives also. That's part of the
6 analysis, exploration of alternatives.

7 PHO: What alternatives do you see as feasible here?

8 CDC: Well, I think -- what I think is the government should
9 demonstrate an absence of alternatives. But it occurs to me that
10 things like screening so that you wouldn't have to refer to these
11 maps or at least the maps wouldn't have to be seen by anybody.

12 PHO: Okay. Major Kurz, you mentioned that in your ----
13 [The trial counsel stood.]

14 PHO: And you don't have to stand up, Major Kurz.

15 TC: Habit, sir.

16 PHO: I know it's probably habit, and that's fine.

17 What about with the maps? Why doesn't screening work?

18 TC: Well, sir, I'd actually like to not respond but take you
19 through the standard found in 405(i) rather than just
20 addressing specific ----

21 PHO: Okay. Go ahead. Explain to me your position.

22 TC: If you read 405(i), sir, the standard is this: an
23 overriding interest that outweighs the value of an open hearing. The

1 closure must be narrowly tailored, and no lesser means -- which I
2 will address defense counsel's position -- exists. An overriding
3 interest does exist, and that is the protection of classified
4 information.

5 PHO: Okay. But you also have to establish that it's necessary
6 to present classified information in this forum in order to ----

7 TC: Absolutely.

8 PHO: ---- accomplish some purpose.

9 TC: Absolutely. One of the elements here has to do with
10 "before the enemy" and "endangerment of the unit." Major Silvino is
11 going to explain exactly where the enemy was in terms of the element
12 of "before the enemy." He will describe where the enemy was in his
13 area of operations.

14 This closure is going to be narrowly tailored. We've
15 detailed the three specific areas where he's going to testify. It
16 will be narrowly tailored to those specific areas of classified
17 information.

18 We have attempted, as you know, to obtain lesser means.
19 We've attempted declassification of the maps, which we could not
20 obtain. We do not believe -- it is the information, per se, that is
21 classified. Once you attach a route location to a point on the map,
22 a troop position to a point on the map, that is what becomes

1 classified. So even if we had an unclassified map, once he began
2 describing routes, that information itself is classified.

3 PHO: Okay. But that, in fact, could be displayed in such a way
4 that is it not visible to the public, and the routes could be
5 discussed; and the route names themselves, in fact, are not
6 classified?

7 TC: They are not. Once you tie them back to a map, they become
8 classified.

9 PHO: But again, let's say we put up a screen, you know, so that
10 members of the public cannot see and that the cameras cannot pick up,
11 all the parties here can see, the witness can see and refer to -- how
12 is that not an adequate substitute?

13 TC: This lesser means can usually only be used where there is
14 no oral discussion of the classified contents of the document. This
15 lesser means would not be sufficient where a witness had to testify
16 as to the classified contents of the document or counsel sought to
17 argue based on the classified contents of the document.

18 PHO: Go ahead, Mr. Fidell.

19 CDC: Colonel, it seems to me that -- unless I'm very mistaken,
20 Colonel Silvino ----

21 WIT: Major Silvino.

22 PHO: Major Silvino.

23 CDC: Excuse me.

1 WIT: Major. Thank you for the promotion, though.

2 CDC: Hold on to that. You never know; it might happen.

3 It seems to me that the witness could testify how far OP
4 Mest was from the enemy.

5 TC: But that -- that ----

6 CDC: What is -- what ---- I mean, the government is creating a
7 problem that is unnecessary. And, you know, it's nice that they have
8 these maps that they presumably spent some of the taxpayer's money
9 on; but, in all seriousness, this is not necessary.

10 PHO: Well, one of my questions for the government is this
11 district-by-district description -- do you intend to use a map for
12 that? Or it sounds like you could very well not use a map for that
13 and just say: In "X" Province, this was happening; in "Y" Province,
14 this was happening. Would that information -- it sounds like, from
15 my security manager that, in fact, would be classified. So that's
16 not actually a map issue. It's a classification issue.

17 Is that -- explain to me what I'm missing here. So if
18 Major Silvino was to say: In "X" Province, this was the enemy
19 activity ----

20 TC: Uh-huh [indicating an affirmative response].

21 PHO: He doesn't need a map do to that because ----

22 TC: Correct.

1 MJ: ---- he's just saying that, in "X" Province, that is
2 something that can be referred to outside of this context -- either
3 myself or a member of the public can see that and refer to the map
4 and understand what district or what province is being discussed. So
5 really, it's not a classification issue related to the map; it's a
6 classification issue related to the enemy activity ----

7 TC: Uh-huh [indicating an affirmative response].

8 PHO: ---- and the classification sources that -- from which he
9 derived that information.

10 TC: Right.

11 PHO: Okay. So do we have any information regarding your
12 attempts to declassify that, to do all the steps like you did for
13 Major General Garrett, the original classification authority for
14 CENTCOM? And this memo that I have here relates only to the maps.

15 TC: Right.

16 PHO: It sounds like we have new classified information that's
17 been brought into the mix.

18 TC: No, sir. There are ways to describe the enemy situation,
19 but it's the government's exigencies of proof, which we believe will
20 be most clear in describing the enemy situation using the
21 point-by-point analysis on the map.

22 PHO: Okay. So you want to be able to refer to the map, not ----

23 TC: Yes.

1 PHO: ---- not just district by district, but point-by-point ----

2 TC: Yes, sir.

3 PHO: ---- and say, "At this point, this was going on. At this
4 point, that was going on." But it's not just the map then that's
5 classified, it's also the very fact that at Point "X," this was
6 happening; at Point "Y," this was happening."

7 TC: There might be some of that. Yes, sir.

8 PHO: And do we have any indications that the government's taken
9 steps along the lines that they have with the maps? I'll let you
10 consult.

11 [Pause.]

12 TC: Sir, I think it's apples and oranges. We can have the
13 witness describe the enemy situation in a general manner, but our
14 analysis is tied to having the witness explain it with the map.

15 The map is intended as a demonstrative exhibit so that you
16 can see the company area of operation and the enemy situation tied to
17 location, and that's what makes the information classified. I mean,
18 he can be very -- you know, he can be very general and say, "Well,
19 there were some IEDs in this area." That's not classified.

20 PHO: Correct.

21 TC: However ----

22 CDC: I'm not sure that -- is that correct? I thought that your
23 security manager had a different take on that.

1 MR. MERSEREAU: Sir, things that happened directly to the unit
2 and which the witness has direct knowledge of, that's fine. What
3 we're concerned about on the classified side is information that was
4 derived from intelligence reporting.

5 PHO: Okay. I'll let -- Major Kurz, go ahead and finish your
6 statement.

7 TC: And Major Silvino will not be relaying intelligence
8 reporting to the hearing.

9 PHO: Okay.

10 TC: It's his personal experience in his company area of
11 operation and the enemy situation in June of 2009.

12 PHO: Okay. Major Silvino, can you confirm that back? That this
13 will be based on personal experience and personal knowledge and it's
14 not -- discussions of enemy activity is not derived from classified
15 information?

16 WIT: From my own experience, sir.

17 PHO: Okay.

18 WIT: My Blackfoot Company's experience.

19 PHO: Okay. So then what Mr. Mersereau said earlier is it does
20 not necessarily pertain -- if it's due to -- if the information is
21 derived from Major Silvino's experience ----

22 TC: Uh-huh [indicating an affirmative response].

1 PHO: ---- and his knowledge as company commander, then putting
2 that to a map would then, in fact, be classified.

3 TC: Yes. And we believe the map will more fully explain to the
4 hearing the evidence we're presenting.

5 PHO: Okay.

6 CDC: May I be heard on that?

7 PHO: You may.

8 CDC: To say that it would more fully explain does not -- that is
9 not the test. The test is what's necessary.

10 And also an exploration of -- you know, the government may
11 want to have the perfect proof beyond a reasonable doubt and so on.
12 That's not what's going on in this hearing room as I understand it.
13 And it's not a question of, you know, perfect proof. The question
14 is: Can the gist of this be done in a way that respects the public's
15 right to observe these proceedings in what Congress, by the way, now
16 calls a hearing rather than an investigation.

17 PHO: Well, the one problem with that position is that you're
18 associate counsel, at the last witness, cross-examined the witness on
19 specific instances of enemy activity in the vicinity of OP Mest. So,
20 once he's done that, does he not start to undermine and attack the
21 government's burden of proof here and their proof to probable cause,
22 thus allowing them to have some additional leeway in explaining the

1 particulars of the enemy activity such that they can meet their
2 burden of proof?

3 CDC: Well, number one, in our view, this is entirely cumulative.
4 And this is going to happen again, because they're pulling three
5 witnesses at, you know, higher and higher levels of the pay table for
6 essentially the same proposition. The test that you have to apply
7 under the *Manual* is witness by witness. And I don't this as a
8 question of having opened the door or anything like that.

9 The government still only has to show probable cause, and
10 the fact that they would like to prove something else or prove it to
11 a higher level is a matter of no moment, particularly when it's
12 balanced against the constitutional right to a public hearing.

13 PHO: Okay. Just let me take a look at the government's proposed
14 writings here.

15 [Pause.]

16 PHO: Okay. Here's what I'm going to do -- and again, this goes
17 back to what was discussed with the previous witness, and that was
18 that this is a visual aid only. It's not considered evidence, and
19 it's for myself as the fact finder to help fully understand the
20 situation and make an appropriate decision based on my
21 understanding -- a complete and thorough understanding of the
22 evidence.

1 So I think, you know, along the terms of the formulation of
2 lesser forms of the testimony or of the evidence have to be proven
3 inadequate, what I want to see here is: I want to hear the witness
4 answer the questions and engage in this dialogue in an unclassified
5 manner. And if, at the end of that dialogue, I am confused or
6 otherwise feel that I don't have a good understanding of the
7 circumstances, then I will, myself, indicate that I think it's
8 necessary to do so. I'll do that on my own motion.

9 And certainly, Government, you may re-open if you believe
10 that you have been unable to adequately get your point across to me.

11 So for that reason, I'm going to go ahead and deny your
12 motion at this point, subject to hearing the questions and answers.
13 And based on that, I'll decide whether or not we need to go into
14 closed session.

15 TC: Thank you, sir.

16 CDC: Colonel, as in the last incident in which this question
17 arose, I'd like to reserve the right to prepare formal proposed
18 findings and conclusions on this, because we've actually analyzed
19 this, including the government's evidence in support of this motion.
20 But it's not -- you know, if you shut them down on it, that's fine,
21 then we can just move on. But if you're disposed to, you know,
22 really entertain their proposal then, if you would alert us of it, we
23 can get you a formal submission.

1 PHO: I will allow the opportunity for the defense to make its
2 case.

3 CDC: Thank you.

4 PHO: Go ahead.

5 **The direct examination of Major Silvino continued by the trial**
6 **counsel:**

7 Q. Major Silvino, we touched briefly on your company's area of
8 operations in June of 2009. Do you recall exactly how many square
9 miles or square kilometers your area of operations was in Paktika
10 Province before 30 June 2009?

11 A. It's an approximate -- around 1,200 square miles.

12 Q. So big?

13 A. Very big.

14 PHO: Excuse me just a moment. Can you just -- yeah, you're
15 getting a little bit too close to the microphone so the court
16 reporter is not able to pick up what you're saying. So not a
17 problem. These are very sensitive microphones so ----

18 WIT: Yes, sir.

19 PHO: ---- you're good.

20 WIT: I'll just use my indoor voice.

21 PHO: Super. And can you repeat your answer? How many square
22 miles was that?

1 WIT: Approximately 1,200 square miles.

2 Am I too loud?

3 PHO: You're good.

4 Q. And you named the five districts that your Blackfoot
5 Company was responsible for covering. And in an unclassified manner,
6 based on your personal observation and experience, could you describe
7 the enemy situation in those -- throughout your AO? What sort of
8 threats did you face?

9 A. Threats were primarily IEDs and small arms harassing fire.
10 Every now and then we would receive indirect fire -- mortars,
11 rockets; but those were very seldom. So the IEDs were the primary
12 danger. And in the event of certain locations, it would be ambushes
13 that we encounter.

14 Q. And this was throughout your area of operation?

15 A. Yes. You could, pretty much, find that all over.

16 Q. Now, there was an engagement in the Omnah area in, I
17 believe, May of 2009. Could you briefly describe that engagement?

18 A. As I recall, that engagement was with a recon platoon
19 conducting patrols with the ANSF; specifically at that location, the
20 police. There's only about two places you can go through to get to
21 Omnah, and that's through certain routes -- can I name the routes?

22 Q. Yeah.

23 A. Either ----

1 Q. I apologize. Yes, you can name the routes. You just can't
2 mark them on a place on the map.

3 Correct, sir?

4 PHO: Is this okay?

5 MR. MERSEREAU: Yes, sir.

6 A. Okay. It comes across from -- location from Sharana would
7 be Route Cutlass, and then coming across from where OP Mest was is
8 Route Dodge. That then works through the mountain; and it's
9 switchback, very, very treacherous. And you have to make it
10 primarily in the center of the road or risk sliding off to the side
11 with your -- with our MRAPs. So those are the two locations or two
12 -- two places -- or two routes we could possibly take.

13 Q. Did your -- did an element of your company come under a
14 complex attack in Omnah?

15 A. Well, the -- thank you. The recon platoon was there to
16 conduct this patrol with the ANSF. As they were moving through the
17 mountain, through Omnah, they encountered an IED strike. That IED
18 strike then disabled one of their vehicles. It is fairly close to
19 the district center but still part of the -- it's the hilly section
20 of Omnah.

21 They conducted their "5 and 25s", which is the manner of
22 how we clear an area prior -- or after an IED strike; and they
23 realized that this vehicle was very extensively damaged, cannot be

1 moved. And we did everything we could -- or they did everything they
2 could to actually move the vehicle to the district center.

3 That said, we requested assistance, perhaps a lowboy or
4 some kind of recovery asset, to come from Sharana and assist with
5 recon platoon, which is the Mohawk Platoon. That was then escorted
6 by Delta Company, 4th Platoon, also called Sioux Platoon.

7 So Sioux moves out with the recovery assets -- the wrecker,
8 the mechanics, and everybody else that needs to be taken. And
9 they're moving out, and they hit an IED lower down the hill at the
10 base.

11 So now we have two broken down vehicles. We have this
12 danger all around us because, again, they could mass on you at any
13 location at any point. And this is very mountainous, and this is
14 their terrain. The insurgents know this area very, very well. So we
15 did the best we could.

16 At that point, I realized that 4th Platoon and Mohawk
17 Platoon -- Sioux Platoon and Mohawk Platoon needed further
18 assistance, because they're requesting it from battalion. I was then
19 alerted. I provided support with that with my 2nd Platoon, which was
20 the QRF platoon at the time. And they moved out again to assist.
21 Sioux Platoon at the base -- at the bottom of the hill, and you have
22 Mohawk Platoon at the top of the hill.

1 This is supposed to be a two -- well, technically, it's
2 supposed to be a mission out and back. That was not so.

3 Q. Did they come under attack?

4 A. They did.

5 So we managed to break down the vehicles. So we couldn't
6 get -- we couldn't get authorization to burn the vehicles down at
7 these two locations. We ended up breaking the vehicle down piece by
8 piece and hauling it down the hill -- hauling it down the mountain.
9 Then that vehicle would then be recovered back to Sharana. We didn't
10 want to leave any piece of equipment there for any type of IO for the
11 insurgents.

12 2nd Platoon had the unfortunate task of escorting these
13 vehicles back. As they already moved into one location at Route
14 Dodge, they did not want to go back the same route as they came in.
15 They moved back through a different location, through a different --
16 Route Cutlass. This is where they ended up receiving multiple
17 attacks, where I believe at one point their own vehicle was on fire;
18 and Lieutenant Billings and the platoon had to do what they had to do
19 to come back home -- to be able to come back to the FOB. Very
20 dangerous, ended up becoming multi-day.

21 Q. Uh-huh [indicating an affirmative response].

22 A. When they left, they were only were bringing ammunition,
23 enough MREs, no change of gear, because it's a day-mission.

1 Q. Uh-huh [indicating an affirmative response].

2 A. Not so. They were there for about 3 to 4 days, I believe.
3 By the time they came back, they had a small five o'clock shadow,
4 hadn't shaved -- because again, that was one of the things that we
5 didn't bring -- they didn't bring, because they didn't think that
6 they were going to be stuck out there for 3 to 4 to 5 days.

7 Q. And I want to be clear: When you say they came under
8 attack, what kind of weapons systems were used against them if you
9 recall?

10 A. I believe there was an IED, some small arms. I think at
11 one point they said maybe possibly an RPG in there. It's a whole mix
12 of different weapons that was utilized.

13 Q. And Omnah -- the town and district of Omnah, is that just
14 east of Observation Post Mest and FOB Sharana?

15 A. It's the hilltop. Directly east from Omnah is Yahya Khel.
16 Further east towards the mountains, towards Pakistan, would be Omnah.

17 Q. And do you know: What is the distance between FOB Sharana
18 and Observation Post Mest?

19 A. Straight-line distance 30 kilometers -- 35 kilometers.

20 Q. When did the accused, Sergeant Bergdahl, arrive at Bravo
21 Company?

22 A. He arrived at our NTC location -- we were at the National
23 Training Center in November -- I believe, November 2008.

1 Q. And was he -- he was assigned to your company?

2 A. Yes.

3 Q. Was he present for the entire -- what portion of NTC was he

4 present for?

5 A. He arrived just in time for the STX training, which is

6 "the box" training.

7 Q. And could you explain "box?"

8 A. "The box" is where we actually move from the containment

9 area -- cantonment area, and we move out to the training site.

10 Q. Uh-huh [indicating an affirmative response].

11 A. In this case, we were at a COP, similar to what we were

12 working off of in Afghanistan ----

13 CDC: COP -- COP? What does that acronym stand for?

14 WIT: Combat outpost, sir.

15 PHO: Just try to make sure you get all your acronyms. You've

16 got a lot of ----

17 WIT: I apologize.

18 PHO: That's okay.

19 WIT: I apologize.

20 PHO: That's why we have Mr. Fidell here.

21 CDC: [Laughing.]

22 WIT: I've got to break it down here. Okay.

23 Combat outpost.

1 Q. When did the accused -- or did the accused deploy to
2 Afghanistan with Blackfoot Company?

3 A. No.

4 Q. Did he -- sorry. Did he deploy to Afghanistan with you in
5 2009?

6 A. He arrived -- he joined us in Afghanistan.

7 Q. Okay.

8 A. Yes, ma'am.

9 Q. And do you know why he was late?

10 A. He had some medical issues that we had to work through. I
11 believe it was some kind of infection, either an arm, foot ----

12 Q. Okay.

13 A. ---- to that effect.

14 Q. Do you see the person that you just detailed as PFC Bowe
15 Bergdahl in the courtroom -- in the hearing room today?

16 [The witness pointed to the accused.]

17 Q. Let the record reflect the witness has indicated the
18 accused.

19 I'd like to direct your attention to 30 June 2009. Where
20 were you that morning?

21 A. 30 June? I was back at my CP ----

22 Q. What is CP?

23 A. Oh, command post.

1 Q. Okay. And where was that?

2 A. FOB Sharana.

3 Q. In Paktika, Afghanistan?

4 A. Oh, Paktika Province, Afghanistan.

5 Q. And earlier that morning, what were you doing in your CP?

6 A. Well, every morning, I checked what my platoon -- my

7 platoon statuses are if I have a platoon out in sector. I conduct

8 personnel accountability through what we call our PERSTAT. I'm

9 drinking my cup of coffee, hovering over my radio-telephone operator,

10 and we have our, what we call our CPOF machine, which is an

11 imagery-type machine that was getting feed from our Blue Force

12 Tracker.

13 Q. And CPOF is Command Post of the Future?

14 A. Yes, ma'am.

15 Q. Did you receive a message concerning the accused?

16 A. I did.

17 Q. Could you describe -- how did you receive the message?

18 A. I received it from -- emergency message, in a message that

19 was directly to me from Lieutenant Billings. It was a message from

20 the CPOF machine that we were talking about -- the BFT.

21 CDC: What?

22 A. I'm sorry. Not the CPOF, the Blue Force Tracker.

1 Q. BFT. Blue Force Tracker.
2 Did your RTO point it out to you?
3 A. Yes.
4 CDC: RTO?
5 A. Radio ----
6 CDC: I'm sorry ----
7 A. ---- telephone operator.
8 CDC: I'm sorry. My military service was in a different branch.
9 We had our own acronyms. So I appreciate your ----
10 PHO: Let me -- let me -- I'll catch ----
11 CDC: ---- patience with me.
12 PHO: ---- I'll catch those to make sure that we have them,
13 especially for the members of the public as well. So if you can,
14 just let me catch those, and you catch my eye, and I will ----
15 CDC: It's a deal.
16 PHO: ---- make sure.
17 TC: Thank you, sir.
18 A. Radio-telephone operator.
19 Q. Did he bring something to your attention?
20 A. Yes. He pointed at it, and he goes, "Sir, you've got to
21 take a look at this thing."
22 Q. What did the message say?

1 A. "Currently looking for one more person. We're not up,"
2 meaning, we are not 100 percent accounted for.

3 Q. Was that unusual?

4 A. No.

5 Q. Was that unusual?

6 A. Oh, yes. Very unusual. Very unusual. That means, "What's
7 going on? We need to -- we need to look further, harder."

8 Q. How did you initially feel when you received this message?
9 [Pause.]

10 A. I felt sick. I felt sick to my stomach. I did not know
11 what was going to come after that. I just knew that I -- I was not
12 -- meaning, not physically sick but emotionally sick inside. There
13 was something that was -- it was gut wrenching.

14 Q. What did you do next after you received that alert? What
15 did you tell Lieutenant Billings?

16 A. He needs to look again. I told him -- I instructed him to
17 go look at every possible location at the OP, around the OP, at the
18 latrine, at the burn pit, with the Afghans, with the trucks, with the
19 gunners, with the drivers. I instructed him to go look high and low,
20 everywhere he could possibly look. I said that's something that is
21 -- that doesn't happen.

22 Q. Did Lieutenant Billing confirm back after he continued the
23 search?

1 A. He did. He confirmed; and he said, "Sir, he's not here."

2 Q. Okay.

3 A. And I later found out who it was through a battle roster
4 number.

5 Q. And who was that person that was missing?

6 A. That is Sergeant Bergdahl.

7 Q. What did you do after you got that confirmation back from
8 Lieutenant Billings? Did you send an alert up higher?

9 A. I did. I personally walked -- as soon as I found out from
10 Lieutenant Billings, I called my Headquarters Platoon, I called my
11 first sergeant, and I called the 3rd Platoon leader. We all had a
12 quick meeting. I gave them the initial warning order, alerting them
13 that we are going back out -- everybody in the company is going back
14 out and we're going to go back to OP Mest.

15 After that, I walked directly to battalion and spoke to my
16 battalion -- or my battalion XO. He looked me in the eye, and he
17 said, "You better be damned sure that this is what you're saying it
18 is." I said, "Sir, it is. Unfortunately, I'm going to go out there;
19 unfortunately this is happening. We're going to go look for him."

20 Q. Who did you leave in your command post?

21 A. It was roughly -- well, maybe four or five personnel left.
22 I left my supply sergeant, my XO, my ----

23 PHO: Just for clarity's sake, XO is your executive ----

1 WIT: My executive officer ----

2 PHO: ---- officer, your number two in command?

3 WIT: Yes, sir. Yes, sir.

4 A. My executive officer, my supply sergeant, my fire support
5 officer, an RTO ----

6 PHO: That's your radio operator.

7 A. ---- my radio-telephone -- one of the radio-telephone
8 operators, and I believe one of the company intel support team
9 personnel. And I took everybody else with me.

10 Q. And those personnel were to run the 24-hour operations in
11 the CP?

12 A. Correct.

13 Q. Command post?

14 A. Correct.

15 Q. How many were normally in the command post?

16 A. We have somewhere between 12 to maybe 10 people in there on
17 any given rotation, depending on -- like I said, I beefed up my
18 company's headquarters. If my company Headquarters Platoon was not
19 conducting patrols, we were working in the TOC -- or our CP or
20 command post.

21 Q. And how long did those five to six individuals have to run
22 the command post?

23 A. Twenty-four hours a day.

1 Q. For how long? How many days?

2 A. For as long as it took us to search and look and until we
3 could get everybody back to FOB Sharana.

4 Q. So for the entire 45-day period?

5 A. Yes.

6 Q. I'd like to break this down into blocks of time as you
7 remember it. The first block of time would be the first couple of
8 days, 30 June through 3 July. Do you remember that block of time?

9 A. I do.

10 Q. And then the second block of time, as you described it to
11 me, was 3 July through the middle of July -- about 15 July? Do you
12 remember that as a block of time?

13 A. I do.

14 Q. And then the third block of time, which was 15 July --
15 middle of July to the end of July?

16 A. I do.

17 Q. And then finally, 30 July to 15 August -- or end of July to
18 approximately the elections?

19 A. Uh-huh [indicating an affirmative response].

20 Q. And I'd like ----

21 PHO: That's four blocks.

22 TC: Yes, sir.

23 PHO: Okay. I just wanted to make sure my math was right.

1 Q. I'd like to take you through those blocks of time and the
2 activities of your company. During those first few days, where did
3 you operate out of?

4 A. OP Mest.

5 Q. Describe for me what you did in the first 72 hours?

6 A. As soon as we got the information -- the report that
7 Sergeant Bergdahl was not present, I gave the instructions to
8 Lieutenant Billings to conduct a dismounted patrol right outside of
9 the OP and start looking for any clues. I then instructed my
10 Headquarters Platoon and my 3rd Platoon that we were going to go out
11 to OP Mest to conduct search operations. I instructed Lieutenant
12 Billings that we were going to meet somewhere in the vicinity
13 adjacent of -- just west of Yahya Khel and then make our way into OP
14 Mest.

15 I instructed 3rd Platoon -- so I was -- I was going --
16 moving with my Headquarters Platoon. I instructed 3rd Platoon to
17 conduct movement from Sharana through Route Cutlass and go
18 vicinity [sic] where -- at the very base of the mountain, going
19 towards Omnah, to conduct blocking positions -- that is, to search
20 vehicles, any type of activity, or look at any type of activity
21 regarding the search.

1 I made my way down on Route Audi. Lieutenant Billings
2 moved through, and I believe that's when he ran into a few kids --
3 that personnel.

4 We conducted the search, and then -- the initial search.
5 So we went out just to look at any clue that we can. There was no --
6 there was no -- no evidence whatsoever; but we had to go and do
7 something, and that was what we had to go with. We were looking --
8 we were searching for anything. We were looking for straws.

9 Q. You described for me a grid-by-grid search of Yahya Khel.
10 Could you tell me a little bit about that?

11 A. Okay. So soon after we did that movement out, I created a
12 grid, pretty much, separating every single location or every -- a
13 grid square of Yahya Khel -- or the grid area of Yahya Khel -- the
14 map. I broke it down by square grid of how we're going to search --
15 deliberately, piece by piece, qalat by qalat, home to home, and be
16 able to find any clues whatsoever we can get.

17 Q. What ----

18 A. That took ----

19 Q. Go ahead.

20 A. That took 3 or 4 days, I believe.

21 Q. Why Yahya Khel?

22 A. It was the biggest village in that area, and ----

23 [Pause.]

1 A. And I feared the worst. I feared that he was either
2 captured already -- Sergeant Bergdahl was captured already and that
3 they were going to make a run for it, meaning that the insurgents
4 were going to try and move him towards Pakistan, towards that
5 direction. But then I had no reporting about this; it was just all
6 gut instinct.

7 Q. So you chose Yahya Khel?

8 A. I chose Yahya Khel, because if anything, there may be some
9 kind of clue, somebody ----

10 Q. Okay.

11 A. ---- from that location that may give us any type of
12 information whatsoever.

13 Q. Did you get any additional manpower or platoons attached to
14 your company during those first 72 hours?

15 A. The first 72 hours was all Blackfoot.

16 Q. Okay.

17 A. Then after that, after of course the battalion reported to
18 brigade, the brigade reported to division, two platoons came to me
19 as reinforcements. I had received 4th Platoon -- Sioux Platoon from
20 Delaware Company ----

21 Q. Uh-huh [indicating an affirmative response].

1 A. That was also attached to the battalion but directly in my
2 control; and then I also received Mohawk Platoon, which is the recon
3 platoon directly under my control.

4 Q. Because before, they had not been attached to you for
5 operational control?

6 A. No.

7 Q. Now you control them?

8 A. Now I do.

9 Q. I'd like to move on to the second block of time that you
10 recall: 3 July through the middle of July. What type of operations
11 did you begin doing during this approximately 2-week period?

12 A. Well, we started out with blocking positions from point A,
13 point B, point C, point D -- anywhere all over the map. Anything
14 that we could possibly find or any type of information that we got
15 regarding any -- anything.

16 Q. Uh-huh [indicating an affirmative response].

17 A. We went blocking position by blocking position on all these
18 locations. And then we soon transitioned into air assault
19 operations, and then that's when we were able to move from -- again,
20 by helicopter from location to location to location, non-stop for the
21 next 10 -- 10-plus days. And we were conducting the searching
22 through any type of intelligence, any type of information that we can
23 get.

1 Q. So the whole company was conducting air assault operations?

2 A. Well, minus the ones that are still remaining at Mest OP.

3 Q. Uh-huh [indicating an affirmative response].

4 A. So I left bare bones in -- I mean, what I'm saying -- when
5 I left security at OP Mest, I'm talking about skeleton crew itself.

6 Q. Okay.

7 A. Normally, you have a platoon there. I can't afford a
8 platoon there. I had to put -- I had to take risks -- tactical risks
9 in manning that. So I cut it in half. I had about 12 personnel
10 manning all the gun trucks ----

11 Q. Uh-huh [indicating an affirmative response].

12 A. ---- conducting all these -- work with the ANSF or the ANP.

13 Q. Uh-huh [indicating an affirmative response].

14 A. And then I took the rest of the platoons and all the rest
15 of the -- either they're in blocking positions, or they're moving
16 with me on an air assault, going from point A, point B, point C, all
17 over.

18 Q. Okay. And during this second block of time, those 2 weeks,
19 they were -- the Soldiers were with you outside the wire, moving from
20 town to town?

21 A. Correct.

22 Q. Did they ever get a chance to go back to Sharana during
23 those 2 weeks?

1 A. No.

2 Q. Was there any refit time?

3 A. No.

4 Q. How did you receive resupply?

5 A. It was either through LOGPAC that's coming through, or ----

6 PHO: Can you explain ----

7 A. ---- by -- oh, correction ----

8 PHO: That's okay.

9 A. Logistics patrol. Logistics.

10 PHO: Okay. So just the logistics ----

11 A. Logistics ----

12 PHO: ---- convoy that comes ----

13 A. ---- convoy, sir, that would ----

14 PHO: ---- out to resupply you, correct?

15 A. Yes, sir.

16 And then I would either receive that or -- that or aerial

17 resupply, meaning coming from either helicopter or one of the -- one

18 of the -- I call them the Russian pilots" that would fly these --

19 "Jingle Air," and they would drop these supplies to us at our

20 location by parachute. We're talking about not really -- with

21 put-together parachutes. We're talking about the canvas ones -- the

22 plastic ones, not the silk. So they're all over the map; they're all

23 over the place.

1 Q. Were Soldiers in your company getting much sleep during
2 this period?

3 A. No.

4 Q. Were they sleeping indoors or outdoors?

5 A. Outdoors in dirt.

6 Q. How cold was it at night? Do you recall?

7 A. Sixty degrees.

8 Q. How does that feel when contrasted with daytime
9 temperatures of 90s and 100?

10 CDC: Objection.

11 PHO: Overruled.

12 A. It is miserable. It's -- it's bone-chilling to some
13 degree. Yes. 130 degrees during the day and dropping down to 60
14 degrees, that's a -- somewhere about between a 45- to 50-degree
15 change. Yeah. It's --

16 Q. Feels a lot ----

17 A. It's nasty.

18 Q. Feels a lot colder?

19 A. Oh, it's -- we had to get together. We had to huddle
20 together. The men had to come together and go, "Hey, you know,
21 you've got to do what you've got to do."

22 Q. Okay.

23 A. So they would literally -- I'll call it "spoon."

1 Q. During this block of time, how were your Soldiers feeling
2 that you could observe?

3 A. The initial -- the initial push out -- I'll do it by phase.
4 The initial push out, when we found out that Sergeant Bergdahl was
5 missing, there was no doubt in our minds: We need to go and look
6 right now. Everybody, lottie dottie; get up and go.

7 So we moved to where we thought he was. They were
8 motivated. I mean, we got -- we were -- we've got to get him back.
9 Right, wrong -- I mean, at this point, we had no idea what's going
10 on. We were confused as hell.

11 And then the confusion -- that confusion became a little
12 bit more elevated because then, after we got to OP Mest, we realized
13 what happened, what took place. So we started asking ourselves, what
14 -- "Who would do this? What's going on? Anybody see anything?" And
15 then that added more to the confusion.

16 I tried to keep them all focused. I know that there was a
17 few times when they would -- I would hear them behind, after I
18 conducted a brief and talked to the platoons -- because I personally
19 was out there. I was talking to them daily. Anytime that they came
20 back to get more ammunition, to get more water, to get more MREs, I
21 would go out and -- if I was there, I would physically go and talk to
22 them and go, "What's going on, fellas? How are you all doing? How's
23 the feet? How's the back?"

1 You know, and they would say, "Oh, sir, we're hanging in
2 there."

3 And I could hear, well, you know, mumbling, mumbling,
4 grumbling, grumbling, expletives; blah, blah, blah."

5 I would turn around and go -- this is where the elevated
6 confusion comes from -- I would tell them, "We are doing what we're
7 doing because he's one of us. He is our brother. We need to get him
8 back. We don't know if he's safe or not."

9 Q. Thank you.

10 A. And they were confused about that.

11 Q. Let's move forward to the third block of time: 15 July to
12 30 June [sic]. What types of operations are you conducting
13 throughout this period?

14 A. More blocking positions at this point. It became more
15 relevant [sic] to us that whatever information that we're getting is
16 sporadic. It's just all over the place.

17 Q. Okay.

18 A. So we did the best we could in managing the patrols -- I
19 did the best I could in managing the patrols. So I would split it
20 into different, like, quadrants. I would say, you know, "2nd
21 Platoon, you're up there in the vicinity -- Sharana area to the
22 West." "3rd Platoon, you're over here by Omnah, because you know
23 Omnah very well," and I'm moving them there.

1 And then, from there, we would rotate or move somewhere
2 close by to where I could think that -- possibly any leads that could
3 come through.

4 Q. And you're still conducting air assault operations?

5 A. Air assault and blocking positions in both.

6 Q. What type of contact are you taking?

7 A. Mostly IEDs.

8 Q. Do you recall the frequency?

9 A. Well, we would hit them -- well, IED strikes would happen
10 -- maybe 2 to 3 days in between each other, right; but the issue that
11 I had, though, is 3rd Platoon, for one instance, they struck three
12 IEDs in a row in the same road.

13 Q. In one day?

14 A. In one day. That then brought up concerns, right,
15 regarding personnel -- concussion, other damages happening here. I
16 had one Soldier -- I believe it was Sergeant Rice -- God bless him.
17 He was on all three of them right down the road. I had to -- I had
18 to take the measure of moving Sergeant Rice and putting him at
19 Sharana and giving him help because the fact that if I would -- if he
20 would have been hit with one more IED, he would have been out of the
21 theater. I'd have to evac him out. But he did so under protest.

22 Q. He didn't want to go?

1 A. No, ma'am. He did not want to go. He knew where he wanted
2 to be. We all knew where we wanted to be. We were all there as
3 miserable as it was, as crappy as it was.

4 Q. Let's move forward to the fourth block of time: 30 July to
5 the middle of August to the elections. You're still conducting
6 search operations at this point, but what else are you doing in
7 preparation for the elections?

8 A. We were -- we were working pulling site surveys. We were
9 working patrols with the ANSF. Everything that we did during that
10 time from start to finish was with the ANSF -- with the Afghan
11 National Security Forces and with the -- specifically the Afghan
12 National Police.

13 We visited them by either air assaulting in or by
14 conducting movement with trucks. Or in some cases -- well, like
15 Omna, we walked in. We walked in from the vicinity of Route
16 Cutlass. We got dropped off down the hill, and we walked all the way
17 up to the hill -- up the mountain, the safest way we can go without
18 hitting any IEDs on the road.

19 Q. Did you feel like the search was winding down?

20 A. It did. It began to wind down because of lack of
21 information that we're getting either from the patrols that we were
22 doing ----

23 Q. Uh-huh [indicating an affirmative response].

1 A. ---- what we were generating.

2 At some point, they had to pull us all back eventually, but
3 we did so by retrograding back slowly. And I'm not talking about,
4 you know, everybody go back in at once.

5 Q. Okay.

6 A. I'm talking about, you know, one platoon will go in for,
7 like, a day or two just to get stuff or equipment or supplies, and
8 then come right back out. And I would then do that for the next
9 platoon until -- when I get that platoon back.

10 Q. Did the Soldiers know that the search was starting to wind
11 down?

12 A. They had a feeling, yes. They're very, very keen.

13 Q. Now, during this fourth block of time, were you able to
14 observe how your Soldiers in your company were feeling?

15 A. They were worn out. They were -- for lack of a better --
16 beat down.

17 Q. Physically, how were they?

18 A. There were -- there were injuries. There was -- you know,
19 from the IEDs, that took its toll.

20 The majority of the -- I think the majority of the issues,
21 though, was just anger. Morale was -- well, I mean, their morale was
22 high; but at the same time, you can tell that there was -- there was
23 something there that they wanted to talk about, but they couldn't

1 express it properly. So they would, you know, kind of get at each
2 other. But then I would hear them, and I'd come back in into the mix
3 and I'd tell them, "Hey, stop that. That's not what's going on right
4 now. We're here. We're a unit. We work together, and we push
5 through this." And ----

6 Q. What were some of the physical effects that you were able
7 to observe on Soldiers being out for 45 days?

8 A. Well, physically, their feet, their skin ----

9 Q. Uh-huh [indicating an affirmative response].

10 A. ---- it was just nasty. I mean, nobody showered.

11 Q. Uh-huh [indicating an affirmative response].

12 A. I mean, if we did, we were using, you know, baby wipes and
13 bottled water.

14 Q. Uh-huh [indicating an affirmative response].

15 A. T-shirts were ripping apart. Socks had to be brought in.
16 At one point, they were resupplying me with socks in one of my -- in
17 one of the air drops that we were receiving. T-shirts, you know.

18 My platoon sergeant -- or my supply Sergeant had to go out
19 to the other battalions and start collecting other t-shirts and socks
20 and amongst -- baby wipes was big.

21 Q. Uh-huh [indicating an affirmative response].

1 A. I think the PX ran out of baby wipes. So they had to go
2 and ask for all these different types of assistance from everybody
3 else, and they were able to put things together for us.

4 So the -- mentally, they were exhausted. Physically, they
5 were worn out. But they pushed. They pushed as hard as they could.

6 Q. I'd like to talk some metrics here. What is a -- what is
7 an MRAP?

8 A. Mine Resistant Armored [sic] Protection [sic] Vehicle.

9 Q. How many MRAPs did you start with in your company prior --
10 at the start of the deployment?

11 A. Let me do some math here -- and I'm using my toes.
12 [Pause.]

13 A. I had about 16 or 17 MRAPs, to include myself -- my MRAP,
14 and First Sergeant's MRAP.

15 Q. At the end of this 45-day search period, how many -- what
16 was the state of all of your 16 to 17 MRAPs?

17 A. They'd been swapped out. Meaning, we conducted controlled
18 substitution.

19 Q. That sounds very clinical. What happened?

20 A. What happened is: After we hit an IED, either the font end
21 or the back end or the middle part of the vehicle would be destroyed.
22 The mechanics had to conduct either putting the back end of another
23 vehicle or the front end of another vehicle and making a whole MRAP

1 so that we could continue our operation or had to go and get other
2 parts from other companies or battalions in the FOB -- the ones that
3 are not using them -- and be able to put together a vehicle that we
4 can use.

5 Q. So at the end of the 45-day search period, had that
6 happened to all of your vehicles?

7 A. About 80 percent of them to some extent, either by IED or
8 just sheer, you know, driving them and having mechanical issues.

9 Q. What is a mine roller?

10 A. A mine roller is a device emplaced in front of the MRAP,
11 and it is to -- utilized to strike pressure plates on the ground in
12 order to take the blast ----

13 Q. Uh-huh [indicating an affirmative response].

14 A. ---- so that the MRAP or the passengers or the actual
15 vehicle itself stays intact.

16 Q. It's actually pretty big?

17 A. Oh, it's very big.

18 Q. How long is it?

19 A. 20 feet, maybe -- 15 to 20 feet long, about 12 feet wide.
20 No, I'm sorry. No, not true. About 10 feet wide. It's enough to
21 place into a lane so that you can have that surface covered.

22 Q. How many mine rollers did you start with on your books at
23 the beginning of the deployment?

1 A. I believe I had one for every platoon.

2 Q. So how many was that?

3 A. Four.

4 Q. Four.

5 How many did you have at the end of the search period?

6 A. No more. I had to go borrow other people's mine rollers.

7 Q. So all four of those were destroyed?

8 A. All of them were destroyed. I had to get other ones from

9 the other battalions, my supply sergeant, through the battalion ----

10 Q. Uh-huh [indicating an affirmative response].

11 A. ---- supply NCOIC or officer. Yes, we utilized -- we had a

12 monopoly on all the mine rollers in Sharana.

13 Q. Now, just before the elections, were you still in the

14 field, outside the wire?

15 A. We were coming in and out of FOB Sharana at this point.

16 Q. After the elections, did your mission change?

17 A. Yes. We received a change of mission. We conducted one

18 more operation, Operation Geronimo Durao, and then we transitioned to

19 combined action.

20 Q. Okay. Now, during ----

21 PHO: When you say "combined action," can you explain what that

22 is? That's combined with the Afghan National Security Forces?

1 WIT: Yes, sir. It's combined with the Afghan National Security
2 Forces, and we're not just talking about going patrolling. We're
3 actually moving to the district center where they're co-located; and
4 we're living with them 24 hours a day, 7 days a week.

5 PHO: Okay.

6 Q. I'd like to talk about your area of operations. You've
7 described your area of operations prior to 30 June 2009. During this
8 entire search period that you just described, did that area of
9 operations change?

10 [Pause.]

11 Q. Did it expand?

12 A. Absolutely. It went from my normal area that I described
13 to other provinces. We made it to Gardeyz, which is Paktiya. We
14 made it to Ghazni, which is adjacent next to Paktika.

15 Our 1st Platoon that was conducting the operations for the
16 brigade was all over the place. They were -- they were in -- in
17 Khost, Gardeyz, Paktiya, Paktika.

18 My 3rd Platoon, my 2nd Platoon, the remaining of them, they
19 were all up and down the roads either by air assault or by driving.

20 Q. Were you familiar with these areas before you moved into
21 them?

22 A. No.

1 Q. What risk does that entail when you move in to an area
2 quickly that you're not familiar with?

3 A. It's very risky.

4 Q. How so?

5 A. It takes -- well, you've got to do the analysis on the
6 terrain and then the enemy. I've always believed that the enemy has
7 a vote. The enemy conducts what's best for him just like we do
8 what's best for us -- how to protect ourselves. So we didn't have
9 any of these intelligence reports or anything like that as far as
10 what other provinces are currently experiencing.

11 Like, for instance, Ghazni. Ghazni is with the Polish Army
12 -- the Polish team. God bless them. They don't report like we do.
13 We don't know what was going on in their area; and when we would try
14 to get information from them, the best that they could tell me was
15 "Oh, it's dangerous."

16 "Okay, can you elaborate?"

17 "Oh, it's very dangerous. I wouldn't go there."

18 But we did.

19 Q. Okay. Now, your normal planning cycle for an operation, I
20 think you related, was 3 to 4 days. Did that shorten during the
21 search period?

22 A. Absolutely. The -- normally, we go into a cycle of: I
23 receive the mission. I conduct the mission analysis. I take

1 one-thirds/two-thirds -- the "one-thirds/two-thirds" rule. I take
2 about one-third, which is roughly about, maybe a day, if even that --
3 half a day. I give the instructions to my platoons, and then they
4 receive that information. They have a chance to provide their own
5 OPORD and then go in through a whole course of action type of -- say,
6 assessment.

7 After that, then they conduct back-briefs to me, and then
8 we go into the whole rehearsals of concept ----

9 Q. Uh-huh [indicating an affirmative response].

10 A. ---- rock drill. We go step by step, line by line,
11 phase-line by phase-line, task and purpose. Provide me, "What is it
12 that the enemy is going to do to you, and what are you going to do to
13 the enemy if this happens?"

14 Q. Uh-huh [indicating an affirmative response].

15 A. That was the normal time line until we get to the point
16 where we get extracted or we come back to FOB Sharana or we go into
17 another mission.

18 During this 45 days that we're talking about, the OPTEMPO
19 was so high, I'd get a mission. I'd receive a message from the
20 battalion regarding a possible location -- possible. I would turn
21 around and create an order. Within hours, we're moving out to that
22 location. We didn't have time to sit there and to conduct, you

1 know -- and when we did the very hasty rehearsal, we would get an
2 imagery of some type of target description from a radio. And if you
3 ever talked on a radio when you're trying to get a description of a
4 qalat, it doesn't work so well. Or even different messages, right,
5 from your -- from your Blue Force Tracker messages.

6 So I did the best I can in drawing out these qalat areas.
7 How big is the location approximately by width and length? And I
8 would break it down to my platoons and ----

9 Q. And to be clear: You're doing this either from a truck or
10 on the ground?

11 A. On the ground. Primarily on the ground. If I get the
12 information from the truck, then we would talk -- huddle around the
13 Blue Force Tracker. But I like to draw it out on the ground, conduct
14 terrain model; and then be able to talk it through. Now, that is
15 hasty. It's very quick, didn't have time to sit there and conduct
16 the full-on -- full-blown rehearsals like we did because time is of
17 the essence. Everything was time -- everything -- we had to take
18 certain risks, and we did that. I did that.

19 Q. Have you ever had -- gone through a hasty planning process
20 like this other than that 45-day period?

21 A. No. No.

22 Q. I'd like to talk about battlefield circulation. What is
23 battlefield circulation by a company commander?

1 A. So Blackwood's a little bit different from the rest of the
2 platoons or the rest of the battalion. I created a Headquarters
3 Platoon so that I can get around. That Headquarters Platoon was able
4 to move to area to area to area.

5 In some cases, if my Headquarters Platoon cannot go and
6 conduct this patrol, I would latch myself -- or I would attach myself
7 to one of the platoons to conduct these operations.

8 Q. Uh-huh [indicating an affirmative response].

9 A. So then I would be with them for the duration of 3 to 4
10 days. In this case, I was out there with them for a majority of -- a
11 good long period.

12 Q. And that's the company commander checking on his troops?

13 A. Correct. I conduct operations with the men.

14 Q. Prior to 30 June, how often did you do battlefield
15 circulation?

16 A. I would go with a platoon for 3 or 4 days on their patrol,
17 and then I would return back to Sharana when that platoon returns
18 back to Sharana and conduct business there as a company commander and
19 run the company. So that would be 3 days out, maybe 4 days, 5 days
20 back; and then I would rotate again to another platoon and do the
21 same thing all over again.

22 Q. During the search period, how often did you come back to
23 FOB Sharana?

1 A. I didn't come back until about 28 days after we pushed out.
2 And then, when I did return, I returned just -- enough to get more
3 ammunition, more water, more equipment ----

4 Q. Uh-huh [indicating an affirmative response].

5 A. ---- and then I'd turn right back around and left again.

6 Q. How did you feel during this entire -- as company
7 commander, how did you feel during this entire search period?

8 A. I was worried -- worried for my men.

9 Q. Were you proud of what they were doing?

10 A. Absolutely. I don't think -- I think lesser men would have
11 caved, I would say. But these men, they hung in there. They were --
12 they were extraordinary.

13 Q. How were they extraordinary?

14 A. Well, with their emotions and everything else that they
15 were feeling, not having been able to talk to their families
16 themselves -- we were all not talking to our families. Nobody was.
17 They were confused. They're tired, hungry, miserable; but they did
18 what they had to do, even though they know -- part of them is telling
19 them, "This is -- this is so wrong." But they did it because of the
20 brotherhood. They did it because I kept going back and telling them
21 and reiterating to them, "Look, one of us is out there, and we don't
22 know where the heck he's at, what they're doing to him. If that was

1 you, I'd go after you, too. I would go find you. I would exhaust
2 everything I could possibly do to get you back." And they knew that.

3 TC: Thank you. No further questions.

4 PHO: Defense?

5 **CROSS-EXAMINATION**

6 **Questions by the defense counsel:**

7 Q. Back when you knew him, Sergeant Bergdahl was a good
8 Soldier?

9 A. Yes.

10 Q. He never gave you any trouble?

11 A. No.

12 Q. On the Rear-D, I think, as a company commander, you're
13 often trying to get those guys to come forward. Do you remember that
14 Sergeant Bergdahl was one who was actually trying to get himself
15 ready to deploy?

16 A. I think we were all trying to get ourselves to deploy.

17 Q. Do you -- you worked closely with First Sergeant Jimenez?

18 A. I did. He was my first sergeant, sir.

19 Q. Did First Sergeant Jimenez -- he never came and told you
20 that some Soldiers who worked with Bergdahl were concerned about his
21 mental health once he had shown up on the deployment and that they
22 were recommending that something happen to him? You never found out
23 about that?

1 A. I did not.

2 Q. And First Sergeant Jimenez never told you that?

3 A. He never -- that never came up to me.

4 Q. And if he had told you that one of the Soldiers -- that the
5 Soldiers are concerned about his mental health on the deployment, how
6 would you have handled that Soldier differently?

7 A. From my experience, having these issues before -- whether
8 it was a mental health issue coming from Iraq when we were first
9 returned back from Iraq -- I would take the Soldier myself, and I
10 would get appointments for him, get him squared away, get him -- get
11 him the mental health or the assistance that he needed, sir.

12 Q. Because you found out that -- that never happened as far as
13 you're aware?

14 A. I did not know.

15 Q. Right. What did -- they were supposed to leave Mest on the
16 30th of June and go back to Sharana? 2nd Platoon?

17 A. Yes, sir. That was the rotation.

18 Q. And you described at length, when Major Kurz was asking
19 you, about a combat operation that 2nd Platoon had that took place in
20 a place called Omnah, and that was very in-detail. But I just want
21 to, you know, make sure that the point is clear that Omnah is not the
22 same location as COP Mest. It's a different district, right?

23 Q. Well, it's different. Yes, sir.

1 A. Okay. And now I want to -- beyond combat patrols, I want
2 to talk to you about something that's even more exciting, and that is
3 paperwork and the responsibilities of a company commander.

4 Would you say it's important as a company commander --
5 you've got over a hundred guys, and the Army's got their paperwork
6 procedures for tracking their Soldiers and their duty status, their
7 moves and schools and awards. Is that one of your things that you do
8 as a commander?

9 A. Well, I -- I'm the approving authority from the command or
10 from the company perspective; but the majority of the work that's
11 being done, I don't, *per se*, type it all. My training room does.

12 Q. Sure. You've got a training room to help you; you've got
13 First Sergeant looking over it; your platoon leaders and platoon
14 sergeants are assisting you in your responsibilities to make sure
15 that, you know, paperwork is helping the Army keep track of
16 everything with all of our Soldiers?

17 A. Certain paperwork, sir.

18 Q. Okay. And a Soldier's duty status is recorded on a form
19 called a Department of Army Form 4187?

20 A. Yes, sir.

21 Q. You're familiar with that form?

1 A. I am.

2 Q. I'm sure you've signed hundreds of them?

3 A. Yes.

4 Q. These are signed and approved by the company commander? It
5 can't be done lower than you?

6 A. Well, it has to be initiated from my level.

7 Q. Uh-huh [indicating an affirmative response].

8 A. Again, that's typed up by my training room, and then that
9 gets pushed on to the battalion staff or the battalion personnel
10 office, the S-1.

11 Q. All right. When a Soldier is present for duty, their duty
12 status is, with the Army, listed as PDY or -- which means present for
13 duty, right?

14 A. Correct.

15 Q. And when -- if a Soldier is AWOL or if a Soldier is a
16 deserter, there is a different duty status that reflects that because
17 we don't want them listed as present for duty if, in fact, they're
18 AWOL or a deserter, right?

19 A. Correct.

20 Q. And you're aware that administratively, Sergeant Bergdahl's
21 paperwork never changed to reflect a status of AWOL, and it never
22 changed to reflect a status of desertion? You're aware of that?

1 A. You informed me of that about -- a couple days ago.

2 Q. Right. So you weren't aware that nothing had ever changed
3 before then?

4 A. Well, what I knew, sir, was the paperwork was initiated at
5 my level.

6 Q. Uh-huh [indicating an affirmative response].

7 A. We pushed it up to battalion. Now, after it moved to
8 battalion -- that is at, again, that level. It could have been
9 either processed or changed to a different one. But what I did is
10 initiate the paperwork. And I know that my first sergeant and
11 everybody else was working on that with my training room, with the
12 battalion S-1. So after it left our -- my company, it's at that
13 level.

14 Q. Well -- and there's no fingers being pointed here, but what
15 I want to get at is, I guess, that for the last 5 years that Sergeant
16 Bergdahl was not listed administratively by the Army as AWOL or a
17 deserter? I guess you're aware of that now?

18 A. I am.

19 Q. Okay. Your company was pretty well manned. It wasn't
20 100 percent; but, you know, it was normal for that time -- you said
21 -- I think you said it was about 90 percent of ----

1 A. Correct.

2 Q. ---- normal strength?

3 A. Yes, sir.

4 Q. And 90 percent for that type of deployment is pretty
5 normal, correct?

6 A. That's pretty -- that's across the board for everybody.

7 Q. And that was able to -- to reflect changes in what's going
8 on? For example, at one point, one of your Soldiers shot himself in
9 the foot, out of action for a bit, a few weeks, but you had the
10 manning to be able to still accomplish the mission?

