

NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES)	
)	SPECIAL COURT-MARTIAL
V.)	
)	
JAMES V. CLEMENT)	DEFENSE MOTION FOR DISMISSAL
)	DUE TO UNLAWFUL COMMAND
CAPTAIN (O-3))	INFLUENCE BY THE COMMANDANT
U.S. MARINE CORPS)	OF THE MARINE CORPS

1. Nature of Motion.

Pursuant to R.C.M. 104 and R.C.M. 906 and Article 37, Uniform Code of Military Justice, 10 U.S.C. § 837, this is a motion to address both apparent and actual unlawful command influence by the Commandant of the United States Marine Corps (CMC), his staff, and other senior Department of Defense officials. The investigations, dispositions and prosecutions of the alleged desecration of corpses by U.S. Marines in Afghanistan have been fatally infected by the CMC's¹ unlawful control from January 2012 to the present day. Well-documented evidence reveals at least six instances of UCI—each alone sufficient to justify dismissal with prejudice of all charges and specifications against Captain Clement—including (1) corrosive public statements by CMC, Marine Corps senior leadership (at the direction of CMC) and senior DoD officials regarding the underlying charges prior to trial; (2) CMC's unlawful removal of the consolidated disposition authority (CDA) after the CDA refused to follow the CMC's demand that Captain Clement face a General Court-Martial; (3) CMC's memorialized attempts to conceal his intentional influence over the proceedings, including the misclassification of exculpatory evidence; (4) CMC's highly prejudicial and inflammatory comments during his "Heritage Tour" about the underlying incident; (5) CMC's demand that certain Generals and senior Marine Corps

¹ The use of CMC includes his civilian and military counsel and his staff.

leadership involved in the case follow his “guidance” to remove Captain Clement and other named Marines from the Marine Corps; and (6) depriving Captain Clement from successfully preparing a defense by ensuring various exculpatory evidence was withheld from the defense. Because this fatal UCI and its resulting prejudice to Captain Clement cannot be cured, all charges and specifications should be dismissed with prejudice.

2. Summary of Facts.

A. Captain Clement is presently charged with dereliction of duty and conduct prejudicial to good order and discipline in the armed forces resulting from his alleged failure to supervise and report junior Marines with respect to their alleged indiscriminate firing during a 27 July 2011 patrol in the village of Sandala, in the Helmand Province, Afghanistan. *See* charge sheet, Exhibit 1. He is scheduled for trial before a Special Court-Martial on 1 November 2013 empanelled by LtGen Mills consisting of officers from MCCDC, Quantico, Virginia.

B. General James F. Amos, USMC, is the 35th Commandant of the Marine Corps and is the highest-ranking officer in the Marine Corps. His duties and responsibilities include “exercising supervision . . . over such of the members and organizations of the Marine Corps and the Navy as the Secretary [of the Navy] determines . . .” *The Marine Corps Manual*. The Commandant is given the highest level of respect and reverence by his Marines. Additionally, the Commandant is a member of the Joint Chiefs of Staff. 10 U.S.C. § 151(a).

C. The public record shows that a toxic public atmosphere was promoted by the prejudicial and virulent public comments by CMC and other senior officials of the United States. The drafting, endorsement and publication of all public statements about these cases were controlled by CMC. As such, no reasonable member of the public could have confidence in the integrity of or the administration of justice in these cases.

D. The evidence will show that on 13 January 2012 CMC appointed and gave independent unfettered authority to LtGen Thomas D. Waldhauser, the CG of MARCENT, as the CDA - a role LtGen Waldhauser had successfully executed on many occasions in the past.

E. After a month of successfully executing his duties as CDA, the CMC fired LtGen Waldhauser on 10 February 2012 because he refused to be influenced by the CMC's demands to send all of the first cases to General Courts-Martial.

F. To aggravate the infection and subversion of the "replacement," the CMC asserted in writing that his comments to the CDA "could be perceived as possibly interfering" with the CDA's "independent and unfettered discretion," when CMC well knew that LtGen Waldhauser refused to agree to his importuning for more severe dispositions. In other words, LtGen Waldhauser demonstrated his faithfulness to his oath to be independent and fair notwithstanding the importuning of the CMC.

