

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

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

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

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

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

MJ: Okay. Great. Thank you.

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

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

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

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

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

continuance. And I found good grounds to grant a continuance; namely, Mr. Mike Maloney, one of the NCIS agents who's a forensic reconstructionist of some of the events that may have occurred in this case literally fell off of a cliff and had some medical concerns and is in surgery this week that we were to begin trial. Can't travel for six weeks and is basically out of pocket. This is the government's -- one of the government's main witnesses and one of the government's witnesses that will help them to deconstruct I guess or assist in cross-examination of the defense counsel's experts as I understand it or expert.

So the fact --

CC (Mr. Puckett): Sir, can we -- can we make a quick correction before you move on.

MJ: Sure.

CC (Mr. Vokey): Just a quick correction. He wasn't in surgery this week. It was last week, and it was actually a kayak accident. We communicated with him last week and he's fine. But he was not supposed to have surgery this week at all. It was last week.

MJ: Okay. Great. Thank you.

So I got the cliff wrong and the surgery date wrong. So evidently it's a kayak accident. I thought we had talked about him going over a cliff. Whatever the issue is he required some major reconstructive surgery from my understanding and was unable to travel based on a doctor's order. So I didn't feel I had any option.

If the defense had the same concern for their main witness, I would have granted a continuance. Therefore I granted the government continuance and I do so here in court, obviously, until 1 November. All parties are expected to be ready to proceed to trial on 1 November and to leave open on their calendars all the way through 19 November. That gives us three weeks to do the trial. We may finish earlier, but we should finish in those three weeks.

We also discussed during that 802 conference the unavailability of any of the witnesses, et cetera, and that some witnesses would be subpoenaed. I know that

there was a mention of a Witness Salinas that might be subpoenaed for that time frame if people left active duty. Obviously this was going to be a major headache for the government to subpoena and get people here for trial at a different time than originally planned. Unfortunately that was the only decision they felt was appropriate in this case, and the court, meaning myself, felt the same way. So the continuance was and is granted until 1 November 2010. All parties are expected to be here on that date and have available until 19 November.

That as I remember it is the sum and substance of the 802 conference other than we discussed the issue of this motion and discovery matters getting to the defense that would help them in preparation to litigate this motion for today.

Does either side wish to add anything to my summation of the 802 conference or put any of your positions on the record?

TC (Maj Gannon): No, Your Honor.

MJ: Defense?

CC (Mr. Faraj): Not with respect to the 802. We do have something -- we'd like to ask for a change of the trial start date.

MJ: A change of the trial start date to when?

CC (Mr. Faraj): Until 4 November, Your Honor.

MJ: Why?

CC (Mr. Faraj): We have some matters that we have to attend to during that period in Washington, D.C., and we can't be here. If we're here, we're going to lose -- we've committed to doing an event in Washington, D.C. At the time when we spoke on the phone, I didn't have that calendar in front of me, and I was reminded of it by Mr. Puckett.

MJ: So when you say "we are committed," what are you talking about? The defense team here --

CC (Mr. Faraj): Yes.

MJ: You and Mr. Puckett? Your law firm?

CC (Mr. Faraj): Yes.

MJ: Okay. Has an engagement in D.C., on 1 November?

CC (Mr. Faraj): 3 November should be sufficient for us to cover it.

MJ: So you're asking for a continuance from 1 November to start the case on 3 November which is a Wednesday?

CC (Mr. Puckett): Yes, sir.

CC (Mr. Faraj): We'll probably be in town on the 1st, but we won't be -- or the 2nd, but we can't be in town on the 31st to start on the 1st.

CC (Mr. Puckett): Sir, I can represent that we could do preliminary matters on the -- on the 2nd, probably without any difficulty.

MJ: Okay.

CC (Mr. Puckett): If you wanted to, like, jump start on the 2nd.

MJ: And what time on the 2nd could you start?

CC (Mr. Puckett): In the morning.

MJ: Okay. 8:30 is the normal start time for this court, so 8:30 on the 2nd.

I guess I need to rule on the next continuance motion posited by the defense.

Major Gannon?

TC (Maj Gannon): No objection, Your Honor.

MJ: Okay. The continuance is granted until 2 November, so we'll start one day later. We'll do preliminary matters on 2 November. Does that include seating the panel? Can we have the panel show up at noon then on that day? We should not have that many more preliminary matters to do. That's what we're here today doing.

CC (Mr. Puckett): I think noon would be a good time, sir.

MJ: Okay. We'll plan on being here at 8:30. We'll take up anything we have to. If it only takes an hour, we'll have a break for a couple hours. But we'll plan on the panel being here then at noon on 2 November.

Major Gannon?

TC (Maj Gannon): Yes, Your Honor.

MJ: The parties will be expected to plan on doing opening statements the afternoon of 2 November. If it's late in the afternoon, we won't do them. But if we get through the panel quickly, we will. So we'll try to stop at a legitimate time on that day. The members will be here at 1200, which means that we could go realistically until about 1700. So if it's 1600 or 1630, we're not going to start openings. But if it's earlier, be prepared to do your openings on that date; otherwise, we'll just start them the next day, which would be Wednesday morning, the 3rd.

Okay. Let me give a quick ruling on the previous motions.