11 A. Correct. We were able to rotate personnel through.

12 Q. And in fact, there was even -- since it was a yearlong
13 deployment, there was a mid-tour leave policy that was in effect
14 for all of the Soldiers of your company as long as they were going to
15 be out for the entire deployment, right?

16 A. Yes, sir.

17 Q. That was about 2 weeks -- 15 days that they could get off
18 on leave?

19 A. Yes, sir.

20 Q. And during that period, they could -- if they want to, they
21 could go back to the States and go to Disneyland?

22 A. Whatever they ----

1 Q. They could go hiking in New Zealand, you know ----
2 A. As long as ----
3 Q. ---- whatever they want ----
4 A. ---- they got that 15 days, sir, they can -- they can do
5 what -- as long as it's within reason of safety and, you know,
6 they're not breaking any laws.
7 CDC: Can we consult for a moment?
8 PHO: Certainly.
9 [Pause.]
10 Q. And it was even worldwide? If someone wanted to go, you
11 know, cruise around Australia, they could do that within that leave
12 period?
13 A. Well, it's got to be done through the right, proper ----
14 Q. Yeah, you've got procedures ----
15 A. Yes, sir.
16 Q. ---- going in and out of the combat zone?
17 A. Yes, sir.
18 Q. And this was staggered, the leave policy, so that not a,
19 you know, big chunk of your combat power is all taking their 15 days
20 of leave all at the same time, right?
21 A. Yes, sir.

1 Q. And so your Soldiers were still allowed to take their 2
2 weeks -- 15 days of leave, even in July and August, while these
3 search efforts that you were talking about were going on, right?

4 A. We were able to rotate some personnel through. But I think
5 what happened was, sir -- is things had to shift a little bit to the
6 left and to the right. What we ended up doing is maximizing the
7 boots on the ground and not to deny leave, but we asked the Soldier
8 if they could move their leave either to the left or to the right of
9 the dates that we were currently working off of because we don't know
10 when it was going to end, but they gladly did so.

11 Q. Sure. That makes sense. You would say that some of those
12 leave plans were hard and fast; but others, the Soldiers hadn't
13 really come up with a plan and, if they had to move left or right,
14 that some of them were willing to do that?

15 A. Yes, sir.

16 Q. Okay. During the -- after Sergeant Bergdahl went missing,
17 your forces increased their operational pace, including increasing
18 the partnerships that you had with the Afghan forces?

19 A. Yes, sir. We would -- like I said, they were there with
20 us.

21 Q. You said then, you know, as you guys went up and went
22 through this together, your company gelled together to accomplish the
23 assigned mission?

1 A. We did what we had to do to get Bergdahl back, sir.

2 Q. At the end of the tour, your mission was successful?

3 [Pause.]

4 A. More so, yes.

5 Q. Within a few days of Sergeant Bergdahl leaving, are you
6 aware of the negotiations that took place with Major Crapo and some
7 Taliban leaders who wanted to deliver him back to U.S. forces?

8 A. There was -- Major Crapo -- Major Crapo was there at Mest
9 OP. He did have some meetings. I believe that was something that
10 they did discuss.

11 Q. And you're aware that this negotiation broke down because
12 the American forces put forth an offer of boxes of MREs and supplies,
13 but -- and that wasn't good enough for the captors? Are you aware of
14 that?

15 A. No, sir. I didn't know -- like I said, I knew about the
16 meeting. I know Major Crapo was there on the ground with me. I was
17 focused on putting out the patrols, moving personnel from point A to
18 point B. Major Crapo was there and was talking to -- it was like a
19 shurah; he had a meeting. I didn't know the details of that meeting,
20 though.

21 Q. Did you know the purpose and the agenda of that meeting?

22 A. I think it was because of exactly what you described. We
23 were all trying to find any information from anybody as far as where

1 his whereabouts were. Major Crapo took it -- he was directed by the
2 battalion, I think, to come down and talk to -- talk to the
3 leadership about that, or the local village elders talk about that.
4 And again, we're appealing to, "Hey, you know, we just want our -- we
5 want our Soldier back. We want him safe. We would like to work with
6 you with that." And I think that was -- I think that was the
7 messaging [sic] that he was pushing out. And as far as what I was
8 concerned, I was not privy. I was not at that meeting. Again, I had
9 a company to run. I had to put platoons out and patrols out, and I
10 was focused on that.

11 DC: Okay. No further questions.

12 PHO: Government, any redirect?

13 TC: Yes, sir.

14 **REDIRECT EXAMINATION**

15 **Questions by the trial counsel:**

16 Q. Defense alluded to the position of Omnah and the village of
17 Omnah and the mountains of Omnah, and it was some distance from
18 Observation Post Mest. What was the enemy situation around
19 Observation Post Mest?

20 A. Not getting into the routes -- like I said, it was a
21 high-traffic area for weapons and IED materials, explosives. So
22 there's always a high-threat area -- that's always a high-threat
23 area. In the vicinity of that, you had the village of Yahya Khel;

1 and north of that, you had Yousef Khel. Those two villages had enemy
2 insurgents -- had insurgents. Primarily in Yahya Khel, there's a lot
3 of -- from my experience, what I've looked at and talked to people
4 about, they've always mentioned that there's a high sense of
5 leadership of the insurgency there. Not naming who, not pointing
6 them out but they've always alluded to that; and to talk about that
7 would be detrimental to them, but then they will -- always hinted at
8 us and would say, "Yeah, there's some people here that you should go
9 and see and meet and arrest."

10 But again, the -- the high-threat area is all around us in
11 that -- that vicinity. Again, high-traffic; high-IED area. You can
12 always hear some small arms fire going off in the background; but not
13 directly to us, but it's in the area.

14 Q. Okay. And, Major Silvino, why did you hesitate when
15 Colonel Rosenblatt asked you if you thought your mission, your
16 yearlong deployment, was successful? Why did you hesitate? What was
17 your other thought?

18 A. Well, by intents -- well, all purposes, the mission was a
19 success. Success because we were able to accomplish the things -- or
20 the missions that we did from counterinsurgency to DUSTWUN
21 operations; to conduct polling sites supporting the election; to be
22 able to conduct combined action, moving out to the district centers
23 with our platoons 24 hours a day, 7 days a week, living and working

1 with the Afghan Security Forces. I think that overall -- that whole
2 process, those things that I just mentioned, success. True.

3 But I hesitated because I know that deep down and what I
4 know -- what my feeling is, my fellow brothers, my fellow company
5 commanders, my fellow Geronimos -- not even just Geronimos, the whole
6 Spartan Brigade, the whole 82nd Task Force, I know that they --
7 behind closed doors they always talk about and say, "Don't be
8 Blackfoot Company. They lose people." That hurts. That's a sting.
9 It's a mark. And to say that and to hear that from people -- and
10 I've heard it, but I didn't confront anybody about it. I let it roll
11 off my back. They don't know what we did. They don't know what we
12 went through. Unless you were there on the ground, walking those
13 days every day, living, sleeping, eating dirt -- they have no room to
14 talk. But I had nothing else to say about -- regarding -- or even
15 respond to that, because that's their initial feeling, and my feeling
16 is, "I got it. They talk about us. I got it. We have a mark."

17 TC: Thank you.

18 PHO: Any recross?

19 DC: Could we ----

20 CDC: If we -- let us just ----

21 PHO: I have some ----

22 CDC: ---- consult ----

23 PHO: ---- questions as well, so I'll let you all go first.

1 CDC: Just one second.

2 [Pause.]

3 CDC: Thanks very much, Colonel.

4 PHO: Okay. I have a few questions, Major Silvino.

5 WIT: Yes, sir.

6 **EXAMINATION BY THE PRELIMINARY HEARING OFFICER**

7 **Questions by the preliminary hearing officer:**

8 Q. Can you tell me -- I'll run this by my security manager for
9 clearance -- but the straight-line -- you know, as-the-crow-flies
10 distance from Yahya Khel to the village of Mest -- so from the
11 village of Yahya Khel to the village of Mest approximately what is
12 that straight-line distance?

13 A. About 6K, sir.

14 Q. Six -- six kilometers?

15 A. Six kilometers, sir.

16 Q. All right. You mentioned a 4187. Did your company put
17 forward a DA Form 4187 to change the status of Sergeant Bergdahl?

18 A. To my understanding, yes, sir. It did.

19 Q. Okay. Well, you would have signed it as the company
20 commander?

21 A. Correct.

1 Q. Okay ----

2 A. But again, sir, that's ----

3 Q. Understand ----

4 A. ---- 6 years ago ----

5 Q. Lack of sleep and 6 years and OPTEMPO. Do you know

6 approximately when that was pushed forward?

7 A. It was roughly about the first 5 days, sir, because I

8 remember there was a few other personnel that came down. Paralegals

9 came down, lawyers came -- I mean, everybody was looking at us.

10 Q. Certainly.

11 A. So we had different investigators trying to talk to us, and

12 one of -- the paperwork, I believe, it was one of those things that

13 we had to sign -- I had to sign.

14 Q. All right. And it was changing his status from present for

15 duty to AWOL, again to your recollection?

16 A. Yes, sir, to that -- to that.

17 Q. But you don't know the status of what happened to that at

18 higher?

19 A. Yes, sir.

20 Q. You pushed it out to your headquarters, and then it was

21 outside of your control, and you weren't -- no one spoke to you about

22 that ----

1 A. No, sir.

2 Q. ---- ever since? Okay.

3 You mentioned that your area of operations significantly
4 expanded after 30 June. Can you -- earlier you said it was, I
5 believe, 1,200 ----

6 A. Square miles.

7 Q. ---- square miles. Can you give me a rough square mileage
8 of your post-30 June operations?

9 A. It's going to be at least, sir, double that. We gained
10 areas -- vicinity, again to -- not knowing -- not giving out routes
11 or anything ----

12 Q. I understand.

13 A. ---- or location, we ----

14 Q. No, that ----

15 A. ---- gained areas ----

16 Q. ---- that helped. "Roughly double" is a ----

17 A. Yes, sir.

18 Q. ---- helpful answer.

19 A. Yes, sir. Sir, though, when I say double, that's just my
20 area. There's other people out there looking.

21 Q. Certainly. Certainly. But this is where your company was
22 operating; and at this point, you had two additional platoons
23 attached to you as well?

1 A. Yes, sir.

2 Q. Okay. You mentioned the MRAPs. You said you had 16 or 17
3 at the beginning of the deployment. Is that roughly the same number
4 you had on 29 June?

5 A. Yes, sir.

6 Q. And you said 80 percent had some kind of damage or required
7 some kind of maintenance. Roughly, what's the breakdown of problems
8 due to mechanical issues and problems due to IEDs?

9 A. I'd say 50 percent of that 80 percent, sir, was from the
10 IEDs -- a good portion of that, 50 to 60 percent of that.

11 Q. Okay.

12 A. Then the remaining parts would be, you know, just the wear
13 and tear of the vehicles.

14 Q. If my math is right, about 30 percent?

15 A. Correct.

16 Q. You mentioned Sergeant Rice who had taken three IED hits.
17 And again, I'll loop in Mr. Mersereau. You said that if there had
18 been another one, what would have needed to happen? What was the
19 policy?

20 A. He would have been evac'd, sir, out of the theater ----

21 Q. Okay.

1 A. ---- meaning he would have been sent back to Rear
2 Detachment.

3 Q. And that's outside of your control as the commander? That
4 was a requirement in the theater?

5 A. Yes, sir. That was something that -- that was pushed down
6 to us. Now, that said, he would not return back. He would be done
7 for the deployment.

8 Q. Okay. But he was not -- it sounds like, because you pulled
9 him under protest, he was not physically injured?

10 A. Well, he -- he had some kind of ----

11 Q. He had his bell rung?

12 A. Yes.

13 Q. But he was not ----

14 A. And at that point, concussion, sir, was ----

15 Q. Certainly.

16 A. ---- a high -- a high probability that that was going on;
17 but we needed to pull him out of the line and get him back to Sharana
18 to get him some rest and recuperation at least to refocus and then be
19 able to again after, I think, about a week or a week and a half, we
20 were able to push him back to 3rd Platoon again and rejoin the
21 platoon.

22 Q. Okay. Did Sergeant Rice receive a Purple Heart or other
23 commendation?

1 A. That was under works, sir, at the time. Again, the high
2 OPTEMPO, it's not like we could just ----

3 Q. Right.

4 A. It was -- we annotated, we wrote it down. The medics knew
5 about it, and then it was processed.

6 Q. Okay.

7 A. We had -- there was a high percentage of the company that
8 actually had Purple Hearts.

9 Q. From the overall deployment?

10 A. Overall deployment, sir, and, you know, just the amount of
11 IEDs that we were hitting, and just the significant danger that we
12 were at. I mean, it's already dangerous; but then, you know, you
13 couple that with more patrols -- double the patrols, triple the
14 patrols, it becomes a little bit more significant, yes.

15 PHO: I don't have any further questions.

16 Defense?

17 **RECROSS-EXAMINATION**

18 **Questions by the defense counsel:**

19 Q. Major Silvino, how confident are you that you signed the
20 paperwork to change him from present for duty to AWOL?

21 A. Like I said, it was 6 years ago. There was a ton of
22 paperwork that I had to do. And we spoke about this off to the side.
23 I'll say 30 percent, sir.

1 DC: Nothing further.

2 PHO: All right. Government?

3 TC: No further questions.

4 PHO: All right. Temporary or permanent excusal?

5 TC: Temporary, sir.

6 [The witness was temporarily excused, duly warned, and withdrew.]

7 TC: Sir, would now be an appropriate time for a break?

8 PHO: I think that would be good. Why don't we shoot for -- I've

9 got 1423.

10 CDC: Twenty of?

11 PHO: How about a quarter 'til.

12 CDC: Quarter of.

13 PHO: So 1445. That way it gives -- with the screening process,

14 I want to build some extra time in for the people attending.

15 So thank you. You're free to go.

16 **[The Article 32 hearing recessed at 1423, 17 September 2015.]**

17 **[The Article 32 hearing was called to order at 1447,**

18 **17 September 2015.**

19 PHO: We are back on the record. The same parties who were

20 present at the recess are again present, to include the accused.

21 Government, call your next witness.

22 ATC: Colonel Clint Baker.

1 COLONEL CLINT J. BAKER, U.S. Army, was called as a witness for the
2 prosecution, was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the assistant trial counsel:

5 ATC: Sir, I want to advise you while testifying if you are asked
6 any question that you believe may require a response containing
7 classified information, it's your personal responsibility to notify
8 the preliminary hearing officer, Lieutenant Colonel Visger, prior to
9 answering. At no time should you disclose any classified information
10 while this hearing is in open session.

11 Do you understand that, sir?

12 WIT: Yes, I do.

13 Q. And please state your full name for the record.

14 A. Clinton J. Baker.

15 Q. And what's your current duty position?

16 A. My current duty position is the G-3/5/7 of U.S. Army
17 Alaska.

18 Q. And how many years have you been in the Army?

19 PHO: Before you proceed with your questioning, sir, just let me
20 advise you that we do have a lot of non-military personnel watching,
21 and so we are trying to be careful of use of acronyms so that they
22 understand. So, during the questioning, I may interrupt just to ask

1 you to explain what those acronyms are so that the people watching
2 are able to understand.

3 WIT: Understood.

4 PHO: Okay. Thank you, sir.

5 Q. And so how many years do you have in the Army?

6 A. Twenty-four years in the Army.

7 Q. And, in that time, how many deployments have you had?

8 A. I've had two combat deployments and, most recently, a
9 peacekeeping deployment.

10 Q. And what positions did you deploy in?

11 A. I have deployed as the battalion operations officer in Iraq
12 and then I deployed as a battalion commander in Afghanistan, and as a
13 NATO battle group commander in Kosovo.

14 Q. And when you were the battalion commander in Afghanistan,
15 what was the battalion that you were in command of?

16 A. 1st Battalion, 501st Infantry.

17 Q. And what were the dates of that command?

18 A. I commanded from May of 2008 to June of 2010.

19 Q. And when did your battalion deploy to Afghanistan?

20 A. We deployed in March of 2009.

21 Q. And when did you return?

22 A. March 2010.

1 Q. And the battalion was assigned to what task force while you
2 were in the theater?

3 A. We were assigned to our organic brigade called Task Force
4 Yukon.

5 Q. And what is that organic brigade?

6 A. It's 4th Brigade, 25th Infantry.

7 Q. And you were also currently assigned to Alaska -- U.S. Army
8 in Alaska?

9 A. That's correct.

10 Q. Okay. And how do you know the accused?

11 A. Sergeant Bergdahl was a Soldier in the Blackfoot -- one of
12 my companies in my battalion in Afghanistan.

13 Q. Okay. And so before you deployed, what was the approach
14 that the unit was going to -- was going to take to accomplish the
15 mission in Paktika Province?

16 A. Well, we were -- we were going to really do doctrinally
17 correct counterinsurgency operations. As you might remember, the
18 Army had recently updated the counterinsurgency doctrine, so we were
19 studying that very hard.

20 And so we had a very good strategy and a program, I think,
21 going into our deployment that we were able to start well in advance;
22 and we did a lot of training with that doctrine in mind. And of

1 course, there is a great deal of details that go along with that; but
2 in general, that was the approach.

3 Q. Well what was the -- basically, I mean, what was the focus
4 of how you were going to fight this fight in Afghanistan? The
5 populace, kinetic operations...

6 A. Obviously the population is, generally speaking, considered
7 the center of gravity for counterinsurgency operations. But what we
8 did is there was pretty good continuity in the area we were taking
9 over for the unit preceding. And actually, several years prior to
10 that there was good continuity in terms of the strategy. And simply
11 put, the approach was separate the insurgents from the population,
12 step one. Step two: Achieve effects with the population to connect
13 them with their government. And then, step three is: Transform the
14 environment so that the insurgency is no longer a viable option for
15 the population. That sums up sort of the brigade strategy. And,
16 again, it came from the unit that was, you know, prior -- there prior
17 to us and had evolved over several years.

18 Q. And do you think Paratroopers in your battalion understood
19 that?

20 A. I do.

21 Q. Okay. And why do you think that?

22 A. Because we spent a great deal of time and effort training
23 and making sure that they understood it. And I would venture to say

1 -- like I can still recite it, you know, verbatim. And I would
2 venture to say many of them would be in the same boat. I mean, we
3 just drilled it and trained it over and over again. So I am
4 confident that a large majority understood that.

5 Q. And did you have any specialized training prior to
6 deploying?

7 A. Sure. We did a lot of specialized training. But I think
8 in this case we benefitted more than I had in my prior deployment
9 because we knew where we were going pretty early on, and so I think
10 the difference in this train-up was that we were able to be very
11 specific in our approach, and I think that was helpful. So we really
12 got down into the details and the particulars of how we were going to
13 -- you know, we were going to actually employ that strategy.

14 And the other thing is, I think, we put way more emphasis
15 than any other unit I have ever been in on leader training to make
16 sure the leaders, you know, inculcated that strategy and that
17 doctrine and understood it in depth; really, some tough academic-type
18 training for our leaders.

19 And just not to be too longwinded, but the other thing we
20 were able to do is cultural training and language training for the
21 Soldiers so they understood it. And I remember my sergeant major and
22 I discussing that just having the leaders understand it is not good
23 enough. And so we made a big push and Sergeant Major Wolf was key in

1 that particular regard in making sure that, all the way down to the
2 Soldier level, that they understood it and really, you know, took on
3 that strategy.

4 Q. And as part of that train-up, did you ever exercise or
5 conduct training on DUSTWUN situations, where a Soldier was missing?

6 A. Absolutely. As a matter of fact, I remember in our
7 culminating training exercise, which was at the National Training
8 Center at Fort Irwin, California, one of the scenarios there, and
9 it's a peer -- you know, a near-peer environment. And in this case,
10 they do a fabulous job of replicating the exact environment that you
11 are going to go into, in Paktika in my case. But they had a scenario
12 in which the brigade had to execute DUSTWUN operations to recover a
13 DUSTWUN. And so as a result of that, you know, we had battle drills
14 and had procedures in place. Should that occur, speed is of the
15 essence; and so that's the reason for that training. The more times
16 you can work it, the faster that you can get.

17 Q. Now, you mentioned, right, that you were -- early on you
18 knew you were going to Paktika Province. In that initial period of
19 time -- I'm talking March to June -- what was the battalion focused
20 on for operations in the Paktika Province? What were your
21 Paratroopers doing?

22 A. Well, we were -- what we wanted to do as best we could is
23 balance our efforts across our four lines of effort, those being:

1 security, development, governance, and information operations. So
2 within each one of those functional categories, we had milestones and
3 strategies for how we improve capacity or increase capacity,
4 particularly for the Afghan government.

5 So ideally for things to work out, I used to tell my guys
6 that all the pistons are firing if things are working right. In
7 other words, your effort is about the same on each of those lines of
8 effort, and they all complement one another. So you never want to be
9 all security and no information operations for instance. And so you
10 want to balance those across, and that's the way we approached it.

11 Q. And as part of that, can you describe that operational
12 tempo in those initial months?

13 A. It's unpredictable over there, the OPTEMPO. So you have
14 your busy times, your sort of manic times. But you also have your
15 slower times. But it's manageable.

16 What you don't want to do in that environment is set a
17 pattern. So you try to -- you actually try to not develop a routine.
18 That said, human nature is that we develop a routine that we can --
19 that we have the endurance to be able to get through. So I would
20 say, in terms of OPTEMPO, it was busy but sustainable.

21 Q. Okay. And when you say, sustainable and endurance to get
22 through this 1-year deployment, you know, was rest and refit a part
23 of that?

1 A. Absolutely.

2 Q. And can you kind of describe why rest and refit is
3 important?

4 A. Well, you've got to maintain your fitness and your fighting
5 capability. If you don't rest, you can't do that. If you don't have
6 a decent diet and if you don't exercise -- so you try to work all of
7 those things in as best you can to maintain the fitness of your
8 force, the fighting capacity of your force if you will.

9 Q. And so down at the platoon level, what were your kind of --
10 your expectations during that time period as far as how much you
11 wanted those platoons out in the field versus the time they were
12 spending back on the FOB getting rest and refit?

13 A. Well there is a balance there. There is a balance between
14 how much you want to be out in the field and off the FOB and how much
15 you are going to sustain the force if you will. My preference was --
16 and this is what I told them, "I want you to stay off the FOB as much
17 as you can," because that's where -- that's where you actually
18 accomplish those things that are in your counterinsurgency program or
19 your strategy. You don't accomplish anything on the FOB except for
20 the sustainment aspects of it. So there is a balance, and so -- I
21 don't know that I can articulate a number that goes along with that
22 or anything like that; but I think it was pretty common knowledge
23 that my expectation was you get the rest and the refit and do the

1 maintenance that's required to make you ready to fight, because we
2 were in some fights. So there was no question it could happen any
3 time, and you've got to be ready. So that means you've got to be
4 rested; you've got to be well-maintained, et cetera. And that's what
5 I expected. At the same time, I want you to maximize your -- the
6 amount of time you spend out actually accomplishing the mission.
7 Like I said, there is a balance there. And I think we struck it
8 pretty well to begin with.

9 Q. Okay. I want to go to OP Mest. Can you kind of describe
10 why you built OP Mest, what was the purpose for it, and kind of the
11 interaction that you had with the Afghans in deciding to build OP
12 Mest?

13 A. Sure.

14 CDC: I am going to object on the grounds that it's cumulative.
15 This will be number three on the reasons for OP Mest.

16 PHO: I am going to overrule it. It just simply provides a
17 different perspective from different levels of the command, so I'll
18 go ahead and allow it.

19 A. So, as soon as we got on the ground and I began forming
20 partnerships with the different Afghan governmental officials,
21 security officials, they had a pretty standard -- I think it was a
22 weekly or biweekly security meeting where we would all get together
23 and we would discuss the security of the province. The very first

1 thing they brought up to me is that they had been wanting to build an
2 out -- an ANP outpost in the Malak area for some time. And the
3 purpose was twofold. It was, one, because they needed a stronger
4 presence down there to demonstrate to the people that they could
5 protect them from the insurgents. But, two, they were having a lot
6 of IED strikes along the route there that runs into Malak from
7 Sharana; and a lot of innocents were being -- they had a lot of
8 innocents that were killed as a result of IEDs. And so there was
9 some pressure on the government by the population, "We need some help
10 here." So they came to me with this proposal -- the very first
11 thing, and they were very adamant about it. But initially, I held
12 off. I didn't commit to anything.

13 Q. And why was that?

14 A. Well, because once you get into something like that, it's
15 difficult to get out without the insurgents taking advantage in the
16 information operations realm. So I didn't want to get into something
17 and have to get out of it and lose information operations and lose
18 credibility with the government and so forth. So I wanted to first
19 make sure that they were committed to it and I could depend on them
20 to do what they said they were going to do.

21 Q. And "they" being who, sir, just to be clear?

22 A. Afghan National Police for the most part under the
23 direction of the Afghan Governor. But I wanted to make sure that

1 they were committed to it before I -- you know, I started assisting
2 them with that.

3 The other thing is I had to get approval from my higher
4 headquarters. So it took several months to start -- to get that
5 approval and work through the process, find where we were going to
6 put it. So it took a little bit of time, but they brought that to me
7 immediately.

8 And I have to say that they understood the situation in
9 terms of the insurgency probably better than I did at that point on
10 the ground. I was a little bit -- I was not confident that it was
11 going to achieve the effects that they thought it was going to
12 achieve. As it turned out, it did. It worked better than I
13 initially thought because they understood the situation better than I
14 did at that point. But it wound up working just as they thought it
15 would. In fact, probably better, and they wound up on their own
16 putting another ANP outpost just south of Mest, you know, sort of on
17 their own.

18 Q. So who picked that corner -- that intersection? I mean,
19 was it the Afghans, was it us, or who did that?

20 A. It was a combined effort. In fact, we all went out
21 together. It was one of the first things we did. We all went, and
22 we took a lot -- took a look at a lot of different areas. And that

1 was clearly -- I mean, if you could see it, you would understand,
2 it's a pretty dominating terrain for that area.

3 Q. And from your perspective as the Battalion Commander, how
4 does the crossroads at OP Mest and Yahya Khel -- how does that all
5 kind of connect together with that route that runs along there from
6 your perspective as far as the enemy situation?

7 A. Right. Well, there is two ways really to travel from East
8 Paktika -- or really from Pakistan to East Paktika, through West
9 Paktika and then into Ghazni and Highway 1. You can go through
10 Sharana -- Orgun and Sharana in the north, which is a little bit
11 better road, but it's also controlled by the legitimate government
12 and, therefore, has Afghan security forces on it. Or you can use a
13 very unimproved road that runs from East Paktika through -- on down
14 through Yahya Khel and then across the -- right through Mest-Malak
15 and then into Ghazni. That's a very highly-trafficked route, not
16 just by insurgents but by everybody, because a lot of times it's just
17 easier to use than it is to go through Sharana and that route. But
18 there is only -- there is really only a couple of choices where most
19 of the traffic was through there.

20 Yahya Khel in particular has the largest bazaar in the area
21 -- in Paktika Province. So and that's important to people and that's
22 where they go to get their supplies and their food and so forth. So
23 it's a thoroughfare if you will.

1 And the people in Mest-Malak were subject to a lot of
2 harassment. A lot of times insurgents come in there at night, and
3 they almost expect that they can just stop and stay in a home and
4 that they are going to feed them and so forth and so on. And
5 typically they are. Sometimes they are welcomed; but a lot of times
6 if they are not, they just kind of force themselves. And the
7 population -- they just get tired of that. And that's kind of what
8 was going on in Malak, I think, and Yahya Khel, too.

9 Q. I want to direct your attention to 30 June 2009 in
10 Afghanistan. Where were you located?

11 A. I got the report that Sergeant Bergdahl was missing in my
12 tactical command post, which was out on a -- really covering the
13 security of a wadi down near Kushamond in a place called -- I think
14 it was near Shakilabad -- the Shakilabad District so down south
15 around Kushamond.

16 Q. And why were you down there on that day?

17 A. We were pushing a combat logistics patrol down to
18 Kushamond, which was another one of our outposts, because we had to
19 get a bunch of gravel pushed down there and a lot of other supplies
20 so to keep the logistics and the sustainment aspect up for Kushamond.

21 Q. And that takes a battalion commander to do that? Why were
22 you there, sir?

1 A. Well, in this case we had done a prior combat logistics
2 patrol down to Kushamond and then further even down to Wazi Kwah when
3 we first got there, and we made a lot of mistakes. We had 37 IED
4 strikes on that particular operation, and it was just a sheer wonder
5 that we didn't lose anyone. And so we learned a lot of hard lessons.

6 It was important at this time that we were going to do this
7 that we incorporated those lessons learned and we got it right.
8 Because it was so dangerous and we had had some challenges on a
9 previous experience, I felt it was important to be out there on the
10 ground and make sure that it all went correctly.

11 The other part of that is we -- everything we did, we
12 integrated the Afghan National Army and Police into the operation as
13 best we could. It's helpful to get their support. At that point, it
14 was helpful for me to be out there and working with them.

15 Q. So you get the report that the accused is missing, and what
16 happens next for you?

17 A. Well, for me I immediately, of course, checked in with my
18 headquarters and we went -- we moved from Kushamond back to a place
19 called Khayr Khot Castle. And I, again, got commo with my TOC -- my
20 headquarters -- excuse me -- and I got a helicopter ride from Khayr
21 Khot Castle right back to my TOC, which was at Sharana so that we
22 could start.

1 In fact, by the time I got there, like I said before, the
2 brigade was pretty prepared for such a -- you know, such a thing to
3 happen. And things happened very quickly. So, as soon as the report
4 went up, things started happening automatically. So, by the time I
5 got back to the TOC, my XO in conjunction with the Brigade S-3 and
6 folks really had the initial isolation almost completed. I mean,
7 they had everything moving in there. They had it fairly well
8 isolated at that point. So they did a really good job, and it was
9 extremely fast.

10 Q. So how quickly are forces outside of your battalion coming
11 into your battle space?

12 A. Hours. It was within hours.

13 Q. Okay. So you go from how many platoons to -- or if you
14 want to go companies -- however you want to -- you know, in your
15 mind, how much additional combat power was coming in in those hours?

16 A. It's hard to say with any real accuracy. But just scale --
17 you know, a general scale, we had 13 combat platoons prior to. That
18 easily increased by -- almost immediately by five, and then
19 subsequently by as much as eight.

20 And then it increased to such a point that my ability to
21 mission command all of those different units -- it exceeded or span
22 of control. And when the brigade commander realized that, he brought
23 another battalion commander in who took part of my AO just to help

1 because of the saturation of different units and the saturation on
2 the mission command part of it.

3 Q. And I am going to try to do this without a map. So I need
4 you to describe, sir, if you can, how -- you know, the Paktika
5 Province, right, that's your Battalion AO -- how you kind of sliced
6 that out if you could in words to the battalion -- and what -- well,
7 first of all, what battalion commander came in? Who was that?

8 A. It was the Commander of the 1st of the 40th Cavalry
9 Squadron. His name is then-Lieutenant Colonel Robert Campbell.

10 Q. And was this a sister battalion of yours?

11 A. Yes. They were -- their AO is Paktiya. So just north of
12 us. He had the Khost-Gardeyz Pass, and that was his normal AO.

13 Q. So he comes in, and kind of describe what happens to your
14 battalion battle space? What's going on from the C-2 span of control
15 perspective?

16 A. Well, like I said, you have all of these disparate platoons
17 coming in with no command -- really a lot of them didn't have company
18 command headquarters. So what wound up happening is you have a lot
19 of platoons out there doing operations all reporting in to the TOC,
20 which quickly becomes somewhat an -- because they all need re-supply.
21 They all need instructions, you know, you name it. So it quickly
22 overwhelms a battalion TOC.

1 So in the south our southern border ran, you know, all the
2 way south of Wazi Kwah and War Mammay on the border of Badakhshan and
3 Pakistan. So we split that southern part and that was what Colonel
4 Campbell took. And it -- I can't remember exactly the northern
5 boundary where we did that, but it was somewhere between Khayr Khot
6 Castle and Kushamond because as I recall, we kept Khayr Khot Castle;
7 but he had my Charlie Company at that point because they were at
8 Kushamond. So he had all of that into the south all the way down to
9 the border of Pakistan.

10 I then had everything north as normal and then we expanded.
11 In the west we expanded out approximately halfway into the Ghazni
12 Province. So we took -- in Ghazni, we took the eastern-most
13 districts of Ghazni. So the -- you know, they are sort of like one
14 east and one west all the way down through Ghazni; and we took all of
15 those eastern districts in Ghazni. And I don't remember the timing
16 of that. But that generally speaking -- so my AO spread out to the
17 west, and Colonel Campbell then took that part in the south.

18 Q. So you got ----

19 PHO: If I could just interrupt for clarification.

20 So when the 40th -- the 1st of the 40th Cav Squadron came
21 in, did they bring their companies as well or was he assuming command
22 and control of units already on the ground?

1 WIT: Both. He brought some that was with him. He took some of
2 my elements. He had other elements from other battalions, so it was
3 -- it was really an ad hoc ----

4 PHO: Throw it together as you can?

5 WIT: ---- fast.

6 PHO: Yes, sir.

7 WIT: And it happened pretty fast.

8 **Questions by the assistant trial counsel continued as follows:**

9 Q. And so from your perspective as the battalion commander, I
10 mean, is their risk in that? Is their tactical and operational risk?
11 Can you describe that?

12 A. Well, absolutely. I mean, you don't have to be a scientist
13 to figure out that if you've got units that are not used to working
14 with one another, not normal reporting channels, not normal SOPs, and
15 all of those things, you know, that causes a great deal of rift.

16 And operating in an area you don't know -- anyone that has
17 deployed will tell you the most dangerous time in a deployment is
18 when you don't understand your environment probably usually about the
19 first 60 to 90 days of your deployment. That's when it's very
20 dangerous. Well, that's given that you stay generally in the same
21 area of operation; but once you move to a new area, again, that's the
22 most dangerous time. It just goes without saying almost.

1 Q. Let's switch gears. So, once the accused goes missing,
2 what's the focus of the battalion? What are your Paratroopers doing?

3 A. The entire battle was in the field operating actively,
4 searching for -- either collecting intelligence or physically
5 searching to try to rescue Sergeant Bergdahl.

6 Q. Are they doing any other -- you know, you talked about your
7 four lines of effort. Are they focused on any of those?

8 A. No.

9 Q. And when you say the entire battalion is in the field, can
10 you give me a flavor for that? I mean, somebody has got to be back
11 guarding the FOBs, right, and stuff like that?

12 A. We -- and there is another place where we took a lot of
13 risk. We cut -- you know, cut back on the FOBs in terms of manning
14 to absolutely the bare minimum. You know, we had like cooks -- you
15 name it, that's who was guarding the FOBs. And so we cut back to
16 almost nothing. Luckily, we didn't have any mishaps.

17 But when I say everybody was operating off of the FOBs, in
18 the area of operations, 24 and 7 nonstop, with emergency re-supply
19 for the most part because it was real spontaneous. And it was almost
20 -- you know, minus the people you needed for mission command, it was
21 almost the entire battalion out there. And they would only get
22 refits as we could cut them loose, which was rare.

1 Q. So, from your perspective as the battalion commander, what
2 platoon was out the longest during this period of time?

3 A. Well, I couldn't say for sure what platoon was out the
4 longest. The one I remember most was a platoon from Charlie Company
5 because I remember we gave them a real short -- they got spun up
6 really short -- you know, short on time. And we said, "Hey, get in
7 your vehicles and just move to this location, and we will give you
8 further instructions," or something to that effect. "We don't think
9 you're going to be gone very long," kind of thing. So I think they
10 went with -- and we said, "You've got to be moved in, like, 30
11 minutes," so they went with, like, assault packs or something.

12 They went to the location and one thing led to another.
13 The next thing is, you know, they are on different missions. We
14 eventually told them, "Leave your vehicles in a certain place. We
15 will secure them for you," and we air assaulted them to another
16 location. From there, they air assaulted to -- the bottom line is,
17 they were gone for 37 days straight with no refit, nothing but
18 emergency resupply. I remember because we flew an emergency resupply
19 of socks and shirts out to them because they literally rotted off of
20 them. They had been out, you know, so long in the field looking.

21 Q. Okay. So what was the battle rhythm of the battalion
22 during that 45-day period, 30 June to 15 August?

1 A. There was no battle rhythm. It was just go as hard as you
2 can all of the time.

3 Q. And so, you know, you described it as just go all of the
4 time. So, I mean, how often is the battalion contacted in this
5 period of time?

6 A. We were -- there were small -- at least, you know -- there
7 were troops in contact multiple every day. There were IED strikes
8 every day.

9 Q. And, like, you know, the platoon 37 days in the field, is
10 that something that Paratroopers normally are expected to do?

11 A. Well, yeah, I think they are certainly expected to be able
12 to do it. That's what Paratroopers do. You know, we drop them
13 behind enemy lines and they are usually, you know, surrounded and
14 they are supposed to be able to get by. Now, that said, they don't
15 have the sustainment capability organic to them, you know, typically
16 to stay more than a few days at a time without resupply or some sort
17 of sustainment package. But it's clearly within their capability if
18 they can get the supplies they need to do that.

19 Q. Well, I mean, how difficult is this compared to, like,
20 Ranger School? How difficult was what you asked your men to do
21 compared to that for example?

22 A. I guess I would say this particular -- these missions and
23 this Operation Yukon Recovery, that's the reason we send people to

1 Ranger School because it's to prepare them for something that is
2 actually much harder. So we have heard a lot recently in the media
3 about Ranger School and so forth. This was much tougher. This was
4 what -- whereas at Ranger School, for instance, you get -- you go to
5 the field for 10 days and you are exposed to the elements and are
6 tough missions, no doubt about it; but then you get a short break and
7 you get to kind of reset yourself, and then you go back out. We
8 didn't -- we didn't have that luxury. The bigger difference is the
9 whole time you were doing it or my guys were doing it -- it was --
10 you know, somebody was trying to kill them the whole time. So that's
11 the big difference is that there is an adversary out there, and he
12 gets a vote. So it's not -- it's not quite, you know, on par. So it
13 was -- it was challenging.

14 Q. Now earlier you mentioned air assault missions. Did you do
15 any of those in the daylight during this time period?

16 A. We did. We did some daylight air assaults, which is, you
17 know, pretty high risk. I remember at least two I would say, and
18 then I know Colonel Campbell down south -- he actually -- they got
19 approval to do a daylight vehicle interdiction with helicopters,
20 which is considered very high risk. And we had helicopters, you
21 know, shot on occasion. On a couple of occasions we had small arms,
22 you know, shooting aircraft with troops. So there was high risk.

1 It's as high risk as any operation I ever -- I have ever seen or been
2 a part of in the Army.

3 Q. Were there any other areas where you were assuming more
4 risk due to the operations during that 45 days?

5 A. Well, risk to the force, to the men, risk to the mission
6 like we talked about. I mean, we, you know, completely stopped, you
7 know, working in terms of counterinsurgency; and we focused
8 completely on recovery of Sergeant Bergdahl. And we accepted a great
9 deal of risk in our partnerships. Even though, you know, the Afghan
10 security forces, they came to us. And they were willing to help, and
11 they did help. They did everything they could.

12 But the leadership was so busy with Operation Yukon
13 Recovery that the partnerships that we should have been working on
14 and working with them in a combined way, that probably suffered as
15 well. So the -- I tell you, a lot of risk to the men, a lot of risk
16 to the mission.

17 Q. Well, was that 2-month period beneficial to your overall
18 accomplishing the mission point? Or was it something that you just
19 continued on path and just kind of shifted focus, or was it
20 completely different?

21 A. I think that is a complicated question and one that is very
22 difficult to answer. You will hear arguments that the way we
23 operated during Yukon Recovery caused us to lose momentum, and I

1 think you could -- a smart person could legitimately argue that. I
2 think you will hear others argue that the way we conducted Operation
3 Yukon Recovery created unprecedented -- I remember the verbiage,
4 "unprecedented disruption of the Taliban," and I think a smart person
5 can make a legitimate argument as to that as well.

6 My view is that there are so many factors involved and it's
7 such a complex situation that the reality of it is it's very
8 difficult to say one way or the other with any amount of certainty.
9 I mean, look, it's not an "X+Y=Z." It's -- there is so many factors
10 out there. Fifty percent of those factors have to do with the
11 adversary, and that's why we say the adversary gets a vote. And we
12 have a saying that, you know, the best plan never survives first
13 contact. So this is an adapting and changing situation; and to say
14 that one factor, you know, led to "X" consequences is a little bit of
15 a stretch.

16 My view personally, for what it's worth, is that there's
17 some or both of that, depending on where you were in the province,
18 but overall it equaled out fairly neutral in a way that we were able
19 to overcome any sort of, you know, setback. So I think those are
20 both legitimate. I think it just depends on where you are talking
21 specifically within the province.

22 Q. Well, you guys kind of switched from key leader engagements
23 to raids, for example, right?

1 A. Right.

2 CDC: To?

3 ATC: Key leader engagements to raids, sir?

4 PHO: Raids.

5 CDC: Raids?

6 ATC: Raids?

7 Q. And so is a raid -- doing raids every night, is that a way
8 to win the counterinsurgency fight?

9 A. Well, I mean, let's be clear that it is a part of winning a
10 counterinsurgency, that's in the security line of effort. So there
11 is this -- sometimes a misconception that you don't have to kill
12 insurgents to win a counterinsurgency; that is not true. You do have
13 to kill and capture insurgents, and you have to do it enough to
14 enable you to achieve things on those other lines of effort. By
15 itself, it cannot win a counterinsurgency. But some of that is
16 necessary to enable you to do the things that will allow you to
17 succeed in a counterinsurgency. Does that make sense?

18 Q. Well, before June 30th, how often were you doing raids?

19 A. Very infrequently. We did some, and we did some after
20 Yukon Recovery. But I was very selective and it ----

21 Q. Why is that? Why were you selective, sir?

22 A. Well, because I had done a lot of it in Iraq and learned
23 some tough lessons for one, and I wanted to make sure that the bang

1 was worth a buck and that it was contributing to the overall
2 strategy. If it's -- if you kill or capture an insurgent because you
3 feel good about it but it doesn't help your mission or worse yet,
4 it's counter to your mission and it makes the population -- it
5 alienates you from the population, or if it ruins the credibility of
6 the Afghan security forces, then you're going the wrong -- then
7 you've done the wrong thing. So what we tried to do was we tried to
8 be very careful in our selection of our targets and so forth when we
9 did that, and make sure that it nested with all of those others lines
10 of effort. And if it was counter to any of them, we would say,
11 "We'll let them -- you know, let them go. We will get them another
12 day."

13 Q. And did that change after June 30th -- how you selected
14 targets to go take -- to go conduct raids?

15 A. Well, it did; but it was a different focus. I mean, we
16 weren't focused on the counterinsurgents at that point. We were
17 focused on rescuing our Soldier -- finding and rescuing our Soldier.
18 That's a different thing completely. So you -- yeah, you're going to
19 -- I'm going to take a lot more risk if I can find and rescue a
20 Soldier.

21 Q. So what did you personally observe your Paratroopers doing
22 during the search and recovery efforts? Right? Did you see them
23 come back from the missions?

1 A. I did. I -- you know, it's tough to sit and watch your
2 Soldiers do something like that; and I was really -- I could not
3 afford to be out there with them like I would have liked to because I
4 had to be back in the TOC for the most part conducting mission
5 command and/or trying to collect intelligence from the local Afghans
6 that might help. So it's hard to watch them go out there and just
7 really lay it on the line day in and day out and come in and just be
8 wrecked. And those guys would come in and just be completely filthy,
9 just exhausted. They were -- you know, they were just burned because
10 in Paktika there is not a lot of shade, and it's very difficult to
11 get in the shade unless your rent a qalat or something like that, but
12 they were out there just exposed to the elements. And you could tell
13 it -- I mean, you know, they are coming in and they -- you know,
14 their face is a mess. There are just sores all over them. And we
15 would tell them, "Hey, repack and get ready to go again." And it's
16 hard -- it's hard. It's hard to do that, you know.

17 Q. So, as a battalion commander, sir, what were you worried
18 about when it came to your men and overall, you know, morale, the
19 ability to accomplish the mission?

20 A. Well, they are Paratroopers, so they are tough and they can
21 handle it. And I thought they could handle it. I never had any
22 doubt about it. It doesn't mean, you know, it's not kind of tough to
23 watch sometimes. But I wasn't worried about the morale. That was a

1 tough -- it was tough on morale; but, I mean, physically and mentally
2 they could handle it.

3 The morale though unit-wide -- that's a hard thing to take;
4 and it's a hard thing to sort of be able to choke down, you know,
5 that one of your Soldiers is a captive of the adversary. That's just
6 hard to swallow. And so it was hard for the Soldiers to swallow, I
7 think, and some morale suffered. And I worried that, you know, we
8 didn't know what had happened, and that's the unknown. And we didn't
9 know when it was going to end either. So there is no endpoint to
10 what you are doing, and everything has sort of changed. The mission
11 completely changed, and you don't have an endpoint that you know of.
12 And, you know, you just -- the only way you can succeed is to find
13 Sergeant Bergdahl and get him back.

14 And as that long -- and as time went by and that didn't
15 happen, you know, that starts to wear on the troops and that worried
16 me. And, I mean, frankly I felt a bit at a loss on, you know, what
17 to do. You know, it was just tough to deal with. And I have to say,
18 you know, in my entire time in the Army, I can't think of a time
19 where I felt that kind of adversity, just period, and really did not
20 -- you know, wasn't able to overcome it. And that's part of it. You
21 know, Soldiers, Paratroopers were used to, if it's hard, just bear
22 down and you can overcome it. You can be successful. And that's

1 what we expect. We're going to -- we're going to bear down and get
2 the job done. We couldn't do that in this case, and that's tough.

3 ATC: Sir, I have no further questions.

4 PHO: All right, defense?

5 DC: No questions from the defense.

6 MJ: I do have one clarifying question.

7 **EXAMINATION BY THE PRELIMINARY HEARING OFFICER**

8 **Questions by the preliminary hearing officer:**

9 Q. Sir, you mentioned the frequency of troops in contact and
10 IED strikes after the 30th of June. How does that compare with the
11 frequency of attacks before the 30th of June?

12 A. That's a good question. It was significantly higher.
13 However, there -- it's not as if -- it's hard to explain. I wouldn't
14 want anyone to think that it didn't happen prior to, because it
15 certainly did. We had -- like I said, on that one operation we had
16 35 IED strikes or something like that.

17 Q. Certainly.

18 A. So it certainly happened but not nearly on the scale. So
19 maybe -- I don't know -- troops in contact once a week maybe. IEDs
20 two or three times a week maybe. That's just a ballpark but ----

21 Q. Roughly.

1 A. ---- I'll just give you a rough scale. So, yeah, it
2 didn't go from 0 to 100 for sure. That's not the case. So it went
3 from like 50 to 100, yeah, for instance.

4 Q. Okay. And then to the extent that you can answer this
5 question in an unclassified environment: To what did you attribute
6 that spike in attacks? Was it due to the fact that your men were in
7 the field with the increased OPTEMPO so there were greater numbers of
8 opportunities for the enemy to attack? Or was it some other reason
9 -- that the enemy knew that you were desperate to find your man and
10 were going to do whatever they could to hinder that?

11 A. Well, I don't -- that's a good question. I don't think it
12 was the last part -- the latter. The reason I say that is because I
13 think the group that originally captured Sergeant Bergdahl was not a
14 large enough force to -- and coherent and organized enough to pull
15 something like that off right up front.

16 Q. I see.

17 A. So they are connected loosely with, for instance, let's say
18 the Haqqani Network, and they would not have had the ability to
19 organize and direct a large group like that.

20 Q. I see.

21 A. So I do think it's probably more of the prior. And that
22 is, you know, just having more people out there doing more
23 operations, you're going to get a lot more contact.

1 The other part is, for instance, in IEDs, we were putting
2 people into places where, you know, nobody routinely went and making
3 them -- and directing them to drive down roads where typically nobody
4 drove. And we did not -- you know, didn't -- you couldn't cover the
5 whole area in terms of route clearance, so we were taking some risks
6 in terms of sending people on some routes and knowing that, you know,
7 there's some high risk in that.

8 PHO: Okay. All right. Any questions from either side based on
9 mine?

10 DC: No, sir.

11 ATC: None.

12 PHO: All right. Permanent or temporary excusal?

13 ATC: Temporary, sir.

14 [The witness was temporarily excused, duly warned, and withdrew.]

15 PHO: Government?

16 TC: The government has no further witnesses at this time.

17 PHO: Okay. Do you have any documentary or written evidence that
18 you -- or other evidence that you wish to present for my
19 consideration?

20 TC: We do.

21 PHO: Okay.

22 TC: We have had previously marked Prosecution Exhibits 1
23 through 4, which are with the court reporter.

1 PHO: Okay.

2 [The court reporter handed Prosecution Exhibits 1, 2, 3, and 4 to the
3 preliminary hearing officer.]

4 PHO: All right. So this binder is all four of them?

5 TC: Yes, sir.

6 PHO: Okay. So this is ----

7 TC: And I will take out the extra papers which are in the
8 front.

9 PHO: Okay. So Prosecution Exhibit 1 is a DA Form 3881, which is
10 a rights warning waiver, purportedly signed by Sergeant Bergdahl.
11 And then, accompanying that, is a 371-page basically verbatim
12 transcript of the accused's statement -- his interview by Major
13 General Dahl.

14 Prosecution Exhibit 2 is attachment orders assigning
15 Sergeant Bergdahl to Headquarters, U.S. Army FORSCOM, Fort Bragg,
16 North Carolina. That is a one-page document.

17 Prosecution Exhibit 3 is a temporary change of ----

18 CDC: So 4 -- wasn't 3 the orders?

19 PHO: No, 2 was the orders. 1 was both the 3881, as well as
20 the ----

21 CDC: Okay. Got it.

22 PHO: ---- sworn transcript of the statement.

23 CDC: Thank you.

1 PHO: 3 is the temporary change of station orders directing
2 Sergeant -- then-PFC Bergdahl to deploy to Afghanistan in support of
3 Operation Enduring Freedom. That is also one page.

4 And then I have a -- Prosecution Exhibit 4 is a two-page
5 document. It is a DA Form 4187, which is a personnel action form
6 changing Sergeant Bergdahl's status from captured to present for duty
7 effective 1745 hours, 31 May 2014. And, it was verified by the
8 battalion commander then, at the time, Lieutenant Colonel Condrey --
9 Jason Condrey. And, this is a two-page document.

10 I have also Prosecution Exhibit 5. That is the
11 unclassified map. Is that for demonstrative purposes only and not
12 being submitted as evidence?

13 TC: Yes, sir.

14 PHO: Okay.

15 CDC: Which -- which?

16 TC: That's the unclassified ----

17 PHO: That is the unclassified map that was presented to the
18 first witness, Captain ----

19 CDC: Oh, the one -- yeah, okay. Thank you.

20 PHO: Right. All right. Defense, have you had a chance to take
21 a look at these documents?

22 CDC: Yes.

23 PHO: Okay. Is there an objection from the defense?

1 CDC: Let me consult, if you don't mind, with co-counsel.

2 PHO: No problem.

3 [Pause.]

4 CDC: Colonel, there is a rights waiver. The rights waiver does
5 not include a cleansing warning. My client was extensively
6 interrogated in the course of debriefings. The absence of a
7 cleansing warning in the warning on the DA 3881 -- the first page of
8 Prosecution Exhibit 1, does not address this. And, to that extent,
9 we have an objection. I don't know if it is within your authority to
10 rule on that, but I want to flag that and ensure that that objection
11 is in no way waived by your accepting this document.

12 PHO: All right. Government, I'll give you a moment to speak to
13 that issue, the lack of a cleansing warning.

14 TC: Sir, that is not even an issue for an Article 32. The
15 government has proffered a piece of evidence. There is no
16 admissibility requirement here.

17 PHO: Okay. However, certainly if there are admissibility
18 issues, I think it would be incumbent on me to note those to the
19 convening authority for the convening authority to consider in
20 deciding on an ultimate disposition. And, certainly if probably one
21 of the larger pieces of evidence that the government has in terms of
22 just sheer volume is possibly not admissible at trial, I think it's
23 incumbent upon me to at least note that.

1 TC: Absolutely, sir. You can note it in your report, and it is
2 an issue for trial.

3 PHO: Okay. Defense?

4 CDC: You have answered my question. And, what you've said, Your
5 Honor, is consistent with R.C.M. 306 -- the discussion to R.C.M.
6 306(b).

7 PHO: Okay.

8 CDC: I just wanted to make sure that we weren't inadvertently
9 waiving a valid objection.

10 PHO: Okay. Just so that I am clear: So there is not an
11 objection to me considering it here; however, you are not waiving any
12 objection at trial and certainly noting that there will likely be an
13 objection at trial?

14 CDC: Yes, on the assumption that your considering it does not
15 waive any objection to its use at trial.

16 PHO: Okay.

17 CDC: I am being a little bit lawyerly about this, but this is
18 the time to be lawyerly.

19 PHO: This is the time to be lawyerly.

20 On that particular point, Government, do you have a
21 position that -- if I do consider it, does that waive any defense
22 objection to its consideration at trial as Mr. Fidell noted that
23 concern?

1 TC: No.

2 PHO: Okay. All right. So, basically, you are agreeing with the
3 defense position that this does not waive any defense
4 consideration [sic] at trial?

5 TC: Yes, sir. It's apples and oranges.

6 PHO: I'm sorry -- defense objection at trial?

7 TC: Yes, sir. Apples and oranges.

8 PHO: Apples and oranges. Okay.

9 Before I make a final decision, I'm going to take a look at
10 the issue, review the case law and other legal resources this
11 evening; and I will note that issue and kind of close it out before
12 we proceed.

13 So any other -- go ahead ----

14 ATC: So just so that I'm clear ----

15 PHO: ---- Lieutenant Colonel Beese.

16 ATC: ---- sir, you are saying -- are you accepting into
17 evidence 2, 3, and 4?

18 PHO: That is just what I was getting to.

19 ATC: Okay. Sorry.

20 PHO: Yes. So there being no objection to Prosecution
21 Exhibits 2, 3, and 4, I will go ahead and consider those. And right
22 now, I'm not hearing an objection to the consideration unless it were
23 somehow determined that that waives the issue at trial, which I don't

1 think it does either. But in an abundance of caution, I'm going to
2 consult with my legal advisor. If anyone has any case law that they
3 would want to cite me to or other authorities, I would be willing to
4 consider those as well; but I am not going to jump off and make a
5 decision here without at least having reviewed the authorities
6 personally.

