The Article 39(a) session was called to order at 0900, 24 March 2010.

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

It's Wednesday morning and the government, after thinking about the issue, wanted to recall a witness. That witness is Mr. Ware, Lieutenant Colonel Ware, retired. He's on the phone, and so we're going to take his testimony at this time and he'll be sworn in.

Lieutenant Colonel Sullivan.

Lieutenant Colonel Paul Ware, Retired, was called as a witness by the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. And you're the same Mr. Paul Ware who testified here in person on Monday, the 22nd of March?

A. Yes.

Q. Now Mr. Ware, I just wanted to ask some particularized questions with regard to your role as the investigating officer in the case of Staff Sergeant Wuterich that we're here today. First of all, you testified on Monday with regard to a phone call that you had with Lieutenant Colonel Riggs which caused you to send out an e-mail that you identified on the record on 1 August of 2007.

Is that correct?

A. Yes.

Q. And that e-mail was sent out to notify the parties with regard to the phone conversation that you had had with Lieutenant Colonel Riggs.

Is that correct?

A. Yes.

Q. Now, after that e-mail notification that you sent out on 1 August of 2007, did you ever have any other further telephonic or e-mail communications with Lieutenant Colonel Riggs prior to your submission of the investigating officer report in this particular case,

U.S. versus Staff Sergeant Wuterich?

A. No. I also had no contact with Lieutenant Colonel Riggs by e-mail or telephone ever since that date of that e-mail.

Q. Right. And that's what -- that's what I wanted to clear up. So from 1 August of 2007, when you sent out the e-mail, you never had any other communication either by phone or e-mail or even in writing.

Is that a fair statement?

A. That's a fair statement.

Q. You started the 32 hearing in this particular case on 30 August of 2007 and you completed it, the 32, on the 6th of September, 2007. I wanted to ask you some questions then with the methodology as to how you compiled your report. After the 6th of September, 2007, you returned to your actual military duty station as a judge out in Hawaii.

Is that correct?

A. That's correct.

Q. And you had an admin assistant by the name of Captain Hur that was physically located here at Camp Pendleton that had been tasked with assisting you in compiling the transcripts, the evidence, and the record so you could finish your report and have the entire record of proceedings collated and sent down to the MARCENT office.

Is that a fair statement?

A. Yeah, that's a fair statement. I didn't want to travel with the jreames of documents back to Hawaii. And I worked with Captain Hur on Tatum and on Wuterich. I'm not sure if I worked with him on Sharratt.

Q. Roger. So from the 7th of September, 2007, to the date of your report on 2 October 2007, did you have any contact whatsoever with anyone in the MARCENT staff judge advocate's office with regard to the investigating officer's report in this case, *U.S. versus Staff Sergeant Wuterich*?

A. I received an e-mail from Lieutenant Colonel Kumagai and there's a gunnery sergeant who took care of my plane reservations. That's the only person I talked to at MARCENT. He -- he handled my travel claim.

Q. All right. I apologize. Sometimes the speaker system here doesn't work as effectively as we want it.

And with regard to the methodology of the submission of your report, when you were collating the report, completed your analysis of the evidence, and your recommendations, and actually documented that in the physical report -- did you send that to Captain Hur so Captain Hur could then forward your report along with the accompanying transcript directly to the MARCENT staff judge advocate's office?

A. Yes. And that's what we arranged, because -- that was the problem with the first report, that the transcripts didn't get submitted with the report.

Q. Right. And so from 7 September 2007, when you returned to Hawaii to complete the report, did you have any communications whatsoever with Lieutenant Colonel Riggs with regard to your analysis of the -- of the evidence in this particular case or recommendations for disposition of charges?

A. No.

Q. And I'm going to ask the same question with regard to Lieutenant Colonel Kumagai. From the completion of the actual hearing in this matter on the 7th of September through the 2nd of October, where you were working and doing your analysis of the evidence, receiving arguments from both government and defense counsel, and completing your investigating officer's report in Hawaii -- did you ever have any communications with Lieutenant Colonel Kumagai about your recommendations as the investigating officer in this particular case of *U.S. versus Staff Sergeant Wuterich*?

A. No.

Q. And from 2 October 2007 on, did you ever have any communications whatsoever with Lieutenant Colonel Riggs with regard to your roles and recommendations and analysis of the evidence and recommendations for disposition of charges in this particular case?

A. No. The last time I spoke to Lieutenant Colonel Riggs was the day before that e-mail I believe, or the day of that e-mail.

Q. 1 August 2007?

A. Yes. I've never spoken to the man since.

Q. Roger. I guess -- I guess the last question I'll ask, Lieutenant Colonel Ware -- and I appreciate, again, you taking the time for this -- while you're conducting the hearing, physically conducting the hearing in *U.S. versus Staff Sergeant Wuterich* on 30 and 31 August and 5 and 6 September 2007 here at Camp Pendleton -- you return to Hawaii, you do your analysis and do your report, did you have any idea that Lieutenant Colonel Riggs was even remaining as the staff judge advocate on this case?

A. No. I was under the impression that Lieutenant Colonel Kumagai was the SJA.

TC (LtCol Sullivan): Okay. Thank you, Colonel Ware. I appreciate it. And again, I'm sorry I had to call you on the phone. I appreciate your cooperation. I know you -- you've got a morning meeting with the U.S. attorney's office. I'm now going to tender any questioning to Mr. Faraj.

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

MJ: There's no questions from the defense. The court does not have any questions.

Mr. Ware, thank you for your testimony.

WIT: Thank you. Have a good day.

TC (LtCol Sullivan): Thank you, sir.

The witness was excused and the telephonic connection was terminated.

MJ: Mr. Ware has been -- has testified on the phone and been disconnected.

Any further evidence by the government in support of defending the motion?

TC (Maj Gannon): No, sir.

MJ: The burden now is with you. Unlike findings for sentencing, I don't have a specific rational as to how many times people argue. Since you have the burden of proof, I do kind of treat it like the findings where you would be given two opportunities to argue.

If you really think that there needs to be a rebuttal to that, Mr. Faraj, I would allow you to do so. But you should assume whoever has the burden of proof on the motion will get two chances to argue, so you can have rebuttal to Mr. Faraj's argument.

So the court's prepared to hear argument on the motion.

Government, since you have the burden of proof.

TC (Maj Gannon): Thank you, Your Honor. May I have one moment here to hook this up.

MJ: Did you have any slides marked as an appellate exhibit?

TC (Maj Gannon): Yes, sir. Will do.

MJ: That will be marked as Appellate Exhibit LXXIII for the record, the PowerPoint slides.

TC (Maj Gannon): Yes, sir.

Good morning, sir.

MJ: Good morning.

TC (Maj Gannon): The government's position obviously is that the government has shown beyond a reasonable doubt that there was no UCI taint in this case. Pursuant to *United States versus Bigasi*, the government's understanding of the standard once it shifts from the defense after their initial showing to the government is that the government must show one of three things or two of three things or three of three things. Any one of the three to satisfy that burden beyond reasonable doubt. Either first, the government can disprove the predicate facts that established the UCI in the first instance.

