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 UNITED STATES )  
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 vs. ) Article 39(a) session  
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 Frank D. Wuterich )  
 SSgt, USMC )  
 XXX XX 3221 )  
 HqBn, 1stMarDiv )  
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The Article 39(a) session in the aforementioned case was opened on 25 April 2011, at 0905.

**PERSONS PRESENT**

MILITARY JUDGE: LtCol D. Jones, USMC  
 TRIAL COUNSEL: Maj N. L. Gannon, USMC  
 TRIAL COUNSEL: LtCol S. P. Sullivan, USMC  
 DEFENSE COUNSEL: Maj M. L. Marshall, USMC  
 CIVILIAN COUNSEL: Mr. N. Puckett, USMC, Retired  
 CIVILIAN COUNSEL: Mr. H. Faraj, USMC, Retired  
 COURT REPORTER: LCpl N. L. Greene, USMC  
 ACCUSED: SSgt F. D. Wuterich, USMC

[The Article 39(a) session was called to order at 0905,  
25 April 2011.]

MJ: The court is called to order.

We have a few changes from the last time we were in court. The last time we were in court was 2 November 2010 for this case and today's date is 25 April 2011.

Last time we were in court, we argued a motion and then there was some appeal to CAAF regarding the witness -- or excuse me, the counsel issue and CAAF heard oral argument around 1 April. And on 4 April, put out a ruling that we have had marked as Appellate Exhibit CXII. It's a 4 April CAAF order denying the defense's motion and indicating -- or leaving a possibility open of further litigating the issue both for the judge, if the judge wanted to, *sua sponte*, or for the counsel. And so we are here today to do that.

I'd like to mention the parties that are different from last time we were in court. First off, we have Lance Corporal Greene has replaced Staff Sergeant Myers. Major Gannon is still here. Captain Brower was working on the case for some time and now he's been released from all further participation in this case. He's deployed somewhere. Lieutenant Colonel Sullivan was on the case previously and he is once again with us. He was excused last time we were on the record. Mr. Puckett and Mr. Faraj are both here. Obviously the accused is here, Staff Sergeant Wuterich. And Major Marshall was not here at the last session of court. She had also been excused. And she's here today. So we have three defense attorneys. We have two prosecutors. And our court reporter has changed.

What I'd like to do is just briefly capture the exhibits that we have had marked and summarize the 802 conferences, and then we'll go forward with the motion that we have for today. CX is the defense motion regarding counsel. CXI is the government's response. CXII is the 4 April CAAF order that I just mentioned. CXIII is an e-mail ruling that I put out -- that was from the 802 conferences. I just wanted to put that in the record. And CXIV is a case of *U.S. versus Lee* that I just received from the defense. The cite on that for the government is *U.S. versus Captain Jonathan Lee* from

NMCCA. I guess this was an unpublished case. Okay. I thought it was published, but it's unpublished. NMCCA 200600543 is the cite on that.

And next, I'd like to summarize the 802 conferences. On 8 April 2011 I had an 802 conference. I was in Okinawa, Japan. The parties were all over the country. Participating was myself, Major Marshall, Major Gannon, Mr. Faraj, Mr. Puckett. And this is where we talked about the CAAF ruling from 4 April. And the defense put the court on notice that they did want to file a motion. They wanted to abate the proceedings for Mr. Vokey to be retained or re-established as counsel in this case at the government expense or brought back on active duty.

We talked -- they spoke briefly about the fact that Texas ethics or Texas rules might allow Mr. Vokey to leave his firm, participate in the case, and then go back to his firm without there being a conflict of interest or something to that extent.

We talked about scheduling, which with this many parties is always difficult. I appreciate Mr. Puckett being willing to move a case that he had this week. I think it was an admin board. And then he had some things at Camp Lejeune that he was able to move, so I appreciate that. And then we were able to get together 25 April, today. We started a little bit late, but we're on schedule meeting today.

What I indicated to the counsel was that I wanted to litigate the motion to preserve the trial dates in case we still go to trial and the motion is denied. We still have trial dates for June -- right at the last week of June until about July 22nd. So I indicated that the sooner we would hear the motion, the better for planning purposes for all parties.

And so I instructed the defense if they had a motion, they needed to file it within a week and they did. They filed it a week later. I gave the government one week to answer. They answered within a week. And so I have received both motions. I've read both motions and all of the things that were attached to the motions. And then we're here for this Article 32[sic] today. So that was on 8 April.

On 20 April we had another 802 conference. And again, this is another telephonic conference. I was in Iwakuni doing a case. I had received three or four days earlier the defense motion. I had not read it yet. I was in a contested trial. I got it over the weekend there and did not read it on Sunday. And Monday I started a contested trial. So I had to tell the counsel I hadn't read their motion yet. But I was able to read it, I think, on Wednesday after we spoke.

But on 20 April -- and again, these are my times -- Friday, 8 April and 20 April -- that's in Japan time -- or days. So I don't know if it coordinates with here. But it was 1215 we met. We had an 802 conference with Major Gannon, Mr. Faraj, Mr. Puckett, and Major Marshall. And again, the accused was not a party to this 802 conference, just like he was not on the last one.

We talked about, principally, witness production for the motion. The defense was concerned about putting their case -- establishing the record for the motion and that they felt that having listened to the CAAF arguments, they needed to do a better job on establishing the record. They were obviously concerned that they wanted to have all the witnesses to testify in this case -- for this motion that they might need. The government brought, to a certain extent, by indicating that this motion was largely a regurgitation of an earlier motion and that we've heard from a lot of these witnesses on the UCI motion or at some time in the past and that some of these witnesses would not be necessary to hear from.

So we talked about witness production. That's why I put in an e-mail that I sent out to the parties. I indicated that I was not requiring the production of anybody other than Colonel Redmon. I wanted him to be able to testify telephonically. I indicated I didn't need to see anybody in person, but I did want to hear from Colonel Redmon. I did want to hear from Mr. Vokey.

And -- and then these other people -- there was a request for Colonel Favors, General Walker, Lieutenant General Helland, General Mattis, and Colonel Jamison. Colonel Jamison's available locally. But I said that I wouldn't require any of those witnesses unless the defense could give me a better showing as to why I actually needed to hear from them during the motion

session. And I -- but I did indicate to the government, please -- and the defense, please get phone numbers for all of these people so if we need to call them -- and I felt I needed to know more evidence for the motion, I would certainly take that up. So those are some of the things we discussed on 20 April.

And then I was instructed or told by the defense something I had no knowledge of and that was that Mr. Vokey -- well, I thought from the phone conversations, Mr. Vokey was detailed -- detailed himself. But in some correspondence I received as part of the government motion, I've realized that I guess Mr. Vokey might have detailed himself. He was detailed to the case by the RDC West, I guess which would have been him. And then more importantly, that Lieutenant Colonel Simmons as the RDC Pacific -- Lieutenant Colonel Phil Simmons was the Regional Defense Counsel Pacific I believe from 2004 to 2007. And that he was given detailing authority by the general, General Mattis, on 12 December 2006 to detail other people to the different cases involved in the Haditha, Iraq incident that allegedly occurred during November 2005.

So General Mattis, who was the Commanding General, U.S. Marine Forces Central Command or CENTCOM, gave Lieutenant Colonel Simmons detailing authority which the reason that that was of a concern to everybody, especially me, was that I replaced Lieutenant Colonel Simmons and -- around July 23rd of 2007, I became the Regional Defense Counsel Pacific. So we talked real briefly on the phone about -- about that issue. And there was certainly no disagreement by the government that Lieutenant Colonel Simmons was given that authority.

And then the question was, Does that remain with his billet or was that an authority given to him? Because according to the letter from 12 December 2006, then I took Lieutenant Colonel Simmons' place as Regional Defense Counsel Pacific about seven months later. I can also see that there was a letter -- 17 January 2007. So about almost a -- a little over a month later where Lieutenant Colonel Simmons did detail a bunch of people to the case.

So I told the parties that I had no knowledge of the detailing of Lieutenant Colonel Simmons, had never

discussed the issue with Lieutenant Colonel Simmons, had no idea why that -- he was the detailing authority, who he detailed, and we never discussed the issue to my knowledge when I took over as the Regional Defense Counsel. I have no recollection of that whatsoever.

I do know that Lieutenant Colonel Simmons is -- that the defense spent the time trying to find Lieutenant Colonel Simmons, so we'll see if his memory is the same as mine. But I don't have any memory of ever discussing the case with him or his detailing or anything to do with the *Wuterich* case or any of the Haditha cases. So that was an interesting issue.

And then I was told that Lieutenant Colonel Vokey wouldn't be here today and I said I would like to have him available by telephone so that -- in case I had any questions even if the parties decided not to call him regarding his participation in the case. That was the 802 conference from 20 April.

And then before we got on the record today, we talked about witnesses that would be available to testify. We talked about Colonel Redmon is waiting, standing by to testify now. We would take him first. Mr. Simmons had a court engagement; we would work around his schedule, try to take him next. And that -- and then whoever else the defense wanted to call since it's their motion.

The last 802 conference was done here in the presence of all parties and the accused. I think Mr. Puckett was out making some copies. He was not here during the three or four or five minutes that we talked before we got on the record. And I think Major Marshall was with Mr. Puckett. So that was with Mr. Faraj, the accused, and the two prosecutors.

Okay. So that's my summary of the 802 conferences, but I invite both sides to add anything to my summation or correct anything that I said from any of the -- the three 802 conferences from 8 April, from 20 April, or from the few minutes before we got on the record today.

Government?

TC (Maj Gannon): Yes, Your Honor. Nothing to correct; just to add. From the 20 April 802 conference, the government discussed the issue of General Conway. The court and

the defense -- with the defense's agreement specifically mentioned that they did not require us to track General Conway down. They, in essence, withdrew that discreet component of their request. And therefore, I have no contact information for General Conway at this time.

MJ: Thank you. You're right. I never even wrote down his name because there was not an issue, but I should of written his name with the other people.

Mr. Puckett, anything to add?

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

MJ: Okay. Very well, then. So we're here to litigate the motion as a result of the latest CAAF ruling. And as I have indicated, I've read the motions and we have the Lee case marked.

So we don't need any objection, but Mr. Puckett, do you have anything to say before we call the first witness?

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

MJ: Okay.

CC (Mr. Puckett): We would challenge the military judge for cause --

MJ: Okay.

CC (Mr. Puckett): -- from hearing this particular motion. We'll reserve the issue of whether or not you need to be challenged for the entire case. But if I could be heard briefly on the rational for that.

MJ: Right. And we should of done that. I had a note up here to talk about that.

CC (Mr. Puckett): It's okay, sir.

MJ: Besides the issue of doing the motion -- and that was taking any voir dire or challenge. So let's do that -- let's do that now.

Do you have any voir dire or are you just challenging me?

CC (Mr. Puckett): Well, sir, you sort of laid out your -- what you recall or don't recall about that period of time and the fact that you were surprised. But let me just make some statements here, give you our position --

MJ: Okay.

CC (Mr. Puckett): -- and then we can go from there.

Your Honor, we want you -- before you rule on this challenge, we want you certainly to take some time to read the *Lee* case. Because, first of all, we will be calling you. And I'm sorry. I didn't mean to be so familiar. We will be calling Lieutenant Colonel David Jones who happens to be you on this motion.

And here's why: When you look at the documents -- and the judge correctly stated his interpretation of the process is -- is what happened -- because Lieutenant Colonel Vokey was going to participate in the Haditha cases as a counsel for Staff Sergeant Wuterich, the convening authority detailed by letter -- the convening authority assigned detailing authority to Lieutenant Colonel Simmons, the Regional Defense Counsel Pacific.

Now, if you look at the letter, it's identical to the letter which granted -- I don't want to get too complex too fast here -- it's identical -- sir, the letter that you have is to Lieutenant Colonel Simmons. And as you know, he was Regional Defense Counsel Pacific. I believe there's a typo on there that may say RDC West somewhere on the letter. Maybe there's not. If you don't see that, then I'm mistaken, sir.

Well, let me -- let me -- let me get to the heart of the matter. It should be clear to the court that in order to avoid conflict -- Lieutenant Colonel Vokey could certainly not act as supervisory authority to any of the other counsel if he was representing one of the accused. And so Lieutenant Colonel Vokey was, in and about that time, assigned detailing authority for the Hamdaniyah series of cases, another large multi-defendant situation. And so they very cleverly broke that out, so that there wouldn't be any conflict.

Now, as the court knows and as the court came -- and this is the important fact, Your Honor -- the court came into this knowledge that I'm about to say before the



court became a military judge and that's important for the *Lee* case. You succeeded -- and again, sorry to be too familiar.

MJ: Oh, that's fine.

CC (Mr. Puckett): You succeeded Lieutenant Colonel Simmons as the RDC Pacific. Now, there was no subsequent letter issued to you to reaffirm your detailing authority, but you became the detailing authority for these cases. Not so much to where you might have to detail additional counsel. Although, if there arose an IMC issue, say, it would come to you because you were the next in the chain of command. Similarly, the government has taken the position throughout that -- and Judge Meeks, the military judge on 9 March.

CC (Mr. Faraj): 11 March.

CC (Mr. Puckett): I'm sorry, 11 March -- we have this in the transcript -- 11 March 2009, informed our client that he -- that his counsel had been relieved. The exact same advice he gave in the *Hutchins* case he gave to our client. And so the government has erroneously briefed several times that Lieutenant Colonel Tafoya relieved Lieutenant Colonel Vokey. Now they, too, perhaps had forgotten or hadn't paid any attention to the fact that the detailing authority didn't rest with RDC West, it rested in RDC Pacific. So when it comes down to demonstrating -- proving facts for our motion that the -- that Lieutenant Colonel Vokey was, in fact, not relieved by the detailing authority, we would have to call you as -- and we are calling you as a witness to testify to that.

Now, the case -- the case of *Lee*, which of course is an unpublished opinion, but I think it gives -- provides some guidance from our parent court here, what sort of their interpretation of the law would be -- indicates that in accordance -- well, basically they said that the judge in this case was mandatorily disqualified under R.C.M. 902(b)(1). And of course the military judge recalls giving advice on many, many, many occasions -- I will not be a witness for either side in this case and I am not aware of any matters which may be grounds for challenge. That means it's the most important disqualifier that a judge can be part of.

Now, we have sort of anticipated what your thought process might be and not -- not to -- to be too presumptuous here, but the military judge may think, Well, Lieutenant Colonel Simmons didn't tell me about that. He didn't show me the letter. I didn't know I had detailing authority. I didn't exercise detailing authority. I didn't relieve Lieutenant Colonel Vokey.

Well, sir, those are all facts in issue which have to be tested by the adversarial process and, therefore, cannot be simply a matter of -- well, let me give you an analysis -- a distinguishing type of situation, sir. You and I have been in court together before where you have revealed to the parties that while you were Regional Defense Counsel, you and I worked on a couple of cases together. And that's a fact which you revealed to the parties in case there's some bias issue that they may want to explore. That's different than a -- than a regulatory disqualification under the R.C.Ms as to whether or not you're going to be a material and necessary witness in the case.

And when it comes to this *Hutchins* issue, which we're now styling it as -- as a handle, witnesses have to testify and be subject to cross-examination. So the point is your answers to the questions doesn't control whether or not you're a witness, whether you knew anything or didn't know anything. And we believe, therefore, that you are disqualified -- mandatorily disqualified under the R.C.Ms and under the analysis of the case law here from hearing this motion.

MJ: Okay. So you don't wish to do any voir dire? You just wish to make the challenge based on the R.C.M. or statutory law and the *Lee* case?

CC (Mr. Puckett): Well, sir, we can -- no, we don't want to do any voir dire because we already have the evidence before the court that you are, in fact, in that position to give evidence.

MJ: Okay.

CC (Mr. Puckett): And we don't believe that simple voir dire and you sort of making a determination in your own mind that, well, I don't know anything; therefore, I won't be of help to any side is not your call to make.

MJ: Government, any voir dire or challenge? Anything else?

TC (Maj Gannon): Yes. The government has voir dire, Your Honor.

MJ: Okay.

TC (Maj Gannon): I'm going to have something marked, sir. It's attached to the motion. While that's being marked, Your Honor, can you please state for the record, sir, when you were -- when you were -- when you were assigned the position as the Regional Defense Counsel based out of Okinawa, which I believe is referred to as RDC Pacific?

MJ: You mean when I took over -- when my orders became effective?

TC (Maj Gannon): Yes, sir.

MJ: I don't know the exact date, but we could look it up. I finished the Hamdaniyah case with Mr. Faraj and you --

TC (Capt Gannon): Yes, sir.

MJ: -- on a Friday.

TC (Maj Gannon): Yes, sir.

MJ: And the next day on Saturday, I went to Okinawa and took over duties as RDC Pacific. So I think it was around July 23rd -- or somewhere around there -- of 2007.

TC (Maj Gannon): Can you describe for us, sir, the process of turnover that you engaged in, if any, with Lieutenant Colonel Phil Simmons, then the RDC Pacific?

MJ: We just talked about some of the duties. I don't remember exactly how long he was there, that we were there together. But we talked about the duties of being the Regional Defense Counsel, about how to get to Hawaii and Iwakuni, about what my responsibility would be as far as how many cases I would be allowed to take. That was a major issue, because he had been going all over doing Hamdaniyah cases and other cases as the RDC Pacific. And Colonel Favors was the new Chief Defense Counsel of the Marine Corps, and she did not want me to take any cases or very few. And that was a source of frustration for me at the time. So I spoke with him quite a bit about that issue and what he was doing.

TC (Maj Gannon): How long did the --

MJ: He helped me check in I guess.

TC (Maj Gannon): How long did the turnover process take place, sir?

MJ: I don't remember. I don't remember how long he was there and I was there at the same time. I want to say it wasn't very long. Maybe a week or so or less.

TC (Maj Gannon): I've never been there, sir, so forgive my ignorance. Is this a situation where you take over his office? It's the same -- you're working out of the same physical plant, and you're taking over his desk? His computer? His office?

MJ: Right.

TC (Maj Gannon): Okay.

MJ: I took over his entire office. And if I remember, he was already all checked out of the office by the time I got there. He had already had all his things gone.

TC (Maj Gannon): So he had removed his files from the office, sir.

MJ: To the best of my knowledge, yes.

TC (Maj Gannon): Has -- since the time that you were occupying that office and functioning as the Regional Defense Counsel, did you have occasion to stumble upon any work product or anything that existed that Lieutenant Colonel Simmons had left behind?

MJ: No. You're talking about regarding this case?

TC (Maj Gannon): Regarding any case, sir.

MJ: No case to my knowledge and I certainly had nothing on this case.

TC (Maj Gannon): Roger that, sir.

And then specifically with this case, the *United States versus Wuterich*, are you familiar with the fact -- I know you are, sir, but I'm going to ask these questions

just to capture on the record -- are you familiar with the fact that the, quote/unquote, Haditha cases encompass a number of cases?

MJ: I am.

TC (Maj Gannon): And there were accused that were charged or investigated that were associated with the actual shooting event, i.e., the alleged unlawful killings of 24 Iraqi civilians on November 19, 2005; that that's a component of the cases?

MJ: Yes.

TC (Maj Gannon): And that there's another subset of cases that we've called the reporting piece where those accused are more in the chain of command and they were looked at for the efficacy and proficiency with which they reported this incident?

MJ: I'm aware of that.

TC (Maj Gannon): Sir, did you ever consult with Lieutenant Colonel Simmons about either the shooting aspect of the alleged misconduct or the reporting aspect of the alleged misconduct?

MJ: Not to my knowledge. We never discussed Haditha cases to my knowledge.

TC (Maj Gannon): Did you ever talk with him about this notion that there was a detailing authority resident in Lieutenant Colonel Simmons?

MJ: Not to my knowledge. I was very surprised to hear about this last week.

TC (Maj Gannon): I have had marked as -- I guess it would be CXV. I'll show this to the defense before I show it to the military judge.

Your Honor, I'm going to go ahead and hand you Appellate Exhibit CXV and ask you to take a moment to look at that, sir.

MJ: Okay. I've seen this. It was part of your motion.

TC (Capt Gannon): Yes, sir.

MJ: This is a letter from General Mattis to Lieutenant Colonel Simmons giving him detailing authority.

TC (Maj Gannon): Sir, have you ever seen that letter in terms of did Lieutenant Colonel Simmons pass that letter to you in the summer of I guess it would be 2007 when you did turnover?

MJ: No.

TC (Maj Gannon): Prior to today, were you aware of whether or not detailing authority had -- where that actually resided?

In other words -- I guess I could ask the question again. Did you have any inkling that you may be -- that there was a possibility that an argument could arise that you were a detailing authority in this case?

MJ: You asked me did I know today?

TC (Maj Gannon): Yes, sir.

MJ: I knew today because of our 20 April 2011 802 conference where this issue was raised by the defense.

TC (Maj Gannon): Prior to that April -- that 802 conference, sir?

MJ: I had no knowledge whatsoever that Lieutenant Colonel Simmons was the detailing authority or that he had a letter from General Mattis detailing him -- having him detail the cases. That was very surprising to me as to why the RDC Pacific would have been given detailing authority. But I can understand it, I guess having looked at it, that Colonel Vokey couldn't detail people I guess once he took the lead case.

TC (Maj Gannon): And have you consulted in any way, shape, or form in your capacity as the Regional Defense Counsel Pacific on this case or even the -- any of the shooting or reporting piece cases that are referred to collectively as the Haditha cases?

MJ: No. I had no consultation or participation in the Haditha cases.

TC (Maj Gannon): I'm going to take Appellate Exhibit CXV back and leave that with the court reporter.

Sir, the government has no further voir dire and does not -- does not have any challenge for the military judge. Thank you, sir.

MJ: Okay. Mr. Puckett, you're standing.

CC (Mr. Puckett): Yes, sir. His questions raised some questions that we would like to pose to the court.

MJ: Sure.

CC (Mr. Puckett): Your Honor, do you remember receiving a turnover binder from Lieutenant Colonel Simmons?

MJ: I don't remember receiving a turnover binder. I remember him helping me specifically with -- I will say this, I am very ignorant on computers, and Lieutenant Colonel Simmons is a genius on computers. And I do know that he -- when he left the office, he left all of his -- or he did some things I guess with the computer so I would have access to cases or something. I'm not exactly sure what he did, because I don't ever remember using it. But I know he fixed my computer and did a few things before he left on the computer.

CC (Mr. Puckett): Well let's explore that a bit, Your Honor. In the old traditional sense of having actual -- a big notebook full of information, do you recall receiving that from him because he recalls making it available to you?

MJ: I don't remember getting a notebook, but I could have. You know, it's almost four years ago. I just have no memory of getting a notebook from him.

CC (Mr. Puckett): And even if there weren't a notebook, sir, or one that you remember, do you remember going through all of his files and discovering this detailing letter?

MJ: No. I've never gotten -- I never went through most of his files. I simply ended up deleting a lot of the files from my memory because -- yeah. I just -- I don't have any knowledge of ever discussing this with him.

CC (Mr. Puckett): Sir, do you agree that if you were the detail -- if you became the detailing authority, even unwittingly, that you would have necessarily had to act on IMC requests that may have filtered up as the

detailing authority for the Haditha cases?

MJ: Okay. You're saying if this -- if the detailing had come to me and not -- because I'm looking at this letter and it looks like it's detailing authority to Lieutenant Colonel Simmons, not to me. But you're saying if this is job specific, would I have been the person to act on IMC requests if this authority from General Mattis went from Lieutenant Colonel Simmons to me? I imagine I would have.

CC (Mr. Puckett): Yes, sir. And you also understand then that if there were any -- any kind of requests by any counsel to be relieved for good cause, that the detailing authority would be the individual who would do that?

MJ: The detailing authority could be one party who could relieve somebody for good cause I would imagine.

CC (Mr. Puckett): Yes, sir. And of course, as we all know and are becoming even more familiar with, that -- that process would have had to have run through a military judge and been approved and so forth. But you understand that the detailing authority is normally also the relieving authority?

MJ: Right.

CC (Mr. Puckett): Okay. And you understand that if that detailing authority devolved to you as the Regional Defense Counsel Pacific, that would have been you?

MJ: Right. I took Lieutenant Colonel Simmons' spot or job.

CC (Mr. Puckett): Right. Exactly, sir. So in the absence of evidence to the contrary; for instance -- let me just use an example -- unless -- unless there were a letter that were issued by General Mattis upon Colonel Simmons' retirement that directed detailing authority be vested in someone else, normally all of our authorities as officers in billets survive to the succeeding holder of the billet.

MJ: Are you asking me if I agree with that?

CC (Mr. Puckett): Yes, sir.



MJ: I don't know. I would assume that if -- I guess if the -- I don't know the answer to that. If this letter were to put delegation to the detailing authority to the RDC Pacific, I would agree with that. I don't know how I feel for the fact that the letter is written to Lieutenant Colonel Simmons and him personally and it's giving him the detailing authority. But the to line is Lieutenant Colonel Philip Simmons. The subject line is Lieutenant Colonel Philip Simmons. Nowhere in here does it say to RDC Pacific. I would agree with you that it would have devolved to me somehow to settle these issues if it would have said RDC Pacific. It does not. It's to him specifically and him purposefully. So I have no idea why it's to him specifically.

CC (Mr. Puckett): Yes, sir. Understand that. That's all good observation. But my point is in the absence of some different decision made by General Mattis -- first of all, forget about the Haditha cases and detailing authority. Would you agree that all of the duties for which the RDC Pacific is responsible and for which for a period of time Lieutenant Colonel Simmons was responsible became your responsibility?

MJ: I agree with that.

CC (Mr. Puckett): So if there was an additional special responsibility that were assigned to him because he was in that job and not RDC West and might be conflicted, could you agree that even unwittingly those duties may have devolved upon you?

MJ: I agree with that.

CC (Mr. Puckett): And do you not agree that that then makes you a witness in this case?

MJ: I don't know if I agree with that. I'd like to think about that issue. But I can see where you're coming from. That -- in other words, that at this point you would like to know if I had that detailing authority or how it got to me or what my knowledge would be, et cetera. Just like I would like to know from Lieutenant Colonel Simmons because I don't really remember exactly what folder he gave me or what occurred four years ago, so.

CC (Mr. Puckett): But, sir, let me -- let me just go one step further. If it becomes apparent to this court in its analysis of the letter and of the situation as it existed, we can -- we actually have Lieutenant Colonel Simmons on standby and would like to present his testimony if that's okay at this time.

MJ: Okay. I think one of the issues for the government was that when we talked about the 802 conference, you were worried about Colonel Redmon's schedule indicating that you had him available at 8:30 due to the -- I'll just put on the record -- the judge not getting his luggage until this morning because my luggage was lost. I came to court late and Colonel Redmon will have to be on standby. We'll have to call him if you need to, to take a break, and let him know we'll have to deal with his testimony later.

The defense's position is that I am not -- that I -- they are challenging me for cause to even hear the motion. So before we can get to the motion, we can't hear from Colonel Redmon. We're going to have to hear from Lieutenant Colonel Simmons and take his testimony and that might be helpful not only for the defense to make their case, but it might be helpful for me also to hear from him and what he remembers about our turnover to tell you the truth.

CC (Mr. Puckett): Yes, sir.

MJ: So I wouldn't mind hearing that testimony as part of this because if you are going -- if you are -- as I understand it, your position is you're challenging me for cause at this point, correct?

CC (Mr. Puckett): Yes, Your Honor, that's correct.

MJ: Okay.

CC (Mr. Puckett): By way of a motion or however you want to consider it.

MJ: Okay. So if that's the case, I definitely would like to hear from Lieutenant Colonel Simmons and see what he remembers and what he may have told me or files he may have left me, et cetera. I would like to hear from him and see if his memory is better than mine about what occurred.

Government, you're standing?

TC (Maj Gannon): Yes, I am, Your Honor. And I agree with the court's course of action so far. Here's my concern and I'm just throwing it out there, sir. The defense has basically moved and challenged you at this point.

MJ: So you don't think I should hear from Lieutenant Colonel Simmons?

TC (Maj Gannon): So I think you need to rule, sir, on the challenge as it exists right now so that -- before we can go forward any further. Now, I'm not objecting to you taking and listening to Lieutenant Colonel Simmons' testimony; however, I think that for the record we need a ruling now based on any showing they've made or failed to make that you can or cannot sit. Because I would think that Lieutenant Colonel Simmons' testimony will be part and parcel to this motion. So the government would respectfully request that you at least consider making a ruling now so that the record is clear. We can take a break if the military judge wants some time to look at some authorities or to slow this process down. But before we hear any testimony or do anything in terms of litigation, the government moves that we take a -- we take a pause and that you rule on this motion, sir.

MJ: Okay. Defense, any objection to that?

CC (Mr. Puckett): Yes, sir. This is actually a motion to challenge you under the R.C.M. to sit as military judge, because you're going to be one of our witnesses. In order to rule on that motion as to whether or not to disqualify yourself under the rules, we'd like to present evidence and be able to argue that evidence.

MJ: Okay. I'm going to go ahead and hear from the witness at this time. I agree with the defense. I'm not going to make the ruling right now. I am -- it's a ruling challenging me for cause, so if I'm going to hear that I'd like to have all the evidence that I think I might need to make that decision including from Lieutenant Colonel Simmons. And I'd like to hear what his recollection is about the incident. So let's keep our places for just a moment.

The court's in recess.

[The Article 39(a) session recessed at 0941, 25 April 2011.]

