

MJ: The court will come to order. All parties present when the court recessed are once again present with the exception of our court reporter. Staff Sergeant Myers has been replaced by Sergeant Rowe who has previously been sworn.

The next witness is Lieutenant General Helland, retired. Both sides before we came on the record who was unsure who was going to do a direct or cross. I'll allow both sides to handle the witness however they would like. Either direct or cross-examination. I believe the government will call the witness. Again, this is to accommodate people's schedules. So I don't mind taking witnesses a little technically out of order. I do understand that the defense and the government are waiting for me to say that the burden has shifted on and what grounds. Right now I'm just listening to the evidence. So, we'll take Mr. Helland or Lieutenant General Helland retired, at this point then.

TC (LtCol Sullivan): Yes, your honor.

MJ: Government, please.

Mr. Samuel T. Helland, USMC, Retired, was called as a witness by the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Sir, could you please state your full name and spell your last name for the court reporter?

A. Samuel T. Helland, H-E-L-L-A-N-D.

Q. Sir, you're a lieutenant general in the United States Marine Corps retired?

A. Yes.

Q. And, sir, what's your current city and state of residence?

A. I really don't have a formal state residence; however, I'm currently residing in Hinckley, Minnesota.

Q. And that's as you're waiting to move to your retirement home in North Carolina at some point?

A. Hopefully, yes.

- Q. Well, general, I would like to take you back to your Marine Corps career. Could you briefly summarize for the military judge, Lieutenant Colonel Jones, some of the command billets you held while you were an officer in the United States Marine Corps?
- A. I entered the U.S. Marine Corps -- excuse me, U. S. military service in 1968. Enlisted three years. Finished college. Back into the Marine Corps. Went to flight school, aviator. Picked up command as Lieutenant Colonel of a Marine Corps flying squadron. Then command again as a colonel, Marine Expeditionary Unit for two years. After colonel, brigadier general, down to U.S. Marine Forces south, I was the deputy. From there to the J3 of Joint Forces Command. From there went to Headquarters Marine Corps as assistant deputy command for aviation. Then I went over and commanded for as the deputy for JTF Shining Hope in Albania. From there back to DC, and then out again to commander of line joint task force at the horn of Africa. And then as a made major general, I commanded the 3rd Marine Aircraft Wing. Lieutenant General, 1st Marine Expeditionary Force, and U.S. Marine forces South.
- Q. And, sir, as an officer in the Marine Corps how many years did you spend on active duty?
- A. About 39 and a half.
- Q. Now, sir, if I understand your career path, you were the commanding general of 3rd Marine Aircraft Wing right down the street here at MCAS Miramar as a major general; is that correct?
- A. That is correct.
- Q. Sir, that was your first tour as a general court-martial convening authority?
- A. Yes.
- Q. Sir, if I understand correctly, you changed command on the 13th of July 2007 from 3rd Marine Aircraft Wing?
- A. Correct.
- Q. Sir, what did you do after that?
- A. After leaving 3rd Marine Air Wing, we came up here to be the deputy of IMEF. I worked as deputy of IMEF awaiting the nomination and the confirmation of myself as a lieutenant general through the presidential and senatorial process.

- Q. Right. And, sir, you joined IMEF approximately 14 July 2007 as the deputy?
- A. That's correct.
- Q. During that timeframe, sir, who was the commanding general for IMEF and commander U.S. Marine Corps Forces Central Command at the time?
- A. Commanding general was Lieutenant General Jim Mattis.
- Q. Now, sir, you mentioned there was a period of time where you were serving as the deputy during July and August into September 2007, where you were awaiting confirmation with regard to the fact that your name was going to be submitted to take over as the IMEF commander and the commander U.S. Marine Corps Forces Central Command. Is that a fair --
- A. That's a fair statement, the nomination process, as you know, you're selected to major general but you're nominated for lieutenant general. As such, you can't assume anything or give any type of indication that you are going to take over as the lieutenant general because the senate doesn't -- or congress doesn't really like that. So I was at that time only the deputy of IMEF.
- Q. The reason why I ask those questions, sir, is we've had some testimony earlier in the proceedings to the military with regard to legal meetings that took place with regard to Lieutenant General Mattis and his Marine Forces Central Command hat and the IMEF command hat during the summer of 2007. Sir, in July and August and early September of 2007, while you were awaiting the word as to whether your name was going to be put forward to be the commander of MARCENT, did you attend any legal meetings in July, August or early September of 2007?
- A. No. Not that I recall.
- Q. Sir, when was the first time that you recall actually attending legal meetings that took place either at the IMEF building or some type of VTC type of thing with Lieutenant General Mattis, at the time, and others with regard to --
- A. It had to have occurred after the nomination was sent into the senate, and I was being confirmed for the billet. As you know, there's a waiting period that goes with that as well. But once that done, then it was okay for me to sit or be part of discussions that included MARCENT.

- Q. And, sir, we're -- we're aware of the process where a successor in command starts getting his situational awareness up with regard to taking over. To the best of your recollection, general, when did do you believe you first started to sit in on legal meetings that took place with regard to particularly the Haditha or Hamdania case status reports when you were now getting ready to assume command from Lieutenant General Mattis as both IMEF and more in particular U.S. Marine Corps Forces Central Command?
- A. If I would specify a specific date, I don't think I could do that, but I would say probably early October.
- Q. And for the military judge, could you explain, general, approximately -- first of all, how many meetings do you believe you attended, and could you describe the type of meetings and the information that was communicated therein?
- A. I would say three or four meetings that we held that I was invited to attend and observe. The meetings were about process. In other words, general Mattis would have in front of him a matrix of events that were happening and occurring, and as the trial counsel and the SJAs would sit in the room, he would it discuss the certain -- where the cases where, what was being done, what the next process was, what we're anticipating when that would be done. Most of them were current up dates on where we were, and what was next in the bucket you might say.
- Q. General, sir, during these meetings that we're referring prior to you assuming command on the 6th of November 2007, as commander U.S. Marine Corps Forces Central Command, and from now on, sir, I'll just call it MARCENT, did you become familiar with Lieutenant Colonel Bill Riggs?
- A. Lieutenant Colonel Riggs Bill Riggs was the SJA for MARCENT.
- Q. And, sir, you also know Colonel John Ewers?
- A. Colonel John Ewers was the SJA for IMEF.
- Q. Sir, during any of the two or three meetings that you sat in on in October of 2007, during those meetings, which staff judge advocate would be briefing the MARCENT related cases?
- A. Lieutenant Colonel Riggs.

- Q. And sir, did Colonel Ewers ever in your presence, and I'm talking now specifically about October 2007, before you assumed the MARCENT commander hat, did Colonel Ewers ever brief Lieutenant General Mattis in your presence on any of the MARCENT cases, specifically the Haditha related cases?
- A. Not to my knowledge. I didn't see it.
- Q. Sir, eventually, we get towards the end of October 2007, and you become aware of the fact that General Mattis is now getting promoted to a fourth star, and he's going to be assuming command of Joint Forces Command. Is that a fair statement?
- A. That's a fair statement.
- Q. Sir, do you recall when General Mattis actually left physically from his one IMEF office and started traveling to assume command of Joint Forces Command on the east coast?
- A. I believe it was late October, in the 20s somewhere. 24, 25 October comes to mind. I think it was a two or three day trip for him and he had to be at Joint Forces Command on a specific date to assume that command. And for some reason the number 28 comes to mind.
- Q. Now, sir, towards the end of October of 2007, we've talked about attending two or three meetings. I want to get a little specific now with regard to the briefings of the Haditha related cases, and in particular the case of Staff Sergeant Wuterich. Sir, during those meetings that you attended in October of 2007, prior to you formally assuming command as the MARCENT commander, were any specific briefings with regard to Staff Sergeant Wuterich that you recall when you attended the meetings in October of 2007 and his case status?
- A. If there were any discussion, it was just an update that the process was being done. If I remember correctly, the comment was made, it's still with the investigating officer and it's still under review. So there's no action being taken and we'll keep track of the process.
- Q. Sir, on the 6th of November 2007, you formally took command as the MARCENT commander and you were dual hatted at the MEF commander. Sir, when you took command as the MARCENT commander, did you have any conversations with your staff judge advocate, Lieutenant Colonel Riggs, with regard to how you were going to conduct business as a MARCENT commander with regard to the

Haditha, Hamdania, and other military justice cases you had under that hat?

A. When the commander takes command, he normally brings all of his staff in and he has a conversation with them, and gives his guidance and his view of the future. And he did just that. And, specifically, he tried to sit down with key special staff officers and the SJAs. In this case, I sat down with Lieutenant Colonel Bill Riggs, and we discussed our play and the fact that quite frankly he's my SJA for all MARCENT matters and that's it. He and I with would work together and I would seek his legal advice on matters pertaining to MARCENT and MARCENT only.

Q. Could you describe for the military judge how Lieutenant Colonel Riggs responded to that and what Colonel Riggs spoke to you about as how he observed or perceived his role as your staff judge advocate for MARCENT matters?

A. I think the best statement to make would be that Lieutenant Colonel Bill Riggs considered himself the MARCENT SJA and that's a fact. He was very adamant about it and very straight forward in that regard.

Q. Yes, sir. And at the same time, sir, you're also dual hatted as the IMEF commander and Colonel Ewers remained your staff judge advocate for the IMEF matters?

A. Correct.

Q. Now, sir, after assumed command on 6 November 2007, did you ever have any discussions with Colonel Ewers on seeking his advice for MARCENT related cases?

A. The same conversation with Colonel Ewers except that I expected him to support me in all IMEF matters. There's no reason for him to be involved with MARCENT or any other matters other than those dealing with IMEF, and he animately agreed.

Q. And, sir, for the military judge, where there any times after 6 November 2007 or even before in which Colonel Ewers ever provided you any sort of legal advice or recommendations with the MARCENT related cases and, specifically, the case of Staff Sergeant Wuterich?

