

From: Trial Counsel
To: Investigating Officer

Subj: GOVERNMENT ARGUMENT REGARDING CHARGES IN THE CASE OF
UNITED STATES V. CAPTAIN DOUGLAS S. WACKER, USMC

This letter outlines the government's position regarding the charges in the subject Article 32 investigation. The evidence introduced at the Article 32 hearing, in the form of live testimony, telephonic testimony, and documentary evidence, provides reasonable ground to find that the charged crimes were committed by the accused, and that referral to a general court-martial is warranted. Due to the gravity of the offenses charged, disposition at any lesser forum is clearly inappropriate. The government has made a more detailed argument under each charge below; however the government welcomes any comments or recommendations by the IO as to possible charges, form of the charges, and additional charges, if warranted.

Charge II: Violation of the UCMJ, Article 120 (Rape)

- 1. That the accused committed an act of sexual intercourse;**
- 2. That the act of sexual intercourse was done by force and without consent.**

Specification 1: Rape of Jessica Brooder

This specification is supported by the scientific testing performed by USACIL, the testimony of Ms. Brooder, Elizabeth Cook, Rebecca Abdullah, and Justin Micklish, and the statements of the accused to Ms. Brooder and Ms. Cook and at the University of San Diego Critical Issues Board hearing on 21 June 2007.

Ms. Brooder can not remember the events that took place during most of the night of 3-4 April. However, the first element of this offense, that the accused committed an act of sexual intercourse, is supported by the forensic evidence submitted to USACIL and by Ms. Brooder's testimony regarding finding a tampon lodged in her vagina. Ms. Cook testified that when she returned to Room 1008 in the Royal St. Charles hotel, Ms. Brooder was completely naked, and Ms. Cook was unable to find Ms. Brooder's underwear (IE 6, Cook). The USACIL forensic examiner found semen right on the crotch of the shorts that Ms. Barker and Ms. Cook put on Ms. Brooder afterwards and determined that, to a mathematical certainty, that semen could not have come from anyone else on the planet other than the accused (IE 17). Therefore, the semen on the crotch of the shorts had to have seeped out of Ms. Brooder's vagina after having sex with the accused.

Additionally, the fact that the accused committed an act of sexual intercourse is proved by Ms. Brooder's discovery of a tampon lodged far up her vaginal canal (IE 5, IE 14; Brooder; Micklish). Not only the testimony of Ms. Brooder, but the defense's own "expert opinion," indicate that penetration by a foreign object such as a penis is a likely explanation for the presence of a tampon high in the vaginal canal (IE 53). It is also extremely unlikely that Ms. Brooder would have neglected the tampon in her vagina if she was still in a condition to give valid consent to any sexual activity, whether intercourse or digital penetration.

An act of sexual intercourse is committed by force and without the consent of the victim if the victim is, at the time of the act, substantially incapacitated and therefore unable to give or refuse consent. If the victim is substantially incapacitated at the time of the sexual act, the only force necessary is the amount of force needed to complete penetration. The evidence shows that Ms. Brooder was too intoxicated, either by the administration of a foreign substance by the accused or by consumption of a large amount of alcohol, to consent to sexual intercourse in the room with the accused. Ms. Brooder's complete inability to recall a large part of the evening is, by itself, highly probative of her state of intoxication during this time period, as is her description of the symptoms she experienced the next morning, which she described as unlike any hangover that she had ever experienced previously.

Ms. Brooder's state of incapacitation is confirmed by the testimony of the two witnesses other than the accused who were in a position to observe her shortly before and after the sexual activity with the accused. Ms. Barker testified that, at the dance club, Ms. Brooder began to exhibit a number of symptoms of severe intoxication including losing her balance, swaying slowly out of time with the music, and vomiting uncontrollably on the bar (IE 8; Abdullah).

