

# COURT-MARTIAL RECORD

NAME FREDERICK, IVAN L., II SSG

SSN \_\_\_\_\_

ACTIONS CODED:

ASSIGNED TO:

INITIAL \_\_\_\_\_

PANEL 4

ACCA \_\_\_\_\_

EXAM. DIV. \_\_\_\_\_

FINAL \_\_\_\_\_

COMPANION(S):

**RETURN THIS FILE TO:**

**OFFICE OF THE CLERK OF COURT**

**US ARMY JUDICIARY**

**901 NORTH STUART STREET, SUITE 1200**

**ARLINGTON, VA 22203-1837**

VOL II OF VIII VOL(S)

ARMY 20041129

VERBATIM<sup>1</sup>  
RECORD OF TRIAL<sup>2</sup>  
(and accompanying papers)

OF

FREDERICK, Ivan L., II  
(NAME: Last, First Middle Initial)  
HHC, 16th MP Bde (ABN)  
III Corps  
(unit/Command Name)

[REDACTED] (b)(6)-2, (b)(7)(C)-2  
(Social Security Number)

Staff Sergeant  
(Rank)

US Army  
(Branch of Service)

Victory Base, Iraq  
(Station or Ship)

BY

GENERAL COURT-MARTIAL

CONVENED BY COMMANDING GENERAL  
(Title of Convening Authority)

Headquarters, III Corps  
(Unit/Command of Convening Authority)

TRIED AT

Baghdad and Victory Base, Iraq  
(Place or Places of Trial)

ON

19 May, 21-22 Jun; 24 Aug;  
20-21 Oct 04  
(Date or Dates of Trial)

COMPANION CASES:

- SPC AMBUHL, Megan M., [REDACTED] (b)(6)-2, (b)(7)(C)-2
- SGT DAVIS, Javal S., [REDACTED]
- SPC GRANER, Charles A., Jr., [REDACTED]
- SPC HARMAN, Sabrina D., [REDACTED]
- SPC SIVITS, Jeremy C., [REDACTED]
- SPC CRUZ, Arman J., [REDACTED]
- PFC ENGLAND, Lynndie R., [REDACTED]

2005 SEP 20 18  
ARMY JUDGE ADVOCATE GENERAL

~~Alleged documents through transcript R.199~~

<sup>1</sup> Insert "verbatim" or "summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)

<sup>2</sup> See inside back cover for instructions as to preparation and arrangement.

RECORD OF PROCEEDINGS OF COURT-MARTIAL

018159



**RECORD OF TRIAL**

**OF**

**FREDERICK, Ivan L., II**  
(Name: Last, First, Middle Initial)

[REDACTED] (b)(6)-2, (b)(7)(C)  
(Social Security Number)

**SSG**  
(Rank)

**HHC, 16th MP Bde (ABN)**  
**III Corps**  
(Unit/Command Name)

**U.S. Army**  
(Branch of Service)

**Victory Base, Iraq**  
(Station or Ship)

**BY**

**GENERAL COURT-MARTIAL**

**Convened by: Commander**  
(Title of Convening Authority)

**Headquarters, III Corps**  
(Unit/Command of Convening Authority)

**Tried at**

**Baghdad and Victory Base, Iraq**  
(Place or Places of Trial)

**on 19 May, 21-22 Jun; 24 Aug; 20-21 Oct 04**  
(Date or Dates of Trial)

**INDEX**

**RECORD**

<b><u>Article 39(a) Sessions</u></b>	<b>R-2/13/34</b>
<b><u>Introduction of Counsel</u></b>	<b>R-2/13/34</b>
<b><u>Challenges</u></b>	<b>R-N/A</b>
<b><u>Arraignment</u></b>	<b>R-8</b>
<b><u>Motions</u></b>	<b>R-13</b>
<b><u>Pleas</u></b>	<b>R-256</b>
<b><u>Prosecution Evidence</u></b>	<b>R-261</b>
<b><u>Defense Evidence</u></b>	<b>R-NA</b>
<b><u>Instructions on Findings</u></b>	<b>R-NA</b>
<b><u>Charge(s) dismissed</u></b>	<b>R-NA</b>
<b><u>Findings</u></b>	<b>R-378</b>
<b><u>Prosecution Evidence</u></b>	<b>R-381</b>
<b><u>Defense Evidence</u></b>	<b>R-400</b>
<b><u>Sentence</u></b>	<b>R-611</b>
<b><u>Appellate Rights Advisement</u></b>	<b>R-608</b>
<b><u>Proceedings in Revision</u></b>	<b>R-NA</b>

**TESTIMONY**

<u>NAME OF WITNESS</u>	<u>DIRECT/ REDIRECT</u>	<u>CROSS/ RE CROSS</u>	<u>COURT</u>
<b><u>PROSECUTION:</u></b>			
[REDACTED] (b)(6)-4-(7)(c)-4	382	392	
<b><u>DEFENSE:</u></b>			
SFC [REDACTED] ic (b)(6)-2-7(c)(2)	42/53	50	
MAJ [REDACTED] e(b)(6)-2-7(c)-2	53/81	71	
Unsworn (Accused)	400		
CPT [REDACTED] e(b)(6)-2-7(c)-2	457/484	470/485	
CW2 [REDACTED] (b)(6)-2-7(c)-2	487	494	
[REDACTED]	496	504	
[REDACTED]	510	513	
[REDACTED]	514		
[REDACTED]	521	537	
[REDACTED]	541/575	562	

**COURT:**

None.

**EXHIBITS ADMITTED IN EVIDENCE**

<u>NUMBER OR LETTER</u>	<u>DESCRIPTION</u>	<u>PAGE WHERE OFFERED</u>	<u>PAGE WHERE ADMITTED</u>
1	Stipulation of fact	261	267
2	Accused's ERB	398	398
3	Buckingham Prison training records	399	399
4	PLDC training records	399	399
5	Excerpt of AR 15-6 investigation	399	399
6	Code of conduct	508	508
7 FID	Closing argument slides	[Not R.602]	
A	Stipulation of expected testimony [REDACTED] (b)(6)-4;(b)(7)(c)-4	441	448
B	Stipulation of expected testimony [REDACTED]	441	448
C	Stipulation of expected testimony [REDACTED]	441	448
D	Email	441	453
E	Interrogator notes	442	453

F	Handwritten letter	442	453
G	Psychology consultation report	442	454
H	Resume of [REDACTED]	442	454
I	[REDACTED]'s CV	443	454
J	Vita - I [REDACTED]	443	454
K	AR 15-6 Investigation/Fay	443	454
L	Good soldier book	443	520
M	AR 190-8, pages 1 through 31	520	520

APPELLATE EXHIBITS

I	Email of appearance (Mr. [REDACTED])	(b)(6)-4, (b)(7)(E)H	13
II	Motion for appropriate relief telephone appearance by civilian counsel		14
III	Email from COL [REDACTED] to Mr. [REDACTED] denying request	(b)(6)-4 (b)(7)(C) 4	14
IV	Email from COL [REDACTED] setting next motions hearing date of 22 July	(b)(6)-2; (b)(7)(C)-2	34
V	Email from Mr. [REDACTED] waiving appearance at motions hearing	(b)(6)-4, (b)(7)(C)-134	34
VI	Motion for appropriate relief reopen Article 32 Investigation		38
VII	Email from CPT [REDACTED] to CPT [REDACTED], dated 28 April 2004	(b)(6)-2 (b)(7)(C)-239	39
VIII	Article 32 investigation, U.S. v. Frederick		40
IX	Verbatim transcript of Article 32 transcript		40
X	Government's response to defense motion to reopen Art 32 Investigation		42
XI	Written findings of fact		162
XII	Request for expert assistance		162
XIII	Request for discovery, dated 16 May 2004		164
XIV	Email from CPT [REDACTED] to CPT [REDACTED], dated 3 May 2004		164
XV	Email from CPT [REDACTED] to CPT [REDACTED], dated 4 May 2004	(b)(6)-2 (b)(7)(C) 2164	164
XVI	Email from CPT [REDACTED] to CPT [REDACTED], dated 27 May 2004		164
XVII	Request for discovery, dated 17 May 2004		164
XVIII	Court order to prospective court members		175
XIX	Order denying motion to move trial		180
XX	Motion for reconsideration of court's decision		180
XXI	Hold harmless agreement		187
XXII	Motion for appropriate relief		215
XXIII	Motion to compel employment of an expert witness		235
XXIV	Request for military judge alone		249
XXV	Offer to plead guilty		362
XXVI	Quantum portion		362
XXVII	Post-trial and appellate rights		608



DEPARTMENT OF THE ARMY  
Headquarters, III Corps  
Victory Base, Iraq  
APO AE 09342-1400

COURT-MARTIAL CONVENING ORDER  
NUMBER 3

8 March 2004

The following personnel are detailed as members of the general court-martial convened by Court-Martial Convening Order Number 1, this headquarters, dated 14 January 2004:

COL [REDACTED], SC, HHC, 3d Sig Bde  
COL [REDACTED], HQ, 13th COSCOM  
COL [REDACTED], SC, HHC, 3d Sig Bde

(b)(6)-2; (b)(7)(C)-2

VICE

COL [REDACTED], GC, HHC, III Corps  
COL [REDACTED], AR, HHC, III Corps  
MAJ [REDACTED], AR, HHC, III Corps

Relieved permanently.

BY COMMAND OF LIEUTENANT GENERAL METZ:

DISTRIBUTION:

Each individual indicated (1)  
Cdr, III Corps (SJA) (1)  
Record Set (1)  
Reference Set (1)

[REDACTED]  
CPT, JA  
Chief, Criminal Law Division

018165

There were no Court-Martial Convening Orders published for calendar year 2003.

DEPARTMENT OF THE ARMY  
Headquarters, III Corps  
APO AE 09342-1400

COURT-MARTIAL CONVENING ORDER  
NUMBER 1

14 January 2004

A general court-martial is convened with the following members:

COL [REDACTED], MI, 504th MI Bde  
COL [REDACTED], CM, HHC, III Corps  
COL [REDACTED], HHC, III Corps  
COL [REDACTED], QM, HHC, III Corps  
COL [REDACTED], AB, HHC, III Corps  
LTC [REDACTED], TC, HHC, III Corps  
LTC [REDACTED], SC, HHC, III Corps  
LTC [REDACTED], AD, HHC Corps  
MAJ [REDACTED], AR, HHC, III Corps  
MAJ [REDACTED], MS, HHC, III Corps

In the event an accused requests that the membership of the court-martial include enlisted persons, the following members are detailed to the general court-martial convened by this order:

MEMBERS

CSM [REDACTED], HHC, III Corps  
CSM [REDACTED], 504th MI Bde  
SGM [REDACTED], HHC, III Corps  
MSG [REDACTED], HHC, 89th MP Bde  
MSG [REDACTED], HHC, 3d Sig Bde

(b)(6)-2, (b)(7)(C)-2

VICE

COL [REDACTED], CM, HHC, III Corps  
COL [REDACTED], QM, HHC, III Corps  
LTC [REDACTED], SC, HHC, III Corps  
LTC [REDACTED], AD, HHC Corps  
MAJ [REDACTED], AR, HHC, III Corps

Relieved only for trials in which an accused requests that the membership of the court-martial include enlisted persons.

BY COMMAND OF LIEUTENANT GENERAL METZ:

DISTRIBUTION:

Each individual indicated (1)  
Cdr, III Corps (SJA) (1)

[REDACTED]  
[REDACTED]  
MAJ, JA  
Chief, Criminal Law Division

018166

1 MJ: Court is called to order.

2 TC: This court-martial is convened by Court-Martial Convening  
3 Order Number 1, Headquarters, III Corps, dated 14 January 2004, as  
4 amended by Court-Martial Convening Order Number 3, same headquarters,  
5 dated 8 March 2004, copies of which have been furnished to the  
6 military judge, counsel and the accused and which will be inserted at  
7 this point in the record. The charges have been properly referred to  
8 this court for trial and were served on the accused on 7 May 2004.

9 The prosecution is ready to proceed with the arraignment of  
10 United States versus Staff Sergeant Ivan L. Frederick II.

11 The accused and the following persons detailed to this  
12 court are present:

13 COLONEL [REDACTED], MILITARY JUDGE; (b)(6)-2; (b)(7) C-2

14 CAPTAIN [REDACTED], TRIAL COUNSEL;

15 CAPTAIN [REDACTED], ASSISTANT TRIAL COUNSEL; and

16 CAPTAIN [REDACTED] DEFENSE COUNSEL.

17 The members are absent.

18 Sergeant [REDACTED] n has been detailed  
19 reporter for this court and has been previously sworn.

20 All members of the prosecution have been detailed to this  
21 court-martial by Captain [REDACTED] Chief of Military Justice,  
22 III Corps. We are qualified and certified under Article 27(b) and

1 sworn under Article 42(a), Uniform Code of Military Justice. We have  
2 not acted in any manner which might tend to disqualify us in this  
3 court-martial.

4 MJ: Sergeant Frederick, you have the right to be represented by  
5 Captain <sup>(b)(6)-2-(b)(7)(C)-2</sup> your detailed military defense counsel. He is  
6 provided to you at no expense to you. Do you understand that?

7 ACC: [While standing.] Yes, sir.

8 MJ: Sergeant Frederick, you can be seated unless we tell you to  
9 stand, okay.

10 ACC: Yes, sir.

11 MJ: You also have the right to request a different military  
12 lawyer to represent you. If the person you request is reasonably  
13 available, he or she would be appointed to represent you free of  
14 charge. Now, if your request for this other military lawyer were  
15 granted, however, you would not have the right to keep the services  
16 of your detailed defense counsel because you are entitled to only one  
17 military lawyer. Now, you may ask Captain <sup>(b)(6)-2 ; (b)(7)(C)-2</sup> superiors to let  
18 him stay on the case, but your request would not have to be granted.  
19 Do you understand that?

20 ACC: Yes, sir.

21 MJ: In addition, you have the right to be represented by a  
22 civilian lawyer. The civilian lawyer would have to be provided by

1 you at no expense to the government. If you are represented by a  
2 civilian lawyer, you can also keep your military lawyer on the case  
3 to assist your civilian lawyer. Or, you could excuse your military  
4 lawyer and be represented only by your civilian lawyer. Do you  
5 understand that?

6 ACC: Yes, sir.

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

8 ACC: No, sir.

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

10 ACC: Captain <sup>(b)(6)-2; (b)(7)(C)-2</sup> [REDACTED] and Mr. <sup>(b)(6)-4; (b)(7)(C)-4</sup> [REDACTED], sir.

11 MJ: Captain [REDACTED] put your detailing and qualifications on the  
12 record, please.

13 DC: Yes, sir. I have detailed myself to this court-martial as  
14 Senior Defense Counsel, U.S. Army Trial Defense Services, Baghdad,  
15 Iraq Field Office. I am qualified and certified under Article 27(b)  
16 and sworn under Article 42(a), Uniform Code of Military Justice. No  
17 member of the defense has acted in any manner which might tend to  
18 disqualify us in this court-martial.

19 MJ: Captain <sup>(b)(6)-2; (b)(7)(C)-2</sup> [REDACTED], have you been in contact with Mr. <sup>(b)(6)-4; (b)(7)(C)-4</sup> [REDACTED]

20 DC: Yes, sir, I have.

21 MJ: Do you have a letter of appearance from him?

22 DC: No, sir, not--not at present.

1 MJ: Okay.

2 DC: We did an 802, Your Honor.

3 MJ: He sent you an email?

4 DC: Yes, sir. He sent it to all parties, including the  
5 military judge, sir.

6 MJ: Okay. No, I've received that email from him, I just have  
7 misplaced it. When we find it, we'll make it an exhibit at the next  
8 hearing.

9 DC: Yes, sir.

10 MJ: Sergeant Frederick, you've actually hired Mr. [REDACTED] is  
11 that correct? (b)(6)-4, (b)(7)(C)-4

12 ACC: Yes, sir.

13 MJ: Okay, so you want Mr. [REDACTED] and Captain [REDACTED]? (b)(6)-4,  
14 ACC: Yes, sir. (b)(7)(C)-4

15 MJ: Nobody else?

16 ACC: No, sir.

17 MJ: I've been properly certified, sworn, and detailed to this  
18 court-martial. Counsel for both sides appear to have the requisite  
19 qualifications and all personnel required to be sworn have been  
20 sworn.

21 Trial counsel will announce the general nature of the  
22 charges.

1 TC: The general nature of the charges in this case is  
2 conspiracy to maltreat detainees, dereliction of duty, maltreatment  
3 of detainees, assault, aggravated assault, and indecent acts.

4 The charges were preferred by Captain <sup>(b)6-2; (7)(C)-2</sup> [REDACTED] and  
5 forwarded with recommendations as to disposition by Colonel [REDACTED]  
6 [REDACTED] <sup>(b)(6)-1; (b)(7)(C) 7</sup>

7 The Article 32 investigation was conducted on 2, 9, and 10  
8 April 2004.

9 Your Honor, are you aware of any matter which might be a  
10 ground for challenge against you?

11 MJ: Not at this time, but I will put on the record in this  
12 case, as I will do in every case, is that I'm the military judge  
13 scheduled to be the judge in at least four of these cases. All  
14 parties, I'm assuming, are aware of that. At this point, my only  
15 involvement so far has been the arraignment of one co-accused, which  
16 I did 10 minutes ago. But, I put that on the record for both sides,  
17 if later on you wish to question or challenge me, but at this point,  
18 are there any questions or challenges?

19 TC: No, sir.

20 DC: No questions or challenges at this time.

1 MJ: And understand, defense, is that it is preserved in case an  
2 issue comes up later on if you want to question and/or challenge me.  
3 Do you understand that?

4 DC: Yes, sir.

5 MJ: Sergeant Frederick, you have the right to be tried by a  
6 court composed of at least five officer members, that is, a court  
7 composed of commissioned and/or warrant officers. Also, if you  
8 request to be tried by a court consisting of at least one-third  
9 enlisted members, but none of those enlisted members could come from  
10 your company and no member of the court would be junior in rank to  
11 you.

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

13 ACC: Yes, sir.

14 MJ: Now if you're tried by court members, the members will vote  
15 by secret, written ballot and two-thirds of the members must agree  
16 before you could be found guilty of any offense. And if found  
17 guilty, two-thirds must also agree in voting on a sentence. And if  
18 that sentence included confinement for more than 10 years, three-  
19 fourths would have to agree.

20 Do you understand that?

21 ACC: Yes, sir.

1 MJ: You also have the right to request a trial by military  
2 judge alone. And if approved, there will be no court members, and  
3 the judge alone will decide whether you are guilty or not guilty, and  
4 if found guilty, the judge alone will determine your sentence. Do  
5 you understand that?

6 ACC: Yes, sir.

7 MJ: Do you understand the difference between the various types  
8 of trials?

9 ACC: Yes, sir.

10 MJ: Captain [REDACTED] do you wish to defer forum election at this  
11 time? (b)(6)-2; (b)(7)(C)-2

12 DC: Sir, Sergeant Frederick wishes to defer forum selection at  
13 this time.

14 MJ: The request to defer forum election at this time is  
15 granted.

16 The accused will now be arraigned.

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

19 DC: Sir, the accused waives reading of the charges.

20 MJ: The reading of the charges may be omitted.

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

## CHARGE SHEET

### I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI) <b>FREDERICK, Ivan L. II</b>		2. SSN [REDACTED] (b)(6)-(7)	3. GRADE OR RANK <b>SSG</b>	4. PAY GRADE <b>E-6</b>
5. UNIT OR ORGANIZATION <b>Headquarters and Headquarters Company, 16<sup>th</sup> Military Police Brigade (Airborne), III Corps, Victory Base, Iraq APO AE 09342</b>		6. CURRENT SERVICE a. INITIAL DATE <b>MAR 20 04</b> <b>28 AUG 01</b> b. TERM <b>3</b> years <small>MAR 20 04 04</small>		
7. PAY PER MONTH		8. NATURE OF RESTRAINT OF ACCUSED <b>None</b>		9. DATE(S) IMPOSED <b>N/A</b>
a. BASIC <b>\$2,809.80</b>	b. SEA/FOREIGN DUTY <b>\$100.00</b>			

### II. CHARGES AND SPECIFICATIONS

10. CHARGE I VIOLATION OF THE UCMJ, ARTICLE 81

**SPECIFICATION 1:** In that Staff Sergeant Ivan L. Frederick, II, U.S. Army, did, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 24 October 2003, conspire with Corporal Charles A. Graner, Jr. and Private First Class Lynndie R. England, to commit an offense under the Uniform Code of Military Justice, to wit: maltreatment of subordinates, and in order to effect the object of the conspiracy the said Staff Sergeant Frederick handcuffed three detainees together and directed the said Private First Class England to photograph the detainees.

**SPECIFICATION 2:** In that Staff Sergeant Ivan L. Frederick, II, U.S. Army, did, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003, conspire with Sergeant Javal S. Davis, Corporal Charles A. Graner, Jr., Specialist Jeremy C. Sivits, Specialist Sabrina D. Harman, Specialist Megan M. Ambuhl, and Private First Class Lynndie R. England, to commit an offense under the Uniform Code of Military Justice, to wit: maltreatment of subordinates, and in order to effect the object of the conspiracy the said Staff Sergeant Frederick did place naked detainees in a human pyramid and photographed the pyramid of naked detainees.

(SEE CONTINUATION SHEETS)

### III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI) [REDACTED]	b. GRADE <b>O-3</b>	c. ORGANIZATION OF ACCUSER <b>HHC, 16<sup>th</sup> MP Bde (Abn) APO AE 09342</b>
d. SIGNATURE OF ACCUSER [REDACTED]	e. DATE <b>20 MAR 04</b>	

**AFFIDAVIT:** Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 20<sup>th</sup> day of MARCH, 2004, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

(b)(6)2 - (b)(7)(C) - 2

<p>_____ Typed Name of Officer</p> <p>_____ O-3 Grade</p> <p>_____ Signature</p>	<p style="text-align: center;">HHC, XVIII Abn Corps Organization of Officer</p> <p style="text-align: center;">Trial Counsel Official Capacity to Administer Oath (See R.C.M. 307(b) - must be a commissioned officer)</p>
--	--

(b)(6) 2 - (b)(7)(C) - 2

Item 10 (continued):

**CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 92**

**THE SPECIFICATION:** In that Staff Sergeant Ivan L. Frederick, II, U.S. Army, who knew of his duties at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, from on or about 20 October 2003 to on or about 1 December 2003, was derelict in the performance of those duties in that he willfully failed to protect detainees from abuse, cruelty and maltreatment, as it was his duty to do.

**CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 93**

**SPECIFICATION 1:** In that Staff Sergeant Ivan L. Frederick, II, U.S. Army, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003 did maltreat a detainee, a person subject to his orders, by participating in and allowing the placing of wires on the detainee's hands while he stood on a Meals Ready to Eat box with his head covered and allowing the detainee to be told he would be electrocuted if he fell off of the box, and allowing the detainee to be photographed.

**SPECIFICATION 2:** In that Staff Sergeant Ivan L. Frederick, II, U.S. Army, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003, did maltreat several detainees, persons subject to his orders, by placing naked detainees in a human pyramid and photographing the pyramid of naked detainees.

**SPECIFICATION 3:** In that Staff Sergeant Ivan L. Frederick, II, U.S. Army, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003, did maltreat several detainees, persons subject to his orders, by ordering the detainees to strip, and then ordering the detainees to masturbate in front of the other detainees and soldiers, and then placing one in a position so that the detainee's face was directly in front of the genitals of another detainee to simulate fellatio and photographing the detainees during these acts.

**SPECIFICATION 4:** In that Staff Sergeant Ivan L. Frederick, II, U.S. Army, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003 did maltreat a detainee, a person subject to his orders, by posing for a photograph sitting on top of a detainee who was bound by padded material between two medical litters.

Item 10 (continued):

**SPECIFICATION 5:** In that Staff Sergeant Ivan L. Frederick, II, U.S. Army, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003 did maltreat two detainees, persons subject to his orders, by grabbing the hands and arms of the said detainees and ordering them to strike or punch each other, with the detainees then striking or punching each other.

**CHARGE IV: VIOLATION OF THE UCMJ, ARTICLE 128**

**THE SPECIFICATION 1:** In that Staff Sergeant Ivan L. Frederick, II, U.S. Army, did, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003, unlawfully strike several detainees by jumping on and impacting the bodies within a pile of said detainees with his shoulder or upper part of his body.

**SPECIFICATION 2:** In that Staff Sergeant Ivan L. Frederick, II, U.S. Army, did, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003, unlawfully stomp on the hands and bare feet of several detainees with his shod feet.

**SPECIFICATION 3:** In that Staff Sergeant Ivan L. Frederick, II, U.S. Army, did, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November, 2003, commit an assault upon a detainee by striking him with a means or force likely to produce death or grievous bodily harm, to wit: by punching the detainee with a closed fist in the center of the chest with enough force to cause the detainee to have difficulty breathing and require medical attention.

V MRH 20 OCT 04

**CHARGE VI: VIOLATION OF THE UCMJ, ARTICLE 134**

**THE SPECIFICATION:** In that Staff Sergeant Ivan L. Frederick, II, U.S. Army, did, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003, wrongfully commit an indecent act with detainees, Corporal Charles A. Graner, Jr., Specialist Megan M. Ambuhl, and Private First Class Lynndie R. England, by observing a group of detainees masturbating, or attempting to masturbate, while they were located in a public corridor of the Baghdad Central Correctional Facility, with other soldiers who photographed or watched the detainees' actions.

018176

(b)(6) 2-7(c)-2

1 TC: The charges are signed by Captain [REDACTED], a  
2 person subject to the Code as accuser; are properly sworn to before a  
3 commissioned officer of the armed forces authorized to administer  
4 oaths; and are properly referred to this court for trial by  
5 Lieutenant General Thomas F. Metz, the Convening Authority.

6 MJ: Accused and counsel, please rise.

7 [The accused and his counsel stood.]

8 Staff Sergeant Ivan L. Frederick, II, I'm asking you, how  
9 do you plead? Before receiving your plea, however, I advise you that  
10 any motions to dismiss or to grant other appropriate relief should be  
11 made at this time. Captain [REDACTED] will speak for you. (b)(6)-2; (b)(7)(C)-2

12 DC: Sir, the defense wishes to defer motions and pleas at this  
13 time.

14 MJ: Please be seated. [The accused and his counsel resumed  
15 their seats.] The request to defer motions and plea at this time is  
16 granted.

17 As previously notified to counsel, I've set the 21st of  
18 June as the next hearing in this case, which the court believes will  
19 be the time to resolve all outstanding discovery issues, and like I  
20 told everybody else, that each case is different, is I expect the  
21 government to respond to every discovery request in writing.

22 Defense, if you feel that you are getting an inaccurate response, we

1 will litigate that on the 21st June, and this includes access to  
2 evidence, whether it's witnesses or other forms of evidence.

3 We also, at that time on the 21st of June, will litigate  
4 any motions that either side wishes to present. The date for service  
5 of those motions to the other side will be the 14th of June. Email  
6 is fine with me and have originals, signed originals for the record  
7 of trial. Everybody understand the suspenses?

8 DC: Yes, sir.

9 TC: Yes, sir.

10 MJ: Captain [REDACTED] *(b)(6)-2, (b)(7)(C)-2* do you understand that your discovery  
11 request must be in writing, with a written response, and if you are  
12 denied access, I would expect that to be litigated at the same time?

13 DC: Yes, sir. Defense will file the necessary motions to  
14 compel.

15 MJ: Okay. Notify Mr. [REDACTED] *(b)(6)-4, (b)(7)(C)-4* of the date.

16 DC: Yes, sir.

17 MJ: He's an attorney, so I'm assuming he will be here on the  
18 21st of June or his presence will be waived.

19 DC: All right, sir.

20 MJ: Convey that to him.

21 DC: Yes, sir.

22 MJ: Any matters to take up before the court recesses?

1 TC: No, sir.

2 DC: Not at this time, sir.

3 MJ: Sergeant Frederick, there is one matter I need to  
4 go over with you. What has just happened is called an arraignment.  
5 An arraignment has certain legal consequences, one of which I'll  
6 explain to you now. Under ordinary circumstances, you have the right  
7 to be present at every stage of your trial. However, if you're  
8 voluntarily absent on the date this trial is scheduled to proceed,  
9 the trial can go on without your presence. Do you understand that?

10 ACC: Yes, sir.

11 MJ: For example, if you went AWOL, the trial could go forward  
12 with you not being here. Do you understand that?

13 ACC: Yes, sir.

14 MJ: And I want you to understand something else, this is  
15 standard advice I give everybody when I arraign them when the trial  
16 does not begin immediately. I don't think you're going to go AWOL or  
17 anything like that and I'm not implying that, but sometimes things  
18 happened and people get hung up or whatever it is. So if something  
19 does happen, make sure you keep your defense counsel and your chain  
20 of command apprised of your whereabouts at all times between now and  
21 the trial dates. Do you have any questions about what I've just told  
22 you?

1 ACC: No, sir.

2 MJ: The court's in recess.

3 [The Article 39(a) session adjourned at 1024, 19 May 2004.]

4 [END OF PAGE.]

all (b)(6)-2; (b)(7)(C)-2

1 [Court reconvened at 1344, 21 June 2004.]

2 MJ: Court is called to order.

3 The accused, Captain [REDACTED] Sergeant [REDACTED] and myself  
4 are again present who were present when the court recessed. Captain  
5 [REDACTED] you're a new trial counsel in this case?

6 TC: Yes, Your Honor. My name is Captain [REDACTED]  
7 I have been detailed to this court-martial by Captain [REDACTED]  
8 [REDACTED] Chief of Military Justice, III Corps. I am qualified and  
9 certified under Article 27(b) and sworn under Article 42(a), Uniform  
10 Code of Military Justice. I have not acted in any manner which might  
11 tend to disqualify me in this court-martial.