A. No.

Q. Now, sir, I want to take you through a couple?

TC (LtCol Sullivan): Your honor, may I have a moment?

MJ: You may. One second. General I was typing something when you gave your last response. I believe the questions was, did Colonel Ewers ever provide you with any advice on the Haditha cases, in particular Staff Sergeant Wuterich. And your answer, sir, was he did not?

WIT: He did not provide any legal advice with concern to the Staff Sergeant Wuterich case. That's correct.

Questions by the prosecution (continued):

Q. And, sir, as a matter of fact, one of the discussions you had with Lieutenant Colonel Riggas as you related to the military judge was one of the cases -- range of cases that you were going to be dealing with was Staff Sergeant Wuterich in particular. Isn't that right, sir?

In other words, sir, when you took command.

CC: Objection. Can the witness respond?

MJ: Let the witness respond. The witness was confused I think.

WIT: Please restate the question.

TC (LtCol Sullivan): Yes, sir. I apologize, sir. I -- sometimes I get confused myself. A better way to ask the question would be, sir, after you assumed command as the MARCENT commander on 6 November 2007, did you have the opportunity to have a discussion with your staff judge advocate, Lieutenant Colonel Riggs, with regard to the status of this case, *U.S. versus Staff Sergeant Wuterich*, where it was in the pipeline?

A. Yes, absolutely.

Q. And could you explain to the military judge those discussions that you had with Lieutenant Colonel Riggs relating to this particular case?

A. The Staff Sergeant Wuterich case was not ready. As I mentioned earlier, it was still with the investigating officer. The investigating officer got a continuance. I believe that's the right words. He had a number of things that he had to do to take care of. The information and the facts and the data that goes with the Wuterich case is very complex, very extensive, and there was a couple of weeks of extension. So it wasn't

ready. So -- Colonel Riggs, we talked about that. You know, obviously, someone like myself would say okay, why isn't it ready? What's the problem here? Why can't we move this along better? As it started to mature and as the Article 24 came back, the IO stuff, then we started focusing on it. And it became more and more of myself and Colonel Riggs having more and more discussion about the status of it, where it is, when we can get on with it so we can move along in fair process.

Q. And, sir, in one of your initial meetings after assuming command of MARCENT with Lieutenant Colonel Riggs, did Colonel Riggs describe to you the fact that you were going to have a particular role that had been designated for the billet of MARCENT Commander called the consolidated disposition authority for the Haditha related matters? Did he discuss that with you?

A. Yes. Along with position of commander general of MARCENT also comes the authority and responsibilities of CDA. We discussed that because he's my legal adviser.

TC (LtCol Sullivan): And, your honor, may I approach the witness?

Q. Just for the record, general, if you could take a look at what is Appellate Exhibit LXII within the record.

Sir, do you recognize that document?

A. Yes. This is the document that assigns the consolidated disposition authority to the commanding general of U.S. Marine Forces Central.

Q. Sir, some of your initial meetings with Lieutenant Colonel Riggs, was that one of the discussions? Did you talk about the fact that for the Haditha related cases, the billet of MARCENT Commander had been designated as the consolidated disposition authority and that you would be the responsible convening authority for those matters?

A. Yes.

TC (LtCol Sullivan): And, your honor, I'm going to review the document. Thank you, general.

Q. Now, sir, and I apologize for jumping ahead a little bit. You were discussing the fact that at some point during -- after assuming command of MARCENT command, Lieutenant Colonel Riggs had discussed with you the fact

that the Staff Sergeant Wuterich case, there were some delays with regard to the investigation and it hadn't been ready immediately for your review. In early December 2007, general, did Lieutenant Colonel Riggs come to you to seek what's called excludable delay because of some of the work that had to be put into the review of the investigating officer's report by your staff judge advocate?

A. Yes.

TC (LtCol Sullivan): And, your honor, may I also approach again?

MJ: Please.

Q. General, I'm going to hand you a document that is dated 7 December 2007, sir. I'm just simply going to ask you to take a look at that. And, sir, for the record, that's Appellate Exhibit XLVI for the record.

And, sir, once you've had the opportunity to review that, just go ahead and look up at me general. I'll only ask you a couple questions.

Sir, do you recognize that document?

A. Yes.

Q. And is that the excludable delay request that Lieutenant Colonel Riggs submitted to you with regard to this particular case?

A. Yes.

Q. Now, general, I want to ask you a couple questions also relating to General Mattis. We've discussed the fact that on October 2007 you sat in some of these status meetings with regard to the cases before you assumed command on the 6th of November 2007. What I'd like to ask you, general, is at any time after you became the deputy commander for IMEF on 14 July 2007, through assuming command of MARCENT on 6 November 2007, at any time during that time period, did General Mattis ever communicate to you his opinion on how Staff Sergeant Wuterich's case should be handled once you assumed command?

A. No.

Q. At any time did General Mattis ever have any off-line discussions maybe where, not really talking formally, but where he shared his own personal opinions with

regard to if he was remaining longer, what he would have done with regard to Staff Sergeant Wuterich's case, particularly with referral or non-referral?

A. No.

Q. At any time, general, after you assumed command on the 6th of November 2007, and General Mattis assumes command of Joint Forces Command and he's a four-star general now, at any time after 6 November 2007, did General Mattis communicate to you in any way his opinion with regard to what should happen with regard to the Staff Sergeant Wuterich case?

A. No.

Q. Now, sir, after you received the excludable delay request on the 7th of December 2007, that we talked about earlier, was there a timeframe in December 2007, sir, where you went in theater to visit your Marines?

A. Yes. I can't give you the exact dates, but it was the first part of December and maybe the end of November as well. There's an obvious reason for that. The holidays days are used up by the dignitaries, I.E. the commanders, the four stars, the senate, the congressman, and it's very difficult to get support over there. So we chose the time right in the first part of December to go over and visit the troops, to make a tour of the area, and get in and get out, and get out of everybody's way. So we back -- probably back into the states in the teens, probably mid-teens, 14, 15 December if I remember correctly. Then we're back here for business.

Q. And, sir, I want to direct your attention now to a time period of, say 16 to 21 December 2007. Based upon your recollection, general, is this the timeframe where you've returned from one of your movements in theater as you described for the military judge you get back to your headquarters hear at Camp Pendleton?

A. Yes. Sounds right.

Q. Sir, during that timeframe, did Lieutenant Colonel Riggs, your staff judge advocate from MARCENT, bring to your attention that the Staff Sergeant Wuterich case was now ready for your consideration with regard to referral or non-referral of charges?

A. Yes.

Q. Sir, are you aware as to whether Lieutenant Colonel Riggs actually physically traveled to Camp Pendleton

during the week of 16 to 21 December 2007, to have in person meetings with you as the convening authority in this case?

A. Yes, he did, because I think there was other business that had to be taken care of as well. So I remember he and I sitting in my office discussing; one, the process where we were, and what the next steps would be with the Staff Sergeant Wuterich case; and, that we both agree that we should spend a very focused period of time looking at all the details so we could not delay it any longer?

TC (LtCol Sullivan): Your honor, may I approach the witness?

MJ: Please.

Q. And, general, I'm going to hand you a document that is dated 21 December 2007. It's Enclosure 32 to Appellate Exhibit LX. It's the 34 advice letter in the case of *United States versus Staff Sergeant Wuterich*. General, I'd like you to just take a look at that briefly.

A. Okay.

Q. Sir, do you recognize that document?

A. Yes.

Q. And is that the 34 advice letter that you received from your staff judge advocate, Lieutenant Colonel Riggs --

A. Yes, it is.

Q. -- with regard to this matter? And general, I'm also going to tender you a document that is in Enclosure 10 to Appellate Exhibit LX. That is the investigating officer's report in the case of *United States vs. Staff Sergeant Wuterich* for the record.

Could you take a look at the IO report also, general?

A. Yes, this is it.

Q. Sir, do you recognize the investigating officer's report in the Staff Sergeant Wuterich case also?

A. Colonel Ware's report?

Q. Yes, sir. Do you recognize that also, general?

A. Yes --

Q. Sir, I'd like if you could describe for the military judge the methodology you used as the MARCENT commander

with regard to preparing to make your referral -- a non-referral decision in this particular case. What documentation you reviewed, and who you spoke to with regard to this matter, *United States versus Staff Sergeant Wuterich*, towards the end of December 2007?

A. It started, basically, with Lieutenant Colonel Riggs's visit. He said, sir, I'm basically ready to hand you the Article 34, and there's a number of exhibits and things I want you to read and become familiar with as we move the case along. So the NCIS report, the report from the IO, his report, the report from the defense or the writings from the defense were provided, pictures, charts, schematics, were also provided, and in depth review. During that -- I kind of remember as Lieutenant Colonel Riggs and I started discussing this back and forth, I would call him and say hey, Bill, you need to send me some more stuff on this because I don't quite understand this. So he would take excerpts out of the voluminous amount of material and send it to me so I could review it. And then we would have on going discussions as to where the evidence or the amount of data that had been accumulated was leading us.

Q. Sir, you have the 34 advice letter before you that I tendered to you. Did you actually read that 34 Advice Letter personally, general, during December 2007?

A. Yes.

Q. You had the investigating officer's report from Colonel Ware that also included both government and defense submissions on argument in September 2007.

Did you read those document also, sir?

A. Yes.

Q. Did you personally consult with your staff judge advocate after his 34 Advice Letter, 21 December through the week of 28 December 2007? Did you have personal conversations with your staff judge advocate where you were asked particularized questions and he responded to you?

A. Yes.

Q. I need to ask this question to, sir. Did you ever discuss with Colonel Ewers any matters in 2007 relating to the referral process or your decision making process with regard to Staff Sergeant Wuterich's case?

