IN THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 1

UNITED STATES,	)	**APPELLEE'S ANSWER TO THE INTERLOCUTORY APPEAL OF THE UNITED STATES**
Appellant	)	
	)	
v.	)	
	)	Case No. 200800299
Jeffrey R. CHESSANI	)	
Lieutenant Colonel (O-5)	)	
U.S. Marine Corps,	)	
Appellee.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

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IN THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 1

UNITED STATES, Appellant v. Jeffrey R. CHESSANI Lieutenant Colonel (O-5) U.S. Marine Corps, Appellee.	))))))))))	**APPELLEE'S ANSWER TO THE INTERLOCUTORY APPEAL OF THE UNITED STATES** Case No. 200800299

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

COMES NOW LtCol Jeffrey R. Chessani, USMC and respectfully urges this Court to affirm the Military Judge's June 17, 2008 ruling that dismissed all charges and specifications in this case without prejudice and disqualified any commander from U.S. Marine Corps Central Command, I Marine Expeditionary Force, or U.S. Joint Forces Command from serving as a convening authority for re-preferral and re-referral of any charges against him based on actual and apparent unlawful command influence.

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ERRED WHEN HE RULED THAT THE GOVERNMENT DID NOT MEET ITS BURDEN BEYOND A REASONABLE DOUBT TO REBUT CLEAR EVIDENCE OF ACTUAL AND APPARENT UNLAWFUL COMMAND INFLUENCE FLOWING FROM FACTS DEMONSTRATING THAT A PLAINLY DISQUALIFIED, SENIOR JUDGE ADVOCATE IMPROPERLY INFLUENCED THE INDEPENDENT JUDGMENT OF THE CONVENING AUTHORITIES AND THEIR JUNIOR STAFF JUDGE ADVOCATES, AND THAT THIS EVIDENCE WOULD CAUSE AN OBJECTIVE, DISINTERESTED MEMBER OF THE PUBLIC WITH KNOWLEDGE OF THE FACTS TO HARBOR SIGNIFICANT DOUBT ABOUT THE FAIRNESS OF THE PROCEEDINGS.

INTRODUCTORY STATEMENT

Unlawful command influence is "the mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). It is the acid that erodes an accused's right to receive a fair trial and the public's confidence in the fairness of the system. The nature of the military makes its system of justice extremely vulnerable to improper influences and pressures; influences and pressures that are systemic in a military command environment. Remarkably, throughout the court-martial proceedings in this case, the Government utterly failed to apprehend the seriousness of a charge of unlawful command influence. This colossal failure is evidenced by the half-hearted ("half-baked")[1] way in which it treated the matter below and the feckless arguments it has presented to this Court in an attempt to reverse the well-supported and well-reasoned ruling of the Military Judge.

The Government inexplicably treats unlawful command influence as a simple pushover, perhaps blinded by its quest for a prosecution in this high-profile court martial. Indeed, General James T. Mattis, USMC, the former Consolidated Disposition Authority/Convening Authority responsible for referring the present charges to a general court-martial, testified under oath in this case that he was not concerned with appearances, dismissively treating the very notion.

But unlawful command influence is not a push-over; it is a very serious matter, one going to the very heart and core of the military justice system. An objective, private citizen, fully informed of the facts and circumstances of the Haditha cases would see the prosecution of LtCol Chessani as one motivated by politics and not justice. This observer—which there are many, as a simple review of the public comments on this case reveals—would conclude that his suspicions about the military justice system are correct: it is a fixed system where justice is secondary to

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[1] (*See* R. 3Jun08 at 31) ("We scheduled this hearing for the government, to specifically present their evidence on this issue. Now, you're telling me that you've only done a half-baked job and you've got stuff and you want to submit it now - -").

achieving the desired result of those in positions of high command. Consequently, the military courts—and its system of justice—require that the Military Judge be the "last sentinel" to ensure not only that "actual" command influence does not taint the process, but that even the "appearance" of unlawful command influence is absent. The credibility of the military justice system requires nothing less.

At the present moment one would conclude that the military justice system has <u>not</u> failed in this case. And that is because Col Steven Folsom, USMC, the Military Judge presiding, has taken his duty and responsibilities quite seriously. Far from being immune from command pressures, a Military Judge on active duty is often in a very difficult position, particularly in a high-profile case such as this one. Despite this tremendous pressure, the Military Judge ruled according to the facts and law and properly dismissed this case. That ruling should not be disturbed, lest this Court is willing to perpetuate the public's eroding confidence in military justice.

STATEMENT OF JURISDICTION[2]

This Court does not have jurisdiction to hear the Government's appeal as the provisions of Article 62, UCMJ and R.C.M. 908 have not been satisfied. Once a notice of intent to appeal is filed with the Military Judge, trial counsel must "promptly and by expeditious means" forward the appeal to the Appellate Government Division.[3] Furthermore, no delay in filing the record of trial with this Court is authorized once received by the Appellate Government Division,

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[2] A similar jurisdictional issue related to Government appeals is currently before the Court of Appeals for the Armed Forces in *CBS Broadcasting, Inc., Petitioner v. United States Navy-Marine Corps Court of Criminal Appeals, United States, and Frank D. Wuterich, Staff Sergeant, E-6, U.S. Marine Corps, Respondents*, No. 08-8020/NA, CCA 200800183, set to be argued on September 17, 2008.

[3] R.C.M. 908(b)(6).

particularly for the Government's evaluation process.[4] The Government did not promptly and expeditiously file this appeal when the record had been authenticated by the trial counsel on June 25, 2008 and by the Military Judge on July 2, 2008; the Government did not file the record with this Court until July 8, 2008. Additionally, the Government "filed" a copy of its brief with this Court on July 28, 2008—the last day of the 20-day window for doing so.[5] However, neither the military defense counsel nor civilian defense counsel was properly served with a copy of this brief until July 29, 2008, which is outside the 20-day filing window.[6]

STATEMENT OF THE CASE

This case arises out of the much-publicized and ill-described "Haditha massacre." LtCol Chessani ("Appellee") is the senior military officer charged with criminal misconduct arising out of the November 19, 2005 incident in Haditha, Iraq, that resulted in the reported deaths of 15 Iraqi civilians. This incident has been the subject of much pretrial publicity and political maneuvering at both the national and international levels.

On June 6, 2006, the Commandant of the Marine Corps designated the Commander, U.S. Marine Corps Forces, Central Command (MARCENT), to serve as the Consolidated Disposition Authority (Convening Authority) (hereinafter "CDA") for all disciplinary and administrative actions that result from the investigations into the Haditha incident. (App. Ex. XCI). Consequently, the CDA was responsible "for the *complete* disposition of any officer misconduct case that might arise from" the investigations. (App. Ex. XCI) (emphasis added). In his capacity as CDA, the MARCENT commander was [allegedly] given "sole and unfettered discretion" as to

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[4] *United States v. Pearson*, 33 M.J. 777 (N-M. Ct. Crim. App. 1991).

[5] *See* CCA Rule 21; N-M. Ct. Crim. App. R. 4-6(c).

[6] *See* Government's motion to correct errata dated July 30, 2008, granted by this Court on July 31, 2008.

the ultimate disposition of each case.[7] (App. Ex. XCI). The MARCENT commander initially serving as CDA for purposes of this case was then-LtGen James T. Mattis, USMC.[8] In November 2007, LtGen Samuel T. Helland, USMC, assumed command of MARCENT and the concomitant duties as CDA. He holds that position today.

On December 21, 2006, the Government preferred one specification of a violation of a general order and two specifications of dereliction of duty in violation Article 92, UCMJ. An Article 32, UCMJ, investigation was held from May 30, 2007 to June 9, 2007. Over the objection of defense counsel, the investigation was reopened on August 8, 2007 for the sole purpose of considering an additional Government exhibit; the defense had requested that the investigation be reopened to consider fully the proposed additional charges that were brought to the defense's attention for the first time on the eve (Sunday evening) of presenting final argument to the Investigating Officer (IO). (*See* Apx. E (Def. Objections to IO Rep. & IO Addendum Rep.)).

On October 19, 2007, the two original dereliction specifications were dismissed and an Additional Charge II for dereliction of duty in violation of Article 92, UCMJ, was preferred.

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[7] The "sole and unfettered discretion" of LtGen James T. Mattis, USMC, the CDA at the time, was overridden by the Secretary of the Navy with regard to three officer cases while the referral decision in Appellee's case was still pending. (*See* R. 2Jun08 at 44-45). On August 9, 2007, the day after the Article 32 investigation in Appellee's case closed and before the IO issued the addendum to his report, LtGen Mattis officially reported to the Commandant that, pursuant to his authority as CDA, he had "decided to give Col Stephen W. Davis, U.S. Marine Corps, a Non-Punitive Letter of Caution, because of his actions relative to" the Haditha incident. (App. Ex. XXIX at 36-38). On September 5, 2007, the Secretary of the Navy intervened and issued a Secretarial Letter of Censure—a significantly harsher punishment—to Col Davis on account of his actions. (App. Ex. XXIX at 39-40). Secretarial Letters of Censure were similarly issued to Col Robert G. Sokoloski, USMC and MajGen Richard A. Huck, USMC for their roles in the Haditha incident. (App. Ex. XXIX at 41-44). The Secretary of the Navy's actions sent a clear message to LtGen Mattis that his decisions with regard to the disposition of the officer cases were too lenient. This alone provides an independent basis for finding the presence of unlawful command influence in this case.

[8] The first designated CDA was LtGen John F. Sattler, USMC, who then subsequently changed command with LtGen Mattis in August 2006.

This same day, the CDA referred the charges for trial by general court-martial. Appellee was arraigned on November 16, 2007.

The essence of the charges in this case is that Appellee willfully failed to accurately report and thoroughly investigate the November 19, 2005 incident in Haditha, Iraq that resulted in the deaths of 24 Iraqis—an incident that the Government alleges was a possible, suspected, or alleged violation of the law of war.