First off, the government motion to reconsider their preliminary ruling of the admissibility of the photos of House 2 is denied. I'm not at this point prepared or willing to give any facts -- findings of fact or conclusions of law for these motions. I'm just going to give the ruling on the motion. So the government motion to reconsider the preliminary ruling on the admissibility of the photos of House 2 is denied. I don't find grounds to reconsider what the previous judge did.

Next, the defense witness production motion is granted in part and denied in part. It's granted for Major Dinsmore. It's denied for Sergeant Maldonado. There was no showing of relevance and necessity at the motions hearing regarding when he arrived at the scene, et cetera. It was not shown to the court.

It's granted for Sergeant Eric Feral based on the time frame and the enlisted perspective. There are a number of military character witnesses; however, most of them that the government has agreed to provide are civilians and officers. And this person offers an enlisted perspective on the accused, so that witness is granted.

And then the court granted either Major Hahn or First Sergeant Carlson based on the time frame to go back for military character evidence of the accused. In court, the defense elected Major Hahn at the last motions session if I had to grant one of those two witnesses.

Are you prepared to elect one of those two today, Major Faraj? Mr. Faraj, excuse me.

CC (Mr. Faraj): We did elect Major Hahn, Your Honor.

MJ: Okay. Thank you. So Major Hahn is granted then. First Sergeant Carlson does not need to be produced.

The defense motion in limine for the exclusion of the comments in the accused's statement and for the dismissal of the charge is denied.

The other motion is the motion to preadmit the unaired CBS outtakes from the interview of the accused. That is granted. The evidence was deemed relevant and admissible by a previous judge and I agree with that. So that is granted to admit those three DVDs.

Now, I have reviewed -- since I sent this e-mail out on 3 September, I have reviewed at this point the other DVDs. And DVD 2 and DVD 5 have possible relevance also under M.R.E. 106. That's 2 and 5. I see 1, 6, and 7, the last three DVDs, that they might be relevant at sentencing.

Since there doesn't appear to be any fight over the privilege and the court believes that -- that I'm the owner of this material at this point in time, my preference is to therefore release all of the DVDs to both parties and -- for your consideration. Three, four, and eight, as I just stated, have already been preadmitted, so they're admitted. Two and five may be possibly admitted under M.R.E. 106 if the defense chooses to do so. And then we can talk about the appropriate time that you would like to play portions of those. But the court specifically finds that two and five may be relevant in explaining Discs 3, 4, and 8 for the defense.

As I indicated previously, one, six, and seven are -- any relevance that may be there might be relevance for sentencing and, frankly, that's probably relevance for

sentencing for the government. Since the rules of evidence still apply in sentencing, we still have the hearsay rule, those discs may be relevant for the government in sentencing. To a lesser extent, they may be relevant to the defense. I don't know. My preference is if it's a close call, to release the DVDs to the parties. You're the ones who know the case, you're the ones who try the case, and let you decide what's relevant for your case and what you'd like to produce.

I also caution you to structure your evidence so that you do something more than simply just push the play button and play the entire thing if it's not beneficial to your side. But, again, at this point, the three discs -- three, four, and eight -- are admitted into evidence. You may use them as you wish.

That particular ruling then on the DVDs I understand might be a sea change from what was previously discussed by the other judge, and the fact that I plan on releasing all of them to you.

Does either side believe that there needs to be a court order to protect what's in the DVDs? In other words, that they been seen only by the defense team or the government and then they be returned to the court and anything like? A protective order?

TC (Maj Gannon): Yes, sir. In an abundance of caution, the government would request that you issue a protective order to prevent the extratribunal publication of the DVDs.

MJ: Okay. Defense? What we're looking for here is to avoid pretrial publicity that -- I believe that's the government's concern. In other words, if I release these to both sides, I don't expect -- I would not expect that these -- this is to be used to manipulate the case in the media. I don't want to go into --

CC (Mr. Faraj): We don't object to that, Your Honor.

MJ: Okay. I'm going to probably do that. It's something I contemplated. I did want to hear from the parties in court. And that -- the purpose of that would be so that we don't get any further statements or videos out there of the accused prior to trial. I wish to avoid as much

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

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

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

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

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

MJ: Okay.

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

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

Mr. Puckett, please.

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

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

MJ: Sir.

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

MJ: Okay. And --

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

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

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

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

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

[The military judge perused Appellate Exhibit CI.]

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

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

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

MJ: Okay. Sure. Mr. Puckett.

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

MJ: Thank you.

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

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

Is that correct?

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

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

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

CC (Mr. Vokey): Yes. Yes.

MJ: -- when you were hired?

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

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

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

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

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

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

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

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

MJ: Okay.

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

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

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

MJ: Okay.

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

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

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

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

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

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

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

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

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

CC (Mr. Puckett): Yes, sir.

MJ: -- and your client --

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

MJ: -- to Iraq --

CC (Mr. Puckett): Yes, sir.

MJ: -- and those kind of things.

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

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

MJ: Is that where we're at?

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

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

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

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

MJ: Okay. Thank you.

Major Gannon.

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

MJ: Mr. Vokey?

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

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

MJ: Okay. So at this --

Mr. Puckett, please go ahead.

