

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

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

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

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

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

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

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

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

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

MJ: Thank you.

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

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

MJ: Thank you.

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

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

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

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

Major Faraj, please.

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

MJ: Okay. Thank you.

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

okay?

ACC: Aye, sir.

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

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

ACC: Yes, sir, it is.

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

ACC: Yes, sir.

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

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

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

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

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

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

MJ: Okay. Thank you.

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

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

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

ACC: Yes, sir.

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

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

ACC: Yes, sir.

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

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

and Mr. Puckett.

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

ACC: Yes, sir.

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

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

Do you understand that?

ACC: Yes, sir.

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

Are you going to put in a request for someone?

ACC: Yes, sir.

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

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

MJ: I agree.

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

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

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

ACC: No, sir.

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

ACC: I do, sir.

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

ACC: Yes, sir.

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

ACC: Yes, sir.

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

Do you understand that?

ACC: Yes, sir.

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

Do you understand that?

ACC: Yes, sir.

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

Do you understand that?

ACC: Yes, sir.

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

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

Am I correct, Major Faraj?

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

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

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

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

MJ: Thank you.

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

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

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

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

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

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

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

Defense, Major Faraj, please.

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

MJ: Okay. Therefore no challenge?

CC (Mr. Faraj): And no challenge.

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

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

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

and we reserve motions and of course we're going through that now, Your Honor.

MJ: Okay. And pleas also, right?

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

MJ: Okay. Thank you.

802 conference. I had two 802 conferences telephonically from Okinawa, Japan, where I'm stationed with the counsel. The first session was on 8 February. At that point I had just been assigned the case and we had a telephone conference with trial counsel, defense counsel, and myself over the phone outside the presence of the accused where we discussed the posture of the case.

At that point the main item of discussion was where's the footage from the CBS outtakes for lack of a better term. Who has it? Where's it at? And is the counsel going to get it, because now that issue is resolve by all parties. So we discussed that and I indicated that I did have it. And I would send it out. It's my understanding that both parties at this point have all of that footage and that's a nonissue in this case. And that's why Mr. Benedetti and CBS have no longer any interest in participating in this case.

So we discussed that during the first 802 conference. We discussed some procedural history in the case. No rulings were made. No decisions were made. And that was the sum and substance of that but I do ask and invite any comment from counsel after I'm through summarizing the 802 conferences to put anything on the record including any objections you may have to any guidance given by the court.

Next on 12 March we had another 802 conference telephonically with defense counsel and trial counsel. And when I say defense and trial counsel, that includes Mr. Puckett -- I know for sure was on both conversations and Major Gannon was privy to both conversations. The other parties may or may not have been there. But I know Lieutenant Colonel Sullivan was in on the second conversation along with Major Faraj. I've never had a telephonic conversation or 802 with either Mr. Zaid or Mr. Vokey.

Also I would be remiss if I didn't interrupt myself and explain that when we went over all the people that I knew in the case prior to coming on the record, I did not mention Mr. Vokey. Mr. Vokey I also know for years, so -- again, neither party has questions for challenge. If you do, however, have any questions or challenge regarding Mr. Vokey, I would be happy to answer those on the record.

The 802 conference we had on 12 March dealt with what we were going to do this week. I indicated that -- I was a little frustrated that I had not received a trial schedule and that I wanted the trial schedule to be given to me that all the parties could agree on. They agreed that 13 September would be a good starting date. And I've requested that we leave three weeks for the trial.

Again, I understand the defense's motion is to dismiss with prejudice all charges and specifications. And I've made no ruling or made any decision because I haven't heard any evidence on this case. However, we're going to proceed with trial dates so that -- as if the motion was denied only so that we can have all of our planning done.

So with that in mind, starting in 13 September, we will leave three weeks to do this trial. All the parties felt like that was enough time. I'm still going to wait for counsel to give me a trial schedule pursuant to the local rules. When I say, "set up pursuant to the local rules," it has all the motions dates, et cetera.

I would anticipate since it's a general court-martial that all the parties would leave at least two -- not an unnecessary number of motion sessions, but at least two because of the general court-martial. The principal session would be dealing with any issues that might delay the trial from going forward. So those would be expert witness issues, witness issues maybe from Iraq or anywhere else. Anything that you think might delay the trial would need to be done in that first motions session. And we can talk off the record any summarize on the record any concerns I have with those motions.

The second set of motions would be to clear up anything from the first set of motions that we did not have cleared up and to argue anything that would not delay

the trial -- motions in limine, suppression motion, whatever the issue is that would not delay the trial. So I know counsel will get together and come up with those dates and I will approve those. I will be here at any time that the counsel need me to be here from Okinawa. I am the only judge there, but I am very flexible and I can arrange my trial schedule. So any time that's convenient to the parties, the court is able to be here. I say that particularly so the counsel understand that I don't have any leave that I need to take over the summer or any other time. So I can be here any time you need.

Also on 12 March we talked about this motion session. The government indicated that they wanted some sort of ruling as far as when the burden shifted to the government. The parties are well aware of the case law on this point and the law stating that the defense has to raise and put on some credible evidence or some evidence or scintilla of evidence, I think -- as Major Faraj put in his motion -- something to raise the issue object of unlawful command influence after which the government has a variety of options in seeking to disprove those predicate facts or prove that it's not going to taint the proceedings, et cetera, based on beyond a reasonable doubt. And all the parties are aware of that.

And what the government asked was that I simply indicate which of the grounds that the defense put in their motion, as I understand it from our 802 conference, which of those grounds the burden actually shifted to the government so that they could prepare a response since the burden would shift to them to prove beyond a reasonable doubt the issue of the unlawful command influence. So that's what we talked about in the 802 conference.

We discussed General Mattis being here and that we would take his testimony and any other witnesses testimony out of order if we needed to. The general is the same as any other witness. I'm happy to work around anybody's availability concerns, and we can certainly take evidence out of order. I don't have a problem understanding who has the burden of proof or what facts need to be established. So anybody who is here from out of town or whenever, we can take those witnesses at your leisure. That's what was discussed on 12 March in the

802 conference.

Just dealing with those two sessions, does counsel for either side wish to add anything to my summation of either one of those sessions or put anything else on the record?

Major Gannon, please.

TC (Maj Gannon): Thank you, sir.

Sir, I advised the court earlier that the first 802 was on 8 February. I'm reflecting -- I'm looking at my notes. It was actually 9 February. The parties present were myself, Major Gannon, Lieutenant Colonel Sullivan, Captain Colgan, Major Plowman, and Lieutenant Reed. And for the defense Mr. Faraj and Mr. Puckett were all present telephonically for the February 9th 802 conference. We established a briefing schedule for our purposes here today which all parties have complied with.

And in addition to that, we discussed the fact that the defense has several experts whose contracts have expired and we need to get them recontracted as soon as possible given the fact that the court noted a moment ago that we need to be apprized of events that may delay the trial. I have a note from my conference on the 9th that we did discuss that and so I wanted to add that to the summation.

MJ: Thank you. I did not remember that at all. I appreciate you helping me out with the parties. The piece of paper that I had from that initial session did not make it into my file. So I was unaware of who was on the phone exactly so I appreciate that.

TC (Capt Gannon): Yes, sir.

MJ: And I will tell you that I do not even remember discussing that issue about experts and contracts. So if the parties want to solve that issue or any others, please let me know this week. I indicated that obviously the parties will be prepared to proceed on the UCI motion, but anything else I can solve while I'm here, I'm happy to do. And I'm here, again, all week to solve any issues in this case that I can before I go back to Okinawa.

Does the defense wish to add anything to the summation of the first two 802 conferences that we had telephonically?

Mr. Faraj?

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

MJ: Thank you.

Next, we had an 802 conference again outside the presence of the accused in the presence of Lieutenant Colonel Tafoya -- who has since been relieved -- Major Faraj, Mr. Puckett, Lieutenant Colonel Sullivan, and Major Gannon prior to coming on the record today. We discussed a 7 August 2008 motion dealing with counsel. This simply needs to be marked as an appellate exhibit. Evidently it was not, so that will be marked.

We discussed the counsel in this case and the posture and who was going to be relived and where everybody was at.

We discussed the schedule for this week; my willingness to take any witnesses or evidence out of order. We discussed the evidence that was submitted with the motions that would need to be formally asked to be admitted on the record although I have read or perused at least through the 524 pages that included the motion and the exhibits that the government gave me and all of the evidence presented by the defense that I received probably about a month ago in Okinawa along with the defense's motion. I have looked at all of that evidence.

I told the counsel I specifically did not read the evidence that was presented by the government dealing with previous testimony of either General Mattis or Colonel Ewers or any other witness. I saw that it was there. I did not read it, because I didn't want to be influenced. I wasn't sure if it was going to make it into evidence, et cetera. Both parties understand that I'm probably going to read that unless there's an objection after I get out of court today.

We also talked about, again, the burden shifting and I indicated to the government that my intention in the phone call was simply to solve this issue this week. If

I didn't get a ruling out before I left here, that I would certainly give a ruling -- would be advisory since only a ruling is only effective once we get on the record. But I would certainly tell you what my ruling is via e-mail if I did not feel comfortable with finalizing the findings of facts and conclusions of law before I left Camp Pendleton. I leave on Saturday.

So we discussed -- what I told the government this morning was that my anticipation was that we would hear anything the defense had today or tomorrow or however long it takes, then I would take a break, a day or half a day or however long to decide on which issue the burden has actually been shifted to the government on this UCI issue. And then have the government hopefully be ready to put any evidence on to prove beyond a reasonable doubt for those issues. And so that's my goal for this week is to hear everything, so that I do not have to come back to hear more evidence on this issue, that I can just put out a ruling.

We discussed the schedule for the trial again in the 802 conference this morning. We discussed the voir dire of the judge and the possible challenge. I tried to put on the record and tell the counsel every association I had with everybody. The only person I forgot was Mr. Vokey who I've known for some number of years. Again, I have not -- since I didn't state it earlier, I have not been in contact with him at all since he left active duty. So I know that he's in Texas at a law firm.

Okay. That was a lot, but I think I've summarized everything that we dealt with this morning.

Again, Major Gannon, anything to add?

TC (Maj Gannon): No, Your Honor.

MJ: Mr. Faraj?

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

MJ: All right. With that in mind then, we're ready to start off with the reason that we're and that's the unlawful command influence motion filed by the defense. It's been marked as an appellate exhibit.

I'm sorry -- counsel, I did not remember. We did

discuss one other issue and that was getting the -- all the DVDs marked that I received from the appellate court. So we discussed that. They've already been marked. Excuse me, I misspoke. They were marked as Appellate Exhibit LVIII. So I want to note for the record that I am giving back that Appellate Exhibit LVIII to the court reporter and that will be part of our -- continue to be part of our record. So I do have that. I didn't want to forget to mention that.

All right. With that in mind then and with the understanding that we're going to take any witnesses out of order, I will state that I have read the motions so I guess I will ask you if you have any evidence on the motions after we go through whatever witnesses we need to today.

Is that amenable to both sides or do you want to deal with all the documentary issues right now?

TC (Maj Gannon): Your Honor, the government's ready to proceed with dealing with the evidentiary -- excuse me. The appellate exhibits and the evidence after we deal with the witnesses.

MJ: Okay.

CC (Mr. Faraj): We would ask that at this time the court consider the exhibits we submitted with our motion as evidence, and I would like to ask the court -- I promised you an Exhibit E that was not attached because it was a bunch of .pdf documents. But the government has those attached to their motion as Enclosures (4), (5), (7), and (8). And I would ask the court at this time to consider that as well as evidence in support of the defense's motion.

MJ: So what I would like to know then so I have everything clear is I'd like all that to be marked as an appellate exhibit or appellate exhibits so I know exactly and I can get it from the court reporter, so we're all on the same sheet of music that I may not have print something off, I may not have got it earlier, that I get everything that you want me to look at.

So what appellate exhibits are those?

CC (Mr. Faraj): Those are LIX and LX. That's our motion and the

government's motion. I'm specifically asking the court to -- I'm sure the court's going to consider all the evidence. But for the purpose of the defense's motion, the entirety of Appellate Exhibit LIX and Enclosures (4), (5), (7), (8) of Appellate Exhibit LX.

MJ: (4), (5), (7), and (8) of Appellate Exhibit LX?

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

MJ: Okay.

Any objection?

TC (Maj Gannon): Your Honor, no objection but if we're going to move the court to consider evidence, the government just moves the court to include all the enclosures to Appellate Exhibit LX which is the government's motion. There's about 34 -- I believe it is -- attachments or enclosures -- 34 enclosures to Appellate Exhibit LX.

MJ: Any objection by the defense?

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

MJ: All right. I have all of those. It was provided in a binder. I appreciate Major Gannon -- I think it was Lieutenant Colonel Sullivan's suggesting -- I really appreciated getting this last week. And you've taken the trouble to FedEx it to me so I could read it when I was in Reno. Thank you.

We also discussed in the 802 conference that the parties may ask fewer questions of either General Mattis or Colonel Ewers or any of the other witnesses that may have already testified in previous sessions even dealing with companion cases. For example, the case of *U.S. versus Chessani*. And so I'm under that understanding and I realize that I can read those exhibits later.

All right. With that in mind then, I believe General Mattis is going to be called by the government, correct?

TC (Maj Gannon): Yes, Your Honor.

MJ: Okay. And he's your first witness?

TC (Maj Gannon): He is, Your Honor.

MJ: Okay. Please call him.

TC (Maj Gannon): Your Honor, can we have about a five-minute break just before we roll into this, sir?

MJ: Sure.

TC: Thank you, sir.

MJ: The court will be in recess.

The Article 39(a) session recessed at 0936, 22 March 2010.

The Article 39(a) session was called to order at 0943, 22 March 2010.

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

I also did not identify earlier our court reporter. She continues to be Staff Sergeant Myers.

Government, you may call your witness.

TC (Maj Gannon): Yes, Your Honor. The government calls General Mattis to the stand.

General James N. Mattis, U.S. Marine Corps, was called as a witness by the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Good morning, general. Sir, could you state your full name, spelling your last name for the court reporter.

A. James Norman Mattis, M-A-T-T-I-S.

Q. Sir, could you describe your current billet, please.

A. I'm the commander, United States Joint Forces Command.

Q. Sir, where is that located?

A. Norfolk, Virginia.

Q. Sir, if I may can I trouble you to discuss or describe for the military judge your career in the Marine Corps. How long have you been on active duty, sir?

A. On active duty since 1972.

- Q. And, sir, could you describe the billets that you've had since 1972 to the present, sir, in terms of your command assignments.
- A. Rifle and weapons platoon commander; rifle and weapon company commander; commander of a recruiting station; command of an infantry battalion; command of an infantry regiment; command of a Marine expeditionary brigade; command of a Naval task force, Task Force-58; command of a Marine infantry division; command of a Marine expeditionary force; command of Marine Corps combat development; command in Quantico; command of Marine Forces Central Command; and now commander of U.S. Joint Forces Command.
- Q. Sir, by my count you've acted as a general court-martial convening authority on at least four different occasions.
- A. Is that accurate, sir?
- A. I believe so, yes.
- Q. General, when did you take command of the 1st Marine Expeditionary Force and Marine Corps Forces Central Command approximately, sir?
- A. It was after my tour at Quantico. I think August or September. Early September of 2006.
- Q. Late Summer early Fall, 2006?
- A. Yes.
- Q. Sir, you came to Camp Pendleton and assumed command of I MEF and MARCENT?
- A. Correct.
- Q. Sir, can you describe please for the military judge the nature of that -- for lack of a better term -- dual-hatted command, sir?
- A. It was two separate commands, Your Honor. One was headquartered in Tampa we're collocated with Marine forces -- or excuse me, central command. That was Marine Forces Central Command, responsible for all the Marines operationally -- Horn of Africa, Afghanistan, and Iraq. Then I had the command of I -- 1st Marine Expeditionary Force here in Southern California, Southern Arizona. About 40,000 Sailors and Marines located here in the deployable forces.
- Q. Sir, did those two commands maintain separate and

distinct staffs?

A. Yes, I had different deputy commanders, different chiefs of staff, and different staffs.

Q. As far as your staff judge advocate, sir, do you recall who your staff judge advocate was for Marine Corps Forces Central Command in the late-Fall -- late-Summer, early-Fall of 2006?

A. Yes. It was Lieutenant Colonel Riggs.

Q. Sir. And in his capacity as your legal adviser, did Lieutenant Colonel Riggs ever discuss with you a consolidated disposition authority letter that was granted to the MARCENT commander by the Commandant?

A. Yes, he did. I had already read the letter before he discussed it with me. General -- or my predecessor having told me that this would be a significant part of my duties.

Q. Sir, what was your understanding of that CDA letter?

A. I was to look into all allegations and I think there was certain -- I haven't seen it in many years now, but certain circumstances that I was specifically to look in to and follow the investigation and take appropriate action. I'm adlibbing now. I'd have to look at the letter to give you a really accurate statement about it.

Q. It essentially made you the convening authority for any actions that were to flow from the allegations arising from 19 November 2005 in Haditha, Iraq?

A. It did.

Q. Did it similarly convey on you responsibility for acting as a convening authority for the events arising out of Hamdaniyah, Iraq in 2006 as well?

A. Yes. And if those investigations led to other matters to follow, those as well.

Q. Sir. Is it fair to say then, General, that when you reported to I MEF/MARCENT in the late-Summer, early-Fall of 2006, you had an awareness of allegations arising out of Haditha, Iraq by Marines with 3d Battalion, 1st Marines on or about November 19th, 2005?

A. Yes. It was in the newspapers, magazines. That sort of -- it was a common item of discussion in the news as well.

Q. Sir, what steps did you take upon your assumption of

command and your assumption as the responsible convening authority for those matters -- what steps did you take in the late-Summer, early-Fall of 2006 and thereafter to become factually aware of the allegations arising out of Haditha in November of 2005?

A. Well, I read -- for Haditha, I read the Bargewell Investigation but that was not a -- that was not the most compelling information. Most of what I was reading -- where I may have the nomenclature wrong here -- reports of investigation that were coming in from the Naval Criminal Investigative Service, NCIS, and those were voluminous and I read them all.

Q. Can you give us an estimation, General, of how many pages you familiarized yourself with to get factually aware of the events surrounding the 19 November 2005 killings in Haditha, Iraq?

A. Thousands.

Q. Sir, just so the court understands, did you actually take time in your office, close the door, and pour through those documents and personally review that material, sir?

A. I did. They came in boxes, normal boxes, large boxes. I took them home at night. I'd come in on any weekend I was there and not in central command's area. I would be going back and forth. I would read them on the weekend. I'd come in around six in the morning, except for a workout. Read them all day Saturday. Do the same thing on Sunday. And I would take them with me on very long flights to and from the Middle East, so I could read them on those flights when I had uninterrupted time.

Q. Sir, is it fair to say then that by the early-Fall of 2006 -- we're talking October, November time frame of 2006 -- is it fair to say then, General, that you had a sufficient factual command of the evidence associated with the 19 November 2005 event in Haditha, Iraq?

A. My confidence grew that I had read everything and cross-checked it probably by early-December, not by November.

Q. Sir.

A. By early-December.

Q. Early-December of 2006, sir?

A. Yes.

- Q. Sir, you mentioned the NCIS ROIs or reports of investigation. You also mentioned the Bargewell Investigation. An Army colonel, Colonel Watt, also conducted a very limited inquiry pursuant to FM 15/6 of the Army regulations. Did you familiarize yourself with the content of those documents?
- A. I did on the Watt. I think a lot of it was reiterated or repeated in Bargewell. Matter of fact it looked like there were direct lifts, which is why I focused -- that was what drew me to focus more on the NCIS, much more thorough investigation.
- Q. Yes, General.
- The accused sat down with Mr. Scott Pelley of *60 Minutes* on CBS and did an interview with him. Did you ever view that interview, sir?
- A. I saw parts of it.
- Q. Did you see the parts which indicated that the accused was aware in the structure we've identified as House I that there may have been noncombatants present in that building? Do you recall that admission he made on that video, sir?
- A. I do. But let me caveat this: There were a lot of data-free things being written and reported. And I did not know what level of editing had gone on, whether or not what he was portrayed as saying was taken out of context or not. So, again, if I were to tell you where most of my -- most of the influence over me came from the NCIS reports of investigation.
- Q. And a part of that NCIS ROI were statements of Marines who were on the ground on 19 November 2005?
- A. Correct.
- Q. Statements of participants in the shootings at the roadside, House I, House II, and House IV?
- A. At the roadside would include what became known in the Marine's parlance who were writing, the "ridge-runner" and also people who had stepped out -- males who had stepped out of I believe a taxi cab or a car at the very head of the convoy. So, yes, that's what their statements were about and the houses.
- Q. And you recall reviewing those statements with your own eyes, sir, by December of 2006?
- A. By early-December.

Q. I'm handing General Mattis a copy of Appellate Exhibit LXI. It is the binder that contains several photos.

General, if I may please, yes, take a look, sir, and when you're done familiarizing yourself with the content of Appellate Exhibit LXI, would you please look up at me, sir?

A. You want me to look at all of them?

Q. Yes, sir.

A. *[The witness did as directed.]*

Thank you, sir.

Q. Do you recognize those photographs, sir?

A. I do.

Q. What are they, sir?

A. They're the part of the evidence that was I believe in the report of investigation. It may have been in the Bargewell. I recall it being in the report of investigation from NCIS showing noncombatants who had been killed.

Q. Sir, were you familiar with the content or the images that we just looked at in Appellate Exhibit LXI -- were you familiar with those by early-December of 2006?

A. Absolutely.

Q. Did those photographs have an impact on your understanding of the evidence in this case, sir?

A. They did.

Q. 21 December 2006 charges are preferred against Staff Sergeant Wuterich and several other Marines that were at Haditha, Iraq on 19 November 2005. Sir, do you remember the preferral of charges on 21 December 2006?

A. I remember doing it slightly prior to Christmas, yes.

MJ: Counsel, did you say preferral or referral?

TC (Maj Gannon): Sir, preferral.

MJ: Thank you.

TC (Maj Gannon): And just so the court is clear that's preferral on 21 December 2006, sir.

Questions by the prosecution (continued):

Q. Sir, do you remember the nature of the most serious charges that were preferred against this accused and several other Marines on 21 December 2006?

A. I believe it was murder. I'm pretty sure it was the charge of murder.

Q. Sir, at this time based on your review of the evidence, had you decided then obviously that these allegations needed to be investigated at an Article 32 investigation?

A. I did.

Q. Sir, why did you feel it necessary to investigate these allegations at an Article 32 or cause these allegations to be investigated at a 32?

A. By this point I don't think anyone had read more about the case. I was convinced they needed investigation to determine the facts. And I acted without any reservations as far as initiating an investigation of them.