Secondary to that, the government can present evidence that will persuade the military judge that the facts that initially shifted the burden do not constitute UCI.

Or finally, in the case as we are here, where the UCI allegations during the trial phase as opposed to an appellate issue. During the trial phase, the government may show beyond a reasonable doubt if it can persuade the court that these proceedings as they exist today will be -- will be unaffected by this UCI issue.

It appears, sir, based on the ruling yesterday, that the military judge was primarily focused on an apparent issue. I don't believe any facts have been raised of actual UCI. I will speak to that a little bit more at length later on in this presentation or this discussion or argument. But it's really the appearance issue I think that the court indicated we're looking at as to whether or not there's an appearance associated with Colonel Ewers' presence at meetings from the Fall of 2007 through the referral event in this case, or whether the appearance of Lieutenant Colonel Riggs' phone call to the investigating officer created some sort of unfair, again, appearance.

So the key here, sir, is that the law -- and I bolded that little phrase at the bottom, "what is the effect." The law requires that there be an effect. It's not just an appearance issue. Appearance may be enough to raise it and shift the burden, but someone at some point's got to be able to point to a concrete effect on the proceedings. And as we'll discuss, that effect is simply not present. Even if one was to concede which the government does not that the two events we discussed a moment ago, the phone call from Riggs and Ewers' presence at the meetings -- even if one of those two burden shifting events constituted UCI -- again, to emphasize the government does not concede that, but even if they did, assuming arguendo that they did, there's just been no impact on these proceedings and we're going to demonstrate that with not only the testimony that we've presented but some of the factual developments that are undisputed in this case.

Now, sir, first the government's position -- I guess I'll take on the Colonel Ewers issue first. So we'll take Colonel Ewers and then we'll discuss the Riggs, Lieutenant Colonel Ware phone call.

With respect to Colonel Ewers' presence at legal meetings, first and foremost, the government's position is that his mere presence at those meetings does not constitute unlawful command influence. It doesn't constitute unlawful command influence, because there's just no ability to show why anything he did was unlawful. Why his presence at legal meetings was unlawful.

The testimony is clear that the nature of these meetings

was such that they were information sessions. The general was -- General Mattis was getting information from a staff, from a group of people. General Mattis testified that his method in obtaining information from staff was similar irrespective of the discipline from which the information was coming, whether it be an operational issue, an intelligence issue, logistics issues, legal issues. General Mattis testified that he -- his typical routine was 0600ish in the morning till 2100 at night, seven days a week. Apparently General Mattis has a very busy schedule, and he finds that the best way to manage his time is to conduct these meetings when they're informational.

But importantly, sir, critically, General Mattis also made it very clear that he understood the distinction between this term of art advice and information. And the proof of that is the fact that General Mattis said something on the stand that was telling and informative of -- of the way he viewed the purpose, nature, and scope of the legal meetings. And it's this, sir, quote, the matrix drove the meetings. The matrix is not an Article 34 advice letter. The matrix is not a preferral event. The matrix is not a decision to appoint an investigating officer. All of these events in the evolution of a criminal case under courts-martial that probably have legal significance and qualify under that term of art advice or of legal moment.

This general was in receive mode and directing RFIs at a staff. Colonel Ewers' presence there in that capacity while those events unfolded, even if -- again, I'm not conceding that. The government isn't conceding that. But even if Colonel Ewers was somehow tainted because of his previous investigative actions on this case and the Chessani case or the reporting piece -- even if he was somehow tainted, sir, his presence at those meetings is not unlawful command influence because the matrix drove the meetings.

MJ: Do you believe it would have been appropriate for Colonel Ewers to be there and to answer questions, to give information on the case just like an NCIS investigator or trial counsel might give information on the case?

TC (Maj Gannon): Absolutely, sir. I was going -- I was going to respond with it depends on the nature of the question.

If General Mattis said, John, what do I do about this IO problem or this -- this -- you know, something very legally specific. If he was a tainted legal adviser, theoretically, maybe. But the reality is, sir, as the court has pointed out, trial counsel, their presence is certainly not problematic. Investigators, their presence is certainly not problematic. To find so would certainly radically change the way convening authority's do business in our system. The government is not aware of a situation where it would be inappropriate for an NCIS investigator to advise the commander on the factual developments of a case. In fact, it's the government's belief that NCIS's statutory requirement is to do so.

And as the court -- even if -- even if Colonel Ewers had offered his opinion about a matter during these legal meetings, it would have been appropriate; because, again, it's simply not UCI. And the next slide is our authority for that, sir. The government is just not simply arguing that Colonel Ewers' presence didn't constitute UCI even if he had offered an opinion. The government's position is rooted in R.C.M. 601(d)(1). This is an acknowledgment in the Manual for Courts-Martial that the convening authority, if advised by a judge advocate, that there are reasonable grounds to believe an offense triable by court-martial has been committed and that the accused committed it, the convening authority may refer it.

Next slide, please.

However, the finding that the convening authority or the statutory judge advocate makes can be based on hearsay, in whole or in part. The convening authority or the judge advocate may consider information from any source. And as the court's question palluded a moment ago, I believe that's the statutory codification for a convening authority's ability to consult with an investigator.

However, sir, I believe -- Next slide, please -- the -- this is a pretty busy slide. Before we get into the weeds on this, sir, if I may, I drew -- we created a timeline to really illustrate it to the court why it is even more so that his presence was not problematic. And I want to emphasize that now since we're in that phase of this discussion. Again critically, sir, Colonel Ewers wasn't even present at the meetings until February

of 2007, post-preferral and post-convening authority's decision to send this case to an Article 32.

And we have the slide up. So in walking you through this slide, sir, if we look on the left, we see 19 November 2005, the Haditha incident in a box in the upper left to the right of that, 17 February through 2 March 2006 is the Watt investigation designated by a very small red line. And then a very long red line is the ongoing voluminous NCIS investigation that General Mattis said he relied on heavily. Above that the Bargewell investigation.

Note, sir, that this is in the Summer of 2006. These investigative work products are being generated and this information is being filtered back to CONUS for review by then Lieutenant Colonel Sattler and ultimately in the Summer of 2006 when General Mattis assumed command of MARCENT, I MEF.

Now, subsequent to General Mattis -- what's indicated there by that line sort of to the bottom of the big black line that denotes the timeline. After General Mattis assumes command, recall, sir, he testified that his goal was to -- to obtain information dominance on this subject matter, and that he poured over thousands and thousands and thousands of pages of investigative materials. And in doing so, he generated his own opinions and his own situational awareness about the merit of the allegations against Staff Sergeant Wuterich. That understanding, that taking in of the information, asking questions, sifting through it -- when General Mattis did that, he did that in the absence of Colonel Ewers.

