WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES v. FRANK D. WUTERICH XXX XX 3312 Staff Sergeant U.S. Marine Corps	)))))))))	GENERAL COURT MARTIAL **DEFENSE MOTION TO DISMISS** (Unlawful Command Influence) 22 February 2010

1. **Nature of Motion.**

Pursuant to Rule for Courts-Martial (R.C.M.) 907, Article 37 of the Uniform Code of Military Justice (UCMJ), and the Due Process Clause of the Fifth Amendment to the United States Constitution, the Defense moves the court to dismiss all charges and specifications on the grounds that the actions of the convening authorities, Secretary of the Navy (Dr. Donald Winter), Marine Corps Commandants Conway and Hagee, senior Marine Corps Officials, the trial counsel, and the Staff Judge Advocates of the convening authorities constituted unlawful command influence, and touch upon the accuser concept in the instant case.

2. **Summary of Relevant Facts.**

A motion with substantially similar facts in the case of U.S. v. LtCol Jeffery R. Chessani, was heard in May of 2008 and decided by, then, Chief Western Circuit Military Judge, Col Folsom. Judge Folsom found UCI to have existed and dismissed all charges then pending against LtCol Chessani. The Government appealed the decision to the Navy-Marine Corps Court of Criminal Appeals. The trial judge's decision was affirmed by that court. The decision is attached as exhibit 6.

The defense presents evidence that the Article 34 advice, referral and subsequent convening authority decisions in this case were apparently or actually impermissibly influenced by Colonel Ewers' presence at and participation in military justice meetings held by the consolidated disposition authority, or CDA, from February 2007 until the referral of charges on December 28, 2007, during which the accused's case, and those of his superiors and subordinates, were discussed and legal advice was rendered to the CDA.

a. Relationship between Col John Ewers and Gen Mattis.

During August 2002, then Lieutenant Colonel John Ewers, a USMC judge advocate, assumed the duties as the staff judge advocate of the 1st Marine Division, located at Marine Corps Base Camp Pendleton, California. As the SJA, Lieutenant Colonel Ewers was the senior legal adviser to the Commanding General, 1st Marine Division, who was at that time Major General Mattis.

During the fall of 2002, the 1st Marine Division deployed to Kuwait in anticipation of combat operations. While in Kuwait, Colonel Ewers, pursuant to direction and guidance from Major General Mattis, spearheaded the establishment of a reportable incident assessment team, or RIAT, for the 1st Marine Division. According to the standard operating procedures which Colonel Ewers wrote, the purpose of the reportable incident assessment team was to investigate potential, suspected, or alleged violations of the law of war allegedly committed by subordinate units which may trigger reporting and investigation requirements imposed on 1st Marine Division by higher headquarters and service regulations such as Marine Corps Order 3300.4, the Marine Corps Law of War Program.

During March of 2003, the 1st Marine Division engaged in combat operations in Iraq as part of a large-scale coordinated attack by U.S. forces whose geographic objective was the

greater Baghdad area. During this operation, Colonel Ewers headed the 1st Marine Division reportable incident assessment team program and was responsible for providing legal opinions to Major General Mattis concerning whether any particular incident met the definition of a "reportable incident," thus requiring a report and subsequent investigation. Colonel Ewers personally participated on at least one or more RIAT missions while in Iraq at that time. And while leading one such mission in late March 2003, Colonel Ewers -- then Lieutenant Colonel Ewers – was severely wounded in action and medically evacuated out of the theater of operations for medical treatment. Several months later, he received orders transferring him out of 1st Marine Division.

In August 2005, now Colonel Ewers reported for duty as the Staff Judge Advocate of the I Marine Expeditionary Force, located at Camp Pendleton, California. The Commanding General, I Marine Expeditionary Force, was then Lieutenant General Sattler. Shortly after joining I MEF, Colonel Ewers was notified that he would deploy to Iraq for a 12-month tour of duty, but not as the I MEF SJA. Instead, during February of 2006, he arrived in Iraq as the I MEF Forward Governance Officer and was subsequently reassigned for duty with the State Department as the Deputy Team Leader, Provincial Reconstruction Team, Al Anbar Province.

b. Colonel Ewers tasked to join the Bargewell investigation into the Haditha deaths