Q. Sir.

A. As you reviewed this significant volume of evidence -- Um-hmm.

Q. -- in late-2006 and as you made the decision, sir, to cause these allegations to have -- to be investigated at an Article 32 --

A. Um-hmm.

Q. -- during this time period, sir, did you have occasion to discuss these matters with Lieutenant Colonel Riggs?

A. Yes.

Q. What was Lieutenant Colonel Riggs' role in advising you at this point, sir? What'd you all talk about, sir?

A. My impressions from my study of the case, his legal advice as far as what those impressions translated in to. When I would make decisions about what to do with the charges, usually in person -- remember, now, my headquarters for MARCENT is in Tampa, but usually he would fly in to Camp Pendleton oftentimes after I'd returned from several weeks in the MARCENT -- in the CENTCOM AOR, and he and I would privately go through his advice to me and I would make decisions.

- Q. As you consumed all of this material, sir, I'm sure or I'm confident that you may have had questions and you may have had RFIs or requests for additional information during this time frame as you were getting smart, sir, about these allegations?
- A. Legally, yes. Generally, I simply tabbed what I found as a question and I'd have to go back through what I'd already read and find contradictions or read on and find resolutions in the various investigations.
- Q. And, sir, when you had legal questions, did you feel able to consult with Lieutenant Colonel Riggs about those matters?
- A. It was never a problem between the TANDBERG, the secure telecommunications link on my desk and his. I could have him on the line as fast as a phone call. But, again, generally speaking, he knew what my schedule was of course and I'd either see him in Tampa on my way in to the Middle East or in Pendleton when I got back. And I would be out there -- you'd have to look at my travel schedule, but I was out there routinely and that was the only interruption. But that was not -- that was not germane because I'd still be reading on those trips.
- Q. Sir, what is a TANDBERG?
- A. Excuse me, it's a secure telephone link with a picture so you see each other as you're talking and it's secure. You can talk classified information on it. He had one on his desk; I had one on mine. If I dial in a phone number, you can link back and forth.
- Q. So you had normal telephonic communications with Lieutenant Colonel Riggs?
- A. Yes.
- Q. You had secure telephonic communications with Lieutenant Colonel Riggs?
- A. Yes.
- Q. And you also had, for lack of a better term, this TANDBERG or a secured video telephone conference capability with Lieutenant Colonel Riggs as well?
- A. But most of this was done face-to-face. He was routinely in Camp Pendleton to see me about this.
- Q. Yes, sir. Now just so that we're clear to the court and the court understands, at this point, sir, we're still talking about the November, December time frame of 2006?

A. Right.

Q. Thank you, sir.

Sir, how do you get information from your staff? Do you have meetings? Do you make them write position papers? What's your methodology with which to acquire information from your staff about a given incident or a given issue, sir?

A. Depending on what the issue is operations, intel, logistics, legal. You get people in the room, you talk with them.

Q. Sir.

A. You're talking about the general information for my situational awareness?

Q. Yes, sir.

A. Yes.

Q. Now let's focus, sir, if we could please on legal meetings.

A. Right.

Q. As you read these materials in November and December of 2006, did you hold legal meetings, sir?

A. Yes.

Q. Who would participate in the legal meetings that you held during October, November, December of 2006 that were related to this Haditha matter?

A. Say that last part again.

Q. The Haditha/Hamdaniyah/CDA type legal meetings during the October, November, December time frame of 2006, sir?

A. Well I commanded both MARCENT and I MEF at the same time, so whichever JAGs, SJAs, investigating officers were dealing with things would be in the office. And we'd go through -- for example, I MEF cases. The I MEF SJA would be talking. We were doing MARCENT; the MARCENT SJA would be talking. That sort of thing.

Q. Now, sir, for purposes of this motion and the reason we're here today, sir -- at least in part -- one of the issues is Colonel Ewers. Now in October, November, December 2006, Colonel Ewers wasn't on your staff, was he, sir?

A. He was in Iraq on General Zilmer's staff.

Q. General, do you recall when Colonel Ewers who ultimately joined your staff on I MEF returned from Iraq to CONUS?
A. February or March of 2007. Although generally, we'd give them some time off and I had another MEF staff judge advocate during this time. And until Colonel Ewers had backed and taken his post-deployment leave, I don't recall seeing him until some time in March or April.

Q. So by the time that you had made the decision to cause these allegations to go to a 32, Colonel Ewers wasn't serving on your staff, was he, sir?

A. No.

Q. In fact when the preferral event took place in Staff Sergeant Wuterich's case on 21 December 2006, Colonel Ewers wasn't serving on your staff at that point?

A. That's correct.

TC (Capt Gannon): Sir, when you voraciously consumed the thousands of pages of material --

CC (Mr. Faraj): Objection. Characterization of voracious and -- just ask the questions, Your Honor.

MJ: Your objection's overruled. I understood he said he reviewed a voluminous amount of materials. That's proper.

Go ahead.

Questions by the prosecution (continued):

Q. Sir, when you read the thousands of pages of materials associated with the investigation of the allegations arising out of Haditha 19 November 2005 -- when you read those materials, when you looked at the photographs contained in Appellate Exhibit LXI, Colonel Ewers didn't serve on your staff at that point, did he, sir?

A. That's correct.

Q. And when you conducted these information gathering meetings during the October, November, and December period of 2006, Colonel Ewers didn't attend those meetings; is that correct, sir?

A. He was not in the United States at that time.

Q. What was the purpose of those meetings, sir?

A. It was for me to get situational awareness. There was a

number of cases both I MEF and MARCENT. And basically, we had a matrix and that matrix had each person's name, and then it went through where each case was. And I tracked through -- and really it was to make certain that I wasn't creating a lethargy in the decision-making. I would know when decisions were coming and I could schedule time on my calendar for those decision meetings, because I would return from two weeks or so gone to central command and I needed to get current again on what had happened during the proceeding two or three weeks.

Q. Take in the information, process it, update the matrix?
A. Right.

Q. Keep the general -- keep the consolidated disposition authority aware of the development of the cases?
A. Right.

Q. The facts and the investigations as they were ongoing?
A. Well, it focused really on what is the next step and are we ready to go forward to the next step or if they're at the decision point that is going to come up so I could allocate time. We were in the midst of putting together the surge into Iraq at this point and there was a significant operational focus in the command. I did not want to abrogate my legal responsibilities to maintain full awareness of where each case was. I didn't want to deal with them as all Haditha cases or all Hamdaniyah cases. I wanted them separated out by individual.

Q. Yes, sir.

And just so that the record is clear, Staff Sergeant Wuterich was not the only individual associated with the events of 19 November 2005 in Haditha, Iraq. He was not the only individual against whom murder charges were preferred on 21 December 2006; is that correct, sir?

A. That's correct. I don't recall how many I preferred on any single date, but that's correct.

Q. We'll be talking about Lance Corporal Tatum in a few minutes, sir. Do you recall Lance Corporal Tatum as having had charges preferred against him on 21 December 2006?

A. I do.

Q. And do you recall whether or not those were murder

- charges, sir?
- A. That's what I preferred.
- Q. Similar to your decision to cause this accused's case to go to an Article 32 by December of 2006, you had made a similar decision, sir -- fair to say? -- about Lance Corporal Tatum's case as well?
- A. That's accurate.
- Q. General, prior to Colonel Ewers' return to CONUS in February, March of 2007 -- after the preferral, after causing these cases to go to an Article 32 investigation --
- A. Um-hmm.
- Q. Before he came home, did you ever call Colonel Ewers, sir, and seek his advice on these cases?
- A. No.
- Q. Did you ever speak with him about these cases?
- A. No.
- Q. Did you ever consult with him in any way, shape, or form, sir, prior to his arrival back in CONUS?
- A. Never.
- Q. Sir, I'd like to move into another area. I'd like to discuss the decisions that you made with respect to Colonel Davis' case.
- A. Okay.
- Q. I'm handing the witness Enclosure (16) to Appellate Exhibit LX which is at page 412 of the government's motion. I'm retrieving from the witness Appellate Exhibit LXI.
- General, if you would, please take a look at that page I've opened up for you there at Enclosure (16).
- A. This is the letter to the Commandant of the Marine Corps reporting I did not find misconduct on Colonel Davis' part around those -- the circumstances around the -- relating to the circumstances around this incident.
- Q. General, what date did you -- was that letter signed?
- A. 9 August 2007.
- Q. And what decision did you advise the Commandant that you had made with respect to taking action in Colonel Davis'

- case?
- A. To award him a nonpunitive letter of caution.
- Q. General, if you would please, would you flip two pages to -- three pages to Enclosure (17), sir. It's dated 5 September and it says the Secretary of the Navy at the top.
- A. Yes.
- Q. Sir, do you recognize that document?
- A. I do.
- Q. What is it, sir?
- A. It's a Secretarial Letter of Censure for Colonel Davis from the Secretary of the Navy.
- Q. Do you recall the issuance of this Secretarial Letter of Censure to Colonel Davis on or about 5 September 2007?
- A. I do.
- Q. Sir, I'm going to retrieve Appellate Exhibit LX.
- Thank you, sir.
- 9 August 2007, sir. You've told the Commandant I'm giving Colonel Davis a nonpunitive letter of caution?
- A. Right.
- Q. 5 September, the Secretary of the Navy issues a Secretarial Letter of Censure.
- A. Um-hmm.
- Q. Did that event have any moment to you, sir? Did it have any impact on the way you analyzed these cases or what you could do in your capacity as consolidated disposition authority?
- A. No.
- Q. Why?
- A. Secretary of the Navy, civilian control of the military, has the authority to do as he believed right. I have the same authority.
- Q. General, did you feel in any way, shape, or form that you needed to take more aggressive actions, more -- a firmer stand on the outcome or disposition of these cases because of this issuance of a Secretarial Letter of Censure on or about 5 September 2007?

A. No.

Q. In fact, sir, after the issuance of the Secretarial Letter of Censure on or about 5 September 2007, you referred charges against Lance Corporal Tatum to a general court-martial on 19 October 2007?

A. It was about a month later, yes.

Q. Secretarial Letter of Censure issues; approximately a month later you refer charges to a general court-martial against Lance Corporal Tatum?

A. Um-hmm.

Q. Now earlier, sir, on the 21st of December, 2006, we talked about the preferral of murder charges against Lance Corporal Tatum?

A. Right.

Q. Do you recall the nature of the charges that you referred on 19 October 2007 in Tatum's case?

A. It was manslaughter.

Q. Sir, what is your understanding -- is manslaughter a more serious or less serious crime than murder?

A. Less serious.

Q. You departed downward in terms of the referral event in Lance Corporal Tatum's case after the issuance of the Secretarial Letter of Censure?

A. Yes.

Q. You didn't feel obligated to refer murder charges against Lance Corporal Tatum in October of 2007?

A. I'm obligated to do my duty. Let me -- you mean because the Secretary of the Navy had gone for a harsher decision on Colonel Davis, did I feel I had to do harsher -- make harsher decisions?

Q. Yes, General.

A. No, I did not.

Q. During that same week, sir, 15-19 October 2007, you also referred to a general court-martial dereliction charges against Lieutenant Colonel Chessani, the battalion commander of 3d Battalion, 1st Marines on November 19, 2005?

A. That's correct.

- Q. Sir, I'd like to talk with you about that week of 15 to 19 October of 2007 and some of the events that were going on.
- A. Um-hmm.
- Q. Now we discussed the fact that you referred to a general court-martial Tatum's case during that week as well as Lieutenant Colonel Chessani's case.
- A. *[The witness nods head in the affirmative.]*
- Q. Can you describe, sir, for the military judge the steps you took and the materials you reviewed prior to causing the referral of those two cases to a general court-martial?
- A. I can. I went back through based on the Article 32 investigating officer's report and confirmed certain things in the reports of investigation from the NCIS. Then I received from Lieutenant Colonel Riggs -- we had talked about when he would need time on my schedule, and then we spoke -- I believe it was in person. I believe he was out there, but I may be wrong on this. It may have been by TANDBERG. It was by TANDBERG or in person though -- what his Article 34 -- what his advice was. This is where he privately comes in, and he and I make the decision. I make the decision, but he and I have the discussion and he gives me his legal advice about the Article 32 and what he recommends.
- Q. 15 to 19 October then, in all, again, the review of these materials, it sounds like your focus was on the Tatum case and the Chessani case during that week?
- A. I believe on Tatum, it may have been Lieutenant Colonel Kumagai guy was acting as my staff judge advocate. He was also a MARCENT staff judge advocate. So, yes. But -- to answer your question, yes, but it may not have been Colonel Riggs alone. It would not have been him alone on both those cases.
- Q. Now, sir, immediately prior to that week, that 15 through 19 October 2007 -- prior to that week, Lieutenant Colonel Paul Ware had completed -- at least initially -- his investigating officer's report in this accused's case on or about 2 October.
- A. Do you recall that?
- A. That date sounds accurate, yes.
- Q. Now, sir, you just described the process by which you

reviewed materials, consulted with the cognizant SJA -- whether it be Lieutenant Colonel Kumagai in the Tatum case or Lieutenant Colonel Riggs in the Chessani case -- during that week of 15 to 19 October?

A. Yes.

Q. Did you have occasion to review, prepare, analyze, or contemplate the future of Staff Sergeant Wuterich's case in the wake of that 32 report coming out?

A. No.

Q. Why, sir?

A. We were -- I was in the act of turning over the command to General Helland. We had significant operational matters underway in the CENTCOM AOR, and I was totally focused legally on the one's -- the cases that had matured to a point that I could methodically go through them. There was no time -- plus I didn't have the Article 34 letter anyway, so it was impossible for me to go forward at that point. The SJA needed time to go through it obviously.

Q. Yes, sir.

A. To go through Staff Sergeant Wuterich's Article 32 and give me his SJA advice.

Q. And review the commentary on the evidence submitted by the government and the defense related to that Article 32?

A. Correct. But even then I would need time after the Article 34 to go through and review the reports of investigations I had on the others to confirm my understanding of the facts.

Q. Sir.

And so the court is clear, when did you depart Camp Pendleton, sir? Do you recall approximately?

A. Late-October 25, 26, 27, 28. I had to drive across country and take command in Norfolk in early-November.

Q. And, sir, do you recall approximately when Lieutenant General Helland assumed command of Marine Corps Forces Central Command I MEF?

A. It was on my drive across country. There was no change of command ceremony. The Senate had not acted yet, so I had to do it by telephone. I think I was somewhere around Little Rock, Arkansas.

Q. Okay, sir.

So then, General, it's fair to say that you had no hand in the subsequent referral of this accused's case?

A. That's accurate. I read about it I think a couple months -- it might have been around Christmas. I read about it in the newspaper. That's when I found out about it.

Q. Did you have any conversations, General, with Lieutenant General Helland about what you thought was appropriate in this accused's case?

A. No.

Q. Did you provide him with any guidance or and suggestions about the way in which he should go forward with any of the Haditha related matters?

A. Not at all. It never came up.

TC (Maj Gannon): May I have a moment, Your Honor?

MJ: Sure.

TC (Capt Gannon): Sir, those are all the questions I have.

Thank you, General.

MJ: Would you like to take a break, Mr. Faraj, or are you ready to proceed with cross-examination?

CC (Mr. Faraj): We're ready to proceed if the witness is fine with it.

MJ: General, you still good?

WIT: I'm still good, Your Honor.

MJ: Thank you.

Please proceed.

CROSS-EXAMINATION

Questions by the defense:

Q. Good morning, General.

A. Good morning.

Q. Sir, you've been a general court-martial convening authority four times?

A. I believe so, yes.

Q. Division Commander, Brigade Commander, MEF Commander, and in your current --

A. Quantico, yes. So four times.

Q. Perhaps even five times. Do you have GCM authority -- GCMCA authority at this time?

A. It's delegated at the component level.

Q. Do you delegate it, sir?

A. I believe so.

Q. Very well. So at least four, perhaps five?

A. Yes, that's accurate.

Q. What does being a general court-martial convening authority mean to you?

A. To maintain good order and discipline in the command. Look out for the process of the legal system. Make sure that the rights of everyone are protected.

Q. I'm going to try to focus you a little bit, sir. I'm specifically speaking about the authority, your power. Does that resonate with you in any way?

A. I would say it's to investigate, defend, and prosecute, if necessary, violations of the UCMJ.

Q. As the general court-martial convening authority in a command, sir, is there a higher authority than yours that you know of?

A. Secretary of the Navy, for example, did something different than I recommended. So, yes.

Q. Yes, sir. But that was the exception to the rule. You've never been overruled before?

A. I'm not sure I can confirm that. I can't recall when I've been overruled before, but I can't confirm that. I think you're right.

Q. Let's try to explore that a little bit. Have you ever taken action on a case after a court-martial and had someone step down and say -- except perhaps a Presidential pardon, and we're not going to get in to that -- but do you know of any time where a Secretarial level interjection came in and said, General, you're

wrong -- except in this case -- you're wrong; we're doing something else?

A. Except in the Tatum case?

Q. Yes, sir. Or, no. In the Chessani case.

A. Okay. The Chessani case. No.

TC (Maj Gannon): Your Honor, objection.

WIT: I've been a summary --

MJ: General, one moment please.

WIT: Yup.

MJ: Major Gannon.

TC (Maj Gannon): My objection is that the question is unclear. He said the Chessani case and I think what we're talking about here is the Colonel Davis case. And I want to make sure the record is clear that it's not the Chessani case, sir, so we have a factual problem here.

CC (Mr. Faraj): I misspoke. I meant the Davis case.

MJ: Okay.

CC (Mr. Faraj): I'm sorry, sir. The Davis case.

MJ: Thank you. Please go ahead.

WIT: I have been, for example, a summary court-martial officer and I can't tell you what happened on appeal and all, but I think you're accurate.

Questions by the defense (continued):

Q. As far as general court-martials[sic] go, I'm accurate?

A. Yes. Okay. I think so.

Q. In fact, as a general court-martial convening authority, you're sort of the law giver. I mean, this court wouldn't be here except that a general convened it. Would you agree with that, sir?

A. Yes.

Q. And that authority springs from the President and the UCMJ?

A. Yes.

Q. In the case of Colonel Davis, however, you took action and then you were overruled or someone else stepped in and said, No, we're going to do something different?

A. That's correct.

Q. And that was Secretary Winters?

A. It was.

Q. You had reviewed -- and I'm going back to your previous testimony -- as I recall over 9,000 pages of investigation?

A. Right.

Q. You spent countless hours.

A. *[The witness nods head in the affirmative.]*

CC (Mr. Faraj): And you had between 6 and 20 meetings, legal meetings on cases, on the series of Haditha cases? Do you recall?

TC (Maj Gannon): Your Honor, objection.

MJ: Basis?

TC (Maj Gannon): Vague. 6 to 20 legal meetings when? We need to specify when because if they're -- otherwise they're not relevant.

MJ: The objection's sustained.

Just give us a time frame.

Questions by the defense (continued):

Q. You've had a lot of meetings, General, on these cases?

A. Absolutely.

Q. Over a dozen?

A. I think it was well over a dozen.

Q. So fair to say -- and we got this testimony from Major Gannon earlier -- that you were pretty familiar with these facts or as familiar as someone can be based on what was presented to you?

A. And my own study, yes, sir.

Q. And you decided that the appropriate action was a

A. nonpunitive letter of caution to Colonel Davis?
That's correct.

Q. Up to the point where the Secretary of the Navy stepped in and issued a letter of censure, you had decided to dismiss charges against Marines that had -- junior Marines that had gone forward in this case in the Article 32s -- and I'm specifically referring to Lance Corporal Sharratt.

A. Do you recall that?
I remember dismissing the charges to Lance Corporal Sharratt, yes.

Q. And after the letter of censure or about a month later, you referred charges in Lance Corporal Tatum's case though not as serious as the initially preferred charges?

A. That's correct.

Q. And the Article 32 officer on that case was a gentlemen -- an officer by the name of Lieutenant Colonel Ware?

A. Yes.

Q. And he's -- he was a military judge at the time? He was a sitting military judge --

A. Right.

Q. -- that you had assigned as the IO?

A. Right.

Q. An IO is the investigating officer in this case.

A. Um-hmm.

Q. Now he recommended those charges be dismissed?

A. Um-hmm, he did.

MJ: Counsel, which -- was that Tatum?

CC (Mr. Faraj): Tatum.

MJ: That was the Tatum case. Thank you.

Questions by the defense (continued):

Q. General, you have gone to great lengths as a convening authority in these cases and in the Hamdaniyah cases to ensure, as you put it, to be the convening authority for

- both the prosecution and the defense?
- A. Exactly.
- Q. In fact, I personally remember you calling me once and making sure -- when I was still in uniform -- that I had everything I needed as a defense counsel.
- A. *[The witness nods head in the affirmative.]*
- Q. I got a personal call from you and you asked if I had everything I needed. And so you were going to great lengths to make sure that the process was fair?
- A. I did my best.
- Q. Is that a fair --
- A. Yes.
- Q. You ensured -- for example, in the Hamdaniyah cases and the trials that went forward that members were seated who had the combat experience necessary to understand the complexity of the issues in the case?
- A. I thought that was important.
- Q. And I think your words you wanted to achieve intellectual dominance with respect to the facts and the issues in these cases because it was a very challenging ethical environment and combat environment?
- A. That drove me to read the amount that I did, yes.
- CC (Mr. Faraj): Yet, sir, you felt it necessary to consult with judge advocates at certain points during this process; is that right?
- TC (Maj Gannon): Objection. Vague as to identity and vague as to time. This issue is crucial on the timeline, sir.
- CC (Mr. Faraj): Your Honor, we're going to get there if you would just let me.
- MJ: Okay. The objection's overruled.

Go ahead. It's a proper question.

Questions by the defense (continued):

- Q. You felt it necessary to consult with various judge advocates on this Haditha case?
- A. Absolute -- if you mean Article 34. For example, any time I came to a decision point, I would sit down privately with that staff judge advocate and make

certain I had his legal advice.

Q. And when we're talking about judge advocates for the Hamdaniyah case and the Haditha case -- and specifically Haditha. I'm not worried about Hamdaniyah. Your staff judge advocate was Lieutenant Colonel Riggs and on one case, it was Lieutenant Colonel Kumagai?

A. That's correct.

Q. Sir, why did you feel it necessary to consult with those gentlemen when you had such a grasp of all the facts perhaps, I would say, probably better than they did?

A. I intended to have a better grasp than anyone before I subject Marines to the kind of situation we're in today. But I also need legal advice. This is a legal system that I must play a part in. And I had to have the legal advice of the staff judge advocate.

Q. And that's because you were familiar with the rule that required you to get advice from a staff judge advocate before a case can be referred to trial by court-martial?