Colonel Ewers wasn't even in CONUS at that point. On the upper right hand side, we see February of 2007 Colonel Ewers reassumes his MEF SJA position. And of course, immediately to the let of that and of great import as emphasized earlier to the government's argument, the preferral event of 21 December 2006 had already taken place prior to Colonel Ewers ever sitting in a meeting. So we have an event in the evolution of this case that the government can point to beyond a reasonable doubt and say it is clear that this convening authority, General Mattis, and this SJA, Colonel Riggs -- that those two individuals had consulted one another and there had been a decision by the convening

authority to cause this case to be investigated further and for murder charges to be preferred, again, before Colonel Ewers ever came back.

The linkage between Colonel Ewers and Lieutenant Colonel Riggs. In the defense pleadings, they're basically relying on Colonel Ewers as being a primary source investigator who was there at Haditha. But, again, that's not necessarily informative here for a couple of reasons. One, Colonel Ewers' investigative role in this accused's case was very minimal. Unlike the 40- or 50-page statement Colonel Ewers took from Lieutenant Colonel Chessani, Colonel Ewers took a 4- or 5-sentence statement from this accused. And it was limited to, in essence -- and it's included in our -- in our -- in Appellate Exhibit LX. The statement in essence was after this took place, did you call it in on the radio.

Now, from the February to October time frame, Colonel Ewers was at legal meetings -- and I discussed those at length where they were information driven sessions. MEF matters were discussed. Colonel Ewers -- the testimony establishes -- rarely participated in the meetings if they were not about MEF cases. Now certainly, he was there. He was there. And, again, it's the government's position even if he had participated, even if he had participated with great frequency and offered an opinion, it's still not UCI for the reasons we discussed before.

And finally, sir, to attenuate Colonel Ewers' impact, influence, or ability to somehow steer -- missteer the ship, so to speak, Lieutenant General Helland took over subsequent to General Mattis' departure which is another step of attenuation.

Next slide, please.

They emphasize during the testimony that -- they being the witnesses, General Mattis, Lieutenant General Helland, and Colonel Riggs -- all emphasized that they were never influenced by Colonel Ewers. Colonel Ewers [sic] said on the stand that he had been giving advise to folks as a judge advocate since he was a captain and he was very -- very comfortable in that role. And that I think his demeanor amplified that, that he was comfortable. I believe General Mattis characterized him and perhaps all lawyers as argumentative at times. And

certainly, Lieutenant Colonel Riggs lived up to the ability -- or demonstrated the ability by way of his testimony adbuttress by the other witnesses that he was an independent adviser and he had the ability to make advice in a neutral, fair, detached, uninfluenced fashion based on his own thoughts, his own impressions, and his own ideas.

Now, the defense in their pleadings emphasized that sort of self-serving claims by witnesses, Hey, I wasn't influenced. But that's not sufficient. The government believes that that is a -- when the court can observe the demeanor and conduct of a witness on the stand that when a witness comes in and looks the court in the eye and testifies under oath, I was not influenced, that that is of moment and that is something the court can consider.

But in addition to that, in addition to those assertions by the individuals, this court can look to facts, events that took place that clearly demonstrate that over the course of this very complex and lengthy investigation, both the convening authorities, both of them, as well as the SJA, Lieutenant Colonel Riggs, took steps to dispose of cases. Where? If the defense's theory was correct that Colonel Ewers brought in this overwhelming personal biography and gravitas and then contaminated the impartiality of the players with this prosecutorial zeal, if that had happened, then these events I'm about to discuss certainly would seem inconsistent with that.

We have several developments in or dispositions of other cases that are informative. The Sharratt case. Sharratt's case was dismissed. Dismissed ultimately with prejudice. I believe it's Enclosure (22) or (23) in Appellate Exhibit LX that discusses General Mattis' rational in dismissing the case. This is post-investigation, post-analysis by the investigating officer, after the judge advocate's reviewed it and the case was dismissed.

Colonel Riggs was the SJA at that point, so if Colonel Riggs had been infected with this overly prosecutorial zeal, certainly he would of tried to convince or had been successful in convincing General Mattis that this shouldn't happen. And even if Colonel Riggs had been overwhelmed by Colonel Ewers gravitas and personal biography, General Mattis dismissed the cases. So the

ultimate effect that we have shown beyond any doubt is that Sharratt's case despite this overly prosecutorial environment that the defense claims existed in these legal meetings, Sharratt's case was dismissed.

Captain Stone, the judge advocate, a reporting piece character -- Captain Stone's case was ultimately disposed of with no action and a report of no misconduct was issued. That's Appellate Exhibit LXV of the record.

Tatum's case. Lance Corporal Tatum's case -- we've had a lot of discussion about because of the phone call between Lieutenant Colonel Riggs and Lieutenant Colonel Ware. Lance Corporal Tatum's case was also dismissed and that was dismissed by General Helland. To be clear, it was dismissed sort of at the end of the timeline that we've been talking about. However, the ultimate decision to dismiss that case occurred while Lieutenant Colonel Riggs was the SJA. An event we can point to to demonstrate beyond a reasonable doubt that Colonel Riggs' impartiality, Colonel Riggs' independent decision making capabilities, Colonel Riggs' ability to continue to be untainted by anyone is evident in that event.

Captain McConnell's case, another reporting piece case. Captain McConnell was the company commander, sir. Captain McConnell was present in the general vicinity when the events took place on November 19, 2005 and there were concerns about the way in which Captain McConnell caused that issue to be reported up to higher. His case was looked at, the NCIS materials were poured over. Much analysis was given to what to do with Captain McConnell's case.

Ultimately in November of 2007, all charges, all thoughts of charging, and ultimately there was a report of no misconduct in Captain McConnell's case. That was issued by Lieutenant General Helland. Colonel Riggs was the SJA at that time. Again, another concrete event we can point to to say this SJA was not so target fixed on prosecuting everything in sight as evidenced by a report of no conduct in Captain Luke McConnell's case, Appellate Exhibit LXXI, Your Honor.

Two more factual events that the government can point to to show beyond a reasonable doubt that Lieutenant Colonel Riggs was not infected with some overly prosecutorial error that the defense alleges originated

with Colonel Ewers.

One, prior to Lance Corporal Tatum's charges being dismissed. On 21 October 2006, murder charges, Article 118 violations were preferred against Lance Corporal Tatum as well as the accused in this case. Murder charges. The -- if not the most severe crime in the code, one of the most. Subsequent to the lengthy and very thorough investigation both by law enforcement types, NCIS and then some -- some -- the 15-6, but also the formal Article 32 investigation. After this information had been distilled and analyzed and witnesses had been confronted by the defense during the 32, in both cases the convening authorities ultimately elected to prefer charges -- excuse me, refer significantly lesser charges against both accused. The convening authority elected to do that.

And in this accused's case, Lieutenant Colonel Riggs was the advising SJA on the referral event that mitigated the allegations of criminal culpability from 118 to 119. That is a direct reflection of the most appropriate prosecutorial theory based on the very elaborate and lengthy evaluation of the evidence in this case. Again, both by law enforcement, the convening authority, and then ultimately by an investigating officer. That process is telling, because when -- at the end of that process, after this analysis had taken place, Lieutenant Colonel Riggs advised on this issue and advised that 119 charges be preferred. That is an example of his independence in thought and lack of taint by Colonel Ewers.