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

MJ: Sure.

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

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

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

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

MJ: Thank you.

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

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

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

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

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

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

MJ: Okay.

CC (Mr. Puckett): Yes.

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

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

MJ: Okay. And obviously from your client.

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

Major Gannon, did you have something?

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

MJ: Right.

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

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

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

MJ: Lieutenant Colonel Sullivan.

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

MJ: Okay. Just a moment, please.

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

MJ: Sure.

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

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

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

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

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

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

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

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

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

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

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

Mr. Faraj.

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

don't think we received what you directed the government to produce and we'd like to discuss that a little bit.

MJ: Okay. I did receive as Appellate Exhibit XCVIII a redacted sanctuary package of Lieutenant Colonels Sullivan and Atterbury. One of the things the defense counsel had requested in our -- at least in discovery in writing for this motion was the packages -- the information on these individuals. And the government prior to coming on the record indicated that they had some things that they didn't feel like were necessary dealing with medical documents or other personal issues for Lieutenant Colonels Sullivan and Atterbury, and they put that in a sealed envelope here for me to look at, Appellate Exhibit XCVIII. So I can take a look at that and see what we need to release to the defense from there.

Is that what you were referring to?

CC (Mr. Faraj): Yes. And we'd also -- well, we object to that because you ordered that to be produced. We think it is relevant. It goes directly to this motion. But also, we wanted any e-mail discussions directly related to that. And I recognize that my request was broad, but it was broad in order to make sure that we got everything that's related to this. So it's a request that's broad, but it's to a narrow issue and that is anything related to prosecutors continuing on active duty service for the purpose of this case.

MJ: Okay. And that was -- in particular, you're talking about Lieutenant Colonels Sullivan and Atterbury?

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

MJ: Okay.

Major Gannon, what's the status of that? I think we talked about that in the 802 conference of September 4th, about the request not being too overbroad but being distinct enough for you to be able to get e-mails regarding this issue.

TC (Maj Gannon): Your Honor, I've checked with the Officer in Charge of the Legal Service Support Section. He has no e-mails. I've provided the e-mails related to myself. That went into the discovery package. In addition to

that, I've discussed --

MJ: I'm sorry. Who's the OIC?

TC (Maj Gannon): Lieutenant Colonel Keith Forkin, Your Honor.

MJ: Okay.

TC (Maj Gannon): He's got no e-mails to that effect. He provided me with the materials that are in there related to myself. And I've also checked with the former OIC of the LSSS, Colonel Jamison, and he has no e-mails that relate to Colonel Sullivan. Now we had -- there is traffic that is basically what the court has, which is these documents and their endorsements and the medical record and all of the components of each respective package, and that's been turned over to the court for in-camera inspection. And the government's position is that those materials are just not relevant and thus they're protected by the privacy act. They need to be -- parts of those are protected by the privacy act. They needn't be discovered on the defense. The vast majority of those materials certainly don't.

In addition to that, they're irrelevant as to time. As this issue matured and we began to research it and really dig down on the timeline -- we've provided the court with a timeline at Enclosure (1) of our -- of Appellate Exhibit, I believe it's XCVII. The timeline captures the fact that -- with particular to Lieutenant Colonel Sullivan -- his sanctuary package did not originate until March of 2009. Well-after the departure of both the counsel in terms of retirement dates.

So the government's position is that it's simply not relevant. If they want to offer it as evidence of disparate treatment for trial counsel and defense counsel, there's no relevance to those documents if they occurred later in time given the fact that these gentlemen left active service in terms of retirement voluntarily a year prior to that sanctuary package even originating. And thus, they're just not relevant.

Until we get to the issue of disparate treatment, the government would respectfully request to keep -- the court keep those documents sealed until we finally -- if we do get to the issue of whether or not there was disparate treatment, sir.

MJ: Defense, anything else on that issue?

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

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

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

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

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

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

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

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

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

Major Marshall, come on up.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Major Gannon, please.

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

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

DIRECT EXAMINATION

Questions by the prosecution:

Q. Sir, can you state your full name and spell a last name for the benefit of the court reporter?

A. Sure. It's Greg Allen Yetter, Y-E-T-T-E-R.

Q. And, sir, you are an active duty United States Marine Corps lieutenant colonel?

A. I'm actually a mobilized reservist, but I'm currently on active duty.

Q. Roger that, sir. What is your current billit?

A. I'm the Deputy Branch Head for Manpower Management Force Augmentation Branch.

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

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

MJ: Defense, your witness.

Questions by the defense:

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

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

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

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

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

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

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

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

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

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

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

Q. So letters of recommendations would help?

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

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

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

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

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

authorized?

