The Article 39(a) session was called to order at 1259, 26 March 2010.

MJ: The court will come to order. All parties present when the court recessed are once again present with the exception of Mr. Vokey.

We discussed this at the previous session of court, Staff Sergeant Wuterich, that he was going to return to Texas and you were going to proceed without him today; is that correct?

ACC: Yes, sir.

MJ: Thank you. Please keep your seat. I appreciate your courtesy.

So his -- he's excused for today's session.

All other parties remain the same and our court reporter is still Staff Sergeant Myers.

Motion to dismiss for unlawful command influence. The defense moves that all charges against the accused be dismissed with prejudice based on unlawful command influence. The court has considered the extensive documentary evidence presented, the testimonial evidence, the argument of counsel, and has made all judgments of credibility of witnesses.

The defense motion is denied.

Findings of fact. On 19 November 2005 the accused was a squad leader involved in combat operations in Haditha, Iraq. On that day the accused's squad was involved in hostilities which resulted in the death of one Marine and twenty-four Iraqis including men, women, and children.

On 14 February 2006, Colonel Gregory Watt, U.S. Army, was appointed by the Commander, Multi-National Corps Iraq, General Peter W. Chiarelli, U.S. Army, as an investigating officer to -- or IO to look into the events.

On 3 March 2006 he completed his inquiry.

On 12 March 2006 then Major General Richard C. Zilmer,

United States Marine Corps, directed that the Naval Criminal Investigative Service, NCIS, investigate the incident for any criminal misconduct. He also ordered a JAGMAN investigation.

On 19 March 2006, Major General Eldon A. Bargewell, U.S. Army, was tasked by General Chiarelli to investigate the reporting of the incident and the training of the Marines involved. This Bargewell report consisted of nearly 100 pages but dealt within the limits of reporting and training. The Bargewell report encapsulated the JAGMAN report. The NCI -- the NCIS report, by contrast, focused on the criminal ram -- ramifications of the accused's actions.

In March 2006, General Zilmer tasked Colonel John Ewers, U.S. Marine Corps, to assist with the JAGMAN report. At the time Colonel Ewers was the I MEF SJA but had been deployed to Iraq since October 2005 as the I MEF Forward Governance Officer. Colonel Ewers interviewed various witnesses involved and took an active role in the Bargewell report. His role involving the accused, however, was an interview resulting in a one paragraph statement concerning how the accused had sent information over the radio to higher headquarters. Again, this was primarily because the role of the Bargewell team was to ascertain training and reporting concerns, not necessarily criminal misconduct which was largely the purview of NCIS.

On 6 June 2006, the Commandant of the Marine Corps designated Lieutenant General Sattler who was duel-hatted as the Commanding General of both the U.S. Marine Corps Forces Central Command, MARCENT, and I MEF as the Consolidated Disposition Authority or CDA for all administrative and judicial actions arising out of the Haditha incident.

In August 2006, General Mattis assumed command from General Sattler, thereby assuming the role as the CDA for all Haditha cases.

At all times from June 2006 until his relief as MARCENT and I MEF Commanding General on 6 November 2007, General Mattis was intimately involved in the decisions surrounding the Haditha cases in general. He read over 9,000 pages of materials, consulted frequently with the MARCENT SJA, Lieutenant Colonel Riggs, held regular

meetings with legal personnel to make sure progress was being made and the Marines charged were being adequately defended, and made independent, well-considered decisions. He was very detail oriented and asked lots of questions of all parties. He read the Watt investigation, the Bargewell report, and the NCIS materials. The NCIS reports were most significant to the general as they principally contained the evidence necessary to make a decision as to the disposition of criminal charges.

By December 2006, General Mattis was in firm grasp of all of the facts involving Haditha. December 2006 was when the first charges were preferred against the accused, Staff Sergeant Wuterich. General Mattis had been a commanding officer countless times and a convening authority several times in the past. Specifically, General Mattis had been a general court-martial convening authority at least four different times. He understood how to deal with legal issues. More particularly, he understood how to divide up the SJA -- SJA advice he sought between his two commands, MARCENT and I MEF.

From August 2006 to November 2007, General Mattis continued to divide his time between the two headquarters in Tampa, Florida and Camp Pendleton, California in his duel-hatted role. During this time, General Mattis held regular staff meetings, wherein he discussed all matters pertinent to MARCENT and I MEF SJA legal issues. At these meetings were a variety of players; most significantly, the two SJAs for the respective commands, Lieutenant Colonel Riggs and Colonel Ewers.

Lieutenant Colonel Riggs was present in person or via video telephone conferencing without exception. Colonel Ewers was not present at the meetings until his return from Iraq in February 2007, wherein he participated in approximately 12 to 20 of these legal meetings.