Another timeline, sir, we talk about the Stone -- I pointed to several incidents a moment ago demonstrating the independence of both the convening authority and Lieutenant Colonel Riggs. And that August 8, 2007 and 9 August 2007 withdraw of charges in Stone's case and Sharratt's case are shown on this.

The Wuterich report comes forth on 2 October 2007. The big blue line in the middle is the moment that General Helland assumed command. Sir, you can see how many of the informative legal events took place after General Helland assumed command. Why is that important? Well, part of the defense's theory is that Colonel Ewers had an inappropriate influence on Lieutenant Colonel Riggs not only because of his personal biography, not only

because of his gravitas, but also because of an alleged special relationship that General Mattis and Colonel Ewers enjoyed.

Now to be clear, Colonel Ewers does have a stellar reputation, absolutely. General Mattis indicated on the stand that he thought Colonel Ewers was a very good MAGTAF officer or words to that effect. Said the same thing about Colonel Riggs, but he said that on the stand. Importantly, sir, even assuming arguendo that the defense allegation that there was some connection between Colonel Ewers and General Mattis based on the REAT mission, based on the fact that Colonel Ewers was wounded in combat while serving under General Mattis' command in 2003 in Iraq, even assuming that that is the case and that somehow subliminally caused the convening authority to gravitate towards Colonel Ewers and move away from Colonel Riggs and somehow ostracize Colonel Riggs on the staff somehow -- which is really the implication they're making -- the fact is that all of the points that matter in this case took place on General Helland's watch. And there's no evidence that General Helland enjoyed any relationship with Colonel Ewers that was any different from the relationship he enjoyed with Lieutenant Colonel Riggs.

Next slide, please. Next slide, please.

Sir, I've spoken at length about the government's position on why it is that Colonel Ewers did not taint or affect either Colonel Riggs in a formal UCI way or even if the court finds that he did, I believe we've been able to show that some of those independent actions of other cases or dispositions that beyond a reasonable doubt, any connection would not influence these proceedings.

I'm about to move into the next area which is this phone call between Lieutenant Colonel Riggs and Lieutenant Colonel Ware, but at this point, did the court have any questions on Colonel Ewers' relation to the process and the legal meetings, Your Honor?

MJ: No, thank you.

TC (Maj Gannon): Phone call is made between Lieutenant Colonel Riggs and Lieutenant Colonel Ware. At this time, sir, I'm going to quote from the letter that was issued on

the 2nd of August of 2007. As the court is aware based on the way we've developed the case so far, phone call takes place between Lieutenant Colonel Riggs and Lieutenant Colonel Ware. During the course of the phone call which was initiated basically for administrative purposes, Lieutenant Colonel Ware testified that he felt the SJA was telling him, Hey, you left me no options. Arguably, that evidence may indicate that Lieutenant Colonel Riggs somehow sought to influence this investigating officer.

First, Lieutenant Colonel Riggs did not call with the mantle of command authority. He called him on an administrative matter. And if the -- if the conversation strayed into an area that it should not have, it was clear based on the testimony of Lieutenant Colonel Ware that the way he perceived the conversation was this: It's a couple of lieutenant colonels talking to each other. It's a couple of guys talking to each other who are peers, who feel the ability to offer an untainted unfiltered opinion about what's going on.

So in other words, it wasn't a formal talking down to. Colonel Ware said, Hey, I felt like -- testified in essence, I felt that he -- like he knew me and he was just calling to talk about this. Clearly not with the mantle of command authority. Absent the mantle of command authority, no UCI.

However, after that took place, Your Honor, Lieutenant Colonel Ware, of course, consulted with his supervising authorities and decided that he needed to issue an e-mail. The e-mail is clear on its face. It says, quote, from Appellate Exhibit LX, Enclosure (21), that he clearly stated -- he being Lieutenant Colonel Riggs -- that he was not concerned with the recommendation I was making in Tatum and was not attempting to influence me on my decision making process. That is placed in Lieutenant Colonel Ware's e-mail. In an abundance of caution, after that took place, Lieutenant Colonel Riggs approached General Mattis, advised him of the situation. I made a phone call and in an abundance of caution, I'm going to take a step back from this case just in case there's an appearance issue.

So General Mattis then issues a letter, 2 August 2007, Enclosure (22) to Appellate Exhibit LX. Quote --

Paragraph 4 -- I pointed you as the Article 32 investigating officer in these cases to give me a thorough and professional analysis of the evidence in the case and recommendation as to disposition. Your report and recommendation in Lance Corporal Sharratt's case represented exactly the candid and un-shrieking opinion that I was looking for from an Article 32 officer. These are the words that were communicated from this convening authority to the IO.

Sir, the government's position is that even if something untoward took place between Lieutenant Colonel Ware and Lieutenant Colonel Riggs, any taint -- any taint whatsoever was removed by this letter from the convening authority to the IO. This letter certainly would have extinguished any -- with that forceful language that General Mattis injected into this letter, would have extinguished any concerns that Lieutenant Colonel Ware may have had. And obviously the government is referring to apparent concerns, because Lieutenant Colonel Ware testified unequivocally that he was uninfluenced and frankly didn't really care about what Lieutenant Colonel Riggs had said. He only reported it out of an abundance of caution.

So you have the IO saying he was uninfluenced. You have the SJA who communicated with him lacking the mantle of command authority. You have the convening authority subsequently telling him great job in Sharratt, carry on. And perhaps most importantly the government demonstrated this morning, which is Lieutenant Colonel Ware could not have been subliminally influenced or apparently influenced, because he didn't know Lieutenant Colonel Riggs, the alleged influencer, was even on the case any longer, sir.

Even if Lieutenant Colonel Riggs should have recused himself from the Wuterich case, even if Lieutenant Colonel Riggs shouldn't have participated, we have demonstrated beyond a reasonable doubt that this specter that is Lieutenant Colonel Riggs could not have had any impact on Lieutenant Colonel Ware because Lieutenant Colonel Ware didn't know he was the SJA on the case. In fact, he testified he believed he was not the SJA on the case. That belief in the mind of the IO is proof beyond any doubt that he was unaffected by the phone call, because he thought Riggs was gone.

Back to it, please.

Now, sir, on the very bottom of this slide, we'd like to also bring another point to the court's attention about this issue. Even assuming arguendo that the phone call between Riggs and Ware was problematic, even assuming arguendo that Colonel Ware had been unlawfully influenced by that phone call, even assuming arguendo that Lieutenant Colonel Ware had somehow colored his findings, subliminally or otherwise, it's the government's position that there has been no showing of taint to these proceedings by that event and that's because of the evidence, sir.

The fact is that there are multiple statements. One of which, Tatum's, is in the record. It's in Appellate Exhibit LX. There are statements of Marines on the ground on November 19, 2005. There are statements talking about this accused and his squad moving to House 1 after having been involved in killings on the roadside. There's no doubt that this accused led that squad. That's not in dispute. There's no doubt that that squad's actions led to the deaths of multiple Iraqis that day, both women, children, and men. There's no doubt that there were images taken from this scene and they were presented to the convening authority and they were presented to the SJA and they were presented to the investigating officer. There is much evidence about what took place.