A. No.

- Q. At any time, sir, did you ever seek Colonel Ewers's advice with regard to the decision making that you needed to make in this particular case with regard to referral or non-referral of charges?
- A. No.
- Q. Who did you seek your legal advice from, sir, on that matter?
- A. Lieutenant Colonel Bill Riggs.
- Q. Now, sir, eventually I know you have the 21 December 2007 as the formal written advice letter. We have the holidays that take place. We have Christmas, 25 December 2007, 26 December 2007. The actual referral in this case takes place on the 28th of December 2007. Sir, did you have conversations with Lieutenant Colonel Riggs after Christmas also where you had the same type of any RFIs were answered and that type of thing?
- A. Yes, we did. As it came down to signing it, it was -- if I remember correctly, it was an intense discussion. We talked back and forth about the pros and cons of what we were doing, and whether it was the right thing to do or not, and with constant and continuous discussion we came up with the fact that we -- that it was the right thing to do.
- Q. Now, sir --
- TC (LtCol Sullivan): Your honor, with your permission, I'd like to approach?
- MJ: Go ahead.
- Q. General, I'm going to tender you a copy of the actually charge sheet that was referred on 28 December of 2007. It's Enclosure 34 to Appellate Exhibit LX. General, I'd just like to ask you to, again, briefly look through that.
- A. Okay.
- Q. Yes, sir. And do you recognize your signature on 28 December 2007?
- A. Yes.
- Q. Now, sir, you're aware of the fact that initially on 21 December 2006, charges of murder were preferred in this particular case against Staff Sergeant Wuterich; is that right?

- A. That's correct. I believe it's the Article 32, has 12 counts of murder.
- Q. And you're also aware of the fact, sir, that the Article 32 officer, Lieutenant Colonel Ware actually recommended the case be referred to a general court-martial, but on some lesser theories of criminality, manslaughter or negligent homicide that type of things; is that correct?
- A. That's correct.
- Q. Now, sir, you referred particular charges on the 28th of December 2007. Did you refer murder charges, sir?
- A. No.
- Q. You referred charges that are less -- Article 119 and others that are less in criminality as opposed to Article 118.
- Is that correct, general?
- A. That's, correct.
- Q. Sir, now was that based upon your consultations with regard to -- with your staff judge advocate, Lieutenant Colonel Riggs, you're personal review of the investigating officers recommendations and bringing your own experience to bear as a commander?
- A. Yes.
- Q. Sir, did anybody outside of Lieutenant Colonel Riggs on the 26th or 27th of December 2007, prior to your referral on the 28th, did anyone attempt to call you or call you or email you or telephonically communicate to you or in any other way to communicate to you their opinions with regard to what should happen with regard to the referral of charges in the Staff Sergeant Wuterich case?
- A. No. Nobody did.
- TC (LtCol Sullivan): Sir, may I retrieve the appellate exhibit?
- MJ: Please.
- Q. Thank you, general. Sir, I want to ask you a couple questions about some -- for lack of a better term, other matters. Sir, did you become aware of the fact that in September of 2007, there was a secretary letter of censure that was issued to Colonel Steven Davis who had been the RC2 commander in November 2005, with

responsibility for the it Haditha AO?

- A. Yes, I was aware of it. It was in the press and it was also in discussion.
- Q. Sir, the fact that the Secretary of the Navy issued a secretarial letter of censure of Colonel Steven Davis, could you explain to the military judge what type of impact that had on your decision making processes as the MARCENT commander from 6 November 2007 on, and particularly any impact whatsoever it may have had with your referral decision in this case?
- A. It had no impact whatsoever. So far removed from where I am and the conditions that were cited had absolutely impact whatsoever, either for U.S. Marine Forces Central or even 1st Marine Expeditionary Force.
- Q. Sir, I know this may sound like an odd question, but you've known General Mattis for a long time and you served as his deputy until you assumed command yourself as the MARCENT commander on 6 November 2007. And you were serving as his deputy from 5 September 2007 until 6 November 2007, when you took command. During that period of time, sir, did you see any evidence whatsoever that the secretary letter of censure that was issued to Colonel Davis had any impact on General Mattis whatsoever?
- A. I saw nothing. I mean, he accepted it just like we all do. We may use the phrase we salute and move on. Its' an administrative process. It was taken up by higher headquarters who are senior to us, and it's over. I personally didn't see any impact whatsoever.
- Q. Sir, if somebody had argued that the issuance of that letter to Colonel Davis by the Secretary of the Navy kind of subliminally affected you in terms that maybe it made you think that you had to act harsher in your military justice decisions towards any of the Hamdania Marines or the Haditha related cases, how would you answer that?
- A. The responsibility and authority given to you as the CDA in the billet that you're nominated and selected for requires you to absence of any type of influences such as that. So therefore, personally, absolutely no impact whatsoever on of the decisions I made for either one of the commands.
- TC (LtCol Sullivan): Your honor, may I approach the general again?

MJ: Yes.

Q. General, I'm going to hand you a document that is marked -- it's Appellate Exhibit LXXI for the record. It's a 10 November 2007 report of no misconduct in the case of a Captain Lucas McConnell, who was the company commander for Kilo Company, 3rd Battalion, 1st Marines. He was the company commander for Staff Sergeant Wuterich. Now, that was a report of no misconduct that was issued on 10 November 2007.

A. Now, general, who signed that document?
I did.

Q. And, sir, that was over two months after the Secretary of the Navy issued the letter we've been talking about. Did you have any concerns whatsoever when you signed that document and forwarded that to higher headquarters with regard to your determinations that there was no misconduct to be reported with regard to Captain Lucas McConnell, who was a Haditha -- one of the Haditha related investigations?

A. No. Absolutely not. It was an independent decision made on the facts that concerned Captain McConnell.

Q. Your honor, may I approach again? I'll just retrieve the document.

MJ: Yes.

Q. Now, general, as the commander for Marine Forces Central Command, when you made your determination with regard to referral decision on 28 December 2007, in this particular case, I just want to conclude my examination -- my question, sir with regard to some of your higher headquarters and the personnel that were in your chain of command. From 6 November 2007, sir, when you assumed command as the MARCENT commander, through 28 December 2007, when you took the referral action in this case, did you ever have any discussions whatsoever with Secretary Winters, now Doctor Winters, who was then the Secretary of the Navy with regard to what should occur or the type of dispositions that should be taken with regard to any of the Haditha related matters?

A. No.

Q. Sir, also, at that time, I believe -- I'm not sure and apologize, general, I'm not sure if Commandant Hagee at

the time had retired, but, I'll just ask this question. At any time, sir, when you were the MARCENT commander or even there after making determinations for the Haditha related cases and in particular this case, did General Hagee, now retired General Hagee, ever communicate to you ever any of his opinions or any of his perspective with regard to what should happen with regard to the decisions on military justice matters related to the Haditha cases?

A. No.

Q. Same question, sir, for General Conway, our current commandant. Did he ever have any discussion with you at any time either before or after your decision making as the commander of MARCENT, particularly, in the Staff Sergeant Wuterich case where he communicated to you any information whatsoever with regard to what he believes should happen with regard to the handling of these cases?

A. No.

Q. Sir, when you were the component commander for Central Command, you were the MARCENT commander, I believe it was Admiral Fallon, that was the commander of Central Command, did the commander of central command, Admiral Fallon ever -- same question, communicate to you in any manner whatsoever at any time his opinions, his theories, any personal concerns on what he thought should happen with the Haditha related case, and in this particular case, Staff Sergeant Wuterich?

A. No.

Q. Same question, sir, for I believe the commander of Marine Forces Pacific? He was also in the chain of command if I understand it correctly, sir. Did he ever at any time communicate to you any of his opinions whether professional or personal with regard to what should happen with regard to the disposition decisions in the case of *United States versus Staff Sergeant Wuterich*?

A. No, he did not.

Q. And then, final question, sir would be with regard to General Mattis. At any time either while you were his deputy or after you assumed command and General Mattis moved onto Joint Forces Command, or even to this day, has General Mattis ever communicated to you in any manner whatsoever what he thought should happen with

regard to the referral or non-referral of charges in the particular case of *United States versus Staff Sergeant Wuterich*?

A. He did not.

Q. And same thing, sir, for your IMEF SJA, Colonel Ewers?

A. He did not.

TC (LtCol Sullivan): Your honor, may I have a moment to consult with my co-counsel?

MJ: Sure.

TC (LtCol Sullivan): Sir, I have no further questions.

MJ: Defense?

CC (Mr. Faraj): Thank you, your honor.

MJ: Conduct your examination however you wish. Whatever format.

CC: Thank you, sir.

CROSS-EXAMINATION

Questions by the civilian counsel:

Q. Good morning, general.

A. Good morning.

Q. General, when you assumed command of IMEF at MARCENT, give me a couple of the special staff officers just by billets, not names that you had under your command?

A. Oh good gracious. Well, you have a staff judge advocate. That's obvious. You have a chaplain. You have a doctor, a medical examiner. You have the PAO.

Q. PAO.

A. You have -- then your normal G staff one through six, and you then have a comptroller, and that's a pretty good example.

Q. Sir, did you -- when did you call your PAO staff from MARCENT and your PAO from your MEF and say you only have responsibility for MARCENT, and you only have responsibility for IMEF? When did you do that, sir?

A. First time I had the staff together as the command in

both cases -- both for MARCENT and IMEF. Exact date? Probably within the first week of taking over both commands, sit down conference room, quite frankly. All the staff was there, and then we talked about my vision of command, and who's responsible for what, and then one by one as they came into brief me, as you do with a normal staff turnover, you have a personal discussion with them.

Q. And that personal discussion with the PAO from MARCENT was, look MARCENT PAO, you will not cross over into MEF territory and MEF PAO, you will not cross over into MARCENT territory. Did you have that discussion, sir?