In March 2006, while on assignment with the State Department, Colonel Ewers was tasked by Major General Zilmer, U.S. Marine Corps, to join as an investigator in an ongoing USMC investigation into the post-19 November 2005 reporting and follow-on command action after the deaths of numerous Iraqi civilians, including women and children, by Marines of 3rd Battalion, 1st Marines. Shortly after Colonel Ewers joined the investigative team, his investigation was merged with a separate ongoing investigation into circumstances of these Iraqi

deaths. The death investigation was convened by the Commander -- Lieutenant General Chiarelli, U.S. Army, and was headed by Major General Bargewell, U.S. Army. As part of his portion of the investigation, Colonel Ewers and another Marine colonel jointly collected evidence and questioned personnel in Kilo Company, 3rd Battalion, 1st Marines reporting chain, starting with the most junior officer on scene and proceeding up to and including, among others, the commanding officer and executive officer of Kilo Company, 3rd Battalion, 1st Marines; the commanding officer, 3rd Battalion, 1st Marines; the executive officer, operations officer, intelligence officer, staff judge advocate, human intelligence officer, civil affairs officer, and watch officer, all of 3d Battalion, 1st Marines; the Commanding Officer, executive officer, and operations officer of Regimental Combat Team-2; the commanding general and the chief of staff of the 2d Marine Division; and then Sgt Wuterich, among others. On March 18, 2006, Col Ewers read the accused his rights and obtained a signed waiver. He then proceeded to question the accused about his reports on November 19, 2005. Specifically, then Sgt Wuterich, was questioned about how, when and to whom he reported his Battle Damage Assessment (BDA). Col Ewers was unpersuaded by the accused's answers and raised some doubts as to his veracity in the investigation.

All of these interviews were recorded and later transcribed into a verbatim transcript. Based on the evidence collected up to that point, Colonel Ewers concluded that a potential law of war violation had been committed by the accused and other Marines of the 3rd Battalion 1st Marine Regiment in the killing of at least 15 Iraqi civilians, including women and children. In the course of the investigation into the allegations of war crimes, (specifically the deaths of the Iraqis), the accused was also interviewed by COL Watt, USA. He was conducting a separate investigation that was later subsumed into the larger Major General Bargewell investigation.

At the conclusion of his investigation in June 2006, Colonel Ewers and other staff officers, in collaboration with Major General Bargewell, prepared draft findings and conclusions for the final report. These findings and conclusions, which Colonel Ewers shared, ultimately posited that then Sgt Wuterich was in part responsible for the negligent or reckless deaths of 24 Iraqi civilians. (Bargewell at v.) Moreover the Bargewell investigation concluded that SSgt Wuterich, along with members of his squad (1st Squad, Third Platoon, Company K) attempted to cover-up evidence of *criminal* misconduct. Bargewell at 16 and 61. (Emphasis added). Although the Bargewell investigation focused primarily on command failures, it by necessity also focused on the conduct of the Marines of 1st Squad, 3rd Platoon, Company K. The Bargewell investigation included statements made by SSgt Wuterich to Col Ewers and COL Watt. Those statements were used by the Bargewell investigators, including Col Ewers, to conclude that the accused shared some responsibility for what appeared to be a war crime violation and a later attempt to cover up.

c. General Mattis appointed as CDA.

Also in June 2006, the Commandant of the Marine Corps appointed the Commander of Marine Forces Central Command, MARCENT, as the Central Disposition Authority, or CDA, for all USMC administrative and disciplinary matters arising out of events in Haditha, Iraq, on 19 November 2005. At the time of this appointment, the Commander MARCENT was Lieutenant General Sattler. In August 2006, Lieutenant General Sattler was succeeded in command of MARCENT and I MEF by Lieutenant General Mattis. Upon assumption of command, Lieutenant General Mattis also assumed the role as the Consolidated Disposition Authority for cases collectively referred to as the "Haditha cases," of which this accused was one. Although there was an ongoing criminal investigation being conducted by the Naval

Criminal Investigative Service, or NCIS, Lieutenant General Mattis was provided with a copy of the Bargewell report, which he read and studied thoroughly.