7 ATC: And then first thing tomorrow morning this will be the
8 first issue that we discuss?

9 PHO: The first order of business is I will take care of that
10 issue.

11 ATC: Okay.

12 PHO: Okay. So the discussion previously between the parties is
13 we will be done with witnesses for today, and then we will be kicking
14 off first thing tomorrow morning.

15 Mr. Fidell?

16 CDC: Yes. That's correct. And Prosecution Exhibit 5, which is
17 not really an exhibit -- it is, but it isn't. That's the map.

18 PHO: A demonstrative aid.

19 CDC: So it is what it is, and we haven't registered an objection
20 to it.

21 PHO: Okay.

22 CDC: I don't even know if we get to register an objection to a
23 demonstrative aid. It's not misleading or anything so it is fine.

1 PHO: Okay.

2 CDC: I do have this question: It is my understanding -- and
3 this relates to the interview. It is my understanding that the
4 preliminary hearing officer does not rule on things like public
5 access to that document.

6 PHO: That is correct. That is outside of my authority as I've
7 noted earlier to the parties in informal conversations.

8 CDC: So out of an abundance of caution and to ensure that in
9 some other forum somebody doesn't say you failed to ask the
10 preliminary hearing officer to authorize public release of the
11 document, I am going to ask you to authorize it. I know the answer,
12 but it is helpful to me in terms of exhausting the remedy if you
13 could so indicate.

14 PHO: I understand, and I will so indicate that I am not
15 authorized to release that to the public.

16 CDC: Thank you.

17 PHO: No problem.

18 All right. This hearing is adjourned until 0900 -- or in
19 recess -- I'm not a military judge for a reason -- is in recess until
20 0900 tomorrow morning.

21 **[The Article 32 hearing recessed at 1544, 17 September 2015.]**

22 **[END OF PAGE]**

1 [The Article 32 hearing was called to order at 0901,
2 18 September 2015.]

3 PHO: Let's go ahead and get started. Good morning, everybody.

4 Prior to going on the record, the parties held an informal
5 conference, and three points I would like to summarize coming out of
6 that conference for the record:

7 First, when we closed the hearing -- when we recessed the
8 hearing yesterday evening, there was a question as to the status of
9 Prosecution Exhibit 1, which is the statement by the accused
10 accompanied by the rights waiver form. To be clear, there is no
11 objection to that particular document by the defense, and so I will
12 consider it as evidence. However, the defense specified and the
13 government concurs that the defense does not waive any possible
14 objection that it has at trial. And, in fact, Military Rule of
15 Evidence 304(f)(1) specifically states the time frame for the defense
16 to object to statements or confessions, and that is prior to the
17 entry of pleas. And, obviously, we are not at that point at an
18 Article 32 hearing. And while Military Rule of Evidence 304 does not
19 apply at an Article 32, it does specify the process for objecting.
20 So all parties are in agreement that no waiver has taken place here.

21 Any supplementation or additional information that the
22 parties would like placed on the record with ----

23 TC: No, sir.

1 PHO: ---- that issue?

2 CDC: No. That accurately summarizes what we discussed.

3 PHO: Okay. Second, there were two documents -- I do not believe
4 they were referenced in the hearing yesterday, but two documents
5 marked as prosecution exhibits. And those were Prosecution Exhibits
6 6 and 7. These were classified maps submitted to me for
7 consideration, first, in support of the government's motion to close
8 the hearing to consider classified information. And then, secondly,
9 I considered -- reviewed those as visual aids both prior to the
10 witnesses' testimony and after their testimony. I did not consider
11 them substantively as evidence, but I reviewed them for purposes of
12 understanding the witnesses' testimony and for that purpose alone.
13 So, they are not evidence. I will not consider them substantively,
14 and so they will no longer be marked as prosecution exhibits. They
15 will be marked as preliminary hearing officer exhibits or what is
16 commonly called appellate exhibits in a trial.

17 [The maps were later remarked as PHO Exhibits I and II.]

18 PHO: Any other questions or issues based on that from either of
19 the parties?

20 CDC: No, sir.

21 PHO: Okay. Third, prior to the hearing, it was represented to
22 me by the government, that the government would not be introducing
23 evidence that any Soldier was killed or wounded during the alleged

1 search and recovery operations. As a result, to the extent that
2 Major Silvino or any other government witness testified that there
3 were injuries suffered by U.S. forces during the alleged search and
4 recovery operations, I will not consider this as evidence. The
5 defense and government concur with this position.

6 Is there any supplementation or addition requested by the
7 parties?

8 CDC: That accurately states our discussion.

9 PHO: All right. So I will not be considering evidence -- any
10 evidence that any Soldiers were killed or wounded during the alleged
11 search and recovery operations.

12 Okay. That summarizes the informal conference that was
13 held earlier this morning.

14 Government, is your case -- do you rest?

15 TC: Correct, sir. The government rests.

16 PHO: Okay. Sergeant Bergdahl, the government has now called all
17 its witnesses and has revealed to you all evidence I intend to
18 consider in this preliminary hearing. As I have previously advised
19 you, you may now present evidence in defense or mitigation so long as
20 it is relevant to the limited scope and purpose of this preliminary
21 hearing.

22 Do you have any witnesses to testify in your defense or in
23 mitigation? If so, you may call them at this time.

1 And I understand, Mr. Fidell, you have a brief opening
2 statement.

3 CDC: I do.

4 PHO: And seeing how you were very brief yesterday, I will allow
5 you to go ahead and make a second statement.

6 CDC: Thank you.

7 Sergeant Bergdahl -- having previously given a 371-page
8 sworn statement concerning this case to Major General Dahl, we see no
9 need for him to take the stand. He will not be taking the stand in
10 this proceeding. We will, however, be presenting a number of
11 witnesses today; and I am going to ask Colonel Rosenblatt to proceed
12 with examination of the witnesses.

13 DC: The defense calls Mr. Greg Leatherman.

14 **GREGORY R. LEATHERMAN, civilian, was called as a witness for the**
15 **defense, was sworn, and testified as follows:**

16 **DIRECT EXAMINATION**

17 **Questions by the assistant trial counsel:**

18 Q. Mr. Leatherman, I just want to advise you that, while you
19 are testifying, if you are asked any questions that you think you
20 believe may require a response containing classified information, you
21 have a personal responsibility to notify the preliminary hearing
22 officer prior to answering. At no time should you disclose any
23 classified information while this hearing is in regular session.

1 Do you understand that?

2 A. Yes, sir.

3 Q. Please state your full name for the record.

4 A. Gregory Richard Leatherman.

5 Q. And where are you from?

6 A. Lake Kiowa, Texas.

7 ATC: Thank you.

8 Lieutenant Colonel Rosenblatt?

9 **Questions by the defense counsel:**

10 Q. Mr. Leatherman, good morning. Could you, please, explain
11 to Lieutenant Colonel Visger, the hearing officer, how you know
12 Sergeant Bergdahl?

13 A. Sir, I know Sergeant Bergdahl from -- he was stationed in
14 our -- or he was assigned to our unit. And he was with us for a
15 short period before we deployed and conducted train up, and went on
16 the deployment with us. And then he was -- I was in charge of him
17 for a short amount of time at the OP before what took place.

18 Q. What role did you play in his platoon?

19 A. I was the Weapon's Squad Leader, and Sergeant Bergdahl was
20 assigned to a different squad; but I was in charge of him due to a
21 detail that was placed under my control.

1 Q. And based on working with him in the same platoon in
2 Afghanistan, what did you notice about Sergeant Bergdahl's
3 performance as a Soldier?

4 A. He was a great Soldier. He was a, you know, "right place,
5 right time, right uniform" guy. You know, he was the SAW gunner that
6 everybody wanted in his squad. Everybody wanted him in his fire
7 team. Not a lot of complaining, kept his head down, did his job; and
8 you know, that is what we are always looking for.

9 Q. Tell us about the mock drafts that you guys would do when
10 you were chatting in idle time.

11 A. Okay. A mock draft -- I think it is kind of infantry-wide.
12 I think everyone sort of does it. You know, the leadership that is
13 there -- we all kind of put together sort of our super squad. You
14 know, if we could pick guys from anywhere in the company or anywhere
15 in the platoon and put together the best squad that we ever could,
16 you know, who would we have. And first pick -- you know, Sergeant
17 Bergdahl was going to be the first pick for everyone almost every
18 time. He was, you know, a great Soldier. Everybody likes that.

19 Q. What was his view of the Taliban and, you know, getting
20 after the enemy?

21 A. He wanted to take the fight to the enemy, you know, just
22 like everybody else did. He was passionate about it. And, you know,
23 I think that was one of the things that I think separated him from a

1 lot of guys was that he wanted to go fight the kinetic fight that we
2 had in Iraq beforehand and I think that we had talked about within --
3 you know, he is hearing, you know, Sergeant Buetow and I telling each
4 other stories. And, you know, he signed up for the Army seeing all
5 these posters, and he wanted to go to that fight just like we all
6 did.

7 Q. What view did he have towards wanting to help the Afghan
8 people?

9 A. I think he just wanted -- you know, I think he just wanted
10 to see the people not being ruled with an iron fist. He wanted to
11 see the people -- you know, wanted to see improvement in Afghanistan.
12 And, you know, thought the best way about it was not the
13 hearts-and-minds fight but to go out and actually improve security.

14 Q. You notice this model Soldier, but you -- it sounds like
15 you got to know him well enough to -- that there might be something
16 else there beyond the image of the model Soldier. Tell us about
17 that.

18 A. Yes, sir. It -- I think over the month or so that I had
19 interactions with Sergeant Bergdahl, it started to kind of feel that
20 he wasn't adjusting to the deployment like the rest of the guys were.
21 He wasn't -- you know, not that he wasn't making friends; but you
22 know, we are all a very outgoing group of guys. And, you know, we
23 are always talking back and forth, always chatting with each other,

1 and, you know, like I said, telling stories. And, you know, he was
2 kind of -- you know, he is an introverted guy. He was quiet and
3 didn't want to go out and do a lot of things with the rest of the
4 guys.

5 And so that started -- you know, I started to notice that.
6 And from my experience on my first deployment, I felt like -- that
7 that might be something that was showing that he might not be
8 adjusting quite right to the deployment at that time.

9 Q. Are you a psychologist or a psychiatrist?

10 A. No, sir.

11 Q. Okay. Well, tell us about -- was this a red flag for you,
12 this -- how he was interacting?

13 A. It was not something that I was, you know, incredibly
14 alarmed about; but it was certainly something that I felt needed to
15 be addressed. And I certainly would have talked, you know, to
16 Sergeant Bergdahl -- or to Sergeant Buetow, Sergeant Gerleve, guys
17 like that, beforehand and, you know, had a chat with them about it.

18 Q. What is the relationship between the squad leader, which
19 was your role, and the company first sergeant?

20 A. He is echelons above me. And, you know, he is -- it is --
21 I assume it is Army-wide; but in the infantry I know for sure that
22 it's -- you know, he is not the kind of guy that you would just walk
23 up to, you know, "Good morning, First Sergeant." You know, it is not

1 really that kind of thing where we are on a personal level. You
2 know, he -- in my mind, he might as well be God. I am not going to
3 go talk to him for any reason unless someone tells me to.

4 Q. And what is it about -- what you noticed with Sergeant
5 Bergdahl, did you take these concerns to your leadership?

6 A. I did. We were on a mounted patrol somewhere southeast of
7 Sharana. I can't remember where. And First Sergeant happened to be
8 sitting in the back of the truck with me. And after, you know, going
9 on a long patrol; and, you know, we sit in the back and we talk for a
10 while. I finally decided, "Well, I am not really concerned about if
11 people get mad at me about this. This is something that I think I
12 can just say and just get it out there." And so, I told First
13 Sergeant that, you know, I thought that Sergeant Bergdahl should chat
14 with somebody, you know, whether it be Combat Stress, or a chaplain,
15 or even if it were just, you know, the company commander just sit
16 down and, "Hey, man, how is everything going," you know, something to
17 just try to kind of integrate him into the deployment and into the
18 mission and make him feel welcome there.

19 Q. What response did you get when you raised this to the first
20 sergeant?

21 A. First Sergeant said that he didn't want to -- he didn't
22 want one of his guys to tell him what was wrong in his company. So

1 it was not my place to tell him if he had problems inside of his
2 company.

3 Q. I think when we interviewed you, you had even more colorful
4 language of what he said.

5 A. Yes, sir.

6 Q. Could you tell us that?

7 A. Sure. He said, "Fuck off." He said, "Shut the fuck up.
8 No one needs to hear what a fucking E-5 has to say about a guy in my
9 company."

10 And I said, "Roger, First Sergeant."

11 Q. If there were options for Combat Stress or something else,
12 what options were available, say back on FOB Sharana?

13 A. Sure. We had a chaplain, obviously, a battalion chaplain
14 and a chaplain's assistant. The problem is when we would have had to
15 time, you know, when Sergeant Bergdahl would have been back on
16 Sharana and the chaplain being there, because he has duty, you know,
17 rotating around to the different companies and, you know, seeing
18 those guys for extended periods of time. And so he may only be on
19 the FOB for a very short period of time and that just happens to be
20 perfectly timed with, you know, Sergeant Bergdahl being back.

21 And then we had Combat Stress. And, you know, those guys
22 are great. They do great things. And the problem is -- that I see
23 is actually going to those things.

1 Q. Tell us -- 11 Bravo, Infantryman -- what is going to happen
2 if an 11 Bravo, Infantryman, back in your unit in 2009 went and
3 sought help?

4 A. There was certainly a stigma involved with going. You
5 know, I -- you know, now having been out of the military, you know, I
6 have gone and talked to them. But it is something that I -- it would
7 have taken a lot of convincing for me to go to it personally. And
8 it's -- you know, I would feel like if I went to see the chaplain or
9 the chaplain's assistant, I would feel like my first sergeant would
10 know immediately and he would get in trouble. And, you know, knowing
11 how I feel about First Sergeant and about, you know, how many
12 echelons above me he is, I am not going to try and get him in
13 trouble.

14 Q. How do you feel your peers would react to you if you or
15 Sergeant Bergdahl or someone back then went and sought help?

16 A. It is going to be -- you know, as much as we hate to say
17 it, it is going to be taken as a sign of weakness. That is -- it is
18 -- you know, and I guess that can be attributed to Infantryman being,
19 you know, a bunch of tough guys and we are all, you know, battle
20 hardened and nobody wants to go seek help. But it certainly has a
21 stigma involved with it, and guys are going to know. And, you know,
22 that is something that -- you know, when I think back, if I did

1 another mock draft, if a guy had went and seen combat stress, that is
2 something that I would think about.

3 DC: No further questions.

4 PHO: Government?

5 ATC: Yes, sir.

6 **CROSS-EXAMINATION**

7 **Questions by the assistant trial counsel:**

8 Q. I kind of want to back up, Mr. Leatherman, to when you were
9 in Alaska. All right?

10 A. Yes, sir.

11 Q. So you were in the -- you were the weapon's squad leader,
12 right?

13 A. Yes, sir.

14 Q. And Sergeant Buetow is your best friend, right?

15 A. Yes, sir.

16 Q. So the accused is in Sergeant Buetow's fire team? Would
17 that be the right term?

18 A. Yes, sir.

19 Q. Okay. So you didn't have that much interaction with
20 him ----

21 A. No.

22 Q. ---- because he wasn't under your control?

23 A. Right, sir.

1 Q. But you kind of got to know him a little bit, right?

2 A. Yes, sir.

3 Q. He was a member of the platoon, so you kind of had a sense
4 of what he was as a person, right?

5 A. Yes, sir.

6 Q. And he wasn't your average Private First Class Infantryman,
7 was he?

8 A. No, sir.

9 Q. Right. I mean, when the guys were going out on the town on
10 the weekend, the accused was back in his room, you know, listening to
11 Rosetta Stone, reading books. And it isn't that that is bad; it is
12 just that it is different, right?

13 A. Right, sir. It is not -- in no way does it make him a bad
14 Soldier. In fact, it probably makes him a good -- a better Soldier.
15 I mean, the guy -- you know, instead of going out with us or going
16 out with his friends, you know, he is studying. He is trying to
17 become a better Soldier. That is -- you know, that is what we want.
18 That is what everybody looks for.

19 Q. But the guys in the platoon were kind of looking at him
20 going, "Well, that's different. Why isn't he coming out with us,"
21 right?

22 A. Sure. Yeah. You know, a lot of these guys are coming out
23 of high school; and you know, they're alpha males in their high

1 school. And, you know, these guys were all-star quarterbacks and
2 that kind of thing. And they are showing up to the platoon, and they
3 feel like everybody else should be like them. Why isn't everybody
4 else an extrovert? Why isn't everybody else so outgoing? And,
5 specifically, you know, why isn't Sergeant Bergdahl going out and
6 doing all these things with us? You know, and so that is something I
7 certainly noticed.

8 Q. And then you talked about an outgoing group of guys, but he
9 is an introvert. So, again, it is not that it is bad; it is
10 different?

11 A. Yes, sir.

12 Q. But, in your mind, right -- "Okay. This guy is a little
13 different than everyone else," right?

14 A. Uh-huh [indicating an affirmative response].

15 Q. And so -- and then when you get to know him on the OP,
16 right, it is almost immediately his complaints about the mission,
17 right? We should be going down and killing bad guys and kicking in
18 doors and stuff like that, right?

19 A. Yes, sir.

20 Q. And it just kind of continued, didn't it?

21 A. Yeah. I mean, I think atmospherically, the way that the
22 mission was inside the platoon and the mission for the battalion and
23 the brigade, I think a lot of guys were unhappy with it. I know, I

1 personally -- I thought -- I wanted to go to the mission that we had
2 done before. You know, that's just what I felt like I had trained to
3 do; and I think he felt the same way.

4 Q. Sure. And so, when you -- when these complaints came and
5 so you are concerned. This was a red flag for you. He wasn't
6 adjusting in your words, right?

7 A. Right.

8 Q. But, again, it was the guy who was reading the Ranger
9 Handbook all the time. It made him a little bit different from
10 everyone else who was, like, watching movies, right?

11 A. Uh-huh [indicating an affirmative response].

12 Q. Again, just different. He was different, right? When you
13 would engage in stories and talk about, "Hey, who is hotter? This
14 celebrity or this celebrity?" the accused isn't in that conversation,
15 right?

16 A. No, not usually, sir.

17 Q. Right. So, again, he is different, right ----

18 A. Yes, sir.

19 Q. ---- from the average Infantryman? So you had this
20 concern he wasn't adjusting with the deployment. But you also talked
21 about this mock draft, right?

22 A. Uh-huh [indicating an affirmative response].

23 Q. He is your go-to guy, right?

1 A. Uh-huh [indicating an affirmative response].

2 Q. In the fantasy mock draft, the fire team leaders, the top

3 one through five picks, right, he is the number one SAW gunner

4 somewhere in there, right?

5 A. Yes, sir.

6 Q. And so your concern was he is not adjusting, right? He is

7 not finding fulfillment in the mission, right?

8 A. Uh-huh [indicating an affirmative response].

9 Q. And so who can I send him to, to make him understand this

10 COIN thing ----

11 A. Yes, sir.

12 Q. ---- so he can find fulfillment?

13 A. Yes, sir.

14 Q. And, in fact, you went to Iraq in 2007, right?

15 A. 2006 through 2008, yes, sir.

16 Q. And that deployment was kinetic?

17 A. Very.

18 Q. Okay. And can you kind of give just a small flavor, three

19 or four sentences, of how you would describe that?

20 A. I can shorten it even more than that. We kicked doors down

21 and shot people, sir. I mean, that is essentially what the mission

22 was.

1 Q. Okay. And so, with those same complaints and red flags
2 about the accused, you know, this is the perfect guy for that Iraq
3 deployment, right?

4 A. Right. He would have fit in perfectly. It would have been
5 a great place for him.

6 Q. So you wouldn't have had any concerns at that time about
7 the complaints?

8 A. No, sir. It's -- I think, you know, as the level of
9 security drops, your concerns about things beyond security sort of
10 kind of go downhill. We don't -- you know, if we are -- if all I am
11 worried about is keeping Sergeant Bergdahl alive -- if that is the
12 most important thing to me, well, then I have a lot less time to
13 worry about is he integrating with the guys. I am worried about, did
14 he duct tape the pin on his hand grenade so he doesn't kill everyone.

15 Q. Okay. Fair enough.

16 And so, the key was getting someone to adjust and
17 understand the ----

18 A. Yes, sir.

19 Q. ---- COIN mission in Afghanistan, what we were doing at
20 that time, right, so he could get something and feel like he is
21 fulfilling his ----

22 A. Exactly, sir. Yes.

1 Q. And this whole time, right, he continues to be great at his
2 job?

3 A. Uh-huh [indicating an affirmative response].

4 Q. Right. Continues to show up in the proper uniform, right
5 motivation. "Hey, Sergeant Leatherman, what do I need to do today?"
6 and get after it for you, right?

7 A. Yes, sir.

8 Q. And that whole time, you were giving him guidance and he
9 seemed to understand what you wanted him to do, right?

10 A. Yes, sir.

11 Q. And those back briefs to you were very coherent and clear
12 that he understood what he needed to do, right?

13 A. Yes, sir. I mean, it was made clear by him -- you know,
14 just like it was made clear by the other guys -- that that is not the
15 fight that he personally and they felt that was the best way to go
16 about winning a war.

17 Q. But he was certainly doing the stuff that you told him to
18 do, right?

19 A. Oh, absolutely. On a day to day level, you know, if it is,
20 "Hey, Bergdahl, run down and grab some ammo for the 16 and bring it
21 back."

22 "Roger, Sergeant."

1 And he would go down there and be back faster than you
2 would expect, I'm sure.

3 Q. Okay. I want to switch gears, Mr. Leatherman. So I want
4 you to -- if you could briefly describe the enemy activity around OP
5 Mest when you were up on that bunker.

6 CDC: We are going to object. We had a very limited direct.

7 PHO: Yeah, I am going to scope this. Keep it within the scope
8 of what the defense questioning was.

9 ATC: I think the only scope here is whether or not it is
10 relevant to the limited scope and purpose of this hearing. And the
11 limited scope and purpose is whether or not he, before the enemy,
12 commits misconduct.

13 CDC: Then you should have called him as a witness. You didn't
14 have him on your list.

15 PHO: I am going to sustain the objection.

16 ATC: Okay. No further questions. Thank you.

17 PHO: Any government -- or I am sorry.

18 Defense, redirect?

19 DC: Nothing further.

20 PHO: All right. Let me take a look at my notes real quick.

21 [Pause.]

22 PHO: I don't have any further questions.

23 Permanent or temporary excusal?

1 DC: He can take off. Permanent.

2 PHO: Okay.

3 [The witness was permanently excused, duly warned, and withdrew.]

4 PHO: Next witness?

5 DC: The defense calls Mr. Curtis Aberle.

6 **CURTIS ABERLE, civilian, was called as a witness for the defense, was**
7 **sworn, and testified as follows:**

8 **DIRECT EXAMINATION**

9 **Questions by the trial counsel:**

10 Q. Sir, before we proceed, I need to give you a caution.
11 Please be advised that, while you are testifying if you are asked any
12 question that you believe may require a response containing
13 classified information, you have a personal responsibility to notify
14 the preliminary hearing officer prior to answering. At no time
15 should you disclose any classified information while this hearing is
16 in open session. Do you understand?

17 A. I do.

18 Q. Please state your full name and current duty station.

19 A. My name is Curtis James Aberle. I am a family nurse
20 practitioner and Chief of McWethy Troop Medical Clinic part of Brooke
21 Army Medical Center here on Fort Sam Houston.

22 TC: Thank you.

23 Defense?

1 **Questions by the defense counsel:**

2 Q. Good morning, Mr. Abele.

3 A. Good morning.

4 Q. We will have you speak up so that everyone can hear you.

5 A. Okay.

6 Q. Could you, please, describe to Lieutenant Colonel Visger
7 your military experience?

8 A. Certainly. I have been associated with the military for
9 over 32 years. I served 26 years in the military; 12 years enlisted,
10 14 years as an officer -- as an Army Nurse Corps Officer. I have
11 been a civilian for the past 7 years. My role was a combat medic for
12 the first 12 years and then a family nurse practitioner for the last
13 13.

14 Q. What role do you play on Fort Sam Houston with regards to
15 preparing physical profiles for Soldiers?

16 A. I am considered the subject matter expert for the Fort Sam
17 Houston for profiling. I train new providers, company commanders,
18 first sergeants; and I guide my staff on how to prepare DA 3349s.

19 Q. How long have you known Sergeant Bergdahl?

20 A. Approximately 15 months.

21 Q. How did you come to get to know him?

22 A. I was assigned to be his primary care manager by the Brooke
23 Army Medical Center Command.

1 Q. And what other information did you have about him to deal
2 with him as a patient?

3 A. I was able to review his records, both inpatient and
4 outpatient, prior to him being released from an -- as an inpatient
5 from BAMC.

6 Q. Could you, please, describe some of the medical conditions
7 that he was facing when you first came to know him back in about June
8 2014?

9 A. Yes, sir. Sergeant Bergdahl suffers from -- both of his
10 lower legs -- I am going to try and put this in layman's terms -- in
11 both of his lower legs, he suffers from nerve damage -- muscular
12 nerve damage. We call it peripheral neuropathy. He has injured his
13 lower back and has some degenerative disc disease in his lower back;
14 and his left shoulder has been injured, and he suffers from decreased
15 range of motion from that.

16 Q. When you were looking at these conditions, what was the
17 cause of them?

18 A. According to the record and according to Sergeant Bergdahl,
19 during captivity, he was held in a position -- in a crouch position,
20 that would have compressed the muscles and nerves from the knees and
21 down below for an extended period of time, causing the nerve and
22 muscular damage.

23 Q. How long was he in captivity?

1 A. Five -- I guess, five years.

2 Q. Were you able to consider whether the medical problems that
3 he had when you first saw him, were -- existed before he was in
4 captivity?

5 A. It is my understanding he had a clean bill of health prior
6 to captivity and all these injuries were suffered during his
7 captivity.

8 Q. Okay. The form that you are the subject matter expert on -
9 - the Department of the Army Form 3349, what is the philosophy behind
10 the permanent profile or the profile form?

11 A. The philosophy behind that is that, as a primary care
12 manager, we want to ensure that our patients don't injure themselves
13 further, that we apply the appropriate duty-limiting conditions to
14 them but also apply the regulation, AR 40-501, and as far as
15 retention standards go from Chapter 3, and then also be a good
16 steward of the Army's resources. So it is up to the primary care
17 manager, like myself, to determine if an injury, illness, or disease
18 meets those retention standards in Chapter 3; and then, if they
19 don't, we refer our patients to the medical evaluation board.

20 Q. And when do you initiate a permanent physical profile?

21 A. A permanent profile is issued when a disease, condition, or
22 illness meets what we call the medical retention determination point.
23 This can be -- it is individually based. So we look at each

1 individual disease, injury, or illness; and we determine whether the
2 condition is at a stable state or needs further workup. If it is at
3 a stable state and there is a permanent disability and the Soldier
4 can no longer do their military duties, then we would say that they
5 meet -- that they're at the medical retention determination point,
6 and we would refer them to the MEB.

7 Q. Did you issue Sergeant Bergdahl a permanent profile?

8 A. I did.

9 Q. When did you do that?

10 A. I don't remember the exact date, but it was approximately
11 12 months from the time that he started medical treatment.

12 Q. Why 12 months?

13 A. According to Army Regulation 40-501, 12 months is the
14 determination point when someone has an injury, illness, or disease
15 that has met the MRDP, the medical retention determination point,
16 they must either get a permanent profile or be sent to the MEB.

17 Q. I am now going to hand you what our court reporter has
18 marked as Defense Exhibit Delta. And I am going to keep that there
19 with you one second.

20 Mr. Aberle, do you recognize that form?

21 A. I do.

22 Q. What is it?

23 A. This is a DA Form 3349.

1 Q. And who is it in relation to?

2 A. Sergeant Bowe Bergdahl.

3 Q. Who signed that form?

4 A. I did and my immediate supervisor, Colonel Kevin Moore,
5 did.

6 Q. Okay. Now, let's talk about this. Could you, please, read
7 for everybody what you wrote in block 8 of the form?

8 A. In block 8, which is the functional limitations and
9 capabilities and other comments, I wrote, the Soldier is
10 non-deployable; no standing in formation longer than 10 minutes; run
11 at own pace and distance; upper body exercise at own pace and
12 distance and resistance; no lifting over 40 pounds; this profile will
13 be adjusted at the completion of the MEB/PEB process.

14 Q. Thank you. Now, I would like to look up that the top of
15 this form. I see six letters written. P-U-L-H-E-S. Could you,
16 please, go down those one by one?

17 A. Certainly. The "P" stands for general physical. This
18 indicates to commanders and HR folks and medical staff that this is
19 the -- kind of the metabolic disorders if you will that someone may
20 have an injury or illness such as heart disease, diabetes, Crohn's
21 disease.

22 "U" stands for upper extremities.

23 Q. Why don't we take them one by one?

1 A. Okay.

2 Q. That might be easier for everyone to understand.

3 Under the "P" block you wrote 3. Can you tell us why you
4 did that and what it means?

5 A. Yes, sir. So, under the "P," general psychical, it
6 coincides with "J" in block 5, living in an austere environment
7 without worsening a medical condition. With Sergeant Bergdahl's --
8 particularly in regard to his lower-extremity injuries, he would not
9 be able to live in an austere environment without worsening that
10 medical condition. Therefore, the "P" would end up being a 3.

11 Q. Describe his ----

12 PHO: Before you go on, what does 3 signify?

13 WIT: Sir, 3 signifies that there is significant limitations to
14 the Soldier's duty in accordance with their MOS.

15 PHO: I apologize. Go ahead.

16 Q. Thank you. I appreciate that.

17 In "U," you also wrote 3. Describe what "U" is and why you
18 wrote 3 for Sergeant Bergdahl.

19 A. "U" is for the upper extremities. His limitations of his
20 left shoulder would indicate a level of 3 since he is no longer able
21 to sustain or heavy lifting overhead or do pushups.

22 Q. In the block "L" you also wrote 3. Tell us what that is
23 and why it applies to Sergeant Bergdahl.

1 A. "L" stands for lower extremities. And this is where the 3
2 would equate to his inability to be able to run, and also it ties in
3 his lower back injury.

4 Q. In "H" you wrote 1. What does that mean?

5 A. "H" is for hearing. And there are no deficits with his
6 hearing; so he would be a 1, which means that there are no deficits.

7 Q. In the fifth block, "E," you also wrote 1. What does that
8 mean?

9 A. "E" is for eyes. And, again, he has no deficits that would
10 be a duty-limiting condition, so he would be a 1.

11 Q. In "S" you also -- in "S" you wrote 3. What does that mean
12 and why did you write it for Sergeant Bergdahl?

13 A. "S" stands for psychological conditions; and with his
14 diagnosis of PTSD and due to the nature of his captivity, I decided
15 to put that as a 3.

16 Q. What information did you base that on in concluding that it
17 was a 3?

18 A. I based that on collaborating with his treating
19 psychologist and the record.

20 Q. Now, I would like to take this to a real-world example. A
21 few months ago, Sergeant Bergdahl took a modified version of the
22 Army's physical fitness test. Could you tell us what happened when
23 he tried to take the physical fitness test?

1 A. Sergeant Bergdahl presented to me several hours after the
2 physical fitness test with swollen legs without pitting edema, but he
3 did have edema, meaning his legs were swollen, to the point where he
4 could not wear Army boots and he was limping.

5 Q. And how long was he out of commission after taking this PT
6 test?

7 A. I believe we put him on no boots for several days and,
8 obviously, no running or walking around for about 7 to 10 days if I
9 remember right.

10 Q. What event during the physical fitness test triggered this?

11 A. According to Sergeant Bergdahl, he had tried to walk the
12 APFT, which is a 2-and-a-half-mile walk.

13 Q. So, walking 2-and-a-half miles caused him to be laid up for
14 a week?

15 A. Yes, sir.

16 Q. Are you trained to identify Soldiers who come to you
17 seeking to exaggerate their conditions?

18 A. Yes, sir.

19 Q. Did you notice any of that with Sergeant Bergdahl?

20 A. Not at all.

21 Q. What is your opinion about whether he is medically
22 qualified, not just for the duties of an 11 Bravo but to remain in
23 the military?

1 A. I don't believe -- it is my opinion that Sergeant Bergdahl
2 does not meet retention standards and should not remain in the
3 military.

4 Q. Knowing about his captivity and his diagnoses, would you
5 recommend that he be deployed again?

6 A. No, sir.

7 Q. What was your recommendation for whether he should go to a
8 medical evaluation board?

9 A. I recommend that he goes through a medical evaluation
10 board. Can you clarify that, please?

11 Q. You recommended that he go through a medical evaluation
12 board. What would that mean for him if he did get an MEB?

13 A. What it would mean for him would be that he would be able
14 to go through the integrated disability evaluation system, the
15 Congressionally mandated VA/DoD system that would illustrate fully
16 his disabilities and allow him to receive VA benefits as well as
17 determine whether he is fit or unfit for service.

18 Q. How will an MEB assist Sergeant Bergdahl?

19 A. It would assist him by establishing this DA 3349 as it
20 being permanent, you know, as adjudicated by the physical evaluation
21 board, the PEB. And it would benefit him by allowing him to get VA
22 benefits for his injuries and also possibly medical retirement from
23 the military.

1 Q. Based on the medical conditions he experienced in
2 captivity, how much ongoing care will he require?

3 A. He'll require lifetime care.

4 Q. How will his work and life opportunities be limited by his
5 medical conditions?

6 A. I believe he will not be able to run or hike an extended
7 period of time. He will not be able to walk extended distances. His
8 ability to lift over 40 pounds will be very limited. His ability to
9 use his upper body for overhead lifting will be very limited.

10 Q. A purpose of this Article 32 is to recommend a disposition
11 of the charges. If you had to recommend between a medical evaluation
12 board or a court-martial, what would you recommend?

13 A. As a health care provider, I would recommend he go through
14 the MEB.

15 DC: Nothing further.

16 PHO: Government?

17 TC: No questions.

18 PHO: All right. I have a follow-on question, and I will wait
19 for a defense objection or a government objection for that matter.

20 **EXAMINATION BY THE PRELIMINARY HEARING OFFICER**

21 **Questions by the preliminary hearing officer:**

22 Q. You mentioned the MEB process. What impact would a finding
23 of "not in the line of duty" have upon that process?

1 Is there an objection from either side?

2 TC: This is beyond the limited scope and purpose of this
3 hearing, sir.

4 PHO: I think it goes to disposition.

5 TC: That would not be a disposition within your purview to
6 recommend, sir.

7 PHO: No, but it is a disposition that I should consider in the
8 overall total picture -- you know, the 306(b) factors -- that I
9 should consider in making a disposition recommendation.

10 TC: Does the defense object to that question?

11 PHO: Is there a defense objection?

12 CDC: Can we confer for a minute, Your Honor -- or Colonel?
13 Excuse me.

14 PHO: Certainly.

15 [Pause.]

16 CDC: Could you re-state the question just so we can focus
17 clearly on ----

18 PHO: I believe I can do that.

19 What impact would a finding of "not in the line of duty" --
20 if the injuries were incurred not in the line of duty -- would it
21 have upon the MEB process and receiving of care after Sergeant
22 Bergdahl leaves the military.

23 DC: No objection to your question.

1 PHO: Government? Do you stand on your previous ----

2 TC: Right.

3 PHO: I am going to go ahead and overrule your objection. I will
4 hear the question [sic].

5 **The questions by the preliminary hearing officer continued as**
6 **follows:**

7 A. Sir, the line of duty investigation would be separate from
8 the MEB. The MEB would go forward, and the PEB would consider the
9 line of duty investigation, which his initiated by the command, in
10 determining the applicability to Sergeant Bergdahl's disposition as
11 far as receiving military or VA benefits.

12 Q. So it is a factor in consideration. It is not a -- the
13 command will decide whether or not he should be receiving benefits?

14 A. Correct, sir.

15 Q. Okay. But it's not -- if it is not in the line of duty, no
16 benefits -- it would be the commander's decision?

17 A. It would be the PEB's decision.

18 Q. PEB's.

19 A. The MEB process -- the IDES process would continue. And it
20 is my understanding that the line of duty investigation, yes or no,
21 goes to the PEB for final adjudication.

22 Q. And do you happen to know what criteria they apply in
23 deciding whether -- in deciding how to consider that line of duty?

1 A. I don't.

2 PHO: All right. Any questions based on mine?

3 TC: No, sir.

4 DC: None.

5 PHO: Permanent or temporary excusal?

6 DC: Permanent.

7 PHO: Okay.

8 [The witness was permanently excused, duly warned, and withdrew.]

9 PHO: Defense?

10 DC: We request a 10-minute break before the next witness.

11 PHO: Okay. I will make it 15. We will go until --

12 Government, do you have something?

13 ATC: Are we going to -- so we can have the witness lined up, who

14 will that next witness be?

15 CDC: It is Major General Dahl.

16 ATC: Okay.

17 PHO: So we will have him standing by, lined up, ready to go at

18 1000 hours.

19 **[The Article 32 hearing recessed at 0944, 18 September 2015.]**

20 **[The Article 32 hearing was called to order at 1000,**

21 **18 September 2015.]**

22 PHO: All right. The hearing is again called to order. The

23 parties who were present at the last recess are again present.

1 Defense, please call your next witness.

2 CDC: Yes. Please call Major General Kenneth R. Dahl.

3 **MAJOR GENERAL KENNETH R. DAHL, U.S. Army, was called as a witness for**
4 **the defense, was sworn, and testified as follows:**

5 **DIRECT EXAMINATION**

6 **Questions by the trial counsel:**

7 Q. Sir, I need to read you a caution. Please be advised that,
8 while you are testifying if you are asked any questions that you
9 believe may require a response containing classified information, you
10 have a personal responsibility to notify the preliminary hearing
11 officer prior to answering. At no time should you disclose any
12 classified information while this hearing is in open session.

13 Do you understand?

14 A. I do.

15 Q. Sir, could you, please, state your full name, rank, and
16 unit of assignment?

17 A. Kenneth Robert Dahl, Major General, United States Army. I
18 am most recently assigned as the Deputy Commanding General of I Corps
19 at Joint Base Lewis-McChord.

20 TC: Thank you.

21 Defense?

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

23 Q. Good morning, General.

1 A. Good morning.

2 Q. Can you -- you know Sergeant Bergdahl -- you have met
3 Sergeant Bergdahl?

4 A. I have.

5 Q. And you know that he is sitting to my right, down a couple
6 of seats. Can you state for Colonel Visger how you became involved -
7 - or how you came to be involved with Sergeant Bergdahl?

8 A. Yes, I can. While I was serving at Joint Base
9 Lewis-McChord as the deputy commanding general there was a --
10 shortly, if I recall, it was a week or so after Sergeant Bergdahl was
11 recovered -- there was a tasker that went out from the Headquarters,
12 Department of the Army, I believe, to the major commands in the Army
13 asking for an officer -- a candidate -- nominees to potentially serve
14 as the investigating officer for an Article 15-6.

15 The criteria as I recall them were, we wanted a major
16 general. We wanted somebody who was from the operational side of the
17 Army, somebody who had recent Afghanistan experience. And they were
18 going to be -- needed to be available almost immediately and probably
19 for a period of about 60 days.

20 So, as the DCG, I saw that traffic on the tasker, and I
21 counted them up. And I recognized that there were probably about
22 three of us; so I began to advocate of the other two, but I failed.

1 And I received notice a day or two later that I was going to be the
2 investigating officer, which I understood why.

3 Q. Certainly.

4 A. And I sort of saw it coming. I said, really, this tasker
5 is kind of made for me but -- so that is how it happened.

6 Q. What is it that made you think the tasker was tailor made
7 for you?

8 A. Well, given those criteria, there were only a couple others
9 that really met that criteria. And, frankly, they were in positions
10 where it would have much more difficult for them to depart their core
11 responsibilities and be gone for 60 days than mine. I mean, I Corps
12 is a very large organization. I was the deputy, not the commander.
13 So my absence would have been a lot easier to back fill than the
14 others, so I pretty much saw it coming.

15 Q. And did you proceed, in fact, to perform the duty of
16 AR 15-6 investing officer?

17 A. I did. I think a couple of days went by before I received
18 a phone from the Vice Chief of Staff of the Army telling me that, of
19 the nominees, I was selected. I believe it was the next day I flew
20 to Washington D.C. to get my appointment orders from Lieutenant
21 General Grisoli, the Director of the Army Staff.

22 Q. Did you have any help on this project?

1 A. I did. I had a great deal of help. When I first arrived
2 in Washington D.C., I was offered the opportunity, frankly, to
3 conduct my investigation in Washington D.C. And I think that there
4 actually may have even been an assumption that that is what I was
5 going to do. And that was not my assumption, so I explained to them
6 that I was going to return back to Washington State and conduct my
7 investigation from there. I really didn't see much value in doing it
8 in Washington D.C. versus Washington State. Again, Joint Base
9 Lewis-McChord is a very large installation. So, of the experts that
10 I would need -- subject matter experts, technical experts -- we have
11 an abundance of that kind of talent, you know, at Joint Base
12 Lewis-McChord. So I thought that it would be better to go back, you
13 know, sort of separate ourselves from the noise and work with a team
14 of people that -- I already knew many of them.

15 So I did, and we went back to -- the only thing I asked for
16 from outside of Joint Base Lewis-McChord was a couple of lawyers to
17 help me on the legal aspects of things. And that is because I work
18 quite a lot with the lawyers at Joint Base Lewis-McChord, and we keep
19 them pretty busy. And I didn't want to distract them from the work I
20 was already giving them to do. So, other than that, I assembled a
21 team at Joint Base Lewis-McChord.

22 Q. How many people were on your team?

1 A. I believe it was 22. It was a very diverse group of
2 people. It sort of was diverse, you know, not necessarily
3 deliberately; but it just turned out that way.

4 As I was returning to Joint Base Lewis-McChord -- as I was
5 flying back, you know, at that time I thought to myself, I don't know
6 Sergeant Bergdahl. I don't know if he is going to want to speak to
7 me at all. Really, what I needed to do was to understand the intent.
8 What was going through the mind of a private first class at the time,
9 you know, on a platoon combat outpost in Afghanistan; and I am a 55
10 year old major general. So I thought, "I need a platoon sergeant. I
11 need an infantry platoon sergeant," who is going to be a lot more --
12 closer to, you know, being able to provide me some input from that
13 small unit leader perspective. So the first person identified was an
14 infantry -- sergeant first class infantry platoon sergeant.

15 And then, I knew I would need some intelligence analyst,
16 some people who are familiar with conducting, you know, good
17 investigations. Some -- a communications person to help me when we
18 were traveling. A psychologist, a psychiatrist, financial experts.
19 So we ended up pulling together about 22 folks. Generally speaking,
20 I think it was -- I want to say we had 9 officers, 11 enlisted, and 2
21 civilians. The two doctors were both civilians. And it was pretty
22 evenly split I think gender-wise and then ethnic backgrounds was
23 also, you know, widely represented.

1 And I only point that out to you because that led me --
2 later, when I recognized -- when we would sit around the table and
3 have conversations at the end of the day -- and it was fairly open
4 and good dialogue going on amongst everybody -- it occurred to me
5 that this is the kind of group of people that would provide a good
6 deal of confidence, you know, at the end of the day, you know, that
7 we have found the truth.

8 Q. And I'm hearing you to say that you really got your hands
9 dirty on this?

10 A. I did.

11 Q. This was not supervising. You were hands on
12 investigating ----

13 A. Yeah, absolutely. Absolutely. Yeah, I wasn't doing
14 anything else but this.

15 Q. This was it?

16 A. This was it. I was not doing anything else but this.

17 Q. Was your staff and the available time adequate to the task?

18 A. Yes. I think in hindsight it was. I was offered the
19 opportunity to have access to military air when it was available. It
20 is available on an as-needed basis; and I didn't think that I was
21 going to have the priority, and sometimes I didn't. But when it was
22 available, I did get it. And that was very helpful in us meeting our
23 time line. Because we could fly to, you know, Tampa; and we could

1 work the whole way there on the plane which you can't do, you know,
2 on a commercial aircraft when you are changing planes and checking
3 baggage and all that. So that was a very efficient use of that.
4 That allowed us to stick with our time line.

5 And yeah, so I think I had -- frankly, by the time we
6 wrapped up, we really didn't have too much more that we had hoped to
7 accomplish or pursue or additional leads. I was a little late in
8 interviewing Sergeant Bergdahl as you'll recall. Other than that, it
9 went, pretty much, the way we had hoped.

10 Q. So how long did the investigation take from start to ----

11 A. Yeah. I'll say 59 days. There were 60 days -- my orders
12 said 60 days. And I had told the group -- I said, you know, "I would
13 like to be done in 60 days. I think we can be done in 60 days. We
14 have a lot of talent here." We had uninterrupted -- I mean, everyone
15 on my team was completely distraction-less. This was your -- you are
16 committed to this until we are done.

17 So with that amount of talent and 60 days; and probably the
18 only thing that really facilitated us, I think, was the mil air. And
19 we did a lot of -- a lot of interviews and things we did, we did over
20 the telephone. It was fine. People were very happy to do telephonic
21 interviews. So we didn't have to travel that much and turn all those
22 into sworn statements. So I think we did a good job.

1 I mean, when we started to get bogged down, you know, we
2 added more people. That is how we ended up with 22. At first, I
3 started with one paralegal. I ended up with two or three paralegals
4 and a court reporter. And that is just because they just couldn't
5 keep up with the interviews. We were doing three, four, five a day;
6 and we were wearing them out. So we started to pull in some
7 additional help.

8 Q. Roughly, how many people were interviewed?

9 A. I think it was 57 if I'm not mistaken.

10 Q. You generated a report?

11 A. I did.

12 Q. Have you had a chance in preparation for today to look back
13 at it?

14 A. I have.

15 Q. And I am referring mostly but not exclusively to the
16 executive summary.

17 A. Right.

18 Q. A small point perhaps, but I will ask it anyway.

19 A. Uh-huh [indicating an affirmative response].

20 Q. There are two dates on the executive summary.

21 A. Uh-huh [indicating an affirmative response].

22 Q. I don't know -- do you need to see it? Would it help
23 you ----

1 A. No. I have it right here [pointing to his head].

2 Q. I imagined that was the case. So why are there two dates
3 on the executive summary?

4 A. Sure.

5 Q. Just to put that to rest.

6 A. No. Sure. I mean, I was very well aware from the very
7 beginning that this was a high-profile case, which is one of the
8 reasons -- another one of the reasons why I thought it was important
9 for us to finish in 60 days. I mean, my orders said 60 days; and I
10 wanted to finish in 60 days. I didn't want anyone to -- if I were to
11 finish early, you know, accuse me of doing that for some particular
12 reason; or if I were to finish late, accuse me of doing that for some
13 particular reason. So I said the best thing for us to do is to do
14 our job and do it in 60 days. If I can't do it in 60 days, then I
15 will ask for an extension. And I think you will recall, I almost
16 considered that, because my interview for Sergeant Bergdahl came
17 quite late, and I thought I might need to. But in the end, I did not
18 need to. So, on day 59, you know, I flew back to Washington D.C. and
19 presented my recommendations and findings.

20 So my investigation at that point was complete. I had
21 gathered all the facts. I gathered all the information that I was
22 going to gather. You know, we had separated fact from fiction. You

1 know, I believe we found the truth; and then based on the truth, we
2 made our findings and recommendations.

3 I asked, at that point, for additional time to write the
4 report because I thought that, as you know, there is 300-plus pages
5 of sworn testimony of Sergeant Bergdahl that came at the end. And I
6 thought it was necessary for me to tie his testimony -- his sworn
7 statement to all the information that I had gathered previously as
8 best as I could to corroborate it so it didn't just have to stand,
9 you know, on its own. Me and the team saw the connections, but that
10 wouldn't have been obvious to people who weren't as intimate with the
11 effort as we were. So I asked for the additional time.

12 That is why I want to say it was the 14th of August, which
13 was about day 59, when I briefed the findings. And then 45 days
14 later is when I turned in the report, and that was the additional
15 time I asked for to do the writing. I, for the most part, released
16 my team back to do their work because we were done investigating.
17 And I only kept a small number of people to help me with the actual -
18 - the paralegals doing the footnotes, you know, creating the actual
19 document itself. I turned that in on the 24th of September or
20 whatever the date is there on the top right of the front page.

21 Q. 28th.

22 A. 28 September. Okay. So it's not exactly right
23 here [pointing to his head].

1 Q. Close.

2 A. I think that is 45 days after I had asked for the time.
3 And I turned it in, and I dated it. And then I didn't sign it
4 because it still had to go through legal review, and that's typical.
5 I mean, that is typical. The difference between the date on the
6 front and the date next to my signature at the very end, you know, is
7 the amount of time that it took to do the legal review back in
8 Headquarters, Department of the Army.

9 Q. For purposes -- you are obviously aware of what the purpose
10 of this investigation is?

11 A. Sure.

12 Q. Of this hearing -- for those purposes, were there any
13 material changes between your report as it stood ----

14 A. No.

15 Q. ---- before the legal review and after the legal review?

16 A. No. No. No.

17 Q. Great. Okay.

18 A. Absolutely not. I mean, I would like to elaborate on that
19 to say I was very comfortable with all of the changes -- all of the
20 things that were changed during that period of time between those
21 dates. They all were done in consultation with me. Some of them I
22 said, "Nope, we are leaving that in." A lot of them I said, "Yeah.

1 Okay. I am comfortable taking that out. It doesn't really change
2 anything." And so the answer to your question is no.

3 Q. You indicated that you did, ultimately, have an opportunity
4 to interview Sergeant Bergdahl?

5 A. I did.

6 Q. That interview was delayed a little bit, was it not?

7 A. It was.

8 Q. Do you remember the reason for that?

9 A. I sure do.

10 Q. What was it?

11 A. The first reason I delayed was I was waiting for the early
12 phases of Sergeant Bergdahl's reintegration to be completed, which I
13 thought was important.

14 At the time I was appointed as the investigating officer --
15 again, you have to put this into context. The first priority for
16 everyone at that time was Sergeant Bergdahl's physical health, you
17 know, and his mental and emotional health, you know, having just come
18 back from captivity.

19 There was also an interest in learning as much as we could
20 from him -- the Army learning as much as we could from him about his
21 -- the circumstances of his captivity and his capture so that they
22 could learn from an intelligence perspective, you know, what might be
23 useful.

1 There was also an effort to learn from him as much as could
2 be learned from him from the experts who were involved in survival,
3 you know, evasion ----

4 Q. The SERE?

5 A. The SERE folks.

6 Q. S-E-R-E?

7 A. That is right. Survival, escape, resistance, and evasion
8 folks. Anything that he had that was valuable, you want to very
9 quickly get that, you know, back into the force because, if a week
10 later someone is captured, you want to be able to benefit from that.
11 So those were all very high priorities.

12 There was also an FBI criminal investigation that I
13 understood was ongoing for kidnapping.

14 Q. That is not of him; that is of someone else?

15 A. That is correct. That is correct. Not of him. I think it
16 was the Haqqani network.

17 I was not personally involved in any of that, but I was
18 very aware that all of that was taking place. I also was aware that,
19 in the early stages, Sergeant Bergdahl didn't have a great deal of
20 stamina. You know, he had just -- he needed some time to recover.
21 So, with all of those competing demands on his time, he still was
22 only able to give -- reasonably give, short periods of time in the

1 morning and then in the afternoon. And then, over time, he was able
2 to spend a lot more time with those de-briefers and folks.

3 So I wanted all of that to run its course for a number of
4 reasons. One, I thought those were a higher priority. Two, I
5 thought, once I start talking to him about the circumstances of his
6 departure from the COP, it could completely derail any cooperation he
7 might offer in all those other areas. And that seems reasonable to
8 me. So I wanted to avoid interfering with any of that.

9 The second -- so, when I understood that he had completed
10 his reintegration, and that was the time when he actually left Army
11 South and went to Army North because that is the completion of their
12 responsibilities -- that is when I flew down here to San Antonio to
13 interview him.

14 We -- that is when we first learned that he had you to
15 represent him. And then you and I had a conversation that you did
16 not want me to speak to him until you could be, you know, present.

17 Q. That was by telephone.

18 A. That was by telephone. Yeah, we talked on the phone. In
19 fact, John -- John Hamner, my SJA, had advised me that you -- I don't
20 know that the two of you had spoken; but he had been informed one way
21 or another that you were representing him and that you didn't want us
22 to speak. And we were already on our way here or may have already
23 been here at the time. So I -- again, wanting to stay in the time

1 line, said, "Well, you know, we can work -- this team can work from
2 anywhere. We just need office space and connectivity." So we began
3 to work from here in hopes that, you know, in a few days you would
4 come out. You had said you wanted to read the 15-6 investigation,
5 the original 15-6 from 2009. So I offered to get you a rapid
6 reinstitution [sic] of a security clearance and have a sergeant first
7 class on the team bring the 15-6 out to Yale and meet with you, and
8 then come on out. But I understood, you know, in your academic
9 field, you know, your time off is between semesters and you had
10 already planned a vacation to Mexico with your wife. And so we
11 weren't going to get that opportunity.

12 At that point, it was important to me -- and, again, you
13 and I over the phone negotiated an accommodation. I thought it was
14 very important at that point -- frankly, I was thinking about
15 Sergeant Bergdahl. I was thinking this is a Soldier who wants to
16 tell his story. Tis is -- you know, I want to hear his story. At
17 the time -- again, to put it in context -- I was taking a beating,
18 you know, out in the media, not necessarily from the media but from
19 other folks because I had not interviewed them. And I didn't want to
20 interview anybody until I had talked to Sergeant Bergdahl.

21 Again, in the context, the original 15-6 had sworn
22 statements, you know, from most of the people that I later

1 interviewed. So I had sworn statements already, you know, that were
2 taken shortly after.