A. Not with the PAOs.

Q. Why would you have it with the SJAs then, sir?

A. Because the relationship between the SJA and the commanding officer are very special. He is my source for legal advice and it's very important to keep those lines straight and unconfused. As commanders we are taught through the different -- when we go to school and when we go to command briefs, that relationship is very special and it has to be kept close knit.

Q. Did you have ever concern that your MARCENT PAO didn't understand his responsibilities or that your IMEF PAO didn't understand his responsibilities?

A. Absolutely not. They both knew exactly where they stood and exactly what their responsibilities are and who they work for.

Q. I apologize, general. I'm still not understanding why you felt it necessary -- I mean that's what you testified to today, that you had to tell them, look you only have MARCENT, and you only have IMEF. I mean that's what we're here for. Your testimony earlier was very specific about this is what you have and this is what you have.

MJ: Speaking of the SJAs?

CC (Mr. Faraj): Yes, your honor.

A. The necessary, sir, I think is your word. I did that with all my command briefs when I took over from -- as commander of 2nd Marine Air Wing. I had the same discussion with my SJA, that we have a special relationship.

Q. Your testimony, sir, was that is was MARCENT and MARCENT matters only?

A. That's correct.

Q. And MARCENT SJA, and that's a fact?

A. Yep.

Q. And I'm still trying to grapple with why the commander would have to have that type of discussion or that type of instruction to fairly senior SJAs who I'm sure quite understand their responsibilities and duties. What triggered that necessity for that conversation.

A. My experience as a commander.

Q. So do -- did you have that discussion at 3rd MAW when you came in --

A. Yes.

Q. -- and you said look SJA, I just want you to limit yourself to 3rd MAW, don't interfere with any of the squadrons, don't interfere with any of the --

A. Assist the squadrons, provide by [inaudible], that's true.

Q. Sir, when did you become aware of the Haditha incident or the Haditha matters?

A. Geez, that's hard to say. In what detail?

Q. Just generally become aware of it?

A. Well, it's in the papers.

Q. Okay.

A. So you start picking it up as, you know -- commanding general of 3rd Marine Air Wing, General Saddler was still the general of MARCENT, IMEF. Things were happening. You read it in the paper, but keenly aware and in depth knowledge, started as I took command of U.S. Marine Forces Central.

Q. Is it fair to say that command of those two massive organizations, MARCENT and IMEF -- and I know MARCENT changes based on what units you have. But MARCENT and IMEF, that's a pretty heavy responsibility?

A. Yes.

Q. They're both big commands?

A. Yes.

Q. Now, you arrived at the MEF in September of '07?
A. No. I arrived at the MEF in July of '07.

Q. I apologize. July of '07. And you knew that you were going to eventually be if confirmed, the commander for MARCENT and IMEF?
A. I anticipated that, yes.

Q. Is it fair to say then, sir, that as the potential commander for those organizations that you would have began to develop sort of essay for those things that you were going to have authority over or command of?
A. That's correct.

Q. And one of those responsibilities would have been the legal side of things which was a pretty substantial matter for the MARCENT at that time?
A. My response to that would be, I became more aware of it or more interactive once I was allowed to go and observe the meetings General Mattis was having. Until that time, I was on the outside looking in.

Q. Okay. Now, you just said allowed, I don't want to put words in your mouth. Does that mean that somebody prohibited you and then allowed you?
A. No. Somebody invited me.

Q. Okay. So you were invited to a meeting?
A. Correct.

Q. Do you remember when that was, sir?
A. I'd have to say first part of October somewhere in that timeframe. I don't remember.

Q. Between July and October, were you curious about what was going on with respect to that big responsibility that you were going to take over?
A. For?

Q. For legal matters. The Haditha. I'm talking about Haditha here?
A. I focused most of my time as the deputy for IMEF, on IMEF issues. The MARCENT issues were, I can use the word secondary, because as you mentioned they are extremely important, but they were not the focus of main effort. IMEF was the focus of main effort because I was the deputy.

Q. Okay, sir. But you weren't concerned that you were going to take over this command, and you've got this big legal matter sort of coming to roost here with all the referrals happening? You didn't want to develop your essay on that? You didn't want to say, hey, I'm going to jump in to just to develop essay? I'm not going to say anything?

A. That goes once General Mattis invited me into the meetings to observe, and to build my essay. Until then, like I said earlier, I was on the outside.

Q. Okay, sir. Did you have any opportunity to maybe go talk to your IMEF SJA to say -- referring to Colonel John Ewers, hey, John, tell me what's going on with this case? This is something I'm gonna handle to.

A. No.

Q. You never did that?

A. No.

Q. Why not?

A. SJA works for the commander, not for the deputy.

Q. I understand, sir, but I was a Marine. XOs go talk to staff all the time and deputies go talk to staff all the time.

A. Only in generalities, and since I was the deputy for IMEF, I dealt with IMEF issues. If it came to my desk from the SJA, then I discussed it with him, but if didn't come to my desk or it was outside of my purview as deputy of IMEF, I did not deal with it.

Q. Okay, sir. So your testimony today is you never sought just to develop essay from Colonel Ewers in any way to say what's going on with these cases, I'm going to be taking over soon, do you know anything?

A. No. The answer to that is no.

Q. Very well, sir. When you took over as the commander -- when you assumed command for MARCENT, whom of your staff turned over?

A. Good question.

Q. Let me be more focused.

A. My deputy turned over. I gotta recage my gyros, if you'll allow me that. The deputy was changed. It went from General Garza [ph] to General Veskowski [ph]. We got a new chief of staff, and most everybody stayed -- I

think I got a new G-3 some time in the interim. That's about all I can --

Q. The legal staff stayed?

A. Yes.

Q. Lieutenant Colonel Riggs was still there?

A. Lieutenant Colonel Riggs was there.

Q. Lieutenant Colonel Kumagai was still there?

A. Kumagai was still there.

Q. And on the MEF side, Colonel John Ewers was still there?

A. Correct.

Q. Did Lieutenant Colonel Riggs ever have a conversation with you about a time that he recused himself from a case because he believed that there was at least an appearance of in-proprity based on a conversation he had with an IO?

A. I don't recall.

Q. Would you recall it if he had that conversation with you?

A. Yes, I would think so, because of the relationship we had. But, personally, I do not recall that.

Q. You said, sir, that the first time you attended a legal meeting was in October, early October?

A. Yes.

Q. Would you tell us what the -- how the meeting ran?

A. Certainly. General Mattis was sitting in his desk. Everybody came in and sat around in a semicircle around him. He pulled out his update material, call it a matrix for lack of a better term. Then he asked the trial counsel and the folks in the room to update him on the process of all the different cases that were pending, where they were, what's the status was, how the progress was going, if there was anything that he needed to do to assist and aid. He was always very concerned about the defense, and making sure that the individual Marines had the appropriate defense and everything was being done for the Marines. And that the cases weren't languishing, and what -- why there were delays, and what he could do or we could do -- the staff could do to accelerate the process.

Q. Was Colonel Ewers in that meeting?
A. Colonel Ewers was present, yes.

Q. And did Lieutenant Colonel Riggs attend in person or by VTC that day?
A. Some times in person and sometimes by VTC.

Q. That first meeting you were at, sir.
A. I can't remember.

Q. How many meetings did you up attending before you assumed command?
A. Throw to four comes to mind, sir.

Q. And Colonel Ewers was in every one of those meetings?
A. I can't say that for a fact.

Q. Do you remember him being absent from any of the meetings?
A. I want to say, yes. It could be one. It could be two.

Q. At the first meeting you had, which MEF legal business did you discuss?
A. I can't recall.

Q. Is it fair to say that no MEF legal business was discussed at that first meeting you attended. It was all MARCENT cases?
A. I couldn't say either way. Honest to God. I mean I can't.

Q. But you don't have a recollection of any MEF business being discussed?
A. I can't say.

Q. You do have a recollection of MARCENT being discussed?
A. Yes.

Q. Thank you, sir. Sir, you were a squadron commander?
A. Correct.

Q. And I wasn't on the air side. Group is the next convening authority over a squadron?
A. Correct.

Q. So the squadron commander is reporting to -- the next commander in the chain is group if I remember right?
A. That's correct.

Q. I want to give you a hypothetical. Lieutenant Colonel Helland commands a squadron. One of you hears about some misconduct by one of his officers. He investigates it. Conducts a thorough investigation. Reads all the material. Every shred of paper that he gets. He talks with the person who's doing the investigation, develops good essay on it, and decides there is no misconduct here. However, to ensure that we don't get into this kind of situation where I even have to investigate, I'm going to give a nonpunitive letter of caution. And in comes Colonel group commander, and says, nope, I'm going to give him a letter of reprimand.

A. How would Lieutenant Colonel Helland feel about that? We'd have a pretty in depth discussion, and I would be very animate about the fact that the officer belongs to me. He's in my jurisdiction, if you want to use those words. He's under my command, therefore, I'll deal with this, and I'd ask the group commander to back off.

Q. Because we as Marines take that job seriously of commanding, and usually when we have discretion to make decisions, we expect to continue to have that discretion?

A. Is that a fair statement, sir?
Say that again.

Q. Marine commanders take their job seriously. You took your job seriously when you commanded squadrons, group and wing and you expect that when you have that authority, that you're trusted. You have the trust and confidence to exercise that authority and discretion to do the right thing and not have it circumvented by someone higher?

A. That's correct.

Q. Thank you, sir. Now, I want you to apply that same example to the issue with the Secretary of the Navy, and you said that you didn't really think anything of it. It was just an administrative matter?

