

# **Investigating Officer's Report: Lt. Col. Gary Brown**

## **a. Case Synopsis.**

(1) On 19 September 2006, Lt Col Brown and Lt Col Hall drove from Kabul Area International Airport (KAIA) to Camp Eggers. Lt Col Brown had to deliver some paperwork to an office on Camp Eggers and he asked for a volunteer to drive with him. Lt Col Hall agreed to go with him and they left right after their afternoon meeting. (IO Exhibits 23 (Lt Col Brown) and 24 (Lt Col Hall)) They first stopped at their living quarters, near KAIA, to pick up their individual body armor (IBA), helmets and a long weapon. (IO Exh's 23 and 24) In order to drive within the city of Kabul, they were required to have two people in the vehicle and to wear their IBA and helmets, if not in an up-armored vehicle. (IO Exh 55, General Order 1) Lt Col Brown was wearing the helmet he brought with him to Afghanistan, which contained a black bracket on the front for mounting a night vision goggle device. They were driving a white Land Cruiser and it was a light skinned vehicle without any electronic countermeasures. (IO Exh 23) When they got into the vehicle, Lt Col Brown placed his M4 inside the door right down by his left leg. It has a collapsible stock so it fits in that space. He also had a M9 and Lt Col Hall had an M9. (IO Exh 23)

(2) Lt Col Brown and Lt Col Hall proceeded to drive on Route White in the direction of Camp Eggers. Route White is a paved road and mostly smooth. There is a short segment of road with poor conditions. It is a popular road and the traffic flow was moderate that day. There are two lanes in each direction and the road is divided by a median strip. This strip is approximately 12-18 inches high and the top is flat cement. There were also children leaving school around the time they were driving and they were going every which way. (IO Exh's 23 and 24)

(3) They were driving in the left hand lane and were following a yellow vehicle. At some point both Lt Col Hall and Lt Col Brown saw movement on the right of their vehicle. They both saw a dark colored SUV with windows that were completely blacked out. The dark SUV was driving fast and tried to cut in front of them into their lane. The dark SUV came across and clipped the right front quarter panel of the Land Cruiser with its' left rear quarter panel. Lt Col Brown maintained control of the vehicle and the dark SUV slowed down and fell back in the right lane. (IO Exh's 23 and 24)

(4) Lt Col Brown testified that he thought, "Holy Shit this guy just hit us." Lt Col Hall testified that he thought, "That's strange—he just hit us and left." Lt Col Hall tried to turn to the right and look for the vehicle but because of his IBA, helmet and seat belt his vision was restricted. Then Lt Col Hall saw the SUV again as it came up parallel with their vehicle. Lt Col Brown testified that a few moments after the first impact, the same vehicle zoomed up again and stayed right beside their vehicle. Lt Col Hall testified that he thought, "This is bizarre. Why is he driving alongside us like this?" Lt Col Brown testified that he was now watching the dark SUV and trying to keep his eyes on the vehicle in front of him. (IO Exh's 23 and 24)

(5) Lt Col Hall testified that Lt Col Brown did not veer into the right lane. The dark SUV was almost in the center of the road. Then the dark SUV made a definite move into the Land Cruiser and Lt Col Hall thought, "Oh my God I'm going to die. He is trying to kill us." Lt Col Brown testified that the dark SUV came straight across into his lane again and the side of the dark SUV hit the side of their Land Cruiser. Their vehicle was already hugging the median and they had to just take the impact. Lt Col Brown's thought was, "Holy Shit, this is a set up!" Then Lt Col Hall said to Lt Col Brown, "Step on it and get us out of here." After the dark SUV hit them it slowed down on the right and Lt Col Brown took off, weaving through traffic, putting distance between them and the dark SUV. (IO Exh's 23 and 24)

(6) Lt Col Brown testified that he thought the dark SUV was a bomb. He wanted to get away from the vehicle and get them to Camp Eggers and the protection of the US military. From where they were it was a straight shot to Camp Eggers through the MOD gate and down Embassy road. This was the most direct and secure route to Camp Eggers. (IO Exh 23) When they reached the MOD or delta gate as it is called, they were directly behind three white SUV's that had just gone through the lift arm and were making their way through the barriers. One of the white SUV's on the other side of the gate had broad brown stripes that went down the side of the vehicle. Lt Col Brown stopped the Land Cruiser right at the lift arm. There was no other vehicle in front of them. (IO Exh's 23 and 24)

(7) When they reached the gate Lt Col Brown testified that he was still very scared and just wanted the lift arm to come up. He could see the gate guard holding a "brick" (radio) in his hands. (IO Exhibit 23) Lt Col Hall testified that they were both still breathing heavy and he looked up and saw one of the Afghan guards trying to get a look behind their vehicle and pointing. (IO Exh 24) Lt Col Brown looked in the rear view mirror, saw the dark SUV and thought, "Oh dear God they're after us." He also testified that he now thought he was going to die. He reached down and grabbed the pistol grip of his M4, looked in the mirror and tried to cock his body to the right. (IO Exh 23) Lt Col Hall testified that his window went down (he did not put it down) and he saw a shadow approaching and then he could see a person. At a later point in time Lt Col Brown and Lt Col Hall figured out that Lt Col Brown accidentally hit the one-touch window control on his door when he reached down and grabbed the pistol grip of his M4. (IO Exh 24)

(8) Both Lt Col Brown and Lt Col Hall described the man who approached their vehicle as dark-skinned, with beard growth and in a shirt and vest. Lt Col Brown testified that the vest had various weapons magazines hanging on it and Lt Col Hall said the man had a clear plastic panel on his chest that had nothing behind it. Lt Col Hall testified that he thought, "This is strange, I wonder what he wants." Lt Col Brown was thinking, "This is a suicide bomber and I am not going to see my wife and babies again." (IO Exh 23 and 24)

(9) Lt Col Brown heard the guy speaking English but they were in the middle of an intersection with traffic and it was loud and chaotic and it was hard to hear the guy

clearly. (IO Exh 23) Lt Col Hall testified that the guy who came up to their vehicle was absolutely furious and extremely irate. The guy yelled at them, "Who are you? Where do you work?" Lt Col Brown echoed the same questions back to him. This seemed to upset the guy more and he yelled, "Fuck you!" Lt Col Brown yelled the same thing back. Lt Col Hall testified that he had no idea why the guy was so mad and his behavior was starting to scare him. Lt Col Hall testified that the guy said something about, "fucking you up," and he was spitting, his veins were bulging and he was extremely upset. At one point he said something like, "I'm DEA and I'm really going to fuck you." (IO Exh's 23 and 24) Lt Col Hall then testified that the guy said, "Hall, I've got you Hall!" The guy said this with a very deep, distinct and deliberate change of voice. Lt Col Hall said when he said this it scared the shit out of me. He thought, "He knows me and he wants to kill me." Lt Col Hall said back to him, "Are you threatening me?" Then the guy took a few steps back and was out of my sight and said again, "I've got you Hall." Lt Col Hall asked him again if he was threatening him. Lt Col Hall testified that he thought, "He has a gun and his going to shoot me now." Lt Col Hall felt like a trapped animal. He pulled out his pistol, undid his seatbelt and got out of the vehicle. (IO Exh 24) Lt Col Brown testified that he heard, "Hall," and thought, "Oh, Fuck they know us and are after us specifically." Then Lt Col Brown testified that he heard the guy say, "I got you Hall, I got you," and then heard Lt Col Hall ask if the guy was threatening him. When Lt Col Hall grabbed his pistol and got out of the vehicle, Lt Col Brown was thinking, "Oh shit, what do you see?" As Lt Col Hall was getting out of the vehicle Lt Col Brown was thinking, "I have to go out there with him." (IO Exh 23) Lt Col Hall said that he could not tell at that time that the man was an American. He was speaking English but he was completely belligerent, his words were distorted and he was stuttering. Lt Col Hall testified that he has heard many Afghans that speak very good English. (IO Exh 24)

(10) When Lt Col Hall got out of the vehicle he saw the guy disappear behind the Land Cruiser. He also saw the dark SUV and realized that this was the same guy who had rammed them on the road. He began to walk slowly towards the back of the Land Cruiser. He could see that the door to the dark SUV was still open. (IO Exh 24)

