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September 5, 2014

Department of Defense, Office of Inspector General
Office of Communications and Congressional Liaison,
ATTN: FOIA Appellate Authority
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Via Certified Mail and Fax (571) 372-7498

RE: Freedom of Information Act (FOIA) Appeal for Case Number FOIA-2014-00672

To the FOIA Appellate Authority:

I request administrative appeal of the determination by Jeanne Miller, Chief, Freedom of Information and Privacy Office, in case number FOIA-2014-00672. Ms. Miller issued her decision on August 26, 2014.

Ms. Miller identified two documents, totaling 46 pages, responsive to the FOIA request at issue. However, Ms. Miller determined that the documents are exempt from release in their entirety pursuant to 5 U.S.C. § 552(b)(6) and 5 U.S.C. § 552(b)(7)(C). This appeal seeks to challenge Ms. Miller's determination and to require full disclosure of the requested documents.

The Public Interest At Stake In This Case is Compelling

As a starting point for why the administrative appellate relief sought should be granted, and why the Inspector General's reports here should be released in their entirety, it must be remembered that the seminal issue in the

multi-faceted investigation by the Inspector General is General Amos' unlawful command influence. Unlawful command influence is prohibited by Rule 104 of the RULES FOR COURTS-MARTIAL and Article 37 of the UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 837. Unlawful command influence has been described as "the mortal enemy of military justice." *See United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986); *see also United States v. Gore*, 60 M.J. 178, 184 (C.A.A.F. 2004) ("Undue and unlawful command influence is the carcinoma of the military justice system, and when found, must be surgically eradicated.").

Indeed, the presence of unlawful command influence in military justice is so harmful that "Congress and (the Court of Appeals for the Armed Forces) are concerned not only with eliminating actual unlawful command influence, but also with 'eliminating even the appearance of unlawful command influence at courts-martial.'" *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (citing *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)). The mere appearance of unlawful command influence may be "'as devastating to the military justice system as the actual manipulation of any given trial.'" *United States v. Ayers*, 54 M.J. 85, 94-95 (C.A.A.F. 2000) (quoting *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991).

These pronouncements from our nation's highest military appeals court underscore the compelling nature of the public interest in this case. Indeed, they are part of the reasons why Rep. Tom Rooney (R-FL) described the allegations brought against the General Amos as "extremely troubling" and stated that they merited continued investigation by the Inspector General.[1] With respect to this case, Rep. Duncan Hunter (R-CA) also believed that any allegations of unlawful command influence must be thoroughly investigated. *Id.* Most notably, Rep. Walter Jones (R-NC), one of the most senior members of the House Armed Services Committee, has repeatedly communicated both in writing and in person with the Department of Defense, Inspector General about the importance of the numerous issues in this case. The fundamental

[1] *See* generally:
http://www.foreignpolicy.com/articles/2014/02/27/tarnished_brass_marine_corps_james_amos.
Rep. Rooney also commented on the whistleblower implications which loom large in this case, stating: "I am concerned that the treatment of Maj. Weirick following his IG complaint has resulted in unfair attacks on his character and work ethic and has been damaging to his career," Rooney, a member of the House Military Construction and Veterans Affairs Subcommittee, told FOREIGN POLICY. "DOD whistle-blower protections exist, and were recently strengthened, to ensure than an independent outlet existed for members of the military to report unlawful practices without fear of reprisal. Undermining the criminal justice system in any way without consequence is not something anyone in uniform should tolerate."

concern is whether the Marines at issue received a fair shake at the hands of General Amos or not.

The pinnacle position that General Amos holds should also remain at the forefront of the FOIA analysis here. General Amos is a public official nominated by the President of the United States and confirmed by the Senate. He has statutory responsibilities under Title Ten of the United States Code. An officer such as General Amos is *exactly* the sort of unelected public servant whose official actions FOIA was intended to expose to sunlight.

Because the United States Has Judicially Admitted General Amos Committed Unlawful Influence, the Inspector General's Apparent Findings and Rationale To The Contrary Should Be Publicly Available

There can be no debate whatsoever that General Amos unlawfully influenced numerous military justice proceedings here. Indeed, the United States government has confirmed General Amos' unlawful command influence in a military court of law. During the Marine Corps' prosecution of Captain James Clement, USMC, Captain Clement's defense counsel raised the issue of unlawful command influence by General Amos, and sought a dismissal of all charges against Captain Clement as a remedy for the same. Remarkably, in a written response filed before the presiding military judge, the United States government counsel **confirmed and judicially admitted** that General Amos committed unlawful command influence in at least some of the cases which spawned the complaints submitted to the Inspector General:

> "Accordingly, ***although evidence of unlawful command influence exists*** (although not directly to this case), it occurred in a Middle Eastern Country between the CMC [General Amos] and LtGen Waldhauser before Captain Clement was identified as being suspected of misconduct. Due to the immediate awareness and regret of his statements, the CMC identified the problem and his mistake and he solved it. He removed the CDA [LtGen Waldhauser] he had unfortunately compromised and replaced him with one he had not." (emphasis added).[2]

The notion that the unlawful command influence at issue is somehow less troubling due to the geographic location of its occurrence in a "Middle Eastern Country" or ameliorated by replacing a commander with someone

[2] *See* Enclosure 1, page 20; *see also* Enclosure 1, Footnote 4 of the Government's motion, stating "While the Government concedes that there was at least the appearance of UCI in cases arising from the urination video, this concession pertains to the cases of the four Marines depicted urinating on the enemy casualties…"

else—someone who then fulfilled General Amos' desires to "crush" Marines—is unsupported by either common law or common sense. In any case, the United States government confirmed before a court of law that there was unlawful command influence—by General Amos—in at least some of these cases investigated by the Inspector General. Yet, the Inspector General has apparently ignored that striking admission.

Because the Inspector General's findings have not been publicly released, the public has thus far been deprived of any opportunity to see and weigh the Inspector General's rationale for ignoring a judicial admission that unlawful command influence—in other words, an illegal act and a violation of federal law—was committed by the nation's top Marine Corps officer. And, if it is indeed the conclusion of the Inspector General in this instance that General Amos did not commit unlawful command influence when the United States government admits it did occur, the absurdity of such a conclusion by the Inspector General would do great violence to the importance that both Congress and our nation's military courts place in avoiding and eradicating unlawful command influence altogether. The public should be permitted to read the Inspector General's findings to consider how such a profound departure from Congressional and judicial intent was effectively blessed by the Inspector General.

General Amos Has No Privacy Interest At Stake In This Case

Ms. Miller's decision to exempt the entirety of the requested documents from release and public review hinges upon the flawed premise that General Amos, the subject of the Inspector General's investigation, has a privacy interest, much less a substantial privacy interest, lurking somewhere within the requested documents. Importantly, under the parameters of 5 U.S.C. § 556(b)(6) relied upon by Ms. Miller, the balancing of the public's right to disclosure against the individual's right to privacy requires an initial determination whether a protectable—and substantial—privacy interest exists at all. *Multi Ag Media LLC v. USDA,* 515 F.3d 1224, 1229 (D.C. Cir. 2008) ("The balancing analysis for FOIA Exemption 6 requires that we first determine whether disclosure of the files 'would compromise a substantial, as opposed to de minimis, privacy interest[.]'" (quoting *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989))). If no privacy interest is found, further analysis is unnecessary and the information at issue must be disclosed. *See Multi Ag*, 515 F.3d at 1229 (stating that "'[i]f no significant privacy interest is implicated . . . FOIA demands disclosure'"

(quoting *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989))); *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984); *Finkel v. Dep't of Labor*, No. 05-5525, 2007 WL 1963163, at *9 (D.N.J. June 29, 2007) (concluding that no balancing analysis was required "due to the Court's determination that the [defendant] has failed to meet its heavy burden on the issue of whether disclosure will invade the inspectors' privacy"); *Trentadue v. President's Council on Integrity & Efficiency*, No. 03-CV-339, slip op. at 4 (D. Utah Apr. 26, 2004) (stating that agency made no showing of privacy interest, so names of government employees should be released) (Exemptions 6 and 7(C)); *Holland v. CIA*, No. 91-1233, 1992 WL 233820, at *16 (D.D.C. Aug. 31, 1992) (stating that information must be disclosed when there is no significant privacy interest, even if public interest is also de minimis). In this case, the public interest is obviously compelling, but in any case, because General Amos does not and cannot have a privacy interest at stake here, the requested information should be released in full.

The Information Sought Is Not Personal in Nature

It also strains credulity to suggest that a Department of Defense, Inspector General's report about the actions of a public official—in this case, the Commandant of the Marine Corps—even meets the threshold requirement of "personnel and medical files and similar files" within the meaning of the statute. *See* 5 U.S.C. § 552(b)(6). Obviously, the Inspector General's reports constitute neither a personnel file nor a medical file. Nor can they be reasonably considered a "similar file" under the statute. The reason is simple: the reports of the Inspector General concerning the public acts of a military service chief are not personal in nature.

Even General Amos himself did not describe these events as personal in nature when he discussed them during an interview he gave to National Public Radio.[3] General Amos also did not describe them as personal in nature

[3] In relevant part, Amos told NPR that ""I have never, ever said that I wanted them crushed and kicked out. ***I don't recall at all saying that.*** What I do recall is there was some motivation on my part -- without getting into the exact matters of the meeting -- there was some motivation on my part that I questioned some early decisions by the commander [LtGen Thomas Waldhauser, USMC]. And once I left that meeting, I went, OK. That probably wasn't the right thing to do is at relates to undue -- what we call undue command influence, the influence that a commander, a senior commander can have on the junior commander. And so immediately, to correct that, I moved that case to another three-star general, and then I stayed completely out of it. And the cases have been processed through that other three-star general, and ***I would argue they've been handled justly***. So, the matter of influence from my office was my concern with regards to my attitude as I was talking to my younger commander. And I didn't - as I got back, and I thought this is probably something that I shouldn't have done. I mean, he got the impression quickly that I was not pleased with how

when he submitted his written responses to questions from Rep. Walter Jones (R-NC) about the events made the basis of the complaints submitted to the Inspector General in the first place.[4] If the Commandant himself has not asserted a personal privacy interest in his public comments, either to the press or to the Congress on these matters, it is impossible and illogical to see how the Inspector General could do so now on the Commandant's behalf. Moreover, in a recent case examining unlawful command influence by General Amos, *United States v. Howell*, Navy-Marine Corps Court of Criminal Appeals, 201200264, wherein General Amos was found to have illegally interfered with a court-martial, the Court included all of the facts related to General Amos's conduct. In the *Howell* case there were no redactions by the Court pursuant to the Privacy Act, as General Amos was acting in his official, not private, capacity. The same result should hold in the release of the subject investigation here.

It is fundamental and obvious that an individual generally does not have any expectation of privacy with respect to information that he or she has made public. *See Nation Magazine v. U.S. Customs Serv*., 71 F.3d 885, 896 (D.C. Cir. 1995) (finding no privacy interest in documents concerning presidential candidate's offer to aid federal government in drug interdiction, a subject about which the candidate had made several public statements); *see also Billington v. DOJ*, 245 F. Supp. 2d 79, 85-86 (D.D.C. 2003) (finding that information about two persons contained in a reporter's notes given to the State Department was not protected by Exemption 6, because these persons "knew that they were speaking to a reporter on the record and therefore could not expect to keep private the substance of the interview"). The Commandant should not be permitted to discuss these matters in the media and submit answers to Congress regarding the same, and then be shielded later by a privacy interest which does not exist and which he has never before asserted.

Federal common law is replete with examples of how the threshold of Exemption 6 is not met when the information pertains to federal government

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this conversation was going." Regarding the subsequent punishments issued to these Marines, Amos stated in the NPR interview that: "Each one of them have been dealt with what we call non-judicial punishment, in some cases, which is dealt with at a lower level, kind of punitive level. Some Marines were reduced in grade from their previous ranks. ***I don't know that any of them have been discharged from the Marine Corps. I'm not sure. I can't remember. Certainly, none of them have been crushed or thrown out of the Marine Corps, and that's an important point.***" (emphasis added). The February 17, 2014 interview that General Amos gave to NPR is available in its entirety here: http://www.npr.org/2014/02/17/278389201/gen-amos-i-see-nasty-places-where-marines-will-be-deployed.