On April 1, 2008, the defense filed a motion to dismiss on the grounds of actual and apparent unlawful command influence. (App. Ex. XXXIX). The three bases proffered by the defense in support of its motion included: (1) the actual and apparent influence created by pretrial publicity of the Haditha cases, specifically including the public statements made by senior military and civilian officials asserting that those involved in the Haditha incident, including the officers, were guilty of criminal wrongdoing; (2) the actual and apparent influence of senior officials, including the Secretary of the Navy, on the independent judgment of the CDA while the referral decision in this case was pending; and (3) the actual and apparent influence caused by the presence and participation of Col John Ewers, USMC, a disqualified legal advisor, at closed-session, legal meetings held by the CDA from February 2007 to the present during which Appellee's case and those of his superiors and subordinates were discussed and legal advice was rendered. (*See* App. Ex. CXII).

During an Article 39(a) session held on May 7, 2008, the defense presented evidence and the Military Judge heard argument on the defense's motion.

On May 20, 2008, the Military Judge issued a lengthy preliminary ruling by email to counsel for both parties, informing them of his findings and initial ruling on the defense's

motion. (App. Ex. CXII). In his preliminary ruling, the Military Judge stated, *inter alia*, the following:

> 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 court-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 (CA) decisions in this case were apparently or actually impermissibly influenced by Col Ewers' presence at, and participation in, military justice meetings held by the Consolidated Disposition Authority (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.

(App. Ex. CXII).

In this ruling, the Military Judge made it clear that he considered not only the improper influence upon LtGen Mattis, but also the improper influence upon the present CDA, LtGen Helland, who held similar meetings in which Col Ewers participated. (*See* App. Ex. CXII). The Military Judge stated the following:

> 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, LtGen Mattis *and* LtGen Helland, through the involvement of Col Ewers as an investigator, prosecutorial witness, and legal advisor 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 rebut beyond a reasonable doubt the apparent and/or actual UCI as demonstrated above.

(App. Ex. CXII) (emphasis added).

Despite having full knowledge of the ruling and its evidentiary burden, during the Article 39(a) session held on June 2, 2008, the Government only called two witnesses: Gen Mattis and Col Ewers. This is a significant point that the Military Judge commented upon in his ruling on June 17, 2008, noting, with emphasis, "In order to meet their burden, the government called two

witnesses *and two witnesses only*." (R. 17Jun08 at 10) (emphasis added); (*see also* R. 17Jun08 at 26) (noting, once again, that "to meet their burden, the government only chose to present two witnesses"). Consequently, the Government *failed to present evidence* to meet its burden; a failure that cannot be remedied or substituted by arguments presented in this Court. The Government's brief is silent on this matter, tacitly acknowledging its failure to call other essential witnesses, such at LtGen Helland, LtCol G.W. "Bill" Riggs, USMC, the MARCENT SJA, and his deputy SJA, among others.

At an Article 39(a) session held on June 17, 2008, the Military Judge stated on the record his extensive findings of fact and conclusions of law with regard to the defense motion to dismiss, ultimately ruling that "the government . . . failed to meet their burden to rebut the presumption of either actual or apparent unlawful command influence. . . ." (R. 17Jun08 at 27). Accordingly, based on his "wide latitude and discretion in fashioning a remedy in order to address the unlawful command influence" and in an effort "to restore the public confidence that [the Appellee] is being treated fairly in this prosecution," the Military Judge dismissed the charges without prejudice and directed that if the Government intends to re-prefer and re-refer, it must do so with a different convening authority outside of MARCENT, I MEF, or U.S. Joint Forces Command.[9] (R. 17Jun08 at 27-28). The Government's appeal follows.

STATEMENT OF FACTS

I. Introduction.

While not essential for this Court to affirm the Military Judge's well-supported ruling on the defense's motion to dismiss, in light of the Government's brief, but misleading statement of the underlying facts (*see* Gov't Br. at 4), Appellee feels compelled to provide this Court with a more complete understanding of the events that precipitated the criminal charges against him.

[9] Gen Mattis is currently the Commander, U.S. Joint Forces Command. (R. 2Jun08 at 3).

This understanding will provide the broader context from which to view the issue of unlawful command influence. Indeed, in light of the fact that Appellee is the senior officer charged with criminal misconduct related to the Haditha incident, the underlying facts provide further evidence of the "prosecutorial mindset" in this case.[10] A complete statement of facts supporting unlawful command influence is set forth more fully in section III below.

During the relevant time period, Appellee was the Commanding Officer of Third Battalion, First Marines (3/1), which was a subordinate unit of Regimental Combat Team-2 (RCT-2). RCT-2 was commanded by Col Davis. The division commander was MajGen Huck, and his Chief of Staff was Col Sokoloski, a judge advocate.

II. Facts Related to the Criminal Charges.[11]

A. Complex Attack of November 19, 2005.

At approximately 0715 on November 19, 2005 in Haditha, Iraq, while conducting a routine resupply operation, a Marine convoy from Kilo Company (K Co), 3/1 was attacked by insurgents. The convoy, comprised of four HMMWVs, was initially attacked by a devastating IED blast, which destroyed the fourth vehicle in the convoy and instantly killed one Marine and wounded two others. The location of this attack was at the intersection of routes Chestnut and

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[10] *See also* sec. III, E below. Although Col Ewers was also the main interrogator for MajGen Huck, Col Davis, and Col Sokoloski, he did not advise these officers of their Article 31(b) rights prior to taking their sworn statements (R. 7May08 at 52-53), contrary to when he interrogated Appellee (R. 7May08 at 47), thereby negating further any serious claim that these officers were ever criminal suspects in this case. The focus of the prosecution was always at the battalion level—and the primary target was Appellee.

[11] For support of these facts, see documents at Appendix E to the Interlocutory Appeal by the United States filed on July 8, 2008, including the Article 32 transcript. See also Appellee's Petition for Extraordinary Relief in the Nature of a Writ of Mandamus filed with this Court on April 30, 2008 under the same case number.

Viper—a known location for insurgent activity.[12] Days prior to the attack, 3/1 received credible intelligence warning of an impending complex attack in the Haditha area.

Shortly after the IED blast, the ambushed Marines started receiving small arms fire from nearby residences, prompting the Marines to conduct clearing operations to secure the area and to clear out the attacking insurgents. The small arms fire was reported to higher headquarters via radio and was heard by those responding to the attack.

Moments after the IED blast, a white vehicle—the subject of a recent "Be On the Lookout" (BOLO) warning—approached the attacked convoy. According to reports, the occupants of the vehicle—five military-aged males (MAM)—were ordered to pull over to the side of the road. The MAMs did so, and then attempted to flee on foot, at which time they were engaged and killed by the Marines.

Several Quick Reaction Forces (QRF) were launched in response to the attack. A vehicle-mounted QRF departed from the K Co Firmbase (Sparta) and shortly arrived on scene at Chestnut and Viper. This QRF was led by Lt William Kallop, USMC, the K Co platoon commander in charge of the Marines that were in the attacked convoy. Another QRF, led by the K Co Commander, Capt Luke McConnell, USMC, left Sparta on foot en route to Chestnut and Viper. During their foot movement to the ambush site, Capt McConnell's QRF could hear small arms fire, which included AK-47 fire, coming from the Chestnut/Viper location. During their tactical movement, Capt McConnell's QRF was also engaged by suspected insurgents. The Marines returned fire, wounding one suspected enemy, who would later die as a result of the

[12] During Operation Rivergate, which was conducted in October 2005, 3/1 uncovered numerous weapons caches, IEDs, IED training/making facilities, and a substantial propaganda facility in and around the Chestnut and Viper location. This area was one of the worst areas in the 3/1 area of operation (AO) for insurgent activity.

gunshot wound.[13] And a QRF comprised of EOD members departed from the battalion headquarters located at the Haditha Dam, which was approximately 1 kilometer north of Chestnut and Viper. As the EOD QRF traveled south along River Road toward the scene of the blast, it was hit by an ambush. The QRF sped through the ambush without casualties.

The IED blast proved to be the catastrophic event that would initiate a city-wide complex attack, as intelligence warnings had predicted.

The 3/1 Combat Operations Center (COC), which started monitoring the engagement via Scan Eagle at around 0830, picked up enemy movement from the Chestnut/Viper location. The battalion tracked insurgents linking up with a vehicle on the Palm Grove Trail, which paralleled River Road to the east. These insurgents were eventually followed along the trail to what was later determined to be a "safe house" in a residential area known as the X-380 Complex. These insurgents were armed and wearing chest rigs—strong evidence of a foreign fighter presence.

The battalion COC directed a platoon from K Co to clear the buildings that the insurgents eventually occupied. After several unsuccessful attempts to suppress the targeted area with rotary-wing CAS, the Marines approached the buildings and were immediately attacked by insurgents with hand grenades. Eight Marines were wounded as a result of this attack. The battalion COC ordered the Marines to back away to a safe distance so that fixed wing CAS could engage the insurgents within the buildings. After several attacks, the buildings were leveled. Despite this devastation, two insurgents were spotted fleeing from the rubble into a nearby palm grove, which was also attacked with CAS. One insurgent survived this attack and fled on foot. He was followed throughout the city and eventually captured by the Marines as he was coming out of a residence holding an infant that was not his. It was a well known enemy tactic,

[13] In total, there were 24 persons killed during the course of this complex attack, which does not count the Marine KIA. The battalion's reports on 19-20 November indicate that 15 civilians (NKIA) were killed and 8 enemy (EKIA) were killed. The EWIA, who was medevaced, eventually died from his wound.

technique, and procedure (TTP), particularly for foreign fighters, to use civilians as cover, as this complex attack demonstrated.

As the dust was settling on that afternoon, Appellee departed the battalion COC with his vehicle-mounted personal security detachment (PSD) to assess the situation on the battlefield. The PSD traveled south along River Road to the last engagement at the X-380 Complex; the major engagement of the day that resulted in multiple wounded Marines. At the X-380 Complex, Appellee met up with his on scene commander, Capt McConnell, and was briefed about the events, including the civilian deaths at Chestnut and Viper. Capt McConnell explained to Appellee that the civilians were killed as a result of Marines entering and clearing hostile buildings that were occupied by insurgents. Appellee was told that the Marines responded the way they were trained.

As evening drew near, Appellee and Capt McConnell returned to Sparta for further briefing and assessment of the day's events and for additional tasking since an OCFI (Other Coalition Forces Iraq) raid was scheduled to commence that evening in the AO. The battalion was tasked with providing support for the raid. A site visit to the Chestnut/Viper location would have to wait until the following morning.

