The Article 39(a) session was called to order at 0908, 17 June 2008.

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

The court reporter this session of court is Staff Sergeant Evans, previously been sworn.

We have the same counsel as the last session of court, both Lieutenant Colonel Sullivan and Lieutenant Colonel Jamison are here in the courtroom for the government.

For the defense, we have all of the defense counsel. We have got Mr. Muise; we have Mr. Rooney; we have got Lieutenant Colonel Shelburne; and we have Captain King; as well as the accused.

Now, let me take up some administrative matters before we step into the reason that we've got this 39(a) session today.

First, after our last session of court, actually during a recess, I had a brief 802 with counsel in my chambers outside the presence of Lieutenant Colonel Chessani. And counsel asked for a continuance so they could litigate a motion that we had pending before the court at the session that was supposed to start yesterday.

They also asked for a continuance of the trial till the 21st of July. I know we discussed that on the record, but I hadn't actually ruled on that.

But during that 802, I went ahead and granted the request to continue the trial. And also, I approved the continuance request to litigate motions at the next session which was scheduled, the 16th through the 18th of June.

Then, during that 802, defense counsel asked for my ruling with regard to their motion to dismiss the Specification of the Charge for failure to state an offense, specifically that the order was not punitive.

And I had told them that I would announce that on the record at that later afternoon session. But given

that I had granted the continuance, the defense asked about my ruling on that.

And I informed them that I was going to deny the motion, but I had not yet put that on the record. But as of that date, defense and the government were on notice. Well, I told them that I'd put my findings of fact and conclusions of law on the record at a later date.

Now, since that 802 session, several things have happened. First, last Thursday I believe it was, I sent an e-mail to counsel in response to one from the government regarding -- well, it was one of the counsel just asking about administrative housekeeping matters for the court.

And I informed both sides that I was going to change the trial schedule -- well, at least the motions session for this session of court; that instead of being three days so we could litigate motions that were pending before the court, I intended to only have a single session. That would be this morning, starting at 0900. And at this session I would address the defense motion to dismiss for unlawful command influence. And that that would be the only bit of business that I would take this morning. And that if we had a need or that we had a timing issue with regard to future 39(a)s, we would take it up this morning prior to the conclusion of this session of court.

Now, that was on Thursday I e-mailed that out. And then on Friday I was informed that the Navy-Marine Corps Court of Criminal Appeals had issued a ruling on the defense petition for extraordinary relief in the nature of a writ of mandamus.

And I don't know if counsel had been informed of it, but it's an opinion of the court dated 10 June 2008. It's an unpublished decision. It was written by Judge Stolaz (phonetic) of that court. And the bottom line is that they have denied the defense's motion for an extraordinary relief, writ of mandamus. Specifically, for those who are not in-the-know, that the accused through counsel had asked the Navy-Marine Corps Court of Criminal Appeals to order myself to grant my motion to compel production of evidence, which the accused

through counsel asserted was relevant, material, and essential to his participation in the preparation of his defense.

Specifically, this was the ruling that I made with regard to hard drives and other material that the defense sought to have disclosed back in February of 2007.

At that motions session, I denied it. They then filed a motion for reconsideration. I denied that as well. And then the defense filed a writ. That was denied.

And in addition, indicta, the Court of Criminal Appeals went on to say that they did not agree with the -- I'm sorry. They do not agree with the defense's position that the military judge's ruling on the motion to compel discovery was erroneous as a matter of law.

They went on to state that they believe that the trial judge's ruling repeatedly, and they thought correctly, emphasized that the petitioner, the accused, did not establish the relevance or necessity of the discovery information he sought to have produced.

So although that did not have an impact on the trial itself, the timing, I believe that parties, if they had not been given notice of that writ and the denial of that, that they needed to be aware of that.

Now, having said that, let's turn to the business at hand.

TC (LtCol Sullivan): Your Honor, just one correction, when you were relating for the record, you mentioned that the motion hearing was February '07. The motion hearing was February of '08.

MJ: Okay. Thank you.

All right. Well, let's turn to the bit of business at hand.

With regard to the defense's motion for unlawful command influence, I am going to spare everyone the suspense. I'm going to grant that. And I am going to dismiss the charges before the court, both the Charge,

the Specification, and the Additional Charge and Specification, without prejudice.

And additionally, I am ordering that, should the charges be preferred and rereferred, that it be done so with a different command and that, well, the commanders of not only MARCENT but also I MEF are hereby disqualified.

In addition, any subordinate commander in -- well, actualy any commander in Joint Forces Command is likewise disqualified from being a convening authority on this case.

Now, let me turn to a rationale.

Only May 7th of 2008, this court heard argument or received evidence on a defense motion to dismiss the charges and specifications due to apparent and/or actual unlawful command influence on one or more of three separate bases; first, pretrial publicity; second, Secretary of the Navy interference in the independent judgment of the convening authority at referral; and three, that Colonel Ewers, a disqualified legal adviser was present at or participated in military justice meetings with the convening authority of MAR -- Marine Forces Central Command, MARCENTCOM, in which legal advice was rendered concerning this case and related cases before, during, and after referral.

On 20 May 2008, this court issued an e-mail which informed counsel for both sides that the defense had met their burden of production on the issues of apparent and actual unlawful command influence only as to the basis number three involving Colonel Ewers.

The court further informed counsel in that e-mail that the burden on this aspect of the defense motion had now shifted to the government.

For those of -- well, I apologize. I am going to have to take a brief recess and actually retrieve a copy of that e-mail, unless counsel have a copy of that.

TC: Government does not, Your Honor.