A. Right.

Q. Now, the Secretary of the Navy, we call him in the chain of command, but he's really pretty far removed?

A. He works for the president, I believe.

Q. All right.

A. Secretary of Defense.

Q. Yes, sir. So you'd be upset if your direct commander as a squadron commander and your direct commander as a group commander, you'd be upset if he came in and took action on one of your officers when you thought no further actions was necessary. But it's your testimony today that it didn't matter to you that the Secretary of the Navy --

A. That is his decision, sir.

Q. Okay. Would you agree with me that it doesn't look right?

A. I can't -- that's your opinion, not mine.

Q. So you don't agree with me?

A. I don't have an opinion on it.

Q. Do you know the Secretary of the Navy personally?

A. No, I don't not.

Q. You have met him. I'm talking about Secretary Winters. Let's be clear. Do you know Secretary Winters?

A. Yes, I have met him.

Q. Do you know him personally?

A. No, I do not.

Q. Do you have any reason as you sit here today to feel any hesitation about saying something negative about the former Secretary of the Navy, Secretary Winters?

A. No.

Q. Or to criticize that type of action?

A. Why would I want to criticize someone's action?

Q. I'm talk about Secretary Winters for circumventing the authority of the MARCENT commander to take action against one of his officers -- or not to take action on one of his officers?

A. I have no opinion on that.

Q. Do you have any concern as you sit here today that that process or that action by the Secretary of the Navy may lead other commanders to fear taking or making decisions that may be contrary to what the Secretary of Navy believes should happen with respect to disciplinary actions?

- A. No.
- Q. Sir, you had some -- you testified earlier that Lieutenant Colonel Riggs told you that he wasn't ready to take action or he wasn't ready to write his Article 34 report because the IO requested some delay. Do you recall testifying --
- A. There were delays. It takes time to put documentation together, to make it correct.
- Q. Now, what was your understanding -- what was his position? What was your understanding of Colonel Riggs's position at the time?
- A. As to what?
- Q. About taking further action? What do you understand that he was looking for?
- A. He thought that the delay was justified.
- Q. So when he told you that there was -- that there's delay, he told you that the IO is asking for delay, and so we should grant it? I don't want to testify, sir.
- A. His letter of justifying delay explains that. He thought it was justifiable and that the delay was proper.
- Q. Now, when did he have that conversation with you, sir? Because the letter came later. The letter came in December, and you said that when you took over, if I remember right, that when you took over, you had a conversation about when Wuterich would mature.
- A. Do you recall that testimony?
- A. That's right. Just like all the cases. You ask for a process, and during your process, you ask for an update. I asked for an update. Obviously, there are a number of cases that were waiting. Staff Sergeant Wuterich was as well. So good common sense is to say when do you think this is going to be ready. His response was, it's still with the IO. It's a complicated case. There's a lot of information. There is a lot of facts, and it's going to take time.
- Q. Okay, sir. And when did you assume command as MARCENT commander, again?
- A. I believe it was 6 November was the official date.
- Q. Okay, sir. Are you aware that the IO report was

A. completed in 2 October?
I guess, I was.

Q. So on 6 November, Lieutenant Colonel Riggs is telling you that it's still with the IO, and we need more time or after 6 November?

A. Constant and continuous updates. Probably a bit -- maybe I as a novice, carried it over or as a laymen carried it over into the next month in my mind. It's just that the due process was taking time.

Q. I understand, sir. May we have a recess for a comfort break?

MJ: Sure. The court will be in recess.

The court-martial recessed at 0934, 23 March 2010.

The court-martial opened at 0954, 23 March 2010.

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

Please get the witness. Thank you.

General Helland has come to the court room. Sir, you're reminded you're still under oath.

WIT: Yes, sir.

MJ: Mr. Faraj.

CC (Mr. Faraj): Thank you, sir.

Questions by the civilian counsel continued:

Q. General, I asked you a question, I'm just going to be more specific in my question again. I asked you earlier whether Lieutenant Colonel Riggs had expressed to you or -- had told you that he recused himself from advice on a previous case. I'm going to be more specific. Did he tell you if he excused himself from further advice on the Tatum case?

A. As I said, previously, I don't recall. If he did, I honestly do not recall.

Q. And he also didn't tell you that he had a conversation with the IO, Lieutenant Colonel Paul Ware, who was in

the billet of a military judge at the time, and told Lieutenant Colonel Ware, that he intended to recuse himself from both the Tatum and the Wuterich case?

TC (LtCol Sullivan): Objection, your honor. Excuse me, general. I just need to make a record. I'm going to object the question. That mischaracterizes -- first of all, previous testimony. I just want to note that for the record.

CC (Mr. Faraj): I knew he was going to say that so, your honor, I would like to have that played back for you in chambers because that's exactly what he said on the stand yesterday. I don't know if you have those notes, but if I may continue with my questioning?

MJ: The objection is overruled. Go ahead and ask the question.

Questions by the civilian counsel continued:

Q. Did Lieutenant Colonel Riggs tell you at any time that he had a conversation with Lieutenant Colonel Paul Ware, the IO in the Haditha cases for Sharrett, Tatum, and Wuterich, and told Lieutenant Colonel Paul Ware that he intended to recuse himself from the Tatum case and the Wuterich case because of some communication -- as a result of some communication that he had with Lieutenant Colonel Paul Ware?

A. Again, sir, if I were to say one way or the other, I would probably be wrong. So --

Q. You just don't recall?

A. I just don't recall. I'm walking through you with it. I'm listening to you. I'm trying to recall back any discussions that we may have had, and certainly something like that -- of that significance would come to my mind. And right now, at this very moment, I do not recall.

Q. You do recall though, sir, that he continued to continue to give advice on that case -- on at least the Wuterich case, and perhaps even on the Tatum case?

A. I would say for certain the Wuterich case. Beyond that, I can't say.

Q. Very well, sir.

CC: If I may have a few moments, Your Honor.

MJ: Sure.

Questions by the civilian counsel (continued):

Q. Sir, a few follow up to the last question. You may or may not recall.

Do you recall dismissing the charges in the Tatum case and granting immunity?

A. Yes.

Q. And did Lieutenant Colonel Riggs advise you on that case? Did he advise you to dismiss the charges in that case?

A. Show me the documentation. You'd have to refresh my memory with a formal piece of paper that transpired, because, again, I don't want to mislead you. I don't want to give you information that could, in fact, be false.

Q. Well, you recall dismissing the charges in Tatum?

A. Yes.

Q. Do you recall substituting an SJA at any time in the Haditha cases?

A. I don't recall.

Q. Okay, sir, if you had, you would recall; isn't that right?

A. I would think so.

Q. Okay. And throughout this process, Lieutenant Colonel Riggs was still the SJA? He was in the billet of SJA for MARCENT?

A. That's correct?

CC: Sir, no further questions.

MJ: Thank you. Government, please? I guess we'll call it redirect.

TC (LtCol Sullivan): I'll be very brief.

REDIRECT EXAMINATION

Questions by the prosecution:

Q. General, defense counsel asked you some -- at the end of his examination asked you some particular questions with regard to who advised you on the dismissal of charges in the Lance Corporal Tatum matter. And I'd like you to direct your attention to a document that I just handed the general is an enclosure to Appellate Exhibit LX. I'll get the enclosure number here, or I can remark it in the manual if you'd like, your honor. It is a letter dated 28 March 2008, and it is signed by a particular member of your staff.

General, is that correct?

A. Yes, it's signed here by Lieutenant Colonel Kumagai.

MJ: Can you give us the enclosure number?

TC: It's enclosure 26, your honor, to Appellate Exhibit LX for the record.

Q. And Lieutenant Colonel Kumagai, sir, was deputy staff judge advocate on your MARCENT staff at the time?

A. Yes, he was.

Q. Roger that, general. Is it fair to say, general, that you had a discussion with Lieutenant Colonel Kumagai where he sought your permission to withdraw and dismiss the charges in Lance Corporal Tatum before he executed this document that I just referred you to?

A. It's documented there. You're right.

TC: One moment, your honor. That's all I have, general. Thank you.

MJ: Mr. Faraj?

RECROSS-EXAMINATION

Questions by the civilian counsel:

Q. Sir, did Lieutenant Colonel Kumagai fly you out to advise you on that letter?

A. I don't know. I apologize.

Q. That's fine, sir. It's been a long time.

A. If he flew -- communications that we have this day are so -- you're in the same room.

Q. The question should have been, did he -- did you have discussion with him about that letter?

A. I'm sure we did.

Q. Okay. And it would have been either in person or --

A. By camera.

Q. Or on the phone or Tanberg?

A. Tanberg normally. The phone is terrible.

Q. Do you recall discussing any Tatum matters in your legal meetings at the MEF?

A. Only process.

Q. Okay, sir. Who writes Lieutenant Kumagai's fitness report?

A. I suspect it's Lieutenant Colonel Riggs.

Q. Thank you, sir.

A. But it could be -- now, it could be the chief of staff as well, because they're both the same rank. You'd have to ask --

Q. But Lieutenant Colonel Riggs is the SJA and the deputy is Lieutenant Colonel Kumagai?

A. Correct.

CC: Thank you, sir.

MJ: Anything further from the government?

TC: No, sir.

MJ: General, thank you for your testimony. I do not have any questions for you. You're excused. You may go on your way. Thank you for your testifying.

WIT: Thank you.

MJ: Mr. Faraj, as I understand the defense's motion then on Page 11 and on Page 17, you have the two questions phrased, I guess, where you're trying to frame the issues that we are dealing with here today. Are you still satisfied that those are the two areas you are concerned with?

CC (Mr. Faraj): I believe under -- the first issue, I also addressed the matter of Lieutenant Colonel Riggs and Colonel Ware. If you recall -- I don't know when the last time you had it, your honor, but if you still recall that, I addressed that issue. I don't list it as a specific sub-issue.

MJ: Well, let's be clear then. I think we've talked numerous times about how we want to handle this. What I'd like to it then is - I was asked by the government in an 802 conference sometime previously that I formally state on which issues the burden has shifted. So I'd like you to tell me then, and you can argue or do whatever you'd like right now. But tell me the basis that you believe that there has been unlawful command influence apparent or actual, and then any argument you'd like to make on those subjects. Then I'll hear from the government.