12 MJ: And Captains [REDACTED] and [REDACTED] will no longer appear?

13 TC: That's correct, Your Honor.

14 MJ: Captain [REDACTED] where's Mr. [REDACTED] (b) 6-4; (b)(7)(C)-4

15 DC: Sir, we have a motion to have Mr. [REDACTED] appear by  
16 telephone.

17 MJ: Do you have a copy of his appearance to begin with?

18 DC: Yes, sir, I handed that to the court reporter earlier and  
19 your acceptance of his email appearance.

20 MJ: It's Appellate Exhibit I. And you have a motion?

21 DC: Yes, sir, a motion to appear by telephone.

1 MJ: Mark that as Appellate Exhibit II. [Reporter did as  
2 stated.]

3 DC: No witnesses or argument for that, Your Honor.

4 MJ: Just on a notice issue, is that on the 14th of June--excuse  
5 me, the 13th of June, Mr. <sup>(b)(6)-4; (b)(7)(C)-4</sup> [REDACTED] had sent me an email requesting to  
6 appear by phone. And at that time, I responded, on the 14th of June  
7 that his request was denied. That will be Appellate Exhibit III.

8 Now, Captain <sup>(b)(6)-2; (b)(7)(C)-2</sup> [REDACTED] since you're appearing on behalf of the  
9 accused in this case, I'm going to discuss this motion with you. And  
10 although I've already told Mr. <sup>(b)(6)-4; (b)(7)(C)-4</sup> [REDACTED] I've denied the motion, I'll  
11 reconsider it after considering this motion hearing. Now he says  
12 that, "The United States has arbitrarily chosen to keep these  
13 proceedings in Iraq for what have become purely political reasons."  
14 Do you have any evidence of that?

15 DC: No, Your Honor.

16 MJ: "The United States has done so in the face of ever  
17 increasing violence to include the recent mortar attack on Camp  
18 Victory. The accused has a right to civilian counsel." I don't have  
19 any issue with that, do you?

20 DC: No, Your Honor.

21 MJ: "The accused should not be penalized by the government's  
22 venue selection. The cost of travel is prohibitive. Telephonic

1 appearances in non-CONUS cases are a regular and ordinary event for  
2 Article 39(a) proceedings. It is not reasonable to expect that a  
3 military accused can afford to bring civilian counsel to every 39(a)  
4 in a non-CONUS setting."

5 Now, Captain [REDACTED] (b)(6) 2-47-02  
6 I can take judicial notice that I just  
7 did two hearings in this case with civilian lawyers, true?

8 DC: Yes, Your Honor.

9 MJ: And both of those civilian lawyers came here for this  
10 hearing, true?

11 DC: Yes, Your Honor.

12 MJ: Now, on the 19th of May, I set this hearing for today, the  
13 21st of June, true?

14 DC: Yes, Your Honor.

15 MJ: And Mr. [REDACTED] (b)(6)-4; (b)(7)(C)-4  
16 was aware of that.

17 DC: Yes, Your Honor.

18 MJ: And he was also aware that he was not going to be allowed  
19 to appear by telephone.

20 DC: As of last week, yes, Your Honor.

21 MJ: Well, when he asked me, I said, "No."

22 DC: Yes, sir.

23 MJ: "When the United States chooses to try cases in an  
24 inherently dangerous war zone, thousands of miles from CONUS, great

1 deference should be afforded to the Sixth Amendment considerations.  
2 To do otherwise would be a defacto denial of right to counsel."

3 Now, there's absolutely no authority for that position.  
4 Are you aware of any?

5 DC: No, Your Honor, but, this is a government's--to my  
6 knowledge, it's the government's position that the case be tried here  
7 in Baghdad.

8 MJ: Oh, I don't dispute that. I'm just trying to figure out,  
9 because in Mr. [REDACTED] motion, there's absolutely no legal authority  
10 for the proposition that counsel have a right to appear by telephone.  
11 And in my 24 years of practice, I have never seen that occur. I have  
12 heard it occurring just for minor appearance issues at arraignments,  
13 and that's it. Are you aware of any case, statute, of any  
14 jurisdiction that somehow the counsel gets to determine how he  
15 appears and not the Court?

16 DC: I am not, Your Honor. But again, sir, this is a different  
17 case and a completely unique situation. (b)(6)-4; (b)(7)(C)-4

18 MJ: What's unique to Mr. [REDACTED] that he can't show up?

19 DC: Well, Your Honor, to my knowledge, the civilian co-counsel  
20 in the other co-accused cases knowingly and involuntarily chose to  
21 come here at their own peril per the directive of the United States.  
22 And that is unique to this environment.

(b)(6)-2; (b)(7)(C)-2

1 MJ: Now, Captain [REDACTED] let's back up a second.

2 DC: Yes, sir.

3 MJ: The accused has a right to civilian counsel, true?

4 DC: Yes, sir. (b)(6)-4; (b)(7)(C)-4

5 MJ: When Mr. [REDACTED] took this case, this case was scheduled to  
6 be tried in Baghdad, true? There was no reason to believe it was  
7 going to be tried anywhere else.

8 DC: No, Your Honor, but the case had not been referred yet.

9 MJ: Okay, but at the arraignment, after referral, you indicated  
10 and Sergeant Frederick indicated that Mr. [REDACTED] is one of his lawyers  
11 for this case. (b)(6)-4; (b)(7)(C)-4

12 DC: Yes, Your Honor.

13 MJ: And we did that arraignment here in Baghdad. So when Mr.  
14 [REDACTED] took this case, absent a change of venue motion or some other  
15 thing that had not occurred, he knew it was going to be tried in  
16 Baghdad.

17 DC: Yes, Your Honor.

18 MJ: And he knew that there's explosions going on around here  
19 occasionally.

20 DC: Yes, sir.

21 MJ: So why isn't he here?

1 DC: Your Honor, to appear today would concede to the fact that  
2 it's possible to try this case in a fair setting, and like just any  
3 other court-martial case in the United States or overseas, when in  
4 fact, the defense's position, it is not, that it is indeed a unique  
5 situation that places people in peril for their lives. And if we  
6 were to try this case like any other case, court-martial, then we do  
7 not want to give up those rights, will place civilian co-counsel into  
8 positions of peril.

9 MJ: But unlike you and unlike Sergeant Frederick and unlike  
10 every other soldier here in Iraq, Mr. [REDACTED] choice to come was a  
11 free and voluntary decision on his part, true? He didn't have to  
12 take this case, did he?

(b)(6)-4; (b)(7)(C)-4

13 DC: No, sir.

14 MJ: He chose to take this case.

15 DC: That's right, Your Honor.

16 MJ: So when he chose to take this case, does he choose to take  
17 it where it's going to be tried at?

18 DC: Sir, we did not know and we've made several requests to the  
19 convening authority pre and post-referral to move this case to a  
20 location outside of Iraq.

21 MJ: Okay, and all those, I assume, they've been denied since  
22 we're sitting here today.

1 DC: Yes, sir, they have.

2 MJ: And you've not asked me to do anything, at this point.

3 DC: That's correct, Your Honor.

4 MJ: So how does that excuse him not being here? Every reason  
5 you've told me, I don't know a single one that applies to him. And I  
6 can understand, Captain <sup>(b)(6)-2; (b)(7)(C)-2</sup> [REDACTED] that you're in a position to argue  
7 something on behalf of the counsel who's not here, so I understand.  
8 But I'm trying to understand why I'm being so unreasonable and not to  
9 have attorneys actually show up when they're supposed to show up.

10 DC: And you're right, as military defense counsel, I am in a  
11 different position.

12 MJ: And tell me this, he wants to do it by telephone. Now, how  
13 are we going to do that?

14 DC: Yes, sir, he wanted to do it by speakerphone.

15 MJ: Okay, so he's going to have the speakerphone there, and  
16 then how does he have private conversations with his client with the  
17 speakerphone? Do we have another phone for that?

18 DC: Yes, sir.

19 MJ: And then how does he view the demeanor of witnesses, or do  
20 we have videophone for that, too?

1 DC: Those are technological issues that we could possibly  
2 remedy to ensure that this case is like any other court-martial case  
3 in the world.

4 MJ: Do you know of any other court-martial case in the world  
5 that would do this, that we have this phone thing set up?

6 DC: Other than in this particular location or in Afghanistan,  
7 we are not faced with the same environment as any other court-martial  
8 case. So in order to remedy those inherent perils, those inherent  
9 issues, and that is a driving theme through a lot of my motions. We  
10 have to take those steps necessary to equalize, so to speak, this  
11 environment and this court-martial to make it like any other court-  
12 martial in the rest of the world.

13 MJ: Captain [REDACTED] <sup>(b)(6)-2; (b)(7)(C)-2</sup> let me ask you about another issue, which  
14 again, I understand you're the messenger here.

15 DC: Yes, sir.

16 MJ: On the 14th of June, I turned his request down, okay? And  
17 he knew that, true?

18 DC: True.

19 MJ: So apparently, he doesn't show up anyway. So, when I issue  
20 something, then apparently it doesn't matter because he didn't show  
21 up. When I said, "You can't appear telephonically," that gave him a  
22 choice to appear in person or to have his appearance waived.

1 DC: Well, sir, I'd like to bring in the government on this  
2 particular aspect. We had a discussion, Captain (b)(6) 2; (b)(7)(C) -2 and myself  
3 that possibly the reason why you were turning it down is because his  
4 request was not necessarily in the form of a motion, because your  
5 response was that you don't litigate email motions.

6 MJ: That's true.

7 DC: So, his remedy to that particular misunderstanding between  
8 the government and myself was to produce a formal motion for your  
9 review. That's my understanding.

10 MJ: "Your Honor, this is a formal request for me to appear  
11 telephonically present on 21 June for the motions hearing in the  
12 above-styled case." That's from Mr. (b)(6)-4; (b)(7)(C) -4 "Mr. (b)(6) your request  
13 to appear telephonically is denied. If the motion for a new 32 is  
14 granted, that will obviously delay the trial. However, the motion is  
15 denied and since defense has no other motions, I assume the defense  
16 will be ready to set a trial date after the motions hearing next  
17 week," signed, Colonel (b)(6)

18 Now, what part of that was unclear that his request was  
19 being denied? I didn't say "denied" because it's not a motion, I  
20 said, "denied". Is there anything unclear about that response?

21 DC: It doesn't appear to be, sir.

22 MJ: But apparently, it has no effect on Mr. (b)(6)-4; (b)(7)(C) 4

1 DC: Well, sir----

2 MJ: I mean, he chose not to come. Is his appearance going to  
3 be waived today?

4 DC: No, sir, my client does not wish to waive the presence of a  
5 civilian counsel and wishes to preserve that issue for appeal.

6 MJ: What issue is that?

7 DC: His right to have civilian co-counsel at no expense to the  
8 government.

9 MJ: Okay, so where is he?

10 DC: Sir, he made a request in order to equalize this  
11 environment with other environments that court-martials are normally  
12 convened by an alternative method and that----

13 MJ: And when I tell him "no," apparently, that doesn't make any  
14 difference, he doesn't show up anyway. That's what you're telling  
15 me.

16 DC: I don't understand the question, sir.

17 MJ: What I'm saying is, he made a request.

18 DC: Yes, sir, he did.

19 MJ: Not to appear, and I said, "No."

20 DC: Yes, sir, he made a request to appear, only not in person,  
21 but via telephone.

22 MJ: I know, I said, "No."

1 DC: Yes, sir.

2 MJ: Lawyers appear in court, they don't appear by phone. And  
3 you agree, isn't this kind of a judge's role to decide how the cases  
4 are litigated? [Pause.] Captain [REDACTED] that's a rhetorical  
5 question. (b)(6)-2; (b)(7)(C)-2

6 DC: Sir, I agree insomuch that it doesn't impugn upon my  
7 accused's right to civilian counsel of his choice. It's based solely  
8 on the fact of the situs of this particular court-martial.

9 MJ: So, if I move it to a place he likes, he'll show up?

10 DC: No, sir, moving to either--arranging for alternative  
11 technological means in order to equalize this environment with those  
12 environments and other court-martial jurisdictions, or by an  
13 appropriate motion before the court for a venue change because such  
14 technological and/or other methods of equalizing this environment  
15 prove futile, that's what he's getting at. (b)(6) 2; (b)(7)(C) -2

16 MJ: Let me ask you this, Captain [REDACTED] what happens next time  
17 we have a hearing here, then what happens?

18 DC: As far as what, sir?

19 MJ: I mean, because what you're telling me now is Sergeant  
20 Frederick won't waive his appearance. So theoretically, then we just  
21 stop right now.

22 DC: No, sir.

1 MJ: We don't stop right now? You can't have it both ways.

2 DC: What the defense wishes to preserve is its right to file an  
3 appeal of your decision to deny my client's request to have civilian  
4 counsel at no expense to the government.

5 MJ: And when is this appeal going to take place? Does he file  
6 a writ on me?

7 DC: Sir, you just denied it in open court a few minutes ago, so  
8 I cannot speak for what Mr. [REDACTED] is going to do in this case, but I  
9 suspect that we will be filing an appeal. (b)(6)-4; (b)(7)(C)-4

10 MJ: You're filing a writ?

11 DC: Yes, sir. But sir, it is your prerogative to go forward in  
12 the interests of justice and judicial economy. We just do not wish  
13 to voluntarily waive our arguments to having civilian co-counsel, or  
14 to have as a potential issue for our request for venue change.

15 MJ: Well, when you request a change of venue, will Mr. [REDACTED]  
16 show up for that, or are we going to go through this telephone thing  
17 again? Is he refusing to show up in this environment totally?

18 DC: Yes, sir, he is.

19 MJ: He's refusing to show up at all?

20 DC: As far as this particular----

21 MJ: No, I'm talking about, is he refusing to show up in  
22 Baghdad, Iraq, as long as this case is in Baghdad, Iraq?

1 DC: I cannot answer that, sir, only this particular  
2 circumstance. The reason I say that, sir, is because the motion  
3 makes reference to the fact that this is not going to be a very long  
4 proceeding.

5 MJ: Oh, okay.

6 DC: And that's why he has qualified his decision in not showing  
7 up.

8 MJ: Okay, so if we spend more time here, then it's okay to show  
9 up because his time is more valuably used. But, if it's just a short  
10 hearing, then he just appears by telephone.

11 DC: Sir, that's a cost benefit analysis that Mr. [REDACTED] makes. (b)(6)-4; (b)(7)(C)-4

12 MJ: Well, apparently. I don't understand--I fail to understand  
13 any court that would tell a guy to show up to represent the accused,  
14 and he doesn't show up and then I'm supposed to say, "Well, that's  
15 okay." I mean, that's what you're telling me to do.

16 DC: In this particular instance, yes, sir, under this  
17 particular motions hearing based on the particular facts as outlined  
18 in our motion.

19 MJ: And as you stated, there's nothing unique to your facts  
20 that other people couldn't show, true? I mean, why is Mr. [REDACTED] he  
21 can't show up but--and I'll take judicial notice that Mr. [REDACTED]

(b)(6)-4, (b)(7)(C)-4

1 showed up and Mr. [REDACTED] showed up. And last time I checked, this  
2 is the exact same place.

3 DC: Yes, sir.

4 MJ: And they had the same notice that he did.

5 DC: Yes, sir.

6 MJ: And so what's unique about him?

7 DC: The other co-accused have made conscious decisions that  
8 this is a case that can be tried with civilian co-counsel present in  
9 country. That's the difference, sir. We are not willing to make  
10 that stand.

11 MJ: Even though I said a week ago, "No," that now we're in the  
12 position of, "Well, the judge didn't really mean 'no' because it  
13 wasn't a motion." Now it's a motion, not it does mean "no," and then  
14 therefore, we grind to a halt until Mr. [REDACTED] fits into his schedule  
15 to show up here.

16 DC: Well, sir, as far as your "no," I don't recall that you  
17 qualified it as----

18 MJ: I read you the whole note there. Later on, I did say, if  
19 he's got problems, file a motion.

20 DC: Yes, sir.

21 MJ: But this was not....

22 DC: And I apologize for any confusion on it.

1 MJ: No, that's okay. He said at the end of his note, "I do not  
2 believe this request requires a formal motion but falls within the  
3 discretion of the Court in its procedural administrative capacity,  
4 respectfully, [REDACTED]." And then I say, "Your request to appear  
5 telephonically is denied." (b)(6)-4; (b)(7)(C)-4

6 Now, what part of that is unclear? He was the one that  
7 said it was an administrative matter, not me. Then he filed a motion  
8 and the motion was denied, also.

9 In his motion, he also states, "The accused cannot afford  
10 to bring civilian counsel from the United States to Iraq for this  
11 brief proceeding." Is that a legal basis not to show up?

12 DC: Sir, it's the basis that he offered.

(b)(6)-2; (b)(7)(C)-2

13 MJ: That's a very diplomatic answer, Captain [REDACTED] but my  
14 point being is, when the accused are advised of their rights to  
15 counsel and they choose civilian counsel, it says, and I believe I  
16 said it in this case, because I say it in every case, at no expense  
17 to the government, at your own expense. Now obviously, if you choose  
18 to hire a civilian from the States to appear here, there's going to  
19 be expenses incurred in traveling. So, why should I--is there some  
20 exception that if you go over X-amount of dollars, then he doesn't  
21 have to show up?

22 DC: Sir, I stand by my previous arguments.

1 MJ: That's a wise course there, Captain [REDACTED] (b)(6)2;(b)(7)(C)-2  
2 Sergeant Frederick, at the last hearing, I discussed with  
3 you your rights to counsel, and I'm sure you recall that?

4 ACC: Yes, sir.

5 MJ: And at the time, you indicated you wanted to be represented  
6 by Captain [REDACTED] and Mr. [REDACTED]. Is that correct?

7 ACC: Yes, sir. (b)(6)-2;(b)(7)(C)-2 (b)(6)-4;(b)(7)(C)-4

8 MJ: And at the time of arraignment, you said you had no problem  
9 proceeding with the arraignment without Mr. [REDACTED] being present. Is  
10 that correct? (b)(6)-4;(b)(7)(C)-4

11 ACC: Yes, sir.

12 MJ: But today, Mr. [REDACTED] is not present, and he's known for a  
13 week that he would not be allowed to appear telephonically, because  
14 quite frankly, I think that's an oxymoron. By that, I mean is, you  
15 either appear in person or you're not here. A telephone is not  
16 appearance. Do you understand that?

17 ACC: Yes, sir.

18 MJ: And I told him that a week ago, and he's chosen not to  
19 come. But now, you're the accused in this case, and it's your right  
20 to counsel. Do you consent to proceeding today without Mr. [REDACTED] (b)(6)-4;  
21 present? [Pause.] You can talk about it with Captain [REDACTED] if you (b)(7)(C)-4  
22 like. [The accused and his counsel conferred.] (b)(6)-2;(b)(7)(C)-2

1 DC: Sir, by your question, are you asking Sergeant Frederick to  
2 waive any possible appeal of your decision in this?

3 MJ: I am asking if he consents to go to this hearing today  
4 without Mr. <sup>(b)(6)-4; (b)(7)(C)-4</sup> [REDACTED] here, period. I'm not going to a--whether it's a  
5 waiver or not. My question is, does he consent to that? Do you  
6 understand my question?

7 DC: Yes, sir. Sergeant Frederick----

8 MJ: No, I want to hear it from Sergeant Frederick, because he  
9 has a right to counsel. Sergeant Frederick? [The accused and his  
10 counsel conferred.]

11 ACC: Your Honor, I do not wish to waive my right to have a  
12 civilian counsel of my choice at no expense to the government, but I  
13 am willing to proceed with this Article 39 Alpha session here today.

14 MJ: Okay, Sergeant Frederick, I want to make this very clear  
15 because this is the right that belongs to you. It doesn't belong to  
16 Mr. [REDACTED] or Captain [REDACTED] it belongs to you. If we proceed today,  
17 you will only have Captain [REDACTED] as your attorney. Do you understand  
18 that?

19 ACC: Yes, sir. <sup>(b)(6)-4 (b)(7)(C)-4</sup>

20 MJ: And Mr. [REDACTED] will not be permitted to appear  
21 telephonically or in any other way, since he's physically not here.  
22 Do you understand that? <sup>(b)(6) 2, (b)(7)(C)-2</sup>

1 ACC: Yes, sir.

2 MJ: Now, if you tell me that you want to go ahead and do what

3 we're going to do today, we've already talked about what we're going  
4 to do today without Mr. [REDACTED]' presence for today's hearing, we will.

5 And I don't quite know whether you told me that or not. What I'm

6 saying is this, is that if you consent to proceeding today with

7 today's hearing without Mr. [REDACTED], we will. If you tell me you will

8 not consent without Mr. [REDACTED] being here, then we will talk about

9 what we will do. And what you told me kind of tells me both. It's

10 not a split-the-baby-type of situation. You either do consent to

11 doing this hearing today without Mr. [REDACTED] here or you do not consent

12 to do this hearing today without Mr. [REDACTED] here. Those are the two

13 choices. Captain [REDACTED], is there a third choice I'm missing?

14 DC: Yes, Your Honor. (b)(6)-2; (b)(7)(C)-2

15 MJ: And what's that?

16 DC: If this case is somehow moved, venue changed outside of

17 Iraq or if there is another 39(a) session----

18 MJ: We're talking about today. I'm talking about today.

19 DC: Yes, sir.

20 MJ: The two choices today. Is there another choice today,

21 right now, not what's going to happen in the future?

22 DC: No, sir.

1 MJ: So do you understand your two choices?

2 ACC: Yes, sir.

3 MJ: Which choice do you want to do?

4 DC: [The accused conferred with his counsel.] Sir, in order to  
5 have my client make a full and--decision in this matter, what  
6 options, if he does not wish to waive his right to Mr. [REDACTED] are you  
7 alluding to? (b)(6)-4; (b)(7)(C)-f

8 MJ: I will fashion an appropriate remedy at the time.

9 ACC: [Pause.] Your Honor, I do not wish to waive my right to  
10 have a civilian counsel of my choice at no expense to the government.

11 MJ: Okay. [Pause.] In light of the accused's position as it  
12 requires the presence of his counsel and the fact that this is a  
13 problem solely made by his counsel, that despite the Court's position  
14 with him that he had to appear here in person or not at all, but the  
15 accused does have a right to civilian counsel. And, I'm not going to  
16 penalize the accused for exercising that right. Therefore, at the  
17 request of the defense, this case is continued, I'm taking it as a de  
18 facto request, until 23 July. On 23 July, Mr. [REDACTED] is either here  
19 or not here. And quite frankly, Captain [REDACTED], I know I'm looking at  
20 you and talking to you, but I decide who shows up and who doesn't  
21 show up. When counsel get a result they don't like, they do it  
22 anyway. I'm not going to force Sergeant Frederick to proceed without  
(b)(6)-2; P 7c 2

1 the counsel he's requesting, but that counsel, and I make a finding,  
2 has voluntarily chosen not to be here. And I could easily say, well,  
3 let's go ahead with it anyway because he's not here on his own  
4 choice. But in an abundance to protect Sergeant Frederick's right,  
5 I'm going to continue this until the 23d of July. On the 23d of  
6 July, that's the date we're going to do it. And you tell [REDACTED] (b)(6)-4;(b)(7)(C)-4  
7 that's the date. I don't care how many bombs are going off, 23  
8 July--well, rephrase that, I do care how many bombs are going off,  
9 but absent extraordinary circumstances, on the 23d of July, we're  
10 going to continue this hearing, and at that time, I will litigate  
11 your motions.

12 DC: Sir, given that I am still detailed to this case and I  
13 still owe an ethical obligation to vigorously defend my client, I do  
14 request that at least of one of my motions, the request for expert  
15 assistance be granted so that we may not hinder my client's right to  
16 as much assistance as possible given the lack of information  
17 given----

18 MJ: Sergeant Frederick says he doesn't want to proceed without  
19 Mr. [REDACTED] (b)(6)-4;(b)(7)(C)-4 How can I consider your motion then? I mean, you can't  
20 have it both ways. I understand your position. You can't have it  
21 both ways and say, "I don't want to litigate some motions without Mr.

(b)(6)-4, (b)(7)(C)-4

1 [REDACTED] and other motions with him."

2 DC: Yes, sir, but I still have an ethical obligation.

3 MJ: Have you filed it with the convening authority, your  
4 request?

5 DC: Yes, sir, we will file it.

6 MJ: Have you filed it?

7 DC: Have we filed it? Yes, sir.

8 MJ: Okay, but I'm not going to decide--you're telling me--your  
9 client's telling me he doesn't want to do anything without Mr. [REDACTED]  
10 here. So how can I do anything? You want me to do what your client  
11 says or not?

(b)(6)-4, (b)(7)(C)-4

12 DC: Understood. I understand the question, sir.

13 MJ: Well, the defense has put me in this position. Do you have  
14 anything else you wish to add before we recess?

15 DC: No, sir.

16 MJ: The court's in recess.

17 [Court recessed at 1436, 21 June 2004.]

18 [END OF PAGE.]

1 [Court was called to order at 1342, 22 June 2004.]

2 MJ: Court is called to order. All parties are again present  
3 that were present that were present when the court recessed, and  
4 we've added a trial counsel, apparently, Major [REDACTED]?

5 ATC: Yes, sir. (b)(6)-2; (b)(7)(C)-2

6 MJ: Please put your qualifications and detailing on the record.

7 ATC: Yes, sir. Sir, I've been detailed to this court-martial by  
8 Captain [REDACTED], Chief, Military Justice, III Corps. I am  
9 qualified and certified under Article 27(b) and sworn under Article  
10 42(a), Uniform Code of Military Justice. I have not acted in any  
11 manner which might tend to disqualify me in this court-martial.

12 MJ: Thank you. After this hearing last night, I sent an email  
13 to all parties in this case, which would be Appellate Exhibit IV. In  
14 the email, it's a very short email. It was addressed to all  
15 involving United States versus Frederick. "The next Frederick 39(a)  
16 is set for 22 July in Baghdad, Iraq. Attorneys who wish to  
17 participate must appear in person. Absent good cause, failure to  
18 personally appear will constitute waiver," signed by me, actually,  
19 typed name at the end by me. (b)(6)-4; (b)(7)(C)-4

20 This morning, apparently, it was sent last night, I  
21 received an email from Mr. [REDACTED] as follows, which will be Appellate  
22 Exhibit V. "Your Honor, I've received your message. I will not

1 appear on 22 July. My client will waive my appearance so that the  
2 matters before the court can proceed without interruption.

3 Respectfully, [REDACTED]. (b)(6)-4; (b)(7)(C)-4

4 Now, Captain [REDACTED] have you shared that email with  
5 Sergeant Frederick? (b)(6)-2; (b)(7)(C)-2

6 DC: Yes, Your Honor, I have.

7 MJ: And have you discussed with Sergeant Frederick his right to  
8 have Mr. [REDACTED] here physically present?

9 DC: Yes, sir, I have. (b)(6)-4; (b)(7)(C)-4

10 MJ: Sergeant Frederick, although the email says is that, Mr.

11 [REDACTED] (b)(6)-4; (b)(7)(C)-4 says you will waive his presence, he can't waive his presence.

12 Captain [REDACTED] can't waive his presence, only you can. Now,

13 yesterday, you indicated to me that you did not wish to proceed

14 without Mr. [REDACTED] (b)(6)-4; (b)(7)(C)-4 present. And as such, I respected your wishes and

15 we waited until he was going to show up and set a new hearing date,

16 then 23 July, and I've adjusted it one day to 22 July, to give him

17 time to get here, if he wants to get here or not get here, and choose

18 not to be here. And that's what we did yesterday, and I discussed

19 with Captain [REDACTED], and you were there and listened to the whole

20 thing. (b)(6)-2; (b)(7)(C)-2

21 Now, Mr. [REDACTED] tells me today that he's not going to be

22 here on the 22d of July. Now, I take from that that he does not

(b)(6)-4; (b)(7)(C)-4 35

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1 intend to show up for the next 39(a) in your case, whether it's the  
2 22d of July or today. But I did say the 22d of July, not the 22d of  
3 June. So arguably, there's some ambiguity, saying he's not going to  
4 come on the 22d of July, with today, the 22d of June, he didn't  
5 address that issue.

6 So, the question I have to you today is the same question I  
7 had to you yesterday. Do you consent to proceeding to today's  
8 proceedings without Mr. [REDACTED] present or do you want him present for  
9 these proceedings? <sup>(b)(6)-4; (b)(7)(C)-4</sup> And understand this, I'm only talking about  
10 today. I'm not talking about further participation in the case.  
11 Whether or not he remains your attorney or not, that's up to you.  
12 I'm just talking about today.

13 Now, Captain [REDACTED] can you move the microphone over  
14 towards.... <sup>(b)(6) 2 - (b)(7)(C) - 2</sup>

15 DC: Yes, sir. [DC complied.]

16 MJ: Staff Sergeant Frederick, do you have any question about  
17 what I just talked to you about?

18 ACC: No, sir.

19 MJ: Do you have any question about this issue at all in any  
20 way, shape or form, both of what I talked to you today about and  
21 yesterday? Do you have any questions about your right to have your  
22 attorneys here present?

1 ACC: No, Your Honor.

2 MJ: And you've talked this over with Captain [REDACTED] (b)(6) 2-(b)(7)(C) 2

3 ACC: Yes, sir.

4 MJ: And you've seen Mr. [REDACTED] email. (b)(6)-4 ; (b)(7)(C)-4

5 ACC: Yes, sir.

6 MJ: Have you had the ability to talk to Mr. [REDACTED] s about this  
7 issue?

8 ACC: I was going to speak to him this evening, sir.

9 MJ: Now, knowing that you haven't talked to him yet, but do you  
10 consent to proceeding to this hearing today without Mr. [REDACTED]  
11 present?

