
United States)

vs.)

WUTERICH, Frank D.)
Staff Sergeant)
U.S. Marine Corps)
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ARTICLE 39(a)
EXCERPTS

The following is a transcript of Article 39(a) sessions in the
aforementioned case, held at Marine Corps Base, Camp Pendleton,
California, on 9 January, 1, 13-14, 20, 22 February 2008; 11-12
March 2009; 22-24, 26 March, 26-27 August, 13-14 September, and 2
November 2010.

PARTIES PRESENT

MILITARY JUDGE:

LtCol J. G. Meeks, USMC
LtCol D. M. Jones, USMC

TRIAL COUNSEL:

LtCol D. J. Erickson, USMC
LtCol S. M. Sullivan, USMCR
Maj D. J. Plowman, USMC
Maj N. L. Gannon, USMC
Capt M. R. Brower, USMC

DEFENSE COUNSEL:

LtCol C. Vokey, USMCR
LtCol P. A. Tafoya, USMC
Maj H. Faraj, USMC
Maj M. L. Marshall, USMC
Capt N. A. Bonner, USMC

CIVILIAN DEFENSE COUNSEL:

Mr. N. Puckett
Mr. Zaid
Mr. H. Faraj
Mr. C. Vokey

CIVILIAN COUNSEL:

Mr. C. Benedetti, CBS
Mr. L. Levine, CBS
Mr. S. Berlin, CBS

MJ: This court is called to order in the case of the *United States versus Staff Sergeant Frank D. Wuterich, United States Marine Corps.*

TC (Maj Erickson): Sir, this court is convened by the Commander, U.S. Marine Corps Forces Central Command by General Court-Martial Convening Order MCC2-07, dated 28 August 2007; copies of which have been furnished to the military judge, defense counsel, accused, and court reporter for insertion in the record of trial.

There are no modifications or corrections to the convening order.

The general nature of the charges in this case are violations of Article 119, voluntary manslaughter; Article 128, assault; Article 134, reckless endangerment; and Article 92, dereliction of duty.

The charges were preferred by Corporal Juan Murillorestrepo, United States Marine Corps, a person subject to the UCMJ, and sworn to before an officer authorized to administer oaths.

The charges were investigated and forwarded with recommendations as to disposition by Lieutenant Colonel P. J. Ware, United States Marine Corps, on 2 October 2007.

The charges have been properly referred for trial by the Commander, U.S. Marine Corps Forces Central Command. The charges have not been referred to any court other than that reflected on the referral blocks of the charge sheet.

The charges were served on the accused on 27 December 2007. The five-day waiting period has expired.

The accused and the following persons detailed to this court-martial are present:

Lieutenant Colonel J. G. Meeks, United States Marine Corps, as military judge;

Lieutenant Colonel C. C. Vokey, United States Marine Corps, as defense counsel;

Major H. Faraj, United States Marine Corps, as defense counsel;

Major D. J. Erickson, USMC, as trial counsel;

Captain N. L. Gannon, USMC, as trial counsel.

Staff Sergeant A. P. Evans, United States Marine Corps, has been detailed as court reporter for this court-martial and has previously been sworn.

Mr. Neal Puckett and Mr. Mark Zaid have filed a notice of appearance with the court. And Mr. Puckett is present.

All members of the prosecution have been detailed to this court-martial by Lieutenant Colonel Mark Jamison, the Officer In Charge, Legal Services Support Section. All members of the prosecution are qualified and certified in accordance with Article 27(b) and sworn under Article 42(a) of the UCMJ.

Sir, no members of the prosecution have acted in any disqualifying manner in this court-martial.

MJ: Very well.

Mr. Puckett, are you going to be the voice for the defense this morning?

CC (Mr. Puckett): I am, Your Honor.

MJ: Very well.

Could each of the members of the defense team state their legal qualifications and status as to oath?

DC (Maj Faraj): Sir, I am certified and qualified in accordance with Article 27(b) and sworn in accordance with Article 42(a) of the UCMJ. I was detailed to this court-martial by Lieutenant Colonel Simmons, who is the detailing authority for this case. I have not acted in any disqualifying manner.

MJ: Very well.

DC (LtCol Vokey): Sir, Lieutenant Colonel Vokey. I have been qualified and certified under Article 27(b), sworn under Article 42(a). I have not done anything that would disqualify me in this case. And I was detailed by Lieutenant Colonel Simmons, who is the detailing authority in this case.

MJ: Is Staff Sergeant Wuterich attired in the appropriate uniform with all insignia and decorations to which he is entitled?

DC (LtCol Vokey): He is, sir.

MJ: Could you please state those decorations or those insignias -- ribbons for the record?

DC (LtCol Vokey): Sir, he has the Meritorious Unit Commendation, the Good Conduct Medal, the Navy Distinguished Service Medal, the Global War on Terrorism Medal, the Sea Service Deployment Ribbon.

MJ: Okay. And I see --

DC (LtCol Vokey): And the Iraq Campaign Medal.

MJ: -- one star -- is it one or two stars on the -- on the Good Conduct Medal?

DC (LtCol Vokey): One star on the Good Conduct Medal, one star on the Sea Service Deployment Ribbon.

MJ: Okay. All right. Very well.

Staff Sergeant Wuterich, you have the right in this particular case to be represented by your detailed defense counsel; that is, Major Faraj and Lieutenant Colonel Vokey.

You may also be represented by military counsel of your own selection if the counsel you request is reasonably available. Military counsel will represent you free of charge.

Now, if you were to request military counsel of your own selection, normally Major Faraj and Lieutenant Colonel Vokey would be excused. However, you could request that they continue to represent you. The authority who detailed Lieutenant Colonel Vokey and Major Faraj would have the sole discretion to either grant or deny that request.

Do you understand that?

ACC: Yes, sir.

MJ: You may also be represented by civilian counsel at no expense to the United States. Civilian counsel may represent you alone or along with your military counsel.

Do you understand that?

ACC: Yes, sir.

MJ: Do you have any questions concerning your rights to counsel?

ACC: No, sir. I do not.

MJ: By whom do you wish to be represented?

ACC: Major Faraj, Lieutenant Colonel Vokey, and Mr. Puckett, and Mr. Zaid.

MJ: Mr. Zaid?

ACC: Yes, sir.

MJ: Do you wish to be represented by any other attorney, either military or civilian?

ACC: Captain Bonner, sir.

MJ: Okay. I understand that you've made a request for individual military counsel in this case for Captain Bonner; is that correct?

ACC: Yes, sir.

MJ: Has that been acted on at this point?

DC (LtCol Vokey): No, sir. We are waiting right now, sir.

MJ: Okay. All right. Do you have any objection to going forward this morning here Staff Sergeant Wuterich without either Mr. Zaid or Captain Bonner being present?

ACC: No, sir. I don't.

MJ: All right. Normally, if you've retained Mr. Zaid, I wouldn't proceed forward without one of your counsel being present without your express consents. Now, my understanding is though that you are consenting to go forward without Mr. Zaid being present; is that correct?

ACC: Yes, sir. I am.

MJ: And at this point, you have not had a resolution of the issue with Captain Bonner; is that correct?

ACC: Correct, sir.

MJ: Do you have any objection to going forward here today, or do you waive their presence?

ACC: I waive their presence, sir.

MJ: Very well. All right.

Now, I have been detailed to this court by the Circuit Military Judge of the Western Judicial Circuit of the Navy-Marine Corps Trial Judiciary.

I am certified in accordance with Articles 26(b) and (c) of the UCMJ, sworn in accordance with Article 42(a).

I will not be a witness for either side in this case. And I don't believe there's any grounds for challenge against me.

I informed counsel here this morning -- as we were holding an 802 conference, they mentioned that a Special Agent Mike Maloney was going to be testifying as an expert witness for the government.

I indicated to counsel that I'm acquainted with Special Agent Maloney. I've known him for about 13 years. I consider him to be a friend. I have known him through -- through church. And I have served with him in different callings in my -- in my church. I also used him as an expert consultant, both as a -- the Senior Defense Counsel for the LSSS at Camp Lejeune; as the Regional Defense Counsel for the Eastern Region, when I was in that billet; and also when I was the Military Justice Officer at Lejeune; and the OIC of the LSSS. So I have known him for a great deal of time.

I don't believe, based on that knowledge, that I am biased one side or the other as it relates to him. However, I wanted all parties to -- to know that I do have an acquaintance with that particular witness.

Does either side have any voir dire or challenges for the

or discussing the proposed trial schedule.

The date proposed for the trial is the 25th of February through the 7th of March of 2008, which is less than two months from today.

There are two proposed Article 39(a) sessions, one on the 13th through the 15th of February, the other on the 20th through the 22nd. And I raised with counsel my concern about those particular dates specifically as it relates to witness requests, both Iraqi witnesses, witnesses deployed to Iraq, and expert witnesses, that if there was a contested issue that we litigated on the 13th through the 15th of February and I were to grant defense requested witnesses that the government had denied, that the possibility of getting those witnesses back from Iraq and/or getting an expert witness spun up and ready to testify on the 25th of February would be low.

I discussed with counsel my concern in this particular area that experience in these kinds of cases may -- may lead to the trial dates sliding out there.

The parties also informed me that both Major Faraj and Lieutenant Colonel Vokey have expiration-of-active-service dates or end-of-service dates or retirement dates of 1 May --

1 May, correct?

DC (LtCol Vokey): That's correct, Your Honor.

MJ: Okay.

Parties indicated to me that they had taken all of these factors into consideration and measured these in proposing the dates that are currently listed on Appellate Exhibit I.

Does that accurately summarize our 802 discussion on this particular case?

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

TC (Maj Erickson): Yes, sir.

MJ: Very well.

The Article 39(a) session was called to order at 1007,
1 February 2008.

MJ: The court is called to order. All parties present when the court last recessed are again present, with the following exceptions: At the prior session of the court, the court reporter was Staff Sergeant Evans. Staff Sergeant Evans has been relieved and has been replaced by Staff Sergeant Cherry, who has previously been sworn.

Also, in the prior session of the court, the defense was represented by Lieutenant Colonel Vokey and Major Faraj and Mr. Puckett. Mr. Zaid was not present at that time, nor had Captain Bonner been approved as the individual military counsel.

Today present representing the defense is Lieutenant Colonel Vokey, Captain Bonner. Major Faraj, Mr. Puckett and Mr. Zaid are not present.

Lieutenant Colonel Vokey, could you explain the situations with regard to defense counsel.

DC (LtCol Vokey): Yes, sir. When this 39(a) was set two days ago, Mr. Puckett, Mr. Zaid, and Major Faraj were all on the east coast doing other things and were unable to travel to be here this Friday. And Staff Sergeant Wuterich waives their presence here today.

MJ: All right. Staff Sergeant Wuterich, normally we would not proceed without all of your counsel being present. However, you can waive their presence for this particular proceeding if you desire to.

Do you understand that?

ACC: Yes, sir, I do.

MJ: Staff Sergeant, you can sit down and you may remain seated at all times unless I specifically tell you to rise. Okay?

ACC: Aye, sir.

The accused did as directed.

MJ: Staff Sergeant, have you discussed this issue, whether

you want to waive the presence of counsel, with your defense counsel?

ACC: Yes, I have, sir.

MJ: Do you desire to insist upon their presence or are you willing to waive their presence?

ACC: I'm willing to waive their presence, sir.

MJ: Very well. Now, present here today also is Captain Bonner.

Captain Bonner, would you give your legal qualifications, status as to oath, and your current status in this case.

IMC (Capt Bonner): Yes. Good morning, sir. I am the individual military counsel for Staff Sergeant Wuterich. I was approved by the OIC of the LSSS at Camp Pendleton. I am qualified and certified and sworn in accordance with Articles 27(b) and 42(a) of the UCMJ, and I have not acted in any disqualifying manner.

MJ: Very well. Now, we had an 802 conference, and as mentioned by Lieutenant Colonel Vokey, on the 29th of January. This was conducted telephonically. Present was Mr. Puckett, Lieutenant Colonel Vokey, and Staff Sergeant Wuterich, on one side of the telephone conversation. Also present for the government was Major Plowman, Major Erickson, and Captain Gannon. Also present during the proceeding was Captain Hur, as a spectator, and Sergeant Trujillo, who is a defense paralegal.

In that particular 802 conference, we discussed three issues: Issue Number One, was the issue of removing a videotape from the Article 32 investigation, which is currently in the possession of the court reporter, in order to make a copy of that; discussed with the counsel that particular issue and authorized them to remove the videotape from the Article 32 exhibits and make the photocopy.

Does that accurately summarize our conversation as it relates to the Article 32 videotape?

TC (Maj Erickson): Yes, sir.

establishment of the trial schedule. The witnesses in this case are not subject to compulsory process and the conditions have been met, which indicate that this inability to compel attendance at trial represents exceptional circumstances required under this rule.

With respect to timing, it appears that the government has complied with the requirements of this rule. The proposed dates may impact on the current trial schedule, but adequate time exists to bring this case to trial prior to the retirement dates of the two military defense counsel. After preserving and presenting the testimony -- as the preserving and presenting of testimony of percipient witnesses to the alleged offense is in the interest of justice, the court is not inclined to interfere with a process necessary to preserve this evidence.

With respect to the financial burden of the accused, occasioned by travel of civilian counsel, the court merely notes that the accused has the right to be represented by civilian counsel at no expense to the United States. How this is to be accomplished is an issue personal to the accused. The accused is currently represented by three military attorneys, as well as his two civilian counsel.

With respect to the security concerns expressed by the defense. The government has made representations that they are taking actions to ensure and safeguard the security of all trial participants, including the accused, during the deposition process. The accused will be in the custody and protection of the United States Marine Corps during all phases of his transportation. The accused and counsel has the right to be present but do have the option to decline to attend. The government is required to ensure all military participants of the defense team are trained, inoculated, and transported to the site of the deposition, and to ensure the civilian counsel are transported from Kuwait to Iraq. The government is responsible for the security of all involved. If the government provides all of this, then the government has complied with the procedures of Rule for Court-Martial 702.

Based on these, the court concludes that the depositions ordered by the convening authority are in compliance

MJ: I understand. So we've narrowed it down to that particular point.

TC (Maj Plowman): Yes, sir.

MJ: Okay. All right.

TC (Maj Plowman): Would you please go get Lieutenant JG LeGaux?

DC (LtCol Vokey): Sir, if it's all right, can you have me excused for a few minutes. I need to go get some medication.

MJ: Well, why don't we take a ten-minute recess at this point.

Court stands in recess.

The court-martial recessed at 1101, 13 February 2008.

The court-martial was called to order at 1116, 13 February 2008.

MJ: Court is called to order. All parties present when the court last recessed are again present with the exception: Lieutenant Colonel Vokey is not present. He apparently escorted the witness some place and, also, apparently may be ill.

Staff Sergeant Wuterich, normally I would delay the trial and let your counsel get back here; however, we could go forward if you consent. Have you discussed this with your counsel who are currently present?

ACC: Yes, I have, sir.

MJ: Do you desire to wait for Lieutenant Colonel Vokey or are you willing to waive his presence?

ACC: Willing to waive his presence, sir.

MJ: Very well.

Trial counsel.

TC (Maj Plowman): Yes, sir. At this time, the government would call Lieutenant LeGaux, sir.

MJ: Very well.

each right.

Q. Okay. Do you remember --

MJ: Hold on a second. Would note for the record Lieutenant Colonel Vokey has returned.

Questions by Major Plowman (continued):

Q. What do you remember Colonel Watt telling the accused that he was seeking information about or the subject matter of the interview?

A. It was -- wanted to know what happened on the events of the day of 19 November with regards to an IED -- a complex IED attack, which also resulted in some house clearing and deaths of some noncombatants.

Q. Okay. Do you remember him using the word "death" when he talked to Staff Sergeant Wuterich?

A. Yes.

Q. You remember him using the word "noncombatants" when he talked to Staff Sergeant Wuterich?

A. Yes.

Q. And this was when he was discussing the rights advisement with Staff Sergeant Wuterich?

A. Yes.

Q. Okay. And did you see Colonel Watt advise Staff Sergeant Wuterich of his Article 31(b) rights?

A. Yes.

Q. And how do you know he advised him of his Article 31(b) rights?

A. I was sitting right across from -- the table from him.

Q. Lieutenant LeGaux, do you remember Colonel Watt telling Staff Sergeant Wuterich, specifically, that he was not suspected of anything?

A. Yes. When -- on the rights statement, there's a part there where it has actually the word "offense" on there. He actually lined that out in front of him and wrote the word "event" because he felt that this was a fact finding investigation. We didn't know if an offense had even been committed yet, so he put it as an event.