The meetings would take place on at least a weekly basis. During these meetings, Lieutenant Colonel Riggs specifically dealt with all of Haditha and Hamdaniyah cases from Iraq as that was his purview as the MARCENT SJA. Lieutenant Colonel Riggs jealously guarded his role as adviser and confidant on all Haditha matters.

The record is absent of any meaningful comments or discussions between the generals and Colonel Ewers regarding anything to do with the accused's case. Although General Mattis found it necessary to rely on his SJA, Lieutenant Colonel Riggs, for legal advice concerning the Haditha cases, nothing supplanted his authority or commander's discretion when ultimately deciding what to do with the case.

Again, significantly, Colonel Ewers was in Iraq when General Mattis and Lieutenant Colonel Riggs were getting all of the information and situational awareness in the accused's case to achieve, quote, intellectual dominance, close quote. The decision to send the case to an Article 32 was made while Colonel Ewers was in Iraq.

It is true that Colonel Ewers had previously served as General Mattis' SJA while the general was the Commanding General of 1st Marine Division. However, despite this relationship, the court again finds that General Mattis and Colonel Ewers had no substantive conversations ever regarding the disposition of the Haditha cases. Any comment Colonel Ewers may have ever made to either General Mattis or General Helland regarding the Haditha cases in general, this court finds as de minimis and not rising to the level of advice as a cognizant SJA.

The court finds the record to be replete and accurate in showing that both General Mattis and General Helland conducted an exhaustive review and unbiased assessment of the accused's case after meaningful debate with the MARCENT SJAs.

Lieutenant Colonel Riggs is a Marine officer with a very strong personality who, in the words of General Mattis, is, quote, focused, intellectually intense, and argumentative, close quote. The court specifically notes his very strong demeanor in court while testifying. All of the actions Lieutenant Colonel Riggs took regarding discounting the tainted Colonel Ewers from being involved in the Haditha cases, the strong Article 34 advice letters to his commanders which bucked the IO's recommendations as well as the opinions of the commanders in some cases cannot be discounted. They all show a consistent pattern. They all show without a doubt Lieutenant Colonel Riggs was not influenced in any way by Colonel Ewers.

Stated a different way, Colonel Ewers' personal gravitas, reputation, rank, and even prior relationship with General Mattis in no way influenced Lieutenant Colonel Riggs' decision making or advice to his general. There was no improper influence flowing either upwards to the generals or downwards to the MARCENT SJAs by Colonel Ewers. Lieutenant Colonel Riggs was very sure of himself. As he testified, he's been an SJA before and he's been advising O-6s since he was a captain. General Helland stated the issue most clearly, quote, Riggs was very adamant about the fact that he was the MARCENT SJA, close quote.

In December 2006, prior to Colonel Ewers' return from Iraq, Lieutenant Colonel Riggs and General Mattis specifically discussed the fact that because Colonel Ewers had been part of the investigative arm of the Haditha cases in working on the Bargewell report, that he should not have any input on the Haditha cases as a legal adviser. They both viewed him as tainted with regards to the Haditha cases. This made sense to General Mattis both legally and operationally. Legally, because General Mattis understood the importance of only receiving legal advice from the cognizant SJA for that specific jurisdiction. It made sense operationally, because Lieutenant Colonel Riggs was his specific adviser or SJA for all matters relating to MARCENT.

Again, despite the fact that the general -- that General Mattis and Colonel Ewers shared a past, personal history of working together, the court is persuaded that Colonel Ewers did not give the general any legal advice regarding the Haditha cases.

From June through September 2007, Lieutenant Colonel Ware conducted Article 32 hearings for Lance Corporal Sharratt, Lance Corporal Tatum, and the accused. The report on Lance Corporal Sharratt recommended dismissing all charges against him.

Lieutenant Colonel Riggs disagreed with the IO. He then had a phone conversation with Lieutenant Colonel Ware, wherein he indicated that Lieutenant Colonel Ware's strong report left him with few options to disagree and that he felt Lieutenant Colonel Ware's report was applying too high of a standard that should be appropriate at an Article 32 hearing.

Lieutenant Colonel Ware was disturbed enough about the phone call that he sent out an e-mail to all of the interested parties. In the e-mail he made it clear that in his opinion, Lieutenant Colonel Riggs was not concerned with the recommendation itself and that he was not attempting to influence him. He made it clear in the e-mail that he was not influenced in any way in giving his assessment of the cases, but that phone call did upset him.

In the e-mail at the time and, again, emphatically in his court testimony, Lieutenant Colonel Ware -- Lieutenant Colonel Ware stated that Lieutenant Colonel Riggs' phone call would not nor did not influence his subsequent reports. The court has no doubt that Lieutenant Colonel Ware was not influenced by this phone call in the performance of his duties in the next IO report dealing with Lance Corporal Tatum or in the following report dealing with Staff Sergeant Wuterich. Again, like Lieutenant Colonel Riggs, Lieutenant Colonel Ware's in-court testimony and demeanor showed him to be of a strong personality and not someone to easily back down.