The evidence showed that the accused not only was present to see how intoxicated Ms. Brooder was, but that he viewed her level of intoxication as an opportunity. Ms. Barker testified that as she saw the accused holding Ms. Brooder from behind on the dance floor, Ms. Brooder's eyes were closed and she was swaying in an uncoordinated manner, yet the accused was alert and smiling. Additionally, the accused witnessed Ms. Brooder vomit on the bar, then leave for the bathroom to vomit again, and repeated Ms. Barker's instructions to make sure Ms. Brooder and Ms. Cook returned to the hotel safely. Finally, the accused's own statements to Ms. Brooder and Ms. Cook the morning of April 4, confirming that Ms. Brooder had been losing her balance and vomiting, confirm not only that she was severely intoxicated but that he was aware of her state of intoxication.

When Ms. Cook returned to the extra room rented by the accused to retrieve Ms. Brooder, Ms. Brooder was lying naked on the bed in nearly the exact same position Ms. Cook had last seen her when the accused was lowering himself on her, and Ms. Brooder was almost completely unresponsive (IE 6; Cook). Ms. Brooder was only minimally able to even assist in Ms. Cook's efforts to get her dressed, which Ms. Cook described as similar to dressing one of her two small children. Ms. Barker confirmed that when Ms. Brooder returned to their shared room, Ms. Brooder was incoherent (repeatedly asking for "concerts"), unaware of her surroundings (stating that there were "too many people" in the room), and incapable of holding a logical conversation (IE 8; Abdullah). Someone who is both unaware of her surroundings and incapable of holding a conversation cannot, logically or legally, give consent to sex.

The government need only prove that Ms. Brooder was substantially incapacitated at the time of the sexual act. As discussed above, the evidence introduced at the Article 32 meets this burden regardless of whether her incapacitation was caused by intoxication or drugging. However, substantial circumstantial evidence supports the theory that Ms. Brooder, Ms. Cook, and Ms. Cusack were drugged. All three women describe experiencing substantial "lost time" after consuming drinks brought to them by the accused, followed by experiencing symptoms of extreme illness, in excess of and

qualitatively unlike any hangover they had ever experienced, the following day. In Ms. Cook's case, she described detailed symptoms of "flash" memories, and struggled in her journal to explain these memories, long before learning that these episodic memories, or "cameos," were a common symptom of date rape drugs (Cook; IE 41, p. 31). The available forensic evidence is inconclusive regarding whether a date rape drug was used. Although Ms. Brooder's boyfriend's mother did attempt to use an available connection to have her take a standard drug test, the test she got did not test for flunitrazepam (rohypnol), gamma-hydroxybutyric acid (GHB), ketamine, diphenhydramine (Benadryl), Zolpidem (Ambien) or scopolamine, nor would any date rape drug even be likely to stay in her body long enough to be detectable on an appropriate test (IE 21; SA Burge prior Article 32 testimony, IE 52). However, the accused's subsequent statements to Ms. Brooder and Ms. Cook indicated that he was aware that they had substantial memory gaps from the night before.

The most damning evidence on this charge comes from the accused. The accused's story about what took place in Room 1008 changed each time he was presented with new information. First he told Ms. Brooder and Ms. Cook that nothing took place except kissing. When confronted with Ms. Cook's memory of seeing Ms. Brooder naked, he stated that more clothes came off, but nothing else happened (IE 5; IE 6; Brooder; Cook). After going to the USD Critical Issues Board and having the opportunity to view Ms. Brooder's statement mentioning the tampon, he suddenly claimed that mutual masturbation also took place (IE 18, p. 3-4). In contrast to his statement to the USD Board, he conceded to Mr. Lowder that one of the women passed out (IE 11; Lowder). Throughout these statements, and in various statements to his classmates, he claimed that "no sexual intercourse" took place (IE 12; Gorman), that "nothing even close to sex happened" (IE 16) and that he "didn't even come," meaning that he didn't ejaculate (Capt Blosser previous Art 32 testimony, IE 52, p. 7).

The accused's denial of sexual intercourse with Ms. Brooder, in the face of the subsequent forensic evidence, is itself evidence of Ms. Brooder's state of intoxication and the accused's knowledge of her incapacity. The accused's false statement to USD strongly suggests consciousness of guilt.

