

this point in time, or by the military judge upon application for withdrawal by the defense counsel for good cause shown.

So I specifically find good cause shown and a proper request or application for withdrawal by Mr. Vokey. So for that reason, under the rule, he is released from further participation. I do not find it necessary to ask the accused whether he wishes to have him on the case or not. I find that that would be irrelevant to my analysis.

TC (Maj Gannon): Understood, sir. And obviously the government is operating in a little bit of a vacuum here because we don't know what the basis for the good cause is. However, just so that the record is clear, we've not been approached with any requests or offers to ameliorate whatever the issue may be or to take alternate means in terms of the way in which the government presents its case. If that -- if that conflict could be overcome, none of those -- none of those ameliorating attempts have been made. They've not been brought to our attention. And just so the record is clear, that is something the government potentially could explore of course depending on the nature of this conflict of the good cause finding that the court made.

MJ: I appreciate that. The court specifically finds that there is not a way to ameliorate the issue, and the only way for this issue to be satisfied is to release Mr. Vokey from further participation in the case.

And, therefore, Staff Sergeant Wuterich will be -- continue to be represented by Mr. Faraj, Mr. Puckett, and Major Marshall.

Okay. We need to talk about the issue for which we're here for. I understand that the defense wants all of the redacted sanctuary packages. And I will look at those at the next opportunity that I have. Obviously I just received those prior to coming on the record and we've been busy. So if I have to look at that overnight, I will; and we'll continue this thing in the morning. Right now I'd like to get any witnesses that we need to get in for the motion, because I know that Lieutenant Colonel Yetter had a specific time frame and that's the next 35 minutes to get him on the line and

anything else the parties would like to talk about regarding this motion.

So with that in mind, Lieutenant Colonel Yetter's whose witness? Defense's witnesses?

CC (Mr. Faraj): The defense's witness, Your Honor.

MJ: Okay. So let's take a brief in place recess. Please keep your seats. The court's in recess.

The Article 39(a) session recessed at 1424, 13 September 2010.

The Article 39(a) session was called to order at 1425, 13 September 2010.

MJ: The court is called to order. All parties present when the court recessed are once again present.

We have Lieutenant Colonel Yetter on the phone. He's alone, able to testify, is not going to be relying on any notes, and we'll be sworn in now by the government counsel.

Major Gannon, please.

TC (Maj Gannon): Yes, Your Honor. Thank you.

Lieutenant Colonel Greg A. Yetter, U.S. Marine Corps, was called telephonically as a witness by the defense, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

- Q. Sir, can you state your full name and spell a last name for the benefit of the court reporter?
- A. Sure. It's Greg Allen Yetter, Y-E-T-T-E-R.
- Q. And, sir, you are an active duty United States Marine Corps lieutenant colonel?
- A. I'm actually a mobilized reservist, but I'm currently on active duty.
- Q. Roger that, sir. What is your current billit?
- A. I'm the Deputy Branch Head for Manpower Management Force Augmentation Branch.

Q. Where is that located, sir?
A. At Manpower and Reserve Affairs, Quantico, Virginia.

TC (Capt Gannon): I'm going to pass you over to Major Faraj.
Thank you, sir. Stand by.

MJ: Defense, your witness.

Questions by the defense:

Q. Lieutenant Colonel Yetter, good afternoon.
A. Good afternoon.

Q. This is Hatham Faraj. I'm the defense counsel on this case.
A. Good afternoon.

Q. Sir, please describe for the court what your current billet is and what you do in that billet.
A. The Deputy Branch Head. It's commensurate to like an XO in a battalion or a regiment. We have a full-bird colonel who is our branch head. And I perform the day-to-day operations, manage some of the section OICs, and pretty well take care of the routine administrative stuff while my colonel takes care of the things commensurate with his grade and responsibilities.

Q. Sir, are you familiar with the sanctuary boards?
A. I am.

Q. What are those?
A. Well, in October of last year, DCM&RA, Lieutenant General Coleman, signed Marine Corps Order 1800.11 which created the sanctuary eligibility boards. It radically changed the way the Marine Corps does business regarding Marines going into sanctuary and things of that nature. So since then, we've had bimonthly sanctuary eligibility boards. And we have another one scheduled in September.

Q. Who do those sanctuary boards apply to? What I mean is, who is the customer?
A. Any reserve Marine currently on the RASL.

Q. And what does a RASL mean?
A. The RASL of the Reserve Active Status List can be anyone in the IRR. It can be part of CELRED. They can be an IMA Marine. They can be a drilling reservist with the SMCR. They just have to be on the active status list.

- Q. What is the mission of the boards?
- A. The mission of the board is to fill shortfalls in the active component.
- Q. Why is that decision not made by commanders that are -- that are looking for additional manpower? Why are the boards necessary?
- A. Well, they just created a way for the Marine Corps to fill shortfalls in the active component and do it in a fair, equitable manner. Right now, the officer assignments and enlisted assignments, those monitors come in, they brief those specific packages regarding their populations. And we pull Marines records. We go into their OMPF. We pull their master brief sheets. Their career history is reviewed as well as their reserve qualification summary that they submit along with their AA form. And it's based on the needs and priorities of the Marine Corps first; and then if a priority or a need exists, then they review the Marines professional qualifications to ensure that they have the requisite abilities to fill an active component shortfall some place in the fleet.
- Q. I understand, sir. Is it fair to say that these boards are competitive?
- A. Oh, yes. Very much so..
- Q. What does it take for someone to become competitive? What I mean by that is if someone is petitioning the board for sanctuary, what typically would you advise someone doing that to ensure they have in their package?
- A. It's very difficult to say, because it's really no different than like a promotion board or selection board. You know, how do you tell a guy going up for lieutenant colonel what he needs to do to be competitive?
- Well, obviously the standard things. You know, they need to be PME complete or at least enrolled in PME. They need to have done a deployment overseas preferably. They obviously have to have attended whatever school's commensurate with that MOS. Now, the monitor's understand that reserve intel officer, 0202, major, is not going to have the same career path as an active component major, 0202.
- But in looking at the reserve Marines' professional qualifications and schools and things, they can make a

determination. If this person has the requisite abilities to be able to be selected and if so, when they check into the 2d Marine Division G-2 shop, the chief of staff is not going to see a sanctuary Marine. He's going to see an active duty major and obviously have a level of professional expectation that coincide with that.

Q. Are endorsements important in these packages? And what I mean by "endorsements," are endorsements by officers senior to the petitioner?

A. Endorsements are no longer authorized with the new Marine Corps order. They can have letters of recommendation, but no command endorsements are allowed. And if they're submitted, they're removed. They're not even presented before the board.

Q. So letters of recommendations would help?

A. I can't get into specifics because of the board process, but I can tell you that they are looked at. But again, the main focus is, is there a shortfall in the active component; and if so, they start looking at the Marine's professional qualifications. And they dig deep into their master brief sheet. They look at fitness reports. They look at many of the same things that a selection board would review in that determination.

Q. Based -- do you have any personal knowledge of the status of the 4402 MOS in 2009?

A. No, I don't. The -- once the board process began, the -- actually that grade and MOS monitor briefs that particular package before the board. So if there were a lieutenant colonel, 4402, applying for the board right now, the lieutenant colonel's ground monitor would be preparing the case and then brief for the board membership.

Prior to October 2009, packages were routed and they were provided to reserve affairs, provided a comment. Then obviously they were provided to MMOA for comment, and then they were sent up through the chain of command to the DCM&RA for decision. My shop has no visibility on the populations, you know, for different grades and MOS's. That -- we rely upon MMOA and MMEA to provide that information.

Q. Prior to the issuing of the order authorizing the creation of sanctuary boards, were endorsements

authorized?

A. Yes.

Q. And tell me again when that order was issued or when it was signed?

A. Late-October 2009.

Q. So before then, endorsements would have been important for a package?

A. Yes.

Q. Do you have any personal knowledge of the request for sanctuary of a Marine by the name of Sean Sullivan, Lieutenant Colonel?

A. Just when I went back and pulled his case file, I remember seeing it last summer. But there's a lot of people that come through our office, so I don't remember the particulars of that individual.

Q. Very well. And I believe we have the package here, so I'm not going to ask you about it. But that package would have been submitted before October of 2009?

A. Right.

Q. Okay. I want to summarize a little bit just so I understand, any Marine reserve officer who wishes to remain -- or to go on active duty and remain on active duty, could not just do so by simply requesting it. There is a process that has to be approved -- or it has to be routed through their chain of command and has to get some approval through that -- from their chain of command.

A. Well, there's two different processes. You have sanctuary eligibility which means the Marine would actually cross 18 years. And by Title 10, Section 12686, it applies to active and reserve Marines, both, that once you cross the 18-year mark, absent the Secretary of the Navy separating you from service, the Marine Corps has to keep you until 20 years and give you an active duty retirement.

There's also a mechanism for when a Marine crosses the 16-year mark, they have to -- what now is called a high-active duty time waiver. And that still requires DCM&RA approval. And basically, it's a management tool for Headquarters Marine Corps to ensure that we're managing that population of Marines crossing that 16-year mark and creating a buffer to your buffer to

ensure that they don't cross the 18 years into sanctuary without having to apply for sanctuary eligibility board.

So if a Marine at 16, less than 18, desires to stay on active duty orders, they'll submit an AA form, it gets routed to the DCM&RA for decision. If they want to go beyond 18 years, that's when they apply to the sanctuary eligibility board. So there's two different ways in which a reserve Marine can do that.

Q. I understand. And, Lieutenant Colonel Yetter, you just brought up an issue that I wanted to explore a little bit. I was on active duty. I was a Marine Corps officer on active duty, and I always heard rumors that it is exceedingly difficult for active -- or reserve officers to reach on their own -- you know, by being recalled -- the -- let me make sure I structure this question right -- that it was difficult for Marine Corps reserve officers being called to active duty to get enough time on active duty to reach that sanctuary; that the Marine Corps took active steps to make sure they don't reach that point so they wouldn't retire as active duty officers.

Do you know what I'm talking about? Does that ring any bells for you

A. Well, it's not so much active measures. It's -- again, it's a management tool. We have to -- because when a Marine crosses 18 years, not only do they count against active duty end strength, they're counting against the grade tables, plus they also have a fiscal consideration. Because the way the Marine Corps pays for reserve retirements and pays for active duty retirements are two entirely separate pots of money. And so, it does effect everything in its totality. So we in Headquarters Marine Corps have been charged with managing that and ensuring that those qualified Marines are approved by the three-star general to go beyond the 18-year mark. So that's -- I mean, it's not a decision that we at lower levels make. It requires lieutenant general approval.

Q. Otherwise, the Marine Corps prevents those officers from reaching sanctuary?

A. Well, I wouldn't say "prevent." I mean, I would say that absent the three-star decision of yes, we cannot take and issue orders allowing that Marine to go beyond 18 years. Does that make sense?

Q. Yes, it does.

A. Okay.

Q. It does.

A. So there has to be some request --
Right.

Q. -- routed to that three star to allow that Marine to
continue to serve on active duty?

A. Right.

Q. And if I understood this right, the reason the Marine
Corps does that is because it affects the different pots
of money and the end strength that statutorily the
Marine Corps is required to be at.

A. Right. And the grade tables too. Because now, even
though you're still -- it affects the total number of
officers that they can have in that particular grade on
active duty any one time. And by law, the Marine Corps
is required to maintain and stay within those parameters
as well. So all those things are taken into
consideration when those packages are being routed.

Q. Just so I understand this right, if, for example, a
4402, lieutenant colonel reservist was granted
authorization to continue to serve on active duty to
reach sanctuary, that -- the 4402 numbers would have to
be reduced by lieutenant colonels at some other place or
the Marine Corps would have to get some congressional
authorization or perhaps Presidential authorization to
go beyond those end strength numbers.

Is that right?

A. It's not so much by MOS. It's by total. I mean, I
don't know off the top of my head what the numbers are,
but there's a percentage of lieutenant colonels that can
be on active duty any one time. Same way with majors,
colonels, all the way down to lieutenants. I know -- I
know for a fact that of the total number of field grade
officers, the Marine Corps is short; that we're not at
those numbers yet. Company grade, I think we're at --
we're even. But I know for the field grade, major to
the colonel, we're below what we're authorized.

Q. Okay. Do you know what -- what our -- the Marine Corps'
numbers were in 2009, early-2009?

A. No, I sure don't.

Q. Okay. But it is -- again, I'm asking the same question. Because of end strength numbers, that process is controlled? And what I mean by process of the number, the numbers of officers in each grade are controlled to ensure that the Marine Corps does not go beyond the statutory allowances on officers in certain grades.

A. Right. And that's why -- I mean, MP, the Manpower Policy Division, they actually get a seat on the sanctuary eligibility board and that's one of the things that that -- that board member is required to bring with them is -- for consideration is, Okay. How would that affect the Marine Corps end strength for that particular grade? So those are all the considerations that are brought into -- into fact.

Q. I'm going to shift gears a little bit. I want you to assume that a Marine Corps officer request -- who is retirement eligible requests to retire. What process would that officer have to go through to -- after that -- after that officer receives the retirement date -- an approved retirement date, what process must that officer go through to either extend the retirement date besides that which was approved or to pull the retirement altogether?

A. Now are you talking about an active component officer or reserve officer who's been granted sanctuary?

Q. Active component.

A. Yeah. Unfortunately I have no knowledge of that, because that's the Separations and Retirement Branch. That's an entirely different portion at Manpower.

Q. I understand --

A. Our --

Q. I understand. Thank you, sir.

A. Okay.

CC (Mr. Faraj): I don't have anymore questions, Your Honor.

MJ: Cross-examination by the government?

TC (Maj Gannon): Your Honor, the government has no questions.

MJ: Lieutenant Colonel Yetter, I do not have any questions for you either. I appreciate you being available to testify. We're going to disconnect you now.

WIT: All right. Thank you.

[The witness was excused and the telephonic connection was terminated.]

MJ: Okay. Now that we've taken that witness, we're back to the beginning which was the motion and the defense having the burden, correct?

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

MJ: And your burden is preponderance of the evidence?

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

MJ: Okay. Any other evidence you'd like the court to consider other than what we just heard?

CC (Mr. Faraj): I move again to -- for the court to consider all the facts proffered in my motion, and I have an additional witness that I intend to call, Your Honor.

MJ: Any objection to considering the facts proffered in the motion?

TC (Maj Gannon): Yes, Your Honor. The government's objection stands that we made earlier at the last session.

MJ: Regarding Mr. Vokey?

TC (Maj Gannon): Yes, Your Honor.

MJ: I'm going to consider all the facts proffered in the motion with the exception of that. I'm going to consider the proffer advanced by Mr. Vokey earlier.

You said you had a witness.

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

MJ: Oh, at this time?

CC (Mr. Faraj): Yes.

MJ: Okay. Go ahead and call your witness, please.

CC (Mr. Faraj): Your Honor, I'm not sure if you have -- do you have the discovery that was produced by the government?

MJ: I do not.

CC (Mr. Faraj): The 50 or so pages I think? We're going to ask that that be moved -- I'm going to ask that that be considered by the court.

MJ: Okay. Was that -- was that put in with anybody's motion?

CC (Mr. Faraj): No, I don't believe so.

MJ: It's not in your motion, right?

TC (Maj Gannon): Well, I'm not sure what we're talking about. The retirement materials for Mr. Vokey and Mr. Faraj?

MJ: I don't know.

[The trial and defense counsel conferred.]

MJ: Okay. So is there something that has not been submitted with the government motion that you wish to submit?

CC (Mr. Faraj): I have some additional documents, Your Honor.

MJ: Okay.

CC (Mr. Faraj): I guess I'll do them after we're done with Mr. Vokey. We're going to call Mr. Colby Vokey to the stand.

MJ: Okay.

Lieutenant Colonel Colby Vokey, U.S. Marine Corps, Retired, was called as a witness by the defense, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. You are Colby Vokey, retired Lieutenant Colonel, United States Marine Corps, sir?

A. That's correct.

Q. And can you state your current city of business?

A. Dallas, Texas.

Q. Occupation, sir?
A. Attorney.

TC (Maj Gannon): Thank you very much.

MJ: Defense.

Questions by the defense:

Q. Good afternoon, Mr. Vokey.

I'm showing you what's been marked as Appellate Exhibit CI. Do you recognize that document?

A. I do.

Q. Do you adopt this document as your sworn testimony today?

A. I do.

Q. I'd like to talk to you a little bit about your final months of service in the Marine Corps. And I'm specifically referring to late-2007 and -- throughout 2008?

A. Okay.

Q. All right. When did you submit to retire from the Marine Corps? When did you request retirement?

A. I put in my retirement about -- it was 14 months out. That's the earliest that you can submit it, and I'm pretty sure it was 14 months out. I requested I think initially a 1 April retirement date. So back up from then -- April -- so something like December of '07 I guess it would have been.

Q. And to recall -- to have you recollect something, you and I went to Headquarters Service Battalion and submitted the retirement request at the same time?