[4] *See* Enclosure 2.

employees but is not personal in nature. *Aguirre v. SEC*, 551 F. Supp. 2d 33, 54 (D.D.C. 2008) ("Correspondence does not become personal solely because it identifies government employees."); *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (finding that the names and work telephone numbers of Justice Department paralegals do not meet the threshold for Exemption 6 on the basis that information is not "similar to a 'personnel' or 'medical' file"), motion to amend denied, 421 F. Supp. 2d 104, 107-10 (D.D.C. 2006), appeal dismissed voluntarily, No. 06-5055, 2006 WL 1214937 (D.C. Cir. Apr. 28, 2006); *Gordon v. FBI*, 390 F. Supp. 2d 897, 902 (N.D. Cal. 2004) (deciding that names of agency employees are not personal information about those employees that meets Exemption 6 threshold), summary judgment granted, 388 F. Supp. 2d 1028, 1040-42 (N.D. Cal. 2005) (concluding that Exemption 6 does not apply to the names of agency's "lower-level" employees, and likewise opining that "[t]he [agency] still has not demonstrated that an employee's name alone makes a document a personnel, medical or 'similar file'"); *Darby v. U.S. Dep't of the Air Force*, No. 00-0661, slip op. at 10-11 (D. Nev. Mar. 1, 2002) (rejecting redaction of names in IG report on basis that such documents "are not 'personnel or medical files[,]' nor are they 'similar' to such files"), aff'd on other grounds sub nom. *Darby v. DOD*, 74 F. App'x 813 (9th Cir. 2003); *Providence Journal Co. v. U.S. Dep't of the Army*, 781 F. Supp. 878, 883 (D.R.I. 1991) (finding investigative report of criminal charges not to be "similar file," on basis that it was "created in response to specific criminal allegations" rather than as "regularly compiled administrative record"), modified & aff'd on other grounds, 981 F.2d 552 (1st Cir. 1992); *Greenpeace USA, Inc. v. EPA*, 735 F. Supp. 13, 14 (D.D.C. 1990) (opining that information pertaining to an employee's compliance with agency regulations regarding outside employment "does not go to personal information . . . [e]ven in view of the broad interpretation [of Exemption 6] enunciated by the Supreme Court").

Exemption 6 Carries a Strong Presumption in Favor of Disclosure

The exemption outlined within 5 U.S.C. § 552(b)(6) requires agencies to strike a balance between an individual's privacy interest and the public's right to know. However, since only a clearly unwarranted invasion of privacy is a basis for withholding, there is a perceptible tilt in favor of disclosure in the exemption. "In the Act generally, and *particularly under Exemption (6)*, there is a strong presumption in favor of disclosure." *Local 598 v. Department of Army Corps of Engineers*, 841 F.2d 1459, 1463 (9th. Cir. 1988) (emphasis

added). In the *Local 598* case, the Ninth Circuit reviewed the context of applicable Exemption 6 case law:

> "The Freedom of Information Act embodies a strong policy of disclosure and places a duty to disclose on federal agencies. As the district court recognized, 'disclosure, not secrecy, is the dominant objective of the Act.' *Department of the Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976). 'As a final and overriding guideline courts should always keep in mind the basic policy of the FOIA to encourage the maximum feasible public access to government information....' *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 715 (D.C.Cir.1977). As a consequence, the listed exemptions to the normal disclosure rule are to be construed narrowly. *See Rose*, 425 U.S. at 361, 96 S.Ct. at 1599. *This is particularly true of Exemption (6). Exemption (6) protects only against disclosure which amounts to a 'clearly unwarranted invasion of personal privacy.' That strong language 'instructs us to 'tilt the balance [of disclosure interests against privacy interests] in favor of disclosure.'"*

Id. (emphasis added), citing *Washington Post Co. v. Department of Health and Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982) (quoting *Ditlow v. Shultz*, 517 F.2d 166, 169 (D.C. Cir. 1975)).

In order to determine whether Exemption 6 protects against disclosure, an agency should engage in the following two lines of inquiry: first, determine whether the information at issue is contained in a personnel, medical, or "similar" file covered by Exemption 6; and, if so, determine whether disclosure "would constitute a clearly unwarranted invasion of personal privacy" by balancing the privacy interest that would be compromised by disclosure against any public interest in the requested information. *See Multi Ag Media LLC v. USDA,* 515 F.3d 1224, 1228 (D.C. Cir. 2008); *News-Press v. DHS*, 489 F.3d 1173, 1196-97 (11th Cir. 2007). When engaging in this analysis, it is important to remember that the Court of Appeals for the District of Columbia Circuit has declared that "'under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act.'" *Multi Ag*, 515 F.3d at 1227 (quoting *Nat'l Ass'n of Home Builders v. Norton,* 309 F.3d 26, 32 (D.C. Cir. 2002)); *see also Consumers' Checkbook Ctr. for the Study of Servs. v. HHS*, 554 F.3d 1046, 1057 (D.C. Cir. 2009) (stating that

FOIA's "presumption favoring disclosure . . . is at its zenith under Exemption 6").

Fundamentally, the FOIA request at issue here seeks inquiry into the public acts of a public official; specifically, the actions undertaken by General James F. Amos, Commandant of the Marine Corps, and his top advisors in the wake of a YouTube video depicting Marines in Afghanistan urinating on dead Taliban fighters. Moreover, the request seeks to understand how the Inspector General for the Department of Defense could ignore General Amos' actions and subsequently issue determinations that various allegations[5] made against General Amos were apparently unsubstantiated in the face of abundant and overwhelming evidence[6] to the contrary. The justification for denying the FOIA request appears to be premised upon the illogic that a high ranking public official has a privacy interest in public actions. As mentioned previously, to date this justification has never been invoked by the Commandant in his comments to the press or the Congress, and on his behalf, it was never invoked by the Government in the *Howell* case. It should not be invoked now by the Inspector General.

These allegations concern whether a member of the Joint Chiefs of Staff intentionally and unlawfully interfered with numerous military justice proceedings. They also raise deep issues of fundamental integrity and ethical conduct by the officer who is supposed to set the leadership example for hundreds of thousands of active duty, reserve and retired United States Marines. As such, profound questions involving the public trust are presented. Importantly, disclosure of information that would inform the public of violations of the public trust serves a strong public interest and is accorded great weight in the balancing process. Moreover, given the Commandant's position atop the Marine Corps, it is literally impossible to have a greater public interest insofar as the Marine Corps is concerned.

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[5] Generally, the allegations are that General Amos and his top advisors (1) deprived Marines of due process in military justice proceedings; (2) made misleading statements both under oath and in the press about these activities; (3) engaged in abuse of the legal discovery process investigating this misconduct; and (4) endeavored to besmirch and disparage the reputation and career of a Marine lawyer who, at great risk to his military career, did the right thing and reported all of this to the Inspector General of the Department of Defense.

[6] In addition to the Government's judicial admissions in the case of *United States v. Clement*, at minimum, this evidence would also include: 1) General Amos' own memorandum dated February 10, 2012 and issued to Lieutenant General Thomas Waldhauser, USMC, (*see* Enclosure 3); and 2) Lieutenant General Waldhauser's sworn declaration dated July 23, 2013 (*see* Enclosure 4, ¶10) (wherein he described that General Amos stated that the Marines involved needed to be "crushed" and that General Amos wanted those Marines "discharged from the Marine Corps when this was all over").

As the Tenth Circuit has held, "[t]he public interest in learning of a government employee's misconduct increases as one moves up an agency's hierarchical ladder." *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1234 (10th Cir. 2007); *see, e.g., Cowdery, Ecker & Murphy, LLC v. Dep't of Interior*, 511 F. Supp. 2d 215, 218 (D. Conn. 2007) ("[T]he Second Circuit found that the official in question's 'high rank, combined with his direct responsibility for the serious allegations examined . . . tilts strongly in favor of disclosure.'" (quoting *Perlman v. DOJ*, 312 F.3d 100, 107 (2d Cir. 2002))). As a general rule, demonstrated wrongdoing of a serious and intentional nature by a high-level government official is of sufficient public interest to outweigh almost any privacy interest of that official. *See, e.g., Perlman v. DOJ*, 312 F.3d 100, 107 (2d Cir. 2002) (noting subject of request involved INS general counsel investigated for allegedly granting improper access and preferential treatment to former INS officials with financial interests in various visa investment firms, and finding that government employee's high rank and responsibility for serious allegations tilted the balance strongly in favor of disclosure), cert. granted, vacated & remanded, 541 U.S. 970 (2004), reinstated after remand, 380 F.3d 110 (2d Cir. 2004); *Stern v. FBI*, 737 F.2d 84, 93-94 (D.C. Cir. 1984) (name of high-level FBI official censured for deliberate and knowing misrepresentation) (Exemption 7(C)); *Ferri v. Bell*, 645 F.2d 1213, 1218 (3d Cir. 1981) (finding attempt to expose alleged deal between prosecutor and witness to be in public interest) (Exemption 7(C)), vacated & reinstated in part on reh'g, 671 F.2d 769 (3d Cir. 1982); *Columbia Packing Co. v. USDA*, 563 F.2d 495, 499 (1st Cir. 1977) (information about federal employees found guilty of accepting bribes); *Cowdery*, 511 F. Supp. 2d at 221 (D. Conn. 2007) (performance evaluation information pertaining to high ranking federal employee charged with wrongdoing); *Chang v. Dep't of the Navy*, 314 F. Supp. 2d 35, 42-45 (D.D.C. 2004) (information about Naval Commander's nonjudicial punishment for involvement in accident at sea) (Privacy Act "wrongful disclosure" suit); *Wood v. FBI*, 312 F. Supp. 2d 328, 345-51 (D. Conn. 2004) (identifying information linking FBI Supervisory Special Agent's name with specific findings and disciplinary action taken against him), aff'd in part & rev'd in part, 432 F.3d 78 (2d Cir. 2005); *Lurie v. Dep't of the Army*, 970 F. Supp. 19, 39-40 (D.D.C. 1997) (information concerning "mid- to high-level" Army medical researcher whose apparent misrepresentation and misconduct contributed to appropriation of $20,000,000 for particular form of AIDS research); *Sullivan v. VA*, 617 F. Supp. 258, 260-61 (D.D.C. 1985) (reprimand of senior official for misuse of government vehicle and failure to report accident) (Privacy Act "wrongful

disclosure" suit/Exemption 7(C)); *Cong. News Syndicate v. DOJ*, 438 F. Supp. 538, 544 (D.D.C. 1977) (misconduct by White House staffers). The requested investigation reports stem from complaints about whether the top officer in the United States Marine Corps, and a member of the Joint Chiefs of Staff, broke the law and conducted himself without the highest integrity. His position at the pinnacle of one of our nation's military branches carries with it an inherent and compelling public interest as relates to his public actions—particularly when the fundamental due process rights of the Marines he leads were not preserved because of his intentional acts.

Exemption 7(C) is Not Applicable

Ms. Miller also cites to 5 U.S.C. § 552(b)(7)(C) as justification for not releasing the requested documents. Exemption 7(C) provides protection for law enforcement information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Exemption 7(C) is the law enforcement counterpart to Exemption 6. Congress intended for Exemption 7 to allow agencies to withhold law enforcement records in order to protect the law enforcement process from interference. However, under Exemption 7, Congress clearly did not intend to protect unlawful and unethical actions taken by a military commander in order to hide them from public scrutiny. Nor could it have possibly intended for Exemption 7 to permit an Inspector General to deny issuance of the investigative report determining that no misconduct by that military commander occurred after the United States government previously confirmed at least some of the misconduct at issue. If there was indeed a finding of no misconduct by the Inspector General, there is, obviously, no ongoing law-enforcement investigation, thus negating the underlying rationale for withholding the investigation report from disclosure.

It is true the D.C. Court of Appeals held in *SafeCard Services v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991), that, based upon the traditional recognition of the strong privacy interests inherent in law enforcement records and the logical ramifications of *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) the "categorical withholding" of information that identifies third parties in law enforcement records will ordinarily be appropriate under Exemption 7(C). 926 F.2d at 1206, *see, e.g., Fiduccia v. United States Dep't of Justice*, 185 F.3d 1035, 1047-48 (9th Cir. 1999) (categorically protecting records concerning FBI searches of house of two named individuals); *Nation Magazine v. United*

States Customs Serv., 71 F.3d 885, 896 (D.C. Cir. 1995) (restating that those portions of records in investigatory files which would reveal subjects, witnesses, and informants in law enforcement investigations are categorically exempt (citing *SafeCard*)). However, the FOIA request at issue in this case has nothing to do with government informants or any past or presently ongoing undercover law enforcement operation. Moreover, the United States Marine Corps, while it certainly maintains a military justice system as part of its overall mission, is not, in and of itself, purely a law enforcement or investigative agency. Within the Marine Corps, that function rests chiefly with the Naval Criminal Investigative Service (NCIS). No person's life or liberty will now be endangered by the public disclosure here of past actions undertaken by the Commandant of the Marine Corps, particularly when those actions related to the Commandant's unlawful interference with the due process rights of Marines.

As noted in my FOIA request, the intent of the Inspector General's investigation was not to explore criminal prosecution against the Commandant of the Marine Corps. Second, even if the requested investigation reports are loosely interpreted as a record compiled for law enforcement purposes, the Commandant of the Marine Corps, quite clearly a public figure and one who has spoken publicly about these events to both the press and the Congress, cannot reasonably be held to have privacy interests in an examination of the ultra vires method in which he conducted his duties. Additionally, the FOIA request does not, at its core, seek any of the information that is routinely considered exempt under law enforcement privacy concerns, such as: birth dates; religious affiliations; citizenship data; genealogical history establishing membership in a Native American Tribe; social security numbers; criminal history records; incarceration of United States citizens in foreign prisons; identities of crime victims; or financial information. What it seeks instead are the reports by the Inspector General so that the public may determine for themselves what factors and evidence the Inspector General considered in arriving at its conclusions.