B. Reporting of the Complex Attack of November 19, 2005.

During the day and throughout the evening of 19 November, 3/1 was reporting the events to its immediate superior command, RCT-2, via email, phoncon, chat, and Journal Entry Notes (JEN). Specifically, Maj Sam Carrasco, USMC, the 3/1 operations officer, was making reports to his regimental counterpart, LtCol Christopher Starling, USMC, the RCT-2 operations officer.

For example, on 19 November LtCol Starling received the following report via Secured Internet Protocol Router (SIPR) email from Maj Carrasco:

> "I am still working out the details on numbers. We had (1) FKIA and (8) FWIA. Confirmed BDA thus far is (13) EKIA, (5) EWIA, and (15) NKIA (7 of which were women and kids). I will call later tonight to give debrief."[14]

Accordingly, it was promptly reported to regiment that at least 15 civilians were killed, "7 of which were women and kids," in the 19 November attack.

The sworn testimony taken during the course of the investigation of this case reveals that Maj Carrasco did call LtCol Starling later that day and provided a more detailed report of the incident. LtCol Starling recounts that conversation as follows:

> "[T]he explanation that Sam Carrasco gave me, I thought was—made sense. He said that it was a congested area, that they were taking fire from buildings, that they had to go in and clear those buildings. When they got into the buildings there were civilians in the buildings."
>
> "I recall him saying that they had to clear buildings and some of the NKIA were inside the structures."

Thus, RCT-2 received reports from 3/1 that civilians had been killed in "buildings" (i.e., residential structures) during clearing operations conducted by 3/1 Marines. Col Davis, the RCT-2 commanding officer, was also aware of this information on 19 November. He testified in a sworn statement as follows:

> "Reports we got is that [civilians] died in the cross-fire and operations going into the buildings to clear up insurgents."

RCT-2 also forwarded this amplifying information to division, as evidenced by the sworn Article 32 testimony of the division commander, MajGen Huck:

> Q: Sir, in hearing reports about this engagement on 19 November, you had heard that Marines had actually entered homes on that day during this engagement. Is that correct?

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[14] LtCol James Christmas, USMC, the RCT-2 XO and senior Marine at Al Asad, which is where all of the information, including journal entries and reports, was going through on 19 November, was copied on this email. LtCol Christmas also had access to the Scan Eagle feed, which showed that aside from the five men around the white vehicle, there were no other civilian dead in the streets or outside the residential structures.

A. I think part of the reporting or verbal reports was that there was an IED, there was a small-arms fire—IED, small-arms fire, and then some clearing of buildings. That is correct.

MajGen Huck testified further:

Q: Sir, during the course of that day, did you learn that civilians had been killed during the engagement?

A: To my recollection, yes, and I think I put that in my testimony.

Q: And included amongst the civilians were women and children, you knew that at some time during that day. Is that correct, sir?

A: Yes, and I think I previously testified to that also.

In fact, MajGen Huck was personally briefed by 3/1 just days following the 19 November incident; yet he never requested additional information or a JEN update, nor did he order a formal investigation.[15]

On the evening of 19 November, Appellee spoke directly to Col Davis via phone and briefed him about the day's events, including the fact that civilians were killed during the attack on the Marines. Col Davis told Appellee that because "it was a 'bona fide' combat action," no investigation was necessary.

One of the JENs submitted to regiment by 3/1—the JEN that serves as the basis for the additional charge of dereliction of duty—stated as follows:

> JEN 20-007 Update to ref 19-019: There was a total of (8) EKIA, (1) EWIA who was medevaced out, and (15) NKIA, and (2) NWIA medevaced. Post engagement assessment has determined that the combined 3/1 and 2-2-7 IA patrol was attacked as it was moving past a group of neutral IZs. The ensuing blast and TIC contributed to the number of NKIAs. AIF elements then engage CF from within residential structures in the area further adding to the number of NKIAs as a result of returned fire by CF. Commanding officer 3/1 moved to the scene to conduct a command assessment of the events.

[15] As noted previously, MajGen Huck, Col Davis, and Col Sokoloski, the division chief of staff, received letters of censure from the Secretary of the Navy for essentially failing to take further action based on the reported information. (App. Ex. XXXIX at 39-44).

As the evidence shows, neither RCT-2 nor the division updated its JEN or SIGACT to include any amplifying details (i.e., civilians, including women and children, killed during clearing operations conducted in multiple residential structures) that were reported by 3/1 via authorized, alternative channels of communication. Both commands knew that civilians, including women and children, had been killed. Both commands knew that civilians were killed during clearing operations into multiple residential structures. And neither command sent requests for information to 3/1 asking for additional details regarding the civilian deaths, nor did they request that the original JEN be corrected, updated, or supplemented to reflect these amplifying details.[16]

LtCol Starling testified during the investigation as follows:

> Q: Do you know why or do you have any reason to—why regiment didn't [do] a supplemental journal entry to division with this information that was orally reported to you?
>
> A: Yeah, right now I don't know why we did not do that.

LtCol Starling testified further:

> Q: And given the tempo that you were operating under in Iraq at the time, it wasn't necessarily uncommon that you didn't go back and rewrite journal entries based on information that was forwarded up to higher that you knew that they had received?
>
> A. Yeah, I could say that's accurate. I mean, if you look in our journals, there are numerous occasions where we did get follow-on information or we did update journals. You know, again, the first report being what it is, often you got additional amplifying information later and you correct the journal entry. But was it done in every case when there was a change, I'd say probably not. There were probably some that were missed.

Appellee and his staff ensured that higher headquarters knew what they knew in a timely manner utilizing all methods of reporting—SIPR email, chat, and voice via phoncon.

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[16] This is critical since Appellee is now being criminally charged for not correcting, updating, or sending a supplemental journal entry when neither of his higher commands corrected, updated, or supplemented their written journal reports even though the information was plainly reported.

Maj Carrasco testified at the Article 32 investigation as follows:

Q: Is it fair to say that based on what you sent up written and orally, that you believe that higher headquarters had the information that they needed?

A. At the time, yes. That is correct.

C. Investigating the Complex Attack of 19 November 2005.

On the morning of November 20, 2005, Appellee and Capt McConnell, along with the battalion executive officer, Maj Kevin Gonzalez, USMC, and others, made a site visit to the Chestnut/Viper ambush location. During this visit, Appellee and Capt McConnell walked the ground and Capt McConnell briefed Appellee as to the events that took place the day prior, pointing out the geometry of fires as it was explained to him by his men.[17] They didn't enter the homes because the families had returned and the Marines wanted to respect their privacy, particularly in light of their recent losses.

In addition to being briefed by Capt McConnell, Appellee had previously viewed Scan Eagle at various times throughout the complex attack, and he was briefed by his principle staff regarding the attacks. In fact, the 3/1 intelligence officer, Capt Jeffrey Dinsmore, USMC, prepared a detailed storyboard of the event and briefed Appellee that evening.

Thus, Appellee received a face-to-face debrief by his on scene commander on the day's events, including the attack at Chestnut and Viper; he inspected the scene of the attack at Chestnut and Viper the very next morning with his on scene commander; and he received briefs

[17] On 19 November, Capt McConnell went to the Chestnut and Viper location and was briefed by his platoon commander, Lt Kallop, and the squad leader of the Marines who conducted the clearing operations, Sgt Frank Wuterich, USMC. On the evening of 19 November, Capt McConnell viewed the bodies of the deceased, including the women and children, and conducted an additional debriefing with Sgt Wuterich. The details of the engagement in light of what he saw, what was briefed, the character of the Marines involved, and how the Marines were trained all made sense to Capt McConnell. Neither he nor any other officer or enlisted Marine in 3/1 suspected that a law of armed conflict violation had occurred on 19 November. Not one officer or enlisted Marine testified during the course of the lengthy investigation into this incident that they thought or suspected that a law of war violation had occurred.

from his principle staff regarding the complex attack. Based on all of the information received, Appellee and his staff concluded that the civilian deaths were the result of an insurgent initiated attack—that is, the civilians died during the course of combat action. Consequently, no further investigation was required nor did higher headquarters ever order Appellee to conduct an additional investigation, despite inquiries by the battalion to higher as to whether any additional action was necessary.[18] Consequently, the battalion moved on and continued with its demanding operational tempo.

D. Haditha City Leadership Meeting.

It was reported that the Haditha city council and other city leaders had close ties to the insurgency. Predictably, shortly after the 19 November attack the city council and its self-appointed leaders issued a complaint, including a letter listing several demands.[19] It was a common propaganda ploy to make exaggerated claims of law of war violations against Marines to use as leverage for other purposes.

Appellee, Capt McConnell, Maj Dana Hyatt, USMC, the battalion Civil Affairs Group (CAG) officer, among others, met with city leaders on November 27, 2005 to discuss the letter and their demands. These meetings with city leaders were somewhat commonplace in Haditha and throughout Iraq. And the letter the Marines received that day was written in a typical, propaganda style, making bold and exaggerated claims.[20]

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[18] It is significant to note that the order requiring a formal investigation into all civilian deaths, including those killed during combat operations, did not issue until April 2006—well after the time period of the charges alleged in this case.

[19] In fact, 3/1 received intelligence indicting that insurgents intended on using the 19 November incident for propaganda purposes.

[20] In the list of demands were such things as "giving permission to all kinds of mass media and to all human organization (sic) to enter the city and to let them know the situation in the city," "Giving up arresting women and terrifying them under any circumstance," "opening the inside and outside (inner and

The city leaders began their list of demands with the claim that "American soldiers had executed three families with a number of university students who were on their way to college," requesting "an immediate investigation about the painful events of 19th—Nov- 2005 (sic) and punishing the doers because the people of Haditha had considered it as a crime of war, which could be never forgotten."[21]

During the meeting Appellee reviewed every demand with the city leaders, spending approximately 30 to 45 minutes discussing the 19 November attack and well over an hour discussing the other issues. At the end of the discussion, the city leaders were satisfied with what they were told. Specifically, they were satisfied with Appellee's representation that he would seek solatia payments for the 15 civilians, but not for the insurgents. The city leaders accepted the explanation that the Marines did nothing wrong—they understood that the Marines were responding to the insurgents' attack. The meeting ended amicably.