12 ACC: Yes, sir.

13 MJ: Now you understand Staff Sergeant Frederick, I want to make  
14 it very clear. This is your right, and as I told you yesterday, I  
15 will do all I can to respect your rights to counsel, and if you tell  
16 me you're comfortable with Captain [REDACTED] doing what we anticipate  
17 doing today, which deals with a new Article 32 motion and some (b)(6) 2-(b)(7)(C) -2  
18 discovery and expert assistance issues, and that's quite frankly all  
19 we're going to do today, we will go ahead and do that.

20 ACC: Yes, sir.

21 MJ: But no one is forcing you to make that decision. Do you  
22 understand that?

1 ACC: Yes, Your Honor.

2 MJ: Now, if you don't want to do it, we will go to 22 July, and  
3 then we will see what will happen on the 22d of July if Mr. [REDACTED]  
4 doesn't show up on that date. Do you understand that?

5 ACC: Yes, sir.

(b)(6)-4; (b)(7)(C)-4

6 MJ: So you've talked this over and you feel you know all you  
7 need to know about this?

8 ACC: Yes, Your Honor.

9 MJ: And you want to proceed today without Mr. [REDACTED] and with  
10 just Captain [REDACTED]

11 ACC: Yes, Your Honor.

(b)(6)-2; (b)(7)(C)-2

12 MJ: Then that's what we will do.

13 Captain [REDACTED] do you have a motion you wish to make?

14 DC: Yes, Your Honor. At this time, defense moves for a new  
15 Article 32 motion.

16 MJ: And is it in writing?

17 DC: Yes, Your Honor.

18 MJ: Marked as Appellate Exhibit VI.

19 DC: The next document is the outline of objections in the  
20 Article 32 where the defense cited the war in Iraq as a primary  
21 reason for his one-day delay in submission.

1 MJ: Did you submit objections to the 32 within the 5 days plus  
2 a day?

3 DC: Yes, sir.

4 MJ: And this just explains why it's one day late?

5 DC: Yes, sir.

6 MJ: Trial counsel, do you have any objections of the  
7 representations made in Appellate Exhibit VII?

8 DC: No, Your Honor.

9 MJ: Assuming it was made the next day, the Court will find  
10 that's good cause for a delay of one day to file the objection under  
11 the Rule.

12 Go ahead.

13 DC: Next, Your Honor, is the Article 32 investigation, itself.

14 MJ: Okay. Next?

15 DC: The next document, Your Honor, is a certified transcript of  
16 the Article 32 proceedings verbatim.

17 MJ: Certified by whom?

18 DC: I believe a court reporting service in New Hampshire, sir.

19 MJ: Well, is there anything that says that?

20 DC: Well, sir, the digital copy was sent directly from the--  
21 there's a certification sheet at the last page of that document.

22 TC: That's unsigned.

1 DC: That is unsigned, yes, Your Honor, given the circumstances  
2 we're in.

3 MJ: Trial counsel, do you have any objection or issue as to the  
4 accuracy of this transcript?

5 TC: No, Your Honor.

6 MJ: I'll accept it as it's represented to be. Go ahead.  
7 Anything else?

8 DC: No more documentary evidence.

9 MJ: Do you have your list of objections?

10 DC: Yes, Your Honor. I referenced it, I believe you'll find  
11 the objections are listed at Appendix E to the report, Annex E.

12 MJ: [Pause.] Captain [REDACTED] can you find that document for me?  
13 I'm now returning Appellate Exhibit VIII to Captain [REDACTED]  
(b)(6)-2; (b)(7)(C)-2

14 DC: Sir, the catalog of objections...I have referenced in my  
15 email, I reference those specific objections.

16 MJ: What day did the Article 32 close?

17 DC: Sir, I don't have that information in front of me.

18 TC: I believe it was April 10th, Your Honor.

19 MJ: And you received the report on or about...it's signed 18  
20 April. And you got this note from Sergeant [REDACTED] "Do you have any  
21 objections to this Article 32 packet before I get Colonel [REDACTED]  
22 recommendation?" Was he the appointing authority? (b)(6)-1; (b)(7)(C)-1

1 DC: Yes, sir, he was.

2 MJ: So you had gotten the 32 officer's report, and you  
3 basically, rather than filing separate, specific objections under  
4 Rule 405(j)(4), you simply sent the email which would incorporate the  
5 objections contained in the report.

6 DC: Yes, sir, in addition to reiterating the defense's position  
7 that I understood the telephonic issue, but as I will go through in  
8 my argument, the lack of use of email in this environment constituted  
9 failure to----

10 MJ: Trial counsel, do you have any issue that the defense  
11 preserved the objections under the Rule by incorporating by reference  
12 to this email?

13 TC: No, Your Honor.

14 MJ: Just so I'm clear, buried into this document you gave me  
15 was Appellate Exhibit VIII, is a list of...there's a list of 13  
16 objections, but 10 appear to be the defense objections. Is that  
17 accurate, Captain  (b)(6)-2;(b)(7)(C)-2

18 DC: Yes, sir.

19 MJ: Now, do you contend all 10 of these are still viable for  
20 purposes of this motion?

21 DC: No, sir.

22 MJ: Do you wish to present evidence?

1 DC: Yes, Your Honor.

2 MJ: Proceed.

3 DC: Wish to call Sergeant First Class [REDACTED] (b)(6)-4; (b) 7(c) -4

4 MJ: I'm sorry, government, do you have a written response?

5 TC: Yes, Your Honor. It's previously been provided to the  
6 court reporter.

7 MJ: Which has been marked as Appellate Exhibit X. Go ahead and  
8 call Sergeant [REDACTED] (b)(6)-4; (b)(7)(C)-4

9 **Sergeant First Class [REDACTED] U.S. Army, was called as a**  
10 **witness for the defense, was sworn, and testified as follows:**

11 **DIRECT EXAMINATION**

12 **Questions by the trial counsel [Captain [REDACTED] (b)(6) 2; (b)(7)(C) -2**

13 Q. Please state your name for the record.

14 A. Sergeant First Class [REDACTED]

15 Q. And what's your duty position, Sergeant [REDACTED]

16 A. Senior Paralegal, 16th Military Police Brigade, Airborne,  
17 Victory Base.

18 **Questions by the defense:**

19 Q. Sergeant [REDACTED] did you previously work for Captain [REDACTED]  
20 of that same brigade? (b) 6-2 (b) 7(c) -2

21 A. Yes, sir.

22 Q. And who was he?

1 A. He was the trial counsel.

2 Q. And you were his Chief Paralegal NCOIC?

3 A. Yes, sir.

4 Q. Do you recall the Article 32 investigation for Staff  
5 Sergeant Frederick held in April?

6 A. Yes, sir.

7 Q. And preparations for that occurred in what month?

8 A. End of March.

9 Q. Were you responsible for coordination with the  
10 investigating officer?

11 A. Yes, sir.

12 Q. In your coordination with the investigating officer, how  
13 did you communicate with him?

14 A. Initially, sir, or throughout?

15 Q. Initially.

16 A. Initially, I think I emailed him initially, then I went to  
17 his location and delivered the file to him.

18 Q. To your knowledge, when you delivered the file to him,  
19 where was his location?

20 A. His location is on Victory Base, sir.

21 Q. So part of your initial correspondence with the  
22 investigating officer, you emailed him?

1 A. Yes, sir.

2 Q. So email was available to you?

3 A. Correct.

4 Q. And email--did you receive a response email from Major----

5 A. I think, sir, but I can't recall exactly.

6 Q. Did you ever receive an email response from Major [REDACTED] <sup>(b)(6)-2; (b)(7)(C)-2</sup>

7 A. I'd have to see my email account, sir, in order to show if  
8 he got them or not.

9 Q. As part of the Article 32 investigation, there are numerous  
10 emails. If you could--see if you could find...do any of those emails  
11 look familiar?

12 A. Yes, sir, I see one here where I emailed the 32  
13 appointment. "I will bring the entire case file to you Friday, 26  
14 March, and get your signature for notification to the soldier."

15 DC: Thank you very much. And that's investigating officer  
16 exhibit 8.

17 Q. Was there telephonic testimony during Staff Sergeant  
18 Frederick's Article 32 investigation?

19 A. No, sir.

20 Q. Were you involved in any of the other co-accused's Article  
21 32 investigations?

22 A. Yes, sir.

1 Q. Was telephonic testimony available at any other co-  
2 accused's Article 32 investigations?

3 A. It was available at one of the other----

4 Q. And do you recall which one?

5 A. U.S. versus Ambuhl, sir.

6 Q. And when was that Article 32 investigation held?

7 A. Around 2 May, sir.

8 Q. Do you recall if videoconference was ever available for  
9 Staff Sergeant Frederick?

10 A. Was it ever available or was it asked?

11 Q. Was it available?

12 A. Not to my knowledge, sir.

13 Q. Was email available?

14 A. Maybe, sir.

15 Q. Was it available to communicate with people here on Victory  
16 Base?

17 A. On Victory Base, yes, it was available, but as far as the  
18 32----

19 MJ: Captain ██████████ wouldn't that determine on who you're  
20 emailing? (b)(6)2-37(c)-2

21 DC: It would determine, Your Honor.

(b)(6)-4; (b)(7)(C)-4

1 MJ: I mean, Sergeant [REDACTED] can say that he had email  
2 capability and the IO had email capability, but that would not  
3 necessarily imply that a witness had email capability. So that's all  
4 he can speak to.

5 DC: Okay, sir.

6 MJ: Go ahead.

7 Q. Did you look into the possibility of ever emailing  
8 witnesses for purposes of extra-theater communications?

9 A. No, sir, what I did do, I emailed witnesses trying to find  
10 their location. They had their own AKO white pages search, trying to  
11 find their information, then I could have their email account, and I  
12 could say, "Hey, where are you located? Give me your phone number,"  
13 stuff like that.

14 Q. Did you ever email anyone in the United States or in  
15 Germany?

16 A. I can't recall, sir. I'd have to check.

17 Q. Would it have been possible for you to email witnesses?

18 A. Sir, it wouldn't have been impossible.

19 Q. It wouldn't have been impossible. Did you create the  
20 investigating officer's witness list?

21 A. Could you specify, sir?

1 Q. In the Article 32 investigation, the initial notification  
2 to Staff Sergeant Frederick, there was listed one CID agent. Did  
3 that list come from Major [REDACTED] or did that come from the  
4 government? (b)(6)-2; (b)(7)(C)-2

5 A. Sir, that was the government intended witness--put on to  
6 the IO's notification to the soldier.

7 Q. For his signature.

8 A. Yes, sir.

9 Q. Did you ever receive the defense document witness list?

10 A. I received an email from the defense with a bunch of names  
11 on it to be witnesses.

12 Q. And was that a request for documents?

13 A. Yes, sir.

14 Q. And what, if anything, did you do in regards to that  
15 document witness list?

16 A. Started looking, doing what I could to find people and find  
17 the documents you requested.

18 Q. And were you successful in finding that?

19 A. I didn't....

20 Q. Sergeant First Class [REDACTED] how far away is Victory Base  
21 from Abu Ghraib Prison? (b)(6)-4; (b)(7)(C)-4

22 A. Maybe 20 miles, sir.

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1 Q. In the Article 32 investigation, it was learned that a  
2 majority of the CID agents had redeployed, how did you determine  
3 that?

4 A. Sir, we were told that information by the CID that we did  
5 have testify because they worked with them.

6 Q. So the only CID agent left in theater was the agent that  
7 testified?

8 A. Yes, sir.

9 Q. To your knowledge, does Abu Ghraib Prison have email  
10 capabilities?

11 A. Sir, they do, but it's classified.

12 Q. To your knowledge, did that capability exist in March and  
13 April of 2004?

14 A. Yes, sir.

15 Q. Yes, it did?

16 A. Yes, they had email--well, yes, they did, because we sent  
17 emails back and forth to CID during that timeframe.

18 Q. What means did you use to diligently search for defense  
19 documents and witnesses?

20 A. Defense documents and witnesses?

21 Q. What method----

22 A. Depends on what document you asked for.

1 Q. Can you name the variety of communication methods that you  
2 used?

3 A. Well, depends on what you're looking for, sir.

4 Q. Did you use telephone?

5 A. I have to know what you're looking for, sir.

6 Q. At any point during the entire Article 32 investigation  
7 time period, and looking through the defense witness and document  
8 list, did you ever use the telephone to determine if they were  
9 available?

10 A. Yes, I did.

11 Q. And did you use electronic mail?

12 A. Yes, sir.

13 Q. Did you use face-to-face communications?

14 A. Yes, sir.

15 Q. Did you use any other mode of communications?

16 A. I don't know of any other mode.

17 Q. In the Article 32 investigation, it was determined that--it  
18 was made a representation by the government that a Captain [REDACTED]  
19 [REDACTED] did not exist. How did you get that information?

20 A. That she did not exist?

21 Q. That she did not exist.

22 A. I couldn't find her.

(b)(6) 2 (b)(7)  
(c)-2

1 Q. Couldn't find her?

2 A. Roger.

3 Q. Not that she didn't exist, but that she couldn't be found.

4 A. Probably because she couldn't be found. I didn't say that  
5 she didn't exist.

6 Q. Do you recall the reasons why you were told that the  
7 victims, the alleged victims in this case were not available?

8 A. I can't recall, sir. One of them probably would have been  
9 security and transferring them from one location to the next.

10 Q. And therefore, they were deemed unavailable?

11 A. Yes, sir, by the IO.

12 DC: Sir, I have no further questions.

13 MJ: Captain [REDACTED]

← (b)(6)-2 (b)(7)(c)-2

14 **CROSS-EXAMINATION**

15 **Questions by the trial counsel [Captain [REDACTED]**

16 (b)(6)4, (b)(7)(c)4 Q. Sergeant [REDACTED] you just mentioned in response to the  
17 defense counsel's questions about detainees, or movement out to Abu.  
18 Can you describe the operational situation here in Iraq during that  
19 timeframe?

20 A. Well, say for instance, say one morning we may wake up,  
21 "Hey, the roads are red," which means there could be an IED on the  
22 road or a bridge could be blown, there could be no traffic.

1 Q. Now, when you say, "red," what does that mean?

2 A. There's a threat.

3 Q. So, is there going to be any travel that day?

4 A. Probably not, sir.

5 Q. Was that a consistent thing that would happen during the  
6 early part of April of 2004?

7 A. Yes, sir, during that timeframe, there was a lot of  
8 sporadic behavior out there.

9 Q. Were there insurgent attacks on convoys?

10 A. Yes, sir.

11 Q. Was it dangerous operational security going to and from Abu  
12 Ghraib Prison at that time from Victory Base?

13 A. Yes, sir.

14 Q. As far as telephonic communications here on Victory Base,  
15 what did you do to try to get a telephone set up for the Article 32?

16 A. For the Article 32, I requested from my First Sergeant to  
17 purchase a speakerphone here on the local economy.

18 Q. And did that happen before April 2d, the day of the  
19 accused's Article 32?

20 A. No, sir.

21 Q. When did you actually get that speakerphone?

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1 A. Actually got the phone, I'd say maybe a week before  
2 Ambuhl's 32.

3 Q. So that's why the co-accused had telephonic testimony.

4 A. That's why there was a telephone at that.

5 Q. Now, where was the Article 32 actually held on Victory Base  
6 for the accused?

7 A. Right here in this room, sir.

8 Q. Does this courthouse have telephone, a commercial telephone  
9 line running to it?

10 A. No, sir.

11 Q. Did you try to make any attempts in finding somewhere else  
12 on Victory Base to get telephonic capabilities for the accused's  
13 Article 32?

14 A. Sir, I had asked around and looked around and didn't find  
15 anything.

16 Q. Who did you specifically talk to about that?

17 A. For instance, I spoke with my S6, the commo section in my  
18 brigade. I spoke with other personnel throughout post, 57th Signal  
19 Brigade--or Battalion, their telephone operator.

20 Q. And what did they tell you?

21 A. There's no phones available, but they actually found one  
22 where we did Ambuhl's 32 in Building 0, the conference room.

1 TC: Thank you, no further questions, Your Honor.

2 MJ: Captain [REDACTED] anything further?

3 (b)(6)-2; (b)(7)(C)-2 | **REDIRECT EXAMINATION**

4 **Questions by the defense counsel:**

5 Q. Captain [REDACTED] mentioned that there was significant  
6 enemy activity during the month of April, and this affected the  
7 physical transportation. To your knowledge, did this also affect  
8 electronic mail capabilities, to your knowledge?

9 A. Not to my knowledge, but it affected other things, sir.

10 DC: No further questions at this time, Your Honor.

11 TC: Nothing further, Your Honor.

12 [The witness was excused, duly warned, and withdrew from the  
13 courtroom.]

14 MJ: Captain [REDACTED] (b)(6)-2; (b)(7)(C)-2

15 DC: Your Honor, the defense wishes to call Major [REDACTED]  
16 Major [REDACTED] (b)(6)-4; (b)(7)(C)-4 U.S. Army, was called as a witness for the  
17 defense, was sworn, and testified as follows:

18 **DIRECT EXAMINATION**

19 **Questions by the trial counsel [Captain [REDACTED] (b)(6)2; (b)(7)(C)2**

20 Q. Please state your name for the record, sir.

21 A. [REDACTED] (b)(6)-4; (b)(7)(C)-4

22 Q. And what's your duty position, sir?

018224

1 A. I'm the Executive Officer for 57th Signal Battalion.

2 **Questions by the defense**

3 Q. Sir, do you recall performing an Article 32 investigation  
4 for Staff Sergeant Frederick?

5 A. Yes.

6 Q. And do you remember about the preparations for that Article  
7 32 in March of 2004?

8 A. Yes, I do.

9 Q. Do you recall how you communicated with Sergeant First  
10 Class [REDACTED] in preparing for your Article 32? (b)(2)-(b)(7)(C) - 2

11 A. Email, phone call, face-to-face.

12 Q. Sir, where are you located?

13 A. I'm located at the stables, which is on the east side,  
14 north of LSA North--Dodge North.

15 Q. Here on Victory?

16 A. Yes.

17 Q. And you were able to communicate via email from across the  
18 installation to Sergeant First Class [REDACTED]

19 A. Email, phone call and voice, face-to-face, all three.

20 Q. Sir, did you consider your job to conduct a full and  
21 impartial hearing for Staff Sergeant Frederick?

22 A. Yes.

1 Q. And as part of your job as investigating officer, you  
2 signed a document outlining the witnesses that you felt were  
3 necessary for that investigation?

4 A. An initial list, yes.

5 Q. And that initial list, did you come up with that list?

6 A. Actually, it was preformed as part of the notification for  
7 the hearing.

8 Q. Sir, where did you get that preformed notification?

9 A. From Sergeant First Class [REDACTED] (b)(6) 4, 57(c) - 4

10 Q. Sir, did you supplement that at any time after reviewing  
11 any of the documents with your own witnesses?

12 A. I took notes along the way. In fact, I think they're  
13 included in my Article 32 packet. When you produced your list, they  
14 kind of synced up with the folks that I had in mind anyway.

15 MJ: Major [REDACTED] (b)(6) 4 - (b)(7)(C) 4  
16 authority to order your own witnesses?

17 WIT: Through the course of the investigation, yes, sir.

18 MJ: That you weren't bound by either the Sergeant [REDACTED] list  
19 or the defense list?

20 WIT: Yes, sir.

21 MJ: Okay.

22 DC: [To the MJ] Sir, may I have the Article 32 investigation?

1 [MJ provided documents to DC.] Retrieving the Article 32  
2 investigation.

3 **Questions by the defense [continued]:**

4 Q. Major <sup>(b)(6)-4;(b)(7)(C)-4</sup> [REDACTED], is that the investigation report that you  
5 made? Does that look familiar?

6 A. Yes.

7 Q. In there, in the investigating officer exhibits, you listed  
8 a number of your email traffic. Do you recall?

9 A. Yes.

10 Q. And in one of those emails, you noted that some of the  
11 defense witnesses and document requests were, quote, very relevant.  
12 Do you recall making that? Do you want me to show you? [DC shows  
13 witness document.] <sup>(b)(6)-2;(b)(7)(C)-4</sup>

14 MJ: Captain [REDACTED] it's very difficult for me to follow along  
15 with this, since you keep taking the exhibit back from me. Do we  
16 have another copy?

17 DC: No, sir, when I was trying to make additional copies, the  
18 photocopier available could only do one copy at a time. And when I  
19 was making photocopies for the court reporter, for my own copies, we  
20 had to deal with the specific circumstances that we find here at  
21 Victory SJA.

22 MJ: Trial counsel, do you have a copy of the 32 report?

1 TC: Yes, Your Honor, I do.

2 MJ: But then you wouldn't have a copy.

3 TC: That's correct, Your Honor.

4 MJ: Okay, I'll do the best I can without a copy. Go ahead.

5 DC: Sir, if it would please the Court, maybe we can get  
6 something now that we can mark with either tape or paper clips.

7 MJ: Just go ahead.

8 DC: Okay, sir. We're doing the best we can.

9 MJ: No, I understand, Captain [REDACTED] (b)(6) 2 (b)(7)(c) 2

10 DC: Sir, before we get there, we'll go in order----

11 MJ: Captain [REDACTED] do you want some paperclips?

12 DC: Yes, sir, that would be helpful. [MJ provides paperclips  
13 to DC.] Thank you, sir.

14 **Questions by the defense [continued]:**

15 Q. Sir, were you expecting a defense delay in this case?

16 A. Was I expecting a defense delay?

17 Q. Yes, sir.

18 A. Obviously, yes, from the civilian attorney, as matter of  
19 fact, I think I had asked you several times about it.

20 MJ: Captain [REDACTED], you're going to need to stand by the  
21 microphone. (b)(6)-2 (b)(7)(c)-2

22 DC: Okay, sir.

1 TC: Could the witness repeat his last response, because I  
2 didn't hear that.

3 WIT: I said that I had asked the defense several times if he  
4 requested a delay, especially with the civilian attorney coming on.

5 Q. Sir, I'm going to show you Investigation Officer Exhibit  
6 Number 19. Do you recognize that?

7 A. Yes.

8 Q. And what is that?

9 A. This is your witness list, your request for evidence, I  
10 guess.

11 MJ: What page is that on?

12 DC: Investigating Officer Exhibit 19, IOE 19, sir.

13 MJ: Got it.

14 Q. Did you find any of these witnesses and/or documents would  
15 help you conduct a full and impartial hearing?

16 A. Yes.

17 Q. Which ones?

18 A. Significant activities.

19 Q. Significant activities?

20 MJ: Please speak up, Major [REDACTED] (516)-4-(570)-4

1 WIT: The 15-6, which obviously covers all of that, because  
2 that's possibly what you were asking for earlier was what was  
3 involved in the 15-6.

4 MJ: Which...because I don't have the document before me.

5 WIT: This is Major General Taguba's 15-6 that was initiated,  
6 sir.

7 MJ: Got it, go ahead.

8 WIT: Which I actually did introduce into my Article 32 for that  
9 very reason.

10 MJ: Okay, it was considered as an exhibit.

11 WIT: Yes, sir, it was.

12 Q. Any other documents in the defense request that appeared  
13 unreasonable or irrelevant?

14 A. I can't remember off the top of my head.

15 Q. The witness list that the defense outlined in its witness  
16 request list included co-accused, eyewitnesses and chain of command  
17 and alleged victims. Did you find those would be helpful in order to  
18 conduct a full and impartial investigation?

19 A. Yes, but obviously in my packet, I had numerous sworn  
20 statements from co-accused, the chain of command and from detainees  
21 at the prison.

(b)(6)-4; (b)(7)(C)-4

1 MJ: Major [REDACTED] by co-accused, at the time of the hearing,  
2 were they all basically represented by counsel, to your knowledge?

3 WIT: Actually, when the government requested they appear, they  
4 all responded back by counsel. However, in my CID packet, I did have  
5 the sworn statements, as well as the CID interviews in there.

6 MJ: Captain [REDACTED] is there any issue about the unavailability  
7 of the co-accused? (b)(6)-2; (b)(7)(C)-2

8 DC: All but one, Your Honor.

9 MJ: Who's that?

10 DC: PFC England, Your Honor. She did not reply back that she  
11 was not unavailable due to her counsel making a statement on her  
12 behalf.

13 MJ: Was she represented by counsel?

14 DC: She was not represented by counsel at the time. In fact,  
15 when we go through the verbatim transcript, the reason why she was  
16 declared unavailable was solely because of her presence in the United  
17 States, according to government, through Captain [REDACTED] (b)(6)-2; (b)(7)(C)-2  
18 representations to the defense. And that's why she testified a month  
19 later via telephone in the Ambuhl case.

20 WIT: She was declared unavailable because she was outside the  
21 100-mile radius.

22 DC: Outside the 100-mile radius.

(b)(6)-4, (b)(7)(C)-4

1 MJ: Major [REDACTED], anybody outside the 100-mile radius was  
2 unavailable in your mind?

3 WIT: Yes, sir. The question came up from the defense, I  
4 actually had to recess my hearing. I referred to my legal advisor,  
5 Captain [REDACTED] (b)(6)-2, (b)(7)(C)-2 and I asked her here, what were the  
6 guidelines with that, and that's kind of the response she gave me,  
7 sir. So that's what I put out.

8 MJ: So you applied a bright line 100-mile rule? More than 100  
9 miles, gone, you're unavailable?

10 WIT: Obviously, out of theater, sir. With the detainees and the  
11 detainees that were released----

12 MJ: Major [REDACTED] (b)(6)-4, (b)(7)(C)-4 e, it would be easier--understand what I'm  
13 asking. For those who were more than 100 miles away, forget the  
14 detainees, because they weren't more than 100 miles away.

15 WIT: Correct, sir.

16 MJ: They were detainees in the prison.

17 WIT: Yes, sir.

18 MJ: For those who were more than 100 miles away, did your  
19 inquiry stop once you found out they had redeployed or were outside  
20 of theater?

21 WIT: [No verbal response.]

(b)(6)2-(b)(7)(D)-2

1 MJ: And you simply say, and Captain [REDACTED] told you that if  
2 they're more than 100 miles away, they're unavailable.

3 WIT: Yes, sir.

4 MJ: And that was the end of your inquiry.

5 WIT: Well, at least the end of the inquiry, I wish I had all the  
6 data. I already had----

7 MJ: No, no, I'm just talking about as far as their being  
8 unavailable.

9 WIT: Yes, sir.

10 **Questions by the defense [continued]:**

11 Q. Major <sup>(b)(6)-4; (b)(7)(C)-4</sup> [REDACTED] did you have an opportunity to review Rule  
12 for Court-Martial 405, which governs Article 32 investigations?

13 A. I read it several times.

14 Q. And when you read it several times, did you consider any  
15 alternatives to testimony, other than in-person testimony?

16 A. Honestly, no.

17 Q. And why not?

18 A. Because I already had from the majority of those sworn  
19 statements and CID testimony.

20 Q. Sir, when you were looking at those sworn statements, were  
21 you able to cross-examine any of those statements?

(b)(6)2;(b)(7)(C)2

1 MJ: Captain [REDACTED] I understand you can't cross-examine the  
2 statements. There's no need to ask such a question.

3 Q. Were you able to further explore....

4 MJ: I get your point.

5 DC: All right, sir.

6 Q. When the defense made numerous requests in the verbatim  
7 transcript and later via email to do some of this questioning via  
8 email, did you take that under consideration?

9 A. Email?

10 Q. Via email?

11 A. I don't recall. I know we talked about telephonic  
12 representation.

13 Q. Would you have been amenable to conducting witness  
14 interviews for purposes of the Article 32 investigation via  
15 electronic mail?

16 MJ: Let me back up, rather than give you a hypothetical. Major  
17 [REDACTED] was at any time that proposed procedure proposed?

18 WIT: Email? (b)(6)-4; (b)(7)(C)-4

19 MJ: I'm assuming what you're talking about, you send an email,  
20 you get a question, it's like a chat room?

21 DC: Yes, sir, IRC?

1 MJ: Was that ever requested by anybody to your knowledge, to  
2 your memory?

3 WIT: It wasn't to me, sir, no, sir.

4 **Questions by the defense [continued]:**

5 Q. Did your legal advisor advise you on taking the fact that  
6 we are in a war zone into account when determining ways and means of  
7 conducting a full and impartial investigation under the rules?

8 A. We never really had a discussion such as that.

9 Q. Did you take into the fact that we were currently in a war  
10 zone and explore options other than in-person testimony to ensure  
11 that your investigation complied with the Rule of Court-Martial 405?

12 A. Obviously, it came up in the courtroom. Captain [REDACTED]  
13 seemed to think that given the circumstances, we weren't really set  
14 up to do that, in lieu of the fact that I did have the statements and  
15 such which are admissible under Rule 405. We didn't pursue it to  
16 great lengths.

17 MJ: You considered, you had sufficient information that you  
18 believed complied with the Rule to make your findings and  
19 recommendations?

20 WIT: Yes, sir.

21 MJ: Got it.

1 **Questions by the defense [continued]:**

2 Q. And that consisted solely of documentary evidence and the  
3 testimony of three people?

4 A. And obviously the photos I had, as well. It just wasn't  
5 the documentation.

6 MJ: Okay, you're talking about the photos plus the documents?

7 WIT: Yes, sir.

8 MJ: Plus the three witnesses who testified.

9 WIT: Yes, sir.

10 MJ: Got it.

11 Q. Sir, do you recall the closing arguments of the prosecution  
12 in the Article 32 investigation?

13 A. Could you be more specific?

14 Q. More specifically, do you call the presence of a laptop  
15 computer and an audio visual equipment----

16 A. A summary?

17 Q. For the summary?

18 A. I recall the summary, yes.

19 Q. So the ability to conduct an email or a chat room argument  
20 was available, at least for the closing argument.

21 A. There was a computer slideshow. I don't see the----

1 MJ: Was there a computer slideshow with a PowerPoint  
2 presentation with Internet capability?

3 DC: Your Honor....

4 MJ: No, I'm just asking.

5 DC: All I'm saying is, Your Honor, it would not be a far  
6 stretch to even have to change venue locations for the Article 32 in  
7 order to comply with the defense's numerous requests that this  
8 Article 32 investigation in order to partially comply with the Rules  
9 of Court-Martial, that we explore all options. Because just like any  
10 other Article 32 outside this theater, we should take those steps  
11 necessary to equalize this situation.