After the 1 August 2007 e-mail, there were no communications whatsoever between Lieutenant Colonel Riggs and the IO. Specifically, Lieutenant Colonel Ware was under the impression that Lieutenant Colonel Kumagai was the IO for the Wuterich case. Therefore, the court finds that Lieutenant Colonel Ware was under no pressure from the command or specifically Lieutenant Colonel Riggs in his subsequent Article~32 report regarding his findings or conclusions. The court has no doubt that Lieutenant Colonel Ware was not influenced by -- by Lieutenant Colonel Riggs in the drafting of any of the IO reports including that of Staff Sergeant Wuterich. The phone call from Lieutenant Colonel Riggs was regarding the Sharratt report and, tangentially, the Tatum report. Lieutenant Colonel Ware -- Ware had not even begun the Wuterich report.

In an abundance of caution, however, Lieutenant Colonel Riggs was excused from any further participation as the SJA to General Mattis with regards to the Tatum case. Lieutenant Colonel Kirk J. Kumagai, the Deputy SJA of MARCENT, took care of all matters dealing with the Tatum case after this incident. The court received no evidence that Lieutenant Colonel Kumagai was pressured

in any way or acted in any way other than what was proper in the Tatum case. Therefore, the court finds normalcy and propriety in the actions of Lieutenant Colonel Kumagai.

Also in an abundance of caution, General Mattis affirmed Lieutenant Colonel Ware's independent status by writing him a letter on 2 August 2007. In the letter, the general uses strong language to complement the IO on his past performance, commend him to continue giving his candid and unshrinking opinion. He assured the IO that he had, quote, complete latitude and freedom to include in his analysis, report, and recommendation anything he thought the general should be provided as the convening authority to meet the ends of justice.

I didn't close the quote in the appropriate place. Excuse me. It should have been closed after, anything that he thought, close quote.

The general indicated that he in no way endorsed Lieutenant Colonel Riggs' phone call. Ultimately, General Mattis agreed with the IO's recommendation in the Sharratt case, disagreed with his own SJA, and subsequently dismissed all charges, even taking the time to write the Marine a letter indicating his personal belief in his innocence.

The IO report on the Tatum case recommended lesser charges. These were drafted but ultimately dismissed with prejudice. As Lieutenant Colonel Kumagai had been the adviser in this case, the Tatum case, he wrote the dismissal letter for the general in regards to the Tatum case, effective 28 March 2008.

On 16 November 2007 General Helland took over as MARCENT and I MEF commander. He was, therefore, the subsequent CDA for all of the Haditha cases. Before the change of command, General Helland attended three to four of General Mattis' legal meetings. One or two of which Colonel Ewers was not in attendance at. He made no comments about the Haditha case at the meetings -- speaking of General Helland -- nor did he discuss what to do in the Wuterich case with General Mattis other than to decide that the evidence wasn't fully in and that the de -- decision would not be made on General Mattis' watch as to the proper disposition of the charges.

Prior to his departure, General Mattis could not act on the Wuterich case because he was still waiting for information, to include the Article 34 advice letter. The court finds that General Mattis had no role in the referral process of the Wuterich case, nor did he give any input whatsoever to General Helland about what course of action should be pursued in the accused's case at any time. It was clear from the general's testimony that they understood -- but -- it was clear from both of the generals' testimony that they understood the concept of staying in their lane as commanders.

After assuming command, General Helland had a conversation with Colonel Ewers, wherein he again emphatically stated that Colonel Ewers would not -- would have no input on the MARCENT cases and that he would be involved only with the I MEF cases. Colonel Ewers readily agreed. Colonel Ewers never offered any legal advice to General Helland on the Wuterich case.

On 2 October 2007, the IO, Lieutenant Colonel Ware, recommended lesser charges in the accused's case. Lieutenant Colonel Riggs still acting as the SJA for the instant case partially agreed with the IO's report. Lieutenant Colonel Riggs wrote an extensive, 15-page Article 34 letter to General Helland on 21 December 2007 indicating his legal opinion of the case. Ultimately, lesser charges were preferred and referred against the accused, Staff Sergeant Wuterich, for which he now stands trial. Prior to this referral, General Helland also did an exhaustive examination of the evidence, consulted with his MARCENT SJA, and determined that referral of the present charges was the correct course of action.

The court finds that the Secretarial Letter of Censure given to Colonel Davis is irrelevant to this motion. At no time was the very independent and strong-willed General Mattis influenced by the actions of the Secretary of the Navy. True, General Mattis was frustrated as one of his Marines was now being punished more severely than he had wanted, but this did not impact his ability whatsoever to judge any other Haditha case in a fair and dispassionate manner.