Q. And how do you know Colonel Watt said that and did that?

certain items of evidence.

TC (Capt Gannon): Yes, sir.

MJ: Which would be an appropriate next motion as this is -- I will give you an opportunity to file the motion, we can litigate it next week.

TC (Capt Gannon): All right, sir.

MJ: Are we tracking?

TC (Capt Gannon): 100 percent, sir.

MJ: Okay. All right. Then what I'm going to do is give you all an opportunity to address the issues that we're looking at.

Trial counsel, since you're seeking to exclude, it would appear to me that you're the one that needs to file the brief on this one.

TC (Capt Gannon): Yes, sir. Absolutely.

MJ: Okay. And, defense, you'll have an opportunity to respond.

Okay. Now, that may open the door to potential classified information issues that were previously discussed. I'll let you guys talk about that particular point.

If it is central to the heart of your case -- it appears that you-all are whetted to the 3 March date, okay?

CC (Mr. Puckett): Yes, sir.

MJ: All right. So you're going to have to make some decisions on that. I'm not whetted to the 3 March date. I'm going to ensure that Staff Sergeant Wuterich gets his due process and has his rights protected. Okay. I understand that there's other considerations that you have concerning the timing of the retirement of counsel and those particular types of things. However, I'm going to give you a chance to think on all those particular issues, and we'll address it next week. And if there is a need for a classified hearing, we may -- we may need to get into that next week, okay?

The Article 39(a) session was called to order at 0831,
20 February 2008.

MJ: The court is called to order. All parties present when
the court last recessed are again present, with the
following exceptions:

Present -- not present today are the accused, Lieutenant
Colonel Vokey, and Captain Bonner.

Are you rising for a reason, Captain Gannon?

TC (Capt Gannon): I'm just trying to adjust something.

I'm sorry, sir.

MJ: Okay. As discussed at the conclusion of the 39(a)
session last week and memorialized in Appellate
Exhibit XXVIII, the accused, fully aware of this
particular session, has voluntarily waived his right to
be present in accordance with Rule for Court-Martial
804.

Also, he has waived the presence of Lieutenant Colonel
Vokey and Captain Bonner. The purpose for waving their
presence is to take care of other issues as it relates
to this particular case.

First of all, does that accurately memorialize the
defense's -- the accused's and the defense's desire with
respect to -- to Staff Sergeant Wuterich and Lieutenant
Colonel Vokey and Captain Bonner?

CC (Mr. Puckett): It does, Your Honor.

MJ: Very well.

Does the government have any objection to proceeding
with the accused being voluntarily absent?

TC (Capt Gannon): No, sir.

MJ: Very well.

Now, present before the court today are the following
motions:

Appellate Exhibit XXX, which is a defense motion to

The Article 39(a) session was called to order at 0813,
22 February 2008.

MJ: Court will come to order. All parties present when the court last recessed are again present. Only two exceptions:

Present here in the courtroom today, also, are representatives of CBS News, *60 Minutes* program, Mr. Seth Berlin, and Mr. Marty -- is it Levine or Levine?

CC (Mr. Levine): Lee Levine, sir.

MJ: Lee Levine. Okay. Mr. Lee Levine.

Would you both please state your legal qualifications and who you represent.

CC (Mr. Levine): Lee Levine, representing CBS Broadcasting, Inc. I'm a member of the bar of the Court of Appeals of the District of Columbia, and the Commonwealth of Pennsylvania; the United States Supreme Court, and most federal courts of appeal.

MJ: Very well. I would note that a motion -- or a notice of appearance has been filed by you. It's been marked as Appellate Exhibit XL.

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

CC (Mr. Berlin): I am Seth Berlin. I represent CBS Broadcasting, Inc. I am a member of the bars of Maryland, the District of Columbia, New York, United States Supreme Court, three federal courts of appeals, and four district courts.

MJ: I would note you also have filed notice of appearance with the court that's marked as Appellate Exhibit XXXIX.

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

MJ: Would also note for the record that the accused, Captain Bonner, and Lieutenant Colonel Vokey are not present today for the same conditions that were discussed on the record on the 20th of February.

Has anything changed in that particular area, Mr.

The Article 39(a) session opened at 0916, 11 March 2009.

MJ: This court is called to order. All parties present before the court last recessed are again present with the following exceptions: In the prior session of court, Staff Sergeant Cherry [sic] sat as court reporter. She has been relieved and has been replaced by Sergeant Doyle, who has previously been sworn.

Present today representing the government is Lieutenant Colonel Erickson, Major Plowman, and Captain Gannon, who has previously made appearances on this case before the court.

Present today representing the defense is a new counsel, Lieutenant Colonel Tafoya.

Lieutenant Colonel Tafoya, would you please state your legal qualifications, status as to oath, and by whom you have been detailed.

DC (LtCol Tafoya): Yes, sir. I have detailed myself to this case in my capacity as the Regional Defense Counsel for the Western Region. I'm qualified and certified under Article 27(b) and sworn under Article 42(a) of the UCMJ. I have not acted in any disqualifying manner in this case.

MJ: Very well. Now, previously present in the court appearing to represent Staff Sergeant Wuterich was Captain Bonner as the individual military counsel.

What is the status of Captain Bonner?

DC (LtCol Tafoya): Sir, Captain Bonner to my knowledge is still the individual military counsel for Staff Sergeant Wuterich.

MJ: Okay. He is not present here today.

DC (LtCol Tafoya): He is not present in the courtroom today.

MJ: All right. Also representing previously as a, I believe, detailed defense counsel was Lieutenant Colonel Vokey. My understanding is that Lieutenant Colonel Vokey has since retired from the Marine Corps; is that correct?

DC (LtCol Tafoya): That's correct, Your Honor.

MJ: There has been some discussion that he may be retained in this case in the capacity as civilian counsel, but that has not occurred; is that correct?

DC (LtCol Tafoya): That's correct, Your Honor.

MJ: Also, not present here today is Mr. Zaid and Mr. Faraj. What are their status today?

DC (LtCol Tafoya): They are not present in the courtroom today, sir.

MJ: Okay. And telephonically present is Mr. Neal Puckett, the senior of the civilian counsel; is that correct?

Mr. Puckett, you can chime in if you are here.

Mr. Puckett?

CC (Mr. Puckett): Still here, sir.

MJ: Okay. Now, Staff Sergeant Wuterich, normally -- you can sit down, and you can remain seated at all times unless I specifically tell you to rise.

ACC: Aye, aye, sir.

The accused did as directed.

MJ: Normally, you have the right to have all of your attorneys to be present prior to proceeding in this trial here today. Now, I will note that we had some discussions previously before going on the record where I was informed that the counsel who are not present are going to be excused because you are giving them the permission to be excused. However, I haven't talked to you about that. So I'm going to go over your rights with you right now on that.

You have the right to have all of your counsel be present with you during the presentation of your case. If your counsel aren't here, normally I would stop the proceeding until they could be here. Of course, we would also have the alternative problem the court directing a date for the counsel to be here and the counsel not being here, we would have to deal with that

separately.

But have you discussed with your counsel their presence and your desires as to their presence?

ACC: I have.

MJ: With respect to Captain Bonner, what is your desire? Do you desire him to be present or do you waive his presence?

ACC: I waive his presence, sir.

MJ: With respect to Mr. Zaid?

ACC: I waive his presence, sir.

MJ: With respect to Mr. Faraj?

ACC: I waive his presence, sir.

MJ: Now, previously, you had been detailed Lieutenant Colonel Vokey while he was on active duty in the United States Marine Corps. He has been relieved in my understanding because he's no longer on active duty in the United States Marine Corps. Now, there's no way the government can compel him to be present.

Do you understand that?

ACC: Yes, sir, I do.

MJ: Now, you have the right, of course, to retain him, but that's something completely between you and Lieutenant Colonel Vokey.

Do you understand that?

ACC: Yes, sir, I do.

MJ: Now, also present here today is Mr. Puckett telephonically; that has the benefit of him being present and hearing what's going on, but, of course, you can't talk to him like you would sitting -- having him sitting next to you.

Do you have any objection to his appearance in this particular fashion?

ACC: No, sir, I don't.

MJ: And this is a decision you made with consultation with all your counsel?

ACC: Yes, sir.

MJ: Mr. Puckett, just to make sure I'm clear, do you have any objection to us proceeding with the counsel being absent here today?

CC (Mr. Puckett): No. None whatsoever, sir, and I would like to thank the court for allowing us to proceed in this fashion.

MJ: Very well. Also present representing CBS today is Mr. Benedetti. He has filed a motion of appearance with the court; that is marked as Appellate Exhibit LV.

Now, previously representing CBS was Mr. Levine and Mr. Berlin.

What is the status of Mr. Levine and Mr. Berlin?

CC (Mr. Benedetti): Mr. Levine and Mr. Berlin are not present today, sir.

MJ: Okay. Does CBS have any problem with those two not being present here today?

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

MJ: Very well. I would note that in Appellate Exhibit LV, the legal qualifications of Mr. Benedetti are laid out, and the notice of appearance is filed in accordance with the circuit rules.

Now, we had an 802 conference back on 1 August 2008. At that time, the Navy-Marine Corps Court of Criminal Appeals had issued a decision; wherein, they had found that this court had abused its discretion in quashing the subpoena. At that time, there was pending an application for appellate review of the issue to the Court of Appeals of the Armed Forces.

As a result of that, the defense made a motion for a continuance, which is marked as Appellate Exhibit LI. The government's response marked as Appellate Exhibit

LII.

On or about mid-September of 2008, the Court of Appeals of the Armed Forces took cognizance of this case, heard argument on it, and ultimately issued the decision in this matter. The continuance, under the circumstances, was granted, and the court held this case in ~~advance~~ **ABEYANCE** until the appellate review process had been completed. *M.J.R.*

On 24 April, the government forwarded to the court attached to an email, the mandated Court of Appeals of the Armed Forces, where the Court of Appeals of the Armed Forces determined that the order quashing the subpoena and the decision was vacated, and the record of trial was remanded to the Judge Advocate General of the Navy for return to me for further consideration whether the relief should be granted to the petitioner, CBS, under Rule for Court-Martial 703. It further directed that I order production of the requested material for an in camera inspection by the military judge alone.

Based on this, we subsequently had an 802 conference around 23 February. Present at that conference representing the government was Captain Gannon, Major Plowman, and Lieutenant Colonel Erickson. Representing the defense was Mr. Puckett, Mr. Zaid, Mr. Faraj and Lieutenant Colonel Tafoya. And representing CBS was Mr. Berlin.

At that conference, we discussed the timing of the hearing that we scheduled here today where I directed the parties to file briefs in accordance with dates that I set, which the parties subsequently complied with.

On 4 March of this year, CBS filed a brief. It is attached as Appellate Exhibit LVI. The government, on 9 March, filed a response brief, it is attached as Appellate Exhibit LVII, and the defense has filed no brief.

Is that correct?

DC (LtCol Tafoya): That's correct, sir.

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

MJ: Very well. Now, first of all, does that accurately summarize our 802 conference that we had and the

The Article 39(a) session was called to order at 0907,
22 March 2010.

MJ: The court is called to order at Camp Pendleton,
California, in the case of *United States versus Staff
Sergeant Wuterich*.

My name's Lieutenant Colonel Jones and I'll put my
qualifications and certification on the record in just a
moment.

This is the first session of court in this case since
March 12th of 2009. I have replaced Lieutenant Colonel
Meeks as the military judge. I can't say all parties
that were present at the previous session are present
because at the last session we had a Mr. Benedetti who
was from CBS. CBS has since decided not to participate
in the case anymore or, better said, the legal
representation from them. I understood that they sat at
counsel table, so we're going to excuse CBS from any
further participation in this case.

Present at the previous session was Mr. Puckett for the
defense as the civilian counsel and also Lieutenant
Colonel Tafoya, who was the detailed defense counsel in
this case. Let me stay with the defense side and
indicate that Mr. Faraj is here with us today and
Mr. Puckett. Those are the two counsel sitting at
counsel table.

Also present for the government is Major Gannon and
Lieutenant Colonel Sullivan. Lieutenant Colonel
Erickson and Major Plowman were previous trial counsel
on this case and they've been relieved by competent
authority.

So with that in mind, Lieutenant Colonel Sullivan, I
have you as not having made an appearance on the record
before. May we start with you.

TC (Maj Gannon): Good morning, Your Honor. I'll go ahead and
speak for Lieutenant Colonel Sullivan. I detailed
Lieutenant Colonel Sullivan to this case in my capacity
as the Officer in Charge of Legal Team Echo. Lieutenant
Colonel Sullivan is qualified and certified in
accordance with Article 27(b) and sworn in accordance
with Article 42(a) and he's not acted in any manner nor
have I acted in any manner which may disqualify us from

this case. I, too, am still sworn and certified under 27(b) and 42(a), sir.

MJ: Thank you.

And to your right seated over there at the counsel table is Lieutenant Reed. Lieutenant Reed will not be of counsel in this case. She is assisting the prosecution. I will allow her to sit at counsel table, and we do not need her qualifications if she's not going to take an active role in the court-martial as far as getting on the record.

TC (Maj Gannon): And just for the record, she is First Lieutenant Meagan Reed.

MJ: Thank you.

TC (LtCol Sullivan): Thank you, Your Honor.

MJ: That takes care of the government side of the house.

On the defense side there was a Captain Bonner who was the individual military counsel. And I understand that he is going to be relieved today. Also there are other counsel who are not present here -- Mr. Colby Vokey and Mr. Mark Zaid -- who are also civilian counsel of record in the case. And they are not here either.

So I believe Mr. Faraj and Mr. Puckett have already put all their qualifications on the record, but let's speak to the issue of Captain Bonner.

Major Faraj, please.

CC (Mr. Faraj): Sir, Captain Newt Bonner is the previous IMC on this case -- or he is still IMC on this case. He has been -- he received orders that took him to Washington, D.C., and we've discussed him with Staff Sergeant Wuterich. And we've decided to go ahead and relieve Captain Bonner as well as detailed counsel, Lieutenant Colonel Patricio Tafoya.

MJ: Okay. Thank you.

Staff Sergeant Wuterich, please keep your seat. Unless you're asked to stand by counsel or me, please keep your seat during all of the proceedings when I address you,

okay?

ACC: Aye, sir.

MJ: You don't have to lean into the microphone. You're good. I can hear you.

Staff Sergeant Wuterich, is it your intention to relieve Captain Newt Bonner from any further participation in this case?

ACC: Yes, sir, it is.

MJ: And that's due to his being PCS'd over to the East Coast and I guess it being difficult for him to participate; is that correct?

ACC: Yes, sir.

MJ: All right. I know you're very capably represented by it looks like four other attorneys at this point, all of them civilians.

So I guess a question I have for you, Major Faraj, is, Is there any military counsel on the case at all?

CC (Mr. Faraj): Once -- once both Captain Bonner and Lieutenant Colonel Tafoya are relieved, there will not be but we will seek to have local detailed counsel reassigned to this case.

MJ: Okay. Unless the government objects, I would recommend that so that we have somebody here who's working with the government in the same building that would be helpful.

TC (Maj Gannon): Yes, sir. And in addition to that, we just conducted a *DuBay* hearing not too long ago in the *Hutchins* case, one of the Hamdaniyah cases. And the issue was release of counsel. In that case it was important to the analysis that the accused had been advised of the fact that he could request that those people stay on past EAS's, past PCS's. The colloquy with Staff Sergeant Wuterich just a moment ago -- the government respectfully request that you build on that a little bit, sir, and ask if the accused has been advised that he could make a request that -- that Captain Bonner stay on his case as well as Lieutenant Colonel Tafoya

and that he understands his rights to be able to do that and he has elected after being advised not to do so.

MJ: Okay. Thank you.

Let me deal with Lieutenant Colonel Tafoya next. Given the accused's request for Captain Bonner, I don't see any need to have him continue on with the case, and he's formally relieved by the court. Assuming that the -- in the next dialogue that we have with the accused if that's still his desire.

Speaking of Lieutenant Colonel Tafoya, he is not seated at counsel table. He is present in the courtroom.

It's my understanding, Staff Sergeant Wuterich, that you also want to relieve Lieutenant Colonel Tafoya from -- and he was your detailed defense counsel -- from any further participation in this case; is that correct?

ACC: Yes, sir.

MJ: All right. And you're aware of what we just talked about with the prosecution that for either one of these attorneys, you could request that they continue to represent you even though they've had a change in duty station. I don't know all the particulars about having them continue after their -- after they leave active duty, but certainly you can make a request that they continue to stay on active duty to represent you. And I guess we might have to litigate that issue.