12 MJ: I got it, Captain (b)(6)2- (b)(7)(C)-2 I understand your point. My  
13 simple point is, is that a computer-generated stand alone  
14 presentation against a screen is not the same as a video  
15 teleconference capability, which is what you're talking about.

16 DC: No, sir, I wasn't talking about video teleconference.

17 MJ: What were you talking about then?

18 DC: I was talking about electronic mail or Internet relay----

19 MJ: Did you ever ask for Internet mail?

20 DC: Yes, sir, I did, and that's why the verbatim transcript,  
21 I'll be going through....

1 MJ: Is it in your list of objections, since I don't have them  
2 now?

3 DC: Yes, sir, if you look in--when referenced the objections in  
4 my electronic mail notification pursuant to R.C.M. 405 within the 5  
5 days, you will notice that I asked the convening authority to explore  
6 these options, that I had mentioned numerous times during the Article  
7 32 investigation, itself, both through the investigation officer and  
8 to the----

9 MJ: Let me see the----

10 TC: Sir, it's attachment 3 of our motion. There's a list of  
11 objections.

(b)(6)-2;(b)(7)C-2

12 MJ: Thank you, Captain [REDACTED]. [Pause.]

13 DC: If it would help, Your Honor, it's specifically objection  
14 11 listed in the report where the defense objected to the unavailable  
15 witnesses and made the request to the convening authority.

16 MJ: Where is it in here that says that you asked for email?

17 DC: Your Honor, that's the reason why I requested a verbatim  
18 transcript. Because Your Honor, I made the objection----

19 MJ: What page is it in the verbatim transcript?

20 DC: If I may have a moment, sir.

21 MJ: Sure.

1 DC: Your Honor, during the defense's initial presentation on  
2 page 18 and 19 of the verbatim transcript, "The defense is more than  
3 willing to request recesses until we are able to get as much  
4 information as possible, including getting the 15-6 investigation.  
5 And the defense is also going to utilize whatever means necessary,  
6 including email, telephone, whatever we can, given the nature of our  
7 surroundings, in order to get as much information as possible to use  
8 so that we can make the appropriate decision as to disposition and  
9 that you can make a proper recommendation to the higher----

10 MJ: Captain [REDACTED] I just asked you where it says "email," I'm  
11 not asking for the whole thing. <sup>(b)(6)2-(b)(7)k 2</sup> What line is that on?

12 DC: Sir, it's the bottom of--line 23 and lines 1 through 10 on  
13 page 19.

14 MJ: Okay, but in your objections that you sent to the--so you  
15 state this parenthetical in here on your email, "Alternative forms of  
16 testimony may be considered, telephonic, email, IRC," etceteras,  
17 preserves it, even though it's not in your list of objections at the  
18 32.

19 DC: Yes, Your Honor. I not only cross-referenced those lists  
20 of objections in the appendix, but I made the specific ones. But we  
21 need to break open the box.

22 MJ: I got it, go ahead.

1 DC: And I'll go through that in a moment in depth.

2 **Questions by the defense [continued]:**

3 Q. Sir, do you recall that opening statement?

4 A. Not verbatim.

5 MJ: Counsel, it's in your transcript. Whether he recalls it or  
6 not is not the issue.

7 Q. Did you consider taking the war in Iraq and our presence  
8 here in Iraq in making determinations of alternatives to testimony,  
9 other than live witnesses?

10 A. I guess in terms of the war in Iraq, I would consider the  
11 burden of gathering evidence harder, harder to do, so I don't think  
12 so, no.

13 Q. Sir, in your report, I'm going to reference back to your  
14 report, and on the continuation sheet of block 21, DD Form 451, which  
15 is listed as your Appendix F, court-martial witnesses availability,  
16 do you recall this document?

17 A. Yes, this was provided by....

18 Q. I'm showing that----

19 MJ: We can't mumble. Ask the question and, you're looking at  
20 the document, Major [REDACTED] if you have an answer you need to speak  
21 up on it. It's not a conversation between you two. The court

(b)(6)-4; (b)(7)C-4  
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(b)(6)-2, (b)(7)(C)-2

1 reporter can't hear it. You show him the document, ask the question,  
2 Captain [REDACTED] or give me an answer.

3 WIT: I recall that I spoke that I wanted to have this in my  
4 report.

5 MJ: Referring to....

6 WIT: I cross-referenced what I thought with what the government  
7 had in terms of their various categories, i.e. outside the 100-mile  
8 radius, and those rights contained on----

9 MJ: Okay.

10 Q. In that specific section of that report, in that first  
11 line, you made the determination based on the evidence you received  
12 at the Article 32 investigation that they were not only unavailable,  
13 but that they were going to be unavailable at trial, as well.

14 A. I said, were more than likely not available.

15 Q. More than likely unavailable.

16 A. Right, and one of the----

17 MJ: Major [REDACTED] (b)(6)-4 (b)(7)(C) 4  
18 question that's being asked.

19 Q. And that particular sentence was for all the witnesses that  
20 you listed underneath it.

21 A. In these various categories, yes.

22 Q. In these various categories.

1 A. Obviously, unless their category changed.

2 DC: Sir, no further questions.

3 MJ: Captain [REDACTED] (b)(6)2-(b)(7)(C)-2

4 **CROSS-EXAMINATION**

5 **Questions by the trial counsel [Captain [REDACTED]**

6 Q. Sir, I just want to be clear of how you proceeded with the  
7 investigation. So you were given a case file in this case. Is that  
8 correct?

9 A. Yes, Sergeant [REDACTED] hand delivered the case file. He had  
10 me initial the draft sheet, the notification, that I signed that had  
11 the....

12 Q. The one witness being Agent [REDACTED] at that point?

13 A. Yes.

14 Q. And then after you received the defense witness list, did  
15 you add a couple more witnesses that you wanted to have in-person,  
16 live testimony from?

17 A. I created a list.

18 Q. Were one of those people Sergeant [REDACTED] Did he come in  
19 and testify?

20 A. Sergeant Major [REDACTED] (b)(6)-2;(b)(7)-2

21 Q. Yes. And Sergeant [REDACTED], is he another person that came  
22 in to testify?

1 A. Yes.

2 Q. And then there were other people who came in, but then  
3 invoked their Article 31 rights. Is that correct?

4 A. Yes.

5 Q. So, Sergeant [REDACTED] created a memo with one witness, and  
6 then from my understanding, you created, or you caused to have more  
7 people show up than just that one witness. Isn't that correct?

8 A. Obviously, we tried to get as many folks available as we  
9 could.

10 Q. And so you had six live witnesses come to the Article 32.  
11 Is that correct?

12 A. [No verbal response.]

13 Q. Well, you had two or three people testify, Sergeant

14 [REDACTED]

15 A. The government and defense.

(b)(6)-4; (b)(7)(C)-4  
(b)(6)-2; (b)(7)(C)-2

16 Q. And then three people came in and took their Article 31  
17 rights. Is that correct?

18 A. Yes.

19 Q. [REDACTED], that's one, Captain [REDACTED] is another.

20 A. Captain [REDACTED]

1 Q. Now, that initial case file from CID that you received, you  
2 received a whole bunch of sworn statements in there. Is that  
3 correct?

4 A. I received a pretty thick packet.

5 Q. And you reviewed the statements of some of the people that  
6 the defense wanted there at the hearing that day. Is that correct?

7 A. I read that cover to cover, sir.

8 Q. Now, you talk about that some of those people were over 100  
9 miles away, what did you do to try to get them on the telephone? Did  
10 you think about how much relevant testimony they were going to have?

11 A. Honestly, reading 405, sworn testimony, unsworn testimony  
12 in some circumstances, was authorized, acceptable. Honestly, since I  
13 had that sworn testimony, yes, I accepted it. Did I try and go over  
14 that 100-mile radius? No.

15 Q. Now, what went into some of your considerations as far as  
16 the 100-mile radius? The operational situation in Iraq, did that go  
17 into your thinking?

18 A. If they were in theater, I mean, you can equate 100 miles  
19 stateside to literally 10 to 15 miles here if you look at it, just  
20 between here and the Green Zone. So, it did play a role. Obviously,  
21 stateside, Germany, do we want to bring those folks over here? The  
22 rules of evidence kind of allow you that 100-mile limit just to

1 alleviate a lot of pain associated with it. I guess that's my  
2 interpretation of 405.

3 Q. Now, you mentioned that 10 or 15 miles in this environment  
4 could be equated to 100 miles back at stateside. Can you talk about  
5 the operational situation that was present in Iraq in April of 2004?

6 A. I think April was the deadliest month in theater, sir.

7 Q. So there were lots of attacks and insurgents on our  
8 convoys?

9 A. Mortars, yes.

10 Q. Did that play into your consideration about going out to  
11 Abu Ghraib and interviewing some of the detainees out there?

12 A. That was never proposed, but obviously, that would play a  
13 role. It was proposed to try and find some of the released  
14 detainees, to try and find some detainees to bring them here. But  
15 once again, it seemed--I had testimony of those key witnesses  
16 already. To try and find them, it would seem to be too difficult a  
17 task given the timeline.

18 Q. Now, when you say "key witnesses," are you talking about  
19 people like Specialist Harman, Sabrina Harman, one of the co-accused  
20 in this case?

21 A. Co-accused and the detainees that were actually abused,  
22 that they had gotten their medical records and....

1 Q. And you also had a CD full of pictures?

2 A. And videos.

3 Q. And did some of those pictures and video show the accused  
4 in this case perform certain acts with the detainees?

5 A. Yes.

6 Q. That were actually charged as charged offenses in this  
7 case?

8 A. Yes.

9 Q. You also had in your possession General Taguba's AR 15-6.

10 A. I actually recessed my hearing just so that I could get it  
11 into testimony.

12 Q. Okay, so the hearing actually started on the 2d of  
13 April----

14 A. It started on the 2d and ended on the 11th.

15 Q. And then so you waited a week and then had to reopen while  
16 that 15-6 was being obtained. Is that correct?

17 A. No, I believe we recessed the first time, at which the  
18 availability--the defense tried to--asked us to try and find some  
19 folks. That was that first 7-day recess. The recess between the 9th  
20 and 10th was, we found out the 15-6 was done, could be released. So,  
21 we recessed to allow that to be copied and put into evidence.

1 Q. Did you consider that 15-6 done by General Taguba as part  
2 of your recommendations?

3 A. Yes, I have to.

4 MJ: Did you consider General Taguba's findings?

5 WIT: Yes, sir. In fact, I addressed that 15-6 in my report.

6 Q. Now going to the judge's last question about the findings  
7 of General Taguba, did you just agree wholeheartedly with General  
8 Taguba, or did you take what was in the 15-6 and add it to what you  
9 already knew?

10 A. Well, what I did was I took the results of his report and I  
11 provided the relevance to my investigation.

12 Q. So, you took what you knew already, the photographs, the  
13 statements from the co-accused and some of the detainees, and applied  
14 it to what General Taguba already had?

15 A. Correct.

16 Q. I'm now showing you, which is Attachment 3 of the  
17 government's motion, do you recognize what that is?

18 A. Yes.

19 Q. Now, what is that?

20 A. Those are the defense objections.

21 Q. So this is what defense objected to at the Article 32. Is  
22 that correct?

1 A. Yes.

2 Q. On the second page of that, number 11, what's your response  
3 to number 11?

4 A. Do you want me to read it verbatim?

5 Q. Yes, please.

6 A. "I made a ruling on the availability of witnesses for the  
7 purpose of this Article 32 investigation. If they were outside the  
8 100-mile radius or either a detainee or former detainee, they were  
9 considered unavailable due to the extraordinary security and  
10 operational measures and concerns associated with providing their  
11 testimony." (b)(6) 4; (b) 7(C) 4

12 MJ: Major [REDACTED] did you...and I asked you earlier about a  
13 witness that was outside the 100 miles, and you indicated that your  
14 legal advisor had indicated that was kind of a bright line rule.

15 WIT: Bright line rule, sir?

16 MJ: By that, I mean, if a witness was 101 miles away, they  
17 were, per se, unavailable? And if they were 99 miles away, they  
18 weren't per se, unavailable, that you have to balance?

19 WIT: Sir, I don't want to say that she made that clear  
20 delineation, because obviously, you really don't have to do that.

1 MJ: Well, let me ask you this, if a witness is more than 100  
2 miles away, did you consider what they might say? And say, even  
3 though they are 100 miles away, I may bring them here?

4 WIT: Yes, sir. Obviously, if there was a witness who had some  
5 type of, you know, truly relevant testimony that I didn't already  
6 have, I would like to think that we would kind of go to some tougher  
7 means to get them here.

8 MJ: So on each of these witnesses that you list that were more  
9 than 100 miles away, did you have some evidence of what they would  
10 have said?

11 WIT: Sir, I mean, we can go down the list, but for all intents  
12 purposes, yes, sir.

13 MJ: And then after you have that evidence, you considered both  
14 the location and assessing their testimony, or just their location?

15 [Pause.] I know, Major ██████████ you're not a lawyer, so just tell  
16 me what you considered. (b)(6)-4; (b)(7)(C)-4

17 WIT: Sir, I considered both----

18 MJ: I want you to understand something, there's no right or  
19 wrong answers.

20 WIT: Yes, sir.

21 MJ: The only right answer is the truth, okay? So tell me what  
22 you thought at the time.

1           WIT: I considered both, sir. Again, there wasn't a witness, or  
2 if somebody to testify that was unique, I guess is the way I want to  
3 phrase that.

4           MJ: So you would say most of these people were cumulative to  
5 somebody else?

6           WIT: Yes, sir.

7           MJ: And you considered--just to make sure what you considered,  
8 you considered the sworn statements of the co-accused?

9           WIT: Yes, sir.

10          MJ: The pictures?

11          WIT: Yes, sir.

12          MJ: And the live testimony?

13          WIT: Yes, sir.

14          MJ: Did you consider anything else? Any other sworn  
15 statements?

16          WIT: Besides what I already had, I mean, I had all of that  
17 already.

18          MJ: No, I didn't ask--no, but I'm asking, for example, the  
19 detainees that were unavailable, did they provide sworn statements?

20          WIT: I had sworn statements in the CID packet from detainees,  
21 yes, sir. Outside of that, no, sir.

1 MJ: Let me back up, you're given a packet that started the  
2 investigation with all this stuff in there.

3 WIT: Yes, sir.

4 MJ: And a lot of that, quite frankly, designed to know who you  
5 need to call or not call. But now, I want you to go to the end of  
6 the investigation, did you consider the--and it's at least unclear as  
7 I'm reading your report, that's probably my fault since I just say  
8 this voluminous document, you had three witnesses testify at least to  
9 something as opposed to not invoking. You had sworn statements from  
10 co-accused, and you had pictures. Did you consider the statements of  
11 the detainees that you found unavailable in making your findings?

12 WIT: No, sir.

13 MJ: Even though it was in the--okay. You understand what I'm  
14 talking about?

15 WIT: That goes to cumulative, sir.

16 MJ: So, did you consider anything else in making your  
17 recommendations other than those three categories I just stated?

18 WIT: No, sir.

19 MJ: Thank you. Captain [REDACTED]

(b)6-2 ; (b)(7)(C)-2

20 TC: No further questions, Your Honor.

21 MJ: Captain [REDACTED]

22 DC: Yes, sir.

1 **CROSS-EXAMINATION**

2 **Questions by the defense:**

3 Q. Sir, you mentioned just now that you made a decision that,  
4 on witness availability, I'm going to read to you--because I need to  
5 read to you quickly from the verbatim transcript on page 126 and page  
6 127, just before you made that decision. I mentioned, "Sir, if  
7 that's the case, the defense would recess until we are able to  
8 communicate by email or whenever you make your decision or able to  
9 procure additional witnesses and continue this Article 32  
10 investigation. Major <sup>(b)(6)-4, (b)(7)(c)-4</sup> [REDACTED] I'm going to take an immediate  
11 recess now. Let me call, inaudible, and then we'll reconvene today  
12 and we can go ahead," and then we reconvened later. At that point,  
13 do you recall talking with your legal advisor?

14 A. Yes, that's when I talked to Captain <sup>(b)(6) 2 - (b)(7)(c) 2</sup> [REDACTED] about this  
15 issue.

16 Q. And what was her--what was your decision about the use of  
17 email?

18 A. Again, if you read my--result of the objection, she said,  
19 "Out of the 100-mile radius, detainees, unavailable." So if they're  
20 determined unavailable, I believe that kind of ends the  
21 communication. Unavailable is unavailable, I guess is what I'm  
22 saying.

1 DC: No further questions, sir.

2 TC: Nothing further, Your Honor.

3 [The witness was excused, duly warned, and withdrew from the  
4 courtroom.]

5 MJ: Defense?

6 DC: Nothing further, Your Honor.

7 MJ: Trial counsel, do you wish to present any evidence?

8 TC: No, Your Honor.

9 MJ: Captain [REDACTED] do you wish to add to your brief?

10 DC: Yes, sir. (S)(6)-4, (S)(7)(C)-4

11 MJ: Proceed.

12 DC: Your Honor, the Rule for Court-Martial 405 presumably was  
13 designed for both non-wartime and wartime environments. That is why  
14 Rule 405 provides for alternative means of testimony for this  
15 particular situation. In the defense's objections to both the  
16 witness and document availability, as part of that objection and  
17 throughout the Article 32 investigation, the government--the defense,  
18 time and time again said, "Government, we need to think outside the  
19 box here. I take into account the fact that we are in Iraq. I've  
20 taken into account that April is a bad month for the Coalition. So  
21 this is important. This as an important case for my client. These  
22 are important witnesses for this investigation. In order for you to

1 conduct a full and impartial investigation, let's explore alternative  
2 means of communications. I understand the fact that we can't have  
3 telephonics [sic], but I do recognize that before this hearing, where  
4 people within this very room earlier were communicating via  
5 electronic mail. We do know that we could have even had this  
6 presentation on Victory Base in at least two people's offices,  
7 Sergeant First Class [REDACTED], who received email, and Major [REDACTED]  
8 who also received email. (b)(6)-4; (b)(7)(C)-4

9 And sir, if you further look into the packet of all the  
10 different personnel who communicated via email during this time, it's  
11 staggering. The convening authority, the Staff Judge Advocate  
12 communicating with respective Brigade Commanders soliciting for 15-6  
13 officers. All of this was done prior to April and prior to this  
14 hearing, the Article 32 investigation.

15 MJ: Captain [REDACTED] let's narrow this down to a little bit more  
16 to legal issues. (b)(6) 2; (b) 7 (C) 2

17 DC: Yes, sir.

18 MJ: I understand that. Now, you have a whole list of  
19 objections here with your email, but what I'm hearing you telling me  
20 is, essentially, what you're objecting to is the failure to produce  
21 other evidence.

22 DC: Yes, sir.

1 MJ: Does that summarize--I mean, okay, that's what we're going  
2 to focus on, but do you have anything else that you're objecting to  
3 to me today other than that?

4 DC: Other than the availability of witnesses and documents?

5 MJ: I'm talking about the failure to provide evidence.

6 DC: The failure to provide evidence, defense evidence, and its  
7 prejudice it has caused this defense.

8 MJ: No, we're going to get there. We're going to get there.  
9 But I just want to make sure I know--because your whole list of some  
10 of these things, you apparently are not raising that's in your list  
11 of objections here.

12 DC: Yes, sir.

13 MJ: So what you want me to talk about or decide is whether or  
14 not Sergeant Frederick's substantial right to have evidence produced  
15 at the 32 were not complied with, and as such, he was prejudiced.  
16 You would agree with me that that's our standard.

17 DC: That's our standard, yes, sir.

18 MJ: So let's back up to step one. Step one is the reasonable  
19 availability issue. Now, Major [REDACTED] gave, quite frankly, two  
20 answers to the same question. On the one hand, he said, "I  
21 considered the 100 miles as being unavailable," and then later on, he  
22 says, "Well, it depends what they would say," too. And obviously, if

1 it's a bright line rule of 100 miles, that is clearly not the legal  
2 standard, and whether that was miscommunication or just misspoken on  
3 his part, that's the way it goes. But if he applied, because I  
4 understand, that's wrong and that's error.

5 DC: Yes, sir.

6 MJ: There's no dispute. Trial counsel, do you have any dispute  
7 with that?

8 TC: No, that's the state of the law, Your Honor.

9 MJ: However, on the other hand, if you consider the distance  
10 with the need of the testimony, the security situation and the  
11 cumulative nature of the testimony and find the person unavailable,  
12 that would appear to comply with the state of the law of finding one  
13 unavailable. True?

14 DC: True, Your Honor. That's why the focus of my questions in  
15 the beginning were the victims that would be necessary for a full and  
16 impartial hearing, the co-accused, full and impartial hearing, and I  
17 asked him during my list of people that he thought were, quote, in  
18 his report, very relevant.

19 MJ: But I come back to the--what I'm saying is, that if he  
20 applied that second standard, and quite frankly, there's an issue  
21 there.

22 DC: Yes, sir.

1 MJ: But assuming he applied that second standard, that was the  
2 correct standard for unavailability.

3 DC: That would be....

4 MJ: That would be that considering distance, operation  
5 concerns, but most importantly, necessity of the testimony, which is  
6 what he said when he fleshed it out, that if it was an important  
7 witness, we'd get him here, but most of this was cumulative with  
8 something else.

9 DC: Yes, sir.

10 MJ: Now let's go to step two. Of all these witnesses, since  
11 what we're talking about is witness availability, and this is in the  
12 IO report right after your objections. Ignoring those who invoked  
13 their rights, because at least that was his conclusion, that these  
14 people all invoked their rights.

15 DC: Yes, sir.

16 MJ: And although you take issue whether England actually  
17 invoked her rights, you would agree with me....

18 DC: She's outside the 100-mile radius.

19 MJ: Well, no, that's not what I was going to say, but she was a  
20 suspect, and actually she's currently a charged suspect.

21 DC: Yes, sir.

1 MJ: So his conclusion that she had invoked, although it may not  
2 have been correct in some ways, certainly was based on reasonable  
3 interpretation of her alleged role in this, true?

4 DC: Sir, I don't want to speculate.

5 MJ: Well, isn't she....

6 DC: Because of the fact---

7 MJ: One moment, one moment. Well, the fact that she's listed  
8 among the specifications would kind of make her a co-accused.

9 DC: Yes, sir, I agree to that.

10 MJ: Okay.

11 DC: But not necessarily that she wouldn't testify. Another  
12 investigating officer in another case----

13 MJ: I'm just saying, is it strikes to the Court it's not an  
14 unreasonable conclusion whether the investigating officer include  
15 this person who would have invoked her rights had she testified. Let  
16 me move that to the side. Of all these other people listed here on  
17 your list, or actually his list, I guess, based on your list, and  
18 that's the list we're talking about, right?

19 DC: Yes, sir.

20 MJ: What would any of these people have said that by not having  
21 the testimony prejudices the substantial right of your accused?  
22 Start at the top and work down.

1 DC: All right, sir. First of all, and I apologize for not  
2 being able to present it, but I'm having problems printing out my  
3 discovery responses from the government. I received, as part of my  
4 discovery, a list of five witnesses, live testimony witnesses that  
5 were going to be present at court-martial and be provided by the  
6 government. Sir, four of those----

7 MJ: Captain [REDACTED] here's what I'm talking about. I'm not  
8 talking about today. (b)(6)2-(b)(7)(C)-2

9 DC: Yes, sir.

10 MJ: Today's different.

11 DC: Yes, sir.

12 MJ: Today, somebody could say something very relevant to what  
13 happened. The question is, at the time of the 32, what would these  
14 people--I mean, you would agree with me that that's what we got to  
15 look at, the time of the 32, not today.

16 DC: Yes, sir.

17 MJ: Not last week, because if all of a sudden a witness showed  
18 up that was totally exculpatory today, does that mean you get a new  
19 32?

20 DC: Sir, but the prejudice that's established by that----

21 MJ: No, no, just answer each question as I ask it, okay?

22 DC: Okay, sir.

1 MJ: But I'm saying is, don't we look at the witness  
2 availability and what they would say at the time of the request of  
3 the 32, not what they would say today, necessarily?

4 DC: Yes, whether or not they would be valid requests.

5 MJ: So my question goes back to you, at the time of this 32,  
6 did you have in your possession anything from any of these witnesses  
7 that the failure of him to consider prejudices the substantial right  
8 of your accused?

9 DC: Yes, Your Honor, at the time.

10 MJ: Okay, which one, or which ones?

11 DC: PFC England, Your Honor, as part of the--during the course  
12 of the investigation----

13 MJ: Didn't he consider England's statement?

14 DC: He did consider her statement, yes, sir.

15 MJ: Is there anything--did you interview Private England, and  
16 she said anything inconsistent with her statement?

17 DC: I haven't been able to interview her, but, sir----

18 MJ: I know she's now--but the question goes back to you, is  
19 that he considered her statement, and now you're saying, that's the  
20 same statement that tells you that she was going to be exculpatory.  
21 So how is that prejudice that he considered the statement that you're  
22 now saying--don't we have to talk about witnesses that he didn't

1 consider, not ones he did? Do you understand what I'm saying? I  
2 know this gets confusing if we're talking about negatives here. What  
3 you're telling me is, is that he considered Private England's  
4 statement, and that's the statement I'm using to show you that she  
5 had exculpatory evidence for my accused. And of course, now we're  
6 back into, well, he considered that then.

7 DC: Yes, sir, but I wasn't able to--considering it and getting  
8 the right to cross-examine witnesses, that's a right under R.C.M.  
9 405. During this particular hearing, during the course of the  
10 investigation, it was the government's position that the photograph  
11 showing PFC England in an allegedly maltreatment pose, which was then  
12 used by the government to establish evidence against the accused for  
13 one of these charged specifications, said that she was forced to do  
14 that by Staff Sergeant Frederick. For example, when I cross-examined  
15 the CID agent, he said that she didn't look--and that's an area that  
16 I was not able to explore with PFC England.

17 MJ: But then now what you're saying to me is--but then now we  
18 get into the speculative area. She might have said something that  
19 might have helped you. You don't know.

20 DC: Yes, sir, and that's what I wanted to have in order to  
21 enforce my client's rights under R.C.M. 405.

(b)(6)-2-(b)(7)(C)-2

1 MJ: No, but my point being though, Captain [REDACTED] is that, do  
2 you believe that you're entitled to a new 32 based on speculative  
3 evidence that might have come out had a witness been called?

4 DC: Well, sir, I think another would----

5 MJ: No, if you answer that question, I'll let you go on.

6 DC: Well, sir, I can only make proffers to the investigating  
7 officer based on information that I received. And I cannot----

8 MJ: But you're not answering my question. You told me is that  
9 England was relevant because she might have said something that might  
10 have helped your client.

11 DC: Yes, sir.

12 MJ: That's what you just told me.

13 DC: Yes, sir.

14 MJ: And you think that's sufficient to show prejudice.

15 DC: Sir, I'm going to have a whole bunch more.

16 MJ: I'm going to give you a chance to go through all of these,  
17 Captain [REDACTED] (b)(6)-2, (b)(7)(C)-2 I'm not cutting you short. I'm just trying to figure  
18 out the legal principles here. We've got all the time in the world.  
19 Don't worry about that. I'm just simply saying is that it strikes to  
20 me is that's not the standard, as you may tell it. The standard is  
21 not a speculative what might have been said, because you don't know  
22 what she would say.

1 DC: No, sir.

2 MJ: And so, do you get a new 32 based on something that nobody  
3 knows what she would have said, or any of these witnesses?

4 DC: And sir, that's the problem. That's one of the cruxes of  
5 the problem, when we are not allowed the opportunity to cross-examine  
6 the witnesses. In our system of justice, that's how we find the  
7 truth. We don't look at things face value, one side of the events  
8 without--in an antagonistic form.

9 MJ: But it's very difficult for you to show actual prejudice  
10 based on non-testimony, wouldn't you agree?

11 DC: Exactly, sir.

12 MJ: You're saying, "My prejudice is a failure to possibly get  
13 favorable testimony." That's what you're telling me.

14 DC: On that particular witness.

15 MJ: On those witnesses that did not testify that you have  
16 nothing--now my question goes back, and let's move on from England.  
17 On this list, who had testimony, who had evidence that you knew about  
18 at the time that would have been at least arguably relevant that the  
19 32 officer didn't have and that was not cumulative to what he did  
20 have?

21 DC: Detainees, detainees' statements.

22 MJ: Okay.

1 DC: As he mentioned, he did not even consider one of the  
2 statements, which is a form of an alternative testimony allowed  
3 under----

4 MJ: Did you have those statements?

5 DC: I did, sir.

6 MJ: Did you have an option to give him those statements?

7 DC: Yes, sir, I did.

8 MJ: And you didn't do it.

9 DC: I requested that I----

10 MJ: No, you said----

11 DC: Sir----

12 MJ: Captain (b)(6)2; (b)(7)(C)-2 I only go with what you tell me. You said  
13 he didn't consider these statements and he should have.

14 DC: He should have.

15 MJ: And I'm telling you, is that you had an opportunity to hand  
16 those statements to him and you didn't.

17 DC: Yes, sir.

18 MJ: And so it's his fault that he didn't reach out and grab  
19 those statements from you?

20 DC: No, sir, I didn't feel like the statements were helpful to  
21 my case.

22 MJ: Then how----

1 DC: Sergeant Frederick--in one of the detainee witness lists.

2 MJ: Now, wait a minute. So he doesn't consider statements that

3 hurt your case, and that is now error.