3 Q. So was Sergeant Bergdahl under a duty to speak with you?

4 A. He was not. He was not. You know, I did -- you said, "I
5 would prefer you not do this." I said, "Well, you can't keep me from
6 going to see him"; but if I go see him, all he is going to do is
7 invoke his rights and that is not very helpful. I mean, we are
8 trying to develop a relationship here so we can get to the truth."
9 And so I didn't want to do that. So, no, he was not under an
10 obligation to do that. Well, he would have been had I gone; and then
11 he would have had to invoke his rights.

12 Q. Right. But it didn't play out that way?

13 A. It did not play out that way.

14 Q. Did he, in fact, submit to an interview with you?

15 A. At the end of the investigation, 2 weeks later, yes,
16 absolutely.

17 Q. Right. Where was that?

18 A. That was done here at the Joint Base San Antonio, Fort Sam
19 Houston.

20 Q. How long did it last?

21 A. About a day and a half. The first day, you know, I think
22 we went from 7:30 in the morning until five o'clock or so. I mean,
23 we barely broke. You know, we took a couple comfort breaks and a

1 short lunch. Other than that, you know, we went all day long from
2 about, you know, 7:30 in the morning until about 1730 or so.

3 Q. Resulting in a transcript of 371 pages?

4 A. That is correct. We picked it up the next morning, and the
5 next morning we went for -- until about lunchtime if I recall
6 correctly -- right before lunch I think.

7 And, frankly, at the end of that, I had no more questions
8 to ask him and he had more story to tell me. So we exhausted each
9 other, and we were done.

10 Q. In the process, did he execute a waiver of his right to
11 silence?

12 A. He did in the very beginning.

13 Q. And I take it, in addition to being physically exhausted,
14 he also exhausted your list of questions?

15 A. He did. He did.

16 Q. Did your ability to interview Sergeant Bergdahl help you
17 complete your assigned duty as investigating officer?

18 A. Yeah, absolutely.

19 Q. Do you have an opinion as to whether he was truthful to
20 you, based on your interaction with him and your investigation?

21 A. I do. I think he was truthful.

22 Q. Did you speak with enough people to know his reputation for
23 truthfulness?

1 A. I did.

2 Q. And what did you learn?

3 A. I learned from the vast majority of them -- I specifically
4 asked them, "What do you think he is going to tell me?" And the vast
5 majority of them said, "He is going to tell you the truth."

6 Q. What did you find, in the course of your investigation,
7 about his experience in the United States Coast Guard?

8 A. It was brief; 28 days I believe -- 23 days. He joined the
9 Coast Guard, you know, looking for some adventure. He was interested
10 in the seas. He was interested in saving lives, you know, doing
11 something really worthwhile. So he enlisted. I don't believe he
12 told his parents until afterwards. I don't think he told Ms.
13 Dellacorva until afterwards either, but I am not sure. She might
14 have known ahead of time.

15 And then he went to the MEPS station in Boise, Idaho. He
16 went to Cape May, I believe, for the Coast Guard basic training. And
17 then it just -- he wasn't ready for it. I mean, he became
18 overwhelmed and then found himself in the hospital and then was
19 released.

20 Q. But was he -- do you recall what kind of separation he
21 received?

22 A. I don't recall the codes or the names, but it is the
23 equivalent of an early entry, you know, separation.

1 Q. Entry-level separation?

2 A. Entry-level separation.

3 Q. Does that sound ----

4 A. Yeah, entry-level separation.

5 Q. And can you put any flesh on what the facts were
6 surrounding his crashing and burning at boot camp?

7 A. Right. I think it just -- I mean, my impression from
8 having spoken with him in his interview and also from whatever access
9 we had to Coast Guard records was that it is not atypical. You know,
10 a certain percentage of recruits, I believe, in all the services
11 enter basic training and find out it wasn't such a good idea; that
12 they weren't ready for it. And, you know, in that environment with a
13 lot of discipline, a lot of focus, a lot of drill sergeants and
14 drill-sergeant-type folks, you know, in your face and challenging you
15 -- I think it just overwhelmed him. And after a few weeks, he
16 couldn't take it anymore.

17 I believe he was found in the barracks, sitting on the
18 floor. He had, you know, some blood on his hands; but I believe the
19 blood had to do with a bloody nose. It didn't have to do with
20 anything else. And I think that is what the -- if I recall
21 correctly, that is what the doctor's, you know, concluded -- that
22 this was an entry-level separation. This is a Soldier who is -- he
23 is not ready for this.

1 Q. Was it -- to your understanding, was this -- was the
2 gravamen of the problem a mental health or mental hygiene issue?

3 A. I don't believe so. I don't believe so. I think it was --
4 again, fell within that range of expectation. You bring a certain
5 number of Soldiers, Sailors, Airman, Marines, Coast Guardsmen into
6 your basic training, and a certain number of them are going to wash
7 out for a verity of reasons. And one of those reasons is that they
8 come in and just find out it is not exactly what I expected; this is
9 a little bit overwhelming to me.

10 Q. Do you remember what the Coast Guard paperwork said?

11 A. I don't.

12 Q. I might get back to that.

13 A. Sure.

14 Q. Colonel Rosenblatt I think is going to pick a page.

15 Thereafter, Sergeant Bergdahl enlisted in the Army.

16 A. Uh-huh [indicating an affirmative response].

17 Q. Is it correct that he required a waiver ----

18 A. It is.

19 Q. ---- in order to enlist?

20 A. It is correct that he required a ----

21 Q. What was the -- yeah. Can I approach the witness?

22 PHO: Certainly.

23 Q. Just to -- the boot camp.

1 PHO: And you are showing the witness the ----

2 CDC: This is Exhibit B -- Defense Exhibit B.

3 PHO: Is it the executive summary or the actual ----

4 CDC: It is the executive summary.

5 PHO: Okay.

6 Q. General, just take a second and look at it.

7 A. Sure.

8 [The witness reviewed Defense Exhibit B.]

9 Q. Does that refresh your recollection?

10 A. It does. Yeah.

11 Q. So now that you -- do you want to hold onto that?

12 A. No, that is fine.

13 Q. Any further thought on whether there was a psychological
14 component to Sergeant Bergdahl's ----

15 A. Not really. I mean, I changed -- you know, there is some
16 medical technical language in there to describe what I believe is the
17 typical response of, you know, a certain percentage, you know, of
18 young people who join the military and find out it is not right. So,
19 you know, minor pre-existing, you know, disorder or adjustment
20 problem or something like that. I mean, I think when someone washes
21 out, you are not going to say, "Well, they just washed out." There
22 has to be some -- a little bit more rigor and technical explanation
23 for that. And I think that that provides that. But I did not

1 interpret that as, you know, someone who has a mental health issue or
2 a behavioral health issue.

3 Q. I was asking you about whether Sergeant Bergdahl required a
4 waiver ----

5 A. Right.

6 Q. ---- in order to become a Soldier.

7 A. Correct.

8 Q. Why did he require a waiver?

9 A. For the technical language there. It says for ----

10 Q. Referring now to the Coast Guard entry-level separation?

11 A. Yeah, again. I am going to put this in layman's terms so -
12 - you know, I am not a recruiter, you know, or a doctor or a lawyer.
13 You know, in order for someone who has washed out, you know, for
14 those reasons, to come back in, you know, there needs to be a waiver,
15 and an interview to ensure that those -- ostensibly, you know, the
16 intent would be that those conditions don't exist and the same thing
17 is not going to repeat itself. So it did require, you know, a
18 waiver; and Sergeant Bergdahl did receive a waiver, you know, at the
19 appropriate levels and he entered the Army.

20 Q. As I recall -- and correct me if I am wrong -- actually,
21 let me phrase this as a proper legal question.

22 Were you able to locate anything that explained why the
23 waiver was approved?

1 [Pause.]

2 Q. Do you remember?

3 A. No. No, I don't -- no, I don't recall.

4 Q. How does -- changing subjects a little bit.

5 A. Uh-huh [indicating an affirmative response].

6 Q. Did you look into how Sergeant Bergdahl related to other
7 people? Was that part of ----

8 A. Sure.

9 Q. ---- your investigation?

10 A. It certainly came up, you know, during the course of the
11 investigation.

12 Q. What did you learn?

13 A. Sergeant Bergdahl was someone who, in the balance of time,
14 with other people and alone -- he spends, you know, the balance of it
15 alone rather than with other people; but that's really more out of
16 choice than, you know, than any other reason. He has friends, not a
17 huge number of friends but a smaller group of friends. He seems to
18 be motivated, you know, to help other people and also motivated to
19 present himself in a favorable light, give a favorable impression to
20 other people as well.

21 Q. Would it be fair to say that -- well, again, I will try to
22 frame this as a proper legal question.

23 How effective is he at forming interpersonal relationships?

1 A. I think he is a little challenged in that regard.

2 Q. We are talking about ----

3 A. Yeah. Yeah. Not now.

4 Q. But then?

5 A. Sure. I mean, really we are talking about 5 or 6 years ago
6 -- 6 years ago really and before.

7 A little bit challenged in that regard. I mean, I think a
8 lot of it had to do with the circumstances of his, you know, growing
9 up. I mean, he just did not grow up around large groups of people,
10 around a lot of his peers and so a little bit challenged in that.
11 But I think he also had the courage, you know, as he got older, to
12 recognize that and to pursue, you know, social relationships,
13 recognizing that it was going to be a challenge and to kind of get
14 through those. He is very selective about who he chooses to spend
15 his time with. He has very high standards and a very idealistic view
16 of people. So, if you don't measure up, you are probably not going
17 to get, you know, a second meeting.

18 Q. Just going back a little bit, you looked into his
19 upbringing.

20 A. I did.

21 Q. In a nutshell, what are the salient characteristics that
22 stand out in his -- the family structure and his young life?

1 A. Sure. Yeah. The most important salient aspects -- and
2 they are salient because they think they help to understand his
3 motive -- is that he is very idealistic. And I think -- again he, as
4 I understand it as we were able to discover, grew up not entirely off
5 of the grid but, you know, in a fairly unusual ----

6 Q. At the edge of the grid?

7 A. At the edge of the grid. A fairly unusual amount of
8 separation let's say -- not isolation but separation. And, you know,
9 so not a lot of social interaction, you know, early on during his
10 developmental years. That is something that I think would be beyond
11 a normal amount of social interaction.

12 Q. How about school?

13 A. Schooling was done at home. I think mainly by his mom, but
14 I am not entirely sure about that; but I believe so, because I think
15 his dad was working. So his mom schooled both he and his sister.
16 And I did not think that homeschooling was such a huge issue. A lot
17 of people are homeschooled and don't have, you know, social
18 interaction challenges; but I think it was a combination of
19 homeschooling, you know, and sort of being on the edge of the grid
20 that denied him, frankly, some normal social development
21 opportunities that would have made social interactions and making
22 friends, you know, a little bit easier for him.

1 I think they also -- during that time frame, he did a lot
2 of reading. I, frankly, find Sergeant Bergdahl to be very bright and
3 very well read. And I think that, in his reading, you know, he
4 internalized quite a bit of what he read. And I think that is also -
5 - there is an aspect of growing up in his family where it is -- there
6 is a fair amount of discipline and focus and moral and ethical
7 standards are very high. So I think, as he went through his
8 readings, you know, he attended quite a bit to those kinds of things
9 and internalized them; and it caused him to be someone who, you know,
10 had very idealistic -- unrealistically idealistic, you know,
11 standards and expectations of other people.

12 Q. We will get to that.

13 A. Uh-huh [indicating an affirmative response].

14 Q. Did you get a sense, again in a nutshell, of what kind of
15 Soldier Sergeant Bergdahl proved to be?

16 A. I did.

17 Q. What was that?

18 A. He was -- well, up until the point that he departed COP
19 Mest, he was a very good Soldier. And, you know, that comes from
20 testimony from the broad range of people in his own unit. You know,
21 it is not unanimous, you know, but it is not a weak generalization.
22 It is a pretty strong generalization that the people in his platoon
23 saw him as a good Soldier, one of the best privates in the platoon.

1 You know, always on time, always in the right uniform, always with a
2 clean weapon, always sharpening his knives. Willing to help other
3 people, volunteering for extra duty. One of the sergeants, I
4 believe, described him as the PFC that every sergeant wanted to have.
5 And I think -- oh, sorry.

6 Q. Did you get a chance -- and I think maybe you were driving
7 in this direction. Did you get a chance to get a fix on his
8 philosophy -- his philosophy of life?

9 A. I did. There is two, you know, when I presented my
10 findings and recommendations, I thought it was important to elaborate
11 on his interests in Ayn Rand and *Atlas Shrugged* and particularly the
12 character John Galt. I didn't get the impression that he was all
13 that interested in the politics of the book. He was much more
14 interested in the character, you know, John Galt, who is, again, very
15 idealistic and is willing to put himself out front and sacrifice
16 himself, you know, for a cause to stop the machine, stop the system,
17 you know, whatever it might be. And it occurred to me, you know, in
18 interviews with his brother-in-law, his sister, and other folks, and
19 some of his own writings -- and then during our interview that that
20 particular piece and that particular character had a great deal of
21 impact on how he saw himself and perhaps his role.

22 I also thought that his fascination with Asian culture -- I
23 thought that he had exhibited quite a bit -- in fact, I did not know

1 much about the Bushido Samurai Warrior Code until I heard that
2 Sergeant Bergdahl was interested in it. So I tried to learn more
3 about that, me and my team. There's a couple of aspects about that
4 that are fairly consistent with what I -- you know, what I know of
5 his conduct and behavior. One, being that if you see a moral, what
6 you perceive to be a moral wrong, that you are motivated to act
7 immediately, you know, to do something about that and that you do so
8 without any regard to your personal consequences to you or even
9 without any regard to whether or not you are going to succeed or
10 fail. You just move out and you do something smartly when you see --
11 when you perceive, you know, a moral wrong.

12 Q. Do you see a connection between that world view and the way
13 events unfolded in this case?

14 A. I do. I certainly do. And I see a connection, not only
15 for that final event which -- the one we are here about -- but also
16 in previous things. I mean, joining the Coast Guard perhaps, you
17 know, before he is -- before is ready, wanting to join the French
18 Foreign Legion before he is ready. You know, doing a number of
19 things that just sort of don't work out because he hasn't been
20 patient, taken the time to sort of think them through but, you know,
21 is motivated to take some action.

22 Q. Did you find out anything concerning his willingness to
23 deploy to Afghanistan? Was he a bit reluctant?

1 A. No, not at all. In fact, he was very motivated to deploy.

2 Q. And did you learn anything about his attitude toward the
3 military mission and fighting the Taliban?

4 A. I did. You know, there was a lot of discussion, you know,
5 back and forth. Frankly, a lot of -- again, in the first 30 days or
6 so before we interviewed anybody, you know, we were subject to a lot
7 of what was going on that had been written over the previous few
8 years some of which, you know, portrayed Sergeant Bergdahl as
9 frustrated with the mission, didn't agree with the mission, you know,
10 sympathetic to the other side -- you know, all those kinds of things.
11 I did not find any evidence to corroborate any of that during any of
12 my interviews or investigations with other agencies.

13 What I found was, you know, a Soldier who was: motivated
14 to go and serve in Afghanistan; that was frustrated because he, as a
15 PFC, was not getting to play a much larger role. I think he had
16 outsized impressions of his own capabilities, which again, I think is
17 consistent with what I have heard from people who grew up around him.
18 So that led to a frustration. "Why aren't I being able to carry, you
19 know, a sidearm in addition to my squad automatic weapon? Why can't
20 I do combatives? Why aren't we out there kicking in doors and
21 helping the Taliban [sic] to do more of this?" There were folks
22 doing those kinds of things, but it wasn't a PFC in a light infantry
23 platoon.

1 Q. Did you find any evidence that he was disposed to go over
2 to the other side?

3 A. No.

4 Q. Or assist the enemy?

5 A. No.

6 Q. Did you have occasion to get Sergeant Bergdahl's
7 explanation for leaving OP Mest?

8 A. I did.

9 Q. What was his explanation?

10 A. His explanation was very clearly detailed in the sworn
11 statement that he did during our interview, but Sergeant Bergdahl
12 perceived that there was a problem with the leadership in his unit.
13 And the leadership of that unit -- the problem with that leadership
14 in his unit was so severe, you know, that his platoon was in danger.
15 And he felt that it was his responsibility to do something to
16 intervene before something dangerous or something negative happened,
17 you know, to his platoon.

18 So his motivation was to have an audience with a general
19 officer so that he could explain, you know, his perceptions, you
20 know, to a general officer. He recognized that, as a PFC, he wasn't
21 going to have many of those opportunities. He was familiar with the
22 open-door policy and some of the opportunities that are there; but he
23 thought that the way to do this was to create a personnel recovery

1 event -- a DUSTWUN personnel recovery event, because he understood
2 that when a Soldier goes missing, an Airman, Marine -- when a service
3 member goes missing, then all the bells and whistles go off and we
4 really lean in to get that Soldier back. And this is going to go all
5 the way up to the top. And so he wanted to create, you know, that
6 event.

7 He was going to run from COP Mest, the platoon COP, to FOB
8 Sharana, which is about 31 kilometers; and he believed that he was
9 capable of running that, you know, during a period of darkness. He
10 understood that he was going to create this PR event, but then when
11 he got to COP Mest [sic] he would present himself and say, "I am the
12 guy you are looking for, and I am not saying anything until I can
13 talk to a General and tell him about this platoon."

14 Q. Do you remember any of the specifics that he referenced
15 when you interviewed him about why he thought conditions were in need
16 of repair in the unit?

17 A. I do. As he, himself, tells the story, it started, you
18 know, before he even joined the Army again, which goes back to
19 understanding the character development and being very idealistic.

20 When he describes his experience in basic training,
21 everyone in basic training is a disappointment except for Sergeant
22 First Class Olivera, who was a drill sergeant, and measures up. The
23 drill sergeant measures up to the ideal. Everybody else is a

1 disappointment; and this becomes, you know, very frustrating for him.
2 And he begins to draw parallels and generalizations from that that
3 other platoons are that way in basic training. And if basic training
4 is this way, then the Army is this way.

5 He moves to Alaska and when he is in Alaska he is
6 disappointed because, you know, again folks are saying things like,
7 you know, "Don't leave your wall locker unlocked," you know, and he
8 doesn't understand why you have to lock your wall locker because
9 these are people that we are going to be going to war with. You
10 know, "Why do we have to lock our wall locker? Are we worried about
11 them stealing from each other?" You know, that just doesn't measure
12 up with the ideal standard.

13 He was very disappointed in all of the exposure in the
14 National Training Center, which is one of premier war fighting
15 training organizations and facilities.

16 Q. What was the disappointment there?

17 A. He thought that the pre-deployment training was lame, I
18 think he might have described it as or, you know, as they were pagues
19 -- or I am not quite exactly sure but ----

20 Q. Wasted time?

21 A. Wasted time. I think, in his mind, he was expecting a much
22 more -- I think his expectations of training at the National Training

1 Center were more along the lines of what you would see from our
2 special operations units and not from a conventional military unit.

3 I asked him -- I recall in the interview, I asked him,
4 "Wasn't there anything or anyone that measured up?" And he said no,
5 which is, you know ----

6 Q. Then comes Afghanistan?

7 A. Right.

8 Q. So what got his goat in Afghanistan?

9 A. Yeah. It even starts before Afghanistan. So, when they
10 get back to Alaska, you know, they are having an inspection, a layout
11 of the platoon. And the platoon sergeant -- I'm sorry -- the
12 battalion commander and the battalion command sergeant major come
13 down to inspect the platoon, which frankly I find very impressive.
14 It is an excellent example of very strong leadership, not poor
15 leadership. But, you know, they called for the inspection. They
16 came down. They personally did it. They ensured that the standards
17 were met. And then they gave some remarks and some guidance to the
18 Soldiers who were getting ready to deploy.

19 You know, again, to put it in context, this was a unit that
20 had previously been in Iraq, a very kinetic environment. They were
21 home for 12 months, and then they were going to a new environment in
22 Afghanistan. The missions were going to be very different. The
23 Afghanistan mission was going to be much more counterinsurgency based

1 and not kinetic. There was going to be a lot more -- a lot less
2 shooting and fighting, a lot more assisting and advising and enabling
3 the Afghans and the international force.

4 Sergeant Major said, you know, "Look heroes, I know you all
5 joined the Army to rape, kill, pillage, plunder and you know, do all
6 that kind of stuff. You know, so did I. You know, and Iraq was
7 that way, but that is not what we are doing here. We are going over
8 there to assist the Afghans." And Sergeant Bergdahl, consistent with
9 what I knew about him, took that quite literally and said, "My
10 sergeant major joined the Army to be a rapist, to be a murderer, and
11 you know, and to be a thief," which, of course, is not at all what
12 the sergeant major was getting at. And I talked to all the other
13 guys in the platoon, and none of them took it that way. Most of them
14 recall him saying that. They put it in the proper context as to the
15 point that he was trying to make.

16 Q. Was that actually what he took away from that? That is
17 your understanding?

18 A. Yeah, it is. Yeah. I mean, it's what he said in his
19 interview that he thought, "I got a failure" -- and that's important
20 because this is the battalion command sergeant major. It is the
21 battalion command sergeant major who has an impeccable record, you
22 know, who has a great reputation. And yet, Sergeant Bergdahl's
23 perception of him was completely off the mark.

1 In Afghanistan, you know, again, he was only there 5 weeks.
2 I mean, you have got to realize, he wasn't in Afghanistan for a long
3 time. It was about 5 weeks. But very rapidly, you know, the
4 frustrations and disappointments continued to mount.

5 Q. Any specifics there that come to mind?

6 A. Probably the most important ones had to do with the
7 battalion commander at the time, Lieutenant Colonel Clint Baker.
8 Sergeant Bergdahl believed that was the wrong guy, you know, for his
9 job. He saw him on one occasion trying to discipline the Soldiers.
10 They were up on -- this had to do with the incident where there was a
11 reporter from *The Guardian* who had been out there interviewing some
12 of the Soldiers, some of this footage or photographs were posted to
13 the internet. They weren't in the proper uniform, and then some of
14 those Soldiers were disciplined for that.

15 Q. The colonel got on their case?

16 A. Correct. And he -- when the colonel went up to discipline
17 these Soldiers, he actually was driving by. He saw them, you know,
18 out of uniform and exposed in a very dangerous environment; stopped,
19 ran up to the hill, and really got in their case quite a bit.
20 Something that he is not naturally good at, frankly. And he didn't
21 have his command sergeant major with him, who would have been, you
22 know, the better person in that particular team of leaders to do it.
23 But he knew it needed to be done. And again, in my view, an example

1 of leader who is going to do what needs to be done even though he may
2 not necessarily be comfortable doing it. And he probably wished he
3 had his sergeant major with him, but he didn't. But he didn't allow
4 it to continue. He went up, and he kicked rocks; and he, you know,
5 went into a tirade to make sure that his point was being made.

6 Q. The rocks were -- was there something special about the
7 rocks?

8 A. Sargent Bergdahl believed that the rocks were on graves.
9 Afghan ----

10 Q. It was a burial ----

11 A. It was a cemetery up on top of this hill where they had
12 built this OP, and Sergeant Bergdahl believed that he kicked an
13 Afghan grave when he kicked one of the rocks. And I was not able to
14 corroborate that with any of the other people that I interviewed.
15 They do recall the battalion commander going off on them. They said
16 they understood exactly what he was getting at. They knew he wasn't
17 very good at it, but they knew that they deserved it. And they
18 recall the rock, but they don't recall the cemetery.

19 Q. But these -- these events and his take on those ----

20 A. Uh-huh [indicating an affirmative response].

21 Q. "Him" in this context being Sergeant Bergdahl?

22 A. Yes.

1 Q. Did you conclude that you were getting an accurate account
2 of his understanding of these events?

3 A. I did.

4 Q. And did you have an occasion to form an opinion as to the
5 sincerity of his beliefs, be they ever so naïve or misinformed?

6 A. Yeah. No, I think he absolutely believed that the things
7 that he was perceiving were true. And I equally believe that he was
8 completely wrong in that, which is just, you know, the sad irony of
9 it. But certainly, in his mind, there wasn't any doubt. I think
10 there wasn't any doubt in his mind.

11 And I also have to add, you know, again, it is the
12 universality of it. You know, I said -- if you recall, during the
13 interview, I asked Sergeant Bergdahl, "Why did you have to go to FOB
14 Sharana and find a General? I mean, what about your -- you know, in
15 the Army, you have a team leader. You have a squad leader. You have
16 a platoon sergeant. You have a platoon leader, a company commander,
17 an XO, a first sergeant, a battalion commander, a battalion command
18 sergeant major, a brigade commander, brigade command sergeant major.
19 Could you not go to any of these people with your grievances, with
20 your concerns about the leadership?" And he went almost to the man
21 and gave me a reason why that was not possible. You know, because
22 all of them were, you know, pretty much, unfit to lead and didn't
23 have the right perspective; and they were only in it for the money or

1 they were only in it for the rank or they were only going to protect
2 themselves. They weren't going to rock the boat. You know, they
3 weren't strong enough to go against the battalion commander and so
4 ----

5 Q. Would I be correct to summarize that piece of your take on
6 things ----

7 A. Uh-huh [indicating an affirmative response].

8 Q. ---- that on the merits his perspective was unwarranted,
9 but it was genuinely held by him?

10 A. That is correct.

11 Q. Was there some intervening event that prevented him from
12 actually getting to a General at Sharana? There was a General at
13 Sharana, I assume?

14 A. No, there was not. And I pointed that out to him, but he
15 didn't know that.

16 Q. He didn't know that?

17 A. He did not know that. He did not know that.

18 He probably would have gotten to speak -- spoken to a
19 General at he made it to FOB Sharana, though.

20 Q. Right. But was there some cause that prevented him from
21 completing the ----

22 A. Sure. He was captured ----

23 Q. ---- march that he ----

1 A. ---- captured by the Taliban.

2 Q. And do you have an understanding of how long it was between
3 the time he departed OP Mest and the time he fell into the hands of
4 the Taliban or Taliban allies?

5 A. Right. Yeah. It is very hard to nail that down precisely;
6 but I can say, we believe that he departed the wire and stepped
7 outside the wire of COP Mest between 2200 and 2400. So between 10:00
8 p.m. and midnight. And we believe that he encountered the Taliban
9 between eight o'clock in the morning and ten o'clock in the morning
10 the next day. So it was 10 or 12 hours. And we tried very, very
11 hard to nail down more precision in there, but that is where -- we
12 were able to conclude that much.

13 Q. Did your investigation address whether he had made escape
14 attempts after he was kidnapped or captured? Well, in a
15 nutshell ----

16 A. Yes.

17 Q. ---- what did you learn?

18 A. Well, by Sergeant Bergdahl's accounts -- and those are the
19 only ones that we have -- is that he tried to escape. Well, let me
20 first say that my investigation -- I was very careful not to -- the
21 scope of my investigation did not require me to look into his
22 captivity. And, frankly, to separate my efforts from, you know,
23 other efforts, we deliberately kept a gap in time between the ending

1 of the time that I was interested in and the beginning of, you know,
2 those other debriefs and what have you. But in my conversations with
3 Sergeant Bergdahl, he did describe that he tried to escape, you know,
4 even in that very first day that -- you know, I think when the
5 Taliban rolled up on him, you know, he got beat up a little bit.
6 They drove him around on some motorcycles. They drove him around on
7 some trucks. They kept moving. Frankly, I got the impression they
8 didn't know what the heck to do with him. And during that time, he
9 got roughed up a little bit; but then I think he also made an effort,
10 at least on one occasion, to run and to get away. And he was
11 unsuccessful, and he got roughed up a little bit more.

12 Q. Did your investigation uncover a shurah held in the Mest
13 area shortly after Sergeant Bergdahl had fallen into the wrong
14 hands ----

15 A. No. No.

16 Q. ---- at which some steps towards a negotiated release were
17 explored?

18 A. No. First time I've heard that.

19 Q. Was it dangerous to leave OP Mest ----

20 A. Absolutely.

21 Q. ---- without a weapon?

22 A. Absolutely. With a weapon, especially without one.

23 Q. With or without a weapon?

1 A. Yeah.

2 Q. Was it more dangerous to leave without a weapon than with a
3 weapon?

4 A. Absolutely. It may be less provocative but, you know ----

5 Q. He didn't take his weapon with him, did he?

6 A. He did not.

7 Q. His firearm?

8 A. He did not.

9 Q. Did you look into that with him?

10 A. I did. I asked him why.

11 Q. Visit with him on that?

12 A. I did. I asked him why. And he did not -- he wanted to
13 remain inconspicuous. You know, he, one, again, thought he was going
14 to run 31 kilometers to FOB Sharana. Instead of running with a squad
15 automatic weapon, which would make that a lot more -- harder. So he
16 wanted to be light and lean.

17 He also, you know, though through, in his mind, you know,
18 through a couple of contingencies and had he not made it, you know,
19 during daylight, you know, then he would be exposed. And if he was
20 carrying a squad automatic weapon, that would have made it pretty
21 clear, you know, that he was not your average Afghan walking across
22 the desert.

23 Q. Did he have an outer garment ----

1 A. He did. He explained ----

2 Q. ---- that would permit him to pass?

3 A. Yeah. Sergeant Bergdahl explained to me that he had bought
4 an Afghan male outer garment and headgear, I believe, from one of the
5 bazaars on FOB Sharana that he had it in his cargo pocket of his
6 pants. Had he not made it, he was either going to go to ground and
7 stay until darkness the following night, or he was just going to put
8 that on, you know, and continue and try to look like and blend in as
9 one of the Afghans.

10 Q. Did the question come up of a conversation he had with a
11 platoon-mate about what would happen if a weapon went missing?

12 A. Yes.

13 Q. What did you learn ----

14 A. Yeah. Sergeant Bergdahl -- I think he desired to take a
15 9-mil, a 9-millimeter pistol with him, which would have been much
16 easier to conceal and be less conspicuous.

17 And, again, Sergeant Bergdahl has high expectations of his
18 own capabilities. You know, so I think he actually believed that, if
19 he had had the weapon and five Taliban rolled up on him, that he
20 probably could have taken care of all of them with his pistol if he
21 had had it with him.

22 But, in any case, before he departed, he considered taking
23 a 9-millimeter with him. He was not assigned one. He asked some of

1 the Soldiers who were assigned them; and I believe -- and I can't
2 recall the Soldiers name but there was one who I believe did man the
3 240 Bravo, which is a machine gun, that requires -- it is the only
4 weapon you are going to have, so he was issued a 9-millimeter.

5 And Sergeant Bergdahl asked him, you know, "Hey, what
6 happens if you lose your weapon? What happens if it comes up
7 missing?"

8 And they said, "Well, I would get in a lot of trouble if I
9 lose my weapon."

10 And then he said, "Well, what if you don't lose it? What
11 if it just shows up missing?"

12 And he said, "I am still going to get in trouble. I am
13 accountable for it."

14 Q. So did you infer from this that he was concerned not to get
15 a platoon-mate in trouble for a missing weapon?

16 A. He said so. And I inferred that, and I believe that to be
17 true.

18 Q. Did you discuss with him whether he had contemplated
19 walking to the People's Republic of China or India?

20 A. I asked him those things only because I had read about
21 them.

22 Q. And what did he say?

23 A. He never considered that.

1 Q. Do you credit that denial?

2 A. I believe he was honest when he said he never intended to
3 do that. I also believe he probably said those things in
4 conversation with the other Privates, because when Privates are
5 sitting around with a little bit of extra time on their hands, they
6 say all kinds of stuff. So that is well within range of Private
7 talk.

8 Q. Did the question of ----

9 A. I love these guys. That's why they're so much fun to be
10 around.

11 Q. Did the question of Sergeant Bergdahl's personal computer
12 come up in your conversation with him?

13 A. It did. I had asked him about his computer. I asked him
14 why he mailed his computer home, because we were able to identify --
15 well, we had heard that he had mailed his computer home. We then, in
16 our interviews, learned that he had mailed his computer home. We
17 actually were able to nail down, you know, the date of that because
18 we were able to get, you know, the finance transaction and the postal
19 transaction, I believe, to confirm that that had happened.

20 It was important because a lot of the -- what we had been
21 reading in the open press was making inferences about, you know, that
22 seems to indicate a preparation for a permanent absence and -- which
23 it frankly -- it's pretty specifically stated in the *Manual for*

1 *Courts-Martial*, you know, under a different aspect of desertion for
2 permanent departure, that you sort of divest yourself of your wealth
3 and those kinds of things. We asked him about that.

4 Q. What did he say?

5 A. That was not his intention. He knew, "I am going to get
6 into a bucket load of trouble when I get to Sharana, and I don't know
7 what is going to happen to my stuff." You know, I think he even
8 imagined, "I might go to jail. I don't know what is going to happen.
9 I don't know what they are going to with me, you know, once I make it
10 to Sharana, but I want to take care of my personal things." So he
11 sent them home to people who could care for them for him so that he
12 wouldn't lose them.

13 Q. And was that consistent with the concern that he had
14 previously expressed that it was too bad that people had to have
15 lockers when he was still in the U.S. to protect their stuff or was
16 it just ----

17 A. I didn't take it that way. I did not take it that way. I
18 thought ----

19 Q. Just simply something would happen ----

20 A. I think that these were not, necessarily, material wealth
21 but this was -- I mean, it is your computer. So you have got a lot
22 of files on it. You know, there is a lot of, not necessarily,
23 material value there but personal value. And I think he wanted to

1 protect that, so he sent it back to the folks who could be trusted to
2 take care of it for him.

3 Q. Now, a very sensitive and important subject.

4 A. Uh-huh [indicating an affirmative response]. They have all
5 been so far.

6 Q. You were not -- your appointment did not call for you to
7 look into the question of whether anyone died looking for Sergeant
8 Bergdahl, then-PFC Bergdahl, correct?

9 A. That is correct.

10 Q. Did you, in fact, look into that?

11 A. I did.

12 Q. Why?

13 A. I didn't deliberately look into it. I encountered, you
14 know, quite a bit of discussion about that during my interviews. You
15 know, there has been an awful lot that has been said about that in
16 the open-source press, allegations one way or another. A lot of his
17 platoon-mates and others, you know, were making those kinds of
18 allegations as well.

19 I had asked the appointing authority, you know, should I
20 investigate this because, really, this is something that, at the end
21 of the day, is going to have to be answered. I mean, if I was a
22 parent, I would want to know. Everybody should want to know. We
23 really ought to close that out. I was told, "No, you don't need to

1 do that, because Central Command is going to take care of that." So
2 I did not pursue finding information, deliberately asking and looking
3 for information along those lines, but a whole bunch of it came to me
4 just in the course of my investigation. My conclusion is that there
5 were no Soldiers killed who were deliberately looking and searching
6 for -- in an effort to deliberately search and look for Sergeant
7 Bergdahl. I did not find any evidence of that.

8 CDC: Colonel, I think that this would be a good break point that
9 will permit me to review my notes -- everybody could perhaps take a
10 comfort break -- and conclude my direct examination.

11 PHO: Okay. How much time do you need?

12 CDC: Oh, should we say, just 10 minutes?

13 PHO: Ten minutes will be fine.

14 CDC: Great.

15 PHO: We are in recess until 1120 by the clock up there again.

16 **[The Article 32 hearing recessed at 1108, 18 September 2015.]**

17 **[The Article 32 hearing was called to order at 1121, 18 September**
18 **2015.]**

19 PHO: All right. We are back on the record. The parties who
20 were present when the court [sic] was last in recess are again
21 present, to include the witness, Major General Dahl.

22 Mr. Fidell, you may proceed.

1 CDC: Thank you, Colonel.

2 **The direct examination of Major General Kenneth R. Dahl by the**
3 **civilian defense counsel continued as follows:**

4 Q. General, do you -- I referred before to your executive
5 summary and to Sergeant Bergdahl's 370-something interview -- the
6 page interview. Do you personally have any objection to those
7 documents being made public?

8 A. No.

9 Q. In the course of your interview with Sergeant Bergdahl,
10 were you able to form an opinion as to whether he is remorseful?

11 A. Yes.

12 Q. What is that opinion?

13 A. Yeah, I believe that he is remorseful. I believe that, in
14 hindsight -- 5 years' hindsight, you know, he sees himself
15 differently. I think he recognizes -- and he even said so that he
16 was young and naïve and inexperienced. And, frankly, I recall, as he
17 was relaying this during the interview, you know, a display of
18 emotion, you know, that anything bad might have happened to anybody
19 in the unit or any individuals. And he hoped that that did not
20 happen.

21 Q. The preliminary hearing officer, Colonel Visger, and I will
22 say, over our objection, Colonel Burke, the little convening

1 authority in this case, get to make recommendations on the
2 disposition of this case.

3 A. Right.

4 Q. Do you have an opinion about whether the interests of
5 justice require a jail sentence in this case?

6 A. I do have an opinion. Can I share that?

7 PHO: Is there a government objection?

8 TC: No, sir. No objection.

9 PHO: Okay. Then proceed.

10 A. I do not believe that there is a jail sentence ----

11 CDC: No further questions.

12 A. ---- as a result of this.

13 CDC: I am sorry. I stepped on your line.

14 A. No, sir. I do not believe that there is a jail sentence
15 that is -- at the end of this procedure -- at the end of this
16 process. I think it would be inappropriate.

17 CDC: No further questions.

18 PHO: Government, do you have cross-examination?

19 TC: No questions.

20 PHO: Let me just take a look at my notes here and make sure I
21 don't have any questions.

22 [Pause.]

1 PHO: All right. Permanent or temporary excusal?

2 CDC: Permanent as far as we are concerned, sir.

3 [The witness was permanently excused, duly warned, and withdrew.]

4 PHO: Okay. So, at this point, I think it would be appropriate
5 to -- my understanding is that the next witness will be somewhat --
6 of roughly the same time frame, so I think it would be appropriate to
7 take a short -- a slightly early lunch. And do we want to do the
8 same as yesterday, shoot for a 1245 for start time?

9 CDC: Yes, sir.

10 PHO: That gives an hour and 20 minutes for security and
11 everything.

12 CDC: Yes, sir.

13 PHO: At 1245, we will gather again; and we will be in recess
14 until that point.

15 **[The Article 32 hearing recessed at 1126, 18 September 2015.]**

16 **[The Article 32 hearing was called to order at 1247,**

17 **18 September 2015.]**

18 PHO: We are back on the record, and the parties present at the
19 last -- at the lunch recess are again present.

20 Defense, please call your next witness.

21 DC: The defense calls Mr. Terrence Russell.

22 PHO: Mr. Russell, please stand in front of the witness table and
23 face the trial counsel.

1 **TERRENCE D. RUSSELL, civilian, was called as a witness for the**
2 **defense, was sworn, and testified as follows:**

3 **DIRECT EXAMINATION**

4 **Questions by the assistant trial counsel:**

5 Q. Mr. Russell, I just want to advise you that, while you are
6 testifying if you are asked any question that you believe may require
7 a response that contains classified information, you have a personal
8 responsibility to notify the preliminary hearing officer prior to
9 answering and at no time should you disclose any classified
10 information while this hearing is in open session.

11 Do you understand that?

12 A. Yes, sir.

13 Q. Please state your full name for the record.

14 A. Terrence Dean Russell.

15 Q. And where are you currently assigned to work?

16 A. I am assigned to the Joint Personnel Recovery Agency at the
17 Personnel Recovery Academy in Spokane, Washington, at Fairchild Air
18 Force Base.

19 TC: Thank you.

20 Lieutenant Colonel Rosenblatt.

21 **Questions by the defense counsel:**

22 Q. Good afternoon, Mr. Russell.

1 The Joint Personnel Recovery Agency, JPRA, I'm predicting
2 that a lot of people here have never heard of. Tell us what it is
3 that JPRA does and how it ties into our national military effort.

4 A. JPRA is -- first of all, it is aligned under the Joint
5 Staff, the J-7. We are what's called a Chairman's-Controlled
6 Activity. We are the office of primary responsibility for personnel
7 recovery, less policy. We engage in analysis; technology, research,
8 and integration; training and education; and support to the
9 components to enhance their capabilities at conducting personnel
10 recovery.

11 Q. What is your job?

12 A. My job specifically, I am a Senior Program Manager at the
13 Personnel Recovery Academy, PRA, in Spokane. Specifically, I am a
14 division chief that conducts research and product development. My
15 division develops lessons learned, products, country studies that
16 identify threats to isolated persons. We conduct research on the
17 captivity environment relative to the isolated person so that we can
18 better gain lessons learned and develop training and education and
19 operational support products to mitigate the risk of isolation and to
20 help those that may become isolated.

21 Q. How much ----

1 A. Currently, my division has about 350 products that we have
2 developed over the last number of years that are all available on the
3 JPRA SIPRNET portal site.

4 Q. How much experience do you have in this field of personnel
5 recovery and dealing with persons in captivity?

6 A. Well, I enlisted in the Air Force in 1977; and I served
7 until 1999 when I retired from active duty. I, very soon after that,
8 was hired as a civilian Department of Defense employee. My job
9 specialty in the Air Force was that of a survival instructor --
10 Survival SERE Specialist -- Survival, Evasion, Resistance, and
11 Escape. I taught at the Air Force SERE School from 1977 until 1993.

12 In '93, I was assigned to the Joint Services SERE Agency,
13 which is a predecessor to JPRA. At that time, I started conducting
14 research. One of my first tasks was to -- to review all of the
15 debriefing materials relative to the Gulf -- Desert Storm POWs.
16 Following that analysis and helping with the lessons-learned product
17 that was developed, I started looking at other isolation cases. I
18 started getting involved in debriefing and analysis and writing the
19 analysis reports on those specific cases, starting with Mike Durant
20 from Mogadishu, Bobby Hall from North Korea, Scott O'Grady from
21 Kosovo.

22 Q. What about Jessica Lynch in Iraq?

1 A. Jessica Lynch, I was her debriefer -- specifically her
2 debriefed. I -- after we got done with Jessica Lynch, about a week
3 later, all of the other POWs came out of OIF, Operation Iraqi
4 Freedom. I was the senior debriefer. I managed the debriefing --
5 the SERE debriefing team. There was five, six -- seven Army, Air
6 Force -- a joint team of debriefers. I was the senior debriefer and
7 managed all of those activities.

8 Since then, I was the debriefer for Edmond Pope, who was a
9 retired Navy O-6 who was detained in Moscow by the Russian Secret
10 Service.

11 I was the debriefer for -- I'm sure there's many others.
12 In total, I've debriefed or interviewed about 125 prisoners of war,
13 isolated persons, and detainees.

14 Q. And of those 125, I guess, how would your experience in
15 dealing in this field compare to other -- other somewhat experts
16 within the Department of Defense?

17 A. Well, I do not believe that there is anybody in the
18 Department of Defense who has interviewed, debriefed more isolated
19 persons than myself. I don't believe that there is anybody in the
20 United States government who has debriefed more isolated prisoners,
21 hostages than myself. There might be some academic somewhere who's
22 done more, but I've done about 125 personally. The division -- the
23 employees of my division, they've done another hundred. We are the

1 central repository for that kind of information, and I think that I
2 have more experience than anybody that I know in this regard.

3 Q. And with so much experience, is it safe to say that you've
4 seen both good and bad behavior in captivity?

5 A. Generally, your -- you'd be surprised at how well even
6 untrained persons do in captivity. They understand what their
7 obligations are. Have I seen behavior that we wish hadn't been
8 conducted? Yes. But by and large, people do the right thing.

9 Obviously in wars past, the Korean War, the War in
10 Southeast Asia, there were individuals that engaged in conduct
11 detrimental to our national interests; but those are, by far, the
12 minority experience.

13 Q. All right. Well, let's focus in now on Sergeant Bergdahl,
14 which is why we are here.

15 How long has JPRA and you been involved with this case?

16 A. Well, as soon as any service member goes missing, JPRA gets
17 involved to one degree or another. Certainly in this case, the Joint
18 Personnel Recovery Centers in theater would be at the front of
19 leading the effort to identify, locate, support, and recover the
20 isolated person.

21 JPRA, being that we are the DoD OPR for personnel recovery
22 matters, we would be involved in a consultation phase. My personal
23 involvement with this -- Sergeant Bergdahl's case began early, and I

1 maintained contact with the case throughout its duration. We would
2 collect information knowing that at some point -- or expecting at
3 some point we would be involved in the debriefing and the
4 reintegration aspects of this. So we would collect material relative
5 to the case.

6 Q. And ----

7 A. During that time, I visited with Mr. and Mrs. Bergdahl in
8 Hailey, Idaho four or five times to gather information about Sergeant
9 Bergdahl initially.

10 Later, I was helping CENTCOM with some very specific
11 support aspects that I'd rather not get into specifically, but I
12 supported CENTCOM in their efforts. We supported the Army Public
13 Affairs Office when the -- when Mr. and Mrs. Bergdahl were being
14 prepped for public appearances at the Rolling Thunder events in
15 Washington, D.C., on Memorial Days.

16 Q. Is it safe to say that in your years of working on this
17 case, that you've had access to both unclassified and classified
18 evidence ----

19 A. Yeah.

20 Q. ---- or information?

21 A. Yes, sir. That would be very fair to say.

22 Q. What SERE training, if you are aware, did Sergeant Bergdahl
23 have back in 2009?

1 A. In 2009, SERE training was divided into three categories;
2 and we call it Level A, Level B, and Level C. Level A is the
3 training that is provided to the general purpose forces, and that's
4 where Sergeant Bergdahl -- that's what he would have gotten. Level B
5 is service related; they might give a select population groups
6 additional training. Level C, that is what you -- that is what the
7 traditional service survival, evasion, resistance, escape -- SERE
8 courses. The Army, I think at the time, certainly had the one at
9 Fort Bragg. They might have had the one at Fort Rucker. The Air
10 Force has one. The Navy has two.

11 Sergeant Bergdahl would have received Level A training.

12 Level A training, specifically at that time, was: Here is
13 the Code of Conduct. Here are the six articles of the Code of
14 Conduct. This is what the six articles of the Code of Conduct mean,
15 and have a good day.

16 Q. So this was before the computer ----

17 A. Yes, sir.

18 Q. Okay.

19 A. And by the way, my office developed that, along with Joint
20 -- JKO. So you can blame me for having to get that and that 8-hours
21 of misery.

22 Q. And the computer bugs?

1 A. Yes, sir. Yes, sir.

2 But that program, which by the way over the course --
3 current lifespan of 5 years, has trained 1.5 million Soldiers,
4 Sailors, Airmen, and Marines very successfully.

5 At the time, Sergeant Bergdahl wouldn't have had that.
6 That went online 1 September 2010. So Level A at the time of his
7 deployment was: Here's the Code of Conduct.

8 Q. After Sergeant Bergdahl came back, how long did JPRA spend
9 debriefing him?

10 A. The debriefing of Sergeant Bergdahl was broken down into
11 three phases. The phase -- the first phase was conducted by CENTCOM
12 in theater, and I don't have a lot of details that I recollect about
13 that.

14 Within a few days he would have been transferred to Phase
15 II. Normally, Phase II would also be the responsibility of the
16 combatant command. In this particular case, Sergeant Bergdahl was
17 determined that he needed medical attention and was transferred to
18 Landstuhl Regional Medical Center, and then it became the
19 responsibility of European Command, EUCOM.

20 EUCOM then started conducting Phase II reintegration, which
21 included the Phase II intelligence and SERE debriefings. That,
22 again, was the responsibility of EUCOM. They had intelligence
23 debriefers. They had SERE debriefers.

1 It was then determined, at the end of Phase II, that
2 Sergeant Bergdahl required additional support; and he was transferred
3 to what's called Phase III Reintegration. And that was conducted at
4 Fort Sam Houston by the U.S. Army. The U.S. Army uses U.S. Army
5 South, USARSO, as their office of responsibility to conduct Army
6 Phase III Reintegration. So he was transferred to Fort Sam Houston.

7 It was at that time that JPRA got directly involved in the
8 reintegration support and debriefing. USARSO asked specifically for
9 reintegration support. They identified an FBI intelligence analyst
10 that was detailed to JPRA to come down. They identified a SERE
11 psychologist, an Army 0-6 that is on our staff at JPRA, to come down
12 to provide support to the two Army SERE psychologists that were
13 working directly with Sergeant Bergdahl. And they required or
14 requested a SERE debriefer, specifically me, to come down.

15 I was familiar with USARSO because I had supported them
16 during the reintegration debriefing of the SOUTHCOM Reconnaissance
17 Systems, the SRS crew, that had been held in Columbia for 5 years. I
18 was the senior debriefer for that event working with USARSO. They
19 were familiar with me. They were comfortable with me coming down.
20 JPRA sent down those three individuals to support the reintegration
21 task.

22 Q. About how long was the debriefing period?

23 A. In Phase II, I'd have to ----

1 Q. Could you give a swag -- a total number of weeks that ----

2 A. Well, at ----

3 Q. ---- you spent debriefing?

4 A. Yeah. At Phase II, which I wasn't involved in, I think he
5 was there for approximately 3 weeks.

6 Then they sent him to Fort Sam Houston. I was -- I don't
7 remember the specific dates. I was down here for about 2-and-a-half
8 weeks. Once I was complete with my SERE debriefing, the intelligence
9 debriefing continued and that continued on for another 12 days or so,
10 something like that.

11 Q. During these debriefings, was Sergeant Bergdahl read his
12 rights?

13 A. No, he was never read his rights.

14 Q. Okay.

15 A. Interestingly -- and this was my first experience
16 specifically with this -- was we had lawyers present to make sure
17 that the debriefing team did not cross a line that would require
18 Sergeant Bergdahl to have his rights read. The lawyer -- well there
19 were two. They overlapped for a day or so. But the lawyers worked
20 with the debriefing teams. When we were planning what the debriefing
21 session was to include, they were very specific about what we could
22 ask and what we could not ask, where was our starting point for
23 asking questions, and to ensure that we were not going to violate his

1 rights and require his rights to be read to him. The lawyers --
2 again they were one at a time; they overlapped for a day or two. But
3 the lawyer was always present during the debriefing.

4 The way the debriefing was set up, you had a room where you
5 would have Sergeant Bergdahl sitting in a chair with a table in front
6 of him -- a coffee table; two chairs for the debriefers. One was
7 leading the debriefing; the other would be taking notes and operating
8 the recording. And then the fourth person in the room was the SERE
9 psychologist. The Army sent down two SERE psychologists. One would
10 operate the morning sessions; one would operate the afternoon
11 sessions.

12 Q. Were these debriefings recorded?

13 A. The debriefings were audio recorded, and JPRA has
14 possession of all of those recordings because that is one of our
15 responsibilities.

16 Q. Okay.

17 A. But at the time, the debriefings were videoed in that there
18 was video monitoring in a nearby adjacent room. And in that room
19 there, was a number of people, including the lawyer, watching and
20 witnessing the debriefing at all times.

21 Q. Is it possible -- you've got a lot of experience with this
22 -- when people are being debriefed that they might not be telling the
23 truth or are trying to mislead you?

1 A. Certainly, that's a possibility. In the hundred or so
2 cases that I have been engaged in, I have listened to individuals --
3 I could count them with one or two fingers -- that I did not believe
4 were telling me the truth, that they were telling me a tale.

5 Q. Was there ever anything about Sergeant Bergdahl's
6 interviews that led you to believe that he was not telling you the
7 truth?

8 A. There was absolutely nothing that indicated that Sergeant
9 Bergdahl was giving us anything but the truth and what he was
10 relating -- his experiences.

11 Q. And if you know, what was the sense of the other debriefers
12 about whether what he was telling them ----

13 A. Right.

14 Q. ---- was -- he was being truthful to them?

15 A. It was not just my opinion. The other debriefers -- the
16 intelligence debriefers, the SERE psychologists, the FBI agents, the
17 other PR debriefers -- everybody, remarked on the quality of
18 information that Sergeant Bergdahl was providing, the ability that
19 Sergeant Bergdahl had to recall the information and to provide it to
20 us in a coherent manner. There was remarked -- expressions of their
21 high satisfaction with the quality of information. There was never a
22 discussion of, "Is he telling the truth? Are these indicators of
23 falsehood?" There was no discussion of that. I do not know and

1 nobody ever mentioned in my presence that they doubted what Sergeant
2 Bergdahl was providing to us.

3 Q. Okay. What can you tell us about the Haqqani group that
4 captured Sergeant Bergdahl and held him?

5 A. Based on what Sergeant Bergdahl described to us, I would
6 call them psychopath, sadistic, terrorist group. And I say that
7 because of what they did to him.

8 Q. Could you start by giving us an account of what you know of
9 his captivity? Is there a helpful way to break this down and
10 describe it?

11 A. Yes. And keep in mind that we could not ask about anything
12 -- any event, prior to the 19th of July 2009, and that was about 20
13 days post-isolation. So if Sergeant Bergdahl left the FOB on
14 30 June, give or take, we couldn't ask about anything that occurred
15 until the 19th of July; and that's based on Sergeant Bergdahl's first
16 appearance on a video that they were able to specifically identify.
17 So what he described was 20 days post-isolation -- what I would call
18 post-isolation -- and then continued on for the 4 years, 11 months.

19 You can generally break down his experience into three
20 phases. The first phase was absolute torture and horror. It included
21 being beaten with a rubber hose. They would have him blindfolded.
22 This was after he escaped. After 2 days, he escaped. He escaped for
23 10 minutes. So on the 21st of July, 2 days after, you know, we are

1 first introduced to this case, he escapes. He escaped for 10
2 minutes. He gets out of the compound. He gets away for 10 minutes,
3 and he is recaptured.

4 They bring him back and they blindfold him, and they take a
5 rubber hose. And they start asking him questions, and they start
6 beating him, concentrating on his feet and his ankles and his legs.
7 They twirl -- as they ask the questions, they twirl; and he can hear
8 the whistling of the rubber tube and, bam, they hit him. They do
9 this repeatedly and continually. Then, they take him out and they
10 make a video. To show the humane treatment of the Haqqanis, they set
11 him down and they provide a buffet of food.

12 And once they are done with that show, they take him to a
13 new holding location for the next 3 months, and they secure his feet
14 and his hands spread eagle on this metal bedframe; and they continue
15 to beat him. But, this time, they use a copper cable. He is left in
16 that position for 3 months with food twice a day, bathroom breaks
17 maybe twice a day. Purposefully to atrophy his muscles. They were
18 not going to risk him escaping again. They beat him with a copper
19 cable for 3 months.