The Secretary of the Navy and General Amos Should Not Be Permitted to Trumpet the Inspector General's Findings When the Public Cannot Review Those Findings

In the wake of Inspector General's unpublished findings related to these events, no less than the Secretary of the Navy himself, the Hon. Ray Mabus, has made much in the media of the fact that the Commandant has apparently

been cleared of any wrongdoing.[7] Secretary Mabus made his comments to the press while conveniently omitting the fact that the United States government previously admitted General Amos' unlawful command influence in its filings in the *Clement* case. Yet, the Inspector General's findings have never been made public and although either the Secretary of the Navy or General Amos could obviously do so voluntarily, neither of them have released those findings. Indeed, the Marine Corps' official position on releasing the Inspector General's report, quite disingenuously, is the Marine Corps it is not the proper releasing authority at all[8]--a position which requires one to believe that General Amos could not, as *Commandant of the Marine Corps*, simply order the release of a report which both concerns and apparently exonerates him. General Amos' refusal to do so begs the question: if he truly did nothing wrong, why won't General Amos simply release the Inspector General's findings?

And the exoneration, or even, the lack of any findings substantiated by Inspector General, is surely curious to any reasonable observer who has followed these disturbing events. After all, it means that according to the Inspector General and the subsequent media messaging from Secretary Mabus, no Marines were unfairly "crushed" by General Amos. It means that General Amos did not lie to National Public Radio when he dissembled and stammered about that "I'm not sure. I can't remember" before finally and disingenuously assuring the national audience that "Certainly, none of them have been crushed or thrown out of the Marine Corps, and that's an important point." Indeed, it means that it was perfectly acceptable for General Amos to relieve Lieutenant General Thomas Waldhauser, USMC, and replace him with someone who in fact started court-martial proceedings against these Marines just as General Amos desired.

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[7] "General Amos has my complete trust in his ability to lead our Marine Corps," Navy Secretary Ray Mabus said in an Aug. 8 statement provided to MARINE CORPS TIMES, "and I am confident in the findings of the inspector general." *See*: http://www.marinecorpstimes.com/article/20140809/NEWS/308090040/With-IG-ruling-clearing-Marine-commandant-observers-say-openness-will-bring-closure

[8] When THE WASHINGTON POST made inquiry to the Marine Corps about the Inspector General's findings, Marine Corps officials declined to confirm the conclusion of the investigation, releasing only a one-sentence statement when asked if Amos' office would release the results of the investigation. "We do not have the necessary release authority to provide details, or confirmation of status, associated with the subject of your query on behalf of the Marine Corps or our Commandant," said the statement, released by Maj. John Caldwell, a Marine Corps spokesman. *See*: http://www.washingtonpost.com/news/checkpoint/wp/2014/08/04/marine-corps-commandant-cleared-by-inspector-general-but-report-has-not-been-released/

It was also, under the presently hidden logic of the Inspector General, fair game to designate the memorandum signed by General Amos—the one which confirmed the per se unlawful command influence at issue here—as "classified" national security material, and acceptable for the Commandant's legal advisors to then withhold that memorandum from the scrutiny of defense attorneys for the Marines being subjected to courts-martial. When, at the eleventh hour before a hearing which would have surely invoked the harshest imaginable judicial review of the actions by the Commandant, all criminal charges were dismissed against Captain James Clement, USMC, that nefarious tactical maneuver ordered by senior Marine Corps leadership—undertaken not to promote justice, but to protect General Amos and a host of other high ranking advisors from the judicial embarrassment which awaited them had the case proceeded—was acceptable, too.

After all criminal charges against him were dismissed, the immediate commencement of a Board of Inquiry against Captain Clement, where the legal advisor to the Board was specifically identified by a military appeals court as someone who had previously committed unlawful command influence, was apparently perfectly acceptable in the eyes of the Inspector General. When the Commanding General of the United States Southern Command, General John F. Kelly, took the time to travel from Miami to Quantico, Virginia to testify *in person* at the Board of Inquiry that Captain Clement had done nothing wrong, and that the Marine Corps in fact owed Captain Clement an apology for what many seasoned observers agree, as noted attorney John Dowd described it, is indeed "the worst case of unlawful command influence in the history of the Marine Corps", and the Board nonetheless ran Captain Clement out of the Marine Corps against his will, that too was not the result of unlawful command influence or any untoward scheme flowing down from General Amos.

When other Marines, under immense prosecutorial pressure, admitted to misconduct arising out of the incident in Afghanistan without their lawyers first having the benefit of having a memo from their own Commandant which might have resulted in the eventual dismissal of all charges against them, that, according to the Inspector General was completely appropriate and in keeping with fundamental fairness.[9] And let us not overlook the extraordinary

[9] Once these Marines entered guilty pleas without first having the benefit of the memorandum establishing illegal conduct by General Amos, and in the case of Captain Clement, once the government dismissed all criminal charges him, and instead acted to forcibly remove Captain Clement from active duty via an

implication that LtGen Waldhauser, who was at the time serving as the Senior Military Assistant to the Secretary of Defense, apparently committed perjury when he signed an affidavit stating that Amos wanted these Marines "crushed"—precisely the opposite of what Amos told the nation during his interview with NPR.[10] If we are to believe Secretary Mabus, the Inspector General apparently had no issues with those astoundingly inconsistent and incompatible statements by two of the highest ranking officers in the Marine Corps, either.

The Inspector General's report(s) which makes all of these things—these impossible things—possible, and which both the Secretary of the Navy and the Commandant are apparently using as a free pass even though the United States government previously admitted in court that General Amos violated the law, ought to be weighed and considered by the American public. The Commandant has no privacy interest in those reports at stake here, and even if he does so, it is vastly outweighed by the compelling public interest at issue.

The Marines who salute the Commandant and who are sworn to follow his orders even at the expense of their own lives ought to know, along with the public at large, whether the military justice system General Amos administers is being run in accordance with federal law, due process, and fundamental fairness. And they surely deserve to know, with a careful reading of the Inspector General's reports here, how the institutional check on his extraordinary power that the Inspector General is supposed to provide could have possibly failed to hold General Amos accountable for his clear abuse of that power—an abuse of power which is plainly illegal and which the United States government admits took place. General Amos and his advisors have successfully maneuvered thus far to ensure that our military courts now lack jurisdiction to review these disturbing events.[11] With the notable and

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administrative, vice judicial process, the Marine Corps could—and did—avoid judicial review of whether General Amos' conduct amounted to unlawful command influence in violation of Rule 104 of the RULES FOR COURTS-MARTIAL and Article 37 of the UNIFORM CODE OF MILITARY JUSTICE.

[10] As noted previously, General Amos concluded his comments to NPR in this regard with the qualifying statement of "I don't recall at all saying that." Additionally, LtGen Waldhauser's statement was provided under oath while General Amos' statement was not. It is a distinction with considerable difference. General Amos has yet to testify under oath concerning what he said to LtGen Waldhauser.

[11] These enlisted Marines never received the memorandum from Gen Amos to LtGen Waldhauser – constitutionally required *Brady* material – before pleading guilty at special and summary courts-martial or accepting nonjudicial punishment (NJP). Because none of these Marines received over a year of confinement

admirable exception of Rep. Walter Jones (R-NC),[12] the Congress has not yet invoked the full range of its investigatory powers into these events, almost certainly in deference to the Inspector General's ongoing investigation.

However, where the watchdog functions of the courts have been intentionally dodged by General Amos and his advisors to avoid embarrassment to their reputations and careers, the Congress, the American public, and most of all the Marines whose careers and brave military service the Commandant endeavored to "crush" are left then to rely upon the Inspector General to conduct a robust and intellectually honest investigation. Hopefully, that is precisely what happened in the fulfillment of the Department of Defense Inspector General's stated mission. That mission is important and holds broad reach, requiring the Inspector General to "provide independent, relevant, and timely oversight of the Department of Defense that:

- supports the warfighter;
- promotes accountability, integrity and efficiency;
- advises the Secretary of Defense and Congress; and
- informs the public."[13]

At this writing, the requested documents have not been released. The Congress has not been advised. The public is not informed. General Amos, having repeatedly and intentionally violated Rule 104 of the RULES FOR COURTS-MARTIAL and Article 37 of the UNIFORM CODE OF MILITARY JUSTICE,

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or a bad-conduct discharge, they could not receive any judicial review by a service Court of Criminal Appeals. The same holds true for the NJP.

[12] http://www.marinecorpstimes.com/article/20140312/NEWS05/303120055/Rep.-questions-Amos-about-sniper-video-scandal-budget-hearing. Video footage of Rep. Jones' questions to General Amos can be viewed here: http://youtu.be/_plOOpZx2Bw. Although the questions were posed personally to General Amos on March 12, 2014 during a House Armed Services Committee meeting, General Amos declined the opportunity provided to him by the Committee chairman to answer the questions immediately, and then did not respond to the Rep. Jones' questions for nearly two months. As such, Rep. Jones expressed his disappointment "with the unacceptable time frame in which these answers [from General Amos] were delivered" and further noted that "Commandant Amos declined to answer my question about the NPR interview and General Waldhauser citing that the matter is under review by the DoD IG" and "I find it terribly ironic that the commandant had no problem discussing the exact same issue during the 17 February 2014 interview with NPR, yet refuses to give an answer to a sitting member of Congress…I would like to know why the commandant felt it was appropriate to discuss on national radio, but refused to answer the same question from a member of Congress." *See* Enclosure 5.

[13] *See* generally, http://www.dodig.mil/About_Us/mission.html

10 U.S.C. § 837, during his tenure as Commandant, has faced no real consequences for it. Instead, he is set to retire soon with the handsome tax-payer funded pension and full benefits afforded to four-star general officers. The requested documents should be laid bare under FOIA, in their entirety, in fulfillment of the Inspector General's mission statement, so that the Congress, the public, and most of all the Marines impacted can judge for themselves whether justice was truly served here. If the documents are not released and they remain hidden from public scrutiny as General Amos quietly slips into a life of leisure, while the Marines who bravely fought, and in some cases were grievously wounded, in service for him and this nation had their careers crushed, then FOIA—and quite a bit more—is a dead letter.

For the aforementioned reasons, I ask that this administrative appeal be promptly considered, and that the relief sought herein be granted in full. Thank you for your attention to this matter.

Respectfully submitted,

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Enclosure 1

EASTERN JUDICIAL CIRCUIT
UNITED STATES MARINE CORPS
SPECIAL COURT-MARTIAL

U N I T E D S T A T E S v. CLEMENT, James V. Captain U.S. Marine Corps	)	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF RELIEF FROM UNLAWFUL COMMAND INFLUENCE 6 September 2013

1. Nature of Motion. This is the Government's response to the defense motion for appropriate relief requesting dismissal of charges as a result of alleged unlawful command influence (UCI). For the reasons discussed infra, the Government respectfully requests the court deny the defense motion. In the alternative, if the court were to find UCI exists in this case, the government requests that the court craft an appropriate remedy taking into consideration the limited connection the UCI has to this case and the many remedial measures the court can implement far short of dismissal.

a. Introduction.

On 13 January 2012, LtGen Waldhauser, Commanding General, Marine Forces Central Command was appointed as the Consolidated Disposition Authority (CDA) for all cases arising from the posting of a video depicting four Marines from 3rd Battalion, Second Marine Regiment (hereinafter "V32" after the unit's monitored command code MCC) urinating on deceased enemy combatants. Between on or about 7 and on or about 10 February 2012, General James F. Amos, the Commandant of the Marine Corps ("CMC"), in a moment of frustration made comments to LtGen Thomas D. Waldhauser that encroached upon the CDA's lawful authority and his

unfettered discretion in resolving the cases.[1] Realizing that he overstepped his authority as CMC, General Amos took immediate steps to ameliorate his mistake by transferring disposition authority for the V32 cases to the Commanding General for the Marine Corps Combat Development Command ("MCCDC"). This transfer of disposition authority is authorized under applicable law and was memorialized in two letters from General Amos to LtGen Waldhauser and LtGen Richard P. Mills, CG, MCCDC, dated 10 February 2012. At the time, the CMC also told LtGen Waldhauser to simply "tell the truth" if he was ever asked about their conversation. It was clear from his immediate actions and by his written letter to LtGen Waldhauser that his actions were based solely on the fact that he had compromised LtGen Waldhauser's position as the CDA and that these actions were not an attempt to ensure harsher disciplinary actions in any cases that resulted from the investigation. On the contrary, these actions were undertaken to preserve the military justice system and the independence of the CDA. Choosing to replace a Convening Authority under these circumstances is appropriate and authorized by law.[2]

In order to insulate the new CDA from being influenced by the CMC's private comments directed to LtGen Waldhauser, the CMC and his legal staff implemented prophylactic measures to ensure that the CG, MCCDC, then LtGen Mills, was not informed of the reason for the transfer.[3] While the decision to insulate LtGen Mills has raised some issues that are discussed further herein, it was successful in that the CG, MCCDC did, in fact, act - with absolute independence - without any influence from above or even any knowledge about CMC's

[1] Notably, the focus of the discussion between the Commandant and LtGen Waldhauser was the disposition of the cases involving the four Marines depicted in the video. Capt Clement was not identified or discussed by the CDA or CMC. Charges against Captain Clement were preferred almost a year after the discussion took place.
[2] *United States v. Villareal*, 52 M.J. 27 (1999) (Pre-referral transfer of jurisdiction to a neutral GCMCA insulated case from unlawful command influence). In the present case, the investigation was still open and the accused had not been identified as a subject of interest by the CDA. Charges would not be preferred against the accused for almost a year.
[3] If LtGen Mills or his staff had become aware of the communications between CMC and LtGen Waldhauser and the reason for the shift in CDA, arguably LtGen Mills would have then become tainted by the same UCI applied toward LtGen Waldhauser.

comments to LtGen Waldhauser. Thus, while the Government concedes that there was evidence of UCI relating to the V32 cases – stemming from the comments from CMC to LtGen Waldhauser – any UCI was immediately ameliorated to the point that it had absolutely zero impact on the CDA's disposition decisions in this case and all V32 urination cases.[4]

In addition, while the CMC's "Heritage Briefs" were found to have created apparent UCI in other unrelated sexual assault cases,[5] there was no apparent UCI influence on the accused's case as a result of the briefs for the following three reasons. First, the CG, MCCDC did not attend any Heritage briefs during the CMC's tour. Second, the accused was not present when the desecration of enemy corpses was filmed (he is charged with dereliction of duty for other aspects of the same patrol). Unlike the Marines who urinated on the corpses, Capt Clement's photo was not included in any slide show and he was not identified in any manner. Third, the CG, MCCDC independently decided to investigate and later charge the accused after reviewing evidence that was separate and apart from the urination video. Similarly, as briefly discussed herein, there is no issue of actual or apparent UCI related to certain public statements issued by a host of important Government officials that were each trying to mitigate the operational and strategic damage done to the United States efforts in Afghanistan following the publication of the urination video.