Now, certainly a trier of fact will struggle and will view that evidence and try to take it in and that's what the trier of fact is for. I guess the government wants to be clear, I'm not arguing that guilt has been established beyond a reasonable doubt at this point. The government's point is that the evidence in this case for a referral decision, a probable cause decision, is overwhelming and that any reasonable investigating officer would have recommended charges go forward in this accused's case based on the evidentiary record that was presented to the investigating officer. The point being even if Lieutenant Colonel Ware had been somehow subliminally influenced, any reasonable investigating officer when looking at the statements, when looking at the photographs, when looking at the nature and quantity of the victims of November 19, 2005 would have caused this case to be -- would have recommended this case to be referred.

I'd like to then discuss, I guess, as we wrap it up, the -- the fact is, Your Honor, that the government has made a showing beyond a reasonable doubt that the two events that have shifted the burden over to us did not constitute UCI. We've also made a showing of beyond a reasonable doubt that there's been no impact on these proceedings by those events. And I guess I should take a moment to emphasize that the fact that we're here and we've not impaneled members, the fact that we've not presented evidence to the trier of fact, the fact that we are months away from a court-martial taking place -- assuming that the government survives this motion.

If we haven't impaneled members, we've -- we've not taken steps to prove up the case. We've not had witnesses intimidated. We've not had all the traditional sort of trappings of UCI. We've not had a commander go to a member's panel and say, Hey, everybody, here's what I expect in courts-martial. This is the results I expect. We've not had a circulation of a confession to potential sentencing witnesses like there was in *Biagasi* where they were offended by -- the court was offended that as a leadership measure, they had taken these statements and sent them around the command to demonstrate what wouldn't be tolerated.

There's been no showing that that's taken place here or that there would be any impact on the members. That's why we're in such a different -- we're almost trying to put a round peg into a square hole calling this apparent UCI, calling this UCI at all, because we're so far in advance of the actual decision making process by the trier of fact that the government has shown beyond any doubt that that process has been unaffected, because we don't have the members identified.

And the big blue line in Appellate Exhibit LXXVII, the slide presentation that the government's been using today -- the big blue line, sir, certainly inoculates the conduct of this case. And it does so beyond a reasonable doubt. Because at the end of the day, no matter what transpired at the legal meetings that Colonel Ewers attended, no matter what transpired between Lieutenant Colonel Riggs and Lieutenant Colonel Ware and what, if any, impact that had on Lieutenant Colonel Ware, the fact is, is that the most critical legal decision in this case, the referral decision, was made by Lieutenant General Helland. A very, very

significant and distinguishing feature from this case to the Chessani litigation for all the reasons we've talked about. The referral was by Lieutenant General Helland after he had the opportunity to review the Article 32, discuss it with his proper legal adviser, and make a decision -- again, a decision for a lesser charge, 119 versus 118 -- but a decision to refer the case and allow members to decide the outcome.

Given the facts as the government has laid them out to the court, it's the government's position, obviously, that a member of the public would not lose confidence in the system based on knowing everything that we've talk about here today, and that a member of the public would not harbor any doubt that these particular proceedings have been unfair. And critically, no one could reasonably point to an event or a series of events that have had a demonstrable impact on this accused's case.

Again, Your Honor, appearance is not enough impact effect. In the beginning slides, we bolded what is the effect. There has been none.

Remedies. Finally, sir, if this court agrees with the government's analysis and finds that beyond a reasonable doubt, the government has shown that Colonel Riggs' call to Lieutenant Colonel Ware and Colonel Ewers' presence at the legal meetings did not constitute UCI or that if it did, it was harmless beyond a reasonable doubt; obviously, then the court will deny the motion and we would move on. If the court has lingering concerns, the government would like to propose a potential remedy if the court has any lingering concerns. And that remedy would be as follows:

If -- if there is -- the investigation, the Article 32 investigation. It seems that the defense's theory is that the taint, the moment of taint would have to be rooted in the referral event. Because obviously the preferral and the investigation itself were unaffected. And the evidence that exists, is the evidence that exists, is the evidence that exists. In other words, there's no -- there's no showing of witness intimidation, coloring testimony, lack of, you know, the standard UCI events. And if that's the case, if there's an issue with the referral event, then the natural and logical remedy this court could offer if this court had a continuing concern about the way this investigation

unfolded would be to cause an independent and neutral convening authority to review the existing Article 32 work product and make a recommendation from there and a decision from there, if the court needed a remedy.

However, sir, we put together a 524-page motion to provide you with the information you needed to make a decision. We put on General Mattis, Lieutenant General Helland, and Lieutenant Colonel Riggs to give you the information that you would need to make this court sufficiently, factually aware that this investigation and prosecution of Staff Sergeant Wuterich has been done with an incredible attention to fairness, an incredible attention to getting both sides of the story, an incredible amount of attention to the evidence.

This was not a rubber stamp, a foregone conclusion, or anything of the sort. This was an investigation that involved hundreds of people and hundreds of thousands of pages of documentation, all of which have been reviewed by the appropriate personnel. The convening authorities, the SJAs, the investigating officers, the discovery to the defense counsel, as well as to the trial counsel. And over the course of that process, Staff Sergeant Wuterich, this accused's rights have been scrupulously observed. And that's why, sir, when we look at in the aggregate which is the lens through which the court analyzes the apparent issue of a person knowing all the facts, that's why the government's position is there's no taint on the proceedings and the two events that shifted the burden to the government simply don't constitute UCI.

Sir, does the court have any questions?

MJ: I do not.

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

MJ: Thank you.

Court will be in recess.

The Article 39(a) session recessed at 0949, 24 March 2010.

The Article 39(a) session was called to order at 1002, 24 March 2010.

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

Defense, Mr. Faraj, please.

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

Your Honor, I'm going to follow the same sort of first issue then second issue. But before I begin that, I want to correct something and the court probably doesn't need any correction on the appearance versus actual, but it's not just actual. It is appearance. And I would refer the court to *U.S. v. Lewis* where the court said to ppfinite the appearance of command influence had been ameliorated and made harmless beyond a reasonable doubt, the government must convince the military judge that the -- that the disinterested public would believe that the accused will receive a trial free from the effects of unlawful command influence. So it's as much actual as it is appearance.

Now, the basis of the government's argument here today and the basis throughout this motion seem to be that Staff Sergeant Wuterich is such a bloody killer, and we've shown you the pictures of his handy work, that the law doesn't matter. The law doesn't matter. There are facts that form probable cause to take this Marine to a court-martial. Those facts were the basis for the decision that was made to take him to a court-martial. We presented them to you, Your Honor. You saw the bloody pictures. And therefore, the manual doesn't matter, the legal advice doesn't matter, all these other facts don't matter.

You didn't hear much argument on law. You heard about Tatum and statements by Sharratt, but what you haven't heard about is why, for example, when the government had evidence -- and I asked the general about it and he didn't know -- when they had evidence that Staff Sergeant Wuterich did not -- most likely did not shoot at four of the five individuals at the car, those charges are still on the charge sheet. You did not hear about -- an explanation about why when Colonel Ware recommended those charges be dismissed, they remain on the charge sheet.