Later that same day, Appellee briefed Col Davis about the meeting, including sending him an email about it that informed his immediate superior that "[the city council] accused us of executing 24 martyrs on the 19th. . . ." Additionally, a verbatim copy of the demand letter was forwarded through the chain of command. In particular, a verbatim copy of the letter was widely circulated by the regimental S-2 watch officer. Consequently, no one throughout the chain of

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outer) roads and ending the prohibition of vehicles (sic) movements," "leaving all schools and offices which are exploited by American forces and keeping the military positions away of (sic) the city centers," "repeating (sic) the damaged bridge," "repeating (sic) the damaged schools and offices," "Lightening the suffering of people in the city and making the basic materials for living easy and available," "solving the problem of salaries which were delayed since 6 months," "giving up getting the families out of their houses leaving them without any shelter in order to exploit them by making these houses residence places for American forces," and "Giving up entering the gardens of houses at night while the families are inside the houses. For many times the soldiers spent all night in the garden while the families are trembling because of fear and horrors."

[21] Prior to the meeting with the city leaders, Maj Hyatt received a list of names of deceased civilians from an Iraqi who claimed to be the lawyer for the decedents' families. The list contained 15 names, which matched 3/1's report of 15 NKIA; the list did not contain 24 names, thereby affirming that 9 of the decedents were not "innocent civilians" (i.e., they were connected with the attack that day).

command considered this letter a credible allegation of a war crime—they considered it insurgent propaganda.

E. *Time* Magazine Allegations & Congressman Murtha.

Sometime in January 2006, Tim McGirk, a reporter for *Time* magazine, began making inquiries about the November 19, 2005 incident based on information he received from a suspected insurgent sympathizer. McGirk submitted a list of questions regarding the incident to Maj Neil F. Murphy, USMC, the PAO for MNF-W. These questions were sent down the chain of command and eventually made their way to Appellee. Along the way the questions were reviewed by Col Sokoloski, the division chief of staff who was also a judge advocate, and Col Davis, among others. Appellee responded to the questions, and his responses were forwarded back up the chain of command with requests for further guidance. They eventually landed on the desk of MajGen Huck. In response to an inquiry by Lt Gen Peter Chiarelli, USA, the Commanding General for MNC-I, regarding the McGirk allegations, MajGen Huck responded, "I support our account and do not see a necessity for further investigation."[22]

Although the *Time* magazine reporter stated that he wanted to visit Haditha "to give the men a chance to tell us their version of events," claiming that "[w]e want to see the truth told here," McGirk never made the visit despite an invitation to do so and the willingness of the Marines to accommodate his request. Accordingly, his exaggerated claims were dismissed.

McGirk's unwillingness to get the Marine's version of the events, however, did not stop *Time* magazine from running its story, alleging that a "massacre" had occurred. Predictably, this

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[22] The *Time* magazine claims included such allegations as "four young men were herded into a large closet in front of the womenfolk and the closet was sprayed with bullets, and all four men were killed," "four students and their driver were forced to descend from their car and were then shot dead execution-style by Marines, according to eyewitnesses, one of whom filmed the killing," "at 2 am the next morning, the bodies were dumped by Marines at a local hospital," and "that the brother of one of the Marines was killed in the IED attack and that he went on a rampage that resulted in the killing of the civilians."

story grew legs as anti-war Congressman John Murtha went on national television and accused the enlisted Marines of killing in "cold blood" and the officers of "covering it up."

III. Facts Supporting Unlawful Command Influence.

The Military Judge's extensive ruling on the record sets forth in significant detail the relevant facts that support the finding of actual and apparent unlawful command influence. (*See* R. 17Jun08 at 10-28). Those details will not necessarily be repeated here. Instead, the following facts are highlighted to further demonstrate the correctness of the Military Judge's ruling, which this Court should affirm.

A. Col Ewers' Prior Relationship with Gen Mattis.

In 2003, Col Ewers was the SJA for the First Marine Division, which was commanded by then-MajGen Mattis.[23] (R. 2Jun08 at 34, 57, 77). During their service together, which included combat action during the invasion of Iraq, MajGen Mattis developed an appreciation and respect for Col Ewers' legal advice and expertise. (R. 2Jun08 at 34-35, 90). In fact, he charged Col Ewers with developing a program for investigating and reporting possible, suspected, or alleged law of war violations. (R. 2Jun08 at 64, 82). The end product of this tasking was the creation of the Reportable Incident Action Team, or RIAT. (R. 2Jun08 at 64, 82). Remarkably, during his testimony in this case, Gen Mattis was noticeably reluctant to give Col Ewers *any* credit for developing the RIAT, insisting that he was the one responsible for it.[24] (*See* R. 2Jun08 at 64). However, in direct contradiction, Col Ewers testified that he was intimately involved with developing the RIAT program. In fact, Col Ewers testified that he wrote the entire SOP for it. (R. 2Jun08 at 82) (stating that he had a "pretty primary" role in creating the RIAT program)).

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[23] Col Christopher Conlin, USMC, the IO for the Article 32 in this case, was one of MajGen Mattis' battalion commanders during this time. (R. 2Jun08 at 15). LtGen Mattis hand selected Col Conlin to be the IO in Appellee's case, which was a unique move for this CDA. (R. 2Jun08 at 33).

[24] This is not the only instance where Gen Mattis' testimony was contradicted, as demonstrated further.

The trusted relationship between MajGen Mattis and Col Ewers was forged even further during Col Ewers' time as the division SJA in Iraq as he was eventually wounded in action while deployed on a RIAT at the request of the General. (R. 2Jun08 at 34-35, 57-58, 90). Col Ewers received a Purple Heart—a rare occurrence for a judge advocate—cementing his legacy and reputation amongst the officers in the judge advocate community. Consequently, Col Ewers' stellar reputation as a combat-tested judge advocate would precede him wherever he went.

B. The Bargewell Report.

Not surprisingly, as a result of his extensive experience with law of war issues and his stellar reputation as a judge advocate, in March 2006 Col Ewers was assigned to assist with the Haditha investigations; the focus of his investigation was on the reporting and follow-on command action. (R. 7May08 at 11). As part of his investigation, Col Ewers collected evidence and questioned numerous witnesses, including witnesses that he suspected of violating the UCMJ for failing to accurately report or thoroughly investigate a possible, suspected, or alleged law of war violation. Consequently, Col Ewers was the investigator who warned Appellee of his Article 31(b) rights and took his sworn statement after securing a waiver of those rights. (R. 7May08 at 47). In addition to Appellee, Col Ewers interrogated numerous witnesses, including many of the witnesses the Government intends to call in its case-in-chief. (*See* R. 2Jun08 at 82-85; App. Ex. XXXIV). Col Ewers is a Government witness himself.[25] (App. Ex. XXXIV).

[25] Contrary to the Government's assertion, Col Ewers is not simply a "foundation" witness. (Gov't Br. at 32). He is also a witness as to the demeanor and other characteristics of the persons he interviewed, which could impact the credibility of these witness; he is a witness to "off-the-record" statements made outside of the course of the formal interview; he can be called as an impeachment witness; he could be called as a rebuttal witness; and with regard to Appellee's sworn statement, which the Government intends to introduce at trial, Col Ewers' opinions about the case are interwoven throughout his questioning. (*See, e.g.,* R. 2Jun08 at 65-66, 85, 87-88; *see also* App. Ex. XCIII & Doc. No. 14 to Gov't Mot. to Attach). Thus, the Government has a senior Marine officer—and a judge advocate—to help shape the testimony of many essential witnesses and to promote its theory of the case; someone who is also closely connected with Gen Mattis, the person who referred the charges to a general court-martial.

In addition to collecting evidence and taking statements, Col Ewers was intimately involved with drafting an official report setting forth the findings and conclusions of the investigation. (R. 7May08 at 13-14). The report, commonly known as the "Bargewell Report" after MajGen Aldon Bargewell, USA, the officer ultimately tasked with the investigation by the commander of Multi-National Corps, Iraq (MNCI), became one of the main sources of evidence for the officer misconduct component of the Haditha investigations. LtGen Mattis acknowledged in official correspondence to the Commandant that he "thoroughly consider[ed]" the Bargewell report during his review of the officer misconduct cases, noting further that the report "contain[ed] evidence suggesting criminally culpable conduct by some Marines." (App. Ex. XXXIX; *see also* App. Ex. XCII; Gov't Br. at 25 (acknowledging that LtGen Mattis "reviewed every page of the Bargewell investigation")). The Bargewell Report was also incorporated into the NCIS investigation of the Haditha incident. (R. 2Jun08 at 36).

The Bargewell Report set forth several significant findings—findings that reflected the legal opinions and conclusions of Col Ewers. (R. 7May08 at 13-15). For example, the report found the following:

- "[T]hat there was evidence from which one could draw the inference that Marine commanders and staff members were guilty of dereliction of duty in failing to request, recommend, or direct that an inquiry into the incident be conducted." (R. 7May08 at 14).
- "[T]hat upon being advised of the allegations raised by Time Magazine, the Second Marine Division Commander, Division Chief of Staff, the RCT-2 Commander, and others had sufficient knowledge and a duty to report and investigate a LOAC violation, but did not." (R. 7May08 at 14).

- "[T]hat the duty to inquire further was so obvious in this case, that a reasonable person with knowledge of these events would have certainly made further inquiries." (R. 7May08 at 14-15).
- "[T]hat a case of willful dereliction of duty could be made out against some of these individuals." (R. 7May08 at 15).

The Bargewell Report was also leaked to the media. Col Ewers' involvement with the Bargewell investigation, specifically his interview with Appellee, was the subject of an article published in the *Washington Post* on August 19, 2006. (App. Ex. XCIII). The article quotes extensively from Appellee's sworn statement. In the article, the author observed, "At one point, Col John Ewers, the Marine lawyer who took the statement, ***seemed almost exasperated with Chessani's passive approach to the incident. Using profanity, he told Chessani his own reaction*** was '15 civilian dead, 23 or 24 total dead, with no real indication of how it was that we arrived at the enemy KIA number.' Ewers asked: 'Did it occur to you that you needed to do an investigation simply so you could go to the locals and say, 'This was righteous'? . . . And be confident that you were speaking with certainty?'" (App. Ex. XCIII) (emphasis added).

During his sworn testimony, Gen Mattis claimed that he read and digested over 9,000 pages of investigative materials because he wanted to ensure he possessed an "intellectual dominance over all the information available" (*see* Gov't Br. at 20; R. 2Jun08 at 12-13, 36, 40, 59), including the Bargewell Report, which is particularly significant for Appellee's case. And as the civilian author from the *Washington Post* observed, Col Ewers not only interrogated Appellee, but he also expressed his opinions on the matter through his questioning. Col Ewers is similarly identified as the interrogator in numerous other sworn statements that were part of the Bargewell Report and later incorporated into the NCIS investigation—the very materials that

Gen Mattis claimed to have thoroughly reviewed and considered. (*See* Gov't Br. at 25).