Lastly, the other allegations raised by the defense in the context of their UCI claims are confusing, full of misinformation, and in all events amount to non-sequitors. For example, the issues surrounding the supposed wrongful "classification" of the videos are irrelevant to Capt Clements's case and do not raise UCI. They need not be litigated beyond the Government

[4] While the Government concedes that there was at least the appearance of UCI in cases arising from the urination video, this concession pertains to the cases of the four Marines depicted urinating on the enemy casualties. In relation to the specific case of *United States v. Capt Clement*, there is not even the appearance of unlawful command influence as a result of CMC's comments given Captain Clement was not identified as an accused for his separate offenses of dereliction of duty at the time of the conversation between the CMC and LtGen Waldhauser. Moreover, any UCI was immediately ameliorated and has had zero impact on the matter of *United States v. Capt Clement.*

[5] *See e.g. United States v. Jiles.*

demonstrating for the Court that even assuming that the classification was erroneous, no actual or apparent UCI is raised because there is no evidence to suggest that the classification was done to unlawfully influence the proceedings or impede the accused's access to the classified materials.[6] Moreover, the accused has had access to all classified materials since the preferral of charges on 29 January 2013 and required clearances being approved.

In short, the Government will prove beyond a reasonable doubt that, in addition to the ameliorative steps already implemented by the Government, *voir dire* will be sufficient to ensure that any actual or apparent UCI will not impact the proceedings and the accused will get a fair hearing for the offenses he is charged with committing. As such, the Government requests that the court deny the defense motion and the accused's proposed remedy of dismissal, which is unsupported by any related precedent and unrealistic under these circumstances. The Government requests that the Court take steps to reassure the public that it has fully vetted the allegations and facts, and has implement remedies to ensure fairness. The process and corrective action selected by the Court should logically reflect any apparent UCI present in this case, but also reflect the independence demonstrated by the CG, MCCDC in acting as the CDA for the V32 urination cases in general and specifically for this separate, but related case. With respect to issues related to classification and public official comments the Government requests that the Court deny the defense motion as simply not raising cognizable claims of UCI.

b. Procedural Posture.

The Government preferred charges against the accused on 29 January 2013. At that time, those charges were two specifications of violating Article 92, specifically for dereliction of duty and violating a General Order, one specification Article 107 for making a false official statement, two specifications of Article 133 for conduct unbecoming an Officer and a Gentlemen, and one

[6] The record reflects that the decision to classify the videos and related materials was to prevent further disclosure and to protect against the incitement of further violence against forward deployed service-members.

specification of Article 134 for conduct prejudicial to good order and discipline and of a nature to bring discredit to the armed forces. On 10 April 2013, following the preferral of the charges against the accused, an Article 32 investigation was conducted. LtCol Christopher Greer, a judge advocate and former military judge, conducted the investigation. In advance of that hearing several of the specifications originally preferred were dismissed or otherwise modified due to the disposition of several companion cases, and based on the recommendations of another Article 32 hearing for a companion case. Those dismissals and modifications were as follows: (1) Specification 1; Charge I was modified in that several subparagraphs comprising the Specification were dismissed; (2) Specification 2; Charge I was dismissed in whole; (3) the sole specification under Charge II was dismissed in whole; (4) Specification 2 under Charge III was dismissed in whole; and (5) the sole specification under Charge IV was modified in that several subparagraphs comprising the Specification were dismissed. In his Article 32 IO Report, Lieutenant Colonel Greer found reasonable grounds existed to believe the accused committed the offenses, and recommended additional modifications to the charges but further recommended a lower forum for the remaining charges, specifically, Commanding General Non-Judicial Punishment.[7] In a letter from the defense to the CDA on 22 April 2013, this alternative forum was immediately and summarily rejected by the accused and his counsel.

The remaining charges against Captain Clement were referred to a Special Court-Martial on 10 May 2013 by CG, MCCDC, LtGen Richard P. Mills. On May 22, 2013 the accused was arraigned. At the arraignment, and in accordance with the Defense requested trial milestones, an Article 39(a) session was scheduled for 30 September and the trial dates were set for 1-3 November 2013. Following this arraignment, on 15 August 2013 at a telephonic R.C.M. 802

[7] Despite defense assertions to the contrary, the charges currently before the court are based on competent evidence as indicated by the fair and impartial Investigating Officer finding that reasonable grounds exist to believe the accused committed the offenses.

Conference, the Circuit Military Judge, Colonel G. W. Riggs, modified the trial milestones and set a 39(a) session for 11 September 2013 and another on 2 October 2013. Additionally, the date of trial was modified to begin on 4 November 2013.

2. **Summary of Facts**

Since the factual background was not fully developed at the time the defendant filed his brief, many of the defense arguments are based upon erroneous assertions, speculation, and conjecture. Therefore, rather than following the categories suggested by the accused in his brief, the government has broken down the facts and general discussion into the following categories: (1) General background of the alleged incidents and the Government's investigation; (2) CDA change and insulation of LtGen Mills, (3) Classification issues; (4) CMC's Heritage Briefs; and (5) Allegations related to ongoing "CMC guidance."

a. General Factual Background.

1. On 10 January 2012, a video emerged on the internet depicting several Marines, attached to Scout Sniper Team 4, 3d Battalion, 2d Marine Regiment in Helmand Province, Afghanistan, urinating on the remains of several Afghan casualties during a combat patrol in the vicinity of Sandala, Musa Qaleh, Helmand Province on or about 27 July 2011.

2. Following the emergence of this video, on 13 January 2012, the CMC appointed Commanding General, MARCENT as the CDA for all potential disciplinary action arising from the video as well as from the surrounding patrols and operations.

3. Lieutenant General Waldhauser, CG, MARCENT, initiated a Command Investigation, appointing LtGen Steven A. Hummer as the Investigating Officer. LtGen Waldhauser also initiated an NCIS investigation.

4. Through these investigations, the identities of the Marines in the video were discovered as well as the identities of other Marines present on the 27 July 2011 patrol. The

accused, Captain Clement, was among those individuals present on that patrol. As a company executive officer (XO), he was the most senior Marine present by billet and rank.

5. In addition to the misconduct involving the urination on deceased enemy combatants, the investigations revealed a general and disturbing lack of discipline among the members of the patrol on 27 July 2011. This conduct included the improper and reckless failure to wear personal protective equipment (PPE), the indiscriminate and excessive firing of automatic weapons, grenades, and rockets, the unnecessary firing of a recovered enemy weapon, and the failure to follow established rules of engagement. This conduct was described by one of the Staff Non-Commissioned Officers who took responsibility for his actions, as "cowboyish" behavior.

6. The accused was the Kilo Company XO. The snipers were operating in conjunction with Kilo Company. He was also present on the patrol and observed most of the aforementioned conduct occurring, which he condoned with his silence. The accused was not present when the urination incident took place. His charges stem from his failure to take any corrective action to stop the unprofessional, "cowboyish behavior" by the junior Marines present. Of note, other Marines assigned to the 27 July 2011 patrol have admitted that their behavior was unacceptable by Marine Corps standards. Most of the junior Marines admitted unprofessional conduct – and all of the charged behavior – was done in the presence of the accused who chose not to assert leadership.

b. <u>CDA Change and Insulation.</u>

1. For approximately a month as the CDA, LtGen Waldhauser supervised the progress of these investigations and began researching potentially appropriate dispositions for the subject cases.

2. On 31 January 2012, after a briefing by NCIS, LtGen Waldhauser offered an update to the CMC in which he outlined his initial thoughts on the road ahead.

3. Although LtGen Waldhauser had made no decisions as to disposition of the cases, he had a general idea of punishments and dispositions in similar cases. Therefore, although he had not firmed up any particular course of action regarding any of the Marines potentially identified in the investigation, he indicated to CMC that he would not be taking any of the Marines to a General Court Martial and that he was considering lower forums for some of the subject cases.

4. Due to intersecting schedules overseas, the CMC and LtGen Waldhauser agreed to meet in a Middle Eastern Country to discuss his progress report more thoroughly.[8]

5. Based on what he provided to the CMC, LtGen Waldhauser anticipated that the meeting would focus on the current status of the cases as well as the potential pace and path forward.[9]

6. CMC and LtGen Waldhauser met on 7 or 8 February.[10]

7. At this meeting, the CMC expressed his desire to LtGen Waldhauser that the Marines involved be "crushed" and eventually discharged from the Marine Corps.[11]

8. LtGen Waldhauser provided his plan for the subject cases, outlining his thoughts on a lower forum for some of the Marines and Special Courts-Martial for the others.[12]

9. The CMC inquired into whether or not LtGen Waldhauser intended to send any of the Marines to a General Court-Martial, to which LtGen Waldhauser stated "No, I am not going to do that."[13]

10. The tone and tenor of the meeting between the CMC and LtGen Waldhauser was tense, but professional.[14]

[8] Defense Attachment 25, Declaration of Lieutenant General Thomas D. Waldhauser.
[9] Defense Attachment 25, Declaration of Lieutenant General Thomas D. Waldhauser.
[10] Defense Attachment 25, Declaration of Lieutenant General Thomas D. Waldhauser.
[11] Defense Attachment 25, Declaration of Lieutenant General Thomas D. Waldhauser.
[12] Defense Attachment 25, Declaration of Lieutenant General Thomas D. Waldhauser.
[13] Defense Attachment 25, Declaration of Lieutenant General Thomas D. Waldhauser.
[14] Defense Attachment 25, Declaration of Lieutenant General Thomas D. Waldhauser.

11. The CMC then informed LtGen Waldhauser he could remove LtGen Waldhauser from the position of CDA and give it to another General Officer.[15] [16]

12. The meeting ended and the CMC and LtGen Waldhauser each departed on separate aircraft for separate destinations.[17]

13. A few hours after this conversation, General Joseph E. Dunford, Assistant Commandant of the Marine Corps, spoke telephonically with LtGen Waldhauser and expressed that the CMC regretted the conversation and that the CMC felt that he had "crossed the line" and put himself, LtGen Waldhauser, and the office of the Commandant in a bad position as a result of his comments.

14. Several days after the meeting in the Middle East when they had returned to the United States, CMC and LtGen Waldhauser had another conversation over secure communications. In that conversation, CMC informed LtGen Waldhauser that he was removing him as the CDA because he felt that he had "crossed the line" with his comments to LtGen Waldhauser and that replacing him was the appropriate means to correct this overstepping. Further, he directly told LtGen Waldhauser that if anyone ever asked him about his removal as the CDA that LtGen Waldhauser was to "tell the truth."[18]

15. On 10 February 2012, General Amos formally removed LtGen Waldhauser as the CDA and appointed LtGen Richard P. Mills, Commanding General, MCCDC.

16. The explicit reason for this removal was because, as stated by the CMC in his letter to LtGen Waldhauser, "I [CMC] believe some of my comments during our recent conversation could be perceived as possibly interfering with your unfettered discretion to take action in these

[15] Defense Attachment 25, Declaration of Lieutenant General Thomas D. Waldhauser.
[16] LtGen Waldhauser perceived that immediately following this comment by CMC, CMC's demeanor showed that CMC realized the implications of what he had said and regretted his comments.
[17] Defense Attachment 25, Declaration of Lieutenant General Thomas D. Waldhauser.
[18] Defense Attachment 25, Declaration of Lieutenant General Thomas D. Waldhauser.

cases. To protect the institutional integrity of the military justice process, and to avoid any potential issues, I withdraw your CDA designation." *Id*.