But it's my understanding that you've made a free election after discussing this with your attorneys, namely the two individuals seated next to -- Major Faraj and Mr. Puckett -- and that it is your expressed desire not to make any requests to keep either Lieutenant Colonel Tafoya or Captain Bonner on this case and that you relieve them freely and voluntarily after being advised of all your legal rights; is that correct?

ACC: Yes, sir.

MJ: Okay. Both those individuals are now relieved from any further participation in this case.

I have as counsel of record for the accused then: Lieutenant Colonel Vokey and Mr. Mark Zaid; Mr. Faraj

and Mr. Puckett.

Mr. Vokey and Mr. Zaid are not here for this session of court. I'm assuming that they knew about the session of court and that you have also have made an election for them not to be here; is that correct?

ACC: Yes, sir.

MJ: All right. I know Mr. Faraj and Mr. Puckett from past experiences. They're capable and able to represent you. So I do not have any concerns with them handling this motion session for this week. But, of course, those other two attorneys will remain on your case as long as you have that relationship with them, I guess.

So you understand that we're going to get a local counsel for you, a military defense counsel?

Do you understand that?

ACC: Yes, sir.

MJ: Would you -- is that your desire to have someone here locally? It's certainly my desire and the court, but I don't want to foist a defense counsel on you. You have plenty of civilian counsel. But I would like a local military defense counsel here, so that they can work closely with the government.

Are you going to put in a request for someone?

ACC: Yes, sir.

MJ: All right. What's the government's position? Does he get detailed somebody else or is it an IMC?

TC (Maj Gannon): Sir, it's the government's position that if Lieutenant Colonel Tafoya is properly relieved as the detailed counsel that he would rate an additional detailed counsel, sir.

MJ: I agree.

So, therefore, you will have someone detailed to you. You'll have all those same rights that you were -- that were addressed with you previously. In other words, somebody would be detailed to your case as a

representative for you. Someone -- and then if you do not like that person, it's my understanding -- unless we have a motion or a disagree -- that you would still have a right then to an individual military counsel if that detailed counsel is not somebody that you would want to assist you. So we'll go through that.

Do you need me to go over any of the counsel rights that you've been read I'm sure more than once in the past?

ACC: No, sir.

MJ: Okay. Do you understand your rights to counsel?

ACC: I do, sir.

MJ: And when all is said and done, do you wish to be represented by Mr. Faraj, Mr. Puckett, Mr. Vokey, and Mr. Zaid?

ACC: Yes, sir.

MJ: Do you willingly waive the right to be represented by any other attorney, either military or civilian, at this point for this session here?

ACC: Yes, sir.

MJ: All right. Now, we just discussed of course that you will be able to have your -- military defense counsel will be detailed to you again through proper detailing channels. That would be somebody from the building a couple buildings over, somebody on the legal team that you're familiar with from the defense shop or from the immediate area. Whoever the detailing authority details. And then you'll have that right to individual military counsel.

Do you understand that?

ACC: Yes, sir.

MJ: Do you understand that normally if you do not elect to have your detailed defense counsel represent you, that the individual military -- and you request individual military counsel that if that person is approved, then normally the detailed defense counsel is excused from further participation in your case.

Do you understand that?

ACC: Yes, sir.

MJ: However, you could request that that detailed defense counsel continue to represent you along with the military counsel that you select, and the detailing authority would have the sole discretion to either grant or deny that request.

Do you understand that?

ACC: Yes, sir.

MJ: Okay. I think we've solved the counsel issues.

The accused continues to be attired in the appropriate military uniform with all awards and decorations to which he is entitled.

Am I correct, Major Faraj?

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

MJ: I know you did this previously, but this is my first session as the judge. So I would like you to put on the record, so I can put it in my notes, what he's authorized to wear and what he is wearing, please.

CC (Mr. Faraj): I still recognize them. It's only been a couple years.

Staff Sergeant Wuterich is entitled to wear the Naval Unit Commendation, Meritorious Unit Commendation, Good Conduct Medal with a bronze star in lieu of a second award, the National Defense Service Medal, the Iraq Campaign Medal, the Armed Forces Expeditionary Medal, and the Sea Service Ribbon with a bronze star in lieu of second award.

MJ: Thank you.

I've been detailed to this court-martial by the Chief Judge of the Navy-Marine Corps Trial Judiciary. I am qualified and certified and sworn in accordance with Articles 26(b) and (c) and 42(a) of the UCMJ. I will not be a witness for either side in this case and there are a few issues that I discussed with counsel in an 802

that I will put on the record. I'm not aware of any matter which I believe may be a ground for challenge against me; however, there are -- Major Gannon?

TC (Maj Gannon): Nothing from the government, sir. I'm just anticipating your next question, sir.

MJ: Okay. All right. Let me finish. Have a seat. Thank you. I appreciate that.

The government does not have any voir dire. I just wanted to put on the record that I do know some of the parties obviously. And I've worked with defense counsel in the past, particularly Mr. Puckett. I know a few of the witnesses, including Lieutenant Colonel Ware and Colonel Ewers, and I've discussed that relationship with the counsel in an 802 conference which we'll summarize in a few minutes.

However, I'm neutral and detached. I have no stake in the case and I don't believe that there is any legitimate grounds to challenge me for cause. However, I invite either side to either voir dire or challenge the military judge.

The government has indicated they have no voir dire or challenge.

Defense, Major Faraj, please.

CC (Mr. Faraj): Defense does not have voir dire, Your Honor.

MJ: Okay. Therefore no challenge?

CC (Mr. Faraj): And no challenge.

MJ: I will confess to the parties that coming into the case, I don't have privy to all of the information that's gone on. Or if I do have that information, I have not studiously looked at it. My question was at this point in the trial, I don't think there's any forum advisement or -- I don't think there's any forum selection or anything of that nature.

Am I right, Major Faraj? None of that's happened, has it? Entering of pleas or forum selection?

CC (Mr. Faraj): We waived -- we waived -- reserved forum election

We did not discuss a lunch time break. Now might be a good time to take a lunch break, so unless you have a witness that absolutely has to testify -- no, you do not. Okay. Government's nodding no.

So it's 1135. We'll take an hour break every day that we need to have a -- that we're in here, we'll take an hour for lunch. So we'll come back in here at 1235.

The court's in recess.

The Article 39(a) session recessed at 1134, 22 March 2010.

The Article 39(a) session was called to order at 1231, 22 March 2010.

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

We do have an addition at counsel table. We have Mr. Colby Vokey. We talked about him earlier on the record as not being here. He has arrived, so he will also be representing Staff Sergeant Wuterich.

Have you made an appearance on the record? I don't have you as having made an appearance.

CC (Mr. Vokey): I don't remember, Your Honor.

MJ: Would you please go through your qualifications?

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

My name is Colby Vokey. I am qualified and certified -- previously qualified and sworn and certified under articles of the UCMJ. And I am in good standing in Texas and good standing with the highest court there in Texas.

MJ: Okay. Would you give us your work address?

CC (Mr. Vokey): Work address is -- would you like just a business card?

MJ: Yeah. If you could bring that up, give that to the court reporter.

City and state of where you're haling from. I know

you're in Texas.

CC (Mr. Vokey): Dallas, Texas, sir.

MJ: Okay. And have you made an official notice of appearance? Have you filled out the form and made the notice of appearance pursuant to the circuit rules?

CC (Mr. Vokey): I have not. I just continue to represent Staff Sergeant Wuterich since active duty.

MJ: Okay. All right. So we'll continue that on.

Government, do you think we need that official notice of appearance?

TC (Maj Gannon): Sir, we always have to comply with the circuit rules.

MJ: Okay.

All right. Mr. Vokey, at your leisure this week some time, please provide a notice of appearance.

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

MJ: And we'll attach that as the appellate record. Thank you for your business card.

Okay. With that in mind, we had a brief 802 right here in court in the presence of the accused and all counsel wherein we discussed what witnesses would be called next. We're kind of back at the same issue where the defense is asking, Well, has the burden shifted? And I told the parties already that my standard on that is pursuant to case law. However, personally I have a low standard for actually shifting that burden and -- but I would like the defense to put on whatever evidence they would like. And then when they have finished that, then I would like to take a break in the proceedings for however long we need to, and I'll make a determination on whether the burden has been shifted to the government and if so, on what facets because I think there were three that were actually mentioned in the motion.

So we'll do that and I think that's all we discussed. And Major Gannon said that he was mistaken. He was not going to call Lieutenant Colonel Riggs. Lieutenant

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

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

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

ACC: Yes, sir.

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

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

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

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

The defense motion is denied.

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

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

On 3 March 2006 he completed his inquiry.

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

The Article 39(a) session was called to order at 0846,
26 August 2010.

MJ: This court is called to order at Camp Pendleton,
California. All parties present when the court recessed
are once again present with the following exceptions:

Lieutenant Colonel Sullivan is not here from the trial
counsel side. Instead, sitting at trial counsel
table -- the government table is Captain Brower.

And Lieutenant Colonel Vokey is not here at counsel
table. Instead, Major Marshall is at counsel table.

Staff Sergeant Myers has been replaced by Staff Sergeant
LeSueur as our court reporter.

So better said, we have Major Gannon, Captain Brower,
Mr. Faraj, Mr. Puckett, and Major Marshall here.

Major Gannon.

TC (Maj Gannon): Yes, sir. I'm sorry to interrupt, sir. It's
actually Captain Matthew Brower.

MJ: Brower.

TC (Maj Gannon): Yes, sir. I detailed Captain Brower to this
case in my capacity as the officer in charge of Legal
Team Echo. He's qualified and certified in accordance
with Article 27(b) and sworn in accordance with
Article 42(a) and has not acted in any disqualifying
manner.

MJ: What's the status of Lieutenant Colonel Sullivan?

TC (Maj Gannon): Lieutenant Colonel Sullivan is still detailed to
this case, Your Honor. He is absent today and will not
participate in this Article 39(a) session, sir.

MJ: For today or for tomorrow?

TC (Maj Gannon): For today or tomorrow, Your Honor. That is
correct.

MJ: Okay. Also as I recall, Mr. Vokey was here at the last
session of court. He is not here today. We'll talk
about him a little bit when we summarize the 802

conferences. But we do have Major Marshall here.

Major Marshall, please.

DC (Maj Marshall): Yes, sir. I was detailed to this case by Lieutenant Colonel Tafoya, the Regional Defense Counsel of the Western Region. I am qualified, certified, and sworn in accordance with Articles 27(b) and 42(a) of the UCMJ. I have not acted in any disqualifying manner.

MJ: Are you the sole detailed defense counsel assigned?

DC (Maj Marshall): Yes, sir.

MJ: When were you assigned?

DC (Maj Marshall): July 1st, sir.

MJ: At one of the sessions of court, one of the motions -- well, we only had one motion back in March or April, whenever it was -- but we talked about having a detailed defense counsel assigned to the defense of Staff Sergeant Wuterich. Although the court opined that he was capably represented by Major Faraj, Mr. Puckett, and Mr. Vokey who had been working on the case for years, that it would behoove the defense and all parties, including the government, to have a detailed defense counsel here locally, especially since the civilian counsel are typically not in San Diego. And so Major Marshall was detailed to the case.

Let me try to summarize the 802 conferences. I invite objections by either party and of course any additions that I may forget.

After we got out of court the last time, the government sent an e-mail on 25 May, wherein they requested to have an 802 conference dealing with issues of expert witnesses, funding, and other concerns. That was set up for 28 May, Friday, 2010. We had a telephonic 802 conference, wherein we discussed the defense answering the government's motions in a timely fashion which they had not done at that point.

We discussed the two additional witnesses including Major Dinsmore; that the defense had an issue with that. And we'll take that up when we talk about the witness production motion.

new parties that are assigned to the case as the attorneys. We talked about doing the pleas and forum which we just did. We also talked about the motions that we would argue.

And we talked about motions were not opposed, so let me go through that. There was a government motion to preadmit the depositions of Iraqi witnesses that are not amenable to service and process and have no intention of coming to the court evidently. That was not opposed by the defense.

We had a motion for appropriate relief, instruction of lesser included offense. Two instructions, actually, asked for by the government. One, Article 77, dealing with principle liability, the theory of liability. And the other -- the lesser included offense of manslaughter under 119, involuntary manslaughter as a lesser included offense of voluntary manslaughter.

Again, the motion was not opposed and the government it looks like looked at the latest case law which was *U.S. v. Jones*. I do note that it appears that some of the motions were written by a Captain Jessica Van Norman. So I just wanted to put on the record who this person is and why she's not here.

Will you do that for me?

TC (Maj Gannon): I will, Your Honor.

Captain Van Norman was a Marine who is currently in law school who was temporarily assigned to Camp Pendleton during the Summer term when she was not in class. She is not qualified or certified in accordance with Article 27(b) but has made appearances at courts-martial and has been sworn in accordance with Article 42(a). She has now returned to her -- to her second or third -- third year of law school and is no longer detailed to the case, Your Honor.

MJ: Okay. Thank you.

Third, we discussed a government request for judicial notice talking about sunrise and sunset on the particular day in 2005 in Haditha, Iraq, talking about the Marine Corps order, and that the United States is a signatory to the Geneva Conventions along with all of

the protocols. And there's been no opposition to that motion.

Also we talked about the government motion to compel discovery. There was no defense response to that motion. The defense indicated that they needed more time, so I'll discuss that in a few moments.

And then we talked about the four motions that we actually are going to litigate today and/or tomorrow. The motion to preadmit CBS outtake interview portions, the motion to reconsider the admissibility of certain photos involving House 2, the motion to exclude portions or all of the accused's statement based on M.R.E. 304, and a witness production motion.

Lastly, we discussed the defense indicated that for the first time they were telling the government and the court that they had another motion that they would like to file that was loosely styled a *Hutchins* motion due to the recent case law of the *Hutchins* case from the Navy-Marine Corps Court of Criminal Appeals. And I'll certainly allow the defense to put their position on the record later. It looks like they're trying to file a motion tonight.

But the bottom line from that evidently is that Mr. Vokey, who was Lieutenant Colonel Vokey who worked on this case originally, left active duty and is working at a law firm somewhere in Texas. He was here at the last session of court when we dealt with the UCI motion. And now, evidently, he works at a law firm that represents Mr. Hector Salinas who was, I guess at one point, one of the coaccused. Mr. Vokey is sick, I guess, this morning and will be here later is what I received as information.

So again the court is concerned with the timeliness of this issue, that it was raised immediately before coming on the record today. The government had no notice of this; neither did the court. So we'll have to discuss what to do with that motion.

And I believe that's the sum and substance of the 802 from today.

Does either side wish to add anything to my summation therein anything I forgot or put any objections on the

record?

TC (Maj Gannon): No, Your Honor.

MJ: Defense?

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

MJ: Okay. The first thing I'd like to talk about then is the motion -- well, I guess the first issue is the counsel that are here -- is Mr. Zaid still on this case, Mr. Puckett?

CC (Mr. Puckett): He is, Your Honor, but Staff Sergeant Wuterich will be waiving his presence.

MJ: Okay. And Mr. Vokey?

CC (Mr. Puckett): Mr. Vokey is not here this morning and Staff Sergeant Wuterich will be waiving his presence as well.

MJ: Okay. Is he here in California?

CC (Mr. Puckett): He is, Your Honor.

MJ: Okay.

CC (Mr. Puckett): He's -- he's really under the weather this morning with regard to some back and neck issues he has. But he told me this morning that he would be here around noon time.

MJ: Okay. So Staff Sergeant Wuterich, I guess, at this point in time, if I am correct, you have four attorneys: Mr. Vokey, Mr. Puckett, Mr. Faraj -- all civilian counsel of course -- and Major Marshall; is that correct?

ACC: Yes, sir.

MJ: Okay. And I believe --

CC (Mr. Puckett): Sir, Mr. Zaid.

MJ: And Mr. Zaid. I'm sorry.

And you're waiving the presence of Mr. Zaid and Mr. Vokey this morning, correct?

ACC: Yes, sir.

MJ: And for these motions?

ACC: Yes, sir.

MJ: And I believe at the last session of court, there was no issues with -- I believe it was Captain Bonner, was somebody who was on the case quite some time ago and you agreed to waive his presence. In other words, that he was no longer assigned to the case and that was not an issue for you; is that correct?

ACC: That's correct, sir.

MJ: Okay. I think we dealt with that at the last session.