G. The CMC, his lawyers, and LtGen Waldhauser never disclosed their conversation or the confirming letter of 10 February 2012 (the "JA" in the date block of the letter clearly indicates that the letter was written in the Judge Advocate Division by CMC's counsel) to anyone, including all those accused and their defense counsel in the desecration cases, until 28 June 2013, after undersigned counsel contacted LtGen Waldhauser and he agreed to be interviewed by counsel for Sgt Richards and Captain Clement.

H. Thus, the replacement of LtGen Waldhauser as the CDA with LtGen Mills, CG MCCDC, for these cases was a ruse and an excuse by CMC to plant a CDA who would "follow the guidance of CMC," notwithstanding the written commitment and order by the CMC that the new CDA, just like old one, had independent and unfettered discretion in the investigation, disposition and prosecution of all V3/2 cases.

I. CMC disclosed to LtGen Mills the reasons for the firing of LtGen Waldhauser. LtGen Mills, however, made no disclosure about the firing of LtGen Waldhauser even though he had a duty and obligation to protect the rights of the accused to assert complete defenses. Thus, they concealed the clear unlawful intentions and influence of the CMC from all those entitled to receive it under the law.

J. The evidence shows that the CMC could not resist the temptation and decided to further the concealment of his unlawful intentions by ordering on 29 February 2012, without proper authority or basis, the imposition of a secret classification upon the testimony and materials disclosed by the previously unclassified investigations of the alleged desecration cases. LtGen Mills lodged no objection to this improper classification.

K. In March of 2012, LtGen Mills sent an unsolicited e-mail to the CMC approving, as complete and thorough, the flawed Command Investigation by LtGen Hummer.

L. In the spring of 2012, CMC issued a White Paper to all Marines, made prejudicial public statements about these cases and then went on the so-called Heritage Tour to the major Marine Installations to call the entire Marine Corps to account for this case, by condemning the conduct in this case and insisting that those accused be called to account over the objection of his counsel not to infect the due administration of justice. LtGen Mills was well aware of the Heritage Tour and sat idly by without voicing an objection to the prejudicial remarks of CMC that poisoned the very commands and Marines who would judge these cases.

M. Again, the evidence shows CMC never disclosed in these Heritage briefings that he had interfered with and fired the first CDA because the CDA would not yield to his demands to order General Courts-Martial of those accused.

N. The evidence shows that during May 2012, at the direction and “guidance of the CMC,” LtGen Mills met with CMC and other General officers at Quantico, Virginia, to sort out, decide and agree on who would be sent to Article 32 hearings and who would not be disciplined. The decisions as to who to charge and not charge memorialized in e-mails and letters to CMC which he approved and executed were based on erroneous factual information and unsavory political considerations, but at all times the CMC’s “guidance” was followed to send them to Article 32 hearings.

O. The evidence shows that thereafter, in July and August 2012, LtGen Mills, following the CMC’s May “guidance,” pursued NJPs on the junior Marines and was closely supervised by the CMC in his press release. Again neither the letter to LtGen Waldhauser nor the reasons for his firing were disclosed by CMC or LtGen Mills to the accused.

P. The evidence shows LtGen Mills, following the May CMC “guidance,” ordered Article 32 hearings and more severe PTAs on the senior NCOs and insisted on Courts-Martial which CMC had insisted on with LtGen Waldhauser.

Q. The evidence shows that in November 2012, CMC’s counsel instructed LtGen Mills’ SJA, Col Jessie Gruter, to instruct Chief Trial Counsel not to disclose the UCI arising from the May 2012 “guidance” meetings and writings of the Generals, to the senior NCO snipers or their counsel until after he signed them up to PTAs. Then, and only then, would the disclosure be made along with a request for waiver of all issues relating to unlawful command influence, with the message that if they refused, the PTAs would not be approved by the CDA.

R. Chief Trial Counsel carried out the orders but the snipers balked at waiving the UCI defense based on the May 2012 CMC “guidance.” Of course, the snipers and their counsel were never made aware of the reason LtGen Waldhauser was no longer their CDA and his plan of

less severe dispositions. CMC was concealing his own UCI from his Generals, his Marines and to the accused and their counsel who had the right to know.

S. CMC and his attorneys continued the concealment when the 10 February 2012 letter to LtGen Waldhauser was not produced in response to a November 2012 discovery request by Major King, detailed defense counsel to Sgt Joseph Chamblin. Instead, he was untruthfully told by trial counsel that all responsive materials had been produced in response to his discovery requests.

T. Thereafter on or about 15 December 2012, LtGen Mills, following the CMC's May "guidance," declined a PTA to avoid a felony conviction with Sgt Richards, the patrol leader, and ordered him to a Special Court-Martial.