CC (Mr. Muise): One moment, Your Honor.

MJ: All right. Go ahead and take your seats. We'll let the defense counsel --

CC (Mr. Muise): We don't, Your Honor.

MJ: You don't? All right. Well, then the court is in a brief recess.

The Article 39(a) session recessed at 0916, 17 June 2008.

The Article 39(a) session was called to order at 0920, 17 June 2008.

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

During the recess, I did retrieve the e-mail that I referred to earlier.

At this point, I would like to read into the record the e-mail that I sent to counsel on 20 May -- I'm sorry -- yeah, 20 May 2008.

Now, I addressed it to both Mr. Muise and Lieutenant Colonel Sullivan. I provided a carbon copy to Lieutenant Colonel Atterbury, trial counsel in this case; Captain Brooks, a trial counsel in this case; Mr. Rooney; Captain King; and Lieutenant Colonel Shelburne. It was titled "preliminary ruling on defense burdens for selective prosecution and UCI motions litigated 7 May 2008. It was sent with high importance.

The text of this e-mail reads, "Counsel," first paragraph, "with regard to the two defense motions that were litigated on 7 May 2008, the following are this court's rulings on the preliminary issue of whether the defense has met their initial burdens:"

Two, "With respect to the defense motion to dismiss for selective prosecution, that motion is denied. The defense has failed to establish a prima facia case that there were others similarly situated who were not prosecuted or that the accused was selectively prosecuted due to bad faith or invidious reasons byt he government.

Paragraph three, "With respect to the defense motion

to dismiss for unlawful command influence, the defense has met their burden only on the following basis and was able to present some evidence of facts of apparent and actual UCI which if true would constitute unlawful command influence and that the alleged unlawful command influence has a logical connection to the courts-martial in terms of its ability to cause unfairness. Specifically, the defense has presented some evidence that the Article 34 advice referral and subsequent convening authority decisions in this case were apparently or actually impermissibly influenced by Colonel Ewers's presence at and participation in military justice meetings held by the consolidated disposition authority, or CDA, from February 2007 to the present, during which the accused's case and those of his superiors and subordinates were discussed and legal advice was rendered to the CDA."

Subparagraph *A*, "In March 2006, while on assignment in Iraq, Colonel Ewers, a USMC judge advocate, was tasked with investigating the post-19 November 2005 reporting and follow-on command action as part of a larger investigation into the deaths of Iraqi civilians in Haditha Iraq.

"As part of his portion of the investigation, Colonel Ewers collected evidence and questioned personnel in the Kilo 3/1 reporting chain, including the accused. Colonel Ewers's interview of the accused was preceded by Article 31b rights warnings, which the accused waived, followed by questions into the accused's actions and reasons therefor in releasing Journal Entry Note number 20-007 and subsequently failing to conduct an investigation into the deaths of 15 Iraqi civilians, including women and children.

"Colonel Ewers later interviewed the accused's immediate superior at Regimental Combat Team-2, Colonel Davis; and the Commanding General, 2d Marine Division, Major General Huck; as well as the Chief of Staff, 2d Marine Division, Colonel Sokoloski. At the conclusion of his investigation, Colonel Ewers and other staff officers prepared draft findings and conclusions for the final report.

"These findings and conclusions which Colonel Ewers shared ultimately posited that the chain of command including the accused was willfully derelict in the

performance of their duties for failing to conduct an investigation into the circumstances surrounding the deaths of Iraqi civilians in Haditha, Iraq, on 19 November 2005."

Subparagraph *B*, "In December 2006, charges were preferred against the accused for violating Article 92, UCMJ, by willfully disobeying a lawful general order to report and investigate a possible, suspected, or alleged law of war violation."

Subparagraph *C*, "The convening authority at the time of preferral was Lieutenant General Mattis, Commander MARCENT, whose headquarters was located at Tampa, Florida. Pursuant to U.S. Marine Corps manpower staffing and organization, the Commander MARCENT is a billet that is dual-hatted, meaning the incumbent also holds simultaneous command as the Commanding General, I MEF, I Marine Expeditionary Force, whose headquarters was located at Marine Corps Base Camp Pendleton, California.

"Each command is staffed with a primarily legal adviser or staff judge advocate who is responsible for providing legal advice and counsel to their respective commander and his subordinate units.

"From December 2006 to the present, the SJA for MARCENT was Lieutenant Colonel Riggs."

Subparagraph *D*, "In February 2007, Colonel Ewers departed Iraq and resumed his duties at Marine Corps Base Camp Pendleton, California, as the SJA for I MEF."

E, "Until November 2007, Lieutenant General Mattis simultaneously held billets as the Commander MARCENT and the Commanding General I MEF. As the Commander MARCENT, he also held the responsibility as the consolidated disposition authority for all USMC cases arising out of the incident of 19 November 2005 in Haditha, Iraq. Thus Lieutenant General Mattis and his successor became the convening authority in this case."

F, "In June 2007 and August 2007, an Article 32 pretrial investigation was held in this case. The investigating officer report ultimately recommended

that the Charge and an Additional Charge of willful dereliction of duty be referred to general court-martial. Lieutenant Colonel Riggs subsequently signed an Article 34 SJA advice letter to the convening authority, Lieutenant General Mattis, which concurred with the IO's recommendation."

G, "In October 2007, Lieutenant General Mattis referred charges in this case to trial by general courts-martial."

H, "In November 2007, Lieutenant General Helland assumed command of MARCENT and I MEF. Lieutenant General Helland is the current CDA, or convening authority, for this case."