[The Article 39(a) session was called to order at 0956, 25 April 2011.]

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

Evidently we have Mr. Simmons on the line.

So government, please.

TC (Maj Gannon): Yes, sir.

Mr. Simmons, can you hear me?

WIT: I can.

TC (Maj Gannon): This is Major Nick Gannon, sir. Good afternoon. I'm going to go ahead and swear you in. But before I do that, sir, are you in a place where you can testify without being disturbed?

WIT: I am in a place where I can testify without being disturbed and congratulations, Major Gannon, on the promotion.

TC (Maj Gannon): Thank you, sir, very much. I appreciate that.

In addition to that, sir, do you have any materials that -- in front of you? Any papers or any other references?

WIT: I have my paramedic study guide in front of me that I was going through, but it doesn't relate to this case at all.

TC (Maj Gannon): Okay, sir. If I could please respectfully request that you put aside any papers that you may have and not refer to them without -- without Mr. Puckett directing you to do so, sir.

WIT: Certainly.

TC (Maj Gannon): Thank you very much, sir.

Lieutenant Colonel Philip Simmons, USMC, Retired, was called as a witness by the defense, was sworn, and testified as follows:

**DIRECT EXAMINATION**

**Questions by the prosecution:**

Q. You are Lieutenant Colonel Phil Simmons, USMC, Retired?  
A. Correct.

Q. And you've formally -- your last billet before you left active duty, please, sir.

A. My last billet was the Regional Defense Counsel for the Pacific Region.

TC (Capt Gannon): Thank you very much, sir. I'm going to go ahead and turn you over to Mr. Puckett. Stand by, please.

MJ: Did we get your city?

WIT: Yeah.

MJ: Mr. Simmons, this is Lieutenant Colonel Jones. How are you?

WIT: Well, thank you.

MJ: Good. Did we get your city and state?

WIT: Arch Cape, two words, Oregon.

MJ: Okay. Thank you.

Mr. Puckett, please.

**Questions by the defense:**

Q. Mr. Simmons, this is Neal Puckett. How are you, sir?

A. Well. Thank you.

Q. Good, sir. You mentioned studying some materials. What is your current occupation, sir?

A. I am currently a student.

Q. A student. Okay. Studying what, sir?

A. Yes. I'm studying to get a paramedics certification.

Q. And is that to work as a paramedic?

A. Correct.

Q. Okay. That's laudable, sir.

Sir, we have some questions concerning your last duty station and the last duties that you performed. Sir, do you remember while you were serving as RDC or Regional Defense Counsel Pacific being assigned detailing authority for the group of cases known by the moniker "Haditha"?

A. I do.

Q. And how did that come about, sir, and why did it come about?

A. This is several years ago. I -- at the time, I -- I was involved in another set of cases referred by the moniker "Hamdaniyah cases" or "Pendleton 8 cases." It was a group of cases stemming from an incident in Hamdaniyah, Iraq, I think in 2006. And I was involved in one of those cases as a counsel.

And at the time, my understanding in working with the Chief Defense Counsel of the Marine Corps, when the Haditha cases came out, there was concern -- at least my understanding from the Chief Defense Counsel, the concern was that the Regional Defense Counsel for the West Region, Lieutenant Colonel Vokey, was -- had a client or a perspective client; had -- you know, had a relationship with one of the accused from the Haditha cases. I mean, the client or the -- one of the kids in the Haditha cases was talking to Lieutenant Colonel Vokey. And the Chief Defense Counsel had some concerns over Lieutenant Colonel Vokey's ability to properly detail all counsel or all the accused for those cases. And so she had directed me to perform that duty.

Q. And do you recall whether or not Lieutenant Colonel Vokey received similar direction or detailing authority in [inaudible]?

A. For the Haditha?

Q. No, no. For the Hamdaniyah cases?

A. Yeah. You know, I don't know who detailed Hamdaniyah. I know I didn't. And I -- and I -- I don't know if Vokey had it or not. I would suspect that would be the case.

Q. Okay, sir.  
A. Because the CDC did not detail. She delegated that task to her subordinates.

Q. Okay, sir.  
A. I know Vokey did not have a Hamdaniyah case.

Q. Right.  
A. So I can only presume that he was the detailing authority. I mean, I can -- I was IMC but I was never detailed to that case. I was involved with the IMC process. I was not involved as a detailed counsel.

Q. Understand, sir. Well, we're going to hear from Lieutenant Colonel Retired Vokey later, but I was just curious as to what your knowledge of that was. So what -- so that to your understanding was orchestrated or coordinated through the Chief Defense Counsel of the Marine Corps?  
A. Yes. The Chief Defense Counsel of the Marine Corps was the one who gave detail authority to her subordinates. That was my understanding.

Q. Now, one of the -- one of the facts or consequences in issue here, sir, is that I -- you know, perhaps because no one contemplated any of these cases lasting beyond people's retirement, you are -- you are given that detailing authority in a letter. Do you recall seeing that letter, sir, back in December of 2007?

MJ: Six.

CC (Mr. Puckett): Six.

WIT: I do. My recollection -- I haven't looked at it recently, but my recollection is that it came from the MEF Commander. I believe it was the MEF Commander who issued that. But it was from a commanding general. It was from the commander who issued that to me.

**Questions by the defense (continued):**

Q. Okay, sir. And that -- and we have a copy of that letter actually and it was General Mattis at the time. Do you recall General Mattis being the commander?  
A. Yes, I certainly do. Yeah. He was the commander. He was the commander of the MEF at the time.

- Q. Okay, sir. Do you know -- do you know if the fact that you're -- that you were, in fact, a sitting regional defense counsel had anything to do with the fact that you were made one of the detailing -- well, the detailing authority for the Haditha cases?
- A. Yes, I do. My -- I mean, I wasn't -- I was the RDC. The CDC -- the Chief Defense Counsel had three subordinates, three Regional Defense Counsel subordinates. One in the East, one in the West, and I was in the Pacific. And she chose me in the Pacific to perform this duty.
- Q. Do you know why she chose you as opposed to let's say RDC East?
- A. You know, I don't know why she chose me other than I was all -- I was at Camp Pendleton a lot because of my Hamdaniyah case. She certainly could -- she certainly could have chose RDC East, because he also was at Pendleton quite a bit. He had a Hamdaniyah case as well. She chose me for whatever reason she chose me. I don't know the reason.
- Q. Well, now, sir, I'm assuming by -- by your knowledge here about her -- or her involvement, the Chief Defense Counsel of the Marine Corps, that there were discussions about -- about how to do this. Is that right?
- A. Sure. Yeah. We certainly spent I'd say quite a bit of time discussing this.
- Q. Well, was there any -- was there any thought given to assigning some other judge advocate lieutenant colonel or colonel in the Marine Corps to be a detailing authority?
- A. No, no. I mean, I -- I do recall discussing with her and I do recall that it was -- you know, it wasn't going to be Lieutenant Colonel Vokey because he was -- he was involved. He was already tied into this. So it was going to be Scott, that was Lieutenant Colonel Scott Jack or myself. And so she chose me.
- Q. Okay, sir. Now let's move to the time in your memory when you recall preparing for retirement and actually retiring. Did you have an opportunity to turn over your duties in any kind of way, shape, or form to your successor?
- A. I did.



- Q. And who was your successor?  
A. Lieutenant Colonel David Jones.
- Q. Okay. And what -- can you describe for us what you recall of that turnover process? How did you do it?  
A. You know, it was a I would say somewhat typical for a Marine Corps officer turnover where we spent a couple of days -- not -- maybe not -- maybe a full day in total over the span of a few days, a few hours at a time -- not more than two or three days though -- primarily in my office going through the files that I kept and that I used to perform my duties.
- Q. Were those electronic files or hard copy files, sir, or both?  
A. That -- you know, I do most of my work electronically, so I believe the majority was electronic. I certainly may have transferred some hard files as well. I don't recall that.
- Q. Sir, do you recall mentioning to him that you had been also assigned -- perhaps we could call it -- as an additional duty not normally associated with RDC Pacific detailing authority for a group of cases that were going to be tried, if at all, at Camp Pendleton, California?  
A. I don't recall that specifically. I mean, I know -- I know he was aware of my involvement in the California cases in general, because that's what I was doing at that time in my life. I was spending a lot of time at Camp Pendleton. But I don't know if I specifically discussed with him the assignment I was given regarding detailing of the Haditha cases or not.
- Q. Well, sir, in your turnover files, let's talk about electronic files. Would the detailing letter have been resident in those files somewhere?  
A. I don't know. That I do not know if I included that in the RDC office files or not. I know if I had to find it, I could probably find that letter going through my electronic files because I keep all my electronic files. I don't recall if I ever placed that letter in a separate -- let's call it RDC PAC file or not. I don't know the answer to that. I suspect I probably did not.

- Q. But -- but whether or not you did, a search of those files even today might -- might reveal that it's there somewhere resident, accessible to the current RDC?
- A. Well, if they exist. I mean, my -- my recollection is that I turned over a set of files mostly on kind of like how to do business type files. Like, you know, it was electronic files that I would use to do my day-to-day tasks. And so, you know, were those files still present, then yes, a search of them would, you know, determine whether the file was there or not presuming that it hadn't been deleted if it was there.
- Q. But, sir, would it be fair to say that you were chosen to be the detailing authority for the Haditha cases primarily and exclusively because you were a sitting regional defense counsel?
- A. I think that's fair, yes.
- Q. And -- and it just so happened that the RDC billet you had was RDC Pacific?
- A. It was RDC PAC at the time, correct.
- Q. Now, at the time you retired, do you recall there being any discussion or correspondence that sought to transfer the responsibility as detailing authority for the Haditha cases to some other billet or some other officer?
- A. No, I don't believe that was ever discussed or contemplated.
- Q. Okay. One moment, sir.
- A. Mr. Simmons, how long did you spend in the Marine Corps?
- A. Twenty -- I think just shy of 22 years, 21 and a half years or so.
- Q. Sir, is it your experience in the Marine Corps that when you leave a job -- defense counsel, chief trial counsel, senior trial counsel, regional defense counsel -- that the -- your successor in that billet assumes all the same duties and responsibilities that you are leaving?
- A. Well, in the Marine Corps, certainly.

Q. Well, that's what I mean. In the Marine Corps.  
A. Sure. I mean, it's a little more difficult in defense specifically because you can't transfer a defense case. But as far as duties, then, yes, generally speaking, the successor in billet assumes the duties of the person he is relieving.

Q. But in terms of the budget, the geographic area, the supervisory responsibilities, detailing authority for that matter perhaps of -- when it arises, would you -- in normal Marine Corps tradition and organizational structure and procedure, would you consider all duties, unless otherwise removed, would transfer to your successor?

A. Yeah. I mean, I think it's fair. It's a fair [inaudible], especially in general. As a general term as a Marine Corps officer, that's certainly fair.

CC (Mr. Puckett): Very good.

Okay, sir. I have no further questions. He's available for cross-examination.

MJ: Cross-examination.

TC (Maj Gannon): I request a ten-minute recess, sir. We were not given notice of this witness. I want to go through some files I've got.

MJ: Okay. Very well.

Mr. Simmons, we're going to take a short recess and give the government a chance to formulate some questions and then we'll get back in touch with you. Can we just call you back in a few minutes?

WIT: You can. I would ask that it be relatively soon. I'm going to be on call here pretty quick to respond to fire calls. I don't want to have to step away if a call comes in while I'm on call.

MJ: Okay.

WIT: So if I could be --

MJ: Probably about -- probably about ten minutes?

WIT: Easy --

MJ: Okay. We'll call you back between 10 and 15 minutes, okay?

WIT: Thank you.

MJ: Okay. Very well. The court's in recess.

[The Article 39(a) session recessed at 1011, 25 April 2011.]

[The Article 39(a) session was called to order at 1027, 25 April 2011.]

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

We have Lieutenant Colonel -- or Mr. Simmons back on the line again for cross-examination.

Major Gannon, please.

TC (Maj Gannon): Thank you, sir.

#### **CROSS-EXAMINATION**

##### **Questions by the prosecution:**

Q. Sir, it's Major Gannon. Can you hear me okay?

A. Yes.

Q. Sir, did you -- when you conducted turnover with Lieutenant Colonel Jones for the RDC position in Okinawa, did you do that in person or over the telephone, sir?

A. I don't know -- I'm sure we talked on the phone prior to us changing billets. I know we've spoke either in e-mail or on the phone at least a bit. But the majority of any -- of the turnover was in my office -- or in the office.

Q. And so that would be physically in your presence with -- with Lieutenant Colonel Jones there physically with you?

A. Yes, in Okinawa Japan.

Q. And at that time, you would have had access to your electronic files and to your physical files in your office in Okinawa, sir?

A. Yes.

- Q. Sir, did you prepare a turnover binder to the best of your recollection?
- A. Yeah, I think I did. Actually I'm pretty certain I did. I always had in the past for previous jobs. I don't -- I had a pretty good feeling I did in this case just because that's what I do. So, yes, I believe that I did.
- Q. Okay, sir. Now, if I recall your testimony from direct examination, you cannot recall as you sit here today whether or not the letter that Mr. Puckett referred to, which is a letter that details -- or excuse me -- that gives detailing authority to you from December of 2007, you do not -- excuse me, 2006 -- if I remember your testimony correctly, you do not have a recollection of placing that letter in the turnover binder you may have prepared?
- A. No. In fact, I don't believe I did. I can -- if I had a turnover binder, I do not believe that that letter would have been in there. Actually I'm pretty certain of it. I am certain of it. If I did a turnover binder, it would have been policies and procedures type of stuff. I don't -- I don't -- I do not believe that letter would have been in a turnover binder.
- Q. Okay, sir. Roger that. Understood.
- Now, in addition to that, sir, if I remember your -- recall your testimony, you do not as you sit here today recall having any discussions with Lieutenant Colonel David Jones about this notion of detailing authority for the Haditha or any other cases.
- Is that accurate, sir?
- A. I'm sorry. Can you -- I got sidetracked. Can you say that again, please?
- TC (Capt Gannon): Yes, sir. If I recall your testimony from direct examination correctly, I believe you indicated that you do not -- as you sit here today, you do not have any recollection of having any discussions with Lieutenant Colonel David Jones about detailing authority for the Hamdaniyah cases or any other cases?
- MJ: Or Haditha?
- TC (Maj Gannon): Excuse me. The Haditha cases or any other cases. I apologize. I misspoke.

Thank you, Your Honor.

WIT: Yeah. What tied me up was the any other cases. I'm fairly certain that we at least discussed that CDC had detail authority for RDCs. I'm pretty sure I discussed that with him. I certainly would have. That's kind of an important thing. But I don't recall specifically for Haditha or Hamdaniyah. If that was the question, the answer is yes.

**Questions by the prosecution (continued):**

Q. Okay, sir. Thank you. I did not understand that distinction and now I do. So let me try to -- let me try to make sure the record is clear. You may have had a conversation with Lieutenant Colonel Jones about the fact that the Chief Defense Counsel for the Marine Corps had detailing authority for the various regional defense counsels.

Is that accurate?

A. Yeah. I am fairly certain I discussed that, at least in concept, with him.

Q. But you -- as you sit here today, you do not have any specific recollection of discussing with Lieutenant Colonel David Jones during the turnover process about this notion that any detailing authority for the Haditha cases had been delegated to yourself, sir?

A. I don't -- I don't recall telling him that. I may have, but I don't recall if I did or not. I don't have -- I don't recall. I mean, I don't -- I mean, we -- I mean, I don't think -- I don't recall discussing in detail with him my duties at Camp Pendleton, either in Hamdaniyah or Haditha. I mean, I don't recall detailed discussions with him. I think he -- I mean, he knew what I was doing in general and I certainly may have discussed with him in general. But I don't recall that as part of my -- as part of my turnover with him, I do not recall specifically stating my -- you know, I was detailed -- had detailing authority for Haditha cases. I do not recall ever telling him that.

Q. Understood, sir. Thank you.

And then lastly if I recall on direct examination when you were discussing with Mr. Puckett sort of the logic or the rationale for you, Lieutenant Colonel Phil

Simmons, being given detailing authority for the Haditha cases, it was because of what could be described as an apparent conflict that the Regional Defense Counsel West, Lieutenant Colonel Vokey, had at the time.

Is that true, sir?

A. Yes, no doubt.

Q. Because he was speaking with an accused associated with the Haditha allegation of misconduct, correct, sir?

A. My understanding was he -- he was involved in some manner with one of the potential accused -- actually one of the accused in the case.

Q. Yes, sir. And did you know, sir, that he was speaking with Staff Sergeant Wuterich?

A. I mean, I don't recall the name specifically. It was one of the -- the lead guy. I recall whoever the lead guy was, the lead accused for that series of cases, that he was talking to the lead guy. The lead accused from the government's standpoint.

Q. Understood, sir. So you were aware of -- when you were told you were receiving detailing authority, you were aware of a preexisting relationship that Lieutenant Colonel Vokey had with the leader or the guy in charge of the allegations of misconduct surrounding the Haditha event?

A. My understanding was that there -- the government had identified someone who was the -- you know, the most seriously culpable and Lieutenant Colonel Vokey had had some relationship with him, you know, prior to charges being filed.

Q. Understood, sir. And that was also prior to you being given detailing authority for the Haditha cases?

A. Yes.

TC (Capt Gannon): Sir, I really appreciate your time today.

I don't have any further questions for you. Please stand by.

MJ: Anything further?

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

MJ: Very well.

Mr. Simmons, thank you for your testimony. We're going to excuse you.

WIT: Very well. Thank you.

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

CC (Mr. Faraj): Our next witness is Lieutenant Colonel Colby Vokey, Retired.

MJ: Okay. For this same issue, right?

CC (Mr. Faraj): Yes. For the --

MJ: Okay.

CC (Mr. Faraj): We're just going to take -- we're going to call him again, but we're just going to call him on this particular issue.

MJ: All right.

Very well. The court will be in brief recess.

[The Article 39(a) session recessed at 1035, 25 April 2011.]

[The Article 39(a) session was called to order at 1037, 25 April 2011.]

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

Mr. Vokey was unavailable by phone, so the defense just indicated before we came back on the record that they wanted to proffer something as an officer of the court. And if necessary, we'll still call Mr. Vokey.

So Mr. Faraj, please.

CC (Mr. Faraj): I spoke to Mr. Vokey about this issue and he would say that he was given a similar letter in the Hamdaniyah case; that he understood the letter to detail him in his capacity as RDC West. And it is his opinion that those duties would have been passed on to his predecessor in the Hamdaniyah cases -- successor in the Hamdaniyah cases. He has no knowledge of what happened in the -- with respect to the Haditha cases, but he does



know that lieutenant -- then Lieutenant Colonel Simmons was the detailing authority similar to what he got in Hamdaniyah.

MJ: Okay. So as far as Hamdaniyah cases, he was given a similar letter and that letter was addressed to him specifically or as the defense counsel -- Regional Defense Counsel West?

CC (Mr. Faraj): He does not recall, but he does -- based on his conduct in the case and his discussions with the CDC, he was always under the impression that whoever his successor was going to be would have picked up that -- that authority.

MJ: Okay. Any objection to me considering the proffer by the government?

TC (Maj Gannon): Yes, sir, we object. We want to hear from the witness, sir.

MJ: Okay. Very well. We'll try to get him again on the phone.

The court will be in brief recess.

[The Article 39(a) session recessed at 1039, 25 April 2011.]

[The Article 39(a) session was called to order at 1040, 25 April 2011.]

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

I'm not going to take the proffer given by Mr. Faraj. There was an objection by the government, and we have Mr. Vokey standing by to give testimony. He's on the phone at this time.

Government, please swear him in.

TC (Maj Gannon): Mr. Vokey, sir. It's Major Nick Gannon. How are you, sir?

WIT: Hey, good.

TC (Maj Gannon): Can you hear me okay, sir?

WIT: I can.

TC (Maj Gannon): Are you in a place where you can testify safely and without being disturbed, sir?

WIT: Yes.

TC (Maj Gannon): Do you have any materials in front of you, sir?

WIT: No.

TC (Maj Gannon): Sir, if you do reference any materials, please make the court aware of that if you could please.

WIT: Yes.

**Lieutenant Colonel Colby C. Vokey, USMC, Retired, was called as a witness by the defense, was sworn, and testified as follows:**

**DIRECT EXAMINATION**

**Questions by the prosecution:**

Q. And for the record, could you please identify yourself and your place of business and your city of business, sir.

A. Yeah. My name is Colby C. Vokey. I'm in Dallas, Texas, and I work at Fitzpatrick Hagood Smith and Uhl LLP. And that's in Dallas.

TC (Capt Gannon): Thank you very much, sir. Stand by, please, for the defense team to ask you some questions.

MJ: Mr. Faraj, please. You can do it from table.

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

**Questions by the defense:**

Q. Mr. Vokey, your last billet in the Marine Corps was as RDC West?

A. That's correct.

Q. And you were the RDC West during a period when a series of cases were charged by the government and those cases were known as the Hamdaniyah or Pendleton 8 cases. Are you -- are you -- do you recollect that?

A. Yes.

- Q. Do you know who the detailing authority on those cases was or is?
- A. For Hamdaniyah, it was me.
- Q. And how did you come to be the detailing authority for the Hamdaniyah cases?
- A. That was a result of -- we had -- with so many cases going on with both Hamdaniyah and Haditha, there was a great concern that there would be a lot of conflicts because -- more in Haditha than in Hamdaniyah -- but some people had sought out counsel. So we had to -- we had the job of trying to find adequate counsel for both these sets of cases and Hamdaniyah was the first one we had to deal with. So we had to get adequate numbers and also ensuring that we didn't have any conflict between the parties. So as a result of that, General Mattis gave detailing authority to me as the RDC West to detail the counsel for Hamdaniyah.
- Q. How did he -- how did General Mattis, the convening authority, notify you of your authority to detail cases?
- A. I believe it was by letter. I believe I got a letter. There was some discussions beforehand as well, discussions with Lieutenant Colonel Riggs and probably some folks from the trial team as well, and the Chief Defense Counsel of the Marine Corps. But I believe it was by letter that I got the notification of detailing authority for Hamdaniyah.
- Q. Was that letter addressed -- well, why -- do you know why you were assigned those duties?
- A. We had counsel coming from -- from a lot of different areas and different bases, and we needed one person who could do the detailing and be able to ensure there was no conflict and make the proper assignments. That was not practical giving these cases -- coming from having somebody in the government do it. And you couldn't just have individuals, senior defense counsels do it. So the logical thing was to have the Regional Defense Counsel do it.
- Q. Do you -- how do you know that?
- A. Through conversations with various different people in the Chief Defense Counsel of the Marine Corps, the SJA for MARCENT, and I don't remember who else we had conversations with.

Q. So is it fair to say that you were not selected because you're the infamous Colby Vokey, but because you were in the RDC West position?

A. Yeah. Without a doubt, it was because I was RDC West.

CC (Mr. Faraj): Okay. Do you have any reason to doubt that the reason you were assigned was because you were RDC West rather than Mr -- or then Colby Vokey?

TC (Maj Gannon): Objection. Relevance.

WIT: No.

MJ: Objection's overruled.

WIT: No.

**Questions by the defense (continued):**

Q. Do you know if there were similar concerns regarding Haditha, the Haditha detailing?

A. There was. There was -- there was definitely the same kind of concerns. Probably even more so, greater concerns of conflict since the folks accused in Haditha were not in confinement and some had come into defense counsel's office or spoken to people on the phone. There was really serious issues of conflict that was out there. We had to be really careful about who was going to be representing who and also making sure we had adequate counsel as we were detailing two counsel per -- per accused charged with murder.

Q. Now it's a matter of record that the person with authority to detail cases is then Lieutenant Colonel Phil Simmons. You're aware of that?

A. That's right. That's right. That was -- that could not fall with the RDC West for a couple reasons. Primarily because I was going to be detailed one of the Hamdan -- one of the Haditha cases, that of Staff Sergeant Wuterich. We identified that. And that also my interaction with all the other counsel on Haditha to that point. We -- it was discussed that there definitely would have been a conflict if I was the detailing authority and handling one of the cases. So the RDC West could not be the detailing authority.

Q. And do you know -- do you know if then CDC went through the same analysis in -- in deciding who to detail or who to select to recommend to the -- to the convening authority to have detailing authority?

A. Yes. It would have had to be another -- another Regional Defense Counsel. It could not have been Regional Defense Counsel East because Lieutenant Colonel Scott Jack was also going to be handling one of the cases and you can't have a -- we didn't want to have any regional defense counsel assigned to a case and then detailing it, if they had subordinate counsel also handling one of these cases.

So it was determined that the RDC Pacific was the best person to detail the cases for the reason there's virtually no chance of conflict, because there was no counsel coming out of the Pacific that were handling any of these cases. Therefore, the RDC Pacific was the logical choice to serve as the detailing authority.

Q. Now I want you to focus back on Hamdaniyah when -- when you were assigned or when you were given detailing authority, do you know if that detailing authority was -- or when you gave up your duties as RDC West, do you know if that detailing authority was taken on by your successor?

A. For Hamdaniyah?

Q. Yes.

A. Yes. The RDC -- RDC West would have continued handling detailing issues for Hamdaniyah if there were any that -- that arose. I don't know if there were or not. I don't believe there was any detailing duties. But yes, the -- Lieutenant Colonel Tafoya would have taken over as the -- any detailing authorities for those cases.

Q. Now do you recall if there was anyone in the interim between -- between you giving up duties as RDC West and Lieutenant Colonel Tafoya picking it up?

A. There was.

Q. Was Matt Cord ever in a detailing position? I guess --

A. I don't believe -- I don't -- I don't remember if Lieutenant Colonel Cord actually assumed the duties of RDC West or not. There was a period of time when I was not the RDC prior to my departure and that was starting in March of 2008, because we thought we were going to

start Wuterich and I'd be walking out of retirement. So if somebody else was acting as the RDC after that, I don't believe that -- I don't remember if that was Lieutenant Colonel Cord or Major Munoz was serving as the RDC.

Q. Well, let's -- let me ask you some questions about that. Major Cord -- or Lieutenant Colonel Cord would have been also disqualified because he had a Hamdaniyah case?

A. Yes.

Q. Hamdaniyah. And Major Munoz also had a Hamdaniyah case?

A. That's true.

Q. And Lieutenant Colonel Cosgrove had a Hamdaniyah case?

A. Yes.

Q. Okay. That's all I have.

Oh, I'm sorry. One more question. Did you have a turnover with Lieutenant Colonel Tafoya?

A. Did I have a turnover?

Q. Yeah.

A. Yeah, I had a turnover with Lieutenant Colonel Tafoya.

Q. Did you notify him that he had cognizance or detailing authority over the Hamdaniyah cases?

A. You know, I gave him a folder that had all that information on the detailing. I don't remember what we discussed as far as detailing authority with Lieutenant Colonel Tafoya. I just -- I don't remember. We talked about so many things. I don't remember specifically that. We could have. We might not have. I don't -- I just don't remember.

Q. The Hamdaniyah cases -- the Hamdaniyah cases were, if we were to set jurisdictions, would have been within your jurisdiction as RDC West or within your sort of authority as RDC West?

A. Yes. Yes.

Q. Okay. Do you have any knowledge -- do you know of a subsequent -- any subsequent letters that were created to pass detailing authority from you to anyone else after you?

A. I do not. I don't believe anybody thought it was going to be an issue, but I'm not aware of any other letters.

CC (Mr. Faraj): Very well. Thank you.

MJ: Any further questions by the government?

CC (Mr. Faraj): Defense.

MJ: Or -- by the government. Any cross-examination?

TC (Maj Gannon): Yes, sir.

MJ: Go ahead.

TC (Maj Gannon): Thank you, sir.

May I do it from table, sir?

MJ: Sure.

TC (Maj Gannon): Thank you, sir.

#### **CROSS-EXAMINATION**

##### **Questions by the prosecution:**

Q. Mr. Vokey, sir, can you hear me okay?

A. I can.

Q. It's Major Gannon. Sir, who is Sergeant Cervený?

A. Sergeant Heather Cervený was the RDC Chief; one of three that worked for me as the RDC Chief.

Q. And was she the RDC Chief or working in the Regional Defense Counsel West's office in August of 2006?

A. August of '06, yes.

Q. Sir, have you had occasion to take a look at an e-mail -- some e-mail traffic that's from you through Sergeant Cervený to multiple officials on the West Coast -- judge advocate officials and it has to do with the detailing authority in these cases?

A. No.

Q. As a defense -- in preparation for your testimony today, have you reviewed any e-mail?

A. No.

- Q. Okay. I want to ask you a question because you haven't seen it, sir. Do you recall an e-mail string where you represented to numerous individuals, to include MARCENT SJA, then Lieutenant Colonel Riggs, that you were the detailing authority for both the 3/5 cases and the 3/1 cases? Do you recall ever writing an e-mail to that effect, sir?
- A. I don't. I do remember that -- that being the case initially, that I -- there could have been e-mails. I don't remember about the e-mails. I do remember that being the case initially until it was determined that I was going to handle one of the Haditha cases. And then Colonel Joyce, who was the Chief Defense Counsel at the time, said that I should not be acting as the detailing authority; that we need to get one of the other RDCs.
- Q. And roger that, sir. When I say the 3/5 cases, just so the record is clear, we can agree that collectively when I say 3/5, we're talking about Hamdaniyah. Is that correct, sir?
- A. Yes.
- Q. And when we talk about 3/1, we're talking about Haditha. Is that correct, sir?
- A. Yes.
- Q. So you and I can agree then at some point you were the detailing authority for the 3/1 cases, correct?
- A. No. I think we discussed me being the detailing authority. I don't know that I was already the detailing -- I'm not sure that I was ever the detailing authority for the 3/1 Haditha cases.
- Q. So it's your position today that in August of 2006 you did not believe that you were the detailing authority for the 3/1 or Haditha cases?
- A. No. No. Because I inherently don't have detailing authority as the RDC. It was discussed that I was going to do it. I do not believe I had authorization at that point to detail anything for Haditha.
- Q. Do you recall receiving --
- A. Now, Hamdaniyah, I believe we'd already done by that point. I just don't remember on Haditha. I -- because I know we didn't detail any -- none of the Haditha cases were detailed until they were charged in December. So I don't remember whether there was any detailing authority actually given out in August of 2006 or not.