4 DC: Sir, this is a statutory right and a victim's statement, a

5 victim....

6 MJ: But you had the option to give him the statement.

7 DC: Sir, that is not--for the purposes of the victims, the

8 statement and the conclusion of the defense was that that was an

9 inadequate form of testimony.

10 MJ: No, Captain [REDACTED] <sup>(b)(6)2-(b)7(C)2</sup> okay, we're talking about on the

11 detainee list. Now we're back to just the detainees, is that you're

12 saying he didn't consider their statements and it could help you.

13 Now, we don't need to beat this because this one to me is clear as a

14 bell. You had statements that you wanted him to consider. His

15 failure to consider statements not proffered by the defense in the

16 defense possession at the time is not error, okay? We don't need

17 to--I mean, I'm just talking about their statements. I'm not talking

18 about their unavailability, that's a separate issue, but their

19 statements, okay? For whatever reason, but I don't think you can

20 have it both ways, not give it to them and say, "Now, it's error for

21 him not to consider what I didn't give him."

1 DC: Sir, the statement, there is a large distinction between  
2 giving him a statement and the alternative means of testimony  
3 allowable under R.C.M. 405, which will further seek this as both a  
4 full and an impartial investigation, email, IRC, all that was  
5 available and should have been considered. And it's----

6 MJ: We're moving on to something else. I'm simply addressing  
7 the last issue that was simply your comment that he didn't consider  
8 the detainees' statements.

9 DC: Yes, sir.

10 MJ: And I'm saying is, you had full opportunity to provide  
11 those statements to him, for him not to consider things the defense  
12 had the option to give it to him is not error. I'm talking about the  
13 statements, not the other forms of testimony, that's a separate  
14 issue.

15 DC: Okay, sir.

16 MJ: And then you obviously take issue on all the detainees  
17 being unavailable.

18 DC: Yes, sir.

19 MJ: Now again, in that case, he applied the operational  
20 situation, not just the 100 mile, because the prison is less than 100  
21 miles away.

1 DC: Yes, sir, the defense conceded that we were under severe  
2 operational constraints. That's why it spent so much time that it  
3 did in the verbatim transcript saying, "Government, we need to start  
4 looking outside the box. This is a full and impartial hearing. We  
5 have to have this Article 32 investigation look like any other  
6 Article 32 investigation in garrison or the United States."

7 MJ: I agree with that principle. Now, we talked about the  
8 detainees. We talked about the co-accused.

9 DC: Yes, sir.

10 MJ: Now, this whole other list.

11 DC: Yes, sir, General Karpinski, Captain----

12 MJ: No, back up, what would General Karpinski say? At this  
13 point, you have the Taguba report, I assume.

14 DC: Yes, sir.

15 MJ: And in the Taguba report, did General Karpinski make a  
16 statement?

17 DC: Yes, sir, she did.

18 MJ: And how is that statement....

19 DC: That was a classified statement. That was listed in an  
20 annex and classified.

1 MJ: Okay, so we'll move aside for a second on that. Based on  
2 what General Karpinski had said that would have impact on your  
3 client.

4 DC: Sir, General Karpinski, and how she would have impacted, is  
5 in this. The defense is authorized under R.C.M. 405, they not only  
6 talk about defenses, but any other relevant matters, which would  
7 include extenuation and mitigation. General Karpinski was a brigade  
8 commander for the brigade that Staff Sergeant Frederick was in at the  
9 time. During the course of the Article 32 investigation, I offered  
10 into evidence and discussed a joint regulation dealing with detainee  
11 operations. In that regulation, it talks about theater command  
12 responsibilities and to assign properly trained, specifically trained  
13 forces to conduce these particular operations and detain--I believe  
14 it's CI, the acronym escapes me right now. I have the regulation in  
15 my file box. But what I wanted to gather from General Karpinski was  
16 who was making this decision? Who made the decision, either, was it  
17 your level or was it a higher level, to place untrained, non-law and  
18 order MPs, which is an MP that Staff Sergeant Frederick is, a  
19 different kind of MP that's supposed to conduct detainee operations.  
20 There's two different MOSs. Why was that decision made and under  
21 what circumstance?

22 MJ: And what would she have said?

1 DC: Sir, it's my understanding from what she would probably say  
2 was it was not her, but she would--who made that decision.

3 MJ: So how is that testimony relevant then?

4 DC: Sir, then that would have led us to the decision-making  
5 process that did lead to that decision.

6 MJ: And who was that?

7 DC: Sir, I haven't been able to speak with General Karpinski.

8 MJ: Okay, you read her statement in the Taguba report that's  
9 currently classified. Is it still classified, government?

10 TC: It is classified secret, Your Honor.

11 MJ: You've read that?

12 DC: Yes, sir.

13 MJ: And I would assume you've read other remarks by General  
14 Karpinski that have been in the unclassified media.

15 DC: Yes, sir.

16 MJ: Is there anything that she says that is at her pay level or  
17 below that's responsible for this?

18 DC: Sir, from her statements, it would seem that she is  
19 implicating higher level commanders.

20 MJ: Everybody but herself.

21 DC: Yes, sir.

22 MJ: So who was her commander?

1 DC: I believe she fell under either the CFLCC commander or  
2 CFLCC or General Sanchez.

3 MJ: But they're not on your list.

4 DC: They're not on my list, no, sir.

5 MJ: We've talked about----

6 DC: But this is the information that I--like you said before,  
7 we have to go back to March 30th when this list was developed,  
8 because I can talk to you about the prejudices that I've experienced  
9 now.

10 MJ: No, but you need----

11 DC: For the purposes of my information----

12 MJ: I understand that, but if General Karpinski came in and  
13 testified on the 30th of March, and the best you can say is she's  
14 going to say, "It's not my fault."

15 DC: Sir, that would have been speculation on my part during  
16 that time.

17 MJ: No, what I'm saying is, what you have now. Do you have  
18 anything more than that, that she's going to say, "It's not my  
19 fault"?

20 DC: Sir, we would have been able to fully explore the  
21 training--I also requested, it would tie into the document request  
22 that I made.

1 MJ: I don't see a document request objected to here. Is that  
2 in your other one? Okay, I got Karpinski. Tell me about anybody  
3 else. And again, what I'm talking about here, Captain Shuck, is that  
4 I understand that the Article 32 investigations perform a valuable  
5 discovery function for the defense.

6 DC: Yes, sir.

7 MJ: I assume you understand that.

8 DC: Yes, sir.

9 MJ: Of course, it's very clear it's not an unfettered right to  
10 discovery. You'd agree with that?

11 DC: What is that, sir?

12 MJ: It's not an unfettered right to discovery.

13 DC: No, sir.

14 MJ: It's not like a civil trial in the civilian sector where  
15 you subpoena everybody and just fish wherever you want.

16 DC: Agree, sir.

17 MJ: So I understand all that. But what I'm trying to get to  
18 now, is the 32 now is done.

19 DC: Yes, sir.

20 MJ: Now, the question becomes is, what prejudice did your  
21 client suffer by not having the 32 done considering certain evidence?

1 You've told me about General Karpinski. We've talked about the  
2 detainees. We've talked about the people who invoked their rights.

3 DC: Right, sir.

(b)(6)-2, (b)(7)(C)-2

4 MJ: On the rest of this list, and understand Captain [REDACTED] I  
5 understand the difficulty here, because on the one hand, you've got  
6 to say, if they testified, I could tell you what they would help you  
7 with.

8 DC: Yes, sir.

9 MJ: But since they didn't testify, I can't.

10 DC: Yes, sir.

11 MJ: Unfortunately, for a pretrial investigation, to get a new  
12 one, the standard is you've got to show me prejudice.

13 DC: Yes, sir, I'm prepared to do that.

14 MJ: Okay.

15 DC: Sir, and I wish I had the two additional lists, but when I  
16 was notified by the government of their live testimony, here, they  
17 had four to five witnesses that I had requested, two of which [REDACTED]  
18 [REDACTED], [REDACTED], and [REDACTED], [REDACTED] And  
19 I apologize if I'm mispronouncing their names, given cultural  
20 differences. But sir, notice on the continuation sheet, block 21, DD  
21 Form 451, Appendix F. The first sentence says, "The following  
22 witnesses were declared unavailable for the Article 32 investigation

(b)(6)-4, (b)(7)(C)-4

1 and will more than likely be unavailable for the court-martial," per  
2 the government, per the government's representation. So, how does  
3 that prejudice the defense in this case?

4 MJ: Well, first of all, we know that's not the law.

5 DC: No, sir, it's not the law, but it's a prejudice, and here's  
6 how it's a prejudice, sir.

7 MJ: I'm assuming you're referring to the last part of that  
8 statement, not the----

9 DC: Yes, sir, and will be unavailable at court-martial. Sir,  
10 I'm going back--if we go back and I say, "Look, it will be very  
11 helpful to look at these witnesses," as I've gone through the report  
12 and as I suspect the CID agent would have gone through it, the same  
13 report, and listed out witnesses that would have been helpful. How  
14 that actually prejudices the defense in this case is, we were told  
15 that these are unavailable. And in fact, they mention not only the  
16 operational constraints, but the security constraints of having these  
17 particular witnesses because they were security detainees, not  
18 necessarily that they were just common criminals, but that they were  
19 being held for other purposes, for purposes of national security.

20 Now, if we're told back in March that our defense has, at  
21 that point in April, our defense has to go other ways, our defense is  
22 not going to be able to rely on witnesses, that we're told by the

1 government are not going to be available to us. So, I have to, with  
2 Staff Sergeant Frederick, reevaluate my defense position and  
3 reevaluate our own defenses because of the government's  
4 representation----

5 MJ: Captain [REDACTED] (b)6-2, (b)(7)(C)-2

6 DC: Which is a prejudice to our defense. I've got more, sir.

7 MJ: I'm sure you do, and I will listen to everything you have  
8 to say, but I'd like to break it up into bite-size pieces.

9 DC: Yes, sir.

10 MJ: The 32 officer, it really doesn't make a difference where  
11 this line came from. It's not the law.

12 DC: No, sir.

13 MJ: You know it and I know it, that whether a witness is going  
14 to show up for trial or not isn't determined at the 32, and certainly  
15 not by a line officer.

16 DC: Yes, sir.

17 MJ: So you know and I know that that line isn't worth the ink  
18 that was spilled to make it. So I find it difficult to think that  
19 you're going to rely your whole defense, or at least a part of your  
20 defense on something that's just not true, that you know is not true.

21 DC: Sir, not based on the legal analysis, but on the  
22 representations by the government as to why--because the witness did

1 not--the investigating officer did not make the decision in a vacuum.  
2 He made the decision based on advice and arguments from both the  
3 government and the defense. During the course of those arguments,  
4 the government made their representations that these witnesses were  
5 security detainees; some of them were detainees, who were otherwise  
6 unavailable.

7 MJ: Captain (b)(6)-2; (b)(7)(C)-2 I'm going to let you have a short break,  
8 because I'm going to ask the government something. I'm going to let  
9 you come back to it.

10 Trial counsel, you see this list of detainees here?

11 TC: Yes, Your Honor.

12 MJ: Eighteen or so, I didn't count them.

13 TC: That's correct, Your Honor.

14 MJ: How many are testifying at trial, as of right now?

15 TC: As of right now, the government intends to call....

16 MJ: I don't need all the names. Some of these are going to  
17 testify?

18 TC: Right now, the government plans on calling about five to  
19 seven of those detainees, Your Honor.

20 MJ: Okay, and where are these five to seven detainees as we  
21 speak? Are they still at the prison?

22 TC: Some of them are, some of them have been released.

1 MJ: So this line about being unavailable for court-martial----

2 TC: I don't know where that came from, Your Honor.

3 MJ: And defense will have an opportunity to interview these

4 long before trial?

5 TC: Yes, Your Honor.

6 MJ: Let me ask you this, all these military witnesses, is there

7 any military witness that the defense will request that has relevant

8 and necessary testimony that will not be made available by the

9 government?

10 TC: No, Your Honor.

11 MJ: And you're going to bring them to Baghdad?

12 TC: We'll bring them to Baghdad.

13 MJ: And any civilian the defense wants that's relevant and

14 necessary, you will issue the appropriate invitational travel orders

15 and a fund cite?

16 TC: That's correct, Your Honor.

17 MJ: And you'll bring them to Baghdad.

18 TC: Yes, Your Honor.

19 MJ: Have you provided the defense with a witness list of who

20 you intend to call at trial at this point? Understanding that we are

21 not trying this case next week.

(b)(6) 2; (b)(7)(C) - 2

1 TC: In our initial discovery response, the government had made  
2 representations of some of the people it intends to call. That is  
3 not the complete witness list, no, Your Honor, nor the final one.

4 MJ: Captain [REDACTED] who are Captain [REDACTED], Major [REDACTED],  
5 Captain [REDACTED], Captain [REDACTED] Captain [REDACTED] Who are all those  
6 people? Are they a shot group or are they two different things?

7 DC: They're different things.

8 MJ: Just tell me, what does Captain [REDACTED] do for a living, at  
9 the time?

10 DC: He was the platoon leader at the time. He was the platoon  
11 leader of....

12 MJ: At the prison?

13 DC: At the prison, yes, sir.

14 MJ: And what was he going to say? Had you talked to him prior  
15 to the 32?

16 DC: No, sir, I had not.

17 MJ: Did you have a statement from him prior to the 32?

18 DC: Sir, he was listed in either the CID--he was listed in the  
19 CID report as someone that would have been relevant to the defense.

20 MJ: No, just go with me here, Captain [REDACTED]

21 DC: Yes, sir.

1 MJ: Well, my question is, at the time of the 32, you hadn't  
2 talked to this witness. My question is, is what, to your knowledge  
3 at the time, was this witness going to say?

4 DC: Sir, he would have been able to give the investigating  
5 officer, as part of his duties to give us a full and fair impartial  
6 hearing, would have been able to describe the particular training  
7 that Staff Sergeant Frederick would have undergone in preparation for  
8 this mission that he was at, with Abu. He would have been able to  
9 talk about the conditions at the prison during the relevant time  
10 period. He would have been able to talk to us, since we did not  
11 receive any documents, even today, regarding the relief in place that  
12 Staff Sergeant Frederick's unit underwent and around September,  
13 October timeframe, he would have been able to talk about what the  
14 prior unit did and the right seat rides that every person, including  
15 Staff Sergeant Frederick, would have an opportunity to conduct and  
16 what the operations of the prior unit were like. He would have  
17 been----

18 MJ: And is he the only guy available to say this?

19 DC: No, sir, but he would have been able----

20 MJ: Did anybody testify to that effect at the 32?

21 DC: No, sir, they did not.

22 MJ: Was there any evidence of that at the 32?

1 DC: No, sir.

(b)(6)-2; (b)(7)(C)-2

2 MJ: Did Captain [REDACTED] say any of this stuff to you, or you're  
3 assuming he knew this stuff because he was coming from----

4 DC: Sir, even if he did not, if he said he did not know, that  
5 would have been helpful for the defense, and it would then help the  
6 investigating officer----

7 MJ: In other words, you don't know what he would say.

8 DC: No, sir, I can reasonably assume that as a platoon leader  
9 he would have that knowledge. And if they didn't conduct those  
10 things, that would be very relevant in both extenuation and  
11 mitigation for Staff Sergeant Frederick, and it would also be very  
12 relevant for determining who the investigating officer should.  
13 Because sir, all we have at this time, if we could take a step back  
14 to March 30th of this year, all we had, if it was given, was the CID  
15 report. That was it. So that's why I had unnamed people like S3 of  
16 the 320th MP Battalion. Because I know as an Army officer that an S3  
17 would have a reasonable understanding of both the training of the  
18 unit, which is why I was requesting him. And it would also be  
19 reasonable to assume that the S3 for this battalion would know about  
20 the operations and would have, either, if he could not provide me  
21 documents, he would have knowledge of the documents that have since  
22 been destroyed or misplaced.

(b)(6)2 (b)(7)(C)-2

1 MJ: Is that Major [REDACTED]?

2 DC: No, sir, that's-[REDACTED] was acting Battalion Commander.

3 MJ: Okay, well, he invoked his rights.

4 DC: Yes, sir, he did.

5 MJ: No issue about his unavailability.

6 DC: No, sir.

7 MJ: And the S3 is by position. I understand your logic there.

8 DC: And understand, sir, that if you look at this, it's only  
9 listed as S3's 320th because I did not know who the S3 of the 320th  
10 was. And the government, through its own lack of due diligence,  
11 could not provide me with who the S3 for the 320th is. Still to this  
12 day, we do not know who the 320th----

13 MJ: What about [REDACTED], [REDACTED] and [REDACTED]

(b)(6)2 (b)(7)(C)-2

14 DC: Sir, these are all Judge Advocates.

15 MJ: What are they going to say?

16 DC: Sir, as part of the allegations and as part of government's  
17 closing arguments in this case, the Geneva Conventions kept on  
18 popping up during the course of its arguments. These three officers  
19 were present at the prison during the relevant time periods and will  
20 be able to--through once again, because I only have the CID report, 2  
21 days--provided to me, one week prior to the investigation and taken  
22 into account----

1 MJ: Did you ask for more time to prepare?

2 DC: No, sir, I can reasonably assume that the documents and the  
3 evidence that I request are going to be made available. Because Your  
4 Honor, if you look through the--I promptly made my request, and there  
5 was not defense--or government request for a delay, even though I  
6 made a point in my argument, verbatim, that we were amenable to  
7 delays on the defense in order to provide these documents. But at  
8 the time----

(b)(6)-2; (b)(7)(C)-2

9 MJ: Back up, back up. So [REDACTED], [REDACTED] and [REDACTED] were Judge  
10 Advocates?

11 DC: Yes, sir.

12 MJ: And you didn't know what they would say because you hadn't  
13 talked to them and had no statements by them.

14 DC: That's right, sir, but I could reasonably----

15 MJ: And there's some legal argument here about the Geneva  
16 Convention that you thought was going to help with your client.

17 DC: Yes, sir.

18 MJ: And what was that?

19 DC: Sir, I could talk specifically about the training of the  
20 unit. I could have them talk about what kind of training, if any,  
21 was present. I could also talk about, because as part of the  
22 document request and the CID packet, one of the documents that I

all (b)(6)2, (b)7(C)-2

1 looked at was a document when they were two--I believe it was Captain  
2 [REDACTED] who created the document, mentioned that----

3 MJ: The Captain [REDACTED] that----

4 DC: Sir, the representation is that----

5 MJ: Let me go back. You kind of drifted off on this. Let me  
6 just get--these three JAGs will say something about the Geneva  
7 Convention that it does or does not apply?

8 DC: Yes, sir, and specifically with the incidents of alleged  
9 maltreatment, whether or not those will receive the legal review.  
10 Because it's part of the jobs of the Judge Advocates at the prison to  
11 the defense's knowledge at the time, was that they were a kind of  
12 checkpoint. They would be advising on the legalities or illegalities  
13 of certain procedures, and that would be very relevant, even if----

14 MJ: Did you call any of these guys up to see what they would  
15 say?

16 DC: Sir, I've made attempts to contact both Captain [REDACTED] and  
17 another Judge Advocate. Since then, I have not been----

18 MJ: And again, I sympathize with the box you're getting in  
19 here, Captain [REDACTED]

20 DC: Yes, sir.

21 MJ: But we're getting into the area of, "They might have said  
22 this was okay," is the best you can tell me.

1 DC: Sir, anything they told me, if it's not okay, or if it's  
2 okay. If they said it's not okay, then that assists the full and  
3 fair investigation that I requested.

4 MJ: Is it appropriate for a witness to opine on the legality of  
5 a particular act, even at an Article 32?

6 DC: Sir, that would not only go to a defense of the "just  
7 following orders" defense, but it also goes to clearly extenuation  
8 and mitigating, if per chance, members of the chain of command,  
9 including Staff Sergeant Frederick, were to obtain legal advice.

10 MJ: That wasn't my question. My question was, is you want to  
11 call these guys as witnesses.

12 DC: Yes, sir.

13 MJ: And they would say whether or not this was legal or  
14 illegal. And what I'm saying is, is that an appropriate testimony,  
15 even at an Article 32?

16 DC: Yes, sir, it is.

17 MJ: Well, then why don't at every 32 you call about four of  
18 your defense compatriots to say, "In my opinion, this isn't illegal,"  
19 and the government call three attorneys and say it is illegal. Well,  
20 let me just carry through this thought. That's irrelevant.

21 DC: Yes, sir.

1 MJ: It's not proper testimony at a 32. The 32 officer is  
2 supposed to determine facts and arrive at appropriate conclusions.  
3 Opinions as to whether or not the underlying misconduct is a crime or  
4 not is no more appropriate at a 32 than it is somewhere else.

5 DC: I agree, sir, and that's not what I mean, and I apologize  
6 for getting you down that train of thought.

7 MJ: What I'm saying is, the problem I get here, you don't know  
8 what they would say. They might have helped you, they might not  
9 have. Or under your theory, they couldn't hurt you.

10 DC: They couldn't hurt us either way, no.

11 MJ: And if they came in and said, "We knew nothing about this.  
12 We specifically briefed all these people that this was illegal," then  
13 how does that help you?

14 DC: Sir, if they said they know nothing about it, that would go  
15 back again to extenuation and mitigation because then they would be  
16 admitting that they weren't properly providing oversight of the  
17 operations at Abu Ghraib Prison.

18 MJ: And that's the JAG's function?

19 DC: Sir, per the documents that the government provided me,  
20 they were to provide the kind of legal review of all of these  
21 operations, so that's what makes it relevant----

(b)(6)2.(b)(7)(C)-2

1 MJ: Captain [REDACTED] though, is that in this Army, that's the  
2 commander's function.

3 DC: Yes, sir.

4 MJ: There may be legal reviews. There may be JAGs floating  
5 around there, but the----

6 DC: And that's why I listed the commanders.

7 MJ: These ICRC representatives, of course, there's no names on  
8 them, so I just assume you don't know who these people are?

9 DC: Sir, that is correct.

10 MJ: Do you know what they would say? How would you know what  
11 they would say?

12 DC: Yes, sir, I do know what they would say.

13 MJ: How would you know what they would say?

14 DC: Because the ICRC, there was an ICRC report that was  
15 included in the CID packet that was provided to the defense.

16 MJ: And that helped you?

17 DC: Yes, sir. Part of that----

18 MJ: And there's no names in this report?

19 DC: There's no names. That's why I had--ICRC representatives  
20 conducted an investigation of the prison, and it was during the  
21 applicable timeframe, October--September, October----

1 MJ: And there's statements in that report that will be  
2 helpful----

3 DC: Yes, sir, there's things in the report that put on notice  
4 to the government, specifically to the chain of command there, that  
5 there were problematic things going on.

6 MJ: Okay, but did you give that report to the 32 officer?

7 DC: No, sir, I couldn't.

8 MJ: Why not?

9 DC: Because I did not know, as a representative of the defense,  
10 who that person was. I asked the government to pursue due diligence  
11 in determining who these ICRC representatives----

12 MJ: The report would imply to me as something with an official  
13 stamp on it or some indicia of where it came from, true?

14 DC: Yes, sir, the Red Cross.

15 MJ: Yes, I figured that out by the ICRC.

16 DC: That's why I put all that I could and I referenced--and  
17 they knew what I was talking about.

18 MJ: But you could have given the report to the 32 officer if  
19 you wanted to.

20 DC: Sir, that was the problem with this particular ICRC report.  
21 It mentioned--it was more like a notification to the government that,

1 "Hey, there's some things going on. We have prisoners without  
2 clothes." That's one of the allegations.

3 MJ: Well, you don't answer my question. Why didn't you just  
4 give it to the 32 officer if you wanted them to consider it?

5 DC: Well, sir, that was helpful, but it's really the  
6 representatives--it would have been more helpful----

7 MJ: Maybe, maybe.

8 DC: ----to delineate what exactly----

9 MJ: How do you know it will be more helpful, not more hurtful,  
10 since you never talked to these people? Because you knew what they  
11 were, I understand.

12 DC: Yes, sir, and that was the problem.

13 MJ: But you could have given the 32 officer the report.

14 DC: Which would not have been helpful enough, because what I  
15 was working with was----

16 MJ: You saw the report as a starting point.

17 DC: Yes, sir, it was just merely a starting point and we needed  
18 to fully analyze this because if the government was put on notice  
19 that there was nudity issues back in October, then that lent support  
20 to at least to extenuation and mitigation that----

21 MJ: Is notice to the chain of command that soldiers were  
22 potentially committing a crime somehow a legal defense?

1 DC: Sir, I would further exploit--see, I can't hit a homerun  
2 with any particular witness. That's rarely the case in a court-  
3 martial or 32 investigations. But what I can do is take particular  
4 facts and tie them to other witnesses' testimony. For instance, I  
5 get the ICRC representative in here. They tell me particular facts  
6 with this report with the nudity, for example, and then tie that back  
7 to either the platoon leader, General Karpinski or the acting  
8 battalion commander and I say, "Okay, you were given this report.  
9 What steps did you take, or did you further..." I mean, I can sit  
10 here and speculate exactly with everything, but with this particular  
11 fact, that's the kind of thing----

12 MJ: But see, what we've talked about here all this time  
13 strikes to me as discovery issues. "This person could say this.  
14 This person might say this. This might help me when I get it with  
15 this person. I don't know what this person may say, but this JAG may  
16 say I knew this," so it's all speculative. And I'm not denying you  
17 have a discovery component at the 32. The failure to get absolute  
18 100 percent discovery at the 32 is not substantial error.

19 DC: Well, sir, I turn to the Ledbetter case that we cited in  
20 our motion. The Ledbetter talks about a key prosecution witness.  
21 And frankly, sir, they've since added to the list that was denied  
22 earlier. But in the Ledbetter case, it says that, "The particular

1 sergeant that was denied at the Article 32 was the key prosecution  
2 witness in this case, and hence its testimony and the accused's  
3 statutory right to cross-examination were crucial in order to forward  
4 both the investigation officer and the convening authority sufficient  
5 information to fulfill their statutory duties." Sir, we would----

6 (b)(6)-2, (b)(7)(C)-2 MJ: Captain [REDACTED] I don't have Ledbetter sitting in front of  
7 me. Let me ask this, what was the offense in that case?

8 DC: I don't remember it, I get confused with the Garcia case.

9 [Pause.] Larceny of government property and conspiracy to commit  
10 larceny.

11 MJ: And who was the person that didn't testify?

12 DC: Sir, I believe it was the victim, but I'd have to sit here  
13 and read it.

14 MJ: But I'm saying, in this case, the 32 officer had, and  
15 again, I'm not talking about discovery. What the 32 officer had were  
16 statements of co-accused. Did Sergeant Frederick make a statement?

17 DC: No, sir, he did not.

18 MJ: In statements of co-accused, which at least on their face,  
19 corroborated the photographic evidence, true?

20 DC: No, sir, it did not. During the course of the Article 32  
21 investigation, I was able to cross-examine the sole CID agent  
22 witness, and I could go right back to that. Despite the government's

1 motion and their characterization of that evidence, I have to  
2 respectfully say that they did mischaracterize the evidence. The  
3 statements that if the co-accused were discredited by me on cross-  
4 examination of the CID agent. It's even in the summary of the  
5 report, although I did not have cross-examination of PFC England  
6 because she was declared unavailable. They say that there was  
7 substantial photographic evidence admitted. Sir, there was  
8 substantial photographic evidence admitted, but when we discussed  
9 that there were only two photographs of Staff Sergeant Frederick in  
10 any of the photographs, one of where Staff Sergeant Frederick was  
11 sitting on a detainee without any context. The CID agent, because he  
12 was not an eyewitness or anything, could not offer any testimony as  
13 to what that picture----

14 MJ: On your denied witnesses, were any of them a witness that  
15 could put it in context?

16 DC: The victims themselves, sir. PFC England could have  
17 possibly, on one of the pictures which--it was a picture of PFC  
18 England pointing at a detainee----

19 MJ: But if he found the detainees reasonably unavailable and  
20 applied the correct standard to them, then is there error there?

21 DC: If he did that, yes, sir.

22 MJ: I mean, that's kind of the first part of the test.

1 DC: Yes, sir.

2 MJ: And England, similarly, if he had found her reasonably  
3 unavailable as invoking, even though technically she may not have, I  
4 understand that, he considered her statement. So they had those  
5 statements. But he said he didn't even consider the detainee's  
6 statement. I thought we already talked about that.

7 DC: So if that's the case----

8 MJ: So I don't understand what you're saying, is that you had  
9 statements of the co-accused. You had hearsay from the CID agent of  
10 talking to people.

11 DC: Yes, sir.

12 MJ: And you have the photographic evidence.

13 DC: Yes, sir.

14 MJ: So he had a reasonable basis for his conclusion.

15 DC: No, sir, no he wouldn't have had. He would not have had a  
16 reasonable basis.

17 MJ: Well, that's not your objection.

18 DC: My objection was there was no--if you look at the  
19 overwhelming photographic evidence clearly depicting detainee abuse,  
20 the evidence that was presented did not suggest that at all. They  
21 corroborated, they attempted to corroborate the co-accused's  
22 statements, which are questionable anyways because they're co-accused

1 and would always want to blame superiors. But they point it at these  
2 statements as corroborating the particular photographs that were  
3 admitted into evidence over defense objection. And why? Because  
4 when you go through the statements, okay, PFC England did such and  
5 such. Well, that doesn't look like it in any of these photographs.  
6 They say that Frederick is in here. Well, Frederick, as I went  
7 through----

8 MJ: Isn't that just a weight test? It's not an admissibility  
9 test. It's just a weight test that the fact finder made. It's no  
10 different than at a trial. The members at a trial see evidence.  
11 They conclude that is so and so or that's not so and so. So what  
12 you're saying is, he weighed it in a way you didn't like it, but he  
13 did have----

14 DC: Well, I agree, sir, but the whole point of my argument is  
15 that the government felt it important to show you that these facts  
16 that they outlined in their response show why it was a full and  
17 impartial investigation, and it was not, clearly by the  
18 investigation, itself. And so, I wouldn't be arguing this, sir, if  
19 the government's whole position was that these weren't--that they had  
20 to characterize the evidence in a certain way in order to somehow  
21 convince this court that it was a full and impartial investigation.