I, "From February 2007 to the present, Colonel Ewers has remained the SJA I MEF. During this period of time, I MEF has been a separate and distinct command from MARCENT. Neither command is in the chain of command of the other. However, during this period Colonel Ewers attended as a legal adviser up to 25 MARCENT military justice meetings held by the consolidated disposition authority, or the convening authority in this case, wherein this and related cases, as well as other unrelated MARCENT cases were discussed and legal advice was rendered.

"These MARCENT military justice meetings occurred during a period of time covering the Article 32 investigation in this case, the rendering of the Article 34 SJA advice letter, referral and regulation of pretrial discovery by the convening authority.

"Also present at these meetings were Lieutenant General Mattis or Lieutenant General Helland, the CDA or CA; Lieutenant Colonel Riggs, the MARCENT SJA; and the MARCENT Deputy SJA; among others.

"As the SJA for I MEF, Colonel Ewers had no official or doctrinal reason to be present at MARCENT legal meetings or otherwise consulted by the CDA in this case, but was however at the invitation, direction, or desire of the CDA, convening authority, presumably as the result of Colonel Ewers's legal experience and judgment."

J, "From February 2000 to the present, Colonel Ewers

has been regarded by prosecutors in this case and other related cases as a government witness due to his role as an investigator and as one to whom the accused made incriminating statements. Colonel Ewers was consulted by prosecutors on numerous occasions during this period of time regarding trial tactics and had meetings with them to prepare his anticipated testimony regarding the admissibility of the accused's 2000 -- March 2006 statement."

K, "Pursuant to Rule for Courts-Martial 406 of the Manual for Courts-Martial, Colonel Ewers's role as an investigator and witness in this case rendered him disqualified from providing legal advice pursuant to Article 34, UCMJ."

"Additionally pursuant to Rule for Courts-Martial 1106(b) Colonel Ewers's role as an investigator and a witness in this case renders him disqualified from providing any post-trial review and advice concerning matters submitted by the accused."

L, "The separate command structures in disparate locations of the headquarters between MARCENT and I MEF provides facial assurance that adequate separation was in place between a disqualified legal adviser and the internal MARCENT legal advice and decision-making activities of the CDA/CA in this case. However, the defense has presented evidence that Colonel Ewers, a clearly disqualified legal advisor/government witness was specifically invited/ directly consulted by the CDA to be present at meetings of a separate command wherein legal strategy and courses of action were discussed for this and related cases before, during, and after referral."

M, "The defense has met their initial burden to present some evidence, if true, of apparent and/or actual unlawful command influence in the pretrial advice, referral, and post-referral actions of the convening authorities, Lieutenant General Mattis and Lieutenant General Helland, through the involvement of Colonel Ewers as an investigator, prosecutorial witness, and legal adviser in this and related cases. The burden on this aspect of the defense motion has now shifted to the government. Both the trial counsel and the defense counsel should be prepared to discuss remedies at the next scheduled session of court if the

government is unable to prove beyond a reasonable doubt the apparent and/or actual unlawful command influence as demonstrated above."

Four, "With regard to the remaining bases of the defense motion to dismiss for unlawful command influence, the defense has failed to present some evidence of facts that, if true, would constitute either actual or apparent unlawful command influence on the basis of; one, pretrial publicity; or two, Secretary of the Navy interference in the independent judgment of the convening authority, Lieutenant General Mattis, at referral as a result of timing the release of Secretarial Letters of Censure issued to Colonel Davis, Colonel Sokoloski, or Major General Huck. Accordingly, those bases of the defense motion to dismiss for unlawful command influence are denied."

Five, "This court's essential findings of fact and conclusions of law will be attached to the record on the above motions and issues prior to authentication."

Thereinafter follows my signature block along with my letterhead.

This will be attached to the record as the next appellate exhibit.

After the issuance of that e-mail, on 2 June 2008, this court received evidence and argument to determine whether the government had with respect to basis three as indicated before proven beyond a reasonable doubt that; first, the predicate facts shown by the defense were untrue; or two, that the predicate facts do not establish apparent and/or actual unlawful command influence; or three, that the apparent and/or actual unlawful command influence established by the predicate facts has not or will not affect the proceedings.

Present at the 2 June 2008 hearing for the government were Lieutenant Colonel Sullivan and Lieutenant Colonel Jamison. Present for the defense were the accused, Mr. Muise, Lieutenant Colonel Shelburne, and Captain King.

In order to meet their burden, the government called two witnesses and two witnesses only. That's General

James Mattis and Colonel John Ewers, the SJA of I MEF from 2000 -- February 2007 to present.

After considering relevant portions of the record, the motions, exhibits, testimony of the witnesses, arguments of counsel, and the controlling case law, the following essential findings of fact are supported by a preponderance of the evidence:

And a lot of this is going to be repetitive, but it's important that it's on the record.

First, during August 2002, then Lieutenant Colonel John Ewers, a USMC judge advocate, assumed the duties as the staff judge advocate of the 1st Marine Division, located at Marine Corps Base Camp Pendleton, California.

As the SJA, Lieutenant Colonel Ewers was the senior legal adviser to the Commanding General, 1st Marine Division, who was at that time then Major General Mattis.

During the fall of 2002, the 1st Marine Division deployed to Kuwait in anticipation of combat operations.

While in Kuwait, Colonel Ewers, pursuant to direction and guidance from Major General Mattis, spearheaded the establishment of a reportable incident assessment team, or RIAT, for the 1st Marine Division.

According to the standard operating procedures which Colonel Ewers wrote, the purpose of the reportable incident assessment team was to investigate potential, suspected, or alleged violations of the law of war allegedly committed by subordinate units which may trigger reporting and investigation requirements imposed on 1st Marine Division by higher headquarters and service regulations such as Marine Corps Order 3300.4, the Marine Corps Law of War Program.