A. Well, more than rule. It's a matter of fairness. I don't know how court systems work. That's what we pay the staff judge advocates to be conversant with.

Q. I want to digress from this point a little bit, sir. I've heard it repeated on several questions from Major Gannon today about private meetings and that had never come up in previous testimony. Would you -- did you discuss these private meetings with Major Gannon before testifying today?

A. Yes.

Q. And when did those discussions take place?

A. Yesterday.

Q. Would you tell me about how that came to be, sir?

A. He was asked me how I made decisions, and I said that was between me and the staff judge advocate. Obviously, he wouldn't have been in the room in those days just like defense counsel wouldn't. And he wanted to know how I did it.

Q. Was there -- did that -- did that meeting yesterday with Major Gannon jog your memory with respect to the private meetings or had you never been asked that question in previous testimony?

A. I don't recall ever being asked that question before.

- Q. Would you distinguish -- now I want to get to specifics about the number of meetings you had on the Haditha cases or as specific as possible. And I'm not talking about the private meetings. I know you had legal meetings where you brought a bunch of staff together.
- A. Oh, yes.
- Q. Between October of 2006 and about November -- or October of 2007 when you turned over command, about how many meetings would you say you had?
- A. You know, I would hesitate to hazard a guess. These legal issues consumed -- not just the time to read about them but numerous coordination meetings, discussions with -- and remember, I'm dealing with the national security espionage case at I MEF, the normal things that come up in running a 40,000-man organization, plus Hamdaniyah, plus Haditha. So I really -- I would tell you that a dozen is very conservative. It was more than a dozen.
- Q. But perhaps at least once a month, maybe twice a month between -- in that 12-month period?
- A. It would depend on how often I was in Camp Pendleton, but I think that's a fair approximation.
- Q. And the way these meetings took place is a message was sent out to all the participants using the Outlook calendar, something like that?
- A. We had a matrix that showed all the cases that were -- the matrix drove the meeting. You'd start at the top with an individual's name, then go across on is the investigation complete, is there going to be charges preferred, is the Article 32 underway, or is it delayed. There were -- for example, in this case there were delays -- legitimate delays by the defense.
- And it just kept me aware of where each one was at make. Really it was to make certain that I was not becoming inaccessible with the other things that were on my plate operationally, logistically. Again, we were going into the surge into Iraq and I did not want these to languish because of my own lack of accessibility to the trial or defense counsels, investigating officers, Article 32 officers, SJAs. It was a matter of disciplining my schedule. So if something came up, I would say, Okay. I need time on my schedule to meet with trial counsel, defense counsel, Article 32 or Article 34 advice letter. That sort of thing.

- Q. These meetings normally lasted between two and five hours?
- A. Sometimes longer. But, yeah, I think that's fair about what they usually lasted.
- Q. And most of the time -- most of the meetings, the time in the meetings was consumed by discussion of MARCENT cases, which is Hamdaniyah, Haditha, and the case in Afghanistan?
- A. No. In many cases, yes. But there would be times when the growing complexity of another case at I MEF would take most of the time. Actually it was a very, very complex case.
- Q. Well, are you referring to the national security cases, sir?
- A. Yes.
- Q. When did those break out?
- A. The investigation by NCIS -- I can't give you a date. Some time ago now. But the NCIS alert that we had a problem was when obviously it would start -- these meetings were not just about court cases. They were also about investigations going on. But I don't recall.
- Q. Was it Summer of '07? About Summer of '07?
- A. I don't recall. It may have been, but I just don't recall.
- Q. Well, it didn't happen in '06. Those cases broke out in '07. Do you recall that?
- A. I believe you're right.
- Q. And just trying to see if we can jog your memory, do you recall having those discussions with an SJA before Colonel Ewers arrived?
- A. Yes. Lieutenant Colonel Margolin I believe was the MEF SJA at that point. A Lieutenant Colonel Daren Margolin I believe. That's phonetic.
- Q. Now, do you recall having national security case discussions with Colonel Margolin -- Lieutenant Colonel Margolin or it's just Colonel Ewers?
- A. Yes. I know I had discussions about it with Colonel Margolin.
- Q. Okay. And now they turned over in -- some time in February or March of '07?

A. I was still dealing with him significantly after February or March of '07.

Q. There was some testimony before that -- by you and Colonel Ewers as to the way these meetings were conducted. Do you recall testifying --

A. Yes.

Q. -- previously?

Now to the best of your knowledge recollection, did you ever have any meetings, legal meetings that only discussed MARCENT cases?

A. I may have. They were legal meetings. They addressed any legal matters and all -- every one who had to be there had to be there for them. I didn't have that much time to parse them out.

Q. Very well, sir. I'm just going to try to rely on your previous testimony because it was closer in time unless you remember something differently.

A. Fine.

Q. Now, how well do you know Lieutenant Colonel Riggs, sir?

A. I know him very well.

Q. Would you describe Lieutenant Colonel Riggs to us? And what I'm talking about is his demeanor, his -- what is your impression of Lieutenant Colonel Riggs?

A. Adjective to describe him?

Q. Would you say he's soft-spoken?

A. No.

Q. Not very aggressive? Well, how would you describe him?

A. Focused. Often intense intellectually. Cryptic. Argumentative.

Q. When you say "argumentative," what do you mean, sir?

A. I mean I would say one thing and he would argue with me about it.

Q. Like what with respect to these cases?

A. What he thought I ought to do and what I -- I would explore different ideas with him so he knew where my thinking was at based on my study and my review of whatever was coming in.

- Q. Did you have any impression of why he would be at odds with you when you were achieving such a personal familiarity with the facts in the case based on the evidence?
- A. Well, he was the staff judge advocate. I'm an infantry officer.
- Q. Well, the being at odds with you wasn't about the -- your legal decisions, it was about the facts of the cases; is that not right?
- A. It was usually about what was legally appropriate based on what, for example, an Article 32 officer had come in with and what I was deciding to do about it.
- Q. Okay. So we know that he disagreed with the IO, with the Article 32 officer with respect to Lance Corporal Sharratt?
- A. Can you remind me about this?
- Q. Do you recall Lieutenant Colonel Riggs sending Lieutenant Colonel Ware an e-mail about his decision in the Sharratt case to dismiss charges?
- A. Yes.
- Q. Were you privy to that conversation? Did he discuss that with you?
- A. No, I don't believe so. I think -- is this where I shift the SJA?
- Q. Yes, sir.
- A. When I became aware of it, I was displeased and I assigned Lieutenant Colonel Kumagai to take over.
- Q. But he didn't discuss that with you before he sent that e-mail?
- A. No.
- Q. Were you concerned after Lieutenant Colonel Riggs sent that e-mail with respect to any other cases that he was the legal adviser on?
- A. No. I thought it was a -- obviously I thought it was inappropriate and I removed him as my legal adviser on the case. But I had numerous data points on him. I'd worked intimately with him now over some period of time and I'm a pretty good judge of character.
- Q. With respect to the advice that you got from SJA, sir, did you receive advice on which Marines -- accused

Marines you should dismiss charges on and grant testimonial immunity?

A. If they went up for an Article 32 that would have been part of the Article 34 advice. If I had questions about whether someone should even have charges preferred, then it would have happened during those discussions with the SJA.

Q. Well, are you familiar with a Corporal Dela Cruz?

A. I know the name and I -- but I do not recall the specifics. I have not reviewed each of the many cases in preparation for today.

Q. You granted him testimonial immunity to testify in these cases --

A. Okay.

Q. -- in January of '07, perhaps December of '06.

A. Okay.

Q. Does that refresh your memory at all, sir?

A. It sounds accurate, yes.

Q. And then subsequently charges were dismissed with prejudice. Do you know what that means?

A. At the time I did. But I couldn't give you a legal definition of it now. I remember dismissing the charges.

Q. Now, sir, I know you take great care in ensuring that only -- that Marines are charged only for those things that they may be responsible for. Is that a fair statement?

A. That's true.

Q. And I know that your view on these types of matters is you are going to give the Marines the benefit of the doubt until you have a reason differently so that when Marines are in combat, they get the benefit of the doubt that they're acting within the bounds of the law. Is that a fair statement, sir?

A. Yes.

CC (Mr. Faraj): Did you get any advice from your SJA on the NCIS conclusion that determined that Corporal Dela Cruz was probably the shooter of four -- of at least four of the five men at the car?

MJ: Hold on, please, General.

TC (Maj Gannon): Objection. Lacks foundation. He's already indicated -- the general's already indicated he does not have a recollection of these matters with specificity and this question lacks foundation. We haven't even established that he's familiar with that -- that NCIS conclusion. And I don't have a source document to refer to to make sure we're talking about the same thing at the same time, sir. It's too vague and it lacks foundation.

MJ: Okay. What's the relevance of this testimony, Major Faraj?

CC (Mr. Faraj): To test the --

MJ: Excuse me. I think I called you Major Faraj.
Mr. Faraj.

CC (Mr. Faraj): Both work, Your Honor.

MJ: I'm sorry.

CC (Mr. Faraj): To test the independence of the SJA, because we're arguing that he was influenced. To test the independence of the SJA in giving free advice -- free legal advice, free of any taint to the convening authority.

MJ: What does that have to do with Dela Cruz?

CC (Mr. Faraj): Well, I've built a foundation that the general would only refer charges when he has facts before him that suggest that a Marine is culpable. In this case, NCIS did some reconstruction and they concluded that Dela Cruz was probably the shooter.

MJ: Okay. I'm going to cut you off there.

I'm going to overrule the objection. I'm going to allow you to just ask the question so we can hear from the witness.

Go ahead, ask your question.

Questions by the defense (continued):

- Q. Do I need to repeat the question, sir, or do you remember it?
- A. Please.
- Q. Okay. My question to you was, do you remember the foundation I built -- I asked you that you would only refer charges when there were facts to support those charges --
- A. Right.
- Q. -- good faith facts?
- A. Yes.
- Q. And my question to you, sir, is did you get any advice from your SJA regarding the NCIS reconstruction of the incident at the white automobile on the street --
- A. Um-hmm.
- Q. -- and that that reconstruction suggested that the shooter is in fact -- of at least four of the five men, maybe five, is Corporal Dela Cruz and not Staff Sergeant or then Sergeant Wuterich? Did you get that advice from your SJA?
- A. I believe I already had that from my reading of the reports of investigation and it certainly came up in the discussions with my SJA.
- MJ: Excuse me. And the SJA that you're referring to is Lieutenant Colonel Riggs?

CC (Mr. Faraj): Lieutenant Colonel Riggs.

MJ: Okay. Thank you. Go ahead.

Questions by the defense (continued):

- Q. Did at any time Lieutenant Colonel Riggs suggest to you that perhaps those charges should be dropped against Staff Sergeant Wuterich because even the NCIS reconstruction suggests that it was Corporal Dela Cruz?
- A. I don't recall that.
- Q. And those charges remain on the charge sheet. Do you know, sir, if those charges remain on a charge sheet against Staff Sergeant Wuterich?
- A. No. I -- after preferring the charges and monitoring the Article 32, I left Camp Pendleton and the command

before the Article 34 advice and the investigating officer -- the Article 32 officer's report got to me.

Q. Sir, who was your deputy when you were the MEF commander and the MARFORCENT commander?

A. I had different deputies of each command. They had different staffs. But Brigadier General McMillan and when Lieutenant General -- excuse me, then Major General Helland gave up command of the 3d Marine Air Wing in the Summer of 2007, he became my deputy. July, August I think is when he actually showed up there after taking some leave.

Q. Did he attend the legal meetings, sir?

A. At the very tail end, he would of attended some. He may have attended some. I don't recall him, but he was attending every meeting I was holding on operations, logistics. I'm sure he would have been in there if he was aboard the headquarters at that time.

Q. I want to focus you, sir, specifically on the legal meetings.

A. Right.

Q. What type of turnover did you conduct with General Helland?

A. Outside of the legal meetings, not much. He was there. He had a copy of the matrix. He knew what the status was of each case that he would be inheriting. In a couple cases it appeared that I would be able to take action. By September we thought, for example, Tatum and another case -- I forget which one right now -- would come to -- would mature sufficiently for me to take action. And it was becoming obvious that an awful lot of things were going to be left -- what was left on the matrix was going to be left for him.

Q. How did you come to decide what you would take action on and what you would leave for him?

A. It depended on whether or not I got it. Basically there was a process, the matrix helped discipline it frankly, and I could monitor where each one -- each case was at. Had the Article 32 officer reported out yet? What was the anticipated date if we knew one? Was the Article 34 advice letter prepared yet? You had to give the -- I had to give the SJA time to prepare his advice to me. And it didn't leave much room for imagination frankly.

Q. So would that have happened a meeting where he was also in attendance and you're engaging with the staff and so he knows by osmosis what's going on?

A. He would have seen the matrix. He would have had a copy of the matrix, absolutely.

Q. So although you didn't have -- earlier on direct, you said you didn't have any discussion with General Helland on Haditha?

A. That's correct.

Q. But he was in the meetings where you were discussing with your staff Haditha matters?

A. He was. The Haditha matters were the progress of each.

TC (Maj Gannon): Objection.

MJ: Yes?

TC (Maj Gannon): Mr. Faraj has mischaracterized the question. The question was did the general give Lieutenant General Helland any guidance on Haditha? No one ever said on direct that he had never discussed these matters with General Helland. The question was --

CC (Mr. Faraj): I believe he said discussed.

TC (Capt Gannon): -- guidance and influence --

CC (Mr. Faraj): I remember you said discussed.

MJ: The objection's overruled.

Go ahead. You can repeat the question, Mr. Faraj.

Questions by the defense (continued):

Q. Sir, the question was -- regardless of whatever discussions you may have had with General Helland, General Helland's awareness of Haditha matters would have developed in the meetings because he was there?

A. Well, he would have had to not been on the planet Earth as much as it had been in the newspaper and the *60 Minutes* and everything else. He knew he was inheriting Haditha.

Q. I understand. But with respect to actions you're taking and actions that he may need to take.

A. He could of read from the matrix that he was going to

inherit some of those cases.

- Q. And how did that information get on the matrix?
A. I believe I held the SJA responsible, but basically it was administrative. It was dates. It was the name of each individual -- I MEF, MARCENT -- that I was responsible for as the general court-martial convening authority. Where they were at. Had I dismissed charges, then they would fall off the matrix. That sort of thing.
- Q. Who had access to that matrix, sir? Was it on line? Is it hard copy?
A. No, it was hard copy. At least I would -- I'm sure it was hard copy. It would be in my book for the day before that I was going to hold meetings so I could go over it. Know what questions I wanted to ask. That sort of thing. But it was whoever was in the meeting could have seen it.
- Q. How did they see it?
A. In hard copy.
- Q. Did you have copies that were passed out?
A. Yeah, in the meeting.
- Q. Okay, sir.
A. Um-hmm.
- Q. So you got updates -- you actually updated the matrix yourself or did you have somebody update it for you?
A. Both. I mean, I would give input on it. I'd say, Okay. You need time for me to review something so get it on my schedule for -- you know, the SJA would say in three days I need to see you, or next week I'm going to be coming to you with this. And it was a matter of making certain that I was allocating the time necessary.
- Q. When you say "SJA," are we referring to a specific SJA?
A. No. Whichever SJA was watching over the case. If the trial counsel needed to see me, if the defense counsel wanted to see me, they were the ones to make sure that I was available.
- Q. I asked you a few questions about Colonel Ewers.
A. Um-hmm.
- Q. Now you met Colonel Ewers when he served as your

division SJA?

A. I may have met him before then, but I knew him well as the division SJA.

Q. And did you -- did he serve with you again as brigade commander?

A. No, he did not.

Q. So just as a division SJA?

A. Yeah. I was a brigade commander before I was a division commander, so he was not my SJA or I never served with him as a brigade commander.

Q. So the first real work experience you had with Colonel Ewers was as the division SJA?

A. That's true.

Q. And as the division SJA -- as the division commander, you came up with the means or a method to investigate law of war, law of armed conflict allegations?

A. I did.

Q. And describe that, please, for the court, sir.

A. I read a book about Vietnam work, law of war violations by Gary Solis and it made clear that a unit could not investigate itself. So I set up a rapid incident assessment team. It was -- any kind of an allegation, this team would move out of the division headquarters. It had an SJA, a public affairs officer with a photographer, so he could take pictures. Frankly I used the combat camera aspect of public affairs. Had a Marine gunner who could look at weapons, cartridge cases, bullet holes. Had a doctor who could look at wounds if there were wounds. I think there was a couple drivers. I may not have the full composition. It's been awhile. And in the event of any allegation, they would be the people I sent in to independently assess what had gone on.

Q. And, sir, when you came up with that idea, did you come up with the -- you know, the physician, the gunner, the combat photographers?

A. I did.

Q. And where did those come from? Is that from the book or did you just kind of think that? Is that originally what Gary Solis put in his book or did you just --

A. No. No, I thought of it.

- Q. Okay. So there was a problem that you thought needed addressing and you created a solution to address the potential problems in law of armed conflict violations or potential violations?
- A. That's correct. In all, I would go down and speak to every infantry battalion and I would tell them this team existed and it was going to investigate any allegations so there was never any sense that this was something they were unaware of as part of setting the conditions for ethical employment of force.
- Q. Did you assign a judge advocate to that team?
- A. Yeah, absolutely.
- Q. And who was that judge advocate?
- A. It was my SJA, Lieutenant Colonel Ewers.
- Q. What discussions, if any, did you have with him with respect to the idea -- the --
- A. I don't recall. I would of charged him with completely looking into in a preliminary inquiry way trying to ascertain the facts if there was ever an allegation of a violation of a law of war. But, I mean, I trust Marine officers. When I set up a team and I tell them what the mission is, I leave it to them to figure out how best to do it.
- Q. So you kind of -- you created the -- you had the idea, you created the concept of the team, and then you assigned people to it?
- A. I went -- after reading the book, I sat back and thought about what happened to this battalion in Vietnam that had to lose one of its three field grade officers in the midst of combat operations to distractions and I thought of what I would need to do a rapid incident assessment. And I came up with a photographer, doctor, gunner, lawyer. That sort of thing.
- Q. At -- now, on one of these missions -- there was an allegation, you sent a team out on a mission and subsequent to that, Colonel Ewers was wounded?
- A. Yes.
- Q. At the time that he left the battlefield when he was medevaced, how long had he served in your command as -- in the division? And when I say "he," I'm referring Colonel Ewers.
- A. I came out of the Afghanistan -- I think I took command

of the division in August, deployed I'd say six or eight months. I'm not positive he was the SJA when I arrived there. He probably was. But from the time I arrived at the division until he was wounded in action in the early days, I think -- literally in the first 72 hours of the invasion of Iraq, he was severely wounded and medevaced.

Q. Sir, when did the division -- when did you deploy? When did you deploy and when did your staff deploy?

A. I took a 100-man planning element in right after the Marine Corps -- mid-November of 2002. And the division began deploying in earnest I believe it was in -- been some action-packed years here. I believe in January of 2003. We attacked in Spring 2003. He was hit in the first 72 hours.

Q. Did Colonel Ewers deploy as part of that 100-man team in the Fall?

A. No, he did not.

Q. When did he deploy? When did he link up with you in theater?

A. I think the division staff got there in February and it came over in several tranches. It depended on how many could get here, what needed to be taken care of here. I couldn't tell you. Certainly he was there I'd say by March. Certainly he was there by March or maybe even February.

Q. Based on your experience with Colonel Ewers, have you had a sufficient opportunity to develop an opinion about his personality and who he is as a Marine officer?

A. Very representative Marine officer, highly capable.

Q. Using some adjectives, if you would describe to the court, sir?

A. Certainly. Articulate. Thoughtful. Like all SJAs, argumentative. He was a good Marine officer. A fine Marine officer.

Q. Thank you, sir.

Now, I want to fast forward to February of 2007.

A. Okay.

Q. And I want to specifically refer to the time when Colonel Ewers joins the MEF staff.

A. He -- you mean when he comes back from I MEF forward and

he rejoins us here at Pendleton?

Q. Yes, sir.

A. And he may have checked in in March, but some time in late-February, early-March, do you recall that, of '07? I mean the staff came back and the time sounds accurate.

Q. At that time, there was a conversation between yourself and Lieutenant Colonel Riggs and that conversation was about the role that Colonel Ewers may -- or could or could not have with respect to the MARCENT cases or specifically -- not MARCENT. I want to specifically refer to Haditha cases.

A. Right.

Q. Is that true, sir?

A. That's accurate.

Q. And the conversation went something like Colonel Ewers is disqualified because he acted as an investigator in the Bargewell report and therefore you can't receive advice from him?

A. Right. And the Bargewell report was the initial report that I had read as the -- and then I shifted to the NCIS reports, yes.

Q. And you have referred to the NCIS investigation on several occasions. You're aware that some of the statements that the Bargewell team took were subsumed into the NCIS investigation?

A. I found -- yes.

Q. So there weren't just two independent investigations. There were some crossover?

A. There was. The NCIS investigation being much more -- much broader, much deeper.

Q. And there were a few occasions after Colonel Ewers rejoined the MEF in your headquarters here where the issue of him participating or -- in any way participating in the Haditha cases came up on different occasions -- or he'd get a call or you'd ask him and he'd say, Sir, I can't -- I can't give you advice on this one.

Do you recall that?

A. No.

Q. Never?

A. Lieutenant Colonel Margolin was in there during most of the decision -- during most of the discussion. At some point both Colonel Margolin and Colonel Ewers were in there. And I believe it was by late-Summer, Colonel Margolin had left, transferred and the turnover was complete on the I MEF cases.

Q. But you don't recall other incidents where there may have been a question put out or a request from either defense or government to do something and Colonel Ewers may have said or Lieutenant Colonel Riggs may have said, Sir, you know, that's a MARCENT case. You know, Ewers can't give advice on it.

A. You don't recall any incidents of that sort of thing? Colonel Riggs may have said that but Colonel Ewers never offered and I never asked for any input on MARCENT.

Q. Very well, sir.

Now, Colonel Ewers did sit in in meetings, legal meetings after he arrived at the MEF where discussion of Haditha -- or MARCENT cases took place and specifically Haditha?

A. Yes.

Q. And Colonel Ewers was at all times the most senior SJA in those meetings when he attended?

A. I don't recall that, but it's probably accurate. I mean rank didn't have much to do with it. It had to do with which SJA or which JAG was dealing with which case.

Q. But he was the only O-6 in the room that is an SJA -- that's a judge advocate?

A. As an SJA, probably, yeah.

CC (Mr. Faraj): Yes, sir.

MJ: Mr. Faraj, do you have -- are you about to wrap up? If you wanted to take a break.

CC (Mr. Faraj): I am about to wrap up, Your Honor.

MJ: Okay. We're going to take a break after you finish. I'm not trying to rush you. It's just we've been on the record for awhile.