A. Yes.

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

A. Late-October 2009.

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

A. Yes.

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

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

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

A. Right.

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

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

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

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

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

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

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

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

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

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

- Q. Yes, it does.
- A. Okay.
- Q. It does.
- A. So there has to be some request --
Right.
- Q. -- routed to that three star to allow that Marine to continue to serve on active duty?
- A. Right.
- Q. And if I understood this right, the reason the Marine Corps does that is because it affects the different pots of money and the end strength that statutorily the Marine Corps is required to be at.
- A. Right. And the grade tables too. Because now, even though you're still -- it affects the total number of officers that they can have in that particular grade on active duty any one time. And by law, the Marine Corps is required to maintain and stay within those parameters as well. So all those things are taken into consideration when those packages are being routed.
- Q. Just so I understand this right, if, for example, a 4402, lieutenant colonel reservist was granted authorization to continue to serve on active duty to reach sanctuary, that -- the 4402 numbers would have to be reduced by lieutenant colonels at some other place or the Marine Corps would have to get some congressional authorization or perhaps Presidential authorization to go beyond those end strength numbers.
- A. Is that right?
- A. It's not so much by MOS. It's by total. I mean, I don't know off the top of my head what the numbers are, but there's a percentage of lieutenant colonels that can be on active duty any one time. Same way with majors, colonels, all the way down to lieutenants. I know -- I know for a fact that of the total number of field grade officers, the Marine Corps is short; that we're not at those numbers yet. Company grade, I think we're at -- we're even. But I know for the field grade, major to the colonel, we're below what we're authorized.
- Q. Okay. Do you know what -- what our -- the Marine Corps' numbers were in 2009, early-2009?
- A. No, I sure don't.

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

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

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

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

Q. Active component.

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

Q. I understand --

A. Our --

Q. I understand. Thank you, sir.

A. Okay.

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

MJ: Cross-examination by the government?

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

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

WIT: All right. Thank you.

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

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

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

MJ: And your burden is preponderance of the evidence?

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

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

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

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

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

MJ: Regarding Mr. Vokey?

TC (Maj Gannon): Yes, Your Honor.

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

You said you had a witness.

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

MJ: Oh, at this time?

CC (Mr. Faraj): Yes.

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

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

MJ: I do not.

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

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

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

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

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

MJ: I don't know.

[The trial and defense counsel conferred.]

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

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

MJ: Okay.

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

MJ: Okay.

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

DIRECT EXAMINATION

Questions by the prosecution:

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

A. That's correct.

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

A. Dallas, Texas.

Q. Occupation, sir?
A. Attorney.

TC (Maj Gannon): Thank you very much.

MJ: Defense.

Questions by the defense:

Q. Good afternoon, Mr. Vokey.

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

A. I do.

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

A. I do.

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

A. Okay.

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

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

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

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

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

A. That's right.

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

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

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

A. That's right.

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

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

Q. I am referring to 2008.

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

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

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

A. I did.

Q. Do you recall what month that took place?

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

Q. It was in the Spring of '08?

A. That's right.

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

A. That's right.

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

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

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

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

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

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

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

A. Yes, that's correct.

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

A. That's correct.

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

A. That's right.

Q. And that was granted?

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

submitted a written request for a 1 July retirement date.

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

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

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

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

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

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

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

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

A. No, just Staff Sergeant Wuterich.

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

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

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

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

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

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

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

there the day before the trial.

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

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

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

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

Q. To go on terminal leave?

A. To go on terminal leave. I was done with the Marine Corps.

Q. Your end of active service date was 1 November?

A. I guess, 31 October was my last day of service; 1 November, I became retired.

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

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

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

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

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

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

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

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

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

Q. You didn't have a job?

A. I didn't have a job.

Q. How many children do you have?

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

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

TC (Maj Gannon): Objection. Relevance.

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

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

MJ: Right.

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

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

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

MJ: Okay. Go ahead.

Objection's overruled.

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

Questions by the defense (continued):

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

A. I did.

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

A. No.

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

A. That's right.

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

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

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

A. Yes.

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

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

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

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

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

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

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

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

MJ: Cross-examination by the government.

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

MJ: Sure. Take your time.

CROSS-EXAMINATION

Questions by the prosecution:

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

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

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

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

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

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

A. No.

Q. It's a common occurrence?

A. It's not uncommon.

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

A. Do you recall that?
To do double detail?

Q. Yes, sir.

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

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

A. I did.

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

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

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

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

Q. Which doesn't happen?

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

- Q. And so you asked the convening authority for permission to double detail?
- A. And the permission to detail. That's right.
- Q. And you asked him for the permission to double detail?
- A. Sure. I mean, you can look at the request.
- Q. And Lieutenant Colonel Simmons did the same thing. He felt it necessary to request from the convening authority to get permission to double detail?
- A. I don't think so. I think he just requested permission to detail. I think we had already established that there was going to be detailing to the cases.
- Q. And subsequent to the convening authority granting the authorization to double detail, that's when then-Major Faraj was detailed?
- A. I think when the -- again, I think before -- I think the issue of detailing two counsel to the case was settled long before any detailing happened in Haditha. And I think it was a matter of sorting out who's detailed and when.
- Q. You don't have a recollection of Lieutenant Colonel Simmons asking specific permission of the convening authority for the purpose of double detailing? Not just detailing authority; double.
- A. I don't -- I don't recall that. That could be the case. That could have been in the request. Again, I -- we had discussed it with Lieutenant Colonel Riggs, again, back in the Summer about -- because we were concerned of -- we're going to detail two counsel -- it wasn't to everybody from Hamdaniyah and Haditha. It's only the ones charged with certain offenses.
- So we -- we were concerned about having enough resources, having enough defense counsel, which we did not. We also had the issue of potential conflicts of any -- any of the folks that come in, speaking with any counsel for advice that we didn't want to start excluding counsel because of that. So it was -- it was difficult to try to make sure -- to keep everybody sorted so we have enough counsel.
- Q. And ultimately Staff Sergeant Wuterich was detailed to counsel --
- A. That's correct.