C. Closed-Session Legal Meetings with Legal Advisors.

Despite his intimate involvement in the investigation and his well-known legal opinions and conclusions with regard to the reporting and investigating component of the Haditha cases, beginning in February 2007, Col Ewers was directed by the CDAs (initially LtGen Mattis and then later LtGen Helland) to attend numerous, closed-session "legal meetings" that were held in the CDA's small office located at Camp Pendleton, California.[26] (R. 2Jun08 at 29-31, 45, 46, 61, 62). There were dozens of these meetings, which would generally last from three to five hours. (R. 2Jun08 at 61). The purpose for these legal meetings was for the CDA to receive legal advice from his trusted advisors with regard to the military justice cases pending, including the case against Appellee. (R. 7May 08 at 57; 2Jun08 at 29, 45, 61, 80). Aside from the CDA, who admittedly had no formal legal training and so relied upon the opinions of those with such training, as was his duty (*see* R. 2Jun08 at 13 ("I still needed legal advice. I'm not a lawyer. I'm not a JAG.")), the persons attending these meetings were lawyers, including Col Ewers, who was the SJA for I MEF. (R. 2Jun08 at 13, 70-71, 80). Consequently, these "legal meetings" were called by the CDA for the purpose of receiving legal advice from his trained and trusted legal advisors. (*See* R. 2Jun08 at 29 (admitting that this was the CDA's "legal time")). And the CDA's senior legal advisor present at these meetings was Col Ewers, who was directed to attend these legal meetings by the CDA because he was a legal advisor and ***for no other reason***. Thus, it is without serious contradiction that Col Ewers' presence at these meetings was for the purpose of providing legal advice—and likely affirming legal advice that was provided—to the CDA. It

[26] When asked by the Military Judge as to why he was present at such meetings, Col Ewers responded: "[T]he CG of I MEF asked me to come, and ***despite the fact that I told him and he understood and acknowledged that I should stay out of Haditha***, Hamdaniyah in general because it wasn't my jurisdiction, he still asked me to come and ***I wasn't inclined to decline***." (R. 7May08 at 52) (emphasis added).

should be noted that these meetings did not include defense lawyers for any of the accused; Appellee's defense counsel were never invited to any of these meetings, which inevitably took on a prosecutorial atmosphere.

Many, if not the majority, of these marathon legal meetings that the CDA directed Col Ewers to attend did not have anything to do with I MEF cases. However, most, if not all, of the meetings discussed the Haditha cases, including Appellee's case. As Col Ewers testified, "I don't recall whether we had *any* meetings where there was no discussion of any Haditha case." (R. 7May08 at 51) (emphasis added). Col Ewers acknowledged that the majority of these legal meetings addressed MARCENT cases, and that I MEF cases were only discussed "on occasion." (R. 7May08 at 58; R. 2Jun08 at 81). Col Ewers testified as follows:

> Q: . . . . So it sounds like the ***majority of the meetings, if not all of them***, were initially scheduled to discuss CDA or MARCENT cases?
>
> A: Yes.
>
> Q: And you were invited to sit in with the Commander of MARCENT slash CDA when he discussed with his SJA, whether it was by VTC or in person, his CDA slash MARCENT cases; is that correct?
>
> A: Yes.

(R. 7May08 at 57-58) (emphasis added).

Despite knowing that Col Ewers was disqualified from providing legal advice in the Haditha cases, the CDAs still directed him to attend these lengthy legal meetings that had nothing to do with I MEF cases. According to Col Ewers, he attended these meetings because the CDA "just wanted [him] there." (R. 7May08 at 26). Thus, far from creating an impregnable and "strict firewall" between the Haditha cases and their disqualified legal advisor (*see* Gov't Br. at 35; R. 2Jun08 at 60), the CDAs themselves created a significant breach in the wall by directing the attendance of Col Ewers. The likely reason is not difficult to discern: the CDAs felt

most comfortable with having their trusted, senior legal advisor available to vet the legal advice they were receiving on these high-profile cases.

During his testimony, Col Ewers expressed his concerns about being involved with the Haditha cases, stating, "I just didn't think it was a particularly good idea for me to get involved on giving [the CDA] advice on these cases - - on the Haditha cases, because I had been involved in the investigation." (R. 7May08 at 26-27). When asked why, Col Ewers admitted, "***Just because from the appearance, in a nutshell.***" (R. 7May08 at 27) (emphasis added).

D. Additional Influence.

Following these closed-session legal meetings with the CDA, Col Ewers did not hide away in a cave. Indeed, the CDA worked about "50 meters" from his office at Camp Pendleton (R. 7May08 at 28), while the only "authorized" legal advisor, the SJA for MARCENT, was principally located hundreds of miles away in Tampa, Florida. (R. 7May08 at 28). In addition to attending these legal meetings, Col Ewers had follow-on conversations and discussions with the CDAs, Government trial counsel, and LtCol Riggs, the MARCENT SJA, regarding Haditha matters. For example, when the question arose regarding the authority of the Secretary of the Navy to issue secretarial letters of censure to Col Davis, Col Sokoloski, and MajGen Huck for their actions relative to the Haditha incident, LtGen Mattis consulted with his senior legal advisors, including Col Ewers, for the purpose of seeking legal advice on the matter. Col Ewers acknowledged being involved in this discussion. (R. 7May08 at 21).

On another occasion, LtGen Helland approached Col Ewers about a Haditha related matter, seeking Col Ewers' advice on how to respond to a defense counsel request from one of

the enlisted accused.[27] (R. 7May08 at 27) (admitting, "I think General Helland asked me to take a look at it").

In addition to his meetings with the CDA, Col Ewers also met with Government trial counsel regarding the Haditha cases. As Col Ewers testified, "[T]here is 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. (R. 7May08 at 30).

As one would expect, Col Ewers also had discussions with LtCol Riggs. Col Ewers testified as follows:

> Q: But you did have a conversation with [LtCol Riggs] ***regarding the Haditha cases***, sir?
>
> A: Right, he told me when the meetings were going.
>
> Q: Is that all you talked about, when the meetings were going?
>
> A: Yeah. ***I am sure there were other things***, but I can't remember specifically the conversation that I had with Riggs, you know, ***issues that were being discussed***.

(R. 7May08 at 26) (emphasis added).

In February 2008, Col Ewers appeared on *Frontline*, a nationally televised PBS program that dedicated an episode to covering the Haditha incident and the cases that followed, including Appellee's case. During his segment of the television show, which was taped sometime in October 2007, Col Ewers appeared in uniform, with his name and SJA title appearing at the bottom of the screen. Unquestionably, he was appearing on the show as a senior SJA for the Marine Corps. While Col Ewers claims that he told the *Frontline* producer that he would not talk about Haditha because he "thought that would be improper" (R. 7May08 at 36), his segment

[27] Appellee's counsel had an identical request that it sent to LtGen Helland for his consideration. Both requests were denied by the CDA. (*See* App. Exs. XCIV & XCV as Docs. 1 & 2 to Appellee's Mot. to Attach; R. 3Jun08 at 24; App. Ex. CX at 6).

was juxtaposed with an interview with one of the civilian defense counsel such that Col Ewers appeared to be describing the Military accused's defense as a "cop out." (R. 7May08 at 38; App. Ex. LXXVII). As Col Ewers acknowledged, "I think that the inference that is available there is that I was actually commenting on that as a defense raised by a Haditha defendant." (R. 7May08 at 38).

In sum, Col Ewers was intimately involved in the Haditha cases. His influence was obvious, as was his resistance to responding fully to questions that demonstrated the impropriety of his actions. As the Military Judge noted, "Col Ewers, whose demeanor as a witness revealed him to be a senior officer who while on the stand 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." (R. 17Jun08 at 26). As stated in the Military Judge's ruling,

> 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 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.

(R. 17Jun08 at 25-26) (emphasis added).

E. Prosecutorial Atmosphere *in this Case.*

Although LtGen Mattis fancied himself as the CDA for the prosecution *and* the defense (R. 2Jun08 at 16, 37), his actions with regard to Appellee's case belie his claim. Indeed, with little exception, both LtGen Mattis' and LtGen Helland's actions throughout the proceedings demonstrated a palpable bias in favor of the prosecution.[28] Virtually every request made by Government counsel, regardless of its cost and the burden it would impose on Appellee and his counsel, was granted by the CDA, while virtually every request, with few exceptions, made by Appellee's defense counsel was denied.[29] The following examples illustrate this point:

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[28] The Government's attempt to substitute the CDAs' actions in some of the enlisted Marine cases with the CDAs' actions in this case is misguided. (Gov't Br. at 28-29). The Appellee is the senior Marine charged with criminal conduct—there was never any serious consideration of charging anyone higher in rank. And Col Ewers' involvement with the Haditha cases was focused on the actions of the officers, specifically including Appellee, for allegedly failing to accurately report and thoroughly investigate the Haditha incident. Col Ewers had virtually no role in the enlisted Marine cases.

[29] Contrary to LtGen Helland's assertions, as CDA he had the authority to grant the defense's requests for witnesses, depositions, and expert assistance. (*See* R. 2Jun08 at 32-33).

- Defense counsel requested that the CDA grant testimonial immunity to Col Davis and Col Sokoloski so that they would be available to testify at Appellee's Article 32 investigation.[30] That request was denied, even though, as LtGen Mattis testified, he never denied one request for immunity from Government counsel.[31] (R. 2Jun08 at 41).
- Defense counsel requested that the CDA reopen the Article 32 so that the defense could fully prepare for and defend against the additional charges that Government trial counsel disclosed for the first time on the eve (Sunday evening) of closing arguments in the investigation. This request was denied. Instead, the CDA, acting on the advice of LtCol Riggs, reopened the Article 32 for the limited purpose of considering *one* Government exhibit. Only two witnesses were allowed to testify at this hearing. (*See* Appx. E).
- Defense counsel requested in February 2008 that the CDA direct Government trial counsel to produce certain trial witnesses to testify on behalf of Appellee at his court martial. This request was denied. (*See* Docs. 3 & 4 to Appellee's Mot. to Attach; R. 3Jun08 at 26; App. Ex. CX at 8).
- Defense counsel requested in February 2008 that the CDA order the depositions of several witnesses (all of whom were in the United States) whose testimony the defense sought in support of their motions to dismiss. The request was denied. (*See* Docs. 3 & 4 to Appellee's Mot. to Attach; R. 3Jun08 at 26; App. Ex. CX at 8).