The court finds from the general's testimony that he still felt, quote, obligated to do his duty, close quote. It is clear from the general's later actions

regarding the Haditha cases that he was not influenced one iota from the Secretarial Letter of Censure as it concerned the proper disposition of the Haditha cases.

The administrative action taken by the Secretary of the Navy toward Colonel Davis has in no way impacted the accused's case which deals with far more serious offenses than failing to re -- adequately report an offense. In no way did the Secretary of the Navy's censure of a colonel in a companion case impact the decisions of either General Mattis or General Helland. Any assertion to the contrary does not rise above the level of mere speculation or conjecture. This is why the court specifically found at an earlier session of court that the defense did not even meet the initial low threshold of some evidence tying the letter of censure to unlawful command influence.

Summary of the law. The law in this subject is relatively straightforward. To begin, the defense must first show some evidence of unlawful command influence. *United States versus Biagase* also *United States versus Simpson* -- I'm going to omit the citations -- specifically, the defense has the initial burden to, one, show facts which if true constitute unlawful command influence. Two, show that the proceedings were unfair. And, three, show that the unlawful command influence was the cause of the unfairness. Again, quoting *U.S. versus Biagase*. This initial burden of proof or showing by the defense need not be proved beyond a reasonable doubt. The standard is merely that some evidence is presented.

If the defense meets this initial hurdle, then the defense -- then the burden shifts to the government to show either that there was no unlawful command influence or that the unlawful command influence will not effect the proceedings. This is done by proving beyond a reasonable doubt one of the following:

One, disproving the predicate facts upon which the allegation of unlawful command influence is based. Or, two, persuading the military judge that the facts do not constitute unlawful command influence. Or, three, producing evidence that unlawful command influence will not effect the proceedings.

Analysis, conclusions of law. In looking at both the

written motion and the arguments made in court, the defense alleged three areas where they -- where they believed there was either actual or apparent unlawful command influence. The issues are as follows:

First, whether advice given by Lieutenant Colonel Riggs to General Mattis and/or General Helland was somehow suspect due to Colonel Ewers being present in the same meetings where the Haditha cases were discussed.

Second, whether Lieutenant Colonel Riggs should have been recused from further acting as a legal adviser in the accused's case due to his influence over or behavior towards the investigating officer, Lieutenant Colonel Paul Ware.

Third, whether a Secretarial Letter of Censure issued by the Secretary of the Navy to Colonel Davis in a companion case somehow improperly affected the independent decisions of either General Mattis or General Helland regarding disposition of the accused's case.

The court recognizes that the foregoing three prongs proffered by the accused are all simply ways to ask the same question: Was there a neutral and detached legal adviser who gave proper legal advice to the general who, in turn, properly referred charges against the accused?

This court takes seriously the concept of the judge being the last sentinel regarding issues of unlawful command influence. This court also takes seriously the philosophy that the judge must avoid even the appearance of evil or unlawful command influence in the courtroom by establishing the confidence of the general public in the fairness of the court-martial proceedings.

The Court of Military Appeals as far back as 1956 indicated that, quote, any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused, must be condemned, close quote; *U.S. v. Hawthorne*.

Based on the foregoing and the low threshold required of the defense, the court ruled earlier that the defense had made a proper showing sufficient to shift the burden to the government of the first two issues mentioned above; namely, whether advice given by Lieutenant

Colonel Riggs to the generals was somehow improperly influenced by Colonel Ewers' presence at the meetings.

And, second, whether Lieutenant Colonel Riggs should have recused himself from acting as legal adviser in the accused's case due to his influence over or behavior towards the investigating officer, Lieutenant Colonel Paul Ware.

As mentioned in the findings portion of the ruling, the defense failed to present sufficient evidence that if true would constitute either actual or implied unlawful command influence regarding the Secretarial Letter of Censure. Therefore, the government is now required to show for items one and two beyond a reasonable doubt that either the predicate facts as shown by the defense are untrue or the predicate facts do not establish apparent and/or actual unlawful command influence or that the apparent or actual unlawful command influence established by the predicate facts has not or will not effect the proceedings.

Was advice given by Lieutenant Colonel Riggs to the generals somehow improperly influenced by Colonel Ewers' presence at the legal meetings? No. R.C.M. 601(d)(1) states that if a convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense trial by court-martial has been committed and that the accused committed it and after the specific -- and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information viewed by any previous authority.

This begs the question, If Colonel Ewers was not the SJA for the MARCENT cases and had no role in the pretrial Article 34 advice concerning those cases but attended meetings where the cases were discussed and eve -- even offered advice on the case to the generals as an investigator would, is that somehow improper? Perhaps not. But we do not need a definitive answer to that question to decide the issue today.

The court has already ruled that Colonel Ewers attended the meetings but did not offer any advice at any time regarding the Haditha cases to either General Mattis or

General Helland. Any comment he may have made during the meetings are de minimis and bore no impact on the proper preferral, investigation, or referral in the accused's case.