(11) Lt Col Brown pushed open his door, and got of the vehicle with his M4. He charged a round in his gun, brought it up to the low ready position, with his left hand on the pistol grip and his right hand on the fore grip and then turned around to face the back of the vehicle. He went towards the back of their vehicle and could see the dark SUV and saw no one else inside the vehicle. When he came around the back end of the Land Cruiser he saw the individual who had just been at the window but did not see Lt Col Hall. (IO Exh 23) Lt Col Brown pointed his weapon at the individual and told him to put his hands on the car. As soon as he said this he thought that was not a good idea and told him instead to get on the ground. The individual said, "I'm going to the car," and Lt Col Brown told him, "no you're not," and stepped in between the individual and the dark SUV. (IO Exh 23)

(12) When Lt Col Hall reached the back of their vehicle he heard Lt Col Brown saying, "Put your hands on the hood." Then he heard the other guy shout, "No!" (IO Exh 24) Lt Col Hall testified that the guy did not identify himself or say that he was

an American at this time. Lt Col Hall stayed where he was and watched Lt Col Brown engage the guy. Lt Col Hall was thinking this is my commander and he seems to know what he is doing. Lt Col Hall testified that Lt Col Brown reached into the open door of the SUV and when he did this the other guy stepped forward and they bumped each other. He saw something shiny fall from Lt Col Brown's hands. Lt Col Hall was scared at this point because Lt Col Brown and the guy had made contact for the first time. Lt Col Hall pointed his weapon at the guy. (IO Exh 24)

(13) Lt Col Brown told the guy to get on the ground numerous times. The guy just kept responding, "No!" Lt Col Brown became more forceful with his requests saying, "Get on the god dam ground and get on the fucking ground." Lt Col Hall stated that the guy was saying, No!" and was angry and defiant. Lt Col Hall stated that there was chaos going on around them. They were out in the intersection, cars were honking and you could hear the noise from the car engines. There was also another altercation involving a Toyota Corolla involving one of the Afghan guards. He continued to watch the interaction between Lt Col Brown and the guy but could not hear a lot of the conversation. Eventually they got far enough away from him that he could not hear and he took a few steps towards them, but decided to stay near the vehicles for protection. When he stepped forward he stepped on something and picked it up. It was a keychain with one or two keys and a little piece of chain. The keys had a clear plastic tag that read, "No Lemon" on them. (IO Exh 24)

(14) Lt Col Brown testified that he wanted the guy to get on the ground so that he could check him for weapons. He could not see his right hand because of the way he was standing. After the guy didn't respond, Lt Col Brown took his right hand off his weapon and tried to shove the guy down on the ground. He grabbed his shoulder with his right hand and tried to pull and then push him off balance so he would fall down. It was like they were waltzing across the street because Lt Col Brown would take a step forward and the guy would take a step back. Then Lt Col Brown tried to trip him with his foot to get him on the ground. When that didn't work Lt Col Brown was thinking, "What now? I don't want to shoot this guy." (IO Exh 23)

(15) Lt Col Brown testified that he never saw an ID card on the man and the man did not say he was an American. He did see part of an ID cardholder around his neck. Because the man was not complying with any of his directions, Lt Col Brown took a step back, raised up his weapon (which had been pointing down because he was holding it with one hand), sighted the weapon on the man and clicked off the safety. The man's eyes got wide, his hands immediately went up in the air and then he said, "I'm sorry, I'm sorry, I'm an American, I'm sorry." (IO Exh 23) Lt Col Hall testified that when Lt Col Brown raised his gun at the man is when the man's hands went up in the air for the first time. The man had been angry and defiant and now he became passive for the first time. (IO Exh 24)

(16) When Lt Col Brown heard the man say he was sorry and that he was an American he stated, "It was like his words threw a switch in my head." Lt Col Brown placed his weapon on safe, took a step back and asked the man if he was ready to calm

this down now. The man responded, “Yes I am.” Lt Col Brown said, “Okay, let’s calm this down and go home.” Lt Col Brown stepped backward and looked for Lt Col Hall. He then worked his way back to where Lt Col Hall was standing. Lt Col Hall was still covering Lt Col Brown with his weapon. (IO Exh 23) Lt Col Brown still considered this man a threat and wanted to delay him from being able to follow them, so he asked Lt Col Hall about the keys and Lt Col Hall handed them to him. (IO Exh 23) Lt Col Brown threw the keys in the opposite direction of where the guy was located, across the dark SUV and into the bushes on the side of the road. (IO Exh’s 23 and 24) Lt Col Brown testified that he did this for their safety—there was no guarantee that the man wasn’t going to get angry again and escalate something again. I wanted to get to safety, find the authorities and report what happened. (IO Exh 23)

(17) Lt Col Hall and Lt Col Brown got back into the Land Cruiser and sat for a few minutes waving their hands at the gate guard to get them to lift the gate. The guard pointed at his radio. Lt Col Brown asked Lt Col Hall, “Clear right?” and Lt Col Hall said, “Clear right.” Lt Col Brown then used his mirrors to back out so they could go to the front of Camp Eggers. The dark SUV was still there at the Delta gate when they left. (IO Exh’s 23 and 24) They drove straight to Camp Eggers. They dropped off their IBA and helmets in Col Hansen’s office and then went into the Provost Marshall’s office to report the incident. The MP’s had them fill out accident reports and do written statements. (IO Exh 23 and 24) According to the written statements, Lt Col Hall and Lt Col Brown finished writing their statements between 1551 hours and 1622 hours. (IO Exh’s 3 and 4) Sgt Sutherland testified that both Lt Col Hall and Lt Col Brown appeared to be scared and excited. Both of them told him that they felt threatened and scared for their lives. They were both cooperative and answered all his questions. During the time that Lt Col Hall and Lt Col Brown were in the MP’s office, two men from the Embassy came in and wanted to speak on Mr. Bergeron’s behalf. The two men said they wanted to make a complaint and that something happened to their guy. Lt Col Hall or Lt Col Brown said to Sgt Sutherland, “that is probably for us.” (IO Exh 22) At a later time that day the two Embassy guys came back to the MP office with Mr. Bergeron. It appears Mr. Bergeron’s statement was completed at 1826 hours that same day. (IO Exh’s 11 and 21)

(18) Lt Col Hall testified that on 19 Sept 06 he was scared for his life and thought he was going to die. Without any other advance knowledge he could only react to the threat as he was trained to do. He testified that he would not have gotten out of the vehicle if Mr. Bergeron had not come up to their vehicle. He believes that his actions were within the rules of engagement (ROE). (IO Exh 24) Lt Col Brown testified that he got out of the Land Cruiser because the man had come out of his car and he thought he had followed them. He would do the same thing today because he wants to go home to his wife and twins. (IO Exh 23)

(19) Both Lt Col Hall and Lt Col Brown admitted that there are some details that they provided in their testimony at the hearing that were not in their written statements. (IO Exh’s 23 and 24) They both testified that the videotape that is purported to be of the

incident on 19 Sep 06 does not accurately reflect what happened that day. (IO Exh's 23 and 24) Lt Col Brown also stated that he and Lt Col Hall attempted to talk to the Generals in charge and no one would talk to them. Lt Col Brown offered to respond in writing to any questions asked of him. (IO Exh 23)

**b. Elements of the Offenses Charged.**

The specification of Charge I alleges that the accused wrongfully orally communicated to Jimmy Bergeron certain language that, under the circumstances, constituted conduct unbecoming an officer and a gentleman, in violation of Article 133 of the U.C.M.J. The elements of this offense are:

- (1) That the accused did, at or near Gate Delta, United States Embassy, Kabul, Afghanistan, on or about 19 September 2006, wrongfully orally communicate to Jimmy Bergeron "fuck you," "on the fucking ground," "I don't care if you are a U.S. citizen, get on the ground," "you're about to be a dead U.S. citizen," or words to that effect, and throw Jimmy Bergeron's keys away from his vehicle, while in uniform; and
- (2) That under the circumstances, these acts constituted conduct unbecoming an officer and a gentleman.

Specification 1 of Charge II alleges that the accused unlawfully pushed Jimmy Bergeron in the torso with his hand, in violation of Article 128 of the U.C.M.J. The elements of this offense are:

- (1) That the accused did, at or near Gate Delta, United States Embassy, Kabul, Afghanistan, on or about 19 September 2006, unlawfully push Jimmy Bergeron in the torso, with his hand; and
- (2) That the bodily harm was done with unlawful force or violence.