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[30] Eventually, on January 22, 2008, LtGen Helland granted Col Davis and Col Sokoloski immunity to testify at the trial. Nevertheless, at this late date, the defense was denied the opportunity to take sworn testimony from these witnesses at the Article 32, thereby denying the defense essential discovery and the ability to "lock-in" the testimony of these crucial witnesses. Not surprisingly, these witnesses, who did not appear on the Government's initial witness list of December 14, 2007, now appear on the Government's most recent witness list as witnesses to testify against Appellee. (App. Ex. XXXIV).

[31] Ten witnesses with immunity appear on the Government's witness list.

- Over the strong objections of defense counsel, the CDA granted the Government's request to go to Iraq to depose several Iraqi civilians whom the Government has no jurisdiction over so that the depositions could be used against Appellee and the other accused at their courts martial without having to call the witnesses to appear live in court. (*See* App. Exs. XCIV & XCV as Docs. 1 & 2 to Appellee's Mot. to Attach; R. 3Jun08 at 24; App. Ex. CX at 6).
- The defense requested that the CDA appoint a computer forensic expert to assist the defense with reviewing the overwhelming amount of evidence that was seized from various computers and computer databases. This evidence was largely stored in electronic format and had been vetted by the Government's computer forensic experts. The request was denied. (*See* Docs. 3 & 4 to Appellee's Mot. to Attach; R. 3Jun08 at 26; App. Ex. CX at 8).
- Prior to receiving the IO's addendum to his report based on the re-opened Article 32, which was held on August 8, 2007, the very next day LtGen Mattis opined in a letter to the Commandant that Appellee was derelict in the performance of his duties, stating, *inter alia*, "The evidence indicates that the reporting of [the Haditha] incident by 3rd Battalion, 1st Marine Regiment was inaccurate and never corrected" and that Appellee did not "completely brief[ ] [his superior commanding officer] on the allegations of the Haditha residents and the demand for an investigation." (App. Ex. XXXIX at 36-38).

Based on the totality of the evidence, it is clear that ***in this case*** a prosecutorial atmosphere or mindset existed and that the CDA's decisions were biased against Appellee. As the Military Judge appropriately stated,

> 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 . . . 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.

(R. 17Jun08 at 26-27).

ARGUMENT

THE MILITARY JUDGE'S FINDINGS OF FACT ARE AMPLY SUPPORTED BY THE RECORD AND HE CORRECTLY CONCLUDED THAT THE GOVERNMENT DID NOT MEET ITS BURDEN BEYOND A REASONABLE DOUBT TO REBUT EVIDENCE OF ACTUAL AND APPARENT UNLAWFUL COMMAND INFLUENCE FLOWING FROM FACTS DEMONSTRATING THAT COLONEL EWERS, A PLAINLY DISQUALIFIED, SENIOR JUDGE ADVOCATE, IMPROPERLY INFLUENCED THE INDEPENDENT JUDGMENT OF THE CONVENING AUTHORITIES AND THEIR JUNIOR STAFF JUDGE ADVOCATES, AND THAT THIS EVIDENCE WOULD CAUSE AN OBJECTIVE, DISINTERESTED MEMBER OF THE PUBLIC TO HARBOR SIGNIFICANT DOUBT ABOUT THE FAIRNESS OF THE PROCEEDINGS AGAINST APPELLEE.

I. Standard of Review.

This Court's review of the Government's interlocutory appeal is limited and deferential; it may only review the Military Judge's determinations "with respect to matters of law." Art. 62, UCMJ; R.C.M. 908. Consequently, "[w]hen a court is limited to reviewing matters of law, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record." *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004) (citations and internal quotations omitted). Accordingly, this Court should not disturb the Military Judge's determination of a fact "unless it is unsupported by the evidence of record or was clearly erroneous." *Id.* (quoting *United States v. Middleton*, 10 M.J. 123, 133 (C.M.A. 1981)). Furthermore, this Court should not "find its own facts or substitute its own

interpretation of the facts" for those of the Military Judge. *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007). Regarding questions of law, this Court reviews the Military Judge's findings *de novo*. *See United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997) ("On issues of command influence, we review the military judge's findings of fact under a clearly-erroneous standard, but we review *de novo* the question of command influence flowing from those facts.") (quotations and citation omitted).

The remedy ordered by the Military Judge is reviewed for an abuse of discretion. *Gore*, 60 M.J. at 187. Under an abuse of discretion standard, the Military Judge's decision cannot be set aside by this Court "unless it has a definite and firm conviction that [the Military Judge] committed a clear error of judgment in the conclusion reached upon a weighing of the relevant factors." *Id.* (quotations and citation omitted). "[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *Id.*

In sum, based on the Military Judge's findings of fact in light of the controlling case law and the deferential standard of review, this Court should affirm the ruling below.

II. Application of the Analytical Framework for Resolving Claims of Unlawful Command Influence to the Facts of this Case Compels this Court to Affirm the Military Judge's Ruling.

A. Duty of the Military Judge to Maintain Public Confidence in the Proceedings.

"[C]ommand influence is pernicious and an anathema to the fairness of military justice. . . ." *Gore*, 60 M.J. at 186; *see Thomas*, 22 M.J. at 393 (describing unlawful command influence as "the mortal enemy of military justice"). The Court of Appeals for the Armed Forces (CAAF) has long recognized that once the issue of unlawful command influence is raised, "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." *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002) (quotations and citation omitted). Accordingly, CAAF has "underscored the role of the military judge as the 'last sentinel,' an essential guard at the trial level, to protect against unlawful command influence." *United States v. Harvey*, 64 M.J. 13, 18 (C.A.A.F. 2006) (citing *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999)).

"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." *Lewis,* 63 M.J. at 407. Congress and CAAF "are concerned not only with eliminating actual unlawful command influence, but also with eliminating even the appearance of unlawful command influence at courts-martial." *Id.* at 415 (quotation and citation omitted). "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." *Id.* (quotations and citations omitted).

It is with this weighty responsibility that the Military Judge correctly ruled in this case.

B. Two-Stage Process for Reviewing Claims of Unlawful Command Influence.

In discharging his duty to address command influence issues, the Military Judge must engage in a two-stage process. Initially, the Military Judge requires the defense to carry the burden of raising an unlawful command influence issue by presenting "some evidence" of "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." *Biagase*, 50 M.J. at 150. Because of the congressional

prohibition against unlawful command influence and its invidious impact on the public perception of a fair trial, the defense's burden is low. *Id.*

Once the defense has successfully raised the issue of unlawful command influence, the Military Judge then shifts the burden to the Government to prove beyond a reasonable doubt "(1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings. . . ." *Id.* at 151; *see also Harvey*, 64 M.J. at 18.

Whether the conduct of the Government created an *appearance* of unlawful command influence is determined objectively. *Lewis*, 63 M.J. at 405. "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 proceeding." *Id.* "To find that the appearance of command influence has been ameliorated and made harmless beyond a reasonable doubt, the Government must convince [the Military Judge] that the disinterested public would . . . believe [that the accused] [will] receive[] a trial free from the effects of unlawful command influence." *Id.*

This analytical framework is precisely the framework the Military Judge applied in this case. (R. 17Jun08 at 20-24). Accordingly, by dismissing the case, the Military Judge discharged his duty and fulfilled his fundamental responsibility—one shared with military commanders, staff judge advocates, and others involved in the administration of military justice—to protect the military justice system and to foster "public confidence in the actual and apparent fairness of" it. *Harvey*, 64 M.J. at 17. In contrast, the actions of the military commanders and judge advocates in this case failed to discharge this duty, as the Military Judge found:

> 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 [legal meetings]. Although at least two legal advisors, 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.*

(R. 17Jun08 at 18-19) (emphasis added).

C. Application of the Framework in Light of the Government's Arguments.

In its brief, the Government concedes that it does not challenge the Military Judge's ruling of May 20, 2008, thereby acknowledging that the defense met its initial evidentiary burden of presenting "some evidence" of actual and apparent unlawful command influence. (Gov't Br. at 17). The Government further asserts that "[t]he narrow legal issue appealed (on the issue of actual UCI) is whether the Government has proven beyond a reasonable doubt that (i) the predicate facts do not establish unlawful command influence, and (ii) there will be no actual unfairness in the proceedings to follow." (Gov't Br. at 17). The Government notes that it is only challenging the "Military Judge's findings relating to the second and third *Biagase* prongs." (Gov't Br. at 17). Thus, despite its apparent quarrel with the Military Judge's findings of fact, the Government admits that the predicate facts exist as found by the Military Judge. This is no small matter in that the Government's admission, in light of the controlling case law, is essentially an admission that the Military Judge's ruling should be affirmed on this appeal.

Indeed, a careful reading of the Government's brief plainly shows that the Government failed to meet its heavy burden of presenting sufficient evidence to rebut the actual and apparent unlawful command influence present in this case. In fact, at times the Government tries to remedy its obvious failure by improperly seeking to shift the burden back to the defense. (*See, e.g.*, Gov't Br. at 20 ("But neither LtCol Riggs, nor any of his MARCENT deputies—the only

persons who could have testified that their legal advice was 'chilled'—actually provided testimony on the motion.")). As the Military Judge carefully noted in his ruling, "In order to meet their burden, the government called two witnesses *and two witnesses only*." (R. 17Jun08 at 10) (emphasis added).

D. The Government's Objections Are Not Well Founded.

As an initial matter, the thrust of the Government's argument appears to be that there was no unlawful command influence because Gen Mattis said so, approximately twenty-one times. (*See* Gov't Br. at 9, 18, 21, 29 (restating the point four times)). But Gen Mattis could say it twenty-one hundred times, that still does not make it true. Indeed, simply relying on a convening authority's bald assertions would entirely undermine unlawful command influence jurisprudence.