20 Then, the next period -- and they start routing him through
21 a variety of holding locations, holding locations 3, 4, 5, and 6.
22 They make videos at holding location number 3. He related that they

1 made approximately 18 in the -- in the time that he was there. We
2 haven't seen all of those videos by the way.

3 But they -- this next period of time, which is about 9
4 months, this second phase, is typified by what I would call
5 maintenance abuse, torment, conditions of horrid captivity. The
6 women and the children are given the responsibility to care for him,
7 because he, at this time, starts to have uncontrollable diarrhea. He
8 suffers from uncontrollable diarrhea for 3-and-a-half years. The
9 women and children are given the responsibility because it is beneath
10 the man to care for such a dirty animal. It is the women and
11 children who did.

12 So what do the women and children do? They take him to the
13 toilet twice a day. They trip him. They hit him. The children, one
14 of them, Mullah Sangeen's son, has a chain and he beats Sergeant
15 Bergdahl with the chain on the way to the toilet and back. They
16 spill his food. They spit in his food. They put dirt in his food.
17 They do everything that they can to make his life absolutely
18 miserable because they hated him. He was filthy. They couldn't
19 stand the fact that they had to be near or to touch such a filthy
20 person.

21 Then the third phase begins, and it begins after Sergeant
22 Bergdahl has another escape. He escaped after 2 days. Okay. Again,
23 we are starting with the time line of 19 July. He escapes on the

1 21st. A year later, give or take, he makes his second escape; and
2 this is after he has been beaten. His muscles are atrophied. He
3 then is able to start walking in his holding locations to build up
4 his strength.

5 And in holding locations 3, 4, 5 and 6 he is attempting
6 multiple escape activities. He is climbing up to the window. He is
7 trying to get out of the ceiling. He is trying to dig through the
8 wall; trying to dig under the wall. He's manipulating the locks on
9 his restraints so that he can get out. And he gets out, and he tries
10 to climb the wall. All of these are what we would call unsuccessful
11 or short-term escapes. But he persistently engages in escape
12 activities at holding locations 4 and 5 specifically. At 5, he makes
13 multiple escapes to get out of his room, to start seeing what the
14 other security that he had to deal with -- what he was up against.

15 They transfer him to holding location 6, called the Taliban
16 Prison. For 20 days, he collects information on what the obstacles
17 are, and he makes another escape. This time, he successfully defeats
18 his restraints. He gets out of his cell. He climbs down using a
19 makeshift rope; and he hits the ground, and he starts running. And
20 he is gone for 8-and-a-half days. I think he describes it as 9.
21 When we kind of laid out the time line, we think it's about
22 8-and-a-half days.

1 During those 8-and-a-half days, he's heading for the
2 southeast, avoiding people, avoiding recapture. He has a little bit
3 of clothing. He has a water bottle and not much else. To survive,
4 he drinks what water he can find. To eat, he eats grass. He
5 continues to evade. He stumbles the first night, injures his left
6 leg and left hip. He gets re-caught. He gets captured after
7 8-and-a-half days.

8 So they bring him back. You know, at the point of
9 recapture, you know, they smack him around a little bit. They bring
10 him back to the holding location, and the guy that was responsible
11 for him hits him. I asked him very specifically, "All right. If
12 they beat you with rubber hoses and copper cables the first time you
13 escaped, what did they do to you the second time you escaped?" And
14 he said, they pulled his shirt, and they saw skin over bones. He was
15 already in the midst of suffering diarrhea for a year -- 9 months at
16 that point. Starving. He's evading for 8-and-a-half days, living on
17 grass and water. He is nothing but skin and bones. And he says, the
18 captor didn't do anything to him because they knew that if they
19 started beating him again, they would kill him. They took him back
20 to his holding location, kept him there for, I don't know, a couple -
21 - 3 weeks.

22 And then we begin the third phase. The third phase is -- I
23 would characterize it as, solitary confinement, isolation, and

1 neglect. They had made -- to make sure that Sergeant Bergdahl did
2 not escape a third time, they made a cage. This metal cage that was
3 collapsible was about 7 feet -- 6 feet tall, 6 feet wide -- maybe a
4 little bit bigger but about a 7 foot cube let's call it and angle
5 iron. They could take it apart. They secured it. They could move
6 it from one place to another, which they did. When they moved him to
7 holding location 8 and 9, they moved this cage along with him. He
8 spent about 3 years inside this cage. This cage, a metal frame,
9 probably angle iron around the sides, and then it had rebar welded to
10 each side, one way and then the other. It was like a honeycomb, you
11 know. Any individual hole in that honeycomb, you could put your fist
12 through, typically. But that was his home for the next 3 years,
13 3-and-a-half years.

14 They required him to be blindfolded, they left him in that
15 cage, and they neglected him. They'd give him the minimal amount of
16 food, water, and toilet breaks; but typically they just kept him
17 there.

18 You know, after a while they put something on the floor of
19 his cage so that he could stand on it. When he was moved from
20 holding location 8 and 9, his last place, the cage was moved with
21 him. And they gave him a plywood -- like a plywood board to stand
22 on, so that gave him a little bit more structure.

1 Towards the end, I'll say the last 6 months or so, they
2 understood that the endgame was coming on. They had -- he had gotten
3 to the point -- but prior to that, he had gotten to the point that
4 his physical condition was so horrendous that he was passing out.
5 They took him to a doctor once, if you could probably call this guy a
6 doctor. God knows what he was. But he provided Sergeant Bergdahl
7 with some antibiotics, some recommended treatment which included,
8 you've got to give this guy some food, including eggs and milk. They
9 improved his diet towards the endgame. Some months prior to his
10 release, they gave him a collapsible treadmill that he could start
11 exercising on, and they improved his diet because they knew that they
12 were going to release him.

13 So those were the three phases: torture, abuse, neglect.

14 Q. Do you know how many times he tried to escape?

15 A. Well, we know that he got out of the compound twice -- or
16 he relates getting out of the compound twice. He engaged in
17 significant levels of escape activity. Even -- even the first day
18 after the -- you know, on the 19th of September with this video, he
19 had met Mullah Sangeen. And they had brought him down to his holding
20 location, and he had attempted and he was successful in getting out
21 of the door but saw that there was too many people around, so he got
22 back. He counts that as an escape. I would characterize it as
23 escape activity.

1 Q. Did ----

2 A. Then he had had his -- what we call a 10-minute escape,
3 where he got out of his room. He got out of the house -- the hut
4 that he was being held in; and he got to a neighboring house where he
5 climbed to the ceiling and hid himself in a mud puddle and was
6 recaptured after about 10 minutes.

7 Q. Did he ever give up trying to escape?

8 A. No, he never gave up. Because you move him to holding
9 locations 3, 4, 5 and 6 and as his strength -- as he regained his
10 strength, he started engaging in increased escape activities to
11 include trying to -- to pound the ceiling, dig through the walls, dig
12 through the floors, get outside the door, manipulate his restraints,
13 manipulate the locks on the doors to get out of -- trying to use
14 means available to get over the compound wall. And he continued to
15 do that at holding locations, especially at 4 and 5.

16 And then they moved him to location 6, from which he had
17 his 8-and-a-half day escape. Once they recaptured him, once they put
18 him into this collapsible metal cage, the escape activities stopped.
19 Not that he didn't think about it, but he saw the conditions of
20 captivity. The security that they imposed was too great an obstacle.

21 Q. And how did he resist his captors?

1 A. So what do captors do? They want information. They will
2 exploit somebody for propaganda, typically videotapes or recordings
3 or photographs and that sort of thing.

4 You know, we asked him specifically about the exploitation.
5 We asked about interrogation. And, you know, after the first escape,
6 they wanted to know ridiculous things like: Who was the woman that
7 was helping him? Who was the man that was helping him? And they
8 would beat him for questions that he had no answer for; and so all he
9 could say is that he had no help, but that didn't preclude them from
10 beating him.

11 I asked him about "What did they want to know about what
12 you could tell them?" You know, specifically, I asked that because
13 there had been some speculation that, you know, the Haqqanis had a
14 disinformation campaign that was pretty remarkable. They would say
15 that, oh, on one hand, you know, he's living this high life in this
16 villa and he was working with the children, playing badminton with
17 the children, going to the market. And then you would have other
18 disinformation saying that Sergeant Bergdahl was teaching small
19 weapons tactics. He was teaching patrolling methodology. He was
20 helping the Haqqanis develop improvised explosive devices. You'd
21 have misinformation: Oh, he's sick. He's at death's doorstep. You
22 know, so you -- this wide range.

1 So I asked him, "What did the Haqqanis want to know? Did
2 they ask you specifically about small weapons tactics? The
3 patrolling TTP for Soldiers? Asking about IEDs?"

4 And his response was actually pretty remarkable. "The
5 Haqqanis held the U.S. Soldier in absolute contempt. They had no
6 respect or no regard for the United States Soldier. These are the
7 same people that fought the Soviets -- same family, same tribe. They
8 fought the Soviets. There was nothing about the U.S. Soldier that
9 they could learn about because they didn't have any respect for the
10 U.S. Soldier." So they never asked about it. They never
11 interrogated him over that kind of stuff.

12 Q. Did Sergeant Bergdahl's resistance to his captors get
13 better or worse with time?

14 A. You know, you have to probably take a look at the range of
15 videotapes that came out of captivity and, you know, the images. You
16 know, on the first videotape, he's sitting behind this table; and,
17 you know, he's being fed all of this stuff; and, you know, he does
18 what he has to do. I asked him about resistance to the videos, and
19 he said that he tried to appear compliant. He tried to minimize any
20 propaganda value, but he tried to appear cooperative. And so,
21 largely, that is what you will see. Yes, he said things. He
22 demonstrated his ability to do four push-ups. And, by the way, that

1 was about his maximum amount of push-ups he said he could do at the
2 time. You saw some other -- some other videos.

3 But the one that is remarkable to me was the last video
4 that came out in December of '13, and I asked him about that one
5 specifically. And, you know, he said he had had it up to here
6 [pointing to his forehead] with them. He was sick, freezing. He had
7 been blindfolded. His eyes were having a hard time adjusting. They
8 were in a hurry to produce the videotape, and he was just going to do
9 the bare minimum to get it done with and be done with them. He was
10 sick of it, and that was effective resistance.

11 In all of those cases, his resistance -- his resistance did get
12 better from what you saw in the first videotapes to what you saw on
13 the last videotape. He learned to resist and, largely, it was
14 because he hated these people. He was sick of what they were doing
15 to him. They were extremely abusive.

16 Q. Did you consider any evidence or possibility that his
17 captors were using chemical restraints?

18 A. We asked about drugs because, you know, who knows? The use
19 of drugs by a captor is very rare. We know of a couple of cases.
20 There was one Desert Storm POW that was interrogated under the use of
21 chemicals; and he describes that, and he just -- Cliff Acree -- and
22 he describes it in his book.

1 So we know on rare occasions -- we know that occasionally
2 captors may use some kind of inhalant or something to subdue a
3 prisoner to make them easier to transport. I wanted to know if, in
4 fact, Sergeant Bergdahl had been -- drugs had been applied to him
5 because, you know, was it because -- did he appear in such a way that
6 -- because he was under some kind of influence of drugs? Well, we
7 asked -- anyways, we asked him about it. And he goes, "No,
8 absolutely not. They never did that."

9 They did -- there was one guy -- I don't remember what the
10 name that Sergeant Bergdahl called him, but there was one
11 particularly nasty man who came in with some -- it was a clay pot.
12 And he would come into his cell -- his room, and put this clay pot
13 and fire -- burn some kind of chemical. And it would produce a blue
14 smoke, and Sergeant Bergdahl felt -- he described it in his
15 debriefing as some kind of opiate or something like that. But it
16 produced a blue smoke; and he said that, within two or three breaths,
17 he would have an altered state where he couldn't determine time.
18 "Time was skipping." These are some of the terms that he was using.

19 So I asked him, "Was there any exploitation associated with
20 the use of this chemical, drug, smoke, device?"

21 "No, nothing at all. It was just torment."

1 It was just to cause him more difficulty, and they did it
2 to him twice. But there was never any use of drugs for exploitation
3 purposes involved with Sergeant Bergdahl.

4 Q. Did Sergeant Bergdahl provide any classified information to
5 his captors or any other information that could harm U.S. forces?

6 A. We asked him that specifically, again, because you know, if
7 there's this speculation in the press about Sergeant Bergdahl doing
8 this or that, we wanted to know. And that's typically a question
9 that we will ask a returnee: "Did you" -- "What kind of information
10 did you provide? Did you provide any classified information?"

11 We ask that very specifically and the answer was very
12 clear-cut, "No, I did not provide anything classified," because, in
13 this case, they didn't care. They didn't want to know anything.
14 That wasn't the purpose of them holding Sergeant Bergdahl for
15 information.

16 And I -- I would be shocked if Sergeant Bergdahl had any
17 classified information that he would have been privy to anyways.

18 Q. What was Sergeant Bergdahl's will to survive?

19 A. Well, he certainly had will to survive. You have to
20 remember what's happening to this young man. The first photograph
21 that we see of him -- and we see this later after the 19 September
22 video. We see this later. He has a large mark, I think it was on
23 the left side underneath his cheek so it was probably -- bam

1 [gesturing] -- a butt stroke to his face, you know, with a rifle
2 butt. So he's already -- you know, they take him up to this. And
3 he's chained; he's secured. You know, he escapes; he's beaten. He
4 has this uncontrollable diarrhea.

5 You know, I don't know about you, sir, but if I have
6 diarrhea more than a couple or 3 days, I'm thinking there's something
7 seriously wrong with me and I want to get some treatment. And you
8 and I have the luxury of using toilet paper. But Sergeant Bergdahl
9 was held in conditions that if it were a dog, you'd be thrown in jail
10 for pet abuse.

11 The conditions of captivity are as horrible as you can
12 possibly imagine; but he continues to resist. He continues to
13 escape. He continues to collect information because he states to us
14 during the debriefing that he knew that he would be an important
15 source of information for the intelligence community and for special
16 operations forces with the information that he was able to collect.
17 He continued to fight.

18 You know, when you are cleaning yourself of diarrhea and
19 your clothing is soiled, your bedding is soiled, you are cleaning
20 yourself with your hands and the only way to clean your hands is to
21 rub your hands in dirt to get the fecal matter off and the only water
22 that you have available to clean your mud-covered hands is your own
23 urine -- that's what Sergeant Bergdahl had to do.

1 But he didn't -- he didn't give in. Did he resist? Yeah,
2 he continued to resist. He continued to escape. He continued to
3 plot for escapes. He continued to fight. Did he give into the
4 captor and provide them the propaganda, the statements that they
5 wanted on the videotape? No, he minimized the value of the
6 statements. He screwed it up as best he could at the same time
7 avoiding continual abuse and beatings and neglect.

8 You know, you judge somebody -- you know, the Code of
9 Conduct says that you will resist to your utmost. What's your
10 utmost? What's my utmost? I don't know.

11 I've asked this question of many POWs. "Did you do your
12 best?" And all you can do is look at yourself in the mirror and say
13 to yourself -- to yourself -- "I did the best job I could do." I
14 think Sergeant Bergdahl did that. He did the best job that he could
15 do, and I respect him for it.

16 Q. On whole and based on everything that you've, you know,
17 read about and your debriefings, what grade would you give him for
18 his conduct in captivity?

19 A. What grade would I give him? I don't know. You know, one
20 of the responsibilities of the SERE debriefer is to give feedback to
21 the returnee at the end of the debriefing. And that's one of the
22 responsibilities that we have, and so I did that with Sergeant
23 Bergdahl. And, you know, my philosophy about this is to provide

1 pretty candid feedback. You know, you take into consideration the
2 level of training or the level of non-training; and you take a look
3 at the conditions of captivity and the captor, what they are seeking,
4 what they are trying to do. And you judge him against or you grade
5 him against, you evaluate him against the Code of Conduct. And the
6 Code of Conduct says that: I will escape. I will aid others to
7 escape. I will take neither parole nor special favors from the
8 enemy. That's Article III.

9 Article IV [sic] says: If I am questioned, I will continue
10 to resist. I will provide name, rank, service number, and date of
11 birth, and I will evade to the utmost of my ability further
12 questions.

13 We know how he did with escape. We know how he did with
14 questioning and providing information.

15 "If I am senior, I will take command." He's an Army of
16 one. He is senior. He will take command.

17 Q. And ----

18 A. Yes, I'm sorry.

19 Q. What is the difference between being a sole captive versus
20 being with a group as we understand the ----

21 A. Right.

22 Q. ---- Vietnam experience?

1 A. It's crazy how much more difficult being an isolated,
2 single person, will be versus having the support of a POW network.

3 In North Vietnam you had isolation. The prisoners, in
4 order to overcome and mitigate that condition of captivity, would
5 organize and communicate. It was paramount for that organization to
6 establish communications with all parts of the camp; and they devised
7 any number of ways to do that, including the use of the tap code,
8 tapping on the wall, and using abbreviated words and sentences. You
9 cannot under -- you cannot overestimate the value of organization and
10 communication.

11 I will give you a story. It comes out of Desert Storm. A POW
12 is being interrogated, and he's being asked to do a videotape. And
13 they torture him, and it involves the use of electricity. And the
14 POW says, "Fine. I'll make the tape." They take him in; they make
15 the tape. And he tries to figure out how he's going to resist, and
16 he mimics the sing-song accent of the guy asking the questions. He
17 uses the accent. He does what he can do to the utmost of his ability
18 to resist the exploitation, but yet he feels that he has let himself
19 and his comrades and his country down. And he's thrown out in the
20 hallway, and he sits there blindfolded. And he hears a voice down
21 the hall "Don't worry, mate. We all made the tape." He says, at
22 that point, the will to resist grows. He knows he is not alone. He
23 knows that he has the support -- although he cannot see them, he

1 cannot touch them, he cannot talk to them -- he knows that he has the
2 support of an organization.

3 Sergeant Bergdahl didn't have any of that. He was an
4 organization of one. He had to fight the enemy alone for 4 years and
5 11 months.

6 Q. Mr. Russell ----

7 A. You can't underestimate how difficult that is, and we are
8 talking about the conditions of captivity that he had to suffer. He
9 was starving. He was dehydrated. He tried drinking his own urine
10 one time to -- because he was so -- he says the pain of dehydration
11 is greatly more difficult than starvation.

12 Q. Okay. Just three more questions.

13 A. Sure.

14 Q. We will talk about the public. How important is it for --
15 for us to keep faith with captured Soldiers?

16 A. Our Code of Conduct tells us to.

17 Q. What have you noticed about public efforts to smear the
18 reputations of Soldiers who are captured?

19 A. You know there's always situations where, you know,
20 Soldiers may be -- and I'm using Soldiers as a generic term -- that
21 individuals, isolated persons may not be -- may not have done what we
22 expect them to do, in rare occasions.

1 But, you know, in this case it's been crazy. Bowe Bergdahl
2 has been accused of many, many things; but what you cannot accuse him
3 of is his lack of resistance, his willingness to serve his country
4 with honor in captivity, to do what he had to do to maintain his
5 dignity and to return.

6 I think the level of -- of widely inaccurate speculation is
7 outrageous. They don't know what the facts are and -- you know,
8 because the facts haven't come out and, you know, for various
9 reasons. Nobody knows Sergeant Bergdahl's story. There's been
10 snippets that have come out. But nobody knows Sergeant Bergdahl's
11 story, and I hope that someday the world gets to understand how
12 difficult Sergeant Bergdahl had it for 4 years and 11 months in
13 captivity.

14 [Pause.]

15 DC: No further questions.

16 PHO: Government, cross-examination?

17 ATC: The government has no questions, sir.

18 PHO: Okay. I have one question.

19 WIT: Yes, sir.

20 **EXAMINATION BY THE PRELIMINARY HEARING OFFICER**

21 **Questions by the preliminary hearing officer:**

22 Q. You mentioned his conditions of captivity and, obviously,
23 you have seen a broad spectrum of different conditions of captivity.

1 If you could express in terms of a percentile of, you know, who --
2 how many percentiles you have seen are worse and how many are better?
3 If you could express it in the terms of a percentile, that would be
4 helpful.

5 A. Certainly, you know, there's been -- you know, I don't know
6 how far back you want to go.

7 Q. Well, based on your experience ----

8 A. Certainly, he had ----

9 Q. ---- and what you've ----

10 A. ---- he had it harder than the OIF prisoners, absolutely.
11 He had it more difficult than the Desert Storm POWs. He had it more
12 difficult than Bobby Hall, Mike Durant.

13 You would have to go back to North Vietnam and the jungle
14 camps of South Vietnam to have any comparables to that. In South
15 Vietnam you had horrible conditions of captivity. You had, you know,
16 the longest held American POWs spending 5 years of solitary; 9 years
17 of captivity, 5 years of solitary in the jungle camps of South
18 Vietnam; that's a comparable. You had guys tortured in North
19 Vietnam; those are comparable.

20 But Sergeant Bergdahl's experience -- and I don't know,
21 sir, that I can give you a percentage. But his experience ranks at
22 the -- at the same echelon of the most horrible conditions of
23 captivity that we've seen in the last 60 years.

1 PHO: Okay. Any questions based on mine?

2 ATC: No, sir.

3 DC: None.

4 PHO: Okay. Temporary or permanent excusal?

5 DC: Permanent.

6 [The witness was permanently excused, duly warned, and withdrew.]

7 PHO: Okay. Defense, do you have any further witnesses?

8 DC: No further witnesses.

9 PHO: All right, Sergeant Bergdahl, earlier -- are you good?

10 ACC: Yes, sir.

11 PHO: Earlier in this preliminary hearing ----

12 CDC: Excuse me.

13 PHO: Yes, if you need a moment.

14 [Pause.]

15 CDC: Thank you, Colonel.

16 PHO: Okay. Sergeant Bergdahl, earlier in this preliminary

17 hearing, I advised you of your rights to make a statement or to

18 remain silent. Would you like for me to repeat this advice?

19 ACC: No, sir. I'm good.

20 PHO: Would you like to -- do you desire to make a statement in

21 any form?

22 ACC: No, sir.

23 PHO: Okay.

1 All right, Defense Counsel, I will now consider any
2 evidence other than testimony. Do you have any such evidence to
3 offer for my consideration?

4 DC: Yes, we do. We have what's marked as Defense Exhibit A.
5 Defense Exhibit A is a submission from Mr. Eugene Fidell and the
6 defense team to General Mark Milley, on March 2nd, 2015, consisting
7 of a 13-page letter and several attachments.

8 Defense Exhibit B, which is ----

9 PHO: Okay. Why don't we start with that one ----

10 DC: Okay.

11 PHO: ---- and we will do it one by one.

12 [Pause.]

13 PHO: All right. Government, I have right now Defense Exhibit
14 Alpha. It said it was 13 pages; but plus attachments, it is a total
15 of 28 pages. Have you had an opportunity to review this document?

16 TC: Yes, sir.

17 PHO: Do you have any objections?

18 TC: No, sir.

19 PHO: Okay. I will consider Defense Exhibit Alpha as evidence.

20 All right. Go ahead with Defense Exhibit B.

21 DC: Defense Exhibit B is the executive summary and the findings
22 and recommendations memorandum from Major General Kenneth Dahl from

1 his Army 15-6 investigation. It consists of a 2-page executive
2 summary and a 56-page memo of findings and recommendations.

3 PHO: Okay. So the 2 pages are the executive summary and then
4 the following 50-some-odd pages are the actual findings?

5 DC: That's right.

6 PHO: Okay. And this is for a total of 59 pages.

7 Government, have you seen this document, and do you have
8 any objections?

9 TC: Yes, sir. And we've seen Defense Exhibits Alpha through
10 Delta, and we do not have any objection.

11 PHO: Alpha through Delta?

12 TC: Roger.

13 PHO: Okay. Why don't you go ahead and describe the remaining
14 two ----

15 DC: Yes.

16 PHO: ---- for the record.

17 DC: Defense Exhibit Charlie is a two-page memorandum from
18 27 July 2015 and it is the two-page R.C.M. -- or Rule for
19 Courts Martial 706 Sanity Board Evaluation, conclusions only,
20 ICO Bowdrie Bergdahl, Sergeant. And this is the memorandum
21 concerning his severe mental disease or defect.

22 PHO: Okay. You can move on to the next one.

1 DC: Defense Exhibit Delta is Department of the Army Form 3349,
2 physical profile -- the permanent profile signed by the defense
3 witness Curtis Aberle.

4 PHO: Okay. I will consider all four of those documents as
5 evidence. Do you have any further evidence?

6 DC: None.

7 PHO: Okay.

8 Government, do you have any evidence in rebuttal?

9 TC: No, sir.

10 PHO: Okay. What we are going to do for administrative purposes
11 -- I guess the first question is: What additional information does
12 the court reporter need for administrative purposes?
13 [The court reporter indicated a negative response.]

14 PHO: Okay. Nothing, she's good. She's limited in her ability
15 to speak.

16 Okay. So what we are going to do is, let's plan on hearing
17 closing arguments at 1430. That is approximately 40 minutes from
18 now. I will -- I have the finishing touches for the preliminary
19 hearing officer exhibits that I will prepare a printout to; I will
20 provide it to both parties so you can review and make sure that all
21 relevant documentation is in there. And we will address that on the
22 record before we launch into closing arguments.

23 Any questions?

1 DC: No.

2 PHO: All right. We are in recess until 1430.

3 **[The Article 32 hearing recessed at 1349, 18 September 2015.]**

4 **[The Article 32 hearing was called to order at 1434,**

5 **18 September 2015.]**

6 PHO: We are back on the record. All parties present at the last
7 recess are again present.

8 We are at the close of evidence. So does government
9 counsel desire to make a closing statement?

10 TC: Yes, sir.

11 PHO: All right. You may proceed.

12 TC: Deliberate and knowing disregard. On 30 June 2009, the
13 accused acted with deliberate disregard for the consequences of his
14 actions when, under the cover of darkness, he snuck off Observation
15 Post Mest in Paktika to make the approximately 30-kilometer hike to
16 FOB Sharana so he could get enough attention to merit a personal
17 audience with a general officer to air his grievances with the Army.

18 The government has been repeating often the limited scope
19 and purpose of an Article 32 preliminary hearing, and that standard
20 is here for a reason. And the government would like to make sure we
21 focus on what the regulation and the *Manual for Courts-Marital*
22 require that we focus on, and that's four reasons -- four reasons why
23 we are here:

1 First, to consider the form -- whether the form of the
2 charges is proper;

3 Two, whether a court-martial would have jurisdiction over
4 the offenses and the accused;

5 Three, to determine probable cause. And probable cause is
6 reasonable grounds to suspect that a person has committed a crime;
7 and

8 Fourth, to make a recommendation as to disposition of the
9 charges or what level of adjudication they should receive.

10 And the government wants to stay focused on those four
11 questions. They don't want to lose focus.

12 First and briefly, a court-martial does have jurisdiction
13 over the accused and the offenses. He is in the military. He was at
14 the time of the offenses. Both of these offenses are military
15 offenses found in the *Manual for Courts-Martial*. And you have, for
16 your consideration, his deployment orders from 2009 and his orders
17 from 2015 attaching him to FORSCOM.

18 Second and briefly, the form of the charges is proper. The
19 government has followed the model specification and you, as a judge
20 advocate, know what they should look like.

21 More importantly, the government's burden here is to
22 present probable cause on each and every element of both charges; and
23 to that end, you have as evidence the testimony of three key

1 witnesses, Captain Billings, Major Silvino, and Colonel Baker. And
2 you have as evidence the accused's own statement, his two sets of
3 orders, and a DA 4187. Probable cause: The government has presented
4 probable cause in each of the charges both through the evidence of
5 witnesses and the accused's own words. And I'd like to take a few
6 minutes here to break down the evidence for each element, both the
7 supporting facts and the accused's own words admitting to those
8 offenses.

9 Article 85, Desertion: First -- the first element is that
10 the accused quit Observation Post Mest on 30 June 2009. Meaning
11 simply, that he was present on 29 June and gone without authority on
12 30 June 2009.

13 The facts: Captain Billings vividly recalls seeing him
14 present on 29 June 2009; and then, on 30 June, he recalls how he was
15 woken with the news and then the brutal search that followed. And
16 the accused's own words confirming that he left on 30 June 2009,
17 "Sometime around midnight, possibly after."

18 Major Silvino, who told you on the morning of the 30th,
19 standing in his company CP, coffee cup in hand, reviewing the morning
20 traffic, read a message that made him sick. He recounted the brutal
21 search that followed; rallying his men day after day for almost 2
22 months; and,

1 Colonel Baker, who remembered that on 30 June 2009, he was
2 on a convoy headed south and he had to fly back to his command post
3 to take charge of the recovery operations.

4 The second element of desertion is with the intent to avoid
5 hazardous duty or shirk important service. And this simply means,
6 the accused intended to be gone at a time when these duties would
7 occur.

8 The facts: He planned to be gone. He left deliberately
9 under the cover of darkness. His own words, confirming he planned to
10 be gone, "At least 24 hours, probably a couple of days," during
11 which, he knew he was expected for a guard shift, a convoy, and a
12 QRF.

13 He mailed home his laptop, Kindle, journals -- the most
14 important belongings for a PFC. His own words saying, "Yep, I mailed
15 home my laptop, journal, a couple of books, and my Kindle."

16 He purchased local national currency. "I got some Afghani
17 cash for bribes."

18 He purchased a disguise, a local national garment. "So
19 what I did was at the little local shop on the FOB, the guy had
20 clothes. The jammie that they would wear. The idea was that if I
21 put that on over my clothes and put on a typical head wrap on my
22 head, at a distance, any of the locals would see an average guy
23 walking through the desert."

1 He e-mailed his girlfriend, his family, his friends, Kim.
2 He confirmed that. And when he left the facts were, he left his
3 weapon, his NODs; and he took only knives, water, food, a journal,
4 Afghan currency, and his disguise when he snuck across the top of the
5 hill, sneaking away from his fellow Soldiers, deliberately evading
6 detection and into the darkness northwards toward Malak. He planned.

7 Now, the law says it is not enough that an accused is
8 motivated by a desire to skip the hazardous duty. He doesn't have to
9 be scared. It is enough that his absence is intentional and he had
10 knowledge of the hazardous duty to be performed. The case law also
11 says, if an accused knew of his duties and their hazardous character
12 and there is evidence that he intentionally failed to perform those
13 duties, that is sufficient. Everything about the time and manner the
14 accused left was intentional. He intended to be gone, and he would
15 be gone long enough to miss those duties.

16 The third element of desertion is that the duty performed
17 was hazardous and important. And all three of these duties are
18 hazardous, both factually and by case law. Major Silvino told you
19 that guard duty is hazardous. They were in a remote area of Paktika,
20 at a key intersection designed to stop the flow of arms and fighters
21 in from Pakistan. The OP was within sight of IED alley. Combat
22 operations were hazardous. They performed QRF duties from Sharana.
23 Major Silvino recounts of the Omnah mission and the complex attack.

1 The accused's own words said, "I was in a combat situation. A patrol
2 -- a platoon in an area known for IED attacks." He knew that as
3 well. And combat patrols are hazardous. Dismounted, moving into
4 villages, always moving tactically. Captain Billings described
5 those.

6 Now, sir, case law and the benchbook says, "Important
7 service is service that is more important than ordinary everyday
8 service of Soldiers," and those certainly were. The benchbook also
9 tells you, "Hazardous duty is a duty that involves danger, risk, or
10 peril to the individual performing that duty." And I would proffer
11 as an example, icebreaking -- according to the case law icebreaking
12 in the Coast Guard is an important service.

13 The fourth element: The accused knew that he would be
14 required for three things: combat operations, guard duty, and combat
15 patrols. This is as simple as the accused knowing of his upcoming
16 duties which would occur when he was gone. He knew specifically he
17 was assigned to a guard shift. He was supposed to be on the convoy
18 back; and as a member of the platoon, he would be called upon for QRF
19 duty.

20 Captain Billings told you guard shifts were 1 to 4 hours
21 long. Shifts were briefed daily. They were posted in writing in the
22 turret of the MRAP. The schedule is really important on the
23 observation post. Soldiers need to know when they would be working

1 and when they'd have some down time. It was an important fixture in
2 their lives. And the accused -- his own words said, "So that left a
3 gap before it came to be my turn again. I left a gap of -- they
4 wouldn't be calling for me until 5:00 or 6:00 the next morning. That
5 left a gap of nobody knowing I was gone until that morning." He knew
6 his shift.

7 Captain Billings also told you the platoon knew they were
8 going on a convoy back to Sharana that day, 30 June. They'd spent
9 the day before cleaning up the construction debris around the
10 observation post, packing up their living areas, packing their rucks,
11 loading up the vehicles. They were ready to roll out on the 30th
12 when third platoon came in. The accused's own words, "I chose that
13 particular time because that should have been the last day we were on
14 the TCP -- Mest, which meant that 3rd Platoon would have been
15 prepared to come out."

16 And that he remained absent -- the fifth element is that he
17 remained absent until 31 May 2014. You have the testimony of
18 witnesses and the personnel action documenting that date.

19 Now, sir, with regard to desertion, the government has not
20 charged desertion with the intent to remain away permanently.
21 Desertion with the intent to remain away permanently is a different
22 offense. The accused committed desertion with the intent to avoid
23 hazardous duty and shirk important service. He committed this the

1 minute he crept out of the boundaries of Observation Post Mest, on 30
2 June 2009, knowing he would miss his duties. He knew of the duties,
3 he knew of their nature, and he intended to miss them.

4 The government would remind the hearing officer that the
5 accused's motive, while interesting, is legally irrelevant. The
6 defense wants you to look at this shiny light over here. We ask you
7 to focus on the law. Case law has properly and clearly distinguished
8 between motive and intent for decades. Motive, or the underlying
9 reason for doing something, is not relevant on the merits and does
10 not constitute a defense.

11 PHO: It's not relevant on the merits, but it is mitigating,
12 correct?

13 TC: It is a matter for sentencing, sir.

14 PHO: Potentially mitigating or aggravating, depending on the
15 circumstances?

16 TC: Roger, sir.

17 His intent is what matters. And his intent was to walk off
18 the observation post, knowing that in walking off he would miss his
19 duties. He knew that his desertion naturally and probably would
20 result in him missing his duties. He specifically admits this in his
21 statement. He intended to be missing long enough that his absence
22 from those duties would raise an alarm. One simply does not walk off

1 through the Afghan wilderness and then return to duty as if nothing
2 happened.

3 The accused is also charged with Article 99, Misbehavior
4 before the Enemy, and that has four elements:

5 First, he had a duty to defend Observation Post Mest and
6 Task Force Yukon. He was a Soldier of 2nd Platoon. His duty -- the
7 essence of why he was on Observation Post Mest was to defend it, to
8 pull guard, to watch out for his duty [sic], to build bunkers,
9 defensive positions. Colonel Baker told you, platoons were the main
10 action unit in this type of conflict. You have Captain Billings'
11 testimony about how they designed and constructed the observation
12 post, and Major Silvino told you the purpose.

13 But the duty doesn't stop there. The accused was part of a
14 larger unit, a larger task force, and that of Task Force Yukon of
15 which he played a part. And that observation post was part of the
16 larger fabric or mesh of the task force, and we all know the duty of
17 each Soldier is to defense his fellow Soldier. Each person must
18 fulfill his duties at this level for the next level to function and
19 so on.

20 Two, the accused committed intentional misconduct. The
21 government has alleged three types of intentional misconduct: that
22 he left alone; that he left without authority; and he wrongfully
23 caused search and recovery operations.

1 The facts are clear that he left the observation post
2 alone. He snuck away. He knew it was wrong because Captain Billings
3 briefed, almost every day, the buddy rule. "Let a buddy know you are
4 going to the latrine." "Never walk up the hill by yourself."
5 "Always be with a buddy." Every patrol brief, "Stay together. Stay
6 with the team. Move tactically."

7 In the accused's own words he described how he left by
8 himself. And, remember, intentional misconduct is conduct with a
9 wrongful intention, not just negligence. His misconduct was
10 intentional. He left without authority. That's undisputed. He had
11 no authority from his platoon leader, his company commander, or his
12 battalion commander to leave.

13 And he wrongfully caused search and recovery operations.
14 Search and recovery operations are meant to recover Soldiers or items
15 that are lost. It's not a tool to be used to gain personal
16 notoriety. He wrongfully triggered search and recovery operations to
17 gain attention to himself. He wasn't accidentally lost. His own
18 words, "I knew that if a DUSTWUN was called from a Soldier
19 disappearing, that call goes not only all the way up to the Army
20 command, it goes to the Air Force. It goes to the Marines. It goes
21 all the way to the States. It goes to every high point and everybody
22 finds out about it." No one knows what happened to him. That call
23 goes out. It hits every command. "If I go DUSTWUN, I am going to

1 get my chance to talk to a General." He deliberately left and
2 intended to be gone long enough to trigger search and recovery
3 operations.

4 The third element is, that he endangered the safety of Task
5 Force -- of Task Force Yukon and Observation Post Mest. Now, to
6 endanger is to subject one to a reasonable probability of harm --
7 reasonable probability. And it is understated, sir, to say that the
8 Soldiers in Task Force Yukon were subjected to a reasonable
9 probability of harm. They were exponentially endangered by the
10 accused's actions. They were exposed to harm. Starting with that
11 unplanned nine-man patrol of fatigued Soldiers. He endangered the
12 observation post because Captain Billings had to leave behind only a
13 skeleton crew and take out an unplanned patrol. Moving all the way
14 up to task-force-wide recovery operations, endangering the task
15 force. Months of grueling fatigue; little water; almost no sleep;
16 always moving; always short on food; working in the brutal Afghan
17 heat during the day and freezing at night; vastly increased IED
18 exposure; taking fire and hits with IEDs; increased air assaults.
19 The task force moved into places it had never gone before, moving
20 down un-cleared routes.

21 But the accused knew this would happen. He knew troops
22 would be called out for DUSTWUN. "An alert would go out." "I chose
23 that particular time because that should have been the last day we

1 were on the TCP and 3rd Platoon would have been prepared to come out
2 and would have been that support."

3 Sir, this element is complete when Lieutenant Billings
4 takes out that nine-man patrol, but the facts are more than that. He
5 endangered the entire task force.

6 And fourth, the act occurred before the enemy. Facts:
7 Afghanistan is a combat zone. Observation Post Mest is one of the
8 most remote OPs in Pakistan [sic]. It is at a critical intersection,
9 one designed to stop the flow of arms and fighters coming in from
10 Pakistan, right down the road from IED alley, within sight. The
11 observation post was set up as a defensive position, bunkers,
12 claymores, MRAPs arrayed tactically covering sectors of fire. The
13 definition of before the enemy.

14 And the accused's own words acknowledged this. He
15 acknowledged that on the Omnah mission he was involved in a complex
16 attack with small arms and RPGs. "Here I am, a Private First Class,
17 standing in Afghanistan, a war zone. We've been blown up. We've
18 been shot at."

19 Now, sir, the benchbook tells you, "before the enemy" is
20 not measured in distance and certainly doesn't require a face to face
21 with the enemy for the offense to be complete. "Before the enemy" is
22 a term of art that encompasses a tactical relationship between an
23 accused and the enemy and is specifically not a question of distance.

1 The base does not have to be under attack in order for an offense to
2 be before the enemy. If a unit is postured, ready to participate in
3 either an offensive or defensive battle, and its weapons are capable
4 of delivering fire on the enemy and, in turn, are so situated that
5 they are with effective range of enemy weapons, that unit is before
6 the enemy. Claymores, tactically arrayed trucks. And the accused
7 went face to face with the enemy, point blank, when he encountered
8 and was taken captive by Taliban elements.

9 I'd like to take a few minutes and address some of the
10 things the defense has presented. The government is certainly not
11 disagreeing that the accused has injuries and that he has suffered.
12 Indeed, he has suffered greatly. But I'd like to use an analogy
13 here. If a person goes out and robs a bank and gets away. He gets
14 in his car, drives away and, while fleeing the bank robbery he is
15 involved in a horrific crash -- injures himself, loses his leg. He's
16 not then allowed to say, I shouldn't be punished for robbing the bank
17 because I was injured, because I lost my leg. He still committed a
18 crime, and he still needs to be held responsible and face those
19 consequences.

20 The defense also tried to imply some things about mental
21 health, but let's take a look at the actual evidence. The testimony
22 is that the accused is very intelligent, well read, bright; but he
23 was just the kind of guy who didn't like to go out drinking and

1 carousing with other infantry Soldiers. He wasn't really into joking
2 about women or that kind of stuff. He was a little different. He
3 wanted to kick in doors instead of maybe doing or understanding a
4 hearts-and-minds mission. Was he immature? Yes.

5 The defense has submitted for your consideration a form by
6 Dr. Lange, one of the top Army forensic psychologists. And I'd like
7 to point out, sir, the rest of what the form actually says. Dr.
8 Lange says that in 2009, at the time of the alleged criminal
9 misconduct, the accused was able to appreciate the nature and quality
10 and wrongfulness of his conduct. And he also says, the accused is
11 able to understand the nature of the proceedings against him and to
12 conduct or cooperate intelligently in his defense. He knew the
13 nature and quality of his actions, and he can cooperate
14 intelligently.

15 PHO: That's true to the affirmative defense, but we also have a
16 specific-intent crime here.

17 TC: Um-hmm [indicating an affirmative response.]

18 PHO: Were you going to address that?

19 TC: No, sir.

20 PHO: Okay.

21 TC: And the last purpose as to why we are here, and that's a
22 recommendation as to disposition. We know that there is probable
23 cause that he committed desertion and misbehavior before the enemy.

1 Those charges and the facts supporting them, are the essence of what
2 charges belong in front of a general court-martial. And if there is
3 anyone who doubts that these charges are serious, know this: The
4 military is a profession of arms, and the keyword here is
5 "profession." Order, discipline, and -- yes -- rank structure, and
6 obedience to orders matter. His actions were the antithesis of that
7 profession. His actions on 30 June 2009, a Private First Class
8 deliberately, single-handedly, and knowingly changed the mission of
9 the United States forces in Afghanistan. In a structured system such
10 as our military, the tail cannot wag the dog. With his deliberate
11 disregard for the consequences by knowingly and deliberately setting
12 out to desert his post, leave his fellow Soldiers behind, cause a
13 DUSTWUN and search and recovery operation, he did just that. There
14 was nothing accidental about what he did. He created the
15 circumstances that brought him here. There are consequences to those
16 actions and those consequences should be a general court-martial.

17 The defense may argue that he's suffered enough and that
18 you should just let him go home. The government would argue that
19 this is narrow minded and more appropriately a matter for sentencing
20 at a general court-martial.

21 But, also, to end the deliberation there ignores the larger
22 purpose and heart of why we are here at a preliminary hearing. A
23 court-martial is about the accused and his misconduct, but it is also

1 about more than that. It's about his victims. In this case, the
2 unit, the Soldiers, the task force who searched for him for months in
3 the heat, and dirt, and sweat, and misery of Afghanistan in July and
4 August 2009. And it's about the Army as a whole and the leaders who
5 carried on for 5 years seeking him.

6 The bottom line is that a general court-martial will make
7 available the full range of punishments to the fact finder. The
8 government doesn't believe that this misconduct is appropriate for a
9 special court-martial or a misdemeanor level offense. It's more than
10 mere bad conduct. Thousands of lives were affected and he
11 singlehandedly shaped our mission in Afghanistan. The accused needs
12 to square himself with the military for what he did and the
13 appropriate forum for that is a general court-martial.

14 Thank you.

15 PHO: One clarification. You mentioned a special court-martial
16 is not appropriate because it would be roughly equivalent to a
17 misdemeanor level offense ----

18 TC: Yes, sir.

19 PHO: ---- and I presume by saying that -- that because the
20 maximum jurisdictional punishment of a special court-martial is 1
21 year, that it would be a misdemeanor level. That said, it's still --
22 if the crimes for which he's alleged to have committed -- if he's

1 found guilty at a special court-martial, that would be -- he would be
2 considered a convicted felon at that point; correct?

3 TC: He would have a federal conviction.

4 PHO: He would have a federal felony conviction?

5 TC: No, sir. Misdemeanor crimes usually carry up to 1 year in
6 the civilian sector, that's why we compare it to the special
7 court-martial.

8 PHO: Okay. We'll have to disagree on that one.

9 TC: Roger, sir.

10 PHO: I will review the law just to make sure, but we'll have to
11 disagree.

12 Defense?

13 [The civilian defense counsel displayed slices from Defense Exhibit E
14 throughout his closing statement.]

15 CDC: Thank you, Colonel.

16 And as I begin, I'd like to employ a PowerPoint. I'm not a
17 PowerPoint guy, so please be patient. There we go. Thank you. And
18 I apologize to the -- because of the layout you may ----

19 PHO: It's okay.

20 CDC: ---- get a neck-ache out of this, but the medical
21 evaluation board can fix you right up on that.

22 As I begin this, I would like to -- this will only take a
23 few minutes by the way. I would like to note for the record that my

1 client is deeply grateful to President Obama for saving his life.
2 He's also deeply grateful for the people who exerted themselves to
3 rescue him.

4 Now, let's -- that's a picture we've seen before. Let me
5 walk through this fairly quickly, and let's see if I can help focus
6 the conversation. These are what I think are the basic issues. The
7 primary issue is probable cause, obviously. Defense has come into
8 the picture by their mitigating factors as prescribed in the *Manual*,
9 that's one of the considerations to be taken into account.

10 You have to make a recommendation. So it's -- one would
11 want to consider what are the -- what is the range of possible
12 recommendations and then the sort of bottom line, what course of
13 action should be recommended.

14 So, on probable cause -- and I'm not going to argue a lot
15 of law with you because you're -- I'm sure you're going to be going
16 back and hitting the books and all that. But just a few brief
17 remarks. I have read with interest a case from 1995 called *United*
18 *States against Gonzalez*, 42 MJ 469 (1995) which, by the way, is the
19 subject of an article by Colonel Lietzau. It's a comment that
20 appeared in the Naval Law Review in 1997, the citation is 44 Naval
21 Law Review 287, the title is *Shirking Important Service that Isn't:*
22 *Desertion under United States against Gonzalez*, and the point that
23 Colonel Lietzau -- who is known to any military justice practitioner

1 as well as law of war people -- is that in that case the Court of
2 Military Appeals -- or, I guess, maybe they had become the Court of
3 Appeals for the Armed Forces by that point -- distinguishes between
4 the intent part -- the first and the second parts of Article 85 of
5 what I'll call short desertions of either category. And as I read
6 the case the test for the first part is subjective, and it would be
7 unfair to you to go into greater detail and have an elaborate
8 conversation about it because you haven't perhaps studied it. So I'm
9 just going to invite that to your attention.

10 As far as the second charge, the benchbook does have a
11 discussion of "before the enemy." We think that there is a
12 substantial question, at the very least, as to whether Sergeant
13 Bergdahl's conduct was before the enemy ----

14 PHO: Could you elaborate on that?

15 CDC: Yes, because it's a fact-intensive issue. And to declare
16 that the entire country of Afghanistan or an entire province is
17 before the enemy is a dramatic inflation of the reach of that
18 statute. The benchbook says what it says. The cases say what they
19 say. But that's -- from our perspective, Colonel, that is a disputed
20 point.

21 The other thing that I would like to do is -- it's
22 sometimes useful to actually go back and read the statute again even
23 though -- and, particularly, let me say, in the case of relatively

1 obscure provisions of the punitive articles and Article 99(3) is as
2 obscure as they get, aside from maybe the provision on dueling. And
3 the word that I would like to invite your attention to in Article
4 99(3) is the word "such." Again, this is not the place to have a --
5 you know, a lawyer's conversation about, you know, teasing things out
6 of the statute. That's not a good use of hearing time. But the
7 answer -- the point that I think emerges if you read the actual text
8 of 99(3) is the reference to "such command, unit, place, or military
9 property." If you look at it, you say, "Ah, well what is the work
10 that the word 'such' is doing there?" And the answer is it's a
11 reference to the immediately preceding subsection of Article 99,
12 which makes it clear that it has to be a command, unit, place, or
13 military property, which it is the individual's duty to defend. And
14 I'm here to tell you that the only possible reference that could have
15 been intended in this case is OP Mest and not some larger command.
16 End of comment on that.

17 As you know, the *Manual* affords us the opportunity and, I
18 guess, it imposes on you the duty to at least consider defenses. And
19 let me just speak on this. We have indicated a defense of
20 condonation of desertion, later in the -- shortly -- very soon in
21 this presentation, I'll give you the R.C.M. reference for this, but
22 returning a Soldier to regular duty knowing of a -- knowing or having
23 reason to believe that the Soldier has committed desertion

1 constitutes condonation. And in this case Sergeant Bergdahl was
2 restored to regular active duty. The Department of Defense and, I
3 think, the Army Public Affairs people at Fort Sam made this very
4 clear back in July of 2014, and he's been there ever since.

5 The second ----

6 PHO: Do you have any case law on that?

7 CDC: No. There isn't any case law on it. This is a very
8 obscure part of the forest. I recognize that. And yet it's there in
9 the *Manual*, and I'll give you the reference in a minute.

10 PHO: Well, no, and I have actually reviewed that reference. And
11 the reason I ask is I note in your letter to General Milley regarding
12 disposition, you suggest that the time was not yet ripe to make a
13 disposition because of your client's health. So, you know, it seems
14 to me that, you know, do we possibly not have condonation here where
15 defense is suggesting that he's not ready and that the case is not
16 ripe yet for a decision.

17 CDC: I'm going to disagree with that because the fact is the
18 Army had him in a job. And he was not a basket case, he was not in -
19 - on sick duty. He was in a job. That's -- and the Army said, "He's
20 been returned to regular duty."

21 Now, the second point is -- and again it's a -- it's an
22 obscure point. And I'm looking at your legal advisor as I say this.
23 I'm sure you'll have an interesting time as you drill down into that,

1 but here you have an absence terminated by -- not apprehension, not
2 surrender but by the criminal act of third parties. And our view,
3 obviously, is that that criminal act of third parties terminated the
4 absence. And obviously there is a question of impossibility to
5 return after he was kidnapped, and we heard in depth about that
6 today.

7 Charge II: Let me briefly -- and again I'm pulling the
8 statute in front of me. Charge II is a charge that emerged from some
9 source other than General Dahl's report. General Dahl had legal
10 advice, and Charge II is entirely missing. Talk about missing --
11 that's missing from his report. And what I can say is, I think it's
12 a grave abuse of Article 99(3) to treat this as a -- to treat the
13 facts and circumstances about which you've heard as a 99(3). An
14 effort, I imagine, to ratchet up my client's exposure, maybe to --
15 well, I'll just leave it at that -- to ratchet up my client's
16 exposure.

17 And may I have the charge sheet? Do we have that handy?
18 March 25th.

19 [Pause.]

20 Or if the court reporter -- does the court reporter have it
21 handy?

22 [The court reporter indicated a negative response.]

23 CDC: No. Okay.

1 [Pause.]

2 CDC: So I'm referring to the charge sheet executed by the
3 special court-martial convening authority, and I'll have more to say
4 about his viability as a special court-martial convening authority
5 since he's the Type I accuser in this case in a few minutes. But
6 Charge II, I'm looking towards the end. As I indicated before, it
7 expands inappropriately the -- the reach of this by going beyond OP
8 Mest. And the last clause which, you know, does the work, reads as
9 follows: "...by intentional misconduct in that he left OP Mest alone,"
10 now, that's an AWOL; "he left without authority," that's an AWOL;
11 "and he wrongfully caused search and rescue operations." And I
12 believe that that is absolutely not what the drafters of Article
13 99(3) contemplated. I don't think Article 99(3) was intended to
14 provide a mini-replica of Article 134, and I think it's an abuse of
15 the Code. And it's certainly multiplicitious; but, in any event, a
16 distortion and a distention of the reach of this criminal statute.
17 That's all, I think, I want to say on that subject.

18 Now, with respect to desertion, you've -- probably more has
19 been said about desertion in the last 2 days than has been said on
20 the subject in the sum total of Article 85 cases tried under the UCMJ
21 in the last 5 years. So I'm not going to go into great detail.

1 I'm going to look at the third bullet. It was obviously
2 far more dangerous outside the wire alone and unarmed than it was
3 inside and armed.

4 And I also -- as you can see from this slide, this is
5 charged in the spec as a 5-year desertion, but Sergeant Bergdahl was
6 captured within hours.

7 Now, on condonation, here's the reference, Colonel, all the
8 way at the bottom, and what you can see are factors that we think are
9 pertinent. And I believe my letter to General Milley, which has been
10 admitted in evidence, gives citations to the statements on behalf of
11 the service, on behalf of the government, that he had been restored
12 to full duty in July 2014.

13 Now, R.C.M. 306 is sort of the -- even though it, in direct
14 terms, speaks to the decision of the convening authority, necessarily
15 since you all have to make a recommendation to a convening authority,
16 whoever that may be, it sort of -- it has to be considered here
17 because it's going to apply later on. And these are things that, it
18 seems to me, are particularly salient.

19 The first bullet is probably the most fundamental
20 proposition of disposition policy that the president has prescribed.
21 Obviously, mitigating and extenuating circumstances have to be taken
22 into account, the character of the accused, cooperation and the

1 apprehension of others, admissibility, and other likely issues. This
2 is just the framework. Let's see what specifics we can talk about.

3 Mitigation: There was powerful evidence with respect to
4 the duration of Sergeant Bergdahl's captivity. His treatment in
5 captivity. His escape attempts. His conduct in captivity. There
6 was evidence of -- powerful evidence of innocent motivation. There
7 was extensive evidence of his cooperation with authorities. It's --
8 we didn't like, you know, beat this to death; but in the record
9 you'll find a letter from the Washington Delegation of the
10 International Committee of the Red Cross indicating Sergeant
11 Bergdahl's cooperation there. The record reveals that he cooperated
12 with the Federal Bureau of Investigation, which is trying to bring
13 his kidnappers to justice in our country. Obviously, Sergeant
14 Bergdahl cooperated extensively with General Dahl. And as General
15 Dahl indicated, Sergeant Bergdahl was under absolutely no duty -- and
16 we all know this -- he was absolutely under no duty to give a
17 statement, much less a statement that took, I think, General Dahl
18 estimated a day-and-a-half, answering every single question.