Specification 2 of Charge II alleges the accused unlawfully attempted to trip Jimmy Bergeron and that in so doing the accused struck Jimmy Bergeron on or about the leg with his leg, in violation of Article 128 of the U.C.M.J. The elements of this offense are:

- (1) That the accused did, at or near Gate Delta, United States Embassy, Kabul, Afghanistan, on or about 19 September 2006, unlawfully attempt to trip Jimmy Bergeron and in so doing strike Jimmy Bergeron on or about the leg, with his leg; and
- (2) That the bodily harm was done with unlawful force or violence.

Specification 3 of Charge II alleges the accused committed an assault upon Jimmy Bergeron by striking him in the chest with a loaded firearm in violation of Article 128 U.C.M.J. The elements of this offense are:

- (1) That the accused did, at or near Gate Delta, United States Embassy, Kabul, Afghanistan, on or about 19 September 2006, commit an assault upon Jimmy

- Bergeron by striking him in the chest; and
- (2) That the accused did so with a certain weapon: a firearm; and
  - (3) That the bodily harm was done with unlawful force or violence; and
  - (4) That the weapon was used in a manner likely to produce bodily harm or death; and
  - (5) That the weapon was a loaded firearm.

Specification 4 of Charge II alleges the accused committed an assault upon Jimmy Bergeron by pointing at his chest and head with a loaded firearm in violation of Article 128 of the U.C.M.J. The elements of this offense are:

- (1) That the accused did, at or near Gate Delta, United States Embassy, Kabul, Afghanistan, on or about 19 September 2006, commit an assault upon Jimmy Bergeron by pointing at his chest and head; and
- (2) That the accused did so with a dangerous weapon: a firearm; and
- (3) That the bodily harm was done with unlawful force or violence; and
- (4) That the weapon was used in a manner likely to produce bodily harm or death; and
- (5) That the weapon was a loaded firearm.

Specification 1 of Charge III alleges that the accused wrongfully and recklessly rammed his vehicle into another vehicle in violation of Article 134 of the U.C.M.J. The elements of this offense are:

- (1) That the accused did, at or near Gate Delta, United States Embassy, Kabul, Afghanistan, on or about 19 September 2006, wrongfully and recklessly engage in conduct to wit: ramming the vehicle he was driving into another vehicle; and
- (2) That the conduct was wrongful and reckless or wanton; and
- (3) That the conduct was likely to produce death or grievous bodily harm to Jimmy Bergeron; and
- (4) That, under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces.

Specification 2 of Charge III alleges that the accused wrongfully communicated to Jimmy Bergeron a threat to kill him in violation of Article 134 of the U.C.M.J. The elements of this offense are:

- (1) That the accused did, at or near Gate Delta, United States Embassy, Kabul, Afghanistan, on or about 19 September 2006, wrongfully communicate to Jimmy Bergeron a threat to kill him; and
- (2) That the communication was made known to Jimmy Bergeron; and
- (3) That the communication was wrongful; and
- (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

### **c. Discussion of the Evidence**

In regards to the specification of Charge I, there is evidence that Lt Col Brown did respond to Mr. Bergeron's verbal tirade with the words, "Fuck you." There is also evidence that Lt Col Brown did escalate his language when he was directing Mr. Bergeron to get on the ground and at one point said to him, "get on the goddamn ground and get on the fucking ground." There is no evidence that Lt Col Brown said, "I don't care if you are a U.S. citizen, get on the ground," or "You're about to be a dead U.S. citizen." While some of the charged language was used by Lt Col Brown, such language does not constitute conduct unbecoming an officer and a gentleman. These words were used only after Mr. Bergeron first used similar language towards Lt Col Brown and Lt Col Hall. Mr. Bergeron clearly began the encounter at the gate by approaching the Land Cruiser. The other words were directed at an individual that Lt Col Brown perceived to be a threat, in the course of using the ROE (specifically the guidance to shout) in order to contain Mr. Bergeron and to insure his own safety and the safety of Lt Col Hall.

In regards to Specifications 1 through 4 of Charge II, there is no evidence that Lt Col Brown pushed Mr. Bergeron in his torso. Lt Col Brown testified that he did push him on his shoulder as he tried to force Mr. Bergeron to the ground. There is also no evidence that Lt Col Brown struck Mr. Bergeron in the chest with his M4. There is evidence that Lt Col Brown attempted to trip Mr. Bergeron and his leg made contact with Mr. Bergeron's leg and that he also pointed his weapon at his chest and that it might have also been pointed at his head as well. Again, all these actions were taken by Lt Col Brown against an individual that Lt Col Brown perceived to be a threat, in the course of using the ROE (specifically the guidance to shove) in order to contain Mr. Bergeron and to insure his own safety and the safety of Lt Col Hall.

In regards to Specification 1 of Charge III, there is no evidence that Lt Col Brown used the vehicle he was driving to ram Mr. Bergeron's vehicle. The evidence shows that Mr. Bergeron tried to get in front of Lt Col Brown's vehicle by crossing over to the left lane. When he did so his vehicle's left rear quarter panel made contact with Lt Col Brown's right front quarter panel. After the first contact, the evidence shows that Mr. Bergeron drove his vehicle back up to drive side by side with Lt Col Brown's vehicle. Mr. Bergeron then made a move across the lane divider into Lt Col Brown's vehicle, the side of his vehicle making contact with the side of Lt Col Brown's vehicle. There is no reliable physical evidence to make an independent determination as to how the contact between the vehicles occurred. In summary, there was no evidence presented at the hearing to support this charge.

In regards to Specification 2 of Charge III, there is no evidence to support the charge that Lt Col Brown threatened to kill Mr. Bergeron.

The CJTF-180 Rules of Engagement, Self Defense ROE, provide that you have the right to use force, including deadly force, in self-defense of yourself, US forces, others designated by your command and mission-essential equipment. The force used must be

necessary. Force is necessary when you face a hostile act (an actual use of force against you); or, hostile intent (the threat of imminent use of force against you.) You do not have to wait for the threat to use force first. The force used must be proportional—use the minimal amount of force necessary to eliminate the threat. If time allows, use the four S's. These are shout, show, shove and shoot. You do not have to use every step if time does not allow. Shout—shout verbal warnings to halt. Show—your weapon and demonstrate an intent to use it. Shove—use non-lethal physical force to control the situation, to include using force to detain the person. Be creative—consider alternatives to force which might de-escalate the situation. Shoot—to eliminate the threat. (IO Exh's 7 and 58)

Lt Col Hall and Lt Col Brown were both briefed on the self-defense ROE (IO Exh 54). After listening to their testimony and considering all the evidence in this case, I believe that they applied those rules of engagement correctly. They both testified that they did not know Mr. Bergeron's status when he hit their vehicle and when he got out of his vehicle and approached them at the Delta gate. Both appeared to be very sincere and credible when they recounted what happened that day. Whether a person feels threatened by a certain situation or person is a very subjective determination, based on all the facts and circumstances at the time. Lt Col Hall stated that the guy said, "Hall, I've got you Hall!" The guy said this with a very deep, distinct and deliberate change of voice. Lt Col Hall said when he heard those words, "It scared the shit out of me." He thought, "He knows me and he wants to kill me." He also said that he felt like a trapped animal. Would another person feel threatened by those same words? I don't know. It doesn't matter. Lt Col Hall was the one who had just been in a vehicle that was rammed twice on the road and was then confronted by a belligerent and very angry man, who came up to his vehicle. All of this happened in Kabul, "outside the wire," during a time when the threat of vehicle born improvised explosive devices (VBIED's) and suicide bombings was very real. Lt Col Hall testified under oath that the man's words made him feel threatened. In response to that threat he got out of the vehicle so that he would not simply be a "sitting duck" while this guy was right outside of his vehicle.