During March of 2003, the 1st Marine Division engaged in combat operations in Iraq as part of a large-scale coordinated attack by U.S. forces whose geographic objective was the greater Baghdad area.

During this operation, Colonel Ewers headed the 1st

Marine Division reportable incident assessment team program and was responsible for providing legal opinions to Major General Mattis concerning whether any particular incident met the definition of a "reportable incident," thus requiring a report and subsequent investigation.

Colonel Ewers personally participated on at least one or more RIAT missions while in Iraq at that time. And while leading one such mission in late March 2003, Colonel Ewers -- then Lieutenant Colonel Ewers -- was severely wounded in action and medevac'ed out of the theater of operations for medical treatment.

Several months later, he received orders transferring him out of 1st Marine Division.

In August 2005, now Colonel Ewers reported for duty as the Staff Judge Advocate of the I Marine Expeditionary Force, located at Camp Pendleton, California.

The Commanding General, I Marine Expeditionary Force, was then Lieutenant General Sattler.

Shortly after joining I MEF, Colonel Ewers was notified that he would deploy to Iraq for a 12-month tour of duty, but not as the I MEF SJA. Instead, during February of 2006, he arrived in Iraq as the I MEF Forward Governance Officer and was subsequently reassigned for duty with the State Department as the Deputy Team Leader, Provincial Reconstruction Team, Al Anbar Province.

In March 2006, while on assignment with the State Department, Colonel Ewers was tasked by Major General Zilmer, U.S. Marine Corps, to join as an investigator in ongoing USMC investigation into the post-19 November 2005 reporting and follow-on command action after the deaths of numerous Iraqi civilians, including women and children, by Marines of 3d Battalion, 1st Marines.

Shortly after Colonel Ewers joined the investigative team, his investigation was merged with a separate ongoing investigation into circumstances of these Iraqi deaths. The death investigation was convened by the Commander -- well, Lieutenant General Chiarelli, U.S. Army, was headed by Major General Bargewell, U.S.

Army.

As part of his portion of the investigation, Colonel Ewers and another Marine colonel jointly collected evidence and questioned personnel in the Kilo Company, 3d Battalion, 1st Marines, reporting chain, starting with the most junior officer on scene and proceeding up to and including, among others, the commanding officer and executive officer of Kilo Company, 3d Battalion, 1st Marines; the accused, as the commanding officer, 3d Battalion, 1st Marines; the executive officer, operations officer, intelligence officer, staff judge advocate, human intelligence officer, civil affairs officer, and watch officer, all of 3d Battalion, 1st Marines; the Commanding Officer, executive officer, and operations officer of Regimental Combat Team-2; the commanding general and the chief of staff of the 2d Marine Division. There were others.

All of these interviews were recorded and later transcribed into a verbatim transcript.

Prior to Colonel Ewers's interview of the accused, and based on the evidence collected -- or he had collected up to that point, Colonel Ewers had concluded by that time that the accused had been derelict in the performance of his duties by failing to report and investigate as a potential law of war violation by Marines of 3/1 the killing of 15 Iraqi civilians, including women and children.

As a result, Colonel Ewers informed the accused that he was suspected of dereliction of duty and then advised the accused of his rights as a suspect pursuant to Article 31b of the Uniform Code of Military Justice.

Following acknowledgment, the accused waived his right to remain silent and to consult with an attorney and was subsequently interviewed by Colonel Ewers and the other investigator about the accused's actions and reasons therefore in releasing Journal Entry Note number 20-007 and subsequently failing to conduct an investigation into the deaths of 15 Iraqi civilians, including women and children.

At times during the interview, Colonel Ewers pointedly

challenged the accused's explanations which subsequently elicited several inculpatory statements from the accused.

Colonel Ewers later interviewed the accused's immediate superior, Regimental Combat Team-2, Colonel Davis; and the commanding general, 2d Marine Division, Major General Huck; as well as the chief of staff, 2d Marine Division, Colonel Sokoloski. None of these officers, however, were advised of their Article 31b rights warnings.

At the conclusion of his investigation in June 2006, Colonel Ewers and other staff officers, in collaboration with Major General Bargewell, prepared draft findings and conclusions for the final report. These findings and conclusions, which Colonel Ewers shared, ultimately posited that the chain of command, including the accused, was willfully derelict in the performance of their duties for failing to report a law of war violation and conduct an investigation into the circumstances surrounding the deaths of Iraqi civilians in Haditha, Iraq, on 19 November 2005.

Transcripts of interviews, including that of Colonel Ewers's interview with the accused, were included as exhibits to this, the Bargewell report.

Also in June 2006, the Commandant of the Marine Corps appointed the Commander of Marine Forces Central Command, MARCENT, as the Central Disposition Authority, or CDA, for all USMC administrative and disciplinary matters arising out of events in Haditha, Iraq, on November -- 19 November 2005. At the time of this appointment, the Commander MARCENT was Lieutenant General Sattler.

Pursuant to USMC manpower staffing and organization, the Commander MARCENT was and remains to the present time a billet that is "dual-hatted," meaning the incumbent also holds simultaneous command as the Commanding General, I MEF.

MARCENT and I MEF are separate and distinct commands, meaning neither command was or is in the chain of command of the other.

The MARCENT headquarters is located at Tampa, Florida.

The I MEF headquarters is located at Camp Pendleton, California.