19 The mitigation includes the permanent profile report about
20 which Colonel Rosenblatt interrogated the witness; the psychological
21 diagnosis that's before you; and the need for continuing medical and
22 psychiatric or psychological care. This is totally undisputed.

1 I'm going to leave this [pointing to the slide] up there
2 for a second because I think it's probably the single most potent
3 factor before you and through you and the officials higher in the
4 chain of authority for this matter. I hope my math is correct. I
5 actually double checked it. I'm not a math whiz. But my little
6 calculator produced a total of 1,797 days over 2 -- 4 -- nearly 5
7 years. That's all I have to say about that slide. It literally
8 speaks for itself.

9 I think one of the witnesses referred to this image.
10 Somebody's having a good time in this picture, and it's not my
11 client. The image -- the individual, whose arm only is shown is, I
12 think, holding a dog tag?

13 [The accused indicated an affirmative response.]

14 CDC: Yes.

15 Behavior in captivity: This is -- you just heard this
16 testimony, so I'm just going to quickly flash by this. You don't
17 need to have me dwell on it. It's utterly un rebutted. And to his
18 credit the witness, Mr. Russell, spoke, I think, impressively about
19 the really unfair assertions that have been made about my client in
20 our country's media. We're -- at this table we're big about the
21 First Amendment. People can do that, but it's not fair.

22 Consequences of captivity: I think you've heard powerful
23 evidence on these subjects.

1 The fourth one there is, I guess, it's by -- it's tied, I
2 guess, to the physical limitations but probably also the
3 psychological evidence that you heard that's unrebutted.

4 I really don't know where the path leads based on -- for my
5 client, based on what we've heard in terms of his future. I'd like
6 to see him go to college. He'd like to go to college. But, you
7 know, as a practical matter, I see a quite rocky path for viability
8 in our world, the world of the workplace and so forth -- and the
9 medical and other needs.

10 This is an interesting issue. I touched on this with
11 General Dahl. This is -- this is what the document says from the
12 Coast Guard. This is unrebutted. This is not -- you know, needless
13 to say, we were extremely gratified that General Dahl was willing to
14 testify, which he did at some inconvenience to himself and entirely
15 voluntarily. But I will say this is a somewhat different account,
16 and this is the official account of what was going on at Training
17 Center Cape May.

18 With regard to the unexplained waiver by Army recruiting,
19 General Dahl addresses this matter in his executive summary.
20 Unfortunately, it's where -- it's not yet public, but I'm hoping that
21 ACCA will fix that. It -- to a -- a reasonable -- withdrawn. A
22 reasonable observer would, I think, have grounds for believing this
23 was an improvident enlistment. You know, I'm not here to hit the

1 Army over the head about this. In candor, General Dahl, if you read
2 his entire executive summary, concluded that it wasn't an improvident
3 enlistment. It was, you know, it unfolded in a way that everyone
4 here would obviously prefer hadn't happened. But I think a
5 reasonable observer, nonetheless, would wonder why the Army would've
6 taken a person who, within the relatively recent past, had
7 bilged [sic] out of Coast Guard recruit training -- boot camp for
8 this kind of reason. And this is pertinent also to the testimony of
9 ex-Sergeant Leatherman and other witnesses as to whether this would
10 have been -- whether it would have been useful information to Army
11 authorities, Army commands, even low down commands to know this in
12 dealing with the other indicators that Sergeant Bergdahl presented,
13 then-PFC Bergdahl.

14 Innocent motivation: General Dahl had an excellent
15 opportunity to investigate this, and my hat is off to the Army for
16 dedicating the resources they did. They spared no effort and got a
17 general officer to run a, you know, a not -- it's unbelievable
18 actually -- nonstop, put everything else aside, straight ahead with a
19 substantial staff to stand up basically a whole unit, just to
20 investigate this. Having done that, this is where General Dahl, who
21 is, I think -- you know, whose strengths are utterly apparent based
22 on his testimony -- that led General Dahl to conclude that while
23 Sergeant Bergdahl's concerns may have been naïve and unrealistic,

1 they were sincerely held. And I think that comes through loud and
2 clear repeatedly, not only in General -- explicitly in his statement
3 -- in his executive summary -- excuse me -- or in his report but also
4 on the witness stand.

5 The last bullet has to do with the point about leaving his
6 weapon behind and not wanting -- not taking the weapon, the taking of
7 which would have gotten somebody else in trouble.

8 Moving right along, I already mentioned most of these, SERE
9 -- the SERE program has benefited from this debriefing. The hostage
10 recovery program. I mentioned the others. You've already heard
11 that. Moving along.

12 Now, one of the things that you should do is alert the
13 recipients of your report to potential legal and other issues that
14 could emerge down the road. And just to mention a few of these as
15 I've had occasion to say in the past: I believe the Niagara of abuse
16 that's been directed to my -- at my client for over a year raises a -
17 - a grave threat to his right to have a fair trial in the event this
18 case were to be referred to a court-martial. Yes, I know all about
19 *voir dire*; but I'm here to say that the amount of abuse and
20 vilification that continues to this instant is without precedent.
21 I've been involved with military justice since 1969, and I cannot
22 think of a case that engendered the kind of hostility and hostile
23 coverage, to be perfectly blunt, as this one.

1 Not to burden you because this is -- this is not your
2 function. I mean, you've had been appointed by somebody to be --
3 you're not a statutory preliminary hearing officer. You've been --
4 this is an ad hoc appointment for you; however, -- and, therefore,
5 you don't have anything to rule on in terms of manipulation of the
6 selection of a general court-martial convening authority or, for that
7 matter, the violation the Secretary's non-delegation directive as to
8 who should be the ultimate decision maker or as to the legality of
9 the condition that General Milley put on Lieutenant Colonel Burke's
10 authority as ostensible convening authority. But those -- you know,
11 somebody is eventually going to have to address those.

12 As you may be aware -- I don't recall whether this is in
13 the record; but it's a fact there were two extraordinary writ
14 petitions that were presented to the Army Court of Criminal Appeals
15 and then the Court of Appeals for the Armed Forces. The Court of
16 Appeals for the Armed Forces denied both of them without prejudice to
17 presentment in the presentation in the ordinary course of appellate
18 review if there is a court-martial and a conviction. Those are
19 issues that are going to arise. They are going to travel with this
20 case and are not unlikely to require another Article 32.

21 We have a grave problem with Lieutenant Colonel Burke
22 serving in any capacity because he is a Type I accuser. He signed
23 the charge sheet, and we cited authority for this and, you know,

1 that's in the case. We've asked General Abrams to modify the
2 referral document to fix this problem, and it hasn't been fixed. I'm
3 just saying it's an issue that's in the case.

4 As you know, The Judge Advocate General of the Army blocked
5 consideration by -- is it Army G-2 -- of our request that I be
6 afforded a top-secret SCI clearance, and that will be an issue in the
7 case. And if we gain traction on that, as I believe we should, we'll
8 be back here again at another Article 32 hearing.

9 PHO: All right. And, you know, just to make sure the record is
10 clear, I've never seen the memo. So I don't know who blocked the
11 security clearance ----

12 CDC: Yeah.

13 PHO: ---- request, but ----

14 CDC: There's so much paper, Colonel, in this case that I can't
15 always keep track of what we've burdened you with and what we haven't
16 burdened you with, as you -- but as you intuited, there are aspects
17 to the case that, you know, are in other peoples' part of the forest.

18 PHO: Correct.

19 CDC: But I'll just represent to you that that's certainly going
20 to be an issue.

21 PHO: Certainly. I understand that you have been denied a
22 top-secret security clearance for purposes of the hearing.

1 CDC: No. Actually what I've -- what I've been denied is even a
2 decision ----

3 PHO: You're right.

4 CDC: ---- by G-2 on whether I'm ----

5 PHO: I stand corrected.

6 CDC: Yeah. Yeah. Sorry to be lawyerly -- picky.

7 PHO: That's okay. That's your job.

8 CDC: We still haven't gotten an investigator. And this is
9 unbelievable; but in all the time that we've been waiting, we still
10 haven't gotten investigative assistance.

11 And this is as good a time as any for me to mention with
12 great appreciation the work of Captain Foster, as well as Lieutenant
13 Colonel Rosenblatt. The three of us have had to take time from our
14 legal functions to perform what otherwise would have been the work of
15 investigators. And that's not right, and it's not fair.

16 There is in the case a HIPAA violation, and it's there.
17 You know, where the path leads for that remains to be seen.

18 As you know from our conversation about the statement that
19 my client gave to General Dahl, we have an objection on the ground
20 that the no cleansing warning was given. That's an issue in the
21 case.

22 The other bullets, I think, are self-explanatory with the
23 exception of the last one. As I believe you -- I believe you are

1 aware -- and correct me if I am mistaken on this -- my client is not
2 permitted to go off this reservation without being accompanied by one
3 or two NCOs. And although that has been -- we have been told that
4 the purpose of that is what I'll call force -- one-man force
5 protection -- mainly for the physical protection of my client against
6 injury -- it also qualifies as a pretrial restriction. And there
7 have been instances in which his requests for leave or liberty have
8 been denied.

9 So what are the possible recommendations? I'm getting to
10 the home -- I'm in the homestretch, Colonel. Obviously to permit the
11 MEB to proceed as was recommended in the profile report. Many people
12 leave the Army with administrative separations. These can be
13 stigmatizing or non-stigmatizing. Obviously, nonjudicial punishment
14 is a possible form of disciplinary action. The rest we're all
15 familiar with.

16 So what should be recommended? Our recommendation is that
17 you recommend that the medical evaluation board process should be
18 permitted to go forward. And in terms of the basic matter at hand,
19 we are willing to note that the record provides probable cause for a
20 1-day AWOL, in violation of Article 86.

21 Thank you.

22 PHO: Okay. All right, before we close I just want to take a
23 moment to be sure that we are on the same page for the exhibits that

1 I will be considering. So, right now, I've got the court reporter
2 worksheet -- exhibit worksheet. So I just want to go over it to make
3 sure that we're on the record for what we have.

4 So for prosecution exhibits:

5 Prosecution Exhibit 1, the sworn statement of Sergeant
6 Bergdahl, dated 6 August 2014; 373 pages long;

7 Prosecution Exhibit 2, Sergeant Bergdahl's attachment
8 orders to FORSCOM, dated 9 January 2015;

9 Prosecution Exhibit 3, Sergeant Bergdahl's deployment
10 orders, dated 1 May 2009. And that is a two-page document; and

11 Prosecution Exhibit 4 is Sergeant Bergdahl's DA Form 4187,
12 changing his status from captured to present for duty, dated 30 March
13 2015. And that is a two-page document.

14 In addition I have, as demonstrative evidence only, the
15 unclassified map of Afghanistan that was displayed to one of the
16 witnesses.

17 Is that a complete and accurate accounting of the
18 government evidence?

19 TC: Yes, sir.

20 PHO: Okay. For the defense, I have four exhibits plus, now, one
21 demonstrative exhibit.

22 The first is Mr. Fidell's letter to General Milley, and I
23 don't have the total number of pages here -- I believe it's 28;

1 I have the executive summary of Major General Dahl's report
2 -- not just the executive summary -- his actual report of
3 investigation into this matter, 59 pages;

4 I have a -- the short-form Rule for Court-Martial 706
5 sanity board findings, and that is dated 27 July 2015; and

6 Then I've got the DA Form 3349, the physical profile, dated
7 25 June 2015; and

8 Then lastly we have the -- we're going to have the printout
9 of the ----

10 CDC: I've handed it to the court reporter.

11 PHO: Okay. We're on top of it. That will be, again, a
12 demonstrative aid. It will not be considered substantively but will
13 be marked as Defense Exhibit E.

14 Is that a complete and accurate statement of the ----

15 CDC: Yes. It is.

16 PHO: Okay. And any objections from the government?

17 TC: No, sir.

18 PHO: Okay. Finally, we have a number of hearing exhibits or
19 what I'm saying is -- or my exhibits as the pretrial hearing officer.
20 I provided a draft list to the parties, and we will meet in an
21 informal session to make sure that all the documentation leading up
22 to this hearing is appended properly to the record. And we will go

1 over that just make sure that there are no missing documents, but
2 that doesn't need to be done on the record.

3 With that, that concludes the hearing. I would like to
4 just take a moment to thank the parties, both the government counsel
5 and defense counsel, for their professionalism. I thank all the
6 support staff. I know there was a whole lot of hard work going on
7 behind the scenes between paralegals, court reporters, security
8 managers, military police support; and I do appreciate and recognize
9 everyone's support.

10 So with that, this hearing is closed.

11 **[The Article 32 hearing adjourned at 1535, 18 September 2015.]**

12 **[END OF PAGE]**

Exhibit 3

BEFORE THE
DEPARTMENT OF THE ARMY
PROFESSIONAL CONDUCT COUNCIL

Request for Interpretation

Introduction

This is a request for an interpretation under Rule 9.1(e) of AR 27-26, *Legal Services: Rules of Professional Conduct for Lawyers* (1 May 1992), at 31. That rule provides that “[a]ny lawyer subject to [the Army] Rules may request an opinion from the [DA Professional Conduct] Council.” This request includes the required description of the factual situation that is the subject of contention, a discussion of the relevant law, and the requester’s opinion as to the correct interpretation.

Expedited consideration is requested.

Request for Recusal

Charges against SGT Bowe R. Bergdahl are the subject of an Article 32, UCMJ, preliminary hearing and related extraordinary writ litigation before the U.S. Army Court of Criminal Appeals and the U.S. Court of Appeals for the Armed Forces. I request that no one who has participated in, advised with respect to, or reviewed either those matters or the AR 15-6 investigation conducted in 2014 by MG Kenneth R. Dahl play any role in the consideration of this request for a Professional Conduct Council interpretation.

Procedural Setting and Facts of the Case

SGT Bergdahl is an active duty noncommissioned officer. He is represented by three attorneys: Eugene R. Fidell (civilian defense counsel, admitted in the District of Columbia and Connecticut), LTC Franklin D. Rosenblatt, JA (individual military counsel, admitted in Colorado), and CPT Alfredo N. Foster, Jr., JA (detailed defense counsel, admitted in Oregon).

SGT Bergdahl was held prisoner by the Taliban-affiliated Haqqani network for nearly five years until he was exchanged for five Guantánamo detainees on 31 May 2014. On 25 March 2015 he was charged with violations of Articles 85 (desertion) and 99(3) (misbehavior before the enemy), UCMJ. These charges carry very serious penalties. MCM ¶¶ 10e(1), 23e. They will be considered by a field grade judge advocate serving as preliminary hearing officer at a hearing to be convened in San Antonio, Texas, on 17 September 2015 in accordance with Article 32, UCMJ.

The purposes of a preliminary hearing are to determine whether there is probable cause to believe an offense has been committed and that the accused committed it; whether a court-martial would have jurisdiction; whether the charges are in proper form; and to make a recommendation as to how the charges should be disposed of. Unless there has been such a hearing (or the accused waives it), no charge can be referred to a general court-martial for trial. The defense has the right to introduce matters going to probable cause, matters in defense, and matters in mitigation.

It is an understatement to observe that SGT Bergdahl's case has been and continues to be the subject of intense and highly politicized media interest. Much of this interest—greater than in any court-martial case in several decades—has been stoked by a variety of shows on such media as Fox News Channel, which has a sizable audience—both military and civilian—around the country. Fox “analysts” (including a retired Army Reserve field grade officer) have repeatedly gone on the air with information said to have been leaked by government officials. In one instance it appeared that classified information had been compromised by such an “analyst.” In several instances persons appearing on Fox have disseminated demonstrably false information, leading Department of Defense and Army public affairs at one point to issue strong public denials.

Among Fox's latest sources is a retired CIA employee who claimed on the air that SGT Bergdahl had been high on drugs when he allegedly left his duty station in Afghanistan. Fox spared its many viewers the fact that that retiree had been indicted on seven counts of perjury and false statements in connection with the notorious Iran-Contra scandal but was pardoned by President George H.W. Bush before his scheduled trial in federal district court.

An entire Facebook page has been established by persons unknown with the title “Bergdahl is a Traitor.” One of the numerous candidates for the Republican nomination for President of the United States has publicly branded him a traitor, as did at least one Fox show host. The retired field grade officer referred to above also asserted on Fox that SGT Bergdahl had given aid and comfort to the enemy. The *Army Times* Facebook page immediately spawned a deluge of hostile comments following a recent op-ed about SGT Bergdahl's case by a respected retired Air Force judge advocate. A printout of these is attached. More comments in the same ugly vein have certainly been added since it was generated.

The media and Internet echo chamber have repeated highly inflammatory claims that at least six Soldiers died searching for SGT Bergdahl and that he deserted to the Taliban. These claims are false, as witness the fact that on 10 June 2015 government counsel advised the preliminary hearing officer that “[t]he Government does not intend to produce evidence at the Article 32 hearing that service

members were killed or wounded during the search for SGT Bergdahl, or that SGT Bergdahl intended to desert to the enemy.”

The amount of venom with which the Internet seethes concerning SGT Bergdahl is beyond description. Matters are even worse in the blogosphere, which has become a veritable cesspool of hatred and abuse. The reader is encouraged to use any popular search engine and the search term “Bergdahl” to test these propositions.

In short, it has been “open season” on SGT Bergdahl. His immediate commander believes he is in physical danger, and therefore has required since last year that he be accompanied by NCOs whenever he leaves Fort Sam Houston. Even on the installation, there is a high risk of confrontation simply by his visiting Brooke Army Medical Center.

Links to examples of hostile and inflammatory commentary are provided in the first attachment to this request. An exhaustive catalogue would consume many more pages.

There is increasingly strong reason to doubt whether SGT Bergdahl can receive a fair trial given the prolonged barrage of opprobrium that has been heaped upon him over the last year.

Governing Law for the Preliminary Hearing

The Sixth Amendment confers a right to a public trial. U.S. Const. amend. 6. Article 32 hearings are subject to the Sixth Amendment right to a public trial. *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997).

The *Manual for Courts-Martial, United States* (2012 ed.) is the governing regulation. As amended on June 17, 2015, see Exec. Order No. 13696, 80 Fed. Reg. 35,783, 35,798-99 (2015), the *Manual* provides in Rule for Courts-Martial 405(i)(4):

(4) *Access by spectators.* Preliminary hearings are public proceedings and should remain open to the public whenever possible. The convening authority who directed the preliminary hearing or the preliminary hearing officer may restrict or foreclose access by spectators to all or part of the proceedings if an overriding interest exists that outweighs the value of an open preliminary hearing. Examples of overriding interests may include: preventing psychological harm or trauma to a child witness or an alleged victim of a sexual crime, protecting the safety or privacy of a witness or alleged victim, protecting classified material, and receiving evidence where a witness is incapable of testifying in an open setting. Any closure must be narrowly tailored to achieve the overriding interest that justified the closure. Convening

authorities or preliminary hearing officers must conclude that no lesser methods short of closing the preliminary hearing can be used to protect the overriding interest in the case. Convening authorities or preliminary hearing officers must conduct a case-by-case, witness-by-witness, circumstance-by-circumstance analysis of whether closure is necessary. If a convening authority or preliminary hearing officer believes closing the preliminary hearing is necessary, the convening authority or preliminary hearing officer must make specific findings of fact in writing that support the closure. The written findings of fact must be included in the report of preliminary hearing.

The 2015 *Manual* amendments supersede AD 2015-09 (24 Feb 2015), Procedures for the Implementation of Section 1702 of the National Defense Authorization Act for Fiscal Year 2014, ¶ 10 of which provided:

d. *Spectator Access*. Access by spectators to all or part of the proceedings may be restricted or foreclosed at the discretion of the convening authority who directed the preliminary hearing or the preliminary hearing officer. Preliminary hearings are public proceedings and should remain open to the public whenever possible. When an overriding interest exists that outweighs the value of an open preliminary hearing, the preliminary hearing may be closed to spectators. Any closure must be narrowly tailored to achieve the overriding interest that justified the closure. Convening authorities or preliminary hearing officers must conclude that no lesser methods short of closing the preliminary hearing can be used to protect the overriding interest in the case. Convening authorities or preliminary hearing officers must conduct a case-by-case, witness-by-witness, circumstance-by-circumstance analysis of whether closure is necessary. If a convening authority or preliminary hearing officer believes closing the preliminary hearing is necessary, the convening authority or preliminary hearing officer must make specific findings of fact in writing that support the closure. The written findings of fact must be included in the report of preliminary hearing. Examples of overriding interests may include preventing psychological harm or trauma to a child witness or an alleged victim of a sexual crime, protecting the safety or privacy of a witness or alleged victim, protecting classified materials and receiving evidence where a witness is incapable of testifying in an open setting.

None of the examples cited in R.C.M. 405(i)(4) or AD 2015-09 ¶ 10d as “overriding interests” are relevant to the documents the defense wishes to be able to disseminate, as explained more fully below.

Need for an Interpretation

In accordance with R.C.M. 405 and AD 2015-09, government and defense counsel have exchanged lists of the evidence they intend to offer and the witnesses they plan to call. Government counsel have indicated that they plan to call live witnesses concerning SGT Bergdahl's alleged conduct and its alleged consequences in order to show probable cause and presumably why the charges should be disposed of by court-martial rather than other available means. Among other documents, government counsel have indicated that they plan to offer into evidence the transcript of MG Dahl's lengthy interrogation of SGT Bergdahl. Neither that transcript nor the executive summary of MG Dahl's AR 15-6 report have been made public. Neither one is classified.

The convening authority who appointed the preliminary hearing officer issued a protective order preventing the defense from disseminating case documents that contain sensitive but unclassified information. A copy is attached. The defense is asking the convening authority to clarify or modify the protective order to permit the defense to disseminate unclassified case documents such as the transcript of SGT Bergdahl's interrogation and MG Dahl's executive summary. The defense wishes to be able to disseminate both of those documents at such time as they are marked in evidence by the preliminary hearing officer. This is important as a matter of affording SGT Bergdahl a fair hearing in the court of public opinion, since the government's live witnesses' testimony will be heard by the numerous news media representatives who are expected to attend the preliminary hearing, whereas mere documentary evidence will not be accessible by them or other new media in real time. In effect, the public will have only the government's side of the story, but not the defense's, as part of the critical news cycle.

Government counsel sent the defense the following email on 15 June 2015:

The 25 March 2015 protective order issued by LTC Burke in his capacity as the convening authority was intended to highlight to the parties their responsibility to protect the privacy interests of the individuals mentioned in the documents, and to protect the due process of the current proceedings. Paramount within that due process concern was the accused's right to a fair trial.

The protective order does not affect the preliminary hearing proceedings since the disclosure of information during those proceedings would not be considered an unauthorized disclosure as contemplated within the order. Accordingly, the defense should present evidence, conduct direct and cross examination, and present their arguments at those proceedings as they would if there was not a protective order in place.

Due to the national interest in the case, the protective order focused on the importance of protecting individuals' privacy rights—personally identifiable information (PII)—that will be implicated if PII is released in violation of the Privacy Act. Further, sensitive information as contemplated by the protective order is again defined as information that contains PII in accordance with AR 380-5, paragraph 5-19.

Independent of, and unrelated to the protective order, the Defense has been provided government owned documents and information for the limited purpose of preparing for the Article 32 preliminary hearing—not for release to the media or other third parties unrelated to Defense's preparation of their case. If the Defense desires to make such releases they must go to the appropriate official—in the case of the AR 15-6 Investigation, it is the Director of the Army Staff—and request the appropriate release of the relevant documents. Trial counsel do not have the authority to authorize release of the documents to third parties, or assist or approve redactions within documents.

The Government's release of information is bound by the Freedom of Information Act and the Privacy Act, and the Government cannot authorize or condone the release of information outside of those official procedures. Further, the attorneys representing the Government must comply with Army Regulation 27-26, Rule 3.6 Tribunal Publicity. The rule recognizes the potential risk that the release of information to a public forum could have a substantial likelihood of materially prejudicing an adjudicative proceeding. Defense counsel should ensure that any contemplated release of information complies with their similar local bar rules governing the release of information.

The Prosecution will continue to abide by the rules protecting privacy interests of individuals, the right of the accused to have a fair trial, and the public's right to attend public proceedings, e.g., the preliminary hearing. The release of documents by the Defense to the public that either does not have PII or has the PII redacted only risks impacting the rights of the accused.

Question Presented

The meaning of government counsel's email is less than clear, but it appears, among other things, to caution SGT Bergdahl's defense team about our professional responsibility obligations. I therefore request an opinion on the following question:

WOULD IT VIOLATE RULE 3.6 FOR THE DEFENSE IN *UNITED STATES V. BERGDAHL* TO MAKE AVAILABLE TO THE NEWS MEDIA COPIES OF MG DAHL'S EXECUTIVE SUMMARY AND THE TRANSCRIPT OF SGT BERGDAHL'S INTERROGATION ONCE THOSE DOCUMENTS ARE OFFERED IN EVIDENCE AT THE PRELIMINARY HEARING, PROVIDED PERSONAL IDENTIFYING INFORMATION HAS BEEN REDACTED?

Requester's Opinion as to Correct Interpretation

The answer to the Question Presented is No.

The course of action described in the Question Presented lies outside the ambit of Rule 3.6(a).^{*} Dissemination of case exhibits is not "a statement" within the meaning of the rule, and even if it were, it would not "have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof" since those exhibits will be available to both the preliminary hearing officer and those officials who will thereafter review that officer's report. Because a preliminary hearing generates only a recommendation that binds neither the CA nor anyone else, it does not constitute "an adjudicative proceeding" within the meaning of Rule 3.6(a). While the term "adjudicative proceeding" is not defined in the Army Rules, it is defined in Rule 1.0(m) of the ABA Model Rules of Professional Conduct, which provides in pertinent part that a "body acts in an adjudicative capacity when a neutral official, after presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter." A report submitted under Article 32, UCMJ, simply does not fall within that definition. It follows that subsequent review processes also lie outside the sweep of Rule 3.6(a).

The proposed course of action could not adversely affect the preliminary hearing because the documents will be (indeed, *already are*) in the hands of the preliminary hearing officer.

^{*} Government counsel's email suggested, presumably on the basis of Rule 8.5(f), that SGT Bergdahl's defense counsel "should ensure that any contemplated release of information complies with their similar local bar rules governing the release of information." I am admitted to practice in the District of Columbia and Connecticut, each of which has a tribunal-type choice-of-law provision that makes the Army Rules the governing standard for conduct subject to those rules. Conn. Rules of Prof'l Conduct R. 8.5(b) & Commentary, 2015 CONN. PRACTICE BOOK 65; D.C. Rules of Prof'l Conduct R. 8.5(b)(1); *see also* Colo. Rules of Prof'l Conduct R. 8.5(b)(1); Or. Rules of Prof'l Conduct R. 8.5(b)(1).

If the focus is not the preliminary hearing but a potential court-martial or non-judicial punishment proceeding somewhere down the road, then there still can be no objection to the proposed course of action since there is no reason to believe dissemination of either document would materially prejudice any such proceeding. I know of no basis for fearing that public knowledge of either document would harm the government's interests in any such disciplinary action, and if the concern is that such knowledge would be inimical to SGT Bergdahl's interests, I can represent that the pros and cons of such dissemination have been discussed with him and he approves the proposed course of action.

Rule 3.6(b)(1) indicates that a statement relating to "the expected testimony of a party or witness" "ordinarily is likely to" materially prejudice a covered proceeding, but that has no bearing on SGT Bergdahl's own statement since he has already given that statement under oath; it is not "expected testimony"—especially once government counsel offers it at the preliminary hearing.

Similarly, Rule 3.6(b)(2) refers in the same vein to "any confession, admission, or statement given by an accused or suspect." That language was obviously written to cover situations where the accused or suspect objects to the extra judicial statement. Here, however, the accused affirmatively wishes his interrogation to be made available to the public. It would pervert the clear intent of the rule to turn what was meant to be a shield for the accused into a sword for the government.

Rule 3.6(b)(4) indicates that a statement relating to "any opinion as to the guilt or innocence of an accused or suspect" "ordinarily is likely to" materially prejudice a covered proceeding, but to the extent that MG Dahl's executive summary expresses such an opinion, SGT Bergdahl is content to have it known to the public through the media.

Rule 3.6(c)(2) permits "a lawyer involved in the investigation or litigation of a matter [to] state without elaboration . . . the information contained in a public record." I do not intend to elaborate on the contents of these documents when making them available to the media (assuming the Council agrees that the answer to the Question Presented is No); rather, I need to know whether the defense can, without fear of professional discipline, disseminate the documents themselves, letting the public in our democratic society make of them what it will.

In this connection, I invite the Council's attention to the Comment to Rule 3.6, which recites that "there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. . . . [T]he subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy." The pertinence of these considerations to this case, which has garnered worldwide attention, is obvious.

In view of Army Rule 8.5(e), which provides that “[t]hese Rules should be interpreted and applied in light of the similar rules and commentary thereon contained in the” the ABA Rules, the Council should take into account Comment [7] to ABA Model Rule 3.6. It is not reflected in the Comment to Army Rule 3.6, having been adopted in 1994 by the ABA House of Delegates in response to *Gentile v. State Bar of Nevada*, 510 U.S. 1030 (1991), two years after the Army Rules were issued. See ABA CENTER FOR PROF’L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 1982-2013, 508, 510-11 (Art Garwin ed. 2013)).

Comment [7] provides that

extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by . . . third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer’s client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

Given the Niagara of adverse publicity that has washed over SGT Bergdahl for many months to and including the present (and shows no sign of abating), Comment [7] is squarely applicable. See also RESTATEMENT (THIRD), THE LAW GOVERNING LAWYERS § 109(1) (“lawyer may . . . make a statement that is reasonably necessary to mitigate the impact on the lawyer’s client of substantial, undue, and prejudicial publicity recently initiated by one other than the lawyer or the lawyer’s client”). SGT Bergdahl has been called every name in the book; there have been demands for his execution (a penalty to which he is not subject). Metaphorically and (I fear) actually, it is as if he had a target painted on him. It is preposterous for him not to be able to defend himself in the court of public opinion by disseminating, if he so chooses, his own statement given under oath in the course of a government interrogation and the executive summary of an AR 15-6 investigation conducted by a respected General Officer, neither of which is classified and both of which will be offered in evidence at a public proceeding.

An expert opinion from Professor Lawrence J. Fox of Yale Law School, one of the nation’s leading experts on professional responsibility, is attached.

If the Council concludes that the answer to the Question Presented is Yes, then I request that the matter be promptly referred to the Secretary of the Army or the General Counsel, as his designee, for an exception, as provided AR 27-26 ¶ 5.

Request for Expedited Consideration

Expedited consideration is respectfully requested so that I and SGT Bergdahl's detailed and individual counsel can ensure that we do not inadvertently violate any ethical duty. A definitive response is needed before the preliminary hearing commences on 17 September 2015 since the live testimony to be presented by the government will be known immediately to the media and it would be extremely unfair for the defense's hands to be tied while awaiting an ethics ruling.

Please contact me if any additional information is required.

Respectfully submitted,



Eugene R. Fidell
Feldesman Tucker Leifer Fidell LLP
1129 20th St., N.W., 4th Floor
Washington, DC 20036
(202) 256-8675 (cellphone)
efidell@ftlf.com

Attorney for Sergeant Bergdahl

24 June 2015

Atch: Examples of Hostile Coverage
Army Times Facebook Page Comments
Protective Order
Declaration of Prof. Lawrence J. Fox

Examples of Hostile Coverage

<https://www.facebook.com/pages/Bowe-Bergdahl-is-a-Traitor/232609076949303>

<http://www.foxnews.com/politics/2015/06/16/trump-announces-white-house-bid-joins-crowded-gop-field/>

<http://www.newsmax.com/Newsfront/Carl-Higbie-Bowe-Bergdahl-death-traitor/2015/03/26/id/634761/>

<http://www.foxnews.com/politics/2015/04/07/ncis-report-on-bowe-bergdahl-raises-new-questions/>

<http://www.foxnews.com/politics/2015/06/15/former-cia-operative-bergdahl-was-high-when-captured-in-afghanistan/>

<http://www.newsmax.com/Newsfront/Tony-Shaffer-Bowe-Bergdahl-plead-charge/2015/03/18/id/631046/>

<http://www.newsmax.com/Newsfront/Bowe-Bergdahl-Taliban-Russian-Mob-Tony-Shaffer/2015/04/06/id/636811/>

<http://www.newsmax.com/Newsfront/Tony-Shaffer-Bowe-Bergdahl-desertion-White-House/2015/03/26/id/634751/>

<http://www.foxnews.com/politics/2015/01/28/bergdahl-to-be-charged-with-desertion-ex-military-intel-officer-says/>

<http://www.foxnews.com/us/2015/03/19/white-house-trying-to-get-bergdahl-to-cop-to-deal/>

<http://www.mediaite.com/tv/the-guys-a-traitor-bolling-oreilly-guest-battle-over-bergdahl-charges/>

<http://nation.foxnews.com/2015/01/27/retired-officer-oreilly-bergdahl-be-charged-desertion>

<http://www.breitbart.com/video/2015/01/26/report-bergdahl-to-be-charged-with-desertion/>

<http://www.hollywoodreporter.com/live-feed/megyn-kelly-scores-rare-ratings-710470>

<http://insider.foxnews.com/2015/03/25/man-who-led-search-bergdahl-soldiers-died-looking-him>

Army Times

June 21 at 1:15pm ·

The case of Sgt. Bowe Bergdahl raises questions about the role of commanders in the military justice system, says a former military lawyer. <http://ow.ly/OAFe8>



Commentary: Bowe Bergdahl and imbalance in military justice system

Editor's note: Rachel VanLandingham is an associate professor of law at Southwestern Law School and served as an active-duty judge advocate in the ARMYTIMES.COM

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178 shares



Write a comment...



Remove **Deputy Tank** The military justice system is SUPPOSED to be a tool for commanders to enforce discipline. THAT'S why there are no lawyers at NJP level and the burden is "more likely than not". We're trying to turn military courts martial into civilian courts with civilian standards, and they just don't fit. Like · Reply · 104 · June 21 at 1:23pm

9 Replies



Remove **Marion Yarger-Ricketts** Please stop portraying this traitor as an American soldier. He is a disgrace to our military! If you must post a picture of him post it out of uniform. Thank you! Like · Reply · 82 · June 21 at 2:00pm

6 Replies



Remove **Shane Willis** This is just a power grab by the judicial branch over the military. And someone tell this pig of a lawyer not to trumpet American Service Members while making excuses for a traitor, Service Members do indeed deserve better than being equated to terrorists and traitors. Like · Reply · 45 · June 21 at 1:34pm

7 Replies



Remove **Veronica Oconnor** Screw a plea bargain....HE ABANDONED HIS POST!!!! Like · Reply · 57 · June 21 at 1:20pm

1 Reply



Remove **Beau H Deacon** I agree commanders need to be removed from the sexual assault cases. There is an extreme conflict of interest on the part of the commanders which causes them to try and disappear incidents instead of see prosecutions and convictions.

I disagree howev... See More Like · Reply · 30 · June 21 at 2:16pm



Remove **Daniel Baum** I've learned that justice is usually seen as unfair by those who have committed crimes no matter if it is a civilian court or the military's. The only ones who truly get a better shake are those with big money and influence. Like · Reply · 18 · June 21 at 1:43pm



RemoveJonathan Bettendorff If their having issues in the justice system... Declare Marshall law on his ass put him in front of a firing squad.... I volunteer myself, my rifle, and the ammo if that's an issue tooLike · Reply · 8 · June 21 at 2:09pm

1 Reply



RemoveAuntray Jones Oh no the Military a Justice System got it right on this one! Because of his actions many others were killed or seriously injured and families were put in unspeakable pain. He must and will be held accountable for his actionsLike · Reply · 9 · June 21 at 1:49pm



RemoveDeb Evans Deciding a Soldiers' fate is the role of Army Commander's everyday!

All Commander's have oversight, whether it's the Commander they report to or a Senate Oversight Committee. ...See MoreLike · Reply · 8 · June 21 at 2:24pm



RemoveVincent Ferraro This lawyer does not know what he is talking about. Bergdahl was a political decision. We also do not see a better job outside the military on the assault and rape problem.Like · Reply · 3 · June 21 at 4:09pm



RemoveJenny Tracz Alexander This is the most biased and garbage article I've ever seen Army Times post. Get your facts right and reengage, you clearly have no idea how UCMJ works in the military.Like · Reply · 11 · June 21 at 2:34pm



RemoveCharlie Motz I have never seen our military justice system operate this slowly. The traitor left his position and his comrades in arms without permission in a combat environment. There is no reasonable excuse or reason. This is not a civilian court. Try the...See MoreLike · Reply · 5 · Yesterday at 2:55am



RemoveChad Pilkington Since when does Army Times take sides on

debates?

"Apparently assuming that five brutal years as a prisoner of the Haqqani Network (cohorts of the Taliban) wasn't sufficient punishment, the Army recently decided to initiate criminal proceedings against Sgt.

SergeantBergdahl for improperly leaving his post in a warzone." ...See

MoreLike · Reply · 7 · June 21 at 3:08pm

1 Reply



Remove**Charles Miller** This is what happens when a Commander in Chief politicizes a legal decision so as not to embarrass himself - even though it hasn't worked. Unfortunately, the GO in this case, has had his hands tied by the Commander in Chief because his poolitical agenda is more important than military justice for the soldiers who were killed looking for this jerk.Like · Reply · 1 · Yesterday at 9:35am



Remove**Anthony Lancaster** Who paid Army times to post this ridiculous and apparently biased article? Gen Milley will be a great choice and if he isn't afraid to step down because of what the Senate might do, then it only makes his nomination and selection that much more reason...See

MoreLike · Reply · Yesterday at 1:11pm



Remove**Jose Bilyeu** I understand some of the points made but as far as that traitor he may have been held prisoner for five years doesn't wipe out his actions of leaving his gear and weapon behind and walking out on his post and battle buddies. This man Bowe Bergdahl is at best a deserter and at worse a traitor.

The person who wrote this article needs to stay in her lane when it comes to the Bergdahl matter.Like · Reply · 3 · Yesterday at 5:14am



Remove**James Yount** Yeah, because the lawyers have not screwed the civilian system into the dirt...Like · Reply · 1 · June 21 at 4:25pm



Remove**Elena Rooney** We have military lawyers, use them. Commanders should not approve or disapprove anything bc they don't have legal training. It's should automatically go to legal, have a top attorney there in each post to determine either its going to a court-martial or not. Do not use civilians bc they don't know the military system.Like · Reply · 1 · June 21 at 4:22pm

4 Replies



RemoveJosh Ua Commanders also listen to their lawyers, that's why they go to their Attorneys for advice. Plus, when it comes to a court-martial, the defendant is seen by an actual Judge. Commanders aren't abusing anything, it's just Bergdahl's attorney trying to take the heat off of himself. Like · Reply · 4 · June 21 at 2:55pm



RemoveColby Troxell Are you insinuating that he is not a deserter Army Times??? Like · Reply · 3 · June 21 at 7:04pm



RemoveJohn Penree He deserted his post and sought to join with the enemy during a time of war. Being held captive and treated like a chi-boy for 5 years instead of being welcomed with open arms to join in the jihad by the enemy, does not constitute a punishment or ...See More Like · Reply · 3 · June 21 at 7:11pm · Edited



RemoveMike Girres Don't waste anymore time HANG THAT COWARD ! Girres Michael A. PV- E2 U.S. Army Retired (DAV) Like · Reply · 3 · June 21 at 4:47pm

1 Reply



RemoveKevin Mills "Imbalance" describes the entire military 'justice' system, period. I've yet to see actual justice done by it. Like · Reply · June 21 at 2:22pm



RemoveRobert May GOOD soldiers died looking for this asshat. Firing squad.. That is all. Like · Reply · 4 · June 21 at 5:48pm

1 Reply



RemoveDavid Rannikko General George Washington would have just hung him. The military justice system was never meant to be that of the civilian system. When you join you know what's expected of you and the circumstances when you don't meet those expectations. Like · Reply · 4 · June 21 at 2:07pm



Remove **James Whitten** He is a piece of sh**. Don't blame army. Remember the soldier that died looking for him. Hang POS. Like · Reply · 4 · June 21 at 2:47pm



Remove **Ralph Humphrey** Time wasted court Martial the traitor then the firing squad! Like · Reply · 4 · June 21 at 1:56pm



Remove **Sonny Lucas** When POTUS arranged this trade the who do you think is stopping justice for this traitor?!! Like · Reply · Yesterday at 9:07am



Remove **Marilyn Porod** He is a disgrace to the Military. Like · Reply · 21 hrs



Remove **Grant Sulham** I'm willing to bet that this lawyer has no military experience. Additionally, her bias shows by stating Bergdahl's captivity is enough punishment. Last she has such little faith in commanders that she believes one will sell out to get selected. Like · Reply · 5 · June 21 at 2:04pm



Remove **Frank W. Walker Jr.** So Army Times is now defending deserters. Like · Reply · 20 hrs



Remove **Kyle Pflager** Been saying this since day one, when I was an MP and arrested people, it's a joke. Commanders have way to much power for criminal cases. Like · Reply · 1 · June 21 at 5:12pm



Remove **Carl Crittendon** This article is nothing but a rant by a ignorant civilian lawyer who doesn't understand the subject. Like · Reply · June 21 at 7:58pm



Remove **Steve Maloy** Non-judicial punishment means instead of going to a court-martial the incident is handled locally. The offender can lose

money, rank, off-time, and freedom of movement. It saves time and money. If the commander can lose his/her position of authority because a subordinate does something wrong then they should have the power to punish too. Like · Reply · 1 · June 21 at 5:44pm



Remove **Don Fritz** I am astonished that a writer for this paper supports a traitor to the Military - where are the writers coming from these days - would not have happened in my day - proud member of the USMA Class of 74. Like · Reply · Yesterday at 2:49pm



Remove **Kyle Loyd McKinney** Seems that army times isn't a neutral party in this instead of just the facts they want us to believe we are the only one that feels it should go to military trial and be fully punished up to hanging by the neck if found guilty of desertion. Like · Reply · 1 · Yesterday at 6:09am



Remove **Nancy Lynn Smith** Please stop portraying him as an American soldier. Good soldiers were killed looking for him. He abandoned his post. Like · Reply · June 21 at 6:34pm



Remove **Thomas Sutherland** Death by musketry is the prescribed method. Nothing will happen to this scumbag until Obama leaves office. They must protect the Emperor. Like · Reply · 2 · June 21 at 2:42pm



Remove **Todd Griffin** Another lawyer saying anybody but them is unable to be just and execute the law, what BS. Also, Bergdahl was not a POW, he was a deserter that was held captive; BIG DIFFERENCE. Like · Reply · 22 hrs



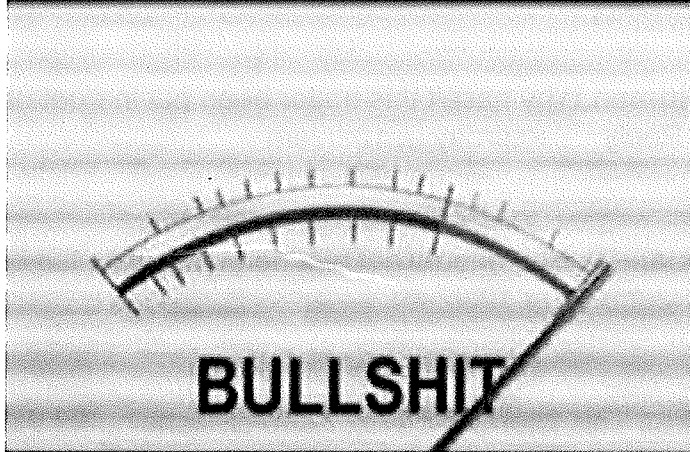
Remove **David Copeland** He is a TRAITOR!! Burn this p.o.s. Like · Reply · 2 · June 21 at 3:49pm



Remove **Sean Newton** Love how the pathetic writers of this page keep trying to pass this POS off as anything but filth.. The military has gotten weak with this liberal BS. Like · Reply · June 21 at 9:39pm



Remove **Shawn Anderson** This case is nothing but BS!! he left his post during a war and Soldiers died trying to locate him!



Like · Reply · 19 · June 21 at 1:32pm



Remove **J.d. Spearhead** Put that dirt bag traitor in front of a FIRING SQUAD! Like · Reply · Yesterday at 7:23am



Remove **Earl Jones** Traitor, coward, deserter should face the firing squad. Like · Reply · June 21 at 8:28pm



Remove **Jim Parisian** Bergdahl should be in Ft. Leavenworth. Like · Reply · Yesterday at 11:31am



Remove **Red Seewun** the only thing wrong with the military justice system is that this scumbag isn't dead yet. Like · Reply · 4 · June 21 at 2:53pm



Remove **John Concepcion** It's all in the name. Uniformed Code of Military Justice. It's as archaic as our country and should remain so. The difference between right and wrong and maintaining good order and discipline isn't something lawyers excel at. Like · Reply · Yesterday at 10:22am



Remove **Jay Crain** If I am not mistaken what he is charged with is

desertion and giving aid to the enemy. I went back and looked up desertion in time of war and giving aid and comfort to the enemy are both capital crimes under the MCM. Either one could land him in Ft. Le...See MoreLike · Reply · June 21 at 10:21pm



Remove**Randell Pittman** Why hasn't this traitor been put in front of a firing squad?Like · Reply · Yesterday at 10:02am



Remove**Joel Heernandez** You should get him home or executed by firing squadLike · Reply · June 21 at 10:27pm



Remove**Ernie Stokes** This idiot is a traitor. Keep civilians out of the military courts.Like · Reply · Yesterday at 11:05am



Remove**Alvin Burk** STOP TRYING TO BLAME THE ARMY FOR THIS SOLDIER THAT WENT AWOL DURING WAR !!!Like · Reply · 4 · June 21 at 1:58pm · Edited



Remove**Judy Northrup Bernard** STOP addressing him with rank pleaseLike · Reply · 9 · June 21 at 1:28pm

2 Replies



Remove**John Sanders** Military judicial system. a total joke. you are guilty no matter what. they will try you numerous times until they get the guilty verdict that they want. just google past high profile cases. my point will be proven. and this is coming from someone who retired from the army. oif vet.Like · Reply · 11 · June 21 at 1:28pm

1 Reply



Remove**J Aileen LS** Set an example. Firing squad for traitors.Like · Reply · 9 · June 21 at 2:23pm · Edited



Remove**Frank Cannon** We have a lawyer who has more than likely never been in combat units or operations and does not understand the responsibilities that commanders have telling us how it should be done.

We have a soldier who deserted his post in a combat area, putting hi...See MoreLike · Reply · June 21 at 4:11pm · Edited



Remove**Christine Murphy** The military justice system worked fine until civilians got involved.Like · Reply · 23 hrs



Remove**Thomas Zeller** How is a civilian lawyer without a day in uniform let alone a JAG have any valid opinions on how the Uniform Code of Military Justice works? It's something we all willingly subscribe to the moment we put up our right hands and swear our oath of service...See MoreLike · Reply · June 21 at 5:37pm · Edited



Remove**David Sigmon** The only question it raises in my mind is the availability of rope in the supply chain.Like · Reply · 8 · June 21 at 1:23pm



Remove**Jamie Kay Stone** Just when I feel the Army Times is beginning to redeem itself, it turns around and pulls this crock of shit. He's a traitor. Criminals and wrongdoers always feel like they're being treated unfairly when presented with discipline and justice. Thanks for...See MoreLike · Reply · Yesterday at 6:47am



Remove**Russell Nordan** For the writer of this article to have been a military JAG officer and never learned that the UCMJ exist to ensure the maintenance of good order and discipline in the Armed Forces is unbelievable. This officer's training during her service must have b...See MoreLike · Reply · 1 · June 21 at 5:23pm

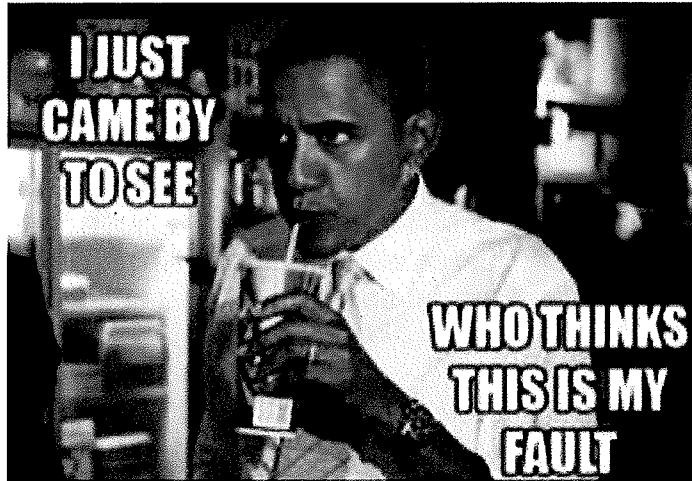


Remove**James Sullivan** I don't know about other officers' commissioning programs, but in my ROTC, we had training on the UCMJ. And while I was on active and reserve duty, we had OPD about it as well. And the multiple times I was an investigating officer, I reread the artic...See MoreLike · Reply · 1 · June 21 at 5:11pm · Edited



Remove□□□□□□□□ □□□□□□□□ with all due respect to the writer and eminent deference to her technical knowledge, nothing about commander's court martial authority is about the technicalities of civilian

law enforcement practices. the commander's authority exists for wartimes not...See MoreLike · Reply · June 21 at 4:23pm · Edited



Remove**John DeBose**

Like · Reply · 7 · June 21 at 1:30pm

57 Replies



Remove**Buck Foley** What a bunch of horse shit The military system works just fine, It supports discipline. I think there should be requirement in the good old USA for anyone who wants to be in the government first serve a term in the military. That way they would know what they are talking about. As for Bergdahl, he is a deserter and a collaborator and should be shot.Like · Reply · 1 · June 21 at 2:28pm



Remove**Talon Herbison** The whole UCMJ prosses needs to be scraped and rebuilt from the ground up. The Commander has to much influence with no repercussions to bad decisions rendered. The appeals process is a terrible joke were nothing is ever over turned except is the very w...See MoreLike · Reply · 2 · June 21 at 9:53pm

1 Reply



Remove**Bradley Blair** He betrayed his entire country and his brothers. Fry that asshole.Like · Reply · 6 · June 21 at 1:28pm



Remove**Donald Devaney** Bergdahl did not dessert - He did what many soldiers always do, he went to town and then smoked some dope with his Afghan Army buddies and lo and behold was captured. this case should

not be more than an Article 15 in my 60 year Army opinion.Like · Reply · Yesterday at 2:12am



Remove**Glen E Coleman** The writer of this article is disloyal, arrogant treason loving clown. I was over searching for this piece of shit, Bergdahl. He deserted his post and should have to pay for his actions in the form of a firing squad. The decay of our military continues...Like · Reply · June 21 at 5:23pm



Remove**Sherry Reilly** If this traitor doesn't die by firing squad, then military justice has failed...Like · Reply · 1 · June 21 at 1:52pm



Remove**Christopher David Knox** Kill that tool. Deserter and traitor.Like · Reply · 1 · June 21 at 4:04pm



Remove**Kathy Kerr** They need to stop wasting the military's time and strip him of all rank and send his traitor ass to Leavenworth KansasLike · Reply · June 21 at 6:14pm



Remove**Terrie McCormick Dodd** How much did the American people pay for Him.Like · Reply · 5 · June 21 at 1:23pm
3 Replies



Remove**Cleveland Robinson** stop calling him Sgt and stop showing that piece of shit with our flagLike · Reply · 7 · June 21 at 1:34pm



Remove**Mike Taylor** Quit trying to search for a "Big Army" problem when this is a coward who abandoned his post.

Or, were you also in RC-East in 2009? I was in the Korengal at the time with B/2-12, and the brief was that he ran off on his own and may be a combatant. ...See MoreLike · Reply · 7 · June 21 at 2:18pm



Remove**Travis Meharry** He should be fucking dead. I am ashamed of

army upper leadership and the definitive lack of courage displayed by the senior officers of this administrations military.Like · Reply · 1 · June 21 at 2:51pm



Remove**Lestant Jacob Mary Deutsch** Execution by firing squad!Like · Reply · 3 · June 21 at 1:26pm



Remove**Charlie Brown Gamino** Not even a Sgt. How did he earn the rank.Like · Reply · June 21 at 3:55pm



Remove**Joseph Holyk** And he still is not a Sergeant. He's a fucking private.Like · Reply · June 21 at 8:29pm



Remove**Nwazaion Nonso** did military justice confirm me a terrorist that my punishment be the death of my father? how can my father be killed by government for my offence?Like · Reply · June 21 at 1:38pm



Remove**Ted Heath** The Author of this article is a seriously misinformed dumb ass. smile emoticonLike · Reply · 1 · June 21 at 3:45pm



Remove**Andrew Keeler** Kill the bastardLike · Reply · 8 · June 21 at 1:16pm



Remove**Stephen Finnegan** Put him in the U.S. Disciplinary Barracks for life, where he belongs. He got soldiers killed looking for his traitorous ass.Like · Reply · 3 · June 21 at 11:29pm



Remove**Kevin Ramsdale** I think we should stop calling him sgtLike · Reply · 2 · Yesterday at 12:25am



Remove**Dennis Fulton** HES A DESERTER AND A TRAITOR SHOOT HIS TREASONOUS STUPID ASS !! ☐☐Like · Reply · 1 · June 21 at 1:58pm



Remove **Matthew Jacobsen** This article brings up good points on conflict of interest. Though the Berghdal case is quite different from sexual assault cases, especially in matters of national interest and politics. Like · Reply · 2 · June 21 at 1:26pm



Remove **John John Kew** sent the guy home. give him a pension. blame George Bush for sending him to Iraq. young men must fight and die for older man s game. crazy. There was a same incident during the Viernam war. I blame George Bush. Bush belong in jail not Sgt Bergdahl. Gave Bergdahl the medal of honour. american hero. Like · Reply · 1 · Yesterday at 2:50am



Remove **Robert Buckner** Court martial and prison is where this guy need to be to leave your post in a time of war is punishable by the death penalty. Like · Reply · 2 · June 21 at 6:52pm



Remove **Laurance Sorrentino** The Army is covering their own butts in the Bergdahl case. His immediate command structure covered for him being AWOL/Deserter. They moved him around on the Morning Report from one catagory to another to reflect his time away as "Good Time." Like · Reply · Yesterday at 1:50am



Remove **Art Stringer** Screw Bergdhal. By the way he is no longer a SGT. Like · Reply · 2 · Yesterday at 1:36am



Remove **Frank Humpal** Ideally the system should work but like so many things with out checks and balances small people abuse the power and it's usually the enlisted people get the short end of the stick. Anyone who has not been in the service would be surprise at the abuses that the system tolerates. Like · Reply · Yesterday at 9:25am



Remove **Daniel Brown** They need to get on with this case AND STOP THE NONSENSE. Like · Reply · June 21 at 3:50pm



Remove **Douglas Knudsen** I will wait to hear the full story before making accusations. Last story I heard was that he was high when he was captured Like · Reply · 1 · June 21 at 1:22pm

4 Replies



Remove **Theresa McLendon** Plea bargain? Absolutely not! Prison for life! Like · Reply · 1 · June 21 at 1:36pm



Remove **David L C Fuller** He is not a Sgt. Quit calling him one Like · Reply · 1 · June 21 at 4:56pm



Remove **Barry Needham** Why is he still called sgt ?! Like · Reply · 1 · June 21 at 1:29pm

2 Replies



Remove **Brian Auggie Augustyniak** Fry his ass..any soldier that has deployed knows you dont leave your weapon without purposely leaving it Like · Reply · 1 · Yesterday at 1:39am



Remove **Ryan Hammerfist** supposed pow. Like · Reply · 1 · June 21 at 2:10pm



Remove **Rebecca Sanford**

Like · Reply · 1 · June 21 at 1:50pm



Remove **PJ Laszar**

Reply · 1 · June 21 at 1:57pm

1 Reply



Remove **Charles Bishop** He is scum that left his post to join the enemy and got good men killed not to mention if he participated in any attacks

Like · Reply · 1 · June 21 at 1:47pm



Remove **Micheal Robert Dunkin** The left wingdings know he will be found guilty under the UCMJ.