Q. Yes, sir. Roger that. I'm going to -- what I'm going to do is I'm going to read you this e-mail, so that the court and counsel are familiar with what -- where I'm -- what I'm reading. This is going to be Appellate Exhibit Number CXI at Bate Stamp Page 24. So this is Appellate Exhibit CXI at 24.

Sir, there's an e-mail, it's dated August 4, 2006. And I want to read this to you and see if it refreshes your recollection.

"Ladies and gentlemen, the Commanding General, MARCENT, has authorized me to detail all cases involving 3/1 and 3/5. Pursuant to that authority and at the direction of the Chief Defense Counsel of the Marine Corps, the following assignments for 3/5 were made on 4 August 2006."

And then you go on to list several cases. Does that -- does that language ring a bell to you, sir?

A. It doesn't but that -- that makes sense. So if that's what I said, then I probably had the detailing authority initially for Haditha -- for the Haditha cases as well.

Q. Okay, sir.

A. I know by that point -- that sounds about the time when I was doing the detailing anyway. No reason to question that e-mail.

Q. Okay, sir. And then I want to see if this response from Lieutenant Colonel Riggs, who as you know was then the SJA for MARCENT. This came on August 5, 2006. And for the record, I'm still on Page 24 of Appellate Exhibit CXI. It says -- forgive me, sir, I'm going to use your first name. It's just because it's in the language of the e-mail. It says:

Quote, "Colby, you keep referencing that COMUSMARCENT has authorized you to detail; to my knowledge, he has not. Aside from our preliminary discussions on this, it never went beyond that. Your detailing authority comes from the delegation that Greg Simmons signed as OIC of the LSSS."

Does that -- does that response to your e-mail from -- from Lieutenant Colonel Riggs, the MARCENT SJA, does that ring a bell, sir?

A. No, not really.

- Q. Do you recall receiving a detailing or delegation letter from the OIC of the LSSS in the summer of 2006, sir?
- A. No, I don't. And I -- you know, I -- my recollection of that was I remember that sort of and there was a problem with Lieutenant Colonel Simmons delegating detailing authority to me in that we didn't believe that that was -- that was permissible. But he had no power to delegate that authority to me at all since he didn't have the authority to detail all the counsel to all these cases anyway.

I mean, Lieutenant Colonel Greg Simmons as the -- the detailing authority originates from the convening authority and the commanding officer of counsel. And the OIC of the LSSS had been delegated detailing authority by the various commands on Camp Pendleton, which means the only people he can pass off detailing authority to is to those people on Camp Pendleton who gave Lieutenant Colonel Simmons, Greg Simmons, the authority. So the problem is he's got no authority to detail folks at Miramar, Twentynine Palms, other locations or the RDC West. So that was the problem with whatever you're seeing in that letter there as far as detailing authority.

- Q. Now, you -- but you do have a recollection of this exchange taking place between yourself, representing that you had detailing authority as the RDC, and Lieutenant Colonel Riggs, the SJA from MARCENT?
- A. I do. It's not real strong, but I do remember. Because I was at -- there was a lot of pulling at the Legal Admin Manual, the JAG Manual, the Manual for Courts-Martial in trying to figure out detailing authority for this. And there was definitely some, you know, discussions that involved -- you know, how we're going to accomplish this. I don't specifically remember that e-mail dealing with Greg Simmons. I do remember the issue coming up as far as just having the OIC of the LSSS do it and why that couldn't be done. But I don't specifically remember that e-mail. I'm sorry.
- Q. But in that time period, you would agree that you had detailing authority for the 3/1 cases and the 3/5 cases as you represented in your August 4 e-mail, 2006?
- A. Well, at least I thought I did in that e-mail.

Q. Yes, sir.

A. Maybe -- maybe I didn't. Maybe that was -- I was prematurely stating that. It would have to be off the -- the letters that came from General Mattis authorizing the detailing.

Q. And the reason that you may have had that recollection in the summer of 2006, that you had detailing authority specifically for the Haditha or 3/1 cases was because you, at that point -- you, Lieutenant Colonel Vokey -- had already formed an attorney/client relationship with Staff Sergeant Wuterich?

A. In August of 2006?

Q. Yes, sir.

A. No.

Q. You had not spoken with lieutenant -- with Staff Sergeant Wuterich at that point?

A. You know, I don't know. I don't know if I spoke with him. I had not formed an attorney/client relationship with him in August of 2006. That's for sure.

Q. Well, then it had been determined that you were going to take his case at that point. Fair to say?

A. I don't know that we determined in August that I was going to handle Staff Sergeant Wuterich's case. I don't remember when we were sitting down determining who was going to handle what, what our available counsel were. I don't know if it was August. It could have been after that. It could have been before that. I think it was after that.

Q. Is it safe to say, sir, that the detailing authority that was given to Lieutenant Colonel Simmons by Commander U.S. Marine Corps Forces Central Command, that that letter was drafted and sent out subsequent to you discussing this case with the accused, Staff Sergeant Wuterich?

A. It depends. When did the letter to Simmons go?

TC (Capt Gannon): Well, let me ask it this way: When did you first start talking with Staff Sergeant Wuterich, sir? Can you give us a time frame?

CC (Mr. Faraj): We're going to object. It's not relevant and it goes into when ACR formed and that's not -- at least that's -- it may become an issue later, but it's not an issue in this motion and it potentially pierces privilege.

MJ: Do I need to know when the ACR was formed for this motion, Major Gannon?

TC (Maj Gannon): I believe you do, sir, because it's going to directly relate to this -- whether or not -- Lieutenant Colonel Vokey's specific detailing to the case. It'll relate to that.

MJ: Okay. The objection's overruled. Obviously you're not going to tell us any content of it, but give us a roundabout or an estimate or a figure of when you believe your relationship began with the accused. Go ahead.

WIT: I believe the attorney/client relationship began the day he was charged, which was in December of 2006.

**Questions by the prosecution (continued):**

Q. When was the first time that you sat down and spoke with Staff Sergeant Wuterich, sir?

A. I -- I don't know. I spoke with him -- I met him prior to that on one occasion or maybe on two occasions, maybe in November. I don't remember specifically when.

Q. So it's fair to say in late 2006, it was very clear that Lieutenant Colonel Vokey was going to take Staff Sergeant Wuterich's case if and when he was charged?

A. Well, when you say "late 2006," December without a doubt. I mean, that was when I was actually detailed. By late November 2006, yeah. We identified -- it had been identified that I was going to be detailed to Staff Sergeant Wuterich.

Q. So --

A. But attorney/client --

Q. So by November of 2006 -- I want to make sure we have your testimony here. By November 2006, it was clear that you were going to be detailed to the case?

A. Yes.

Q. And that was because you had already spoken with the accused?

A. No. It had nothing to do with me speaking to the accused. I spoke -- I spoke to the accused and met him after it had been established that I was going to be representing Staff Sergeant Wuterich.

Q. So you never had a meeting with the accused prior to it being established that you were going to represent Staff Sergeant Wuterich?

A. No.

Q. And as far as you can recall here today, the first time you spoke with Staff Sergeant Wuterich was in November of 2006?

A. I don't remember if it was November or not. I just don't -- I don't remember.

Q. Fair to say it was prior to -- prior to the preferral of charges against Staff Sergeant Wuterich?

A. Yes. Yes.

Q. And fair to say that it was prior to 12 December 2006 the date of the Commander U.S. Marine Corps Forces Central Command letter to Lieutenant Colonel Simmons giving him detailing authority?

A. Yeah.

Q. And just so you know, sir, he just testified that he already knew you were going to be detailed to the case, so I just want you to know that when he -- when this got to him.

A. Yes. I -- yes. I knew prior. But by the time it was -- yeah. Prior to that letter, we definitely knew. As a matter of fact, I think we had a meeting. I think there was a meeting concerning detailing either right before or right after the preferral of the Haditha charges of -- it was a discussion about who's going to be detailed to what and I remember getting kicked out of that meeting because I was going to be detailed the case, so.

Q. Okay.

A. And that would have been in early December I believe.

TC (Capt Gannon): Okay, sir. Just give me one moment.

Your Honor, I've got to refer to an e-mail here, so I need about a minute to look at this.

MJ: Okay. Go ahead.

**Questions by the prosecution (continued):**

Q. Okay, sir. It's Major Gannon again. I've got just another few questions. Hopefully we can wrap this up pretty quickly.

Are you still there, sir?

A. I'm here.

Q. So 17 January 2007, an e-mail -- or excuse me, a letter was sent from Lieutenant Colonel Philip Simmons, the Regional Defense Counsel Pacific, and it purports to be a detailing memoranda for the Haditha cases. Did you ever recall being copied on detailing memoranda that were generated by the RDC's office?

A. I believe so. Probably. I'm not sure. I'd have to look at it to be able to really remember it.

TC (Capt Gannon): Roger that, sir.

Sir, was there -- in the Haditha cases, were you a party to a joint defense agreement?

CC (Mr. Faraj): Objection as to the relevance.

MJ: Major Gannon, where are we going here? I want to be careful we're not getting into any ACR. And so where are we going? What's the relevance of that?

TC (Maj Gannon): The relevance would be, sir, that they have a -- that the defense bar had a collective approach to these cases and there was a lot of internal communications going on and agreements to cooperate within the cases. And so I think that that's evidence that the court could take to understand that that's the environment we were working in at the time.

MJ: The objection's sustained. I don't need to hear that evidence for this ruling.

Go ahead. Move on, please.

**Questions by the prosecution (continued):**

- Q. And sir, as the last part of this -- this cross-examination, I'd like to talk with you about what type of turnover you had with Lieutenant Colonel Tafoya, the Regional Defense Counsel who replaced you. When that process took over -- I didn't quite catch on direct examination -- did you indicate to him in a turnover binder or in an oral discussion or any other way that he was a detailing authority?
- A. No. I said I don't think I remembered one way or the other whether we discussed him being a detailing authority for those -- the Hamdaniyah or Haditha cases.

TC (Capt Gannon): Okay, sir. Thank you.

Those are all the questions that I have.

MJ: Anything further from the defense?

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

MJ: Mr. Vokey, thank you for your testimony. We're going to excuse you. I think we're going to call you later on perhaps based on my ruling, the defense indicated. So if you could please remain available by telephone.

WIT: Okay.

MJ: Thank you, sir.

WIT: All right.

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

MJ: We've disconnected the witness.

Anything further for the motion to recuse myself?

CC (Mr. Puckett): Yes, sir. I'd like to just make a brief argument.

MJ: Okay. And before you make any argument, do you have any further voir dire of me either side?

TC (LtCol Sullivan): Your Honor, could I have a moment?

MJ: Sure.

CC (Mr. Puckett): Not from defense, sir.

MJ: Government.

TC (Maj Gannon): Sir, very briefly. It's our understanding based on the earlier voir dire, but I want to be -- make sure the record is crystal clear. Prior to the 802 that we had a couple of weeks ago in this case, *United States versus Wuterich*, when we were --

MJ: Last week.

TC (Maj Gannon): Last week, sir. Thank you. Did you have any knowledge of -- did you have any discussions or knowledge of there being any potential for detailing authority resident in the RDC Pacific office?

MJ: No.

TC (Maj Gannon): Thank you, sir.

MJ: Argument on the motion for me to recuse myself.  
Defense, please. Mr. Puckett.

CC (Mr. Puckett): Thank you, judge.

Sir, the court has heard evidence this morning. I would just like to point out that -- that literally all of the questions that came from the prosecutor for our witnesses completely missed the point. And here's the point -- I just want to boil it down and make it pretty simple, sir, and focus the issue on what you need to decide.

Let me first say that when you assumed your duties as Regional Defense Counsel Pacific -- I want to just make it clear that it is irrelevant whether you knew you also assumed duties as detailing authority for Haditha. It's irrelevant whether or not you got briefed about that or whatever.

But what is relevant, sir, and what becomes a fact in issue for the motion we are anticipating litigating and because the government has argued such and because Judge Meeks says -- and you have the transcript of this in the



government's answer to our motion -- Judge Meeks says it's my understanding -- it's my understanding -- okay. All right. Let me just read it, sir. Now previously, you had -- this is Judge Meeks to Staff Sergeant Wuterich.

MJ: And what's the date?

CC (Mr. Puckett): The date is 11 March 2009. It's on Page 17 of the government's response, Bate stamp 0017.

"Now, previously, you had been detailed Lieutenant Colonel Vokey while he was on active duty in the United States Marine Corps."

And then in bold it says, "He has been relieved is my understanding because he's no longer on active duty in the United States Marine Corps."

And then he goes on to say, "Now, there's no way the government can compel him to be present."

"Do you understand that?"

Okay. So he says he's been relieved. Now there were only two people at that point, Your Honor, as you know under the rules, who can relieve a counsel of record -- the military judge -- and obviously the military judge doesn't indicate that he relieved him there. It's just his understanding -- or the detailing authority.

So what I want the court to consider today is in the absence of a detailing letter to the contrary, there's simply a presumption that that authority transfers to the successor in the billet whether you were personally aware of it or not. So in order to provide proof of a fact in issue and that is whether Lieutenant Colonel Vokey had been properly relieved upon his retirement, we would have to speak on the witness stand to the detailing authority.

Now there may be a dispute as to who that was, but you are absolutely a witness on that issue, because you were the presumptive detailing authority. And -- and your answer to our questions on the issue is irrelevant. I mean, you know, whatever your answer is going to be. You know, I didn't do that. I didn't relieve him as detailing authority. Sir, that's a fact in issue. It's

a material fact in issue.

And the government argues in all of its pleadings up to this point on this issue both times that Lieutenant Colonel Vokey had been properly relieved. And the -- so the question becomes by whom and, you know, under -- under what authority he was properly relieved. They argue it was Colonel Tafoya. But there is no evidence that detailing authority transferred from someone who didn't have it, Lieutenant Colonel Vokey, to his successor, Lieutenant Colonel Tafoya. So we know it didn't -- it didn't vest in Lieutenant Colonel Tafoya. Perhaps in some separate letter, which could have been written by General Mattis or his SJA.

So the point here is, Your Honor, we can't -- we can't -- when at some point in the future when we move forward on this motion, we will absolutely be calling you as a witness. I mean, we -- we -- there's no way we cannot do that. And therefore, under the rules and under interpretation of the rules as in *U.S. v. Lee* here, we believe that unfortunately -- I mean, it's not our -- it's not our wish that you leave the case -- and we don't know if this impacts your ability to sit as military judge. But we definitely believe that as to this particular issue, you have material facts available to you.

Again, I say even if the answer is a negative -- no, I didn't do it -- that's a disputed fact. And for that, it's not something you can just say on voir dire and then it's not an issue. It has to be exposed to the adversarial process and you have to be -- and you are a witness. You're the only person who can give us that information as a witness.

And so we also need to discover your files to determine -- you know, your RDC files as they existed at that time, whether or not this information was available to you, whether -- you know, in order to cross-examine you. Maybe -- maybe there's an issue as to whether or not you knew. Maybe there's an issue as to whether or not you did or did not. You know, your representation, your memory may not be sufficient so we're going to have to seek discovery of your files here. So for all these reasons, Your Honor, we believe that you are disqualified to sit as a military judge on this motion.

MJ: Thank you.

Government.

TC (Maj Gannon): Your Honor, according to Lieutenant Colonel Vokey, he started to speak with the accused and probably formed an ACR, an attorney/client relationship, with the accused some time in the late -- late winter, late 2006 time frame. The testimony is undisputed that the rationale for transferring any detailing authority at all to Lieutenant Colonel Phil Simmons is rooted in the fact that there may have been a conflict because Lieutenant Colonel Vokey was already speaking with this accused and had arguably formed an ACR prior to the preferral of charges.

So, if we take that for where it -- where it is, it makes perfect sense then if the court were to look at Page 22 of Appellate Exhibit CXI, that's our response. And on Page 22, that's the Bate stamp of Appellate Exhibit CXI, down under note number -- where it says Paragraph 3, Notes (a):

"The detailing authority for Lieutenant Colonel Vokey, Lieutenant Colonel Starita, Lieutenant Colonel Cord, and Major Cosgrove is the Regional Defense Counsel West." That's because Lieutenant Colonel Vokey had, in essence, detailed himself to this accused's case, because he had already begun speaking with him which is what created the necessity to detail outside of the RDC West Region in the first instance. So the detailing authority as evidenced by the detailing memoranda of 17 January 2007 for Lieutenant Colonel Vokey was the RDC West, not the Pacific. We would ask that you consider that in considering this motion, sir.

In addition to that, clearly it's undisputed as well that Lieutenant Colonel Vokey had detailing authority for the 3/1 or the Haditha cases and that too is contained in our response pleading at Page 22. If the court has no other -- if the court has any questions, I'll address them, sir, but we would like you to consider those two what we believe are saline pieces of evidence prior to deciding on the motion though.

MJ: State the second point again, please. The 3/1.

TC (Maj Gannon): Yes, sir. If the court were to take a look at -- again, I'm referring to page -- Appellate Exhibit CXI, that's our response. And I'm going specifically to Page 24 of the response. Lieutenant Colonel Vokey is making representations to Colonel White, Major Ashbacher, Lieutenant Colonel Simmons, Lieutenant Colonel Riggs, Lieutenant Colonel Atterbury -- then Major Atterbury -- Lieutenant Colonel Sullivan, who's present in the court today, Captain Blair, Captain Mitchell, Captain Seeds, and Captain Slabbekorn cc'ing the Chief Defense Counsel of the Marine Corps, Major Faraj -- then Major Faraj -- Lieutenant Colonel Smith that he is the detailing authority for the 3/1 cases.

So it is clear that if we were to reconstruct the events what took place was the detailing authority for the 3/1 cases was Lieutenant Colonel Vokey. Subsequent to that, he, in essence, effectively, prior to preferral, detailed himself to Staff Sergeant Wuterich's case as he spoke of on cross-examination, that he was speaking with the accused prior to the preferral of charges.

So Lieutenant Colonel Vokey, in essence, details himself effectively by beginning the conversation in a dialogue with the accused. Subsequent to that, it was realized Hey, he has detailing authority for the 3/1 cases. There may be a conflict. The concern being Lieutenant Colonel Vokey details himself to the Staff Sergeant Wuterich case and then details brand new attorney to, for example, the Lance Corporal Tatum case, a companion case in the Haditha event.

So once that potential for conflict became known, that was the rationale for giving detailing authority to Lieutenant Colonel Phil Simmons, so that Lieutenant Colonel Vokey's potential conflict could be cured. That's what the record establishes. That's why it went personally to Lieutenant Colonel Simmons. And that's why Lieutenant Colonel Vokey's detailing authority pursuant to Lieutenant Colonel Simmons' memo 17 January 2007 -- pursuant to that memoranda, the RDC West was the detailing authority for Lieutenant Colonel Vokey, because he had a preexisting ACR with the accused.

MJ: Thank you.

Very well.

CC (Mr. Faraj): Sir, you're going to hear additional evidence before you hear further argument to go -- is that okay?

CC (Mr. Puckett): Yeah.

CC (Mr. Faraj): All right. I was there, so I've got something on the record and you can kind of see it from --

CC (Mr. Puckett): The 17 January '07 memo, sir.

CC (Mr. Faraj): Colonel Vokey was never detailed to Staff Sergeant Wuterich -- I was the first counsel to be detailed to Staff Sergeant Wuterich. I have a clear memory of that. I was the first one to be detailed to his case. That happened on 11 January of 2007. I don't have that e-mail, but it's referenced in there. I specifically remember that.

And I've wanted to argue this all along because people keep saying that Vokey was detailed first then Faraj was detailed. I had a memory that was different. And it's just been confirmed by what I'm -- what I'm seeing. I was detailed on 11 January 2007, then Colonel Vokey was detailed. So to the -- to the -- well, we don't have that 11 January memo, but I'm -- I will tell you that if we can discover that, that it'll say Faraj is the detailed counsel. And then Colonel Simmons got further authority to detail additional counsel, a second counsel, and that's when Colonel Vokey was detailed.

MJ: Okay. Thank you.

Mr. Puckett.

CC (Mr. Puckett): Yes, sir. Just briefly. I want to take issue with -- again, there are sort of manufactured facts that are coming from the prosecution here that simply don't exist. First of all, Lieutenant Colonel Vokey doesn't have -- to the extent that he had the detailing authority over any cases, nobody has it until preferral or confinement, and so he couldn't detail himself to the case. Whether or not he might have had a meeting or two with Staff Sergeant Wuterich is irrelevant.

But if you notice this memo, this 17 January memo, what it says in the notes is the detailing authority for Lieutenant Colonel Vokey, Lieutenant Colonel Starita, Lieutenant Colonel Cord, and Major Cosgrove is Regional Defense Counsel West. That is normally speaking. RDC West, therefore, has made each of these people available for these cases. Then what happens, sir, is that CDC, you know, in cooperation with everybody else, they decide how they're going to segregate out the detailing authority for these cases. Haditha cases go to Lieutenant Colonel Simmons as RDC PAC.

Then on 17 January of '07 is when Lieutenant Colonel Vokey is first detailed to represent Staff Sergeant Wuterich. That's when it first happens. And the detailing authority never was -- in this case, never was Lieutenant Colonel Vokey. He may have thought presumptively back in August that since he's in that billet that he's going to get it. But as he testified subsequently, there arose these conflict issues. They divided out the detailing authority.

So the actual detailing for a case that was -- that was referred in -- or actually preferred in very late December, just before Christmas of '06. The detailing came in January of '07 by Lieutenant Colonel Simmons and that's -- and that's who detailed. So there is no issue at all according to the documents that Lieutenant Colonel Simmons, RDC PAC, had detailing -- exclusive -- exclusive detailing authority for all the Haditha cases, and that the first detailing of Lieutenant Colonel Vokey to this particular case, Staff Sergeant Wuterich, occurred on 17 January 2007.

Right, sir. The LSSS never detailed anybody or exercised detailing authority through the OIC of the LSSS. These were big cases and so these strategic decisions were made in the manner indicated. So there is no -- there is no supportable fact that Lieutenant Colonel Vokey at any time detailed himself to this case; and therefore, it devolved -- that detailing authority devolved to Lieutenant Colonel Tafoya. That's completely unsupported.

So again, Your Honor, we renew our request, the military judge grant our challenge for cause.

MJ: Very well. The court will be in recess.

[The Article 39(a) session recessed at 1124, 25 April 2011.]

[The Article 39(a) session was called to order at 1242, 25 April 2011.]

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

Mr. Puckett.

CC (Mr. Puckett): Yes, Your Honor. Based on appellate exhibit whatever this is.

MJ: CXVI.

CC (Mr. Puckett): CXVI -- sir, we withdraw our motion to challenge you for cause as the military judge to hear the pending motion.

MJ: To hear the motion that we came here to hear?

CC (Mr. Puckett): Yes, sir. That's correct.

MJ: Okay. Let me make sure I'm clear. You're withdrawing your motion challenging me from cause on a case?

CC (Mr. Puckett): No. I'm withdrawing the motion to challenge you for cause from hearing the counsel motion that we came here to litigate.

MJ: Okay.

CC (Mr. Puckett): Is that clear?

MJ: But you -- or -- but you still have -- so then you have no challenge to recuse me as a military judge at all?

CC (Mr. Puckett): At present, sir, we do not.

MJ: At present. Okay. So you're saying I don't need to give a ruling?

CC (Mr. Puckett): That's correct, sir.

MJ: Okay.

CC (Mr. Puckett): Because we're withdrawing it.

MJ: Okay. Okay. We'll move on then if I don't need to make a ruling on the challenge for disqualification of the military judge under Rule 902. The defense is withdrawing that challenge and that motion, so we'll go on to hear the motion regarding the counsel issue that we came here for originally to hear involving Mr. Vokey and what may or may not have changed regarding Texas and his law firm or whatever else the defense would like to talk about.

So with that in mind, I think the first witness that we wanted to call was Colonel Redmon because of his availability. So we're going to have a brief in-place recess while we get him on the phone.

[The Article 39(a) session recessed at 1244, 25 April 2011.]

[The Article 39(a) session was called to order at 1253, 25 April 2011.]

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

In the mean time, we have Colonel Redmon on the phone and the prosecution was just asking him what materials he had in front of him. He was identifying a few pieces of evidence he might have.

And what we'll ask for you, Colonel Redmon, is that you simply put all of those exhibits or whatever paperwork you have to the side at this point for your testimony. And if you need to refer to that, if you'll please let us know or the counsel can point you to something if they need to. But I would like to hear testimony from your own memory, okay, sir?

WIT: Okay.

MJ: Okay. Go ahead, please.

TC (Maj Gannon): Thank you, sir.



**Colonel Patrick L. Redmon, U.S. Marine Corps, was called 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 your last name for the record?

A. Yes. My name is Colonel Patrick L., middle initial, Redmon, R-E-D-M-O-N; no "D" on the end. Just M-O-N.

Q. Roger that, sir. And sir, can you please tell us what your current billet is?

A. I'm currently the Acting Chief of Staff, Marine Corps Base, Quantico, Virginia.

Q. And sir, you're an active duty Marine Colonel?

A. Yes, sir.

TC (Capt Gannon): Thank you, sir. I'll turn you over to the defense.

MJ: Defense, please. And you can do it from counsel table, Mr. Faraj.

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

**Questions by the defense:**

Q. Good afternoon, Colonel Redmon?

A. How are you?

Q. Good. How are you, sir?

A. Good.

Q. Sir, when -- when did you know that you were going to testify in this case?

A. When did I know I was going to testify in this case? Probably some time early last week or may have been Friday the 15th. I was at an OPT up at Headquarters Marine Corps for the better part of two weeks as we're standing up Marine Corps Installations Command. And I want to say I wrapped that thing up on Thursday and was back in my office on Friday the 15th. And I think I got an e-mail then from -- and I can't remember whether it was Lieutenant Colonel Sullivan or Major Gannon -- but that was the first -- around the 15th of April.

Q. And what did that e-mail tell you, sir?  
A. It just said that -- you know, briefly was, Hey, you could be asked to testify. There's a motion on the *Staff Sergeant Wuterich* trial based on your involvement in a retirement of a Lieutenant Colonel Vokey.

Q. Did that e-mail state anything else about this case?  
A. Not that I remember. Just that -- that there's some dispute on the events of what transpired with Lieutenant Colonel Vokey's retirement.

Q. Did -- did -- did you have any attachments to that e-mail?  
A. I think that was the e-mail where they attached the motion filed, looks like, 15 April 2010. The one that I talked about earlier.

MJ: Okay. We were not on the record earlier, sir. That was one of the things I told you not to look at. And that would have been a defense motion. Is that what you said?

WIT: Yeah. Defense motion. Yeah. It was -- yeah. It was the defense motion dated 15 April 2010.

MJ: Thank you, sir.

**Questions by the defense (continued):**

Q. Sir, you also referred to -- earlier you referred to a timeline of key events?  
A. Yeah. There was a -- that was the other attachment in there. It was a two-page document that basically laid out timeline of events. And then next to the event, there was, in parentheses, whichever enclosure to whatever master document that thing must have been attached to.

Q. Did anything -- was there anything in either document that you found useful in -- in preparing to testify today?  
A. No. I pretty much remembered everything from the case. One, I've got a -- unfortunately a pretty good memory. And two, I can remember it very vividly because it was so unusual of a case in 2008.

Q. Sir, did you have any other -- any live conversation with the prosecutors?  
A. Last -- it may have been Thursday or Friday. I can't remember which. I talked to Major Gannon on the phone.

CC (Mr. Faraj): What did you discuss, sir?

MJ: Okay. Hold on a second.

Why do I need to hear this? What relevance does that have with the motion, Mr. Faraj?

CC (Mr. Faraj): I am trying to decide -- I'm trying to decide what the witness remembers personally and what he may have recently discovered based on documents or discussion.

MJ: Okay. Well --

CC (Mr. Faraj): It's important for us in questioning him to determine what he still remembers from that period and what he learned recently that may influence his testimony.

MJ: Okay. Just ask him that question then, please.

**Questions by the defense (continued):**

Q. Sir, did you discuss -- when you spoke to the prosecutors, did you discuss any facts related to your potential testimony?

A. What do you mean?

Q. Did you discuss any of the facts of the case with reference to what you were going to testify about?

A. Well, he asked me what I remembered, if -- one, if I remembered the Vokey case and his retirement and I told him I did. And I kind of gave him a brief outline of what I remembered happening. There were a few things new that I did discover that I didn't know prior to Friday.