Questions by the defense (continued):

- Q. Sir, I asked you about this issue when we started with respect to the Secretary Winters' letter and Colonel Davis.
- A. Um-hmm.
- Q. How did you feel when that letter was issued?
- A. I don't have any feelings about this. I do my duty and let others do theirs.
- Q. Well, your position was that Colonel Davis had done -- in fact, if I remember right, didn't you issue a statement with respect to your findings on Colonel Davis or letter?
- A. Public affairs kind of statement. I think we did that on most of the cases, yes.
- Q. And so in your opinion, Colonel Davis was deserving of nothing more than a cautionary letter because you didn't believe he did anything wrong?
- A. That was by my best military judgment, yes.
- Q. And I guess I've asked you the question but as you sit here today, you still have no opinion with respect to you being circumvented and having this official determine that even though you found there's nothing wrong with what Colonel Davis did or if it was wrong, it wasn't criminal -- that this person stepped in and circumvented your authority?
- A. Well, he has his authority. I have mine. And mine is -- as you pointed out -- established by statute. And I was very confident that I had done my homework. And he's entitled to his opinion and his authority to exercise that opinion. It does not change mine.
- Q. Sir, have you had any occasion -- and I know you're [inaudible] to feel them and listen to Marines all the time and you have discussions, so I need you to think on this a little bit. Have you had any occasion to have any of your officers or even enlisted Marines come up to you and say, Sir, if you're not the final -- you know, you're not where the buck stops, how do we know what we get from a secretary or a president if you're not -- if you're the decision maker and they go around you -- have you had -- have you been privy to any of that type of conversation or concerns from Marines or officers?
- A. Not on legal matters. It has happened on operational

matters, frankly. But not on legal matters. I don't think it's ever been brought up and they're pretty outspoken young men. But they have brought it up about other issues and I explain about civilian control of the military.

Q. Do you have any concern as you sit here today, sir, that either for you personally as a general -- as a general or general court-martial convening authority or other generals that your ability to administer the military justice system is compromised by a civilian official coming in and circumventing that authority?

A. You're talking about one with the proper authority of course?

Q. Certainly.

A. Not in the least.

CC (Mr. Faraj): Sir, I probably need another five minutes.

MJ: We need to take a break.

CC (Mr. Faraj): You want to take a break?

MJ: We do need to take a break.

Court will be in recess for ten minutes.

The Article 39(a) session recessed at 1109, 22 March 2010.

The Article 39(a) session was called to order at 1120, 22 March 2010.

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

You may continue your examination, Mr. Faraj.

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

Questions by the defense (continued):

Q. General, I just want to get a sequence down if you could help me out, sir. The Sharratt 32 takes place, the recommendation by the IO, Lieutenant Colonel Ware, is that charges be dismissed?

A. Right.

Q. And you actually dismiss those charges?

- A. Right.
- Q. And you issue a letter -- a pretty nice letter to Lance Corporal Sharratt saying, I don't think you did anything wrong. March on, Marine. Words to that effect.
- A. Do you recall that, sir?
I do.
- Q. You make a decision in Colonel Davis' case. You issue a nonpunitive letter of caution. Secretary Winters overrules you and issues a letter of censure?
- A. Um-hmm.
- Q. That's -- that happened after Sharratt, correct, sir?
- A. Yes.
- Q. And the next event -- major event is Lance Corporal Tatum's Article 32 hearing. The same IO, Lieutenant Colonel Ware, who heard the evidence in the Sharratt case -- essentially the same evidence. Here's the evidence again in the Tatum case; here's some witnesses. Also recommends dismissal of the charges. And in that case you dismissed some of the charges, but you bring back other lesser serious charges against -- referred -- you refer lesser -- charges of lesser seriousness against Lance Corporal Tatum.
- A. That's correct.
- Q. Sir, were you overruled on any other cases in the Haditha -- in anything arising out of Haditha besides that of Colonel Davis?
- A. I don't recall. I frankly haven't tracked -- since leaving here, I've been rather busy and I have not tracked what happened after I acted on several of the cases.
- Q. Well, I'm referring to things that you would know of, sir, if anyone ever issued a letter or called you on anything regarding any of these cases.
- A. Yes, I have been overruled.
- Q. Besides Colonel Davis?
- A. On Haditha -- no, I think on Hamdaniyah. If I recall correctly, I was overruled on retaining certain Marines on active duty.
- Q. Yes, sir. But on Haditha to the best of your

A. recollection, you don't -- you can't think of anything?
No.

Q. Has anyone had any conversations with you -- let me back up. Have any more senior officers or officers of a senior billet or civilian officials have had any conversations with you regarding anything in Haditha?

A. No.

Q. Sir, you testified on direct that you were not in any way personally affected or impacted, more accurately, by the decision of the -- of Secretary Winters with respect to Colonel Davis? Did I say that right or did I capture that correctly?

A. Right. I thought it was a rather minor event frankly.

CC (Mr. Faraj): Do you have any concerns as to that actions impact on Marines of lesser grade or -- and more junior billets?

WIT: None whatsoever.

TC (Maj Gannon): Objection, relevance.

MJ: Response?

CC (Mr. Faraj): It goes directly to the appearance, Your Honor.

MJ: Okay. I'm going to allow the question.

Sir.

WIT: None whatsoever.

Questions by the defense (continued):

Q. So as you sit here today, you're not concerned that that action would have any impact on other junior commanders or Marines in more junior billets to be able to take independent action without having a more senior official circumvent that authority?

A. I can't imagine it having that impact, but I'd be speculating about other people. It didn't on me. I can say that.

Q. Sir, you're probably serving in one of the most senior billets in the military today.

A. Um-hmm.

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

MJ: General, did you say that you thought the Colonel Davis issue, the SECNAV -- Secretarial letter was a rather minor issue in your mind?

CC (Mr. Faraj): To me. Not to Colonel Davis. But to me, it was of idle interest to me.

MJ: Yes, sir.

Redirect?

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

WIT: If I could, Your Honor, my point is the Secretary of the Navy has his own authority and I don't presume to tell him how to conduct it.

MJ: Yes, sir. I got that from your previous testimony. Thank you.

Major Gannon, please.

TC (Maj Gannon): Thank you, sir.

REDIRECT EXAMINATION

Questions by the prosecution:

Q. Sir, on cross-examination you spoke with Mr. Faraj about a phone call that was made by the MARCENT SJA, Lieutenant Colonel Riggs, to an investigating officer, then Lieutenant Colonel Ware. Do you recall that line of questioning, sir?

A. Yes.

Q. There was a -- subsequent to that, there was a decision to have Lieutenant Colonel Riggs recuse himself from the Tatum case.

A. *[The witness nods head in the affirmative.]*

Q. Sir, I just want to -- I want to make it clear to the military judge that on cross-examination you indicated that you had decided that to be the case. But I would ask you, Did Colonel Riggs come to you and make that recommendation to you, that he in an abundance of caution recuse himself from the case?

A. Yes. I think those were the words he used in the letter to me, "out of an abundance of caution."

TC (Capt Gannon): I'm handing the witness Appellate Exhibit LX, Enclosure (22).

General, if you could please, could you take a look at Paragraph 3, once you've identified and familiarized yourself with that document.

MJ: Excuse me, Major Gannon, which one was it?

TC (Maj Gannon): Sir, it's Appellate Exhibit LX, Enclosure (22).

MJ: Twenty-two. Thank you.

WIT: Yes.

Questions by the prosecution (continued):

Q. Sir, do you recognize that document?

A. I do.

Q. And what is it, sir?

A. It's a letter from me to Colonel Ware, the Article 32 officer, saying that I -- to remove any possible taint of influence, Colonel Riggs recommended and I concurred with recusing him and Lieutenant Colonel Kumagai would act as the staff judge advocate. He was one of my other SJAs at MARCENT.

Q. So, General, the recommendation originated with Lieutenant Colonel Riggs?

A. Yes.

Q. For recusal in the Tatum case?

A. Yes.

TC (Capt Gannon): Thank you, General. I'll take Appellate Exhibit LX back from you.

Thank you, sir.

MJ: General, did this Lieutenant Colonel Kumagai, did he work for Lieutenant Colonel Riggs?

WIT: He did. He was an SJA at MARCENT, Tampa Headquarters.

MJ: Thank you, sir.

Questions by the prosecution (continued):

Q. On cross-examination, sir, you indicated that the matrix, this informational piece of paper that had dates, certain -- and documented the development of the various Haditha cases, this matrix. The matrix drove the meetings.

Do you recall that, sir?

A. Um-hmm.

Q. Sir, were these meetings informational in nature or advice in nature? Do you see the distinction I'm drawing, sir? Could you describe that to the military judge?

A. It was to get my situational awareness on each individual case. When I first got there, I was having trouble just keeping the cases straight. There were so many. So I put this matrix together, directed even what would be in each column, so I could have my information accurate about what I was dealing with. Even getting that level of certainty was initially a challenge. The advice would come to me from the SJA, from whichever one it was -- MARCENT or I MEF. In MARCENT's case, two different ones; and I MEF's, two different ones.

Q. And just so that the court is clear, 21 December 2006, preferral of charges against Staff Sergeant Wuterich. Colonel Ewers isn't even in CONUS at that point?

A. That's accurate.

Q. And you had no hand, sir, in the referral of charges against Staff Sergeant Wuterich?

A. That's accurate.

Q. Last area I'd like to talk about, sir. Mr. Faraj spent quite a bit of time talking with you about the Secretary of the Navy's actions in the Colonel Davis case. And I believe he covered this at the end of his examination, but I want to make sure the record is clear.

Sir, did the Secretary of the Navy ever contact you and tell you how to handle these cases?

A. Never.

Q. Did the Commandant of the Marine Corps ever contact you and tell you how to handle these cases, sir.

A. Neither. It changed from General Hagee to General Conway. I never spoke with either of them about these cases.

Q. Did any elected official ever contact you and tell you how to handle these cases, sir?

A. I believe -- I don't remember his name -- one congressman when I dismissed charges indicated he might want to see me. That never happened. But no, there was no contact between me and their office. I just heard this. But that obviously was either rumor or never amounted to anything.

TC (Capt Gannon): In your capacity as the consolidated disposition authority for the Haditha matters, do you feel, sir, at any time anyone ever attempted to unlawfully influence the --

CC (Mr. Faraj): Objection. That's a legal conclusion.

TC (Maj Gannon): Tried to influence --

CC (Mr. Faraj): I have an objection.

MJ: Okay. Hold on.

What's your response to the objection? Do you feel like you're asking for a legal conclusion?

TC (Maj Gannon): No, sir, I don't. I feel -- I think that the general can perceive whether or not someone was trying to unlawfully influence him. However, I'm --

MJ: Ask that specific question.

TC (Maj Gannon): Yes, sir.

MJ: Okay.

Questions by the prosecution (continued):

Q. General, sir, do you feel at any point that anyone ever attempted to unlawfully influence your impartiality in your decision-making process in these cases?

A. I don't recall a single time that anyone tried to influence me unlawfully. Obviously my SJAs did, but they had a lawful role.

TC (Capt Gannon): Yes, sir.

Sir, those are all the questions I have.

General, thank you. That's all I have.

MJ: Recross, Mr. Faraj?

CC (Mr. Faraj): May I have a moment, sir?

MJ: Please, go ahead.

REXCROSS-EXAMINATION

Questions by the defense:

Q. General, do you recall the congressman that sought to see you?

A. No. It may have even come out of the newspaper that someone was -- when I -- I think it was when I either dismissed or preferred charges in some -- it was receiving a lot of attention in those days.

Q. Could it have been Murtha?

A. Pardon?

Q. Could it have been Congressman Murtha?

A. I'm sure it was not Congressman Murtha. But -- I would of remembered that name, but I don't recall.

Q. Very well, sir.

A. And it never amounted to anything.

CC (Mr. Faraj): We have no further questions, sir.

MJ: Okay. Government, anything else?

TC (Maj Gannon): The government has no further questions for General Mattis, sir.

MJ: General Mattis, sir, thank you for being here to testify. You're excused. You may carry out the plan of the day.

WIT: Thank you, Your Honor.

The witness was excused and departed the courtroom.

MJ: Please have a seat.

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

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

The court's in recess.

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

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

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

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

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

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

MJ: Would you please go through your qualifications?

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

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

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

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

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

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

you're in Texas.

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

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

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

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

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

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

MJ: Okay.

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

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

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

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

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

Colonel Riggs is stationed -- he's a judge on the East Coast. So he's also flown in here and we'd like to work with his trial schedule. So I think the defense is going to call him next and you're going to, therefore, present direct examination, correct?

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

MJ: Okay. Let's have Lieutenant Colonel Riggs come in here, please.

TC (Maj Gannon): Sir, I'm going to clear my materials.

MJ: All right. Please do that.

And while you're doing that, does either side wish to add anything to my summation of the 802 conference we had in the presence of the accused?

TC (Maj Gannon): Not from the government, Your Honor.

MJ: Mr. Faraj, anything to add?

CC (Mr. Faraj): With respect to?

MJ: My summation of the 802 conference.

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

MJ: Okay. Thank you.

Lieutenant Colonel George W. Riggs, U.S. Marine Corps, was called as a witness by the defense, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Good morning, sir.

A. Good morning.

Q. Sir, can you state your full name, spelling your last name for the record.

A. George William Riggs, R-I-G-G-S.

Q. You are the same Lieutenant Colonel Riggs who testified previously in this case?

A. I am.

Q. Sitting circuit judge on which judicial circuit?
A. Military judge on the Eastern Judicial Circuit.

Q. And that's your current billet?
A. It is.

TC (Maj Gannon): Thank you, sir.

MJ: Your witness, Mr. Faraj.

Questions by the defense:

Q. Good afternoon. Good to see you again.
A. Good to see you.

Q. Sir, before you assumed your current billet, where were you stationed?

A. I was the deputy team leader for the Anbar Province -- reconstruction of the Anbar Province for seven months before I took the bench. Prior to that, I was the MARCENT SJA.

Q. And the previous, what was your senior unit or your senior command that had authority over you?

A. In Iraq?

Q. Yes.

A. I was attached to MNF-West.

Q. And before that, sir, you were the SJA for MARCENT?

A. Correct.

Q. What is the time period during which you held that billet?

A. I was the SJA of MARCENT from the end of July 2004, until June of 2008.

Q. Had you had any other SJA billets before that one?

A. I've had numerous SJA billets. First one, I was an assistant at U.S. Central Command. The next one was SJA Joint Task Force, Operation Assured Response and Quick Response. Subsequent to that, I was the Deputy SJA and the SJA for 2d FSSG. And subsequent to that, I was the SJA for 2d MEF -- Deputy SJA, II MEF. And I was then -- not a traditional SJA job, but I was the head of the Operational Law Branch, Navy; directly advised the Navy JAG. Subsequent to that, I was the SJA at MARCENT.

Q. Thank you, sir. Do you know a Colonel Ewers?

A. I do know Colonel Ewers.

Q. How do you know him?

A. Never worked for him; never worked with him. My primary contact with him -- even though I think we had met on several occasions years past -- he was the I MEF SJA. I was the MARCENT SJA which had a commander who wore two hats. That was really the extent of my exposures to him.

Q. Had you met him before you met him in that billet?

A. We had met professionally at a course or something when he was a major and I was a captain -- or lieutenant colonel, major. But I never worked for him; never worked with him.

Q. Alright, sir. Did you know of Colonel Ewers?

A. Sure, I recognized his name.

Q. How do you know of him?

A. Just that he was one of the senior lawyers in the field.

Q. Based on your personal acquaintance with Colonel Ewers and your knowledge of him by reputation, however limited it is, have you formed any opinions about Colonel Ewers?

A. Weighed on his reputation and what little bit I've seen, good officer, good judge advocate, good reputation all around.

Q. With respect to him as a judge advocate in the small judge advocate community in the Marine Corps, would you share with the court your opinion, if any, of Colonel Ewers?

A. As to his competence?

Q. Competence, credibility as an officer, as a lawyer.

A. His reputation for all of those things is high -- highly competent. Very well thought of in the community. Has done, you know, SJA-type jobs, judge advocate jobs. I know he's been a commander at least once. So, yeah, his reputation is pretty high.

Q. Sir, when did you become involved -- we're here for the Haditha case -- the Haditha series of cases.

A. Yes.

Q. When did you first become involved in the Haditha cases?

A. March of 2006, I was at the forward headquarters in

Bahrain. And as we were coming to the end of that forward deployment, my chief of staff called me, asked me to come over. Sat down and talked with him, and he said -- that's when I first learned of what has commonly been now called the "Haditha Incident." We didn't know a lot at that point. I was on my way back to CONUS literally either that day or the next day along with the rest of the MARCENT staff. And when I got back, started trying to get more information.

Q. And how did you get information?

A. I believe I went to my higher headquarters which was CENTCOM and talked to the SJA there at some point and I think --

Q. Do you remember who that person is?

A. Then Army Colonel Fred Pribble, now retired.

Q. And what did he share with you, if anything?

A. He didn't have a lot of information at that point. Basically what was out there was the *Time* reporter -- I can't remember his name -- had either written a story or put out some information about what had happened on the 19th of November, 2005. It was at that point that we found out there was -- at some point we found out that there had been a very brief 15-6 investigation by Colonel Watt. And that subsequent to that -- I'm not sure the timing, but it was -- it was concurrent with me learning of Haditha. There was an investigation that became known as the Bargewell investigation, I think it was.

Q. Did you read the Watt 15-6?

A. I eventually read it. I don't think I had it for several weeks. And the same thing for the Bargewell investigation.

Q. When did you say you first got the Bargewell investigation to the best of your recollection and completed going through it, if you did go through it?

A. I definitely read it on more than one occasion -- different parts of it on more than one occasion. I don't think we actually saw -- we started receiving parts of it until May -- March, April, May. That's probably about right.

Q. Of '06?

A. Of '06, yes.

- Q. Would you say based on Bargewell and Watt, you had a better understanding of what the -- what had transpired in Haditha -- maybe not specific facts -- but did you have a better sort of idea of what happened in Haditha?
- A. I think I had a better grasp of the basic facts of what unit it was, where they were, what they were doing to some extent, who the players -- for lack of a better word -- were, and how the civilians had been killed.
- Q. And to be clear, the Bargewell investigation -- the Bargewell mandate was to look into the -- primarily the reporting?
- A. There was two aspects to Bargewell. The reporting piece, and the other side of the Bargewell report was the ROE, LOAC, and MOUT training that the Marines received.
- Q. But not specifically the facts of the shootings or the incidents in the houses?
- A. Correct.
- Q. But they came to look into those, because they sort of formed an underlying factual basis to better read the whole investigation?
- A. That's right. That's my understanding.
- Q. And do you recall that the Bargewell investigation -- the Bargewell drafters had concluded that there was probably a LOAC violation? There was some misconduct by some of the Marines?
- A. Generally, yes, I remember that.
- Q. In fact some of the misconduct -- I don't know if you recall -- some suggested that Staff Sergeant Wuterich may have been covering up, and he may have committed a LOAC violation?
- A. I don't remember that specifically.
- Q. Okay. But you do remember generally that there was a LOAC violation and probably misconduct by the Marines?
- A. I remember ROE being mentioned, LOAC being mentioned, the reporting piece was paramount for Bargewell, and I remember that the Bargewell said that there were problems in the way that the incident was actually reported.
- Q. And we're talking about -- when I refer to misconduct, I'm not talking about any allegation of derelictions by

officers in the reporting chain. I'm talking about with respect to incidents that took place in the village during that day.

A. Yeah. I don't remember the specifics of those types of allegations of misconduct.

Q. Do you recall who drafted the Bargewell investigation?

A. I know it was a team effort. I know it was a large team because the Bargewell investigation had subsumed a JAG Manual investigation that was initiated by Lieutenant General Zilmer. I know Colonel Ewers was involved.

Q. Colonel Ewers and Colonel Connell?

A. Connell sounds familiar.

Q. Were the Marines that were involved -- and when we talk about Major General Bargewell, U.S. Army?

A. Yes.

Q. Who had overall authority of the investigation?

A. Yes.

Q. You're aware that Colonel Ewers not only drafted the investigation but took part in the investigation?

A. Yes.

Q. And he interviewed a number of officers, almost all the Marine officers in the investigation?

A. I knew he interviewed many of them. I don't know. I just don't remember how many.

Q. Very well. Based on information you had with respect to Colonel Ewers' involvement in the Bargewell report, when Colonel Ewers returned from theater on or about February or March of 2007, you recommended to General Mattis that he take care or ensure that he doesn't receive advice on Haditha from a judge advocate who was disqualified in your opinion. Did I summarize that correctly?

A. Mostly.

Q. Please tell us what happened.

A. I don't think I saw an appearance problem with Colonel Ewers being involved in anything doing with Haditha. I felt he was disqualified just because he had been an investigator, no more than one of the NCIS investigators would not be able to talk to General Mattis about the case. I did make it clear to General Mattis that I thought it was an appearance problem and in an abundance

of caution, put up the Chinese walls to make sure any activities as to I MEF did not bleed into the MARCENT activities and what I was doing as the MARCENT SJA.

- Q. Sir, I'm going to -- just to sort of dig in a little bit and explain for the court what you meant or intended to happen when you communicated that advice to General Mattis.
- A. Well, my intent was to make him aware of an appearance. What I saw was an appearance problem legally by the strict letter of the law. I did not see an issue with General Mattis and Colonel Ewers. Obviously, they could discuss I MEF matters, but I had to make it clear for General Mattis that when it came down to referral designations and decisions about the case -- the *Chessani* case and the Haditha cases generally -- that I had -- I was the one who'd be advising him and that Colonel Ewers should have no part in that show. That was my intent.
- Q. Would you say that General Mattis understood you're the MARCENT SJA not Colonel Ewers?
- A. Absolutely.
- Q. MARCENT cases not MEF cases. Once the Marines were MEF Marines -- or all of them were MEF Marines?
- A. When he assumed the command as I MEF or MARCENT, the first time he and I met, we sat down and the focus of our discussion -- although it was because the fact that he was the CDA for the Haditha and Hamdaniyah cases as well and what that meant -- I have no doubt he understood that.
- Q. Why did you feel it necessary to advise him of that again?
- A. My practice as an SJA, especially when it comes to issues of this nature where there could be a UCI, number one, the first thing I do -- he wasn't a new convening authority, but he was new to me -- was to sit down and have that UCI discussion. I know you've heard this before. You've been a battalion commander. You've been a regimental commander. Just remember it. And then to go back and periodically give them a booster shot on UCI and other things. Nothing elaborate. Just to make sure they're keeping those things at least in the back of their mind so you don't have a problem.
- Q. Simply talking to Colonel Ewers about MEF matters would

- A. not even run afoul of anything you described?
Absolutely not.
- Q. Talking to you about MARCENT cases, just about MARCENT cases, doesn't run afoul of anything you've described?
- A. Right.
- Q. Kind of asked earlier and I want to parse it out, what were you concerned about besides appearance? What actions were you concerned would take place by either General Mattis or Colonel Ewers that may create an appearance if not an actual problem?
- A. When -- and if any of these cases came down to the referral decisions, the decisions to send to 32s, I wanted to make sure he understood statutorily I have to give him that advice; although he can, I have to give him that Article 34 advice and advice on other things relative to MARCENT issues.
- Q. Okay. On that issue, Article 34, couldn't come from anyone but you because you were in that billet?
- A. Right.
- Q. Whether you told him or not, the advice letter had to come from you?
- A. Exactly.
- Q. So is it fair to say then that you were really concerned that you had to give the Article 34 advice letter?
- A. As I said earlier, I was concerned with the appearance problem. Just give the gravamen of these cases and the seriousness of these cases, I wanted to make sure that everything went by the numbers and to avoid appearance problems.
- Q. Is it fair to say that an appearance problem would arise if during discussion with you about the cases, the person who investigated in the field was sitting in?
- A. No, it's not fair to say. Because many times when you're having a discussion with a convening authority, I may very well bring an NCIS investigator in and say, Okay. Special Agent Smith, explain to the commander what your investigation revealed. Simply having someone else in the room during factual nondecision-making discussions would not run afoul with UCI in my opinion.
- Q. Fair enough. We're talking about Colonel Ewers?
- A. We're talking about Colonel Ewers, sure.