A. That's right. I don't remember what date it was. I remember it was 14 months out. And that's when we submitted.

Q. Right. You were detailed to the case -- to this -- to the case of *U.S. v. Wuterich* at that time?

A. That's right.

Q. Did you have an expectation when the case would finish?

A. I didn't know exactly, but I definitely thought it would be finished before I retired.

Q. At some time you received a trial date? You had a trial date set?

A. That's right.

Q. And do you recall what that trial date -- or thereabouts when that date was?

A. And I don't -- I'm trying to remember now if we had set trial more than once. But if you're referring to 2008, I remember that.

Q. I am referring to 2008.

A. That -- the trial was set to begin the very beginning of March. It may have been March 1st. So I definitely remember that, because I left right -- excuse me -- right before that trial date was the convening authority had ordered depositions done in Iraq. So in January and February of 2008, I traveled to Iraq with Staff Sergeant Wuterich and -- to collect depositions, to walk the scene, to do some of the pretrial preparation stuff with -- including with Mike Epsy who we mentioned before.

And we were going over there and then going to try to rush -- we were going over there quickly to rush back for the start of trial. And the plan was do that, come back right before the start of trial, try the case -- we estimated about three weeks. So towards the end of March, we would have been done with the case. And then at that point, as soon as the case was over, my plan was to walk out on terminal leave using proceed delay travel terminal leave. As soon as that case was ended, my plan was to walk out on retirement right after the case.

Q. And, in fact, you scheduled a retirement ceremony?

A. I did.

Q. Do you recall what month that took place?

A. I don't. I still got the flyer. I know that we did the retirement ceremony together.

Q. It was in the Spring of '08?

A. That's right.

Q. And it was supposed to coincide right after the trial and then you'd be out the door?

A. That's right.

Q. All right. Did you find any information related to the

start of the trial or the trial date when you were in Iraq or waiting to come back from Iraq?

A. While I was in Iraq with Staff Sergeant Wuterich, motions were being conducted back here by yourself, Mr. Puckett, without Staff Sergeant Wuterich here. And while we were out there -- and it may have been on -- towards the end -- on our way back from Iraq, we got word that there's an interlocutory appeal so that the case was going to be delayed.

Q. Did you have a belief as to how long that delay would continue?

A. At that time I didn't. I didn't have enough information. When we arrived back, yeah, we tried to ascertain exactly how long this delay was going to be. What I understood was that this issue was trying to be handled expeditiously by the Navy-Marine Corps Court of Criminal Appeals, and we were trying to gage how long it would last so I would know exactly when to retire. And I think my retirement had been set instead of 1 April, was at 1 May.

So in April, I submitted a written request to extend my retirement to -- well, let me back up. We requested a 1 June retirement based on the initial -- initial delay. In the middle of April, it appeared that it was going to take longer and we weren't going to get out by -- that 1 June wouldn't have been enough. So that's when I submitted a written request for --

Q. Let me stop you for a minute. When you say "we," you're referring to you and me? Or who's "we"?

A. Yes, that's correct.

Q. Okay. And again, we were doing this sort of together by requesting dates and so on at least for a period?

A. That's correct.

Q. Okay. So please continue. You requested an extension -- we requested an extension to June 1st?

A. That's right.

Q. And that was granted?

A. That was granted. And I believe that one was done orally going through the command. And while this whole process was going on, my battalion -- our battalion was aware. I had spoken to Colonel Ingersol about it a number of times. And in the middle of April is when I

submitted a written request for a 1 July retirement date.

And at the time we submitted that, we thought that would be sufficient time -- we were anticipating the case going May and June. Now, we may have been way off, but that's what we were thinking. So we were trying to extend it so that we could finish Staff Sergeant Wuterich's trial.

So I submitted that and that was approved. Time kept going on; everything was taking longer than I think we had hoped or anticipated. And as we move into July, we realize that -- I'm sorry. I had requested -- I believe it was by phone talking -- encouraged the battalion commander to talk to Headquarters Marine Corps Manpower, a 1 August retirement date, thinking that the trial will probably go in July now. But that we'd -- we have enough time to do that. I would probably lose most terminal leave, wouldn't be able to take much terminal leave. But we have enough time to try it and then get out of town -- you know, travel by the 1 August retirement date.

So 1 August was where it sat, and it was -- best of my recollection, some time in July when we learned that the case was now going to go to the Court of Appeals for the Armed Forces. And whenever we learned that and we discussed what would happen with the case, one thing we definitely knew was it was going to take more than just a month or two before this was going to come back. Because it was now there, it was going to take a much lengthier delay.

Now at the time, backing up a little bit -- again, I was planning on walking out the door right at the end of the trial in March to go on terminal leave. And we had our retirement ceremony set. We finally had to set that date, and we did that. And I PCS'd my family. So my wife and children left in May of 2008. They went off to Texas and were living with my parents. I -- we had a travel trailer, so I moved to Lake O'Neill. So I was living in a trailer at the lake so I could finish Staff Sergeant Wuterich's case.

Q. How long did you live in that trailer?
A. Probably about three months down there.

Q. And share with the court some of the things that you had to do in order to continue living in that camping location or that campsite.

A. Well, I couldn't stay for the whole time, so every -- I don't know -- like, five or seven days, I had to move the trailer to a new site. They wouldn't let you stay in one site. So it was a real pain that you could only reserve for so many days in a row and I'd have to constantly keep going and moving the trailer.

Q. Did you have any other cases going at the time?

A. No, just Staff Sergeant Wuterich.

Q. Did you have any other purpose besides -- for being here besides *U.S. v. Wuterich*?

A. No. As a matter of fact, it was really affecting my ability to try to apply for a job. I was expecting to get and be able to -- I had contacted some people beforehand about a possible job based on when I thought I was going to get out. I couldn't do that because I had no idea when we were going to trial. So I'm living in a trailer, waiting for the trial to go on, and in about mid- to end-July is when we realized it's going to take a lot longer than just a month or two.

And so that's when I called back up to Manpower, Headquarters Marine Corps and talked to Colonel Redmond about extending it yet again. This time it was not going to be for a month. It was going to be for longer.

Q. What did he say to you, if anything?

A. I explained to him that I need another extension. I gave him -- that it's now been appealed up to the next higher court. Colonel Redmond said, No. We're not granting anymore extensions; that you should have thought of this beforehand. And I tried to explain to him that this was not my doing and this was not my idea. I didn't think about this beforehand, because I'm not causing this to happen. And there's no way to determine exactly when we're going to trial.

And his advice to me was -- he definitely chastized me and said some derogatory things about lawyers. And -- Yeah, you lawyers all think you're irreplaceable.

And I said, Sir, that's not the case. It's just this is a very complex case. I've been on it for a long time. And it's not something we can just throw somebody on

there the day before the trial.

And basically his response to me was too bad. You know, turn it over to a replacement because you're out of here 1 August.

And at that point when he said, "You're out of here 1 August," that conversation lasted about 15, 20 minutes. And I kept trying to argue why I needed to stay on the case for Wuterich; that this is not a normal thing; that this is -- he sort of kind of accused me of trying to stay on the West Coast like a lot of people do. And I explained to him, Sir, I'm not doing this for some benefit for me. As a matter of fact, this is a great detriment to me. I'm away from my family. I'm living in a trailer. I can't look for a job. All that was lost. And I really think he thought I was just trying to stay in Southern California longer. And he said, You're gone 1 August.

And at that point, I didn't have a choice. It was already at the point where I was going to probably not even have enough time after I check out to have my proceed delay and travel, my normal entitlements; much less get any terminal leave. So I was scrambling at that point.

And then the following week, I called back up there to simply ask for a little more time, a modification so I could get my travel -- proceed delay travel and some terminal leave so I could, you know, go back and start looking for a job. I called back up there, Colonel Redmond was gone. He was on leave or TAD, something. I talked to his assistant, and he's the one who extended it from 1 August to 1 November in order for me to be able to take terminal leave and properly -- properly move. So he grant -- he allowed me to do that. It was modified that last time for that purpose. And on 6 August, I packed up -- I had my orders from battalion, I packed up, and I drove out on 6 August.

- Q. To go on terminal leave?
A. To go on terminal leave. I was done with the Marine Corps.
- Q. Your end of active service date was 1 November?
A. I guess, 31 October was my last day of service; 1 November, I became retired.

- Q. I understand. Did you have a job waiting for you when you left?
A. I did not.
- Q. What did you do to get a job? Well, tell us about some of the challenges you had in waiting for the trial -- if you had any challenges, in waiting for the trial to take place and then trying to transition into civilian life.
A. Well, it's tough because, you know, you want to call firms and tell them, hey, you're looking for a job. And they want to know when you can be there and you can't tell them. So either people are interested, but they want something more immediate. So it was very difficult, if not impossible. So it was in July while I was still living in the trailer that -- when I found out that I was gone that I started sending out tons of resumes.
- Q. About how many resumes did you send out, do you think?
A. In all, I sent out probably about 300.
- Q. And how many total job offers did you get?
A. Three.
- Q. And did you interview with those firms?
A. I did.
- Q. Okay. Tell us about --
A. I had some other interviews as well.
- Q. Okay. Well, you interviewed with several firms, but solid job offers?
A. Solid job offers, three.
- Q. Say a little bit about that.
A. I had an offer with a firm that did mostly civil stuff in Collin County, Texas. And they were looking to add me to do some criminal for their firm. Not the most attractive offer, but I was kind of getting desperate.
- I had an offer with a civil firm. We didn't quite get to the offer stage, but it looked like they were going to offer me a position.
- And then I got -- I interviewed with the firm I'm with now, and they offered me a spot. When I originally talked to them, they said, We'd love to have you but we don't have any room for you. Sorry. Then something

changed and they said, Hey, we have room for you. And then they interviewed me.

Q. I want you to focus on the two jobs that you didn't take. Why didn't you take those jobs?

A. The first one I spoke of was -- the money wasn't that great. The work wasn't that great. It was -- I wasn't quite certain exactly what they wanted to do with me.

And then the other job, the second job, the civil firm, that one actually looked pretty good to me. But they were taking a lot of time in -- I interviewed with them several times and they were taking their time before they would offer me something. I didn't know if they actually really wanted me or not. So I was getting impatient. I was getting very nervous because my family situations.

Q. Where were you living at the -- where was your family living at the time when you --

A. With my -- with my wife's parents. We were all living there.

Q. Why didn't you get your own place?

A. I couldn't afford to at the time. I can't go get a -- you know, go buy a house without a job.

Q. You didn't have a job?

A. I didn't have a job.

Q. How many children do you have?

A. I have three kids. I've got -- at that time, I had one in college. She's still in college now. And a teenager and another boy who's younger. So I was not just worried about normal bills, but I got a kid in college. I've got another one in high school; you know, playing soccer. All that costs money. And my savings was drying up quick.

CC (Mr. Faraj): Did you -- do you feel like you had many choices in accepting the job that you --

TC (Maj Gannon): Objection. Relevance.

MJ: Mr. Faraj, what's the relevance?

CC (Mr. Faraj): If he had a choice in accepting the job he was offered, Your Honor?

MJ: Right.

CC (Mr. Faraj): It goes directly to the issue of the conflict that we addressed.

MJ: You're talking about what was dealt with *ex parte*?

CC (Mr. Faraj): No, no, no. We've discussed conflict already, Your Honor. And what I'm trying to get -- to elicit from the witness is what options he had that could have allowed him to avoid the conflict.

MJ: Okay. Go ahead.

Objection's overruled.

WIT: It was definitely the best offer that I had. The first offer I spoke of, I didn't think it was a very good offer at all. I wasn't very easy with the people in the firm. I want to say it was -- it wasn't I didn't have a choice, but I had to find something fast. It was an offer, it looked very good to me, and I liked the people in the firm so I took it.

Questions by the defense (continued):

Q. You came back to continue to assist Staff Sergeant Wuterich as a -- in a civilian capacity?

A. I did.

Q. What resources, if any, did the government provide you -- and what I'm referring to you is I want you to compare the resources you had in uniform as to what you have as a civilian. Were you allowed to -- did you get any resources from the government to assist you in your defense of Staff Sergeant Wuterich?

A. No.

Q. Of course besides the experts that they paid for.

A. That's right.

Q. All right. Did you get paid for any of your travel?

A. No. The government's -- the government has paid me nothing. I haven't asked them for anything, but I wasn't on active duty anymore, so.

Q. You had resources when you were on active duty?

A. Yes.

Q. And I'm referring to defense resources.
A. Yes.

Q. In fact, you worked two buildings over; you were the RDC.
A. That's right.

Q. You were the same rank as the LSSS OIC.
A. Yes.

Q. And you reported directly to the chief defense counsel of the Marine Corps?
A. That's correct.

Q. When you needed resources or assistance, you had your own budget to spend money on this case?
A. I did.

Q. In addition to money that was provided by MARCENT?
A. That's right.

Q. And once you left active duty, you no longer could avail yourself of any of those resources?
A. That's correct.

CC (Mr. Faraj): All right. I don't have anymore questions.

MJ: Cross-examination by the government.

TC (Maj Gannon): Yes, Your Honor. Just give me ten seconds, sir?

MJ: Sure. Take your time.

CROSS-EXAMINATION

Questions by the prosecution:

Q. Sir, good afternoon.
A. Hey, Nick.

Q. You were detailed to this case on approximately 11 January 2007, correct?
A. That's right.

Q. And you were detailed to this case by Lieutenant Colonel Simmons, the RDC Pacific?
A. That's right.

Q. Mr. Faraj was detailed to this case on or about 11 January 2007, so roughly the same time as you?

A. Yeah. I think it was actually a couple days later than me, but that's right.

Q. It's A-typical to have double detailing on cases, isn't it, sir?

A. No.

Q. It's a common occurrence?

A. It's not uncommon.

Q. In this case, isn't it true that Lieutenant Colonel Simmons asked specific requested permission from the convening authority to do so?

Do you recall that?

A. To do double detail?

Q. Yes, sir.

A. I don't know if he specifically requested it. I know I had -- I had met with a lot of folks back before we -- before the Hamdaniyah cases even came up to discuss double -- detailing two counsel to everyone from Hamdaniyah and Haditha. That was well-before the Haditha guys had been detailed. So that was probably -- I don't know -- June, July of '06.

Q. And you sought permission to do that from the convening authority?

A. I did.

Q. So just so it's clear, you asked the convening authority for the ability to double detail counsel?

A. Yeah. But you got to understand I was not -- I didn't have any inherent authority to detail anybody.

Q. Absolutely. It's A-typical for the regional defense counsel to be granted detailing authority, isn't it, sir?

A. The only detailing authority that I had was to detail myself to cases. Or if on the odd occurrence that there was any other attorneys attached to the regional defense counsel office specifically which --

Q. Which doesn't happen?

A. Which doesn't happen, except it did in this case.

Q. And so you asked the convening authority for permission to double detail?

A. And the permission to detail. That's right.

Q. And you asked him for the permission to double detail?

A. Sure. I mean, you can look at the request.

Q. And Lieutenant Colonel Simmons did the same thing. He felt it necessary to request from the convening authority to get permission to double detail?

A. I don't think so. I think he just requested permission to detail. I think we had already established that there was going to be detailing to the cases.

Q. And subsequent to the convening authority granting the authorization to double detail, that's when then-Major Faraj was detailed?

A. I think when the -- again, I think before -- I think the issue of detailing two counsel to the case was settled long before any detailing happened in Haditha. And I think it was a matter of sorting out who's detailed and when.

Q. You don't have a recollection of Lieutenant Colonel Simmons asking specific permission of the convening authority for the purpose of double detailing? Not just detailing authority; double.

A. I don't -- I don't recall that. That could be the case. That could have been in the request. Again, I -- we had discussed it with Lieutenant Colonel Riggs, again, back in the Summer about -- because we were concerned of -- we're going to detail two counsel -- it wasn't to everybody from Hamdaniyah and Haditha. It's only the ones charged with certain offenses.

So we -- we were concerned about having enough resources, having enough defense counsel, which we did not. We also had the issue of potential conflicts of any -- any of the folks that come in, speaking with any counsel for advice that we didn't want to start excluding counsel because of that. So it was -- it was difficult to try to make sure -- to keep everybody sorted so we have enough counsel.

Q. And ultimately Staff Sergeant Wuterich was detailed to counsel --

A. That's correct.

Q. -- in February of -- excuse me -- in January of 2007?

A. That's correct.

Q. And the very next month, both you, sir, and then-Major Faraj requested permission to retire. You requested a retirement date in February of 2007?

A. That may be right. February of 2007.

Q. So if that's right, within less than a month of being detailed to the case --

A. And I'm sorry. I don't remember the specific date that we went in and requested it. I thought it was the earliest possible, which would have been 14 months out. It may have been a little bit after that. It may have been more like 12 months out. I don't remember exactly which month we requested retirement.

TC (Capt Gannon): Okay. But if it was in February of 2007, that would have been less than a month from when you were detailed to the case?

CC (Mr. Faraj): I'm going to object to this, because I was there when I requested retirement. And so if he's going to ask Lieutenant Colonel Vokey, he can certainly ask him that question. But if the court needs that information, then I'd like to be permitted to offer that information. I'm sure it's --

TC (Maj Gannon): The court has that information attached to our motion.