Now, let's talk about why that may be. And we have maintained all along in this hearing that the findings

in the previous motion -- and because those facts or that -- those transcripts are in evidence, we ask you to consider them -- we ask you that -- to continue to consider them, because I think they are persuasive. You didn't hear from Colonel Ewers and so that testimony from the previous hearing is the only one you have. You did hear from General Mattis and it's a little bit more firm here today or during this hearing.

Now, let's talk about Colonel Ewers' participation. Colonel Ewers is a Marine Corps judge advocate, O-6, one of the most senior judge advocates in the Marine Corps. Colonel Ewers wears a Purple Heart. Colonel Ewers was involved in combat, and that's kind of rare for a lawyer. You may have an opportunity to be in that type of situation, but it's rare because of what lawyers in the Marine Corps do.

Colonel Ewers, because of his experience, was selected to become a member of the Bargewell investigation. The Bargewell investigation indeed began as an investigation that looked into the reporting and the failures in reporting. But if you read -- and you don't have to go through the whole thing. The government gave it to, but even if you just focus on the summary, they will tell you that in order to look into the reporting, we had to look into the underlying facts and the facts of the shootings at the houses and the roadside. Colonel Ewers helped draft the investigation -- or he investigated, drafted the investigation. Colonel Ewers made a conclusion that there was a LOAC, a Law of Armed -- Law of Armed Conflict violation, and Colonel Ewers also determined that Staff Sergeant Wuterich may have been hiding evidence or not being truthful and there was -- he was, therefore, suspected of misconduct.

Now, you have a law of armed conflict violation and you have an individual who's suspected of misconduct. And this person is not in the reporting chain -- remember I said earlier that the investigation looked into the reporting issues for the command. He had nothing to do with that. Those little facts would lead a reasonable person to conclude that Staff Sergeant -- or Colonel Ewers developed an opinion or believed that Staff Sergeant Wuterich was responsible for a law of armed conflict violation based on his investigation of the facts in order to look into the reporting chain. That's his state of mind in February when he reports to the

MEF.

Now the government has made a lot of, Hey, these meetings began early and they were ongoing. Well, sir, they began on November 19, 2005. The *TIME* report -- the *TIME Magazine* report came out in February. This thing had blown up already, so the information was out there. In December when General Mattis begins to have these meetings, the sole purpose of the meetings is Hamdaniyah and Haditha. He's not having MEF legal meetings. The only reason these meetings are taking place is because of these two high profile cases and then you have another case that comes up later in Afghanistan. I think it's called MSOC where some force recon Marines were involved in something. But all MARCENT business and all focused on these high profile cases. The MARCENT commander and the MEF commander was not spending hours and hours every week to look into drug busts and UAs at the MEF level.

And we've heard a lot of talk about the matrix this and the matrix that. And I'm going to ask you, Do you want the blue pill or the red pill, sir, because they want to give you the red pill and I'm ready to give you the blue pill. Let's talk a little bit about staff planning and how meetings go, sir, because that's the reality that we're talking about. They kept talking about, Well, it was only informational. He just sat there and he was in receive mode. I sit here and I try to imagine what that meeting must have been like. And they really want you to believe that he sat there and the only thing he was doing is saying when is the Article 32 report coming out, when is the Article 34 letter going, when are we going to go to trial. It took two to five hours to do that.

You read in that transcript that there was back and forth discussion on defense requests. And of course, when you talk about defense requests, for example, when you want a blood splatter expert, you talk about well, what evidence do we have. What is the basis for that request? Should we support it? Should we not support it? They want a scene reconstructionist that will cost $150 an hour. They want $45,000 to do a scenery construction. Well, what do we have? Okay. We have a scene that's bloody and we have forensic evidence and so on. And this is the discussion that's going on. And you have people saying don't give it to him; people

saying give it to them.

On May 7, 2008 and June 2008, the testimony was the meetings were held by the CDA to receive legal advice from his trusted advisers with regard to military justice cases pending. Colonel Ewers was in there, because he was a -- he was a trusted legal adviser and he wasn't in there for any other reason. Colonel Ewers testified previously, I don't recall whether we had any meetings where there was no discussion of any Haditha cases. That's from 7 May.

He also acknowledged on 7 May and 2 June that the majority of these legal meetings addressed MARCENT cases and that MEF cases were only discussed on occasion. When asked so it sounds like the majority if not all of them were initially scheduled to discuss CDA or MARCENT cases, he said yes. And you were invited to sit in with the commander, MARCENT/CDA when he discussed with his SJA, whether it was VTC or in person, CDA/MARCENT cases; is that correct? Yes. From May 7.

Now, General Mattis knew that he was disqualified or may be disqualified. We never really arrived at that conclusion. The government has gone on to great lengths to talk about, Well, even if he were an investigator, he would not be prohibited from sitting in in the meetings, like an NCIS investigator. Well, he's not an NCIS investigator. He's the most senior staff judge advocate on the base, probably in MARCENT and at I MEF. He's a combat vet. He wears a purple heart. He investigated Bargewell. Or in -- he did the Bargewell investigation and he's sitting there. What is his purpose?

But the flip side of that is, is the government really ever going to say that he was there to give advice? Are they ever going to admit that he had an impact on that hearing? Have you ever had a prosecutor come into -- to a UCI hearing and say, Yes, I admit there was influence? And that's why the courts counsel military judges as in Wallace to not just listen to the testimony. You need evidence. And appearances do matter.

Colonel Ewers also admits that General Helland sought him out for information and that's from his May 7, I believe at page 27. I may have the page wrong, but it's definitely May 7, Your Honor. He also says there's no doubt in my mind that I commented from time to time on

my impressions of the cases in general or about specific points about the case during these meetings.
May 7, 2008.

Lieutenant Colonel Riggs came in here and said he wasn't affected. Well, I'm glad that he wasn't. But I would ask you to imagine having a primary investigator in a meeting as these subtle issues come up and maybe occasionally Colonel Ewers does speak up as he says, he gave some comments. It's not like he's admonishing Lieutenant Colonel Riggs, but doesn't it make sense that Colonel Riggs would defer to someone who did the primary investigation? Could it not even subtly affect his view? Maybe he just sits there and listens, because he knows that this man has the answer. Maybe General Mattis begins to look to him, because he's really the primary source and even if it's just informational.

And I don't know the difference between information and advice because it kind of gets jumbled. You get information, you get advice, it all comes together, and you make decisions. It's not as black and white as the government wants us to believe it. Those subtleties may have resulted in chilling the ability of Colonel Riggs to be more forthright, more open. Not because there was an intent to do it, but because it just happens. And that's why the rule that fashioned and created the way it was, because we don't want to fall into that situation.

But even if it didn't, Your Honor, if I were to share that information with a member of the public, give them all the facts, and then tell them, Oh, by the way, that convening authority also picks the jury, convenes the court-martial, approves witnesses, and disapproves witnesses, gives funding to the defense, and disapproves funding to the defense. I'd argue that they'd harbor significant data as to the propriety of those proceedings.