The government notes that Article 134, Indecent Assault, is a lesser included offense of rape under the 2005 edition of the Manual for Courts-Martial.

Specification 2: Rape of Nicole Cusack

The discussion above regarding the elements of the offense and the legal standard for rape by substantial incapacitation are the same as discussed above regarding Ms. Brooder.

The facts of Ms. Cusack's sexual encounter with Capt Wacker are eerily similar to that of Ms. Brooder and Ms. Easley, except that it occurred several months before. During the holiday break in 2006, Ms. Cusack went home to Seattle, WA. She had recently met Capt Wacker and had agreed to meet up with him over the break since they both were from Seattle and attending law school together. The first time she met with him in Seattle, she described his conduct as very outgoing and he seemed to be very eager to be friends. They went to a bar where the accused bought Ms. Cusack and her sister several drinks. During their time at the bar, Ms. Cusack describes how Capt Wacker encouraged them to stay out later when they decided to leave.

The second time they met, they attended a comedy show. Ms. Cusack recounts in her statement that Capt Wacker continually asked her if she wanted a beer despite her saying she didn't several times. After the show they went to a bar, Finn McCool's, near the university. She states that she had a mixed drink with vodka, and she recalls taking a couple of shots. At this point, Ms. Cusack's memory of the remainder of the evening becomes "splotchy," much like Ms. Brooder and Ms. Cook, consisting of a series of brief flashes of memory with lost time in between (IE 7; Cusack; Lowder).

Ms. Cusack remembers attempting to open the door of her sister's house and taking a long time working the key in the lock. She remembers vomiting uncontrollably on her clothes and down her front. She sat down on her sister's bed and felt like she could not move. She then remembers being in the shower, falling down uncontrollably and bringing the shower curtain down with her. When she fell down in the shower, the accused laughed at her. The accused brought her someone else's toothbrush as well.

After vomiting uncontrollably on herself and falling down in the shower in front of the accused, Ms. Cusack woke up to find the accused having sex with her. She does not recall ever agreeing to have sex with the accused on that night. She was confused and having difficulty saying anything but believes she did manage to say "no" and something about having to continue to see him at school. Ms. Cusack was still so intoxicated that she wasn't even sure if the accused stopped having sex with her because she passed out again. When she woke up the next morning the accused was gone and she was very sick. She continued to throw up and it took her much of the next day to recover. Ms. Cusack had never experienced such an extreme reaction to being drunk before, even after consuming significantly greater amounts of alcohol (IE 7; Cusack).

Ms. Cusack freely acknowledges that she had a sexual relationship with the accused after the events in December 2006. Ms. Cusack looked the Investigating Officer in the eye and explained how she could not understand how such an incident could have occurred, and how she blamed herself and felt embarrassed about the incident. Although her relationship with the accused afterward is seemingly counter-intuitive, it is consistent with someone who experienced a confusing event attempting to normalize her experience and take control. In any case, her reaction does not relieve the accused of responsibility for his actions.

In fact, Ms. Cusack's testimony is substantially corroborated by admissions of the accused. According to the sworn statement of Anand Upadhye, the accused called him shortly after the encounter with Ms. Cusack and told him how Ms. Cusack had been extremely drunk, threw up on herself, and fell down in the shower. However, the accused did not imply that any sexual contact took place (IE 13), although he later acknowledged to Mr. Gorman that he "hooked up" with Ms. Cusack on the night in question (IE 23, Gorman). In other words, the accused himself corroborated not only that Ms. Cusack was intoxicated to the point of incapacitation, but the details of her testimony regarding several of her flashes of memory.

The defense implied through cross-examination that Ms. Cusack a) was motivated to fabricate her testimony by discovering that the accused had engaged in sexual activity in New Orleans with other women while she was still in a relationship with the accused, and b) fabricated her story regarding the accused to match the incident in New Orleans, based on her knowledge of the accounts of Ms. Brooder and Ms. Cook. This implication is rebutted by the fact that Ms. Cusack made consistent statements about the incident

involving the accused in Seattle not only before she heard about the events in New Orleans, but before those events even took place.