TC (Maj Gannon): As well as Lieutenant Colonel Taffoya, same position -- my understanding is as Captain Bonner, sir. That's another counsel that was associated with the case and has subsequently been released.

MJ: Thank you. We dealt with both those issues I think back in March when we met and you indicated -- in fact, we even mentioned the *Hutchins* case at that time and you indicated you had no problem with releasing those individuals understanding all of the ramifications of that at that point. I guess Mr. Vokey will be a different issue, but we'll take that up when that arises.

TC (Maj Gannon): Yes, sir.

MJ: Did I state that correct?

CC (Mr. Faraj): I just want to correct. In May -- we were on the record in May, Your Honor, I wasn't even aware of the *Hutchins*' decision at that time. We did discuss *Hutchins* in June. I don't think we had -- when we talked about Captain Bonner, Taffoya, we -- we didn't raise a *Hutchins* issue -- we're not talking about *Hutchins* now, but I just wanted to correct that we -- I don't think that came up on the record in May.

MJ: Okay. The only time that we were on the record in this case has only been one time when I came for the UCI motion in March or April.

CC (Mr. Faraj): Right.

MJ: And at that point the case had not been decided yet.

CC (Mr. Faraj): Right.

MJ: But Major Gannon said, Hey, there's a case on appeal right now, *Hutchins*. Let's deal with that issue. And so we dealt with that at that time.

Am I correct?

TC (Maj Gannon): Your Honor, you're correct. And in addition to that, if there now is a *Hutchins* issue with either Captain Bonner or Lieutenant Colonel Taffoya, the government requests notice now because they're on active duty and I can take steps now theoretically. But, you know, six weeks from now, eight weeks from now, if either has EAS'd or is gone, that's an issue. So the government would request -- if this is something new, we'd like to know about it now, sir.

CC (Mr. Faraj): I rise for -- just to discuss what we covered in the 39(a). I certainly was not aware of the *Hutchins* issue. The government was aware of it. I wasn't on *Hutchins*. The decision had not come out. I specifically -- distinctly remember when the *Hutchins* issue came out. It was after the UCI motion, so I wouldn't of -- we wouldn't have discussed it because I wasn't aware of it. Maybe the government was. We are not raising an issue for Bonner or Taffoya with respect to *Hutchins*.

MJ: Okay. Thank you. And my memory is we talked about it but the decision had not come out yet. It was just an issue that we saw and we talked about.

CC (Mr. Faraj): And I wasn't aware of the facts so I couldn't of --

MJ: Oh, right. Okay.

So again, Staff Sergeant Wuterich, you're not raising the issue that you want Lieutenant Colonel Taffoya or Captain Bonner as your detailed defense counsel? You specifically waive any representation by them and you're giving up the right to representation by them, correct?

ACC: That is correct, sir.

MJ: All right. Again, Mr. Vokey may be a different issue and we'll talk about that I guess later.

Okay. First issue I want to talk about is the -- the motion to compel discovery. The government made a motion indicating that they want to have all of the reports, et cetera, and access to the witnesses, if they're going to be witnesses, by the defense.

In the 802 conference, the defense indicated that they didn't oppose this motion, but they simply were behind and they don't have the reports. Or they haven't talked with the defense witnesses enough to get those reports.

Is that accurate, Mr. Faraj?

CC (Mr. Faraj): That is accurate. In fact, two days ago was when we were notified that they no longer had to go through the formal contracting process and they could go directly and get paid. And so you can kind of understand that these expert witnesses will not work unless they know that there is money coming. And I can't -- frankly, we haven't discussed with him the case. We've discussed contracting. And until we can do that -- and I think we will be able to do it before September 13th. I can't produce reports and I don't even know if they're going to testify. They might just be consultants.

MJ: Well, when are you going to make that decision so we don't have to give the government a continuance, because that decision needs to be made enough in advance of trial that they have an opportunity to interview those people who are going to be witnesses.

CC (Mr. Faraj): As soon as -- well, we haven't gotten the government's expert reports if there are any besides, I think, Brady and Maloney.

TC (Maj Gannon): All reports that -- the government currently has four experts they intend to rely on in trial: Mr. Mike Maloney, Special Agent Thomas Brady, Dr. Vincent Di Maio, and Doctor -- Lieutenant Colonel Elizabeth Rouse. All of their work product has been turned over to the defense some time ago. There's no additional materials that I'm aware of at this time that would necessitate

The other witness, Sergeant Maldonado, I need to decide then. Sergeant Ferrel, Major Hahn, and First Sergeant Carlson, I need to make a ruling on.

Does either side wish to add anything to my summation of the 802 conference?

TC (Maj Gannon): No, Your Honor.

CC (Mr. Faraj): No, sir.

MJ: Okay. I will give you ruling on all of these motions. I'm not guaranteeing any time frame. I do want to go through and look at the DVDs and some of the pictures and the other things I need to look at to get up to speed on some of the evidence that was produced for the motions.

As I see it, the only issue that we have left is this issue about the so-called *Hutchins* type issue with Mr. Vokey. And defense indicated that they're writing a motion I guess this afternoon or this evening for that issue. I again find the -- find the motion to be untimely. It's frustrating to the court that I would have to be litigating this without -- without being aware of it earlier and that it wasn't filed earlier. I understand the defense just came to the conclusion that it may be an issue for the defense. But I still believe that this should have been raised at an earlier point. If an issue is filed late and I feel like I have to decide it, like I do this one, then I will never require the opposing side, in this case the government, to respond in writing.

You can still argue, represent any evidence you would like. You do not have to spend your time answering the motion in writing if anything -- because a motion's filed late.

Defense, I do want this to be in writing from you, however, so we can get your position.

So this is something that obviously, if we can, we want to decide before I leave Saturday morning so I have all tomorrow to work it looks like just on this one issue. I don't know all of the issues. I certainly am thinking about it over the break. I have a lot of questions that I would have concerning the issue.

Mr. Puckett.

CC (Mr. Puckett): And in that regards, sir, we -- we were a little bit hesitant. I mean, we wanted to tell you that there was more work to do today, but we were hesitant in the absence of it being completed. We didn't want to present it to you in piecemeal fashion --

MJ: Right.

CC (Mr. Puckett): -- in a -- and have you start thinking about it in ways that might cause you to sway in one direction or the other. So please don't accept --

MJ: Okay.

CC (Mr. Puckett): -- our earlier representations as a substitute for the motion.

MJ: Okay. I guess what I meant by that is I know that he has made a previous appearance in this court as a civilian counsel, because I know he was here with us in the end of March, beginning of April when we were -- when we did the UCI motion. I remember seeing him here and we excused him for today's proceeding. So I know he was here at that. And I don't understand the conflict of the law firm or a lot of other issues. So he's going to be here later today and I assume he's going to be available tomorrow if he needs to offer testimony or something. Is that right? Or is he planning on leaving?

CC (Mr. Puckett): I believe he's leaving Friday night, sir.

MJ: Friday night. Okay.

CC (Mr. Puckett): Yes, sir.

MJ: So anything that we had to do with him -- I guess the point is if we don't have anything left to do today, I'm going to watch DVDs and a few other things. But I guess --

CC (Mr. Puckett): Well, sir, I just -- just to also preview you -- and again not to draw your mind in any direction -- he's going to withdraw from the case because of a conflict.

MJ: Okay.

CC (Mr. Puckett): And not -- and also not to step on what I said before and belabor the point, but the focus is going to be what happened at the time that Colonel Vokey was fighting to remain on active duty. And regardless of what additional assistance from afar he may have provided the case, it doesn't eliminate the *Hutchins* issue. So -- so we're not -- and you're going to find when you hear from him that there hasn't been much additional participation by him in the case. I mean, he felt -- he felt obligated to try to help, but there -- there was this continuing conflict that there -- you know --

CC (Mr. Faraj): There was no case.

CC (Mr. Puckett): Yeah. Well -- but there was no case for two years. There was literally nothing to do. So -- for him to do.

So don't be -- don't start jumping ahead in your mind. If you would, sir, I ask you to consider, Well, wait a minute. Has he been on the case all along? Well, he hasn't and he'll explain that.

MJ: Okay. So we'll hear from him I imagine first thing in the morning then if you'll make liaison from him. Because I can tell you that even if either side calls him, I'm going to want to hear from him.

TC (Maj Gannon): Sir -- and we would reserve the right to at least have another chance to interview, to cross-examine. I can't be expected to be prepared to cross-examine if I don't have the pleading before me. I'm hearing *Hutchins*. I'm hearing conflict. And, you know, if this just came to the defense, so be it. That's fine. But I need to be provided time -- not just the court's leave for me not to file a written response, but I need to be able to be provided time to figure out how I'm going to handle this issue, do the research. Tomorrow morning, if there are key witnesses testifying, the government can't be -- possibly be ready to cross-examine this witness if we don't, (a), have the pleading; and, (b), have sufficient time to research the law.

MJ: Well, do you -- I guess the question I would have is --

I know it's hard for the government to answer this -- but either side, do you anticipate calling any other witness besides Mr. Vokey I guess would be the issue?

CC (Mr. Faraj): The evidence the court will hear will either be through -- I will be making a proffer and Lieutenant Colonel Vokey retired will be making a proffer. If you want us to take the witness stand, we'll do that. Or we can make it as an affidavit or a proffer about -- specifically about the time when we left active duty and what efforts -- and what efforts we took to remain on -- and I think the government may be aware anyway. But that's all the evidence that -- that's the essence of the evidence we're offering.

MJ: Okay. Then what -- Major Gannon.

TC (Maj Gannon): Is the accused going to be willing to sign a limited waiver of the attorney/client relationship? I'm certainly going to cross-examine Colonel Vokey on what he did in this case, any specific areas of inquiry that he was charged with -- I mean, to distinguish it from the *Hutchins* fact pattern if we, in fact, have a *Hutchins* fact pattern. I mean, the court in *Hutchins* relied on the fact that he had two distinct -- Captain Bass had two areas that he was responsible for, the mental health piece and the sentencing piece. He abandoned his client a week and a half before trial. He was actively engaged in the case for over a year. Those are all distinguishing factors that the government needs to develop on cross-examination and cannot do so in the absence of an ACR waiver. So all these mechanics I think probably should be discussed, thought out, and planned for prior to proffers and submission of evidence.

MJ: Okay. And I understand your frustration. Again, the court's frustrated that we're -- that I'm hearing this for the first time now. But at the same token, I'm going to get whatever evidence I can tomorrow. I'm certainly going to allow you whatever time you need to cross-examine, to recall him. I can certainly take testimony from him over the phone at another time if I have to. If I leave now and we finish this up at the beginning of the trial on 13 September, we can do it at that point. So there's lots of times that we can finish this up without me necessarily making a ruling. Whatever we can accomplish tomorrow, I would like to do.

I don't know if the accused is going to put in the waiver that you talked about. I hadn't even thought about that issue. That's another issue. So rest assured that I'll give you whatever -- just like I would the defense if you filed a motion late that I accepted -- I'll give you whatever time you need to prepare and to cross-examine. You can simply state if they put Mr. Vokey on the stand -- because I certainly would like to hear from him -- then you can state, I want to cross-examine but I don't feel like I'm prepared to. I haven't even had a chance to talk to him. And that's fine too. I would suggest that we go on the record a little later tomorrow, so that you can have the morning to prepare after you get the motion from the defense tonight.

TC (Maj Gannon): Yes, sir. And I -- I take, you know, Mr. Faraj's word when he said it just came to me; made that representation, I take him at his word. It's not -- my frustration is not necessarily routed really in the timeliness of this issue. I believe the defense when they say, Hey, it just came to us when we were working up the case. I absolutely take that for the truth that it is. It's not that frustration. It's that I just want to make it clear, I need to be provided time to prepare for this. That's all I'm asking for, sir. And your statement a moment ago, Your Honor, has assuage my concern. Thank you, sir.

MJ: Sure. So we'll do what we can tomorrow and anything you want to present later, you can. I'm even happy to hear argument from either side and you can still put in more evidence. You can send me things. I don't want to take evidence outside the court of course unless it's a document. But I just want to get through whatever we can tomorrow. So maybe we could start a little later also to provide you time to look at things in the morning. If he has an evening flight, maybe we could come in at noon, for example, having already eaten. And that would give us two or three hours that we might need that I don't think we'll take. But we could spend that time interviewing him or taking up whatever issues we can for this tomorrow afternoon.

CC (Mr. Puckett): We'll double check his schedule, sir.

MJ: Okay. So let's do that. I have my BlackBerry so all the parties can e-mail me if we want to go earlier than

noon. Let's establish a noon time frame right now to come back in.

Any rulings I can give you on these motions, I'll do that even if I don't have findings of fact, conclusions of law written out at least I'll give you rulings. If I don't feel comfortable with that, I'll e-mail them to you later. And we'll take up this issue to the extent that we can.

So all I ask from the defense then is that you get your motion done tonight. It may not be as, you know --

CC (Mr. Puckett): Erudite?

MJ: I didn't want to use the word "Erudite" because I feel like it will be erudite, of course. It doesn't have to be succinct I guess is my point. It doesn't maybe have to establish every single piece of a case law or whatever. Just the motion out --

CC (Mr. Faraj): My motions are never succinct, sir.

MJ: Just get the motion out there to the best of your ability to give the government an idea of where you're going, so we can try to deal with whatever issues we can tomorrow and we'll take advantage of Mr. Vokey's presence here tomorrow.

Okay. Anything else that we need to take up today by either side? Anything I'm forgetting?

TC (Maj Gannon): No, Your Honor.

CC (Mr. Faraj): Nothing from the defense, sir.

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

The Article 39(a) session recessed at 1117, 26 August 2010.

[The Article 39(a) session was called to order at 1018,
27 August 2010.]

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

Staff Sergeant LeSueur was our court reporter. He was previously sworn and he's been replaced by Staff Sergeant Myers who has previously been sworn. And she'll be our court reporter for the motion session today.

Other than that at counsel table we now have Mr. Vokey sitting at counsel table and due to the constraints of the table in the room, only three defense counsel can sit at the defense counsel table. That's all there is reasonably room for. Therefore, Major Marshall is here. She's seated in the gallery, because there's no more room for her to sit. So I would certainly allow -- we didn't talk about this, but I would certainly allow, Major Marshall, for you to continue in your representation of him. He's not waiving your presence here today. "Him" meaning Staff Sergeant Wuterich. And you can feel free to pass notes back and forth over the bar. That's the one exception I will make because you're actually detailed to the case and you can -- if you need to have a short conversation over the bar, you may do that also.

And obviously, we're going to talk about Mr. Vokey's appearance here, et cetera, his presence I think was waived yesterday. He was not feeling well. He's here today.

I wish you better health.

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

MJ: And we'll take that up as we move along here.

Okay. The motion's been filed as Appellate Exhibit XCIV. Let me summarize an 802 conference we had in the presence of the accused and all parties before we came on the record. We talked about the procedural posture of the case and where we were going. Defense indicated they may have another motion or two just dealing with animation and whether we would need a

end at 1730 every day for the trial.

But I would indicate to the parties, I guess adjust your witness arrival times, especially the defense, to what's appropriate since we won't even be starting the merits of the case until 16 September at 8:30. I would ask you to be ready to do your openings on 15 September. Be ready to do that in case the panel selection goes faster than we think. If, again, the panel selection is done at 1700, I'll have you just do the opening in the morning. If we're done, you know, before 1630 or 1600, I'll have you do your openings on that day, 15 September, so be ready to do that.

That's pretty much what we discussed during the 802 conference. I may be forgetting something, of course, so I invite objections or additions from both parties.

Major Gannon, please.

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

MJ: Defense.

CC (Mr. Faraj): Nothing from the defense, Your Honor.

MJ: Appellate Exhibit XCIV then is the motions. You want me to consider as evidence all of the things that are attached to the motion?

CC (Mr. Faraj): Yes, Your Honor. As well as my proffered -- my fact section, which is a proffer from counsel in this case, specifically, myself and Lieutenant Colonel Vokey retired.

MJ: Is there any objection to me considering -- this'll be important for you, Major Gannon -- as evidence here, the proffer portion -- I know we're going to hear from Mr. Vokey, but the proffered portion of the facts that he's put in here without having him to stand up in court, Mr. Faraj in particular, to say what's contained in the document?

TC (Maj Gannon): Your Honor, the government will reserve on that until we hear from Lieutenant Colonel Vokey.

MJ: Okay.

TC (Maj Gannon): With respect to what Mr. Faraj represents, no objection with respect to either the accused -- anything that's related to accused or Mr. Vokey, we'll reserve on whether or not we're objecting to your consideration of the proffer until we hear from Mr. Vokey.