The court is satisfied beyond a reasonable doubt that there was no actual unlawful command influence in this case. However, was it a good idea to have Colonel Ewers attend the legal meetings where MARCENT cases were discussed when he was an investigator in those cases? Probably not. Certainly pursuant to R.C.M. 1106(b), Colonel Ewers could not act as a legal adviser due to his investigative role. So here, his presence raises the specter of unlawful command influence on either the generals or Lieutenant Colonel Riggs as the SJA in the case.

Therefore, the government must show beyond a reasonable doubt that the apparent unlawful command influence established by the predicate facts has not or will not effect the proceedings. This the government has adequately accomplished. They have proven beyond a reasonable doubt that Colonel Ewers' presence at the CDA meeting -- legal meetings had no effect whatsoever on the MARCENT SJA's legal advice to either General Mattis or General Helland in the accused's case. There was no chilling effect. Both generals and Lieutenant Colonel Riggs emphatically deny any such influence. All of the witnesses are strong personalities not adverse to disagreeing and arguing with each other concerning what the best course of action was for any particular Haditha case.

Lieutenant Colonel Riggs at times disagreed with the IO and both generals disagreed with Lieutenant Colonel Riggs. No one even appears to have been subject to Colonel Ewers' influence regarding the Haditha cases. Both generals pointedly discussed how they viewed their staffs as different and their SJAs as staying in their lanes with regards to which cases were whose.

The court has no doubt that Lieutenant Colonel Riggs was not influenced in any way by Colonel Ewers' attendance at the meetings or possible in -- inference -- influence due to his rank. The court has no doubt that the generals were not influenced by Colonel Ewers with regards to any aspect of the accused's case. As General Mattis said, quote, we had the best site picture

we're -- we were -- we are going to get, close quote, of the Haditha cases at the time of the original preferral in December 2006, some two months before Colonel Ewers arrived on the scene from Iraq.

To find that somehow Colonel Ewers was offering advice on the Haditha cases or somehow had a chilling effect on Lieutenant Colonel Riggs or others at the meetings when all witnesses have emphatically stated that this was not the case and the independent evidence bears it out is unreasonable. The court must deal in facts not mere speculation or conjecture.

The court agrees with the government that the defense's reliance on the judge's ruling in the Chessani case is misplaced, see *United States versus Chessani, NMCCA 200800299 at 2009 CCA LEXIS 84*. This is an unpublished case which does not serve as precedent. In Chessani, the appellate court affirmed the trial judge's ruling that after the specter of unlawful command influence was raised, the government did not put enough evidence on to show beyond a reasonable doubt, quote, that the MARCENT SJA's legal advice was not apparently or actually impermissibly influenced by Colonel Ewers' presence in the CDA legal meetings. The government presented no testimonial or documentary evidence from any member of the MARCENT SJA's office, close quote, at page seven.

Instead, the government in the Chessani case called only General Mattis and Colonel Ewers. This was not satisfactory to the trial judge who ordered that the charges be dismissed without prejudice, meaning that Lieutenant Colonel Chessani could be charged again. He also ordered other remedial remedies if the government chose to recharge Lieutenant Colonel Chessani which, evidently, they did not.

The appellate court in Chessani never found that there was unlawful command influence. They simply ruled that the government did not present evidence beyond a reasonable doubt that there was no unlawful command influence after the defense had produced some evidence. Specifically, the Chessani court found that the dispositive issue was the following: The government mistakenly attempted to prove that the potential improper influence of Colonel Ewers flowed upwards to the CDA rather than proving that the improper influence did not float downwards to the MARCENT SJA.

In the Wuterich case, the government has overwhelmingly met this burden by showing that the alleged unlawful command influence did not in any way impact Lieutenant Colonel Riggs' advice to his convening authority.

The facts of the Chessani case and the accused's case are different factually as well. Unlike in the Chessani case when there was never a change in convening authorities during the proceeding -- processing of the case, in Staff Sergeant Wuterich's case, there was a change in convening authorities: General Mattis left and General Helland took over.

The record is clear that there was no taint between the two generals regarding the accused's case. General Mattis testified that the Wuterich case wasn't ripe for decision before he left command. General Helland considered the Article 34 advice letter from his SJA, the IO's report, and then did his own independent review of the evidence. After all of this, his -- his decision was to refer lesser charges in the accused's case following the advice of the IO and to an extent, his SJA, Lieutenant Colonel Riggs.

General Helland referred charges of voluntary manslaughter under Article 119, UCMJ, vice the original murder charges under Article 118 of the UCMJ. The difference between these charges is significant. Even if one assumes a taint from Colonel Ewers to General Mattis because of their past history together which this court specifically rejects, one would still have to tie that taint to General Helland to prove how the alleged impropriety affected the accused's case. This connection is nonexistent.