Each command is staffed -- or manned with a full complement of staff officers, including a primary legal adviser or staff judge advocate who is responsible for providing legal advice and counsel to their respective commander and his subordinate units.

Thus, as the Commander MARCENT and as the Commanding General, I MEF, Lieutenant General Sattler had at the time two separate command headquarters and two separate staffs, but which were located on opposite sides of the Continental United States.

In August 2006, Lieutenant General Sattler was succeeded in command of MARCENT and I MEF by Lieutenant General Mattis. Upon assumption of command, Lieutenant General Mattis also assumed the role as the central disposition authority for cases collectively referred to as the "Haditha cases," of which this accused was one.

Although there was an ongoing criminal investigation being conducted by the Naval Criminal Investigative Service, or NCIS, Lieutenant General Mattis was provided with a copy of the Bargewell report, which he read and studied thoroughly.

In November 2006, NCIS provided Lieutenant General Mattis a comprehensive report of the criminal investigation into the circumstances surrounding the deaths of Iraqi civilians on 19 November 2005 in Haditha, Iraq, and into the reporting and follow-on command action after that event. This investigation became the primary source document for Lieutenant General Mattis's review and reference from that point on.

Included as exhibits to this NCIS report were verbatim transcripts of the interviews Colonel Ewers had conducted, including that of the accused, as an investigator for the Bargewell investigation.

In December 2006, Lieutenant General Mattis was approached by his MARCENT SJA, Lieutenant Colonel Riggs, who informed him that Colonel Ewers was expected to return from Iraq in February 2007 and

resume duty as the I MEF SJA. As the I MEF SJA, Colonel Ewers would be expected to routinely meet with Lieutenant General Mattis to discuss legal matters. Given Colonel Ewers's detailed investigative role in pending Haditha cases including this accused, Lieutenant General Mattis was informed that with respect to Haditha cases and this case in particular, Colonel Ewers was "tainted."

On November 21, 2006, charges were preferred against the accused for violating Article 92, UCMJ, by willfully disobeying a lawful general order to report and investigate a possible, suspected, or alleged law of war violation.

In February 2007, Colonel Ewers departed Iraq and resumed his duties as the SJA for I MEF.

I June 2007 and August 2007, an Article 32 investigation was held in this case. The IO report ultimately recommended that the Charge and an Additional Charge of willful dereliction of duty be referred to general court-martial. Lieutenant Colonel Riggs subsequently signed an Article 34 advice letter, SJA advice letter, to the convening authority, then Lieutenant General Mattis, which concurred with the IO's recommendation.

In October 2007, Lieutenant General Mattis referred charges in this case to trial by general court-martial.

From February 2007 to November 2007, Lieutenant General Mattis made frequent trips between his two headquarters and the Persian Gulf Region. However, he made his primary location during this period at his I MEF headquarters at Camp Pendleton, California.

In addition to his many operational duties, he spent a considerable amount of his time on military justice matters.

In addition to his role as the CDA for the Haditha investigations and cases, as the Commander MARCENT, he had other ongoing investigations and courts-martial in cases arising out of combat operations in Afghanistan, and also from the murder of an Iraqi civilian in the town of Hamdaniyah, Iraq. As the Commanding General,

I MEF, he had an ongoing investigation into a possible compromise of classified material.

As the result of the magnitude and multitude of potential military justice issues facing him during this period, Lieutenant General Mattis established a routine by which he could remain informed of case developments and obtain legal advice on investigations and subsequent courts-martial. At least one or more times per week, a legal meeting was held, during which Colonel Ewers; Lieutenant Colonel Riggs; the trial counsel for respective high profile investigations; and the officer in charge of the special prosecution team, or LSST Charlie; were either present in person at these meetings or were piped into the meeting by video teleconference.

The majority of these legal meetings were held in Lieutenant General Mattis's personal office in the I MEF headquarters, at which Colonel Ewers's office was also located.

Colonel Ewers attended most, if not all, of these legal meetings at Camp Pendleton in person.

Lieutenant Colonel Riggs, and/or his deputy SJA, a major, on the other hand attended in person when they were in California or when Lieutenant General Mattis was in Tampa. But most of their participation was by video teleconference.

The OIC of the special prosecution team, a lieutenant colonel, as well as the Camp Pendleton base trial counsel, which ranged in rank from lieutenant colonel to captain, were present at the Camp Pendleton meetings. Otherwise, they participated by video teleconference, as did trial counsel located at Quantico, Virginia, a lieutenant colonel to a captain.

The legal meetings routinely followed a set agenda once all participants were either present or connected by VTC. Cases were briefed by general category based upon their priority to trial or other near milestone event. Cases in the investigative stage were generally briefed later. Virtually all of the cases discussed during these meetings were MARCENT cases. These legal meetings routinely lasted anywhere from two to five hours per session.

Although few, if any, I MEF cases or business was discussed at these legal meetings, Colonel Ewers was present at them. Other than Lieutenant General Mattis, Colonel Ewers was the next senior officer in attendance. However, in terms of judge advocates, Colonel Ewers was by rank at all times during these meetings the senior legal advisor in the room.

And during this period of time, Colonel Ewers attended at least 25 such legal meetings, possibly more according to Lieutenant General Mattis who said "dozens and dozens." Regardless, the hours totaled at these meetings ranged from a minimum of 50 on a conservative side to at least 125 or more, wherein this case and related cases as well as other unrelated MARCENT cases were discussed and legal advice was rendered.

These closed-door military justice meetings occurred during a period of time before, during, and after the Article 32 investigation in this case, the rendering of the Article 34 SJA advice letter, referral and regulation of pretrial discovery by the convening authorities.