Mr. Lowder confirms that Ms. Cusack told him during spring semester of 2007, prior to spring break, that she had memory gaps of the evening and was throwing up and falling down in the shower before waking up with the accused on top of her (IE 11; Lowder). The evidence shows that hearing about the similar experience of Ms. Brooder and Ms. Cook motivated Ms. Cusack not to fabricate a rape accusation, knowing full well the gravity of such a claim and the effect that coming forward would have on her, but to come forward for the safety of other women.

The facts as recounted by Ms. Cusack make a clear case for rape and establish a modus operandi for Capt Wacker. Whether from too much alcohol or a drug put in her drink by Capt Wacker, Ms. Cusack was too intoxicated to consent to have sex with Capt Wacker. Anyone who is so intoxicated that they have difficulty opening a door, throw up on themselves, fall down in the shower, and then pass out, logically can't knowingly consent to having sex. Capt Wacker, on the other hand, clearly displayed that he was substantially in control of his faculties and knew what he was doing. It is difficult to see how this event could be a mutually intoxicated sexual encounter when the accused cleaned up Ms. Cusack's vomit, put Ms. Cusack in the shower, got her someone else's toothbrush, and even called a friend to brag about seeing her naked. On the contrary, combined with Ms. Cook and Ms. Brooder's accounts of what he did to them, it shows that Capt Wacker preys on intoxicated women and that he does so while he is in full control of his own faculties.

Charge I- Attempted Rape of Elizabeth Easley (Cook)

- 1. That the accused did a certain overt act;**
- 2. That the act was done with the specific intent to commit a certain offense under the code;**
- 3. That the act amounted to more than mere preparation; and**
- 4. That the act apparently tended to effect the commission of the intended offense.**

The evidence of this charge comes from the testimony of Ms. Cook, Ms. Brooder, and Ms. Abdullah, as well as from the documentary evidence submitted. Although Ms. Cook consumed several drinks throughout the evening of 3 April 2007, her memory became "splotchy" after consuming part of a drink brought to her by the accused. She recalls sitting at a table in a bar and the accused giving her and Ms. Brooder each another drink. She recalls being in a hotel room, without a clear idea of whose room she was in or how she got there. Next she is lying on a bed with an unknown male (presumably the accused, although Ms. Cook only recalls a shadowy figure) kneeling between her and Ms. Brooder. Then she recalls an unknown male (again, presumably the accused) straddling her on the bed wearing only his boxer shorts. Her next memory is being extremely disoriented and suddenly realizing that she was not in the room with Ms. Barker, then looking over and seeing the accused leaning over on top of Ms. Brooder. She then left the room saying "I can't do this" or words to that effect and leaving Ms. Brooder behind.

After getting back to her room, she only remembers Ms. Barker, her roommate, telling her "go get her". She then went back to the room to get Ms. Brooder. She couldn't find Ms. Brooder's underwear. She tried to get Ms. Brooder into her jeans,

however, due to her intoxicated state she couldn't figure out how. She eventually got the jeans on her but they were on backwards. She then recalls the accused laughing at her and saying that the jeans were on backwards.

The testimony of Ms. Abdullah and the sworn statement of Mr. Cook, as well as the admissions of the accused to both Ms. Brooder and Ms. Cook, corroborate the fact that Ms. Cook was too intoxicated to consent to sexual activity. Not only did Ms. Cook begin to lose her memory early in the evening, she was too disoriented to know where she was or why she was in a room with the accused, and she could not even put Ms. Brooder's pants on properly. Both Ms. Barker and Mr. Cook, the only other witnesses who spoke to Ms. Cook during the relevant time period, describe her as being incoherent, "out of it," difficult to understand, and having trouble completing her sentences. (Abdullah; IE 8; IE 9; IE 62; IE 63). The following morning, the accused told her that she was stumbling during the short walk back to the hotel. Someone who is unaware of her surroundings and struggles to complete simple tasks cannot logically consent to sexual activity.