Q. And what were those, sir?

A. Okay. One of them was your existence. At the time you were Major Faraj. Up until last week, I didn't even know you existed because I was under the impression the spring and summer of '08 that Lieutenant Colonel Vokey was the only guy working this case. So I was actually a

little surprised to hear that you were retiring about the same time, because I never saw anything on you because majors and below were taken care of by MMOA 1 and they never had to forward any of that to me. So the only one I knew was working the case and had a retirement issue was Lieutenant Colonel Vokey. So actually I did learn something new last week.

Q. Anything else that you learned that was new to you?

A. Yes. I was -- I was under the impression going all the way back to that summer that in fact Lieutenant Colonel Vokey stayed in the job on the job until 1 November in order to turn the case over to his replacement. I found out last week that in fact he'd gone on terminal leave early in August of '08. So that -- that was something new that I learned that I didn't know prior to.

Q. Do you -- do you know who his replacement was and when that replacement came into the job?

A. Right off the top of my head, I can remember it had -- because my first name's Patrick. And I remember him being like a Patricio or something like that; first name. I don't remember the last name right off the top of my head. But I do remember assigning a lieutenant colonel to MCC-TEJ that summer. When exactly he got there, I don't know because we moved so many things around, you know, for this case that -- I know he got there some time that spring or summer.

Q. All right. So let me -- let me clarify something: When we refer to the job, we're referring to the job of RD -- the Regional Defense Counsel?

A. That's exactly right.

Q. Okay. Do you have any information whether a turnover was done or not done based on -- based on the existence of Patricio -- or based on the assignment of Patricio to that position?

A. I do not -- as far as whether Patricio was assigned as the guy on the case?

Q. No, no. I'm not referring to the case. I'm referring to RDC West. There's two --

A. Right.

Q. -- different issues here. RDC -- the Regional Defense Counsel West billet is one issue that I think you just brought up, so do you know if there was a turnover done or were you testifying that Vokey asked to remain in the Marine Corps so he can do a turnover on the job -- for the job?

A. I'm testifying that -- I'm testifying that in July we received -- we received a message traffic from -- from, you know, whether -- you know, the base, LSSS or whatever, requesting a move yet again of the retirement date from 1 August to 1 November. And I can remember specifically that the last if not second to last sentence on there was -- okay. Request is made so said named officer can do proper turnover file -- or turnover with defense lawyer. Or something along those lines.

So when that happened -- when that happened -- when that message came in, I was on leave in Cape May, New Jersey, and I talked with the branch head on my BlackBerry and he said, Hey, we got one more request wanting to go from 1 August to 1 November on Lieutenant Colonel Vokey. He read me -- he read me the -- you know, the message traffic. And Steve Nitschke[ph], who was the MMOA branch head at the time, he says, Hey, I'm going to go ahead and approve this.

And I said, Well -- I said, you -- you know, you can if you want. I said, But the last conversation I had with Lieutenant Colonel Vokey was if he wanted to push his retirement yet out again, he'd need an AA form with general officer endorsement, whether it was from the convening authority, whether it was from the judge, whether it was from Brigadier General Walker himself. Didn't care. But we'd made so many exceptions to the Marine Corps order in changing his retirement date with two weeks notice since April every month that if he, in fact, was required to stay on and this case was actually going to get started, which is what the promise month after month, then he'd need -- he'd have to do an AA form with general officer endorsement to DC (M&RA). And as best to my knowledge, that never happened.

Q. Did you ever communicate that to Colonel Vokey?

A. Absolutely.

Q. How did you communicate it?

A. Verbally on the phone when he called me.

Q. Did you ever communicate it by e-mail?

A. Don't know if I did or not.

Q. Do you -- at the time that you were doing this, do you keep track of communications that -- do you keep a log of who you spoke to?

A. No. You mean like a written log in a book?

Q. No. I mean, do you pull up somebody's file and put in notes that I spoke to, for example, Vokey and -- you know, I received a call from Vokey asking me something. I responded to him and told him this to --

A. You mean in monitor notes?

Q. Yeah. Something like that.

A. I don't know if I did or not. I probably did not because I wasn't his monitor. I was the -- it was sent up to me because Eric Mellenger, his monitor, we had already changed his retirement date three or four times. We were -- we were way outside the box of the Marine Corps order, what we were actually allowed to do to be perfectly honest.

And every month we were told this case is going to start. I'm the only guy that's working it. You know, blah, blah, blah. And I said, Hey, look. I said, We're to the point now is we've been hearing the same thing since April. If this is in fact the case that only you can try and you have to be held on active duty yet again past your retirement date, which, oh, by the way, he requested, then we'd need an AA form with general officer endorsement and we'll let folks settle this one out.

Because again, you know, this -- this had gotten to the point where there were three elements of the Marine Corps retirement manual about changing your retirement date: One, you need 45 days advance notice. Well, we were getting about two weeks notice every month. Two, any request for a modification of a retirement that was based on cancellation or nonissuance of orders, okay. And he was supposed to have gotten orders and PCS'd in summer of '07. He requested retirement 14 months out in February of '07. So we, therefore, did not cut him orders in '07. He was right at the top of the cue with a 1990-something overseas control date. We were looking to send him to Okinawa. He dropped his retirement beforehand. Okay. Got it.

But again, that's why that's in -- that's in the Marine Corps order about retirements. So if you retire in lieu of getting orders issued to you, okay. That was step number two.

And then the last piece was any modification of a retirement after Headquarters Marine Corps -- after Headquarters Marine Corps has already taken the initiative to backfill that position, okay, is an exception.

So we've been doing last minute changes of his retirement since April going all the way through the summer. His retirement was only because he requested it and did not get orders issued to him in '07 when he was a projected mover to begin with.

And three, we had already taken initiatives. In fact, I believe the lieutenant colonel going into his billet -- and that's what we do. We assign to billets, who gets what job is up to the CG or whoever makes those assignments. But we had already assigned another lieutenant colonel to his billet.

And I said, Hey, if we're going to keep two lieutenant colonels sitting on the same billet when there's other commands going without lieutenant colonels that rate them, then a GO is going to have to step up to the plate and say, Hey, this guy is so crucial that he's going to have to be extended indefinitely or just pull his retirement all together. Which, oh, by the way, I did offer to Lieutenant Colonel Vokey. I said -- I said, Why -- I said, Why haven't you just pulled your retirement.

And it was almost a schizophrenic conversation because, you know, half the time he was telling me, you know, I can't retire because I got to work this case. And the other half of the conversation he was telling me, you know, my whole life's, you know, in turmoil right now. My wife's moved. I'm living in a trailer. You know -- you know, I've had to put my whole life on hold. I'm missing job opportunities. And I made the point to him -- I said, Hey, as far as I know, no one in the Marine Corps is making you not retire when you want to. And if someone is telling you you can't retire, then you need to tell me who that is because I'm not sure they have that authority either. So --

Q. But there's --  
A. -- I laid it out to him give me an AA form with general officer signature. And I said whether it's Lieutenant General Mattis, the MEF commander, whether -- I said we'll even take it from the judge. Somebody. Somebody in the legal arena that's going to tell us, Hey, it's absolutely imperative that this guy stays on until this thing goes to trial which I don't think anybody had any clue when it would go to trial and I find it ironic it still hasn't.

CC (Mr. Faraj): Sir, do you remember an e-mail to Lieutenant Colonel Vokey telling him just -- just turn the case over to your replacement and you're done?

TC (Maj Gannon): Objection. Vague as to date of the e-mail. I don't object to the question line, but I'd like to identify with certainty what it is we're looking at, so I can look at it too, Your Honor.

MJ: Mr. Faraj.

CC (Mr. Faraj): I don't have the e-mail. I just -- I'm just asking if he ever sent an e-mail.

MJ: Okay. Overruled.

Just see if the witness can answer it. You don't have to mute the --

CC (Mr. Faraj): Well, when the government jumps up and tells him the answer, I like to mute it.

MJ: Okay. All right.

**Questions by the defense (continued):**

Q. Do you remember an e-mail to Lieutenant Colonel Vokey telling him to turn the case over and then move on or words to that effect?

A. I don't -- don't remember it. I'm sure I probably sent him an e-mail somewhere along the line. But again, I'd be curious to have -- my guess is it was -- that e-mail was probably not until July.

Because see, here's -- here's the whole thing. I never once weighed in on this thing in April, May, June. I only got involved in July after it became readily



apparent at least to MMOA-1, his monitor, and retirements branch -- who were, by the way, jumping through hoops trying to change all the paperwork, stop pay, start pay, all that stuff. We were now pushing into a retirement that was going to effect the promotion zone because it was going to be now within 90 days of the promotion zone.

So I mean, there was a whole bunch of things at play here and I didn't get involved in this as a colonel until July when it appeared to all of us up there anyway that this thing was dragging on, going on, and somebody -- this -- you know, trial going to start next month, next month, next month wasn't panning out. So if I did send him an e-mail at all, I'm guessing it wasn't until July after the third or fourth change to his retirement already.

Q. Sir, is it fair to say then that you were probably frustrated with Colonel Vokey?

A. No. No, I wasn't frustrated with him personally.

Q. Well, how'd you feel about what was going on?

A. Well, who I felt bad for were the GS employees out at the finance center and then retirement's branch who kept having to jump through hoops to make all this stuff work because of the start stop on pay, had to reroute everything for signature. You know, all the things that go up to the White House and the Commandant and all that when you retire.

My only thing on this was we'd been operating on pretty much phone calls and informal e-mails up until now, okay. And I thought -- you know, we being MMOA and retirements branch -- who are two separate pieces of M&RA, by the way. We had done good work and gone above and beyond the call of duty to try to make this thing work as informally as we could. When it became apparent to me in July that this thing had gotten too far outside the box and no one was really sure on when this thing was coming to trial, what the deal was, that's when I told Lieutenant Colonel Vokey, Hey, Okay. Phone calls, e-mails, all that stuff. Okay. We're outside the window on that. I want to see an AA form for two reasons:

One, we had a case earlier that year where we'd extended an officer's retirement at his own bequest over the phone. Come to find out, you know, we got -- we got reprimanded because the officer filed a complaint that somebody changed his retirement date which didn't allow him to take a certain job that had some acquisitions ramifications to it, when in fact he had -- he had asked to do it. So I was a little leary that sooner or later this thing was going to come out that, Hey, everybody was -- everybody was changing my retirement date, forcing me to stay when I didn't really want to.

So I wanted something in writing -- two things, one, that Lieutenant Colonel Vokey was voluntarily willingly staying past his requested retirement date that he asked for. And two, that it was absolutely required to do so by the -- you know, the JAG convening authority or all the rest of it.

Because again, my conversation with him was somewhat schizophrenic, and he was telling me he had to stay. But the other piece of him was saying he was just as tired of this as everybody else and wanted to get on with his life.

- Q. So he was -- he was -- I think what I'm hearing you saying is he didn't really want to continue in the Marine Corps and duck orders. I think you -- I think -- I think what I hear you saying is you were frustrated with him because you sensed that he was ducking orders took him to Okinawa, he wanted to go, but he also wanted to stay?
- A. No. His -- his -- the -- the thing with orders to Okinawa had nothing to do. He didn't talk to anything about that. He was talking about getting on with his life, family was in Texas, missing job opportunities, all that stuff. Okinawa had nothing to do with our conversation in July.
- Q. Yet he definitively communicated to you that he wanted to stay and continue to represent Staff Sergeant Wuterich, but I think what I'm -- what I'm hearing you say -- and correct me if I'm wrong -- is he wasn't taking the steps -- the steps that you were recommending to him or at least you communicated to him?
- A. What I'm -- what I'm saying to you is I told him that if he felt -- if he felt there was a legal requirement -- if he felt there was a legal requirement for him to stay

in the Marine Corps to try this case, okay, then he was to put pen to paper with an AA form and get somebody other than -- because again, here's the thing.

There was only one judge advocate general in the Marine Corps that ever discussed Lieutenant Colonel Vokey or anything associated with Lieutenant Colonel Vokey to me and that was he and himself. I never -- never once got a phone call from Vaughn Ary, Ewers, Woods, Favors, Walker, Pete Collins -- all the colonels that I was their monitor with -- I was their monitor. All those colonels I just named, I was their monitor. Never once got a single phone call, e-mail, AA form, anything from any of the judge advocate generals at the O-6 rank that I knew because I was their monitor discussing Vokey or his case. So I don't know who he was talking to that was -- you know, that was going to trumpet, you know, him staying to work this case. But I never saw an AA form, received a phone call or an e-mail from any of those people I just listed.

Q. But is it fair to say that when Colonel Vokey was contacting you, he was trying to convince you to remain on active duty as you understood so he can continue to represent Staff Sergeant Wuterich?

A. He -- he was communicating to me that it was -- it was -- it was a legal requirement for him to do so.

Q. And he -- and he was trying to get extended on active duty but not withdraw his retirement, but extend on active duty for the purpose of -- of continuing to represent his client at the time?

A. Yeah, that's a fair statement.

Q. Okay.

A. And I told him how to do that.

Q. I understand.

Now, did you communicate how to do it to him in any other means than those discussed and that is orally over the telephone?

A. Orally over the telephone, just pretty much as direct as I just gave you.

Q. Okay. It's your testimony today, however, that had Colonel Vokey drafted an AA form and gotten a general officer endorsement, then he could have extended as long

as is necessary to do -- well, he could have gotten the extension requested?

A. I don't know that because -- because DC (M&RA) would have ruled on that. And like I told him, if he was going to stay and not retire, then, you know, perhaps we would of revector'd his replacement. I mean, I don't know what the general officers would have done. But we had done everything we could at our level based on just a phone call from the officer himself with no corroboration, no justification from anybody other than him talking to me or his monitor or the GS employees down at retirement's branch.

Q. Let's talk a little bit about how AA forms are processed. And I'm just going to walk you through it and tell me if I get it right. The service member or the officer places their request in the administrative -- on the administrative action form and then it gets routed up through the chain of command.

Is that correct?

A. Yeah.

Q. And the chain of command, meaning the unit that that person belongs to, and then the unit forwards it up to the necessary sections at Headquarters Marine Corps if it requires going up that far?

A. Well, it depends. I mean, it depends. You've got different chains of command. For instance, here at Quantico, theoretically everybody -- theoretically everybody belongs to what we call the beast, H&S Battalion. I don't -- you know, whether you're working over at MCCDC, or MARCORSYSCOM or TBS or all the rest of it. So theoretically, we all work for H&S Battalion. But in my particular case, if I was submitting an AA form for something at the general officer level, okay, my, AA form would go through CG MCCDC.

Q. Well, let me -- let me talk to you about that a little bit, sir, because I'm -- you know, I spent 22 years in the Marine Corps and I've never, even as a major, felt that I can go directly to a general officer level. So perhaps as a colonel, you could -- I don't know what colonels do, but maybe they can approach general officers. Do you feel like a lieutenant colonel can directly go to a general officer and skip his chain of command?

A. I didn't say go directly to a general officer. What I

told Lieutenant Colonel Vokey on the phone was, you know, get an AA form or -- you know, we'd even taken a, you know, from/to letter. Something signed by either a general officer or even the presiding judge or even, you know, Brigadier General Walker's endorsement.

Q. Well -- but let me ask you something: What general officer are you referring to? I mean, any random general officer?

A. No, no.

Q. I mean, who does -- who does Colonel Vokey go to?

A. He could have -- it could have been the convening authority. It could have been MCI-West. I mean, I told him even Brigadier General Walker. If General Walker said --

Q. Well, what if I tell you -- what if I tell you the convening authority is not in his chain of command?

A. Not in his direct chain of command?

Q. No.

A. That's why I gave him about four options.

Q. Well, what are the other options?

A. I said, Hey, either convening authority, get something signed by the judge, get something signed by MCI-West.

Q. Well, you say general officer and a judge is not a general officer. Did you actually tell him to get something by the judge?

A. I said --

TC (Maj Gannon): Your Honor, objection.

MJ: Hold on one second. Colonel Redmon, hold on.

TC (Maj Gannon): Sir, a couple things. Objection number one, I don't think counsel's letting the witness answer the questions.

Number two, we're getting argumentative and badgering at this point, sir.

MJ: Okay.

TC (Capt Gannon): I object on those grounds.

MJ: All right. I'm going to overrule the badgering. I'm going to consider him a hostile witness at this point that your calling him. But I do want you to let Colonel Redmon finish his responses.

So Colonel Redmon, please, sir, finish your response and Mr. Faraj will ask you the next question.

WIT: Yeah. And again, my -- my guidance to him was get us an AA form or, you know, from/to letter signed by convening authority, the judge, MCI-West, general officer involved in the case. And I even told him, Look, even if Brigadier General Walker is the SJA -- you know, even if he comes back and says, Hey, this guy is crucial to the case. You know, he needs to stay on that billet even though a lieutenant colonel's on it -- I mean, all that stuff. We'll even accept that. What we weren't going to do is to continue to approve at our level something that was clearly outside the box, that we'd already bent over backwards to do.

And all I wanted was something to cover us because we -- the Marine Corps order was fairly specific, okay, and that's all I asked for. And if it was -- and I told him, I said, Hey, if somebody above you, Lieutenant Colonel Vokey, deems that in fact it is legally imperative that you stay on the Marine Corps, change your retirement or withdraw your retirement to work this case, you know, send it up. Put it on a piece of paper, have somebody endorse it, send it up, and we'll have DC (M&RA) take a look at it. And best of my knowledge, it wasn't even attempted.

**Questions by the defense (continued):**

Q. All right. How -- why do you say that?

A. Well, I stayed in the job until -- I stayed in the job until summer of 2009. Again, never once --

Q. Well, let's -- sir, my question was: Why do you think -- because I -- you said you don't think it was even attempted.

A. Okay. I'm --

Q. You didn't say I didn't receive it. You said --

A. Let me answer --

Q. -- it wasn't attempted. Why do you think it wasn't attempted?

A. Well, let me answer that. I stayed in that job until summer of 2009. And again, like I said earlier, never once even then or to -- from the whole time I was at MMOA, never once did any JAG in the Marine Corps, any general officer in the Marine Corps -- and I had plenty of discussions with all those guys -- never once did I hear even a peep from anybody over the Vokey case.

And in fact, I was even at Pendleton for the roadshow October of that year. And so -- so I -- I'll make the -- okay, granted -- assumption on my part but the assumption is no one ever made a peep to me one way or another even verbally, so I assume that no one even initiated it.

Q. Okay. So you don't know if he attempted or not --

A. No, no, no.

Q. -- you just never received anything?

A. No, no. That was an assumption on my part. I never received anything nor did I get a phone call or any comment from anybody regarding Lieutenant Colonel Vokey. In fact, I pretty much forgotten about it until it just cropped back up, so.

Q. Why'd you make that assumption about Lieutenant Colonel Vokey?

A. No, I made it -- well, I never heard anything, so I assumed that -- because if he would of submitted an AA form and it would of got to, you know, general officer level, I am sure -- I am sure that would of gotten somehow, someway to me because I saw just about everything that was personnel related, that would come through, you know, MM Division.

Q. Do you know -- do you have any personal knowledge as to whether Lieutenant Colonel Vokey spoke to Colonel Favors, his direct supervisor?

A. No. I can tell you I never spoke with her, but I don't know whether he did or not.

- Q. All right. And as you -- as you're thinking back on this case, you didn't -- you don't recall telling Colonel Vokey that he directly needs to go to Lieutenant General Helland, General Mattis, Walker, anything like that? You said -- you said you need to go to a general officer?
- A. No, I said -- and Mattis was the -- Mattis was I MEF at the time. Helland didn't get there until -- I want to say it was right before we got out there for the roadshow. So I don't think General Helland took I MEF until some time in early October. And this was in July. So it was still Lieutenant General Mattis was I MEF.
- Q. You do recall exchanging some e-mails with Colonel Vokey?
- A. I -- if I -- if I exchanged an e-mail with Vokey, I would say probably no more than one, maybe two. But again, I didn't even get involved in this thing until -- until the -- the, you know, July time frame. So my guess is if I -- my guess is if I exchanged an e-mail with him, there was one, maybe two tops.
- Q. Do you ever recall in one of your e-mails making any type of derogatory comments about lawyers?
- A. No.
- Q. Do you ever recall making a comment telling him you're gone 1 August?
- A. No. You mean like verbatim, you're gone 1 August?
- Q. Yes.
- A. No, don't remember it. I probably told him you're retired 1 August.
- Q. Okay.
- A. But again, that was before we moved it to 1 November.
- Q. All right. And sir, then you were a colonel in the United States Marine Corps?
- A. Yeah. Um-hmm.
- Q. And what position did you hold at Manpower?
- A. I was -- I was MMOA ground colonel's monitor with oversight over MMOA-1, which is all the ground -- ground MOS's.



- Q. Sir, if based on what you knew of Colonel Vokey then -- and I think you didn't know him very well, but --
- A. Didn't know him at all.
- Q. Okay. Is there any reason to doubt his truthfulness when he tells you that he has a duty to continue to represent his client?
- A. Did I doubt his truthfulness?
- Q. Yes. Did you have any doubt that what he was saying to you is the truth? Did you believe it was a sort of just a baseless excuse to remain on active duty?
- A. I wouldn't say I knew -- I thought it was a baseless excuse. Was I 100 percent sure he was absolutely accurate? No. Again, I'd been in the job for a while by that time. And I know this is a shocker to folks, but I found you didn't always get the full story from an officer when he was talking to MMOA.
- And again, that's why we gave him the benefit of the doubt numerous times. And when it appeared that here we were again now later in the year starting to affect promotions and all the rest of it, that's when I said, Hey, look. We've got to get more formal in this and to get some -- you know, some GO level, convening authority, lawyer, if you will, you know, corroboration and endorsement on this before we go back and keep this guy on indefinitely. And that was -- now did I think he was lying to me? No. But did -- was I 100 percent sure everything I was hearing was straight up gospel? No, I wasn't. But I didn't think he was lying to me. Sometimes --
- Q. Well, I guess I want to get into those. He's either -- he's either not telling you everything, he's lying to you, or he's telling you the truth. What did you believe was going on?
- A. Probably not telling me everything.
- Q. And -- and did you come to find out that there was more that you didn't know about at the time?
- A. Well, I mentioned earlier that I didn't even know you existed, because the impression he gave me was he was the only -- he was the only lawyer working this case and -- you know, and he was it.

- Q. Well, let me -- let me -- let me be --
- A. He never once said, Oh, by the way, there's another major working this case and you've extended his retirement as well because of this and all that. So again, did he have an obligation to tell me that? No. Was it part of the equation? Yeah. So yeah, there was probably a few things that he didn't tell me, but --
- Q. When you say -- when you say you got the impression, sir, it's kind of important because what you're basically saying is he -- he told you that I didn't exist. But was that the impression you got or did he tell you that?
- A. No, he never said Major Haram[sic] does not exist, no.
- Q. Okay. So why do you say -- what led you to the -- to the -- to the conclusion that he was the only lawyer on the case?
- A. Him telling me. You know, I'm the only guy working the case. And you know, we've been waiting to go to trial, waiting, you know, month after month. And I'm the only guy working the case and I don't have -- you know, I haven't had -- I'm going to need a bunch of time to turn the case over to the next guy. So I kind of got the impression he was the only guy that had been working this case. And again, I didn't know anything about the case.
- Q. You're saying he told you that he has to turn over the case to the next guy?
- A. Well, to his replacement.
- Q. You're sure about that?
- A. Yeah. Yeah. And in fact, that's exactly what was in the -- in the -- in the official message traffic that came in while I was in Cape May. You know, that came from the IPAC. That said, said named officer, you know, needs more time to turn over the case with his new defense counsel or something along those lines.
- Q. So that official communication still exists? Should exist?
- A. Should, yeah.

Q. And -- and is that an e-mail or is it -- or a message?  
A. I believe it was a -- I believe it was a message if I remember right. But again, I was talking to somebody over the phone at the time. I want to say it was a -- it was a message from IPAC, you know, wanting to go out to 1 November which of course MMOA did approve.

Q. And -- and it's your recollection that the message from IPAC said that he needs more time so he can turn over the case to his replacement?  
A. Yeah. Yeah. I want to say that was -- that's exactly what the message said.

Q. Okay.  
A. So we just -- we just assumed that he was going to be turning over the case with whoever was appointed to -- to take the case after him.

Q. And it's your belief that cases -- you know, when a lawyer has to leave, he turns over the case to his replacement, and then -- and then they go forward?  
A. I -- I assume so, yeah.

Q. Okay. I'm going to move on to another topic, but I want to clarify -- just to clarify something before we move on.

It is your testimony that Colonel Vokey told you that he wanted to extend to remain on the case to represent his client?  
A. No.

Q. When he did talk to you?  
A. No. I'm saying -- I'm saying what he relayed to me was it was -- it was -- it was a legal requirement for him to remain on active duty until this thing went to trial, although no one knew when it was going to go to trial.

Q. Thank you for clarifying that, sir. That's -- that was my question. I appreciate you clarifying it.

Sir, you're -- you're an active duty officer?  
A. Sure am.

Q. Have you been on active duty the entire time?  
A. Um-hmm.

Q. Have you had any breaks in service?

A. No.

Q. So the "um-hmm" was a yes?

A. Yes, I've -- active duty. No broken time.

Q. Thank you, sir.

When -- when an active duty reserve officer wants to remain on active duty -- is recalled and wants to remain on active duty -- and I know there's probably a lot of programs, but I just want to --

A. Oh, there's a gazillion actually.

Q. Okay. Well, let's refer specifically to what -- one of the issues we're here for. Are you familiar with Lieutenant Colonel Sean Sullivan? Does that name sound familiar to you?

A. Yes, it does sound familiar to me.

Q. What about Lieutenant Colonel Paul Atterbury?

A. Atterbury. Atterbury. I want to say Atterbury was a reserve lawyer guy who was looking for an extension of his contract and I want to say he was employed -- although he was on the West Coast, I want to say he was as some sort of MARCENT lawyer type.

Q. Okay. What does it take for a reserve officer in the position of those two gentlemen to remain on active duty until retirement?

A. Are you talking a reserve guy hitting the sanctuary status.

Q. Before they hit sanctuary, does -- can they just remain on active duty until sanctuary or --

A. Well, it depends on -- are you talking now or are you talking back then? And here's --

Q. Let's talk about 2009.

A. Okay. In 2009. Well, in 2008 we -- being MMOA -- we were pushing for some sort of systematic program to -- my term. Not anyone else's -- to get a handle on the number of reserve officers on active duty. As you well said, there's about a gazillion different programs. There's about -- at the time, anyway -- about five or six different headquarters where you could get your orders cut. Whether it was MOBCOM, MARFORRES, at one of the MEFs as an IMA guy. All kinds of stuff. RSUs. And

no one -- and I say that collectively -- no one really had a good handle on how many officers we had on active duty any given day, because there was so many different programs.

So starting in 2008, we at MMOA started pushing for some sort of policy. And again, MMOA, we do assignments. We don't make policy. We just try to, you know, enforce the Marine Corps orders which are difficult to enforce at times. But anyway, so we tried to get MP to get some sort of policy going, okay. There's got to be one central processing for reserve officer requests to stay on active duty; most importantly, those pushing the 18-year mark.

So the first -- the first step in all that was -- they said, Okay. Anybody that's going to request an extension of their active duty or to be recalled to active duty that will put them at the 17-year mark, okay, we want to see the package routed through DC (M&RA). And you're asking, Okay. Why 17? Well there was a kind of unwritten rule out there, or at least a perception anyway, that once you got over 17. You're close to 18. No one's going to tell you you got to go home at 17 and a half or 17 and three quarters. So -- so the perception was -- even though 18 is the sanctuary, the perception was you get past 17 guys and you're home free. So that's why they had this 17-year mark.

About a -- little less than a year after that, we actually had -- MP came back and said, Hey, we want to start seeing anybody who's going to hit the 16 year -- and what they used to call a 16-year waiver letter. Because again, there were so many folks that -- you know, that were figuring, Okay. Well, if I got 16 and three quarters, that's close to 17, so.

And again, those things were going on. So at the time, our -- our recommendation was if you're going to bring somebody into a sanctuary status -- in fact, what you're doing is de facto, if you will, a return to active duty board. Because once you pull them into sanctuary, they -- you know, you now keep them until 20-year retirement. So on and so forth. We had lieutenant colonels who were getting pulled into sanctuary, then picking up colonel in the reserves. Because even if you were in sanctuary, you competed for colonel in the

reserve community, not the active component. They pick up colonel at the 19 and a half, if not 20-year mark. And then request to stay another three years for time in grade, so they could actually retire as a colonel.

So I mean, all those things were going on. So -- so what they started to do late -- late '08, fall of '08 through '09 for the first time, any requests for things that would take you 16, 17 or even sanctuary, they were taking those things and routing them through MMOA. And so up until that point, we weren't able to do that.

As I understand it now -- been out of the business for a couple years -- as I understand it now, they're actually doing sanctuary boards, if you will, almost like a return to active duty board. So -- so anyway, so by 2009 -- by 2009, I was starting to see requests for reserve officers come across my desk, you know, for a recommendation. And again, all I did was make a recommendation because Deputy Commandant Manpower and Reserve Affairs had the final say. So I remember -- I remember Sullivan. I remember Atterbury. You know again, I've got a pretty good remember. I remember, you know, quite a few other folks.

Q. What -- what was the -- thinking back on your billet and managing, did you have a responsibility to manage numbers for -- of officers?

A. What do you mean by manage numbers?

Q. For example, obviously requests -- it sounds like requests were coming to you for endorsement. I'm not specifically referring to this case now, but just generally in your duties. Did you have to ask of -- you know, basically recommending whether someone remained or not remained based on statutory numbers that the Marine Corps had to manage?