Remarkably, immediately following the Military Judge's ruling, Gen Mattis felt compelled to release a public statement that essentially criticized the ruling. The *North County Times* reported as follows: "Mattis rejected [the Military Judge's] conclusion, issuing a statement the day Folsom ruled that he stood by what he said during a court hearing on the issue in May—that he made his decisions independently and was not influenced by Ewers."[32] The *San Diego Union-Tribune* reported as follows: "Yesterday, Navy Capt. Denny Moynihan, a spokesman for the Joint Forces Command, said Mattis testified 'under oath that he did not speak to (Ewers) about the case and was not influenced by him. He stands by his statement under oath.'"[33] Gen Mattis' public statement is a modern day version of the "skin letters" that were commonly used to reprimand military judges for their decisions. Congress drafted Article 37, in part, to eliminate this sort of pernicious influence. (*See, e.g.,* Gov't Br. at 36-37). It is evident that even

[32] The article, which is attached as Appendix A to this answer brief, can be found at: http://www.nctimes.com/articles/2008/06/28/military/zcaed43dd200c477388257472005a24b4.txt.

[33] The article, which is attached as Appendix B to this answer brief, can be found at: http://www.signonsandiego.com/news/military/20080618-9999-1n18haditha.html.

following his testimony and the Military Judge's ruling, Gen Mattis cared little about "appearances," adding further support for the Military Judge's uncontroverted findings on this matter. (R. 17Jun08 at 18-19) ("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 its brief, the Government first seeks to find reversible error by modifying and then quibbling with the Military Judge's finding that "most of [LtCol Riggs'] participation was by video teleconference [VTC]." (Gov't Br. at 10). What the Military Judge correctly found was that "[t]he 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." (R. 17Jun08 at 17). The Military Judge further correctly found that "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." (R. 17Jun08 at 17) (emphasis added). As Gen Mattis confirmed, "Most of the time the VTC's in Tampa were his deputies who were listening in." (R. 2Jun08 at 62-63). Accordingly, *most of the time* either LtCol Riggs and/or his deputy were appearing via VTC.

Regardless of the accuracy of this minor point, which is not essential to the Military Judge's ultimate ruling, the uncontroverted facts demonstrate that LtCol Riggs' office was located in Tampa, Florida, while Col Ewers's office was located at Camp Pendleton, California, the site of the courts-martial. Camp Pendleton is where the vast majority of the "legal meetings" at issue occurred. Col Ewers' office is approximately "50 meters" from the CDA's office at

Camp Pendleton. Col Ewers was the senior legal advisor to both LtGen Mattis and LtGen Helland; he was senior to LtCol Riggs. LtCol Riggs did appear at these meetings via VTC.[34] And regardless of the number of times that LtCol Riggs actually appeared via VTC, it is equally likely that Col Ewers was able to influence the legal advice rendered to the CDA by being physically present with LtCol Riggs. Both verbal and nonverbal cues, affirming or disagreeing with the legal advice rendered, are more pronounced when the parties are physically present. And LtCol Riggs' physical presence provided more opportunities for him to talk "off-line" with Col Ewers about the cases. (*See, e.g.*, R. 7May08 at 26). Thus, the Government's argument does little to disturb the Military Judge's finding.

The Government next takes issue with [and again improperly modifies] the Military Judge's correct finding that "[v]irtually all of the cases discussed during these meetings were MARCENT cases." (Gov't Br. at 12; R. 17Jun08 at 17). The Government incorrectly refers to these meetings as I MEF/MARCENT meetings (Gov't Br. at 12), in the apparent hope of seeking to justify Col Ewers' presence as the I MEF SJA. But the record does not support the Government's version of the facts; it fully supports the Military Judge's finding. For example, Col Ewers testified as follows:

> Q: Okay. So all of the cases that you previously described were MARCENT cases, correct?

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[34] Col Ewers testified as follows:

> Q: And [LtCol Riggs] was based in Tampa, Florida?
> A: Yeah. I mean, he would participate by VTC.
> Q: Oh, I see. Okay. So it wasn't as if he was physically in the room or you were physically in the room. It sounds like a meeting was conducted at a common time, and you would hook in by VTC?
> A: No. No. No. No. The meeting was held at - - the meetings I attended we held at the I MEF CG's office. Sometimes Lieutenant Colonel Riggs would be in California. He would either be in California or he would come out specifically for the meeting because his Legal Team Charlie was there. And sometimes he would ring in, from Tampa, a VTC. I never came by VTC.

(R. 7May08 at 57).

> A: Were CDA cases - - well, again, I don't know that we ever discussed any MARCENT cases that weren't CDA cases. I do specifically remember that ***a couple of times*** the agenda included ***one or two MEF cases*** that were going on. So I don't know - - does that answer your question?
>
> Q: Yes and no. So it sounds like ***the majority of the meetings, if not all of them***, were initially scheduled to discuss CDA or MARCENT cases?
>
> A: Yes.
>
> Q: And you were invited to sit in with the Commander of MARCENT slash CDA when he discussed with his SJA, whether it was by VTC or in person, his CDA slash MARCENT cases; is that correct?
>
> A: Yes.

(R. 7May08 at 57-58) (emphasis added).

On June 2, 2008, Col Ewers confirmed this testimony. (R. 2Jun08 at 81) (confirming that there were legal meetings that he was directed to attend in which no I MEF case was discussed).

The Government also objects to the Military Judge's finding that Col Ewers' "presence at these meetings was as a legal adviser to the convening authority." (Gov't Br. at 13; R. 17Jun08 at 25). Contrary to the Government's claims, the Military Judge's finding is not "clearly erroneous," and it is amply supported by the record—not to mention commonsense. The meetings in question were "legal meetings"—their sole purpose was to discuss military justice matters and to seek and render legal advice regarding the pending cases, specifically including Appellee's case. These meetings were not general staff meetings. To that end, the Government's attempt to justify these meetings on the basis of efficiency, equating them with meetings about "logistics, operational matters, and intelligence" and thus claiming that "military judge's (sic) shouldn't be in the business of telling three-star generals how to run their staff meetings in a time of war" is offensive. (*See* Gov't Br. at 33-34). Efficiency does not necessarily equate with justice, nor does it excuse the violation of an accused's fundamental

rights. Moreover, perhaps contrary to the view of some, "three-star generals" are not above the law. Indeed, this case may very well be a catalyst for changing a method of doing business that has the potential for abuse, as the facts of this case demonstrate.

Nevertheless, it is without serious contradiction that Col Ewers was directed to attend these legal meetings by the CDA because he was a lawyer—in fact, Col Ewers was the CDA's senior legal advisor as the SJA for I MEF and the senior lawyer in attendance at these meetings. Aside from the CDA, the only persons attending these legal meetings were lawyers, whose role was to provide the CDA with legal advice on pending cases. These were not meetings in which "routine NCIS or CID investigor[s]" would attend. (*See* Gov't Br. at 32). As the CDA's senior and most trusted legal advisor, Col Ewers was directed to attend for no other reason than the fact that he was the CDA's legal advisor. Thus, it is without serious contradiction that Col Ewers' presence at these meetings was for the purpose of providing legal advice—and likely affirming legal advice that was provided—to the CDA. It is also without contradiction that Col Ewers' legal opinions on Appellee's case were well-known by all of those in attendance. As the Military Judge astutely and correctly found: "The fact that [Col Ewers] 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." (R. 17Jun08 at 25). Thus, this Court should not disturb the Military Judge's finding.

Finally, the Government takes issue with the Military Judge's findings that "Lieutenant General Mattis was unconcerned with how Colonel Ewers's presence in these meetings may appear to third parties," (R. 17Jun08 at 19), and that "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," (R. 17Jun08 at 26). (Gov't Br. at 14). In its brief, the Government improperly accuses the Military Judge of "twist[ing]" the General's testimony. (Gov't Br. at 15). However, as the Government's brief tacitly acknowledges, the Military Judge's findings are supported by the record. (*See* Gov't Br. at 14) (referring to "[t]he only evidence arguably supporting these findings"). Nonetheless, it is evident that Government appellate counsel was not present during the hearing. General Mattis' claim that he "was more concerned with the reality of what was going on than what other people would draw for conclusions" (R. 2Jun08 at 63) was received exactly the way the Military Judge received it. In fact, one can only fully understand the General's cavalier response when it is considered in light of the Military Judge's question, which was as follows: "Q: Did anyone, any SJA ever voice – or did anyone ever voice a concern to you, sir, that Colonel Ewers' presence at military justice meetings where Haditha cases – and for this case in particular were being discussed with you ***may not be proper or may create an appearance problem***? (R. 2Jun08 at 63) (emphasis added). In fact, Col Ewers expressed during his testimony concerns about being involved with the Haditha cases because of his involvement with the Bargewell investigation. (R. 7May08 at 26-27). When pressed further as to why he had such concerns, Col Ewers stated, "***Just because from the appearance, in a nutshell***." (R. 7May08 at 27) (emphasis added).

In addition to supporting the Military Judge's findings, the reasonable conclusion to draw from this evidence is that General Mattis disregarded what others thought about these cases, specifically including the effect the appearance of his actions would have on a disinterested member of the public. This is particularly troubling in this case because, as the Military Judge correctly found, "From March 2006 to the present, this and related Haditha cases have generated considerable international media interests," resulting in numerous press conferences, media

inquiries, and congressional briefings, not to mention numerous published news articles and television programs dedicated to the Haditha cases. (*See* R. 17Jun08 at 19-20). General Mattis was well aware of the significant public interest in this case. (R. 2Jun08 at 48-50).