Lt Col Brown saw that Lt Col Hall got out of the vehicle and his first reaction was, "Oh shit, what does he see?" He then got out of the vehicle to defend Lt Col Hall and himself. Lt Col Brown followed the four S's to a tee. He first shouted at Mr. Bergeron and after doing so a number of times he then tried to shove him. He testified that he was thinking, "I don't want to shoot this guy." Then he tried to trip him to get him to the ground. All of this was done to disengage what he perceived to be a direct threat to him and Lt Col Hall. Again, whether someone else in the same situation would view Mr. Bergeron as a threat or take the same exact steps is not relevant. Lt Col Brown testified under oath that he felt threatened, especially after he had gotten out of the vehicle and saw the dark SUV behind their vehicle. Lt Col Brown also showed his weapon and demonstrated a willingness to use it, as specifically directed in the ROE. He only took that weapon off of safe and directly showed an intention to shoot Mr. Bergeron AFTER using the other steps in the ROE. In my opinion, Lt Col Brown demonstrated a calm, collected demeanor during the whole incident. Another person might have been "trigger-happy" and shot Mr. Bergeron.

Captain Toomer, 755<sup>th</sup> ESS, testified that his understanding of the ROE was when reacting to a hostile threat, they are taught to shout, shove, show and shoot. Examples of shove would be to grab the collar, push or attempt to trip a person. You do not have to use the steps in order, it depends on the threat. You should use the minimum amount of force necessary to alleviate the threat. He further stated that there is no definition for a “viable hostile act,” it is really your own perception of whether there is a threat. If you initially perceive a threat and then something happens to de-escalate the threat then you would not continue to escalate your response. You should use the minimum amount of force necessary to address the threat. (IO Exh 14)

Captain Toomer also testified that the fact that a person may be holding both hands in the air and holding his ID card up are factors to consider in whether to de-escalate the use of force. A vehicle ramming you at least once would be a threat. He stated that he drives through Kabul every day and for the most part people move out of the way. If someone rammed him he would consider that to be a hostile threat. If that person continued to chase him and used threatening words, and then approached from behind, and then refused to comply with his orders and to get on the ground, then all those things might make him feel threatened. The ROE require further escalation if they are not followed. (IO Exh 14)

He testified that if someone knocked on the window, exchanged words and then walked away that would not necessarily mean that the threat had gone away. The person could be walking away to get his weapon. There are a million different things to consider and very real threats every day. People have been killed on a regular basis. He agreed that if you are at the gate and you exchanged words in English with a person then there are numerous ways that you could respond. (IO Exh 14)

He testified that the ROE are there to give guidance on how to engage a person who is hostile to you. Nothing in those rules states anything about nationality, skin color or language. The threat is not necessarily confined to nationality. All training is focused on Afghans and Iraqis. He has reviewed IO Exhibit 7 and there is no definition of a “viable hostile threat.” It is the person who determines whether there is a threat. He stated that he doesn’t have to wait until he has a weapon pointed at him before he can determine that there is a threat. We are in an asymmetric battlefield with an asymmetric enemy. If he perceives there to be a threat then he can respond to that level of threat. (IO Exh 14)

Captain Toomer’s description of the ROE and how to apply them is very important because he also is located in Kabul and deals with the security situation and the possible threats every day. It was apparent to me that he understood Lt Col Brown and Lt Col Hall’s actions in the situation in which they found themselves.

Captain Toomer’s testimony that, “there are a million different things to consider and very real threats every day,” is, in my opinion, about a good a summary as one can give of the security situation in Kabul, Afghanistan. I believe that holding the Article 32 hearing in Kabul was exactly the right thing to do. You cannot begin to understand the

mindset a person lives with in Kabul until you have experienced it yourself.

There was testimony from a number of witnesses as to the security situation in Kabul in the couple of months leading up to 19 Sep 06. Col Brooks, 755<sup>th</sup> Expeditionary Support Squadron, testified that since September some people have been killed and an SUV was attacked by a suicide bomber. The roads have been mostly red and black and there has been more emphasis on what is required for each situation. He also testified that he is very familiar with the driving conditions in Kabul and Afghanistan because he drives there all the time. The driving conditions in Afghanistan are as follows: there are not a lot of traffic laws; the driving conditions are similar to most third world countries; Afghans do not have insurance on cars so they drive fairly slow and try to avoid accidents, although they will go the wrong way down a road. An International Security Assistance Force (ISAF), UN vehicle or civilian security agency vehicle may be more dangerous, but these are Americans and usually you can recognize Americans. Driving is very haphazard; there are no working traffic lights in Kabul; people do not stay in certain lanes; on the road you will have bicycles, donkey carts, people pushing carts, people walking, herds of animals and giant potholes. It is hard when you are trying to look out for IED's because a guy could be coming straight at you, but not for terrorist purposes, just to avoid a pothole. It is fairly easy to get bumped or side-swiped and have it be an accident. You don't see many high-speed type wrecks in Kabul because they don't drive that fast. It is amazing how every day they really don't have many accidents, although there is lots of scraping. (IO Exh 29)

He further testified that in September the road conditions started as yellow, but then there were numerous incidents. One happened in Massoud Circle where a vehicle born IED killed two people. Everyone could hear the blast. The road went immediately black. In September they were starting to find IED's. He has 48 SUV's that people drive around in Kabul. The targets had been specifically military vehicles. Around the 13<sup>th</sup> or 14<sup>th</sup> an SUV was attacked by a suicide bomber detonating himself. This resulted in all three individuals in the car being hurt. Both these incidents occurred when the road condition was listed as yellow. These incidents definitely caused him to be more aware of what is going on. He testified that he is scared for his safety and that of his folks. In September he had no armored vehicles and now he has six. Since the events in September CSTC-A is in the process of purchasing armored vehicles. His people work in 18 different locations and for most of them there is only one way in and out- there aren't varied routes to take as you are supposed to per force protection briefings. The timing of their schedules is predictable because of the schedules that the Afghans keep. In July there was a surge in activity, but in September there were these attacks and it really came home and it is never been the same. Because of all this activity he would expect his officers to be in a heightened state of alert. (IO Exh 29) Sgt Sutherland also confirmed personal knowledge of the increased terrorist activity. (IO Exh 22) Major Hendricks also confirmed an awareness of the local threat conditions during that same time. (IO Exh 15)

There is ample evidence that the terrorist threat in Kabul was very real during the months preceding the incident and in September 2006. This was confirmed by numerous witnesses. It was also confirmed by news reports concerning the existence of the threat

(IO Exh's 71 and 72) and in the daily situation reports from 14 August through 21 September 2006 (IO Exh 73). These reports give the details on Improvised Explosive Devices (IED's), Vehicle Born IED's (VBIED's), bombings, murders, kidnappings, insurgency presence, etc... The day that I departed Kabul, we were briefed prior to starting out with our convoy that VBIED's were still a threat.

The testimony of Mr. Jamshid Ahmadi, for the most part, confirms the statements of Lt Col Hall and Lt Col Brown. While there are details in his testimony that match up with the incident as described by Lt Col Brown and Lt Col Hall, there are also details that are the opposite—for example, the skinny guy (Lt Col Hall is thin) had the M4 weapon and the fat guy (Lt Col Brown is not as thin and shorter) had his pistol and his M4 hanging on his back. At the hearing Mr. Ahmadi admitted that the intersection was busy, there was a lot of traffic and a lot of things going on, and he couldn't really hear their conversation.

In reviewing his testimony, it is clear that he witnessed the incident but could easily have some of the details out of order. This was fairly clear when he was answering questions as he described the events out of order. (IO Exh 20, third paragraph) He did confirm that "Morpheus" (Mr. Bergeron) approached the Land Cruiser; that the Land Cruiser was parked right at the lift arm; that Morpheus was looking for his keys when Lt Col Hall and Lt Col Brown left the gate; and that the incident took place at 3:35 pm local time. He also confirms that Mr. Bergeron is a big, tall, dark-skinned person and he had a beard and was dressed like a local, without a uniform. (IO Exh 20)

The translated written statement of Mukhtar is less helpful. (IO Exh 17) Given the problems we encountered during the hearing with translation of the Afghan languages, I believe that this statement is questionable in terms of how the details are described and the sequence of events.