A. Not so much statutory numbers. That was part of it. DOT/MA field grade was another. But really what my piece was -- again, because we do assignments, my piece was, Okay. If we pull this guy into sanctuary, is there a valid table of organization BIC, Billet Identification Code. What we used to call line number -- is there a valid BIC out there that we, the active component monitor shop, could not fill for whatever reason -- i.e., if we're going to bring this guy on to sanctuary, do we have a hole, if you will, that the active duty component cannot fill. And that was kind of the -- you

know, the short answer, meat and potatoes of why it came through the officer assignments.

So most of my -- most of my recommendations were in fact that. Hey, this guy, he's at I MEF. He's requesting to come into sanctuary. He's a lieutenant colonel, 0402. I'm looking right now at our staffing. We've got three extra lieutenant colonels at I MEF already above their T/O. So, you know, if this guy wants to come into sanctuary, I don't know what valid active duty BIC the active component was not able to fill for that I MEF commander. Recommend disapproval because, you know, there's no active duty hole, if you will -- in fact, most of the time, they even had one or two extra especially at I MEF.

So that was kind of the gist of what I was doing when we'd see these requests for extension on active duty or a 3-year contract that would pull them in or near sanctuary.

Q. I understand, sir. Thank you. What do those -- those -- I think BICs. Is that what you said?

A. Yeah. We used to call them T/O line numbers.

Q. Okay.

A. But, you know, yeah. They're now called BICs.

Q. All right. I'm familiar with the T/O line numbers. So let's talk about that. Where do those numbers come from? How do you know what you -- what's out there and what you can have?

A. You know, we look at the unit's T/O, table of organization, that's put out by Total Force Structure Division. And of course, you know, in WEBMASS, we see where every active duty officer is assigned.

Q. Okay.

A. So --

Q. So at some point you did receive some requests for sanctuary that were going to bring into sanctuary Lieutenant Colonel Sean Sullivan and Lieutenant Colonel Paul Atterbury. Do you remember those requests and the process?

A. I -- I remember those two names. I remember those two names. I don't -- like I say, I want to say -- because I can remember the Atterbury case, because I was a

little confused because his -- he was actually sitting in -- he was actually sitting in California but I remember -- if I remember right, the request was from MARCENT Headquarters in Tampa. And I'm thinking, Okay. Well, how's MARCENT saying they've got a requirement for this guy when he's sitting out there in California. And then I called down there and somebody explained to me that even though he was in California, you know, he was working, you know, for MARCENT under the I MEF, MARCENT dual-hat thing or whatever. So I remember that one in particular.

And I can remember -- I can remember the Sullivan case, because I remember asking, you know, Hey, who's this Sullivan guy? And I remember somebody -- somebody out west. I called the G-1 at, you know, MARFORPAC or wherever it was. And I can remember they said, Oh, well, he's a civilian prosecutor from Chicago. I remember that. And I said, Okay. He's the only guy that can prosecute in the Marine Corps? I mean, he's that valuable where no one else can be a prosecutor? And -- so -- and if I remember right, he was pretty senior.

And I said, Hey, you know, you pull this guy into sanctuary, you know, he's a pretty senior lieutenant colonel. He's probably going to pick up colonel. Now you got a colonel in sanctuary. You know, what are you going to do with him after that. So those are the -- those are the things that -- that we started looking at from a manpower management division to try to get a handle, if you will, on the number of reserve officers out there working under just a gazillion different sets of orders.

Q. And you may not have the benefit of having that communication, but I read some of the conversation going back and forth between you and the people recommending sanctuary for those people. Is it fair to say that based on your reading of the numbers, the T/O line numbers, that you opposed approval of those two packages? And the two I'm referring to are, again, Lieutenant Colonel Sullivan and Lieutenant Colonel Atterbury.

A. I don't remember. I don't have them in front of me. I don't remember what I -- you know, what my recommendation was. I will say that, you know, I did -- I did develop a -- you know, I did develop a reputation.



I was like the only guy in the building that would -- you know, that wouldn't rubber stamp things. I'll put it that way. And I can -- I can remember -- you know, I probably -- I probably said, you know, face value recommend disapproval unless somebody can come up with a valid T/O BIC, you know, on the active duty structure that we can't fill.

Because see, that was the other thing that took awhile and they finally got it right was the commands -- the commands would, you know -- you know, they'd come say, Hey, we want -- we want to give this guy another 3-year contract. And of course it was OPM, other people's money, on, you know, how to pay for it and pay and allowances and all the rest of it. But most of the time they wouldn't come -- you know, the command wouldn't give you what I call billet compensation. And oh, by the way, we want this guy to be pulled into sanctuary to fill billet X, Y or Z because MMOA has not been able to staff it with an active component officer since the last, you know, two, three years. That's the piece that all the commands out there were very slow to do.

But again, as I said earlier, I think they've done that now where they actually have a board process and all the rest of it. So I know in 2009, we were -- we were just starting to get what I -- what I feel anyway is a handle on the -- on the reserve officers we had out there.

Q. Is it fair to say, sir, that if -- if you received a package and there's a valid BIC number that is unfilled in the active duty forces, that it's more than likely you would approve it, because you'd see that it -- it has a valid T/O number?

A. Yeah.

Q. Or BIC number.

A. But again, don't -- don't confuse me approving anything.

Q. I understand.

A. It was --

Q. I meant -- I meant recommending approval.

A. Recommend approval. Yeah. I mean, if it was a clear cut case where, you know, I knew -- you know, I knew, you know, we were unable to get 3d MARDIV, you know, their CommO that year because of, you know, all kinds of issues and there was a reserve guy that they wanted to

pull into sanctuary to be the 3d MARDIV CommO because I couldn't get a colonel to take those orders, absolutely.

I mean, if it was that clear cut, I'd say so in the deal saying, Hey, I was unable to get these guys an active component colonel to fill that G-6 spot. You know, recommend -- recommend approval because, you know, I knew there was a hole there. Like I say, the problem -- the problem is most of those requests, again, you didn't -- you know, you had to, you know, look real hard to figure out, okay, where -- you know, where do they want them. Okay. Yeah. You want them at I MEF. Okay. I got that. But -- and then of course, there's all kinds of non-MOS billets and -- and all that crazy stuff. JMDs and manning documents outside the T/O. So -- so yeah, if it was clear cut and I knew exactly what they were talking about, you know, I'd recommend approval.

Q. And of course by extension, if there's an open T/O number or an unfilled active duty T/O number, then the funding is already part of --

A. No. No. Now again --

Q. Help me out.

A. -- I don't want to speak out -- I don't want to -- I don't want to speak out of -- I don't want to speak out of turn, because I'm not a big, you know, financial funding dude, okay. But the Marine Corps -- you know -- you know, we're funded and allocated money for "x" amount of active duty component. Whether they're sitting in the right billets or not is immaterial to Congress or anybody that gives us our money. So whether we fill that or not has nothing to do with what we're appropriated to pay our active duty component.

So reserve officers are a different pot of money. And there's, again, about five or six different pots of money that would actually pay for that. At the time, most of it, I'm guessing anyway, was GWOT supplemental funds. But yeah, completely -- completely different pay and all the rest of it. For instance, we didn't even cut orders. "We" being MMOA. We only had -- we only have appropriations data for active duty officer, PCS moves, and all the rest of it. So if a reserve officer was given a 3-year contract and was going to PCS somewhere to take it, we did not cut those orders, because it's a completely different pot of money.

- Q. I understand, sir. I think I conflated the two. So Congress authorizes a certain manning level and then the Marine Corps decides how to fill those billets that they need?
- A. Yeah, in loose terms. But again, I'm -- you know, I'm -- I'm speaking outside my lane here. I -- you know, appropriations and all that. Like I say, I -- I'm -- I'm definitely outside my league on that one.
- Q. I understand. Now, let me ask you -- you might be able to answer this: Do you know if in the year 2009, whether fiscal or annual, the Marine Corps was below its manpower numbers?
- A. Oh, I don't know. Because again, don't forget, in 2009 -- 2009 we'd been -- we'd been authorized -- see, don't confuse authorization and appropriated. Remember we were doing the 202K ramp up. And -- and I know in 2009, you know, we were -- we were well ahead of what we thought we'd be, you know, in growing the force, the 202K. So -- so I know by that time, we had been authorized to grow to 202K. Whether we were actually appropriated -- i.e., here's your money -- I don't know. Again, I'd be way outside the box talking about that. But --
- Q. Do you know if when you got the package for Lieutenant Colonel Sullivan, you had a valid active duty BIC number for him?
- A. I -- I don't remember. Like I say, I'm sure that -- I'm sure that package is floating somewhere. I'm sure my endorsement's, you know, probably in there somewhere. So again, right off the top of my head, I don't know. The only thing I specifically remember about the Sullivan package was, you know -- you know, somebody said, Well, he's a really good prosecutor. And I was like, Okay. You know, we ain't got any other real good prosecutors on the West Coast, you know, so.
- Q. What else do you remember about the conversations that were related to you regarding Lieutenant Colonel Sullivan's skills as a prosecutor?
- A. That was it.
- Q. Or the necessity of him to be on this case?
- A. I didn't even know what case he was on. Again, I -- I didn't even know there was a connection, you know, with Vokey, Sullivan, you know, you. Hell, I didn't even know you existed. So I didn't even know there was a

connection to all this. Bottom line is, I just remember -- okay. They said, Well, he's a prosecutor from the Chicago Area. I remember that. And I was like, Okay --

Q. You specifically remember they said prosecutor from the Chicago Area?

A. That's what I recall, yeah.

Q. Okay. And who told you that?

A. I don't even know. And -- because I asked, I said, you know, Hey, who is this guy? And they said, He's a reserve guy. He's a prosecutor. Civilian type guy out of Chicago.

Q. And the reason that -- that they wanted you to -- to endorse this was because what, with respect to the prosecutor issue?

A. No, no. I just asked who he was and they told me. And I said, Okay. I said, you know -- I said, you know, is he the only guy we got on the West Coast that can prosecute a case? And they said, Well, no, sir. I said, Okay. So -- and again, I was just trying to figure out, you know, the criticality of this whole thing because any --

Q. Did you figure it out? I mean --

A. No, no.

Q. -- did someone --

A. And again, I don't -- again, his package is probably floating somewhere in the archives. I don't remember exactly what my recommendation was, but I do remember him and I remember Atterbury, because I remember that -- asking, Okay. Is this guy in Tampa? Where is he?

Q. I apologize, sir. I'm probably getting repetitive, but I'm trying to figure out why you would ask -- I mean, you obviously had a need to know why someone is critical. Is that to determine whether you should endorse it favorably or not? Did that factor into your endorsement?

A. No, no. I was just -- I was just calling out there to ask who is this guy because like I said before, especially in the early stages of these sanctuary packages that they were finally routing through M&RA, they were, you know, pretty skosh on -- on, you know, the details and all the rest of it.

- Q. What does skosh me? I'm sorry. I need to understand.
- A. Very little detail. Again, it was early in this new process and I -- like I say, if it wasn't clear cut to me where the guy was at, where he was working -- you know, was he at MEF, was he at base, was he at MARFORPAC. Because again, most of them were routed through the major headquarters. So no, it was just nothing in particular with him.
- Q. What would you need to know -- at the time, what would you need to know to receive a favorable endorsement from you -- to give a favorable endorsement if there is no active duty BIC available?
- A. Would there -- if there's no active duty BIC available, you know, is he -- is there a -- is there a O-6 BIC that went unfilled? Because we'll do that too. If there's an O-6 BIC that goes unfilled, we'll put a lieutenant colonel in there. You know, doesn't necessarily have to be, you know, at that rank. And there were even times where -- where commands had a reserve lieutenant colonel sitting in a major's BIC, so.
- Q. Any other factors?
- A. No.
- Q. You wouldn't -- you wouldn't want to know why he's necessary?
- A. No.
- Q. So is it fair to say then if there is no active duty BIC for that rank or for the higher rank, then you would consistently give an unfavorable endorsement?
- A. Yup, pretty much. And yeah. I'd say that's a fair statement. And -- and for those cases where they didn't provide an active duty BIC that was unfilled, I usually made a comment like, Hey, if the command can -- you know, if the command has a BIC that's unfilled regardless of, you know, one up or one down and they're going to, you know, bring him into sanctuary to fill that one, that's fine.
- Okay. But -- and here is the kicker -- here is the kicker that we always got from MMOA is, you know, a guy would come into sanctuary. He'd -- you know, to fill an empty BIC, if you will, and then the next year during the staffing goal the same command would come back and say, Hey, where's my guy for, you know, T/O BIC whatever. And we'd say, Hey, you know, you've got a

reserve guy sitting in there. And they'd say, Well, that don't count because you owe me, you know, T/O active duty BICs.

And so most of the time my comment always ended on the line there, Hey, if they can find a BIC to put this guy on that we can't fill from the active component, roger that. But M&RA needs to be getting staffing goal credit, if you will, for that so the command don't come back and double tap us the next staffing cycle, because, Hey, you know, where's our guy. You haven't filled it in three years. Well, you've got a reserve dude sitting in there. But again, that was so tough to do -- that was so tough to do because there was so many reservists out there on active duty that no one really knew where they were all at and what they were doing.

- Q. All right, sir. If the only analysis that goes -- that you consider is -- or the only analysis that you go through is whether there's an active duty BIC above, below, or in that rank, then why would you ask why they need him or who this guy is?
- A. No, I didn't -- well, not him in particular. I was like who is this guy and where's he at.
- Q. Why did you ask that if it's --
- A. Because I didn't know --
- Q. -- if all you care about is the --
- A. I didn't know whether he was at -- I didn't know whether he was at MLG. I didn't know whether he was at division. I didn't know whether he was at I MEF Headquarters. I didn't know whether he was with the wing.
- Q. Well, isn't -- isn't that -- I mean, you received a package on that? It had all that information?
- A. I don't -- I don't -- I don't know if it did. I don't know if it did.
- Q. An administrative action form to bring somebody into sanctuary doesn't include the billet, the unit assignment, and all kinds of other data that normally follows us around in the Marine Corps?
- A. Well, again, as I said earlier, some of the packages had more information than others. You know, some of them -- and most of the time they were from/to letters, you know, vias and all the rest of it. Not necessarily in

AA form itself. So -- and again, as the process went on, it got better. And again, now I think they actually have a board, so --

Q. So you're saying you received a sanctuary request for him but it didn't tell you what unit was requesting him and you wanted to find out where he's at --

A. I don't --

Q. -- if at MLG or MEF?

A. I don't remember exactly what it said. If you track it down and you should be able to look at it and tell me what I said on the endorsement. I don't remember right off the top of my head. But what I'm telling you is --

Q. All right. But I don't understand if -- how you -- because a unit is requesting the T/O number. So how do you get a T/O number request or an officer -- a request for somebody to stay, but it's not from the unit that's -- I'm not connecting the dots, if you would help me please.

A. Well, what do you mean by unit? I MEF? How many different MCCs, Monitor Command Code, T/Os do you think there resides within I MEF?

Q. So you would need to specifically know what billet they're putting him in? It's not just I MEF?

A. Well, yeah, if you're going to try to find out what BIC went unassigned. But I MEF has got a boatload of monitor command codes associated with it. Or MARFORPAC. We get them from MARFORPAC. And MARFORPAC had III MEF, I MEF, Marine Corps Base Butler, Marine Corps Base Hawaii. You know, I mean, individual regiments, individual battalions. And then the MLGs. We got the -- separate MCCs with the MLGs. They start breaking them down by combat logistics regiments. I mean, so you're talking a bunch of different monitor command code table of organizations.

Q. And what monitor command code did you find out about Lieutenant Colonel Sullivan, if you remember?

A. I don't know. That's -- that's what I'm saying. I -- you know, that was, shoot, two and a half years ago or two years ago, anyway.

- Q. All right. But what you're saying is you wouldn't of -- you wouldn't of endorsed it favorably unless you knew what the MCC code was?
- A. Or -- or if there wasn't anything in there, I probably would have put a comment, something like, Hey, if the command has a valid T/O BIC that's unfilled and they're going to put him against that, you know, roger that. But we should get credit for it.
- Q. All right. So we're still focused on, again, BICs going filled or unfilled, so why would you know what he's doing? Why would you need to know what he's doing or who he is or where he's from?
- A. Well, I need to know what his MOS is. I mean, where's he working. Again, I think I've already answered that.
- Q. Well, I think you said that all you worry about is the unfilled BICs or filled BICs and whether they can fill it up. So why would you need to know that other information?
- A. Because I got to know -- I got to know what BIC we're talking about. Is it -- is it at an MLG? Is it at a division? Is it MEF Headquarters? Is it at a wing?
- Q. I know. We've already covered that. So they tell you what BIC, you decide if it's filled or unfilled, why do you need to know any information about him? What he does, where he's going. I mean, what does that -- why does that matter? Since you already said it doesn't matter to you, so why are you asking that question at the time?
- A. I'm not sure I did ask that question.
- Q. Well, how'd you find out he was a prosecutor from Chicago?
- A. Because when I called out there, said, Hey, who is this guy? And they said, Hey, he's some reserve lawyer, some prosecutor guy out of Chicago.
- Q. Why did you call up and ask who is this guy if all you need to know is the BIC filled or unfilled?
- A. Because that information probably wasn't in the package. That's why I called out there. Where is this guy? Is he MEF? Division? MLG?
- Q. Alright, sir. I don't have any more questions for you.
- A. Okay.



MJ: Hold on, please.  
Any examination by the government? Cross-examination?

TC (Maj Gannon): Government has no questions, sir.

MJ: Okay. Very well.

Colonel Redmon, I do not have any questions that I feel I need to ask of you that have not already been asked. Thank you for your willingness to be available. I understand you had some commitments. And you were supposed to testify this morning, but I appreciate you being available to testify, sir.

WIT: No problem.

MJ: Very well. We're going to disconnect you from here.

WIT: Okay. Thank you.

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

MJ: The court will be in recess.

[The Article 39(a) session recessed at 1400, 25 April 2011.]

[The Article 39(a) session was called to order at 1416, 25 April 2011.]

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

We have Mr. Vokey back on the line.

Mr. Vokey, we all know who you are. You were identified earlier. And also -- you also testified earlier today, so you're still considered to be under oath, okay?

WIT: I understand. Yes, Your Honor.

MJ: Okay. Go ahead, please, defense, from your table. Counsel can do it from the table. Go ahead.

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

Lieutenant Colonel Colby C. Vokey, USMC, Retired, was recalled as a witness by the defense, was reminded he was still under oath, and testified as follows:

DIRECT EXAMINATION

Questions by the defense:

Q. Mr. Vokey?

A. Yes.

Q. Do you know a person by the name of Colonel Redmon?

A. I do.

Q. How do you know him?

A. Colonel Redmon was working up at manpower. He is the one that I had to deal with concerning -- concerning my retirement date.

Q. When is -- to the best of your ability, when do you remember first beginning to communicate with Colonel Redmon?

A. With Colonel Redmon -- I communicated with his office first. I don't remember when I specifically first started talking to Colonel Redmon. When I first put in the first extension of my retirement -- change my retirement date, that was through AA form in a written request. And I was dealing with the separations and retirement branch for manpower up at Headquarters Marine Corps. And I was dealing with some of the -- a couple women that were working up there. It wasn't until some of the later requests where -- got involved dealing with Colonel Redmon and that he would be cc'd on some e-mails. And I think I only spoke to Colonel Redmon once. And that was -- that phone conversation where he would not allow me to stay any longer.

Q. All right. Based on your recollection of that conversation, what, if any, advice did Colonel Redmon give you to assist you in having your request to extend on active duty be endorsed or to be successful in getting your requests?

A. None at all. You know, prior to this -- again, we had -- I had gone through -- immediately through my battalion commander in the chain of command the first request. And then later on, I was told -- directed just to direct liaison with the separations and retirement people up at manpower. And so, we didn't have to have

full endorsements every single time for those last requests. However, when I called up Colonel Redmon, I had sent an e-mail -- this was in July when it looked like the case was going to CAAF. And it looked like there was going to be a lot longer delay and I sent up saying -- you know, an e-mail saying I'm going to need a much longer extension this time. And that's when I was told to -- told to contact Colonel Redmon directly. So I called him up and tried to explain the situation to him, the seriousness of the case, and what was going on with it, and Colonel Redmon said, No, you -- this is taking too long, we're not going to keep you here forever.

Q. Do you recall what month and year this was?

A. That would have been late July of 2008.

Q. Did you have any other military counsel on the case at that time?

A. I did not. Yourself -- you were -- you had retired prior to that. I'm not sure when your actual retirement date was, but you were gone by that point. I was the only military counsel on the case.

Q. Did you ever communicate to Colonel Redmon that you were the only lawyer on the case?

A. No. What I communicated to Colonel Redmon is that I'm the only military attorney on the case.

Q. Did you ever -- did Colonel Redmon ever communicate to you any advice that you can remember now -- any advice about how to connect or how to get general officers involved regarding your request?

A. No, absolutely not. As a matter of fact, what he did was chastise me for not finding a replacement and turning the case over to someone else. And I tried to explain to him -- you know, he's not an attorney, so I was trying to explain to him that it's not that simple and it's a very complicated case. And I just can't turn this over to, you know -- hand a file to a lieutenant and walk out the door. I said it doesn't work that way. And he didn't really seem to care.

As a matter of fact, he also sort of halfway accused me of using this as a ploy to stay in Southern California longer. And I tried to -- and that's when -- I got a little bit upset at that one. I tried to explain to him, Sir, you know, my family's already moved to Texas

anticipated for the retirement and I'm living in a trailer at Lake O'Neill on Camp Pendleton. And he didn't seem very moved by that and he still said, Well, we're just not going to let you stay any longer. You're gone. And -- and he also told me he wasn't even going to allow me to have any terminal leave.

It wasn't until -- I think it was the following week when I called back up there and spoke to his deputy that he allowed the retirement date to be actually 1 November so I could take terminal leave. Because based on my conversation with Colonel Redmon, he wasn't even going to allow me terminal leave. I was going to be gone in a matter of just a couple of days without terminal leave at all.

But no, he offered absolutely no suggestions on any endorsements at all. Not one.

Q. Now --

A. Again, I was -- I was trying to offer things to him as far as how I could stay. And again, he was just kind of blaming me for improper planning and not handing this off to somebody else. And I tried to also explain to him that the delay is nothing that we did. This is the delay based on the government's action appealing the issue. It wasn't even something I was requesting. And this is just the fallout from those -- those court's actions.

So no, absolutely not. He did not offer any kind of suggestion whatsoever. I was the one trying to come up with ways to be able to extend and stay on active duty. And he absolutely would not allow it.

Q. When you say you were trying to come up with some -- ways to extend on active duty, what -- what do you mean by that?

A. Well, I was -- he -- he had been -- during our conversation, he was talking about how this is just an ongoing thing and it's just request after request. And I told him, Sir, it's a little bit difficult to accurately predict exactly how long this is going to take. And that I didn't want to leave -- you know, I didn't want to stay -- just stay on active duty here at Camp Pendleton forever. But it's difficult to determine exactly what the courts are going to do.

But when we found out the case was going to CAAF, we kind of knew that it was going to be at least -- and I even called a few different people to get an idea on time frame. I think I called Colonel Sullivan up at appellate defense, and I knew it was going to be at least six months before we were going to get back in there. So I was telling Colonel Redmon that, you know, the reason we've been doing these requests so short at a time is we didn't want to stay on any longer than we had to.

But now I was -- I told him I did not want to do these things just one month at a time now because I understand that there's some hoops that they -- their office has to go through and that's why I was telling him the best thing here would be going six months out. And I think we'd get a pretty good idea by then of what was going on with the case, whether it was going to trial. And he said absolutely not.

- Q. Did he ever bring up getting an endorsement from Brigadier General Walker?
- A. No, absolutely not. He did not.
- Q. Did he ever bring up getting an endorsement from the convening authority in the case?
- A. No.
- Q. What about saying go get something signed from the judge?
- A. No.
- Q. Are you sure about that?
- A. I'm absolutely 100 percent sure on that. As a matter of fact, I discussed with him the fact that the Chief Defense Counsel knows. This is a case of -- a very high vis case. And that -- I think what I said to him is this is probably one of the biggest military justice cases since Vietnam. And it's that big of a case. And he said he didn't care. I should of thought of that beforehand before I started delaying the case.
- Q. What about a statement -- something like, Well, just get any general officer?
- A. No. Colonel Redmon offered absolutely no suggestions. The conversation was you are leaving active duty. You're not staying any longer, period. There was nothing of, Well, you might be able to stay if you did

this. He was telling me, We're not granting any more extensions. You're leaving.

Q. Why did your voice just get louder?

A. My voice got loud because it makes me a little bit -- it makes me pretty angry, because I was -- not trying to martyr myself, but I felt like I was sacrificing a lot to be able to stay on the case for Staff Sergeant Wuterich. And I had this colonel up at manpower who is accusing me of trying to stay in Southern California longer for some kind of benefit. I'm not even sure what that could be.

Q. Because --

A. I had my --

Q. Well, let me stop you there. Where was your family at that point?

A. My family was in Dallas. They were living with their parents. You know, couldn't buy a house, because we didn't know what my future was at the time. So they were living with my wife's parents. We had -- I mean, it caused all kinds of problems as far as what school we're going to get my son in to, because we didn't know where we were going to live. I mean, it was -- it was -- it created a whole lot of problems.

And to have this colonel, one, accuse me of just trying to stay in Southern California longer and then to suggest that, Well, I just should have found a replacement and handed him the file. He clearly did not understand that aspect of it because he's not an attorney. But to accuse me of doing something myself to make this happen, that somehow I'm benefiting from it really, really offended me. I was very angry at the end of that phone call.

Q. Well -- and I just shared with you what he testified about -- specifically about what he -- who he said that he told you to go ask for assistance. Do you recall that conversation I had with you?

A. I do.

Q. Okay. So you knew that these questions were coming?

A. I did.

Q. Okay. You did receive an e-mail from him, and I think that's already part of the record of this case. Do you recall that?

A. I do.

Q. Okay. What was the substance -- not specifically verbatim, what was the substance of that e-mail? What did it tell you?

A. I remember seeing this last time that we talked about the e-mail. Let me see here. Matter of fact I think I still have it. I can pull it up to you.

CC (Mr. Faraj): When you pull it up, please let us know what it is.

Your Honor, it was part of the last motion, and I don't have a copy of it for the court.

MJ: Okay. Go ahead. As long as Mr. Vokey identifies when he's testifying from memory and when he's looking at the e-mail, we're fine. It's a motions session.

WIT: Give me one minute here.

Okay. I found it.

**Questions by the defense (continued):**

Q. Okay. Tell us -- orient us to the document, please. Who it's from. Who it's to. The date, time stamp, and then the subject line and content.

A. Okay. This is an e-mail from Colonel Redmon sent -- I sent it from my -- the e-mail date is June 21, 2008. And it was -- the e-mail I have is an e-mail that was sent from my USMC e-mail account and I sent it to my personal Yahoo! account.

And it looks like within it contains an earlier e-mail from Colonel Redmon. I'm sorry, the subject is -- it's a forward, request for modification of retirement. In the body of the e-mail is another e-mail from Colonel Redmon to Sheila Arritt, A-R-R-I-T-T, and me and cc'ing Andre Robinson, who was -- or personnel at my battalion. And it says:

"Sheila, roger below. Like I said last week, I don't want to get into a situation where we..." parenthetical "...USMC collectively are bumping his retirement date

out 30 days at a time all summer long.

"Lieutenant Colonel Vokey, 1 August is your official retirement date. You need to make sure you pass on all the details to your relief. You need to understand the hoops, jump, and drama that results from changes to your retirement date. In fact, I'll guess your pay has been, will be somewhat jacked up between now and Christmas."

And then there's some -- under -- other e-mails -- earlier e-mails that are connected to that.

Q. What was the date -- not of the Yahoo! e-mail, but the date of the e-mail from Colonel Redmon to you?

A. That one looks like Monday, May 19, 2008.

Q. Okay. I'm referring to an e-mail where you -- when he refers to you. The content -- the body of the e-mail says, "You're gone 1 August."

Do you have an e-mail that says that?

A. Well, this particular e-mail says, "Lieutenant Colonel Vokey, 1 August is your official retirement date."

Q. Got it.

A. I don't know if there were subsequent e-mails to that. This is the only e-mail that I happen to still have. All I know is the phone call that I had with him happened in July.

Q. Got it. Okay.

A. There may have been subsequent e-mails to that.

Q. In total, how many requests for extension did you submit?

A. Three or four.

Q. Did you at some point stop submitting requests for extension?

A. I did. Yeah, based on that conversation with Colonel Redmon. He said there would be no more extensions. So there was no further request, because he already told me no.

Q. And conversation means the -- are you referring to the July phone call?

A. Yes, that's correct.



Q. What did he communicate to you that led you to believe that you should stop submitting requests for extension?

A. He said that we're not going to keep -- he said the same -- some of the same things he says in the e-mail. We're not going to keep just requesting -- granting new retirement dates every 30 days, because everything we have to do at our office. That's when I tried to explain to him, Well, sir, this -- I think we need longer than that. We need about six months now.

And he said, No, you should of thought of that before. And that's when I kind of got into the conversation with him, Sir, well, you got to understand this was not my idea in the first place. I don't care. You should of thought of that. You should of prepared better. And you should have given this case over to someone else.