Like · Reply · June 21 at 8:22pm



Remove **Vincent Rogers** He is a traitor kill him and stop wasting tax payers money.

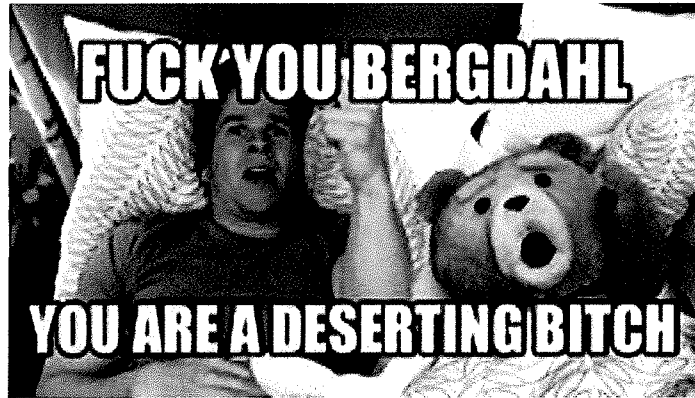
Like · Reply · Yesterday at 12:35am



Remove **Gilbert San Roman** Bergdahl against the wall...wink emoticon

Like · Reply · Yesterday at 2:48pm





Remove **Katie Mussack**

Like · Reply · June 21 at 2:25pm



Remove **Robert Smith** He should have Beed shoot by now. A traitor

Like · Reply · June 21 at 5:16pm



Remove **Judi Glisson Green** Please stop showing him in uniform with that beret.

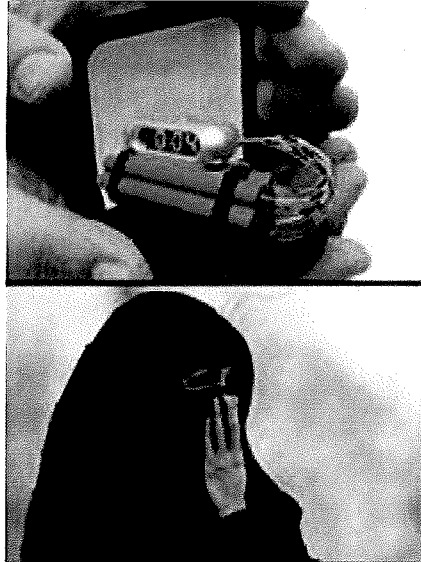
Like · Reply · June 21 at 3:56pm



Remove **Dawn Rodgers** Hes going to say anything to be able to walk, if he does walk than theres something wrong with our govt! Hes not a soldier damn sure no hero hes a towel head lover! This POS needs to rot in hell for what he did and to the true heroes that lost there lives for this POS! He chose to be with the towel heads, he was treated good by his new family! POW my ass thats a joke, he was a cry baby cause he wanted to go home!

Like · Reply · June 21 at 7:03pm · Edited



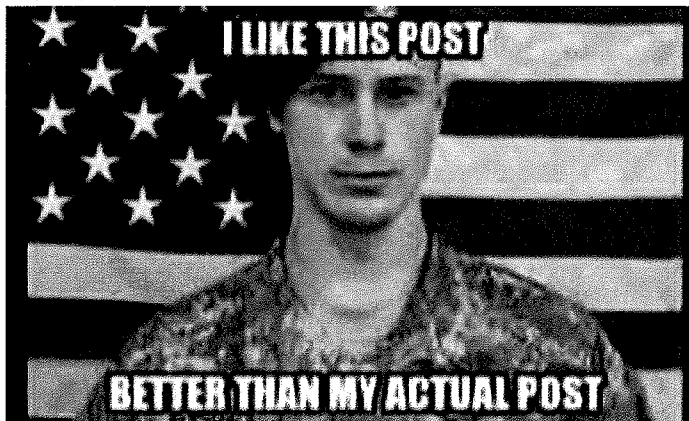


RemoveAlexis Lopez

Like · Reply · June 21 at 7:22pm



RemoveChris Christilaw



Like · Reply · June 21 at 7:37pm



RemoveGail Parker He went A.W.O.L!!!! He's a TRAITOR !!!

Imprisonment,there's NO OTHER choice!!! Except execution. What's so hard to decide???Like · Reply · June 21 at 5:26pm





Remove **Veteran From Hell**

Like · Reply · Yesterday at 1:03am



Remove **Artourus Barbari E Lupi** even though this piece of fucking shit is a fucking traitor....everyone is entitled to rights...wtf... because the overwhelming inculpatory evidence should have been enough to secure a conviction against him... we all have rights... not a fucking power...See More



Remove **Hermelinda Rippstine-Rippy** Just court martial him and put him on the electric chair



Remove **James A. Mathias** He was found Guilty. Burn him down.



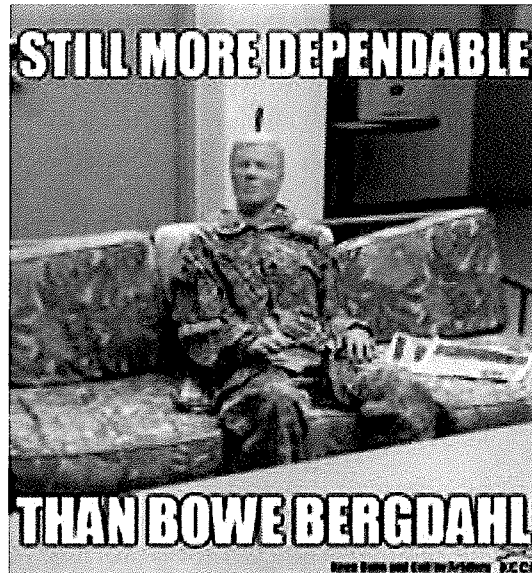
Remove **Randy Harrington** Piece of crap he should hang himself with his bed sheet



Remove **Jim Collier** Execute him.



Remove **Deborah Curcio-Rangel** Is he kidding? He stands a better chance with them than NCO's. Let him have it. They'll let destroy him as they should.



Remove **David Cecil Patch**

Like · Reply · June 21 at 2:20pm



Remove **James Morrison** he should be shot for desertion Like · Reply · Yesterday at 12:18am



Remove **Leon Just** This is such bullshit he's a god damn traitor and he needs to be treated as one Like · Reply · 22 hrs



Remove **Gary Sinclair** He's a deserter and because of him good men died. Why is this even a discussion? Like · Reply · June 21 at 1:46pm



Remove **Ernie Smith** If it cant be handled in house then you have shitty leadership this pussy brigade military bullshit people who cant run a shower leading soldiers in battle is a fucking disgrace to those who served before us who but boots in asses and squared away this...See More Like · Reply · Yesterday at 12:22am · Edited



Remove **Steve Parisian** I realize this is not 100 years ago, but he should still be hung for what he did to his own unit. He's lower than scum. Worst person ever, right up there with out POTUS! Like · Reply · Yesterday at 11:49am



Remove **Calvon D Hinson** Anthony hmmm.

Non lawyers practicing law to save e7's and above Like · Reply · June 21 at 2:31pm



Remove **Penny Cline** F R Y. B O W E !! Like · Reply · June 21 at 6:38pm



Remove **Daniel Grimes** Fry is sorry worthless traitor ass.. death shod be his real punishment Like · Reply · June 21 at 4:15pm



Remove **Michael Barthelemy** I also love the part where this dumb writer says he was exchanged for 5 "former" GTMO detainees. They were only "former" because of the exchange. I'm in serious doubt of this writer having ever completed a single college course. Like · Reply · Yesterday at 6:08am



Remove **Daniel Victor Fontanella** I say "death by firing squad" or leatheal injection just to see that little bitch suffer Like · Reply · June 21 at 5:30pm · Edited



Remove **Ron Portillo** Why is he still a sgt Like · Reply · Yesterday at 1:53am



Remove **Hank Wortman** He Definety does not deserve the title of Sergeant....he didn t earn it Like · Reply · June 21 at 8:33pm



Remove **Janet M. Kell** Wish traitors still faced the firing line! Like · Reply · June 21 at 7:48pm



Remove **Bobby Johnson** Get a pic out of my uniform. He does not deserve to be seen wearing this Like · Reply · Yesterday at 6:04am



Remove **Korey Kilburn** Just shoot the traitor already and quit talking about him. Like · Reply · 23 hrs



Remove **Daniel N Celina Romero** Dudes a bum behead him now Like · Reply · June 21 at 5:16pm



Remove **Joshua Bailey** Shoot that traitorous piece of shit fucker in the face. Like · Reply · June 21 at 5:36pm



Remove **Stuart Phillips** Simple answer: follow the lead of many allied countries, and have charging decisions made by JAG. Currently, they advise only. Like · Reply · June 21 at 2:07pm



Remove **Matthew Petri** He should have been shot for desertion. UCMJ *frag out* POS Like · Reply · June 21 at 4:34pm



Remove **Carlos Villate** Truth Like · Reply · June 21 at 2:00pm



Remove **Lee Oscar** He should be executed. Like · Reply · June 21 at 7:13pm



Remove **Terrie McCormick Dodd** Time to kiss your ass is over Like · Reply · June 21 at 1:40pm



Remove **Dante Vonnegut** "Id love to spit Beechnut in that dudes eye and shoot him with my old .45" Like · Reply · June 21 at 3:25pm





Remove **Tim Walz**

· Yesterday at 12:52am

Like · Reply



Remove **Billie Hill** Did any of you read the article to the end? The authors point is it is a conflict of interest for the general to be deciding on the case, when he is awaiting Congress' approval to have the top job in the Army, assuming many voting congressman will weigh...See MoreLike · Reply · June 21 at 4:03pm · Edited



Remove **Mike Pulos** When will this traitor be formally charged and go to Courts Martial?Like · Reply · June 21 at 3:49pm



Remove **Betty Shaw Elwell** Send him back.Like · Reply · June 21 at 7:53pm



Remove **Manuel Gilliam** That has nothing to do with that. He left own his own.Like · Reply · June 21 at 5:51pm



Remove **Isaiah Fisher** Why is he still a Sgt not a prisoner should be cell mate with buddy ObamaLike · Reply · June 21 at 5:46pm



Remove **Anthony Ratzburg** What does sexual harassment have to do with this sorry fuck deserting his post ? I will tell you NONE !!!!!Like ·

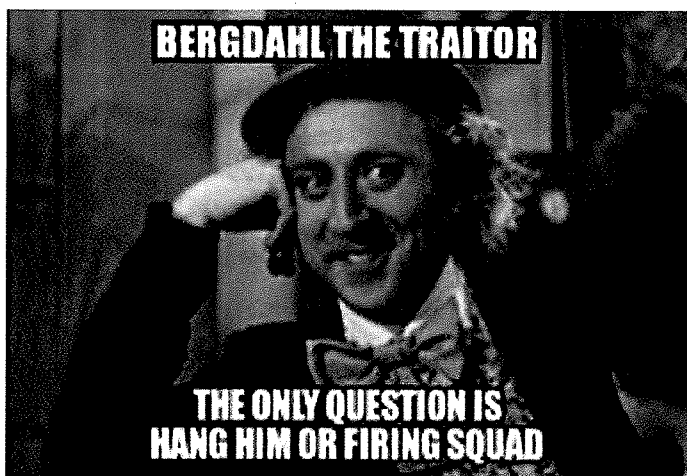
Reply · June 21 at 1:35pm



Remove **Paul Bergeron** USMJ works fine, I wish Congress could work as good, for getting stuff done, they surely know when to vote for a PAYRAISE!!!!!! Like · Reply · June 21 at 11:12pm



Remove **Frank C. Irons** Bedrgdahl is a Traitor. Obama just about portrayed him as a hero. I have never heard of a cout marshal to take as many year as this joke has. in the Rose Garden with Bregdahl's family. Then instead of thrown into the stockaid waiting for trial, given a job while being investiaged. Yet Chris Kyle was a hero. When he was "MURDERED", his widow never got a call nor a letter of condolence from the President. Like · Reply · 22 hrs · Edited



Remove **Scott Willis**

Like · Reply · June 21 at 6:21pm



Remove **Wuod Okuyu** Ave been following closely waiting for the verdict, burden of proof lies to the prosecuter Like · Reply · June 21 at 1:35pm



Remove **Shirley Temple** I think he's innocent. Like · Reply · Yesterday at 1:56am



Remove **Drew Scafidi** Commanders consult extensively with their lawyers before making charging decisions and throughout the entire ucmj

process.Like · Reply · Yesterday at 7:45am



RemoveArthur Deich He left his post during wartime and I don't care how you put in how you look at it that is treason during wartime you were to be taken out to the field by your superiors and we shot in the head how come he wasn't done that wayLike · Reply · June 21 at 7:45pm



RemoveJoseph Holyk Imbalance as in officers get away with murder?Like · Reply · June 21 at 8:27pm



RemoveBen Woyvodich He got captured while deserting. The punishment for the crime hasn't been administered. His capture is what is likely to occur if you wander around enemy territory alone and unarmed.Like · Reply · June 21 at 3:38pm



RemoveBrent Anthony Hames He gave up the title of "SOLDIER" when he broke the FIRST GENERAL ORDER.Like · Reply · June 21 at 2:47pm



RemoveRick-Sharon Ferreri The government keeps laggingLike · Reply · June 21 at 11:48pm



RemoveGraciela Mezta Vidal this ia a PUNK ASS BITCHLike · Reply · June 21 at 6:43pm



RemoveDebbie Etchison Culver Traitor. Fireing squadLike · Reply · June 21 at 4:06pm



RemoveEric Coger Pure horse-crap. We read about judges all the time in the civilian side that sentence sex offenders and other serious criminals to very short or very long sentences. There will always be disparities. And there should be. Congress should stop looking so...See MoreLike · Reply · Yesterday at 12:03am



Remove**Gene Harding** I'll admit there are some flaws in the military system like in any other, but this time and in this case, yeah we got this one. This worm isn't getting off the hook.Like · Reply · June 21 at 7:10pm



Remove**Marvin Haylett** He needs to face a courts martial. We the Soldiers and family who served and lost friends and loved ones deserve the truth. No plea bargens or deals. If proven beyond a boubt that he deserted his post he should be officially labeled a deserter and face...See MoreLike · Reply · June 21 at 2:03pm



Remove**Jonathan Andrew Shockey** Fuck him he can go to hellLike · Reply · June 21 at 10:37pm



Remove**Josh Kosanovich** The relationship you're trying to draw between the two shows how little you know about an oath to your brothers in combat. You dragged bergdahls name and face into this to get clicks. FTA! All for my comrades! You stir burning shit in jp8 with a stick so you don't get it on your hands. You mam are the stick.Like · Reply · June 21 at 9:33pm



Remove**Matthew Ursery** Now, it is not necessary to off this guy although by the book he should be. What I find offensive is that they still call this poor excuse for an American SGT. He did not earn those stripes. They were given to him because he did something tremendously ...See MoreLike · Reply · June 21 at 8:53pm



Remove**Deb Evans** Geez people, The article is about Commander's making legal decisions without legal degrees.Like · Reply · June 21 at 3:00pm



Remove**Brandon Selles De Jesus** Just shoot him in the head and go on with your lives.....Like · Reply · 20 hrs



Remove**Lee S Burnett** Deserter in war zone... Death... O wait promote.. Give back pay.. Pow pay... Hang his ass!!!!!!Like · Reply · Yesterday at 11:55am



Remove **John Dodd** General Milley will do what obama tells him. He was/is not a POW, he is a Muzzie deserter. Hang him high. Like · Reply · June 21 at 8:35pm



Remove **Donald Devaney** He did not desert - sorry about that error. Like · Reply · Yesterday at 2:13am



Remove **Brendan Flynn** Execute the traitor. Like · Reply · 4 · June 21 at 1:27pm

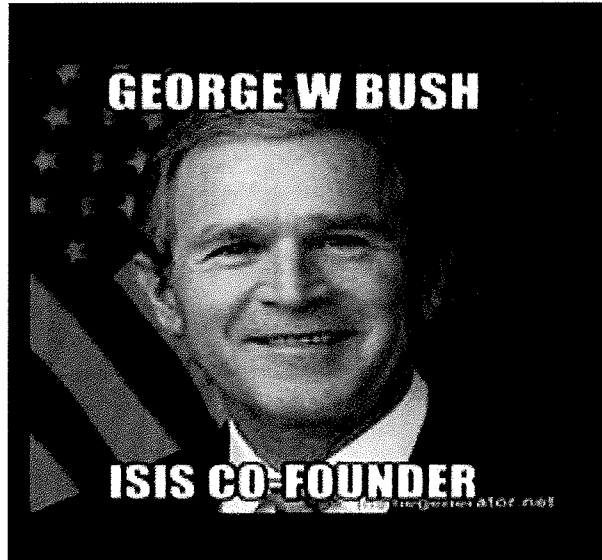


Remove **Tom Bowers** Last sentence of the article: "Our service men and women deserve better." This may be true, but Bergdahl doesn't. He deserves to be hung by the neck until dead. Like · Reply · 22 hrs



Remove **Lisa M Wood** Like · Reply · June 21 at 8:08pm





RemoveLisa M Wood

Like ·

Reply · June 21 at 8:08pm



RemoveKobie Johnson



Like · Reply · June 21 at 3:56pm



RemoveChuck Griffiths "Are you a pussy and kiss-ass? Then here's your star"Like · Reply · 1 · June 21 at 1:26pm



RemoveWalt Clark Obama and his disgusting bunch will hobble anything that should happen to this lying piece of garbage.Like · Reply · June 21 at 3:37pm



RemoveTracy Usry What do you call it?Like · Reply · Yesterday at 12:42pm



RemoveJon Davis The army times is a joke.Like · Reply · June 21 at 2:49pm



RemoveDarla Kuboi He is a should be shot that was what this country use to do with people who deserted their post and commandLike · Reply · June 21 at 6:17pm



RemoveDwayne Perry ...and STILL we wait !!!Like · Reply · June 21 at 5:42pm



RemoveJarvis Russette Just shoot that fuc'erLike · Reply · June 21 at 2:48pm



RemoveSilvio Pilgrim The guy is guilty of many things, but it will not be heard for PR and friendly psyops reasons.Like · Reply · June 21 at 3:06pm · Edited



RemoveHolly Lynn Hindes He shouldn't even have the title "SGT". So...anything else this article speaks of is really irrelevant.Like · Reply · June 21 at 5:00pm



RemoveJean Huber Angulo AgreeLike · Reply · June 21 at 10:14pm



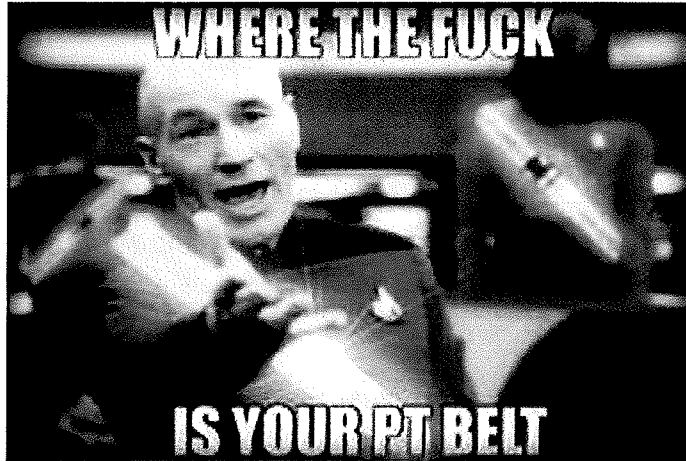
RemoveRobin Mccord Kill him already get on with itLike · Reply · June 21 at 9:27pm



RemoveEarl Malick This guy is a joke he is no hero just a stupid man that what he is. Do the trial and make him spend some more time and forget about him.Like · Reply · Yesterday at 11:58am



RemoveNathaniel Walker



Like · Reply · June 21 at

1:35pm



Robbie Reaves You mean, " Private McFuckstick"! Like · Reply · June 21 at 4:23pm



David Kelly My theory is. He was a spy for us. Pretty sure I'm right. Like · Reply · June 21 at 8:00pm



Malachias Gaskin Hang him from the neck until dead. Like · Reply · June 21 at 8:41pm



Michele Frost tired of hearing bout' this coward b*stard too.. hang him.. and bring Obama and The Butcher too.. we need to start making examples of anyone who betrays us.. and OUR country.. Like · Reply · June 21 at 10:42pm



Adem Nimani Forever US ARMY Like · Reply · June 21 at 1:30pm



John Castaneda How's it imbalanced , the court was forced by the white house to do what they did. Like · Reply · Yesterday at 10:38am



Joe Becerra Fuck the military justice system. Nobody wanted to deal with this fuck to begin with. We should of never of traded the 5 ass hates for this fuck! Let's think big here. I'll give you a clue. He's in the

White House and doesn't like any of us!Like · Reply · June 21 at 3:10pm



RemoveRichard Dickson http://lexch.com/.../article_c62835f4-b00d-11e1-bf70...

Shooting of suspect at Offutt raises

questions How did the driver manage to break into the Air Force base?LEXCH.COMLike · Reply · June 21 at 1:51pm



RemoveLuke A Francis Agreed.Like · Reply · June 21 at 2:55pm



RemoveSteven Montavon He walked away! Not a soldier not a man!Like · Reply · June 21 at 9:00pm



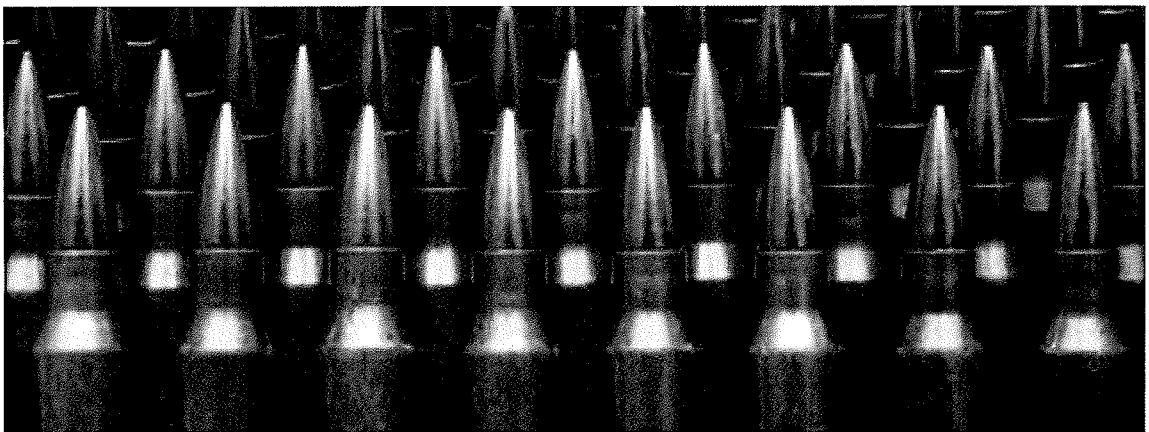
RemoveBill Ferguson You know they are gonna let him go. The Army is too kind and gentle.Maybe someone could pay him a visit when he is a civilian. The second he gets out he will get a book deal and a movie contract laughing at us all driving his Ferrari. That's the f*ed up partLike · Reply · June 21 at 4:40pm · Edited



RemoveElion Rudari

<https://www.facebook.com/pages/Guns/1453344734983742> LIKE FOR

GUNS tongue emoticon GUNSWebsite





Like Page 1,053 Likes Like · Reply · June 21 at 8:49pm



Remove Durango Belga

Like · Reply · June 21 at 8:08pm



Remove Lila Young Like · Reply · 15 hrs



Remove Lucas Lueloff

<https://m.facebook.com/profile.php?id=304350579750317>

I PREACH ABOUT HOW TO GET TO HEAVEN THROUGH JESUS



CHRIST! Luke Lueloff Community

Like Page 311

Likes 17 talking about this Like · Reply · June 21 at 11:39pm



DEPARTMENT OF THE ARMY
UNITED STATES ARMY FORCES COMMAND
4700 KNOX STREET
FORT BRAGG, NC 28310-5000

AFCS-STB-BC

25 March 2015

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Protective Order for Personally Identifiable Information (PII) and Sensitive Information - United States v. Sergeant Bergdahl

1. References.

- a. 5 U.S. Code § 522a, "The Privacy Act" as amended .
- b. AR 340-21 (The Army Privacy Program), 5 July 1985.
- c. AR 25-2 (Information Assurance), 24 October 2007.
- d. AR 380-5 (Department of the Army Information Security Program), 29 September 2000.

2. PURPOSE. The purpose of this Protective Order is to facilitate discovery and to prevent the unauthorized disclosure or dissemination of personally identifiable information and sensitive information. This Protective Order covers all information and documents previously available to the accused in the course of his employment with the United States Government or which have been, or will be, reviewed or made available to the accused, defense counsel, and other recipients of information in this case.

3. APPLICABILITY. "Persons subject to this Protective Order" include the following:

- a. The Accused;
- b. Military and Civilian Defense Counsel and Detailed Military Paralegals;
- c. Members of the Defense Team IAW M.R.E. 502 and U.S. v. Toledo, 25 M.J. 270 (C.M.A. 1987);
- d. Security Officers;
- e. Members of a Rule for Courts-Martial 706 Inquiry Board (if one is conducted); and
- f. Behavioral Health Providers for the Accused.

AFCS-STB-BC

SUBJECT: Protective Order for Personally Identifiable Information (PII) and Sensitive Information - United States v. Sergeant Bergdahl

4. ORDER:

a. The inadvertent or unintentional failure to identify PII and/or designated discovery materials sensitive but unclassified shall not be deemed a waiver in whole or in part of a party's or the United States' claim of confidential treatment under the terms of this Order.


b. If a document or item is produced for which the designation of personally identifiable information (PII) or sensitive information is lacking but should have appeared, the producing party or the United States may restrict future disclosure of the document or item in accordance with this Order by notifying the receiving party in writing of the change in or addition to such restrictive designation with respect to the document or item.

c. The receiving party shall then take reasonable steps to prevent any further disclosure of such newly designated information, except as permitted by this Order.

d. A producing party also may downgrade or remove any designation under this Order by so notifying the receiving party in writing.

e. If a party determines that a previously produced document inadvertently was not identified as containing protected information, the producing party shall give notice in writing that the document is to be treated as protected, and thereafter the designated document shall be treated in accordance with this Protective Order.

f. If a party receives documents containing personally identifying information (PII) they will notify the producing party, and give that party the opportunity to replace said documents with and properly redacted version. Personally identifying information is information that identifies, links, relates, is unique to, or describes the individual, such as name¹, SSN, date and place of birth, mother's maiden name, biometric records, home phone numbers, other demographic, personnel, medical, and financial information, or any other PII which is linked or linkable to a specific individual. This definition of PII is not anchored to any single category of information or technology. Non-PII can become PII when information is publically available and when combined could identify an individual. Documents that contain PII are prohibited from further use or distribution.


PETER Q. BURKE
LTC, AG
Commanding

¹ Names of relevant parties to this case are excluded from this definition.

BERGDAHL EXPERT DECLARATION

Declaration of Lawrence J. Fox

I am a lawyer duly admitted to practice in the Supreme Court of the Commonwealth of Pennsylvania, the Appellate Division, Second Department of the Supreme Court of New York, the Supreme Court of Connecticut, the United States Supreme Court, and numerous federal circuit courts of appeal and district courts. Currently, I am the George W. and Sadella D. Crawford Visiting Lecturer in Law at Yale Law School teaching legal ethics and professional responsibility. I am also the Supervising Lawyer of the Ethics Bureau at Yale, a pro bono endeavor to provide ethics advice, counseling and support to those who cannot afford such services. I am a partner and former managing partner of Drinker Biddle & Reath LLP, a general practice law firm of approximately 650 lawyers with a principal office in Philadelphia and branch offices in New Jersey, New York, California, Delaware, the District of Columbia, Illinois and Wisconsin.

I have been asked by counsel for SGT Bowe R. Bergdahl whether it is permissible under the rules of professional conduct of the Army for counsel to disclose to the public two items at the time these items are introduced at the preliminary hearing of SGT Bergdahl's matter: the transcript of MG Dahl's interrogation of SGT Bergdahl and MG Dahl's executive summary. I have concluded, to a reasonable degree of professional certainty, that such disclosure could not possibly prejudice, let alone materially prejudice, an adjudicative proceeding, nor could disclosure implicate any of the reasons for the applicable rule's limitations on free speech. In the author's view, SGT Bergdahl's seeking an interpretation from the Professional Conduct Council reflects a level of conscientiousness and decorum that goes well beyond anything that was required.

I have regularly been consulted and testified about the ethics and professional responsibility of lawyers in various proceedings in both state and federal courts throughout the United States. I have spent my entire career as a trial lawyer, first at Community Action for Legal Services in New York City and, since 1972, at Drinker Biddle & Reath LLP. My specialties are general commercial litigation and the representation of and consultation with lawyers regarding their professional responsibilities.

I was a lecturer on law at Harvard Law School, teaching legal ethics and professional responsibility from 2007 through 2010. I was the I. Grant Irey, Jr. Adjunct Professor of Law at the University of Pennsylvania Law School from 2000 through 2008, teaching the same topic. I have lectured on legal ethics at more than 35 law schools throughout the country, have been a visiting professor at Cornell University Law School, and was the Robert Anderson Fellow at the Yale Law School in 1997. I have also lectured abroad on legal ethics and professional responsibility.

I have produced and participated in more than 200 continuing legal education seminars, and I have written extensively in the professional responsibility field. I am the author of *Legal Tender: A Lawyer's Guide to Professional Dilemmas* (American Bar Association 1995); co-author (with Professor Susan Martyn) of *Traversing the Ethical Minefield* (Aspen 1st ed. 2004; 2d ed. 2008; 3d ed. 2012), a casebook on professional responsibility; *Red Flags: Legal Ethics for Lawyers* (ALI-ABA, 1st ed. 2005, 2d ed. 2010, Supplement 2009); and *Your Lawyer, A User's Guide* (LexisNexis 2006); co-author (with Professors Susan Martyn and W. Bradley Wendel) of *The Law Governing Lawyers: National Rules, Standards, Statutes, and State Lawyer Codes* (Aspen 2006-2007 ed., 2007-2008 ed., 2008-2009 ed., 2009-2010 ed., 2010-2011 ed., 2011-2012 ed., 2012-2013 ed., 2013-2014 ed., 2014-2015 ed., 2015-2016 ed.); co-author (with Professor

Susan Martyn) of *The Ethics of Representing Organizations: Legal Fictions for Clients* (Oxford University Press 2009); and author of almost 100 articles on legal ethics and related topics and several book chapters. I am the editor and contributing author of *Raise the Bar: Real World Solutions for a Troubled Profession* (2007) and *Ethics Centennial* (2009), both published by the American Bar Association (“ABA”).

I am a former member and Chair of the ABA Standing Committee on Ethics and Professional Responsibility and a former Chair of the ABA Section of Litigation, the largest section of the ABA representing almost 60,000 trial lawyers. I was an advisor to the American Law Institute’s 12-year project, *The Restatement of the Law Governing Lawyers*. I am a Fellow of the American College of Trial Lawyers, and I was the founder and a member of Ethics 2000, the ABA Commission established to rewrite the Model Rules of Professional Conduct. Currently, I am also a member of the Board of the Connecticut Bar Foundation.

In the last decade I have turned my attention to professional responsibility matters relating to the military. I wrote the Introduction to Chapter 4, “Professional Responsibility, Civility, and Judicial Conduct” in the publication *Military Court Rules of the United States* (LexisNexis 2d ed. 2014). I have filed a number of amicus briefs in military court proceedings where issues of both professional responsibility and judicial canons of ethics were implicated. And I have counseled a number of military lawyers in connection with ethical questions for which they sought guidance.

My résumé, including my publications, is annexed hereto as Exhibit A. The list of cases in which I have testified in the last four years is annexed hereto as Exhibit B.

Introduction

The Council ought to know my professional relationship to this particular question. As the Council is undoubtedly aware, the rule at issue here, indeed the entirety of the Army Rules of

Professional Conduct for Lawyers, like the rules of every jurisdiction in the United States except California, is premised on the American Bar Association's Model Rules of Professional Conduct, first adopted by the ABA House of Delegates in the early 1980's. The adopted rules included an earlier version of Rule 3.6, "Trial Publicity."¹ In 1991 the United States Supreme Court decided the case of *Gentile v. State Bar*, 501 U.S. 1030 (1991), declaring unconstitutional, as a violation of the First Amendment free speech clause, part of the original version of Rule 3.6. As a result, the ABA Standing Committee on Ethics and Professional Responsibility, the committee to which the definitive interpretation of and amendments to the rules are delegated, was required to revisit and revise Rule 3.6. The committee then consisted of a Chair and eight members, of which I was one, and because of my interest in the intersection of the rules of professional conduct and Constitutional principles, I played an active role in the drafting of the present model rule which I believe in all material respects (except as noted below) to be identical to the Army's Rule 3.6.

The Issue

Any rule-making that attempts to restrict free speech regarding pending matters faces a dilemma. On the one hand we are confronted with the First Amendment which provides Constitutional protection of free speech and the public's right to know. The Constitution, as we all recognize, as a result puts a very high burden on those who seek, by statute, rule or court order, to restrict what lawyers and litigants may say and when and how they may say it.

On the other hand, it is possible that free speech, unfettered free speech, could interfere with our system of justice and particularly a litigant's right to a fair adjudication based only on what occurs in court.

In *Gentile v. State Bar*, the Supreme Court balanced these two important values and determined that the ABA had gone too far in its then current version, restricting free speech by

¹ In the Army rules the title is "Tribunal Publicity."

the rule's categorical prohibitions. Thus the rewrite was intended to strike a balance that was decidedly in favor of the First Amendment, placing a bigger burden on any restrictions, while leaving the basic standard of the original rule in place. That standard, prohibiting tribunal publicity, is triggered if the "lawyer knows or reasonably should know that the statement will have a substantial likelihood of prejudicing an adjudicative proceeding or an official review process thereof."

Applying that standard, the ABA Committee identified the variables that the Standing Committee thought should be considered in adjudicating this issue. Among these were the content of the speech, the method of delivery, the timing of the speech, the audience that might be affected by the speech, and the speaker's need to reply to the speech of others. When each of these is considered in the present circumstances, one comes quickly to the conclusion that SGT Bergdahl's lawyer's request clearly deserves the First Amendment protection the Supreme Court has emphasized in its case law on the topic.

First, what is being released are documents that cannot be contradicted; a transcript of SGT Bergdahl's interrogation whose content is key to understand SGT Bergdahl's position in this matter and the Executive Summary of an investigative report by MG Dahl, to which the transcript is appended.

Second, the timing of the release would occur long before any trial of this matter, if that ever occurs, long before the fact-finders have even been identified. Unlike many cases, moreover, the ultimate fact finders themselves are particularly unlikely to be affected by any disclosure of this nature.


Third, documents that would be released are documents that are already before the presiding official at the preliminary hearing and the fact that they are released to the public will not change the effect the documents will have on that official.

Fourth, though the Army Rules of Professional Conduct do not explicitly adopt a right to reply to other pre-trial publicity, the ABA rule was amended to include a right to respond because the ABA Ethics Committee believed that such a right was constitutionally required. It is hard to imagine a litigant who has a greater right or need to respond than this applicant. Any review of the stream of publicity on television and the press that movant has endured cries out for a need to answer. And all the requester is seeking is clearance to share the most limited information with the press, when, in my view, SGT Bergdahl and his lawyers could conduct uncensored speeches and press conferences to respond to what government officials and others have uttered in a campaign to demonize him.

Conclusion

I consider it a privilege to be able to offer these observations. The issues presented by this request for guidance go to the heart of effective lawyering. Accordingly, it is without reservation that I urge that the permission sought be granted, and the rights of the accused to disseminate this information be approved.

I declare under penalty of perjury that the foregoing is true and correct.



Lawrence J. Fox

Executed on June 23, 2015
Philadelphia, PA

LAWRENCE J. FOX
One Logan Square, Suite 2000
Philadelphia, PA 19103-6996

Partner, Drinker Biddle & Reath (since 1976), specializing in corporate and securities litigation; Managing Partner - 1987-1989, 1991-1998; Former Chairman, Professional Responsibility Committee.

Professional Organizations

- Member, ABA House of Delegates, 1998-2001; 2002-present
- Member, ABA Commission on the Evaluation of the Rules of Professional Conduct (Ethics 2000) 1997-2002
- Chair, ABA Post Conviction Death Penalty Representation Project 1996-2004
- Chair, Section Officers Conference, American Bar Association 1996-1998
- Chair, ABA Standing Committee on Ethics and Professional Responsibility 1996-1997; Member, 1991-1996
- Chair, ABA Litigation Section, 1995-96
- Chair, ABA Day in Washington 1997-2001
- Member, ABA Law Firm Pro Bono Advisory Committee, 1997-2000
- Chair, National Conference on Professional Responsibility, 1996, 1997, 1998
- Member, Executive Committee of the Section Officers Conference, 1994-1996
- Member, ABA Center for Professional Responsibility Publications Board, 1994-1996; 2005-present
- Member, ABA Working Group on Lawyers Representation of Regulated Clients, 1992-1994
- Member, ABA Business Section Task Force on Joint and Several Liability Under Rule 10b-5, 1992-1997
- Member, ABA Task Force on Judicial Removal - 1992-1994
- Member, Council, Section of Litigation, American Bar Association 1983-1991; 1992-1999; 2002-present
- Chair, Section of Litigation Fall Meeting 1990
- Budget Officer, Section of Litigation, American Bar Association 1983-1988
- Member, ABA Section of Litigation, Task Force on Ancillary Business, 1987-1991.
- Member, American Law Institute, 1989-present
- Special Adviser to ALI Restatement of the Law Governing Lawyers 1988-2000
- Member, Board of Editors, ABA/BNA Manual on Lawyers' Professional Conduct 1988-1991
- Member, Philadelphia Bar Association Professional Responsibility Committee, 1978-present
- Member, House of Delegates, Pennsylvania Bar Association 1988-1991, 1992-2006.
- Member, Board of Editors, CPR Alternatives 1991-present
- Member, ABA Section of Litigation, Legal Services Project, 1997-present.
- Ide Commission (2006-2010)
- ABA Death Penalty Moratorium Project (2006-2010)

Exhibit A

- Member of the Board of Connecticut Bar Foundation, 2011-present

Teaching

- Lecturer on Ethics at Moscow State University, Moscow, Russia, April-May 2014
- George W. and Sadella D. Crawford Visiting Lecturer in Law, Yale Law School, 2009-present
- Supervising Lawyer at the Ethics Bureau at Yale Law School 2011-present
- Lecturer on Law, Harvard Law School, 2007-2010
- I. Grant Irely, Jr., Adjunct Professor, University of Pennsylvania Law School, Fall 2000-2008
- Visiting Professor, Cornell Law School, Fall 1999
- Instructor, 1986-1992, University of Pennsylvania Law School, The Legal Profession and Professional Responsibility
- Lectures at the law schools of Case Western Reserve University, Cornell University, Dickinson – Penn State, Duke University, Emory University, Fordham University, George Washington University, Georgetown University, Hofstra University, Mercer University, Northwestern University, Rutgers University (Camden), Seton Hall University, South Texas University, St. Johns University, Stetson University, Temple University, The College of William & Mary, Tulane University, University of Arizona, University of Chicago, University of Georgia, University of Houston, University of Miami, University of Minnesota, University of South Carolina, University of Toledo, University of Virginia, Villanova University, Wayne State University, William Mitchell College of Law, Yale University

Publications: Books

- Legal Tender: A Lawyer's Guide to Professional Dilemmas, published by ABA (1995).
- *Traversing the Ethical Minefield*, by Susan Martyn and Lawrence J. Fox, published by Aspen (First Edition 2004; Second Edition 2008, Third Edition 2013).
- *Red Flags: Legal Ethics for Lawyers*, by Lawrence J. Fox and Susan R. Martyn, published by American Law Institute (First Edition 2005, Second Edition 2010, Supplement 2009).
- *The Law Governing Lawyers: National Rules, Standards, Statutes, and State Lawyer Codes*, by Susan R. Martyn, Lawrence J. Fox, W. Bradley Wendel, published by Aspen (2006-2007 Edition, 2007-2008 Edition, 2008-2009 Edition, 2009-2010 Edition, 2010-2011 Edition, 2011-2012 Edition, 2012-2013 Edition, 2013-2014 Edition, 2014-2015 Edition, 2015-2016 Edition).
- *Your Lawyer, A User's Guide*, by Lawrence J. Fox and Susan R. Martyn, published by Lexis Nexis (2006).
- *Raise the Bar: Real World Solutions for a Troubled Profession*, edited by Lawrence J. Fox, published by ABA (2007).
- *How to Deal with Your Lawyer: Answers to Commonly Asked Questions*, by Lawrence J. Fox and Susan R. Martyn, published by Oxford University Press – Oceana (2008).

- *The Ethics of Representing Organizations: Legal Fictions for Clients*, by Lawrence J. Fox and Susan R. Martyn, published by Oxford University Press (2009).
- *A Century of Legal Ethics*, edited by Lawrence J. Fox, Susan R. Martyn and Andrew S. Polis, published by ABA (2009).

Publications: Book Chapters

- "Accounting Experts" in *Expert Witnesses*, edited by Faust Rossi, published by ABA (1991).
- "The Law of the Third Circuit" in *Sanctions*, published by ABA (1991).
- "The Special Litigation Committee Investigation: No Undertaking for the Faint of Heart," edited by Brad D. Brian and Barry F. McNeil, published by ABA (1992) (rev'd 2002).
- "The Last Thing Dispute Resolution Needs Is Two Sets of Lawyers for Each Party," edited by Russ Bleemer, published by CPR Institute for Dispute Resolution and Alternatives (January 2001).
- "Mediation Values and Lawyer Ethics: For the Ethical Lawyer the Latter Trumps the Former," *Dispute Resolution Ethics, A Comprehensive Guide*, edited by Phyllis Bernard and Bryant Garth, published by ABA (2002).
- "The Academics Have It Wrong: Hysteria Is No Substitute for Sound Public Policy," *ENRON Corporate Fiascos and Their Implications*, edited by Nancy B. Rapoport and Bala G. Dharan, published by Foundation Press (2004).
- "The Death of Partnership: Can We End the Trend?" and "Should We Mandate Doing Well by Doing Good," *Raise the Bar: Real World Solutions for a Troubled Profession*, edited by Lawrence J. Fox, published by ABA (2007).
- "The ABA's Role in Writing Ethics Rules: A Sacred Trust," *A Century of Legal Ethics*, edited by Lawrence J. Fox, Susan R. Martyn and Andrew S. Polis, published by ABA (2009).
- "Professional Responsibility, Civility and Judicial Conduct," in *Military Court Rules of the United States* (2010 National Institute of Military Justice).

Publications: Articles

- "Waivers of Future Conflicts of Interest: A Blessing Or A Nightmare?" and "Issue Conflicts: Genuine Ethical Dilemmas Or Problems Of Public Relations" published by Securities Regulation Institute (1989).
- "CB&H Announces New Public Service Initiative," The Pennsylvania Lawyer (March 1991).
- "Two Views on Ancillary Business" published by South Carolina Lawyer (1991).
- "Restraint is Good in Trade," National Law Journal, April 29, 1991.
- "Litigation in 2050 - A Backward Forward, Topsy-Turvy Look at Dispute Resolution," and "Professionalism: Misplaced Nostalgia or Meaningful Loss?" ABA National Conference on Professional Responsibility (May, 1991).
- "Fie On The Purchasing Agents: An Outside Counsel's Reply to Ellis Mirsky's In-House Counsel Recognizing New Buying Opportunities," Corporate Counsel, September, 1991.

- "Slip-Sliding Away," The American Lawyer, October, 1991.
- "The Future Of The Law Firm As An Institution," International Society of Barristers, October, 1991.
- "The Ghost of Litigation Future," 18 ABA J. SEC. LITIG. 1 (1991).
- "It Wasn't the Money," The American Lawyer, December 1992.
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- "OTS vs. Kaye Scholer," The Business Lawyer, August, 1993.
- "Mini-trials," 19 ABA J. SEC. LITIG 4 (1993).
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- "It's All In The Atmosphere," Vol. 62 Fordham L. Rev., March 1994.
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- "He Should Know Better," Litigation Docket, Summer 1996.
- "Money Didn't Buy Happiness," Dickinson L. Rev., Spring 1996.
- "Lawyers Need Not Be Contingent-Fee Villains," National Law Journal, December 9, 1996.
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- “Making the Last Chance Meaningful: Predecessor Counsel’s Ethical Duty to the Capital Defendant,” Hofstra L. Rev., Summer 2003.
- “Let Us Keep Our Dignity: Thirteen Habits of Highly Effective Judges (A Lawyer’s List),” ABA The Judges’ Journal, Fall 2003.
- “The Fallout from Enron: Media Frenzy and Misguided Notions of Public Relations Are No Reason to Abandon Our Commitment to Our Clients,” Illinois L. Rev., Volume 2003, No. 5.
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- “Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?,” Hofstra L. Rev., Volume 32, No. 4, Summer 2004.
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- “End Billable Hour Goals ... Now,” The Professional Lawyer, Volume 17, Issue Number 3, 2006.
- “Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities,” Hofstra L. Rev., Volume 36, No. 3, Spring 2008.
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- “Non-Engaging, Engaging, and Disengaging Clients,” ABA J. SEC. LITIG, 4 (2010).
- “How to Help Yourself: Researching the Law Governing Lawyers,” co-authored with Susan R. Martyn, The Practical Lawyer, October 2010.
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Professional Appearances

- “Ethical Problems in Counseling,” University of California, San Diego, Securities Regulation Institute, January, 1989.
- “Money Isn’t Everything But It May Help: Settling Class Actions,” ABA Annual Meeting, August, 1989.

- "ALI Restatement of Law Governing Lawyers", ABA Section of Litigation, January, 1990.
- "Ancillary Business, Pro and Con," ABA Division of Professional Liability, May, 1990.
- Hearing on Ancillary Business Proposed Rules, ABA Standing Committee on Ethics and Professional Responsibility, February, 1991.
- National Association of Law Firm Marketing, Ancillary Services Debate, April, 1991.
- "The Legal Profession v. The Legal Business," Philadelphia Bar Association, 1991.
- "Doing Business with Clients: The Practice and Professional Implications," American Bar Association, August, 1991.
- "Lawyers and Their Liabilities in the 1990's," ABA Standing Committee on Lawyers' Professional Liability, Santa Fe, New Mexico, September, 1991.
- "Lawyer Dissatisfaction, A View From The Bottom", Philadelphia Bar Association Bench-Bar Conference, November, 1991.
- Pennsylvania Bar Association, "Quality of Life for the Young Lawyer: A Forum", February, 1992.
- "An Introduction: The Legal Profession and Professional Responsibility," Rutgers University School of Law, Camden, February, 1992.
- "Let's Make A Deal: The Ethics of Negotiations," ABA 18th National Conference on Professional Responsibility, June, 1992.
- ABA Presidential Showcase Program, "Lawyers Serving on Clients' Boards/Financial Transactions with Clients: Merit or Mistake," ABA Annual Meeting, August, 1992.
- "After Kaye, Scholer Can We Still Represent our Clients Effectively?," ABA Litigation Section Fall Council Meeting, Pebble Beach, California, September, 1992.
- "Professionalism and Service: The Practical Side of Ethics Beyond the Code," ABA Annual Meeting, Phoenix, Arizona, November, 1992.
- "Ethical Concerns in Today's Practice," Pennsylvania Bar Institute, December, 1992.
- "Evolving Responsibilities and Liabilities of Counsel and Accountants," Twentieth Annual San Diego Securities Regulation Institute, January, 1993.
- "Ethics and Litigation Management: Your Road Map to the Minefield," Fourth Annual Litigation Management Supercourse, New York, New York, March 1993.
- "In-House - Outside Counsel Forum: In-House and Outside Counsel Square Off," Fourth Annual Litigation Management Supercourse, New York, New York, March 1993.
- "The Woman Advocate," Conference on the Woman Advocate, ABA Section of Litigation and Prentice Hall Law & Business, New York, March 1993.
- "Regulatory Residue: The Fallout from Kaye Scholer," 19th National Conference on Professional Responsibility, Chicago, Illinois, May 1993.
- Ethics Seminar, Aetna Institute, May, 1993.
- "Death Penalty Appeals: The End of Fairness," ABA Spring Council/Committee Chairs Meeting, Santa Fe, NM, June, 1993.
- "ABA Working Group Report on Lawyers' Representation Of Regulated Clients: 18 Months After OTS v. Kaye, Scholer," ABA Annual Meeting, New York, New York, August, 1993.

- "Blowing The Whistle: Should Regulatory Lawyers Be Required To Sound The Alarm: The Kaye, Scholer Story," Business Law Forum, Temple University School of Law, Fall 1993 Lecture Series.
- "Ethics of Negotiations," Berks County Bench-Bar Conference, Hershey, PA, October, 1993.
- "Ethics, Responsibility and ADR," Dispute Resolution Alternatives Supercourse, Practicing Law Institute, New York, October 1993
- "Don't Throw the Baby Out with the Bath Water - How Much Management Is Too Much Management... How Inside and Outside Counsel Must Communicate to Achieve the Proper Balance, A Litigator's TQM Survival Kit," The District of Columbia Bar/George Washington University, National Law Center CLE Program, Washington, DC, October 1993.
- "Representing Economic Competitors - Maritrans Revisited," Pennsylvania Bar Institute, Baltimore, Maryland, November, 1993.
- National ADR Institute for Federal Judges, Harvard Law School, Cambridge, Massachusetts, November, 1993.
- Conference on Ethical Problems in Representing the Elderly, Fordham University, New York, December, 1993.
- "Legal Ethics for the Corporate Counselor," ABA Committee on Corporate Counsel, February, 1994.
- "Revolutionary Changes in Practice under the New Federal Rules of Civil Procedure," ABA/Prentice Hall Law and Business, New York City, February 1994.
- "Lawyers at Risk: Lessons from the Savings and Loan Crisis," University of Pennsylvania Center on Professionalism, February, 1994.
- "Ethical Issues in Corporate Representation: 'The Seaside Resort' Case Study," University of Pennsylvania Center on Professionalism, March 1994.
- "Should the Legal Profession Adopt Stricter Controls on Lawyer Advertising?," The State University of New Jersey at Rutgers, March 1994.
- "Legal Ethics and the Rule of Law," The Federalist Society, Philadelphia, Pa., March, 1994.
- "Rule 26: A Trap for the Wary," Eighteenth Annual United States Judicial Conference for the District of New Jersey, April 1994.
- The Woman Advocate Conference, ABA and Prentice Hall, New York, April 1994.
- "Are the Model Rules Out of Date in the Modern Regulatory State?," Keck Foundation Fellow, Duke University, April 20, 1994.
- "Emerging Issues in Professional Responsibility and Malpractice", ABA Satellite Seminar, June, 1994.
- "Strange Bedfellows: Law Firm and Corporate Counsel: Can This Partnership Be Saved?," Business Law Section and CLE Committee of The Florida Bar, June, 1994.
- "Pre-Trial Practice in the 90s and Coping with New Rules of Civil Procedure and the Civil Justice Reform Act," ABA Annual Meeting, New Orleans, August 1994.
- "The Receipt of Inadvertent Transmissions," Philadelphia Bar Education Center, December, 1994.
- Professional Responsibility Issues, Twenty-Second Annual Securities Regulation Institute, Hotel del Coronado, Coronado, California, January, 1995.