The fact that the accused intended to have sex with either Ms. Brooder or Ms. Cook while they were substantially incapacitated is shown by the fact that the accused did have sex with Ms. Brooder, as discussed above. Several of the accused's actions along the way meet the "substantial step" requirement of UCMJ Article 80, including serving additional alcohol to both women after being asked for help getting them home because of their intoxicated state, purchasing an extra hotel room, leading the women to the hotel room, and undressing. The evidence about the entire course of events of the evening shows that when both Ms. Brooder and Ms. Cook were intoxicated to the point of needing assistance simply to close out a tab and return to a hotel room a few blocks away, the accused instead led them to another hotel room with the intent of having sex with whichever woman presented the easiest target.

Charge III, Specifications 1-3

1. That the accused committed a certain act

2. That the conduct was unbecoming of an officer and a gentleman.

These specifications are based on the same conduct and the same evidence as Charges I and II, but with different elements. The elements of these specifications differ in that the government would have the burden of proving that the conduct compromised the accused's standing as an officer. Because of the aggravating nature of this additional element, specifications 1-3 of Charge III can and should be submitted to the members along with Charges I and II.

Although the UCMJ does not demand absolute perfectly virtuous behavior from every officer, certain conduct inherently compromises the moral authority of an officer of Marines, and therefore violates Article 133, even if that conduct is not otherwise criminal.

Attempting to indulge the accused's own personal group sex fantasy with two women who were intoxicated to the point of vomiting, disorientation, and loss of motor control meets this standard. That the accused's conduct compromised his standing as an officer is made clear by Ms. Barker's sworn statement that she trusted the accused to help her two intoxicated friends return home safely because "he was a Marine" (IE 8). Similarly, having sex with a woman so intoxicated that she vomited on her own clothes,

collapsed in the shower, and required the accused's assistance just to brush her teeth, is conduct that would inherently disgrace any Marine Corps officer (IE 7, IE 13).

If the charges in this case are referred to a general court-martial, the decision whether the accused's conduct was unbecoming of an officer and a gentleman will ultimately be made either by a senior military judge or by a panel of officers with many years of active-duty experience. The government contends that the evidence in this case should be submitted to the members so the members can decide in light of their extensive experience whether the accused's conduct constitutes conduct unbecoming of an officer.

Charge III, Specification 4 (Indecent Assault on Elizabeth Easley)

- 1. That the accused assaulted a certain person not the spouse of the accused in a certain manner;**
- 2. that the acts were done with the intent to gratify the lust or sexual desires of the accused; and**
- 3. That, under the circumstances, the conduct of the accused was unbecoming of an officer and a gentlemen.**

This charge is based specifically on the recollection of Ms. Cook of having a flash of memory where she was lying down on a bed with the accused on top of her. Ms. Cook could tell that the accused had to be straddling her based on where his head and body were positioned in relation to her. The evidence of Ms. Cook's state of intoxication, and therefore her inability to consent, are discussed above. The accused's own statements leave no question that this act was done with the intent to gratify the lust or sexual desires of the accused. A panel of officer members could reasonably find that the act of straddling a heavily intoxicated female who was disoriented and fading in and out of consciousness, in order to satisfy the accused's own sexual desires, was indecent and unbecoming of an officer and a gentleman.

Although the evidence on this charge overlaps with Charge I, particularly with respect to Ms. Cook's state of intoxication and lack of consent, this charge is focused on a distinct and specific act. The government does not need to prove that the accused straddled Ms. Cook in order to show attempted rape, nor does the government need to show specific intent and a substantial step towards rape in order to show that he committed an indecent assault. The members could logically find the accused guilty of Charge I in addition to this particular specification, or they could also logically find him guilty of either specification but not the other.