MJ: Your objection's overruled.

You can ask this witness whatever you want about him or any knowledge he has about Mr. Faraj's retirement.

Go ahead.

Questions by the prosecution (continued):

Q. So if that was February of 2007, sir, it was within -- it was less than a month of when you were detailed to the case you requested retirement date?

A. Let me think a second here. I just don't remember which month it was that I requested retirement.

Q. In fact, if it was February of '07 that you made the request, the Article 32 investigation hadn't even run,

- correct?
- A. Again, I don't remember exactly when I put in for a retirement date.
- Q. The Article 32 in this case went from 30 to 31 August 2007?
- A. That sounds right.
- Q. And then again on 5 and 6 September of 2007?
- A. That's right.
- Q. This case was referred to a general court-martial in December of 2007?
- A. That's right.
- Q. Now at this point, you had a 1 April retirement date for 2008?
- A. No. I believe I requested 1 April and they gave me 1 May. It had something to do with computation in days. So I think they gave me 1 May.
- Q. And ultimately you made a request for a modification of your retirement date, didn't you, sir?
- A. Yeah, 1 May to 1 June; 1 June to 1 July; 1 July to 1 August.
- Q. And you made another request for 1 August to 1 November?
- A. Well, yes. My initial request was much longer than that when I talked to Colonel Redmond on the phone.
- Q. That's not what I asked you, sir. What I asked you was did you make a request to get the date modified from 1 August 2008 to 1 November 2008?
- A. Yeah. That was the last modification.
- Q. Okay. So you made that request?
- A. Yes.
- Q. And that request was approved?
- A. That's right.
- Q. Now the e-mail that you all attach at the defense team -- attached to their motion that supposedly came from Colonel Redmond admonishing you not to seek another retirement date, that e-mail is actually merely an approval of the date moving to or being modified to 1 August?
- A. Yeah. But that -- that was not the admonishment.

Q. Okay.

A. That was by phone.

Q. But that e-mail was supplied to this court during our last session and referred to as such by your team. Isn't that true, sir? I mean, we were all sitting in this room.

A. I know it was put in the motion, I know it was supplied into the evidence, but not as an admonition.

Q. But you and I agree that that e-mail is actually an approval of a 1 August retirement date, correct?

A. Yeah. I'd have to look at it again. I've looked at so many things now. Show it to me, I'll tell you.

Q. And it did not operate to deny the modification that you sought for 1 November?

A. Say it one more time.

Q. That e-mail did not operate to deny you anything?

A. Show me the e-mail and I'll be able to tell you. I just don't recall it right now.

Q. I'm showing the witness what's been marked as Enclosure (8) to the government's brief.

I'll show you the first page, sir, and ask you to take a look at that; refer to the middle paragraph there. It's addressed to "Sheila." I'll come back and get that from you once you've had a chance to look at it.

A. Oh, yeah. I do remember this. This is --

Q. Thank you. I'll take that from you.

I'm retrieving from the witness Enclosure (8).

A. Yeah. And the reason why --

Q. And so, sir, this e-mail from May did not operate -- to answer my question, this e-mail did not operate to deny you anything, did it?

A. No. That's the only e-mail record that -- when the motion was supplied -- I don't have any of my e-mails from when I was on active duty. For whatever reason, I had forwarded that to -- that one e-mail to my civilian e-mail. So that's the only one that I had that we could provide.

Q. So the answer to my question is the e-mail you just

- reviewed did not operate to deny you anything?
A. No. That was extending me to 1 August.
- Q. Sir, who is Colonel Dwight Sullivan?
A. Colonel Dwight Sullivan is a reserve colonel, United States Marine Corps; and he works at -- up working on appellate defense cases for the Marine Corps. And I think he currently works as a civilian for the Department of the Air Force.
- Q. And he was -- worked on this case, didn't he, sir?
A. He worked on the -- yes. Some of the interlocutory appellate issues.
- Q. Earlier you were testifying, if I recall your testimony correct, there was a series of modifications requests that you made in the Summer of 2008. Do you recall that line of testimony?
A. That there were a --
- Q. Series of modification requests that you made during the Summer of 2008?
A. Yes.
- Q. There were four total?
A. That's right.
- Q. All four were approved?
A. Yes. Four approved and one not approved.
- Q. We'll get to the one, that one in a moment, sir.
A. Okay.
- Q. Now at this time in 2008 when you made these series of modification requests, this case was stayed. Is that fair to say?
A. That's correct. Yeah, that's fair.
- Q. It was stayed because of a ruling by the military judge on February 22, 2008?
A. Yes.
- Q. And when the military judge ruled, he ruled that the materials that the government sought, specifically the subpoena of the outtakes from your client's interview with Scott Pelley, that that subpoena didn't -- he quashed that subpoena in essence?
A. That's right. I wasn't here for the motions but I'll

take your word for it.

Q. Well, but your aware of that because you're a professional defense counsel who talks to other defense counsel --

A. That's right.

Q. -- and keeps apprised --

A. That's right.

Q. -- of the things in your case, don't you, sir?

A. I just don't know what the judge said in the motion --

Q. But you understood the issue?

A. Well, yeah.

Q. The issue was that a subpoena had been quashed.

A. Yes.

Q. Okay. And when that subpoena was quashed, it was quashed on relevancy grounds, R.C.M. 703?

A. I don't know. I was not there. I did not get into that issue very much at all. Again, I was in Iraq doing other things.

Q. You are aware that based on your experience -- I mean, you've been -- how long have you been a judge advocate in the Marine Corps? Twenty years, sir?

A. No, not that long. I was -- I started as an artillery officer.

Q. Okay, sir. So you've been a judge advocate for 12 years, 14 years of your career?

A. Ten.

Q. And, sir, under Article 62, you realize that the government has three days to request for an appeal, correct? Or to notify the court that they're going to take it and appeal?

A. That's right.

Q. So that's three days.

A. That's correct.

Q. You're also aware that subsequent to those three days, the government has 20 days to get the authenticated record of trial to Code 46 to start the appellate process?

- A. Sure.
- Q. And then you're aware of after that under the rules of the CCA, that there's another 30-day briefing period that's created where the government has to supply a brief?
- A. I don't know. I'd have to go back and look at the rules.
- Q. But those rules are readily available to you, aren't they, sir?
- A. Sure.
- Q. I mean, it's a matter of looking them up, correct?
- A. Yes.
- Q. So if you wanted to, you could have availed yourself of this knowledge that there are certain deadlines and time frames that are created attendant to an appeal?
- A. Yes.
- Q. And all you would have needed to do is access the CCA's rules, correct?
- A. Sure.
- Q. And so subsequent to the 30-day briefing period, there's another 30-day reply brief period as well?
- A. Again, I don't know.
- Q. Again, you could have availed yourself of this knowledge, correct?
- A. Sure.
- Q. And so that creates a predictable timeline attendant to an Article 62 appeal, doesn't it?
- A. That's not how I went about trying to determine the length of time, but -- I mean, you can look at it that way; that's not what I did.
- Q. You didn't look at the CCA's rules and try to apprise yourself of what was a reasonable timeline attendant to a 62 appeal?
- A. No. We called appellate defense counsel to get an idea of when we can expect this issue to come back. That's what we did.
- Q. And appellate defense counsel briefed you on a number of possibilities, didn't they, sir?

- A. Sure.
- Q. They talked about the issue of the R.C.M. 703 relevancy going up before the CCA, didn't they?
- A. I don't remember specifically what I talked to them about. What I do remember is talking to them about when can you expect this coming back to trial. I don't remember talking to him specifically about the issue.
- Q. And you could have certainly discussed, for lack of a better term, branches and sequels, coas, possibilities with the appellate defense counsel of what the timeline would be, correct, sir?
- A. I did do that.
- Q. And they told you that there were a number of possibilities that this appeal could have taken, correct?
- A. That's not what they told me.
- Q. They told you that there was a lock-step way that this was going to go?
- A. They told me -- I asked them, when do you think this thing's -- best guess, when do you think this thing can come back to trial. When can we expect to be back in the courtroom. And that's the information we went on.
- Q. Okay.
- A. Whether that was correct or not, I don't know.
- Q. So in the Summer of 2008, you were apprised by Code 45, appellate defense, that this case would come back when? Likely? What was their estimate?
- A. Don't think it was in Summer when we first started talking to them about it. I don't remember when we first started talking to them. It was Spring probably.
- Q. But you had an opening and continuing dialogue. You didn't rely on just one conversation?
- A. No. No. I think we -- the first -- the request to extend it the one month was based on the first conversation I had with them. And then when it seemed to take longer, you call him up again, say, Hey, what's taking so long? When can we expect this thing to go to trial? They would tell me another thing and we'd modify our -- try to modify our retirement dates based on what we were told.

- Q. And so they were telling you 30-day increments was what this was going to take? Because that's what your -- the bulk of your modification requests were, were 30-day increments. 1 May to 1 June; 1 June to 1 July.
- A. Yeah. Right.
- Q. So Code 45 is telling you this is going to be resolved in 30 days, this appeal?
- A. No.
- Q. But you just said you predicated your requests --
- A. No. That's not what I said.
- Q. Okay. Well, help me understand, sir, because it sounded like you told me --
- A. What I did is we --
- Q. -- that you talked to -- let me finish my question, sir. It sounded like what you said was you called up Code 45, they apprised you of a timing, an estimate, and then you made a modification request to reflect that.
- A. Yeah.
- Q. Okay. I just wanted to make sure I understood your testimony, sir.
- And so it sounds like what you were trying to do is you were trying to alter your retirement date to coincide with the appellate litigation, fair?
- A. No. I was trying to alter my retirement date so that we would have time to try Staff Sergeant Wuterich's case before I left on retirement. That was -- that was my purpose. And frankly, they were handling the appellate issue; I didn't care as much about what issues were briefed. I wanted to know when we're back in trial, so I know when I can -- when I should request a modification for retirement date.
- Q. Right. And you certainly spoke -- you personally spoke with appellate defense about that issue, about the timing?
- A. Yeah. Some of the times it was personally me. But some other times it was other members of the defense team.
- Q. And by June of 2008, it was clear that this case was going to go beyond the initial appeal to the court of criminal appeals; that was clear to the defense team by June of 2008.

Isn't that true, sir?

A. June or July, yes.

Q. Okay.

A. It was right around then.

Q. Because the CCA opinion issued on the 20th of June, 2008, the first opinion. Do you recall that?

A. I'll take your word for it. I don't recall the date.

Q. Ten days later on the 30th of June, the defense team, your team, sir, filed a brief with -- seeking a writ to the CAAF. So they joined in the appellate process on the 30th of June.

A. That's when appellate defense filed that --

Q. On 30 June.

A. Appellate defense filed it. Okay.

Q. And you're certainly aware of that action by your team, correct?

A. Sure. I was aware -- I was not involved with filing that, but yes.

Q. And by early-July it was readily apparent to the entire defense team that the CAAF appeal could have any number of permutations?

A. In early-July with the thing going to CAAF, we discussed -- yeah, we discussed possible outcomes of the case and length of time for the appeal; that was something. But there were some other considerations that we had to -- that I'm not really at liberty to discuss about how this was going to effect the defense team.

Q. But the answer to my question, I think, sir, is then Yes, in early July your team knew that the appellate litigation when it got in front of CAAF could take any number of manifestations, any number of things could happen, each of which could impact the timeline?

A. In early-July we became aware of that? Yes. Yes.

Q. In fact, it was well-known amongst the defense team in early-July that this appellate litigation could drag on imperpetuity. It could go on for months and months and months and months and months and months and months.

Isn't that true, sir?

A. That it could go longer? Yeah. We didn't think it was going to go that much longer. But, yes. And there was --

Q. You didn't think it was going to go much longer? You didn't think it was going to go months and months and months and months and months and on and on and on in July of 2008, sir?

A. Did we -- in July of 2008, did we think it was going to go on for months? Yes, we did. Absolutely.

Q. It was going to continue on for months and months and months and months?

A. That if it kept going on the course it was going with CAAF, it would have taken probably talking six months.

Q. Because the defense was even aware that it was highly likely that CBS was going to seek to remove to an Article 3 court.

Weren't you aware of that?

A. Yeah. I don't know what CBS was going to do.

Q. But you were aware of the possibility -- you being the defense team -- were aware of the possibility that CBS would seek to remove this issue -- the issue of the outtakes -- to Article 3 court.

You knew that?

A. Yeah. That's not something I want to discuss. That's really something that Mr. Puckett should answer on that one. I --

TC (Maj Gannon): Your Honor --

WIT: Quite frankly, I was not really concerned with what CBS was going to do during that time --

TC (Maj Gannon): Objection. Nonresponsive. Request that you direct the witness to answer the question. He was aware that there was the possibility that they were going to remove -- they being CBS -- to Article 3 court in July.

CC (Mr. Faraj): I'm going to object to this question, because we initially told this court that we were not a party to the litigation between CBS and the government. The brief that was submitted by the defense was done at the direction of the appellate court and not because defense

sought to do that. They just wanted our opinion on this and on the issue of the delay in the trial. And we -- we are going to represent -- we didn't know what CBS was doing. Sometimes we'd get notices from defense that CBS did something, but we did not know what CBS was doing. And frankly, we didn't care because it had nothing to do with us.

MJ: Appreciate your proffer.

The objection's overruled to the --

If you can answer the question, Mr. Vokey, answer the question if you knew personally.

Go ahead and restate your question.

Questions by the prosecution (continued):

Q. The defense team and yourself in particular, sir, in early-July of 2008 was completely aware that there was a possibility that CBS was going to seek to remove to an Article 3 court?

A. We had no idea what CBS was going to do.

Q. Colonel Sullivan was the defense counsel on this case?

A. He was -- he's one of the appellate defense counsel.

Q. So he was a part of your team, sir?

A. Well, appellate -- I had nothing to do with the appeal.

Q. But if you wanted to discuss timelines like you testified to earlier, you certainly could have contacted them correct, sir?

A. I'm sorry. Say again?

Q. Well, they're only a phone call away, sir. So if we're talking about how long the appellate process is going to take, Mr. Sullivan or Colonel Sullivan is only a phone call away, correct?

A. Sure.

Q. I'm handing you Enclosure (6) to our motion. I've highlighted a line on the second page of that. Take a look at the second page, sir, the highlighted portion if you would. That's a posting on CAAF Log authored by Colonel Sullivan from 5 July 2008. If you look at the second page, I've highlighted a portion, sir.

- A. Can you take a look at that?
Sure.
- Q. Are you looking at page 2, sir?
A. I am.
- Q. What does the highlighted portion say?
A. "Does it seem more likely that CBS will seek an order from an Article 3 court to trump any ruling against it? Does it seem quite possible" -- is that it? That's all you want?
- Q. Yes, sir. So Colonel Sullivan's writing on CAAF Log on 5 July that it's readily apparent there's a high-probability or possibility that CBS is going to remove to an Article 3 court. That's knowledge on the defense team.
- A. Fair enough, sir?
A. That he wrote that? No, I see that he wrote that on CAAF Log.
- Q. So this is -- this is obviously knowledge that he had, right?
A. I have no idea. You have to ask Colonel Sullivan.
We --
- Q. And you could have called --
A. We had --
- Q. And you could have called Colonel Sullivan?
A. We had no idea what CBS was going to do and CBS wasn't talking to us either.
- Q. Sir, that's not the question I asked you. What I asked you was you could have availed yourself of Colonel Sullivan's guidance on this timing issue, couldn't you?
A. I did contact appellate defense on timing as far as requesting -- when all to request a retirement.
- Q. And an Article 3 removal event would have had a massive impact on this case, wouldn't have it, sir?
A. I have no idea. I do not know.
- CC (Mr. Faraj): Your Honor, we're not sure what the relevance of these questions are.
- MJ: Major Gannon, I think one of the issues that's one of

the sticky points between you and the witness is you're -- you're saying that -- you're putting Colonel Sullivan as part of the defense team.

TC (Capt Gannon): Yes, sir.

MJ: And I understand he's part of the appellate defense and not necessarily part of this defense team here at the trial level. But I understand where you're going.

TC (Capt Gannon): Yes, sir.

MJ: Where are we going now?

TC (Maj Gannon): Well, we're about to -- we're about to change gears a little bit, sir --

MJ: Okay.

TC (Maj Gannon): -- to --

MJ: Go ahead.

TC (Capt Gannon): -- this discussion with Colonel Redmond.

Questions by the prosecution (continued):

Q. All right, sir. So by early-July it's clear that the CAAF litigation can go in many directions. We can agree on that. You agree that you knew that then?