Additionally, General Helland has now retired and a new general, Lieutenant General Joseph Dunford, is the convening authority for all further aspects with regards to the accused's case. Also, there are new SJAs at both I MEF and MARCENT. So, unlike the Chessani case which dealt entirely with Colonel Ewers and General Mattis, the Staff Sergeant Wuterich case has different SJAs and, more importantly, is now two generals removed from General Mattis. All of this of course would not obviate unlawful command influence in the past if there was any, but it is instructive as to the future processing of this case.

Another difference between the Chessani case and the case at bar is that Colonel Ewers' role in the accused's case was much more minimal than his role in the case of Chessani. Chessani was accused of failing to take appropriate action in the reporting of the incident in Haditha, which was largely driven by the Bargewell report to which Colonel Ewers had a hand in developing. He conducted an interview with Chessani that took up 41 pages.

In Staff Sergeant Wuterich's case, his involvement was to take a single paragraph statement. The accused's charges are much more serious than anything facing Lieutenant Colonel Chessani. Whereas one case can be categorized as dereliction of duty, the accused's alleged misconduct concerns the deaths of 24 Iraqis. It is clear that both General Mattis and General Helland relied much more heavily on the NCIS investigation concerning the accused's alleged actions rather than the Bargewell report.

To sum up, after hearing the evidence in this motion, the court is confident beyond a reasonable doubt that what the government failed to prove during the Chessani unlawful command influence motion, according to the previous judge, was adequately proven in the accused's case. Should Lieutenant Colonel Riggs have recused himself from acting as legal adviser in the accused's case due to his influence over or behavior towards the investigating officer, Lieutenant Colonel Paul Ware? No.

In other words, was the general who referred the charges provided proper legal advice pursuant to Article 34, UCMJ, so that he could render a fair and impartial decision? Yes. Lieutenant Colonel Riggs' comments to the IO were imprudent as they can be viewed as attempting to influence a pretrial investigation. This is why the court required the government to prove beyond a reasonable doubt that the predicate facts did not exist, which they did not do; or that the facts do not constitute command influence, which they did; or that the unlawful command influence will not prejudice the proceedings or did not effect the findings or sentence, which the government has also done.

The IO, Lieutenant Colonel Ware, took from the con -- the conversation with Lieutenant Colonel Riggs that he

should allow more wiggle room for the SJA to be able to pitch his case to the general about what he deemed the proper disposition of the Sharratt case. It should be clear that the conversation was regarding the Sharratt case not the Wuterich case.

Nevertheless, Lieutenant Colonel Ware was absolutely never influenced to change his reporting or analysis of the cases in any matter. The imprudent comments were regarding the Sharratt Article 32, a case for which all charges were ultimately dismissed. Although Lieutenant Colonel Riggs disagreed with the way the report was done and the conclusions, General Mattis ultimately agreed with the IO, dismissing all charges and specifications.

After informing General Mattis what he had done, the general took the extraordinary step of writing directly to the IO to ensure that he understood that the general liked his work product and that he expected the same kind of attention to detail on the two outstanding cases, Tatum and Wuterich. Lieutenant Colonel Ware, the IO, took the letter to mean that he was doing a good job and that he should continue what he was doing with the investigations. However, in an abundance of caution, the general removed Lieutenant Colonel Riggs as his SJA for the Tatum case after Lieutenant Colonel Riggs self-reported his conduct.

Significantly, General Helland, after considering Lieutenant Colonel Kumagai's advice, ultimately dismissed all charges against Tatum in March 2008.

When studying the IO reports on Sharratt -- Sharratt, Tatum, and the accused, Lieutenant Colonel Ware's reporting and analysis as the IO are internally consistent throughout. The legal conclusions reached by the IO in the different cases are factual based and logical. The inescapable fact is that the three cases were all different and resulted in three different conclusions. One can disagree as to what the evidence means, but the reports are well-written. There is no evidence that anything regarding the conversation with Lieutenant Colonel Riggs changed the way the IO wrote the Wuterich report. Lieutenant Colonel Ware was not improperly influenced by Lieutenant Colonel Riggs and, in fact, thought that Lieutenant Colonel Riggs had recused himself from the Wuterich case; thereby, giving more corroboration to the fact that he would not have

somehow felt influenced.

The proof is in the pudding. Although not necessary to the legal conclusion, it cannot be ignored that the ultimate decisions in all of the Haditha cases is that they have either been dismissed outright or the charges have been reduced. Time and again, the generals involved in this case demonstrated that they alone, after seeking legal advice from their SJAs, would make an independent and well-thought-out decision.