Q. -- in February of -- excuse me -- in January of 2007?
A. That's correct.

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

A. That may be right. February of 2007.

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

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

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

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

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

MJ: Your objection's overruled.

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

Go ahead.

Questions by the prosecution (continued):

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

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

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

correct?

A. Again, I don't remember exactly when I put in for a retirement date.

Q. The Article 32 in this case went from 30 to 31 August 2007?

A. That sounds right.

Q. And then again on 5 and 6 September of 2007?

A. That's right.

Q. This case was referred to a general court-martial in December of 2007?

A. That's right.

Q. Now at this point, you had a 1 April retirement date for 2008?

A. No. I believe I requested 1 April and they gave me 1 May. It had something to do with computation in days. So I think they gave me 1 May.

Q. And ultimately you made a request for a modification of your retirement date, didn't you, sir?

A. Yeah, 1 May to 1 June; 1 June to 1 July; 1 July to 1 August.

Q. And you made another request for 1 August to 1 November?

A. Well, yes. My initial request was much longer than that when I talked to Colonel Redmond on the phone.

Q. That's not what I asked you, sir. What I asked you was did you make a request to get the date modified from 1 August 2008 to 1 November 2008?

A. Yeah. That was the last modification.

Q. Okay. So you made that request?

A. Yes.

Q. And that request was approved?

A. That's right.

Q. Now the e-mail that you all attach at the defense team -- attached to their motion that supposedly came from Colonel Redmond admonishing you not to seek another retirement date, that e-mail is actually merely an approval of the date moving to or being modified to 1 August?

A. Yeah. But that -- that was not the admonishment.

Q. Okay.
A. That was by phone.

Q. But that e-mail was supplied to this court during our last session and referred to as such by your team. Isn't that true, sir? I mean, we were all sitting in this room.
A. I know it was put in the motion, I know it was supplied into the evidence, but not as an admonition.

Q. But you and I agree that that e-mail is actually an approval of a 1 August retirement date, correct?
A. Yeah. I'd have to look at it again. I've looked at so many things now. Show it to me, I'll tell you.

Q. And it did not operate to deny the modification that you sought for 1 November?
A. Say it one more time.

Q. That e-mail did not operate to deny you anything?
A. Show me the e-mail and I'll be able to tell you. I just don't recall it right now.

Q. I'm showing the witness what's been marked as Enclosure (8) to the government's brief.
I'll show you the first page, sir, and ask you to take a look at that; refer to the middle paragraph there. It's addressed to "Sheila." I'll come back and get that from you once you've had a chance to look at it.
A. Oh, yeah. I do remember this. This is --

Q. Thank you. I'll take that from you.
I'm retrieving from the witness Enclosure (8).
A. Yeah. And the reason why --

Q. And so, sir, this e-mail from May did not operate -- to answer my question, this e-mail did not operate to deny you anything, did it?
A. No. That's the only e-mail record that -- when the motion was supplied -- I don't have any of my e-mails from when I was on active duty. For whatever reason, I had forwarded that to -- that one e-mail to my civilian e-mail. So that's the only one that I had that we could provide.

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

reviewed did not operate to deny you anything?
A. No. That was extending me to 1 August.

Q. Sir, who is Colonel Dwight Sullivan?
A. Colonel Dwight Sullivan is a reserve colonel, United States Marine Corps; and he works at -- up working on appellate defense cases for the Marine Corps. And I think he currently works as a civilian for the Department of the Air Force.

Q. And he was -- worked on this case, didn't he, sir?
A. He worked on the -- yes. Some of the interlocutory appellate issues.

Q. Earlier you were testifying, if I recall your testimony correct, there was a series of modifications requests that you made in the Summer of 2008. Do you recall that line of testimony?
A. That there were a --

Q. Series of modification requests that you made during the Summer of 2008?
A. Yes.

Q. There were four total?
A. That's right.

Q. All four were approved?
A. Yes. Four approved and one not approved.

Q. We'll get to the one, that one in a moment, sir.
A. Okay.

Q. Now at this time in 2008 when you made these series of modification requests, this case was stayed. Is that fair to say?
A. That's correct. Yeah, that's fair.

Q. It was stayed because of a ruling by the military judge on February 22, 2008?
A. Yes.

Q. And when the military judge ruled, he ruled that the materials that the government sought, specifically the subpoena of the outtakes from your client's interview with Scott Pelley, that that subpoena didn't -- he quashed that subpoena in essence?
A. That's right. I wasn't here for the motions but I'll

take your word for it.

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

A. That's right.

Q. -- and keeps apprised --

A. That's right.

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

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

Q. But you understood the issue?

A. Well, yeah.

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

A. Yes.

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

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

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

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

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

A. Ten.

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

A. That's right.

Q. So that's three days.

A. That's correct.

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

A. Sure.

Q. And then you're aware of after that under the rules of the CCA, that there's another 30-day briefing period that's created where the government has to supply a brief?