A. I just knew that it was going to take awhile.

Q. Okay. And so you called Colonel Redmond in July and asked him for a modification?

A. That's correct.

Q. Orally?

A. Yes.

Q. Did you do it in writing, sir?

A. No, not at that time, I did not.

Q. Did you do it in -- 15 or 20 July, did you ask for a modification in writing?

A. I don't remember when -- exactly when the phone call was.

Q. Okay. Can you give us an estimate?

- A. I think it was somewhere around mid-July.
- Q. All right. So in mid-July --
- A. Maybe 15 to 20, I'm thinking somewhere around there. I know it was -- pretty sure it was at least mid-July, because I know I was getting concerned because August 1 was coming up pretty quick.
- Q. So in mid-July you have a conversation with Colonel Redmond at Headquarters Marine Corps?
- A. That's right.
- Q. And according to your testimony and your proffer, Colonel Redmond aggressively denied orally your requested modification?
- A. I wouldn't say aggressively. He told me no, absolutely.
- Q. Okay. And that happened in mid-July time frame?
- A. That's right.
- Q. Now, subsequent to that on 23 July, you're aware that Headquarters received a modification request from you?
- A. That's correct. 23 July? That sounds about right. It was -- that -- it was the following week after I spoke with Colonel Redmond. That tells me exactly when I spoke to Colonel Redmond. It's the week proceeding that.
- Q. And that modification request was approved?
- A. That's right.
- Q. And obviously you had done something to generate this request to show up at Headquarters? You had requested --
- A. It was a phone call again. The only time -- I think the only time I put in a written -- I think I only put in one written modification, because they were -- and I would speak with the command. You know, you initially submit your retirement on the diary and when you had to modify them -- I mean, this is kind of special circumstance. This is something that didn't pop up very well. So I would contact them and then they basically authorized direct liaison with the Manpower folks on my retirement.
- Q. And in late-July, a modification request was approved, correct?
- A. For the 1 November?

Q. Yes.
A. That's right.

Q. So on the paper record that we've got, every request you made was approved?
A. Well, what paper record are you talking about?

Q. Well, I haven't seen a -- I have not seen a document?
A. There's only -- there's only one written document for an extension that was ever submitted. Everything else was all oral.

Q. And so when this oral denial took place, this took place in mid-July?
A. That's right.

Q. Before the approval --
A. Before the approval -- that's right.

Q. -- of the modification to 1 November?
A. That's correct. It was before -- it was the week before the -- when I got that modification, that was with talking with another colonel who worked up in the same office when Colonel Redmond was gone. And he's the one who allowed me to extend it so I could take -- so I'd have -- be allowed to have proceed delay and travel and terminal leave. It was the week -- immediate week before that is when I talked to Colonel Redmond.

Q. So Colonel Redmond had departed, the person who orally denied your request?
A. Yeah. And --

Q. And a subsequent individual approved one?
A. Yes. I can't remember if it was -- if he was TAD or he was on leave the following week when I called back up.

Q. And the subsequent approval took you out to 1 November 2008?
A. That's right. And it was done with the purpose of what I just stated. It was so I could take terminal leave. Because I had discussed with him of -- I've got this much leave. I've got to travel. Backing it up, I was asking for -- it would have me depart on the 6th of August --

Q. So this modification was --
A. -- so I wasn't taking terminal leave till 1 November.

TC (Capt Gannon): I'm sorry to interrupt you.

MJ: Okay. Hold on.

TC (Capt Gannon): Sorry to interupt you.

MJ: Major Gannon, please let him finish the responses --

TC (Capt Gannon): Yes, sir.

MJ: -- so our court reporter can --

TC (Capt Gannon): Yes, sir.

MJ: -- accurately reflect what's being said.

TC (Maj Gannon): I apologize, sir.

MJ: Go ahead and finish your response, Mr. Vokey.

WIT: Okay. It was -- that was sufficient time so I could -- I'd have time to get my orders prepared and depart on 6 August, travel to -- proceed delay travel to Texas and then terminal leave. And that took me up to 1 November. So in my conversation with the other colonel, he was aware that it was already denied and that I wasn't going to be allowed to stay for the issue with Wuterich. But I told him I was -- kind of a sob story of, you know, I'd like to have a little bit of terminal leave. He says, All right. But we will modify it for the purpose of allowing you to do your terminal leave as long as you're out of here.

Sir, I'm out of here 6 August.

Okay.

Questions by the prosecution (continued):

Q. And so at some point, at least you believe, there's been a denial of any more modifications, correct?

A. Absolutely.

Q. Okay.

A. No question.

Q. And so when you learned that, you didn't come -- you didn't go to the convening authority and seek relief,

did you?

A. No. I mentioned -- my battalion commander I talked to. I didn.

Q. But that's not what I asked you. You didn't go to the convening authority and seek relief?

A. No.

Q. The convening authority was General Mattis, correct?

A. I don't remember who was the convening authority at the time. It may have been General Helland at the time.

Q. You didn't go to the military judge and seek relief?

A. No. Well, there was no military judge. There was no court in session at the time.

Q. You didn't draft a pleading and submit it to anyone?

A. No.

Q. You didn't go to the OIC of the LSSS and seek relief?

A. No.

Q. You didn't -- you didn't come to the trial counsel --

A. Well, he can't -- he can't grant me relief anyway, so.

Q. Well, you didn't bring it to his attention?

A. No.

Q. You didn't bring it to the trial counsel's attention?

A. I don't know who I told. My -- I will tell you that the person I worked for, the chief defense counsel of the Marine Corps, was aware of it.

Q. And so you departed or left active duty on 1 November 2008?

A. I'm sorry. What was that?

Q. You left active duty -- you retired on 1 November 2008?

A. 1 November I became retired, yes.

Q. And the CAAF hadn't even issued an opinion yet? Are you aware that the CAAF opinion came out on 17 November 2008?

A. I'll take your word for it. I don't remember when it came out. I was --

Q. Let's talk about when you joined the firm that you moved on to, sir. You took a job with Mr. Haygood's firm?

A. Yes.

Q. And during the process of that, you -- during -- when you sought employment there, you did an interview?

A. I did.

Q. And you spoke with partners at the firm?

A. I did.

Q. And -- about the prospect of being employed there?

A. Yes.

Q. And you talked about your experiences and your merit and your qualities to be an attorney at the firm?

A. Yeah. I don't specifically remember what we talked about, but yes.

Q. And at some point you discussed with Mr. Haygood the fact that you represented the accused in this case, correct?

A. Yeah. Well, I mean, he already knew that.

Q. And you knew that he represented Hector Salinas?

A. That's right.

Q. Or had at one point?

A. That's right.

TC (Capt Gannon): And you never divulged any privileged communications from the accused that were made to you to Mr. Haygood?

CC (Mr. Faraj): Your Honor, we're going to object to any line of questioning that's related to communication between attorneys related to either client. Whether they discussed it or not discussed it is not at issue here.

MJ: Okay. Thank you.

Why do I need to know this?

TC (Maj Gannon): Because, sir, part of this -- part of the analysis is that Mr. Vokey made choices of his own -- his own decision-making process. And I think I heard a line of questioning earlier about being forced into working for this firm. And I think that it's important that the court realize that there was no surprises here in this employment. He knew that he represented the

accused and the partner at the firm knew that as well.

MJ: You can ask those questions. I do not want you to ask anything that he talked specifically about regarding attorney/client privileged information.

That objection is sustained.

Questions by the prosecution (continued):

Q. You're familiar with the term "an ethical wall" or a "Chinese wall," sir?

A. Yeah.

TC (Capt Gannon): And isn't it true that when you joined the firm, you adhered to an ethical wall?

CC (Mr. Faraj): Again, Your Honor, whether he had knowledge -- he can ask about knowledge, representation but -- and we've already disclosed that. But I don't understand why we're going to discuss what he -- what measures he took or the firm took with respect to information.

MJ: Okay.

CC (Mr. Faraj): It's not relevant.

MJ: Again, Major Gannon, why do I need this for purposes to decide this motion?

TC (Maj Gannon): Sir, again, part of the theme and the theory here is that this -- the counsel have made choices and the choices were informed choices. They weren't forced on them which was I think the thrust of part of the direction examination.

MJ: Okay.

TC (Maj Gannon): These were knowing, intelligent choices that were made by informed, reasonable and capable counsel.

MJ: And you can ask those questions, but you can't get into any of the areas that I just described including that last question.

The defense objection is sustained.

Questions by the prosecution (continued):

- Q. You had three -- three offers total, sir. Is that true?
Is that what you testified to on direct examination?
- A. Yeah. Two. The other one hadn't quite matured into an offer yet. I was kind of hoping it was.
- Q. And you chose to go work for Mr. Haygood and his firm?
- A. Yeah. I had two definitely solid offers. The first one was not very attractive at all for a lot of different reasons.
- Q. Well -- but there were alternatives to employment at Mr. Haygood's firm?
- A. Sure. I was not forced to go work with Fitzpatrick, Haygood, Smith, and Ule. It was an offer and it was attractive. And yes, I took it.
- Q. Mr. Faraj discussed with you the -- sort of the gravitas of you being a lieutenant colonel in the Marine Corps when you were the regional defense counsel and how something had changed when you became a civilian.
- Do you recall that line of questioning, sir?
- A. I do.
- Q. He asked you about your rank and whether or not it was similar to the OIC of the LSSS, et cetera?
- A. Yes.
- Q. Subsequent to your departure, Lieutenant Colonel Tafoya, Patricio Tafoya, was detailed to this case, wasn't he?
- A. He was. I don't know when he was detailed.
- Q. I didn't ask you when, sir. I said he was detailed.
- A. I thought you said prior to me leaving he was detailed.
- Q. Subsequent to your departure --
- A. Oh, subsequent to my departure --
- Q. -- he was detailed?
- A. Yes. That's correct.
- Q. And Colonel Tafoya became the RDC?
- A. That's right.
- Q. The regional defense counsel?
- A. That's right.

Q. He was a lieutenant colonel on active duty?
A. Yeah. And he was -- he actually was the RDC before I left.

Q. And he's two buildings over from this building, correct?
A. That's correct.

Q. He sat in your office -- your old office?
A. Yeah. He still sits there.

Q. Same spot.
A. That's correct.

Q. And he, too, had a budget not disimilar to your budget -- isn't that true, sir -- when you were the RDC?
A. I don't know what he kept, but he has -- to my knowledge -- well, I don't know that. I don't know what's going on with the budget. That's a whole nother issue.

Q. Fair to say he has a budget, sir?
A. I don't know anymore. That was -- without going on a totally collateral issue, that may have been something that had changed, but I don't know that.

Q. And you talked about a lack of resources as a result of your departure from the Marine Corps. About how you were not provided with any resources.
A. Do you recall that line of questioning?
Yeah. That's right. The government provided me nothing. That's correct.

Q. But you never asked for anything, did you, sir?
A. I did not.

Q. You never made a request to the convening authority?
A. No.

Q. You never made a request to the OIC of the LSSS?
A. No, I did not.

Q. You never made a request for relief from a military judge?
A. No.

Q. And never advised the trial counsel of any issues?
A. No. I think I had one conversation with Lieutenant

Colonel Sullivan, but it was very informal. I wasn't asking for anything. So I do remember I was out here at Camp Pendleton for something. I think we were in the chow hall, and I said I was going to try to stay on Wuterich. But that's about the only thing I can remember.

TC (Maj Gannon): Your Honor, one moment. I have -- I don't think I have any more questions.

MJ: Sure.

Questions by the prosecution (continued):

Q. Sir, going back just very briefly to your attempts to overcome this oral denial of modification requests. You -- you were aware -- I didn't ask you the question, but you have known the OIC of the LSSS, then now-Colonel Jamison, you had known him for over a decade?

A. No, not that long. But I'd known him for awhile.

Q. And you had known now-Major General Ary, the now-SJA to the Commandant -- you knew then-Colonel Ary for many years prior to --

A. Yes.

Q. You had a relationship with him?

A. Yes.

Q. And you could have picked up the phone and asked Colonel Ary for relief, couldn't of you?

A. I can call anybody and ask for relief, but no -- and Ary wasn't a general at that point.

Q. And you never once sought any written relief from anyone from this oral denial of a mod request?

A. No. I was directed by my battalion in requesting for these extensions to contact Headquarters Marine Corps directly. And I had many phone conversations with -- I talked to Colonel Redmond a couple of times, his deputy. I talked with some of the other -- the civilian women that worked up in that office on trying to effect this -- so this wasn't one phone call up to Manpower when this happened. I had made probably a dozen phone calls by that point.

Q. Colonel Redmond is not a judge advocate, is he, sir?

A. No. He's the one who controls whether I stay on active

duty or not.

Q. Right. But he's not a judge advocate?

A. He is not.

Q. You never sought an explanation or a discussion of this issue of the attorney/client relationship with a judge advocate who maybe would have understood it a little bit better?

A. Well, the chief defense counsel of the Marine Corps knew of the situation, so she was definately aware of it.

Q. But no one at JAM?

A. I don't remember who's in JAM. I don't remember if I talked to anybody from JAM. But colonel -- but of course Colonel Favors works in the JA division.

Q. But Colonel Favors is not at JAM?

A. No. She's a part of JA division. It's all part of one division. You have judge advocate division in different sections and offices within that. Hers is one of those sections under JA.

Q. Right. But that's not the question I asked you, sir. What I asked you was, She's not a member of JAM?

A. That's right.

TC (Maj Gannon): No further questions.

MJ: Redirect.

REDIRECT EXAMINATION

Questions by the defense:

Q. At the time you were in the Marine Corps, apparently it's different now, there was a chain of command?

A. That's right.

Q. And Colonel Favors was in your chain of command?

A. That's right.

Q. On at least the legal side?

A. That's right.

Q. And then you had Manpower who you had to go to?

A. That's -- well, I went through my --

Q. Eventually.
A. -- my chain of command, my battalion here. From battalion through base. I'm not sure if it was base or MCI-West at the time. And then to Headquarters Marine Corps.

Q. All right.
A. My operational chain of command was colonel -- was the chief defense counsel of the Marine Corps.

Q. Did you believe that anybody could give you relief at the time -- was there anyone that could -- at the time that you believe could have given you relief that you did not seek relief from?

A. No.

Q. And this may be --
A. And I even suggested to Colonel Redmond that he should contact some folks within JA division and I think that they can tell him.

CC (Mr. Faraj): How did -- how did the people at JAM feel about you or generally the judge advocate at the SJA to CMC?

TC (Maj Gannon): Objection. Speculation.

CC (Mr. Faraj): How did people there feel about you?

WIT: I don't know.

MJ: Okay. Hold on a minute.

What was the objection?

TC (Maj Gannon): Speculation.

MJ: Your response, Mr. Faraj?

CC (Mr. Faraj): Well, I'll rephrase the question.

MJ: The objection's sustained.

Questions by the defense (continued):

Q. I'm going to call your attention to a time when you went to Washington, D.C., and you were asked by the chief defense counsel of the Marine Corps to go see her.

A. Can we talk about that?
Sure.

Q. Is that alright?
A. Sure.

Q. All right. What happened at that -- this happened in '08, right?
A. No, this was in August of '07.

Q. '07. Okay. And what happened when you went to that meeting?
A. August of '07 is -- that was -- I was out working on -- actually working on the *Wuterich* case and I informed Colonel Favors I would be in town. And she asked me to drop by and I did.

Q. And what did she tell you?
A. That I was relieved.

Q. As the RDC?
A. Right.

Q. You were eventually brought back on the case -- or you were eventually brought back as RDC?
A. I was.

Q. Due to some pressure?
A. The -- there were a number of calls made. General Mattis called me. I know there was a number of people that made calls and wrote letters.

Q. Were you aware of a reputation that the defense section had here when you were in charge as RDC? And I'm specifically referring to the defense at Camp Pendleton of Legal Team Echo.
A. I'd like to think so, yeah. I'm aware of the reputation.

Q. What was that reputation?
A. A very -- strong advocates. Very diligent. We were nicknamed the "pirate ship" because of the building over there.

Q. Well, at your level of rank and leadership, what was the relationship like between defense and prosecution at the time?
A. Defense in general and the --

- Q. Yeah.
- A. -- prosecution on the West Coast?
- Q. No. Here --
- A. Here at Pendleton?
- Q. Camp Pendleton.
- A. That's kind of a hard question to answer. It was a relationship of prosecutors and defense counsel.
- Q. All right. Well, I'm talking about the "pirate ship" then. Can you say more about that?
- A. Well, we -- I guess prior to that, we had done a lot of things like demand resources, demand things for the defense. It wasn't often well-received by certain people. It wasn't just -- I'm not talking about something with the prosecutors, like the prosecutor sitting at the table here. But it was generally a lot of the efforts of the defense collectively were not well received. I received calls and people were not happy with things that were going on in defense. Not just my actions, but other defense counsel.
- Q. So what, if anything, did that do to your state of mind with respect to going to ask for things from the prosecution or the people in charge of prosecution? And I'm specifically referring to Legal Team Echo or the LSSS?
- A. Well, I mean, I guess I -- I don't think that made me fearful to go ask, you know, Major Gannon or Lieutenant Colonel Sullivan for anything. But I wouldn't have done it. I mean, I'm not looking for any favors from over there. That's for sure.
- Q. When you left active duty, did you feel any continued obligation to continue to work this case? And if so, where does that come from? Where did you -- where did that obligation come from, if one existed?
- A. I mean, I felt a duty to Staff Sergeant Wuterich. I mean, I believed in his case. I think -- I wanted to help him. I had felt a strong bond with Staff Sergeant Wuterich. I still do.
- Q. But that had nothing to do with you being detailed to this case?
- A. No.
- Q. I mean, that was a personal obligation that you imposed

on yourself?