Q. So he -- his office was collocated in the same building as General Mattis at the MEF?

A. It was not in the same building.

Q. Well, you walk across the hallway --

A. He was in the same complex.

Q. Right. But he was at the MEF headquarters?

A. Right.

Q. You were in Tampa?

A. Right.

Q. So physically speaking, he was much closer.

A. In Tampa, I was closer.

Q. Fair enough.

A. And when I was in Camp Pendleton, we were both pretty far away.

Q. Do you recall having meetings -- legal meetings that had to do with the Haditha, Hamdaniyah, and MARCENT cases?

A. Absolutely.

Q. And where did those meetings take place?

A. They would oftentimes take place at the office in Camp Pendleton because as I'm sure you're aware, I spent a lot of time out here during that period of time because of the Haditha, Hamdaniyah cases.

Q. And when you weren't here, you attended the meetings by VTC?

A. Correct.

Q. About -- to the best of your recollection, about how often were you in attendance by VTC, percentage-wise?

A. Probably 20, 25 percent.

Q. So 70, 80 percent would have been here?

A. Correct.

Q. Okay. And is it fair to say also in attendance was Colonel Ewers?

A. It's not fair to say, because those meetings started almost immediately upon General Mattis assuming command, and Colonel Ewers wasn't even here. So I think General Mattis took command in July or August of '06. Ewers was in Iraq until February of '07. It was March by the time

he got back and took block leave and things like that.

Q. I appreciate the correction. You're right. I'm talking about the period when Colonel Ewers was back with the MEF between late-February, early-March of '07 until the time General Mattis turned over which was around October of '07. Would you -- would you say that he was at every meeting?

A. He was not.

Q. Okay. About how many of the meetings did he miss?

A. I'd say he may have sat in the back, maybe 60, 65 percent of the time. And I will tell you I am guessing.

Q. Okay. I know it's been awhile. So you have a lot of meetings. About how many meetings -- I should have asked that earlier. How many meetings did you have if it was -- if it was a constant thing a month on legal meetings -- on Haditha cases; if it was not consistent or a regularly scheduled meeting? I want you to focus more again on the period of February '07 to October '07.

A. Okay. We -- and it was not a regularly scheduled meeting. General Mattis would normally try to block off time in his schedule and then if we need it, we would meet. Or if he wanted it, we would meet, I should say, to update him on status. So here's what's -- and this was not just Haditha. This was Hamdaniyah, Haditha. I can't remember when MSOC-F came into play. That eventually came into play -- Nazario, Weemer, and Nelson from the Fallujah 2004 shootings.

So we would -- literally we would meet and kind of walk the dog on where they were at in the process, what was moving, why it was moving, what was not moving, and why it wasn't moving. Just so -- and I would say we met on average -- a good average would be twice a week. We would have time scheduled. But as I said, it would be hit or miss whether we actually used the time that he had blocked.

Q. How long did each meeting on average last? You can give us a spread.

A. Towards the beginning they were lengthy because the NCIS investigation was still in full swing, so there was a lot of information coming in. It was early on we were still dissecting the Bargewell report, because it was voluminous, so the meetings would be longer initially.

Sometimes two, three, maybe four hours even. As the investigation part of the cases started to wind down, the meetings got shorter because, you know, we knew what we knew at that point. And it was easier to keep him updated, because at that point it was truly just what was going on, where we're at in the process.

- Q. There was some previous testimony in a UCI motion filed by the Chessani team where there was some testimony about meetings lasting between two and five hours.
- A. Yeah. I think I just said two, three, four. And, yeah, there may have been one or two that trickled to five hours.
- Q. I want to get into -- earlier today, General Mattis said that he had a sort of matrix. Do you remember the matrix?
- A. Yes. My office created it. My office kept it updated -- my office in Tampa.
- Q. And he kept all the names of the different cases and phases and he'd check off what was going on?
- A. Right. That's how we -- that was usually the agenda for the meeting. We would go through that list. Okay. Here's where Sergeant Smith's case is and et cetera.
- Q. Okay. Well, I want to dig. He'd look to you what's going on with Wuterich? We have a few requests. We're waiting. Whatever. It wouldn't take a very long time. I want to get to what was being discussed with respect to -- to those agenda items in the meetings. What was the substance of the discussions? Let me clarify a little bit. I'm not looking for all the information that happened, just a broader, sort of idea of why were the meetings lasting so long if all we really have are phases, where we're at?
- A. Still a lot of factual matters that were unknown, so General Mattis was reading the NCIS updates. He was reading Bargewell. He was asking questions of the trial counsel. You know, what does this mean. What does that mean. General Mattis asks a lot of questions. He's very detail-oriented. Much more so than any convening authority I've ever served with. In a nutshell, that's why it took so long because he had a lot of questions.
- Q. The Bargewell report, to the best of your recollection, was consumed to a certain extent?
- A. At one point we provided Bargewell to NCIS and that was

not an easy thing to do. The Army did not want to let it go. Even CENTCOM intervened just so they could look at the statements Bargewell had collected prior to interviewing witnesses that they wanted to -- that they had given previous names.

Q. When you say, "General Mattis asked a lot of questions," you mean of his readings of Bargewell and NCIS?

A. Generally, yeah.

Q. And we're talking about factual issues?

A. Right.

Q. And we're talking about decisions?

A. If you're talking about decisional type issues and advice type things, that did not usually happen in these meetings. We had a staff process for that. And I'm no different. If you have a decision you need from the commander, you put a package together, you put it on a read board with a cover sheet, you route it to the people it needs to get routed to, and then it goes to the commander. Given the gravity of these issues, I would normally pick up the phone or go see him if I were here as those packages were coming to him, and he would -- Hey, sir. First one's the defense request for an expert assistant. I recommend you approve it. Understood. Let's sign it. Normally those types of decisions and advice type interactions were between him and I, not in his selective meetings just discussing status and process and things like that.

Q. When questions came up, especially factual questions that had to do with information in the investigations --

A. Um-hmm.

Q. -- who does General Mattis look to for that information or for those matters?

A. For Haditha and Hamdaniyah?

Q. We're just going to talk about Haditha. We're not worried about Hamdaniyah.

A. Yeah. To me. He would either call me, TANDBERG me. If I was here, he'd call me up to the office.

Q. I'm going to ask about the meetings. When questions came up in the meetings, who did he look to?

A. To me. Not being the master of the details, that's why I usually had Lieutenant Colonel Jamison or another one

of the other trial counsel who were even more intimately familiar with the facts than I was, and they'd be able to answer in detail the questions.

- Q. Now, you have a prime investigator; you have a prime witness to the investigation. Someone who participated in the meetings. Colonel Ewers.
- A. Right. Colonel Ewers.
- Q. In many of the meetings.
- A. Right.
- Q. Asking an investigator about factual matters -- do you know why General Mattis wouldn't look to Colonel Ewers on answers to things that had to do with the factual matters?
- A. I don't know. I don't know why he -- he never did it in my presence. So I don't know why he would, especially after I had had the discussion with him about -- about Colonel Ewers' role. I think he understood that.
- Q. But Colonel Ewers was in the meetings -- in many of the meetings?
- A. He was in some of the meetings.
- Q. In the majority of the meetings?
- A. Like I said, maybe 60, 65 percent.
- Q. When he was in meetings, sometimes he was there when you were not physically there?
- A. I don't remember whether he would have been.
- Q. You wouldn't have been able to see the whole room?
- A. No, the way the --
- Q. Just general?
- A. I could see him generally. Colonel Ewers sat in the back. I remember him saying something maybe once or twice but, you know, nondecisional type matters. But he really didn't speak up much to be honest.
- Q. I want to focus your attention on your actions and the Article 32 investigation in the case of Lance Corporal Sharratt.
- A. Okay.
- Q. You remember that?
- A. I do remember Sharratt.

- Q. You had a conversation with Lieutenant Colonel Ware.
A. Ware.
- Q. And you and he felt -- decided that it would be best if you recused yourself?
A. Right.
- Q. Would you please tell the court the decision you made, in calling Ware. What happened there?
A. After the -- after Lieutenant Colonel Ware finished the Sharratt investigation -- 32 investigation, he, for whatever reason, did not follow the guidance in his appointing order. He released his report to trial and defense counsel instead of me and the convening authority first. He submitted -- he released the report prior to the verbatim transcript being finished, which was a directive in the appointing order. And the report was full of grammatical errors and misspellings. The reason I called post-Sharratt and pro-Tatum and I told him -- I said, Look. Let's not have a repeat of this. This stuff is too sensitive. Let's do it by the numbers in your appointing order. And that's why I called him. I specifically said I don't care what your recommendation is. Just follow the administrative guidelines in your appointing order.
- Q. Is there anything else with respect to his decisions -- did you discuss anything in that conversation regarding his decision in the case? His recommendation in the case, I should say.
A. As we were talking, the only thing I wanted to talk about were the administrative guidelines that he did not follow in Sharratt. He started morphing it into something else, so I kind of -- I listened passively and said, Look, Colonel Ware, I don't care what you think the evidence is. Put it in the report. But follow the guidelines in your report. I think I said don't try to be the trier of fact via 32 IO, which obviously offended him.
- Q. What happened after that, sir?
A. Phone call was quick. It ended. He called me back. It was no later than an hour or so that same day. He had talked to his boss -- I assume that meant his circuit judge since he was a sitting judge. Well, that's fine. You do what you got to do. Just make sure you disclose I called you because you screwed up the administrative procedures in the previous report -- which I think he

had screwed that up.

After that conversation, I either called and/or e-mailed General Mattis, told him what had happened, told him I was going to recuse myself from any further Tatum since that was the case at bar at the time, and that that was my last contact with the *Tatum* case. My deputy, Lieutenant Colonel Kumagai took that one over from there. And I completely disassociated myself from any involvement.

Q. What were you concerned about, sir?

A. Again, in an abundance of caution, the appearance caution. We didn't need to add my ego and Paul Ware's ego to the mix in these cases. There was no reason for it. Colonel Kumagai is a very competent judge advocate who was perfectly capable of giving advice on the *Tatum* case.

Q. And when you say "appearance," please specifically explain.

A. The appearance that somehow I was trying to influence Lieutenant Colonel Ware. Although he even said in his e-mail, I recognize -- you know, it was clear to him that I was not trying to influence him. I just -- I didn't want that as an issue for anybody -- trial counsel, the defense counsel, or General Mattis, which is why I recused myself.

Q. Were you concerned with any appearance problems with respect to follow-on cases?

A. No, because the conversation I had with Ware was specific to his report in Tatum. That was the case that was at bar. I didn't see any kind of appearance problems for any follow-on cases, and I think -- I'm not sure. I think he was the IO on one of the subsequent cases, maybe even this one.

Q. So you weren't concerned that whatever appearance of impropriety that may be arisen as a result of that conversation would bleed over to follow-on cases?

A. I was not.

Q. And is that because of the assurances that Colonel Ware made? Because he did make some assurances that he wasn't influenced in his e-mail. Or was it because you were -- some actions that you took or didn't take?

A. I'm not -- I'm missing the point of your question, I'm

sure.

Q. You said you didn't feel like it was necessary for you to recuse yourself from any other cases.

A. Correct.

Q. My question to you was: You were no longer worried because of the assurances that Colonel Ware made or is it because you feel that whatever action that you took in that conversation was limited to just that case, in Sharratt, and wouldn't bleed over further?

A. Probably a combination of the fact that he said he did not feel influenced or that I was trying to influence him, and the fact that this conversation was specific to the processing -- the administrative processing of the Tatum report. I didn't see this extending out to any of the other cases that he might be the IO on.

Q. Had you developed a personal opinion on what should happen in these cases with respect to referral?

A. Which case?

Q. The Haditha cases in general. I'm going to begin generally right now. And I'm referring to the Marines not the officer cases. Members of Staff Sergeant Wuterich's squad.

A. Well, we were already at preferral.

Q. I'm saying with respect to referral, had you developed an opinion as to what should happen?

A. No. I would not have reached that point until the 32 was finished and I reviewed the IO's recommendations and his opinions, and then conducted my own independent review which I'm statutorily required to do. Then make my informed decision and give my 34 advice to the command.

Q. Well, that's what I want to get in to next, as you're authorized to do. He recommended dismissal?

A. In which case?

Q. In Sharratt. He recommended dismissal and you disagreed?

A. I did disagree.

Q. When did you form that opinion?

A. Well, I read his report -- and I'll talk about Sharratt first. I read his report. I conducted my own review of

the evidence that I had available, which was the NCIS investigation to date and Bargewell. I didn't rely heavily on Bargewell. I looked at the evidence and made my own assessment of the case.

- Q. And that was also the case in Staff Sergeant Wuterich's case as well. He recommended certain charges be dropped?
- A. I agreed actually when it came to this case. I agreed with much of what he had put in his recommendations. We don't agree with anything. We're lawyers after all and my recollection is that the charges that were preferred anew against Staff Sergeant Wuterich were more aligned with what Colonel Ware recommended than the original charges. In other words, they were significantly reduced.
- Q. At the time of referral in this case, which was December of 2007, I think --
- A. Correct.
- Q. -- General Helland was the CA at the time?
- A. And had been for about 60 days, I think.
- Q. Okay. When did you begin discussing the case with General Helland?
- A. Almost immediately when he came on board. He sat in on a meeting.
- Q. I'm sorry, sir. When you say "he came on board," can you tell me what you mean by that?
- A. Okay. Let me explain. Prior to General Mattis leaving and General Helland assuming command, General Helland was technically sitting in the deputy MEF commander's chair in that capacity. We had a couple meetings and he sat in on those just to get his SA up once General Mattis departed, which was the end of October. And I don't think General Helland officially took command till maybe a week or two weeks later. But he was ostensibly in charge. We were just waiting for approval. I met with him. I talked with him. The meetings with General Helland were a little different than the way General Mattis did business. Just different. I got his SA up to where he was comfortable on the Haditha cases.
- Q. Do you remember when you first went in to meet with General Helland on this case?
- A. It was almost immediately upon him taking command.

Q. Okay. And before him taking command as you said, he had been in sort of a deputy commander billet for a period of time?

A. Right. I think since he left the MAW mid- to late-summer, took some leave I think, and then came to Pendleton as the Deputy I MEF.

Q. You're saying in mid- to late-August, September?

A. I'm thinking it was -- his change of command at Miramar was August some time. I'd have to say September.

Q. He took some leave and came over to Pendleton?

A. That's my recollection. I don't know.

Q. And that's when he began to attend the legal meetings on these cases?

A. He didn't always. Only when he was available. He had other things going on, so occasionally.

Q. When you say "occasionally," can you give me a percentage of the times he sat in?

A. 30, 40 percent of the time he was there.

Q. Okay. Did you have any input on the assignment of an IO in these cases -- investigating officer for the Article 32 hearings?

A. I did.

Q. Would you please share that with the court. What would you do?

A. A specific case or --

Q. All the cases were heard by one IO --

A. No.

Q. -- for the enlisted Marines?

A. No. I think there was a different IO -- okay. I won't argue with you. I remember several different IOs for various cases, because we had Colonel Conlin on the officer cases.

Q. The enlisted Marines.

A. Okay. My recollection is that we were -- we wanted -- we wanted an IO who had obviously some seniority and some experience. And at some point I think I talked directly to the Chief Judge of the Navy-Marine Corps Trial Judiciary, Colonel Day[ph] at the time, to see if he would assign a military judge. I think that's how

Colonel Ware was assigned.

- Q. How did you feel about Colonel Ware's assignment?
A. I was glad that Colonel Day was going to provide him. I didn't know him, never met him, didn't even recognize his name. So I didn't really have any feelings. I was just glad we had a seasoned officer.
- Q. After you issued the first report, did you feel like he had a bit of an ego?
A. I don't think I'd say that.
- Q. I don't want to put words in your mouth.
A. Okay. I don't think I'd say that.
- Q. Did you feel like he was taking some greater interest than what you expected or intended an IO to take?
A. I'm just not sure what you're getting at.
- Q. Agenda. Did you feel like he had an agenda?
A. I didn't have any indication that he had any kind of personal agenda.
- Q. You used the word "ego" earlier when you talked about the letter.
A. Right.
- Q. Was there an issue of egos?
A. I didn't want my ego or his ego or hurt feelings to get in the way of these cases, the burden, or defense counsel or trial counsel. I didn't mean the term in the sense that you're using it; that for some reason, you know, he had this giant ego, had some kind of agenda.
- MJ: Lieutenant Colonel Riggs, can you keep your voice up? Would you like some water?
- WIT: That would be great.
- MJ: Trial counsel, do you have a bailiff?
Do you wish to continue on or do you need a break?
- WIT: Not right now. I'm good. Thank you.
- MJ: Mr. Faraj, go ahead, please.

Questions by the defense (continued):

Q. Were you surprised that he memorialized your -- when I say "he," I'm talking about Lieutenant Colonel Ware. When he memorialized your telephone conversation to an e-mail, how did you feel about that?

A. I wasn't surprised because he called me very professionally. Look, I think I need to make counsel aware and I said I understand.

Q. How'd you feel at the time when he did that? You had -- you called him to admonish him to -- as to his administrative duties listed in the appointing order.

A. Right.

Q. Based on your testimony, he was going into some other matters as if you're trying to influence in on his decisions.

A. I was surprised when he called and said, Hey, I'm going to have to advise counsel of this because I couldn't -- at least based on that very short conversation, he had never raised anything that said, you know, Hey, we can't talk about this or I don't want to talk about this and he actually -- from my perspective -- seemed like he wanted to talk about it. And I didn't want to talk about it. Okay. I was surprised.

Q. Did he seem -- you're telling me this and I'm thinking --

A. Okay.

Q. I don't want to put words in your mouth. You're having this conversation and now I feel defensive that maybe here, the SJA is calling me after I issue a decision --

A. Thank you. Okay. Go ahead.

The witness was given a glass of water.

Q. I'm going to do that over, sir.

A. Okay.

Q. You're Lieutenant Colonel Riggs calling me, Lieutenant Colonel Ware.

A. Right.

Q. After I've issued a decision that may be difficult for me to issue based on --

A. We're talking about the *Sharratt* case?

Q. Sharratt.
A. Okay.

Q. And we're having a conversation, and all of a sudden I think -- I think -- Lieutenant Colonel Ware, I think that you're perhaps trying to admonish me. Is that how it came across to you?
A. No, not at all.

Q. Did he get defensive?
A. You're going to have to ask him. I mean, I've got my perception and my recollection of the conversation, and I did not want to get into -- as I said, I specifically told him I don't care what your recommendation is. Just follow the administrative procedures in your appointing order. It then trickled into this other conversation that I didn't want to have, and it was clear he was -- it sounded like he was getting offended or defensive, and that's about when the conversation ended. I don't know how else to characterize it from his perspective.

Q. Very well, sir. So you hang up the phone. What are you thinking?
A. That was a little odd.

Q. Because --
A. But really because of the way he -- he circled back around to some sort of a discussion about what the Sharratt -- his decision had been, his recommendation in Sharratt. I didn't want to talk about that. Sharratt was a done deal at that point. It was over. And you know, he made his recommendation. I made mine. The convening authority decided. I just didn't want a repeat of the report, it being sent to trial counsel and defense counsel before myself and the convening authority had it. That's just -- that's unheard of for an IO to do that.

Q. Time-wise with respect to this conversation on the phone, do you remember how long after the original 32 report was drafted?
A. The Sharratt report?

Q. Yes, sir.
A. I don't remember.

Q. Was it after you drafted your Article 34 letter?
A. I think Sharratt was a done deal at the time. I think

the commander may have already dismissed Sharratt.

- Q. So it was after the dismissal of the charges that you called him up, not after you read the report and realized there was a bunch of typos, didn't follow your instruction -- not your instruction --
- A. Let me explain. When he initially finished and released it to trial counsel and defense counsel, I sent him an e-mail telling him, Hey, you need to recall this because, (a), you shouldn't have sent it out to counsel before you give it to the man that appointed you. (b), you didn't supply the verbatim transcript with the report as you were directed to do. And, (c), as an aside, your report's full of typos and grammatical errors. Initially the phone call was much later. And, again, I believe it was after the Sharratt decision had been made by the general just to make sure we weren't going to have this administrative screw up again.
- Q. And to the best of your recollection, the conversation by telephone was a rehashing of the e-mail that was sent previously?
- A. That's the way it started.
- Q. That's what I mean. Before he began to talk about the decision.
- A. Right.
- Q. You were reiterating what you told him in a previous e-mail?
- A. Right.
- Q. General Mattis -- well, let me back up. Did General Mattis ever call you regarding a decision by the Secretary of the Navy -- Secretary of the Navy to issue a letter of censure after he decided that he was going to give a NPLOC to Colonel Davis?
- A. No. I called him, because I found out before he did via judge advocate division.
- Q. Okay. Do you remember what you called him about?
- A. Yes. The Deputy SJA to the Commandant called me -- I want to say this was early-September -- and he advised me that the Secretary of the Navy agreed with a Secretarial Letter of Censure for General Huck and Colonel Sokolowski, but that he disagreed with the NPLOC for Colonel Davis. And he was going to issue a Secretarial Letter of Censure for Colonel Davis. I

said, Roger, sir. Got it. I'll let the convening authority know. I called TANDBERG -- I was in Tampa at the time -- and I gave him that word.