A. I don't know. I'd have to go back and look at the rules.

Q. But those rules are readily available to you, aren't they, sir?

A. Sure.

Q. I mean, it's a matter of looking them up, correct?

A. Yes.

Q. So if you wanted to, you could have availed yourself of this knowledge that there are certain deadlines and time frames that are created attendant to an appeal?

A. Yes.

Q. And all you would have needed to do is access the CCA's rules, correct?

A. Sure.

Q. And so subsequent to the 30-day briefing period, there's another 30-day reply brief period as well?

A. Again, I don't know.

Q. Again, you could have availed yourself of this knowledge, correct?

A. Sure.

Q. And so that creates a predictable timeline attendant to an Article 62 appeal, doesn't it?

A. That's not how I went about trying to determine the length of time, but -- I mean, you can look at it that way; that's not what I did.

Q. You didn't look at the CCA's rules and try to apprise yourself of what was a reasonable timeline attendant to a 62 appeal?

A. No. We called appellate defense counsel to get an idea of when we can expect this issue to come back. That's what we did.

Q. And appellate defense counsel briefed you on a number of possibilities, didn't they, sir?

A. Sure.

Q. They talked about the issue of the R.C.M. 703 relevancy going up before the CCA, didn't they?

A. I don't remember specifically what I talked to them about. What I do remember is talking to them about when can you expect this coming back to trial. I don't remember talking to him specifically about the issue.

Q. And you could have certainly discussed, for lack of a better term, branches and sequels, coas, possibilities with the appellate defense counsel of what the timeline would be, correct, sir?

A. I did do that.

Q. And they told you that there were a number of possibilities that this appeal could have taken, correct?

A. That's not what they told me.

Q. They told you that there was a lock-step way that this was going to go?

A. They told me -- I asked them, when do you think this thing's -- best guess, when do you think this thing can come back to trial. When can we expect to be back in the courtroom. And that's the information we went on.

Q. Okay.

A. Whether that was correct or not, I don't know.

Q. So in the Summer of 2008, you were apprised by Code 45, appellate defense, that this case would come back when? Likely? What was their estimate?

A. Don't think it was in Summer when we first started talking to them about it. I don't remember when we first started talking to them. It was Spring probably.

Q. But you had an opening and continuing dialogue. You didn't rely on just one conversation?

A. No. No. I think we -- the first -- the request to extend it the one month was based on the first conversation I had with them. And then when it seemed to take longer, you call him up again, say, Hey, what's taking so long? When can we expect this thing to go to trial? They would tell me another thing and we'd modify our -- try to modify our retirement dates based on what we were told.

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

Isn't that true, sir?

A. June or July, yes.

Q. Okay.

A. It was right around then.

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

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

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

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

Q. On 30 June.

A. Appellate defense filed it. Okay.

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

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

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

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

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

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

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

Isn't that true, sir?

- A. That it could go longer? Yeah. We didn't think it was going to go that much longer. But, yes. And there was --
- Q. You didn't think it was going to go much longer? You didn't think it was going to go months and months and months and months and months and on and on and on in July of 2008, sir?
- A. Did we -- in July of 2008, did we think it was going to go on for months? Yes, we did. Absolutely.
- Q. It was going to continue on for months and months and months and months?
- A. That if it kept going on the course it was going with CAAF, it would have taken probably talking six months.
- Q. Because the defense was even aware that it was highly likely that CBS was going to seek to remove to an Article 3 court.
- A. Weren't you aware of that?
- A. Yeah. I don't know what CBS was going to do.
- Q. But you were aware of the possibility -- you being the defense team -- were aware of the possibility that CBS would seek to remove this issue -- the issue of the outtakes -- to Article 3 court.
- A. You knew that?
- A. Yeah. That's not something I want to discuss. That's really something that Mr. Puckett should answer on that one. I --
- TC (Maj Gannon): Your Honor --
- WIT: Quite frankly, I was not really concerned with what CBS was going to do during that time --
- TC (Maj Gannon): Objection. Nonresponsive. Request that you direct the witness to answer the question. He was aware that there was the possibility that they were going to remove -- they being CBS -- to Article 3 court in July.
- CC (Mr. Faraj): I'm going to object to this question, because we initially told this court that we were not a party to the litigation between CBS and the government. The brief that was submitted by the defense was done at the direction of the appellate court and not because defense

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

MJ: Appreciate your proffer.

The objection's overruled to the --

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

Go ahead and restate your question.

Questions by the prosecution (continued):

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

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

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

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

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

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

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

A. I'm sorry. Say again?

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

A. Sure.

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

A. Can you take a look at that?
Sure.

Q. Are you looking at page 2, sir?
A. I am.

Q. What does the highlighted portion say?
A. "Does it seem more likely that CBS will seek an order from an Article 3 court to trump any ruling against it? Does it seem quite possible" -- is that it? That's all you want?

Q. Yes, sir. So Colonel Sullivan's writing on CAAF Log on 5 July that it's readily apparent there's a high-probabilty or possibility that CBS is going to remove to an Article 3 court. That's knowledge on the defense team.