A. Yes.

Q. And perhaps a professional one imposed on you by your state bar that you couldn't just walk away from a criminal case or any case without -- well, let me ask you this: Did you ever come on the record and ask to be excused before you left active duty?

A. No.

Q. Were you ever excused by your client from further representation?

A. No.

CC (Mr. Faraj): I don't have anymore questions, Your Honor.

MJ: Any recross?

TC (Maj Gannon): Yes, sir.

REXCROSS-EXAMINATION

Questions by the prosecution:

Q. Just briefly about your relationship with trial counsel, sir. I know that you said that you didn't feel any astrangement from the counsel sitting at this table, but you and I have known each other for awhile, haven't we, sir?

A. We have.

Q. In fact, I used to work for you, didn't I, sir?

A. Yes.

Q. When I was a brand new lieutenant, slash, captain, defense counsel?

A. Yes.

Q. Fair to say I probably learned a thing or two from you?

A. I hope so.

Q. Fair to say you and I sat outside of my office in Twentynine Palms on more than one occasions and had -- on more than one occasion and had conversations into the wee hours of the night about defense strategies and trial tactics?

A. We did.

- Q. Sir, you referenced a conversation you had with the chief defense counsel of the Marine Corps where you indicated that she had relieved you at some point. This is Colonel Rose Favors?
- A. That's right.
- Q. Ultimately there was intervention on your behalf, though, wasn't there, sir?
- A. There was.
- Q. In fact it came from the convening authority -- at least one phone call came from the convening authority in this case?
- A. Phone call to me?
- Q. There was -- well, we'll get to that. But there was intervention on your behalf by the convening authority in this case, wasn't there, sir?
- A. To my knowledge, yes.
- Q. General Mattis, the convening authority in this case, intervened on your behalf, correct?
- A. That's my understanding, yes.
- Q. He was an advocate that you be reinstated to the regional defense counsel position?
- A. I don't know that. I just know that he called me and asked me for my take on what happened. I told him. So I don't know exactly what he said to anybody else. He's not the one who called me up and said you're the RDC again. Somebody else did that. That was General Walker.
- Q. But that took place after your discussion with Lieutenant General Mattis?
- A. Yes, it did.
- Q. That phone call that reinstated you?
- A. That's right.
- Q. Isn't it true that General Mattis told you when he called you that he would give you anything you needed? Didn't he use those words, sir?
- A. When he called me up -- on that phone call?
- Q. On any phone call. He expressed to you a willingness to give you whatever you needed, didn't he, sir?
- A. In that phone call, he didn't say that. I don't

remember having other phone calls with him concerning Staff Sergeant Wuterich's case or at all. So I don't remember a phone call from Mattis saying, Hey -- I think that's the only phone call I had with him dealing with Haditha at all. Or that wasn't even about Haditha; that was about me getting relieved. So I didn't have any phone calls with Mattis on the -- General Mattis on Haditha to my knowledge. I don't remember any.

TC (Maj Gannon): No further questions, sir.

MJ: Mr. Vokey, I do not have any questions for you. Thank you for your testimony. You're excused.

Defense, let's take a break.

The court will be in recess.

The Article 39(a) session recessed at 1551, 13 September 2010.

The Article 39(a) session was called to order at 1612, 13 September 2010.

MJ: The court will come to order. All parties present when the court recessed are once again present.

Defense, do you have any further evidence you'd like to present?

CC (Mr. Faraj): It's the evidence that's contained in that sealed envelope, Your Honor -- what I believe is to be relevant evidence. I'm not sure, however.

MJ: Okay. Anything besides that?

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

MJ: All right. I'm going to take a look at this tonight. We'll have closing argument in the morning on the motions. So if I have to release anything to you, I'll give you a few minutes to look at that and incorporate that into your closing argument unless the -- I just think that'd be fair. I don't want to take the time now to look at it.

CC (Mr. Faraj): By the same token, since you've agreed to consider it in camera, any documents that have not been produced in the way of other communications --

endorsements, e-mails -- related specifically to this issue, we would ask for the government to also produce for your consideration overnight so you can decide if we should have it.

MJ: Okay. What -- I'm sorry. What do you think that you're still missing?

CC (Mr. Faraj): I don't know. I'm just --

MJ: Okay.

CC (Mr. Faraj): I would ask that you ask the government to produce it, if they have it.

MJ: Okay.

CC (Mr. Faraj): Or if they can get it.

MJ: Major Gannon, are there any other e-mails that you can get at this point?

TC (Maj Gannon): Did you say "if there are" or "are there," sir?

MJ: Are there.

TC (Maj Gannon): I don't believe so. I've talked to -- we've sent the discovery request to Lieutenant Colonel Yetter to search his files. We sent it -- we just cut and pasted in. I've spoken to the OIC and the former OIC. I've produced what they have in their files. And then I produced even my own materials which are actually in the discovery response, sir. We've got what appear to be the complete sanctuary packages that have been delivered to the court for in-camera review. And I'm not aware of anything else that is out there that I have at this time, sir.

MJ: Okay. I find you both forthright and thorough, so I'm going to take your word on that issue.

All right. So what we'll do is I'm going to look at this overnight. Anything that needs to be released, I'm going to release to the defense. You can look at it for a few minutes before you make your argument on the motion.

Government, do you have any evidence you'd like to

present on the motion?

TC (Maj Gannon): Nothing further other than the evidence attached to our motion. We respectfully request that you consider that, sir. And then just, again, very briefly since the court has severed the attorney/client relationship between Mr. Vokey and the accused, the government's position is that none of the materials in that in-camera packet are relevant in any way, shape, or form because the issue before the court is whether or not the government improperly severed. The disparate treatment argument doesn't flow unless there was an improper severance. Since this court just severed the ACR on good cause, we don't even get to that, sir. That's our position, sir. Thank you.

MJ: What about the issue as it relates to Mr. Faraj?

TC (Maj Gannon): In terms of relevance to Mr. Faraj?

MJ: Right.

CC (Mr. Faraj): The ACR is alive and well and Mr. Faraj continues apparently to represent Staff Sergeant Wuterich, frankly rather capably.

CC (Mr. Faraj): Till I think of another argument tonight, Your Honor, and come up with it tomorrow.

MJ: Okay. Thank you.

It is true that -- I'm sorry. Go ahead.

CC (Mr. Faraj): They asked for some evidence to be considered by the court. I am going to object based on the same grounds that the government offered to -- evidence that I offered in my motion; and that is this timeline of key events was produced by counsel for the government. And I ask that the court not consider it based on the same grounds that the government argued against my evidence. And these are simply proffers by government counsel. And any facts that aren't supported by evidence that's on the record within their motion, I would also object to your consideration, again, based on the same grounds that were used for our motion.

MJ: Government.

TC (Maj Gannon): Your Honor, I've articulated in an enclosure that supports every fact on that timeline.

MJ: Okay.

TC (Capt Gannon): That's not a proffer. That's supported by the package of evidence, primarily in Enclosure (3), the 20-odd pages of Enclosure (3), Your Honor.

MJ: I understand the objection. I'll make sure that the dates match up with the evidence that I have here.

All right. Are there any other issues that we need to take up before we come back in tomorrow when I will give you perhaps anything in the redacted version and we'll hear closing argument on the motion?

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

MJ: Defense, Mr. Faraj?

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

MJ: Okay. The court will be in recess then till tomorrow morning, 0830.

The Article 39(a) session recessed at 1617, 13 September 2010.

The Article 39(a) session was called to order at 0930,
14 September 2010.

MJ: The court is called to order. All parties present when the court recessed are once again present with the exception of Lieutenant Colonel Sullivan. He's been released by the court. His presence is not necessary here as a witness on this motion, and he has other duties to attend to so the court has released him for this session of court. All other parties remain the same.

In regards to Appellate Exhibit XCVIII, the court saw a need to release all of the documents contained in here and it looks like they've been marked as Appellate Exhibits CII and CIII. I appreciate that since I do not wish to open up what was previously sealed in Appellate Exhibit XCV. We'll just leave it sealed as I got it from the government.

But that copy at least that I received, I did release to the defense. I did find that it was necessary and relevant to the motion. Again the import of those documents will be argued by the parties. I will note that they were already blacked out of the medical information by Major Gannon. It was my understanding that prior to reading through this last night that the -- that one of the issues with the documents was that it contained personal information dealing with medical history, et cetera. And to the extent that it contains that, I'm releasing it to the parties. I'm sure you'll use good judgment and not release anything that does not need to be released, and Major Gannon blacked out portions of the medical document information on there anyway.

Major Gannon, you're standing?

TC (Maj Gannon): Yes. Good morning, Your Honor. We actually request a protective order of those materials; that you direct the defense directly to not release or publish online or reproduce those to any nonparty to this litigation, sir.

MJ: Defense.

CC (Mr. Faraj): We object to that, Your Honor. This is part -- this has been discovered on the defense. To the extent

Mr. Faraj, please.

CC (Mr. Faraj): Thank you, Your Honor.

MJ: Trial counsel, you can move if you need to see the --

TC (Maj Gannon): Thank you, Your Honor.

MJ: -- the presentation. You may sit in the deliberation box. That's fine.

TC (Maj Gannon): Thank you, sir.

CC (Mr. Faraj): This is new territory sort of. The *Hutchins* court even states it's an issue of first impressions. No one disagrees that the right to counsel is a right guaranteed by the constitution, but this is more nuanced. This is the right to a detailed counsel that has been afforded by the legislature to a military accused. And military case law is ripe with references to the rights of the accused to a detailed counsel, an individual military counsel -- which may excuse the detailed counsel -- and a civilian counsel. And a civilian counsel.

And, sir, when you go through your colloquy with the accused to inform him of his rights as *U.S., Johnson* requires -- *U.S. v. Johnson*. And really, it counts on the military judge to be the guardian of the accused's rights. Because it contemplates that military accused are different. Their job is different, the hierarchy that orders them is different, and the pressure they're under is different. And so it requires the judge, the military judge to be the guardian of the process.

And so you go through a lengthy colloquy with the accused to ensure that he understands his rights or she understands her rights. You go through a lengthy colloquy to understand that an accused is providently pleading guilty and understands the right not to plead guilty. And Article 38 requires you to ensure that he understands, he has a right to a detailed defense counsel and a civilian counsel.

And on that point, I'd like us to pause for a minute, because I racked my brain last night trying to think of whether Staff Sergeant Wuterich was ever asked when we came back into court whether he understood that his

detailed counsel are no longer at the table. Major Faraj and Lieutenant Colonel Vokey are no longer at the table. Mr. Faraj and Mr. Vokey were at the table, but his detailed defense counsel were never inquired in to.

I'm going to argue later -- and this is not -- you know, Judge Meeks didn't know any better either, because the law wasn't solidified. But when myself and Colonel Vokey left active duty, there should have been a session at court to inquire if this accused, if he understands what was going on. Sort of like Colonel Meeks did in the *Hutchins* case. Well, we never even had that. That was the last gate before *Hutchins*. It was accepted that an EAS or by analogy a retirement would excuse counsel.

Now, something deep down inside me -- and you heard from Colonel Vokey -- felt wrong about it, about walking away from the case. It just didn't feel right. I never signed a contract with Staff Sergeant Wuterich. He never hired me. He never gave me any money. The Marine Corps detailed me. And because of my employment contract with the Marine Corps and because of my state bar rules, I was required to work this case. When my employment contract with the Marine Corps ended, according to the Marine Corps at the time, I was no longer required to work this case.

And you heard testimony about it from Redmond. Just go. Or based on what colonel -- or Mr. Vokey said. But there was something there that would not allow me to just walk away. You can call it state bar rules. You can call it an obligation. You can call it perhaps a relationship that I built with this man and I came back. But I didn't know what I was -- what capacity I was coming back in. I was a lawyer, but I certainly wasn't a detailed lawyer anymore.

MJ: I'm going to interrupt you a couple of times, Mr. Faraj. The first question I have for you is another happenstance of this case, however, is that you left active duty and at some point secured employment with Mr. Puckett, who was representing the accused already, correct?

CC (Mr. Faraj): Right.

MJ: So what about that obligation? It's the firm's obligation to represent him, correct? You said you have

not been paid, but I'm sure Mr. Puckett has a contract with the accused.

CC (Mr. Faraj): He does have a -- they certainly had a contract when they first began representation. And perhaps you could argue that part of my duties as a member of that firm, that that obligation would extend to me. That's not the argument here though, Your Honor, because my focus is on the detailed counsel piece.

For example, the law -- if I may, your ruling is going to have an impact on other cases or may have an impact on other cases. For example, if that were allowed to stand, then essentially the government will be divorced of their obligation to continue to represent detailed -- or military accused, because they could argue, Well, the obligation continues after active duty because of state bar rules. In this case it continued because -- by happenstance. I happen to work for the same person that -- that represented Staff Sergeant Wuterich. But what if I did not? I would still be here, because I'm required to be here by my state bar rules. But *Hutchins* says differently and that's what we're going to discuss today.

Again, that was the last gate before *Hutchins*. *Hutchins* sort of validated what I sort of felt and I think what Colonel Vokey felt at the time and that is it doesn't terminate it. You have to continue to come back. There has to be more. And all *Hutchins* stands for is a simple principle. The regular happening of an instance in the military in the life of every person in the military and that is exiting active duty is not good cause without more. So simply leaving the military does not rise to the level of the good cause required to sever the attorney/client relationship. There could be more, but that in and of itself is not sufficient. Certainly, it's not good cause when the client isn't even informed of it. And they go through some analysis, but at its core, that's what the court is saying in *Hutchins*.

MJ: But if we take the -- if we take that rationale to its extreme and we read that, that that's what the *Hutchins* case court is saying, does that mean then that as soon as somebody is appointed as a defense counsel, on day one of becoming a judge advocate, they might never -- they should just be told right away, you'll never be a prosecutor. You can never be a prosecutor, because you

might take a case right now that could go through the appellate process for the next eight years. So you're not going to be a government counsel. You're not going to be an SJA. You'd better sit there in the defense counsel. That's where you're likely going to be.

And if you have a four-year contract and you're going to leave active duty, well, maybe you won't be leaving active duty either. So to what extent does the accused's rights trump the right of the organization and the military to be able to let people be relieved from active duty, et cetera. Don't we still just have to look at a good cause basis?

CC (Mr. Faraj): The CAAF has answered that question. Not an extensive -- not -- not -- and I don't have all the answers, but for example in *U.S. v. Spriggs*, it says the accused doesn't have a right to the same counsel at a -- at the appellate level. And so they have the right to that counsel during the trial level, but it severs at the conclusion of that trial.

Now, that may be the case, Your Honor. It may be that a defense counsel appointed and they remain on that case for their entire career and that's unfortunate. But that's supported by Supreme Court case law. *Gonzales v. Lopez* says you cannot sever that relationship, again, unless there is good cause.

MJ: And here you're saying there's no good cause.

CC (Mr. Faraj): There is no good cause -- your Honor, I want to be clear. There's no good cause simply by EAS. I mean, for example, there's -- the court doesn't say you can't sit down with a client, explain what is going on, explain the hardships that the defense counsel may be undergoing because they have to leave, do a good turnover, allow the client to have an informed consent, then come in front of a judge who makes the inquiry and then gets released. That's okay. But simply severing without going through the judge -- in fact, the only place you can sever that relationship is in front of a judge, Your Honor. And in this case, there was a severance of the ACR in the Summer of 2008. The detailed ACR. And it's distinguished for the military.

There are two spaces in which we exist: In a detailed realm and in the civilian realm. And in courts-martial

under Article 38, the judge is required -- is the only person permitted once the court-martial's convened to sever that relationship, period. It has to be in front of the judge. And that did not happen in this case.

Hutchins makes sense. *Hutchins* makes sense. And it makes sense perhaps in hindsight because of what we have gone through in this case. I'm still embarrassed that my motions are late to you. I can't say I was always on time, but I was never two or three or four weeks late. We are still laboring under the pressure of having to work other cases in order to be able to afford to come here and do this case essentially *pro bono*.

MJ: But would you -- would you agree though that a court can force you to continue representing a client who fails to pay?

CC (Mr. Faraj): Certainly. But that is the court -- the reason the court can do that is because the court contemplates that you entered into the contract freely. I did not have that -- that free will.

In any event, under in CJA, the Criminal Justice Act, federal courts are authorized by the Supreme Court to pay attorney's fees when client no longer are able to pay. And that is another remedy that has contemplated the problematic nature of compensation-free representation, Your Honor.

Now, this is not the prosecutor's fault. We're not saying Captain Gannon did anything wrong. He wasn't required to --

MJ: Major Gannon.