Charge III, Specification 5

Article 133- Conduct Unbecoming an Officer (False Statement to USD Board)

- 1. That the accused committed a certain act (to wit, falsely claiming before a USD Critical Issues Board that he did not have sexual intercourse with Jessica Brooder);**
- 2. That the conduct was unbecoming of an officer and a gentleman.**

The evidence that the accused did in fact have sexual intercourse with Ms. Brooder is outlined above. The accused described his version of the events in New Orleans, omitting any mention of sexual intercourse. Even more specifically, he states that there was "no sexual intercourse." The accused described being able to recall all of

the night's events, indicating that he did not simply forget about having sex with Ms. Brooder.

The USD hearing was an official academic proceeding investigating allegations of criminal activity and potentially involving consequences to the accused's career. The accused was advised that "the university expects its students to be truthful" before giving his statement (IE 18). The idea that a Marine Corps officer would lie at a proceeding of this type would inherently undermine public trust in the status of a Marine Corps officer, the same status that led several of Capt Wacker's classmates to place misplaced trust in him.

More specifically, the discussion of Article 133 in the Manual for Courts-Martial notes that "there are certain moral attributes common to the ideal officer and the perfect gentlemen, a lack of which is indicated by dishonesty." Para. 59(c)(2), MCM 2005. The making of a false official statement is specifically listed as an example of conduct unbecoming an officer. Para. 59(c)(3), MCM 2005.

The government also requests that the Investigating Officer consider whether the actions charged in this specification would support a specification under Article 107 of the UCMJ, false official statement. The Article 107 charge would also require that the government prove that the statement was an official statement. For purposes of Article 107, the term "official" includes all statements made within the line of duty. The accused's statements on 21 June 2007 meets this standard because the accused's entire duty as a Marine Corps Officer from August of 2006 through June of 2009 was to attend law school and obtain a degree; therefore, the accused's statements at an official academic board were "within the line of duty."

Charge III, Specification 6- Obstructing Justice (Spring 2008)

- 1. That the accused wrongfully asked Mr. Amos Lowder to speak to Ms. Nicole Cusack and tell her not to talk to anyone about the accused's ongoing case;**
- 2. That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending;**
- 3. That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice;**
- 4. That the conduct was unbecoming of an officer and a gentlemen.**

This specification is supported by the testimony and statements of Mr. Lowder and Mr. Gorman, and by the statements of the accused in text messages to Mr. Gorman. With regard to the second element, the government does not need to show that criminal proceedings were in fact proceeding against the accused, only that the accused had reason to believe that there would be criminal proceedings pending. *United States v. Ashby*, 68 M.J. 108 (C.A.AF. 2009). An attempt to impede an investigation may be charged as conduct unbecoming an officer under Article 133, UCMJ. *Id.*

It is indisputable that the accused was aware by the spring of 2008 that he had been the subject of a rape accusation and that criminal charges were pending. A reasonable person, particularly a Marine officer then attending law school, could expect that testimony from another victim concerning a very similar incident could be very relevant in the investigation or prosecution of a rape case. Even if charges had not been pending in New Orleans, the accused had reason to believe based on the accusation from

Ms. Brooder and Ms. Cook that charges could be pursued in a different jurisdiction (including under the UCMJ, which could not have been far from the mind of a Marine officer intending to become a judge advocate). Additionally, after hearing that Ms. Cusack was discussing the incident in December 2006, the accused had reason to believe that he could be facing criminal charges based on that incident, if Ms. Cusack spoke to law enforcement. An attempt to silence a rape victim, either directly or by indirect pressure, may amount to obstruction of justice even if no investigation has begun or charges have been filed. *United States v. Culbertson*, 65 M.J. 587 (N-M. Ct. Crim. App. 2007).

Once the accused learned that Ms. Cusack had openly discussed the incident in December 2006, he attempted to contact her by phone. After he could not contact her himself, he reached out to two of her close friends at the time. His message to Mr. Lowder was unambiguous: tell her not to talk to anybody about the case. The accused also contacted Mr. Gorman and asked him to speak to Ms. Cusack.

In order to show the necessary intent to commit the crime of obstructing justice, the government has no burden to show that the recipient of the communication (Mr. Lowder) shared an intent to obstruct justice, only that the accused intended to obstruct justice. Placing the accused's request to Mr. Lowder in context clearly shows his intent. Both Mr. Lowder and Mr. Gorman testified that prior to the time the accused asked Mr. Lowder to speak to Ms. Cusack, the accused had discussed impending investigations and legal proceedings relating to the New Orleans incident with them on numerous occasions.