The evidence was mountainous and the generals did not always agree with the SJAs or the IO recommendations, but the actions of the -- of General Mattis and General Helland in scrupulously studying all of the evidence and considering each case independently and with great care, exhibit exactly what we expect and what the law requires of our convening authorities. It is reassuring to know that the generals really did their homework in the accused's case as well as the other cases and didn't act as a mere rubber stamp for the SJAs in referring charges and disposing of cases.

It had been shown beyond a reasonable doubt that there was no improper prosecutorial zeal against any of the Marines, including the accused. In fact, the opposite has been conclusively proven. Succinctly, it may be stated thus: In the Wuterich case, Lieutenant Colonel Riggs acted as a neutral and detached legal adviser who gave proper legal advice to the general who, in turn, properly referred charges against the accused.

R.C.M. 406(a) states that before any charge may be referred for trial by a general court-martial, it shall be referred to the staff judge advocate of the convening authority for consideration and advice. The non-binding discussion section states, the staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. Another person may prepare the advice, but the staff judge advocate is, unless disqualified, responsible for it and must sign it personally. Grounds for disqualification in a case include previous action in the case as an investigating officer, military judge, trial counsel, defense counsel, or member, close quote.

Colonel Ewers was not the SJA for MARCENT. Although

Lieutenant Colonel Riggs may have been disqualified to give advice on the Tatum case based on his phone call, there is nothing that suggests he was disqualified from giving his advice in the Wuterich case. The government has shown beyond a reasonable doubt that Lieutenant Colonel Riggs' independent judgment was not impacted by either Colonel Ewers' attendance at legal meetings or by his interaction with the IO on a separate case.

The Court of Appeals for the Armed Forces in *United States versus Lewis* stated that when looking at an -- at apparent unlawful command influence, the query becomes whether an, quote, objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceedings. In the accused's case, after hearing all of the evidence, the court is convinced beyond a reasonable doubt that an objective observer would not harbor a significant doubt about the fairness of the proceedings. The court is convinced that there is no way that an objective person with all of the facts would believe the military justice system to be unfair. The evidence shows that time after time, the investigating officer, the SJA, and the generals acted fairly and impartially and only after very careful consideration of the accused's case.

The court is convinced that if the charges against the accused were dismissed based on the evidence presented at this motions hearing, that a disinterested observer would think the system was unfair to the government. The disinterested person would believe the government was being punished for minor errors in judgment which bore absolutely no weight on the proper preferral, investigation, referral, and trial by court-martial of Staff Sergeant Wuterich.

It has been said that an accused is entitled to a fair trial, not a perfect one. The same could be said for all events leading up to the decision to refer charges. Perhaps Colonel Ewers should not have sat in on meetings where Haditha cases were discussed. Surely, Lieutenant Colonel Riggs should not have made comments to the IO regarding his investigation when a pending investigation was forthcoming.

But the government has shown beyond a reasonable doubt that any apparent unlawful command influence from these

actions did not and will not effect the proceedings against the accused. There has been no showing that either of these actions stifled advice, chilled the ability of the MARCENT SJA, intimidated witnesses, or in any other way would effect the findings or sentence in the accused's case. There is simply no evidence that any apparent unlawful command influence which may have occurred very early in the stages of this case has had any demonstrable or concrete effect on the accused's case whatsoever.

Ruling. For any facts which led to the appearance of unlawful command influence, the government has proved beyond a reasonable doubt that those facts did not constitute unlawful command influence and in the alternative, that the alleged unlawful command influence has not nor will not prejudice the proceedings of *United States versus Wuterich* in any way. The defense motion in its entirety is denied.

Thank you for bearing with me on the -- the reading of the -- the lengthy ruling. What we need to discuss now is the way forward in the case. I asked the parties to come up with a trial schedule in the case.

Do you have that?

TC (Maj Gannon): Your Honor, may I approach?

MJ: Please.

TC (Maj Gannon): I'm handing the military judge what's been marked as Appellate Exhibit LXXIV, a proposed trial schedule for the case. I've socialized this schedule with the defense counsel, and they've indicated to me that this schedule is acceptable, Your Honor. And as such, we offer that to the court in compliance with the court's directive to so generate a trial schedule.

MJ: Okay. The original here is not signed by the defense.

So, Major Faraj, have you looked through these dates? Are these amenable to you?

CC (Mr. Faraj): I have looked at these dates, Your Honor, and they're acceptable to us.

MJ: Okay. Major Gannon will have you sign the original.

TC (Maj Gannon): Taking Appellate Exhibit LXXIV from the military judge, handing to the defense.

MJ: You're stating in court that they're fine, so this signature is probably more of a formality, but I appreciate you signing it.

When he's done with that since we don't have a bailiff, Major Gannon, please bring that back up.

TC (Maj Gannon): Aye, sir.