CC (Mr. Faraj): I'm sorry. Did I say captain? I apologize. Major Gannon. Hopefully soon Lieutenant Colonel Gannon.

That's not the issue here. When I write "government" in my motions, I'm talking about the big "G" government. The government that is required to guard the record of trial. The government that produces witnesses and funds the prosecution and affords the accused detailed counsel. Not the military judge. You have no control over those. You can order it, you can abate it, but in the end the government makes those -- makes those decisions.

What happens if the relief we seek is not granted in this case? Well -- and I'll tell you I considered this. To force the judge to grant me relief, I should not show up. That wouldn't be appropriate. You could even argue that that would be a violation of my state bar ethics rules. But essentially, I'm put in a bind. By showing up and demanding that my client get relief based on his right to detailed counsel, I must show up.

And so that gives the government the opportunity to argue, They're here, Your Honor. They're representing him. They're effective. It's not an effectiveness argument -- and I'll get to that in a little bit. This is not a *Strickland* prong argument for effectiveness of counsel. This is a *Gonzales, Lopez* argument or -- yeah, *Gonzales, Lopez* argument or a *Baca* argument. This is not about effective assistance. This is about what the legislature contemplated when they afforded the accused the right under Article 38.

So I could not show up and then you would be forced to grant the type of relief that we seek, either to abate the proceedings or dismiss the charges. Of course, it would allow -- it would allow the government to get around their obligations to ensure that detailed counsel remain on cases, because there's an escape mechanism. And of course, detailed counsel would be forced to come back into these courtrooms and to work without compensation after they exit active duty service.

I'm going to analogize to a public defender. If a public defender were assigned to a case, that public defender would certainly not be expected to continue to work the case without compensation. Now there's some Supreme Court case law on this, and it basically says that there is no right to a defendant -- and I'll give you the citation here in a little bit, Your Honor. I'll give you the cite later, Your Honor. The Supreme Court --

MJ: Is it in your motion?

CC (Mr. Faraj): It's not in my motion.

MJ: Okay.

CC (Mr. Faraj): They basically said there is no right to continued representation by a public defender. But it

also contemplates a turnover and a relief on the -- release on the record. Again, similar to our rules. But Article 38 requires more. It requires a continuation of a detailed counsel. Once -- once that detailed counsel is assigned, he must remain except for good cause or release on the record by the accused.

And again, we're -- detailed counsel are not the same as a civilian counsel. What -- the government cites to *Wykeman* in their -- in their brief, and they go on and on in *Wykeman*. I want to distinguish *Wykeman*. First of all, *Wykeman* ended up in a guilty plea. The accused in *Wykeman* waived his rights to many appellate issues. But here's what's important:

Wykeman actually works to assist my argument, because the court said in *Wykeman*, they found error in the convening authority interfering with the second detailed counsel. They said there's no difference between an assistant detailed counsel and the actual detailed counsel. They're only talking about detailed counsel in that case. But they reaffirm the inviolability of the right to detailed counsel. And they say we're going to find it harmless because they did a prejudice test. And they say although the convening authority interfered with the detailed counsel, detailed counsel continued to do their work. It was a guilty plea and so we don't find harm. The harm analysis -- in my opinion, a harm analysis is not merited in this case. We don't get to harm. Just like the *Hutchins* court said we don't get to harm.

Spriggs. This court's -- our court has been vigilant in protecting the relationship between a service member and his or her military counsel. We have emphasized that defense counsel are not fungible. *Spriggs*, 52 M.J. at 239.

And then in the case of *Howard, U.S. v. Howard* at 47 M.J. 107 -- the threshold should be low enough if an appellant makes some colorable showing of possible prejudice. We will give the appellant the benefit of the doubt and we will not speculate as to whether there should have been a different outcome. They don't -- they don't go into testing for prejudice. It's difficult to do and court's will not go into that exercise of testing for prejudice.

In the *Hutchins* case -- I'm sorry. *Hutchins* also does not test for prejudice and they say we presume it. We're not going to try and determine what value Captain Bass would have added. It's sufficient that he was detailed and they -- and even though they did a *DuBay* hearing, they do not go into that analysis.

I think I've established the right to his detailed counsel and this is where I get to your colloquy. The colloquy that never took place here. We never got on the record after 2008 where he was asked you are represented by your detailed defense counsel, Major Faraj and Lieutenant Colonel Vokey. Do you wish to let them go? That never took place. And so we have an error that's already built into this record.

MJ: Mr. Faraj, how do you explain two different facts from the *Hutchins* case. The first fact is that I think the court was perturbed that the judge misstated the law on counsel. And second of all, that the person who left the active duty, Captain Bass, was somebody who had worked on the case to an extreme amount and then got kicked off the case, basically, two weeks before the trial started. How do you distinguish that from the facts of this case?

CC (Mr. Faraj): Well, we would -- we would be required to go through that if we did a prejudice analysis. And I've prepared this for you, Your Honor: These are the similarities and differences. And it's interesting. I'm actually going to bring in some of the endorsements. I'd like to refer to some of the endorsements from -- the government's endorsements to the prosecutor's request to remain on active duty. But in *Hutchins*, Captain Bass worked on a case for a year. We're on our fifth year. But at the time Vokey and I left active duty, it had been about two years.

MJ: Why do you have three and a half years on there?

CC (Mr. Faraj): It's been three and a half -- we've --

MJ: You've got three and a half now?

CC (Mr. Faraj): A total -- a total amount of three and a half years.

MJ: Okay.

CC (Mr. Faraj): Yes, he was released two weeks before trial which in *Hutchins*, the court says the good cause runs on a spectrum. You can add other factors. So I would argue certainly that three weeks before trial would be more prejudicial than a longer time before trial. And the further you go back, the less prejudicial it may be. But again, I argue the court says it's not enough. It's not sufficient by itself to be good cause given some of the factors. So for example, if he were released three weeks before trial and a quick turnover had taken place the way they argued on the record, that still wasn't enough because three weeks isn't enough to prepare. But had there been a voluntary release of counsel two years before trial, counsel works up, and the court can argue, Well, you know, we don't -- we think that is good cause enough. That's -- we accept that. So that's the difference there.

Severance by the government. Both our counsel in this case and in *Hutchins* were severed by the government. It wasn't severed by explicit government action. They didn't say -- they didn't come out and say we're going to end your contract. But *Hutchins* distinguishes it. Was it an action taken by the appellant or the defendant or was it something else? And that's how -- that's how they distinguish. Was it an action by the defendant or something else. And the something else is, of course, the end of EAS -- or the EAS or the retirement.

Both counsel in this case and in the *Hutchins* case abandon the client. Now, what does that mean? It means we left without further communication with the client. Now we continued to assist and work. I'm not -- I'm not going to speculate on what Captain Bass did, but from our end we did abandon the client because there was nothing else going on. But then we contacted the client again to see how we can assist and eventually we're here. And in neither case did the client release. The client did not make a voluntary release of the detailed defense counsel. There was no motion to withdraw from the case in either case.

And *Hutchins* -- the EAS was actually addressed on the record by Judge Meeks. The NMCCA decides that that's not good enough because the lawyer was already gone. That never happened in this case. We are never -- we've never addressed the release of the two detailed counsel on the record.

Captain Bass is a one-tour attorney though he did quite a bit of work it sounds like from the record on the PTSD issue. Well, Colonel Vokey at the time had 18 years of service; I had 20 years of service. The government endorsements go on and on and on and on about the combat experience of Lieutenant Colonel Sullivan. Well, I had a lot of combat experience and I served 16 years in the infantry. And if anybody understands how to present the tactics and procedures and the issues involved in this case, I would have. And I would have done it in uniform and so would have Colonel Vokey and the credibility that comes with that. We don't get to do that anymore.

So that's how we -- that's where the two cases are similar. If there is a distinguisher, it's the three -- three weeks before vice a couple years before trial.

This severance was a result -- was not a result of any action by the appellant. And the *Hutchins* case says -- or quoting, "In cases involving service of an existing attorney/client relationship by someone other than the appellant or the defense team, CAAF has consistently opined that due to the unique nature of defense counsel, appellate courts will not engage in those calculations as to the existence of prejudice." They're quoting *Baca*, 27 M.J. at 119.

Severance was not by this accused. It was a result of government action or inaction. And I think this is a good time to segue into what the government actions were for the prosecutors. And you can kind of understand why. This is a complex case. There is institutional knowledge in the heads of Major Gannon and perhaps Lieutenant Colonel Sullivan. Certainly Major Gannon. I understand why -- I didn't understand it yesterday, but I understand why Major Gannon attacked, attacked, attacked Colonel Vokey's actions in remaining on active duty, because he knew what was in those packets.

And shame on you for not turning those over yesterday, because you know they're relevant. And they are relevant.

Everyone knew we were retiring. He came to my retirement ceremony. I think the judges got invited also, but they didn't show up because judges don't come to those things. But everyone knew we were retiring.

We discussed abandoning this case. I asked for an extension and so did Colonel Vokey. And when Colonel Vokey testified yesterday about how Colonel Redmond spoke to him when he asked for an extension, the sense that I got is -- from the cross-examination's questions -- is he shouldn't be believed. But he should be believed, because when you read the correspondence from Colonel Redmond, it is sarcastic, it is challenging, and it refuses to accept the prosecutor's arguments.

This is from Colonel Redmond: "None of the endorsements discuss active structure for which to place this officer against -- this officer against should he be granted sanctuary. Despite anything else, Lieutenant Colonel Sullivan has resounding endorsements from General Mattis, Lieutenant General Helland, Brigadier General Walker. Not sure what to think of Brigadier General's comment."

And in quotes, "I have tried to replace him from the active duty judge advocates, but I do not have available active duty judge advocates with his skill set, but he should plan on finding an active duty requirement."

"Our T/O requirement for lieutenant colonel, 4402 officers is 49. Our inventory is 90. With only eight with 2009 retirement dates giving us 33 more than T/O requires." Colonel Redmond.

So he is flippant and he is sarcastic and he is resistant to requests to continue on active duty. And that's what Colonel Vokey got and that's when he stopped asking. Because the end strength numbers are important for the Marine Corps. They're the law. And Colonel Redmond is required to manage those numbers, so he doesn't violate the law. And even when presented with an endorsement from General Mattis, Lieutenant General Helland, Colonel Jamison, Brigadier General Walker, he's not persuaded, because we're so much over on lieutenant colonels.

And so when Colonel Vokey says -- or Mr. Vokey says, I tried. I stopped trying because Colonel Redmond wasn't having any of it. And then you heard the government focus, Well, they granted you the last request. Well, he told you why he got the last request. And you know, the same thing -- the same thing happened to me. I

bumped against my EAS date literally a day or two before and I asked them for a couple of months just to be able to go on leave and travel. And that's what Colonel Vokey told you he did. I mean, that's the situation in 2008.

With respect to the appellate process and what he should have known and what he should have not have -- what he should not have known -- I guess I'm giving you some facts now -- we didn't know what was going on. I still don't understand the process. We thought it was going to be denied. Judge Ryan in the CAAF opinion goes on and on on why it should have been denied, the Article 62 appeal. And why we should be right back in court, because there's a right to a speedy trial. And that's what we thought was going to happen. And we didn't have that decision at the time. But everything rested on the likelihood of the government being denied this and then we're right back in court.

I don't know if you've read the Appellate Exhibits CIII and CIV -- or CIV and CV, I think.

MJ: CII and CIII?

CC (Mr. Faraj): CII and CIII.

MJ: These are the things I released to you?

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

MJ: I have read through them. I read quickly through the individual endorsements that talked about Lieutenant Colonel Sullivan and Lieutenant Colonel Atterbury, but I've looked at every page of the documents.

CC (Mr. Faraj): The government went to great lengths to ensure they kept the trial team together. They violated Marine Corps statutory end strengths. Colonel Redmond talks about O-5 lieutenant colonels having to work in O-4 jobs, because we have so many lieutenant colonels in the 4402 OCC specialty. And yet they continued in their efforts to keep these prosecutors on this case, because they thought it was important.

I've heard you say it time and time again and other judges, prosecutors are fungible. Just give me another prosecutor. I've never heard you say that about a

defense counsel or a detailed counsel. Prosecutors are fungible. This case as lieutenant -- or General Mattis refers to it is one -- is one of the most important cases since the Vietnam war. It's important enough for the government to keep their prosecutors on it, because they have the institutional knowledge and they get endorsements from general officers up and down the train to persuade Manpower to keep Lieutenant Colonel Sullivan on active duty and Lieutenant Colonel Atterbury.

Major Gannon is on active duty, but we all understand the Marine Corps. And you understand that he's still here because of this case. I don't have any evidence to prove that to you, but officers of his rank and his experience would have normally moved on to other billets to do other things. But they've kept him here -- the convening authorities have kept him here because he has in his mind the institutional knowledge to try these cases. It's that important. None of that -- I would argue we required an equal effort to be expended to keep us on this case, but there was no effort by the government to ensure Staff Sergeant Wuterich continued to enjoy the -- the representation of his two detailed counsel.

Now, it would be disingenuous of me to say we bore no responsibility. We had some. But the responsibility based on -- based on the UCMJ lies with the government. They're the ones that are responsible for ensuring that he has detailed counsel, the record is protected, and he's afforded his rights. But there is some responsibility by -- by counsel. Well, what did we do? I worked through my boss at the time. He knew where I was at. I belonged to the same command. He spoke to Colonel Favors. Colonel Favors worked for General Walker. Please consider the endorsement from General Walker and Lieutenant Colonel --

TC (Maj Gannon): Objection. I'm not aware of any evidence that there was a conversation with Colonel Favors from Major Faraj's boss, if we can focus on that. Otherwise, my objection is facts not in evidence.

CC (Mr. Faraj): Lieutenant Colonel Vokey --

MJ: Okay. Hold on a second. Your response?

CC (Mr. Faraj): Lieutenant Colonel Vokey testified that he spoke

to the CDC, Colonel Favors.

MJ: That he spoke to the CDC. But the objection is that the CDC spoke to the SJA. Do we have evidence of that? The SJA to the Commandant, excuse me.

CC (Mr. Faraj): I don't have evidence of that. That's okay.

MJ: Okay. The objection's sustained.

Go ahead.

CC (Mr. Faraj): Very well. The CDC works for the SJA to the Commandant of the Marine Corps, Brigadier General Walker. Brigadier General Walker wrote an endorsement and put it in a package for Lieutenant Colonel Sullivan and Lieutenant Colonel Atterbury. They were aware.

Do I have a smoking gun of Brigadier General Walker denying the extension? I don't. But I know how the Marine Corps works and so does this court.

The packages before you are clear that the government was aware of this issue, they're aware of Haditha and Hamdaniyah and then they make it clear in their endorsements. This was a big deal. They were aware enough to ensure that the prosecutors remain on the case, and it would stand a reason that they should have been aware that the defense counsel also had -- or they had a duty to the accused to ensure that his defense counsel remained on the case.

I'm about to wrap up, but I want to make sure that we're not confusing the 6th Amendment right to counsel or the Article 38 right. R.C.M. 505 and 506 speak to the right of a detailed counsel. *Spriggs, Baca, Iverson*, and now *Hutchins* read together make it clear that detailed counsel may not sever -- detailed counsel may not sever their relationship with the accused except for good cause and end of service is not good cause. And even if they were going to present good cause, it must be done in front of a military judge who excuses the detailed counsel. That did not happen here, Your Honor.

The government in their brief goes on and on. But in totality, they're talking about effective assistance of the counsel. That's under the *Stickland* analysis and that is not the issue here. The issue is a statutory

right that perhaps bleeds over into a 6th Amendment right. But your analysis must begin at the statutory level before you reach the constitutional level. But if you do reach the constitutional level, that you must look to the prejudice of the loss of these two counsel.

And I get emotional when I talk about the prejudice. They can talk about Colonel Tafoya being available and Major Marshall. That's great. They don't know this case. I know this case. And so did Colonel Vokey. And we had resources and access that we don't now have, with or without compensation. We just don't have those types of resources that we did when we were in uniform at this base calling from a 763 or a 725 number to a command saying send us a witness; or going to a meeting and letting them know that we're short something or we need something. It's different. And that's prejudice that this court can never -- not can never -- would be challenged to try and encapsulate it and analyze. That's at the 6th Amendment, if you reach the 6th Amendment analysis. But I think this case is made at a statutory level, because he is denied his right to detailed counsel.

When you read those packages that the government provided, you will see the tension between Colonel Redmond trying to manage numbers to ensure that they stay below a certain end strength. And so in order to keep one, they have to lose something else. And it just leaves me wondering why it is that Lieutenant Colonel Sullivan and Lieutenant Colonel Atterbury won out in the end with respect to end strength numbers over Lieutenant Colonel Vokey who was guaranteed by statute and perhaps Constitution to continue to represent Staff Sergeant Wuterich. I may not have articulated that as well as it came out -- as it was in my mind. But the point is, they let Lieutenant Colonel Sullivan go, but kept the prosecutors who are fungible.

MJ: Lieutenant Colonel Vokey.