In the accused's Google chat messages with Mr. Gorman on 5 March 2008 (IE 23), the accused mentioned the warrant issued in New Orleans within a minute of saying, with respect to Ms. Cusack, that "I just don't think she knows that her off-the-cuff remarks can be very damaging." Elsewhere in the same conversation, the accused described Ms. Cusack's claims as a "similar situation," stated that "I just keep hearing about more people asking questions," and said that "Nicole brought up the situation in the spring, but I refused to discuss it." Taken as a whole and in context, the statements of the accused clearly show that he considered Ms. Cusack's statements to be potentially relevant and damaging with respect to the ongoing case in New Orleans.

Charge III, Specification 7 (Obstructing Justice- Fall 2008)

The elements of this offense are the same as discussed with respect to Charge 6. This charge is supported by the sworn statement of Mr. Gorman. Prior to 30 October 2008, the accused was clearly aware that NCIS was investigating his case and that criminal proceedings were a possibility. He discussed both the NCIS investigation and hiring a military attorney with Capt Blosser in mid-October (IE 52: Wacker/Blosser Gmail chat messages originally numbered IE 24). On 29 October, Ms. McShan met with SA Burge from NCIS and gave SA Burge Mr. Gorman's name. Ms. McShan also informed the accused that she had given Mr. Gorman's name to SA Burge.

The next day, the accused contacted Mr. Gorman via Gmail chat, but refused to explain over email why he wanted to talk. The accused asked Mr. Gorman if he had spoken to NCIS. The accused told Mr. Gorman not to say anything to NCIS about the nickname "Creepy Doug" (the nickname Ms. Barker indicated that the accused picked up after his inappropriate conduct in the fall of 2006), after which Mr. Gorman responded that he had not heard of the name. A reasonable fact-finder could infer that the accused

found out from one of his close friends who had been contacted by NCIS that they had been asked about the nickname “Creepy Doug.” Based on Ms. Barker’s statement, knowledge of this nickname could lead an investigator asking the right questions to uncover additional information about the accused’s conduct and character. The fact that Mr. Gorman did not recall hearing the name at the time of the conversation is irrelevant—what is relevant is that the accused was concerned enough about the nickname to ask a friend not to mention it to NCIS.

Additionally, within the same conversation, the accused emphasized to Mr. Gorman that there was “no sexual intercourse” with Jessica Brooder. He told Mr. Gorman, “you remember that, right?” (IE 61, summary of Gorman interview). Given the accused’s concern with the NCIS investigation, the apparent intent of this remark was to make sure that the information Mr. Gorman gave to NCIS was consistent with the version of events that the accused wanted SA Burge to hear. This statement to Mr. Gorman also constitutes obstruction of justice and conduct unbecoming an officer. The government requests that the IO consider another specification, either in addition to or in place of specification 7 of Charge III, charging that the accused endeavored to impede an investigation by asking Mr. Gorman to provide false information to the NCIS investigator, SA Burge. The evidence of the falsity of the denial of sexual intercourse with Ms. Brooder is outlined above with respect to Charge II, Specification 1, and Charge III, Specification 5. The government proposes the following specification:

In that Captain Douglas S. Wacker, United States Marine Corps, on active duty, did, at or near San Diego, California, on or about 30 October 2008, act in a manner unbecoming of an officer and a gentleman, to wit: By wrongfully endeavoring to impede an investigation in the case of Captain Douglas S. Wacker, by asking Mr. Joseph Gorman to give a false statement to Special Agent John R. Burge, Naval Criminal Investigative Service, an investigating agent in the case of the said Captain Douglas Wacker, to wit: that the said Captain Douglas S. Wacker did not have sexual intercourse with Ms. Jessica Brooder.

//s//

E. S. DAY
Captain, U.S. Marine Corps
Trial Counsel