17. In order to avoid actual unlawful command influence from infecting the new CDA, LtGen Mills and his staff were not informed of the reason for the shift of CDA. Additionally, to avoid tainting LtGen Mills with imputed knowledge of the CDA withdrawal, the MCCDC Staff Judge Advocate, Col Jessie L. Gruter and his deputy Maj James Weirick were instructed by Judge Advocate Division (JAD) to have no contact with MARCENT SJA regarding these cases.

18. This guidance was intended to insulate LtGen Mills from the potential influence of General Amos' comments to LtGen Waldhauser and to preserve the integrity of the military justice process.[19]

19. While in the role of CDA, LtGen Mills has actively insulated himself from all potential or suspected sources of interference on the subject cases.

20. LtGen Mills affirmatively absented himself from any and all discussions of the cases at the EOS meetings and he affirmatively chose not to attend any of the "Heritage Briefs" by the CMC.

21. LtGen Mills never knew about the CMC's comments directed towards LtGen Waldhauser. CMC never expressed any opinion to LtGen Mills about how the urination cases - or the accused case – should be handled. Nobody acting on behalf of the CMC, nor anyone else ever sought to influence LtGen Mills.

c. Classification issue.

1. On 29 February 2012, LtGen Tryon, Deputy Commandant, HQMC Plans, Policies, and Operations, as an Original Classification Authority (OCA) classified the majority of the videos and images associated with the Scout Sniper Patrols of 27 July 2011 and 27 August 2011. He

[19] *See United States. v. Villareal*, 52 M.J. at 30.

did so upon the recommendation of Mr. Robert Hogue, Counsel for the Commandant of the Marine Corps.

2. The videos were then classified at the Secret level. The stated purpose of the classification by LtGen Tryon was to reduce the risk of harm to deployed servicemembers that may result from the continued release of the videos and related materials. This classification was undertaken in the aftermath of the accidental burning of religious materials, including Korans, at the Detention Facility at Parwan in Afghanistan. As a result of the burnings, numerous riots and violence directed at US and Coalition forces were taking place in Afghanistan and there was concern that the violence would spread. As part of this violence, there were several instances of "insider attacks" whereby members of the Afghan Security Forces (ASF) attacked and killed US servicemembers serving alongside them. These acts, and those like them, were what the classification sought to prevent and there is no indication or evidence of another clandestine purpose driving the process.

3. In the aftermath of the classification, however, MCCDC expressed concerns about whether the classification met the requirements found in Executive Order 13526. Opinions expressed by MCCDC lawyers and security officials included premature concerns about the impact of over-classification on subsequent legal proceedings. However, there were contemporaneous indications that any classification would be reviewed prior to any legal actions against any Marines who could be held accountable. In fact, on 5 April 2012, LtGen Tryon signed out a memorandum through MARCENT that specifically requested that U.S. Central Command take over as the OCA and reclassify the videos, as appropriate. On 22 June 2013, the Chief of Staff, U. S. Central Command, MG Horst, reclassified the videos and images. This reclassification retained classification on several of the videos. Later, on 28 August 2012, LtGen Tryon formally rescinded the Marine Corps OCA classification of the videos.

4. Subsequent to the U. S. Central Command re-classification and per the published Central Command classification guidance, LtGen Mills ordered a reclassification review on LtGen Hummer's command investigation, the result of which was that the majority of the materials previously classified were rendered unclassified.

5. This classification process bore no effect on the availability of these materials to any defense counsel, most relevantly, the accused in this case. Specifically, all materials were declassified or reclassified 5 to 7 months *before charges were preferred in this case.*

6. Since the preferral of charges on 29 January 2013, all materials associated with any investigation of the relevant incidents has been provided or been made available for inspection by the accused's counsel. In order to further accommodate the defense, the government has produced copies of these materials and provided them to the defense for their own keeping and use.

d. CMC's Heritage Briefs.[20]

1. Beginning in the late spring of 2012, the CMC and the Sergeant Major of the Marine Corps (SMMC) conducted a live tour of most Marine Corps installations. The intent was to put the Marine Corps back "on a true North heading." The CMC's intent was to talk to all SNCOs and Officers.

2. The speech focused on the heritage of the Marine Corps and the role of leadership.

3. The CMC explained that his primary role as Commandant is to protect the spiritual health of the United States Marine Corps.

[20] The defense asserts that the CMC comments regarding leadership within the Marine Corps, his efforts to reinforce good order and discipline, and his specific comments about the urination video have amounted to unlawful command influence in the case of *United States v. Captain Clement*. The defense also asserts that comments by other senior officials within the Federal Government regarding the urination video have unlawfully influenced the case. Importantly, the accused is not facing charges related to the urination incident but rather other misconduct that occurred on the same day. Neither CMC nor any other official has ever publicly commented on the misconduct that the accused is charged with failing to stop.

4. The CMC discussed how SNCO's and commissioned officers are the leaders of the Marine Corps, and that he wants to discuss with them how public perception and the spiritual health of the Marine Corps is being negatively impacted by a failure in leadership.

5. Specifically, the CMC addressed how failure in leadership to enforce standards and hold Marines accountable who commit crimes has tarnished the image of the Marine Corps.

6. The CMC and SgtMaj never stated that jury members in a court-martial should convict a Marine simply because the Corps needed to become tougher on criminals, or in response to any public perception of a problem in the military.

7. The CMC and SgtMaj never stated that anyone found guilty must receive a punitive discharge sentence at a court-martial.

8. The CMC and SgtMaj never cited any current case pending at court-martial.

9. The CMC and SgtMaj never mentioned displeasure in the findings or sentence of any court-martial of any kind.

10. The CMC and SgtMaj never mentioned Captain Clement, the facts of his individual case, or his pending court-martial.

11. While the CMC and SgtMaj did show images of the Scout Snipers posing and urinating on the Afghan casualties, neither the CMC nor SgtMaj publicized the events and conduct for which Captain Clement has been charged.[21]

12. The CMC and SgtMaj never asked or directed anyone in the audience to disregard their moral and legal duty to impartially render judgment in court-martial cases.

[21] Ironically, but for the attention generated by the defense, it is highly unlikely that any potential member of the public or any panel member at trial would be aware that the accused's case is connected to the video of Marines urinating on deceased enemy combatants. To be sure, those same communities would be just as unlikely to have ever heard of Captain Clement.

13. The CMC and SgtMaj conducted a tour of the Marine Corps, giving a similar "Heritage Brief" at most Marine Corps installations, to include Camp Lejeune, NC and Washington D.C.

14. LtGen Mills, pursuant to his SJA's guidance, never attended one of these "Heritage Briefs."

15. As the service chief, the CMC is responsible to the President, Congress, and the American people to "prepare for such employment of the Marine Corps, and for such recruiting, organizing, supplying, equipping, training, servicing, mobilizing, demobilizing, administering, and maintaining of the Marine Corps, as will assist in the execution of any power, duty or function of the Secretary or the CMC."[22]

16. He is further required to: (1) preside over the Headquarters, Marine Corps; (2) transmit the plans and recommendations of the Headquarters, Marine Corps, to the Secretary and advise the Secretary with regard to such plans and recommendations; (3) after approval of the plans or recommendations of the Headquarters, Marine Corps, by the Secretary, act as the agent of the Secretary in carrying them into effect; (4) exercise supervision, consistent with the authority assigned to commanders of unified or specified combatant commands under chapter 6 of this title, over such of the members and organizations of the Marine Corps and the Navy as the Secretary determines; (5) perform the duties prescribed for him by section 171 of this title and other provisions of law; and (6) perform such other military duties, not otherwise assigned by law, as are assigned to him by the President, the Secretary of Defense, or the Secretary of the Navy.[23]

[22] 10 U.S.C. 5042.
[23] 10 U.S.C. 5043.

17. On 23 March 2012, the CMC issued White Letter 1-12 on Leadership and Conduct, covering discipline in the war zones.[24]

18. On 12 July 2012, the CMC released White Letter 3-12, on the subject of leadership. In that letter he stated that he wanted "to be clear about our ever-present responsibilities as senior leaders to uphold the enduring tenets of the Military Justice System. While the briefings express my strong feelings about '*getting the Corps back* on *a heading of True North,'* I am not directing or suggesting specific administrative or military justice actions be taken absent compliance with established law. My intent is not to influence the outcome or response in any particular case, but rather to positively influence the behavior of Marines across our Corps."[25]

e. Allegations related to ongoing CMC guidance.

1. In May 2012, an Executive Off-Site ("EOS") meeting between the CMC and other Generals[26] of the Marine Corps was held in Quantico, VA.

2. These meetings were held to discuss pressing and significant matters affecting the Marine Corps.

3. LtGen Richard P. Mills, did brief that he was going to take disciplinary action again nine named Marines including the accused. This was a one-way brief. He was not seeking validation or guidance from CMC or any other general officer or civilian official. Moreover, he was not present for any further discussions relating to the cases under his authority, including the accused's.

As part of his CDA, LtGen Mills had the authority to take any appropriate administrative or disciplinary actions against identified Marines. Further, he was given the authority to place "any suspect or witness you deem necessary in a legal hold status…"

[24] CMC White Letter No. 1-12, dated 23 March 2012.
[25] CMC White Letter No. 3-12, dated 12 July 2012.
[26] The EOS is normally held at the three star general and above level.

By indicating that he was taking action against nine individuals, LtGen Mills also indicated that he was not taking action against other current and former members of 3/2. These Marines, numbering at least in the dozens, had been in an administrative (vice "legal") hold status for months thereby causing a ripple effect on Marine Corps personnel management impacting numerous units, Marines, and Marines' families. LtGen Mills could have objected to any other moves at that time pending the resolution of the disciplinary cases, but he did not. His lack of objection or affirmative action to the contrary was an indication that he was not taking action against the others – therefore, LtGen Paxton, as the MEF Commanding General had an interest in ensuring that personnel actions that had been frozen pending LtGen Mills decision, including EAS, PCS, promotions, etc. were able to move forward.

4. On 31 May 2012, CG II MEF, then LtGen Paxton, sent an email to the CMC, with LtGen Mills copied, stating in part, "Your guidance after the EOS was clear and it was communicated and was being executed…please know that all of us are united and convinced that these COAs are best for our Corps as an institution."

5. Though LtGen Mills was copied on this correspondence, he had no knowledge, through his own self-removal, of what had been discussed at the EOS meetings regarding the related cases. Moreover, the correspondence simply noted administrative and personnel actions being accomplished apart from the cases managed under LtGen Mill's Consolidated Disposition Authority.

6. Furthermore, LtGen Paxton carried no authority over the disposition of the Scout Sniper cases. LtGen Mills continued to act in his independent role as the Consolidated Disposition Authority. LtGen Paxton was rightfully focused on the administrative and personnel matters that were collaterally and directly impacted by the legal process.

7. Attached to LtGen Paxton's email was an attachment detailing LtGen Mills' courses of action for the subject cases indicating "LtGen Mills intends to pursue Article 32 proceedings in the case of nine individuals."

8. CMC provided no comment or guidance on this email or the proposed COAs outlined by LtGen Paxton to LtGen Mills.[27] While he merely acknowledged the fact that LtGen Mills would take action against certain Marines, he did approve that other moves could take place. Those approvals were more akin to an acknowledgment and were well within his authority as CMC.

9. In a 4 June 2012 email to MajGen Vaughn Ary, SJA to CMC, CG II MEF, LtGen Paxton, who again had no authority over the subject cases, wrote "Believe CMC intends to acknowledge that CDA will proceed with Article 32 on nine members shown on enclosure one…I'm looking for the initial or head nod to start to do so."

10. MajGen Ary responded to the 31 May and 4 June email with: "to the extent that the 31 May letter creates an impression that CMC is a part of the decision process or is providing tacit approval for command decisions – either by initials on awareness for Art 32s or approval of a 'legal hold' process – I was trying to clarify that CMC's CDA letter established the command authority and dirlauth [direct line of authority] to resolve this issue without any additional involvement of CMC."

11. Through this email, MajGen Ary informed LtGen Paxton the extent to which CMC wished to be and was involved in the disposition of the subject cases.

12. All preceding or subsequent correspondence between LtGen Mills and CMC were simply updates regarding the process of the subject cases, updates which the CMC is entitled to receive.

[27] Demonstrative of LtGen Mills' independent discretion is the fact that ultimately only two Article 32 Investigations were convened.

13. LtGen Mills did not seek any guidance from CMC on the disposition of the cases within his authority, nor did CMC offer such guidance.