Major Gannon also argued that Captain McConnell's case was dismissed, Captain Stone's case was dismissed, Lance Corporal Sharratt's case was dismissed, and he said the case that I hoped he wouldn't say for his own good but then he said Tatum. And I though is he going to tell the judge the truth. And unfortunately he didn't tell you all the truth. He didn't lie, he just didn't tell you all the facts.

So how did Tatum come to be dismissed? Tatum was referred. On the eve of trial, the government bought his testimony which was by the way, Your Honor, inconsistent with other testimony that they bargained and bought earlier but they didn't like. And that was from PFC Mendoza who said Staff Sergeant Wuterich was nowhere near that room when the shootings took place. He said, Tatum was in the room, he saw Staff Sergeant Wuterich outside. Well, they give Mendoza great consideration, but they didn't get what they bargained for so they went and bought another witness and that was Tatum.

TC (Maj Gannon): Objection. Facts not in evidence.

CC (Mr. Faraj): This is a motion.

MJ: It is a motion, but try to argue only the things that I've heard about. I understand your point though.

The objection's sustained.

CC (Mr. Faraj): Well, they did give Tatum a pass. They dismissed his charges without prejudice a few days before trial, maybe on the eve of trial. I don't remember anymore. And that's how those charges went away, because these prosecutors went and told the -- probably went and told the SJA that we need him to testify. And probably because --

TC (Maj Gannon): Objection. Facts not in evidence.

CC (Mr. Faraj): I said probably, Your Honor. It's an argument.

MJ: The objection's sustained, once again.

CC (Mr. Faraj): The taint we're arguing, Your Honor, does not begin after the referral. We're arguing that it begins in the proceedings when they're sitting discussing the way ahead in these cases. And this is a good point to sort of go into the next issue and that is the Riggs/Ware connection.

Lieutenant Colonel Ware has testified that he wasn't influenced and the government has argued that there is no actual UCI. But I think if you go with me on this one a little bit, just follow my reasoning, you'll find that there could be actual. I'm saying it's -- I'm not

saying it's definite. I'm just saying it could be. Certainly there's an appearance.

Colonel Ware testified that he felt as a military judge -- because he was assigned to this investigation -- that they were looking for some more definitive answers from him. And General Mattis' letter confirms that. He says that's the kind of thing I want you to do. So he writes a report that says this is what I think, dismiss the charges, the facts don't support it, in Sharratt. He gets the call from Lieutenant Colonel Riggs -- and I'm going to pause here for a minute. Lieutenant Colonel Riggs testified that the call was about administrative matters. Typos. I really find it hard to believe that Colonel Ware would have typos in his report. If he was copying stuff, certainly he'd copy the typos with it. But the mistakes that he had were about names of Iraqi victims and he testified as to why that is. But there's no doubt that there's also a conversation about him -- or Lieutenant Colonel Riggs being left options. He wanted options.

Now, Major Gannon wanted you to believe that this was a conversation between fellow lieutenant colonels. He doesn't know them. And Lieutenant Colonel Ware, after the conversation began to move forward, began to feel a little upset about this because he thought this was inappropriate and rightfully so. It's an ex parte communication, and it wasn't just about administrative matters because there'd be no reason for him to be upset about that.

This is a conversation that sought to influence the report. What else is it about? When he says, You're not leaving me options, you have the staff judge advocate of MARCENT, the CA's staff judge advocate in the case -- the CDA's staff judge advocate. He is speaking with a mantle of authority as *U.S. Lewis* would say. What other -- what other authority is he speaking with? He reviews the doggone IO report. He writes the letter. What connection could he possibly have to Lieutenant Colonel Ware since they're not friends except this issue? And every time he acts on this issue, it is the commander acting.

We're going to ask you to dismiss these charges with prejudice, and I'm going to tell you why now on the Riggs' issue. Had this been a negligent act, had this

been a call from someone who's unaware of the law, had this been a call from a lay person saying, Hey, Colonel Ware, you know we really think that you're going too easy on these guys. It wouldn't be a big deal. This is a call from a man who sat here and said I was briefing generals when I was a captain. And I give UCI briefs to all my commanders when they check in or when I check in to make sure they're aware. He understood exactly what his role is and what his responsibilities are. He knew the law. He either intended to intentionally influence Lieutenant Colonel Ware or with reckless disregard for the law, to have him change the way he's doing these reports. And because of that reason, I'm going to ask you at the conclusion of this to dismiss with prejudice.

Now, the results of that phone call. In Sharratt, you have a definitive report that says dismiss. And, in fact, it is dismissed. In the Tatum case, there are options. And Colonel Ware is not a man who is uncertain. I mean, he sat here and says you want your exhibit back? He's not afraid -- I'll admit, he's not afraid to speak his mind, but subtlety's important. He gives options. Colonel Riggs asked for options, Colonel Ware gave him options. Actual UCI. Likewise in Wuterich. He got options. It's irrelevant what the command does with it after. Whether they refer or not, whether they dismiss or not, you see the effect of the phone call.

The government has gone to argue at great lengths about the facts of the case and about this is not the classical UCI -- or the classic UCI where you have members that are being influenced and witnesses that are being influenced. But perhaps the most egregious case of UCI that we know of in recent times is the *Lewis* case, where prosecutors have tried to influence the judge or influence the proceeding. And we weren't -- it wasn't me. The case wasn't at the trial level. It was still in motions and so on. And the courts perhaps used their strongest language to ensure that UCI is not allowed, to ensure that the military judge understands that he is the last sentinel or she is the last sentinel and to make sure that all people involved with the military justice understand that it is the mortal enemy of justice.

In this case I grant you it may not be as egregious, but the consequences that we're dealing with with respect to

Staff Sergeant Wuterich are terminal, life-changing. And if, if -- had, I should say, General Mattis or even General Helland had had the benefit of a pretrial investigation, meetings that were free of the influence of an investigator sitting in the meetings, or the benefit of an IO who was really appointed to make sure that they -- he gives definitive answers on facts who was not influenced later. Perhaps -- perhaps he'd still be charged. Or perhaps he wouldn't have the roadside charges. Perhaps you'd have lesser charges. Perhaps it's negligent homicide. I don't know. And I can't answer that. And I can't answer that unless this is done all over again with a new Article 32 and new proceedings.

Now, I'm not -- I think we should get a dismissal with prejudice, because lawyers should know better and lawyers assigned to staff judge advocates should know better. And that's the message that should be sent. And you should not consider -- and I know you won't even though they tried very skillfully to get that in there. But again, it's about subtleties. You shouldn't consider those ugly photos, because there's been no link to Staff Sergeant Wuterich. The statements haven't been put through the crucible of trial to ensure that they're truthful and not truthful. And I hope you won't be influenced by that evidence that was put in here for no other reason except to prejudice this court, because it wasn't necessary.