In November 2006, NCIS provided Lieutenant General Mattis a comprehensive report of the criminal investigation into the circumstances surrounding the deaths of Iraqi civilians on 19 November 2005 in Haditha, Iraq, and into the reporting and follow-on command action after that event. This investigation became the primary source document for Lieutenant General Mattis' review and reference from that point on. Included as exhibits to this NCIS report were statements made by the accused to Col Ewers and COL Watt.

d. General Mattis Reversed by Commandant of the Marine Corps and Secretary Winters

The June 6, 2006, written directive appointing a Consolidated Disposition Authority in all Haditha matters—administrative or disciplinary—regarding the Haditha investigations read in part *"Furthermore as CDA you will be responsible, pursuant to chapter 4 of reference (c), for the complete disposition of any officer misconduct case that might arise from the subject named investigation."* The appointment letter provided the CDA with plenary authority to dispose of all matters and charges related to the Haditha incident. *"Your designation as CDA will ensure consistent handling of similar allegations, provide centralization of the administrative and disciplinary processing of cases, and provide visibility of these matters to the Commander, U.S. Central Command."*

General Mattis succeeded General Sattler as the CDA. He believed his authority encompassed what the appointment letter clearly states; that it was—plenary. On August 9, 2007, General Mattis decided to issue Col Stephen Davis a Non-punitive Letter of Caution for his involvement in the Haditha investigation and his role as the Regimental commanding officer.

Gen Mattis informed the Commandant of his decision regarding Col Davis in a standard naval letter correspondence addressed only to the Commandant. Its purpose was to officially inform the Commandant what decision had been made in regard to Col Davis by the CDA. The Secretary of the Navy was not addressed or mentioned in the letter to the Commandant. On September 5, 2007, Secretary of the Navy, Dr Donald Winter, inexplicably overruled the CDA and issued Col Davis a Secretarial Letter of Censure. Secretarial Letters of Censure were also issued to Col Sokolowski (2d MarDiv Chief of Staff) and Major General Huck (2d MarDiv CG). It is not known what the CDA decided to do in their respective cases or if he was overruled by SECNAV again.

e. Preferral of charges, legal advice from a disqualified SJA, and unlawful influence.

In December 2006, charges were preferred against the accused for violating Articles 107, 118, and 134 UCMJ, for the murder of twelve people and a cover up by soliciting members of his squad to lie, and lying himself. From February 2006 until the present, Colonel Ewers has been regarded by prosecutors in this case and other related cases as a government witness due to his role as an investigator and as one to whom the accused made at least one statement that is alleged to be of questionable veracity. Colonel Ewers was consulted by prosecutors on numerous occasions until at least the point when he assumed his present duties as Chief Circuit Military Judge.

In December 2006, Lieutenant General Mattis was approached by his MARCENT SJA, Lieutenant Colonel Riggs, who informed him that Colonel Ewers was expected to return from Iraq in February 2007 and resume duty as the I MEF SJA. As the I MEF SJA, Colonel Ewers would be expected to routinely meet with Lieutenant General Mattis to discuss legal matters. Given Colonel Ewers' detailed investigative role in pending Haditha cases including this one,

Lieutenant General Mattis was informed that with respect to the Haditha cases, Colonel Ewers was "tainted." Nonetheless, Gen Mattis made the decision to include Col Ewers in the legal meetings regarding the Haditha cases and to seek his advice despite his disqualification according to the Manual for Courts-Martial. In February 2007, Colonel Ewers resumed his duties as the SJA for I MEF.

In addition to his role as the CDA for the Haditha investigations and cases, as the Commander MARCENT, Lieutenant General Mattis had other ongoing investigations and courts-martial in cases arising out of combat operations in Afghanistan and also from the murder of an Iraqi civilian in the town of Hamdaniyah, Iraq. He had an ongoing investigation into a possible compromise of classified material at I MEF. As the result of the magnitude and multitude of potential military justice issues facing him during this period, Lieutenant General Mattis established a routine by which he could remain informed of case developments and obtain legal advice on investigations and subsequent courts-martial. At least one or more times per week, a legal meeting was held, during which Colonel Ewers; Lieutenant Colonel Riggs; the trial counsel for respective high profile investigations; and the officer in charge of the special prosecution team, or LSST Charlie; were either present in person at these meetings or were piped into the meeting by video teleconference.