Now, during the period of times that these legal meetings were taking place, Colonel Ewers was considered by all trial participants as a government witness in this and related cases, given his role as a principal investigator. Specifically, Colonel Ewers was interviewed and prepared for trial as a witness by the government on numerous occasions during this period of time by the same trial counsel who, in the presence of Colonel Ewers, attended the weekly legal meetings and provided case-status briefings on this case to the convening authority.

Although aware that Colonel Ewers was "tainted" as a legal adviser, Lieutenant General Mattis did not require Colonel Ewers to either not attend or to leave the room during these discussions.

Although at least two legal advisers, Lieutenant Colonel Riggs and Colonel Ewers knew of a potential appearance problem due to the appearance -- or the presence of Colonel Ewers at these meetings, not one person in that room full of lawyers advised Lieutenant General Mattis of it.

And this court specifically finds, however, that Lieutenant General Mattis was unconcerned with how Colonel Ewers's presence in these meetings may appear to third parties.

In November 2007, Lieutenant General Mattis was succeeded in command of MARCENT and I MEF by Lieutenant General Helland. Like his predecessor, upon assumption of command, Lieutenant General Helland assumed responsibility as a central disposition authority for the Haditha cases, and more specifically as the convening authority in this case.

From November 2007 to May 2007, possibly to the present, Colonel Ewers attended up to at least half a dozen or more legal meetings held by the current CDA, at which this case and other related cases were discussed and legal advice was rendered. And at least on one or more occasions during this period, this current CDA has approached Colonel Ewers, who is the I MEF SJA, seeking legal advice on documentation submitted by defense counsel in a separate but tangentially related MARCENT Haditha case or cases.

From March 2006 to the present, this and related Haditha cases have generated considerable international media interests.

The progress of the investigation into the 19 November 2005 events and subsequent command reporting and follow-on action was raised by reporters at numerous press briefings given by the executive branch of the U.S. Government. Public affairs officials from the Department of Defense, Department of the Navy, the Secretary of Defense, the President of the United States, and the Chairman of the Joint Chiefs of Staff have routinely been asked about these investigations.

Members of the U.S. House of Representatives and the U.S. Senate Armed Services Committee were given several private status briefings on the ongoing investigations.

Several members of Congress made public statements, most noticeably Congressman Murtha and Senator Charles Rangel, among others, in which they expressed their personal opinions about what they believed had occurred on 19 November 2005 and the propriety of the

post-incident reporting and investigation.

Additionally, this court has seen the need to issue a specific court order to ensure seating in the gallery for media representatives, some of whom the court notes are present today.

Rule for Courts-Martial 406 of the Manual for Courts-Martial states -- I'm sorry. Let me start that again.

Rule for Courts-Martial 406 of the Manual for Courts-Martial states the requirements of pretrial advice before any charge may be referred to general court-martial.

This rule reads in substantial part, RCM 406(a), "In general. Before any charge may be referred for trial by general court-martial, it shall be referred to the staff judge advocate of the convening authority for consideration and advice."

The discussion to this section states, "The staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. Another person may prepare the advice. But the staff judge advocate is, unless disqualified, responsible for it and must sign it personally. Grounds for disqualification in a case include previous action in that case as an investigating officer, military judge, trial counsel, defense counsel, or member."

The rationale for this rule is to provide convening authorities with a sound, rational, independent legal review to prevent the waste of resources in prosecuting cases at this highest forum, the general court-martial, that are either minor in nature or unprovable.

Article 37 of the Uniform Code of Military Justice, which can be found at 10 USC § 837(a), the 2000 version, establishes the congressional prohibitions against unlawfully influencing the action of a court-martial. "No authority convening a general, special, or summary court-martial or any other commanding officer may censure, reprimand, or admonish

the court or any member, military judge, or counsel thereof with respect to the findings or sentence adjudged by this court or with respect to any other exercise of it or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or by any unauthorized means influence the action of a court-martial or any other military tribunal or any member thereof in reaching the findings or sentence in this case or the action of any convening, approving, or reviewing authority with respect to his judicial acts."

And there I'm reading from *United States versus Thomas* found at 63 MJ 405, specifically page 411, 2006 Court of Appeals of the Armed Forces.

Now, "unlawful command influence is the mortal enemy of military justice," from *United States versus Gore,* 60 MJ 178, Court of Appeals of the Armed Forces, quoting *U.S. v. Thomas* found at 222 MJ 388 at 393, Court of Military Appeals, 1986.

"Where it is found to exist, judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of the criminal proceedings," *U.S. v. Rivers,* 49 MJ 434, CAAF, 1998; *U.S. v. Sullivan*, 26 MJ 442, CAAF, 1998.

"The appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial," *U.S. v. Simpson*, 58 MJ 368, CAAF, 2003, quoting *U.S. v. Stahlman*, 57 MJ 35, CAAF, 2002, and *U.S. v. Lewis*, 63 MJ 405, 2006, CAAF.

"The threshold for raising the issue at trial is low, but more than mere allegation or speculation," *U.S. v. Johnson*, 39 MJ 242, Court of Military Appeals, 1994.

In *Ayala*, that's Court of Military Appeals case 43 MJ 296 at 1995, the Court of Military -- Court of Appeals of the Armed Forces defined the evidentiary standard for raising the issue as some -- as the same as required to raise an issue of fact. And that is "some evidence."

"And as a general matter, the defense has the initial burden of raising the issue of unlawful command

influence." That's *U.S. v. Viagazzi,* at 50 MJ 143, CAAF, 1999. And that's citing *U.S. v. Straumbaugh*, 40 MJ 208, COMA, 1994.