CC: Very well, sir. Before I begin, I would like to ensure that the court has accepted all the offered evidence. We don't have any more witnesses but, I don't think we had any objection to the exhibits to the motion.

MJ: No. Everything has been accepted. In fact, the enclosures that you told me you were going to submit at a later date, which was Tab E of your motion, were actually exhibits that the government put in as part of their motion. So I have all that together. And I was able to review the testimony of Colonel Ewers and General Mattis, I believe, last night. So I've reviewed those materials also. The copy I received had pages that were not in order, but I was able to correct that, and I did get through all the testimony.

CC (Mr. Faraj): Very well, sir. The defense has three issues -- has submitted three issues to the court on UCI. One, is whether a -- the advice given by Lieutenant Colonel Riggs in by virtue of him having been in the same meeting as Colonel Ewers is tainted -- or because Colonel Ewers, in our opinion is disqualified, creates a UCI issue. That's number one. Number two is whether Lieutenant Colonel Riggs should have been disqualified as a legal adviser because he -- again, the defense is arguing had an inappropriate conversation with Colonel Ware that may have actually or apparently influenced Colonel Ware even though Colonel Ware testified that it didn't have any actual influence. And the third is the

secretarial letter that circumvented the CDA's authority and related cases to this one. And we are arguing that that does not go away because you know have a new convening authority because the secretary is the secretary for both CDAs and the influence -- although both testify it wasn't actual, we believe it would give an appearance of unlawful command influence? So those are the issues before the court, your honor.

MJ: Thank you. Would you like to make any argument on any of those issues?

CC: I would, your honor.

MJ: Okay, please.

CC: As I've stated in my motion, your honor, and as you know this motion -- or a similar motion was brought by the Chessani team in the *U.S. v Chessani* case. The facts are slightly different in that the CDA turned over. In every other since, they're the same. The staff is the same. The issues are the same, and the law is the same. All though the evidence you heard in our 39(a) hearing was slightly different than what you have in the transcripts. What you heard in our hearing is that the meetings were private. That, as you recall, was not -- they didn't testify that way before. There was more specificity and more firmness in the exclusion of Colonel Ewers from communications between General Mattis and perhaps General Helland in this hearing. But as it stands, that evidence is also before the court. So you have the same evidence as in Chessani. Although you're not bound by the findings, we'd ask you to take a look at them. Of course, the same law applies, and but for the changing of the CDA, we believe that the same result should apply as well. And I ask you that because, again, the staff didn't change. It's the same tainted legal advisers.

How does someone like Lieutenant Colonel Riggs get influenced by someone like Colonel Ewers? Well, it doesn't have to be direct, and it doesn't have to be nefarious. It can be subtle. It can be simply by virtue of Colonel Ewers's reputation, experience. He's one of few staff judge advocates or judge advocates in the Marine Corps with a Combat Action, a Purple Heart. He's been there. He has a good relationship with General Mattis, and he's in the meetings. But the

important factor here is that he was on the ground investigating these matters. He was there. He's a primary source, and he's sitting in a meeting where Lieutenant Colonel Riggs far removed where these events happened sits in the same meeting. And if you will imagine for a minute, if you had -- if you were in there and you had to contradict something that's in the evidence packet. If you had a different opinion, you may be pretty reluctant to do it, because you have a primary source. He was there. And that sort of subtlety is where the unlawful -- it what disqualifies -- or potentially disqualifies the judge advocate from giving advice. Because the commander doesn't have the benefit of that neutral advice that considers all the facts.

Now, what we have in General Mattis is really an outstanding convening authority. He is what probably every defense counsel would want in a convening authority. Because he truly wants to be the neutral convening authority to give the defense what it needs to properly defend it's client, and ensure that the proceeding goes off the way it should. But that's not the issue. That only factors in when you have actual -- the issue is only of actual unlawful command influence. The appearance is still there. The law is still there. What if you didn't have someone like General Mattis? What if it's Lieutenant General Helland, who wasn't aware of the facts? Who didn't have a command as he -- as General Mattis called it, intellectual dominance of the facts. Brand new and here you have a tainted -- or someone who was not able to speak his mind like he should in Lieutenant Colonel Riggs.

Now, that I've begun to talk about General Mattis, I'm going to digress into the next issue, and that's the secretarial letter. When I stood here and asked General Mattis how he felt about the secretarial letter, I really expected for him to be upset. To say, I didn't like it, because I think we've all become familiar with his personality. He didn't give us that. I was little surprised. But then I thought about it last night, and what did I expect him to say. Oh, Mr. Faraj, you know me, I'm a tough commander. I do what I want, and I did what I thought was right. And here comes this guy who is sitting in Washington DC, doesn't know this officer, doesn't know these facts, and he circumvents my authority. Do you want me to tell you that, Mr Faraj? Is that what you want me to say? You want me to sit

here and criticize an elected official or an appointed official appointed by our president. You weren't going to get any other besides that. Same thing with General Helland. But General Helland gave you something. He said he'd be upset as a squadron commander, but he's not going to be upset about it as a general officer. He's not going to look at a general officer's authority being circumvented or overridden by an elected or an appointed official on matters that are directly related to his authority to lead and discipline his Marines. And say, oh, I wasn't upset about it, but I was upset if I was a lieutenant colonel. I'll grant you this, your honor, General Mattis probably didn't care. He probably didn't care if the Secretary of the Navy overrode his decision with respect to future action. He was still going to do the right thing is my point. I think he was upset about it. There is no reason for Lieutenant Colonel Riggs to tell you that, and he reaffirmed that when he said -- before he left, he said I don't understand why he did that. But I will grant that General Mattis was probably unaffected in future decisions. But again, that's not -- that's not the only issue before the court. It's also the appearances.

On the issue of Lieutenant Colonel Ware and Lieutenant Colonel Riggs -- well, let me back up. I need to cover one more point. I want to point out to the court the sequence of event. You have -- with respect to appearance, you have an Article 32 in Sharratt, a recommendation by the IO to dismiss, a dismissal of the charges. The secretarial letter of censure, a recommendation to dismiss by the same IO, no dismissal of the charges in Tatum. And likewise, no dismissal of the charges in Wuterich. To a disinterested member of the public aware of all the facts, I think there's a real argument to be made that there would be a question as to the propriety of the military justice system as to whether that commander really had authority to take as he saw fit, or whether he was required to take more serious action against these Marines.

Now, to Lieutenant Colonel Riggs. Lieutenant Colonel Riggs admitted himself that his communication with Colonel Ware was -- seemed to be inappropriate, and he decided to recuse himself. But did he really recuse himself? The person that drafted the letter in Tatum was Lieutenant Colonel Kumagai. He still worked for him. Lieutenant Colonel Riggs still attended the

meetings, and you heard Lieutenant Colonel Ware say that Lieutenant Colonel Riggs told him -- and if you don't recall that, sir I would request that you listen to the audio. Lieutenant Colonel Riggs told Colonel Ware that he was going to recuse himself from the Tatum case and the Wuterich case. He still gave advice on the Wuterich case. Lieutenant Colonel Riggs also sat here and told you that he just called about an administrative matter. Administrative issues, typos and so on.

Well, the report is in front of you as part of the evidence. I don't think it has many typos. What Lieutenant Colonel Riggs did tell him, and I want to correct something. I wrote in my motion that Lieutenant Colonels Riggs was upset. I meant to say that Lieutenant Colonel Ware was upset by the communication. What Lieutenant Colonel Riggs did express to him is that I want options. And although Lieutenant Colonel Ware testified that he wasn't influenced and he wrote that in the email, you got to wonder why he got options in the Tatum case -- why he gave him options. I mean, they assigned a military judge to make definitive findings. That's what he said. General Mattis reaffirmed that in his letter later. After this whole thing happened, General Mattis sent Lieutenant Colonel Ware a letter reaffirming his decision to have this military judge make findings.

There is nothing. Sir, there is nothing in the Article 32 -- the article itself that requires an IO to give options to the staff judge advocate. The commander is free to tell him, give me some findings, give me some good recommendations. And this commander wanted to make sure he was doing the right thing. The SJA steps in and says I want options, and he got options. He got them in Tatum, even though Kumagai wrote the letter, and he got them in Wuterich.

I lost sleep over this next issue. And I don't say that -- throw it out there just to catch your attention. When Lieutenant Colonel Riggs sat here and I asked him some questions because I was curious about the answers I was getting, they just fit too neatly. Did you review any documents? I reviewed letters. Did you read any reports and things like that? Did you review anything else? Did you review any of the previous testimony? He finally says, yes. So heres what we have. We have the prosecution giving a sitting military judge witness

testimony from a similar motion, and according to him it was to review -- refresh his recollection of facts that he had nothing to do with. Why was it necessary to give Lieutenant Colonel Riggs the former testimony of General Mattis and Colonel Ewers? If it wasn't an issue, it's now an issue. You have a sitting military judge that is reviewing testimony from a witness in a previous hearing. That's just rely curious.

Now, those are the facts. I'm going to talk about the law a little bit, sir. I got a couple more facts I want to talk about. I want to call your attention again to General Helland's firm testimony about how he separated his staff judge advocate and told them, you have this responsibility and you have that responsibility. And, again, you got to wonder why he would testify that way.

MJ: Okay. And you just handed to the prosecution and ask to the court the case of the *United States versus Douglas*, and the site?

CC (Mr. Faraj): It's a new case. Site --

MJ: February 23rd 2010. Do you that site? Am I missing it? I have an appellate number, S31055.

CC: That's all I have on this case, your honor. I don't have a site.