The majority of these legal meetings were held in Lieutenant General Mattis' personal office in the I MEF headquarters, the same building in which Colonel Ewers' office was located. Colonel Ewers attended most, if not all of these legal meetings at Camp Pendleton in person. Lieutenant Colonel Riggs, and/or his deputy SJA, a major, on the other hand attended in person when they were in California or when Lieutenant General Mattis was in Tampa. But most of their participation was by video teleconference. The OIC of the special prosecution team, a

lieutenant colonel, as well as the Camp Pendleton based trial counsel, who ranged in rank from lieutenant colonel to captain, were present at the Camp Pendleton meetings. Otherwise, they participated by video teleconference, as did trial counsel located at Quantico, Virginia, a lieutenant colonel to a captain. The legal meetings routinely followed a set agenda once all participants were either present or connected by VTC. Cases were briefed by general category based upon their nearness in time to trial or other near milestone event. Cases in the investigative stage were generally briefed later. Virtually all of the cases discussed during these meetings were MARCENT cases. These legal meetings routinely lasted anywhere from two to five hours per session.

Although few, if any, I MEF cases or business was discussed at these legal meetings, Colonel Ewers was present at them. Other than Lieutenant General Mattis, Colonel Ewers was the next senior officer in attendance. However, in terms of judge advocates, Colonel Ewers was by rank, at all times during these meetings, the senior legal advisor in the room. And during this period of time, Colonel Ewers attended at least 25 such legal meetings, possibly more, according to Lieutenant General Mattis, who testified at a 39a session in the case of U.S. v. LtCol Chessani, up to "dozens and dozens." Regardless, the amount of time spent in these meetings ranged from a minimum of 50 on a conservative side to at least 125 or more, wherein this case and related cases, as well as other unrelated MARCENT cases, were discussed and legal advice was rendered.

These closed-door military justice meetings occurred during a period of time before, during, and after the Article 32 investigation in the case of U.S. v. Wuterich, the rendering of the Article 34 SJA advice letter, the referral of the case to general court-martial and regulation of pretrial discovery by the convening authorities. To be sure LtGen Mattis turned over the helm of

command to LtGen Helland in November of 2007, after the Article 32 investigation in this case but before the referral of Charges. In the weeks preceding the turnover of command however, LtGen Helland attended those military justice meetings, received briefs from Col Ewers and discussed the cases with LtGen Mattis. During the periods of time that these legal meetings were taking place, Colonel Ewers was considered by all trial participants as a government witness in companion cases and could have become a witness in this case for the Government or Defense if either side chose to admit the statement made by the accused to Col Ewers. Colonel Ewers was interviewed on several occasions by the same trial counsel who, in the presence of Colonel Ewers, attended the weekly legal meetings and provided case-status briefings on this case to the convening authority.

Although aware that Colonel Ewers was "tainted" as a legal adviser, Lieutenant General Mattis did not prohibit Colonel Ewers from attending the meeting nor was he asked to leave the room during discussions related to the Haditha cases. Moreover, both Col Ewers and LtCol Riggs were aware of a potential appearance problem due to the presence of Colonel Ewers at these meetings. Yet none of the lawyers present in the meetings advised LtGen Mattis of that problem. In any event, LtGen Mattis was unconcerned with how Colonel Ewers' presence in these meetings may appear to third parties.

The "legal meetings" were called by the CDA for the purpose of receiving legal advice from his trained and trusted legal advisors. The CDA's senior legal advisor present at these meetings was Col Ewers, who was directed to attend these legal meetings by the CDA because he was a legal advisor and for no other reason. Thus, it is uncontradicted that Col Ewers' presence at these meetings was for the purpose of providing legal advice to the CDA. It should be noted that these meetings did not include defense lawyers for any of the accused; Defense

counsel were never invited to any of these meetings, which inevitably took on a prosecutorial atmosphere.

In addition to discussing cases, counsel requests for assistance, funds, depositions, experts and other support were entertained. Not a single request by prosecutors was turned down by the CDA or his legal staff. Yet, the defense had to fight and argue for all but the most obviously permissible requests.

In late August and early September of 2007, an Article 32 pretrial investigation was held in this case. Lieutenant Colonel Riggs subsequently signed an Article 34 SJA advice letter to the convening authority, who at the time LtGen Mattis. LtGen Mattis turned over command in November of 2007 to LtGen Helland. In December of 2007, LtGen Helland acted on the advice letter and referred the current charges.

Upon assumption of command, LtGen Helland assumed responsibility as CDA for the Haditha cases, and more specifically as the convening authority in this case. From November 2007 until February 2008 when the Government took an Article 66 appeal in this case, Col Ewers attended several legal meetings held by the LtGen Helland, at which this case and other related cases were discussed and legal advice was rendered.