22 MJ: Standard substantial compliance.

1 DC: Substantial compliance with R.C.M. 405.

2 MJ: Trial counsel, was there any evidence at the 32 about  
3 training, SOPs, command involvement? (b)(6) 2; (b)(7)(C) -2

4 TC: Specialist [REDACTED] who was part of the same company  
5 as the accused did testify. And he testified as follows from the  
6 summarized transcript. This is page 17 of 20 of the summarized  
7 transcript. "I had very little training. They only told us how to  
8 do counts, how to handle certain situations. We did tag team with a  
9 couple of soldiers who we replaced to see how things worked out. I'm  
10 not aware of any policies or SOPs. We counted the prisoners at least  
11 once per night." Then he goes on and talks about some of what  
12 happened in the prison, itself. And then he goes on to implicate the  
13 accused. "I saw Staff Sergeant Frederick, Sergeant Davis and  
14 Corporal Graner walking around the pile hitting the prisoners. I  
15 remember Staff Sergeant Frederick hitting one prisoner on the side of  
16 the ribcage. The prisoner was no danger to Staff Sergeant Frederick.  
17 They were still flex-cuffed and sandbagged. I left after that. I  
18 returned later because someone wanted me to get Staff Sergeant  
19 Frederick for something. I went down to Tier 1. When I looked down  
20 the corridor, I saw two naked detainees, one masturbating to another  
21 and the other one with his mouth open." Skip a few lines, it says,  
22 "I saw Staff Sergeant Frederick walking towards me and he said, 'Look

(b)(6)2; (b)7(C)2

1 what these animals do when you leave them alone for 2 seconds.' I  
2 heard PFC England shout out, 'He's getting hard.'"

3 So Specialist [REDACTED] he's part of the company, testified  
4 about SOPs. He testified about the left seat, right seat ride that  
5 defense counsel just mentioned, and then went on and implicated the  
6 accused in the misconduct as charged.

(b)(6)2; (b)7(C)2

7 MJ: Captain [REDACTED] we just kind of stopped going through your  
8 list. So let me just finish with that. The second group beginning  
9 with Sergeant [REDACTED] (b)(6)2; (b)7(C)-2

10 DC: Say again, sir?

11 MJ: I was looking on page two now, the lower, the last  
12 detainee.

13 DC: Yes, sir.

(b)(6)2; (b)7(C)-2

14 MJ: These appear to be--let's just talk about, what does  
15 Sergeant [REDACTED] do for a living? Do you know?

16 TC: He's one of the dog handlers, sir, at Abu Ghraib. He had  
17 PCSd back to Fort Bragg, or not PCSd, redeployed back to Fort Bragg.

18 MJ: Is he implicated in this at all in what is charged with  
19 Sergeant Frederick?

20 DC: Not that I'm aware of. He is not yet a co-accused.

21 MJ: I understand that dog handlers may have their own issues.  
22 But dog handling issues are not present in this case, are there?

1 DC: No, sir.

2 MJ: I mean, some of these charges are really generic and it's  
3 kind of hard to----

4 DC: Yes, sir.

5 MJ: And who is Mr. [REDACTED]? (b)(6) 3 - (b) 7 (C) - 3

6 DC: [REDACTED] sir?

7 MJ: [REDACTED] It says CACI Corporation.

8 DC: Yes, sir, he's one of the contract interrogators.

9 MJ: Did you have a statement from him?

10 DC: No, sir.

11 MJ: And I understand your position here, Captain [REDACTED] I don't  
12 mean to keep repeating myself. But I understand there's difficulty  
13 in saying, "I need this guy, without knowing what he's going to say.  
14 And then I don't know what he's going to say until he shows up." So  
15 I understand that. And all the others are CID agents involved in the  
16 case?

17 DC: Yes, sir.

18 MJ: Now, of those CID agents, I'm assuming as investigators  
19 they're not firsthand witnesses to anything except potentially taking  
20 statements?

21 DC: Yes, sir, and the scope and context of their investigation,  
22 which would have been helpful to see whether or not the CID report

1 was full and impartial. The government felt that at least one of the  
2 CID agents who had a very small part in the investigation was highly  
3 relevant and necessary for the conduct of a full and impartial  
4 investigation. The defense only felt that we should have the rest of  
5 the CID agents, including at least Special Agent [REDACTED] <sup>(b)(6) 1 - (b) 7(c) 1</sup> who wrote  
6 the report on the CID as more relevant given the fact that the  
7 government felt and the investigating officer felt that their  
8 testimony was both necessary to conduct their statutory obligations.

9 MJ: And you had access at the time to the Taguba report. Is  
10 that correct?

11 DC: No, sir, not at the time, after----

12 MJ: But before it closed.

13 DC: Before it closed, yes, sir. That was the only document to  
14 my knowledge that was listed. And we've only talked about witnesses,  
15 not yet documents.

16 MJ: But in the Taguba report, I'm going back to the S3, Captain  
17 [REDACTED] <sup>(b)(6)-2, (b)(7)(C)-2</sup> issue where you said they would come in and tell you the  
18 traditions, the training, the experience, the command climate, the  
19 command control or lack thereof of all five of those, four of those  
20 categories. And of course, I can only decide cases on what I have on  
21 each case.

22 DC: Yes, sir.

1 MJ: Did the Taguba report reference any of that stuff?  
2 DC: Yes, sir, it did,  
3 MJ: Extensively?  
4 DC: In the first 55 pages, I believe was the scope of the  
5 report and then it had several hundred pages----  
6 MJ: So what I'm saying is----  
7 DC: ----but it did mention that it----  
8 MJ: ----it may not have been the best option, but you did have  
9 an option to provide the evidence from [REDACTED] and the S3 through the  
10 Taguba report as far as training and command climate. (b)(6)2, (b)(7)(C)-2  
11 DC: Yes, sir.  
12 MJ: I got it. Now you want to talk about documents.  
13 DC: Yes, sir. The defense made numerous requests for documents  
14 under R.C.M. 405 and later under R.C.M. 701, the same request.  
15 MJ: Let's talk about the ones you didn't get for the 32 that  
16 prejudiced your--and I understand prejudice can be a cumulative  
17 thing.  
18 DC: Yes, sir.  
19 MJ: So I'm not, although it may sound like I'm piecemealing  
20 this, really, I'm not. Mentally, I'm keeping it altogether.  
21 DC: Yes, sir. Roger that. I mentioned in here that the  
22 defense had learned that there was a parallel administrative

1 investigation conducted of the entire chain of command. I did not  
2 know that was the Taguba report, but that's, in fact, the Taguba  
3 report.

4 MJ: Okay, so that's OBE.

5 DC: And that was OBE, yes, sir, such as the investigation would  
6 be held there. The defense requested any and all documents related  
7 to administrative investigations be produced at the Article 32  
8 investigation, that we got, to include this investigation, any  
9 memoranda or other documents appointing that investigation, recent  
10 OERs and NCOERs of the accused's chain of command, situational  
11 reports, SIGACTS related to the events surrounding the charges facing  
12 the accused. And I was going to later put it as an appellate exhibit  
13 for one of my discovery documents, but you can follow along, sir, if  
14 you wish.

15 MJ: No, I'm listening.

16 DC: Situation reports, SIGACTS related to the events  
17 surrounding the charges facing the accused, public affairs  
18 notifications surrounding the charges facing the accused, any  
19 administrative actions taken against any of the accused's chain of  
20 command, any awards and supporting documentation given to members of  
21 the accused's chain of command. In addition to the administrative  
22 investigation, the resulting reliefs for cause or other adverse

1 administrative actions, the defense requests the following documents  
2 be produced at the Article 32 as they relate to the charges the  
3 accused faces: any or all significant activity reports from the 372d  
4 MP Company and/or 800th MP Brigade during the applicable timeframe,  
5 any and all OPORDERS from the 372d MP Company and/or 800th MP  
6 Brigade, especially those surrounding the relief in place that  
7 occurred in October 2003, any and all legal opinions, etceteras,  
8 generated from the 800th MP Brigade Judge Advocate or its equivalent  
9 office regarding training requirements, regulations governing  
10 detainee operations and law of war, EPW detainee confinement  
11 facilities, any and all applicable copies of training SOPs, post  
12 notifications, etceteras, regarding how MPs were to conduct detainee  
13 operations, OPERDERS, SIGACTS, FRAGOs, or other similar documents  
14 related to ICRC visits of the prison during the applicable timeframe.

15 MJ: Captain <sup>(b)(6)2:(b)(7)(C)-2</sup> [REDACTED] how long is that document?

16 DC: Sir, this document is ending in about two sentences.

17 MJ: Because I'm going to start reading in a minute, but go  
18 ahead.

19 TC: It's also attachment one to the government's motion. It's  
20 also part of the Article 32 investigator's report.

21 MJ: Okay.

1 DC: OPORDERS, SIGACTS, FRAGOs or other similar documents  
2 related to ICRC visits of the prison during the applicable timeframe.  
3 In addition to the following documents, the defense requests the  
4 following personnel, and therefore, I went into the listing of the  
5 victims.

6 MJ: Well, this looks to me like a discovery request.

7 DC: Sir, under R.C.M. 405, there is a----

8 MJ: I didn't say that. You're jumping ahead of me here,  
9 Captain [REDACTED] I'm simply saying it looks to me like a discovery  
10 request, <sup>(b)(6)-2; (b)(7)(C)-2</sup> which tells me you don't have this stuff, at the time.

11 DC: That's right, sir, I do not have it.

12 MJ: Have you had it since then, some of it?

13 DC: Sir, I have received some of it, but as of today, I----

14 MJ: Out of this entire list, is there anything there that if  
15 you had it at the 32, it would have made a difference?

16 DC: Yes, sir.

17 MJ: What?

18 DC: If I were to have the legal opinions, I would have been  
19 able to cross-examine those witnesses that were available.

20 MJ: And what would these legal opinions say?

21 DC: I don't know, sir.

1 MJ: That's what I'm asking though. Of those documents you've  
2 been provided, had you had them at the time of the 32, would they  
3 have been----

4 DC: Sir, the SIGACTS, there was significant activity reports  
5 generated by the prison during the applicable timeframe.

6 MJ: Yes, but what I'm saying, what does that have to do with  
7 anything?

8 DC: Sir, that puts this--as R.C.M. 405 indicates, we could put  
9 in those things that would matter for the defense in extenuation and  
10 mitigation----

11 MJ: Well, I understand that, but what's a SIGACT report, what  
12 is a SIGACT report under your understanding?

13 DC: Sir, a SIGACT report would report the significant  
14 activities occurring at the prison.

15 MJ: Hence the name.

16 DC: Hence the name, which would have given the defense at the  
17 time the ability to talk to Specialist [REDACTED] and.... (b)(6) 2 ; (b) 7(c) -2

18 MJ: And what would you ask Specialist [REDACTED]? Did something  
19 significant happen at the prison that day? Isn't this just a  
20 standard police report, law enforcement report that goes through the  
21 chain of command if something big happens, and all it does is simply  
22 repeat, that it's found somewhere else?

1 DC: Well, sir, there's a lot of things that the SIGACT reports  
2 could be helpful for us. For instance, it would place into context  
3 the situation at the prison, which would include the frequent mortar  
4 attacks that were occurring during this applicable timeframe. It  
5 would also talk about----

6 MJ: Did the Taguba report address that?

7 DC: I don't recall, sir.

8 MJ: Trial counsel?

9 TC: As far as....

10 MJ: Did the Taguba report reference the conditions at the  
11 prison in terms of the operational difficulties with rocket attacks  
12 and mortars, things like that?

13 TC: I believe it did. Off the top of my head, I could not cite  
14 the particular passage, but I believe it did, sir.

15 MJ: Go ahead. Do you have any more you want to add in there?

16 DC: Yes, sir. With the significant activities, it would also  
17 talk about the Ganci riot that may--there was a riot occurring on the  
18 one part of the prison during the applicable timeframes of these  
19 allegations which would have placed into context and would have been  
20 helpful had I gotten other witnesses so that we could tell the  
21 investigating officer, "Look, this is the context in which all this  
22 was going on." That would have been helpful. The legal opinions,

1 had they--if they exist, I don't know if they exist, but they would  
2 have shed some light on whether or not the particular methods of  
3 interrogation were approved by not only the Judge Advocates present  
4 at the prison, but also the chain of command, which although----

(b)6-2;(b)7(2)(C)

5 MJ: Captain ██████████ hold on a second. Are there in existence  
6 legal opinions as to the appropriate interrogation techniques that  
7 are authorized, that were authorized during the relevant time period?

8 TC: From the 800th MP Brigade? Not that the government's aware  
9 of.

10 MJ: No, from CJTF-7 on down.

11 TC: As of right now, I am not aware of any.

12 MJ: Are you aware of any SOP, any----

13 TC: SOP, yes, sir.

14 MJ: An SOP of how to treat detainees?

15 TC: And interrogation techniques, yes, sir.

16 MJ: That was in effect last fall?

17 TC: Yes, sir.

18 MJ: And who promulgated that SOP?

19 TC: General Sanchez, sir.

20 MJ: And you suspect he had a legal review on it, also?

21 TC: I would imagine, but I have yet to see any legal review of  
22 that document.

1 MJ: Do you have a copy of that document?  
2 TC: I do, sir.  
3 MJ: Have you provided it to the defense?  
4 TC: It's for access up in our C2 section; it's a secret  
5 document.  
6 MJ: Was there any lower level SOPs or anything what to do with  
7 these guys?  
8 TC: From the Taguba report, there was the unclassified SOP for  
9 interrogations that was put up on the wall that the government has  
10 since learned it was promulgated by Captain [REDACTED]  
11 MJ: The mysterious Captain [REDACTED] who may not exist?  
12 TC: The mysterious Captain [REDACTED] that's correct, Your Honor.  
13 MJ: Is there a Captain [REDACTED] (b)(6)-2, (b)(7)(C)-2  
14 TC: There is a Captain [REDACTED] Your Honor.  
15 MJ: Where is she?  
16 TC: In the United States. I believe she is represented as  
17 counsel.  
18 MJ: What was her role at the prison?  
19 TC: Her role, she worked in the JIDC, or the Joint  
20 Interrogation Debriefing Center.  
21 MJ: Is she an MI officer?  
22 TC: She is, sir.

1 MJ: And she put out some SOP?  
2 TC: Yes, she did, Your Honor.  
3 MJ: And this was posted on the wall?  
4 TC: It was posted on the wall.  
5 MJ: What did the SOP say?  
6 TC: It listed certain interrogation techniques, Your Honor.  
7 MJ: Did any of those interrogation techniques include what  
8 Sergeant Frederick is charged with?  
9 TC: Not at this point, Your Honor, no.  
10 MJ: Do you have a copy of that? Is that a classified document?  
11 TC: I do not believe it is, Your Honor.  
12 MJ: You may or may not is what you're telling me. Your look  
13 tells me...make sure he gets that!  
14 TC: Okay.  
15 MJ: And all related cases, obviously.  
16 TC: I mean, this obviously has been floating around.  
17 MJ: I understand. I understand.  
18 TC: Yes, Your Honor.  
19 MJ: Captain ██████████ I interrupted you. We were talking about  
20 all the other stuff you didn't have.  
21 DC: Yes, sir. What's that, sir?  
22 MJ: I said, do you have anything to add?

1 DC: Well, sir, with that, gives a perfect example. As we all  
2 know as lawyers when given posted examples, now that we know the  
3 timeframe, although the government denied her existence, she did in  
4 fact exist, and that we do know that the SOPs that I did request did  
5 exist at the time and were readily available for the government, but  
6 through their lack of due diligence did not provide the defense. I  
7 could have then cross-examined or at least presented argument to the  
8 investigating officer on these documents. I could have used the  
9 information, because when you have a set of rules, when you do  
10 something--if they're broad or narrow, then what do soldiers and  
11 commanders do? They seek legal advice.

12 MJ: Captain [REDACTED], in this SOP you're talking about with  
13 Captain [REDACTED] making? (b)(6)-2; (b)(7)(C)-2

14 TC: Yes, Your Honor.

15 MJ: Allegedly posted on the walls at the prison?

16 TC: Yes, Your Honor.

17 MJ: Have you looked at this document?

18 TC: I have, Your Honor.

19 MJ: Do you have a copy of this document?

20 TC: I do, Your Honor. Here? No, Your Honor. Once again, it's  
21 up in the Joint Interrogation Debriefing Cell here.

22 MJ: Is it a classified document?

1 TC: Not that I'm aware of, Your Honor, but they do have it.

2 MJ: Is there stuff on there that's unauthorized? Is there  
3 anything on there that the command saw and said, "This is wrong.  
4 We're not going to do this."

5 TC: Not that I'm aware of, Your Honor, at this time. I don't  
6 want to speak to definitively, because I have thought about--all I  
7 know is that I've seen that document and I do know that it was posted  
8 on the wall at Abu Ghraib. Past that....

9 MJ: I find it difficult to consider if a document was posted  
10 on a wall in a prison that somehow it's a classified document.

11 TC: I agree, Your Honor.

12 MJ: I mean, the government knows if it's classified or not, but  
13 that strikes to me as even a stretch, even if----

14 TC: I'm just being careful because I'm not sure what the  
15 classification is. I do not have a copy here. The copy is with our  
16 C2 cell here on Victory Base.

17 MJ: Okay, thank you. (b)(6) 2; (b)(7)(C) 2

18 DC: Sir, with that, it had come to the defense's knowledge that  
19 Captain [REDACTED] did witness an event with a naked detainee at the  
20 prison. And it would have been helpful to have questioned her when  
21 she received this. And as being a Judge Advocate for the command,

1 what steps were taken at that particular time and when she  
2 particularly saw that.

3 MJ: And again, when did you become aware that that's what she  
4 would say?

5 DC: Sir, not until the past couple weeks. But that's something  
6 I foresaw because I knew that the command would have been intimately  
7 involved in these kinds of interrogations, and that's why I requested  
8 them at the time. Now, as far as--so that's why I was making those  
9 particular requests and why I felt, why I foresaw that there was  
10 probably some guidance and it was probably posted on the walls, which  
11 the government just admitted it was posted on the walls. So all it  
12 took was for the government to go through some due diligence, but  
13 their read of the rule was, we just have to put on a bare bones case.

14 And according to Garcia, the case they even cited, that's  
15 not the standard. The Garcia case specifically says that it is not  
16 the government that controls the Article 32 investigation, but rather  
17 the investigating officer making charged with making a thorough and  
18 impartial investigation in the form and substance of the charges,  
19 which includes examination of available witnesses requested by the  
20 accused. And I might add, sir, that that also, under R.C.M. 405,  
21 that includes available documents. And this was a document that the  
22 defense felt was relevant to our defense at the Article 32, which

1 would have assisted the investigating officer at the time, which the  
2 government now concedes does exist and was present, but through their  
3 lack of due diligence, did not provide, nor through the various  
4 requests that the defense made for the investigating officer to  
5 request that the government pursue due diligence and gain these  
6 relevant documents.

7           Now, why would the defense request OERs, NCOERs, awards,  
8 adverse administrative actions? Sir, once again, it goes to  
9 extenuation and mitigation. If we were to show to the investigation  
10 officer, look this is what--according to the Taguba report and the  
11 15-6----

12           MJ: Which he had.

13           DC: Which he had, these are the following things that took  
14 place against these particular individuals within the chain of  
15 command as a result of the allegations that my client is facing.

16           MJ: And that's extenuating to have.

17           DC: Sir, that shows that although they would have had  
18 culpability and that the government shows, in those particular cases,  
19 to pursue an adverse avenue, which would----

20           MJ: A less adverse avenue.

21           DC: What's that, sir?

22           MJ: They chose a less adverse avenue.

1 DC: Yes, sir, a less adverse avenue.

2 MJ: Because we argue that they're not stationed the same--  
3 that's okay. But I come back to the idea, is that you had that  
4 thing. See, I don't understand your argument. Although you may not  
5 have had the reports themselves, you had the Taguba report that says  
6 these people got relieved.

7 DC: Yes, sir.

8 MJ: So what you're saying--so he had that. You just didn't  
9 have the nitty-gritty details.

10 DC: The nitty-gritty details, which would have been----

11 MJ: Clear, the chain of command, from I don't know from where  
12 to where, but apparently, even General Karpinski, were all suspended  
13 or relieved over this thing for failure of command.

14 DC: Yes, sir.

15 MJ: And you had that and he had that.

16 DC: Yes, sir.

17 MJ: And it was clear that the officers, at least at that point,  
18 were all going to get off, I'll use this term, "administratively,"  
19 and the enlisted were all going to be court-martialed.

20 DC: Yes, sir.

21 MJ: And so you have that and he had that. So I don't  
22 understand. What you're saying is he could have had it in a

1 different form to make it better. Of course, at the time, wasn't  
2 General Karpinski, was she relieved or suspended?

3 DC: I think she's relieved now, but I can't----

4 MJ: But I'm just saying is that----

5 DC: One of the things, sir, I did have, which made it relevant  
6 to me, further relevant, and once again, as a trial defense counsel,  
7 during this time period, I'm thinking, knowing the facts that I have  
8 that this is the kind of information that will be helpful for the  
9 investigating officer. When we received the Taguba report, yes, sir,  
10 we had these generalities of reliefs, suspensions and  
11 recommendations. What I did not have were the specifics and the  
12 whys, which would have been very relevant for the 32 officer.

13 MJ: Well, you did get the general "why".

14 DC: Yes, sir, I knew the general "why"----

15 MJ: The general "why," because they hadn't done well.

16 DC: Yes, sir, they didn't do well when the event happened. But  
17 what specifically did they not do well? As the command made that  
18 decision, then I could have made the argument at the 32 investigation  
19 pursuant to that information.

20 MJ: Of course, you have the opportunity to make the argument  
21 about the difference of treatment of the officers and enlistment at  
22 the time.

1 DC: Yes, sir, and I did make argument. But it would have been  
2 much more compelling had I had that information at the time.

3 MJ: I agree.

4 DC: The public affairs notifications would have been helpful  
5 because of--it would have been helpful for several reasons. First,  
6 it would have given me notifications of when these ICRC visits were  
7 occurring, which could have led me to further argue to the  
8 investigation officer, "Look this is the timeframes that the Red  
9 Cross was visiting the Abu Ghraib Prison." It came to my knowledge  
10 that General Sanchez visited the prison during the applicable time  
11 period through one of the other witnesses. It would have been  
12 helpful to find out exactly who possibly, a public affairs release,  
13 if General Sanchez had visited. There was also information----

14 MJ: Couldn't you just call General Sanchez' SGS and ask him?

15 DC: Yes, sir, but it would have led me so that--what kind of--  
16 because from my knowledge at the time is that there was high profile  
17 visitors at the Abu Prison, not necessarily Sanchez, but high profile  
18 visitors. Then I could have, in the course of public affairs  
19 releases or similar type of documents, found out, okay, when are all  
20 these visits going on so that I could....

21 MJ: Call up General Sanchez' SGS?

1 DC: Yes, sir, and we could open up--make the investigation full  
2 and impartial investigation. So all these documents, sitting in my  
3 chair as a defense counsel, with one document produced for me, I have  
4 to open up the box and I have to get creative and think about what  
5 kind of general documents are going to be necessary for me to argue  
6 to the investigating officer to make this a full and impartial  
7 hearing if only one document is provided. And of course, the relief  
8 in place, the operations orders, those would have all been very  
9 relevant to have.

10 Sir, I could go specifically through particular arguments  
11 that I made and requests I made in the transcript. And the reason  
12 why I feel it's relevant is, although they're not per se, I made the  
13 objections, sir, but I made the objections qualified with, "Look,  
14 we're in a combat environment. I realize that. I realize there's a  
15 lot of witnesses involved in this case, and I realize that the  
16 government has a lot of--would spend a lot of expense to prepare  
17 these witnesses and to procure their testimony." My only offer at  
18 the 32 was, let's realize that Rule 405 was not designed in a vacuum,  
19 that Rule 405 was not--does not have bright line rules, that Rule 405  
20 should be interpreted broadly so as to get to a full and impartial  
21 hearing. That is why, throughout the investigation, I told the  
22 government and the investigation officer, we need to break the mold

1 on things, in these particular circumstances. We need to equalize  
2 the events that we face here in Iraq with those, if we were to try  
3 this case back at Fort Hood or Fort Bragg. And I gave several  
4 requests from the very beginning.

(b)(6)-2; (b)(7)(C)-2

5 MJ: But at the end of the day, Captain [REDACTED] and I'm not  
6 minimizing your efforts to be accommodating to the operational needs  
7 of the command, but at the end of the day, the decision I have to  
8 make is whether there's a substantial compliance with the Rule, and  
9 if not, whether a substantial right of your client has been  
10 prejudiced.

11 DC: Yes, sir.

12 MJ: And so, I'm stuck with what happened, not with what could  
13 have happened, or necessarily the reasonableness of your position.

14 DC: Okay, sir.

15 MJ: Understand, I hear what you're saying, but I don't think  
16 necessarily there's any legal significance to my decision in the  
17 sense of whether or not you've made those offers doesn't  
18 necessarily--whether or not you've made those offers, which were  
19 apparently rejected by the government, doesn't necessarily make it a  
20 bad investigation or a good investigation in the legal sense. Do you  
21 understand what I'm saying?

22 DC: I understand, sir.

1 MJ: But I understand your position, and I appreciate you taking  
2 that position. But do you see what I'm saying? That's what you did  
3 then, now I've got to look at what was done, what you actually  
4 received, not what you were willing to adjust based on the  
5 operational environment.

6 DC: Yes, sir. And we talked about prejudice, what's not  
7 mentioned in the case file that I found, which I think is one of the  
8 most prejudicial aspects of this, is under Rule 405, which is meant  
9 to not only make sure that we have the right form and we have the  
10 right charges being investigated by an impartial officer, but what is  
11 a search for the defense is an opportunity, along with discovery  
12 which happens after referral, but it gives the defense an opportunity  
13 to establish that there is a defense, that's one of the--we have  
14 R.C.M. 405 which allows us to present a defense at an Article 32  
15 investigation. And Rule 405 also says, any other matter which might  
16 affect the predisposition. And oftentimes, government and defense  
17 counsel argue that that's highly--whether or not the case should be  
18 referred to a general court-martial, special court-martial, but also,  
19 whether or not the case could be settled and putting the defense  
20 counsel in a position where, "Look, government, I've got--this is the  
21 kind of facts that we have. This is the kind of facts that were  
22 presented at the Article 32 investigation which shows the relative

1 strength and weaknesses of your position and your case." And it puts  
2 me in a better position, now June 22d, 3 months later, of trying to  
3 get the case settled, if need be. So that right of pursuing justice,  
4 in that sense, is significantly hindered when I'm not given the  
5 ability to have a defense fully brought up under R.C.M. 405.

6 MJ: But as you say, there's no legal authority for the  
7 proposition of the purpose of a 32 is to facilitate settlement.

8 DC: That's true, sir, but it is a prejudice, now 3 months  
9 later----

10 MJ: How can it be a prejudice if it's not a right?

11 DC: Sir, it's not----

12 MJ: If the right doesn't exist, how can it be prejudice?

13 DC: Sir, it's not a right, per se, it is an expansion of--it's  
14 kind of a----

15 MJ: It's a penumbra argument now?

16 DC: What's that, sir?

17 MJ: Penumbra argument now?

18 DC: Yes, sir.

19 MJ: I got it.

20 DC: And for instance, it gives the government, what happened in  
21 this case, it gave the government the ability, because the  
22 investigation officer and the convening authority basically made the

1 declaration that the following witnesses were not going to be  
2 available at court-martial, and we're not going to have these  
3 witnesses here today--at the trial. So, for 3 months while they're  
4 preparing for their case, I am going on a separate route because I  
5 can safely assume from the declarations made by the government that I  
6 won't necessarily have to--I'll have to probably go into other areas,  
7 based on prejudice of this particular 32----

8 MJ: Captain (b)6-2, (b)7(C)-2 of course, you've been disabused of that  
9 assumption today, if not before today.

10 DC: Yes, sir.

11 MJ: And you're going to have plenty of time to adjust fire, if  
12 necessary.

13 DC: Yes, sir, but that is a prejudice, and it's a 3-month  
14 prejudice.

15 MJ: It's a prejudice based on a misstatement of the law that  
16 you were aware of at the time. So how can that be prejudice?

17 DC: Well, sir, it's not only the 100-mile----

18 MJ: You're saying the 32 officer controls who the government is  
19 going to produce at trial? Come on.

20 DC: No, sir. But at the foundation of the investigation  
21 officer's opinion on unavailability is based on government  
22 representations made at the Article 32.

1 MJ: But that's the unavailability for the 32. It's got nothing  
2 to do with availability at trial.

3 DC: Yes, sir.

4 MJ: You know that.

5 DC: Yes, sir.

6 MJ: And you knew at the time.

7 DC: Yes, sir, but it's one of the prejudices.

8 Another, specifically to one of the charged offenses, Staff  
9 Sergeant Frederick is accused of willful dereliction of duty. As I  
10 repeatedly requested in both my documentary evidence and my witness  
11 evidence is, well, part of the essential elements of willful  
12 dereliction is actual knowledge of duty. There was actually no  
13 evidence of duty, no documents, other than a CID agent who mentioned,  
14 "Well, this is not what MPs are supposed to do." That's what he did  
15 mention.