For both statements, as well as your possible consideration of the written statements of the other two Afghan guards, it is noteworthy that prior to leaving Kabul I was approached by Daniel from the US Embassy Annex to come and speak with the Police Commander for the Afghan guards, Tajudin, as he wanted to report an attempt to bribe his guards. He reported that he was contacted numerous times in an effort to convince him to have the Afghan guards testify falsely. (IO Exh's 155 and 156) I provided the statement he gave me to the legal office at Kabul and asked that they have it translated. Again, it is a rough statement due to the translation from the original language. Whether it is entirely accurate is questionable. The translated statement indicates that some, if not all, of the Afghan guards were approached to give false testimony as to what happened at the gate on 19 September 2006. There is no date on the letter so it is impossible at this point to be able to say when this may have happened. I believe there is enough information there that this issue should be investigated. I have sent a request to Army CID, through the Army legal personnel at Kabul, to have this information investigated.

Both Lt Col Hall and Lt Col Brown are senior officers in the United States Air Force with

impeccable careers. There are numerous character reference letters for Lt Col Brown attesting to his level-headedness, his professionalism, his “spot on judgment,” his being calm and not prone to emotional outbursts, and his good decision making. These include letters from general officers, NATO officers, an Afghan national and a contractor. The character reference letters for Lt Col Chris Hall describe him as calm and focused, culturally sensitive, level-headed, focused on doing the right thing and exhibiting a rational and professional demeanor. These include Army officers and former commanders. There is no evidence in the career records of either officer that they have ever had issues with losing their temper, being prone to emotional outbursts or lacking in good judgment. There is some evidence that there have been other instances of aggressive behavior by civilian contractor personnel and that Mr. Bergeron may have had prior “issues” according to his peers at Blackwater. (IO Exh’s 75 and 76)

Both Lt Col Brown and Lt Col Hall testified under oath and I found them to be very credible in their explanation of the events of 19 Sep 06 and why they took the actions they did. When the incident happened they immediately reported to the MP’s and provided written statements describing all the events of that day, including their drawing weapons on Mr. Bergeron. They also openly discussed the incident with Maj Hendricks from the 755<sup>th</sup> ESS. (IO Exh 15) There is evidence that they have been willing to discuss this incident with those in the chain of command but were not given that opportunity. (IO Exh 23)

In the end, after reviewing all the facts and circumstances from that day, as well as all the evidence presented in this case, I find that Lt Col Brown and Lt Col Hall followed the ROE in their actions involving the incident with Mr. Bergeron. Given the security situation in Kabul at the time and the facts and circumstances of their encounter with Mr. Bergeron on the road, and then at the gate, I believe that they truly felt threatened and reacted exactly as they were trained to do. Therefore, I do not believe that either Lt Col Hall or Lt Col Brown engaged in any criminal conduct. I believe that all the charges and specifications against both officers should be dismissed.

#### **d. Legal Issues.**

##### **1. Service of Modified Charge Sheets on Lt Col Brown and Lt Col Hall**

On 24 February 2007, the day the Article 32 hearing began, the government representative, Capt Brown, informed all the parties that she had discovered that there were two charge sheets for Lt Col Brown and two charge sheets for Lt Col Hall. (IO Exhibits 1A through 1D) Capt Brown discovered a charge sheet she had not seen before with the word “restricted” in block 8 instead of “unknown.”

On IO Exhibit 1A (DD Form 458), block 8 of the charge sheet reads, “Restricted.” Block 9 on this same charge sheet reads, “9/23/2006 to present.” The back page of the DD Form 458 is not filled in and the third page is the continuation of the charges. On IO Exhibit 1B, block 8 reads, “Unknown,” and block 9 is blank. The back page of this charge sheet has information filled in blocks 12 and 13. This is the charge sheet that the

defense counsel for Lt Col Brown received. They did not receive, nor were they made aware of, IO Exhibit 1A. They first learned of these changes to the charge sheet on the 24<sup>th</sup> of February 2007.

On IO Exhibit 1C (DD Form 458) block 8 of the charge sheet reads, "Restricted." Block 9 on this same charge sheet reads, "9/23/2006 to present." On the back page of the DD Form 458, blocks 12 and 13, are not filled in. On IO Exhibit 1D, block 8 reads, "Unknown," and block 9 is blank. The back page of this charge sheet has information filled in blocks 12 and 13. This is the charge sheet that the defense counsel for Lt Col Hall received. They did not receive, nor were they made aware of, IO Exhibit 1A. They first learned of these changes to the charge sheet on the 24<sup>th</sup> of February 2007.

The copies of the charge sheets that were signed and sworn to by Col Morris are apparently the charge sheets with the word "restricted" and the information, "9/23/2006 to present." When Capt Brown inquired about these changes she was told by TSgt Freeman that she was directed by Ninth Air Force to make the changes.

On 27 January 2006 charges were preferred by Col Morris against Lt Col Hall and Lt Col Brown. (IO Exhibits 1A and 1C) I can only assume that Col Mark Morris was provided documentary evidence to review, including the documents titled "Temporary Safety Precautions," (IO Exhibits 61 and 65) and that he believed that both Lt Col Hall and Lt Col Brown had been under some form of restriction since the 23<sup>rd</sup> of September 2006, as this was the information in blocks 8 and 9 on the charge sheets that he signed.

At the direction of Maj Scullion at 9<sup>th</sup> AF, TSgt Freeman, currently deployed to Bagram AB, Afghanistan, whited-out the words "restriction" on block 8 on both charge sheets and hand wrote in the word "unknown." She also whited-out the words, "9/23/2006 to present," in block 9 of both charge sheets. (IO Exhibit 10) She was told to do this because Maj Scullion wasn't sure if there was a restriction order in place and they (9<sup>th</sup> AF) needed to look into it. TSgt Freeman stated that she believes she made this change a couple of days before the charge sheets were forwarded to be served on both accused. (4 Feb 07 is the date that appears on IO Exh 1B and 3 Feb 07 is the date that appears on 1D) It is clear that 9<sup>th</sup> AF knew there were two charge sheets. At my direction SMSgt Pedersen contacted Col Perry, 9AF/SJA, and asked her to send us copies of the original charge sheets in the files at her office. Col Perry sent us 2 copies of each charge sheet—one for each accused with the words "restriction and 9/23/2006 to present," in blocks 8 and 9, and one for each accused with the word "unknown" in block 8 and no words in block 9. (IO Exhibits 1A-1D) Therefore, TSgt Freeman's testimony as to how the changes came about appears to be corroborated.

I did call Maj Scullion as a witness. When I did so, I gave her an Article 31 rights warning advising her that she was suspected of Obstruction of Justice and Altering a Public Record under Article 134 of the UCMJ. Out of an abundance of caution, and after recommendations by both the government representative and the defense counsel for both accused, I determined that I should give her a rights advisement before questioning her about this matter. Maj Scullion declined to testify under rights advisement and indicated

she did want a lawyer at this time.

Whether TSgt Freeman was told to “white-out” the words by Maj Scullion, or simply decided on her to make the change in that manner, does not really matter in the end. The charge sheets were changed and the defense counsel and the accused were not made aware of the changes at the time. The defense counsel and the accused were only served with the charge sheets that read “unknown.” In the end 9AF/JA could certainly make what I consider to be administrative changes to the front of the charge sheet. However, these changes should have been made according to standard legal practice. The words should have been lined through and initials placed by the changes. Then the changes should have been served on the accused and defense counsel.

Both defense counsel have objected to the service of “illegally” modified charge sheets on their clients, Lt Col Brown and Lt Col Hall. (IO Exhibits 150 and 151) Both defense counsel state that their clients have been systematically denied their rights under RCM 304, 305 and 707. They allege that Maj Scullion had knowledge of the restrictions placed on both Lt Col Hall and Lt Col Brown because she received a copy of the Special Interest Reports prepared on 23 Sep 06 by Lt Col Michal J. O’Connor, CSTC-A/SJA. (IO Exhibits 43 and 44) They further allege that there is a question as to whether Col Perry, 9 AF/SJA, had knowledge of Maj Scullion’s actions and should, therefore, be disqualified from continuing to serve as the servicing Staff Judge Advocate to the convening authority; whether Col Morris knew of the altered charge sheets and why an altered charge sheet was served on both Lt Col Hall and Lt Col Brown.