3. **Discussion.**

a. WHETHER ACTUAL OR APPARENT UNLAWFUL COMMAND INFLUENCE IS CREATED WHEN AN INVESTIGATOR WHO INTERVIEWS THE ACCUSED AND PARTICIPATES IN AN INVESTIGATION OF ALL THE FACTS UNDERLYING THE CHARGES AGAINST AN ACCUSED PROVIDES LEGAL ADVICE AND COUNSEL TO THE CONVENING AUTHORITY WHO LATER RELIES ON THAT ADVICE TO REFER CHARGES?

Yes. An investigator is disqualified from acting as a legal advisor and from providing legal advice regarding referral of charges to the convening authority . Rule for Court-Martial

406, Manual for Courts-Martial (2008 ed.). An SJA is presumed to act with the mantle of command authority. *United States v. Lewis*, 63 M.J. 405 (2006). Accordingly, when Col Ewers offered advice that influenced the referral decision after having been an investigator in this case, he violated the fundamental principle of Article 37, UCMJ and R.C.M. 406, requiring the Convening Authority to obtain neutral advice and to act neutrally. While it is true that Col Ewers was not the SJA who signed the Article 34 advice letter, he nevertheless attended meetings and provided advice to the CA and more junior legal staff, including LtCol Riggs. The staff relationships in the instant case were so conflated that it is difficult to determine where one SJA's authority begins and the other's ends. Col Ewers was the SJA for I MEF. LtCol Riggs was the SJA for MARCENT. Col Ewers, however, was located in the same building as the CDA at Camp Pendleton, CA, while LtCol Riggs was located thousands of miles away at MARCENT headquarters in Tampa, Florida. Col Ewers had won the unquestionable trust of the CDA because of their previous relationship in and out of combat and because of Col Ewers' stellar reputation. Although LtCol Riggs may have been a trusted advisor, he did not enjoy the same relationship that Col Ewers had with LtGen Mattis. Col Ewers was an 0-6 with broader experience and was closer in rank to LtGen Mattis than LtCol Riggs. These qualities and the spatial proximity to LtGen Mattis made Col Ewers the natural choice for legal advice on this case and others.

By participating in legal meetings regarding the Haditha cases with the CDA, Col Ewers clearly had an impact on the decision of the CDA. Col Ewers spent countless hours investigating the Haditha incident. Based on his investigation, he developed an opinion that criminal misconduct had occurred. He also believed thatSSgt Wuterich was responsible for eliciting squad members to lie and that he had been untruthful. It stands to reason that if Col Ewers

believed SSgt Wuterich was moved to lie about the facts, he must be trying to hide something which further bolstered the conclusion that he must have been criminally culpable. Armed with these beliefs and the unwavering trust of LtGen Mattis, Col Ewers then sat in on meetings and provided advice to the CDA that touched on every facet of these cases from the decision to charge to handling requests for support by the defense counsel, including which Marines' charges should be dismissed with prejudice and which Marines should be given grants of testimonial immunity.

Even giving Col Ewers the benefit of doubt as to his intent to remain neutral, it strains logic to believe that a person who was so intimately involved in this investigation and who was at times upset with the lack of response he received to his questions would successfully divorce himself from his beliefs as to the facts. Moreover, as the senior lawyer in the room during the legal meetings, he clearly had influence over other lawyers present and their ability to freely express views that may have been contrary to his; not because he determined to suppress those views, but because everyone who attended knew Col Ewers was in Haditha and investigated the events in question. Eveyone in the room knew he had a repository of information regarding Haditha. Everyone in the room, including LtGen Mattis, was familiar with the Bargwell investigation, Everyone knew what Col Ewers' opinions were as to the criminal culpability of SSgt Wuterich and others who had not yet been granted immunity from prosecution in return for testimony. His influence may be reflected in the conduct of LtCol Riggs, the MARCENT SJA.