CC (Mr. Faraj): I meant Lieutenant Colonel Vokey. Yes. They kept lieutenant -- they sent Lieutenant Colonel Vokey home, kept Lieutenant Colonel Sullivan; when Staff Sergeant Wuterich had the statutory and constitutional right to continue to have Lieutenant Colonel Sullivan and myself represent him -- lieutenant Colonel Vokey and myself represent him.

MJ: You don't -- do -- you don't draw any distinction between the fact that two people were talking about sanctuary and with Lieutenant Colonel Vokey and yourself -- well, Mr. Vokey now and yourself were talking about retirement dates?

CC (Mr. Faraj): There is no distinction. In fact, it works in our favor. The Marine Corps' -- you heard from Mr. Yetter when he talks about how challenging, how difficult it is to reach sanctuary and what is required, and now they have boards that they institute and make sure it's a fair process. I mean, there's no evidence in the record of this, but I didn't reach an end of service obligation. When I put in my retirement request, I had -- I didn't contemplate a case going for four or five years. In fact, and -- when the case supposed to go in March of 2008, I would have been well within that time period. And a few months extension would have solved the problem. So all those are red herrings.

But even if I could draw a distinction, even if it were easier to extend them on active duty, statutorily the government was required to keep Colonel Vokey and myself on active duty to continue to represent Staff Sergeant Wuterich.

I don't have any more in my presentation, Your Honor, but I'll be happy to answer some questions for you. And I've got some case law that I'd be happy to -- it's not in my brief and they're little paragraphs, but I can send those to you.

MJ: Okay. If it's simply cases and cites, you can offer those up to the court. We don't necessarily need to put them in the record. I do want them to be given to the government obviously.

CC (Mr. Faraj): I will do that, Your Honor.

MJ: Okay. I do not have any further questions at this point. I asked you a couple of questions during your argument. Thank you.

CC (Mr. Faraj): I guess I should tell you what remedy we want.

MJ: I think in your motion you argued about dismissal with prejudice of all charges and specifications.

CC (Mr. Faraj): Well, that's not the only remedy. I mean, there's -- the court may dismiss without prejudice if you find that -- we think that the government's actions and continue -- and because they were aware of this as demonstrated by the evidence you got today, that it merits dismissal of prejudice. But if you find that that doesn't rise to the level of dismissing with prejudice, then dismissal without prejudice is available to you.

So is -- this is an issue for the government. The government has to solve this issue. And I think post-*Hutchins*, especially if CAAF -- if CAAF endorses the finding, doesn't vacate or reverse, then the government is going to have to do something to fix this problem. And another -- so another option would be to abate until the government can decide how they're going to handle these kinds of cases.

We on the defense -- we on the defense side do not have a solution. I can't -- I can't institute a remedy to fix what -- what has taken place. The government may be able to and they have the resources to do so. It may take some mental gymnastics to figure it out, but it's going to have to be solved.

MJ: Thank you.

Major Gannon.

TC (Maj Gannon): Your Honor, can we take a 10- or 15-minute recess?

MJ: Take a ten-minute recess.

The court's in recess.

The Article 39(a) session recessed at 1039, 14 September 2010.

The Article 39(a) session was called to order at 1049, 14 September 2010.

MJ: The court is called to order. All parties present when the court recessed are once again present.

Major Gannon, please.

TC (Maj Gannon): Thank you, Your Honor.

Good morning, sir. The trap the court has to avoid in hearing Mr. Faraj's eloquent argument about the sacredness of counsel and the attorney/client relationship -- which the government agrees it is sacred. The problem with the argument is that there has been no severance event with respect to Mr. Faraj and there has been no severance event until yesterday with Mr. Vokey. I counted the times that Mr. Faraj actually went the whole way and said attorney/client relationship, ACR. And he said it about three times in his entire argument. He kept calling it, this, it, that, the relationship, the detailed counsel. And the court does have to be careful not to conflate what *Hutchins* stands for. *Hutchins* stands for the severance of an attorney/client relationship, not the dismissal of a detailed defense counsel or even the dismissal of an IMC. In fact, if I remember correctly, Captain Bass was an IMC. He was not a detailed counsel.

The ACR, the attorney/client relationship which is what the *Hutchins* opinion is all about, it's what the 6th Amendment and the interpretation thereof in that respect is about and it survives and it's alive and it's well here today with respect to Mr. Faraj. There were -- before yesterday, there were two entities on the planet that could sever the ACR with respect to Mr. Vokey: The accused and this honorable court. And after engaging in a 29-minute *ex parte* communication with the defense, this court in its wisdom decided to do a 506(c) good cause analysis and found good cause to sever the attorney/client relationship between Mr. Vokey and the accused.

Interestingly and from the government's perspective in an informative way despite repeated attempts by the government to ascertain Staff Sergeant Wuterich's feelings on this matter -- the matter being severance of the ACR, not the detailed relationship, but the ACR -- every attempt, every request the government has made, Your Honor, ask the accused. Let's have a colloquy. Let's determine first what his position is before we even talk about *ex partes* or severance or 506(c). Every effort the government made was frustrated by an unwillingness by the defense to allow us to explore via the appropriate mechanism, a colloquy by a military judge, what the accused's feelings were.

And, sir, that brings me to the point of the problem at

least from the government's perspective with the *Hutchins* case. It's not so much the *Hutchins* case per se, but it's the application of the *Hutchins* case. *Hutchins* is clearly designed to be a shield. It's designed to be a holding that protects the sacred 6th Amendment rooted attorney/client relationship. But here the defense seeks to use it as a sword. One fundamental distinguishing feature of the *Hutchins* case that we're not addressing here today is that *Hutchins* was a post-trial case. The actual members were impaneled, jeopardy attached when the government put in its first piece of evidence, and the analysis was built around the notion that they were deprived the assistance of Captain Bass at trial in this very courtroom with members in this very box. We're not there yet. And even in what the court very aggressively worded in their opinion, especially Judge Maxim's concurring opinion, very aggressively worded opinions -- even under those circumstances -- which clearly the court found very troubling -- even under those circumstances, they authorized a rehearing. They authorized the government to try Sergeant Hutchins once again. That's a telling and important point, because the defense seems to be approaching this scenario with this notion that, Hey, where we're at is fatal. You've got to dismiss. Whether it's with prejudice, without prejudice, you've got to dismiss because it's fatal. Well it wasn't fatal in *Hutchins*, because the government was authorized to do a hearing and retry Sergeant Hutchins.

The primary, single most important point that is undisputed here today is that the attorney/client relationship for both Mr. Faraj and Mr. Vokey, until yesterday, survives. *Wykeman* is a case that we cited in our brief. I believe it's 67 M.J. 495. And we relied on *Wykeman* because it's very clear that that case is applicable to these facts. As the court is aware from looking at the case, the convening authority denied detailed status of one of the counsel. And the court found importantly -- the court found importantly that where -- even where there's error in the failure of a convening authority to acknowledge the detailed counsel's status, where the ACR survived and the counsel continued to work on the case, the error was harmless.

Now, in addressing some of the concerns that Mr. Faraj articulated with respect to what amounts to an argument that there was disparate treatment between government

counsel and defense counsel. Acknowledging that the ACR survived and then the government -- so the government's fundamental position is we don't even get to that analysis because the ACR survived. There's no issue. That's the point. ACR survived; we move on. But I will address and distinguish some of the issues that Mr. Faraj brought to your attention with respect to this argument that there was some sort of disparate treatment between the government and defense counsel.

There are three factors that separate and distinguish the situation between the two sides. You cannot make a comparison, Your Honor, between the trial counsel and the defense counsel in this case because they differ in status, they differ in conduct, and they differ in time. What do I mean by that? Status. As the court indicated when you were questioning Mr. Faraj during his argument, the two differing status because they were looking for and requesting two fundamentally different things. In this case with a preferral event that took place in December of '06, subsequent detailing of counsel on 11 January 2007 and 17 January 2007 for Mr. Faraj and Mr. Vokey respectively, so about two, three weeks later, detailed counsel. Here you have the defense counsel seeking release from active duty by way of voluntary retirement. Neither Mr. Vokey nor Mr. Faraj had reached any sort of statutory limitations; neither were 2-P'd. They didn't have to go. They requested it. It's characterized under Chapter 2 of the MarCorSepMan as a voluntary retirement; i.e. they got to request it and the government then will approve it.

Status. I want to retire. That's the status of the defense counsel. Very, very, very radically different concept from specifically Lieutenant Colonel Sullivan's position. In fact, it's really the opposite. I want to stay on active duty. That's what a sanctuary package amounts to. I want to stay. The two sides differ in status.

Conduct. Not only do the two sides differ in status, but they differ in conduct as well. With respect to the defense counsel as I mentioned a moment ago less than a month after being detailed to this case, they requested retirement. Now during -- during your colloquy with Mr. Faraj or the court's questioning of Mr. Faraj, I believe the court mentioned, Well, what if we took *Hutchins* to its extreme? What does that mean? It could

mean a couple of things. Theoretically it could mean, if I'm an OIC of an LSSS, I may be tempted to assign only brand new judge advocates to the defense bar, because I know I've got them for three years. What's the outcome of that? Brand new judge advocates in the defense bar. In addition to that, think about how potentially an unscrupulous detailing authority could potentially sabotage a case. Imagine if you have someone with detailing authority who decides to detail counsel to a case that they know are going to retire or they know are going to EAS; and there's a big murder case and that person's detailed to the case. The system is turned on its ear if *Hutchins* is taken to its logical extent -- or to its extreme extension. Not its logical but its extreme extension. So here we have the defense counsel, both Mr. Faraj and Mr. Vokey, less than a month after being detailed to this case requesting retirement. The government's not put on notice of that. The trial counsel isn't put on notice of that. I guarantee if we look through this record in the infancy of this case, I don't believe anybody mentioned, Hey, we've requested retirement. So no one put the military judge on notice. Certainly -- and I'll get to this later -- but certainly when there was a denial event on a modification of the retirement date, no one brought that to the military judge's attention. But you have defense counsel requesting to retire less than a month after being detailed to the case, both of whom received a 1 April date for retirement.

Ultimately Mr. Vokey retired voluntarily after 20 years and 7 months of service. And Mr. Faraj after 22 years and 2 days of honorable active service. And again, to emphasize that they hadn't reached any statutory limitations. As evidenced by the several modifications that both Mr. Faraj and Mr. Vokey sought. Mr. Vokey sought a modification in February of 2008 seeking to modify his date from May to June. In April of 2008, seeking to modify the date from June to July '08. In May of 2008, seeking to modify the date from July to August. And on 21 July, to modify in date from 1 May to 1 June. Mr. Faraj requested two modifications. One in February of 2008 requesting that his modify date go from 1 May to 1 June. And one in April of 2008 requesting that the modified date be moved from 1 June to 1 August.

Your Honor, the record shows that what we've presented to the court in terms of paper, every single one, all

six of those modifications were approved. Every single one of them. And those six modification requests were predicated at least by the records we have on the need to continue to represent the accused in this case.

Now, very briefly, the reason why we put together a timeline for your analysis, sir, is to help you put into perspective some of the events and where this case was knowing that the military judge now detailed to the case wasn't always a part of this case. And it's important to note and look into the reasonableness of some of those modification requests. Because the defense, number one, is seeking 30-day continuance -- excuse me, modification requests. 30-day increments with the exception of Lieutenant Colonel Vokey's 23 July request which was from August to November. We've got to look at what was going on when these 30-day requests were being made. For some of these requests, for most of these requests, we were in an appellate litigation phase. And yesterday I had some back and forth with Mr. Vokey on this point and I felt -- while at times it got tedious, I felt it was important to demonstrate that the modification requests -- not only because they were only of 30-day durations -- and this goes to the conduct argument -- are unreasonable because of where we were at in the case. But it was also unreasonable because these defense counsel through picking up a telephone could have availed themselves of a very, very, very complete, relatively accurate and concise analysis and estimate of what was going to happen in this case. At Enclosure (8) to our motion, I've submitted to the court a posting from CAAF log drafted by Colonel Sullivan who is the detailed -- one of three -- detailed appellate defense counsel to this case, where he -- it's entitled an Article 62 timeline. And in it, Colonel Sullivan talks --

MJ: Hold on. Hold on one moment.

Mr. Faraj.

CC (Mr. Faraj): Your Honor, I've objected to things that are not part of the record. Frankly, I didn't know what CAAF log was until about a couple of months ago. I found out that it was a blog. That's not part of military practice and there's no evidence to suggest that anyone read CAAF log or was aware of CAAF log. I mean, he's aware of it, but nothing should be attributed to the

defense unless they have some evidence that we looked at CAAF log and knew what was going on.

MJ: The objection's overruled. It's been admitted into evidence. It's fair argument on the -- or it's a fair argument on the evidence as it's been presented.

Go ahead.

TC (Maj Gannon): It was posted on 5 July 2008. And it's important not because someone referenced the CAAF Log, but it's important to demonstrate that the defense team, writ large, the appellate defense team and the trial defense team in early July had a pretty darn good understanding of the timeline attendant to appellate litigation that necessitated attacking the military judge's ruling on R.C.M. 703 grounds at the CCA, on R.C.M. 703 grounds, again, at the CAAF, and then on the existence of a news gathering privilege again at the CCA level. Three levels, layers, or attempts at appellate litigation. This defense team was well aware of the timeline attendant to that effort, and yet we're seeing 30-day modification requests.

In fact importantly when both Mr. Faraj -- Major Faraj and Lieutenant Colonel Vokey left active duty pursuant to their voluntary retirement requests, the CAAF hadn't even issued its opinion yet. In fact, in Mr. Vokey's case -- excuse me, in Major Faraj's case -- and Major Faraj is right. I did go to his retirement ceremony and I enjoyed it. In August of 2008, the oral argument at the CAAF had happened 13 days previous. And with respect to Lieutenant Colonel Vokey's departure from active duty on 1 November, CAAF hadn't even issued its opinion yet which ultimately was issued on November 17, 2008. So we have a departure by defense counsel in this case from their active status during the pendency of this litigation -- this appellate litigation and that they were certainly on notice of or at a minimum could have availed themselves of a much more complete analysis of the timeline that would be needed to complete the appellate litigation.

The record that we have, that we've submitted to the court, documenting Mr. Faraj or Major Faraj, his two attempts to modify his retirement date, we have no denial event for Mr. Faraj. There's no evidence before this court that any entity ever said, Major Faraj, no.

From a documentary perspective, all four of Lieutenant Colonel Vokey's retirement requests, modifications were approved. Lieutenant Colonel Vokey -- Mr. Vokey testified that he had a conversation with Colonel Redmond and Colonel Redmond told him orally on the phone no. Having known Lieutenant Colonel Vokey for a very long time and known him to be an aggressive advocate, I have to believe that he at least considered in the wake of this oral telephonic conversation that he at least considered seeking redress elsewhere. Because there certainly were avenues he could have followed in an attempt to seek redress of an oral decision by a Marine O-6. And the fact is -- again, conduct. The fact is, is that the defense never did it. They never availed themselves of any of the remedies that could have at least questioned, analyzed, taken a second look at the decision that Colonel Redmond communicated to Mr. Vokey.

That's why -- going back to status and conduct -- the two sides differ. Because importantly, sir, I believe it's at Enclosure (2) of our motion on Page 2-8, which is the MarCorSepMan, Chapter 2. It says very clearly that modification requests are required via separate correspondence and have to be in writing. So even when the defense -- and Mr. Vokey testified that he was doing all oral modification attempts and requests. Even if you want to ascribe the best efforts to the defense counsel, they were still failing to comply with the rules governing modification attempts. There has -- I guess the point -- the sum total of this argument is that there has to be a point where the court says, Look, defense. You've got to do -- you've got to do a better job. You've got to do a better job of sending up the red flag. Again -- and that's forgiving for a moment that the ACR survived in Mr. Vokey's case until yesterday and continues to this very moment in Mr. Faraj's case.

MJ: Do you believe their actions would have been different if the *Hutchins* case was already in effect at the time that they were contemplating retirement?

TC (Maj Gannon): Your Honor, from Colonel Redmond's perspective in all candor, I don't know that it would have been. I honestly don't know. But I certainly can say this: Had it been brought to the court's attention, had the issue been brought to the convening authority's attention, had the issue been brought to the OIC of the LSSS's

attention, had it brought to the trial counsel's attention, I can guarantee that there would have been -- especially in the wake of the *Hutchins* decision -- there would have been a different outcome. Colonel Redmond, I can't say. And that's why I asked Colonel Vokey yesterday -- Mr. Vokey on the stand about the only person from whom he sought any relief was a lay person. A person who's not necessarily -- I don't know anything about Colonel Redmond but I have to assume he's not an attorney and he's not going to understand what the nature of the ACR is. What the nature and scope and breadth of an ACR is.

CC (Mr. Faraj): That misstates the evidence. He clearly said he spoke to Colonel Favors. Colonel Vokey said he spoke to Colonel Favors about the issue.

MJ: Okay. I understand the objection. I think it's misplaced. I think you were arguing about Colonel Redmond. And you're speaking of Colonel Favors.