16 MJ: Couldn't they have an inference then?

17 DC: What's that, sir?

18 MJ: If an NCO saw misconduct occurring, an NCO is a military  
19 policeman, couldn't the 32 officer infer that he had a duty to  
20 intervene and his failure to intervene was willful dereliction?

21 DC: Sir, there was no----

1 MJ: You had that evidence, didn't you? You had evidence that,  
2 again that, you had evidence that the accused was a military  
3 policemen. You had evidence the accused was a noncommissioned  
4 officer. You had some evidence, and again, I'm just taking--no value  
5 to them, they observed maltreatment of the detainees and he did  
6 nothing. Now, couldn't you, I mean, isn't that sufficient to infer a  
7 dereliction charge?

8 DC: A willful dereliction of duty, sir? ┌

9 MJ: Yes, sure. I'm not saying it's conclusionary. I'm not  
10 saying the members will do it beyond a reasonable doubt, but couldn't  
11 one reasonably infer that an NCO had an affirmative duty to stop such  
12 things and his failure to do that is willful dereliction? Isn't that  
13 just normal inference?

14 DC: Sir, that is evidence of it, but it's, along with that,  
15 their training and the circumstances surrounding that----

16 MJ: But now you're going back to where we're weighing evidence  
17 now. We're weighing that they didn't have enough training,  
18 therefore, he thought it might have been okay, therefore there was no  
19 dereliction of duty because he didn't think it was maltreatment,  
20 therefore you're arriving at different inferences.

21 DC: But I can't change the fact that 405, R.C.M. 405 allows me  
22 as a defense counsel the right, the statutory right to put on a

1 defense and to put on other evidence that I see fit, and that would  
2 go to extenuation and mitigation, and I can't change that. I  
3 understand that----

4 MJ: Just your conclusion that there's no evidence of willful  
5 dereliction of duty, and I'm just saying as that, under the law,  
6 there's some evidence to infer it.

7 DC: Yes, sir.

8 MJ: And that's enough for the investigating officer, isn't it?

9 DC: And all they would have had--if that would have----

10 MJ: No, I'm saying, what they had, are you telling me it's a--  
11 no rational investigating officer could infer what was a dereliction  
12 of duty charge out of what he had?

13 DC: Yes, sir, under----

14 MJ: "Yes, sir," that none could do it, or "Yes, sir, I agree  
15 that,"--no, I got too many negatives here. The question is, based on  
16 what he had, could no rational fact finder, investigating officer in  
17 this case, infer a willful dereliction charge? And so, that charge  
18 is based on no evidence?

19 DC: Well, sir, I misspoke, but what caught me was, based on the  
20 facts that he had. And the defense position is he did not have  
21 enough facts in which to make that judgment.

1 MJ: So you're saying, you're changing your objection. Now  
2 you're saying that charge is based on no evidence.

3 DC: Not that it's not based on evidence, it's not based on  
4 sufficient evidence. He did not hear a defense to that charge at  
5 all.

6 MJ: Which you had the option to present the defense, true?

7 DC: What's that, sir?

8 MJ: You had the option to present, with what you had....

9 DC: With what I had.

10 MJ: ...to present any defense you wanted.

11 DC: Yes, sir.

12 MJ: Whether in the Taguba report, you talked about the  
13 detainee's statements earlier, or the statements of other co-accused.  
14 Now again, not a perfect world, I understand that, and not a perfect  
15 defense either. And again, this is not a trial.

16 DC: Yes, sir.

17 MJ: I mean, this is a trial, but that one isn't.

18 DC: Yes, sir, and frankly, sir, by the government's actions,  
19 you hit it right there. They would have had, if they would have  
20 balanced the evidence in the government's favor for prosecution, it  
21 would have been tipped. But I could have, if I had a full and fair

1 impartial hearing with the witnesses, documents, I may have been able  
2 to tip those scales in favor of a different----

3 MJ: Is this a cumulative error argument, that he get all this  
4 stuff, of people that you don't know what they're necessarily going  
5 to say, might tip the scales? Isn't that where we're at? At the end  
6 of the day, Captain  <sup>662,670-2</sup> and again, I sympathize with your  
7 positions. But at the end of the day, you were not given certain  
8 evidence, whether or not it was legitimate not to give it to you is  
9 one issue. But at the end of the day, you don't know what this  
10 evidence is going to say. You don't know what General Karpinski  
11 would have said. You don't know what these legal reviews would have  
12 said. And you're right, they may have helped you, and they may have  
13 hurt you. And if you want them for trial, obviously, you have full  
14 discovery for trial. But based on speculation, which is all you're  
15 telling me, and again, I sympathize your problem, but basically what  
16 you're telling me, is this could have changed it. It could have put  
17 it in the context of, this was obedience to orders, or the MI people  
18 were at fault, or it was a chain of command issue, we were doing what  
19 we were told or whatever. I mean, I don't know. There's a whole  
20 range of possibilities. But, you don't know that, either, because  
21 you don't know whether these people would have said that or they  
22 would have come in and said, "I gave them Geneva Convention training.

1 I told them not to do this," right? So, it could have cut against  
2 you as well as for you. But the bottom line----

3 DC: Sir, it would have helped me in making----

4 MJ: It's all speculative.

5 DC: Yes, sir.

6 MJ: And then you go back to your right to settle, which quite  
7 frankly, is not a right. So, you may say it is. I say it isn't.

8 DC: But it's a prejudice. If it's not necessarily a right,  
9 it's a prejudice.

10 MJ: I don't know how you can have a prejudice to a right that  
11 doesn't exist. Let's just agree to disagree on that one, okay?

12 DC: Okay, sir.

13 MJ: Do you have anything further at this time? I'm not cutting  
14 you off,  b(6)-2

15 DC: Yes, sir.

16 MJ: Do you have anything else you'd like to add?

17 DC: Sir, with maltreatment of the detainee on the MRE boxes.  
18 That is listed as a----

19 MJ: I tell you what, can we...the court reporter needs a break,  
20 so we're going to be in recess for 10 minutes.

21 [Court recessed at 1605, 22 June 2004, and reconvened at 1630,  
22 22 June 2004.]

1 MJ: Court is called to order. All parties are again present  
2 that were present when the court recessed.

3 Captain [REDACTED] (S)(6)-2;(6)(7)(C)-2

4 DC: Sir, with regards to specific charges, Charge 1 and  
5 Specification 1, the evidence that the investigating officer in his  
6 report specifically named only PFC England's prior sworn statement  
7 and three to seven photographs, which to him established a probable  
8 cause to suggest reasonable certainty that that charge had sufficient  
9 evidence. He had misapplied the 100-mile rule and disallowed the  
10 testimony in any fashion, in any form, of PFC England, nor did the  
11 government make any attempts to do that, therefore denying us the  
12 ability to show that--elaborate on the photographs that PFC England  
13 had discussed in her sworn statement, and not allowing the specific--  
14 not allowing me to cross-examine a witness that was available via  
15 email or otherwise denied him of a substantial right with regard to  
16 that charge.

17 With regards to Charge III, Specification 4, the only  
18 consideration that the investigating officer, according to his  
19 report, was that he said that the photograph, itself, was all that  
20 was necessary, regardless of the fact that the detainee in question  
21 appears to have a smile on his face, and that the detainee was  
22 possibly listed on the defense witness list, not giving us any

1 opportunity to discover whether or not--and for the investigating  
2 officer to fully and impartially look at the context of that picture  
3 in a manner which would have made, for that specific charge, a proper  
4 recommendation. By following statutory requirements of R.C.M. 405,  
5 that specifically prejudiced us in that case--those specific two  
6 charges were recommended for a general court-martial.

7           With regards to the assault charge whereas the government  
8 alleged that Staff Sergeant Frederick had, quote, grievous bodily  
9 harm, they solely looked at the statements of co-accused in that  
10 matter, but the detainee in question may have been listed on the  
11 defense witness list as the victim and therefore, since all of the  
12 detainee victims were listed by the defense, therefore denying us,  
13 since it appears from the sworn statements that there was no--that  
14 the detainee in question did not die and was only punched, giving us  
15 the--denying us the opportunity to argue for the 32 investigation  
16 officer that was conducted, if it did happen, was merely a simple  
17 assault consummated by a battery, rather than the greater offense of  
18 grievous bodily harm.

19           Charge II was subsequently referred for a general court-  
20 martial as it stood in the specification, based on, solely based on  
21 co-accused witnesses and not the victim itself. By not having the  
22 victim testify, given the fact that the victim--there was no

1 evidence, no records provided to the investigation officer regarding  
2 possible treatment, photographs of injuries or anything like that, it  
3 denied us the ability to argue to the investigation officer that that  
4 would be, that this particular charge, should be referred instead as  
5 a simple assault rather than referred as a grievous bodily harm  
6 offense, which is a substantial difference in that the simple assault  
7 consummated by battery has a maximum incarceration of 6 months,  
8 whereas grievous bodily harm, the greater offense is a difference of  
9 2 1/2 years with a 3-year maximum offense.

10           So, in that particular instance, the victim's testimony is  
11 very much relevant since it goes to what specific charge should be  
12 referred. But once again, the investigation officer, on the  
13 government's own information, denied that victim's testimony.

14           The assaults by stomping on hands and bare feet, there was  
15 absolutely no evidence in the packet to talk about any detainee  
16 injuries from this activity, only co-accused's statements. None of  
17 the victims listed by the defense testified. No victim testimony, no  
18 documents to suggest--were presented by the government. Once again,  
19 that charge was referred to general court-martial without the ability  
20 to speak to and have the investigation officer look into that  
21 particular offense and the victims, which since the victims are the  
22 ones that actually allegedly had their hands and feet stomped on with

1 shod feet, would be able to more accurately describe the extent of  
2 their injuries, if any, and who exactly was involved in that, more so  
3 than the co-accused. Once again, this was denied to us.

4 "Jumping into a pile of detainees" charge, included in the  
5 government's case, photographs of piles of detainees. But there was  
6 no evidence, no pictorial evidence of anyone jumping, actually  
7 jumping on a detainee.

8 MJ: Was there a statement to that effect?

9 DC: There is a statement to that effect, sir.

10 MJ: I mean, Captain [REDACTED] <sup>(b)(6)-2; (b)(7)(C)-2</sup> you keep--this whole thing you're  
11 talking about sounds to me, it simply goes to weight. You're saying  
12 is, is that there's statements of co-accused, but not the victims,  
13 therefore, that shouldn't go to trial. There's statements of co-  
14 accused, but no pictures, therefore that doesn't go. I mean, that's  
15 not....

16 DC: In particular, with England's statement, because of the  
17 misapplication of Rule, we were not--we now only have the statement,  
18 which was brought in over objection by the defense.

19 MJ: But you can't un-ring that bell because she does have  
20 counsel now, true?

21 DC: That's true, sir.

1 MJ: Because she's not available today. Again, we're not  
2 talking about today, but today, she's not available. Back then, she  
3 might have been.

4 DC: Yes, sir, but I guess I'm confused because I have to----

5 MJ: I know, I'm not consistent, either. I understand. Go  
6 ahead.

7 DC: But back then, I wasn't. We asked that--the defense really  
8 went above and beyond in requesting on multiple times during the  
9 course of the investigation that we take into account the fact that  
10 we are in Iraq, that we look into alternative methods of testimony,  
11 that we look into the possibility of using something as simple as  
12 email, which we knew by both witnesses that testified today, that was  
13 present and was available for witnesses that seemingly would have  
14 provided the ability to counterbalance a lot of the evidence  
15 presented by the government and therefore ensure that the end result  
16 was not just, there's some evidence, basically uncontroverted  
17 evidence of these activities, but by denying us, we can't even have  
18 the investigation officer do that balancing test at all, because then  
19 it does not become a question of weight, it becomes a question of  
20 whether or not there was any evidence. And because the government  
21 denied me all the witnesses, I was not able to present a defense.

(b)(6)-2/(b)(7)(C)-2

1 MJ: But aren't we back to where we started here, Captain [REDACTED]  
2 At the end of the day, is quite frankly, isn't this a discovery  
3 issue?

4 DC: No, sir.

5 MJ: That all these people, every person you've talked about in  
6 the last 2 1/2 hours, and if I missed it, tell me where I did. I am  
7 trying to figure out any one of these persons on the day of the 32,  
8 provide non-cumulative, relevant testimony that you knew they would  
9 say at the time. What I keep hearing you saying is, "They might  
10 have, this might have put it in balance. There may be this legal  
11 opinion. This might say this. This might say that." I mean, at the  
12 end of the day, isn't that what you have?

13 DC: Yes, sir, and the only reason why those "mights" exist is  
14 because what is known--what is fact is that he was denied almost  
15 totally all witnesses and documents.

16 MJ: But since that time, since that time, have you developed--  
17 and I know I talk about what you knew at the time, but since that  
18 time, any of these denied witnesses that you now are aware are going  
19 to give you something that would have been relevant and non-  
20 cumulative at the time?

21 DC: Well, sir, I----

22 MJ: That's a "yes" or "no."

1 DC: No.

2 MJ: Your answer to that is "no"?

3 DC: At the time----

4 MJ: No, I'm not talking about at the time. I'm talking about  
5 from the day of the 32 until the 22d of June. You have all these  
6 people that you were denied access to, witnesses, well--were not  
7 produced, documents not produced. Is there anything that you've  
8 discovered since when this 32 took place until today, in that pile of  
9 stuff, in that long list of witnesses, that you're now aware would  
10 have non-cumulative relevant testimony had you known about it at the  
11 time of the 32?

12 DC: Sir, that's not a requirement for me----

13 MJ: I didn't ask you that. I did not ask you that. I'm trying  
14 to establish whether you had prejudice. I'm asking you this, is that  
15 since the 32, this is the third time, I'll try it again. Until  
16 today, do you have any evidence of denied witnesses or witnesses that  
17 weren't produced that would have been non-cumulative and relevant had  
18 you had them at the time of the 32?

19 DC: PFC England would have been, at the time of the 32, would  
20 have been helpful and relevant.

1 MJ: But you had--but that's not what I asked you. You had  
2 England at the 32, a statement, and today, that's all you have from  
3 England.

4 DC: Yes, sir.

5 MJ: So let's put her to the side.

6 DC: So both--I still do not have access--well, to my knowledge,  
7 I still don't have access to any of the victims.

8 MJ: I understand that, and we're talking about discovery here.  
9 This is what I think this is, is a discovery issue. Because I'm  
10 asking you is----

11 DC: Sir, I'm not asking for discovery.

12 MJ: I know you're not. You're asking for a new 32, but kind of  
13 sounds to me like discovery, and I'm coming back to the same  
14 question. Of all the stuff that you were denied at the time of the  
15 32, or witnesses not produced, as you stand here before me today, do  
16 you know in any of that stuff today that you didn't know back then  
17 that would have provided non-cumulative relevant testimony to the 32  
18 officer at the time.

19 DC: Not that I haven't already elaborated on, no, sir.

20 MJ: No, I don't want a qualification, I want a "yes" or a "no."  
21 If the answer is, "Yes, this would have made a difference," tell me  
22 what it is. If the answer is, "No," it's none.

1 DC: All right, sir. Unfortunately, sir, due to the lack of  
2 production of many of the documents that I requested by the  
3 government, I cannot make that determination.

4 MJ: You can make--no, you can make that determination.

5 DC: To my knowledge----

6 MJ: To your knowledge, your answer is, "No," based on the----

7 DC: Is, "No."

8 MJ: Based on what the government has not given you----

9 DC: Based on what the government has----

10 MJ: Based on what the government has given you and not given  
11 you.

12 DC: Yes, sir.

13 MJ: Understand.

14 DC: And remedy could be to wait until after discovery, and then  
15 I could tell you what exactly I was denied that would have helped me  
16 on the 32. But I can't make an informed decision right now based on  
17 these documents that I suspect would help me, but I cannot give you a  
18 definitive answer based on the lack of----

19 MJ: If you have a legal basis to re-raise this issue and you  
20 wish to, not that I've ruled yet, but if I rule against you and you  
21 wish to renew the issue on another separate grounds, you always have  
22 that right.

1 DC: Yes, sir.

2 MJ: And I don't decide the legal issues on what might or could  
3 happen in the future, okay?

4 DC: Yes, sir.

5 MJ: Do you have anything further on your motion?

6 DC: No, sir.

7 MJ: Well, I think as I stated, I find that most of what the  
8 defense is requesting appears to comport with more of a discovery  
9 issue than an R.C.M. 405 issue. The court finds, and again, for the  
10 multiple time, sympathizes with the defense position here, but finds  
11 that there was substantial compliance with 405 Alpha, and that the  
12 accused, any prejudice appears to be only speculative at this point.  
13 The court will review the transcript of this proceeding and submit  
14 further detailed written findings of fact and attach it to the record  
15 as Appellate Exhibit XI.

16 Now, defense, I understand you have a motion for  
17 investigative assistance?

18 DC: Yes, I do, Your Honor.

19 MJ: Can I see it, please? [MJ was handed document.] Trial  
20 counsel, it's the Court's understanding that the government intends  
21 to provide investigative assistance to the defense?

22 TC: That's correct, Your Honor.

1 MJ: Do you have a copy of the motion?

2 TC: The government's response? We did not file a response.

3 MJ: No, I said, do you have a copy of the motion?

4 TC: Yes, Your Honor.

5 MJ: Who are you going to provide?

6 TC: The government has taken certain steps. We've contacted  
7 the Provost Marshal of Multinational Forces, Iraq, to identify either  
8 a CID agent or credentialed military police investigator. At this  
9 point, they are still trying to identify that investigator for the  
10 defense. We hope to have it wrapped up by the end of this week.

11 MJ: Is 30 June a realistic suspense on that, Captain [REDACTED]

12 TC: Yes, Your Honor.

13 MJ: Captain [REDACTED] so apparently, the convening authority has (b)(6)2;  
14 not turned this down yet, since what I'm hearing is the convening (b)(7)(C)2  
15 authority is going to provide it. So, it's technically not right for  
16 this court to decide. But it would appear that you're going to get  
17 what you asked for by 30 June.

18 Captain [REDACTED] make sure this investigator understands  
19 his priority is working with the defense on this and that he will be  
20 a member of the defense team with all the privilege and work product  
21 rules that apply to that.

1 Captain (b)(6)2;(b)(7)(C)-2 [redacted] once the investigator is identified, who do  
2 you wish him to contact, you or Mr. [redacted]

3 DC: Sir, Mr. [redacted] (b)(6)4-(b)(7)(C)4

4 MJ: Okay, provide the contact information to the defense--or to  
5 the government. And government, that's the point of contact. If I  
6 hear nothing from either side, I'm assuming this issue has gone away.

7 Defense, do you have any outstanding discovery issues?

8 DC: Yes, sir, I do. Pursuant to the 802 session, I have  
9 provided the Court a copy of all, there's several requests.

10 MJ: That will be Appellate Exhibit XIII, Appellate Exhibit XIV,  
11 Appellate Exhibit XV, the latter two are emails, one dated 3 May, one  
12 dated 4 May, and XVI, dated 27 May, and XVII, dated 17 May, which is  
13 in the form of a motion; 16 May is in the form of a motion.

14 Do you have copies of all these, trial counsel?

15 TC: Yes, Your Honor.

16 MJ: Of all the stuff that they're asking for, operating from  
17 the default, the government is going to provide everything except  
18 what you tell me you're not going to provide. What aren't you going  
19 to provide there, Captain [redacted] (b)(6)2;(b)(7)(C)-2

20 TC: At this time, Your Honor--I'm sorry, can I see the last  
21 discovery? I'm not sure if I have that. [MJ provided document to

1 TC.] At this point, Your Honor, the government intends to comply  
2 with the discovery request.

3 MJ: Okay, then it would appear to be a non-issue for me.

4 Defense, do you agree with that?

5 DC: I agree, sir.

6 MJ: Anything else, defense counsel?

7 DC: Yes Your Honor. Pursuant to co-accused cases, Your Honor  
8 has granted interviews to the chain of command for purposes of not  
9 only the case-in-chief, but for unlawful command influences purposes.  
10 The defense requests similar access to these general officers under  
11 similar circumstances.

12 MJ: Well, generally, each case stands to itself. Since I know  
13 what I ruled in those cases, I know what I'll rule in this case. Do  
14 you have any objection, Captain [REDACTED] that this case should be  
15 treated any differently? (b)(6) 2; (b)(7)(C) -2

16 TC: We just have a clarification point, Your Honor.

17 MJ: Okay.

18 TC: In the interviews that you ordered the government to have,  
19 yesterday, you ordered in certain cases that the defense have access  
20 to certain high ranking officers and anyone in their command for  
21 interviews. We just want a clarification if those were supposed to  
22 be sworn or unsworn interviews.

1 MJ: They were interviews, not depositions.

2 TC: Yes, Your Honor, that's what we wanted clarification on,  
3 thank you.

4 MJ: I did indicate that as far as the general officers are  
5 concerned, that the interviews are to be, at a minimum, recorded and  
6 strongly recommended that a verbatim transcript be made of that.  
7 But, they are interviews, they are not depositions, and that would  
8 include everybody from General Sanchez on down that is relevant.  
9 Now, understand, I want to make sure this is clear, is I'm saying is  
10 that if General Sanchez, General Metz and anybody on down below that  
11 level, and we're talking about in the chain of command that has  
12 relevant testimony is subject to interview. Now, if defense requests  
13 an interview with somebody and the government says, "We don't think  
14 this person has anything to do with anything," then of course, we can  
15 revisit that issue. This is not a carte blanche to everybody below  
16 General Sanchez, since that includes everybody in Iraq, in Kuwait and  
17 wherever else.

18 Similarly with General Abizaid, I said, General Abizaid,  
19 separate. That does not include everybody who's in CENTCOM. So,  
20 just to clarify, that's what I meant and I'm assuming everybody took  
21 it that way. And this, of course, would be those who do not  
22 necessarily have Article 31(b) or a Fifth Amendment right not to be

1 interviewed. And if they assert such a right, obviously, they would  
2 become unavailable for interviews and we'll discuss potential  
3 remedies, if necessary. Okay?

4 Anything else, Captain [REDACTED] (b)(6)-2;(b)(7)(c)-2

5 DC: Yes, sir. In co-accused cases and in this case, the status  
6 of Abu Prison as a crime scene has been much an issue, whether or not  
7 it's going to be preserved. Given the nature of the turnover of  
8 power, if you will, to the local Iraqi government and the possible  
9 lack of judicial oversight over another country's decisions----

10 MJ: Well, wait a minute, back up, possible?

11 DC: Yes, sir.

12 MJ: By possible lack of oversight under the Iraqi government  
13 system? Let me ask you this. Do I have any authority with the Iraqi  
14 system?

15 DC: No, sir.

16 MJ: It's not possible one way or the other.

17 DC: No, sir.

18 MJ: After 1 July, they will be a sovereign country and it's  
19 their decision. And the last time I checked, I don't have any  
20 authority over them.

21 DC: That's right, sir.

22 MJ: So I won't even say "possible."

1 DC: Sorry. Because of both--rather, the possibility of them  
2 making an adverse decision to your ruling, I ask----

3 MJ: Well, by definition, they can't, because they're not  
4 subject to my ruling.

5 DC: Yes, sir, exactly.

6 MJ: If they choose to destroy the prison, do you want me to do  
7 something about it?

8 DC: Yes, sir, well, no, sir----

9 MJ: What's that?

10 DC: I ask that the crime scene be sufficiently videoed and/or  
11 photographed sooner rather than later in order to at least establish  
12 some sort of evidence for any possible court-martials in these cases.

13 MJ: There appears to be ample photographic evidence of it  
14 already, you want more?

15 DC: Well, sir, I do not have yet, as of yet, that ample  
16 photographic evidence. I have pictures that were given to me by CID.

17 MJ: Captain [REDACTED] is there any photographic evidence of  
18 the prison, itself? (b)(6)-2;(b)(7)(C)-2

19 TC: Only about 1,000 pictures that have already been turned  
20 over to the defense.

21 MJ: I'm talking about, are there any of them without people in  
22 them?

1 TC: Yes, Your Honor.

2 MJ: It would appear that--and understand this, the word "crime  
3 scene" was used by the defense, not by the Court, and I simply  
4 adopted that as a, there's no legal judgment that a crime had been  
5 committed there. It was simply in the colloquial sense that there's  
6 an alleged crime there and therefore it's the scene of an alleged  
7 crime. And there should be no inference taken that--or the  
8 conclusion that it is a crime scene, or any crime committed there,  
9 because that's a conclusion of law that's not made by the Court.  
10 Now, I believe Captain [REDACTED] says there's already such photos.  
11 Take a look at them. (b)(6);(b)(7)(C)-2

12 DC: Understood, sir.

13 MJ: Anything else?

14 DC: Yes, sir. Several other issues I would also like to  
15 address in regards to specifically with Staff Sergeant Frederick. I  
16 made a request to the government on April 16th of this year that due  
17 to the nature of the situation in Iraq, that my client be allowed to  
18 remain under arms and have his personal weapon returned to him for  
19 his own protection. He has it with him today in anticipation of a  
20 convoy. He has it with him when he's to provide security when we go  
21 to trials, and it would only be reasonable that he also be allowed to

1 have it when he's here at Victory, which is still very much a combat  
2 zone.

3 MJ: Is that my lane, Captain [REDACTED] (b)(6)-2; (b)(7)(C)-2

4 DC: What's that, sir?

5 MJ: Is that my lane?

6 DC: No, sir, but I just wanted to address it now because it  
7 could very well be a--potential in your lane with an Article 13  
8 violation.

9 MJ: Government's on notice of the issue. The government  
10 chooses to do what the government chooses to do. And if you believe  
11 a violation occurred, I will give an appropriate remedy. But that  
12 sounds to me as a command decision.

13 DC: Yes, sir.

14 MJ: Not that it makes it right or wrong, just at this point,  
15 that's not--I don't see the purview of the Court to decide whether or  
16 not a soldier is armed or goes on leave or anything else.

17 DC: Understood, sir.

18 MJ: So if the command chooses to treat a soldier in such a way  
19 that it constitutes a violation of Article 13, obviously, we will get  
20 an appropriate relief.

21 DC: Understood, sir. There is evidence seized by the  
22 government which consists of two memory sticks. The memory sticks,

1 themselves, are personal property of Staff Sergeant Frederick. There  
2 are some personal digital photographs and other items that the  
3 defense would like to get back, realizing that the memory sticks  
4 themselves are still evidence. The digital pictures and whatnot are  
5 still very much personal and are not evidence in this particular case  
6 and we'd also make a request that they be returned to the defendant.

7 MJ: Is the memory stick being retained as evidence in this  
8 case, trial counsel?

9 TC: Yes, Your Honor.

10 MJ: How many images are on this memory stick?

11 DC: We don't know, exactly, Your Honor, but there are----

12 MJ: Ballpark it for me, Captain [REDACTED] (b)(6)(2)-(b)(7)(C) -2

13 DC: Approximately 4 to 500 personal images.

14 MJ: How do you define "personal"?

15 DC: Images of my client's experiences here in Iraq.

16 MJ: And trial counsel, there are also evidentiary images on  
17 them?

18 TC: Yes, Your Honor.

19 DC: So far, sir, we've only been provided with the evidentiary  
20 images. All we're asking for is that a CD-ROM be put in a computer  
21 somewhere and burn the entire contents of those--it doesn't seem  
22 to----

1 MJ: What do you say there, Captain [REDACTED]? (b)(6)2 (b)(7)(c) Z

2 TC: I think we can accommodate that, Your Honor.

3 MJ: I mean, since the evidentiary stuff they're entitled to  
4 anyway, the personal stuff they can have back. Just download the  
5 whole thing.

6 TC: Yes, Your Honor.

7 MJ: This isn't really my lane, but what the heck.

8 TC: Yes, Your Honor.

9 MJ: But go ahead and just download the whole thing because he's  
10 entitled to, one, as the accused of the evidence stuff, and the other  
11 stuff is personal.

12 TC: Yes, Your Honor. (b)(6)2 (b)(7)(c) -2

13 MJ: Okay, Captain [REDACTED] you got that one. What else?

14 DC: As per other co-accused, it's our intention also to file a  
15 leave request with the government, given the status of Staff Sergeant  
16 Frederick being present in country for over a year, and being  
17 flagged, he has not so far been allowed to have any rest and  
18 recuperation leave.

19 MJ: It's similar with the issue with dealing with the weapon.

20 DC: Yes, sir.

21 MJ: You may re-file or do what you want with the chain of  
22 command on that.

1 DC: Yes, sir.

2 MJ: And then if it's denied and there is appropriate relief,  
3 he'll get it. But at this point, I don't have authority to tell the  
4 command to put a soldier on leave.

5 DC: And then on May 27th, 2004, I notified the trial counsel  
6 of my request for support under Army Regulation 27-10, paragraph 6-4.  
7 I am currently unable to have private communications with civilian  
8 co-counsel given my locations here. The DNVF phone that was provided  
9 does not allow me access to outside DSN lines, which don't give me  
10 access back to the United States----

11 MJ: I understand. What do you say to that, trial counsel?

12 TC: Access has been provided. In fact, we've already worked  
13 this out with defense where all he has to do is come to the SJA  
14 office, give us an approximate time. We set him up with his own  
15 office up in the palace that has a DSN line and he can call his  
16 defense counsel. All we ask for is a reasonable notification of what  
17 time so we can make the coordination up in the palace.