The Article 34 advice letter in this case was prepared and signed by LtCol Riggs. Despite not having attended the Article 32 hearing, he angrily disagreed with many of the recommendations made by the Investigating Officer, (IO), LtCol Ware, at the time, a sitting general court-martial-certified military judge. LtCol Ware was the IO for three related cases,

including that of SSgt Wuterich. After an earlier Art 32 investigation in a companion case, LtCol Riggs actually admonished the IO for his conclusions and findings in that Article 32 report and as a result, rendered himself disqualified from preparing the Article 34 letter. His opposition to the IO's findings of an absence of criminal culpability on many of the charges begs the question: why take such an inflexible and opposing view of a neutral Investigating Officer, an experienced military judge, findings, when that IO had heard and evaluated the evidence first hand? One logical answer is that he was influenced in his views from his exposure to one of the primary investigators in the case, Col Ewers. After dozens of meetings that may have lasted over a hundred hours, it stands to reason that LtCol Riggs developed a belief in a set of facts endorsed by Col Ewers, a participant in the Bargewell investigation. That view of the facts would have compelled LtCol Riggs to abandon his position as a neutral advisor and to take a position contrary to what his training, experience, knowledge and the law counsel. Even if this analysis is inaccurate or misplaced, the mere fact that it offers one reasonable explanation for the conduct of the SJA in this case, satisfies the defense' burden for a showing of UCI.

The defense bears the initial burden to raise the issue of UCI by a quantum of evidence "the same as that required to submit a factual issue to the trier of fact." *United States v. Baldwin*, 54 M.J. 308, 311 (C.A.A.F. 2001); *see also United States v. Jameson*, 33 M.J. 669, 672 (N.M.C.M.R. 1991)(quantum of evidence needed is "some evidence sufficient to render reasonable a conclusion in favor of the allegation asserted.").

The burden then shifts to the government to prove **beyond a reasonable doubt** that (1) the predicate facts which the allegation of unlawful command influence is based do not exist; or (2) by persuading the military judge that the facts do not constitute unlawful command influence; or (3) if at trial producing evidence proving that the unlawful command influence will not affect

the proceedings. *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999). *United States v. Harris*, 65 M.J. 594, 598 (N.M. Ct. Crim. App. 2007). "This burden is high because command influence tends to deprive servicemembers of their constitutional rights." *United States v. Lewis*, 63 M.J. 405, 413 (2006) (citations omitted). It is important to consider not only whether there was actual unlawful command influence, but also whether there was an appearance of impropriety that would taint the public's perception of the fairness of the court-martial: If the Government fails to meet its burden, then:

> the military judge must find that command influence exists and must take whatever measures are necessary and appropriate to ensure that the findings and sentence, if any, are so far unaffected by any command influence that a reviewing court would find them to be so beyond a reasonable doubt. If and only if the trial judge finds that command influence exists (because the defense successfully raised it, and the Government failed to disprove it by clear and positive evidence) and finds, further, that there is no way to prevent it from adversely affecting the findings or sentence beyond a reasonable doubt should the case be dismissed.

Jameson, 33 M.J. at 672 (quoting *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R. 1990)); *see also Stombaugh*, 40 M.J.at 214; *United States v. Thomas*, 22 M.J. 388 (C.O.M.A. 1986).

"Unlawful command influence is the moral enemy of military justice." *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998). The test for apparent unlawful command influence is "whether a reasonable member of the public, if aware of all the facts, would have a loss of confidence in the military justice system and believe it to be unfair." *United States v. Allen*, 31 M.J. 572, 590 (N.M.C.M.R. 1990), aff'd, 33 M.J. 209 (C.M.A. 1991). A reasonable member of the public aware of all the facts in this case would most certainly question the fairness of the military justice system under these circumstances and would undoubtedly lose confidence in it. The Convening Authority is supposed to act neutrally. He convenes the court and details members. He approves requests for witnesses, resources and funds. According to Rule for Court-Martial 105, Convening Authorities are required to communicate at all times with the SJA

regarding matters of military justice. In this case the communications were with an SJA who was disqualified because he had investigated the allegations, concluded that a crime had been committed and that the accused was involved in an attempt to cover-up. *See* R.C.M. 406. (an SJA who previously investigated the charges is disqualified).