Q. What was his response?

A. He was nonplus to say the least. He felt like he had complete decisions based on the CDA letter, so he was not happy about it.

Q. And based on your reading of the CDA letter, he really did have to dispose of these matters?

A. He did, but that didn't absolve anybody above him from taking action as well.

Q. I understand.

A. Just like any other disciplinary matter. A one star, higher headquarters with a three star, reach down and take authority over a case.

Q. Sure. But we're not talking about a uniformed commander that took charge. We're talking about civilian interference.

A. You know, in the chain of command.

Q. That's fine, sir. But I'm saying he cannot convene a court-martial.

A. I don't know that.

Q. You think the Secretary of the Navy can convene a court-martial?

A. He can certainly issue a Secretarial Letter of Censure. He's the only one that can do it.

Q. That's why he's called "secretary" based on your reading of the CDA.

A. Um-hmm.

Q. Before you heard from the Deputy SJA to the Commandant, was it your understanding that General Mattis had authority to dispose of cases arising from Hamdaniyah and Haditha?

A. Yes. But I don't know that I believe he had absolute, final authority. Because as I said, people can do things above him and above the Commandant.

Q. This was kind of a new thing. Have you ever seen this before?

A. This whole thing was a new thing, Mr. Faraj.

Q. Sure. But this was really new for the secretary to step in.

A. I've never seen it before.

Q. We've heard testimony and there's previous testimony before today that General Mattis went deep into the facts of these cases, read just about everything he could get his hands on.

A. That's absolutely correct. He's very detail-oriented about these cases.

Q. More than any convening authority that you've worked for before?

A. Yes.

Q. Based -- again, based on things that he'd been reading or things he understood to know about?

A. Right. Before he came aboard, I gave him read aids. I couldn't give him all of Bargewell. It was too big to travel with. But I gave him little bits and pieces. Some of the NCIS executive summaries. I think there was an executive summary off of Bargewell. Some of the things I had put together that I used with General Sattler to keep him briefed up so he had some read aids. He wanted the whole Bargewell. He wanted everything that NCIS produced. The man's a voracious reader. He read it all.

Q. Some of his decisions in the case, would you say he made decisions based on reports he received, investigations he received, and others? He wasn't making decisions in a vacuum is what I'm asking.

A. Absolutely not.

CC (Mr. Faraj): It was on those readings that he decided to dismiss Stone and Sharratt even though you recommended otherwise?

TC (Maj Gannon): Objection, speculation.

MJ: Response?

CC (Mr. Faraj): He can testify if he knows. Do you know?

MJ: Your question was why the convening authority, General Mattis, dismissed in Sharratt?

CC (Mr. Faraj): My question was that based on his reading of the

facts, does -- or knows that he dismissed in Sharratt because of his readings, his own personal readings of the investigations in the evidence.

MJ: So you're asking him -- I'm confused now.

CC (Mr. Faraj): I'll --

MJ: You're sustained at this point because I don't know.

CC (Mr. Faraj): I don't want you to --

MJ: It's stained as to confusing. Start over.

And he does that all the time.

CC (Mr. Faraj): My question is do you know if General Mattis dismissed against Sharratt based on his readings of the investigations and the facts before him even though you recommended something different?

MJ: Okay. You can answer that question.

WIT: I think General Mattis read the Article 32 in combination -- I think he read my Article 34 pretrial advice letter and then either added that to what he already knew based on Bargewell and NCIS or went back and reread things again. This was not a snap decision that he made sitting in one of these meetings. And he, you know, decided to dismiss the case. He and I discussed it. I told him I didn't agree with that. He said he understood. We moved on.

Questions by the defense (continued):

Q. When you notified General Mattis that the Secretary of the Navy decided to circumvent his authority and issue a letter of censure, do you know if General Helland was aware of that?

A. I don't remember General Helland being there when I talked to General Mattis. I talked to him from Tampa and it was via TANDBERG or phone. So I don't remember General Helland being there. I don't know that General Helland would know that.

Q. So you wouldn't know if he was aware of that action?

A. He may have been subsequently aware of it.

- Q. But not based on your -- that conversation?
A. I didn't tell him. I worked for General Mattis at the time. If General Mattis would have told me, Hey, make sure you let General Helland know, I would of called him. My job was to keep General Mattis informed.
- Q. Understand. When, if at all, did that letter of censure come up again in any legal meetings after you first informed General Mattis of it?
A. It came up again because as they were crafting this letter for the Secretary's signature, they wanted somebody with knowledge -- that person being me -- to at least review the letter and make sure it was correct.
- Q. Please tell us about that.
A. Well, I talked to General Mattis. I said, Hey, sir, they want me to review this. It's fine. You know the facts. And I drafted the language for the other two letters, so I was familiar with the format. I was familiar with the facts, and I think it was Colonel P. Collins, Deputy SJA to CMC, sent his draft down to me in an e-mail. I looked at it, changed a couple words around, sent it back to him.
- Q. So the Secretary of the Navy comes to you and --
A. No. The Secretary of the Navy did not come to me.
- Q. His staff.
A. JA Division is not his staff.
- Q. So his legal staff didn't -- so they had to come to you down the chain?
A. To fact check, yes. They came to me for a fact check to make sure they hadn't missed anything.
- Q. And you had to make some corrections?
A. Nothing extensive.
- Q. They'd come to you for typos? Didn't they have spell checks?
A. They wanted a fact check. I gave it a fact check. I may have changed a few words around, but I didn't do a major rewrite on it.
- Q. When, if at all, did that letter come up again in any conversation?
A. I think it was near the end of General Mattis' tenure as he was getting ready to depart.

Q. And what was the substance of that conversation or discussion?

A. It was almost just an off-hand comment. He said something about, you know -- and I can't remember his words, but it was something to the effect that he still didn't understand why the Secretary overruled his decision.

MJ: What?

WIT: Why the Secretary overruled his decision on Colonel Davis, sir.

Questions by the defense (continued):

Q. How did you feel when you learned about it?

A. I had recommended he get a NPLOC from the beginning, so I wasn't surprised that somebody at a higher echelon saw it differently from General Mattis.

Q. I'm saying how did you feel about the decision to take action at the Secretarial level without a recommendation from General Mattis; that they decided to sort of reach down and take control?

A. I don't know that I felt anything. I mean, I was not surprised. That's how I felt based on what I knew about the cases.

Q. Do you remember having any conversations on -- regarding the propriety of that decision by the Secretary of the Navy?

A. I think initially General Mattis said, Well, you know, he can do that.

Q. And he talked to you about it. And he talked to Colonel Ewers about it?

A. I don't know that he talked to Colonel Ewers.

Q. So he spoke to you about it?

A. He and I definitely spoke about it.

Q. He could do that even though he had the CDA.

A. [The witness nods head in the affirmative.]

Q. And that's consistent with what you said earlier, that he was not very happy about it?

A. Right.

Q. Lieutenant Colonel Riggs, before you testified today,

have you had any discussions regarding your testimony today with any of the trial counsel?

A. I have. I met with Lieutenant Colonel Sullivan several weeks ago while he was in Camp Lejeune. Very brief discussion. He provided me with some of the relevant documents for the referral and preferral for me to review. I then saw Major Gannon and Lieutenant Colonel Sullivan briefly when I arrived here Saturday. Same thing, more documents. They showed me the government response and provided me with some more documents to review. And then I met with Major Gannon on Sunday once I read over those documents, and we talked about what I remembered and what I didn't remember.

Q. What did you discuss as far as meetings go with Major Gannon?

A. Meetings?

Q. Meetings -- the legal meetings.

A. Basically what I told you here today. I mean, these were informational status updates, nothing out of the norm, the way that General Mattis did business.

Q. Were you provided any of the transcripts of other witnesses?

A. I did. I saw, I believe, General Mattis' testimony from the Chessani UCI motion, and I think Colonel Ewers was in there as well possibly.

Q. Did you ask for those?

A. No.

Q. Did you read those transcripts?

A. I read General Mattis'. I don't think I read Ewers', if he was in there or not.

Q. You don't recall?

A. I don't recall if he was in there. He may have been in there, but I don't think I read it.

Q. Did you think that was odd why you needed to read General Mattis' testimony?

A. I didn't think it odd.

Q. Was it helpful to you?

A. It confirmed what I already knew about some of the things that had happened in the case.

- Q. Were you having a problem remembering anything in the case before -- before reading that testimony?
- A. It's been three years since those events basically, and I have been out of the MARCENT job for two years this Summer. My recollection was very clouded until I read the preferral, referral, my 34 letter, the 32 report, things of that nature. I'll say that General Mattis' testimony was unremarkable. There wasn't anything in there that jumped out at me.
- Q. Were there any conversations with the prosecution regarding the result that was expected in this hearing today?
- A. No. I -- I told them I was going to come in, I was going to testify truthfully and to the best of my recollection. Absolutely no discussion about outcomes or anything of that nature.

CC (Mr. Faraj): I have no further questions, Your Honor.

MJ: Court's in recess.

The Article 39(a) session recessed at 1347, 22 March 2010.

The Article 39(a) session was called to order at 1402, 22 March 2010.

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

Lieutenant Colonel Riggs remains on the stand.

Cross-examination by the government.

CROSS-EXAMINATION

Questions by the prosecution:

- Q. Sir, you indicated I believe on direct examination -- ballpark -- you started to work on these cases as far as obtaining information and getting situationally aware in approximately May of 2006 you began to review materials.
- A. It actually predates that. I think I said I became aware of this incident end of March 2006 while I was forward deployed. And immediately upon returning to CONUS, started trying to get my assay up and figure out exactly what we were dealing with. So probably as early as April.

Q. And you testified on direct examination that that process of getting situationally aware necessitated the review of a large amount of documents?

A. That's correct.

Q. From the Bargewell investigation, from the NCIS reports, et cetera?

A. Correct.

Q. So from the period of May -- roughly May -- March, May 2006 until December of 2006, you were actively engaged in reviewing investigative materials?

A. That was part of what I was doing relative to Haditha and Hamdaniyah.

Q. And why were you doing that, sir?

A. Just to get my own assay up, so that I could provide good advice to the convening authority.

Q. At some point the decision to prefer charges against this accused and several other individuals involved in the 19 November 2005 incident in Haditha, Iraq, the decision was made to prefer charges against those individuals?

A. That's correct.

Q. 21 December 2006?

A. That's my recollection.

Q. I would like to talk with you about the state of the investigation and the information that you had at your disposal at that time.

I'm going to hand Lieutenant Colonel Riggs Appellate Exhibit LX.

Handing the witness Appellate Exhibit LX.

Sir, if you would please, can you take a look at -- in the lower right-hand corner there you'll see an appellate exhibit marking as well as a pagination --

MJ: Mr. Faraj?

CC (Mr. Faraj): I know we're not at trial, sir, and the rules are as strict or relaxed as you allow them to be, but before the witness begins to refer to documents -- I'm not sure if we're refreshing recollection, impeaching, whatever,

but maybe he can testify from his own memory before we begin to have -- go through those exhibits. Because they're already admitted anyway and they're before the court.

MJ: I understand the objection.

Your response?

TC (Maj Gannon): Sir, I'm going to walk the witness through several evidentiary items that compose the Bargewell and the NCIS investigation and ask him if he recalled having access and having reviewed those prior to the preferral event of December 2006.

MJ: Okay. Objection's overruled. You can take him through that scenario.

Questions by the prosecution (continued):

Q. Sir, in the lower right-hand corner of that document, you see Appellate Exhibit LX is stamped?

A. Right.

Q. And then there's page 1 of -- or however many it is or 2. Do you see that, sir?

A. I do.

Q. I'd like you to turn to page, if you could please, 161 of Appellate Exhibit LX. And let me know when you're there, sir.

A. I'm there.

Q. This is Enclosure (2) to the government's response. What are we looking at, sir?

MJ: Did you say page 160?

TC (Maj Gannon): 161, sir.

MJ: 161.

TC (Maj Gannon): It's a list of -- on my 161, it's a list of starting at 89 at the top, going down to 108 at the bottom, enclosures to a report.

MJ: Okay. I'm there.

Go ahead.

WIT: And I'm there as well.

Questions by the prosecution (continued):

Q. Okay. Let me do a better job.

A. Okay.

Q. Colonel Riggs, sir, flip back to the part -- the Enclosure (2). There's a Number 2 on a tab. Flip back to that. Do you see that?

A. Got it.

Q. Okay. So that's the first part of the this -- this exhibit we're looking at. Do you recognize this?

A. I do recognize this.

Q. What are we looking at, sir?

A. I think this is the Bargewell report.

Q. Yes, sir. Now, if you would please, flip to page 161. I apologize for that. It was unclear.

A. Okay.

Q. Enclosure (99) to the Bargewell report is a statement to NCIS of Corporal Salinas of 24 March. Do you see that, sir?

A. I do see that.

Q. Did you review that prior to the preferral event in this case?

A. Did I review his statement to NCIS?

Q. Yes, sir. Yes, sir. The written memorialized statement of Corporal Salinas?

A. I'm sure I did.

TC (Capt Gannon): How about the statement Enclosure (101)?

CC (Mr. Faraj): How is this relevant?

MJ: Hold on a second.

CC (Mr. Faraj): How is this relevant?

MJ: The objection's relevance.

Response?

TC (Maj Gannon): Sir, it's relevant because I want to draw a very

clear distinction for the court of what information was available at the time of preferral.

CC (Mr. Faraj): Just ask him.

MJ: Thank you, Mr. Faraj.

Just -- if you could just go through the different things that you want and make sure that he reviewed prior to the advice or the referral you may do so. You don't necessarily need to take him through the exhibit. You can just ask him what he considered and if he has a response, you can go into further detail as to anything he may leave out.

TC (Maj Gannon): Looking at -- thank you, Your Honor. I will do that.

Questions by the prosecution (continued):

Q. Looking at Enclosure (102) to the Bargewell report which is a statement from Lance Corporal Mendoza. Do you recall reviewing that and considering that, sir, as part of your informational predicate prior to advising on the preferral event in Staff Sergeant Wuterich's case?

A. I don't have a memory of reading that specific statement, but I read -- I read all of the statements.

Q. Okay, sir.

A. Numerous times during the course of my tenure and as decision points for coming up in the cases. So I'm confident -- I'm more than confident that I read all the statements in here that are relative to the preferral of this case and the other cases.

Q. Sir.

Flip to Tab 3, if you would please. This is Enclosure (3) to Appellate Exhibit LX.

A. Got it.

Q. Do you recognize that, sir?

A. I do. That's at least one of the interim NCIS reports if not the full NCIS report.

Q. If you would, sir, a couple pages beyond that is page 170 of 524 for Appellate Exhibit LX.

A. Okay.

Q. Paragraph Subpart (b), it says "House Number II." Do you see that, sir?

A. I do see that.

Q. Several sentences down, "Suspect Tatum reported hearing Suspect Wuterich firing into a room and responded by joining him. Upon entering the room, Tatum stated he observed a body in the doorway and then positively identified unarmed women and children on or around the bed before shooting." Do you see that, sir?

A. I do see that.

Q. Do you recall that factual allegation or that allegation, that evidence, that statement, that information being available to you at the time of December 2006?

A. Well, I wouldn't necessarily have pulled that information from the NCIS -- what I would call the executive summary at the beginning. I would have gone to the actual statement itself and read the statement.

Q. Do you recall being aware of the fact that Lance Corporal Tatum on November 19, 2005 in House II had identified unarmed women and children and having fired on them?

A. I do --

Q. And that this accused was present during that event?

A. I specifically remember that.

Q. Did that factor in to your command of the facts in December of 2006 when charges were preferred against this accused?

A. It did.

Q. Handing the witness Appellate Exhibit LXI and retrieving Appellate Exhibit LX.

Sir, if you would please, take a look at Appellate Exhibit LXI and once you familiarize yourself with its content, if you could please, sir, look up at me.

A. Okay. I've reviewed them.

TC (Maj Gannon): Your Honor, this is a copy of Appellate Exhibit LXI for the court's use.

MJ: Thank you.

TC (Maj Gannon): I've handed a copy of Appellate Exhibit LXI to the military judge.

Questions by the prosecution (continued):

Q. Sir, did you recognize those photographs?

A. I do recognize them.

Q. Were those photographs available to you for your review prior to December of 2006?

A. They were.

Q. Prior to the -- excuse me, the preferral of charges against this accused?

A. They were.

Q. Sir, did those images have an impact on your understanding of the factual events related to 19 November 2005?

A. They did.

Q. What impact did they have, sir?

A. They were just part of the evidence that had been collected as a whole across the spectrum of this case.

Q. I am retrieving Appellate Exhibit LXI from Lieutenant Colonel Riggs.

21 December 2006. Voluminous Bargewell report available for your review?

A. Correct.

Q. Available for General Mattis' review?

A. Correct.

Q. Voluminous NCIS investigation available for your review?

A. Correct.

Q. Available for General Mattis' review?

A. Correct.

Q. Photographs of alleged victims of the shootings of 19 November 2005 available for your review?

A. Correct.

Q. Available for General Mattis' review?

A. Correct.

Q. All of this information was made available to you prior

to 21 December 2006?

A. Correct.

Q. These matters were discussed between yourself and General Mattis on a regular basis via TANDBERG, via phone or secure phone and in meetings right up to that preferral event in 21 December 2006?

A. That's correct.

Q. As of 21 December 2006, did you feel that the CDA had a solid factual command of the allegations surrounding the Haditha shootings of 19 November 2005?

A. At that point in time I believe we had the best site picture we were going to get relative to the incident in Haditha. The NCIS investigation had -- it was not over by any means, but it -- whereas they had 50 agents here during the Summer and I believe into the Fall that -- you know, they had reduced their team down and things were starting to wind down on the investigation side of things.

Q. At the moment that you developed -- and your belief as you just stated, the CDA developed a solid site picture of these allegations. 21 December 2006, Colonel Ewers wasn't anywhere around?

A. He was not.

Q. He hadn't participated in any briefings?

A. None.

Q. He hadn't spoken to you about this incident?

A. None. Not at all.

Q. Are you aware of whether or not General Mattis had spoken with him?

A. I don't know.

Q. 21 December 2006, the decision had been made to cause this accused's case to go to an Article 32 investigation?

A. The preferral event if you're saying that's what sent it to the 32 happened, correct.

Q. And it was understood by the commander, by yourself that that was actually what was going to happen?

A. Correct.

Q. In December of '06?

A. Correct.

Q. Prior to Colonel Ewers being around?

A. That's correct.

Q. General Helland -- jumping forward -- assumed command on or about 6 November 2007?

A. The official assumption came out then. Like I said, General Mattis left I believe around 26, 27 October, was on the road to his new assignment as Joint Forces Command Commander; and General Helland for all intents and purposes was sitting in the chair starting on that date.

Q. And it was General Helland that made the referral decision in this accused's case?

A. That's correct.

Q. In late December of 2007?

A. That's correct.

Q. After General Mattis had departed?

A. Well after.

TC (Capt Gannon): Well after.

Your Honor, I've had a document marked as Appellate Exhibit LXVI. It's not actually been tendered to the court, but I'm going to hand what's been marked as Appellate Exhibit LXVI to the witness.

Questions by the prosecution (continued):

Q. Sir, if you would please, take a look at what's been marked as Appellate Exhibit LXVI and if you could look at me when you're done.

A. Okay. I've reviewed it.

Q. What is Appellate Exhibit LXVI?

A. LXVI is my recommendation to the commander that he exclude certain periods and his signature on a document that it excludes certain periods during the course of the Wuterich trial.

Q. Which commander, sir?

A. General Helland.

Q. Alright, sir.

Now, in order to exclude this delay, you had to articulate a basis for why you sought exclusion of the delay?

A. Correct.

Q. Can you tell the military judge some of the factors that came into your recommendation to Lieutenant General Helland that he exclude delay in this accused's case?

A. The reason I asked the commander to exclude the delay is that -- my recollection is the Wuterich 32 closed very early October. October 1st, October 2nd, October 3rd. We then -- it was a voluminous Article 32 -- began reviewing those documents in my office at Tampa by my staff.

Also, I believe we went out and asked both trial and defense counsel if they had comment on the IO's report. My recollection is the trial counsel did and the defense counsel did not ultimately. And we gave them -- I believe it was almost two weeks to comment on the IO's report for me to incorporate that into my 34 advice.

Again, we -- it was a lengthy Article 32. I think about 250 exhibits. We reviewed -- we were in the process of reviewing that and trying to digest it and it just -- it took a long time to get through it.

Q. Now, this Appellate Exhibit LXVI helps us establish several dates in sort of a timeline about the last analysis that took place, if you will, prior to referral of this accused's case. So going back to the 32. The 32 took place in early-September, correct?

A. Correct. And it closed early October.

Q. On or about 21 September the government submitted written commentary on the evidence that had been presented during the 32?

A. To the IO.

Q. To the IO. Yes, sir.

A. Correct.

Q. On or about 24 September, the defense also submitted a written commentary to the investigating officer about the evidence presented during this accused's Article 32 investigation?

A. That's my recollection.

- Q. 2 October 2007, the IO report issues?
A. Correct.
- Q. And on or about 12 October, objections were offered by the government to your office?
A. Correct.
- Q. And on or about 15 October, the defense indicated via e-mail -- which is contained in Appellate Exhibit LXVI on or about 15 October that they had no commentary on the evidence?
A. Correct.
- Q. Is it fair to say then, sir, that on or about 15 October 2007, the IO -- the Article 32 process was still sort of unfolding in terms of the submission of documents and the collection of those documents?
A. Sure.
- Q. It was not mature for the CDA's analysis at that point?
A. It was absolutely not ripe for a decision about referral. I had not digested the 32. I had not digested the government's input. The defense did not have any input. But it was a lot of material to cover.
- Q. And this is the last week that General Mattis is actually at Camp Pendleton?
A. That's correct.
- Q. There were some other things going on during the week 15 to 19 October. You were at Camp Pendleton, weren't you, sir?
A. I believe I was.
- Q. And you were working on the Lieutenant Colonel Chessani case at that point in terms of making a recommendation to the commander on the way ahead in that case?
A. That's correct.
- Q. And that would be General Mattis for Lieutenant Colonel Chessani's case?
A. Correct.
- Q. Because charges were referred against Lieutenant Colonel Chessani on 19 October of 2007?
A. That was one of the last acts that General Mattis took.
- Q. In addition -- yes, sir?