A. Fair enough, sir?
A. That he wrote that? No, I see that he wrote that on CAAF Log.

Q. So this is -- this is obviously knowledge that he had, right?
A. I have no idea. You have to ask Colonel Sullivan.
We --

Q. And you could have called --
A. We had --

Q. And you could have called Colonel Sullivan?
A. We had no idea what CBS was going to do and CBS wasn't talking to us either.

Q. Sir, that's not the question I asked you. What I asked you was you could have availed yourself of Colonel Sullivan's guidance on this timing issue, couldn't you?
A. I did contact appellate defense on timing as far as requesting -- when all to request a retirement.

Q. And an Article 3 removal event would have had a massive impact on this case, wouldn't have it, sir?
A. I have no idea. I do not know.

CC (Mr. Faraj): Your Honor, we're not sure what the relevance of these questions are.

MJ: Major Gannon, I think one of the issues that's one of

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

TC (Capt Gannon): Yes, sir.

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

TC (Capt Gannon): Yes, sir.

MJ: Where are we going now?

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

MJ: Okay.

TC (Maj Gannon): -- to --

MJ: Go ahead.

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

Questions by the prosecution (continued):

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

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

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

A. That's correct.

Q. Orally?

A. Yes.

Q. Did you do it in writing, sir?

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

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

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

Q. Okay. Can you give us an estimate?

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

Q. Yes.
A. That's right.

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

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

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

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

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

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

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

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

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

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

MJ: Okay. Hold on.

TC (Capt Gannon): Sorry to interrupt you.

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

TC (Capt Gannon): Yes, sir.

MJ: -- so our court reporter can --

TC (Capt Gannon): Yes, sir.

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

TC (Maj Gannon): I apologize, sir.

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

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

Sir, I'm out of here 6 August.

Okay.

Questions by the prosecution (continued):

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

A. Absolutely.

Q. Okay.

A. No question.

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

- did you?
- A. No. I mentioned -- my battalion commander I talked to. I didn.
- Q. But that's not what I asked you. You didn't go to the convening authority and seek relief?
- A. No.
- Q. The convening authority was General Mattis, correct?
- A. I don't remember who was the convening authority at the time. It may have been General Helland at the time.
- Q. You didn't go to the military judge and seek relief?
- A. No. Well, there was no military judge. There was no court in session at the time.
- Q. You didn't draft a pleading and submit it to anyone?
- A. No.
- Q. You didn't go to the OIC of the LSSS and seek relief?
- A. No.
- Q. You didn't -- you didn't come to the trial counsel --
- A. Well, he can't -- he can't grant me relief anyway, so.
- Q. Well, you didn't bring it to his attention?
- A. No.
- Q. You didn't bring it to the trial counsel's attention?
- A. I don't know who I told. My -- I will tell you that the person I worked for, the chief defense counsel of the Marine Corps, was aware of it.
- Q. And so you departed or left active duty on 1 November 2008?
- A. I'm sorry. What was that?
- Q. You left active duty -- you retired on 1 November 2008?
- A. 1 November I became retired, yes.
- Q. And the CAAF hadn't even issued an opinion yet? Are you aware that the CAAF opinion came out on 17 November 2008?
- A. I'll take your word for it. I don't remember when it came out. I was --
- Q. Let's talk about when you joined the firm that you moved on to, sir. You took a job with Mr. Haygood's firm?

A. Yes.

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

A. I did.

Q. And you spoke with partners at the firm?

A. I did.

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

A. Yes.

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

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

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

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

Q. And you knew that he represented Hector Salinas?

A. That's right.

Q. Or had at one point?

A. That's right.

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

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

MJ: Okay. Thank you.

Why do I need to know this?

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

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

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

That objection is sustained.

Questions by the prosecution (continued):

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

A. Yeah.

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

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

MJ: Okay.

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

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

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

MJ: Okay.

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

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

The defense objection is sustained.

Questions by the prosecution (continued):

Q. You had three -- three offers total, sir. Is that true? Is that what you testified to on direct examination?

A. Yeah. Two. The other one hadn't quite matured into an offer yet. I was kind of hoping it was.

Q. And you chose to go work for Mr. Haygood and his firm?

A. Yeah. I had two definitely solid offers. The first one was not very attractive at all for a lot of different reasons.

Q. Well -- but there were alternatives to employment at Mr. Haygood's firm?

A. Sure. I was not forced to go work with Fitzpatrick, Haygood, Smith, and Ule. It was an offer and it was attractive. And yes, I took it.

Q. Mr. Faraj discussed with you the -- sort of the gravitas of you being a lieutenant colonel in the Marine Corps when you were the regional defense counsel and how something had changed when you became a civilian.

Do you recall that line of questioning, sir?

A. I do.

Q. He asked you about your rank and whether or not it was similar to the OIC of the LSSS, et cetera?

A. Yes.

Q. Subsequent to your departure, Lieutenant Colonel Tafoya, Patricio Tafoya, was detailed to this case, wasn't he?

A. He was. I don't know when he was detailed.

Q. I didn't ask you when, sir. I said he was detailed.

A. I thought you said prior to me leaving he was detailed.

Q. Subsequent to your departure --

A. Oh, subsequent to my departure --

Q. -- he was detailed?

A. Yes. That's correct.

Q. And Colonel Tafoya became the RDC?

A. That's right.

Q. The regional defense counsel?

A. That's right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MJ: Sure.

Questions by the prosecution (continued):

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

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

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

A. Yes.

Q. You had a relationship with him?

A. Yes.

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

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

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

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

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

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

duty or not.