MJ: Okay. I will consider as facts those issues involving Mr. Faraj so he doesn't have to stand up in court and recite them again as a proffer.

I guess these types of motions will now be considered *Hutchins* motions for lack of a better term.

CC (Mr. Faraj): He liked fame.

MJ: What's that?

CC (Mr. Faraj): Nothing, Your Honor.

MJ: Okay. All right. And then I will -- there's no objection, I'll consider everything else that's contained -- was put in -- all the attachments that were put in with the original motion.

One thing we did not discuss during the 802 conference, we're going to hear from Mr. Vokey today. Is it the defense's intent for Mr. Vokey, I guess first, to remain on the case?

CC (Mr. Faraj): Mr. Vokey is still on the case. He will move this court to be relieved from further representation of Staff Sergeant Wuterich once we're done with this motion.

MJ: That was my next question. Do we expect Mr. Vokey then to be here on 13 September for cross-examination or are the parties saying we're going to take that telephonically.

CC (Mr. Faraj): That all depends -- well, he -- I guess he can be here -- if he's available, he can be here to be heard from or telephonically. As far as representation goes, that will be decided by the court. And what kind of government action they take.

TC (Maj Gannon): We're drafting a subpoena for Mr. Vokey literally as we speak.

MJ: Okay. So Mr. Vokey will, in all likelihood, be here on the 13th of September then. All right. That was something we had not discussed.

Okay. With that in mind then, do you wish to present any further evidence on the motion?

CC (Mr. Faraj): Your Honor, under Rule 104, I do move that the court consider as it is your -- at your discretion, everything contained in my fact section and this motion.

MJ: That's granted with the exception of things dealing with Mr. Vokey and the attorney/client information that may be or may not be divorced just because there is an objection at this point.

CC (Mr. Faraj): I also make a proffer on behalf my client, Staff Sergeant Wuterich, that at the time he -- at the time Mr. Vokey, then Lieutenant Colonel Vokey, and myself left active duty, he was wondering what is going on with his defense team; why his lawyers were leaving him. And of course, he wanted us to remain on the case.

MJ: Any other proffer or any other evidence; in particular, you talked about perhaps if you choose putting your client on the stand or Mr. Vokey?

CC (Mr. Faraj): Well, if we're going to do it on the 13th, then I just reserve until that time --

MJ: Okay.

CC (Mr. Faraj): -- to read the government's brief and decide how we're going to -- we're certainly not waiving ACR. He can talk about his expectations with attorney/client relationship and we are going to very closely control what testimony's elicited, but he is not waiving any ACR in this case. He's not waiving his 5th Amendment right. Or 6th Amendment right to counsel, I'm sorry. That's the right to remain silent.

MJ: Okay.

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

MJ: Sure.

TC (Maj Gannon): I went ahead and prepared a limited waiver of

the ACR for the purpose of allowing Mr. Vokey to take the stand today. I'd request that that be marked.

MJ: That's been marked as Appellate Exhibit XCV. Give me just a moment.

[The military judge perused Appellate Exhibit XCV.]

MJ: Defense, your position?

CC (Mr. Faraj): Well, we're not signing any waiver.

MJ: I missed that.

CC (Mr. Faraj): We're not signing any waiver.

MJ: Okay.

CC (Mr. Faraj): That's the short. If you want to hear more argument, I can explain.

MJ: Okay. Go ahead.

CC (Mr. Faraj): This is a -- this is a -- this is going to be -- we believe the court is going to find that this is a -- going to take a step-by-step approach. We have to prove certain things before we even get to this type of finding by the court which I think would result -- would go to prejudice, how he was prejudiced by losing counsel as the relationship -- so we're not there yet. And you may not -- you may decide that we never get there. Once we get to that point, I think there will be some room to ask him questions about how counsel participated in order to prove some prejudice and certainly the government will have a right to examine that. But that does not require a waiver of attorney/client privilege. Or if -- it'll be certainly very limited based on what we believe is necessary to be considered by the court.

MJ: Okay. And again I am looking at your facts section of your motion and considering that within the limits established by the government since they objected to some of it at this point in time. So as I understand it then it is the -- the defense's position not to put Mr. Vokey on the stand at this point.

CC (Mr. Faraj): Your Honor, he's counsel of record. He's a sworn officer of the court. You can ask him anything you'd

like, and he's required to answer it as long as it doesn't go to privilege. And they can certainly ask questions through the court and that's how we do it. I don't know why he needs to take the stand. It's not a misconduct motion where he needs to be cross-examined. These are -- this is facts. If they're challenging these -- they have these facts. It's a matter of record. If they challenge these facts or there is some suggestion of misconduct or Misrepresentation, then perhaps we get to that. But I don't think we're quite there yet.

MJ: Okay. I think we asked yesterday -- Staff Sergeant Wuterich, please keep your seat. I think we talked about this yesterday that you waived Mr. Zaid's presence who is still I guess on your case, correct, or yesterday and today?

ACC: Yes, sir.

MJ: And then we already -- we already finished with Lieutenant Colonel Tafoya and Captain Bonner. I know you have Major Marshall here today. So I guess the only presence we're talking about is Mr. Zaid who's not here; is that right?

ACC: Yes, sir.

MJ: And we already talked about that. You waived his presence for today and yesterday, right?

ACC: Yes, sir.

MJ: Okay. Government, where would you like to go?

TC (Maj Gannon): Sir, if the defense isn't going to present any evidence, I'm not -- I'm not exactly sure to be honest with you. We've got -- like I was indicating earlier in the 802, I've got positions to take depending on what motions the defense takes or what steps they take in furtherance of this issue. I mean, it seems to me like the defense has an obligation here to put some evidence on or to do something in furtherance of this motion. So I'm reticent to take a position on what does the government want to do until I'm clear on what they want to do. I mean, I read the motion. I understand what they're looking for. They're looking for a dismissal. It sounds like that's going to be modified. Perhaps we

could capture some discussion of Mr. Faraj's notions of ulterior -- not ulterior but alternate resolutions --

CC (Mr. Faraj): Freudian?

TC (Maj Gannon): A little bit.

CC (Mr. Faraj): Deliberate.

TC (Capt Gannon): Alternative resolutions to this matter, sir. Other than that, you know, I have some positions to take on some of the representations that are made in the motion as far as the law is concerned and the government can articulate those.

MJ: Okay. We're just in an odd situation here.

TC (Maj Gannon): Yes, sir.

MJ: Because nobody's ready to put argument on the motion. It's not finished; you want more time to do it. My purpose in coming here today was to take any testimony that we could if anybody wanted to offer it. I do not feel in the position at this point that I wish to ask anybody to take the stand. That's my position as the court. I could ask for that as the arbiter of the motion. I don't feel that I'm in the position to request that either the accused take the stand, which would truly be extraordinary, or that Mr. Vokey take the stand at least at this point in time. So, I'm kind of leaving that up to the parties.

Mr. Faraj.

CC (Mr. Faraj): I do request some brief argument and I'm going to base some of it on some of the facts in my motion and I think that may or may not move the government to just accept without requiring testimony. I don't think this is going to be a very contested issue as far as the facts are concerned. This is really quite legal. It's a legal argument not a factual argument. We may get some --

MJ: But there are some issues of fact that you would like me to take. I mean, your motion's pretty strong in the fact that you think that the government has specifically gone out of their way to ensure that their trial team stays together and has done all kinds of things to make

sure sanctuary is granted for Lieutenant Colonel Sullivan, et cetera, where they haven't done a thing for the defense. So those are pretty strong assertions.

CC (Mr. Faraj): Well, that's a fact -- it's a fact in this case. Every time we make an appearance, you know which counsel are on record. We provided you an e-mail -- at least one e-mail from -- of an exchange between Manpower and Lieutenant Colonel Vokey. And I have spoken to Lieutenant Colonel Sullivan myself who told me that he got sanctuary, he remains on this case, and he will be litigating this case. Now maybe on September 13th he won't show up. But when I spoke to him earlier this week on Monday -- on Monday, he said he was still doing this case.

MJ: Okay. I guess my point in saying that is not to argue with you but just to say I don't know if the government's in complete agreement with all those facts. And of course it is more of a legal issue and I understand that. But, again, factually I want to give -- and the government -- that's why we're going to continue on 13 September -- I'm going to give them whatever time they want to present anything factually also that might dispute what you have in here. I don't know. And I have not read through all your exhibits here either.

CC (Mr. Faraj): Of course. And that really does go -- Your Honor, that really does go to the remedy or the prejudice. But we have -- we have a burden of showing where the law, if any, was violated with respect to this. So there's a legal question first before we get to those factual matters. And the factual basis for my legal argument is not in dispute and will not be in dispute.

MJ: Okay. Why don't I hear from you then -- why don't you make any argument that you wish at this time. I understand we're going a little out of order here, but I'd like to at least hear where you're going besides on the alternative remedies or anything else you'd like to say.

CC (Mr. Faraj): Your Honor, I am -- I'm making a motion to dismiss these charges, because we've lost detailed counsel. And I'm going to reduce it -- I'm going to reduce it for you to an almost mathematical equation.

R.C.M. 506(a) states the accused has a right to civilian counsel and, not or, and -- let me back up. First I apologize for bringing in a late motion. And I sincerely mean it. We -- this came up as a last minute -- and of course *Hutchins* is recent case law. So I apologize to the court for my late motion.

But 506(a) states that civilian counsel and detailed counsel. That's an important distinction. 505(d)(B)(2) -- R.C.M. 505(d)(2)(B) states that detailed counsel may only be excused when they're basically fired by the client or for -- I'm not going to cover IMC. It covers IMC. I'm not going to cover IMC. But --

MJ: For good cause.

CC (Mr. Faraj): For good cause with the court's permission.

MJ: Right.

CC (Mr. Faraj): And so the question becomes, What is good cause? *Iverson* and *Baca* -- *U.S. v. Iverson* and *U.S. v. Baca* say extraordinary circumstances. Something that is not common, everyday, expected, foreseeable. *Hutchins* -- all *Hutchins* really does is defines good cause. And it says, you know, leaving the military is not extraordinary circumstances. We all come into the military and leave the military. It's expected. It's foreseeable. That's not good cause.

MJ: But wouldn't you agree that that ruling was -- has two distinctions: One, is that it was limited maybe to the facts of that case in the situation that someone who had worked on the case forever was dismissed three weeks prior to trial. And second of all, that -- that -- that that case talked about -- excuse me.

CC (Mr. Faraj): The prejudice.

MJ: I lost my train of thought. The fact that it happened three weeks before trial and also -- okay. I don't remember my second thought. Go ahead.

CC (Mr. Faraj): Yes, Your Honor. The -- the attorney/client relationship is sacrosanct. It's inviolable, unless there is some good cause to break it. You have served as an RDC and I am betting that you have counseled your defense counsel on more than one occasion, be careful

about forming A/C, you must be detailed. I got that. Be careful forming A/C, you much be detailed. You can't just form A/C with anyone as a military counsel. Once you are detailed, it is unbreakable except for good cause in front of the court or being fired. I distinguish detailed counsel from civilian counsel. They are separate.

Hutchins -- all *Hutchins* really did is define good cause. The two week is a red herring and that was specific to that case. It was talking about the prejudice. But if you -- if you read *Hutchins* along with *Baca* and *Iverson*, you will find that separation from the military does not sever attorney/client relationship. And in fact, *Hutchins*, read with our state bar rules, requires that we be in court today in civilian clothes, in uniform, or whatever. My state bar rules do not care what uniform I show up in or what vestments I have on me. They require that I appear whenever a hearing or proceeding is ongoing and that relationship has never been severed. And I'm here today but not in uniform. But I'm not detailed counsel anymore, and that was forced on me by the government.

What's interesting in this whole thing is I found out -- and we haven't -- our client cannot pay us. And I guess I'm going to pierce some of the attorney/client privilege to offer some information -- that even were I to wish to continue to represent my client as a civilian, the JAG Instruction and 18 U.S.C. 203 prohibits me from receiving any pay. I have to work without compensation unless I get permission.

MJ: Permission from who?

CC (Mr. Faraj): The JAG.

MJ: Have you received that?

CC (Mr. Faraj): No. We never asked for it, because we're not getting paid. But that's troubling because you see what's happened is I was sitting in a building two doors -- two buildings over, getting a salary, working on no other case. I'd cherry pick a case here or there; I'd assist other clients. But I worked on no other case but this. I had a file room, I had clerks, I had printers and computers, and I could call as Major Faraj to any unit and say please send me witness "X" or

witness "Y." I can't do that as a civilian. And so did Colonel Vokey. He was the RDC.

As detailed counsel, I was going to show up in a uniform wearing my military experience on my chest and the credibility and presence that brings with it and present a case to members who are going to look into combat actions on November 19th. We don't have that anymore.

The prejudice as a result of the deliberate severance of A/C -- or the attempt to sever, although we're still here, was even contemplated in Judge Ryan's desending opinion in the -- in her -- in the CBS brief -- or the CBS decision on whether the court had -- had jurisdiction to hear the Article 62 appeal on the CBS, *60 Minutes* outtakes. And that's an interesting -- her desending opinion is really interesting, because she covers this very issue as to the delay and the loss of counsel. And of course she says there shouldn't have been jurisdiction for the appeal, because all they're going for are things that are -- a reasonable person would understand that are included in the *60 Minutes* show. And of course, that's what it is. He testified -- he said it all along that I was a know -- what he participated in. There's nothing knew.

I digress. In that -- in their oral argument on that -- on that brief, the government conceded prejudice to losing counsel. And her decision talks about that. The prejudice I speak of which to me, to Staff Sergeant Wuterich, and to Lieutenant Colonel Vokey and the rest of the team is palpable. Our defense team has been disintegrated. We live all over the country. I don't live where I work by the way. We live all over the country. We have to travel long distances. We don't have access to witnesses. We don't have access to hard files because we couldn't move everything with us. It had to remain here for whatever counsel took over. We weren't sure if we would come back on the case or not.

On the other hand, trial counsel remained in position. Extraordinarily Captain Gannon then, Major Gannon now, gives you an idea of how long this case has taken. He's been promoted yet has remained on the case. He hasn't been moved. I think he PCA'd recently, but he's still on the case.

Colonel Sullivan -- I mean, extraordinary move. He's a

reservist. Lieutenant Colonel Atterbury at the time of Hamdaniyah was a reservist. Both have reached sanctuary. Maybe there's another reason, but I find it hard to believe that when Manpower tells him we don't have any room for you and he's a defense -- "him" being Lieutenant Colonel Vokey -- we don't have any room for you. You got to go. That they're extending the right to remain on active duty to Lieutenant Colonel Sullivan -- both of the same rank -- lieutenant Colonel Sullivan, Lieutenant Colonel Atterbury -- when arguably they're under the same constraints. I mean, if Title 10 limits the number of officers, lieutenant colonels, and they're both 4402s, then why can they stay and he has to go?

Well, I'll tell you why, sir, because this is a complex case and although the government doesn't have a right to maintaining a trial team, to continuity, they recognized that in order to litigate this case, you have to keep this trial team together. It's got way too many pieces, way too many witnesses, way too many issues. And so does the defense. But he has a constitutional right to that counsel. He has a statutory right to detailed counsel. They don't. Yet they took the steps necessary to ensure that they put on the case they wanted to put on. We've been disintegrated, because we had no other options.

We kind of sensed that we were required to stay on. Based on the reading of the R.C.M., you could argue that it was extraordinary circumstances and I'm done. And that was the common understanding. But we sensed we had to remain on. *Hutchins* kind of verified what we felt. I can't tell you that I was so intellectual that I thought about it. But in my gut, I felt like if I left this case, I'd be in violation of something. *Hutchins* affirmed that.

I will say this, Your Honor, had this case been ongoing and there was a judge -- if you were sitting where you are today in '08 when I went to retire and Lieutenant Colonel Colby Vokey went to retire, I would -- I'm sure that we would not have been allowed to leave or to sever A/C. I'm certain of it, because you would have inquired into it. And I don't say that because I want to sway you one way or the other. But you would have asked the hard question. You would have said, Counsel, I don't think that quite relieves you of your responsibility to

your client as far as A/C goes. I'm sure of it.

MJ: But the reason you believe you were relieved was because the appeal process that the government instituted took so long?

CC (Mr. Faraj): Yes.

MJ: That people just said, Look, we have no idea when this is going to solve itself, so you guys need to leave. It's time to go.