- A. I'm sorry. There were several other preferrals.
- Q. Yes, sir, there was. In fact, Lance Corporal Tatum's case was also referred on 19 October 2007?
- A. I know that it was. But again, I was not giving advice on Tatum at that point.
- Q. And, sir, it's fair to say that the analysis and the decision-making and the advice rendered by you in the Chessani case and by Lieutenant Colonel Kumagai in the Tatum case, that process was consuming a significant amount of the commander's time at that point?
- A. As I said earlier, General Mattis was very detailed oriented and he was going back and reviewing things meticulously before he would make that decision and refer a case.
- Q. But during this time frame, one of the things that General Mattis was not reviewing was the Article 32 and the allied papers associated with this accused's investigation?
- A. That's correct. And during -- while I was out here during that time period, simply because Staff Sergeant Wuterich's name was on the list of cases we were handling, it may come up and I would say, Hey, sir, Staff Sergeant Wuterich not even close to having you a 34 advice letter yet. So we would literally move on to the next item. And I think towards the end, General Mattis realized he was not going to make a decision on Staff Sergeant Wuterich's case. There just wasn't time.
- Q. And General Mattis never did make a final decision on Staff Sergeant Wuterich's case?
- A. He did not.
- Q. Sir, I'd like to discuss the legal meetings that Mr. Faraj spoke with you about at length. I want to make I guess one thing very clear to the court so that I understand. Again, from the time that you were first made aware of the allegations associated with 19 November 2005 in Haditha, Iraq, to the point that charges were preferred in 2006 against this and several other accused, there were informational meetings presided over by General Mattis obviously after he assumed command of MARCENT I MEF?
- A. Right.
- Q. During that time frame.

- A. Exactly. And General Sattler before him. General Sattler conducted business very differently from General Mattis as General Mattis conducts it very differently from General Helland. But part of my function at that time was the coordination between us, NCIS, making sure that the right people at Headquarters Marine Corps were kept informed about what was going on, and advising the commander and keeping him up to date because this was a constantly emerging issue. Nobody had their arms around what had really happened at the early stages.
- Q. And during these meetings that led up to the preferral, advice was not rendered at these meetings?
- A. These were -- they were like almost any other staff meeting where information would be provided to the commander, he would ask questions. If something came up, it was in the nature of legal advice. I would give it. I can't think of -- I have an example, but it's not a Haditha specific example.
- Q. Sir.
- A. Do you want me to go ahead?
- Q. Yes, sir. Please.
- A. This relates to the Hamdaniyah cases and General Mattis was adamant that he get to meet with the accused. Initially he wanted to do it before the trials, I believe, and I told him -- I thought that was not a good idea legally and explained to him why. So he readjusted and ended up doing it after the trials were finished. He did. He met with all the accused after the trials were over. So those types of things would pop up. I didn't look at them as, Hey, sir, here's what the law. Here's what I think you should do. And he would either agree or disagree.
- Q. And so the nature of these meetings was to keep the commander informed?
- A. Like any other staff meeting.
- Q. The matrix, as it were, General Mattis' informational document that your office maintained --
- A. Yes.
- Q. -- drove these meetings?
- A. Yes.
- Q. Colonel Ewers comes back in February, March of 2007; he

- sits in on some of these meetings?
- A. Correct.
- Q. Now, by the time Colonel Ewers is back, as we've made clear, the preferral event and the decision to go to a 32 in this accused's case, that decision had already been made?
- A. Correct.
- Q. Colonel Ewers did participate in some of these meetings, these informational meetings, and did you ever witness Colonel Ewers offer advice to the CDA regarding a Haditha matter?
- A. No.
- Q. Regarding this accused's case?
- A. No. And we're talking about General Mattis, correct?
- Q. Yes, sir. When Colonel Ewers -- we're talking about the February, March 2007 time frame at this point, sir.
- A. No, I never saw Colonel Ewers do that.
- Q. Sir, Colonel Ewers was -- is an O-6?
- A. Yes.
- Q. You are an O-5?
- A. I am.
- Q. Were you intimidated by Colonel Ewers' presence at the meetings that he did participate in roughly March of 2007 forward?
- A. Hardly.
- Q. Why do you say hardly, sir?
- A. I've been advising general and flag officers since I was a Captain in various SJA billets I've been in. I'm not intimidated by them. I respect John Ewers because he's a colonel. A very well thought of judge advocate. But quite frankly, I didn't care what his opinion was. It was my advice.
- Q. Did you ever feel that Colonel Ewers attempted to influence you in any way, shape, or form?
- A. We never even discussed my decisions as the MARCENT SJA. It never came up. I never sought out his advice and he never offered it.
- Q. Did you ever witness Colonel Ewers during any of these

meetings that he attended in 2007 on adopt what you perceived to be an overly prosecutorial zeal which subsequently affected your decision-making?

A. He rarely said much at all. So to say that it was a prosecutorial event, no. When he said anything at all, it was really just input on collateral matters that would come up.

Q. Did you ever feel he was getting in your space so to speak?

A. Definitely not.

Q. Okay, sir.

A. Nor did I get in his.

Q. In fact, sir, when decisions of legal import were made by the CDA as you said on direct examination, they were made after the appropriate staffing process had unfolded?

A. That's just the way you do business at a headquarters like MARCENT or I MEF. You don't just walk into the commander's office and say, Hey, sir, I need you to sign "X" and here's what it is. You put together a package that outlines it and explains it. It goes through the staffing process, into the commander's office, and I believe I said on direct -- normally what I would do, I would block -- if I wasn't here, if I was in Tampa, I would let the aide know, Hey, I need 15, 20 minutes on the VTC with the boss, set it up. And then when those packages were actually walked in the door, I would cue them up. We'd talk about it, I'd answer any questions he had, and he would make his decision. If I was here, I would just go make time on the schedule and go see him and carry the packages in myself.

Q. And you were traveling back and forth between Tampa and Camp Pendleton with some frequency during this phase as well?

A. I think during that time period from March of '06 until I left MARCENT in June of '08, I was probably out here an average of one to two weeks a month in the beginning. It tapered off at the end.

Q. You indicated on direct examination one of the first things that you do when you sit down with a commander, sir, that you're just starting to work for is to give them a UCI brief?

A. Yes, that's correct.

Q. And part of your brief is to -- in essence, you cover the basics of UCI. Don't intimidate members, correct?
A. Right.

Q. Don't intimidate judges, correct?
A. Correct.

Q. Don't try to influence parties?
A. Correct.

Q. Try to avoid giving the general guidance having a commander's meaning and saying I expect this to be the outcome of courts-martial under my -- that I convene. That type of advice?
A. That's correct.

Q. In fact, sir, General Mattis never did anything during his conduct prior to Colonel Ewers' arrival or return or after that that differed from your initial UCI brief to the commander, did he, sir?
A. That's correct.

Q. I'd like to direct your attention to August of 2007. There were several cases that were disposed of during that time frame. Do you recall that?
A. I remember there was a flurry of activity in August of 2007 in early-September.

Q. Captain Stone's case was disposed of?
A. I believe so.

Q. The Sharratt case was disposed of?
A. Yes.

Q. Colonel Davis' case was disposed of?
A. The initial decision to send it up with a NPLOC happened.

Q. And that's what I'd like to talk about. So there was a cluster of cases that were actually disposed of in that time frame?
A. Correct.

TC (Capt Gannon): And, Your Honor, for the court's purposes, we've included all of the documents and so we'll be arguing those. I can go through those with the witness now, but I'm going to rely on those submissions because we've got those case disposition letters in our motion

that have a cluster of disposals in August of 2007.

MJ: I've seen those. You don't need to go through those again.

TC (Maj Gannon): Very well, sir. Thank you.

MJ: Thank you.

Questions by the prosecution (continued):

Q. After these cases were disposed of, this letter of censure issue from the Secretary of the Navy --

A. Yes.

Q. Did you witness General Mattis ever act in any way inconsistent with his previous behavior as far as his orientation in dealing with these cases in the wake of that letter?

A. No. As I said before, he was not happy about the fact that his decision had been overrode, but he pressed on as per normal.

Q. Not unhappy but did he ever confide in you and say anything to the effect of, Lieutenant Colonel Riggs, what do you think the Secretary of the Navy's going to think about this action I'm contemplating?

A. Absolutely not. Not from General Mattis.

Q. Why did you say that, sir? Absolutely not. Not from General Mattis. Why did you choose those words, sir?

A. Anybody that knows General Mattis or has worked for General Mattis knows he's probably one of the most single-minded, focused commanders we've had in recent history and to put a not too fine a point on it, he doesn't give a damn what higher headquarters thinks. He's his own man.

Q. In fact, sir, on 21 December 2006, charges were preferred against Lance Corporal Tatum and those charges included allegations of violating Article 118, murder?

A. That's my recollection, yes.

Q. And I understand you were not advising on this but I'm sure you had general knowledge. And if you didn't, let me know --

A. Well, I was advising on it up until the 32.

Q. Yes, sir. And about the question I'm about to ask.

Because on 19 October 2007, involuntary manslaughter charges, Article 119 violations, were referred against Lance Corporal Tatum?

A. That's my understanding, yes.

Q. Criminal culpability in terms of 119 versus 118, which one's more severe?

A. 118.

Q. So obviously 119, involuntary manslaughter, is less severe?

A. I agree.

Q. And the decision was made to refer that less severe theory after this Secretarial Letter of Censure had been issued?

A. Correct.

Q. Did General Mattis ever as far as you're aware speak with anybody about being concerned about that in the eyes of the Secretary?

A. No.

Q. Your Article 34 advice letter in this case, sir -- I'd like to talk with you briefly about that. What type of information, evidence -- what did influence your drafting of that work product? What informed your opinion in your advice?

A. Well, first off, the Article 32 investigation itself, as I stated earlier, it was voluminous so I spent a lot of time studying that and reading it. I also then went back and reread certain portions of Bargewell and the NCIS investigation. I looked at the *60 Minutes* transcript -- or not the transcript, but the actual video. Watched that several times. And then made my -- I also talked to the trial counsels to get their input. And then made my decision about what I thought was appropriate for the case.

Q. And when you reviewed that evidence or that information, do you recall the portion of the aired version of the *60 Minutes* interview where this accused acknowledged that he was aware of the existence of women and children in House I?

A. I remember that.

Q. You were also aware of the statement that was taken by Colonel Watt where -- at least in his statement, it's

indicated that this accused told the Marines prior to assaulting House I to shoot first and ask questions later?

A. I remember that statement. I wasn't sure -- at this point in time, I wasn't sure where that was from.

Q. Did that statement inform your decision as far as your Article 34 advice was concerned?

A. It was certainly considered.

Q. Did Colonel Ewers inform your decision or your advice in the Article 34 letter?

A. I never talked to Colonel Ewers about this. Most of the drafting -- the initial drafting was done by my staff in Tampa. And they would send me drafts, and I would work on them and read them. And the finished product was -- I may have signed it here, because I think I was here on December 21st when I signed my Article 34 advice letter. But Colonel Ewers was not in my chain and, as I said earlier, I did not seek his opinion.

Q. And obviously Lieutenant General Helland referred the charges in this accused's case?

A. He did.

Q. Did you have access to Lieutenant General Helland in December of 2007 when the preferral/referral event on the new charges issued?

A. I did.

Q. Can you describe that for the judge, please?

A. I can. It was pre-Christmas when I was here. I can't give you the exact dates, but I was here for more than a few days. I personally met with General Helland, discussed with him what the IO was recommending in general terms, what I saw as the likely charges, and told him that eventually I will craft my Article 34 advice and provide it to him with the new charges that I was recommending. He understood. I believe he actually had a chance to read the 34 advice letter in advance. I returned to Tampa prior to the referral, and I at least on one occasion spoke with him on phone or via VTC prior to the referral to make sure he understood and see if he had any questions.

Q. In fact, you were TAD to Camp Pendleton between 16 and 21 December 2007; isn't that true, sir?

A. That sounds about right.

Q. I'm handing a copy of the Manual for Courts-Martial 2008 edition opened to page II-52, which is R.C.M. 601, to the witness and retrieving Appellate Exhibit LXVI.

Sir, I'd like you to take a look at R.C.M. 601, Subpart (d) if you would, please?

A. Did you say (d)?

Q. Yes, sir. I believe that's the discussion of with whom a convening authority may confer during a referral decision?

A. Okay.

Q. Sir, what is your interpretation of that rule?

A. It's a pretty broad rule in my view in that not only can the SJA consider many different matters from any source when making his recommendation, but the convening authority can do the same thing. He does not have to rely solely on the Article 32 or the Article 34 advice letter. He can go back and look at other things relative to the case that he thinks may have a bearing on it.

Q. To include opinions of people?

A. Sure.

Q. Investigators?

A. Sure.

Q. Hearsay evidence?

A. Yes.

Q. In fact like you said, it's a very broad spectrum of things that a commander can consider when making a referral decision?

A. Correct.

CC (Mr. Faraj): Your Honor, are we going to discuss the legal meaning of R.C.M. 601 and have the witness testify on it or is this a matter where the judge decides based on these facts?

MJ: Do we need to -- thank you.

Do we need to go any further down this line?

TC (Maj Gannon): We don't, sir. I just have --

MJ: Okay.

TC (Capt Gannon): -- actually just very, very, very brief -- a couple of additional questions, sir.

MJ: Okay. Go ahead.

Questions by the prosecution (continued):

Q. Was what you just articulated, sir, this broad reading of R.C.M. 601, was that your understanding of 601 in 2006?

A. Sure.

TC (Capt Gannon): 2007?

CC (Mr. Faraj): Your Honor, again, this is -- this -- these are legal conclusions that this court is going to make based on facts that are presented. Whether he did or did not is irrelevant. He could have considered many things and they may have fell within the rule and you might find for the government. He may have considered none of these things and be outside the rule and not find for the government. But it's not relevant what the witness' understanding of Rule 601 at that time or now is to this court.

MJ: I disagree. The objection's overruled.

Go ahead.

CC (Mr. Faraj): Yes, sir.

Questions by the prosecution (continued):

Q. During the conduct of these cases in terms of the legal meetings, the advice you provided, the information provided to the commander, the documents reviewed, did you witness during your tenure as the Marine Corps Forces Central Command SJA in the 2006 time frame to the 2007 time frame -- late-2007, did you witness any event that ran south of R.C.M. 601?

A. Absolutely not. And as long as I follow my statutory obligations as an SJA and give him per GCM, the Article 34 advice which is mandated by 601, the commander is then free to consider anything else. I never saw anything that ran afoul of that.

TC (Capt Gannon): Sir, I'm going to retrieve the Manual for Courts-Martial from the witness.

MJ: When you say "you didn't see anything that ran afoul of that," you mean dealing with General Mattis?

WIT: Or General Helland.

MJ: Okay. Or General Helland.

WIT: They were both free to consider -- my intent was that they were both free to consider things outside my 34 advice letter and the 32.

TC (Maj Gannon): Your Honor, thank you. I have no further questions.

MJ: Redirect, Mr. Faraj?

REDIRECT EXAMINATION

Questions by the defense:

Q. There was a cluster of cases disposed of in August, September of '07 and they were disposed of by dismissal of the charges?

A. There were.

Q. And there was an IO report that issued after that time on Lance Corporal Tatum that also recommended dismissal of the charges?

A. I believe that's what it said. But remember, I recused myself at that point.

Q. Okay. And it was after that time that the Colonel Davis -- or the overruling of General Mattis on the Colonel Davis matter happened?

A. That happened in early-September, correct.

Q. And that's when charges stopped being dismissed?

A. I don't know if that's correct. I don't know.

Q. Tatum didn't get dismissed. Even though you didn't act on it, you know Tatum didn't get dismissed?

A. Tatum did not, but I think McConnell did. I think Stone did.

Q. I'm only talking about -- I'm only talking about the enlisted Marines, the shooters.

A. That could be true.

Q. You testified that as of December 21, 2006, you had all the information that you were going to have to give you a clear site picture as to the status of the case?

A. I think we had a much better site picture than we had mid-Summer. I think the --

Q. Mid-Summer of --

A. '06.

Q. -- '06?

A. Mid-Summer of '06. I think we had a much better understanding of the events. As I said, an investigation -- an NCIS investigation never closes. But I think at that point my feeling was that we had probably developed about as much evidence as we were going to develop.

Q. And of course one of the people that developed that evidence got to sit in meetings after he came back from Iraq?

A. Colonel Ewers.

Q. Right. He sat in those same meetings where some of these factual issues were being discussed?

A. Correct.

Q. There was one other critical piece of evidence, if you recall, that came to your attention in about February of '07 and that was the reconstruction by the NCIS experts of the scene?

A. I remember that I --

Q. Do you recall that?

A. I remember it.

Q. The thing that was done at the Illinois State Police labs with NCIS expert reconstructionists?

A. I remember it.

Q. And that happened in February -- February, March of '07?

A. I'll have to take your word for it.

Q. And I don't have an exact date, but it was after December '06?

A. I want to say, yes, it was.

Q. And that's where if you recall important to the termination was the number of shooters in some of the

houses and then the location of the shooters roadside?
A. I remember ballistic geometry being the takeaway from that report --

Q. And it was --
A. So our position's --

Q. And it was the conclusion at that time by those reconstructionists that about four -- at least four of the five men that were killed roadside were shot at from a northern position on the street and one may have been shot at from the north or the south -- or killed from the north or south?
A. I really don't remember.

Q. Do you remember if one of the issues was Sergeant Dela Cruz being in the north and Staff Sergeant Wuterich then Sergeant Wuterich being in the south?
A. I don't.

Q. That was a critical piece of evidentiary material that you would of wanted to also include in your --
A. It could have been at that time. I just don't remember it now.

Q. You said General Mattis frankly doesn't care what somebody in higher headquarters thinks?
A. I said that.

Q. And I will confirm that because he does a lot of things that sometimes you all didn't recommend or other people didn't recommend?
A. Absolutely.

Q. Yet you were still concerned with the appearance of UCI when general -- when Colonel Ewers gets back and you brief him on it?
A. Correct.

Q. Because it doesn't matter what the general thinks. The appearance is sometimes all you need?
A. Well, we're talking about two different paradigms here. I'm talking about what General Mattis -- what his concerns are about somebody in his chain of command above him. My job as his SJA is to give him legal advice and to give him legal opinions about the justice system. And just because it may not be a concern of his, I still have a statutory and ethical obligation to

advise him of that legal concern that I had.

Q. Because in the end statutorily there's some rules that you have to abide by regardless of the facts?

A. Absolutely.

CC (Mr. Faraj): I have no further questions, Your Honor.

MJ: Recross, Major Gannon?

REXCROSS-EXAMINATION

Questions by the prosecution:

Q. Sir, when you had that conversation with General Mattis, it was done out of an abundance of caution, correct?

A. Yes.

Q. You didn't think that Colonel Ewers' presence, again, in 2007 forward necessarily was UCI but in an abundance of caution you said, Hey, there may be an issue here?

A. When I had that conversation with General Mattis, Colonel Ewers had not even returned yet. My recollection is this was December, maybe January, just before Colonel Ewers came back. I -- I didn't know what General Mattis had in mind, and that's why I had that conversation with him just to make sure he understood the right and left lateral limits of what I thought he should be doing.

Q. So it really wasn't necessarily built on Colonel Ewers' presence or not, it was just making sure that legal advice goes through legal advice channels and information is okay in open meetings?

A. Generally, yeah. Correct.

TC (Maj Gannon): No further questions.

CC (Mr. Faraj): Just a couple follow-up, Your Honor.

MJ: Go ahead.

REDIRECT EXAMINATION

Questions by the defense:

Q. When you did advise General Mattis on the propriety of Colonel Ewers' attendance, he said words to the effect

of, Well, I don't really care, Colonel Riggs. He's a trusted adviser. I want him there?

A. I don't remember him saying that. And again, I had that discussion with General Mattis before Colonel Ewers had returned. So it wasn't me saying, Hey, sir, I don't think Colonel Ewers should be sitting in here. It was me telling him preemptively, Sir, when Colonel Ewers gets back, here's "X," "Y," and "Z" for your information.

Q. You remember him communicating anything to you with respect to, Look, I don't really care. He's a trusted adviser. I want him there?

A. No.

Q. Words to that effect?

A. No, I don't remember that.

CC (Mr. Faraj): Thank you.

TC (Maj Gannon): Nothing further, sir.

MJ: Lieutenant Colonel Riggs, I do not have any questions for you. Thank you for coming here and making yourself available to testify. You're excused. You may carry out the plan of the day.

WIT: Thank you, Your Honor.

CC (Mr. Faraj): We ask warning.

MJ: Okay. You're reminded not to discuss your testimony with anyone except the trial counsel or the defense counsel until the case is over. There may be more evidence you're going to give on this motion or other motions.

WIT: Understood, Your Honor.

MJ: Thank you. You're excused.

The witness was warned, excused, and departed the courtroom.

MJ: Court will be in recess.

The Article 39(a) session recessed at 1451, 22 March 2010.

The Article 39(a) session was called to order at 1504,

22 March 2010.

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

The next witness to be called, defense?

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

MJ: Bailiff, please.

TC (Maj Gannon): I recalled that it was your practice during the Hamdaniyah cases not to have bailiffs during 39(a) sessions, sir, so we didn't go get one.

MJ: You're right and that's correct.

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

DIRECT EXAMINATION

Questions by the prosecution:

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

A. Paul Ware, W-A-R-E is my last name. First name is spelled Paul, P-A-U-L.

Q. And where are you currently employed, Mr. Ware?

A. The Bureau of Alcohol, Tobacco, Firearms, and Explosives L.A. Field Division.

Q. Okay. And you're the former Lieutenant Colonel, United States Marine Corps, now retired and former military judge out of Hawaii if I recall; is that correct?

A. Yes, that's correct.

Q. And you were the Article 32 officer in the subject case of U.S. versus Staff Sergeant Wuterich?

A. Yes, I was.

TC (LtCol Sullivan): Thank you very much, sir. I'm going to tender you now to Mr. Faraj.

MJ: May I have your city and state of residence.

WIT: San Diego, California.

MJ: Thank you.

Your witness, Mr. Faraj.

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

Questions by the defense:

Q. Good morning, Mr. Ware.

A. It's afternoon. But good afternoon.

Q. Good afternoon.

A. Started in the morning.

Q. What's that?

A. I was here in the morning.

Q. I'm having such a good time in this hearing that I think it's still morning.

How many Article 32 hearing -- how many Article 32 hearings in the Haditha matter did you act as investigating officer in?

A. Three.

Q. And what were those?

A. U.S. versus Sharratt, U.S. versus Tatum, and U.S. versus Wuterich.

Q. You recommended dismissal of charges in Sharratt?

A. I did, yes.

Q. And in Tatum?

A. I did, yes.

Q. After you made your recommendations in the Sharratt case, did you have a telephone conversation with Lieutenant Colonel Riggs?