"At trial, the defense meets its burden by showing facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings. But once the issue of unlawful command influence has been raised, the burden then shifts to the government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted," *Stohlman*, 57 MJ 41.

"And this burden is high because command influence tends to deprive service members of their constitutional rights," *Gore*, 60 MJ of 185, quoting *Thomas* 22 MJ of 393, cited by U.S. v. *Lewis*, 63 MJ 405, 2006, CAAF.

Now, CAAF has refined -- well, the Court of Appeals of the Armed Forces has refined this principle in subsequent case law to state that, "At trial, the accused must show facts which, again, if true, constitute unlawful command influence and that the alleged unlawful command influence has a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings."

So thus, once the issue of unlawful command influence is raised, the government must prove beyond a reasonable doubt one of three subsequent -- I'm sorry. All three. First, the predicate facts -- let me state that again.

The government must prove beyond a reasonable doubt; one, that the predicate facts do not exist; or two, that the facts do not constitute unlawful command influence; or three, that the unlawful command influence will not prejudice the proceedings or did not affect the proceedings.

When reviewing allegations of unlawful command influence, military judges must necessarily consider both whether actual command influence was cleansed from the proceedings, as well as whether any perceived

unlawful command influence has been eradicated.

"A review of the command influence is not limited to actual unlawful influence and its affects on a trial. Congress and Court of Appeals of the Armed Forces are concerned not only with eliminating actual unlawful command influence but also with eliminating even the appearance of unlawful command influence at courts-martial." And that's *U.S. v. Rosser*, 6 MJ 267, found at 271, COMA, 1979.

"Once unlawful command influence is raised, we believe it is incumbent on the military judge to act in the spirit of the code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings," *Stahlman*, 57 MJ 42.

"This call to maintain the public's confidence that military justice is free from unlawful command influence follows from the fact that even the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial," *Simpson* at 58 MJ 374.

"Thus disposition of an issue of unlawful command influence falls short if it takes into consideration the appearance of unlawful command influence at courts-martial, "*U.S. v. Lewis*, 63 MJ 405.

Now, "whether the conduct of the government appearance -- creates an appearance of unlawful command influence is to be determined objectively," *Stahlman*, 57 MJ 42.

"Even if there was no actual unlawful command influence, there may be a question whether the influence of a command placed an intolerable strain on public perception of the military justice system," *Stahlman* at 42, 43, quoting *U.S. v. Weissen*, 56 MJ 172, CAAF, 2001.

The objective test for the appearance of unlawful command influence is similar to the test the Court of Appeals of the Armed Forces has applied when reviewing questions of implied bias on the part of court members or in reviewing challenges to military judges for an

appearance of conflict of interest.

And these standards are laid out in *U.S. v. Miles*, 58 MJ 192, CAAF, 2003; U.S. v. Calhoun, 49 MJ 485, CAAF, 1998; and in 28 USC section 455; as well as RCM 902(a); RCM 912(f)(1)(N).

Now, "the focus is upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. Thus the appearance of unlawful command influence will exist where an objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceedings." That's *U.S. v. Lewis*, 63 MJ 405, at 414, 2006, CAAF.

"Where actual or apparent unlawful command influence has been held or found, CAAF has long held that a military judge has wide latitude in discretion of fashioning a remedy. CAAF has recognized and long held the role that dismissal is a drastic remedy and courts must look to see whether alternative remedies are available. However, they have held a dismissal of charges with prejudice is an appropriate remedy where the error cannot be rendered harmless." And that's found at *Gore*, 60 MJ 198.

Now, earlier, this court determined that the defense had met their initial burden on this motion to raise some evidence, if true, of actual or apparent unlawful command influence in the processing of this case.

That ruling had the effect of establishing a rebuttable presumption for the government carried with it a burden of proving one of the three prongs beyond a reasonable doubt; either, first, again, that the predicate facts were not true; two, that the predicate facts did not establish actual or apparent unlawful command influence; or three, that such UCI has not or will not affect the trial.

Well, with regard to the first prong of the government's burden, this court finds that they have failed to prove beyond a reasonable doubt that the predicate facts are untrue.

With regard to the second prong, the government has

failed to prove beyond a reasonable doubt that the predicate facts did not establish or do not establish either actual or apparent UCI on either the convening authority or upon the SJA and/or deputy SJA of MARCENT.

The predicate facts have established that Colonel Ewers personally investigated the offenses, questioned the accused, formed opinions as to his guilt, and expressed his views publicly. Later, he attended as a primary legal adviser of a separate command at least 50 to 125 hours of meetings with the convening authority where this and other related cases were discussed and legal advice was rendered.

The court finds that his presence at these meetings was as a legal adviser to the convening authority.

The fact that he may not have offered specific legal advice on this case while in these meetings is hollow comfort where the facts indicate that all present knew Colonel Ewers's legal opinion on the guilt of this accused as a result of his personal investigation and personal questioning of this accused.

His legal opinion, along with his unnecessary personal presence at what amounted to in reality MARCENT legal meetings, his status as a prosecution witness, his history of investigating reportable law of war violations for then Major General Mattis, his status as the senior legal adviser at all meetings, his combat record, and stellar reputation as a judge advocate and former military judge, when taken together lead this court to conclude that the government has failed to prove beyond a reasonable doubt that Colonel Ewers was not a disqualified legal adviser whose presence did not contribute to a prosecutorial atmosphere or mindset against this accused such that the decisions and actions of the convening authorities or the MARCENT SJA or deputy SJA were not influenced and their independent judgment was compromised.