The changes made to the charge sheets were not the normal process that we use in legal practice. Standard legal procedure is to line through a change and initial next to the change. Also, the proper term if there is no pretrial restraint is “none.” Under the discussion section of RCM 603(b) there is nothing to indicate that a change to the administrative data at the top of the charge sheet is improper. There is language that any change should be initialed by the person who makes the changes. I believe that 9AF/JA could certainly make these changes, but that they should have done so in the proper manner. Also, the defense counsel and accused should have been made aware of the changes at the time they were made. I do not have any evidence of an improper motive by anyone at 9AF/JA in making these changes. On the contrary, if there was an effort to hide these changes then why would 9AF/JA have retained both copies of each charge sheet in their files as originals? Clearly, 9 AF/JA knew of the changes and retained both originals of each charge sheet in their files.

Whether 9AF/JA believed that the accused were restrained or not, and whether the words “restrained” or “unknown” were in block 8 on the charge sheets does not take away the issue of whether both accused were subject to pretrial restraint such that the speedy trial clock started on 23 Sep 06.

In the end, I believe this is an issue that will be brought up by the defense counsel at trial, should these cases be referred to courts-martial. I address the issue here because it was brought to light at the Article 32 hearing, it is a potential issue for trial and I believe that

9 AF/JA should be made aware of the defense counsel objections. Whether the 9 AF/SJA believes that her office is disqualified from further involvement in the referral of these cases is a decision for the 9 AF/SJA to make. 9 AF/JA should expect that the defense counsel will make a request for Maj Scullion and TSgt Freeman to testify at any future court-martial.

## 2. Speedy Trial

R.C.M. 707 (a) provides that the accused shall be brought to trial within 120 days after the earlier of (1) the preferral of charges; (2) the imposition of restraint under R.C.M. 304 (a) (2)-(4); or (3) entry on active duty under R.C.M. 204. R.C.M. 707 (b)(3)(B), provides that if the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of (i) the date of preferral of charges; (ii) the date on which restraint under R.C. M. 304 (a)(2)-(4) is re-imposed; or (iii) the date of entry on active duty under R.C.M. 204.

Under Appendix 21, Analysis of Rules for Courts-Martial, it states that the harm to be avoided is continuous pretrial restraint. In U.S. v. Gray, 21 M.J. 1020 (NMC MR 1986) the court found that where the accused is released from pretrial restraint for a substantial period, he will be treated the same as the accused who was not restrained. Therefore, unless pretrial restraint is re-imposed, the 120-day period will run from the date of preferral, whether that event occurs before or after the accused was released from restraint.

In this case there is evidence that Lt Col Brown and Lt Col Hall were placed on restriction on 23 September 2006 and it is unclear whether this restriction has been lifted. On 23 Sep 06, Major General Durbin served an order on Lt Col Brown titled, "Temporary Safety Precautions." In this letter Lt Col Brown's pass privileges are suspended and he is directed to physically remain within his work area and living areas of Kabul Area International Airport (KAIA) at all times. Exceptions can be approved by Col Hansen, Chief, Air Corps Advisory Group. (IO Exh 61) The exact same letter was served on Lt Col Hall on the same date with the same applicable conditions. (IO Exh 65) In these orders Lt Col Brown and Lt Col Hall's authorization to bear firearms was also suspended pending resolution of the allegations against them.

Both defense counsel proffered at the Article 32 hearing that other than a small amount of time over the Christmas holiday when they were allowed to go on leave, both accused understood themselves to be under restrictions to this present date. Lt Col Brown took leave from 19 Dec 06 through 2 Jan 07. (IO Exh 64) Lt Col Hall took leave from 23 Dec 06 to 6 Jan 07. (IO Exh 67) Other than these times when they returned to the US they have been in Kabul and subject to the restrictions in the orders given on 23 Sep 06. On 27 Oct 06, it appears that Gen Miller intended to issue another letter to both Lt Col Hall and Lt Col Brown which basically stated the same "temporary safety precautions." (IO Exh's 63 and 66) These letters were apparently never served upon Lt Col Hall or Lt Col Brown as they do not contain the signatures of either one.

The issue of whether Lt Col Hall and Lt Col Brown were under restriction such that it

amounted to restriction in lieu of arrest under R.C.M. 304 (a)(2), and therefore, started the speedy trial clock on 23 Sep 06, will certainly be the subject of a defense motion. The accused were both directed by written orders to remain within specified limits and they continued to perform their military duties. For those individuals deployed to Kabul, Afghanistan, there are already restrictions placed on their movement, for any reason, “outside of the wire,” or in other words, outside the secure areas of Camp Eggers and Camp Phoenix or KAIA. Whether the restriction placed on Lt Col Hall and Lt Col Brown was more restrictive than the measures that apply to everyone will be a matter for the court to decide. The Gray case involved a situation where the accused was released from pretrial restraint for 47 days prior to the preferral of charges in the case. The court found this to meet the definition of a “significant period” within the meaning of R.C.M. 707 (B)(2). The Gray case cites to U.S. v. Schesso, where 29 days was found to be a significant period of freedom during which no charge was pending.

Lt Col Brown was on leave for 14 days and Lt Col Hall was on leave for 15 days. If the orders to remain within their living and work areas are determined to be “restriction in lieu of arrest,” then the question for the court will be whether time periods of 14 and 15 days respectively are deemed “significant periods” within the meaning of R.C.M. 707 (B)(2). There is also the complicating factor that both the accused returned from leave and then were under restriction again until 26 January 2007 when the charges were preferred.

If the orders are found to be “restriction in lieu of arrest,” and the leave periods are not significant periods of release from that restriction, then the speedy trial clock began on 23 Sep 06 for both cases. **Today, 14 March 07, is 172 days from 23 Sep 06. This will be a significant issue for the government at trial.** It will not help that the government apparently thought both the accused were under restriction when they typed in “Restriction” in block 8 of the original charge sheets and typed “9/23/06 to present,” in block 9 of the charge sheets. The Special Interest Reports (IO Exh’s 43 and 44) also indicate that the accused were subject to restriction on their movement. After this, and before service on the accused, the government then changed block 8 on both charge sheets to read, “Unknown,” and block 9 was left blank. Apparently the government had not determined their position on whether the accused were restricted. It also appears the government was not in any hurry to determine the answer to that question. All of this will certainly hurt the government’s position at court when it argues that the accused were not under restriction.

### 3. Release of Special Interest Reports to Defense Counsel

The defense counsel for both accused requested a copy of the Special Interest Reports (SIRs) for each of their clients. They stated that although they understand that these are normally documents prepared and kept within JAG channels, they had evidence that the SIRs had been released to the commanders of the accused. Normally, although it is not specifically stated in AFI 51-201, paragraph 12.8, these are documents that are kept within official JAG channels. The SIRs normally contain a factual summary of the charges and issues in the case. (IO Exhibit 42) Both defense counsel wanted to see the

SIRs to determine if they had mentioned pretrial restraint. Specifically, the defense presented written evidence that a copy of the SIR for Lt Col Brown had been given to his former commander, Colonel Joerger, at Charleston AFB, South Carolina. (IO Exhibit 41) Defense counsel for Lt Col Hall proffered that his commander at Laughlin had also received a copy--this was known because the commander mentioned it in an email he sent to Lt Col Hall. The defense did not present a copy of this email. Also, the government representative proffered that she was informed by Maj Dashiell at Bagram that he saw an email from Maj Smith at 9 AF/JA in which a copy of one of the SIR's was emailed to one of the defense counsel. He informed Capt Brown that he didn't have a copy of the email but he remembered seeing it. Maj Smith did not recall sending such an email.

After considering all this information, I determined that the release of the SIRs to the defense counsel was permissible as the SIRs had not been kept within JAG channels and they might consider information pertinent to the issue of whether the accused in these cases were considered to be under pretrial restraint. Defense counsel for both accused state objections to the argument by Capt Brown as to why she believed these documents should not be released. I consider this to no longer be an issue as these documents were provided to both defense counsel and I have considered the information they contain in writing this report. (IO Exhibits 150 and 151)

#### 4. Release of Classified Security Information

The defense counsel requested that I review classified security situation briefings surrounding the charged timeframe. I reviewed classified security briefing documents for 17, 18 and 19 September 2006. These documents basically describe the intelligence gathered on these dates and are used to provide situational awareness about the security threats for the military personnel at Camp Eggers. The defense counsel also provided me with a copy of the unclassified version of these same documents. (IO Exhibit 73) The defense counsel for both accused have requested that they be provided with the classified documents after they have completed their SF 86's and their security clearances have been verified.