MJ: I don't have a Lexus or any other number. So that's what we have now, *U.S. v Douglas*, U. S. Court of Appeals for the Armed Forces, argued October 14, 2009. Decided February 23rd 2010. Thank you. Go ahead.

CC (Mr. Faraj): In *U.S. v. Wallace*, your honor, sir, it's sited in my motion, the court is counseled -- this court is counseled to not just take perfunctory comments by witnesses that they were not influenced. That's not enough. The burden is much higher than that. The evidence you have to look for must convince you beyond a reasonable doubt that the UCI was ameliorated. *Douglas* goes further. In *Douglas*, the judge fashioned a remedy that was endorsed by the NMCA and the CAAF. I want to back up a little bit. *Douglas* was also interesting because it's one of the few cases that I've found where UCI begins in the investigation phase. It's not post-referral or post-preferral. It's as early as the investigation phase. That's tangential, but I wanted to

call that to your attention because it's sort of an issue in this case as well. But *Douglas* stands for the proposition that even when the judge fashions an appropriate remedy and elicits testimony that some of that remedy was put into -- placed into effect, but doesn't have evidence beyond a reasonable doubt that the remedy worked, and even though the defense didn't object, the court -- the military judge was reversed. Because the military judge didn't go far enough to ensure that whatever UCI that existed was completely removed -- the taint was removed, even when the defense counsel did not object. The military judge ordered or required that the command to issue a cease and desist order against the person that was making some comments that were unlawfully influencing the proceeding, had some letters issued to people that may have been intimidated from testifying, and then asked the defense if they were satisfied.

They came back. They gave them a continuance. They came back and said has the order been issued? Have the letters been sent out? Yes and yes. Defense do you have any objections? No objection. The judge was reversed, your honor. The judge was reversed because the judge didn't elicit evidence that the cease and desist order had in fact worked, that the person committing the unlawful influence had ceased doing what he was doing. And more importantly, that all the witnesses were really no longer intimidated and were ready to testify. Even though the defense didn't object. The defense believed it had worked. In this case -- we haven't heard from you yet if you have found if we had met our burden, but in this case, if you decide that we've met our burden, then the government must -- must present evidence to show that whatever taint as a result of this unlawful command influence has completely dissipated or has been removed before we can move on. Otherwise, of course, *Douglas*, also holds that you can fashion a remedy, but we believe our remedy should be a dismissal with prejudice. Because all we're going to do is come right back here again, and go through the same process, and I don't think it's going to be ameliorated, because we have the same evidence and the same taint. I don't have any further commentary, your honor, unless you have questions for me.

MJ: I do not. Thank you. Major Gannon?

TC (Maj Gannon): Thank you, your honor. Your honor, good morning.

MJ: Good morning.

TC (Maj Gannon): As I understand the court's directive, sir, I'm going to limit my argument strictly to whether or not there has been a burden shifting event.

MJ: Thank you.

TC (Maj Gannon): Issue Number 1, Colonel Ewers. The defense motion fails to shift the burden. The defense defendants evidentiary presentation fails to shift the burden to the government. At Page 12 of Appellate Exhibit LIX, which is the defense motion says accordingly, when Colonel Ewers offered advice that influenced the referral decision. There's absolutely no evidence in front of this court whatsoever that Colonel Ewers ever offered any advice that influenced any referral decision in this case, absent some evidence under *Bigasi* that allegation fails. The Secretary of the Navy -- I guess the way I should approach this, your honor. Let me back up. I guess what I'm going to state first is my read of the law for burden shift and then I'll plug it into the three areas that Mr. Faraj just discussed. The threshold old is low. We know the phrase. The threshold is low, but it must be more than a speculation or a suspicion. That's *U.S. v. Johnson*, 29MJ 242 at 244. So it's a low threshold, but it's gotta be more than just a speculation. It's gotta be more than just suspicion.

And then, obviously, under *Bigasi*, the defense must present some evidence, but it's not just some evidence in the global sense. It's some evidence of facts which true constitute UCI. So it has got to be some evidence of facts, if true, constitute UCI, with a logical potential to influence the proceeding hearing. So it's not just -- we often quote -- when we look at *Bigasi*, we often just say some evidence. But it's not just some evidence. It's some evidence if true is UCI with a nexus to this proceeding. That's what necessary to shift the burden.

Colonel Ewers as I already mentioned -- the Colonel Ewers allegation, there is no evidence. So the defense has failed to raise some evidence which if true would

constitute UCI, because there is no evidence that Colonel Ewers -- again to pinpoint site to Appellate Exhibit LIX, Page 12, first paragraph, when Colonel Ewers offered advice that influenced the referral decision. Sir, that prong, that attempt to shift the burden fails because there has not been some evidence presented.

MJ: Excuse me. You're looking at Page 12 of the defense motion, right?

TC (Maj Gannon): I am, sir. Appellate Exhibit LIX.

MJ: Where are you at there?

TC (Maj Gannon): I'm, accordingly -- very top, sir.

MJ: Okay thank you. First -- second line down. Okay. Thank you.

TC (Maj Gannon): So the allegation involving Colonel Ewers fails because, again, the defense has failed to raise any evidence that if true constitute a UCI on that prong. Secretary of the Navy. Different angle. Now, they have raised this issue that the Secretary of the Navy sent out a secretarial letter of censure. So theoretically you could conceive that the secretarial letter of censure issuance on the 5th of September 2007 is some evidence. The problem is now, the second aspect of the analysis which is some evidence would constitute UCI. The fact that an administrative action is taken by a higher headquarters is not UCI. There's no basis. There's no foundation. There's no authority for that in the case law. Every time a commanding general then administratively separates a Marine in the wake of a court-martial, the argument is that's unlawful command influence, because the GCMCA -- so imagine a Marine goes to special court, and ultimately that Marine's package works its way up to the general and the general causes a separation to take place. Is that UCI? That's not UCI. What they've argued here -- this is an administrative act.

Now, had the Secretary of the Navy said send this back, and send it to a court-martial, that would be UCI. That would be some evidence which if true would constitute UCI. Again, you can say -- I mean, the government agrees the act took place. The Secretary of the Navy

did issue a letter of censure on the 5th of September for Colonel Davis. The problem is that that action is not UCI. Thus, the burden fails to shift to the government on that prong as well. And, finally, on Lieutenant Colonel Riggs's phone call to Lieutenant Colonel Ware. So again, some evidence of facts if true constitute UCI with a nexus to the case. That's the *Bigasi* burden shifting standard. And, again, it has to be more than an allegation or more than a suspicion under *Johnson*.

So Lieutenant Colonel Ware received a phone call from Lieutenant Colonel Riggs. The defense argument is that's a fact which if true would constitute UCI. But in this case we're failing to analyze the last requirement to shift the burden which is that if the fact if true constitutes UCI -- which the government isn't conceding that that does constitute UCI. However, I'm going to weight my argument on the third part which is, with a logical connection to cause unfairness in this case. That is a required showing to shift the burden. That's not just an analytical prong in the subsequent post-burden analysis. That's a required showing at this stage in order for the burden to shift to the government. And, sir, there has been no evidence introduced here whatsoever that that event has any nexus to this hearing. To the case of the *United States versus Wuterich*.

Sir, this is a lot of information and a lot of facts and a lot of timelines that have been put before the court. But if we distill it down to the salient requirements each of the three areas that the defense has raised, they fail at some point in that multi-part analysis under *Johnson* and *Bigasi*. And so, sir, I'll submit on that unless the court has any questions.

MJ: How do you feel that the facts in this case are different? And I understand that we don't want to get into a whole UCI argument that we can save for later if we get there, but how do you feel the facts in this case are different than the Chessani case. The defense said that absent the change of the CDA, all the facts are the same.

TC (Maj Gannon): Where does one begin, sir? Obviously, we spent a lot of time in our testimonial presentation setting out sort of the chronology of the evolution of this

case. First and foremost, it's critical to note that charges were preferred in the case of *United States versus Wuterich* on 21 December 2006. At that point in time, that preferral event had been proceeded by the consumption of information by the convening authority. He testified at length about that. And importantly as it relates to the Chessani theory of this legal taint by Colonel Ewers, Colonel Ewers was no where to be found. That's a critically important distinguishing feature of this case because, again -- if I understand the defense's theory in the big picture as I read it in their pleadings -- it's morphed here a little bit today and seems to be more emphasizing Colonel Riggs and Colonel Ware's interaction. But as I read it in it's original form, it was very much modeled on Chessani and it goes something like this. Colonel Ewers is an investigator in Iraq. Colonel Ewers generates information as a part of the investigation of the events of Haditha 19 November 2005. In doing so, Colonel Ewers develops an intensely prosecutorial zeal and opinion that misconduct had taken place.

Colonel Ewers then like Typhoid Mary carries that prosecutorial zeal back to closed door legal meetings that took place with the CDA. And the prosecutorial zeal and personal gravitas of Colonel Ewers then effects into these meetings this overly prosecutorial focus tainting both upward the commander and vertically or maybe downward a parallel staff officer on a different staff. So that's the defense's theory of the UCI as I understand it.

So what are the distinguishing features? What are the distinguishing characteristics here? First and foremost, we have a clear absolute showing that on 21 December 2006, the consolidated disposition authority had made a decision independent of Colonel Ewers -- by virtue of the fact Colonel Ewers was overseas at this point, had made a decision to cause these allegations to be -- have charges preferred, Article 118 charges, and to be sent to an Article 32 investigation. That's the first fact that's not disputed. It's not contested. It's not been attacked by the defense. The fact is, is that the CDA made a decision to send this to investigation with no link to Colonel Ewers whatsoever.