CC (Mr. Faraj): Well, lawyers would of probably -- I don't know that that decision -- we didn't go through trial counsel. They have no say on whether we say or not. I guess the government, the CA could have demanded that we remain, but we had to go through Manpower. They're separate. And the e-mail basically tells Lieutenant Colonel Vokey -- and I got the samething. I just don't have it in an e-mail. And there are a lot more e-mails. We can't pull them off. He just forwarded this to himself at the time -- do a turnover and leave because lay persons don't grasp the A/C.

So I'm not saying that, you know, Major Gannon took a look at our request and said, No, they don't get it. And there wasn't much we could do with the trial counsel. The government, Big "G," Manpower basically didn't get it. Now, the difference is they have a more direct line to the convening authority and to use that power to remain and we did not. We tried. We asked, we tried, and there was not much we could do about it. And part of the reason probably -- one is they weren't reaching end of active service. The other reason is as you just said, Your Honor, is that we didn't know when this case was going to end. We assumed. We really did think that that appeal wouldn't be granted and we'd be back -- you know, we were ready to go in February of '08. We thought we'd be back by May or June.

MJ: I notice in reading some of the record that you had made a speedy trial request at some point.

CC (Mr. Faraj): Right. Right. We knew -- we knew that our terms of service were coming to an end and we wanted to get this case over with. But --

MJ: Is that why there was a request for a speedy trial?

CC (Mr. Faraj): Part of it. And he wanted to get on with his life, of course.

MJ: Okay. So where do we go from here? What remedy would you like other than dismissal with prejudice of all charges and specifications? Which I'm not ruling out. But I'm saying besides that, what -- where do we go from here? What's the remedy? Certainly our top priority at least from the court's perspective is that both sides be given a fair trial including Staff Sergeant Wuterich and he ought to have who he needs to to represent him. And this court's opinion, who needs to be representing him are the people that are sitting next to him because you are the people who have been working on the case forever.

CC (Mr. Faraj): Yes, Your Honor. If there were no prejudice in this case -- if there were no prejudice -- and there's plenty of it and I'd like to be heard on a little bit more on that. But if there were no prejudice, I think the remedy that the government would be required to undertake or effectuate is to order Lieutenant Colonel Vokey and myself back to active duty, give us the necessary time to prepare as detailed counsel and to try the case.

I do not comment on our willingness to come back to active duty, because frankly I've -- I have clients and I have a life outside the Marine Corps now. But if I'm ordered, then I will deal with that at that time. I am not conceding that I'll do it voluntarily, but it has to be orders.

That said, I'd like to go back to some of the prejudice.

MJ: Sure.

CC (Mr. Faraj): And I'd like to highlight a few things for you. Yesterday, I sat here and I got smaller -- felt smaller and smaller and smaller as you looked at me and you said you are late with your motions. And I'm not normally late with my motions. I have to make a living doing other things in order to work this case and so unfortunately I have to devote some time to clients that pay in order to have the time to do this. I don't have assistants to write. I did not have Summer funners like I did when I had detailed counsel and they'd come in and I'd assign them cases. And if you look at the

Hamdaniyah case -- and you did Hamdaniyah, sir -- I wrote very few of those motions. Many were written by assistants that were available to me and some other counsel.

MJ: This court was not aware of the fact that you are not getting paid. I am now, but I was not aware of that. Anyway, go ahead.

CC (Mr. Faraj): So that's some of the prejudice. I can't devote the time necessary, because I have to do -- I have to make a living. I mean, that's a real-life scenario. The rules of -- the professional responsibility don't talk about that. But matter of factly, I can't do this work if I don't pay my bills and pay my rent and so on and travel from the East Coast to here and pay for hotels and eat. And so I have to do that work in order to do this work, because I've been forced to do it that way. And so has Colonel Vokey. I don't have a Captain Jessica Van Norman to write brilliant briefs for me during the Summer.

If you take a close look at the *Hutchins* decision and you sort of flip it upsidedown, what it essentially tells you is -- what it told Captain Bass is A/C was never severed, Captain Bass. A/C was never severed. And that's what it tells us. We are required to be here until the court relieves me. That's what *Hutchins* says. Forget the two weeks or whatever. A judge must find good cause once a detailed counsel is assigned and be relieved by that judge. I can't just walk away from the case.

MJ: And that was the second distinction I had lost earlier when I had my brain cramp. In that case, I think the court was also perturbed with the fact that they thought the judge gave bad information to the accused by telling him, Hey, guess what? That guy's gone. You don't get him anymore. In this case, has there ever been a situation that's occurred like that that's -- okay. So that's a little distinct also.

CC (Mr. Faraj): No. But we're sitting, working the case a couple days and we're talking about this issue -- literally two days ago and Staff Sergeant Wuterich utters out, he says, You know I was wondering where you guys were leaving me. Why you guys were leaving me. That kind of gives you some insight as to what was going on here. We

went away. We had -- without *Hutchins*, we had no obligation. I have no obligation to be here today, Your Honor, and neither does Vokey based on the pre-*Hutchins* decision. The Marine Corps sent us away and never told us we have to come back here. There was no judge to speak to. We were gone. And that's the danger.

And take this to its natural end if the government -- and I'm not saying that they're doing this, but if the government had a nefarious purpose to get rid of effective counsel, they would delay. They could withdraw charges and bring them back later until EAS arrived. Counsel would go away, they detail someone not as effective and take the case to trial.

MJ: But what about all the cases on appeal? Let's say a case is done and an individual gets a BCD or DD, it goes up for appeal, three years later, it comes back to be retried, the defense counsel's left active duty. Certainly the accused has no right to request that same defense counsel to come back to active duty, does he?

CC (Mr. Faraj): They don't. And as you know, sir, the representation terminates when the --

MJ: When he gets appellate defense counsel.

CC (Mr. Faraj): Right. Or when there's a verdict and it's done.

MJ: So this case is distinct from that scenario because it's an ongoing process.

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

MJ: Okay. Go ahead.

CC (Mr. Faraj): I will point something out. You asked me this question, we never went on the record to discuss whether he is approving -- unlike *Hutchins*, Staff Sergeant Wuterich was never heard from, if he agrees that he no longer has a right to his detailed counsel. And I would -- I'm going to proffer there if you asked me, he'd say, I do want my detailed counsel. That's what he uttered to us a couple days ago. The Benchbook at 2-11 where you read -- where you read the counsel rights tells him you have a right to a detailed counsel and a civilian counsel. And it's not just any detailed counsel that comes and goes, because once that A/C is

formed, it can't be broken except for those -- for those exceptions I gave.

I'm speaking a lot and I tend to do that. Since we're going to have another one, I would want to bring up more of the prejudice to support why dismissal is merited. Because you can never be -- we can never be back where we were pre-August 2008 when Colonel Vokey and I retired.

One last thing before I sit down, Your Honor. We submitted a -- what's called a declaration or an affidavit as part of our evidence. It states in there -- and it's written by Mr. Puckett -- it states in there that Lieutenant Colonel Vokey left active duty October 1, 2008. That's a mistake. It's November 1, 2008. It's correct in my motion. It's wrong in the declaration. The declaration was provided to the appellate government lawyers when they were litigating the CBS motion.

MJ: Okay. He left November 2008.

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

MJ: Also in your motion, I think you had another error unless I'm wrong. I may be wrong because it's the second time you've said this. You said it yesterday in court also about the last time that we were in court and you keep saying May. But we were here in March and the beginning of April --

CC (Mr. Faraj): Okay.

MJ: -- was the only time we've come into court. But you said, again, in your motion was May. So I just want to clear up for the record that we were never in court in May of this year.

CC (Mr. Faraj): That is correct. I'm mistaken. It was -- it preceeded *Hutchins*. Our appearance preceeded *Hutchins* if I recall.

MJ: Yes. Yes. The ruling on *Hutchins*, correct.

CC (Mr. Faraj): Right.

MJ: Correct. We were in the end of March, beginning of

April. I'm sure we have the date here in court.

CC (Mr. Faraj): Just one more thing, I got to throw it out there.

MJ: Okay.

CC (Mr. Faraj): The government just provided us with a requirement to waive so we can go on with this motion. And that's just another example of the prejudice we're suffering, because we have to even go through this. The fact that he would have to waive privilege in order to have his detailed counsel is prejudiced. Thank you, Your Honor.

MJ: Major Gannon, you're under no obligation to offer any argument or anything else. We can continue this on the 13th after you get a chance to respond and to research the issue. But do you wish to say anything today?

TC (Maj Gannon): Sir, just briefly. I think the key issue or the distinction here is going to be the ACR hasn't been severed. We've got counsel at table right now.

MJ: You're saying has not been?

TC (Maj Gannon): It hasn't been severed.

MJ: Has not been severed. They're here. They're offer -- I mean, the offer of putting in a limited waiver and the unwillingness to waive the ACR in the limited purpose of this hearing is -- demonstrates that. On the 22nd of March at 1231, we went back on the record and Mr. Vokey appeared. He put his credentials on the record. He said I continue to represent Staff Sergeant Wuterich since active duty. That happened on the 22nd. Mr. Vokey has appeared today. Mr. Faraj has appeared today. They enjoy the benefits of the ACR. There's been no severance event. That's obviously a position the government is taking on this issue.

The court raised the notion that the defense had requested a speedy trial; however, I'm very confident that opposing counsel will agree that opposing counsel was absolutely clear and filed continuances during the pendency of the CBS issue and made it very clear to us in writing that they were more than willing to wait throughout the appellate -- let the appellate process run its course. And I think that's -- I think that

opposing counsel would agreed. So I was concerned that the court rose -- raised the issue of the speedy trial request which was subsequently effectively withdrawn due to these filings from the defense counsel during the pendency of the CBS issue.

Mr. Faraj spoke of the 18 U.S.C. 203 section which has -- can be interpreted to forbid someone from receiving compensation post-government service under certain circumstances. If the court is going to rely on that representation, it's important that the court to review 18 U.S.C. Section 206, which says that 18 U.S.C. Section 203 does not apply to retired officers. So it's an opposite in this case.

MJ: Do you have any comment about the -- Mr. Vokey securing employment with the law firm that represented or represents Mr. or Corporal or Sergeant Salinas?

TC (Maj Gannon): My comment is that that was the primary -- one of the primary reasons we wanted to have the benefit of cross-examination of Mr. Vokey, because the government would like to explore what steps were taken to ameliorate or eliminate any notion of conflict. With a counsel of Mr. Vokey's experience and reputation, I'm extremely confident that he and his employer took steps to ensure that there was a -- some sort of ethical wall that was built between them with respect to that issue. And I would -- we would like to explore that, whether that was discussed during the employment process. That was actually one of the reasons we wanted to have testimony today and object to the court's consideration as fact any proffers related to Mr. Vokey.

MJ: I thought that might have been why you were objecting to that and you just stated that's probably why.

TC (Maj Gannon): Yes, sir.

MJ: Okay. Salinas -- is this person still on active duty?

TC (Maj Gannon): No, sir. Mr. Salinas is -- he may have a reserve -- I'm getting conflicted. I'm not positive about the reserve issue. I know for a fact that he is a civilian at this time. And he is -- I believe he's employed -- he was the one we were mentioning yesterday I think, sir, that's employed with a contractor. He works in Afghanistan. He's been served with a subpoena

here in CONUS. The government anticipates that he will testify as a witness in this case.

Sir, at this time I have no additional discussion to offer on this issue at this time, reserving of course for the 13th.

MJ: Okay. What I'd like to do especially if I'm not going to receive your answer until maybe Friday when I'm traveling and may be on some leave or personal business before I come here to court on the 13th, I'd like to at least know by e-mail what witnesses each side might be putting on on the 13th. If I could just know that in advance. We can just stay in touch via e-mail on what you anticipate us seeing on the 13th. I won't have a lot of time to decide the issue, so I'd like to research it and think about it as much as I can before the 13th. That's hard to do without hearing all the evidence, of course, decide an issue. But at least I understand the parameters of where we're going.

Is there -- are there any other issues that we need to discuss today then that we can solve before 13 September? Anything that I'm forgetting about?

TC (Maj Gannon): While they're conferring, sir, I believe that it was the intent of the defense to attempt to seek withdrawal from the case today. Obviously the government's position being that there is a current, healthy ACR and effective representation ongoing, the government would request, (a), that we capture a couple of things on the record today -- (a), whether or not Mr. Faraj, Mr. Vokey or both intend to seek withdrawal from the court from this case. And in addition to that, the government request that there be some colloquy with the accused. Because if the accused doesn't object to the withdrawal, then I think we've got a nonissue. So I think we should capture those things and I can discuss the government's position on withdrawal at this point as well if and when any counsel seek withdrawal, sir.

MJ: Okay. That's a very good suggestion.

Mr. Faraj.

CC (Mr. Faraj): We are going to move that Mr. Vokey be permitted to withdraw. Let me put something to rest, they are not going to get to talk to Staff Sergeant Wuterich, period.

We are not willing to waive any -- any attorney/client privilege. But I do want -- I would request the court note what the government is doing. They created this situation and now they want to pierce the privilege in order to question him and that is prejudicial. Mr. Vokey is going to move to withdraw because of an ongoing conflict that is not going to be waived. Of course, the court is going to want to talk to Staff Sergeant Wuterich. My admonishment was directed towards the government, sir.

MJ: Okay. Well, let's take that up.

Mr. Vokey, what's your position on the case?

CC (Mr. Vokey): Your Honor, the position here is that there is a conflict now in representing Staff Sergeant Wuterich, and frankly, I'm not quite sure what I should be doing.

MJ: What's the conflict?

CC (Mr. Vokey): The conflict is that I work for a firm called Fitzpatrick, Haygood, Smith, and Uel. And a partner in the firm, Dan Haygood, represents Hector Salinas -- Sergeant Hector Salinas. That conflict didn't exist when I retired 1 November of 2008.

MJ: When did the conflict arise or when did your firm have representation -- or the partner in the firm have representation of Mr. Salinas?

CC (Mr. Vokey): They represented Mr. Salinas in -- I believe it was in January of 2007 or it may have been in late-2006.

MJ: So how could there not have been a conflict if you weren't hired until you retired?

CC (Mr. Vokey): Say that one more time.

MJ: How could there not have been a conflict with you being hired by the firm if the -- they were already representing Mr. Salinas before, while you were still on active duty?

CC (Mr. Vokey): Yes, Your Honor. I think there was. I think there was a conflict when I first came on.

MJ: Okay. Well, was that a con --

CC (Mr. Vokey): Is it something I did anything about? No.

MJ: Okay. So there's been no waiver of this issue by Staff Sergeant Wuterich or Mr. Salinas?

CC (Mr. Vokey): No. Now, I spoke to Mr. Haygood about that issue. I never obtained a written waiver from Mr. Salinas or from Mr. Haygood.

MJ: Wouldn't your state bar require you to get a waiver by one or both of the clients at the same law firm who's representing people whose interests might be antagonistic?

CC (Mr. Vokey): Yes. Now -- and I -- orally through Mr. Haygood that Mr. Salinas or Sergeant Salinas did waive -- he had no problem with me representing Staff Sergeant Wuterich.

MJ: Okay. So Salinas did make a waiver then?

CC (Mr. Vokey): As far as I know. That's what Mr. Haygood represented to me.

MJ: Okay.

CC (Mr. Vokey): It -- there's really -- the conflict issue kind of rates itself I'd say in probably June time frame, maybe July of this year when case -- kind of case preparation became a little more intensive and the issue of Sergeant Salinas testifying and what he'd be questioned on was discussed a little more thoroughly. So a lot of preparation -- not done by myself. It was done by Mr. Faraj and Mr. Puckett. They identified that this conflict is going to be problematic.

MJ: So what's the position of your law firm then?

CC (Mr. Vokey): Position as to what?

MJ: As to the conflict. Evidently, this was not going to be a conflict according to the partner in the law firm that was representing Mr. Salinas. And of course, if the partner represents the client, the entire partnership or law firm represents the client. So you just told me that Salinas made a waiver -- gave a waiver for the law firm to represent someone whose interests may be antagonistic and that would be Mr. Wuterich's -- Staff Sergeant Wuterich's interest through you. And now

you're saying that it comes to be that there is a conflict. So did Mr. Salinas then withdraw his permission, his waiver of the conflict or what happened?

CC (Mr. Vokey): Not to my knowledge, sir. No, I don't believe the -- I don't believe so. As far as I know, he's still fine with it.

MJ: Okay. But then -- so then if the law firm is still fine with it and there's still a waiver from Corporal Salinas, what about Staff Sergeant Wuterich?

CC (Mr. Vokey): That's where the problem comes from, sir.