A disinterested member of the public aware of the fact that the same person who investigated the case provided legal advice to the commander who convenes the court and is supposed to be neutral would most certainly harbor grave doubts about the fairness of this court-martial and the military justice system. Accordingly, there is at a minimum an appearance problem – a fact confirmed by both LtCol Riggs and Col Ewers in discussions with LtGen Mattis. In this case, however, there is a strong colorable argument that the unlawful command influence is actual, and not one of mere appearances simply based on the conduct of LtCol Riggs in his attempts to influence the Article 32 investigation. This assertion is further supported by evidence that was elicited by the defense team in the case of United States v. Chessani. The Chessani team filed a UCI motion very similar to this one. During the 39a hearing on the motion, Col Ewers testified regarding his participation in the legal meetings and agreed that they had an appearance problem that was ignored by LtGen Mattis despite being informed of the law. In commenting on the demeanor of the witness, the Court noted that there was palpable frustration in Col Ewers' demeanor as a witness who was exacerbated and occasionally mumbled under his breath when responding to certain questions. Judge's findings on Chessani UCI motion at 26.

Under Rule for Courts-Martial 406 of the Manual for Courts-Martial, pretrial advice must be provided by a staff judge advocate to the convening authority on any general court-martial. The staff judge advocate, unless disqualified, is responsible for the pretrial advice and must make

an independent and informed appraisal of the charges and evidence in order to render the advice. Grounds for disqualification in a case include previous action as investigating officer, military judge, trial counsel or defense counsel. Discussion, R.C.M. 406, Manual for Courts-Martial (2008 ed.).

As previously discussed, the duties and responsibilities of the various legal advisors became conflated with the dual authorities of the CDA over I MEF and MARCENT and their respective staffs. It is clear, however, that by virtue of his availability, proximity, reputation, rank, experience, previous relationship with the commander and familiarity with the facts of the case, after having been one of the lead investigators on the Bargewell team, Col Ewers became a pivotal figure in providing legal advice to the CDA. And just as importantly, he became a persuasive mentor and counselor to the more junior lawyers at the legal meetings including the MARCENT SJA, LtCol Riggs, who ultimately prepared and signed the Article 34 advice letter.

Col Ewers' involvement was that of an SJA, irrespective of who signed the Article 34 letter, because his advice and counsel were sought out and heeded by the commander.

b. WHETHER UCI EXISTS WHEN A COMMANDER WHO IS VESTED WITH PLENARY AUTHORITY TO DISPOSE OF CHARGES IN CASES ARISING FROM THE SAME FACTS OR CIRCUMSTANCE AS THIS CASE DECIDES TO TAKE ADMINISTRATIVE ACTION IN A COMPANION CASE IS REVERSED BY THE SECRETARY OF THE NAVY WHO SUBSTITUTES HIS OWN JUDGMENT AND AWARDS PUNITIVE ACTION?

Yes. Another form of unlawful command influence is when a superior substitutes (or attempts to substitute) his or her judgment for that of a subordinate who should be allowed to exercise independent judgment. *United States v. Wallace*, 39 M.J. 284 (C.M.A. 1994). When a convening authority exercises their authority to refer charges to a court-martial, they must do so impartially, and must not be actually or apparently influenced by superiors. *United States v.*

Allen, 31 M.J. 572 (N.M.C.M.R. 1990). In the instant case, the CDA at the time LtGen Mattis, claims that he was not influenced to refer charges against LtCol Chessani by the Commandant or the SECNAV. However, at the very least, apparent influence was exerted when LtGen Mattis informed the Commandant that he had "*decided*" to issue Col Davis, the Regimental Commander, a Non Punitive Letter of Caution (NPLOC) citing his CDA authority over all Haditha matters. When the SECNAV unexpectedly overruled LtGen Mattis' decision the message from the SECNAV was clear—your decision was not tough enough. Clearly, LtGen Mattis was not the true decision makes in the Haditha cases—even though he was allegedly vested with plenary authority under the CDA.

In deciding on the existence of UCI, the law asks how would a disinterested member of the public view the process if informed of all the facts. *Allen*, 31 M.J. 590. The defense has argued throughout this brief that a member of the public would certainly consider the presence of Col Ewers in military justice meetings that considered the disposition of this case among others to be unfair and would cast doubt on the military justice process. The real effects of unlawful command influence are far more pernicious than what the public may perceive, however. In this case, the accused and his defense team have lost faith in the fairness of the process given the facts of this case. The presence of Col Ewers in meetings related to this case aside, the unlawful command influence is tangible and palpable, whether it is through the statements of members of Congress or the Commandant or the obvious dissatisfaction of the Secretary of the Navy with certain actions by LtGen Mattis regarding the type of disciplinary action to be taken against senior officers in the accused's chain of command. The Secretary of the Navy has made clear that mere administrative action is unacceptable against Col Davis, the accused's former regimental commander in theater. The SecNav has usurped the independent judgment of the

CDA and replaced his own with respect to disciplinary actions against a Colonel. What chance, then, does SSgt Wuterich, a person accused of the killing of 13 people, have in the CDA make an independent judgment in his case or to take commander's actions in granting clemency after trial in his case?