And I said -- very emphatic saying, Sir, you got to understand, I mean, this is a big case. This is one of the biggest cases we've had in military justice since Vietnam. I've been on this case for several years. I can't just hand a folder to somebody and give them the case. It doesn't work that way. And he says, I don't care. We're not going to extend you anymore. You're gone.

And that conversation happened in July. I think it was somewhere mid- to late-July. I think it was about roughly a week, maybe ten days before the -- the 1st of August. Because he was telling me I was gone August 1st. I was gone. And I remembered I -- I was going to have to scramble to get out of there by 1 August.

Q. And -- and during that conversation -- during that conversation in July, again, you don't recall him ever recommending any personnel to reach out to for assistance?

A. He did not. He -- without a doubt, he did not.

CC (Mr. Faraj): How do you feel about -- about -- about hearing that? That you were told to reach out to officers. How do you feel about that?

TC (Maj Gannon): Objection, relevance.

MJ: Hold on just a minute.

Your response, Mr. Faraj?

CC (Mr. Faraj): It is relevant because -- because it goes to his state of mind and I have a -- I have words on paper but it doesn't show the court how Mr. Vokey feels about somebody representing that he was told information that he's saying that he doesn't -- he was never -- had that -- that he never had that information communicated to him.

MJ: All right. I'm going to overrule the objection.

Go ahead and ask -- answer the question, Mr. Vokey.

WIT: I felt -- I feel insulted and I feel very angry. There was absolutely no help that Colonel Redmon was offering me. As a matter of fact, he kept telling me, No, you're gone. And I was the one trying to plead with him and argue and convince him that I need to stay around. And he said absolutely no. There was no suggestion of, Well, you could do this if you got this certain endorsement or if you talked to somebody. There was absolutely nothing like that at all. It was a one way conversation from Colonel Redmon's point of view, from his perspective. There was no suggestions. No saying this is what you could do. He said enough is enough. You're gone. It was very frustrating for me.

And to hear that there's been testimony the other way, that makes me very angry and insulted. I was doing whatever -- I was doing everything possible that I knew how to do in order to stay on active duty to represent Staff Sergeant Wuterich. And it was going at great costs to me and my family. And it was very frustrating to have Colonel Redmon tell me, No, you're gone. And for somebody now to suggest that that's not what happened in the phone call, God, I'm livid.

Q. And again, I think I heard your voice rise again; is that correct?

A. Absolutely. Yeah. It makes me very, very angry. That absolutely did not happen in the phone call. There was no suggestions of this is what you can do. This is how it can be better. It was you're gone, too bad, and you have a few days to leave. And again, I had just over a week if I recall right to actually be gone off active

duty. 1 August was going to be the new retirement date. And I was very angry that I wasn't being allowed to stay -- like I said, I -- I thought I was trying to do the right thing. I was trying to do the right thing for Staff Sergeant Wuterich. I think he's a good Marine, and I think he deserves a good defense.

And I spent a lot of time and I've gotten to know him very well and the case very well. And I was trying to do the right thing and this guy shut me down. And for him to suggest now that I was doing something that -- that he suggested ways to correct this or make it work is -- is absolutely patently false. I don't know if the colonel just doesn't remember quite accurately or he's lying, but that did not happen.

Q. Thank you, sir. Now, I want to talk to you about your chain of command at the time.

A. Okay.

Q. Sorry for the abrupt change.

All right. Did -- to the best of your recollection, what were your -- you had three chains of command; is that correct?

A. I -- well, I probably view it as two chains of command. I had the battalion I belonged to that went up through Marine Corps Base. Had that chain of command. And then I -- then on the defense side with the Chief Defense Counsel.

Q. Okay. And on the -- let's talk about the Marine Corps Base chain of command. At the time you were transitioning -- and I'm just going to sort of lead you here -- Lieutenant Colonel Ingersoll was the Battalion Commander; is that correct?

A. I believe that's correct. That's -- I believe that's correct.

Q. Okay. Did you submit any type of documents, official documents or from/to letters through the battalion to try and extend your retirement dates?

A. Initially, yes. Absolutely.

Q. When did you stop doing the official correspondence?

A. When the -- when I was directed to do direct DIRLAUTH with Headquarters Marine Corps.

Q. And DIRLAUTH means what?  
A. Direct authorization -- direct liaison authorization.

Q. Who directed you to do that?  
A. The Battalion CO.

Q. Okay. And that was direct liaison authority directly to manpower to try and get the extensions necessary?  
A. That's right.

Q. Did you ever get any resistance to your requests from Lieutenant Colonel Ingersoll?  
A. No. No, it was a -- he was a full colonel. As a matter of fact, I had a number of discussions. I sat down in his office two, three, maybe four times talking to Colonel Ingersoll about that. And he was very supportive of my staying to finish the case.

Q. Was anybody else in that meeting with you?  
A. In those meetings? Not that I -- not that I remember. I would sometimes just talk to him. You know, the Battalion XO may have been in there once or twice. But I don't know. I think it was probably just Colonel Ingersoll.

Q. But just to be clear, when you went to Colonel Ingersoll, he basically supported every time -- he supported you every time you asked for an extension --  
A. Yes.

Q. -- and he eventually said go ahead and coordinate directly with manpower?  
A. That's correct. He also had me talking with his personnel guy, Mr. Robinson, who's the -- the other guy who's listed on the e-mail. That was Andre Robinson. He was a civilian who worked there at the CPAC.

Q. Was there anything -- today, thinking back, is there anything else that Headquarters Battalion could have done but did not do to help you get extensions?  
A. Not that I know of. Not that I know of.

Q. Okay. Now let's talk about the defense chain of command. Who was your boss at the time in the defense chain of command?  
A. Colonel Favors was the Chief Defense Counsel. Although I think probably, technically at that time, I was no longer the -- filling the role of RDC. It may have -- I

might -- Lieutenant Colonel Tafoya was probably already on deck as the new Regional Defense Counsel at that point.

Q. All right. And of course, if he took over as RDC, you would have been having conversations with him and up to through Colonel Favors?

A. Yes.

Q. All right.

A. Lieutenant Colonel Tafoya was well aware of what was going on with my extension request. I briefed him. We talked about it quite a bit.

Q. What, if any, advice did Colonel Favors offer you to assist you in extending on active duty?

A. None that I remember other than I would keep her informed of what we're doing as far as -- what I was doing as far as the extension requests and -- just keeping her informed as far as the extension requests that we were doing. Because she has -- she doesn't have operational or administrative control over me. She's in the defense chain of command, so she's -- she can't direct orders for me directly. I mean, she can't issue orders to me. Like any kind of personnel request goes through the battalion, not through her. But that way she's kept informed as far as what's going on with the extension request.

Q. Okay. In August -- in July, August of 2008, did you believe -- what, if anything, did you believe you could do in addition to what you did to help yourself stay on active duty?

A. Nothing.

Q. Based on your understanding of the law in 2008 as a regional defense counsel, what was your understanding of the law related to whether you could -- whether separation from active duty terminates an ACR?

A. Well, yeah. Absolutely. I assumed that leaving active duty severed the attorney/client relationship.

Q. So based on that, did you believe -- based on the law then, did you believe you had any recourse available to you besides trying to convince manpower to keep you on?

A. No. I mean, ultimately there -- no. I mean, ultimately they're the ones who decide whether I stay in the Marine Corps or I leave. And you know, my battalion commander

was supporting me on it and he would provide -- he provided favorable recommendations up front. I believe he spoke with folks at Marine Corps Base. I don't know if it was Marine Corps Base or Marine Corps Installations at that time as well. But ultimately, it was up to separations retirement branch up at manpower because they represent the Commandant of the United -- of the Marine Corps. So no, that was -- that was the authority to stay on or -- or be forced out on retirement.

Q. Did you believe based on your understanding of the law whether a military judge could extend you on active duty or order you to be extended on active duty for a case?

A. The military judge cannot. That was my understanding then. That's my understanding now.

Q. Based on your understanding of the law then, did you believe you had any relief available to you in court regarding remaining on active duty?

A. No.

Q. What about -- again, based on your understanding of the law, did you believe that you can bring a motion to the convening authority to extend you on active duty?

A. No. A motion -- because the judge -- the judge can't do anything to keep me in the Marine Corps or order me out of the Marine Corps. That's not within the purview of the military judge. So no. There was no motion I could bring that would do so. And -- and as far as the convening authority, the convening authority in this case was not my commander. So there -- I had -- there was -- that person was not in my chain of command whatsoever.

Q. All right. Now I want you to fast forward to on or about -- between then, August of 2008 and March of 2009, had you ever been officially released from further participation in this case by any detailing authority that you know of?

A. No.

Q. My question again, just to be clear, had you ever been officially released from further participation in the case by any detailing authority?

A. No.

- Q. Now let me focus specifically, had Lieutenant Colonel Tafoya ever communicated to you that you have been released from further participation in this case?
- A. No. I did have conversations with Lieutenant Colonel Tafoya when I found out I was leaving right away. A lot of complaining on my side but knowing that I'm leaving the case and there's nothing I can do to stay.
- Q. Were you -- I want you to focus on March of 2009 or before. In March of 2009 or before -- and before is the period after you left active duty, had you been retained by Staff Sergeant Wuterich?
- A. No.
- Q. Between the time you left active duty and on or about March of 2009, had you made any appearances in the case?
- A. No. As far as officially retained, no. March of 2009. That's probably about the time when I was going to try to do something to help, but no, never been -- never been retained and no appearances for Staff Sergeant Wuterich.
- CC (Mr. Faraj): Okay. Mr. Vokey, I don't have any questions for you at this time -- any more questions. Please stand by.
- MJ: Cross-examination by the government?
- TC (Maj Gannon): Yes, sir.

#### **CROSS-EXAMINATION**

##### **Questions by the prosecution:**

- Q. Mr. Vokey, it's Major Gannon. Can you hear me okay?
- A. I can.
- Q. You made, in essence, four requests to modify your retirement date. Is that accurate?
- A. That sounds about right. I know there was at least three.
- Q. On 12 February 2008, you made a modification request to move your retirement date. Does that ring a bell?
- A. It does.

Q. And in April you did so?  
A. That sounds -- that sounds right too. I'm not -- I don't have any of those in front of me, so I'll -- I don't know for sure.

Q. And then you just testified about a 19 May 2008 e-mail exchange between yourself and Colonel Redmon from MMOA?  
A. Right.

Q. And that -- that effectively moved your retirement date from 1 July 2008 to 1 August 2008, correct?  
A. Yes, I think that's correct. It went from -- I think it was 1 July before that.

Q. So the e-mail you testified to a moment ago was an approval of a mod request from 1 July 2008 to 1 August 2008, correct, sir?  
A. Let me look. I'm looking at the e-mail right now. Yes, that's correct. 1 July to 1 August.

Q. And then subsequent to that, you received a fourth modification request. This one was approved on 21 July 2008 and it approved your fourth modification retirement date to move your retirement from 1 August 2008 to 1 November 2008. Is that accurate, sir?  
A. That's correct. That's the one I was referring to that I got to allow me to take terminal leave.

Q. Yes, sir.  
A. That was -- that was the purpose of the 1 November.

Q. And that -- that modification request took place after your conversation that you testified earlier to with Colonel Redmon, your telephonic conversation?  
A. That's right.

Q. And that was -- it sounds like you were very frustrated by that conversation?  
A. I was very frustrated.

Q. It sounds like you -- you testified that you pleaded and you argued to continue on the case?  
A. Yes.

Q. And that you were doing everything possible to continue on the case?  
A. That's right.



- Q. And that conversation where you were pleading and doing everything possible to stay on this case, that conversation took place in mid-July 2008?
- A. Yes. Somewhere around mid- to -- somewhere around mid-July, maybe a little bit later than that.
- Q. Okay. Last time if it helps -- you testified last time or at our last hearing that it was either -- it was some time the week before the phone call, which would of put it 14 to 18 July 2008. Do you recall that testimony?
- A. The week before what phone call?
- Q. The phone call with Colonel Redmon.
- A. I'm sorry. What was the week before that phone call?
- Q. Mid-July, 14 through 18 July 2008.
- A. Okay. And what happened then?
- Q. Is it -- that -- that the -- this -- the phone call was taking place at that time?
- A. Oh, yes. Okay. Yes. Somewhere around there.
- Q. So we can agree that it is July 2008 that you had the phone call, the conversation with Colonel Redmon?
- A. That's right. And then his deputy was the following week.
- Q. Okay. But I want to focus on Colonel Redmon.
- A. Okay.
- Q. That's the phone call you testified to that you were frustrated and angry over?
- A. That's right.
- Q. That's the phone call in July of 2008 where you were attempting to do everything possible to stay on the case?
- A. Well, that's when I was -- when I was asking, yes, Colonel Redmon to allow me to stay on -- allow Headquarters Marine Corps to stay me on the case, yes.
- Q. Right. But you testified just minutes ago that at that point you were doing everything possible to stay on the case? Is that -- do you recall saying that just -- not even ten minutes ago?
- A. Yes.

- Q. Okay. Now you realize, sir, that this -- this is something that you could have brought to the court's attention, correct?
- A. I guess perhaps. I think the case was stayed at that point. So I guess I could have brought it to the Navy-Marine Corps court's attention.
- Q. Well, you were certainly talking with your fellow defense counsel on the case during that period, weren't you, sir?
- A. Yes.
- Q. You were sharing this frustration you were having with Mr. Puckett and Mr. Faraj?
- A. I don't think Mr. Faraj. I think he was already gone by then.
- Q. Okay. But Mr. Puckett?
- A. Yes.
- Q. Okay. So you were making him aware in July of 2008 that you were pleading and arguing to do everything you could to stay on the case?
- A. Yes.
- Q. Now you do realize, sir, that we had an 802 conference with Colonel Meeks on the 1st of August, 2008?
- A. No.
- Q. Mr. Puckett didn't tell you that we were going to have an 802 conference with the judge on 1 August 2008?
- A. I don't -- I don't remember the 802 conference. I don't know if I was there or I don't remember anything about that.
- Q. So you must not recall the e-mail traffic that you were cc'd on on 28 July 2008 which made you aware of the fact that we were going to do an 802 conference on 1 August 2008? You don't recall being cc'd on that traffic, sir?
- A. I don't. If you can send me the e-mail, I can -- I'll look at it and it may refresh my recollection.
- Q. And you do realize that the defense filed a motion to continue this case on 7 August 2008, don't you?
- A. I don't. I was -- I drove off and left active -- left Camp Pendleton I believe it was either the -- I think it was on the 4th of August, so I didn't have any e-mail.

I didn't -- I wasn't getting any Marine Corps e-mails. I was shut down. I was gone from Camp Pendleton on terminal leave by then.

Q. And so it is safe to say, sir, that you never did bring this to the military judge's attention during that summer of 2008?

A. No.

Q. And you never brought it to the convening authority's attention during the summer of 2008?

A. No. I don't -- I have no idea why I would bring it to the convening authority's attention.

Q. Well --

A. He can't do -- the convening authority is not in my chain of command, and he can't grant me the ability to stay on it. They would just -- the convening authority would just go up to Headquarters Marine Corps, the Commandant's manpower office. So I was already talking at the -- I was at -- I was already talking to somebody at the top who makes the decisions, so.

Q. During this time frame, sir, it is safe to say that you were -- you were very frustrated generally speaking with the military justice system as a whole. Isn't that true?

A. During -- in August?

Q. In August -- in the summer of 2008, yes, sir. There was an -- there was an [inaudible] or existing deep concern with you and your thoughts about the fairness of the military justice system. Didn't that -- didn't that idea already reside in your mind in the summer of 2008?

A. Yeah. It was probably some of that. I don't think that's -- it was anything revolutionary.

Q. Weren't you -- weren't you -- as early as October of 2007, weren't you fed up, your words, with the military justice system?

A. I don't think that's -- I'm not sure I'd say I was fed up with the military justice system at that point. I think a lot of that may be referring to Guantanamo and the military commission system.

Q. Now, with respect to where -- what was going on at this point, just so that we're clear, you had requested retirement well before this period where you were doing everything possible to stay on the case?

A. Yeah. Are you talking about when I first requested retirement or when I --

Q. Yeah. When you dropped the papers, sir.

A. -- requested modifications? Yeah. I probably requested -- let's see, it was March 2007 I think.

Q. And so you and I can agree that one possible thing you could of done in the summer of 2008 is make a request to rescind your retirement or to revoke your retirement, correct?

A. No.

Q. That option didn't exist?

A. I'm going to retire at some point anyway, so delaying it is the same as -- as taking away the request for retirement in my book.

Q. Well, but you and I can agree that a 30-day continuance request for your retirement is different than trying to rescind it altogether. Isn't that true, sir?

A. Yeah. But you're never actually rescinding it altogether ever anyway. And what I was trying to do in -- in that phone call with Colonel Redmon was to not do 30 days at a time and to set my retirement date out much further.

Q. Yes, sir. But that's not what I asked you. What I asked you was you never tried to rescind your retirement.

A. I don't think you can rescind a retirement. Again, I'm going to retire at some point. You can't -- and stay on active duty for 60 years. So at some point I'm going to be retiring. It's a matter of when.

Q. But at this stage, you were at 20 years. You could of gone to 26 years. Isn't that true, sir?

A. I --

Q. You knew that, correct?

A. Sure.

- Q. Earlier you testified that the issue with the stay -- or with the case that it was stayed in the summer of 2008. Do you recall that?
- A. Yes.
- Q. So you are aware that the NMCCA opinion came out on 20 June 2008?
- A. I'll take your word for it. I don't -- I don't remember now.
- Q. And you are aware that the defense filed a petition to reconsider that decision with the Court of Appeals for the Armed Forces on 30 June?
- A. Again, I don't remember all those dates, but if you say so.
- Q. Well, I'm just asking, sir, because you testified earlier that in July and August, there was a stay. But the truth is there wasn't.
- A. Okay.
- Q. Isn't that your recollection, sir?
- A. I don't remember.
- Q. So you don't -- you remembered earlier but you don't remember now?
- A. No. The case was originally stayed -- we were supposed to go to trial on the 1st of March. And based on the government's appeal, the case was stayed. Now, I know that once Navy-Marine Corps court decides and before it goes up to CAAF, I don't know -- I don't specifically remember now whether the case was still stayed or it was pending hearing at CAAF. And I don't remember when that stay actually was lifted. What I do know is that the case was going to be heard before CAAF before we were going to go to trial. So I was trying to best adjust my retirement date, so I could be there for trial. I was not really -- I was not involved in any of the action going at the Navy-Marine Corps court or CAAF. That was being handled by appellate defense.
- Q. Right. But we covered this last time you testified. And if I remember your testimony correctly, you were in contact with appellate defense attorneys, correct?
- A. Yes.

Q. In fact, I think you testified earlier that you consulted with -- with Mr. Sullivan -- Dwight Sullivan, who was working on behalf of Staff Sergeant Wuterich at the appellate level?

A. That's right. Colonel Sullivan and Major -- I can't remember who else was involved.

Q. And you're aware based on those conversations that at that time frame after the NMCCA issued their opinion in June of 2008 that the defense requested that CAAF stay the case? You're aware of that, aren't you, sir?

A. I don't -- I don't remember.

Q. That would have been information that was readily available to you, correct, sir?

A. Sure. A lot of my conversations with Colonel Sullivan or anybody else up there was when can we expect this thing to go to trial, because I got to keep adjusting my retirement date. So that's what there -- a lot of my conversations were based on how you think it's going to play out. When -- when will this thing be back at the trial court.

Q. Sir --

A. Which is why I was putting in those extension requests as we were doing them.

Q. You spoke with General Mattis about your position as the Regional Defense Counsel, didn't you, sir?

A. Yeah. Yes, I guess. It depends on what you're --

Q. You guess?

A. What do you mean by that?

Q. Well, I guess I'll just ask the question, Did you ever speak with General Mattis about -- about matters in the summer of 2008?

A. No.

Q. Okay. When did you speak with General Mattis?

A. Let's see, I first met General Mattis back in 2000 --

Q. Let me rephrase the question, sir, because it sounds like I asked a poor one. Did you ever speak with General Mattis and give him your side of the story about why you were relieved as the Regional Defense Counsel? Did that conversation ever take place?

A. Yes, it did.

Q. When did that conversation take place, sir?  
A. 2007.

Q. When in 2007?  
A. I believe it was either in August or September.

Q. So we can agree then that this conversation with General Mattis preceded your conversation with Colonel Redmon?  
A. Oh, yes, by almost a year.

Q. Okay. So my understanding is that at some point you were summoned to Washington, D.C., and you were relieved as the Regional Defense Counsel. Is that correct?  
A. No. I was --

Q. At some point in 2007, you were not relieved as the Regional Defense Counsel?  
A. I was relieved, but I was not summoned to Washington.

Q. Okay. So at some point in 2007, you were relieved as the RDC?  
A. That's right.

Q. Subsequent to that relief, you received a phone call from the convening authority on these cases, General Mattis?  
A. That's right.

Q. And in the wake of that conversation or during that conversation, you explained to the General what your side of the story was?  
A. That's right.

Q. And after that conversation you were reinstated as the Regional Defense Counsel?  
A. That's right.

Q. And that conversation that you had with the convening authority in this case took place before your conversation with Colonel Redmon?  
A. Yes.

TC (Capt Gannon): Your Honor, I have no further questions.

MJ: Anything further from the defense?

## REDIRECT EXAMINATION

### Questions by the defense:

Q. Would you like to distinguish the conversation between you and General Mattis as it relates to your relief and why you didn't think -- well, would you like to distinguish that from leaving active duty?

A. Well, one, I did not contact General Mattis. General Mattis contacted me. It was unsolicited. And General Mattis had some concerns with the appearance of this action on him. So he called me -- I think he was in London at the time at the airport, something like that, and he contacted me and asked me what was going on and what led to this.

And it had nothing to do with -- I didn't ask him to keep me in my billet or do anything concerning my retirement date whatsoever. It's entirely different -- it had nothing specifically to do with Staff Sergeant Wuterich at all. And I believe he was responding, because there were a lot of complaints to -- to him, I think, the Secretary of the Navy, maybe members of Congress about my relief. And he was calling to get his -- to get a -- my version of what happened.

Q. And, in fact, there were letters sent by many members of the criminal defense bar who were former military, who were suggesting that this was UCI as a result of the results in the Hamdaniyah cases.

A. Yeah. Although I didn't -- I didn't get any of those letters. I didn't have any part in them. So I was told that letters had been sent, but I have never seen any of them.

Q. All right. Did you at any time in your Marine Corps career feel like you can pick up the phone and call a general officer to have a chat with him?

A. No. No. Not particularly, no.

Q. Did you feel like you could contact General Mattis and have a talk with him about what was going on with manpower?

A. No. I wasn't -- I wouldn't say I was friends with General Mattis or he was a confidant or a mentor or anything like that, so.

CC (Mr. Faraj): I have no questions.



MJ: Anything else from the government?

TC (Maj Gannon): Yeah, briefly, sir.

**REXCROSS-EXAMINATION**

**Questions by the prosecution:**

Q. So let's just -- let me be clear, sir -- it's Major Gannon again. But you had had conversations with general officers on the defense needs for the Hamdaniyah and Haditha cases, hadn't you?

A. Yes.

Q. So you had spoken with general officers previous to that time frame? When I say that time frame, I mean the summer of 2008.

A. Well, general officers singular, yes. General Sandkuhler when we were discussing the needs for the defense.

Q. And it wasn't -- it wasn't unprecedented then for you to have a conversation talking about defense needs with a general officer.

A. That's right. As a matter of fact, I was speaking with General Sandkuhler because of manpower deficiencies and facilities deficiencies for the defense bar as a whole.

Q. And that meeting where you sought redress for these issues was attended in part by -- as you testified to -- General Sandkuhler?

A. Yeah. Well, the meeting -- the meeting was in my office with the Chief Defense Counsel, I believe Lieutenant Colonel Riggs, and General Sandkuhler was on the phone.

Q. Yes, sir. General Sandkuhler was telephonic. But Colonel Riggs was there. And Lieutenant Colonel Riggs was the MARCENT SJA, correct?

A. That's right.

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

WIT: Your Honor, I had one thing to clarify or I think I may have given a bad date earlier.

MJ: Okay. Go ahead, please.

WIT: It was asked when I actually left Camp Pendleton. I said it was either the 4th or the 6th. I found my 2008 calendar, and it was the -- 6 August is when I drove away from Camp Pendleton.

MJ: Okay.

WIT: That's when my terminal leave started, and I departed Camp Pendleton. So it was 6 August, a Wednesday.

MJ: Give me just a moment, please.

CC (Mr. Faraj): Your Honor, we are going to ask Lieutenant Colonel Vokey to continue to stand by today for another call later that we anticipate to have.

MJ: Okay. Very well.

I don't have any questions for you then, Mr. Vokey. If you'll be available to testify a little later.

WIT: Sure. By cell phone, please.

MJ: Okay. Thank you for your testimony.

WIT: Okay.

MJ: We're disconnecting.

WIT: All right.

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

MJ: The court will be in recess.

[The Article 39(a) session recessed at 1512, 25 April 2011.]

[The Article 39(a) session was called to order at 1530, 25 April 2011.]

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

We have here Lieutenant Colonel Tafoya, who's the next witness to be called by the defense.

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

**DIRECT EXAMINATION**

**Questions by the prosecution:**

Q. Can you state your full name, sir, and spell your last for the record?

A. Patricio Tafoya, T-A-F-O-Y-A.

Q. Sir, you were formerly -- or you are the Regional Defense Counsel for the regional -- the Western Region?

A. Correct.

Q. And that is your current assignment correct, sir?

A. It is.

TC (Maj Gannon): Those are all the questions I have. Thank you, sir.

MJ: Defense, your witness.

**Questions by the defense:**

Q. Lieutenant Colonel Tafoya, did you ever become the detailing authority for the Haditha cases?

A. Yes.

Q. Do you recall when that was?

A. It was in 2008.

Q. Have you -- would it refresh your memory if you looked at the detailing letter to see what the date exactly was?

A. I'm sure it would.

Q. I'm handing Lieutenant Colonel Tafoya Appellate Exhibit CXVI.

A. Okay.

Q. Would that help you remember the date?

A. It does.

Q. And what is the date, sir?

A. 6 August 2008.

Q. And this is addressed to Regional Defense Counsel West. Do you know who that -- who Regional Defense Counsel West was on 6 August 2008?

A. It was me.

Q. Okay. Have you -- has this authority been withdrawn from you since then?

A. No.

Q. All right. Sir, between then and now, have you ever relieved Lieutenant Colonel Vokey from representation of Staff Sergeant Wuterich in the case of *U.S. v. Wuterich*?

A. No.

Q. Have you ever taken any action to release Lieutenant Colonel Vokey from further representation of Staff Sergeant Wuterich?

A. No.

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

MJ: Cross-examination by the government?

TC (Maj Gannon): Yes, sir.

#### **CROSS-EXAMINATION**

##### **Questions by the prosecution:**

Q. Sir, good afternoon.

A. Good afternoon.

Q. You detailed yourself to this case, correct?

A. I did.

Q. In your capacity as RDC West?

A. Correct.

Q. Subsequent to your relief from this case, you detailed Meridith Marshall -- Major Meridith Marshall to this case as well?

A. I'm not sure whether I did detail Major Marshall to this case. We might have used the traditional detailing authority from her normal chain of command for that.

Q. If I told you the record indicated that you were -- you were the detailing authority, would that make sense?  
A. It wouldn't -- it wouldn't.

CC (Mr. Faraj): We would ask to see the record, Your Honor, because we know something different.

MJ: Okay. Your objection's overruled.

You can ask the question.

Go ahead and answer it.

**Questions by the prosecution (continued):**

Q. Just what was your recollection then, sir?

A. My -- my --

Q. The record's going to speak for itself.

A. Right. My recollection about the detailing of Major Marshall was that she was not going to be detailed using that delegation from MARCENT. She was going to be detailed by her commanding officer, OIC, or appropriate detailing authority per the JAGMAN.

Q. And were you involved in those discussions to make that determination?

A. I remember having some discussions to make that determination.

Q. With whom did you speak, sir?

A. I believe it was Lieutenant Colonel Forkin at the time, who was the OIC of the LSSS.

Q. Okay. So you had conversations with Lieutenant Colonel Forkin who did not have detailing authority over Major Marshall at that point?

A. Well, I think he did because she was getting ready to leave as the -- as the OIC of Legal Team Delta to be a defense counsel at Miramar. So I think she was introduced to the case or had some dealings with Staff Sergeant Wuterich's representation before she actually moved wholly to Miramar, I think.

- Q. Certainly, Lieutenant Colonel Forkin did not have detailing authority over Meridith Marsh -- Major Marshall if she was the OIC of Delta. She was detailed in her defense capacity, correct?
- A. She was detailed -- well, it must have been Lieutenant Colonel Daly or the CO of H&HS Squadron. Somebody.
- Q. And that defense capacity attached when she reported to Miramar?
- A. Yes, so then what had to have --
- Q. Because she was the Regional Defense Counsel at Miramar, correct, sir?
- A. She's the Senior Defense Counsel.
- Q. Excuse me, the Senior Defense Counsel at Miramar. Sorry. I didn't mean to take your job. Senior Defense Counsel at Miramar.
- A. Yes.
- Q. And she was not the Senior Defense Counsel at Camp Pendleton?
- A. Correct.
- Q. Either at Delta or Echo?
- A. Correct.
- Q. In 2008, when you began turnover for this case with Lieutenant Colonel Vokey -- specifically it would have been in the early summer time frame -- he had lengthy conversations with you about his frustrations in being extended on active duty?
- A. I don't remember the exact nature of the conversations.
- Q. Do you recall having any conversations with Lieutenant Colonel Vokey; wherein, he expressed how frustrated he was that manpower was, in his words, frustrating his efforts to stay on this case?
- A. You're putting me in a difficult spot here because conversations that Lieutenant Colonel Vokey and I would have had -- me being the new RDC; him being the outgoing RDC with regard to this case that I was going to be detailed on -- those could arguably be considered confidential communication with furthering the representation of a particular client.