MJ: Okay. And --

CC (Mr. Vokey): And Staff Sergeant Wuterich is -- this is part of the reason why I'm not sure the best way to go, because Staff Sergeant Wuterich does not want to lose me as counsel, but he also recognizes that there is a conflict here which makes it difficult for me to continue representing him.

MJ: Well, he has to make that decision, though. That's a tough decision, but he's got to make that call. You're either on the case or you're not. And he's either going to waive that there's an issue there because of your experience and because as the motion states, you were the one that went to Iraq with him and looked around in the homes and did all these other things. So he either needs to waive that and have you continue on the case, or he has to not waive it and give up your right to represent him. He can't have his cake and eat it too. He needs to make up his mind on what he wants to do. So my question is, What does he want to do? What are you going to do?

Do you need time to think about that given what we're discussing?

CC (Mr. Vokey): Yes, sir.

MJ: Okay. Because that's what I'm concerned with is him making a knowing waiver of your representation or something needs to happen at the law firm or something. We can't -- you can't please everybody here. But your law firm I think is in the unenviable position of representing two interests that are conflicting. And I

think when -- you know, again, I don't want to lose my place here, but when they hired you, that was I think should have been a consideration to get this in writing. But -- or, you know, at least --

CC (Mr. Vokey): Yes, Your Honor. But, I mean, when I left active duty, I wasn't anticipating leaving active duty when I did. So I was scrambling to find a job. I sent out 300 resumes. I interviewed with, like, 15 different firms before I landed with this firm. And frankly, that was -- at that time there was nothing going on with Staff Sergeant Wuterich's case. So it really wasn't at the forefront of anybody's mind.

MJ: I guess that was part of the motion here is that you expected or hoped to stay on active duty to continue the case, however long it took.

CC (Mr. Vokey): That's correct, Your Honor.

MJ: Okay. So it looks like you certainly need to take time. I guess the whole -- what's left of the defense team and talk to Staff Sergeant Wuterich -- go ahead.

So we know kind of how to proceed, do you want to take a break now or what would you like to do?

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

MJ: Okay. The court will be in recess.

The Article 39(a) session was called to order at 1110, 27 August 2010.

The Article 39(a) session was called to order at 1125, 27 August 2010.

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

Mr. Vokey.

CC (Mr. Faraj): Sir, I'm going to speak for Mr. Vokey.

MJ: Mr. Faraj.

CC (Mr. Faraj): Sir, I understand that you're seeking from us a decision on either waiving a conflict that Staff

Sergeant Wuterich does not have to waive in order to keep Lieutenant Colonel Vokey or to fire Lieutenant Colonel Vokey which he doesn't want to do because he was detailed Lieutenant Colonel Vokey and wants him to continue to represent him. We frankly can't make that decision. What we are going to ask, Your Honor, is since we're coming back on the record on the 13th to litigate this issue, we are going to offer some evidence in forms of affidavits from both me and Lieutenant Colonel Vokey, sworn affidavits, that you will be able to consider. And then we're going to ask the court to make a decision on this motion. At which time, whatever the court decides, we will then deal with whether Lieutenant Colonel Vokey remains or is dismissed because of conflict.

MJ: Okay. But at this point, your client, Staff Sergeant Wuterich, does not wish to make any decision regarding the representation of Mr. Vokey?

CC (Mr. Faraj): Which means -- yes. Which means he will remain until the 13th when we get a decision from the court.

MJ: Okay.

Staff Sergeant Wuterich, is that accurate?

ACC: Yes, sir, it is.

MJ: Thank you.

Government.

TC (Maj Gannon): Your Honor, the government renews its objection to the court's consideration of any facts contained in the motion related to Mr. Vokey or the accused. There's been inconsistencies already between -- and this is probably just due to lack of recollection. It's certainly not my allegation this was an intentional inconsistency. But it clearly says it that page 3 of the motion, I believe that there was a conflict issue discussed with the accused between Lieutenant Colonel Vokey and the accused. And if I understand correctly, that didn't come -- if I heard the colloquy between Mr. Vokey and the accused talking about that -- that issue didn't manifest in the eyes of -- in the mind of the defense counsel till June, if I understand that correctly.

So, again, to emphasize, I'm not saying anybody's been disingenuous in any way, shape, or form. I think there's just enough confusion to where at this point the government objects to your consideration of anything factually -- any factual assertions in this motion absent testimony by witnesses subject to cross-examination.

In addition to that, I'd like to offer -- we can offer it now or later. We went ahead and printed off -- may I approach, sir?

MJ: Please.

TC (Maj Gannon): We went ahead and printed off Mr. Vokey's profile from the firm at which he's employed and it clearly states in the first paragraph of his -- talking about his qualifications and the exceptional quality of the attorney that he is. It talks about his representation of Staff Sergeant Wuterich at the last sentence of the first page, first paragraph. So we'll put that in just for consideration.

MJ: The website -- I'm not going to enter this as an appellate exhibit. The website is www.fhsulaw.com/bio/colbyvokey.asp. That's the url.

Okay. Anything else?

TC (Maj Gannon): Your Honor, finally the government would request that for purposes of the court's self-education on this issue as the court prepares to litigate this, we would take -- we would request that you look at a case called *United States versus Young*, 50 M.J. 717. It discusses the court's ability to deny a request to withdraw. And it talks about a test that's articulated and we would request that you familiarize yourself with that case in preparation of our session on the 13th.

And finally, sir, the government would request that you direct that Mr. Vokey not take any steps that would be -- any steps that would be problematic in terms of his communication of this case or the *Salinas* case with any of his partners; that the court direct the defense counsel to not create any further conflict issues from this date forward, if there are any -- and the government is not conceding that there are any. In fact, it sounds like there are none. However, we don't

want anybody to take any action that would create any conflicts, sir.

MJ: Defense, anything else?

CC (Mr. Faraj): I'm going to pose a scenario, Your Honor. In January of 16 of 2007, I was detailed to this case. I was a major in the Marine Corps and got paid a salary. The government imposed that A/C on me, because they had a right to; they paid me. I was employed by them. I never signed a contract with this man. I left active duty and my state bar rules told me I have to continue to represent him. I happen to be lucky enough to work for the same man who probably sort of grabbed me because I was already working the case.

MJ: And to make the record clear, you're working for Mr. Puckett.

CC (Mr. Faraj): Neil Puckett.

MJ: It's a law firm that you both own.

CC (Mr. Faraj): We are now partners.

MJ: You're partners.

CC (Mr. Faraj): Okay. What the --

MJ: So when you say that you are not getting paid, does that mean the law firm is not getting paid?

CC (Mr. Faraj): We are not getting paid any money from this man or any donations. There was some money received before we ever went to an appeal, but there is no money now. I'm not getting paid for any representation. I get paid for doing other work.

MJ: Right. I just --

CC (Mr. Faraj): But not from --

MJ: Right. I just wanted to say that you were talking about the law firm as a whole, right?

CC (Mr. Faraj): Yes.

MJ: Okay. Go ahead.

CC (Mr. Faraj): What the government is asking you to do after they discharged me and Lieutenant Colonel Vokey is to continue to represent him for free. I didn't -- see he has to continue to represent him in this court, because he entered into a contract. And whether he pays or not is up to him. They imposed the A/C relationship on me. They were required -- so for example, Your Honor, let me put you on the horns of a dilemma, if I move to -- if I move this court to be excused from further representation -- for me and Lieutenant Colonel Vokey -- for no other reason. No conflict or anything else. I left active duty. I'm done. You would not let me go, because my state bar rule -- I'd have to give you some good cause, and I don't have any good cause except I never -- I'm not getting paid.

What they have done is created all these dilemmas for us and they're asking us to resolve them. I don't care if it's -- if he's got a website. We all talk about our exploits. The fact of the matter is they're still in their building getting paid with all the resources, have access to everything they need, and we are in a more difficult position -- a much more difficult position. And I represent him because I believe in this case and I care about him and I want to continue. But that's besides the point.

Again, it's the government -- the government imposed the relationship. They're requiring you -- they're using you to continue it without wanting to take any measures to try and give us compensation, reestablish that relationship the way it used to be as detailed counsel, or anything else. This is not an issue of effectiveness of counsel or ineffectiveness of counsel. It's a legal issue established by statute, implemented by a rule, R.C.M. 506, and now clarified in *Hutchins*, Your Honor. And that's what this is about.

Now, finally, they asked for an objection. This is the first time I've ever been in your courtroom, and I can understand why you're not considering it. But I would ask you to reconsider we've always been able to offer evidence as officers of the court either through proffer or -- I'm not talking about what someone else said. I'm -- we're offering things that we experienced.

Now with respect to representations I made about trial counsel, that's fine. If that's the case, then we are

going to ask that Lieutenant Colonel Sullivan be here, because we would want him to -- we're not going to require him to take the stand, but we'd like the court to ask him about those things that we represented so the court can have all the evidence. Thank you, Your Honor.

MJ: You're welcome.

Okay. So what the government objected to was things dealing with Lieutenant Colonel Vokey and attorney/client relationship. So as those things were not proffered by him, so I will consider that within those constraints as I indicated earlier. But I do understand the factual situation involved in what we're dealing with.

Okay.

CC (Mr. Faraj): I can't shut up. If he were released from active duty, no one would require him to come back and work this case. And I'm referring to Major Gannon. And that's what this is about. Without compensation.

MJ: Okay. Staff Sergeant Hutchins --

ACC: Excuse me, sir.

CC (Mr. Faraj): Wuterich, sir.

MJ: Excuse me. Now I've got Hutchins -- I'm thinking of the *Hutchins* case. Staff Sergeant Wuterich, excuse me.

TC (Maj Gannon): And promoted.

MJ: Hutchins was a sergeant.

TC (Capt Gannon): I'm sorry. Hutchins was a sergeant, sir. I'm sorry, sir.

MJ: Okay.

All right. Staff Sergeant Wuterich, excuse me, at this point I gave you a break during the interim to see if you wanted Lieutenant Colonel Vokey to represent you. What I just heard from your attorney, from Mr. Faraj, was that may be something that the defense is asking the court to decide. I'm not so sure how I feel about that. I will determine that later I guess after I think about

it and get some more evidence on this issue. But I certainly want you to be ready on 13 September especially if we do this trial, since it's going to be a mere few days later, what your desires are with regards to Mr. Vokey. You can discuss with all of your attorneys to the extent you care about their professional relationships with their bar, the law firm, or whatever. But the bottom line is you might be called upon to make a decision as to whether he's going to continue representing you or he's not. And I may ask you to make that determination on the 13th. So I want you to be ready to talk to me about that at that point, okay?

ACC: Yes, sir.

MJ: All right. I think that's a good point that we talked about when I asked if we had anything further, Major Gannon. Is there anything else you'd like to discuss?

TC (Maj Gannon): Yes, sir. I just want to make -- bring one additional issue to the court's attention. We just -- I have a little bit of experience on this issue from another case unrelated to this case, somewhat recently. And I believe the defense actually attached a lot of the pleadings from the case called *Hohman*, where we kind of touched on some of the issues, but they're pretty distinct from one another.

In preparing for that motion, it became very clear to the government that involuntary recall is not an option. And so earlier, it just dawned on me that Mr. Faraj proffered to court, Well, we want this alternate -- or we want this option to be brought back to active duty. I'm not going to commit as to whether or not I would accept orders, but they need to do that. The court -- if the court is going to consider that remedy at any point, the court should be aware that voluntarily theoretically I believe in a retiree capacity, it may be possible. But involuntarily, it is not a possibility. It's not an option. And I'm about 99.9 percent sure that's just not -- involuntary recall of a retiree is not -- other than to face charges or by the President of the United States, I think that's --

CC (Mr. Puckett): Sir, can I just inquire -- I'm interested in knowing why it's not. I just -- just because I don't know.

TC (Maj Gannon): I believe that the statute doesn't authorize it absent -- there are certain, I think, enumerated exceptions. I just -- my belief in preparing for that case is that the code sections that talk about -- certainly in a post-EAS capacity -- and we haven't had time to do the research as much on the retiree capacity. The we got a couple of minutes this morning to look at it in case it came up, and it's our initial read that involuntary recall of a retiree will not be an option for us.

MJ: Okay. I also believe that to be the case, but I don't know for sure.

TC (Maj Gannon): But -- that's why the government wants that distinction made clear, because it's interesting that the defense counsel stands up and says, Hey, we want that option. Because that would put us in the same exact category as the *Hohman* case where ultimately Mr. Muth, the attorney in question, was not going to be willing to come back to active duty. And that was a problem for us in that case and that gave an additional layer of analysis to the military judge in that case.

MJ: Okay. As one of the exhibits here -- I guess this *Hohman* case was put in here as an exhibit?

CC (Mr. Faraj): It's the government's brief, specifically, so that you can consider their JAG Instruction argument.

MJ: Okay.

CC (Mr. Faraj): And I believe that they were saying that that would be improper.

MJ: Okay. Because it was mentioned in your brief, right?

CC (Mr. Faraj): Right.

MJ: Okay. Mr. Puckett.

CC (Mr. Puckett): And, sir, my question wasn't -- didn't get answered and I'm interposing it through the court here. I'm just curious as to why it's not simply because I don't know.

MJ: Right.

CC (Mr. Puckett): I had always assumed that we're all subject to recall because we're -- you know, Article 2 jurisdiction and all that. Can I inquire from the government as to why it's not an option? I just want to be informed.

MJ: I don't think the government knows at this point. I think -- I think both the government and the court don't believe it is, but I don't -- I know I can't cite you the law at this point in time.

CC (Mr. Puckett): Because -- I'm just saying it, sir, because we thought it was.

MJ: Right.

CC (Mr. Puckett): We believed it was and if there's a provision in a particular law that -- even through initial research and he's aware of it -- I'd just like to ask his assistance in helping us locate it so that we can take a look at it.

MJ: Sure.

TC (Maj Gannon): It'll be covered in our written brief, sir.

MJ: Okay. If you do, that'll point -- that'll point the court there too. Obviously, we can all look up the law ourselves, but if you have it on hand, that would be handy too.

TC (Maj Gannon): Yes, Your Honor.

MJ: Okay. Anything further from defense?

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

MJ: All right. I anticipate staying in perhaps a little closer contact with all the parties than we have hitherto been simply because the trial's coming up and there are these issues that we want to take care of to make sure that we continue on with the trial. As I've said numerous times before, we will never rush the trial. We'll give the government all the time they need and the defense all the time they need. However, both sides are entitled to get this trial done and I think we're all anticipating starting that then on the 15th of September. We'll be here 13 September. And I will certainly give you a ruling on all of the motions that

we had yesterday. That will be coming in e-mail. And this issue, I don't -- I will not decide and cannot decide until we come back in here and I actually hear some argument and any other evidence that may be presented. Even if I have an idea of where I'm going, it will not be decided ahead of time.

TC (Maj Gannon): And, Your Honor, just so that we're absolutely clear on the record, Mr. Vokey has not been released from this case.

MJ: That's correct. Mr. Vokey has not been released from this case. There's been no waiver of the accused nor good cause shown by the -- or approved by the military judge nor has there even been a request for him to be removed. So he will be expected to be here at the next session of court.

Also, what I do -- what I would like to have is when we -- when we start back up if certain parties are not going to be here for sessions of court, I do like to know that in advance. Like if Lieutenant Colonel Sullivan is still on this case, then I certainly would like to know that before the 13th. If Mr. Zaid is not going to be here or doesn't really have any further participation, I'd like to know that. And, again, we'll work with the seating for the defense the best that we can. And if you can actually move the table and put four defense counsel there and it's workable, then we'll do it. But if there's not enough room, then we won't.

Okay. With that in mind, the court's in recess.

The Article 39(a) session recessed at 1140, 27 August 2010.

[END OF PAGE]

The Article 39(a) session was called to order at 1254,
13 September 2010.

MJ: The court's called to order. All parties present when the court recessed are once again present with the following exceptions:

Lieutenant Colonel Sullivan was not here at the previous session of court. He's here today, so that's an addition.

Also, Mr. Vokey, I believe you were here at the last session of court?

CC (Mr. Vokey): Yes, Your Honor, I was.

MJ: Okay. Great. Thank you.

All right. The court reporter's the same. Everyone else is still the same.

Major Marshall remains detailed to the case. Again, she is not sitting at counsel table. She's behind the bar, because there's no more room for more than three defense counsel sitting at the table. She remains a participant of the case and is here present in court.

And, again, as I indicated before, Major Marshall, you are free to whisper over the bar, pass notes over the bar. All the other things that we forbid normal people who sit in your chair to do. I know that you got on this case late, but anything you wish to add you may do so over the bar to the defense counsel.