14. The only "guidance" offered by the CMC was on the reporting of the dispositions of the subject cases, not on their actual forum or outcome.[28]

3. **Discussion.**

a. General Legal Background

Rule for Court-Martial 104 and Article 37 of the Uniform Code of Military Justice provide a general prohibition on the military command structure from unlawfully influencing the outcome of a court-martial. The initial burden on the accused of showing potential unlawful command influence is low, but is more than mere allegation or speculation.[29] The quantum of evidence required to raise unlawful command influence is "some evidence."[30] Once an issue of unlawful command influence is raised by some evidence, the burden shifts to the government to rebut an allegation of unlawful command influence by persuading the Court beyond a reasonable doubt that (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence did not affect the findings or sentence.[31]

Allegations of unlawful command influence are reviewed for actual unlawful command influence as well as the appearance of unlawful command influence.[32] The test for the appearance of unlawful command influence is objective.[33] An appearance of unlawful command influence arises "where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding."[34]

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[28] Notably, CMC was concerned with the transparency of the proceedings and wanted to ensure they were reported in as open and public a way as is permitted by applicable laws and regulations.
[29] *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F 2002).
[30] *Id.* at 41.
[31] *United States v. Salyer*, 72 M.J 415 (C.A.A.F. 2013).
[32] *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).
[33] *Id.*
[34] *Id.*

b. CDA Change and Insulation

The Government concedes that the comments made by the CMC to LtGen Waldhauser are evidence of unlawful command influence but only upon those cases directly related to the urination video. This unlawful command influence, however, was immediately and effectively ameliorated such that it had no impact on the actual dispositions on any of the V32 cases, especially the case involving the accused.[35] As outlined in the summary of facts above, in a moment of frustration, the CMC encroached upon the authority granted to the then CDA, LtGen Waldhauser. He attempted to influence and direct the path and progress of those cases not under his authority. These attempts, even at the outset, were resisted by the CDA, LtGen Waldhauser, and they never had any effect upon the progress of this case or any other V32 case due to LtGen Waldhauser's steadfast position. Nevertheless, upon immediate reflection on the conversation with LtGen Waldhauser, CMC had no other choice but to withdraw the CDA. CMC and his office took the necessary, lawful and prudent steps to further ensure that the unfortunate but inappropriate comments to LtGen Waldhauser would never influence the cases and that the CMC's comments would not appear to have any effect on future forums or disposition decisions.

The removal of LtGen Waldhauser was a necessary step, not an act of reprisal. Nor was it an attempt to "forum-shop" for a CDA that would follow his guidance. Instead, the CMC's letter was the correct course of action as it was designed "[t]o protect the institutional integrity of the military justice process, and to avoid any potential issues."

Following this removal, and to further the goal of preserving the military justice process, the CDA removal letter and the surrounding incidents were not disclosed so as to avoid tainting the future CDA, LtGen Mills. Had the letter been disseminated and made known to LtGen Mills,

[35] The investigation that uncovered the misconduct by the accused was not complete until a month after the CDA change occurred. Moreover, the discussions between CMC and LtGen Waldhauser were focused on the four Marines depicted in the video. Therefore, the only arguable unlawful command influence that may exist in this case is so far removed in time as to be only minimally relevant.

or any other individual including his SJA, the issues the CMC was remedying through his removal of LtGen Waldhauser would be extant. LtGen Mills would most likely be aware of a previous entanglement of the CMC with the cases now under his authority and such knowledge would have had the potential to chill any future dealings or dispositions of those cases. As it was, the record shows that LtGen Mills demonstrated total independence and unfettered discretion with these cases. Accordingly, what the defense claims to be unlawful command influence (i.e. the "secret replacement of LtGen Waldhauser") is in fact the successful actions of the CMC and his office to render his comments to LtGen Waldhauser effectively neutered and effectively non-prejudicial to this case and the military justice system.

Since this removal of LtGen Waldhauser and since the appointment of LtGen Mills, LtGen Mills further insulated himself from any further possible command influence. LtGen Mills excused himself from the EOS meetings in Quantico when the cases under his authority had been brought to the floor. LtGen Mills also refrained from attending any of the Heritage Briefs offered by the CMC or the SgtMaj. As Major Weirick, the Deputy SJA to LtGen Mills and a key component to the defense UCI contentions, states "It must be noted that my immediate supervisor, Col J. L. Gruter and my Commanding General, LtGen Richard P. Mills, have at all times, and to the best of their abilities, avoided any involvement in any unlawful command influence." And, further:

> I have been present for, or participated in, nearly every briefing of LtGen Mills on these cases. LtGen Mills has at all time fulfilled his role as a convening authority in an impartial manner, carefully reviewing the fact of each case, considering mitigating and extenuating circumstances of the individual Marines, and arriving at legally appropriate decision [sic] when determining the appropriate administrative or judicial action to take in each case.

Accordingly, although evidence of unlawful command influence exists (although not directly to this case), it occurred in a Middle Eastern Country between the CMC and LtGen

Waldhauser before Captain Clement was identified as being suspected of misconduct. Due to the immediate awareness and regret of his statements, the CMC identified the problem and his mistake and he solved it. He removed the CDA he had unfortunately compromised and replaced him with one he had not. To determine that this removal and replacement was improper would effectively eliminate the CMC's ability to ameliorate such an issue and it could have the tendency to chill any future steps to strengthen and preserve the military justice process, as it was preserved in this case. The newly appointed CDA was totally insulated from this isolated incident of UCI so that all LtGen Mills knew was that the V32 cases were his to handle. Additionally, LtGen Mills exercised total independence and unfettered discretion and insulated himself from all potential for outside influence and through this avoidance and through the CMC's actions, LtGen Mills was allowed and able to "[fulfill] his role as a convening authority in an impartial manner" – which he did.

c. Classification Issues

The defense allegations regarding improper classification, and the alleged motives behind that process, are simply not accurate. The bottom line is that throughout the litigation process of this particular case all relevant information has been provided to the defense or been available for inspection by the defense. The defense motion claims that the videos and investigations were classified in order to prevent the accused and his counsel from accessing the evidence. This claim, however, ignores the very established fact that this never would have worked. No matter whether a document or video is classified or unclassified, the defense is entitled to inspect all evidence relevant to its case, as evidenced by the fact that such classified materials were made available for the defense and were subsequently reviewed by both the defense and the Article 32 Investigating Officer.

The Command Investigation was classified pursuant to the classification determination of 29 February 2012. The Commanding General, MCCDC ordered a reclassification review of the investigation pursuant to CENTCOM guidance. That review was completed and the vast majority of the information contained in the investigation was subsequently reclassified as unclassified. MCCDC then took reasonable steps to appropriately mark and redact the remaining classified materials contained within the investigation making it available to the defense. There are limited parts of the investigation that remain classified following the reclassification review. The materials associated with the Command Investigation that remain classified have been and continue to be available for the defense to review and prepare with. Furthermore, the remaining classified pieces of the investigation have been copied and been transported to Quantico in order to allow the defense easier access to those materials.

Accordingly, nothing to do with classification amounts to UCI. The defense contention that the classification process was a piece of a larger attempt to influence the outcome and process of this court martial is unfounded, for the process in no way hampered the defense nor prejudiced the accused. All materials have been, and continue to be, available for the preparation of the accused's defense.

d. CMC's Heritage Briefs and comments by Senior Officials

1. The alleged UCI does not constitute "some evidence" that is logically connected to this court-martial.

The CMC's remarks simply do not amount to UCI relative to the case against Captain Clement. The CMC, in his comments, never discussed a particular court-martial or implied an appropriate verdict or punishment for such a proceeding. He did not use his rank to attempt to change an outcome in a case; instead, he used his rank to reach a wide audience in an effort to educate the ranks regarding a leadership challenge. The CMC is not just allowed to speak on matters of leadership and good order and discipline within the ranks, he "is directly responsible

to the Secretary of the Navy for establishing and maintaining leadership standards and conducting leadership training within the Marine Corps."[36] In a direct and deliberate effort to fulfill that responsibility, CMC and the Sergeant Major of the Marine Corps toured installations throughout the Marine Corps reminding Marines of their responsibility "to exert proper influence upon their comrades by setting examples of obedience, courage, zeal, sobriety, neatness, and attention to duty."[37]

Because the CMC must ensure the highest standards of discipline, he has the authority to set the tone and tenor of discipline in the Marine Corps. Discipline does not occur in a vacuum. It requires the CMC to instill it in Marine leaders by actively engaging them, clearly articulating standards, and holding Marines accountable when they fail to uphold those standards. As a commander, the CMC is "allowed maximum discretion in the exercise of authority vested in [him]."[38] The CMC can speak bluntly with his leaders about his concerns without committing UCI. He can point out what he takes seriously; and that is precisely what he did during the Heritage Tour. The CMC spoke by design to his leaders: SNCOs and Officers. This was not a speech to all Marines; it focused on leaders because, in intent and effect, it addressed what the CMC sees as a leadership issue.

The CMC's comments indicating that we do not need to keep Marines who are substandard, reflect a fundamental aspect of our institutional identity as old as the Corps itself. We hold a high standard, and cannot continue to do so if we routinely keep those who fail to meet that standard. Existing Marine Corps Orders reflect the reality that some Marines who enter the ranks are not fit for continued service. "[E]very reasonable effort must be made to identify, in a timely manner, members who exhibit a likelihood for early separation; and… [s]eparate promptly those

[36] Marine Corps Manual, 1100.2.a.
[37] Marine Corps Manual, 1100.2.c.
[38] Marine Corps Manual, 1100.2.b.

members who do not demonstrate potential for further useful naval service."[39] The CMC's comments were not comments on the outcomes of trials. Rather, they were an acknowledgement that too many Marines are ignoring the defining legal and moral standards which have been properly published and legally executed throughout ours and other services, and which have justified our existence for more than 200 years.

The CMC's remarks did not constitute UCI because they fulfilled statutory and regulatory responsibilities, dealt specifically with institutional problems for which Congress demands solutions, and did not request or imply a verdict or punishment in the case of any court-martial, either specifically or generally.

Likewise, neither General John R. Allen's, Secretary of Defense Leon Panetta's, Secretary of the Navy Ray Mabus' nor Secretary of State Hilary Clinton's public comments are remotely close to UCI. The operational and strategic damage done by the urination video was vast and these senior officials were each appropriately trying to mitigate that damage. Furthermore, each of these officials spoke not of the accused in this case, but of those depicted urinating on the Afghan casualties, an act for which the accused was not even present or charged. Accordingly, none of these senior officials made any comment on the conduct for which the accused has been charged and, thus, there is no logical connection between those comments and this case. This fact is even more substantiated by the dates of the comments. Almost all were made immediately following the release of the urination video. At that time, and maybe even now, none of these senior officials even knew who Captain Clement was, knew of what he failed to do in his capacity as a Marine officer, or knew that he would later be facing a court martial.

[39] Paragraph 6101, MCO P1900.16F (MARCORSEPMAN).

2. *There is no actual UCI in this case as a result of the comments.*

Assuming *arguendo* that the defense has established some evidence of UCI logically related to this case and has thereby shifted the burden to the Government, there is no actual UCI in this case related to Heritage brief comments made by CMC or statements by any other leader acting to mitigate the national security damage associated with the publication of the urination video. Actual UCI must consider *this case*, which requires an analysis of *this panel*, not a hypothetical panel drawn. The members in this case, however, have yet to be seated. Nonetheless, the defense speculates that the various comments identified in their motion will impact the findings and sentence in this case. Yet, the defense's allegations are not evidence and do not demonstrate any connection to this case. The accused's arguments further ignore the role of trial counsel, defense counsel, and the military judge to identify and to take corrective action in order to eliminate from the panel all members who have bias or preconceived notions about findings or sentencing.[40] Moreover, the defense assumes that the potential panel members are at least familiar with the substance of the comments. The defense motion does not allege that the impartiality of the military judge in this case was in any way affected by the various comments, and the government or defense may conduct *voir dire* of the military judge to establish that fact beyond a reasonable doubt. The defense has not made a link between the various comments and the likely witnesses in this case, and no defense witness has indicated a reluctance to testify because of those comments.

3. There is no apparent UCI in this case as a result of the Heritage brief comments.

Apparent UCI does not exist in this case because a reasonable member of the public would view the various comments for what they are: military and civilian leadership addressing

[40] Additionally, the accused's arguments ignore that corrective action has been taken by the Secretary of Defense, on behalf of the President of the United States, to ensure that the Military Justice process remains fair and impartial. *See Secretary of Defense Memorandum: Integrity of the Military Justice System*, dated 6 August 2013.

leadership issues that have shaken the public's trust in the military and given rise to increasing public concern and scrutiny. To determine whether apparent UCI exists, military courts consider "whether a reasonable member of the public, if aware of all the facts, would have a loss of confidence in the military justice system and believe it to be unfair." [41]

4. Assuming arguendo *that UCI exists, such UCI will not affect this court-martial.*

Even if the court finds that an element of unlawful command influence exists, there is no prejudice to the accused or the fairness of the proceedings because (1) subordinate commanders have not been swayed from their duty to properly conduct post-trial matters, (2) there is no indication that defense's witnesses are unwilling to testify, (3) any impact on the members panel is pure speculation, and (4) panel members will be vetted during *voir dire* and eliminated by challenges for cause.