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

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

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

Q. But no one at JAM?

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

Q. But Colonel Favors is not at JAM?

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

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

A. That's right.

TC (Maj Gannon): No further questions.

MJ: Redirect.

REDIRECT EXAMINATION

Questions by the defense:

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

A. That's right.

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

A. That's right.

Q. On at least the legal side?

A. That's right.

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

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

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

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

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

A. No.

Q. And this may be --

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

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

TC (Maj Gannon): Objection. Speculation.

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

WIT: I don't know.

MJ: Okay. Hold on a minute.

What was the objection?

TC (Maj Gannon): Speculation.

MJ: Your response, Mr. Faraj?

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

MJ: The objection's sustained.

Questions by the defense (continued):

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

A. Can we talk about that?
Sure.

Q. Is that alright?
A. Sure.

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

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

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

Q. As the RDC?
A. Right.

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

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

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

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

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

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

- on yourself?
A. Yes.
- Q. And perhaps a professional one imposed on you by your state bar that you couldn't just walk away from a criminal case or any case without -- well, let me ask you this: Did you ever come on the record and ask to be excused before you left active duty?
A. No.
- Q. Were you ever excused by your client from further representation?
A. No.
- CC (Mr. Faraj): I don't have anymore questions, Your Honor.
- MJ: Any recross?
TC (Maj Gannon): Yes, sir.

REXCROSS-EXAMINATION

Questions by the prosecution:

- Q. Just briefly about your relationship with trial counsel, sir. I know that you said that you didn't feel any astrangement from the counsel sitting at this table, but you and I have known each other for awhile, haven't we, sir?
A. We have.
- Q. In fact, I used to work for you, didn't I, sir?
A. Yes.
- Q. When I was a brand new lieutenant, slash, captain, defense counsel?
A. Yes.
- Q. Fair to say I probably learned a thing or two from you?
A. I hope so.
- Q. Fair to say you and I sat outside of my office in Twentynine Palms on more than one occasions and had -- on more than one occasion and had conversations into the wee hours of the night about defense strategies and trial tactics?
A. We did.

Q. Sir, you referenced a conversation you had with the chief defense counsel of the Marine Corps where you indicated that she had relieved you at some point. This is Colonel Rose Favors?

A. That's right.

Q. Ultimately there was intervention on your behalf, though, wasn't there, sir?

A. There was.

Q. In fact it came from the convening authority -- at least one phone call came from the convening authority in this case?

A. Phone call to me?

Q. There was -- well, we'll get to that. But there was intervention on your behalf by the convening authority in this case, wasn't there, sir?

A. To my knowledge, yes.

Q. General Mattis, the convening authority in this case, intervened on your behalf, correct?

A. That's my understanding, yes.

Q. He was an advocate that you be reinstated to the regional defense counsel position?

A. I don't know that. I just know that he called me and asked me for my take on what happened. I told him. So I don't know exactly what he said to anybody else. He's not the one who called me up and said you're the RDC again. Somebody else did that. That was General Walker.

Q. But that took place after your discussion with Lieutenant General Mattis?

A. Yes, it did.

Q. That phone call that reinstated you?

A. That's right.

Q. Isn't it true that General Mattis told you when he called you that he would give you anything you needed? Didn't he use those words, sir?

A. When he called me up -- on that phone call?

Q. On any phone call. He expressed to you a willingness to give you whatever you needed, didn't he, sir?

A. In that phone call, he didn't say that. I don't

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

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

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

Defense, let's take a break.

The court will be in recess.

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

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

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

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

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

MJ: Okay. Anything besides that?

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

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

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

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

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

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

MJ: Okay.

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

MJ: Okay.

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

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

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

MJ: Are there.

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

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

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

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

present on the motion?

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

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

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

MJ: Right.

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

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

MJ: Okay. Thank you.

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

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

MJ: Government.

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

MJ: Okay.

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

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

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

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

MJ: Defense, Mr. Faraj?

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

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

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

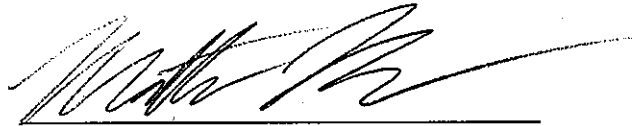
AUTHENTICATION OF THE RECORD OF TRIAL

in the case of

Staff Sergeant Frank D. Wuterich, XXX XX 3221, U.S.
Marine Corps, Headquarters Battalion, 1st Marine Division,
Marine Forces Pacific, Camp Pendleton, California 92055.

TRIAL COUNSEL CERTIFICATION

In accordance with R.C.M. 1103(i)(1)(A), I have examined the
record of trial in these proceedings and caused those
changes to be made which are necessary to report the
proceedings accurately.



M. R. BROWER
Captain
U.S. Marine Corps
Trial Counsel

20/0/221
Date

MILITARY JUDGE AUTHENTICATION

D. M. JONES
Lieutenant Colonel
U.S. Marine Corps
Military Judge

Date