Likewise, the government has failed to prove beyond a reasonable doubt Colonel Ewers's history and presence at these legal meetings where MARCENT cases were discussed, particularly this one, did not chill subordinate legal advisers from exercising

independence and providing potential contrary legal advice in the presence of Colonel Ewers.

With regard to the third prong, the government has likewise failed to prove beyond a reasonable doubt that Colonel Ewers's history, status, and presence at legal meetings has not influenced the decisions of either convening authority in regulating discovery before, during, or after the Article 32 investigation or referral of this case.

Likewise, the government has failed to prove beyond a reasonable doubt that the legal advice and recommendations of the SJA and deputy SJA of MARCENT were not inappropriately influenced.

On these issues, to meet their burden, the government only chose to present two witnesses, Colonel Ewers, whose demeanor as a witness revealed him to be a senior officer who while on the stands was at times frustrated and exasperated and occasionally mumbling under his breath prior to responding to a question that posed a differing version of the facts than his.

General -- and the other witness, General Mattis, was a convening authority who was unconcerned with how the appearance of Colonel Ewers at what were essentially MARCENT legal meetings would look to the outside.

However, that does not end the analysis. Having found that the government hasn't proven their burden of rebutting the presumption of either actual or apparent unlawful command influence, this court has the duty to actually determine if there was the appearance of unlawful command influence based on these facts.

As indicated earlier, the burden is on the government to prove beyond a reasonable doubt that a disinterested member of the public with knowledge of the facts would have a significant doubt as to the fairness of the proceeding against this accused.

And again, using that standard, and looking at these facts, the government has failed to meet their burden. And this court finds, and actually is convinced of one thing beyond a reasonable doubt, that a disinterested member of the public would harbor significant doubts as to the fairness of the proceedings against this

accused and the military justice system as a whole if they knew that this accused's main interrogator was during significant portions of this trial prepare -- not only prepared as a government witness but was seated at the side of the convening authority as a trusted legal adviser while prosecutors and subordinate legal advisers discussed the details of this accused's case and offered legal advice and strategy which would determine whether this accused would be prosecuted and, if so, how.

And having found that the government has failed to meet their burden to rebut the presumption of either actual or apparent unlawful command influence, this court must now turn to an appropriate remedy.

As I've stated earlier, the appellate courts have given military judges wide latitude and discretion in fashioning a remedy in order to address the unlawful command influence that's present either in the case or in the appearance of it in the courtroom.

As I've said, dismissal is a drastic remedy. But courts have sanctioned that -- actually, they've approved that, when they believed that it was absolutely necessary to not only remove the taint but to ensure that public confidence is continued in the military justice system and in a particular proceeding against any particular accused.

Now, the defense has asked this court to dismiss these charges with prejudice. And frankly, I don't believe that's appropriate. I believe that the accused can receive a fair trial. But I do not -- and consequently, I am not going to dismiss with prejudice.

However, the government has asked this court to, at the worst, order a new Article 34 advice letter if -- so that if there was any taint or any influence, unlawful influence in the independence of the SJA from MARCENT, that it would be cured by having a new Article 34 advice letter. Well, frankly, I think doing that is only addressing half the problem. I think the problems really started when Colonel Ewers was invited or required to be present at the MARCENT meetings. The fact that there was miniscule I MEF business there really is not of much consequence.

But bottom line is that I think that in order to restore the public confidence that this accused is being treated fairly in this prosecution that we need to take it all back to -- and remove any potential influence of Colonel Ewers. So he showed up at February 2007. I believe we need to at least turn the clock back to that. The only remedy available to this court at this point is -- to ensure that occurs is a dismissal without prejudice. Again, if the government intends to prefer, reprefer, and refer, then you will do so with a different convening authority outside the -- of MARCENT or I MEF or Joint Forces Command.

Well, it is now 10 after 10 on Tuesday, 17 June, at Camp Pendleton, California.

Government, your 72-hour window pursuant to Article 62(a)(2) of the UCMJ starts now.

TC (LtCol Sullivan): Well, before that, Your Honor, I would make an oral motion for reconsideration.

MJ: Okay. What -- based on what?

TC (LtCol Sullivan): Just -- I'm just making the oral motion. Judge, you're going to deny it. I understand. And then I'll -- I'll -- I know the 72-hour clock starts.

MJ: Okay. Your motion is denied. You've presented nothing.

TC (LtCol Sullivan): Okay. Roger that, judge. And then -- then the 72 hours starts, I understand, today. I'll just give you notice right now that we --

MJ: Wait. No. Sit down. I'm going to be very blunt and direct. Please sit down, Lieutenant Colonel Sullivan.

TC (LtCol Sullivan): Yes, sir.

MJ: Your 72-hour period starts at 10 after 10 on the 17th of June, not "today." You have 72 hours from now.

TC (LtCol Sullivan): Yes, sir.

MJ: All right?

TC (LtCol Sullivan): Yes, sir.

MJ: The rule requires written notification. You intend to file an appeal, you provide written notification to this court within 72 hours, not oral notification, not going to do it on the record. You're not going to do it sometime today. Written notification within 72 hours from this point forward.

All right, gentlemen --

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

MJ: To do what?

TC (LtCol Sullivan): I want to consult with counsel, sir.

MJ: Go ahead.

TC (LtCol Sullivan): No. Sir, I'll withdraw that.

MJ: Because, quite frankly, there are no other issues in this case. These charges are dismissed without prejudice. You have 72 hours to give your written notice that you want to appeal it. Following that, or failing that, this court is adjourned.

The Article 39(a) session recessed at 1009, 17 June 2008.