- "Different Strokes for Different Folks: Methods for Handling Corporate Litigation," 13th Annual Mid-Winter Meeting, American Bar Association, Boca Raton, FL, February 1995.
- "Redefining Client Service: The Legal Tech Evolution," Philadelphia Bar Association, April 6, 1995.
- "Prospects and Likely Impact of Dodd-Domenici Legislation," ABA Annual Spring Meeting, San Antonio, Texas, March, 1995.
- The Woman Advocate Conference, ABA and Aspen Law and Business, San Francisco, April 1995.
- Hot Topics for Corporate Counsel, "Ethics and the Corporate Counselor: Recurring Ethical Tough Calls," The Corporate Counsel Committee of the ABA Section of Litigation and the ABA Center of Continuing Education, May 11-12, 1995, Atlanta, GA.
- Media Law Roundtable, "Access Leads to Understanding - Understanding Leads to Access," ABA Section of Litigation and the National Conference of Lawyers and Representatives of the Media, May 19, 1995, Washington, DC
- "Revolutionary New Changes in Civil Practice in the Federal Trial Courts," New York, May 22, 1995.
- "Contingency Fees: Is One Third of a Loaf Better Than None?," 21st National Conference on Professional Responsibility, San Diego, California, June 1-3, 1995.
- The Woman Advocate Conference, ABA and Aspen Law and Business, New York, June, 1995.
- "Securities Litigation Reform," Philadelphia Bar Education Center, October 11, 1995.
- "Discovery Abuse," Cornell Law School, October 25, 1995.
- "Practical Issues in the Practice of Environmental Law," Philadelphia Bar Association, November 1995.
- "The Six Most Frequently Asked Questions," Philadelphia Bar Education Center, December 15, 1995.
- Securities Regulation and Business Law Problems, Dallas, Texas, February 1996.
- "Legal Ethics: The Core Issues," Hofstra University School of Law, March, 10-12, 1996.
- Chief Justice's Ethics Seminar, Deer Valley, Park City, Utah, March 15, 1996.
- "Ethical Considerations of Representing Corporate Clients and Their Affiliates," Western Pennsylvania Chapter of the American Corporate Counsel Association, April 1, 1996.
- "Business Lawyers Under Fire, Liability and Ethical Risk Facing In-House and Outside Counsel," ALI/ABA Satellite Program, April 2, 1996.
- "Taking Care of Each Other," The Dickinson School of Law Senior Speaker Series Dinner, April 23, 1996.
- Third Annual Conference on Women in the Profession: "Unraveling the Mystery of Ethics," Pennsylvania Bar Institute, May, 1996.
- "Restatement of the Law Governing Lawyers: Its Effect on Lawyer Discipline," 22nd National Conference on Professional Responsibility, American Bar Association, June 1, 1996.

- "Improving the Profession," American Corporate Counsel Leadership Summit, June, 1996.
- "Lawyer as Director of A For-Profit Corporation, Philadelphia Bar Education Center, July 1996.
- "Lawyers Serving on Boards of Directors of Their Clients," ABA Annual Meeting, Orlando, Florida, August, 1996.
- "Ethics for Transactional Lawyers," Philadelphia Bar Education Center, September 9, 1996.
- "Ethical Issues for Corporate Counsel," The Price Waterhouse General Counsel Forum, September 19, 1996.
- "Testing the Ethical Limits: Should We Resurrect the Appearance of Impropriety," Yale Law School, October 8, 1996 and ABA Committee on Corporate Counsel, 1996 Northeast Regional Workshop, November 7, 1996.
- "Advertising, Solicitation and Professionalism—Do's and Don'ts," December Bench-Bar, Philadelphia Bar Association, December 3, 1996.
- "Recent Developments in Legal Ethics," 15th Annual Corporate Counsel Institute, December, 1996.
- "Conflicts of Interest in Corporate Transactions: The Leveraged Buyout of the Harris Chemical Company," Rhodes College Institute on the Profession of Law, January, 1997.
- 1997 Lawyers' Conference, PNC, February 12, 1997.
- "Litigators Under Fire," ALI-ABA Satellite Program, April 3, 1996.
- Third Annual Chief Justice's Ethics Symposium, "Lawyer/Client Conflicts You Never Knew You Had," April, 1997.
- Regulation of "Pay to Play": By Whom? For What? How Far?, Business Law Section, American Bar Association, Spring Meeting April 1997.
- National Association of Bond Lawyers' Washington Seminar, May 1997.
- "Seeking Common Ground II:" A Continuing Dialogue Between General Counsel and the American Bar Association Second Annual Conference on Corporate Counsel Issues, Ethics for In-house Counsel Washington, DC, May, 1997.
- "The Model Rules of Professional Conduct: Have We Lost our Professional Values?," 23rd National Conference on Professional Responsibility, Naples, FL, May, 1997.
- "Building Strategies for Better Corporate Client Services, 1997 Legal Leadership Summit, Dallas, TX, June, 1997.
- Keynote Address: "An Informal Conference on Relationships Between Judges and Lawyers," Maine Bench Bar Conference, June, 1997.
- "The Global Economy - Implications for Law and Legal Practice, Presidential Showcase Joint Program, ABA Annual Meeting, August 1997.
- "The Lawyer as Director of a Client," ABA Annual Meeting, August 1997.
- "Lawyers Serving on their Clients' Board: How to Avoid an Accident Waiting to Happen," ABA Annual Meeting, August 1997.
- "Pathways to Leadership: A Primer for Women and Men," ABA Annual Meeting, August 1997.
- "Ethics Issues for Transactional Lawyers," Philadelphia Bar Association Transact Conference, September 19, 1997.

- "A Debate: The Role of the American Bar Association, The Federalist Society for Law & Public Policy Studies," September 22, 1997.
- "Professional Issues in Complex Litigation," Seventh Circuit Judicial Conference and Seventh Circuit Bar Association Annual Meeting, September, 1997.
- "Resolving Litigation's Civil Wars: Negotiating a Ceasefire Among Plaintiff Lawyers, Defense Lawyers, and Judges," Institute of Continuing Legal Education in Georgia, October 10, 1997.
- "Mastering Time, Costs, Information & Technology, American Corporate Counsel Association's 1997 Annual Meeting, San Francisco, CA, October 22-24, 1997.
- "Dialogue on Professional Dilemmas," American Bar Association, Section of Litigation, October 25, 1997.
- "Ethics," Environmental Law Institute 1997 "Boot Camp" Course on Environmental Law, November 1997.
- "Corporate Compliance, Ethics and Preventive Law," Price Waterhouse General Counsel Forum, November 20, 1997.
- "Professionalism in Practice," University South Carolina Law School, South Carolina Bar CLE Division, November 21, 1997.
- "Tangled Loyalties: Conflicts of Interest in the Real World," Fellows of the American Bar Foundation Annual Meeting, January 31, 1998.
- "Litigation Management Toolbox for the 21st Century," ACCA Legal Leadership Summit, February, 1998.
- "The Future of Legal Services," The First Annual Arthur Liman Colloquium, March 5, 1998.
- "Professionalism in Class Action and Mass Tort Litigation," Sixth Annual Alvin B. Rubin Federal Symposium, New Orleans, April 2, 1998.
- "Conflicts of Interest in a Deregulated World," Edison Electric Institute, Spring Legal Conference, St. Pete Beach, FL, April, 1998.
- Legal Ethics: Access to Justice "Another Look at Corporate Family Conflicts," Hofstra 1998 Legal Ethics Conference, April 5-7, 1998.
- "Litigators Under Fire," ALI-ABA Satellite Program, April 9, 1998.
- "Legal Ethics in an Online World," Managing the Legal Risks of E-Commerce: Practical Legal Strategies, The Computer Law Association, April 16, 1998.
- "The Brave New World of Lawyers' Ethics," Twenty Fifth Annual Disciplinary Conference of the District of Columbia, April 21, 1998.
- "Multidisciplinary Partnerships: Accounting Firms and the Practice of Law," ABA 24th National Conference on Professional Responsibility, May, 1998.
- "Dual Professions," 1998 Masters Seminar on Ethics, Florida Bar CLE Committee and the Professional Ethics Committee, June 1998.
- Who Shall Live and Who Shall Die, Death Penalty Focus, June 3, 1998.
- Keynote Address, Virginia State Bar Disciplinary Conference, July 21, 1998.
- "The Eroding Borders Between Law and Accounting: Look Who's Eating Your Lunch," ABA 1998 Annual Meeting in Toronto, Ontario, August 3, 1998.
- "The ALI and Its New Projects," ABA 1998 Annual Meeting in Toronto, Ontario, August of 1998.

- "Ethics in the 21st Century," ABA Product Liability Seminar in Phoenix, Arizona, October 3, 1998.
- The Atlanta Bar Association, The "Presidential Showcase" CLE Program: The Millennial Lawyer in the 21st Century, "The Practice in the 21st Century", October 15, 1998.
- Association of American Law Schools, Workshop on Professional Responsibility, "The Ethics Professors: Enablers or High Priests," October 16, 1998.
- "Ethics in Environmental Law" Environmental Law Institute 1998 Boot Camp, November 13, 1998.
- "Political Contributions; Freedom of Speech or Pay to Play" 4th Annual New York Public Finance Conference, November 16-17, 1998.
- "Pay to Play: How We Got Here and Where We Might Be Going". Pennsylvania Bar Institute, Current Issues in Municipal Finance, November 19, 1998.
- "Can We Revive Professionalism?," ACCA Annual Meeting, November 12, 1998.
- "Death Penalty Representation," University of Pennsylvania Law School Public Service Form, November 17, 1998.
- "Ethical Problems for In-House Counsel," Western Pennsylvania Chapter American Corporate Counsel Association December 2, 1998.
- "Roundtable on Ethics," Western Pennsylvania Chapter of the American Corporate Counsel Association, December 7, 1998.
- "Professional Responsibility for Intellectual Property Practitioners," Patent & Trademark Office Day, December 9, 1998.
- "Cross-Examination," an ABA Section of Litigation Teleconference, December 15, 1998.
- "Ethics: Negotiating in Cyberspace," Practicing Law Institute 19th Annual Institute on Computer Law, March, 1999.
- "Preserving Professional Independence," ABA Winter Council Meeting, Aspen, CO, January, 1999.
- "What Firms Want and Need to Know About Representing a Death Row Prisoner," ABA Winter Council Meeting, Aspen, CO, January, 1999.
- "The Accountants are Coming! The Accountants are Coming! Ethical Dilemmas Facing Lawyers Practicing at CPA Firms," Los Angeles County Bar Taxation Section, Los Angeles County Bar Association, February 1999.
- "Florida Should Oppose Lawyers Working for Non-Lawyers," Florida All Bar Conference, February, 1999.
- "Ethical and Practical Challenges in Compliance Programs," Edison Electric Institute 1999 Spring Legal Conference, Charleston, S.C. April 1999.
- "Traversing the Ethical Minefield," ABA Section of Litigation Annual Meeting, April, 1999.
- "Is a Whole Generation Getting the Wrong Message on Ethics," ABA Section of Litigation Annual Meeting, April 1999.
- "Ethics for the In-House Lawyer," ACCA, April 22, 1999.
- "Ethical Dilemmas in the Triangular Relationship," Insurance Practice Institute, April 1999.

- "Intrusion Into the Profession," Pennsylvania Bar Association Annual Meeting, May 5, 1999.
- "The Challenge of Multidisciplinary Practice," New Jersey State Bar Association Annual Meeting, May 14, 1999.
- "Should the ABA Abolish Rule 5.4?," debate with John Aldock, ABA Section of Litigation, Cancun, Mexico, June 19, 1999.
- "Race in Your Case," National Conference for Minority Lawyers, ABA Section of Litigation, June 23, 1999.
- "Ethics 2000: Professional Responsibility in the New Millennium," 1999 Annual State Bar of Arizona Convention, June 25, 1999.
- "Intrusion Into the Profession or the Future of Law Practice? Multi-Disciplinary Practice," PBI-PBEC Education Center, Philadelphia, September 24, 1999.
- "MDP: Should In-House Counsel Care?," Corporate Counsel Committee of Business Law Section of the ABA, San Diego, October 25, 1999.
- "Multi-Disciplinary Practices, Ethics, and the Future of the Legal Profession," Cornell Law School, October 27, 1999.
- "Pro & Con: Should the PA Bar Embrace MDP?," PA House of Delegates, October 29, 1999.
- "New Roles, No Rules? Redefining Lawyers' Work," The Phyllis W. Beck Chair In Law Symposium, Temple University Beasley School of Law, November 12, 1999.
- "Current Issues In Professional Responsibility," First Year Professional Responsibility Lecture Series, Yale, December 1, 1999.
- "Multidisciplinary Practice, What it is and What it Means to the Vermont Practitioner," Vermont Bar Association, Young Lawyers Section, January 14, 2000.
- "Symposium on Multidisciplinary Practice," University of Minnesota Law School, Minnesota L. Rev., February 24-25, 2000.
- "Modifications to the ABA Model Rules of Professional Responsibility and Application to Environmental Practice," American Bar Association Section of Environment, Energy, and Resources' Conference on Environmental Law, Keystone, Colorado, March 12, 2000.
- "The Fifth Nearly Annual Ethics CLE & Ski," Park City Bar Association, Silver Lake Lodge, Deer Valley, Utah, March 31, 2000.
- "The Question of Multi-Disciplinary Practice: Point – Counterpoint," National Academy of Elder Law Attorneys, Inc., Philadelphia, Pennsylvania, May 4, 2000.
- "Multidisciplinary Practice: Curse, Cure or Tempest In a Teapot," American Intellectual Property Law Association, Pittsburgh, Pennsylvania, May 19, 2000.
- "Multi-Disciplinary Practices and Ethics 2000," American College of Trial Lawyers Regional Meeting, Short Hills, New Jersey, May 20, 2000.
- "Excessive Legal Fees: Protecting Unsophisticated Consumers, Class Action Members, and Taxpayers/Citizens," U.S. Chamber Institute For Legal Reform, et al., Washington, DC, May 25, 2000.
- "Ethics 2000," Delaware Bench & Bar Conference, June 7, 2000.
- "Legal Ethics in Cross-Border Practice," The International Law Briefing, New York, New York, June 8, 2000.

- "The Changing Practice of Law," DC Circuit Judicial Conference, Williamsburg, Virginia, June 15, 2000.
- "MultiDisciplinary Practices (MDPs): A New Paradigm For the Delivery of Legal Services?," 62nd Annual Meeting Virginia State Bar, Virginia Beach, Virginia, June 17, 2000.
- "May It Please The Court, I am from Arthur Price & Deloitte: MDP's, Should Trial Lawyers Care?," ABA Section of Litigation, New York, New York, July 8, 2000.
- "Successful Partnering Between Inside and Outside Counsel: Advice from the Experts," ABA Section of Business Law, New York, New York, July 9, 2000.
- "The Imposition Of The Death Penalty Is 'Fraught With Error': Where Do We Go From Here?," ABA Section of Litigation, New York, New York, July 10, 2000.
- "If Free Enterprise Has Its Way, Will We Still Need Rules of Professional Responsibility," Centennial Lecture, William Mitchell College of Law, St. Paul, Minnesota, October 4, 2000.
- "ABA Call to Action: A Moratorium On Executions," Atlanta, Georgia, October 11-12, 2000.
- "Negotiating the Ethical Minefield," Professional Education Group, Miami, Florida, October 13, 2000.
- "All's OK Between Consenting Adults: Enlightened Rule on Privacy; Obscene Rule on Ethics," Howard Lichtenstein Legal Ethics Lecture, Hofstra University School of Law, October 18, 2000.
- "Ethics in the Workplace," University of Pennsylvania, Philadelphia, Pennsylvania, October 25, 2000.
- "Ethical Issues in Corporate Practice Today; Compensation and Acquisitions," Corporate Governance Institute, Washington, DC, November 9, 2000.
- "Ethics in Environmental Law," Environmental Law Institute's Ninth Annual Boot Camp Course, Georgetown University, Washington, DC, November 13, 2000.
- "Proposed Revisions to the American Bar Association Model Rules," The Federal Council & Foundation, Princeton, New Jersey, November 18, 2000.
- "ABA Ethics 2000: What's New in the Proposed Model Rules," Louisiana State Bar Association, New Orleans, Louisiana, December 1, 2000.
- "Teleconference on Ethics," National Association of Bond Lawyers, Washington, DC, December 6, 2000.
- "Multi-Disciplinary Practice and the Fiduciary Lawyer," Pennsylvania Bar Institute, Philadelphia, Pennsylvania, December 12, 2000.
- "Multidisciplinary Practice: What it is and What it Means for Vermont Practitioners," Young Lawyers Section of the Vermont Bar Association, Montreal, Quebec, January 14, 2001.
- "Conference on Attorney Conduct Rules," Administrative Office of the United States Courts, Washington, DC, January 16, 2001.
- "Multidisciplinary Practices & Healthcare," American Bar Association, Health Law Section, Orlando, Florida, February 9, 2001.
- "The Death Penalty: A Bar Leadership Issue," National Conference of Bar Presidents, ABA Midyear Meeting, San Diego, California, February 17, 2001.

- Ethics 2000 Presentation: "What Every Lawyer Should Know About Ethics 2000 – Highlights of the Proposed Changes to the ABA Model Rules of Professional Conduct," Center for Professional Responsibility, ABA Midyear Meeting, February 18, 2001.
- "Ethics 2000: The Proposed Rules and Your Practice," American College of Trial Lawyers Spring Meeting, Boca Raton, Florida, March 30, 2001.
- "The American Bar Association's Ethics 2000 Commission: A Review of Proposed Changes in the ABA's Model Rules of Professional Conduct," The Board on Professional Responsibility, District Columbia Court of Appeals, Washington, DC, April 18, 2001.
- "The Role of Honesty in the ABA Ethics 2000 Report," The Fellows of the Wisconsin Law Foundation Symposium, Lake Geneva, Wisconsin, May 1, 2001.
- "Summer Associates' Day's Ethics Discussion," Philadelphia Volunteers for the Indigent Program, Philadelphia, Pennsylvania, June 4, 2001.
- "Legal Tender: Negotiating the Ethical Minefield," Kentucky Bar Association 2001 Annual Convention, Lexington, Kentucky, June 13, 2001.
- "Ethical Issues in Public Interest Law," 9th Annual Public Interest Law Day, Pennsylvania Bar Institute, Philadelphia, Pennsylvania, June 21, 2001.
- "Costs & Funding Forum," Personal Injuries Bar Association, Annual Conference 2001, St. Catherine's College, Oxford, June 30, 2001.
- "Ethics 2001: Are you ready for the challenge?," American Law Institute-American Bar Association Committee on Continuing Professional Education, Washington, DC, July 24, 2001.
- "Death Penalty Program," American Bar Association Annual Meeting, Chicago, Illinois, August 5, 2001.
- "Ethics 2000: Should Litigators Care? Should Clients Care?," American Bar Association Annual Meeting, Chicago, Illinois, August 5, 2001.
- "Ethical Dilemmas for Capital Post-Conviction Counsel," National Federal Habeas Corpus Seminar, Nashville, Tennessee, August 10, 2001.
- "Forget About Conflicts – If Citibar Has Its Way, We Can Have Just One Big Law Firm," Hofstra University School of Law, The 2001 Legal Ethics Conference, Legal Ethics: What Needs Fixing?, Hempstead, NY, September 10, 2001.
- "Trial Evidence in the Federal Courts: Problems and Solutions," American Law Institute-American Bar Association Committee On Continuing Professional Education, Philadelphia, PA, October 5, 2001.
- "Ethics and Professionalism", Pennsylvania Bar Institute, Philadelphia, PA, October 11, 2001.
- Vermont Bar Association Seminar, Burlington, Vermont, November 8, 2001.
- "Ethics in Capital Defense," Ninth Annual Capital Defense Workshop, The Virginia Bar Association, Richmond, VA, November 15-16, 2001.
- "Litigation Ethics," Section of Litigation and Young Lawyers Division, ABA Mid-year Meeting, Philadelphia, PA, February 2, 2002.
- Ethics Round Table, 2002 Winter Federal Bench Bar Council Conference, Puerto Rico, February 16, 2002.

- "The Future Structure and Regulation of the Law Practice," University of Arizona, James E. Rogers College of Law, Tucson, Arizona, February 22-23, 2002.
- "Litigation in a Free Society," Institute for Law & Economic Policy, Hollywood, Florida, March 15-16, 2002.
- "The Ethics 2000 Commission: The Adversary System and the Lawyer-Client Relationship," University of Tennessee College of Law's Center for Advocacy Dispute Resolution, Knoxville, Tennessee, April 4, 2002.
- "Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual," Law Review Symposium sponsored by University of Illinois at Urbana-Champaign, Champaign, Illinois, April 5, 2002.
- "The Intersection of Lawyer Ethics and the Death Penalty," Yale Law School, April 8, 2002.
- "Ethics and Enron," 22nd Annual Ray Garrett, Jr., Corporate and Securities Law Institute, Northwestern University School of Law, Chicago, Illinois, April 12, 2002.
- "Planning for Disaster," PBI-CLE, Philadelphia, PA, April 22, 2002.
- "Ethical Issues in Corporate Practice Today," ALI-ABA Ninth Annual Corporate Governance Institute, Boston, MA, May 10, 2002.
- "Ethics Issues for the IP Practitioner," Philadelphia Intellectual Property Law Association, Philadelphia, PA, May 16, 2002.
- "Legal Tender," New Jersey Bar Association, Mt. Laurel, NJ, May 18, 2002.
- "Legal Tender," New Jersey Bar Association, Atlantic City, NJ, May 22, 2002.
- "Ethical Issues In Public Interest Practice," 10th Annual Public Interest Law Day, Philadelphia, PA, June 7, 2002.
- "Ethics for In-house Counsel," IBM, Armonk, NY, June 11, 2002.
- "Legal Tender," Louisville Bar Association, Louisville, KY, June 25, 2002.
- "The Fallout from Enron," ABA Section of Litigation, Banff, Alberta, Canada, June 22, 2002.
- "How to Improve the System of Justice through CLE," Association for Continuing Legal Education, Montreal, Canada, July 28, 2002.
- "Enron and its Aftermath," St. John's University School of Law, Jamaica, NY, September 20, 2002.
- "The Attorney-Client Privilege," PBI Workshop, Philadelphia, PA, October 16, 2002.
- "The Ethics of Litigation," South Texas L. Rev. Annual Ethics Symposium, Houston, TX, October 18, 2002.
- "Handling Professional Dilemmas," Maine Bar Association, Portland, ME, November 7, 2002.
- "Problems in Discovery and Professionalism," University of Georgia School of Law, Athens, Georgia, November 15, 2002.
- "The Role of the Corporate Attorney after Enron and the Sarbanes-Oxley Act," Fordham Center for Corporate, Securities and Financial Law, Fordham University School of Law, New York, NY, November 22, 2002.
- "Lawyer Regulation After Enron," Association of American Law Schools, Washington, DC, January 5, 2003.
- "A Matter of Corporate Responsibility: Where Are We Going From Here?," New York State Bar Association, New York, NY, January 22, 2003.

- "Ethics and Professionalism on the Big Screen," New York State Bar Association, New York, NY, January 23, 2003.
- "Trial Evidence in the Federal Courts," ALI-ABA, Coral Gables, FL, January 30, 2003.
- "Did Enron Create a Need for New Regulation of Lawyers?," Univ. of Houston, Houston, TX, February 3, 2003.
- "Bar Summit On Corporate Responsibility," (Sarbanes-Oxley panel) Association of the Federal Bar of the State of New Jersey 27th Annual United States District Court Judicial Conference, West Orange, NJ, March 6, 2003.
- "Legal Tender," The State Bar of New Mexico, Albuquerque, NM, March 13, 2003; Santa Fe, NM, March 14, 2003.
- "Insight for Inspired Practice: Dispute Resolution Ethics," ABA Section of Dispute Resolution, San Antonio, TX, March 21, 2003.
- "Ethics Issues in Dispute Resolution," 2003 Petroleum Marketing Attorneys' Meeting, Washington, DC, April 1, 2003.
- "The Brave New World of Lawyers' Ethics: Revised Rules and Bold Challenges," ALI-ABA Video Law Review, Washington, DC, April 4, 2003.
- "Ethics in the Media: The Ever-Growing Thirst for Information," ABA Litigation Section, New York, NY, June 5, 2003.
- "The Death Penalty: Race, Representation and Reform," ABA National Conference for the Minority Lawyer, Philadelphia, PA, June 5, 2003.
- "Corporate Governance After Sarbanes-Oxley," ALI-ABA Tenth Annual Corporate Governance Institute, Philadelphia, PA, June 6, 2003.
- "Legal Issues in a New World," Eighth Circuit Judicial Conference, Minneapolis, MN, July 17, 2003.
- "Judging Judges' Ethics," Hofstra University School of Law, Hempstead, NY, September 15, 2003.
- "You've Finished the Internal Investigation – Now What?," Association of General Counsel Fall Meeting, Washington, DC, October 10, 2003.
- "Settlement Strategies and Ethics," ABA-CLE TeleConference and Audio Webcast, October 14, 2003.
- "Strengthening the Guiding Hand of Counsel: Reforming Capital Defense Systems," Hofstra University School of Law, Hempstead, Long Island, NY, October 24, 2003.
- "Ethics and Professional Liability," American Board of Professional Liability Attorneys Convention, Philadelphia, PA, October 25, 2003.
- "Ethics in Environmental Law," Environmental Law Institute's Twelfth Annual Boot Camp Course, Georgetown University, Washington, DC, November 11, 2003.
- "Federalism & The Regulation of Attorneys," The Federalist Society, Washington, DC, November 15, 2003.
- "Advocacy & Ethics," ALI-ABA, Scottsdale, AZ, December 4-5, 2003.
- "Can Client Confidentiality Survive Enron, Arthur Andersen and the ABA?," Stetson University College of Law, Tampa, FL, January 28-30, 2004.
- "Supreme Court Judicial Recusals," The Federalist Society for Law and Public Policy Studies, Washington, DC, April 6, 2004.

- "Liars and the Lying Lawyers and Clients Who Tell Them," ABA Section of Litigation Annual Meeting, Scottsdale, AZ, May 6, 2004.
- "Beating the Rap: How to Protect Your Clients (and Yourself) from the Exposure of Criminal Violations in Bankruptcy Cases," Eastern District of Pennsylvania Bankruptcy Conference, Philadelphia, PA, May 17, 2004.
- "Lawyers' Ethical Challenges in the Office, Boardroom, and Beyond," ALI-ABA Video Law Review, Washington, DC, June 25, 2004.
- "Negotiation, Ethics & Mandatory Disclosures," Atlanta, GA, August 7, 2004.
- "The Decline of Confidentiality for the Corporate Attorney," Philadelphia, PA, August 25, 2004.
- "Ethics & Marketing – Learn How to Comply When You Communicate," Philadelphia, PA, September 22, 2004.
- "New Rules of Professional Conduct," Philadelphia Bar Association, Philadelphia, PA, September 29, 2004.
- "Negotiating the Ethical Minefield," Professional Education Group, Cary, NC, September 30, 2004.
- "Ethics of Contingent Fees," ABA Tort Insurance Practice Fall Council Meeting, Rockport, ME, October 8, 2004.
- "Ethics and the Law," CNL Leadership Forum on Integrity, Philadelphia, PA, October 25, 2004.
- "Private Equity and Venture Capital Financing," Philadelphia, PA, November 10, 2004.
- "Ethics in Environmental Law," Environmental Law Institute's Thirteenth Annual Boot Camp Course, Georgetown University, Washington, DC, November 11, 2004.
- "Amendments to Pennsylvania Rules of Professional Conduct," Philadelphia Association of Defense Counsel, Philadelphia, PA, November 16, 2004.
- "Corporate Governance After Sarbanes-Oxley," ALI-ABA Corporate Governance Institute, Washington, DC, December 3, 2004.
- "Eastern District of Pennsylvania Bankruptcy Conference," 16th Annual Forum, Plainsboro, NJ, January 29, 2005.
- "Valuation of Intellectual Property for Litigation, Business and Tax Purposes," Philadelphia Bar Institute, Philadelphia, PA, March 4, 2005.
- "Erosion of the Attorney-Client Privilege," Atlantic Legal Foundation, Washington, DC, March 10, 2005.
- "The New Pennsylvania Rules of Professional Conduct: What Do They Mean for Health Lawyers?," PBI – Annual Health Law Institute, Philadelphia, PA, March 15, 2005.
- "Professional Challenges in Large Firm Practices," Fordham University School of Law, New York, NY, April 15, 2005.
- "Death of Confidentiality: Not on Our Watch," Louisville, KY Bar Association, April 20, 2005.
- "Red Flags, Client Troubles, and the Ethics of Representation," ALI-ABA, Washington, DC, June 3, 2005.
- "Legal Ethics in a New Millennium: New Practice, New Rules, New Visions," AALS, Montreal, Canada, June 12-14, 2005.

- “Legal Tender – Wyoming State Bar Convention,” Professional Education Group, Inc., Casper, Wyoming, September 9, 2005.
- “The Business Lawyers Institute 2005,” Philadelphia Bar Institute, Philadelphia, PA, October 20, 2005.
- “Trial Evidence in the Federal Courts Problems and Solutions,” ALI-ABA, Chicago, IL, October 21, 2005.
- “Professional Responsibility & Risk Management Conference,” Hinshaw & Culbertson LLP, New York, NY, October 27, 2005.
- “Ethics Guidance for the Conflicted Lawyer,” ABA TIPS Aviation and Space Law Committee, Washington, DC, November 10, 2005.
- “Working Both Sides: Conflicts Arising Out of Advance Waivers Where Law Firm Attempts to Represent Both Insurers and Insureds,” ABA Section of Litigation, Insurance Coverage Litigation annual conference, Tucson, AZ, March 4, 2006.
- “Outreach Through Lawyering,” University of Pennsylvania Law School, Latin American Law Students Association, Philadelphia, PA, March 17, 2006.
- “Gandhi: Ethical Legal Practice in the Modern Era,” University of Pennsylvania Law School, South Asian Law Students Association, Philadelphia, PA, March 24, 2006.
- “ConocoPhillips Global Attorneys Meeting,” Houston, TX, April 25, 2006.
- “Strategies for Avoiding Conflicts of Interest,” Multi-Site Teleconference, May 17, 2006.
- “Ethics 2006: Accidental Clients, Red Flags, and Other Ethical Conundrums,” ALI-ABA, Washington, DC, October 13, 2006.
- “Ethics 101 Conquering Ethical Dilemmas, 2006 Fall Conference Young Lawyers Division, American Bar Association, Baltimore, MD, October 20, 2006.
- “How the Law Schools Can Help,” Rutgers Faculty Forum, Camden, NJ, November 6, 2006.
- Fourth National Seminar on Forensic Evidence and the Criminal Law, New Orleans, LA, January 20-21, 2007.
- “E-Ethics: Practical Considerations and Ethical Issues in Electronic Discovery,” 1st Annual National Institute on E-Discovery, American Bar Association, Chicago, IL, March 9, 2007.
- “Trial Evidence in the Federal Courts: Problems and Solutions,” ALI-ABA, New York, NY, March 22, 2007.
- “Enhanced Ethics & Professionalism: the Intersection of Legal and Business Concepts,” Tulane University Law School, 19th Annual Corporate Law Institute, New Orleans, LA, March 30, 2007.
- “Institutional Investor Activism: the Evolving Role of Institutional Investors in Corporate Governance and Corporate Litigation,” 13th Annual ILEP Conference, Cabo San Lucas, Mexico, April 19-20, 2007.
- “Electronic Information Storage: Ethical Considerations and Risk Issues,” Nixon Peabody, Boston, MA, April 24, 2007.
- “Conflicts of Interest: Keys to Solving Your Toughest Problems,” National Constitution Center audio conference, Philadelphia, PA, May 22, 2007.
- “Ethics for Bank Regulatory Attorneys,” CLE Program, Office of the Chief Counsel, Comptroller of the Currency, Washington, DC, June 14, 2007.

- “Litigation Quiz Show,” ABA 2007 Annual Meeting, San Francisco, CA, August 11, 2007.
- “Switch Hitting? Ethical Implications of Advance Conflict Waivers,” ABA 2007 Annual Meeting, San Francisco, CA, August 11, 2007.
- “Fourth Annual Institute on Corporate, Securities, and Related Aspects of Mergers and Acquisitions,” Co-sponsored by Penn State’s Dickinson School of Law and the New York City Bar, New York, NY, October 16, 2007.
- “Ethics Update 2007 – Accidental Clients, Red Flags, and Other Ethical Conundrums,” ALI-ABA Live Video Webcast, December 7, 2007.
- “Man the Barricades! Defend the Privilege!,” The Lou Ashe Lecture, University of the Pacific, McGeorge School of Law, Sacramento, CA, March 12, 2008.
- “Ethics for the Corporate Law Firm,” Shearman & Sterling LLP, New York, NY, March 20, 2008.
- “The Ethical Obligations of Lead Counsel,” Institute for Law and Economic Policy (ILEP) Fourteenth Annual Conference, Co-sponsored by the University of Wisconsin Law School, Naples, FL, April 11, 2008.
- “The Ethics Centennial,” ABA Litigation Section Annual Conference, Washington, DC, April 18-19, 2008.
- “Conflict of Interest – The Attorney/Client Relationship,” LexisNexis Teleconference Series, May 22, 2008.
- “The Last Days of the Philadelphia Lawyer,” Philadelphia Bar Association, Philadelphia, PA, July 1, 2008.
- NAACP Legal Defense & Educational Fund, Inc.’s 29th Annual Capital Punishment Training Conference., Warrenton, VA, July 11, 2008.
- “Confidentiality and Ethical Dilemmas in Jewish and American Law,” Gratz CLE Series, Gladwyne, PA, July 30, 2008.
- “Harnessing the Winds of Change to Bring Balance and Meaning to the Workplace,” American Bar Association Annual Meeting, New York, NY, August 9, 2008.
- “Hot Topics in the International Arena,” Chicago Bar Association, London, England, October 5, 2008.
- “Ethics Update 2008: Control, Communication, and Competence,” ALI-ABA, Philadelphia, PA, October 7, 2008.
- “Litigation Practice: Risks that Never Relent,” 2008 Large Law Firm Symposium, Chicago, IL, October 15, 2008.
- “Judicial Ethics and the Lawyer’s Role in the Process,” Philadelphia Bar Institute – Thirteenth Annual Bankruptcy Institute, Philadelphia, PA, October 16, 2008.
- Clifton Kruse, Jr. Ethics Lecture, National Academy of Elder Law Attorneys, Inc., Kansas City, MO, October 24, 2008.
- “Ethical Considerations in Internal Investigations,” Association of Corporate Counsel, Chicago, IL, October 30, 2008.
- “Leading Legal Innovation,” University of Southern California, San Diego, CA, December 12-13, 2008.
- “Federal Practice in the District of Delaware: Ethical Issues in the Practice of Law,” CLE program co-sponsored by the U.S. District Court and the Federal Bar Association, Wilmington, DE, March 11, 2009.

- “Ethical Duties in Mitigation Development,” Imagining Future Mitigation: New Science, New Ideas, Fifth National Seminar on the Development and Integration of Mitigation Evidence, Philadelphia, PA, April 17, 2009.
- “When Trouble Walks Through the Door,” ABA Litigation Section Annual Conference, Atlanta, GA, May 1, 2009.
- “Ethics in Appellate Practice,” Third Circuit Judicial Conference, Philadelphia, PA, May 6, 2009.
- “Developments in Legal Ethics 2009: Using Screens in Private Practice,” ALI-ABA, Washington, DC, May 17, 2009.
- “Ethics or No Ethics?” and “Changes and Unique Opportunities for Defenders in Today’s Economic Crisis,” 30th Annual Capital Punishment Training Conference, Warrenton, VA, July 10-11, 2009.
- “Litigation Fundamentals: Negotiations and Settlements including Ethics Issues,” ABA Teleconference/Webcast, August 20, 2009.
- “The Ethics Quiz Show: Are You Ready to Be a Player,” National Conference for the Minority Lawyer, Philadelphia, PA, September 24, 2009.
- “Ethics and Risk Management Seminar,” Milwaukee, WI, October 15, 2009.
- “Drawing the Ethical Line: Controversial Cases, Zealous Advocacy and the Public Good,” 10th Annual Legal Ethics & Professionalism Symposium, University of Georgia School of Law, Athens, GA, October 16, 2009.
- “Due Process,” 7th Constitutional Law Conclave, Pennsylvania Bar Institute, Philadelphia, PA, October 30, 2009.
- “Legal and Government-Lawyer Ethics,” ABA Senate Ethics 2010 CLE, Washington, D.C., April 8, 2010.
- “Arguing Crime/Fraud and Other Exceptions to Privilege: An Expert Demonstration,” ABA Litigation Section Meeting, New York, NY, April, 2010.
- “Ethical Pitfalls – What Every Civil Practitioner Needs to Know About Criminal Issues in Civil Litigation,” ABA Litigation Section Meeting, New York, NY, April 22, 2010.
- “The Assault on Client Loyalty: Of Prospective Waivers, Screening and Suing Your Client’s Parent,” ABA Litigation Section Meeting, New York, NY, April 22, 2010.
- “Arguing Crime Fraud and Other Exceptions to Privilege: An Expert Demonstration,” ABA Litigation Section Meeting, New York, NY, April 23, 2010.
- “Ethical Dilemmas in Representing Organizations,” Delaware State Bar Association, Wilmington, DE, April 29, 2010.
- “Multiple Clients, Multiple Headaches: Identifying and Resolving Ethical Red Flags, ALI-ABA, Washington, DC, May 16, 2010.
- National Institute on Contemporary Mediation, ABA Section of Litigation, Chicago, IL, June 10, 2010.
- “2010 Law Department Biennial Meeting,” Office of the Comptroller of the Currency Ethics CLE, Washington, DC, June 15, 2010.
- “Ethics for Litigators: Conflicts, Confidentiality and Competence,” ABA Section of Litigation Spring Leadership Meeting, Whistler, BC, June 19, 2010.
- “The Ethics of Disengagement Letters,” Best of Sound Advice, ABA Section of Litigation, Chicago, IL, June 24, 2010.

- 31st Annual Capital Punishment Training Conference, Warrenton, VA, July 9, 2010.
- “Class Action Litigation Strategies,” Practicing Law Institute, New York, NY, July 22, 2010.
- 15th Annual National Federal Habeas Corpus Seminar, Cleveland, OH, August 26, 2010.
- “ETHICS: What are the ethical implications for a capital trial attorney in a habeas proceeding?,” Ohio Capital Habeas Seminar: Litigating Ineffective Assistance of Counsel, Cleveland, OH, February 4, 2011.
- “Ethical Applications of the New Illinois Rules of Evidence,” Clifford Law Offices, Chicago, IL, February 17, 2011.
- “Ethical Considerations for Lawyers During the Financial Crisis,” Symposium on the Status of the Legal Profession: Facing the Challenges of the 21st Century, American Inns of Court, Washington, DC, April 1, 2011.
- “Traversing the Ethical Minefield: Professional Responsibility Dilemmas in the Class Action Practice,” Institute for Law & Economic Policy’s 17th Annual Symposium, “Access to Justice,” Manalapan, FL, April 8, 2011.
- “Ten Traps for the Wary,” Atlanta General Counsel Forum, Atlanta, GA, May 10, 2011.
- “Lawyers’ Websites, Blogs, and Other Social Media – Ethical Issues,” PBI Ninth Annual Nonprofit Institute, Philadelphia, PA, May 24, 2011.
- “Legal Ethics,” 2011 Law Department Biennial Meeting, Office of the Comptroller of the Currency Ethics CLE, Washington, DC, May 25, 2011.
- “Legal Ethics (Parts I and II),” CLE program for the Office of the Chief Counsel, Comptroller of the Currency, Biennial Meeting, Washington, D, May 25, 2011.
- “Reality Ethics: How to Avoid Getting Kicked Off the Island,” G. Thomas VanBebber Twelfth Annual Ethics in Litigation Forum, Earl E. O’Connor American Inn of Court, Kansas City, MO, June 16, 2011.
- “Can We Make Ethical Violations a Basis for Relief on Death Row?” Airlie Center, Warrenton, VA, July 8, 2011.
- “Expert Life After Changes to Rule 26,” American Bar Association Annual Meeting, Toronto, Canada, August 5, 2011.
- “Ethics for Defenders,” Defender Summer School 2011, Orlando, FL, August 15, 2011.
- “Legal Ethics and Criminal Law: Resolving the Practitioner’s Headaches When the Two Come Together,” Federal Criminal Practice Seminar, Cleveland, OH, August 19, 2011.
- “Life Over Death,” Florida Public Defender Association, Inc., Lake Buena Vista, FL, September 9, 2011.
- “Loyalty under Attack: The Pernicious Prospective Waiver,” ABA Lit. Sec. Ethics & Professionalism, October 18, 2011.
- “So Someone Objects To Your New Client ...,” ABA Administrative Law Conference, Washington, DC, November 17, 2011.
- “Traversing the Ethical Minefield,” CLE program for Shearman & Sterling LLP, New York, NY, December 1, 2011.

- “Larry Fox and Susan Martyn on Ethics: Accidental Clients and Lawyers in the Job Market,” ABA, Litigation Section Webinar, December 14, 2011.
- “Prosecutorial Accountability in the Post-*Connick v. Thompson* Era: Reforms and Solutions,” ABA Midyear Meeting, New Orleans, LA, February 4, 2012.
- “Ethical Issues: Who Is The Client?” PBI-CLE Protecting Our Children, Philadelphia, PA, February 27, 2012.
- “Can This Profession Be Saved?” Northern Illinois University law lecture, DeKalb, IL, March 30, 2012.
- “Legal Representation of a Nonprofit Organization: Ethical Issues for Lawyer and Client,” PBI 10th Annual Nonprofit Institute, Philadelphia, PA, May 23, 2012.
- “Capital Punishment,” NYC Bar Habeas Corpus Training Program, New York, NY, July 11, 2012.
- 33rd Annual Capital Punishment Training Conference, Airlie Center, Warrenton, VA, July 13, 2012.
- “Breakfast Ethics,” South Carolina Bar Convention, Myrtle Beach, SC, January 27, 2013.
- “Constitutional Considerations,” Annual William P. (Bill) Redick, Jr. Capital Defense Seminar, Nashville, TN March 14, 2013.
- “Current and Emerging Issues in Ethics & Professional Responsibility, CLE Panel Discussion, University of Pennsylvania Law School, Philadelphia, PA, May 10, 2013.
- “Examining the Ethical Issues of Nonprofit Financial Failure: A Case Study of *In re Lemington Home for the Aged*,” PBI 11th Annual Nonprofit Institute, Philadelphia, PA, May 22, 2013.
- “Traversing the Ethical Minefield,” Kentucky Bar Association Annual Convention, Louisville, KY, June 20, 2013.
- “Traversing the Ethical Minefield: of Biased Judges, Turncoat Lawyers, Prying Prosecutors and Dwindling Budgets,” 34th Annual Capital Punishment Training Conference, Airlie Center, Warrenton, VA, July 12, 2013.
- “For the Client or for the Lawyer?” The All New Litigation Ethics Quiz Show 2013, American Bar Association Annual Meeting, San Francisco, CA, August 8, 2013.
- “Legal Ethics in the News; ‘Beauty Contest’ and Screening,” American Law Institute CLE, Video Webcast, December 17, 2013.
- “Who are They to Judge? Ethical and Professionalism Issues Facing the Bench,” 14th Annual Georgia Symposium on Legal Ethics and Professionalism, Athens, Georgia, February 21, 2014.
- Tennessee Death Penalty Seminar 2014, Tennessee Association of Criminal Defense Lawyers, Nashville, TN, March 20, 2014.
- Eleventh National Seminar on the Development and Integration of Mitigation Evidence, Administrative Office of the U.S. Courts, *Defender Services Office, Training Division*, Philadelphia, PA, March 28, 2014.
- “Oops”: Communicating about Mistakes with Clients and Others, ABA Litigation Section Annual CLE Conference, Phoenix, AZ, April 10, 2014.
- “Nonprofit Ethics Potpourri,” PBI 12th Annual Nonprofit Institute, Philadelphia, PA, May 28, 2014.

- “Preparation vs. Perjury: Ethical Issues Involving Working with Witnesses,” Webinar sponsored by the American Bar Association, May 29, 2014.
- “2014 Mart Vogel Lecture on Professionalism and Legal Ethics,” University of North Dakota School of Law, Grand Forks, ND, June 13, 2014.
- “Ethical Jeopardy, eDiscovery Edition,” American Bar Association Annual Meeting, Boston, MA, August 8, 2014.
- “Nineteenth Annual National Federal Habeas Corpus Seminar,” Atlanta, GA, August 14, 2014.
- Keynote Address, Intercollegiate Moot Court Competition, Tufts University Law School, Boston, MA, November 15-16, 2014
- “33rd Annual Jay L. Westbrook Bankruptcy Conference,” Austin, TX, November 21, 2014.
- “Don’t Get Tangled in the Web,” American Bar Association Winter Leadership Meeting, Laguna Beach, CA, January 10, 2015.
- “Law Professors as Expert Witnesses,” Widener Law School, Wilmington, DE, April 24, 2015.
- “Ethics at the Movies,” PBI 13th Annual Nonprofit Institute, Philadelphia, PA, May 27, 2015.
- “First Judicial District Law Clerk CLE – Ethics,” Federal Courthouse, Philadelphia, PA, June 17, 2015.

Prior Employment

- 1971-1972 Staff Attorney, Community Action for Legal Services, New York, NY
- 1969-1971 Reginald Heber Smith Community Lawyer Fellow, New York, NY
- 1968-1969 Clerk, Justice Samuel Roberts, Pennsylvania Supreme Court, Erie, PA

Honors and Awards

- Fellow, American College of Trial Lawyers
- Fellow, American Bar Foundation
- U.S. Speaker and Specialist, “Professional Ethics and Responsibility, and the Role of Standing Committees on Lawyers’ Professional Conduct,” Federal Capital Bar Association and the Professional Council of Economics, Buenos Aires, Argentina, August, 1997
- CPR/ADR Guest Lectu, rer: Development Lawyers Course, Institute for Law and Development, Rome, Italy, March 1997
- Keynote Address, Pennsylvania Legal Services 1996 Striving Towards Excellence Awards Banquet, Harrisburg, PA, March 12, 1997
- Keynote Address, The Georgetown Journal of Legal Ethics, Tenth Anniversary, February 7, 1997
- Baccalaureate Speaker, Dickinson Law School, April 1996
- Robert Anderson Fellow of the Yale Law School for 1996-97
- Community Legal Services “Champion” Award, April 1996
- Philadelphia Bar Education Center Excellence in Legal Education Award, July 14, 1998

- Service Above Self Award, Lamokin Village Council, December 8, 1998
- Alumni Award of Merit, University of Pennsylvania Law School, May 14, 1999
- “The Rights and Responsibilities of Legal Professionals in the United States,” U.S. State Department, The People’s Republic of China, January 11-29, 2002
- Levy Award, New York State Bar Association, Committee on Professional Ethics, New York, NY, April 23, 2003
- Wachovia Fidelity Award, December 9, 2003
- Thomas A. O’Boyle Lecturer for Academic Year 2003-2004
- William Reece Smith, Jr. Distinguished Lecturer, 2004
- American Bar Association Pro Bono Publico Award, 2005
- Michael Franck Award, 2007
- 25-Year Life Member, The American Law Institute, 2013
- Lifetime Achievement Award, *The Legal Intelligencer*, 2013
- Howard Lesnick Pro Bono Award, The Law Alumni Society, University of Pennsylvania Law School, 2013.

Directorships

- Credit Suisse Asset Management Income Fund – 1988-present
- Credit Suisse Asset Management Strategic Global Income Fund – 1988-present
- Indonesia Fund – 2000-present
- Winthrop Trust Company – 2001-2009
- The Chile Fund, Inc. – 2006-present
- The First Israel Fund, Inc. – 2006-present
- The Latin America Equity Fund, Inc. – 2006-present
- Dynasil Corporation of America – 2011-present

Appearances

- “Inside the Law, Lawyers at a Crossroads,” American Bar Association and Reliance National Production, New York, November 5, 1993
- “Inside the Law, Whatever Happened to Atticus Finch?” American Bar Association, March 12, 1996
- *CNN Crossfire*: “The Death Penalty,” February 9, 1997
- *CNN Crossfire*: “Should Federal Judges Be Impeached,” March 13, 1997
- “Inside the Law: Examining the Lawyer/Client Relationship,” Public Television Series, April 9, 1997
- *Nightline*: “Ethics regarding tobacco industry lawsuits,” May 29, 1997
- Testify before Congress regarding Contingent Fees, April 30, 1997
- *Today Show*: “Attorney-Client Privilege,” December 1, 1997
- *Nightline*: “Attorney Client in the Tobacco Litigation,” April 22, 1998
- *Today Show*: “Attorney-Client Privilege after Death,” June 8, 1998
- *Nightline*: “Should this Privilege Survive Death?” June 8, 1998
- *MSNBC*: “Contingent Fees for Tobacco Lawyers,” June 9, 1998
- *CNN*: “Impeachment of the President” September 14, 1998

- *CNN: Talk Back Live*: "Disbarring the President," March 15, 2000
- *MSNBC*: "Moratorium on the Death Penalty," July 10, 2000
- *CNN*: "The Death Penalty and the Presidential Election," July 30, 2000
- *WHYY/Delaware*: "Your Lawyer: A User's Guide," July 18 and July 25, 2006
- *WHYY/Delaware*: "Legal Lesson re: Product Liability Law" (spinach/E. coli outbreak), September 19, 2006
- *MSNBC MOST*: "Could Pres. Bush Decide to Pardon Lewis "Scooter" Libby?," March 7, 2007

Community Activities

- Member of the Board of Overseers of University of Pennsylvania School of Law and Associate Trustee of the University of Pennsylvania, 1992-1999
- Member, Board of Trustees, Friends Select School, 1982-1992
- Member, Board of Trustees, Beth Zion - Beth Israel Synagogue, 1988-present
- Former National Chairman, Annual Giving, University of Pennsylvania Law School 1987-89
- Member, Board of Advisors, United Way
- Lecturer, sailing, U.S. Coast Guard Auxiliary

Education

- University of Pennsylvania, The College, B.A. 1965
- University of Pennsylvania Law School, LL.B. cum laude 1968
- Managing Editor, University of Pennsylvania Law Review

Date of Birth

July 17, 1943

Home Address

468 Amity Road
Woodbridge, CT 06525

**CASES IN WHICH LAWRENCE J. FOX
HAS TESTIFIED BY DEPOSITION OR TRIAL IN LAST FOUR YEARS**

Johnson v. Buchanan Ingersoll & Rooney PC, Court of Common Pleas, Chester County, No. 09-07537

CoTherix, Inc., et al., Claimants, and **Bingham McCutchen LLP**, Respondent, In the Matter of an Arbitration Under the ICDR Arbitration Rules, No. 50 194 T 00749 10. (Under Seal)

Cruickshank-Wallace v. Klehr, Harrison, Harvey, Branzburg & Ellers LLP v. Cruickshank-Wallace, Court of Common Pleas, Philadelphia County, August Term, 2009, No. 003546

U.S. Bank National Association v. Verizon Communications Inc., et al., United States District Court, Northern District of Texas, Dallas Division, C.A. No. 10-CV-1842-G. (Under Seal)

Warrior Sports, Inc., v. Dickinson Wright, PLLC, United States District Court, Eastern District of Michigan, Southern Division, Case No. 09-12102. (Under Seal)

Federal Deposit Insurance Corporation v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., et al., United States District Court, Middle District of Florida, Tampa Division, Case No. 8:11CV2831t33MAP

Pawa Law Group, P.C. v. Sher Leff, LLP, Arbitration Before Judicial Arbitration and Mediation Services, Reference No. 1400014271. (Under Seal)

Mary Bucksbaum Scanlan v. Marshall Eisenberg, et al., United States District Court, Northern District of Illinois, Eastern Division, Case No. 1:09-cv-05026

Ferguson, et al. v. Stout, et al., Circuit Court of the 11th Judicial Circuit and for Miami-Dade County, Florida, Case No. 08-09767CA40

In re: Go Fig, et al.; Strauss, Trustee v. Helfrey, Neiers & Jones, P.C., United States District Court, Eastern District of Missouri, Eastern Division, Case No. 08-40116-705, Chapter 7

In re: 1H 1, Inc., et al., Bankruptcy No. 09-10982(PJW); **George L. Miller, Chapter 7 Trustee v. Kirkland & Ellis, LLP**, Adversary Proceeding No. 12-50713 (PJW)

Exhibit 4



**DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
104 ARMY PENTAGON
WASHINGTON, DC 20310-0104**

September 14, 2015

Mr. Eugene R. Fidell
1129 20th Street, N.W., 4th Floor
Washington, DC 20036

Dear Mr. Fidell:

I have been asked to respond on behalf of the Department of the Army Professional Conduct Council to your request for an interpretation under Rule 9.1 of Army Regulation 27-26, Rules for the Professional Conduct for Lawyers (1 May 1992). You have asked whether it would violate the professional responsibility rules if you released certain information to the news media that you plan to offer into evidence at a preliminary hearing.

The Department of the Army Professional Conduct Council will not issue an advisory opinion regarding this matter. The applicable rules permit you to ask the convening authority to rescind or amend any protective order prohibiting release of the materials that you seek to release. Indeed, your request for an advisory opinion notes that you are already pursuing this remedy.

Thank you for request and for your zealous defense of your client.

Sincerely,



Daniel McCallum
Deputy General Counsel
(Operations and Personnel)

Exhibit 5



DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
9275 GUNSTON ROAD
FORT BELVOIR, VIRGINIA 22060

13 September 2015

MEMORANDUM THRU Colonel Vanessa Berry, Staff Judge Advocate, United States Army
Forces Command, Fort Bragg, North Carolina 28310-5000

FOR General Robert B. Abrams, Commander, United States Army Forces Command, Fort
Bragg, North Carolina 28310-5000

SUBJECT: Media Access to Article 32 Proceedings and Records in United States v. Bergdahl

1. Sergeant Bergdahl, through counsel, agrees with and hereby joins in the San Antonio Express-News's request that the media be afforded contemporaneous access to unclassified evidence, briefs, other party filings, and written orders. Permitting such documents to be withheld after they have been submitted by or issued to the parties circumvents Sergeant Bergdahl's right to a public hearing as provided in R.C.M. 405(i)(4) and case law. It also does not contribute to public understanding of and confidence in the administration of military justice.
2. Without prejudice to the general issue of media access, we particularly believe the news media should have access to the executive summary of Major General Dahl's 2014 AR 15-6 investigation and the transcript of his interview with SGT Bergdahl no later than the moment they are formally received by the preliminary hearing officer, and we ask that as GCMCA you so direct. If someone else in the Army must give approval in order for this to happen, we request that you direct your staff to coordinate with the cognizant official(s) and forward this memo as necessary so there can be a decision on this important matter by the time indicated in Mr. Ibarquen's email.

A handwritten signature in black ink, appearing to read "Frank D. Rosenblatt", is located above the typed name.

FRANKLIN D. ROSENBLATT
LTC, JA
Individual Military Counsel