18 MJ: Can he convert that to a civilian line once he calls----

19 TC: Yes, a DSN line is a civilian line, Your Honor, and he can  
20 call directly to the United States with that.

21 MJ: And he can switch over to a civilian at the other end is my  
22 question.

1 TC: Yes, Your Honor.

2 MJ: Now, I'm not very technologically advanced here, Captain

3 [REDACTED] (b)(6) 2; (b)(7)(C) - 2

4 TC: I call my wife back in the States all the time. He can do  
5 it, sir.

6 MJ: What do you say to that, Captain [REDACTED]

7 DC: Sir, with that, I agree that I have been--given the  
8 presence of co-counsel in New Hampshire, there's not an installation  
9 nearby, so I cannot have a--I haven't been able so far to connect  
10 with a DSN operator close to New Hampshire. So what I end up doing  
11 is contacting a DSN operator, for example, at Fort Bragg, then  
12 spending my own funds, via calling card, to have them dial a 1-800  
13 number. So all I asked before was that I be provided a calling card.  
14 That was rejected by the government.

15 MJ: Is Captain [REDACTED] having technological problems here,  
16 Captain [REDACTED] or is it---- (b)(6) 2; (b)(7)(C) - 2

17 TC: Sir, all he has to do is raise it to the government.

18 MJ: Here's the issue, it's very simple, is this case involves  
19 both civilian counsel and a Reservist with I'm assuming ties to his  
20 local community. So he's going to have to be given private access to  
21 commercial phone lines to permit the defense to prepare their case.  
22 Solve the problem. If you don't, I will.

1 TC: I agree, Your Honor. All he has to do is raise it to the  
2 government.

3 MJ: Captain (b)(6) 2; (b)(7)(C) -2 if what he gives you is not satisfactory,  
4 re-raise the issue. What I'm being told right now is that you will  
5 be given access, under the limitations of this environment, to  
6 private, commercial lines to the States to talk on official business  
7 to your heart's content in preparing for your case.

8 DC: Yes, sir.

9 MJ: And that would also include if your client needs to  
10 participate in said discussions.

11 DC: Yes, sir.

12 MJ: Go ahead. Anything else?

13 DC: No, sir, that's it.

14 MJ: Trial counsel, do you have anything?

15 TC: Yes, Your Honor. The government would move that the court  
16 issue a publicity order to any perspective panel members in this  
17 case.

18 MJ: Defense counsel, do you object to me signing said order?

19 DC: Your Honor, the defense does not have a problem with that  
20 order, only to the extent that we feel that it's not remedy enough to  
21 cure a possible change of venue from this location.

1 MJ: So you don't object to it, you're just not sure it's going  
2 to be all that effective.

3 DC: Yes, sir, I don't think it's going to be curative enough.

4 MJ: And I think we discussed at the 802 that the change of  
5 venue motion, we will take up at a later time. And of course, at  
6 that time, we can talk about the effectiveness or lack thereof of  
7 said order.

8 The government motion to issue such order is granted. I've  
9 signed it. Distribute it to all court members, and also distribute  
10 it to all other--number of cases we have in this case. What's your  
11 pool of court members there, Captain [REDACTED] (b)(6) 2, (b)(7)(D) - 2

12 TC: Excuse me, Your Honor?

13 MJ: The number of accused in these related cases, I'm just  
14 reading the charge sheet in this case, you have, I believe, five  
15 pending trials.

16 TC: That's correct, Your Honor.

17 MJ: So I assume you have five pending panels.

18 TC: We will be bringing nominees to the convening authority so  
19 he can select additional panel members for these five cases.

20 MJ: Once they're all selected and identified, make sure each  
21 and everyone has that and make sure each and everyone signs it. And

1 defense, you will have, of course, access to all the files nominating  
2 the court members and this information, also.

3 Anything further from the government?

4 TC: No, Your Honor.

5 MJ: Anything further from the defense?

6 DC: No, Your Honor.

7 MJ: Sergeant Frederick, one matter I need just go over with you  
8 again. In the event the command decides to give you leave, as I told  
9 you before, you have been arraigned. We did that last month in May,  
10 and you normally have a right to be present at every stage of your  
11 trial. Do you remember me telling you this?

12 ACC: Yes, Your Honor.

13 MJ: Now do you remember, I said if you went AWOL, that the  
14 trial could proceed without you?

15 ACC: Yes, Your Honor.

16 MJ: And again, as I told you then, as I tell you now, I'm not  
17 implying that if you get leave to go back to the States you're going  
18 to go AWOL or anything like that. This is standard advice I give  
19 everyone I arraign when trial does not begin immediately. So if you  
20 do get leave and you do have difficulty getting back, make sure you  
21 notify your chain of command. Do you understand that?

22 ACC: Yes, Your Honor.

1 MJ: Also, for planning purposes, I expect all discovery in this  
2 case to be completed by 31 July, and at that time, I will have an  
3 affirmative email from every party involved of any outstanding  
4 discovery issues. Assuming that that date is met, defense, you have  
5 a 14 August suspense date for motions. I understand your discovery  
6 is not complete, but there's no reason in the world that a lot of the  
7 motions can't at least be started in draft format at this point.  
8 That gives you almost 2 months to prepare for motions.

9 Government, they're going to have 2 months to prepare,  
10 you're going to have 1 week to respond. Your suspense is 21 August,  
11 with anticipated motions hearing date subsequent to that, ball  
12 parking it somewhere after the 21st of August.

13 Does everybody understand their suspenses?

14 TC: Yes, Your Honor.

15 DC: Yes, Your Honor.

16 MJ: Any other matters to take up at this time?

17 TC: No, Your Honor.

18 DC: No, Your Honor.

19 MJ: Court's in recess.

20 [Court recessed at 1705, 22 June 2004.]

21 [END OF PAGE.]

1 [Court was called to order at 1355, 24 August 2004, at Mannheim,  
2 Germany.]

3 MJ: Court is called to order. All parties are again present  
4 that were present when the court recessed with the exception of the  
5 civilian defense counsel, who has now joined us.

6 (b)(6)-4, (b)(7)(C)-4 Mr. [REDACTED] can you put your qualifications on the record?

7 CDC: Yes, Your Honor. I'm a member of the bar of the District  
8 of Columbia in good standing. I know of nothing to disqualify me  
9 with the representation of this case.

10 MJ: Please raise your right hand. [Civilian defense counsel  
11 was sworn.]

12 MJ: I would note for the record that this hearing is being  
13 conducted in Mannheim, Germany, at the request of the defense because  
14 they would be in Germany at this time to conduct further discovery in  
15 this case. The movement of this hearing to Germany in no way  
16 indicates a movement of the trial itself or any further hearings  
17 outside of Baghdad, Iraq subject to a granting of a motion for a  
18 change of venue.

19 At the last hearing, I denied a defense request to reopen  
20 the Article 32 hearing. I have reduced additional findings to  
21 writing as I said I would. Major [REDACTED] here's a copy for you and

(b)(6)2, (b)(7)(C)-2

1 the defense, and I believe that's Appellate Exhibit XI. [MJ handed  
2 both counsel a copy of Appellate Exhibit XI.]

3 Furthermore, the defense filed a motion for a change of  
4 venue, that would be to change the location of this trial. Defense,  
5 the government filed a response to the sentence to change the  
6 location of the trial. For the agreement, the parties had decided  
7 the motion without conducting a hearing; we did it by email on the  
8 4th of August. I denied the motion and provided copies of my denial  
9 to both sides and at this time, I will make my ruling, defense  
10 motion, government motion and the relevant email traffic as Appellate  
11 Exhibit XIX.

12 Defense, you indicated that you wish to file motion for me  
13 to reconsider that motion I just referred to?

14 CDC: That's correct, Your Honor.

15 MJ: Do you have a copy of the motion for the court reporter?

16 CDC: We've provided it to the court reporter, Your Honor.

17 MJ: That will be Appellate Exhibit XX. [Reporter handed  
18 document to MJ.]

19 Trial counsel, do you have a written response?

20 ATC: No, Your Honor.

21 MJ: Defense, what is new in your motion for reconsideration  
22 that I did not have before me when I decided on the original motion?

1 CDC: What is new, Your Honor, is the discussions with respect to  
2 the witnesses and their import. And additionally, we have noted one  
3 other witness, Lieutenant Colonel [REDACTED] and we have indicated in  
4 the motion for reconsideration that the court's interpretation of the  
5 law in this area was an error. (b)(6)-4; (b)(7)(c)4

6 MJ: What part was in error?

7 CDC: If I may, Your Honor, approach the podium. There were  
8 multiple areas, Your Honor, where we respectfully disagreed with the  
9 court. Allow me to enumerate them if I can.

10 MJ: Sure. (b)(6)-4; (b)(7)(c)-4

11 CDC: Firstly, with respect to the civilian witnesses who we  
12 identified as being material witnesses, that is to say the civilian  
13 expert, Dr. [REDACTED], the warden of the Buckingham Prison, the prison  
14 guard who worked with Staff Sergeant Frederick, his wife, his  
15 stepdaughter and the local pastor, all of these persons wish to  
16 testify and provide material evidence to the court. They have,  
17 however, advised the court by way of declaration and the pain of  
18 penalty and perjury, that they are unwilling to travel to Iraq. Now,  
19 the court, in responding to their declaration said that they were  
20 choosing not to go to Iraq. In other words, the court imposed a  
21 burden upon the witnesses as though going to Iraq were somehow----

22 MJ: What was the legal error?

1 CDC: The legal area was that, I can suggest to you, United  
2 States versus Nivens, which is a case that cites United States versus  
3 Hodge, Hodge being a Vietnam-era case. There, the court said that  
4 not going into a war zone is not a matter of choice, that it is  
5 tantamount to the equivalent of a witness who is diseased or near  
6 death. And therefore, the court's ruling that this was over a choice  
7 on the part of these civilians we believe to be legal error.

8 MJ: Well, let me ask you, there is nothing physically  
9 preventing them from flying to Iraq, true?

10 CDC: Yes, Your Honor.

11 MJ: The government will provide resources and transportation  
12 that they've done for other cases and for other civilians, true?

13 CDC: Well, not true.

14 MJ: Well, you're saying the government will physically prevent  
15 them from showing up?

16 CDC: No, other civilians, I do not believe are analogous to  
17 these witnesses. The civilians who go into Iraq do so either at the  
18 behest of the government because they're government employees or  
19 because they have an interest in financial gain and are willing to  
20 subordinate their personal interest to that.

21 MJ: Mr. [REDACTED] would it surprise you to know in a case held in  
22 Tikrit, Iraq, that the family members of both the accused and the

(b)(6)-4, (b)(7)(C)4

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1 victim voluntarily came to Tikrit and testified in the trial and sat  
2 the whole time?

3 CDC: Nothing in the law surprises me.

4 MJ: So what I'm simply saying is, there is the physical  
5 capability of transporting them to Iraq if they so chose to go.

6 CDC: Yes, Your Honor, but the case law is otherwise.

7 MJ: I'm not talking about the case law. I'm talking about,  
8 they can get on a plane in CONUS, fly commercial to Kuwait to get  
9 picked by MILAIR in Kuwait and go to Baghdad. There is not  
10 physically preventing them from doing that, true?

11 CDC: True, but it's not the legal test.

12 MJ: I didn't ask you that. Now, they're choosing not to come  
13 because they say it's not safe.

14 CDC: Well, true. They say it's not safe because common sense  
15 dictates that, Your Honor.

16 MJ: And therefore, I should move the trial out of Baghdad to  
17 someplace that they're willing to come to.

18 CDC: That's one of the reasons you should move the trial out of  
19 Baghdad, yes.

20 MJ: And so, where should I move it to to accommodate their  
21 desires?

1 CDC: Well, you can move it anywhere, and if you intend to keep  
2 the case, Your Honor, you could move it to Kuwait. You were there  
3 with great regularity. It's just across the border. It's far safer  
4 than Iraq. We can get many more witnesses there in person, and  
5 you're there on a regular and recurring basis.

6 MJ: But you would agree with me that the court has no subpoena  
7 power over civilians to go to any place outside of the continental  
8 United States.

9 CDC: United States versus Bennett.

10 MJ: Is that a "yes"?

11 CDC: Yes.

12 MJ: Okay. And then, so what happens if it goes to Kuwait and  
13 they say, "Well, I'm not going to show up there because I don't want  
14 to"? Isn't this, at the end of the day, is that this case was  
15 started in Baghdad, Iraq, and I know that's not dispositive, and then  
16 the court posture of the case, these are sentencing witnesses, and  
17 they will be provided transportation if they wish to come, and  
18 they're choosing not to come because in their view, it's not safe to  
19 come. At the end of the day, what is wrong with that analysis?

20 CDC: Here's is what is wrong, Your Honor, is it's contradictory  
21 to United States versus Hodge, where the court said that attending a  
22 trial in a combat zone presents such grave danger to a civilian

1 witness that we can properly compare his situation, namely, the  
2 witness, to one who, because of illness or disease, would be in  
3 grave danger to compel to attend.

4 MJ: I'm not compelling them to attend. If they want to come,  
5 they come, if they don't, they don't.

6 CDC: The point of that language, Your Honor, is that it is not a  
7 question of whether they are willing to come. It is a recognition  
8 that no one need to into a combat zone to discharge their  
9 responsibilities as a witness if there is an alternative that can  
10 meet the ends of justice.

11 MJ: Mr. [REDACTED] <sup>(b)(6)-4, (b)(7)(C)-4</sup> wouldn't that apply to every case in a forward  
12 and deployed environment?

13 CDC: I don't represent people in every case, Your Honor.

14 MJ: I didn't ask you that. What you're telling me is that  
15 because these witnesses choose not to go to Iraq because they believe  
16 it's too unsafe, therefore, they've now chosen where the trial is  
17 going to be. And my answer to you is, what happens when they say--  
18 under your analysis, you're letting defense sentencing witnesses  
19 dictate the place of trial based on choice. They're choosing, "I  
20 don't want to go to Iraq," maybe they won't, I don't know. They may  
21 go to Germany. But the bottom line is, they can't be forced to go  
22 anywhere outside the continental United States, which tells me is the

1 end result of this logic that you're giving me is that when defense  
2 sentencing witnesses don't want to come to a particular location,  
3 therefore, we move the trial to where they will come.

4 CDC: No, Your Honor, it's far more complex than that, far more  
5 complex than that. We are in a place where there are no witnesses.  
6 All the witnesses are going to come to Iraq in this trial, in this  
7 sentencing proceeding. And here is what these civilians, Your Honor,  
8 are going to have to sign, if I may, may the indulgence of the court.

9 MJ: Go ahead.

10 CDC: "You will be traveling into a combat zone in a dangerous  
11 part of the world. By agreeing to come to Iraq, you assume several  
12 risks, including, but not limited to, serious injury or death. You  
13 will again be potential targets of enemy insurgents who have been  
14 known to fire weapons, rifles and rocket propelled grenades and to  
15 plant improvised explosive devices alongside roads traveled by  
16 coalition forces. Before allowing you to enter Iraq, you must agree  
17 to hold the United States harmless, assume the risks set forth above  
18 and affirmatively waive your right to sue the Army or any other  
19 government agency for injury or death."

20 Now, I suggest to you respectfully, Your Honor----

21 MJ: And what is that piece of paper?

1 CDC: This is the hold harmless document that every civilian is  
2 required to sign going into the country of Iraq by the United States  
3 if they are to be transported into Iraq.

4 MJ: You need to make that an appellate exhibit. It will be  
5 XXI.

6 CDC: I will be happy to do so. Your Honor, I can give you a  
7 better copy eventually. We had difficulty taking this down off of  
8 the computer.

9 MJ: Government, do you take any issue of this document as it  
10 purports to be?

11 ATC: No, Your Honor.

12 MJ: I'll consider it.

13 ATC: I'm not trying to dictate terms of the arrangement, because  
14 this is a frivolous claim, Your Honor. The United States recognizes  
15 the danger, implicit danger associated with entering into the country  
16 of Iraq, and in so doing, has held itself harmless. We don't do that  
17 in Korea. We don't do that in Germany. We don't do that in Kuwait.  
18 It's completely reasonable for you, as a bare minimum, to have this  
19 trial in Kuwait. I can't tell you that people won't come to Kuwait,  
20 but I can tell you with great certainty that they are far more likely  
21 to come to Kuwait than they are willing to go into Iraq, and that's  
22 not unreasonable. In fact, I would say with some certainty, Your

1 Honor, that to suggest that they're unwillingness to go to Iraq is a  
2 volitional act on their part, which therefore, conveys some sense of  
3 blame, is inconsistent with the reality of the marketplace there.

4 MJ: That's not blame that's consistent with a choice.

5 CDC: I don't believe they have a choice, Your Honor.

6 MJ: We'll have to agree to disagree.

7 CDC: Well, I do so respectfully, of course.

8 MJ: No, I understand, that's fine.

9 CDC: But with respect to those civilian witnesses, I believe  
10 that the Vietnam case of Hodge says it all. And you know, also,  
11 Judge, with regard to travel these days and times, this isn't  
12 Vietnam. This is a country that is surrounded by non-combative  
13 circumstances where the Army has a significant presence at Camp Doha  
14 where you try cases on a regular basis just south of there. We are  
15 all here today. We can be in United States as is evidenced by the  
16 England case, and that case is moving at a pace without difficulty.  
17 Well, it's moving at a pace.

18 MJ: It's moving.

19 CDC: I perhaps was excessive in my use of the language, Your  
20 Honor. It's moving a pace and it is there and will remain there.  
21 So, it's not as though things can't be done in CONUS or in Kuwait.  
22 It is rather that conscious choices are being made to keep it there.

1 Now, may I say with all due respect to the court that the decision to  
2 initiate the case in Iraq was perhaps reasonable given the fact that  
3 the incident arose in Iraq. However, the case has become  
4 substantially politicized since then, Your Honor. And in fact, now,  
5 we are told 2 days ago by General Kimmitt that these trials must be  
6 held in Iraq because the Iraqis are a people who are slightly  
7 paranoid and would feel there was a conspiracy if we moved it from  
8 there. Even the government suggested that one of the reasons----

9 MJ: Just so that I--A, I've never heard that remark, and B,  
10 with all due respect to General Kimmitt, I don't care what he thinks.

11 CDC: Very well.

12 MJ: It's not his decision.

13 CDC: Understood.

14 MJ: He can want to have it on the moon for all I care, which I  
15 don't at all. So whatever his view of this case is is fine, but his  
16 personal views have nothing to do with the decision of this court.  
17 Go ahead.

18 CDC: But there is, Your Honor, implicit in these proceedings, an  
19 impression that is meant to be left by bringing this case to Iraq.  
20 And what I am suggesting to you respectfully, that there is a  
21 political component to this case. Even the government in their  
22 response to our initial brief said, that one of the principal reasons

1 for keeping the case in Iraq was to demonstrate to the Arab world in  
2 General and the Iraqis, specifically, that we had a transparent  
3 system of justice. Now, there is a paradox here, Your Honor, because  
4 if all these witnesses do not attend, we're going to demonstrate a  
5 transparency of justice to people who have not known it for decades,  
6 will we at the same time deny the individual American justice that  
7 would normally be accorded to an American elsewhere all because we  
8 have this compelling need to maintain this trial in Iraq. I can  
9 perceive of no operational necessity which requires this trial to be  
10 in Iraq.

11 MJ: On your motion for reconsideration, you indicate the  
12 civilian witnesses are the ones, I'm saying "choose," you're saying  
13 "being forced," and then there's a number of military witnesses. You  
14 would agree with me that they will not get this option. The military  
15 witnesses are going to be told where they need to be.

16 CDC: Absolutely.

17 MJ: So that part of your argument doesn't apply to them.

18 CDC: You're quite right, obviously, yes.

19 MJ: And for those in your earlier brief that invoked their  
20 31(b) rights, absent a grant of immunity, they are unavailable for at  
21 least legal reasons unconnected with the locus of trial.

22 CDC: And we're trying to address that later on.

1 MJ: But what we're talking about here, is you're saying is  
2 they're no operational necessity to try this case in Iraq, but isn't  
3 the default place of trial where the convening authority puts it and  
4 that you have the burden to show it should be moved?

5 CDC: Yes.

6 MJ: And therefore, the burden is you, not to show why it needs  
7 to be moved, not them to show it is operational necessity.

8 CDC: Quite agree, and by a preponderance of the evidence  
9 standard, we have to do that.

10 MJ: And what basically, what I'm hearing you tell me is the  
11 primary reason to move this trial location is the civilian witnesses'  
12 lack of attendance, and you won't say why. That's what you're  
13 telling me, the primary reason is because civilian witnesses will not  
14 attend the trial in Iraq.

15 CDC: Civilian witnesses will not attend the trial in Iraq, that  
16 is correct.

17 MJ: Government, what's wrong with moving this thing to Kuwait?

18 ATC: Your Honor, it's the government's position that it is the  
19 default position of where the convening authority puts it, and the  
20 defense has to meet the burden. On top of the burden of, they have  
21 to show why it needs to be moved, you also have to take a look at the  
22 posture of the case which is a sentencing case, so it's under R.C.M.

1 1001 which clearly points to the fact that of the preference of  
2 alternative forms of testimony as opposed to necessarily having live  
3 witnesses. When the Rules of Court-Martial were set up, it's clear  
4 from the wording of 1001 that unless there's a showing of necessity  
5 of why this person needs to be taken as a live witness, that other  
6 forms are actually the preferred means of taking that evidence. So,  
7 as far as...two things, one, the default position of where the  
8 convening authority puts it, and second, the posture of the case  
9 dictates that unless they can show why this--there's a particular  
10 civilian witness that needs to be taken live, other than that, it  
11 should default to Baghdad, Iraq.

12 MJ: What do you say to that, Mr.  (b)6-4, (b)7(c)-4

13 CDC: Well, I say, Your Honor, that----

14 MJ: You would agree, we're talking about a sentencing case  
15 here.

16 CDC: Oh yes, of course, we are. I've disclosed that, too.

17 MJ: No, I'm with you. And the rules do permit alternative  
18 forms of testimony that the government indicated they're perfectly  
19 willing to participate in. Doesn't that somewhat obviate any  
20 prejudice suffered by the lack of personal attendance?

21 CDC: Well, it depends on how you interpret 1001(e). The  
22 foundation upon which 1001(e) is built is a notion is that it's an

1 indigent status kind of language. That is to say, it reflects  
2 witnesses brought at government expense. That's what it says. And  
3 the government is spending hundreds and hundreds of thousands of  
4 dollars for these cases, and they are hanging their hat on 1001(e),  
5 which is really an economic section of the Code. It says that you  
6 are limited in what you can do as a Judge with respect to your  
7 discretion, if the witnesses come at government expense. So, the  
8 purpose of that Code section is to ameliorate costs associated with  
9 the production of witnesses. That's the underpinning of that  
10 section.

11 MJ: But in this case, there's no issue about them paying for  
12 the witness to show up. It's simply saying if the witnesses don't  
13 show up...it's one thing to say, the government says, "I'm not going  
14 to produce these witnesses because it costs too much money," which is  
15 I think is what you're saying, and therefore, use these other means.  
16 That's where the government is unwilling to pay. And assuming that's  
17 a justified position, then you say, use alternate means. But the  
18 government is perfectly willing to pay in this case. And so you are  
19 choosing, not you, but the defense says, "I want these witnesses  
20 here. They won't come, therefore, move the trial to them." And I  
21 come back to the idea is, that when this trial was started, it  
22 started in Baghdad. The expectation was, because as you're well

1 aware, the default is it usually ends where it starts. I'm not aware  
2 of any trial that moves sua sponte somewhere else. Be all that as it  
3 may, it started in Baghdad. The offenses occurred in Baghdad. The  
4 convening authority has directed Baghdad as a site, and so  
5 everybody's on notice that this is where it's going to be. And now,  
6 you want it to be moved somewhere else, even though the Rule permits  
7 and the government has done nothing to prevent you from bringing  
8 these witnesses in, and has both agreed to stipulate if they won't  
9 come in or pay if they do. And you're saying I----

10 CDC: They haven't agreed to stip--excuse me, Judge, I didn't  
11 mean to interrupt you.

12 MJ: They don't agree to stipulate? I thought they did agree?

13 CDC: Stipulation of fact.

14 ATC: In our brief, we offered alternative forms of testimony, to  
15 include depositions and stipulations of fact, if that's agreeable to  
16 the parties.

17 CDC: Only if it's agreeable. And the stipulations of fact that  
18 we would anticipate coming from people may not be satisfactory to the  
19 government.

20 MJ: Mr. [REDACTED] *(b)(4);(b)(7)(C)-4* let me ask you this. If a witness testifies and  
21 we move this somewhere where the witness shows up and testifies,  
22 that's testimonial evidence, true?

1 CDC: Sure.

2 MJ: And then their opinion, they'll give whatever their opinion  
3 is, true?

4 CDC: Of course.

5 MJ: And so, the government says, we're going to stipulate to  
6 their expected testimony. Are they supposed to stipulate to what  
7 they say is fact?

8 CDC: Well, I think the Rule suggests that it has to be a  
9 stipulation of fact, Your Honor.

10 ATC: Under 1001, that is correct, that you have to stipulate  
11 that it's fact as opposed to expected testimony if----

12 MJ: Well, I understand what the Rule says, but what you're  
13 saying the fact would be what? Give me an example of what you want  
14 them to stipulate to as a fact?

15 CDC: Well, I certainly want them to stipulate to the fact that  
16 the warden from Buckingham is going testify that the procedures  
17 employed at Abu Ghraib were simply so far out of bounds of what  
18 normal prison conduct is that----

19 MJ: But that sounds to me like your stipulation of fact of what  
20 he would say.

21 CDC: What are you going to do in a stipulation of fact except  
22 say what he is going to say?

1 MJ: Okay, but then I think we're parsing the terms here, but  
2 okay. And government, do you have any objections--

3 ATC: I have no objection, Your Honor.

4 MJ: ----to stipulating as fact of what these people would say?

5 ATC: That's correct, Your Honor.

6 CDC: Well, is that carte blanche, that we just simply give the  
7 government whatever we want our witnesses to say?

8 MJ: Well, no, then they call the witness up and see what the  
9 witness will say then. I mean, don't you think that's the way the  
10 system works?

11 CDC: No.

12 MJ: No, wait a minute, are you telling me that you think you  
13 ought to make them sign something that they can't confirm as true?

14 CDC: No, not at all, not at all. I'm simply saying that they  
15 may find that the stipulation of fact is unsatisfactory for their  
16 purposes, and then I'm left with what? A stipulation of fact is not  
17 a solution in this case, I do not believe, Your Honor, because it's  
18 too high a standard. If it were a stipulation of expected testimony,  
19 I think I would be on a lot shakier ground. But a stipulation of  
20 fact----

(b)(6)-4, (b)(7)(C)-4

1 MJ: Mr. [REDACTED] as you define "stipulation of fact" in this  
2 case, it strikes to me as the government would have no problem, am I  
3 wrong?

4 ATC: You're not wrong, Your Honor.

5 MJ: Draft them up, give it to them, and they'll sign it.

6 CDC: That doesn't get us----

7 MJ: I know, we've down a digression, I understand that.

8 CDC: That really doesn't get us anywhere.

9 MJ: So I mean, the bottom line is, the Rule does contemplate in  
10 sentencing proceedings alternative forms of testimony.

11 CDC: Oh, it does, indeed, but the preface to it is that the  
12 government--the reason for that is that the government is going to  
13 pay for it, you see. I mean, the idea is, under 1001(e), if you'll  
14 look at the prefatory remarks, Your Honor.

15 MJ: Go ahead.

16 CDC: So if you'll look at the prefatory remarks, it refers to  
17 the initiation of this particular provision only in those cases where  
18 the government is paying for the expense. You know, John Kerry and  
19 George Bush's kids never have to worry about 1001(e), Your Honor.

20 MJ: I'm not sure what relevance that has, Mr. [REDACTED]. But if  
21 you read the Rule, it says, "A witness may be produced to testify  
22 during presentence proceedings through a subpoena or travel orders at

1 government expense only if...," and then they have all these  
2 requirements, other forms aren't acceptable. But what I'm saying is,  
3 that's not being triggered because the government is going to pay for  
4 this.

5 CDC: Well, it is being triggered, it's being triggered because  
6 the government's paying for it.

7 MJ: Okay, but you're saying is that the subparagraph Delta,  
8 "Other forms of evidence would not be sufficient to meet the needs of  
9 the court-martial to determine an appropriate sentence," doesn't  
10 apply because the government is willing to pay.

11 CDC: No, I'm not, Your Honor, at all. What I'm suggesting to  
12 you, if the government were not paying for these witnesses, that  
13 section would have no application to this accused. We're not paying.  
14 That section would have no application. If, for example, the accused  
15 were to pay for his own witnesses, your standard of review would not  
16 be----

17 MJ: Well, there is no standard of review because I don't review  
18 it.

19 CDC: Well, your standard of analysis with respect to what  
20 witnesses will be produced by you is a different standard than the  
21 1001(e) standard.

1 MJ: But if the government is not paying and you're not asking  
2 me to make the government pay, then I don't review how the witness  
3 got there. They just show up, right?

4 CDC: Well, no, not really. You still, if you'll look at the  
5 preceding paragraph of that section, 1001(e), you still have an  
6 obligation to order production, but the accused pays for it.

7 MJ: What I'm simply saying is that if you don't want the  
8 government to pay for a witness, how that witness gets there is not  
9 my call.

10 CDC: Correct.

11 MJ: That's all I'm saying. Now, the witness may show up and  
12 have irrelevant testimony, then that is my call. But that's a non-  
13 issue. What I'm simply saying here, is that they're willing to pay.  
14 The witnesses are not willing to come. That's the starting point.

15 CDC: At the moment.

16 MJ: You say, "At the moment," well, that's what I got.

17 CDC: Right.

18 MJ: And then they've said they'll enter into a stipulation of  
19 fact containing the matters to which the witness is expected to  
20 testify. They said they'll do that, okay. They've also said they'll  
21 introduce whatever else, alternative forms of testimony you want to