I'd like to summarize first an 802 conference that we had 4 September. I was in Okinawa. I was on the phone with Major Gannon, Mr. Puckett, Mr. Faraj. At that point I had received a continuance request from the defense asking to continue the trial until the 20th of September. I thought we were going to discuss that issue, and I was going to make a ruling on that over the phone. And as soon as we started the conversation, the government indicated that they wanted to have a continuance in this case until 1 November 2010.

Needless to say I was shocked by that development, since I had not been forewarned in an e-mail and so I expressed my concern as to why the government needed a

as possible any taint. It's been a few years since this occurred, and I don't wish to have any taint on possible members or jury pool.

With that in mind then, I'll issue a protective order and release all of the DVDs. Again, two and five, you'll just need to make a consideration that those be admitted, explain to me why; but I can see how they might possibly be relevant for the defense.

CC (Mr. Faraj): Your Honor, we don't have a copy of these DVDs. We'd like to get a full set.

MJ: Right. We're going to need to make copies of it. As I understand it, the court is the only one that has a copy of all eight DVDs. I'm holding those up for everyone to see. This is what came back to me from the appellate courts. It's Appellate Exhibit LVIII.

TC (Maj Gannon): And that's it. Those are all that exist of all eight, sir. So with the court's permission, what we'll do is the government will take those at the end of the session today and cause them to be discovered on the parties.

MJ: Okay.

Okay. We're here to talk about the motion to dismiss for appropriate relief to dismiss all charges and specifications. Before we go to that then, I need to find out the status of Mr. Vokey, if he's being released by Staff Sergeant Wuterich or what the position of the defense is.

As I looked at my notes prior to coming on the record now, it looks like that was what we -- the last thing we talked about.

Mr. Puckett, please.

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

Your Honor, it's Mr. Vokey's intent to seek the court's permission to withdraw from the case based on an ethical conflict. And so I would defer to Mr. Vokey to submit that request to the court.

MJ: Sir.

CC (Mr. Vokey): Your Honor, at this time I seek to withdraw from the case.

MJ: Okay. And --

CC (Mr. Vokey): And, Your Honor, last time we spoke, we were talking about some of the facts behind me getting off active duty. We were starting to say some things about that. You indicated that you would accept a proffer. So what I've done, and I apologize to the court for being late. We had some problems with trying to get things printed. But I have a written proffer I'd like to submit to the court regarding this issue if that's alright.

MJ: Okay. I'd like to look at that, please. We don't have a bailiff, so just come on up.

Have you provided this to the government? You're doing so now? Okay.

CC (Mr. Vokey): Your Honor, let me have this marked.

MJ: That will be Appellate Exhibit CI. Give me just a moment, please.

[The military judge perused Appellate Exhibit CI.]

MJ: As I read through this, I'm going to ask any questions I may have.

Mr. Vokey, who was the civilian assistant that went with you to Iraq to do a site visit?

CC (Mr. Puckett): I can answer that question, sir, if you don't mind.

MJ: Okay. Sure. Mr. Puckett.

CC (Mr. Puckett): He's a -- best way to put it probably is he's a videographer retained by the defense team and is part of the defense -- well, he's one of our defense team members retained by me.

MJ: Thank you.

Okay. The court's read through the proffer. The ethical conflict -- does this deal with then with what

we talked about at the previous session that when you got hired by the law firm that you presently work for -- Fitzpatrick, Haygood, Smith, and Uel -- that they were already representing Mr. Salinas and that, if I remember correctly, the partner told you when you were hired that Mr. Salinas did not object to you being hired by the firm orally, but you did not see anything in writing nor did you receive anything in writing from your client, Staff Sergeant Wuterich.

Is that correct?

CC (Mr. Vokey): Yes, sir. It really wasn't discussed when I first joined the firm. It was actually not discussed for months later. When -- at the time I got out, I left here in -- on -- like, 6 August I drove out of town and I was anticipating -- I hadn't looked for a job because I didn't know when the case was going to go. So when I got back to Dallas, I was kind of frantically looking for a job and putting out resumes and that sort of thing.

So when I took the job with Fitzpatrick, Haygood, Smith, and Uel, I had known a few of the people there because that's where I'm from and I'd known Dan Haygood for a number of years. It had nothing to do with him representing Salinas. It's just a very reputable law firm in Dallas. So I started working there. At the time, I was not doing anything with Staff Sergeant Wuterich's case at all. I really didn't discuss that with Mr. Haygood or anybody else in the firm. That really didn't come up for a number of months later.

MJ: But was the firm already representing Mr. Salinas --

CC (Mr. Vokey): Yes. Yes.

MJ: -- when you were hired?

CC (Mr. Vokey): Yes, that's correct.

MJ: Okay. And did you get a waiver from your client or have you received a waiver from your client up until today, 13 September?

CC (Mr. Vokey): I have not. And at the time, I didn't -- I didn't think it was necessary. When I first joined the firm, it really -- I didn't even know if I was going to

be representing Staff Sergeant Wuterich or not. That didn't enter my mind. I was transitioning. When -- I did some things on Staff Sergeant Wuterich's case over time, not initially but later, it was after I started becoming involved again with Staff Sergeant Wuterich's case when this issue presented itself. Even at that time, I didn't -- when it initially came up, I did not believe that there was a conflict requiring a waiver. It was only later as pretrial preparations got even closer that that became apparent.

MJ: Would you say that would be -- I'm looking for a time frame -- June, July of this year?

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

MJ: Okay. So June, July of this year, it became apparent that -- that Mr. Salinas was going to be a more important part of this case? I'm trying to remember from last session.

CC (Mr. Puckett): Well, sir, actually we'd like not to reveal that information.

MJ: Okay.

CC (Mr. Puckett): As to how it came about.

MJ: But June and July is when you recognized your conflict is the point?

CC (Mr. Vokey): That's probably fair.

MJ: Okay.

CC (Mr. Vokey): And that question might be better met -- better addressed by Mr. Puckett and Mr. Faraj.

MJ: Okay. But I guess I'm just trying to ascertain as the court here your ethical conflict. You don't feel at liberty to discuss what it is in particular with the court? Is that what your point is?

CC (Mr. Vokey): That's -- I believe that would be --

MJ: Or do I assume it's from this issue?

CC (Mr. Puckett): Well, sir, speaking for the defense team, it's

the questions you might ask regarding the specific nature would get into areas of privilege.

MJ: Okay. Here's my concern -- go ahead and have a seat, Mr. Vokey.

Here's my concern, Mr. Puckett: My concern is that in order to -- in order to keep the emotion alive despite my ruling, if I ruled against you, you would be kicking off a member of your team prior to going to court to save the issue on appeal that you didn't have your entire defense team here. So I'm not going to allow that to happen if I feel like Mr. Vokey can continue to represent Staff Sergeant Wuterich. And the reason for that is because he's the one that did the site visit according to his proffer.

It seems to me -- I've heard different things, but I don't think it's been incongruent. I heard last session that he -- that Mr. Vokey hasn't worked on the case recently too much at all, but I certainly know that he worked on the case earlier. He did the site visit with your videographer --

CC (Mr. Puckett): Yes, sir.

MJ: -- and your client --

CC (Mr. Puckett): Right. On active duty.

MJ: -- to Iraq --

CC (Mr. Puckett): Yes, sir.

MJ: -- and those kind of things.

So if he is an indispensable part of the team, I certainly don't want him off the case and I understand why Staff Sergeant Wuterich would. But if the defense team is telling me there's an ethical conflict, Mr. Vokey cannot represent him from this point forward; and you're representing that to me but I can't ask any more questions, then I would have to release him because my hands are tied. I don't want to get into any attorney/client privileged information.

CC (Mr. Puckett): Right, sir. Right.

MJ: Is that where we're at?

CC (Mr. Puckett): Well, that -- that is pretty much where we're at, sir. But we are mindful and have been since this issue first arose independently of the *Hutchins* issue. We have always been mindful since we started thinking about the *Hutchins* issue that the two may be read together as some sort of sham severance. And I -- all I can do as an officer of the court, sir, is assure the court on the record here that it is not a sham. It is not -- the two -- the two issues are completely unrelated.

And I will further proffer that only as a result of what this court would understand as nearness -- nearness to trial date preparation with witnesses -- and I'd like for those witnesses to remain unnamed -- it became apparent that this conflict was more than one of appearances. More than one of an attorney working at a firm that also happened to represent a witness.

MJ: That's enough said. I do appreciate -- what I wanted to hear was what you were telling me, that the two were not related and you stated it there.

CC (Mr. Puckett): Sir, what I would further do -- what I would further offer to the court is if we could communicate more specific information *ex parte*, we'd be willing to do that.

MJ: Okay. Thank you.

Major Gannon.

TC (Maj Gannon): Your Honor, there's one fact that the court should consider as the court analyzes this issue. And it's our understanding -- it's the government's understanding that the firm that Mr. Vokey belongs to no longer represents Mr. Salinas; that that representation has been terminated.

MJ: Mr. Vokey?

CC (Mr. Vokey): Your Honor, I don't want to -- I don't want to make any claims on behalf of Mr. Haygood or the rest of my firm concerning the representation of Salinas. But as for me, it doesn't really -- as the conflict exists right now, it doesn't really matter whether they

continue to represent him or not. The same conflict exists whether they've ceased representation or they're going to continue representation. That -- it really has no bearing on the conflict.

MJ: Okay. So at this --

Mr. Puckett, please go ahead.

CC (Mr. Puckett): One moment, sir.

MJ: Sure.

And this is an issue that I'm welcoming all parties. I'm not just limiting this to one defense counsel or one prosecutor standing up.

So Lieutenant Colonel Sullivan, you're standing, sir?

TC (LtCol Sullivan): Yeah. Since we're doing -- Your Honor, with your permission -- proffers for the record, I'll just proffer that I spoke to Mr. Haygood personally about this matter last week. And Dan is also a friend of mine. He's a retired colonel, Marine Corps Reserve, former battalion commander for 2/24, spent 20 years in Dallas County DA's Office, and I had worked with Dan to schedule a witness interview with Sergeant Salinas when Dan was representing him.

So I called him when I found out about the motion, and Dan said, I'm no longer representing nor my firm is representing Sergeant Salinas. And more importantly, I've never discussed that representation or any privileged communications that my client ever gave me with Mr. Vokey once he joined the firm. That was -- and Mr. Haygood actually said he'd also testify if need to -- to be called at this hearing. That's the proffer he gave me. Because when I found out about the motion, I simply asked, Hey, was there a Chinese wall? He said, Absolutely.

MJ: Thank you.

Okay. So what I am going to do is I'm going to have an *ex parte* communication with the defense to get at the bottom of this issue.

Do you feel at liberty before we do that, Mr. Puckett or

Mr. Faraj, in stating whether you have been able to get -- whether you have been able to get all of the information from Mr. Vokey of his -- his portion in the case early on and use it to your benefit or do you not feel at liberty to discuss that?

CC (Mr. Puckett): What -- I'm not sure how --

MJ: In other words, his -- his doing the site visit and early work on the case -- which it appears is more substantial than it has been recently -- have you been able to communicate and get that information from him to assist your client?

CC (Mr. Puckett): By way of reports and things like that? Absolutely, sir.

MJ: Okay.

CC (Mr. Puckett): Yes.

MJ: And you still have the information from your videographer?

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

MJ: Okay. And obviously from your client.

Okay. We're going to do an *ex parte* hearing on that issue. I want to see what the conflict is and make sure that I feel comfortable releasing Mr. Vokey.

Major Gannon, did you have something?

TC (Maj Gannon): Yes, sir. It seems that to the government we're getting a little ahead of ourselves if we're going to do *ex partes*. We don't even have the accused's position on this matter. If the accused is willing to release Mr. Vokey pursuant to the existence of this conflict and it's not -- and there's no objection, then we don't need to have an *ex parte* communication, sir. He could release him and then the rule would be satisfied.

MJ: Right.

CC (Mr. Puckett): Sir, the very issue that the prosecutor refers to is protected as to whether or not the accused wants to do that or doesn't want to do that. That's

protected. And he has no right to even know it.

MJ: Okay. I understand the issue and that's why I did not actually ask Staff Sergeant Wuterich at this time. I'd like to meet with the defense and then, of course, in the final analysis, we'll see if we can get to that issue.

MJ: Lieutenant Colonel Sullivan.

TC (LtCol Sullivan): I thought you were excusing us to do the *ex parte*.

MJ: Okay. Just a moment, please.

TC (Maj Gannon): Your Honor, one more thing. I apologize. If the court is going to engage in an *ex parte*, then the government moves the court to capture in some sealed document for the record the nature and the four corners of the discussion that takes place so that future courts, if necessary, can review it and understand what was communicated *ex parte* and obviously outside of the record.

MJ: Sure.

TC (Capt Gannon): We request that you reduce that to writing and seal it, sir.

TC (LtCol Sullivan): One of the things is just have the court reporter do it. That's how they do it in Chicago. Just do the -- you know, we're not going to look at this record. You capture it with the court reporter. There's a verbatim transcript of the *ex parte* discussions and that way on appellate review, we have a transcript of it for them. That's a limited suggestion.

MJ: Thank you. Except for here, the person that controls the court reporter is the government, not the court. So I'm not so sure I feel comfortable doing an *ex parte* with the court reporter present in our -- in our system as it is now.

Let me see, the other thing I want to talk about before we do that is the notice of appearance from the defense counsel. The court reporter told me unsolicited before we got on the record that there was no notice of appearance from any of the defense counsel.

And so we discussed before we came on the record -- I find that hard to believe because this case has been around for four or five years. Mr. Puckett indicated that he did give a notice of appearance, at least for himself as the civilian counsel initially involved and Lieutenant Colonel Sullivan echoed that that he thought there was a notice of appearance. We don't have one in the record. So I'd require a notice of appearance from the law firm of Puckett and Faraj.

I'm sorry, did I say the law firm name correctly?

CC (Mr. Puckett): You did, sir.

MJ: Okay. I want to make sure I put your name first, Mr. Puckett, if it belonged there.

So of the law firm of Puckett and Faraj, please do another notice of appearance. We don't seem to have a copy of that here. And I don't know if that was given to the judge and he kept that in a file he had. The court reporter certainly does not have that. So we'll need that. And then I requested one previously from Mr. Vokey but, however, we have this concern now that we need to deal with.

Okay. So after we have an *ex parte* hearing, we'll need to discuss the facts of this motion that we have in front of us. The government -- I did not require that they put anything in writing. They elected to do so. They gave this to the court and to the defense counsel right before we came on the record -- or right before we were going to come on the record at 1200. So we took 35 or 40 minutes and read through it -- and I've also read through it -- so that we can litigate anything we need to today regarding that issue.

So anything else that I'm forgetting by the parties to encapsulate anything that's occurred today or in our 802 sessions that either side would like to bring up before I have a short hearing with the defense?

Mr. Faraj.

CC (Mr. Faraj): And I may not have been paying attention, Your Honor. I think I was. But I don't remember us talking about you ordering the discovery. We asked for some discovery and we had a discussion about that. And I

MJ: Defense, anything else on that issue?

CC (Mr. Faraj): We'll reserve until we argue the motion, Your Honor.

MJ: Okay. All right. The court will be in recess.

The Article 39(a) session recessed at 1332, 13 September 2010.

The Article 39(a) session was called to order at 1420, 13 September 2010.

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

I had an *ex parte* hearing with the defense counsel and the administrative assistant to the defense counsel. All defense counsel, all four of them -- Major Marshall, Mr. Vokey, Mr. Faraj, and Mr. Puckett. The accused was not present. The request by the government is granted and would have been done without your request and that is to summarize the *ex parte* hearing and seal it and make it a part of the record. So I will certainly do that.

After having discussed the issue with the defense counsel, Mr. Vokey, it's my understanding that you are making a request to be excused and to withdraw from this case under R.C.M. 506(c); is that correct?

CC (Mr. Vokey): That's correct, Your Honor, because I don't have a choice.

MJ: Based on our *ex parte* hearing and your representation to the court and previous representations by counsel regarding this issue, the court releases Mr. Vokey from all further participation in this case. Thank you.

Major Marshall, come on up.

TC (Maj Gannon): Your Honor, then, just to be clear for the record, the court is finding good cause to excuse Mr. Vokey?

MJ: Absolutely. The rule says that except as otherwise provided in R.C.M. 505(d)(2) and Subsection (b)(3) of the rule, defense counsel may be excused only with the expressed consent of the accused, which I do not have at