The proper procedure to determine whether jury members have been influenced is to determine the impact the commander's communications have had on the jury members.[42] The burden is placed upon trial counsel, defense counsel, and the military judge to question the panel and determine whether any of the members actually heard or read any of the comments identified by the defense, whether they remember any of the comments, and, if so, whether the comments affected the members' ability to render an impartial judgment.[43] The court should not "disqualify members of a court- martial panel simply because they were assigned or were in close proximity to the command where the comments were made [because] to do so would ignore the members' oath to adhere to the military judge's instructions and to determine the facts in accordance therewith." [44] This is accomplished through *voir dire*. In fact, the *voir dire* process, without more, sufficiently ensures that any potential UCI will not infect this trial.

[41] *United States v. Allen*, 31 M.J. 572, 590 (N-M. Ct. Mil. Rev. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991).
[42] *United States v. Thomas*, 22 M.J. 388, 396 (C.M.A. 1986).
[43] *Id*.
[44] *Id*.

Upon questioning, this court may choose to discern who heard or read which comments. This court may also choose to ask who saw which media reports or read news articles. The court can then further determine whether hearing and recalling the comments and any other media reports may affect that member's judgment. The court can instruct the members not to consider any policies or personal wishes of the CMC, SECDEV, and SECNAV, or others in rendering judgment. Each side may then make challenges for cause, which the court may grant. These measures will sufficiently ferret out any bias and eliminate it before assembling the court. No further remedy is warranted in this case.

e. Allegations related to ongoing CMC guidance

Any CMC guidance relating to the V32 cases, including the accused's, does not amount to any evidence of unlawful command influence. The most important factor relating to this alleged "guidance" is that the CDA, LtGen Mills, was never informed of what this guidance may be. The alleged location of this guidance was the EOS meeting in Quantico in May 2012. As outlined above in the Summary of Facts, this meeting was between the CMC and other Generals of the Marine Corps for them to discuss pressing and significant matters affecting the Marine Corps. Among those matters was the conduct of the patrols of 27 July 2011 and the subsequent urination videos and pictures. This meeting was conducted and the matters were discussed; however, once the topic of the V32 cases arose, LtGen Mills excused himself from the meeting so as to avoid any possible influence from those discussions. And, after that meeting, there is no indication that LtGen Mills became privy to what was specifically discussed on the cases under his authority. Accordingly, this meeting was not an act of unlawful command influence, either actual or apparent, because (1) it was a private meeting which the general public, and the USMC as whole, did not participate nor receive any information from and (2) because LtGen Mills was

not present for the topic of discussion relevant to the cases under his authority nor was he later informed about what specifically was discussed.

Following the EOS meeting, on 31 May 2012, then LtGen Paxton wrote an email to the CMC stating, in short, that the guidance was clear and that it was being executed. LtGen Mills was copied on this correspondence. Again, however, there is no indication that LtGen Mills was ever informed of this "guidance," whatever it may be, and there was no additional correspondence further explaining it. Further, LtGen Paxton bore no authority over the disposition of the V32 cases or over LtGen Mills. While it is true he was the II MEF CG at the time, and thus had administrative interests in the cases, this did not unfurl into any control over their progress and final outcome.

Following this email, LtGen Paxton emailed MajGen Ary stating "[b]elieve CMC intends to acknowledge that CDA will proceed with Article 32 on nine members shown in enclosure one…I'm looking for the initial or head nod to start to do so." LtGen Mills had nothing to do with this email nor was it requested or desired by the CMC or the SJA, as evidenced by the follow on email from MajGen Ary stating:

> to the extent that the 31 May letter creates and impression that CMS is a part of the decision process or is providing tacit approval for command decisions – either by initials or awareness for Art 32s or approval of 'legal hold' process – I was trying to clarify that CMC's CDA letter established the command authority and dirlauth to resolve this issue without any additional involvement of CMC.

The defense has categorized this email from MajGen Ary as an attempt to "put the cat back in the bag," but nothing even begins to support this contention. Instead, the email was simply a brief point of education to LtGen Paxton about the level of involvement the CMC had and wished to have with the V32 cases. And, most importantly, LtGen Mills, the actual authority on these cases, was not involved in this email or any other email, nor did LtGen Mills ever seek or receive any "guidance" on the disposition of these cases. The only correspondence relative to

the V32 cases from LtGen Mills to the CMC were simply updates, updates which the CMC is entitled to receive. And, the only emails from the CMC to LtGen Mills reminiscent of "guidance" were with regard to the reporting of the dispositions, not about the dispositions themselves.

Accordingly, the defense allegations regarding CMC guidance on these cases does not amount to even some evidence of UCI. LtGen Mills was never privy to, nor did he seek out, any guidance from the CMC on these cases. Any discussions had among General Officers regarding these cases at the May 2012 EOS meeting were had outside the presence of the CDA. Finally, any correspondence between LtGen Paxton, MajGen Ary, and the CMC does not amount to UCI in this case because, simply, the CDA had nothing to do with that correspondence.

4. **Conclusion.**

Accordingly, while the Defense has arguably provided some evidence that UCI exists, the Government will prove beyond a reasonable doubt that, in addition to the ameliorative steps already implemented by the Government, *voir dire* will be sufficient to ensure that any actual or apparent UCI will not impact the proceedings and the accused will get a fair hearing for the offenses he is charged with committing. As such, the Government contends that the defense motion and the accused's proposed remedy of dismissal, which is unsupported by any related precedent and unrealistic under these circumstances, should be denied.

The Government requests that the Court take steps to reassure the public that it has fully vetted the allegations and facts, and has implemented remedies, if any are needed, to ensure fairness. The process and corrective action selected by the Court should logically reflect any apparent UCI present in this case, but also reflect the independence demonstrated by the CG, MCCDC in acting as the CDA for the V32 urination cases in general and specifically for this separate, but related case. With respect to issues related to classification and public official

comments, the Government requests that the Court deny the defense motion as simply not raising cognizable claims of UCI.

5. **Burden of Proof and Evidence.**

a. In raising the issue of UCI, the burden of proof rests with the defense to present "some evidence," beyond mere allegation or speculation, that UCI exists and that it is logically connected to the present case, in terms of its potential to cause unfairness in the proceedings.[45] If the defense can make such a showing, the burden then shifts to the government, using a beyond a reasonable doubt standard, to (1) prove that the predicate facts do not exist, (2) prove that the facts do not constitute UCI, or (3) prove that the UCI will not prejudice the proceedings.[46]

b. In addition to the exhibits already before the court, the government will provide the following evidence in support of its request to deny the defense's requested relief:

1) CMC White Letter, dated 23 March 2012

2) CMC White Letter, dated 12 July 2012

3) Secretary of Defense Memorandum: Integrity of the Military Justice Process, dated 6 August 2013

4) DC, PP&O Action Memo of 29 February 2012

5) DC, PP&O letter 5500/P of 5 April 2012

6) CENTCOM CoS Memorandum for Record of 22 June 2012

7) HQ, USCENTCOM Regulation 380-14 of 15 June 2012

6. **Relief Requested.** The Government respectfully requests the court deny the defense motion. In the alternative, if the court were to find UCI exists in this case, the government requests that

[45] *United States v. Biagase*, 50 M.J. 143, 150 (1999).
[46] *Id*. at 150-51.

the court craft an appropriate remedy taking into consideration the limited connection the UCI has to this case and the many remedial measures the court can implement far short of dismissal.

7. **Argument.** The Government requests oral argument. In short, we look forward to litigating the issue and setting the record straight.

_____
M. D. LIBRETTO
Major, U.S. Marine Corps
Trial Counsel

_____
J. D. PETTY
Captain, U.S. Marine Corps
Trial Counsel

****

Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel electronically on 6 September 2013.

_____
M. D. LIBRETTO
Major, U.S. Marine Corps
Trial Counsel

Enclosure 2

THE SECRETARY OF THE NAVY
WASHINGTON DC 20350-1000

May 7, 2014

The Honorable Walter B. Jones Jr.
House of Representatives
Washington, DC 20515-3303

Dear Representative Jones:

Thank you for your concerns regarding Major Weirick's case. I appreciate your desire to ensure that the record is clear and devoid of misinterpretation.

Please find enclosed, the Commandant of the Marine Corps' responses to your questions voiced during the Department of the Navy's Posture Hearing before the House Armed Services Committee.

Sincerely,

Ray Mabus

Copy to:
General James F. Amos
Commandant, of the Marine Corps

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3000 MARINE CORPS PENTAGON
WASHINGTON, DC 20350-3000

1 May 2014

The Honorable Walter Jones
U.S. House of Representatives
Washington, DC 20515

Congressman Jones:

Find enclosed the responses to your Questions for the Record during the Department of the Navy's Posture Hearing before the House Armed Services Committee on March 12, 2014.

Semper Fidelis,

JAMES F. AMOS
General, U.S. Marine Corps
Commandant of the Marine Corps

Enclosure: (1) Responses to Questions for the Record (#4-8) from the 2014 DON Posture Hearing

Via:
The Honorable Raymond E. Mabus Jr.
Secretary of the Navy

Copy to:
The Honorable Howard P. McKeon
Chairman, Committee on Armed Services

CHARRTS No.: HASC-08-004
House Armed Services Committee
Hearing Date: March 12, 2014
Hearing: Budget Request from the Department of the Navy
Member: Congressman Jones
Witness: Gen Amos
Question: #4

Weirick situation

Question: Who brought to your attention the email Major Weirick sent to Peter Delorier on 21 September 2013? Who decided to issue the protective order taken out against Maj Weirick, and since you were named in the protective order, did you fear Major Weirick at any point?

Answer:

I recall hearing about Major Weirick's 21 Sept 2013 email briefly from someone on my staff, but I do not remember the full context, nor the circumstances when I first read it.

Major Weirick's Battalion Commanding Officer issued a lawful military protective order as a result of the email. Commanders may issue a military protective order to safeguard discipline and good order in his or her unit.

No, I do not fear Major Weirick.

CHARRTS No.: HASC-08-005
House Armed Services Committee
Hearing Date: March 12, 2014
Hearing: Budget Request from the Department of the Navy
Member: Congressman Jones
Witness: Gen Amos
Question: #5

Weirick situation

Question: Your job is to stand up for your Marines. That said, was your civilian attorney, Robert Hogue, ever reprimanded for his slanderous comments comparing Major Weirick to the Navy Yard shooter? Mr. Hogue made these comments in the press both before and AFTER Maj Weirick had been found by a Navy Behavioral health provider as fit for duty and posing no threat.

Answer:

No. Mr. Hogue has not been reprimanded.

CHARRTS No.: HASC-08-006
House Armed Services Committee
Hearing Date: March 12, 2014
Hearing: Budget Request from the Department of the Navy
Member: Congressman Jones
Witness: Gen Amos
Question: #6

NPR Interview

Question: In a February 17th interview with NPR, you stated "I have never, ever said that I wanted them crushed and kicked out" when speaking about the Marines involved with the video. However, Gen. Waldhauser gave sworn testimony, that you did, in fact, say that you wanted them "crushed." Are you saying that Gen. Waldhauser lied under oath?

Answer: Inasmuch as this matter is under review by the DoD Inspector General, I will not comment further.

CHARRTS No.: HASC-08-007
House Armed Services Committee
Hearing Date: March 12, 2014
Hearing: Budget Request from the Department of the Navy
Member: Congressman Jones
Witness: Gen Amos
Question: #7

NPR Interview

Question: During the same NPR interview, you stated "Certainly, none of them have been crushed or thrown out of the Marine Corps..." General, how many of them were not allowed to continue to serve in the Corps? Because seven of the nine Marines involved in the V3/2 case are no longer in the Marine Corps.

Answer:

Of the nine Marines held accountable for their actions in this matter, seven enlisted and two officers, only one, a Captain, was separated involuntarily after an administrative board found substandard performance on his behalf. This officer received an honorable discharge. This separation action, taken by the Secretary of the Navy, was determined subsequent to the NPR interview. No others involved were separated involuntarily as a result of performance or misconduct. One other officer accepted non-judicial punishment and remains on active duty. Four of the seven enlisted Marines were medically retired. One of the seven enlisted Marines remains on active duty; another served out his enlistment and separated from the Marine Corps. The last of the seven enlisted Marines died in a later training accident.

CHARRTS No.: HASC-08-008
House Armed Services Committee
Hearing Date: March 12, 2014
Hearing: Budget Request from the Department of the Navy
Member: Congressman Jones
Witness: Gen Amos
Question: #8

Foreign Policy Magazine Article

Question: "Tarnished Brass," a 27 February 2014 article in Foreign Policy magazine, poses this question: "The top Marine Corps general is unpopular with his troops, damaged on Capitol Hill, and under investigation in the Pentagon. Can he really still lead?" What do you think about this, Commandant?

Answer:

Editorial criticism is a part of being a service chief and making difficult decisions.

During my service as Commandant, the Marine Corps has faced a number of challenges that we have worked diligently to address and to answer in support of our national security. Marines completed our mission in Iraq after 7 hard years of fighting there. We have waged a counter insurgency campaign in Afghanistan, while simultaneously helping train and assist Afghan National Security Forces.

While thousands of Marines operated in Afghanistan, the Marine Corps continued to provide the best trained and equipped Marines ready to respond to global uncertainty around the globe. All of this being done during a period of fiscal uncertainty, marked by significantly reduced budgets, a substantial drawdown of force structure, and a civilian workforce furlough… all done during a time of war. This is unprecedented. The Marine Corps has faced these challenges head on and has performed well in every effort.