TC (Maj Gannon): Absolutely. Absolutely. In fact, what I would ask that we do then is we take a break and we obtain a waiver from the accused so that we can get a full and fair hearing of the facts on this issue.

CC (Mr. Faraj): We're not going to waive his Sixth Amendment right -- or the Fifth Amendment right to get Sixth Amendment right. We're not going to waive any rights that he has. They can ask him the same question: Was Colonel Vokey frustrated with leaving. He said he didn't recall. I don't know what else he gets out of Lieutenant Colonel Tafoya, but he's not going into this ACR anymore.

MJ: Looks like the defense does not want to give a waiver, so go ahead and just ask whatever questions you can.

CC (Mr. Faraj): Yes, sir. I couldn't even ask Colonel Redmon what they said to each other. You stopped me, Your Honor, and that's not privileged.

MJ: I understand. I sustained your objection.  
Go ahead.

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

**Questions by the prosecution (continued):**

Q. So I guess to clear it for the record, we don't have a waiver. But I still would like to explore some initial issues in terms of your contact with this case.

When were you told you were going to become the RDC, sir, here at Camp Pendleton?

A. Probably in the early spring of '08.

Q. Early spring of '08?

A. Right.

Q. So that would be before the summer?

A. Exactly.

Q. When did you check in to Camp Pendleton, sir?

A. July 7th, 8th, 9thish of 2008.

- Q. Okay. And you indicated a moment ago you knew you were going to be detailed to this case at that point?
- A. I knew I was going to be the RDC, and we suspected because the RDC -- outgoing RDC was the detailed counsel. And so that -- it would make sense, at least initially, if the incoming RDC picked up the reins if the outgoing RDC was not extended to continue representing Staff Sergeant Wuterich.
- Q. And you did what folks do when they're transitioning in billets. You picked up the phone prior to July of 2008 and spoke with Lieutenant Colonel Vokey?
- A. I don't know if I did. I mean, I could have because that's -- I know him from before. So I don't remember doing that specifically, but I probably did.
- Q. Okay. And at that point you were aware -- I'm just trying to establish when you were aware of when you were going to come on the case as a defense counsel.
- A. Okay. I can tell you I was not aware when I first found out I was going to be the RDC, because I didn't know where any of these cases were in the pipeline, in the process. I had no idea what cases were still going, which ones were pending, or where they were in their own individual process.
- Q. But by July of 2008, you were aware that you were probably going to be detailed to the case?
- A. I was aware I was going to have to have something to do with Staff Sergeant Wuterich's case more than likely, yes, if it was not resolved by then.
- Q. And you were aware that you were going to be detailing yourself to the case?
- A. I had pretty much figured I would detail myself to the case if Lieutenant Colonel Vokey was no longer on the case.
- Q. And that's the summer of 2008?
- A. It would be the summer of 2008 -- July, August 2008.
- Q. July, August 2008 -- summer of 2008 you were aware you were the detailing authority. You were aware you were coming on the case?
- A. I was aware. Yes, I was thinking I was going to come on the case because we had to have somebody to come on the case. And looking around the region, I would have been the logical choice.



Q. Right, but you were also aware that you were going to be the detailing authority for the case?

A. Yes --

Q. Isn't that true?

A. Yes, I knew I was going to have -- in August -- or late July, I did find out that they were going to delegate detailing authority to RDC West. I think it had been done before, but Lieutenant Colonel Brasure at MARCENT just wanted to, I guess in an abundance of caution, redo a letter from MARCENT Commander delegating the authority to detail counsel to these cases to the RDC West.

Q. Okay.

A. Yes.

TC (Maj Gannon): That's all I have, sir.

MJ: Redirect?

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

MJ: Lieutenant Colonel Tafoya, I do not have any questions for you. Thank you for being available to testify. You're excused.

WIT: Yes, sir. Thank you.

[The witness was excused and departed the courtroom.]

MJ: Defense.

CC (Mr. Faraj): At this time, the defense moves for an *ex parte* hearing to take testimony of Lieutenant Colonel Vokey by telephone.

MJ: According to the Court of Appeals of the Armed Forces, it says if the military judge determines that any such determination requires an *ex parte* hearing, the military judge should ensure that the record establishes the necessity and basis in law for any *ex parte* proceeding, including the basis in law for any assertion of privilege as the basis for an *ex parte* proceeding. If the accused is not present for any proceeding, the military judge should set forth in the record the basis in law for conducting the proceeding in the absence of the accused.

So I think we talked about having the accused here. It sounds like the Appellate Court thinks that would be a better way than us going into the other room like we did last time without the accused being there, so the accused will certainly be here. It says that I'm supposed to have a necessity and basis in law for any *ex parte* proceeding.

So what is the necessity and basis in law for the *ex parte* proceeding from the defense's view?

CC (Mr. Faraj): The defense will be offering information that we have a good faith reason to believe is privileged communication -- attorney/client privileged communication from Lieutenant Colonel Vokey, who previously represented Staff Sergeant Wuterich. And I've just been reminded by Mr. Puckett that Staff Sergeant Wuterich will also be providing some information regarding that representation, because that communication -- most of it will probably be privileged, Your Honor, we would ask that it be done *ex parte*.

MJ: Okay. Government, you have the same ruling from the Appellate Court that I do. I'm not going to set out all of the appropriate case law. I'm not prepared to do that at this point in time. But at least at this preliminary juncture, I would see -- would think that the -- based on my understanding of privileged communication and my understanding of the necessity for an *ex parte* proceeding in this case, that I would find that there's a necessity and basis in law for the *ex parte* proceeding and for the assertion of the privilege.

Do you wish to say anything before we commence with the *ex parte* hearing or have the judge put anything else on the record at this time? Of course, I am privy to the *ex parte* hearing that I have already conducted with the defense and you are not, which is why I am more easily persuaded to have an *ex parte* hearing at this point in time.

TC (Maj Gannon): Yes, Your Honor. That's what I'm struggling with. What I'm struggling with, sir, is that it's the government's understanding from the pleading process that we're going to go from an *ex parte* communication that, other than your recollection, is not captured on the record other than the sealed document you put forth. And you concluded definitively and absolutely and made

several rulings on the record saying, hey, this is an irreconcilable conflict.

I don't know what to do frankly, Your Honor, if you encounter information during the course of this upcoming *ex parte* communication that conflicts with your previous recollection and how that's going to be resolved.

I've also just heard for the first time that it's a possibility that the accused may make some representations to the military judge. That's not an *ex parte* communication. That's testimony in front of the judge without the crucible of cross-examination. An *ex parte* communication would be communication with counsel making representations as the court see fit -- sees fit.

So I think there's a couple of issues that we should deal with here, and I think that it's fair for the government to know whether or not the accused is going to speak on these issues and how we're going to resolve any conflicts that may arise during the course of this upcoming *ex parte*.

MJ:

Okay. So the first issue is if something contradicts what I heard before I'll have to waive that and judge that as the trier of fact or the decider of the motion and the necessity for this hearing. I can't -- I'm not going to be at liberty to divulge any of those things to the defense.

The second issue that you have is you're objecting to the defense -- to the accused actually saying something during the *ex parte* hearing not subject to the crucible of cross-examination. I was just informed that the accused is going to be testifying about privileged communication with the attorney. So therefore, I don't find the need for the government to -- it's inappropriate, therefore, for you to hear that testimony and be able to cross-examine him on that. Your cross-examination would be useless to me anyway if he's just merely relating communications he's had with his attorney because those would be, simply, conversations that he's had regarding this case or the representation of the counsel, et cetera. So that's the best I can answer for you on that.

You are correct. I did -- and I want to state for the record in case I did not state so earlier, I took messy but extensive notes at the first *ex parte* hearing. And after I left, I rewrote them. I did not retype them. I rewrote them so my recollection would not fade. Subsequently I retyped them into the document that was presented to the Court of Appeals -- or NMCCA, I think at that point.

So what I put in there was exactly as I remember our first *ex parte* hearing occurring, and I have that on my computer here that I can certainly reference any inconsistencies or anything else. And I don't know if these trial -- defense counsel have that. I would assume they might, but that was put into the record sealed at least to NMCCA. So I just want to state that I did take copious notes and not only rewrote them immediately thereafter, but retyped them again based on my knowledge. And I tried to go chronologically and that was a little hard. But I tried to go chronologically on everything that occurred in the first session.

So I just wanted to put that on the record, but -- so I guess I'm -- maybe I'm missing your point, but I would not allow you to cross-examine based on privileged communication. If he's going to get up and talk about other things in the motion, you know, understanding that the reason we're having this is so that we can talk about things that are not discoverable by the government.

And therefore, are you asking me just to make sure that I have a tight rein on his testimony so that he doesn't start offering other testimony that's not privileged?

TC (Maj Gannon): Exactly, Your Honor. Yes, exactly. I mean, if he's going to talk about it -- theoretically, if one was to read between the lines and talk about the potential for conflict existing that's rooted in Lieutenant Colonel Vokey's representation of the accused and it's subsequent employment by the Hagood firm, which represented Sergeant Salinas, and that there were communications that were made that may render him unable to continue, then that would be something -- that's one -- one aspect.

But if the accused is going to make representations to the court about what he was told during the departure time frame as alleged by the defense in their pleadings, specifically the summer of 2008 -- if the accused is going to say, Your Honor, I was told "x," I was told "y," and I was told "z," we've got that in their pleadings. And our position would be that that's been waived both by the proffer from Lieutenant Colonel Vokey -- which is an appellate exhibit -- and by the lengthy factual representations by the defense counsel, previously, that those communications have been waived. And those would be subject to cross-examination based on the record that exists.

So we don't have the benefit of hearing the testimony or the statements that the accused is going to make to the court if the court hears from him during an *ex parte*. That's our concern.

And then our subsequent concern: The government would respectfully request on the first point -- if there's inconsistencies between the *ex parte* that took place previously and the one that is apparently about to take place today -- if there are inconsistencies, we would respectfully request that the court capture those on the record too so that subsequently an appellate court -- when they look -- as you referenced yourself a moment ago as the trier of fact or the finder of the law on this motion, so that your basis can be evaluated as well because I don't know for a fact but, based on the change in the pleadings, I suspect there's going to be some inconsistencies between the two.

And if I'm wrong, I'm wrong and it's all for not. But we would request that you make findings of fact and conclusions of law on your decision that are rooted in any inconsistencies between the original *ex parte* and the one that apparently is going to take place today.

MJ: Okay. And I will certainly do that. I don't have a problem doing that. And regardless of which way it goes on this, I would assume I would be giving you findings of fact, conclusions of law at any time up until the authentication of the trial -- of the record of trial, excuse me, regarding this issue.

I wouldn't hear any inconsistencies, I guess, from the accused since he was not at the *ex parte*, but I understand the nature of your argument. I also understand the uncomfortable nature of kicking one party out of the proceeding, and I understand that it's a rare thing to allow *ex parte* hearings. We don't do it very often as military judges. And I found that the last time we had an *ex parte* hearing that the defense was, I felt, entitled to have it -- at the conclusion of that, very entitled to have the *ex parte* hearing and that they had good grounds and good reason to request it. So I assume the same thing today.

But I understand your consternation with my taking evidence that might be on the motion regarding Mr. Vokey's representation that would go further than privileged communication and that if the accused had something further to offer on that subject that went outside the purview of privilege, he could take the stand like any other witness, be subject to cross-examination, and he could take the stand for the limited purpose of the motion. And even if the defense forgot to say that, I would assume that that's why he was taking the stand, was for the limited purpose of the motion.

Did I answer any of your concerns, or do you still have any other concerns before we have an *ex parte* proceeding?

TC (Maj Gannon): Your Honor, I don't want to belabor this. You spoke to my concerns. I just -- I just -- I just want to remake -- make it very clear to the court there are types of representations that can come from the accused that will conflict with the existing record. Our position is that those are not privileged communications, because that privilege has been waived by the -- by the defense reviewing that -- those facts -- specifically, what was discussed with him in the summer of 2008 immediately prior to Lieutenant Colonel Vokey's departure. Other types of privileged communications that the government can't know what the nature of those are and whether or not those were brought to your attention, we would object to your consideration of any statement from the accused that varies from the record as it exists currently.

MJ: And what is the very nature -- I want to make sure I understand your objection.

What specifically has the defense already waived that we're -- that you're talking about?

TC (Maj Gannon): The accused was advised prior to Lieutenant Colonel Vokey's departure that the relationship between Lieutenant Colonel Vokey and the accused would continue, but it would not be as detailed counsel.

MJ: Okay. And where exactly was that?

TC (Maj Gannon): That's in the defense pleading, sir. I cite it with specificity in terms of its exact location in the record. And I believe it's in the defense 26 August original motion on this issue. And I cited it in the most recent appellate exhibit that we've just filed on this -- this issue.

MJ: Where's it mentioned in your motion?

TC (Maj Gannon): I'm going to find it right now, Your Honor.

MJ: Okay. I also notice on the defense motion -- it's CX -- you put 15 April 2010. We all understand that to be 15 April 2011. It's this year.

CC (Mr. Faraj): Don't want to grow old, Your Honor.

MJ: I noticed that CAAF had some of the dates wrong in there -- in the order. They had Lieutenant Colonel Vokey representing the accused -- so I'll state for the record in case it goes back to CAAF -- in their order of 4 April, they have that Lieutenant Colonel Vokey represented the accused until September 13, 2011. That's obviously wrong. It's now April 25, 2011. That should say either 2009 or 2010. I believe they're referring to 2010 when we were in court.

CC (Mr. Puckett): And Your Honor, they subsequently issued a corrected abatement --

MJ: Thank you.

CC (Mr. Puckett): -- a corrected order.

MJ: And I have not seen that order, so I went off the original. Thank you.

CC (Mr. Puckett): And it specifically made those date corrections.

MJ: Okay. Thank you.

TC (Maj Gannon): It's Appellate Exhibit XCIV, Your Honor, Page 5. And we reference it in our motion, Page 4, second full paragraph.

CC (Mr. Faraj): What was it? Page 5?

TC (Maj Gannon): Appellate Exhibit XCIV, Page 5.

CC (Mr. Faraj): Is Appellate Exhibit XCIV my first motion on this?

MJ: It's the motion dated 25 August 2010. You're welcome to come up and look at it if you'd like.

CC (Mr. Faraj): 26 August or 25 August?

MJ: 26 August 2010, if I said the wrong date, and you mentioned that specifically. I remember it, and I obviously read the government's motion.

I remembered that. I just wanted to get, specifically, what you were talking about so I understood your objection -- or your bone of contention. And I see it also mentioned, of course, on Page 4 as you indicated of your response to the current defense motion.

Okay. Anything else from the government?

TC (Maj Gannon): No, Your Honor. Thank you for hearing us on that. I appreciate it, sir.

MJ: Sure. Yeah. I want to give you as much time as you need to to put anything on the record to make sure that I'm not missing anything, simply because it is rare to do an *ex parte* proceeding and I just want to make sure I'm not missing anything before we do it. So I do find the sufficient basis in law for an *ex parte* proceeding.



Again, I can put all this in writing later based on the rule of the privilege -- the right to privileged information between the accused and his attorney. And I'm assuming that Mr. Vokey will talk about that and perhaps some other matters that we dealt with in the last *ex parte* proceeding. And we'll have the accused here.

So at this point I just turned off all of the -- local view is off. The remote view is off. So all of the proceedings are no longer being broadcast outside the courtroom. We'll have to seal this portion of the record of trial. So when we start, I'll alert the court reporter, Lance Corporal Greene, about what point we're at. And for the *ex parte*, I will close the courtroom to all spectators and also to all of the government counsel. When we get back on the -- we'll stay on the record, but we -- when we start the *ex parte* proceeding, I will note -- again, have the court reporter note when we're starting it exactly. And also, I will note who is present in the courtroom during the *ex parte* proceeding. And then we'll proceed from there.

So at this point the courtroom is closed to all the government counsel and all spectators.

[The *ex parte* session follows and is sealed by order of the military judge. The session began at 1557, 25 April 2011.]

**[END OF PAGE]**

[The ex parte session concluded at 1704, 25 April 2011.]

[The Article 39(a) session recessed at 1704, 25 April 2011.]

[The Article 39(a) session was called to order at 1729, 25 April 2011.]

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

We had an extended break, and then we went into an 802 conference I'll summarize.

The bottom line is the defense wants to go through argument on the motion and -- tonight and so hopefully they can leave tomorrow and move onto other engagements that they have, evidently, in other cases.

And the government doesn't know if they're going to have evidence or not and would like time to think about the evidence that has been presented so far and find out whether they wish to present any more evidence or not. In response, the defense indicated that some of the government's points were about the motion that was withdrawn, which was me recusing myself. So I certainly don't need any more evidence on that. And then the government was concerned with -- with knowing anything that occurred during the ex parte hearing that would not be privileged information. And so that, they said, might be able to inform their decision tonight on whether they have more evidence to present or not.

So I'm not going to discuss anything that happened during the ex parte proceeding with the government counsel today. And I'm going to -- what I indicated to the government counsel was that I tried to -- with the evidence in the ex parte hearing, I tried to go through Footnote 2 on Page 4 of CAAF's order to the best extent that I could. Obviously I can't -- I'm not reaching legal conclusions or findings of fact on the record. What I did was simply ask questions of certain individuals, and I've done that to my satisfaction at least. I hope when I write these out that that will allow me to answer the questions posed by CAAF in Footnote 2 of their order.

So that's where we're at now. I talked about an 802 conference about giving counsel an hour to see if they had any further evidence. I don't want to rush them. If the defense counsel are both trying to leave in the morning and we can do the argument tonight, I would like to do that. If the government has further evidence they would like to present in the morning, then the defense counsel can stay here. We planned the motions hearing for two days, and they'll have to make other arrangements. I appreciated everyone dropping their schedules to get this into court as soon as we could, and so I don't want to punish anybody by making them stay. The defense counsel can stay till tomorrow if there really is no more evidence to present.

So that's the basis -- or that's the summary of the 802 conference. So I would like to have either side go ahead and add anything or correct anything I said about what happened off the record in the presence of all parties and the accused.

CC (Mr. Puckett): None from defense, Your Honor.

MJ: Government?

TC (Maj Gannon): No, Your Honor.

MJ: Okay. So would you like to avail yourselves of that opportunity? Again, I'm not trying to pressure the government. If you have further evidence or something else that you think I need for this motion, that's fine. I'll hear it tomorrow. I'm in no hurry to go. I don't leave till Wednesday. But if you don't have anything and we can work with defense counsel's schedule, then we'll take that argument tonight.

TC (Capt Sullivan): Yes, sir. I think it's a good suggestion. Can we take an hour, Judge?

MJ: Sure.

TC (Capt Sullivan): And then we'll have a response for you.

MJ: And if you're ready before an hour, let me know. Otherwise, it's 5:30.

TC (Capt Sullivan): And that's a good point too. It may be less than an hour.

MJ: It's 1730 now. I'm not going anywhere. I'll be in the judge's chambers for at least until 1830 and at least until I talk to you. So the court will be in recess.

[The Article 39(a) session recessed at 1732, 25 April 2011.]

[The Article 39(a) session was called to order at 1840, 25 April 2011.]

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

Two times -- two sessions ago, we got on the record and Major Marshall was not here and she's not here now. She left about 1715 or 1720 before we took our hour break and before we got back on the record and during the 802 conference with all parties. And the accused indicated that he was excusing her from further participation today because she had some childcare issues.

Is that right, Staff Sergeant Wuterich?

ACC: Yes, sir, it is.

MJ: All right. So everybody else has been here and will be here.

We just had an 802 conference. Major Gannon would you like to summarize that? I'm drawing a blank on what we just talked about.

TC (Maj Gannon): Yes, sir. We had a brief 802 conference, and the military judge brought it out -- brought it to the government's attention in the presence of the accused and his counsel that, during the course of the *ex parte* communication, the defense adopted the summary that the military judge prepared and sealed for the consideration of the Court of Appeals for the Armed Forces in the previous *ex writ* that went up. And that that write-up -- that written summary had been adopted by the defense counsel as being an accurate record of that proceeding.

MJ: Okay. Thank you. That's what we talked about. I don't know why that slipped my mind. We just talked about it a few minutes ago. And I did let the government know that -- and there's no objection from the defense -- simply so that they would understand that. And then I

indicated that I still have some questions of some witnesses in the *ex parte* hearing. And that's all I'm going to discuss about that.

So anything to add to the summation by the defense?

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

MJ: Okay. Please keep your seats. We're going to put the court in recess while we try to get Mr. Vokey back on the line.

[The Article 39(a) session recessed at 1842, 25 April 2011.]

[The Article 39(a) session was called to order at 1844, 25 April 2011.]

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

We also discussed during the 802 conference that the parties wanted -- particularly the government -- wanted time to think about any issues they may be missing. They expect this issue to be -- have an extraordinary writ, once again, by the defense and they requested 72 hours to put any argument in writing that they have regarding this motion. The defense was not opposed and both sides are open to presenting me any material for your arguments in writing before 72 hours and also any other affidavits or documentary evidence.

WIT: This is Colby Vokey.

CC (Mr. Faraj): Colby.

WIT: Yes.

CC (Mr. Faraj): Are you available to talk?

WIT: I am.

CC (Mr. Faraj): Okay, great. Stand by, please.

MJ: We're on the record, Mr. Vokey. I'll remind you you're still under oath.

WIT: Yes, sir.

MJ: Government, you may proceed.

**Lieutenant Colonel Colby C. Vokey, U.S. Marine Corps, Retired, was recalled as a witness by the prosecution, was reminded he was still under oath, and testified as follows:**

**DIRECT EXAMINATION**

**Questions by the prosecution:**

Q. Sir, it's Major Gannon. Can you hear me?

A. I can.

Q. Sir, just a couple of questions. Your -- I'd like to take you back to the summer of 2008.

A. Okay.

Q. You testified earlier about a conversation you had telephonically with Colonel Redmon?

A. Yes.

Q. In the wake of that conversation, did you speak with or have any written communications with the MARCENT SJA -- the outgoing MARCENT SJA, Lieutenant Colonel Riggs, related to that conversation -- that conversation being that with Colonel Redmon?

A. No, I'm not. I'm not -- and I don't remember if Lieutenant Colonel Riggs was still the SJA or not at that time but --

Q. Yes, sir. I just want to make sure at that time it's unclear he may have been out-processing or still there. But just, you know, who Lieutenant Colonel Riggs is, correct?

A. Yes. Absolutely.

Q. Did you have any written or oral communications with Lieutenant Colonel Riggs regarding your phone conversation with Colonel Redmon that took place in mid-July 2008?

A. I don't know. Not that I recall.

Q. Same question for Lieutenant Colonel Brasure.

A. No. Was he the replacement for Lieutenant Colonel Riggs?

- Q. Yes -- yes, sir. That's correct. I wasn't aware. I thought you knew who the SJA was to MARCENT, Lieutenant Colonel Ian Brasure.
- A. Do you know who that is, sir?  
I do.
- Q. Okay. That's who -- that's the gentleman who took over for Lieutenant Colonel Riggs.
- A. Okay.
- Q. Did you have any written or oral communications with Lieutenant Colonel Ian Brasure, the MARCENT SJA, in the summer of 2008 regarding your conversation with Colonel Redmon?
- A. Not that I recall.
- Q. Did you have any written communications with Colonel Ingersoll during the summer of 2008 related to your conversation with Colonel Redmon?
- A. Written communication, no. In person I met with Colonel Ingersoll concerning that, yes.
- Q. You met with Colonel Ingersoll after the oral conversation you had -- the telephonic conversation you had with Colonel Redmon?
- A. Yes.
- Q. What did you tell Colonel Ingersoll?
- A. I relayed to Colonel Ingersoll what Headquarters Marine Corps had said about me not being allowed to stay any longer and I had to leave.
- Q. Did you seek redress from Colonel Ingersoll? Did you ask him to intervene on your behalf?
- A. Yeah. Colonel Ingersoll said there's nothing more can be done.
- Q. That's not my question. Did you ask him -- did you ask him to intervene on your behalf?
- A. I don't recall how all the conversation occurred. Other than that I told him what happened in the phone conversation and that the -- I said that the manpower folks weren't letting me stay. And he said, Well, there's nothing more that can be done.

Q. Yes, sir. I heard you answer that twice now. But do you recall whether or not you asked him for assistance?

A. I don't recall.

Q. Did you request mast?

A. No, I did not.

Q. Alright, sir. Now I'd like to jump ahead and talk with you briefly about the time period of when you realized that there was a conflict that had arisen which has been the subject of this litigation.

When did that first come to your attention, sir?

A. And which part come to my attention?

Q. The fact that there may be a conflict.

A. Last summer --

Q. All right.

A. -- of 2010.

Q. And when you came to this conclusion -- if I recall correctly -- I was present for some testimony -- you had some discussions with your fellow defense team related to this potential conflict?

A. That's right.

Q. Okay. Sir, at that time or since then, have you sought any advisory opinions from your state bar related to this conflict?

A. Just take it with you -- no, but my state bar doesn't provide advisory opinions.

Q. Have you sought a written ethics opinion related to this issue from your state bar?

A. No, because I can not.

Q. So if I understand your response, you don't have any paper, any written work product or opinion, for lack of a better term, in your possession on this matter from your state bar?

A. No. It wouldn't make any sense, because they do not provide advisory opinions.



Q. Yeah. The question is did you seek it.  
A. I don't think I had -- no. I don't think I had any conversations with anybody from the state bar on that issue. I had it on some other issues, but not on -- I don't believe on that issue.

Q. Okay. Sir, so the answer to my question was, No, you did not seek an opinion from your state bar related to the potential conflict that arose from your employment with the firm that you work for now?  
A. I don't believe so. I could have, but I don't believe so. I say that because I had conversations with the state bar on some issues relative to this case, but I don't think it was on that issue.

Q. Okay. What conversations did you have with your state bar relevant to this case?  
A. I'm -- like I said, if I had some conversations, it wasn't on this issue. And I'm not comfortable disclosing that any other -- anything else I discussed with the state bar.

Q. Okay, sir. And I apologize to keep asking, but I'm having a hard time understanding your response. So it sounds like the answer to my question is, No, I did not seek an opinion related to this issue from my state bar.  
A. Is that fair, sir?  
Yes.

Q. Did you seek waiver from Mr. Hagood at any time?  
A. I'm not very comfortable answering that question either.

Q. I understand that, sir, but the question is still there unless you're refusing to answer it.  
Did you seek a waiver -- I'm not asking whether or not you obtained one. I don't want to know about the nature of the conversation. My question to you, sir, is did you seek a waiver from Mr. Hagood?  
A. Major Gannon, I'm not comfortable answering any questions dealing with the representation of Sergeant Salinas or from folks in my firm.

TC (Maj Gannon): Yes, sir. I understand your response.

Sir, at this time the government objects as nonresponsive, and we would request that you direct him to answer the question.

MJ: Mr. Vokey, are you refusing to answer the question based on possible self-incrimination, or are you refusing to answer the question based on attorney/client privilege or --

WIT: Yeah. It's not due to the self-incrimination, Your Honor. It would be I'm not comfortable answering that question due to it may involve -- I mean, that involves the inner workings of my firm and representations of Sergeant Salinas. I'm --

MJ: Okay.

WIT: It seems like that may be privileged information that I may be relaying.

MJ: Okay. So you're basing your refusal to answer the question based on privileged information. And the specific question that you're refusing to ask -- to answer is whether you even sought a waiver from Mr. Hagood at any time regarding this issue.

Is that correct, sir?

WIT: That's correct, sir. I think that may be privileged information.

MJ: Okay. Major Gannon, I do not need the answer to that question asked and I did have a chance to discuss questions with Mr. Vokey in the *ex parte* hearing.

TC (Maj Gannon): Yes, Your Honor. I understand the court's position.

**Questions by the prosecution (continued):**

Q. Mr. Vokey, it's Major Gannon again.

A. Yeah.

Q. Question, sir, did you ever seek a waiver from the accused?

A. Again, I believe that's privileged information I'm not willing to disclose.

MJ: Again, I don't need the answer to that question, and I had the opportunity to question Mr. Vokey during the *ex parte* hearing. So the objection to that question is also sustained.

TC (Maj Gannon): The refusal of the witness to answer the question is tolerated. I didn't hear an objection, Your Honor.

MJ: You're right. And I misspoke. You're correct. There was no objection, and I am allowing the witness to not answer that question in open court.

TC (Maj Gannon): Understand, Your Honor.

**Questions by the prosecution (continued):**

Q. And Mr. Vokey, sir, one last question. Going back to your conversations with individuals in the wake of your July 2008 conversation with Colonel Redmon, we talked about Lieutenant Colonel Riggs, Lieutenant Colonel Brasure, and Colonel Ingersoll.

Did you ever make any -- did you ever seek or inform the SJA to the CMC, Brigadier General Walker, about this issue in writing?