#### 5. Testimony of Mr. Gerald Tilghman

Daniel, an employee of the US Embassy Annex provided information at the hearing that Mr. Tilghman was not currently in the country. He also informed us that he had been told that the camera system used to film at the MOD or Delta gate had a 30 day archive system in place. Therefore, the defense counsel request for the hour before and the hour after the time that is captured on the video purported to be of the incident on 19 Sept 06, is no longer available. This 30 day archive system was in place in September 2006. (IO Exh 147)

The defense counsel for both accused also requested a copy of video from the time between 12:20 and 12:40 on 24 Feb 2007. They stated that they had staged an event at the Delta gate and wanted to get a copy of the video. On 27 Feb 2007, I was escorted by

US Embassy Annex personnel to their complex in order to view a copy of the video. I did view the video. Basically, a white SUV pulls up at the gate, a military member gets out and waves at the camera, then gets back into his vehicle. When I relayed this information to the defense counsel they stated that this was the video they had requested. Specifically, they stated that they wanted me to consider the helmet on Lt Col Brown in the video. Lt Col Brown's mounting device on his helmet is visible in the video.

I requested that the US Embassy Annex personnel provide me with a copy of this video. I assured them that I would take the necessary precautions to protect the force protection information on the video. I also assured them that I would do the same with the video we had already been provided for the 19th of Sep 06. In this regard I have cautioned defense counsel about the limited use of this evidence. I have issued a protective order to the defense and government counsel to insure that only the necessary parties view this information. (IO Exh 146)

It is unclear who provided a copy of the videotape that is purported to be from the 19<sup>th</sup> of Sep 2006. The defense counsel argued at the hearing that the videotape was provided by Mr. Bergeron and was fabricated. They argued that the videotape does not match the testimony of Mr. Ahmadi, Lt Col Brown or Lt Col Hall. They stated that they believe the video to be a re-enactment, rather than the actual footage of what happened at the gate on 19 Sep 2006.

Some of the discrepancies they pointed out are:

1) The video shows an off-white SUV, up against the lift arm, in front of the vehicle that Lt Col Brown and Lt Col Hall are depicted as getting out of—there was no vehicle in front of the Land Cruiser;

2) A person gets out of the one vehicle and goes to the second vehicle—this didn't happen;

3) The dark SUV moves out of the area first, before the white SUV which is supposed to be the Land Cruiser—this didn't happen;

4) The first car moves up at one point and then the vehicle that is supposed to be the Land Cruiser also moves up—this didn't happen.

5) No one goes over to pick up the keys at the end of the incident.

The defense counsel argued that this video is a recreation and an attempt to influence and improperly sway the tribunal. They argued that it is clearly obstruction of justice and whoever reviewed the video, prior to drafting charges, did not scrub the statements and pay attention to the details. This video was used as support for the charges, therefore, this is a fatal blow to the government's case. The defense counsel also objected to my consideration of Mr. Tilghman's unsworn statement. The defense counsel has objected to the introduction of the videotape as it is not what it purports to be, but instead, is a

complete fabrication. (IO Exh's 150 and 151)

In their testimony, both Lt Col Brown and Lt Col Hall also pointed out discrepancies in the videotape. They pointed out that there is a silver SUV at the swing gate and their vehicle appears to be behind this one—there was no vehicle between theirs and the gate. In the video their SUV moves up—that didn't happen. In the video the person who gets out of the second SUV does not charge his weapon and is not wearing a helmet with a night vision goggle mount on the front. Lt Col Brown's IBA has a first-aid kit mounted on the front of the vest and the person in the video does not have that on his vest. When the person comes back to the vehicle he gets right in—it takes Lt Col Brown a few minutes to get in the car with all his gear on. In the video the dark SUV leaves the scene first—Lt Col Brown drove off first. The SUV in the video is pointed at almost a 90 degree angle—Lt Col Brown's vehicle went to about a 45 degree angle only. Finally, the SUV depicted in the video does not have a stripe on the side—the Land Cruiser has a stripe on the side of it. (IO Exh 23) Lt Col Hall stated that the vehicles that were ahead of them, already past the swing gate, do not appear in the video. There appears to be two people that come up to his window on the SUV—there was only one, Mr. Bergeron. It appears that Lt Col Hall gets out while someone is still standing by the window—when he got out there was no one else at the side of their vehicle. You do not see Lt Col Brown charge his rifle. There appears to be bodies moving around them in the video—there wasn't anyone else near them on the 19<sup>th</sup>. The white Toyota Corolla is not pictured in the video and should be. When the person comes back up to the side of the vehicle (supposed to be Lt Col Hall) he bends over to pick something up—he didn't do this, he just got back in the vehicle. (IO Exh 24)

I reviewed the videotape, considered the comments from defense counsel and the testimony of Lt Col Brown and Lt Col Hall on the discrepancies they saw in the videotape. I myself noticed these same discrepancies in the videotape. I was not presented with any evidence as to how the video was obtained by the government and when it was produced. There is no chain of custody for the videotape. I concur that the videotape provided, that is purported to be from 19 Sep 2006, does not match the sequence of events as they have been described by the witnesses. Therefore, I did not consider it for purposes of this report.

## 6. Evaluation of the Incident on Route White

There is insufficient evidence to determine an opinion as to who hit whose vehicle, by simply evaluating the vehicles involved. Sgt Shoffner testified that he took numerous pictures of each vehicle (IO Exh's 8A-8L and 9A-9SS) Sgt Shoffner testified that the two vehicles were not preserved and protected from the elements. He stated that he was not allowed to go off post to investigate the road on which the collision between the vehicles occurred. He also admitted that his investigation was incomplete without going to the scene of the accident and preserving the vehicles involved in the accident.

There is also evidence that there was damage done to both vehicles prior to 19 Sep 06. (IO Exhibits 15 and 21) The forensic evaluation provided by the defense counsel states

that there is insufficient evidence to do a formal reconstruction of the incident.  
(IO Exhibit 70)

Given the fact that there was not a complete investigation at the time the incident was reported and that the evidence was not properly preserved, as well as the fact that there could have been numerous prior incidents of damage given the daily road conditions, I believe this evidence will not prove helpful to the fact finder in determining who hit whose vehicle. This will come down to a determination of the credibility of the witnesses--two Lt Colonels in the Air Force versus a civilian Blackwater employee.

#### 7. Request for Verbatim Testimony of Afghan Witnesses

The government representative Capt Brown requested that 9 AF/JA give approval for taking the verbatim testimony of the Afghan witnesses. This request was approved by Col Perry, 9 AF/SJA, on 24 Feb 07. The defense counsel objected to taking the testimony of the Afghan witnesses verbatim. This was based on 1) the last hour notice of this approval based on the fact that they were not prepared to cross-exam these witnesses as if the testimony would be presented at trial, and therefore, they requested a week long delay to adequately prepare; 2) that videotaping of the testimony would be an acceptable way to preserve the testimony, but we did not have the proper equipment to do so; 3) that without the proper video taping equipment, a court reporter was required and we did not have one; 4) that they required the requested videotapes from the US Embassy Annex in order to conduct proper cross-examination: and, 5) that the government representative did not notify the defense of this request in a timely manner. The government representative stated that she had not notified the defense at an earlier time because she was not sure that the request would be approved. The government representative objected to the defense counsel's request for a week delay on the basis that a week was absurd and that the defense could have asked for the videotape evidence earlier so it would have been available at the hearing.

I determined that a request to take verbatim testimony of the Afghan witnesses was made by the government representative and approved by 9 AF/JA on 24 Feb 07. (IO Exh 152) AFI 51-201, Para 4.1.3, states that verbatim testimony may only be done with advance approval of the SPCMCA's SJA. (IO Exh 153) While the request was approved and we could take verbatim testimony, I determined that we did not have a court reporter or the proper videotape equipment available to do so. I also determined that the defense counsel was entitled to notice of such a request so that they might prepare for a cross-examination of the witnesses that would be used at trial if the witnesses became unavailable. The government representative also informed me that when she spoke with the Afghan witnesses, she was told that they had worked for the US Embassy since 2001 and none of them had any intention of leaving anytime soon. I would recommend that if these charges are brought to trial the convening authority consider taking depositions of these witnesses. Although they have no intention of leaving their current positions, they are located in a war zone and, although no one wants to say this, they could be killed. Also, they are in a place where it will certainly be hard to locate them should they leave their current jobs.