We are asking for a dismissal with prejudice, but if you're not moved by our evidence to find that a dismissal with prejudice is appropriate, then a dismissal even without prejudice is appropriate, because this must go through a new investigation, through a new untainted SJA, and through a process that ensures that Staff Sergeant Wuterich gets his full rights.

Thank you, Your Honor. Unless you have questions, I have nothing else.

MJ: I do not. Thank you.

Rebuttal argument?

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

If the government understands at least one of the

pillars supporting the defense contention on this issue it's that somehow charges related to the deaths associated with the individuals in the white car, what we call the "roadside" survived at the 32 and went on and were referred.

Now, Your Honor, we went to great pains to ask witnesses very specific questions about the things they knew about and the evidence they reviewed as they developed their situational awareness of this transaction. And the witnesses testified one of the things they were aware of was the *60 Minutes* interview that this accused gave with Mr. Pelley. And in that interview, he admits to shooting the people at the roadside. A fairly strong piece of evidence that this accused was involved in that transaction. And so --

CC (Mr. Faraj): Objection. Again, facts not in evidence.

TC (Maj Gannon): The witnesses testified that they watched the *60 Minutes* presentation.

CC (Mr. Faraj): There's a different between watching and testifying that he admitted to shooting people in the car.

MJ: The objection's noted. I do remember that at least one or more of the witnesses -- I'll check my notes. I know General Mattis said he watched the *60 Minutes* video. So the objection's noted, but I understand that they considered that in their deliberations.

TC (Maj Gannon): Sir.

MJ: Again, I was not given that as evidence in this hearing necessarily to look at nor do I believe it's probably necessary for me to do so.

TC (Maj Gannon): If the judge feels it necessary, the judge has reviewed --

MJ: Right.

TC (Maj Gannon): -- Appellate Exhibit LVIII at this point and is aware that that -- so we would request that you consider that, sir.

Now, in addition to that contention, it seems that

another if not the pillar, the central pillar of the defense's argument is that this may possibly theoretically could have perhaps maybe influenced somebody, somewhere, somehow. It is that attenuated. Major Faraj -- Mr. Faraj must have said subtly affected, may have chilled, possibly affected or influenced. Your Honor, theoretical possibilities are not unlawful command influence even in an appearance analysis. The law is clear that there has to be an impact, and the government has shown beyond a reasonable doubt that there has been no impact.

The defense is focused on Colonel Ewers' presence at meetings. And again, we've emphasized and labored they took place well after the preferral event. However, even at -- even at the heighth, even when the defense is making pin point cites to the record as to what they feel establishes unlawful command influence, it's Colonel Ewers -- even in -- viewed in a light most favorable to the accused, it's Colonel Ewers offering his opinion on the facts of a case. It's Colonel Ewers hearing about a defense request for an expert witness. It's Colonel Ewers sitting in a meeting when funding is discussed. That's unlawful command influence.

A disinterested member of the public who looks at our system from the outside would be much more offended, I'll wager, that in our system when you're charged, the person that in essence is responsible for the charging, the convening authority, picks the jurors. If that's not UCI and it can't be because when the defense described the apparatus that they allege constitutes UCI, this taint and the system where the convening authority makes these decisions, he's describing our system. That's what it is. The convening authority does make funding decisions. The convening authority does pick members. All of these facts are part of the system.

But most importantly in watching the defense's presentation and commentary on the evidence here today, sir, we almost do have to take the red pill or the blue pill to believe that if this team is actually indicting a convening authority, General Mattis, for caring, for trying to get information, for trying to obtain informational dominance over this transaction so that he would be informed to make the most educated and fair decisions in the processing of this accused's case. If

the defense position is that they're indicting that thirst for knowledge, that quest for information on the part of this convening authority who testified here today under -- on the 22nd under oath. That seems to defy reality to a degree. Because the conduct of that convening authority in his attempt to obtain information, make informed decisions again was immaculate.

Finally, sir, Lieutenant Colonel Riggs. Again, you do have to swallow the red pill or the blue pill to sort of split Colonel Riggs down the middle, because you've got to see -- there've got to be two Colonel Riggs for the defense case to have any merit. On the one hand, you've got to have this weak, pathetic, shrieking violet who sits in these meetings and is so overwhelmed by Colonel Ewers that he can't think straight. The glow of Colonel Ewers is overwhelming his judgment because of his combat experience and his purple heart and what he's wearing on his chest, I would wager to say Colonel Ewers probably wasn't in Chucks in these meetings. Colonel Riggs may not even know about the history of Colonel Ewers in terms of his combat experience.

But more importantly, on the one hand, Colonel Riggs is a shrieking violet who can't even think straight in the presence of the great one. And on the other hand, he's this demonic figure that has the absolute gaul to reach down and try to influence Colonel Ware. It doesn't make any sense, sir. There aren't two Lieutenant Colonel Riggs. There's one and he testified before this court. And it's intellectually unsound to split Colonel Riggs into two entities to make this attenuated UCI theory work, because it doesn't.

Finally, sir, briefly on remedies. Take a look at if you would, Your Honor, Enclosures (1), (2), (3) and when you review (1), (2), (3) which is the bulk of the investigations as well as (12), (20), and (30). (12), the Article 32 investigative report for Sharratt. (20), Tatum. (30), this accused.

Your Honor, the different outcomes between those cases. The different results: Sharratt goes away, Tatum ultimately goes away, Staff Sergeant Wuterich is referred to a general court-martial. Those different results are explained in the facts. The defense argues that because Sharratt's case went away, was dismissed

prior to the phone call, somehow that's evidence that thereafter decisions were tainted because of the varying outcomes.

The problem is, is that -- well, when you review the materials, sir, you'll see. The problem is, is that we've broken down the Haditha incident into several different engagements or transactions: Roadside, House 1, House 2, House 4. House 3 is not important for this discussion. Roadside, House 1, House 2, House 4. The problem with the defense's position that the Sharratt outcome is telling is undermined by the fact that Sharratt was not involved in Roadside, House 1, or House 2. Only House 4.

So in other words, sir, there was a very myopic focus on House 4 for Sharratt's 32. It's a different factual circumstance is the point, sir. As to where this accused was the consistent figure for Roadside, House 1, House 2, and House 4. Different facts, different outcomes, sir.

The defense argues that they need a new 32 if the court grants their request. Your Honor, take a look at the incredible and thorough 32s that were done, and the amount of -- I believe there were over 200 exhibits submitted to the 32s in all three of the cases we've been discussing. I believe that -- I know numerous witnesses testified. The statements that the defense spoke about were confronted with the crucible of cross-examination. Not the crucible of trial as was said here, but the crucible of cross-examination did take place, actually in this room at times.

So, Your Honor, a new 32 is not necessary, because there would be no additional information brought to the 32 officer. The record exists as the record exists. Maybes, possibilities, theoretical input, theoretical issues don't constitute unlawful command influence and nothing that's been brought to this court's attention warrants any finding that this case should be dismissed. Thank you, sir.

MJ: Thank you. Anything further from counsel?

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

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

MJ: Court's in recess.

The Article 39(a) session recessed at 1043, 24 March 2010.