CC (Mr. Faraj): He said the only person he spoke to was a lay person and that's not true.

MJ: That objection's sustained then. He also spoke with Colonel Favors.

TC (Maj Gannon): And so -- I'll deviate briefly from the argument and let's assess that. He spoke with Colonel Favors and apparently the testimony I heard yesterday was that Colonel Favors and Lieutenant Colonel Vokey did not enjoy a very good relationship. Because apparently, according to his testimony, Colonel Favors relieved Lieutenant Colonel Vokey from the RDC position. Interestingly, and in the wake of that, the convening authority in this case or then, General Mattis, apparently personally called Lieutenant Colonel Vokey, asked him for his version of events, and subsequent to that telephonic conversation between a three- or four-star general depending on if General Mattis had been promoted at that point and a lieutenant colonel -- in the wake of that conversation, he was reinstated. So Colonel Vokey may have spoken to Colonel Favors; but again, when we're talking about the reasonableness with which defense counsel are conducting themselves. And the natural and probable success rate of their conduct, perhaps, the government submits, that Colonel Favors may not have been the best source of a remedy. And here,

again in terms of conduct, the trial counsel associated with this case, Lieutenant Colonel Sullivan, he simply put in an AA form, sought endorsements, received endorsements, and submitted the package up to Headquarters Marine Corps. I was intrigued when during argument Mr. Faraj said that the fact that Colonel Redmond had negatively endorsed both Lieutenant Colonel Atterbury's package and Lieutenant Colonel Sullivan's package, I was intrigued by that line of argument of because had there been a positive endorsement by Colonel Redmond on both packages and apparently this -- not apparently. The conversation that Mr. Vokey testified to, that would seem to create maybe some disparate treatment. But the fact is there's continuity and consistency. Colonel Redmond, apparently his job is to say no and he did to everybody.

Again, Your Honor, the trial counsel in this case simply put together an administrative request, sent it up through the chain of command, reached out, got endorsements, submitted that to higher. Conduct. The defense did not.

Mr. Faraj continually and repeatedly emphasizes this notion that the government went to extreme measures to protect the integrity of the trial team, while simultaneously at every turn and attempt to undermine the continuity of the defense team. But, sir, that's just not accurate. Lieutenant Colonel Atterbury hasn't been associated with this case in over a year. He's --

MJ: That was one of my questions -- excuse me for interrupting -- is I got on this case late obviously. What was Lieutenant Colonel Atterbury's role and when did he leave?

TC (Maj Gannon): Lieutenant Colonel Atterbury was a member of Legal Team Charlie and he was assigned exclusively to what we call the reporting cases. He actually did the Grayson trial and was intimately involved in Lieutenant Colonel Chessani's courts -- efforts to try to prosecute him for court-martial for 92, for dereliction, and then subsequently his BOI.

MJ: So he did the BOI?

TC (Maj Gannon): He did, along with Colonel Sullivan and I believe Colonel Jamison.

MJ: Okay. And he has had no participation in this case for over a year?

TC (Maj Gannon): It's 2010. I believe he's been in Afghanistan -- he's on a 13-month deployment in Afghanistan currently and he's been there for several months, sir. He went back to the MEF some time ago and I don't have a date for the court.

MJ: That's okay. Go ahead.

TC (Maj Gannon): Another member of the trial team who has made an appearance -- and, again to emphasize, Colonel Atterbury -- Lieutenant Colonel Atterbury has never made an appearance in this case. But one of the members of the trial team who did make an appearance in this case, Major Donald Plowman, who is much more similarly situated to Mr. Faraj and Mr. Vokey. He did retire. He retired in May of 2010. The government didn't go to extraordinary lengths to keep him on active duty. The government didn't do any of those things. He retired. He's gone. He's off of the trial team. So of the four individuals that they sought -- or that they accused the government of maintaining this integrity -- the trial team: Myself, Lieutenant Colonel Sullivan, Lieutenant Colonel Atterbury, and Major Plowman. Two of those are gone. And as evidenced by my materials that were turned over to the defense in terms of my PCA to base. There's no smoking gun. There's nothing untoward. I even gave -- put in my wish list package and it clearly says all the little places that I was looking to go. Nothing there, sir.

But the fact is that the government has kept me on this case and has kept Lieutenant Colonel Sullivan on this case and there's no arguing that the institutional knowledge is something that the government is benefiting from. There's no doubt about that. But that same institutional knowledge exists right now as we sit here in this courtroom on the defense side as well.

MJ: And if anything -- and if any institutionalized knowledge was lost through Lieutenant Colonel Vokey, I guess the point was that that was the court's doing.

TC (Maj Gannon): Absolutely, sir. The severance that took place was the court's doing and not the government's doing. Otherwise, why did we do a 506(c) analysis yesterday --

why did the court conduct a 506(c) analysis and make a specific finding that it was releasing Lieutenant Colonel Vokey for good cause just as the *Hutchins* case requires.

Conduct -- status, conduct, and time. So we've talked about how the status is different. One's seeking to leave; one's seeking to stay. We've talked about the conduct of the two sides which differentiate them and render any comparison in terms of disparate treatment inapplicable to these facts. But perhaps the most compelling aspect of the difference between the two parties is time.

Mr. Faraj and Mr. Vokey left active duty in November of 2008. November of 2008 -- excuse me. Mr. Faraj left in August of 2008; Mr. Vokey left in November of 2008. So in August and November of 2008, they've departed. They're in civilian practice. Mr. Faraj is working with Mr. Puckett at the Puckett, Faraj law firm. And Mr. Vokey is with Mr. Haygood in Dallas. They've left active duty. They're gone.

Lieutenant Colonel Sullivan didn't even initiate his sanctuary package until March of 2009, so this notion that the way the argument comes across, the way the pleading presents the issue, it seems as if that in near simultaneous time, you've got these two sides looking to stay on active duty. You've got the defense and the government competing at the same time. And the argument is that the government, you know, had these endorsements and got to stay and the defense didn't. But that's not -- that's not what happened. What happened was during February of 2007, they asked to go. In April, March -- in April and May of 2008, they requested to stay a couple of times. And in August and November, they left active duty. All in 2008.

And again, Lieutenant Colonel Sullivan didn't even initiate the sanctuary request until 4 March 2009. So the entire episode with the defense teams or the two members of the defense team attempt to stay on active duty and postpone their retirement through these 30-day modification requests, that had all taken place. It was done, it was complete, it was over before the trial counsel even initiated a sanctuary package request.

Status, conduct, and time render these two in -- or not

comparable. And additional evidence, obviously the court is well aware of that when Lieutenant Colonel Vokey appeared in 22 March of 2010 -- this goes back to the notion that the ACR is alive and well, he represented on the record, "I continue to represent Staff Sergeant Wuterich." And that representation was severed yesterday by this honorable court.

The -- I'm looking at my notes of a couple of the points I wanted to address from Mr. Faraj's argument, and there's one that merits some comment. Time and time again during argument or otherwise or in pleadings, the defense has argued about the time attendant to the 62 appeal, and it was a long time. But it's important to note, Your Honor, that in enclosure -- at Enclosure (9) of our pleading, the defense completely and totally waived all delay attendant to the appellate process. And the government was chomping at the bit to get back into court after the CAAF opinion. The government was making every effort. We've got several 802 conferences that are on the record now where the government was saying, We've had a ruling from CAAF, we want to go back into court. And the military judge frankly, Lieutenant Colonel Meeks, and the defense wanted to see the appellate litigation run its course before we did any of that. And hence, we drafted this document and said, Well, we want you to sign off on this, and basically waive all speedy trial governing -- you know, authorities, Article 10 -- even though not applicable here. But we wanted it clear to make a record that the defense made a decision during the pendency of that litigation to wait it out. That's important that the court consider that.

The fact is, is that as we find ourselves here with this issue before the court, the admonishments of the *Hutchins* court have attached, have had purchase, and this court has acted on them. And what I mean by that, Your Honor, is that when the appropriate time came, this honorable court conducted an R.C.M. 506(c) analysis. And after evaluating the basis, the nature, and the scope of the good cause, the court elected -- the court elected pursuant to the rule to sever the attorney/client relationship between the accused and Mr. Vokey. And as I've said repeatedly, it survives here today with Mr. Faraj.

Your Honor, that's all I've got as far as argument.

Does the court have any questions?

MJ: I do not.

TC (Maj Gannon): Thank you, Your Honor.

MJ: Thank you.

Mr. Faraj, a brief rebuttal, please.

CC (Mr. Faraj): I'm going to try to take it just as a rebuttal, step-by-step, Your Honor.

Major Gannon began with talking about jeopardy attaching courts have -- do not make that distinction. Detailed counsel, once detailed, remain on the case until good cause based on R.C.M. 506. And that's what Article 38 guarantees. And that can't be broken. That can't be broken unless voluntarily or with good cause, *U.S. v. Palenius*, 2 M.J. 86 at 91 discusses that. *U.S. v. Andrews* requires an informed waiver. Once that detailing occurs, once that relationship forms, the ACR forms, for a detailed to be severed, *U.S. v. Andrews*, 44 C.M.R. at 222.

Major Gannon talked about the *Wykeman* case as argument or a case that should compel you to decide that there is no severance of the ACR. That case is really distinguishable. It was a guilty plea. It had two detailed counsel. One detailed counsel would not be accepted by the convening authority. The court decided that appropriate regulations gave the authority to the detailing authority to detail that counsel to the case even though as an assistant. And therefore, he should have been allowed to work the case.

The court then considers whether the assistant and detailed counsel were able to work the case and they decided that if there was harm, it was harmless. However -- this is the important part of the case -- interference with either detailed counsel -- we're not even talking about severance. There was severance here. Interference was determined to be a violation of Article 38(a). And that's at 67 M.J. 456.

I spoke to you earlier during my initial argument about the right to military counsel being greater than the civilian counterpart and I distinguished it from the

right of a civilian counterpart to a public defender. The Supreme Court makes that distinction at -- in *Morris v. Slappy* at 461 U.S. 1.

MJ: I'm sorry. Would you say the site again.

CC (Mr. Faraj): *U.S. v. Slappy*, Your Honor. 461 U.S. 1.

MJ: Thank you.

CC (Mr. Faraj): And in our -- our Court of Military Appeals sounds off on that in *U.S. v. Gnibus* or *Gnibus* -- perhaps the "G" is silent -- G-N-I-B-U-S, 21 M.J. at 8. And they say the congressional mandate that service members are entitled to more than the minimum that the constitution requires cannot be questioned by this court. And they go on to say the attorney/client relationship may not be severed without good cause.

Major Gannon argued on and on and on that the ACR did not sever. And I want to, again, distinguish it from 6th Amendment right to counsel, the general lay type of right to counsel and the type mandated by the UCMJ. It's a greater right. It's a right to a detailed counsel and a civilian counsel. And it simply is not -- the government does not meet it's obligation by simply having the counsel available or the person available. It must be a detailed counsel available.

Major Gannon argued about their case in *Hutchins* was not the -- the decision of the court was not fatal to the charges. The *Hutchins* case -- the *Hutchins* court dismissed the charges. They authorized a rehearing, but they dismissed the charges. They didn't send it back for resentencing. They didn't send it back for some other -- they dismissed the charges. That is the most extreme remedy they have and that's what they did. Now they authorized a rehearing and they get to do that. And that's important for you to consider in this case.

The government, if you hold for the defense in this case, may appeal; probably will appeal. And the courts will sound off on it, and you'll probably be right; but even assuming you're wrong, we get to do this over again. If we move forward without a remedy and there's a conviction, this man may find himself in jail for several years before he is availed of whatever legal right the court decides that he should have. We don't

get a right to appeal. We don't have a right to an interlocutory appeal of your decision. They do.

Major Gannon went on and on and on to argue something that I believe is a red herring. This is an Article 38 issue that is clarified by the case law on what is good cause. This issue about reasonableness of the defense counsel's conduct, status, conduct, and time is really a red herring. We asked to remain on active duty. We didn't have a red telephone to Lieutenant General Mattis or perhaps to the immediate supervisors that led to General Mattis, but we took the measures that we understood necessary to extend on active duty. The 30-day extensions -- remember those happened about two to three months before we got to those dates in anticipation of getting back into trial. Redmond's correspondence is revealing. It supports what Colonel Vokey said all along in which Major Gannon now attacks.

In any event, this isn't about -- this isn't about what Lieutenant Colonel Sullivan did and what myself and Lieutenant Colonel Vokey did. This is about where the government wound up after four and a half years of litigation and where we're at. They continue to have their trial team intact. This defense team is no longer intact. And if it is intact to the extent that Major Gannon is arguing that the ACR survives, it is not -- it is not intact as a detailed counsel and civilian counsel. And that's what Article 38 requires.

The fact that Lieutenant Colonel Sullivan requested to remain on active duty in March of 2009. Well, I don't know why he did it then, but it probably -- it's probably because he came to the end of his tour or whatever it was, whatever period that he was called to active duty for. When we submitted our request for retirement 14 months out, who -- who would have known that we were going to be here in 2010? Most cases don't take that long. Even complex cases, you know, you're done within a year. We were 14 months out and we got another 4- to 5-month extension on top of that.

So that's a red herring and there is nothing in the -- in the case law that supports the argument as to reasonableness of the defense counsel. Defense counsel have obligations, requirements. They're required to show up in court. That's what *Hutchins* talks about and they admonished Captain Bass for not coming. We're

here. We're here to argue. And that shouldn't be held against us or held against our client because we decided to show up and represent the client in this case.

In the entire argument about unscrupulous detailing authorities detailing people at the end of their careers or at the end of their tours or junior counsel, I think we have faith and trust the Marine Corps officers to do the right thing when they're -- when they have a job to do. And again, it's -- I find that to be an unreasonable argument.

We went on and on about Lieutenant Colonel Atterbury. The correspondence in Lieutenant Colonel Atterbury's package clearly states that he is on the Haditha and Hamdaniyah case. And that's all we've argued. We didn't argue that it was specifically for this case. These cases were considered in totality as a whole, and they decided to keep a trial team on the cases for their institutional knowledge and that's what this is about.

And I didn't -- I didn't understand the whole thing about the speedy trial. We waived our right to a speedy trial a long time ago. But this has nothing to do with speedy trial. This has to do with Article 38 rights that are supposed to be afforded to Staff Sergeant Wuterich by detailing of his detailed counsel. And one issue that was not addressed by Major Gannon -- and I want to reinforce it -- and he talked about you wanted to -- you should have asked Staff Sergeant Wuterich who he wants to be represented by -- or whether he wants to be represented by Lieutenant Colonel Vokey. That's not the colloquy. The colloquy that never took place is the one where you, sir, would ask him -- well, you'd ask the detailed counsel, Now is anyone else detailed to this case? And there is. It was Lieutenant Colonel Vokey and Major Faraj, and they've never been released.

And so that's the -- that's the heart of the issue that the -- that this court has to deal with; but more importantly, that the government has to deal with.

The landscape has changed. *Hutchins* created a problem that the government must now solve. One of the remedies is to dismiss this case and start over again and that would solve the problem. He gets new detailed counsel, and we begin litigation again.

But if you find -- and I don't think the government's argument as to reasonableness of the conduct of defense counsel. But even if that were a consideration for you, then I'd ask you to consider what we did to remain on this case. And I can't prove a negative. I can't prove what discussions that happened or who I should have talked to and who I should have talked to and who I should have -- did not talk to. I submitted correspondence. I seem to recall that the process to withdraw a retirement was much different than they -- but I don't have evidence. I don't have a memory from two years ago.

But here's what's more important, what's really important: The duty is on the government. The government recognized that Haditha was going on. Colonel Jamison was right across the grinder. He was aware that Vokey and Faraj was leaving. He was aware that we were retiring. He was aware Haditha litigation was ongoing. And at the time -- and I'm not blaming him for anything -- at the time, no one grasped, no one understood that release from active duty is not good cause. We now know it's different. That's -- that's the issue here, Your Honor. Unless you have questions, I'm done.

MJ: I do not. Thank you.

CC (Mr. Faraj): Thank you.

MJ: Okay. As I see it now then, what we need to discuss is the next time that we get on the record. We'll do that off the record after we get done here, and we'll talk about the date of when we will hear the UCI motion.

Anything else from counsel?

TC (Maj Gannon): Your Honor, the only thing the government would say is -- it has to do with Mr. Faraj's argument. It's one sentence. Dismissal without prejudice, this case will reach the statute of limitations on November 19, 2010. I just wanted to bring that to the court's attention.

CC (Mr. Faraj): Is that a consideration for the court, Your Honor?

MJ: I just wrote it down, so I don't know if it's a

consideration or not. But if you would like to rebut that, you may.

CC (Mr. Faraj): Well, I don't have any case law but based on practice in this court and in other courts in this circuit, judges make decisions based on law of the case and not whether a crime was committed or not committed, whether the accused is innocent or not innocent; but based on the law before the court and the facts before the court. And so that would be our position.

MJ: I understand that completely. Thank you.

All right. Nothing further then, the court's in recess.

The Article 39(a) session recessed at 1137, 14 September 2010.