A. Yes, I did.

Q. Please tell us about that conversation.

A. Well, I've had more than one, but I think there's only one relevant to this hearing. The one that I had was shortly after the Sharratt report was put out on the -- I guess web pages on the news. Bill Riggs called me, left a message, asked me if I could call him back, and I got hold of him a day later. I think he was at

Pendleton some place. And the basics of the conversation was he was concerned, one, that the report got out in the media before the general had an opportunity to look at it. And he was concerned that the way I wrote the report didn't give him options.

Q. What do you mean by that?

A. You'd have to ask him what he meant by options. I can only tell you what I thought it meant.

Q. Well, tell me exactly what he told you and then tell me what that meant to you?

A. I don't think I can recite it verbatim. I can just tell you what I remember the conversation being about. My feeling from the conversation was that he wanted me to write a report that would be less like a judge which would be facts, conclusions, and analyzing of law that would make the opinion seem more tighter and give more facts that would be contradictory to my opinion and give more, I would say, fuzzy analysis with regard to how you should dispose of the charges.

I would say that when a judge is trained to write an opinion, you're trying to use the facts that are strongest to support your opinion. You don't give much weight to the other ones so they don't show up. So if someone reads the report, they may seem logical. That's the hope; that it sounds logical and it sounds bulletproof, if you will. It may not be. People from the other side may say, Well, you didn't talk about these facts.

And I thought my role and the reason why they asked a judge to do the 32s was to analyze it like a judge. And I think he was asking me not to; to analyze it like a layman.

Q. Did you discuss administrative matters and typos in your report?

A. Not with Bill Riggs. I discussed that with a -- I'm sure he's not a captain anymore. Maybe he's a major. I'm not sure. I forget his name. He's a young kid. May even have been a first lieutenant. He called my up because in one of my reports I had cited a specific part of testimony and the transcript was wrong. And the names were a little bit off. So he called me and wanted to let me know that they had gone back to the tape and they wanted to let me know the transcript was wrong.

I don't remember the point of that transcript, but it was important at the time. I said, Well, thank you for correcting that. But the transcript they gave me had the testimony incorrect. Of course, I'm reading through thousands of pages. And when I was going back to go through it, I found that I had cited it. So I took that out of the report. But I think I had confused -- you know, from the report, these people's last names all seem relatively the same and I don't mean to be callous but I'm more used to names like Smith. And so I think I mixed up a couple names and he helped me with that.

- Q. You mixed victims up and people that -- when you're saying "people," you're referring to Iraqi witnesses or Iraqi people -- Iraqis that gave statements?
- A. I don't think I made any mistakes of the NCIS agents or the Americans. It's just the names all look so similar and then they -- some reports had them abbreviated like A-med and then there's, like, more to the name. So by the time you get done with, like, the fourth report, I had to go with numbers. I was -- but I didn't want to be disrespectful. I didn't want to say Number 1, 2, 3, 4, 5. But I had a couple of them mixed up.
- Q. Did you have an -- were you -- were you contacted by Lieutenant Colonel Riggs by e-mail on this matter initially before the phone conversation?
- A. Not that I remember. Not related to that conversation. There was no e-mail that would -- related to I needed to talk to you about that type of thing. I may have had e-mail prior to Sharratt about who's going to help arrange my travel and stuff. But I'm not --
- Q. On this issue, though, you don't remember an e-mail?
- A. It was verbal. The only e-mail I remember is the one that I drafted, sent out, and I sent it to him as well.
- Q. Well, when he called you, do you remember him saying, Look, I don't want to talk about your decisions or conclusions. You can make whatever conclusions you want or words to that effect. I'm just telling you about typographical errors and mistakes in you releasing the report? Do you remember anything like that?
- A. Well, not to be hypercritical, I believe I called him on that conversation. He didn't call me. And I was just returning his call because he said he needed to talk to me. I wasn't sure what it was. I thought it was about admin stuff.

I don't remember the conversation in that manner. I was -- the conversation in my opinion -- and I don't know what he was thinking -- was one that you would have between a couple of lieutenant colonels -- and I didn't know Lieutenant Colonel Riggs. I still don't know him. I don't think I've ever spoken to him since then. It was one that as the SJA advising the general and that report going out in the media and the way it was drafted gave him limited options. And I interpreted that as meaning, you know, sometimes you get 32 reports. They say, Well, you can do this. You can do that. You can do that. And I didn't write my reports in that manner, because that's not the way I give recommendations. It's not a recommendation to say do what you want, so I wrote the recommendation the way I thought it should be. That was what I believe he was concerned with the way I was drafting it, because I was about to do the Tatum hearing.

- Q. And did you get any communications from -- or a letter from General Mattis appointing you as the IO?
- A. Well, I did get an appointment letter. I believe it was signed by General Mattis and also -- I believe I got three appointing letters; not just one. I was initially contacted by Colonel Daly, who was the chief judge. He said that he had a request for a judge to do this and he wanted me to do it. And he had no idea what it was going to entail. I'm not so sure I would have volunteered. But I got -- I think I believe I got three appointment letters all at the same time. Because I knew the day I began Sharratt. It wasn't like I was getting appointed in a surprise. I had all three from the beginning. So I'm not sure if it was three separate letters, but I believe it was. It would have to be in the reports.
- Q. After you -- after you were -- you had your conversation with Lieutenant Colonel Riggs, you commenced to draft an e-mail that memorialized that conversation. Do you recall that?
- A. I wrote an e-mail. I'm not so sure I memorialized the whole conversation. And I didn't commence right away. The first thing I did was digest what happened. I told -- in the course of the phone conversation, I believe that -- what'd I say. We were talking like a couple colonels and then I think like the roles got mixed up. I was, like, I'm not comfortable with this conversation. This isn't the type of conversation you

should have with a judge or with an investigating officer who's about to hear another hearing. It's not going to look good. So I told him this conversation isn't happening, it's not going to effect me, and we got to end it. Something along that effect.

And then I thought about it for awhile and I thought, All right. If someone else knew that this occurred and I didn't release it, I didn't disclose it, it would be a problem. Now, I wasn't concerned that I was going to all of a sudden become some fuzzy recommending investigating officer. But I was concerned that that shouldn't occur. I talked to my chief judge, Captain MacKenzie, and he made it clear that he thought I had an ethical and a moral obligation to inform the parties. I think it was the next day I sent the e-mail out. But I did call Colonel Riggs, because, you know, I'm not a fool. I knew this was going to cause some kind of ripples and I wanted him to know I was sending the e-mail out so he'd be ahead of that. And I sent it to him and to the counsel and the parties involved so they could voir dire me on the Tatum. Remember Sharratt was already done and there was no influence on Sharratt.

Q. And on or about August or September of 2007, how long had you been a lawyer?

A. I was a judge advocate for about eight years.

Q. And how long had you been a judge?

A. I think I had been a judge about five.

Q. What training did you go through to become a judge?

A. Well, I went through the standard training that military judges went through. First of all, of course, you're a judge advocate. I was a prosecutor for just about -- just under four years I believe. And then I went to the military judge's school. And then subsequent to that, I went to the National Judicial College in Reno and received a certificate in -- I don't know what they call it -- judicial studies. I'm not exactly sure what they call it. And then I, of course, attended other -- I think they call it interconference military judges seminars where you go to that. Of course I spent the first three and a half years as a judge here at Pendleton working with some great judges and learning from them. So I had on-the-job training, practical training, and I had theoretical training.

- Q. And did you understand your role as the IO when you were assigned as IO?
- A. I had been IO before -- before I was a judge, and I know there's a difference in the two roles. And I think it was unique that a judge was being asked to do this one. And I had questioned Colonel Day at the time, Why would they want a judge? And he said, They wanted a judge's perspective on it. And he was volunteering me and I was coming back to Southern California where my family was at. I thought, Okay. I'll do it. I had no knowledge -- I had never heard of Haditha to be quite honest. I was in the islands enjoying myself.
- Q. Did you receive any other communications from General Mattis after the appointing order about your role or what he expected?
- A. Which one?
- Q. Had you received any other communications?
- A. I received a letter shortly after I sent out the e-mail to Colonel Riggs. I first received an e-mail from a Lieutenant Colonel -- begins with a "K".
- Q. Kumagai?
- A. Kumagai. Okay. And his e-mail said that Lieutenant Colonel Riggs was no longer going to be the SJA for the Tatum hearing or for the Wuterich hearing. And I believe he attached on that a letter and I received separate correspondence from General Mattis -- a letter that specifically told me something to the effect that he didn't ask Lieutenant Colonel Riggs to communicate to me. He did not want to influence me or for me to be influenced. And that his staff wasn't going to do that. And that he wanted me to write the report in the same manner which I had written the previous reports. And I took that for face value.
- Q. So you received affirmation that what you'd been doing all along was the right thing?
- A. Well, I was told --
- Q. In the way you're analyzing --
- A. I don't know if it was the right thing. I was told that that's what the general wanted me to continue to do for his subsequent investigations.
- Q. I'm not referring to your conclusions. I'm saying the manner in which you were accessing the evidence.

- A. I took that letter as meaning continue to do business the way I was doing it.
- Q. You had been.
- Okay. And just to be clear, you understood that communication from Lieutenant Colonel Riggs to be a disagreement with the way that you were doing business?
- A. I don't know if I characterize it as a disagreement. I characterize it as frustration with the report that came out in front of him. It went to the media long before the general got it. It wasn't me that was giving it to the media. And that all these questions were coming in before the general had even had an opportunity to digest my report. And if you read that report, I worded it very strongly and I think he just didn't want me to word it as strongly.
- Q. Strongly that the charges should be dismissed?
- A. Not so much that, but my opinions. The word I used, it didn't give him much options.
- Q. Well, and it -- based on your opinions, you recommended -- based on your findings, you recommended the charges should be dismissed?
- A. I believe in Sharratt, I did more than that. I said that there was no reasonable grounds. And there was no evidence for those charges to go forward. I think it would be a travesty if that one went forward. It wasn't the exact same analysis in the other two. But in that one, the government just didn't have a case.
- Q. Do you remember a conversation with Lieutenant Colonel Riggs about, hey, something about egos or hurt feelings or I don't want to hurt your feelings or anything like that? It would have been during that phone call.
- A. No, I don't remember that. But that would have been inappropriate at the time. Like, I described the conversation as if you were talking to someone who was a friend of yours even though we're not friends. I never met the man before. And I think he forgot he was talking to an investigating officer who's about to hear another hearing. If I wasn't going to do Tatum, that conversation would have been him telling me, Hey, look, you bound me up with this report. I would have told them, Hey, don't assign me to any more. But the fact that I was just about to start the Tatum hearing is when I said, Wait a minute. You're the SJA. I'm about to do

another hearing.

I believe I told him something specifically like, If you don't like my recommendations, just ignore them. They're just recommendations. The general does what he wants with them. You don't ask me to change the way I write it. Just ignore them. They're nonbinding recommendations. And if the general doesn't want me to do it, just assign someone else the 32. It doesn't matter to me.

And in the course of that he may have thought, you know, I was taking it personal. When I wrote the e-mail, I was upset. But I was upset because of the position it put me in. It makes me look like this hypersensitive person. But there's an ethical obligation you have. Even if I don't feel he's influenced me, I have a responsibility to tell all the parties because other people may want to question me about that. And that's what I didn't like about it. That's what upset me is that how can someone -- I mean, it's just common sense. You don't call the investigating officer in the middle of that hearing who's about to hear another one. You just don't do that.

CC (Mr. Faraj): I have no further questions, Your Honor.

MJ: Give me just a minute.

Cross-examination?

TC (LtCol Sullivan): Yes, Your Honor. And, Your Honor, may I approach?

MJ: Please.

CROSS-EXAMINATION

Questions by the prosecution:

Q. I'm going to hand you Appellate Exhibit LX, Enclosure (21), which is the e-mail dated August 1, 2007, Mr. Ware. And just go ahead and take -- it's a two-pager. Go ahead and take a look at that because counsel asked you a lot of questions.

A. It's a lot longer than I remember it.

TC (LtCol Sullivan): Yeah. But just go ahead and take a look at

the two-page e-mail and I'm going to have very few questions for you.

MJ: What was the page number?

TC (LtCol Sullivan): It's -- Your Honor, on the Bates Stamp, it's 463 of 524.

MJ: Thank you.

TC (LtCol Sullivan): It's Enclosure (21) to Appellate Exhibit LX.

WIT: Okay. I've read it.

Questions by the prosecution (continued):

Q. Now, Mr. Ware, that was the e-mail you sent out on August 1, 2007 that you're referring to in your responses to Mr. Faraj's questions; is that correct?

A. Yes.

Q. Now, when's the last time you had the opportunity to review that e-mail?

A. It would have to be somewhere around the 1st of August of 2007. I don't go back and read them.

Q. All right. Roger that. What I want to make clear is that's -- obviously this is an attachment to some of the evidence the military judge is going to consider. Now that you've had an opportunity to review that, would you say that is a fair and accurate summary of the conversation you had with Lieutenant Colonel Riggs since -- obviously you sent this e-mail immediately or close to the time frame following the conversation?

A. No.

Q. So the e-mail's not a good summary of your conversation with Lieutenant Colonel Riggs?

A. My conclusions of it. Nowhere in there do I put quotes or say what Colonel Riggs said to me. So it's not an attempt to capture everything that was in the conversation. It was an attempt to capture the communication which I think I had to reveal.

Q. Right. And as you testified here today, part of the conversation was with regard to the fact that the way your initial report was disseminated in Sharratt; somehow it made it out into the news media prior to it

getting to the SJA and the convening authority?
A. Well, after reading that, I remember there's two concerns. My memory prior to reading that -- and I still don't have a memory of that. I'm just reading something here -- was that there was also concern with the transcripts in the report.

Initially what I did is I sent the report to -- that's embarrassing. I should remember that captain's name or that lieutenant who worked for you at the time. I sent him the report and he was going to have the transcript put together --

Q. Was it Captain Hur?

A. Yes, that's the name. Captain Hur. And he was going to have it put together, the transcript, and then forward it out. That did not occur. That went -- that report went to the defense counsel and then to the media. And that's why I said it was my responsibility. As the investigating officer, I should have put it all together and mailed it directly. But I was using Captain Hur. He said he'd put it together for me and send it out.

So that's why in the e-mail I'm talking about there's a concern that the report wasn't 100 percent complete because the transcripts weren't 100 percent complete.

Q. I guess my question though is that was one of the concerns in the conversation with Lieutenant Colonel Riggs was that he didn't get the report with the accompanying transcripts together; is that correct?

A. I don't think I would write that if it didn't happen. I don't remember that but, you know, that's what it says in the e-mail and I think it's accurate.

Q. Okay. Roger that. And then also the fact that I guess the report that was disseminated did make it out into the media, I mean, relatively quickly; is that correct also?

A. I do remember having that conversation, and I told him that he's the one that controlled that not me.

Q. Okay. Roger that. Roger that.

Well, also -- and I guess it's in Paragraph 3 of the e-mail that he clearly stated he was not concerned with the recommendations that you made and he was not attempting to influence your decisions. I mean, was

- that at least communicated?
- A. Yes, he did say that.
- Q. Okay. Roger that. And then with regard to your actual investigative recommendations in these cases, you sat as the investigating officer on three cases if I'm correct. First one was U.S. versus Lance Corporal Sharratt, correct?
- A. That's correct.
- Q. And in that case you recommended that charges be dismissed; is that correct?
- A. Yes.
- Q. And in that case the convening authority actually dismissed the charges; is that right?
- A. He did, yes.
- Q. Okay. The second case you sat on was U.S. versus Lance Corporal Tatum, correct?
- A. Yes.
- Q. In that particular case, different fact patterns. If I -- well, I know the facts and if you recall the facts, Lance Corporal Tatum participated in the engagement in what was called House II, back bedroom that involved women and children along with at least some of the factual information you considered along with Staff Sergeant Wuterich; is that correct?
- A. Do you recall that?
It's hard to say correct, because it's so compound. Maybe you could break that down. Tatum was focused on a different series of facts than Sharratt, if that's your question.
- Q. Yeah. Right. But one of the series of facts at least in the Lance Corporal Tatum investigation was that there was a -- what was referred to as a back bedroom of House II in the investigations.
- A. Do you remember that?
Yes, I do.
- Q. And in the back bedroom of House II, there was approximately six children and one woman that was killed in that room; is that correct?

- Do you remember that?
- A. Yes.
- Q. Okay. In Lance Corporal Tatum, some of the factual evidence that you considered -- it was indicated in the investigation that Lance Corporal Tatum was one of two Marines that may have participated in the shooting in that back bedroom of those individuals; is that correct?
- A. That is correct.
- Q. All right. In that particular case, you made a recommendation that the charges should not be referred to general court-martial with regard to Lance Corporal Tatum, right? That was your recommendation in the Tatum case?
- A. I believe so.
- Q. Right. And however, in this case, the convening authority actually referred Article 119 charges. Were you aware of that?
- A. Which case are you talking about?
- Q. Lance Corporal Tatum.
- A. Who?
- Q. Lance Corporal Tatum's case?
- A. I know that there was some charges referred. I don't know the final disposition.
- Q. And I apologize if I'm being unclear. I guess what I'm saying is in Lance Corporal Sharratt, you recommended dismissal. The convening authority agreed and dismissed the charges, correct?
- A. As far as I know, yes.
- Q. Lance Corporal Tatum, you recommended dismissal. Convening authority actually referred Article 119 charges. You understand that, right?
- A. I'm pretty sure my recommendation also had an alternative theory in Lance Corporal Tatum. I think I outlined other charges they could go forward with. I think my recommendation was I don't recommend them going forward. Much different than Sharratt, which I said you didn't have reasonable grounds.
- Q. I get -- roger that. Well in this particular case with this accused, you actually recommended that the charges be referred to a general court-martial along with

alternative theories that you actually forwarded for consideration to the staff judge advocate?

A. I haven't had the benefit of reading this report. I know I recommended this to be referred to trial, but I believe I recommended reduced charges. Didn't find reasonable grounds on some of the charges. I'm not 100 percent positive. But I believe my recommendation had reduced some of the severity of the charges and changed some of the charges and I may even added a charge as far as --

Q. Right. From 118 to some reckless theory -- or negligent theory of homicide; is that correct? Do you recall that being part of your consideration?

A. I know it was a lesser. I don't want to say which one it was.

Q. All right. But the ultimate -- at least in this particular case with this particular accused, your ultimate recommendation was that some charges be referred for trial at general court-martial.

Do you recall that?

A. Yes.

TC (LtCol Sullivan): Okay. Your Honor, may I have a moment?

MJ: Sure.

WIT: Would you like your exhibits back?

TC (LtCol Sullivan): I will. Just one second.

Questions by the prosecution (continued):

Q. And I guess -- and I will retrieve those -- and I'll just ask you -- we've had a lot of conversations about -- a lot of questions should I say about the phone call between yourself and Lieutenant Colonel Riggs.

Let me ask you this: At the time you received the phone call, you were also a sitting judge, correct?

A. Yes, I was.

Q. All right. And were you influenced in any way whatsoever by that phone call in any of the recommendations that you tendered in this particular case?

A. No.

TC (LtCol Sullivan): Okay. Thank you.

MJ: Redirect?

CC (Mr. Faraj): Defense has no further questions.

MJ: Mr. Ware, I do not have any questions for you. I guess since I didn't ask last time, since we're at a motion session not the trial, but you asked for a warning. Would you like that again for this witness?

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

MJ: Okay.

Mr. Ware, you may be subject to being recalled in this case for purposes of the motion or something to do with this motion. So please don't discuss your testimony with anyone except the counsel until we terminate your role in the proceedings.

Okay. You're excused. Thank you for coming.

WIT: When you say recall -- I'm not here on a subpoena, so is someone going to try to subpoena me if they want me to come back.

MJ: You do not need to stay in the building today and if we need you later in the week, then someone would have to arrange with you and/or subpoena you.

WIT: All right. Thank you. Trial counsel has my number. He can call me.

MJ: Okay. Thank you.

The witness was warned, subject to recall, excused, and departed the courtroom.

MJ: Defense.

CC (Mr. Faraj): At this time, Your Honor, we would -- we want you to read the testimony of General Mattis and Colonel Ewers, the previous testimony that's included, and then we'd want to call -- we don't intend to call Colonel Ewers today. I think the testimony's sufficient. And then we would just begin with General Helland whenever he's available.

MJ: Okay. It's a motions hearing. The parties are responsible for litigating the motion. However, as the decider of fact, if I do need to call somebody again, I can certainly feel that's in my purview as a military judge to call somebody. So I have it marked. I will read through Colonel Ewers' and General Mattis' testimony that I did not read previously this evening. And then if we need to call him, we will. But your idea right now is that you are not going to call him, correct?

CC (Mr. Faraj): We don't intend to call Colonel Ewers. We may have something for him if you decide that the burden is shifted and the government calls him, but we are going to depend on his previous testimony.

MJ: Okay. So I might have missed the last part. What other evidence do you have for today then?

CC (Mr. Faraj): Well, there's General Helland. But I don't have anything today. General Helland is not available until tomorrow unless we have -- I don't think there are any other witnesses that we know of.

TC (LtCol Sullivan): No other witnesses today.

MJ: Okay.

TC (LtCol Sullivan): And certain, Your Honor, what time for planning purposes would you want to start tomorrow morning?

MJ: 8:30.

TC (LtCol Sullivan): Roger.

MJ: Every day 8:30.

TC (LtCol Sullivan): Roger.

MJ: So we'll plan at 8:30 in the morning. If you'll be here please a few minutes before then to get organized so we can start promptly at 8:30, and we'll take -- it's General Helland retired, right, from what I read?

TC (LtCol Sullivan): Yes, sir.

CC (Mr. Faraj): He is, yes, sir.

MJ: Okay. So we'll take General Helland retired then in the morning and any other evidence the defense has. After that, we can take a short break. We'll discuss whatever witnesses or evidence you have and then I may need to take a break to determine what burden is shifted to the government. And then like I said, if the government can be ready to go assuming that happens, then we'll take that up perhaps even Wednesday if we needed to. But we'll take this up after the record as far as logistics go.

So anything else for today from the government?

TC (Maj Gannon): No, sir.

MJ: Defense?

CC (Mr. Faraj): No, sir.

MJ: One other issue we have is pay of the accused on the charge sheet. There's a little yellow sticky on the charge sheet up here. Do you want to correct that?

TC (Capt Gannon): Yes, sir.

MJ: Is there any objection from the defense to correcting his pay -- the pay of your client to \$3,051 which I assume would be the 2010 pay chart?

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

MJ: Please make that change, initial it, date it, show it to the defense -- you can do that off the record -- and then show that back up to me.

TC (Maj Gannon): Yes, Your Honor.

MJ: The court then will be in recess until 8:30 tomorrow morning.

The Article 39(a) session recessed at 1532, 22 March 2010.