Enclosure 3

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3000 MARINE CORPS PENTAGON
WASHINGTON, DC 20350-3000

IN REPLY REFER TO:
5800
JA

10 FEB 2012

From: Commandant of the Marine Corps
To: Commander, U.S. Marine Corps Forces, Central Command

Subj: WITHDRAWAL OF CONSOLIDATED DISPOSITION AUTHORITY FOR ANY APPROPRIATE ACTION RELATIVE TO THE ALLEGED DESECRATION OF CORPSES BY U.S. MARINES IN AFGHANISTAN

Ref: (a) CMC ltr 5800 JAM of 13 Jan 2012

1. In reference (a), I designated you as the Consolidated Disposition Authority (CDA) for the alleged desecration of corpses by U.S. Marines in Afghanistan.

2. I believe some of my comments during our recent conversation could be perceived as possibly interfering with your independent and unfettered discretion to take action in these cases. To protect the institutional integrity of the military justice process, and to avoid any potential issues, I withdraw your CDA designation.

JAMES F. AMOS

Enclosure 4

NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	SPECIAL COURT-MARTIAL
	)	
v.	)	
	)	
JAMES V. CLEMENT CAPTAIN (0-3) U.S. MARINE CORPS, **and**	)	DECLARATION OF LIEUTENANT GENERAL THOMAS D. WALDHAUSER, U.S. MARINE CORPS
	)	
ROBERT W. RICHARDS SERGEANT U.S.MARINE CORPS	)	

I, Lieutenant General Thomas D. Waldhauser, U.S. Marine Corps, Declarant, hereby declare as follows:

1. In January 2012, I was the Commanding General of Marine Corps Forces, Central Command ("MARCENT") and I Marine Expeditionary Force ("I MEF"). Through media releases and notifications from my chain of command, I became aware of internet videos of U.S. Marines urinating on enemy Taliban corpses in Afghanistan.

2. On or about 11 January 2012, I contacted Headquarters Marine Corps and offered to assume jurisdiction of these cases. I believed there was a possibility the Marines involved in the incident were from or currently with various units throughout the Marine Corps. Consequently, based on previous instances where Marines from disparate commands were involved in the same case, it was my view the MARCENT legal team — and I as the MARCENT Commander — were uniquely qualified to assume jurisdiction.

3. On 13 January 2012, my authority to dispose of these cases was memorialized by General James F. Amos, the Commandant of the Marine Corps ("CMC") in a written appointment letter, whereby I was designated the Consolidated Disposition Authority ("CDA"); in the appointment, the CMC let it be known that I would "exercise completely independent judgment on the disposition of these cases."

4. I initiated a command investigation, appointing Lieutenant General Steven A. Hummer as Investigating Officer. Additionally, I took steps to initiate a Naval Criminal Investigative Service ("NCIS") investigation as well as make appropriate Law of War Notifications. Finally, I informed the CMC of these actions.

5. To my knowledge, while I was the CDA, there was never consideration given to classifying the overall command investigation or any other information related to the case. I do not recall ever discussing this topic with my legal team.

6. During January 2012, I became aware the four Marines depicted in the urination video were a Staff Sergeant who was the 3d Battalion, 2d Marines ("3/2") Scout Sniper Platoon Commander; a Staff Sergeant who was the 3/2 Scout Sniper Platoon Sergeant; a Sergeant who was the 3/2 Scout Sniper Team 4 Team Leader, whose Marines conducted the mission out of which the video surfaced; and a Sergeant who was a member of Team 4. I also learned the Marine who had filmed the incident was a Sergeant and a Combat Engineer working with Sniper Team 4 on the mission. On 31 January 2012, I notified the CMC, via email, that each of the identified Marines had retained civilian defense counsel and each was engaged in disposition discussions with my Staff Judge Advocate ("SJA").

7. In an effort to determine the range of discipline that might be appropriate, I asked my MARCENT SJA and his team to research and explore how the military had dealt with prior instances of misconduct of this sort. Although not as egregious as the desecration cases, I was informed the punishment in cases involving "war trophies" or unauthorized photographs of enemy corpses etc. had been in the range of non-judicial punishment (NJP) and Letters of Reprimand. That said, I considered the 3/2 desecration cases to have been more egregious and thus may have warranted disposition at a higher forum.

8. On 31 January 2012, after being briefed by NCIS, and following discussions with the MARCENT Chief of Staff and SJA regarding the cases of the five individuals directly involved in the video, I provided a report of my progress and tentative plans to the CMC via email. In that email, I specifically noted I had ruled out referring any of the Marines to trial by General Court-Martial. I further indicated the MARCENT SJA had "started discussion with the defense counsel for the suspected Marines. The first one, defense counsel for Sgt Richard, appears agreeable to what I have in mind." To explain that statement, I had not at that point nor did I ever agree to any specific terms on any case. Instead, I had indicated a range that I had in mind to my SJA—in the case of Sergeant Richards, in the NJP/summary court-martial range. I had not received a specific proposal from the defense but understood from my SJA that the defense appeared amenable to something in that range.

9. The CMC and I agreed we would have a chance to discuss my report more completely when we met overseas during the following week, as our schedules took both of us to the Middle East. Interestingly, at the 31 January meeting, I had been informed NCIS would require two to three more months to go through all the evidence. Therefore, in my mind, the purpose of the meeting with CMC was two-fold: first, to inform him of the current status of the case and second, based on the evidence that still needed to be analyzed, to discuss the pace of moving forward with the cases. Simply stated, we could either move forward with the evidence available at that time or wait until all evidence was reviewed before taking any action.

10. On or about 7 or 8 February 2012, I met with the CMC in a Middle Eastern country. It was a private meeting between the two of us. I do not necessarily remember the exact words or sequence of what was said, but the CMC did make a comment to the effect that the Marines

involved needed to be "crushed." The CMC went on to say that he wanted these Marines to be discharged from the Marine Corps when this was all over.

11. I gave the CMC my then-current views regarding disposition, and told him that I was considering charging the Sergeants at a lower forum than the Staff Sergeants. Specifically, I was considering in the range of NJP or Summary Courts-Martial for the Sergeants and Special Courts-Martial for the Staff Sergeants. The CMC asked if those proceedings would result in the discharge of the Marines; I explained that discharges would not be an option for the Sergeants and that while it was an option for the Staff Sergeants at a Special Court-Martial, there was no guarantee. However, I also told the CMC it would ultimately be his decision whether to terminate these Marines' careers, because each of the Marines would eventually come up for re-enlistment. At that time, the CMC could prevent them from staying in the Marine Corps because of their involvement in this case, regardless of final disposition.

12. The CMC asked me specifically something to the effect of why not or will you give all of them General Court-Martials? I responded, "No, I am not going to do that," or words to that effect, stating that I did not believe any of the cases warranted General Court-Martial. The CMC told me that he could change the Convening Authority on the cases and I responded that would be his prerogative. At the end of the conversation, I told him I appreciated his input and I would take it under consideration as I moved forward with these cases. At that time the only final decisions I had made were that I would not send any of these Marines to a General Court-Martial, and that I would hold the Staff Sergeants to a higher level of accountability than the Sergeants.

13. The tone of the conversation was at times tense, but always professional. Although I was surprised by parts of the discussion, I believed I had maintained my independent role as a convening authority and that nothing about the conversation would have deterred me from continuing to do so. That is what I meant when I told the CMC I would take his input under consideration. After the conversation, we parted ways and went to our respective aircraft to continue to separate locations.

14. I immediately departed for the continental United States. A few hours later, my plane landed for crew rest and refuel in Europe, at which time I received a message to call General Joseph E. Dunford, Jr., the Assistant Commandant of the Marine Corps ("ACMC"). The ACMC said he was not sure what had happened during my conversation with the Commandant. The ACMC indicated the Commandant was upset and regretted the conversation he had with me. Additionally, the CMC said he felt he had put me, himself (the CMC), and the office of the Commandant in a bad position. The CMC indicated because of this, he was going to remove me as the CDA for these cases and that a formal letter would follow. I told the ACMC I understood, but this issue would likely come up again some time in the future. Because it was obvious the CMC had made a decision to replace me as CDA, I did not question the ACMC or CMC on the decision. In my view, the Commandant had acknowledged he made a mistake and this was his way of addressing it and moving forward.

15. On 10 February 2012, I received a letter from the CMC withdrawing my CDA designation. I was confident I could have remained on the case and maintained my independence and

discretion if I had been required to do so. I had never been removed as the convening authority of a case before.

16. On Sunday, 12 February 2012, the Commandant contacted me and we talked via Video Teleconference. He admitted that he had crossed the line and that replacing me as CDA was how he was going to fix that. He told me that if ever asked about the incident, I should simply tell the truth.

17. I did attend the Executive Off-Site ("EOS") in May of 2012. I understand that at this EOS there was a discussion of the urination incident but I did not attend this discussion nor at any other time did I discuss the matter or my conversation with the CMC with anybody at the EOS. I did not participate in any discussion about the urination incident nor did I agree to any recommended way ahead.

18. Since my removal as CDA in these cases, I have not spoken with anyone regarding these cases or the above-mentioned conversation with the CMC, until I was interviewed by Government Counsel and Defense Counsel in July 2013. I understood another convening authority was going to receive this case and that discussions about the case would not be healthy for the process or the independence of the new convening authority. I specifically have never discussed any aspect of this case with Lieutenant General Mills, the new convening authority.

[*signature page follows*]

19. The information contained in this Declaration is true and correct to the best of my knowledge.

Respectfully submitted,

T. D. WALDHAUSER
Lieutenant General
United States Marine Corps

Acknowledgement

STATE OF VIRGINIA
COUNTY OF PRINCE WILLIAM

Before me this 23d day of July, 2013, the above-named Declarant, **Lieutenant General Thomas D. Waldhauser**, did swear or affirm that the information contained in the foregoing Declaration is true and correct to the best of said Declarant's knowledge.

KURT J. BRUBAKER
Colonel, U.S. Marine Corps
Officer in Charge, Legal Services Support Section, National Capital Region

Enclosure 5

WALTER B. JONES
3D DISTRICT, NORTH CAROLINA

ROOM 2333
RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
TELEPHONE: (202) 225-3415

COMMITTEES:
COMMITTEE ON ARMED SERVICES

DISTRICT OFFICE:
1105-C CORPORATE DRIVE
GREENVILLE, NC 27858
(252) 931-1003

(800) 351-1697

Congress of the United States
House of Representatives
Washington, DC 20515-3303

May 13, 2014

The Honorable Ray Mabus
Secretary of the Navy
1000 Navy Pentagon
Washington, DC 20350-1000

Dear Secretary Mabus:

I write to you today regarding Commandant Amos' responses to the questions I posed during the Department of Navy's Posture Hearing before the House Armed Services Committee on 12 March 2014. I must say, I am quite disappointed with the unacceptable time frame in which these answers were delivered. My main concerns rest with two of Commandant Amos' responses in particular.

In question #4, I asked about Major Weirick's email to Peter Delorier and how the commandant became aware of this email, as well as the subsequent protective order taken out against Major Weirick. The commandant responded that he did "recall hearing about Major Weirick's 21 Sept 2013 email briefly from someone on his staff," but he did not "remember the full context, nor the circumstances" when he first read it. Not only does this not answer my question about who brought the email to his attention, but it deeply concerns me that the leader of the United States Marine Corps cannot remember how he found out about an email that was so "threatening" that it called for a protective order and the removal of Major Weirick from his position. If I was named in a protective order, I can assure you that I would remember the details quite clearly. I am forced to wonder if Robert Hogue is the man the commandant is protecting, since Delorier worked under Hogue. This answer is weak, at best, and I request the real answer be provided.

My second concern regards question #6. Commandant Amos declined to answer my question about the NPR interview and General Waldhauser citing that the matter is under review by the DoD IG. This strikes me as being terribly ironic, Mr. Secretary. I find it terribly ironic that the commandant had no problem discussing the exact same issue during the 17 February 2014 interview with NPR, yet refuses to give an answer to a sitting member of Congress. Throughout this entire ordeal, Marines have been required to answer questions about issues under review by DoD IG. For example, Captain James Clement was required to defend himself about several matters under investigation. I would like to know why the commandant felt it was appropriate to discuss on national radio, but refused to answer the same question from a member of Congress.

Mr. Secretary, you placed this man in charge of the United States Marine Corps, an institution that prides itself on honesty, trust, and integrity. These non-answers speak volumes about the direction in which the Marine Corps is heading, and by which the Marine Corps is lead. Despite any personal feelings the commandant and his staff may have, I am still a sitting member of Congress and one of the most senior members of the House Armed Services Committee. It is the responsibility and obligation of the Department of Navy and its members to answer any question the committee and I may have in a forthright and timely manner. The commandant's responses, via your approval, did nothing but disappoint, disrespect, and offend me.

It is my hope after reviewing this information that you would feel an obligation and responsibility to look into the facts that I have brought to your attention and give me, as well as the committee, a response as soon as possible.

Sincerely,

Walter B. Jones

Walter B. Jones
Member of Congress