MJ: I see that there are two motions sessions. And again, I believe -- I know I already discussed with the parties that anything that would possibly delay the case -- especially witness production issues, discovery issues, issues dealing with Iraq, anything that deal with that -- we need to handle at the first motion session, because I would like to -- for the government and for Staff Sergeant Wuterich come to a resolution in this case in the foreseeable future. So I'm going to be reticent. I'm going to tell you right up front to move the trial dates. I'm going to expect a good reason if I'm ever going to move them. It's difficult to get all of the parties together.

So I'm going to now order these dates then as trial milestones in this case. That means that I will come back here the 13th and 14th of May to hear any motions, and I'll leave extra time during those days also to stay if I'm needed. And then 26 to 27 August, another two days of motions. And again, if I need to stay longer I will. I just don't know what the nature of the motions are at this point. The trial date we've left for three dates, commencing 13 September to 1 October. All the parties seem to think we need two weeks. We probably may only need two weeks. I really don't know. I've read all of the reports, obviously, the IO reports and all that, but I really don't know where the case is going. So we're going to leave three weeks in an abundance of caution.

So all these are ordered as judicial milestones. The parties are expected to comply absent relief from the court. If you need relief, please e-mail me, or we can do an 802 via teleconferencing and we'll deal with those issues. Otherwise, I expect all the deadlines to be met.

Staff Sergeant Wuterich, please keep your seat. These dates, you're going to be expected to be here also. You're not in pretrial confinement, right?

ACC: No, sir.

MJ: Okay. Or restraint of any matter?

ACC: No, sir.

MJ: All right. So then on 13 May, you'll be expected to be here and -- for any motions.

ACC: Yes, sir.

MJ: It looks like written notice of pleas and forum are due 19 July 2010. So that's a date that we will not be here in court.

So you actually need to sign that, Staff Sergeant Wuterich. Your counsel will prepare something and you can just sign that what your pleas and your forum will be.

Do you understand what I mean when I say forum?

ACC: No, sir.

MJ: Okay. It's F-O-R-U-M. What it means is what kind of court-martial that you elect. You have the opportunity as it's been explained to you previously, to be tried by military judge alone or by members or by members with at least one-third enlisted representation.

CC (Mr. Faraj): Just a moment, Your Honor.

MJ: Go ahead.

CC (Mr. Faraj): Your Honor, with the court's indulgence, we can go ahead and make our elections at this time.

MJ: Okay. That would be --

CC (Mr. Faraj): Save us --

MJ: That would be fine. I don't need -- it doesn't matter what the government wants to do. If you would like to make your election at this point, you can. Are you --

CC (Mr. Faraj): We -- well, as to the plea, the -- Staff Sergeant Wuterich is going to plead not guilty. He's going to elect to be tried by members with enlisted representation. And we would ask the court to be able to reserve motions, pending those -- pending dates.

MJ: Okay. So normally in some instances you waive motions when you enter pleas.

CC (Mr. Faraj): I understand.

MJ: So what you'd like to do now is not formally entering pleas. You're telling the court simply what the please will be, but you're not formally entering pleas.

CC (Mr. Faraj): Well, the court has the discretion to allow us to have motions if we enter pleas. But I leave -- that's what I was saying. I leave it up to the court whether we're going to do that.

MJ: Okay. I'm going to -- I'm going to have you put a formal recognition of your pleas in writing on 19 July.

CC (Mr. Faraj): Very well.

MJ: That way there'll be no debate as far as you having waived motions or whether I have to decide if those motions can be heard. We've established the trial milestones. It's evident to all parties, you're going to file motions, and we're going to argue motions. But just for the fact that you don't waive any unfairness to you and your client, I'm not going to take your pleas at this point, but I will take your forum election. So you've elected Staff Sergeant Wuterich to be tried by -- yes?

CC (Mr. Faraj): Yes, Your Honor.

MJ: Okay.

CC (Mr. Faraj): Members with enlisted representation.

MJ: Right. Okay. You were standing, so I stopped. I was talking to Staff Sergeant Wuterich.

Your attorney has just made that election for you, so I'm verifying with you that you do wish to be tried by members to include at least one-third enlisted

representation for the final panel that we have.

Is that correct?

ACC: Yes, sir.

MJ: All right. So those people would judge whether or not you are guilty or not guilty of any of the charges that you face, and they also would administer the sentencing or punishment in your case if they found you guilty of any of the charges.

Do you understand that?

ACC: Yes, sir, I do.

MJ: Okay. So the government's on notice as to that. I don't see -- I do see a date, 19 July, for questionnaires, et cetera. So that will give the parties plenty of time also to look at all those questionnaires involving potential members.

Okay. Is there anything further that we need to discuss on the record before the next session of court which would be, it looks like, 13 May?

TC (Maj Gannon): Nothing from the government, sir.

MJ: Defense?

CC (Mr. Faraj): No, Your Honor.

MJ: The court's in recess until the next scheduled event.

The Article 39(a) session recessed at 1349, 26 March 2010.