Importantly, prior to that, this lateral taint that supposedly went to Lieutenant Colonel Riggs, he too had

to be untainted at that point. Again, December 2006, because Colonel Ewers was overseas. So this infectious prosecutorial zeal that Colonel Ewers brought back from his investigative efforts could not have impacted the decision of the CDA to investigate this matter at a 32. That's the first very important, I think, clarification that needs to be made. So if the -- and, your honor, just to be also clear, that's why I showed those witnesses the photo binder because I wanted to make it clear that there was very, very strong evidence that something went very wrong on 19 November 2005 in Haditha, Iraq. And that visual evidence demonstrates that. Colonel Ewers didn't take those pictures. Colonel Ewers didn't bring those pictures home. Colonel Ewers didn't dig those pictures up and give those to everybody to see and pass them around like calling cards. Those were a component of the investigation along with this accused's statement that said, shoot first ask questions later. Those facts had been developed in December of 2006. Colonel Ewers had nothing to do with that. That's important, sir.

Obviously, the other significant distinguishing feature from the Chessani case that's resident here, sir, is the fact that General Mattis did not refer Staff Sergeant Wuterich's case to a general court-martial. General Mattis wasn't able to review the Article 32 investigation or the report of the investigation of 2 October 2007, because he was focused on other matters. So in the Chessani litigation, the Chessani team had an actual legal moment that they could point to and say, gravita, personal biography, relationship with General Mattis, prosecutorial zeal, infected meetings, referral event. We can't get there in this because at that last critical event of legal moment, the referral, it's a different convening authority.

So what the defense has had to do in their motion in the last part is so profoundly attenuated, they've actually had to say and argue that this prosecutorial zeal that Colonel Ewers infected these legal meetings with, then carried over to Lieutenant General Helland by virtue of attending one, two, or three of these meetings. General Helland's involvement in the case obviously is a critical distinction from the Chessani litigation. Colonel Davis. The secretarial letter of censure, another significantly distinguishing feature from what's before the court now, sir, vice the issue before Colonel

Folsom a year ago -- a little more than a year ago is this, I think that it's -- the issuance of the secretarial letter of censure to Colonel Davis at least conceptually was more related to the Chessani case because as the court has been made aware through the evidentiary presentation of both sides, that really the Haditha investigation broke down into two parts. What we call the shooter piece, or the investigation of the actions of the Marines on the ground that actually pulled the trigger or were in the vicinity of having the trigger pulled and then what we call the recording piece. The investigation into why was there so much delay? Why did it take so long?

Obviously, Lieutenant Colonel Chessani's case is on the reporting side, and Staff Sergeant Wuterich's case is on the shooting side. That's another distinguishing feature because arguably, again, without conceding, but arguably any event in Colonel Davis' case because Colonel Davis was a subject of the reporting piece investigation, coupled with Lieutenant Colonel Chessani's actions -- and there had been communications between the two, arguably they are more linked. Here again, the attenuation is so significant because, again, they broke down really into two separate investigations.

Sir, I can offer --

MJ: That's fine. And I read your motion and you did outline in your motion the differences.

TC (Maj Gannon): Yes, sir. We spent a lot of time working on distinguishing the Chessani precedent -- the Chessani developments, and I guess the last -- this is more of an argument for later maybe. Maybe not, but it's important to note that while the defense characterizes the NMCCA unpublished opinion that -- after the government took the 62 appeal in the Chessani case, they characterize that as controlling affirmative evidence or -- in this case that that should inform the court. The government's position is that -- I know we made this clear in the proceedings, but I guess I should reiterate it. The government's position is that if you really boil down the NMMCA Chessani holding, it was this, the government didn't carry its burden. That's what it was. It wasn't that -- any of that path that I just described was actually UCI, actual or apparent. The holding was, the government, once the burden shifted,

didn't carry it's burden beyond a reasonable doubt.
Sir, do you have any other questions I can answer?

MJ: I do not.

TC (Maj Gannon): Sir, good morning. Thank you.

MJ: Thank you. Okay. Thank you for your arguments.

The court will be in recess.

The Article 39a session recessed at 1041, 23 March 2010.

The Article 39a session opened at 1457, 23 March 2010.

MJ: The court will come to order. All parties present when the court recessed are once again present. In a motion for relief from alleged unlawful command influence, the defense has the initial burden to one, show facts which if true constitute unlawful command influence; two, show that the proceedings were unfair; and three, show that the unlawful command influence was the cause of the unfairness. *U.S. v Bigasi*, 50 MJ 143 at 151. This initial burden of proof or showing by the defense need not be proved beyond a reasonable doubt. The standard is merely that some evidence is presented. In looking at both the written motion and the arguments made in court, the defense has alleged three areas where they believe there was either actual or apparent unlawful command influence. The issues as the court sees them are as follows: First, whether advice given we Lieutenant Colonel Riggs to General Mattis and/or General Helland was some how suspect do to Colonel Ewers being present in the same meetings where the Haditha cases were discussed; second, whether Lieutenant Colonel Riggs should have been recused from further acting as a legal adviser in the accused's case due to his influence over or behavior towards the investigating officer, Lieutenant Colonel Paul Ware; third, whether a secretarial letter of censure issued by the Secretary of the Navy to Colonel Davis in a companion case some how improperly effected the independent decisions of either General Mattis or General Helland regarding disposition of the accused's case.

The court recognizes that the forgoing three prongs proffered by the accused are all simply ways to ask the same question, was there a neutral and detached legal

adviser who gave proper legal advice to the general, who in turn properly referred charges against the accused? This court takes seriously the concept of the judge being the last sentinel regarding issues of unlawful command influence. This court takes seriously the philosophy that the judge must avoid even the appearance of evil or unlawful command influence in the court room by establishing the confidence of the general public in the fairness of the court-martial proceedings. Based on the forgoing and the low threshold required of the defense, the court rules that the defense has made a proper showing sufficient to shift the burden to the government of the first two issues mentioned above; namely, first, whether advice given by Lieutenant Colonel Riggs to the generals was some how improperly influenced by Colonel Ewers's presence at the meetings and, two, whether Lieutenant Colonel Riggs should have recused himself from acting as legal adviser in the accused's case due to his influence over or behavior towards the investigating officer, Lieutenant Colonel Paul Ware. The defense has failed to present sufficient evidence that, if true, would constitute either actual or implied unlawful command influence regarding the secretarial letter of censure. Therefor, the government is now required to show for items one and two beyond a reasonable doubt that either, first, the predicate facts as shown by the defense are untrue or, second, the predicate facts do not establish apparent and/or actual unlawful command influence or, three, that the apparent or actual unlawful command influence established by the predicate facts has not or will not effect the proceedings.

Of course, the court realizes that both parties have already presented voluminous documentary evidence as well as some testimonial evidence regarding these two outstanding issues. The parties are reminded that the court will consider all evidence both documentary and testimonial that has been presented in ultimately determining this motion. The parties are also reminded that due to the advanced reading of the evidence as well as testimony already provided to accommodate witness availability, it was necessary for the court to compartmentalize the evidence to determine solely whether the burden has shifted to the government.

With that in mind, does the government wish to present any further evidence in order to carry it's burden?

TC: Your Honor, the government at this time is about 99.9 percent sure the answer to the court's query is no. However, I would respectfully request that I be given a little bit of time. There is one angle I want to analyze and discuss with co-counsel. And I'm at the court's disposal to advise the court when I think that decision will be made. But like I said, sir, 99 percent sure no. But there's one area I'm concerned about we may want to present some additional testimony.

MJ: You asked in emails and also in the 802 conference and also in your motion to be provided a separate time to respond if the burden had been shifted, and I indicated I was not inclined to grant that since I'm coming from Okinawa. So I would be happy to give you whatever time you need within reason, and certainly over the overnight recess. I don't plan on doing anything else today.

TC: No, your honor, I don't need that much time. I'm not asking for weeks. We will be prepared to comply with the court's directive which is we will resolve this issue this week. I'm just asking for ten hours.

MJ: Well, I'm going to give you until tomorrow morning.

TC (Maj Gannon): Brilliant, sir.

MJ: Is that fine?

TC (Maj Gannon): It is, sir.

MJ: That was my intention was just to read this, and then see if you had any other evidence. You could talk to all of the people that you would like to talk to, and get any advice you would like. You can do any research you would like to do. And then any other evidence that you have, we'll take that up at 0830 in the morning. We could talk off the record on best how to handle the logistics on that. As I indicated to all the parties, if you do have evidence, at the conclusion of that evidence, I will turn to on actually deciding the motion. If you do not have any evidence, I will be here working in the building Wednesday, Thursday, and Friday, as long as it takes to get a ruling out. And it's my intention to announce the ruling on Friday afternoon. We'll pick 1300 on Friday afternoon. If I can give you a written ruling at that point, I will. I certainly will announce the ruling. It's not going to take me

that long to decide. It will just take that long to maybe right it up. So on Friday you will have at 1300 a ruling on the UCI motion, a complete ruling. However, hopefully I can give you all the legal rational, the findings of fact and conclusion of law at that time.

With that in mind, anything else that we need to discuss on the record now with the caveat that when we're done I do want to see counsel about possible trial schedule in this case. Again, I have not decided the motion, but it's just something I want to discuss off the record. Anything else?

TC (Maj Kent): Yes, your honor. Very briefly. Is the court inclined to take additional argument on this motion?

MJ: Absolutely.

TC (Maj Gannon): Okay, sir.

MJ: You had argument on shifting the burden, and I cut off Major Faraj I think, and yourself on the ultimate issue. I think he spoke a little bit about the ultimate issue in his first argument, but I'm happy even if you have no further evidence to hear more argument on the UCI motion from both sides.

TC (Maj Kent): Certainly the government desires to make that argument, sir.

MJ: Absolutely. Because the context of the previous argument was not dealing with the motion in it's entirety. It was supposed to be limited to the burden shifting.

TC (Maj Gannon): Yes, sir.

MJ: Okay. With that in mind then, the court will be in recess until tomorrow morning at 0830.

The Article 39a session recessed at 1505, 23 March 2010.