## 8. Interpreters/Translation of Afghan Witness Testimony

I attempted to take the testimony of several Afghan witnesses at the Article 32 hearing through the use of local interpreters. At the hearing the interpreter would have a conversation with the witness rather than ask a question and then relay the response of the witness. I attempted to direct the interpreter in the proper way to interpret, but the conversation between the interpreter and the witness continued to occur. Also, the defense interpreter indicated numerous times that he had a different interpretation than the government interpreter. This appeared to be due to the fact that neither interpreter had experience with providing interpretation within the courtroom setting, as well as, due to the inherent differences in English and the various Afghan languages.

Defense counsel objected to the use of the interpreter as he was having a conversation with the witness and giving summary of what the witness was saying, rather than translating the witness' testimony. They also objected to the fact that the interpreter had been present the day before in the hearing (a fact the government representative, defense counsel and the IO were not made aware of). The government representative argued that the Military Rules of Evidence concerning translators do not apply at an Article 32 hearing and that we were not taking verbatim testimony. The defense counsel stated that they were concerned about the reliability of the testimony and that we were only getting a portion of the witness' testimony.

I finally determined that we could not take accurate witness testimony in this manner. Inquiry was made as to whether there were other interpreters who might be made available for our use. I was notified that while there were other interpreters that are used by the Army, they were currently occupied working on the transfer of detainees to the Afghan government and they would probably have the same difficulties as the interpreters we were using. There was no definite timeframe given on when the other interpreters might be made available to assist us.

Along with this information, I also considered the fact that no action had been taken prior to directly before the hearing to ensure that there were interpreters available who could provide the necessary assistance. It was apparent to me that no one had considered this issue or made any plans to arrange for translation. Capt Brown, who was appointed only one week prior to the Article 32 hearing date, did arrange for the interpreters that had been made available to us. She did what she could, in the limited time and from a great distance, to secure interpreters for the hearing. This is an issue that needed attention long before all the parties were in the AOR for the hearing.

Capt Brown presented evidence as to the fact that there are no standards of accreditation and no requirement as to years of experience. (IO Exh 45) The case law presented stated that the defense counsel can challenge the accuracy of the translation through cross-examination or calling another translator to testify. (IO Exh's 47-52) While there is no national standard, I determined that we did need an accurate translation. I also determined that the defense raised the issue in an appropriate and timely manner. I had

no confidence in the accuracy of the translated testimony because of the conversation that accompanied straightforward questions. It was not clear how long it would take, or if we even could find, interpreters with the necessary qualifications to assist us. Therefore, in the end, I decided I would not call the other 2 Afghan witnesses (Identified in IO Exh's 18 and 19) and would note this issue fully in my reports. However, we did take the testimony of Mr. Ahmadi (who spoke English) and I have considered the two translations of the written statement of Mukhtar.

The defense counsel has objected to my consideration of any of the testimony that was taken at the Article 32 hearing (via the interpreter) and to my consideration of any alternative form of the Afghan witnesses' testimony. (IO Exhibits 150 and 151) I have not considered the testimony taken of Mukhtar, through the interpreter, at the hearing. However, as noted above, I have considered two different translations of his written statement—one from the government interpreter and one from the defense interpreter. (IO Exh's 17 and 159) As you can tell when reviewing these statements, the order of the details and the way they are conveyed is not consistent. Also, as noted above in the discussion of the evidence, these statements need to be considered in light of the information that one or more of the Afghan witnesses may have been influenced to change their testimony.

I have attached the written statements of Noor Rahman and Mian Ahmad for consideration by the convening authority. (IO Exhibits 18 and 19) These statements at first glance appear to have been prepared by the witnesses. However, these statements are actually a written version of the translation of their verbal statements and are of questionable reliability. We do not have the original statements in Dari to compare with the English translations. We have to assume these are at best summaries of the testimony of the witnesses. Both the government representative and the defense counsel agreed, after interviewing the Afghan witnesses, that there were inaccuracies in the prior translations.

#### 9. Telephonic Testimony of Mr. Jimmy Bergeron

Prior to the hearing, the government representative informed me that the government intended to offer the telephonic testimony of Mr. Jimmy Bergeron. Defense counsel for both Lt Col Brown and Lt Col Hall submitted objections to my consideration of Mr. Bergeron's telephonic testimony. Also, the defense objected to any unsupported claim by the government that Mr. Bergeron was not reasonably available, any argument that he could not be produced for live testimony and any argument under R.C.M. 405 (g)(4)(B) for consideration of alternatives to testimony based on the notion that Mr. Bergeron was not reasonably available. (IO Exhibit 33)

Applying R.C.M. 405 (g)(2)(A) and the balancing test as laid out in the case law, I found that the difficulty, expense or delay in producing Mr. Bergeron was not so great that it outweighed the importance of the witness' testimony. Therefore, I found Mr. Bergeron was reasonably available. I further determined that regardless of his availability, R.C.M. (g)(4)(A) allowed me to consider his sworn statements or telephonic testimony as long as

the defense counsel did not object. Because the defense counsel objected, I did not consider either the sworn statements or telephonic testimony of Mr. Bergeron. My complete analysis is found in IO Exhibit 32, which I provided to the government representative and the defense counsel at the start of the Article 32 hearing.

At the hearing, Capt Brown requested that I reconsider my decision finding Mr. Bergeron reasonably available. I considered all the information again and confirmed my determination that Mr. Bergeron was reasonably available. It was clear from the email correspondence with Mr. Bergeron that he was willing and able to attend the hearing, had the government invited him before 15 Feb 07, just 8 days before the hearing began. I found that Mr. Bergeron was the government's alleged victim and key to the government's case, and therefore, his presence at the Article 32 hearing was crucial to a fair and impartial hearing for Lt Col Hall and Lt Col Brown. These two officers are facing general court-martial charges on the basis of Mr. Bergeron's statements. The government had the means and had the time (had they acted sooner) to assure his presence at the Article 32 hearing so that he could be subject to cross-examination by the defense counsel. I still found him reasonably available and determined that I would not hold the hearing open for his deposition. The defense counsel reaffirmed their objections to my consideration of anything other than the in-person testimony of Mr. Jimmy Bergeron. (IO Exhibits 150 and 151) The convening authority may want to consider ordering a deposition of Mr. Bergeron here in the United States.

**e. Recommendations:**

I recommend that all the charges and specifications against Lt Col Brown be dismissed. After reviewing all the evidence in this case, I find that Lt Col Brown followed the rules of engagement (ROE) when he confronted Mr. Bergeron on 19 Sep 06. After being rammed by the vehicle that Mr. Bergeron was driving and then having Mr. Bergeron approach his vehicle at the Delta gate, Lt Col Brown stated that he feared for his life and he believed, at the time, that Mr. Bergeron was a threat. Lt Col Brown shouted, shoved Mr. Bergeron and showed his weapon while demonstrating a willingness to use it. This is exactly what the ROE state should be done. Application of the ROE is not an exact science and its use is based on a subjective belief, by the person, at the time of the events, given all the circumstances, that their life is threatened. Lt Col Brown's testimony as to his fear was very convincing. I believe that court members or a military judge would view the evidence in exactly the same way and defer to Lt Col Brown's perception of the situation and events at the time they took place.

**f. Defense Objections and Requests for Information**

These have been noted in the discussion of evidence and the legal issues paragraphs of the report. They are also contained in IO Exhibits 150 and 151 in greater detail.

The defense counsel requested the following documentary evidence at the Art 32 hearing:

- a. Copies of the classified security situation reports for 1 – 19 Sep 06

- b. The Blackwater personnel records for Mr. Jimmy Bergeron
- c. Mr. Jimmy Bergeron's complaint to Embassy Security (IO Exh's 150,151)
- d. A copy of the videotape from the US Embassy Annex for 24 Feb 07 \*(I did try to obtain this videotape prior to finishing my report but did not receive it—I determined it was better to forward the report rather than waiting to receive a copy)

16 Mar 07

Mailed Report to 9 AF