LtGen Mattis has a reputation of great personal strength and will undoubtedly deny being influenced by anyone in making his decision. Likewise for LtGen Helland. That is little comfort to SSgt Wuterich and fails to consider the public's perceptions of the process. But more importantly, it fails to address the prohibition against influence by a superior and calls into serious question the ability of the CA to remain impartial. *Id.*

In deciding on the extent of the influence, this court may not rely solely on perfunctory and probably self-serving statements made by witnesses as to the impact of the influence. For example, if Gen Mattis or LtCol Riggs were to testify that Col Ewers' presence at the legal meetings did not influence their decisions or if Gen Mattis or LtGen Helland were to testify that Secretary Winter's reversal of Gen Mattis' decision to issue a NPLOC to Col Davis was of no influence as to the decisions in this case, the court would run afoul of the law. The law counsels Judges to develop an objective record of the facts as to the effect of the influence. *See, e.g., United States v. Wallace*, 39 M.J. 284, 287 (C.M.A. 1994) (advising the lower courts to be cautious in relying on "perfunctory statements" from witnesses claiming that they were not influenced and instead "to fully develop the objective facts on the record"); *see also United States v. Zagar*, 18 C.M.R. 34, 38 (C.M.A. 1955) (rejecting the Government's argument that the court is bound by the insistence of court members that they were not improperly influenced by the statements of the SJA).

As the Navy-Marine Court of Criminal Appeals has made clear, in order to rebut beyond a reasonable doubt evidence of unlawful command influence "the Government must produce more than mere assertions of impartiality by the person alleged to have been influenced." *Allen*, 31 M.J. 591. This includes situations concerning the existence of unlawful command influence upon a convening authority. *Id.*

4. **Evidence and Burden of Proof.**

a. Burden.

The initial burden is on the defense to present a quantum of evidence to raise the issue of unlawful command influence. Once raised the burden shifts to the government to prove beyond a reasonable doubt that UCI does not exist or that it is harmless beyond a reasonable doubt. *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999). *United States v. Harris*, 65 M.J. 594, 598 (N.M. Ct. Crim. App. 2007).

b. Evidence.

Witnesses

1. Secretary of the Navy Dr. Winters
2. Gen Hagee
3. Gen Conway
4. Gen Mattis
5. Gen Helland
6. Col Ewers
7. LtCol Riggs
8. LtCol Ware

Exhibits

a. Preferral Charge sheet dated 21 Dec 2006

b. Referral charge sheet dates 28 Dec 2007

c. SSgt Wuterich statement to Col Ewers dated 18 March 2006

d. Judge Folsom's findings in Chessani UCI 39a hearing on 17 June 2008

e. Transcript of testimony by Col Ewers and Gen Mattis at 39a hearing held on 7 May 2008 in the case of U.S. v. Chessani.

f. NMCCA decision in the case of U.S. v. Chessani; *United States v. Jeffery R. Chessani*, 2009 CCA Lexis 84; (N-M.C.C.A. Mar 17, 2009).

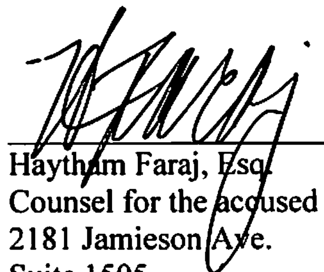
5. **Relief Requested**.

Based on the forgoing, the accused by and through counsel, respectfully requests dismissal of all charges and specification with prejudice.

6. **Argument**.

Respectfully requested.

Respectfully Submitted,



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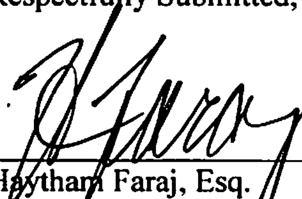
I hereby certify that a copy of the forgoing of this motion was served upon opposing counsel and the court on February 22, 2010.

Respectfully Submitted,



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