A. You know, I don't remember. There may have been a communication that was passed to the Chief Defense Counsel that was forwarded to Colonel Walker[sic], but I don't recall now.

Q. Did you forward something -- did you cc General Walker on a communication that you had with the Chief Defense Counsel of the Marine Corps?

A. No, but I normally don't just cc any general officers that I want to. I go through -- going through the chain of command.

Q. Did the chain of command ever direct you or invite you to go to General Walker and seek redress of this issue?

A. No.

Q. As you sit here today, do you have a specific recollection of seeking redress from General Walker on this issue?

A. No, I don't have -- I don't. No, I don't have any recollection one way or the other.

TC (Maj Gannon): Your Honor, we have no further questions.

Thank you, Mr. Vokey. I appreciate your time this evening.

WIT: All right.

MJ: Any further questions from the defense?

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

TC (Capt Sullivan): And, Your Honor, can I have a moment before we let Mr. Vokey go?

MJ: Sure. Mr. Vokey, hold on, please.

WIT: Okay.

TC (Maj Gannon): Your Honor, I apologize. After speaking with Lieutenant Colonel Sullivan, I do have a couple of additional questions.

MJ: Okay. Go ahead, please.

**Questions by the prosecution (continued):**

Q. Mr. Vokey, sir, sorry. Can you hear me still? It's Major Gannon.

A. Yes, sir, I can.

Q. You've testified a couple of times about conversations or written communications you've had with Colonel Favors regarding the 2008 -- July 2008 conversation you had with Colonel Redmon.

Do you recall that?

A. Yeah. I don't remember if I had any e-mails directly with Colonel Favors or not.

- Q. Have you done any searching for any e-mails lately since this issue has manifested -- since this issue's been brought to the court's attention?
- A. I don't have access to any of those e-mails.
- Q. Okay. Where are those e-mails -- that implies that they still exist.
- A. I don't know. I was still in the Marine Corps using a USMC account which I do not have access to any longer. That was a couple years ago when I was still on active duty.
- Q. Okay. Is it your testimony that you did, in fact, write an e-mail or any other written communication to Colonel Favors regarding this issue -- this Colonel Redmon conversation in July of '08?
- A. No. I don't know if I did or not.
- Q. As you sit here today, do you have a recollection of drafting or sending an e-mail or any other written communication to Colonel Favors regarding this issue?
- A. I don't remember.
- Q. You don't remember. So you do not have any specific recollection of writing anything to Colonel Favors?
- A. That's correct.
- Q. How about Colonel Joyce?
- A. No, certainly not. Colonel Joyce wasn't the Chief Defense Counsel at the time.
- Q. So you had an oral conversation with Colonel Favors?
- A. I don't remember if I -- I don't remember if I had any direct communications with Colonel Favors on this or not. I don't remember if it was oral, it was e-mail, somebody else did it. I just don't remember. I'm sorry.
- Q. Don't be sorry, sir. I just want to capture for the record your testimony.
- So is it your testimony that as you sit here today, you don't have any recollection of informing Colonel Favors in any way, shape, or form, written or oral, about this conversation you had with Colonel Redmon in 2008, specifically in July of 2008?
- A. I don't have any recollection. I'd have to -- no, I don't. Don't know if I did. Don't know if I didn't.

TC (Maj Gannon): Your Honor, no further questions. Thank you.

Mr. Vokey, stand by, please.

MJ: Mr. Vokey, I don't have any questions for you. Thank you for being available to testify so many times today. We're going to excuse --

CC (Mr. Faraj): Your Honor, we --

MJ: Hold on one moment. The defense may have a question.

WIT: Yes, Your Honor.

### CROSS-EXAMINATION

#### Questions by the defense:

Q. Mr. Vokey, this is Neal Puckett.

A. Hello, Mr. Puckett.

Q. How are you doing?

A. Good.

Q. Sir, earlier I think there had been some testimony or some reference to there being an assumption that Colonel Favors knew about your pending departure from the Marine Corps, departure from the *Wuterich* case and so forth.

If you didn't have any discussion with -- or how would you know about that?

A. Hello?

Q. Can you hear me?

A. Yeah. I got you.

CC (Mr. Puckett): Okay. If you didn't have any discussions with her or can't remember any discussions with her, do you know how she might know about that? About your pending departure from the Marine Corps?

TC (Maj Gannon): Objection. Speculation.

MJ: Overruled. You may answer it if you know the answer.

WIT: Yes. If I didn't speak with Colonel Favors on the post-Colonel Redmon call, it was because it would have been -- it would have been coming from the RDC at the

time, Lieutenant Colonel Tafoya. I don't remember if I notified or talked with Colonel Favors after that phone call or Lieutenant Colonel Tafoya did.

I definitely had conversations with Lieutenant Colonel Tafoya after this happened, and he was aware of my leaving and what had happened during that phone call.

Q. But is it also fair to say that you might have had discussion with Colonel Favors before you had the talk with Colonel Redmon such that she knew about your pending departure?

A. Yes. Oh, that's definitely true.

Q. And is it also fair to assume that since she works perhaps steps from General Walker, that General Walker probably would have known about your pending departure?

A. I think that would be fair without a doubt since she works directly for General Walker.

CC (Mr. Puckett): No further questions, Your Honor. Thank you.

MJ: Anything further from the government?

TC (Maj Gannon): Yes, sir. Yes.

MJ: Go ahead.

#### **REDIRECT EXAMINATION**

##### **Questions by the prosecution:**

Q. Mr. Vokey, it's Major Gannon again.

A. Yes.

Q. Now, the line of questions I asked you wasn't about whether or not folks knew you may be leaving or you were leaving the Marine Corps. You went on national public radio and announced your retirement in October of 2007.

My question very specifically -- and I want to make sure that we're clear on this -- was whether or not in the wake of your conversation with Colonel Redmon in July of 2008, whether or not you had any communications with Colonel Favors about the fact that he told you you would not be extended on active duty any further and thus, in essence, according to the argument the defense is making, terminating your relationship with the accused.

- Did you protest that to Colonel Favors?
- A. I'm sorry. That was kind of a long question. What exactly is the question?
- Q. Sir, did you protest -- did you advise Colonel Favors of the conversation you had with Colonel Redmon in July of 2008?
- A. That's the same answer. I don't recall if I spoke to her or had any e-mails with her myself. I just don't remember. I did speak with Colonel Favors, you know, definitely prior to that. Certainly in May, June -- in June time frame about it. But whether I spoke to her after that conversation with Colonel Redmon, I just don't recall.
- Q. When you say about it, sir, you mean about what? About your retirement?
- A. About my retirement and extension and continuing to represent Staff Sergeant Wuterich.
- Q. And up to that point all of your modification requests had been approved?
- A. I believe I spoke to Colonel Favors after they were initially telling me they wouldn't extend me any further. But I mean, as far as exact time, I just don't remember. I mean, it was a long time ago and I don't have any other -- my e-mails or anything to, you know, refresh my memory. But I do remember having discussions with Colonel Favors letting her know that -- she knew I was extending and that there were some pushbacks. I just don't remember when that was that I talked to her, and I do not remember whether I had any conversations or e-mails with her after Colonel Redmon's phone call.
- Q. So you told Colonel Favors that you were having pushback from Headquarters Marine Corps?
- A. I believe so, yes.
- Q. The only time you received any pushback from Headquarters Marine Corps was from Colonel Redmon. Isn't that true, sir?
- A. Yes. But before -- the e-mail on not wanting to extend me longer didn't occur in July. It occurred back in May.



Q. Let me -- let me -- okay. Back up. You were told -- according to your testimony earlier, you were told you were going to retire and there would be no further modifications by Colonel Redmon, correct?

A. That's right. He told me --

Q. And you were told that in July of 2008, correct?

A. Yes, during that phone call. Yes.

Q. After that phone call, did you protest that phone call to Colonel Favors?

A. I do not remember if I had any conversation with Colonel Favors after that or not.

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

MJ: Anything further from the defense?

CC (Mr. Puckett): No, Your Honor. Thank you.

MJ: Very well.

Mr. Vokey, again, thank you for being available to testify so many times tonight. Good evening, sir.

WIT: Thank you, Your Honor.

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

MJ: Anything further from the government?

TC (Maj Gannon): No, sir.

MJ: Okay. And if I -- I was trying to summarize the 802 conference I had earlier while we were getting Mr. -- Colonel -- or Mr. Vokey on the line. And I reiterate that both sides are comfortable with having 72 hours to respond with any further argument in writing. And also I will be happy to accept any further documentary evidence from either side before that time period.

Argument on the motion, defense, please.

Mr. Puckett.

CC (Mr. Puckett): Thank you, sir. I'd like to be brief.

Judge, I know we've been down this path once before on this issue, and I had the -- the great privilege of perhaps for the only time ever in my legal career to be able to sit at counsel table at oral arguments at CAAF. I'm not otherwise qualified to make oral arguments. I just sat there to provide some -- some good looks and charm. But Major Kaza made the argument.

But we were able to determine, sir, is we were able to -- we were able to see from the CAAF judge's perspective what's important about this issue in this case, okay. And I -- I took notes and I -- but more than that, it really impacted me that -- I'm just going to go through this piece by piece, Your Honor. There was never any mention, discussion, or argument by government counsel that at the time of Colonel Vokey's retirement, there was not an unlawful severance of the attorney client relationship.

Now, if you need any proof of that, all you have to do is read CAAF's *Hutchins* opinion. You know, they didn't -- they didn't buy everything that NMCCA said, but they definitely bought that. That was an illegal severance. Remember in this case, Your Honor, we had the same judge, the same scenario where counsel is leaving, but there are some differences here.

So the first point I want to make, Your Honor, is that I recall that this court's findings last time was that there wasn't any severance. Well, I can tell you that that -- that gets no purchase now since the *Hutchins* decision has come out. And in fairness to this court, that decision came out after this court found facts in this case. So we now can point to Judge Meeks' colloquy with -- with our client in March of 2009 as being the exact same colloquy that was had with Sergeant Hutchins. So we know that there was a severance at that point.

Now, the other interesting thing that happened in that case was that two of the judges -- and I believe it was Judges Efron and Ryan -- kept hammering at the government appellate counsel, Mr. Keller. And, you know, there's nothing that prevents this court from going back and listening to those arguments, and I think it would [inaudible] for the court to do so. They asked him twice, So, counsel, is it better that this case just go to trial with this error already built into it? Is that what the government would prefer?

So, Your Honor, it has already been established as an accepted law of the case based on Judge Meeks' ruling that there was a severance without good cause of the attorney/client relationship between Staff Sergeant Wuterich and Lieutenant Colonel Vokey.

Now, so there should be no argument today in this courtroom since it wasn't made on -- on appeal and no -- no judge believes that the attorney/client relationship continued past Colonel Vokey's retirement. That is not a legal fact that's going to -- that anybody else accepts. So it would not behoove the court to once again find that that had happened, because it didn't. And in fact, we clarified that today with Colonel Vokey's testimony, the fact that there was a break in representation. There was a promise.

There was some indication that perhaps Colonel Vokey could play some part in the case in the future. But there was no contract, there was no agreement between attorney and client, and there was no assurance like there would have been if he were to remain on active duty that he was going to proceed to trial with this case. There certainly was no way for the accused to compel that like now the accused has that right post-*Hutchins* to indicate his desires on the record and perhaps for a military judge to abate the proceedings until the government figures out a way to keep that relationship intact.

Another almost comical moment and a moment that we spent way too much time this afternoon talking about, which again carries no legal weight or significance whatsoever, Your Honor, is how much effort Colonel Vokey expended or stopped short of expending to stay on active duty. That has no legal relevance whatsoever in terms of repairing the broken attorney/client relationship.

And to point out the humor of it all, I was present in that courtroom in D.C. when Mr. Keller made the argument that, Well, Judges, Your Honors, Mr. Vokey asked four times but he never asked a fifth time. The fifth time was a request to buy himself a little time so that he could transition off of active duty. Once he was told no, you're gone 1 August, he went back with an AA form to get some time to transition and do some terminal leave and process out.

People -- lawyers in the courtroom couldn't believe that the government was actually taking the position that perhaps if he had asked a fifth time that would have been okay. But what we know from this case, Your Honor, is that of all the ways, of all the four categories in which a counsel can be excused from a case or can be relieved from a case none of them happened in this case.

So by definition, there has been an illegal severance in violation of the *Hutchins* rule -- now the *Hutchins* rule of the attorney/client relationship in this case. So what can be done about it? Well, in pointing out that it would be much worse -- in pointing out to the government counsel that it would be much worse to let this error continue in the record and then if there's a conviction, try to fix it then.

Remember, Your Honor, there is some difference between this case and the *Hutchins* case. One difference is Captain Bass in the *Hutchins* case wanted off active duty as quickly as he could. What we've demonstrated here is that Colonel Vokey took all reasonable means to try to stay on active duty to continue this case. That's all you need to know. You don't need to know if he asked three times or four times or five times or who knew and who didn't know.

Because recall, Your Honor, at the time he can only be held responsible for -- you know, what process -- what processes were available. And he exhausted all these remedies. So it can't be gained said that because he didn't get some general officer involved or directly talked to General Walker or directly talked to General Mattis or General Helland that somehow that means that his attorney/client relationship with his client wasn't illegally severed.

So the question now becomes for the court, now that it must find, it is compelled is to find, it would be error not to find and this court would certainly be reversed if it did not find that there was an illegal severance of the attorney/client relationship at the retirement -- or at the movement into retirement of Lieutenant Colonel Vokey because the procedures were not followed.

The only thing that remains is what's the remedy. Well, Your Honor, the remedy is that we have not been to trial yet and that right that is so dearly protected by -- by

not only the statutory and regulatory law and now the case law can be -- can be fixed. That problem can be fixed. And there are ways to fix it. And we've suggested those ways in our brief. We know that if this court abates the proceedings -- and that's all we're asking for, an abatement -- and, you know, the other interesting thing that we learned is that Judge Efron kept saying, Well -- well, defense counsel, was the judge ever offered an opportunity to abate the proceedings until the problem was fixed? No, Your Honor, he wasn't. Well -- and then the question was, Well, are we still pretrial counsel? Yes, we are, Your Honor. So the defense can still move to abate the proceedings, can't they? So it was almost like a roadmap that we were being given as to what we do when we got back to court because we are still pretrial.

So, Your Honor, we believe that the -- the remedy that the law and the law givers contemplate here is that this court will abate the proceedings until that attorney/client relationship can be put back together. How they choose to do that is up to them. Now, we -- we have -- I believe we submitted in our brief, Your Honor, the -- we didn't? -- well, we can provide this, Your Honor.

We -- we hired a retired Navy captain personnel expert to comb the Naval regulations and Marine Corps regulations to determine whether it was -- it could be authorized to recall Colonel Vokey to active duty, because the position taken by Major Gannon at our last hearing was, Well, we just did the *Hohman* case or something, Your Honor. We've already determined that that can't be done involuntarily. Well, it turns out it can, so it has to do with the amount and quality of the research. So they -- they can do that.

MJ: And you're going to give me evidence of that?

CC (Mr. Puckett): Yes, sir. Actually we can submit that. I actually thought we included that but it's -- it would have been an exhibit attached to the motion. Can we submit that to you --

MJ: Sure.

CC (Mr. Puckett): -- in the next 72 hours?

MJ: Sure.

CC (Mr. Puckett): It's a point paper, if you will, as to how that's possible.

So we believe that that is a way to get Mr. Vokey back on the case. And we also believe based on arguments made elsewhere, sir, and evidence presented to you otherwise that Texas ethics law permit -- this is only an imputed conflict. It's not a forever conflict as we -- as we talked about before -- and that if Mr. Vokey were brought back on active duty or if he were to take a leave of absence from his firm because he had been contracted by the government to provide legal services even as a civilian to this case, that that would -- that that would make the conflict disappear. We've already made that argument, but of course trial counsel can certainly address that.

But we believe that it's neither up to Staff Sergeant Wuterich or the defense team or the court as to how the government fixes this problem. We just know that it's -- it's definitely already been identified at the highest levels of appellate courts of appellate courts that it is a problem and that that is best remedied pretrial. Because remembering *Hutchins*, they went back and they tested for prejudice because they could.

And if you read *Hutchins* and you read the information available on the motion in this case, Your Honor, you'll see there's a significant difference in the role that Colonel Vokey is -- would have played in this -- in this court-martial as to that played by Captain Bass. And we believe that a lot different results on the facts of *Hutchins* would have obtained if Colonel Vokey had been the person in question who had been released.

And so while we don't need to reach a prejudice analysis actually here, Judge, because we don't -- I mean, we can't really demonstrate prejudice. We can only [inaudible] it or propose it -- that would be a distinguishing factor between the result that was reached in *Hutchins* stopping short of dismissing the case or whatever -- dismissing the charges or reversing the conviction when it overturned that piece of the NMCCA decision.

Sir, Your Honor, we believe that the only way through this attorney/client relationship severing mind field is to simply acknowledge -- is to find -- for this court to find that the attorney/client relationship has been illegally severed, that is without legal authorization, without good cause, and abate the proceedings until the government can supply a fix for that. And that way, we can guarantee -- this court can guarantee that Staff Sergeant Wuterich will not have to go to trial without his detailed defense counsel who was unlawfully taken from him.

MJ: Trial counsel.

TC (Maj Gannon): I guess it's a threshold matter, Your Honor. The government objects to any factual representations that Mr. Puckett made during his argument. I was debating in my mind whether or not to object based on facts not in evidence. The transcript or the content or defense counsel's interpretation of questions at oral argument are just simply not evidence before this court and we object to your consideration of any component of Mr. Puckett's argument predicated on the goings on at the oral argument at the appellate court.

Your Honor, we've heard no evidence in this matter today or in the defense pleading that would tend to upset your findings you've already made. The government absolutely does not concede that a severance event took place on 11 March 2009 between Mr. Vokey and the accused as evidenced by the fact as we argued before that Mr. Vokey's representation continued all the way until he continued to appear at 39(a) sessions -- multiple 39(a) sessions. Mr. Vokey I think was here at six or seven 39(a) sessions and they're all detailed in the motion in our response; either that or his presence was waived. His status as counsel of record in the case was referred to by cocounsel -- either Mr. Puckett or Mr. Faraj -- multiple times and those -- throughout the record and those too are documented in our response to their pleading -- our most recent response.

The one point on Mr. Puckett's argument before I move into just a quick discussion of the law -- Mr. Puckett alluded to a couple of times the notion that CAAF was projecting or broadcasting to counsel during the oral argument that there was already an error built in. And I just -- I object -- or we object to any -- to any

consideration of any factual representations by defense counsel that are not in evidence. But there's another interpretation to that line of questioning and it is that the *ex parte* communication with defense counsel was not reduced to a verbatim transcript. The problem, quote, unquote, that the CAAF was educating counsel on was the fact that they were not capable of making a decision about this issue without a complete record. That's been cured apparently because the court today has done an *ex parte* communication with the accused and his counsel and it was -- it was done in a verbatim fashion obviously absent the government.

We talked in -- in cross-examination and in the pleadings and a focus of our presentation was what the defense counsel did to ameliorate the situation. Specifically, what did Mr. Vokey do prior to his departure from active duty? The reason we were focused on that is simply resident in the *Hutchins* opinion. There's -- there's a passage in the *Hutchins* opinion that analyzes this issue and makes some very interesting findings that may be of assistance to this court in determining whether or not there's a deprivation of the Sixth Amendment right to counsel. And those -- those determinations that were made by the CAAF are whether or not there was multiple counsel in the case. So there as here we have multiple counsel representing the accused throughout the proceeding.

Two, whether or not they had the replacement -- the assistance of a replacement counsel. In this case, Lieutenant Colonel Tafoya, was detailed to replace Lieutenant Colonel Vokey and made a representation on the record that he as the detailing authority had detailed himself to the case. Whether or not, as happened in the *Hutchins* case, there was a continuance granted to the defense in order to prepare and adapt to the change that took place in terms of representation. That was a factor that the CAAF found compelling in the *Hutchins* case. That too is present here at Appellate Exhibit LI and LII on 1 August 2008, a mere couple of days, few days after the supposed conversation where Colonel Redmon denied any further extensions or modifications to then Lieutenant Colonel Vokey's retirement date.



Days later, we had an 802 session with the judge. Not only did the -- did the defense not bring this issue up during the course of that 802 but subsequent to that, on the 7th of August, 2008, at Appellate Exhibit LI, the defense counsel specifically filed a continuance motion with the court in order to get time to adjust the counsel and to give Lieutenant Colonel Tafoya time to become familiar with the facts in this case -- additional time. Why is that important? It's important for a couple of reasons.

One, previously in our previous session it was represented that there was no judge to talk to. The case was out of stay. That's just factually not correct. The case was not stayed and there was an active military judge, Lieutenant Colonel Meeks, who accepted pleadings on this matter both from the government and from the defense. That continuance was not opposed by the government by the way in Appellate Exhibit LII specifically because of the representations by Mr. Puckett during the 802 conference of 1 August 2008, wherein they represented that they wanted time to acquaint the newly detailed counsel, Lieutenant Colonel Tafoya, and they also specifically represented that the accused's interests would not be harmed by allowing the appellate litigation to go and run its course.

We have to remember that at that point in June of 2008, the Navy-Marine Corps Court of Criminal Appeals ruled on one component of the appellate issues we were having with CBS news over the acquisition of the outtakes. So the NMCCA had ruled the defense and CBS were seeking to remove that to CAAF in order to get -- to try to turn or flip the NMCCA rule. So everybody was aware that this appellate litigation was ongoing and it was highly likely -- in fact, I believe at that point -- in fact, I know at that point because I believe it was the 30th of June, 2008, the CAAF had come out with an opinion basically ordering a briefing schedule on this very issue and the briefs -- the briefs were due at the end of the July time frame. So everybody knew that this was going to go to CAAF.

And I recall -- and I believe we put in our -- in Appellate Exhibit LII, that's the government's response to the defense motion to continue -- their motion was dated 7 August 2008. Ours was 24 August 2008. In

Appellate Exhibit LII we -- we wrote a nonopposition pleading predicated on the notion that a specific representation by the defense counsel that Staff Sergeant Wuterich's interests would not be harmed if the appellate process ran its course. That, by necessity, would carry it out beyond Lieutenant Colonel Vokey's retirement which at that point -- at that point or soon thereafter was modified to 1 November of 2008. So a continuance was granted.

In *Hutchins* another issue was the defense did not, thereafter, request additional time or resources to afford preparation of the new counsel. And in this context of what I've just described, the CAAF -- the Court of the Appeals of the Armed Forces specifically found that there was no deprivation of the Sixth Amendment right to counsel. So the government's first position is that there's no evidence before this court that changes, modifies, or renders unsupported your previous findings of fact and conclusions of law as we understand them; caveat, we didn't -- we were not privy to the *ex parte*. So there may be information there that we're not aware of.

And second, I just wanted to focus the court on why it was that we were asking questions about what counsel did -- what defense counsel did to ameliorate this issue, because it seemed to have some purchase with the CAAF.

And finally, the last issue that the CAAF raises in the *Hutchins* opinion is this notion of, Well, did the personnel action in question -- hear a retirement -- in the *Hutchins* case it was an EAS -- did the personnel action in question originate with the government or with the defense?

Now clearly this record beyond any doubt establishes, (a), that Lieutenant Colonel Vokey requested retirement. That was his request. It was not imposed on him by anyone or by statute. In fact, on cross-examination today, he conceded that he could have gone out to 26 years and, in fact, he requested retirement right around the 20-year mark.

So it's definitively shown within the record that the personnel action in this case did, in fact, originate with the defense. Subsequent to that, the record

remains unchanged. Four modification requests were made. Four modification requests were granted. That's the record that we have.

And then finally, in the wake of this very aggressive denial of Lieutenant Colonel Vokey's efforts to stay on active duty, that he testified about during his characterization of the conversation with Colonel Redmon, the fact is that in the wake of that -- even assuming that the defense recollection -- that Lieutenant Colonel Vokey's recollection is accurate, there was no attempt by the defense counsel -- by anyone on the defense team to try to educate anyone on that issue. And then follow that fact with the notion that Lieutenant Colonel Vokey continued to represent the accused all the way until the September 2010 severance that took place in this court at the request of Lieutenant Colonel Vokey upon application.

TC (LtCol Sullivan): One moment, Your Honor.

TC (Maj Gannon): Sir, I'm going to reserve the rest of my argument. It's getting very late. I'm going to reserve the rest of my argument for -- those are some of the highlights. One other highlight I wanted to -- we talked earlier on cross-examination with Lieutenant Colonel Tafoya. He acknowledged that he was, in fact, the detailing authority. That's important. We also got into whether or not Major Marshall was detailed. The record at Page 701 -- that's the Bate stamp for the record -- clearly shows that Lieutenant Colonel Tafoya detailed Major Marshall to this case.

CC (Mr. Faraj): Can we have a proffer of what record you're referring to?

TC (Maj Gannon): The *United States versus Wuterich*.

CC (Mr. Faraj): What are you --

TC (Maj Gannon): Page 7 -- Page 701.

CC (Mr. Faraj): Is that a finding by a court?

TC (Maj Gannon): No, it's the -- it's the transcript of the case. The record of the case.

TC (LtCol Sullivan): It's Major Marshall on the record saying she was detailed by Lieutenant Colonel Tafoya.

MJ: Anything further from the government?

TC (Maj Gannon): Again, sir, I just reserve anything else I've got in writing, sir. That's all.

MJ: Okay. And again, any evidence anybody wants to offer in writing is fine. The -- although it's cited in the motion, the defense also told me that they would get me any applicable Texas law that they wanted me to look at that might be different than what's in the motion or -- and you're free to do that. And again, any argument. I'll give everyone three days to -- 72 hours to put in any of that.

Major Gannon, you're -- I don't care about the lateness of the hour if you'd like to argue anything else. I don't mean to cut you off. I didn't cut you off. You cut yourself off. Is there anything else you wanted to say?

TC (Maj Gannon): No, Your Honor.

MJ: Okay. Defense, any last words? Mr. Puckett?

CC (Mr. Puckett): No, thank you, Your Honor.

MJ: Okay.

TC (LtCol Sullivan): And, Your Honor, just for clarification. You're -- I know you're heading back to Japan. I think your -- your day starts at -- when you said 72 hours, are we going to close of business Pacific Time Thursday or close of business Pacific Time Friday?

MJ: What would you like? 72 hours is three days and today is Monday, so I would think that would be Thursday at -- at this time. But do you want till Friday?

TC (LtCol Sullivan): If that's permissible with the court.

MJ: Okay. That's four days.

Any -- any objection from the defense?

CC (Mr. Puckett): What's the question, Your Honor?

MJ: They want four days rather than 72 hours. They want till Friday afternoon.

TC (LtCol Sullivan): 1630 Pacific Time.

CC (Mr. Faraj): I don't have an objection, but what are we -- what are we -- is it another brief or just argument?

MJ: No, no, no. It's argument. I said I would accept argument and I would also accept any documentary evidence from either side since I haven't made a final decision.

TC (Maj Gannon): Yes, sir. And we're --

CC (Mr. Faraj): If there's going to be another brief, then we want time to respond to the brief. I don't -- I don't -- we don't intend to submit anymore argument.

MJ: Okay.

CC (Mr. Faraj): I think this is an issue of law.

MJ: They need to give you a copy -- they need to give you a copy of the argument when they send it to me and you can give further argument I guess if you'd like, but it needs to be done within that time period.

CC (Mr. Faraj): Well, that's my point, Your Honor. If there's another brief -- I'm not talking about argument.

MJ: Okay.

CC (Mr. Faraj): But if there's something that cites law, then we want to be able to check it and come back to you with -- again, we're talking law not argument.

MJ: Right. We're only talking --

CC (Mr. Faraj): So if it's a brief --

MJ: We're only talking argument.

CC (Mr. Faraj): Okay.

MJ: You're allowed to make argument which means they can argue anything that we've discussed during this motion session.

CC (Mr. Faraj): Very well.

TC (Maj Gannon): And, Your Honor, is -- I'm -- I want to work through the evidentiary void that we're working with right now in terms of the *ex parte* and one other issue. You mentioned Texas law. Is there any evidence before the court at this point regarding Texas law and the law of severance or conflict or privileged communications?

MJ: The only Texas law that I have been given -- I have not been given any. It was cited in the defense motion. That's it. Whatever's cite -- whatever was put in the defense motion, that's the law that the defense said they want me to rely on. And I said I did not have a copy of that law. If they have a copy of it that they wanted to give me tonight or whenever, they could. Or I would look it up myself and just print it off.

TC (Maj Gannon): Understood, sir.

MJ: Okay. But that's a good question.

So there was nothing else I believe that's not cited in their motion that they wanted me to look at.

Okay. If there's nothing further, then the court will be in recess.

[The Article 39(a) session recessed at 1933, 25 April 2011.]

**[END OF PAGE]**

**AUTHENTICATION OF THE RECORD OF TRIAL**

in the case of

Staff Sergeant Frank D. Wuterich, XXX XX 3221, U.S. Marine Corps, Headquarters Battalion, 1st Marine Division, Marine Forces Pacific, Camp Pendleton, California, 92055.

**TRIAL COUNSEL AUTHENTICATION**

Pursuant to R.C.M. 1104(a)(2)(B), the excerpt in the foregoing case is authenticated by the trial counsel due to the military judge's absence.

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N. L. Gannon  
Maj, U.S. Marine Corps  
Trial Counsel

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date