In the final analysis, neither the Government nor this Court can substitute its own interpretation of the facts for those of the Military Judge. *See Gore*, 60 M.J. at 185. Accordingly, this Court should not disturb the Military Judge's determination of the facts because his findings are supported by the record and are not "clearly erroneous." *See id.*

E. Actual and Apparent Unlawful Command Influence Flowed from the Well-Supported Findings of Fact.

1. Actual Unlawful Command Influence.

Rather than relying solely on the perfunctory and self-serving (if not self-preserving) statements of Gen Mattis that he was not influenced by Col Ewers' presence at and participation in these legal meetings, which the CDA directed, the Military Judge properly relied on the extensive objective evidence that undermined, if not directly contradicted, the testimony of both Gen Mattis and Col Ewers.[35] *See, e.g., United States v. Wallace*, 39 M.J. 284, 287 (C.M.A. 1994) (advising the lower courts to be cautious in relying on "perfunctory statements" from witnesses claiming that they were not influenced and instead "to fully develop the objective facts on the record"); *see also United States v. Zagar*, 18 C.M.R. 34, 38 (C.M.A. 1955) (rejecting the

[35] The Government asserts that the facts giving rise to unlawful command influence in this case are not as "egregious" as those found in other cases. (Gov't Br. at 38-42 (citing cases)). Appellee respectfully disagrees. As an initial matter, all cases of unlawful command influence, whether actual or apparent, are "egregious" "[b]ecause command influence is pernicious and an anathema to the fairness of military justice." *Gore*, 60 M.J. at 186. Unlawful command influence erodes the public confidence in the fairness of the system. It erodes the accused's confidence in the fairness of his trial. And "even the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial." *Lewis*, 63 M.J. at 415 (quotations and citation omitted). Here, you have a convening authority and his senior SJA who, at a minimum, were well aware of the "appearance" problem with their actions, yet proceeded as if the UCMJ did not apply to them. This is an "egregious" case.

Government's argument that the court is bound by the insistence of court members that they were not improperly influenced by the statements of the SJA).

As this Court has made clear, in order to rebut beyond a reasonable doubt evidence of unlawful command influence "the Government must produce more than mere assertions of impartiality by the person alleged to have been influenced." *United States v. Allen*, 31 M.J. 572, 591 (N-M. Ct. Crim. App. 1990). This includes situations concerning the existence of unlawful command influence upon a convening authority. *Id.* The Government has failed to meet this heavy burden.

As this Court proceeds in its review of this case, and in particular its review of the Military Judge's evaluation of the testimony of the Government's only two witnesses, this Court should be "mindful that as to this sensitive issue, the judge's evaluation of the demeanor of the witnesses is most important." *Gore*, 60 M.J. at 187, 188 (noting that "[t]he military judge believed [the witness] to be testifying falsely when he attempted to minimize the impact of the CA's order for him not to testify on behalf of Appellant").

Accordingly, based on his in-court evaluation of the witnesses' testimony, the Military Judge made the following specific findings: "Col Ewers, whose demeanor as a witness revealed him to be a senior officer who while on the stand 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," (R. 17Jun08 at 26) and "that Lieutenant General Mattis was unconcerned with how Colonel Ewers's presence in these meetings may appear to third parties," (R. 17Jun08 at 19, 26). Without the benefit of observing these witnesses in court, this Court should not disturb these findings, which are plainly <u>not</u> "clearly erroneous."

Furthermore, it is without contradiction that Col Ewers was a disqualified legal advisor in Appellee's case. *See* R.C.M. 406. The Government witnesses admit as such. And despite the claim (and tacit admission of impropriety) that LtGen Mattis erected a "strict wall" of separation between his admittedly "tainted" legal advisor (R. 2Jun08 at 9, 37, 59, 60) and MARCENT cases, the facts demonstrate otherwise. The objective facts reveal that Col Ewers was directed by the CDAs (both LtGen Mattis and LtGen Helland) to attend closed-session legal meetings held at the I MEF headquarters in Camp Pendleton to discuss legal issues dealing with MARCENT cases, and more specifically, to address legal issues related to Appellee's case. The purpose of these meetings was for the CDA to seek and for his legal advisors to render legal advice regarding the cases. LtGen Mattis was admittedly not a legal expert so he had to rely on the advice of those with legal training, specifically including Col Ewers, his most trusted and senior legal advisor with whom he had developed a close, working relationship with over the years. Col Ewers was not just another lawyer in these meetings—he was the senior SJA for LtGen Mattis and LtGen Helland. Indeed, the law recognizes the unique role of an SJA, who carries with him the "mantle of command authority." *United States v. Kitts*, 23 M.J. 105 (C.M.A. 1986); *see also United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006) (finding that the actions of the SJA and trial counsel gave rise to the appearance of unlawful command influence). Additionally, Col Ewers was recognized as an expert on reporting and investigating possible, suspected, or alleged violations of the law of war, having been tasked by then-MajGen Mattis to develop the SOP on the very subject. Col Ewers was intimately involved with the investigation into the Haditha matter, particularly the investigation of Appellee. Col Ewers' legal opinions regarding the guilt of Appellee were well-known by those attending these meetings, particularly the CDAs, who thoroughly reviewed and considered the Bargewell Report where those opinions

were expressly stated. Col Ewers' legal opinions were also well-known by the junior MARCENT SJA and his deputy, who held Col Ewers in high regard due to his stellar reputation as a judge advocate. Consequently, Col Ewers' improper influence as a tainted and disqualified legal advisor on the legal advice rendered in Appellee's case and the decisions that followed cannot be—and was not by the Government—rebutted beyond a reasonable doubt, as the Military Judge found.

In the final analysis, the Government did not meet its heavy burden to rebut beyond a reasonable doubt (1) that the facts of this case constituted unlawful command influence or (2) that the unlawful command influence prejudiced these proceedings. *See Biagase*, 50 M.J. at 150.

2. Appearance of Unlawful Command Influence.

Irrespective of any "actual" unlawful command influence, the overwhelming evidence of the "appearance" of unlawful command influence is sufficient for this Court to affirm the Military Judge's ruling. As CAAF stated, "Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an intolerable strain on public perception of the military justice system." *Lewis*, 63 M.J. at 415 (quotations and citations omitted). "This call to maintain the public's confidence that military justice is free from unlawful command influence flows 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." *Id.* (quotations and citations omitted).

The question of whether the appearance of unlawful command influence exists in a given case is determined objectively. Accordingly, as the Military Judge did below, this Court must "focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. *Id.* "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 proceeding." *Id.*

Applying this test to the instant case, the Military Judge made the following finding:

> 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 . . . 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.

(R. 17Jun08 at 26-27).

At trial, the Government did not present evidence to prove beyond a reasonable doubt that this "appearance of command influence has been ameliorated and made harmless." *See Lewis*, 63 M.J. at 415. The record supports the conclusion that despite knowing of the appearance problem associated with their actions, the Government ignored it and proceeded with a reckless disregard for it. This is particularly problematic here because the Government witnesses were acutely aware of the immense public interest in this case. Accordingly, the Military Judge specifically found that "Lieutenant General Mattis was unconcerned with how Colonel Ewers's presence in these meetings may appear to third parties," (R. 17Jun08 at 19), and that "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," (R. 17Jun08 at 26). These findings are not "clearly erroneous" and they are amply supported by the record. Indeed, as Col Ewers candidly admitted, he should not have had <u>any</u> role with advising the CDA on legal matters related to the Haditha cases "[j]ust because from the appearance, in a nutshell." (R. 7May08 at 27).

In sum, the Military Judge's findings are not clearly erroneous; they are amply supported by the record. Additionally, the Military Judge correctly applied the relevant and controlling law to the facts and properly concluded that the Government failed to rebut beyond a reasonable doubt the presence of actual and apparent unlawful command influence in this case.

III. The Military Judge Did Not Abuse His Discretion by Dismissing the Charges Without Prejudice and Disqualifying Certain Commands from Taking Further Action on the Case.

Upon finding actual and apparent unlawful command influence, the Military Judge dismissed the charges without prejudice and disqualified any commander from MARCENT, I MEF, or U.S. Joint Forces Command from serving as a convening authority for re-preferral and re-referral of any charges against Appellee. As the Government acknowledges, this Court cannot set aside the Military Judge's discretionary action "unless it has a definite and firm conviction that [the Military Judge] committed a clear error of judgment in the conclusion reached upon a weighing of the relevant factors." (*See* Gov't Br. at 42 (citing *Gore*, 60 M.J. at 187)). Additionally, "the abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *Gore*, 60 M.J. at 187.

The choice the Military Judge made to remedy the actual and apparent unlawful command influence in this case was entirely within the range of permissible options. Indeed, the Military Judge could have dismissed with prejudice due to the pernicious effects of the unlawful influence, but chose not to do so.

In its brief, the Government asks this Court, in the alternative, to remedy the actual and apparent unlawful command influence by simply ordering a new Article 34 advice letter. (Gov't

Br. at 43). This specific request was made by Government trial counsel and appropriately rejected by the Military Judge:

> Well, frankly, I think [having a new Article 34 advice letter] 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 - - and remove any potential influence of Col 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.

(R. 17Jun07 at 27-28).

In sum, in light of the applicable standard of review and the Military Judge's well-supported reasoning, this Court should not disturb his discretionary ruling as to the appropriate remedy for curing the unlawful command influence. If anything, this Court should consider dismissing this case with prejudice due to the widespread and pernicious effects of the unlawful influence, which has metastasized like a cancer, affecting every aspect of this case from discovery to witnesses. *See Lewis*, 63 M.J. at 413 (dismissing charges with prejudice and noting, "Our review of the effect of this unlawful command influence must necessarily consider both whether actual command influence was *cleansed* from these proceedings as well as whether any perceived unlawful command influence has been *eradicated*") (emphasis added).

CONCLUSION

WHEREFORE, Appellee respectfully requests that this Court affirm the well-supported and well-reasoned June 17, 2008 ruling of the Military Judge dismissing all charges and specifications without prejudice and disqualifying any commander from MARCENT, I MEF, or U.S. Joint Forces Command from serving as a convening authority for re-preferral and re-

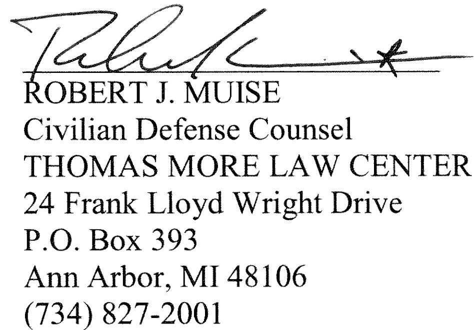
referral of any charges against him. Alternatively, in light of the evidence and arguments presented, Appellee respectfully requests that this Court modify the Military Judge's remedy and dismiss the charges and specifications with prejudice.

APPENDICES

Appendix A: Mark Walker, *Haditha Cases Continue to Unravel,* N. County Times, Jun. 28, 2008.

Appendix B: Rick Rogers, *Charges in Haditha Killings Thrown Out*, San Diego Union-Trib., Jun. 18, 2008.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to this Court and filed electronically in CMTIS pursuant to N-M. Ct. Crim. App. R. 4-1(b), with a copy served upon:

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