U. The evidence shows that on 29 January and 8 February 2013 LtGen Mills, following the CMC's May "guidance," announced to the CMC that he was charging Sgt Richards, Captain Clement and Captain Thornton. Additionally, in direct violation of the JAG manual, LtGen Mills noted he would name Sgt Richards, Captain Clement and Captain Thornton in a press release suggesting the possibility of a General Court-Martial even though the evidence showed there was no evidence to support the charges against Captain Clement or Captain Thornton.

V. LtGen Mills charged Captain Clement on 29 January 2013 with violations of Articles 133 and 107 which were dismissed by Trial Counsel on 14 March 2013. He also charged Captain Clement with violation of Article 92 which was dismissed by Trial Counsel one day before the Article 32 hearing on 9 April 2013. He charged Captain Clement with violations of Article 133 which was dismissed by Trial Counsel on 24 June 2013.

W. In a 5 February 2013 e-mail, LtGen Paxton, the new ACMC, reported the contents of several meetings by LtGen Mills in which the status of cases and new information was reported, also indicating that the CMC expressed his “concern that all cases are fully litigated.”

X. On 8 February 2013, LtGen Mills, in explaining a proposed press release to CMC regarding the charges that had been preferred against Captain Clement, grossly misinformed the CMC that Captain Thornton, a second officer charged, had knowledge of the urination incident and trophy photos of the corpses and failed to report them, when in fact there was never any evidence developed or presented that Captain Thornton was aware of the urination event or trophy photos. In fact, the Hummer report specifically states that Captain Thornton (as well as Captain Clement) was not present during the urination incident and makes no finding of fact or renders any opinion that he was aware of the urination or the trophy photos.

Y. LtGen Mills never corrected this misstatement, even after Captain Thornton appeared before him during his Article 15 hearing and denied having seen the urination or any trophy photographs of the enemy corpses. The record of that Article 15 hearing is a travesty of justice. LtGen Mills never corrected his false representations to CMC because under the May CMC “guidance” he did not know the correct facts and the facts were irrelevant. The mission “guidance” was to get rid of the Marines.

Z. On 14 March 2013, the charges under Articles 133 and 107 were dismissed against Captain Clement. On 9 April an Article 92 charge was dismissed against Captain Clement. On 24 June another Article 133 charge was dismissed against Captain Clement. No press releases were issued on each of those occasions.

AA. On 10 April 2013, Captain Clement’s Article 32 hearing was held. Captain Clement was unable to present evidence in his favor and to cross-examine a key witness because

the materials were erroneously classified. The trial counsel made no recommendation for disposition. The Article 32 officer did not recommend a court-martial. He recommended NJP on the one charge involving excessive and indiscriminate fire. Captain Clement objected to the finding in a letter to LtGen Mills, requested a meeting with LtGen Mills and declined NJP.

BB. LtGen Mills, following the May CMC “guidance,” declined to meet with counsel for Captain Clement on three occasions before and after his referral in which he would have learned that the NCIS, Hummer and defense investigations showed no factual basis for the charges against Captain Clement.

CC. In April 2013, consistent with LtGen Waldhauser’s assessment, trial counsel and the Article 32 officer declined to recommend disposition by courts-martial against Captain Clement. The Article 32 officer recommended NJP on the excessive fire charges, notwithstanding the overwhelming proof that there was disciplined, focused, discriminate fire during the patrol. Captain Clement declined NJP, sent a detailed letter to LtGen Mills objecting to the Article 32 officer’s recommendation and sought to meet with LtGen Mills to demonstrate the factual flaws in the remaining charges. LtGen Mills declined to meet or respond to counsel’s letter - all in keeping with his mission under the May 2012 CMC “guidance.”

DD. The evidence shows that on 10 May 2013 LtGen Mills, in accordance with CMC’s May “guidance” and contrary to the recommendation of his trial counsel and the Article 32 officer, referred the remaining charges to a Special Court-Martial at Camp Lejeune, North Carolina, with a member panel from MCCDC sitting at Quantico, Virginia.

EE. Notwithstanding the declassification of the videos and investigation, Captain Clement has been crippled in this case by his inability to gain access to exculpatory evidence and

evidence of false testimony by government witnesses, due in large part by failure for months to deliver and make available the bogus, classified materials at Quantico.

FF. Several Marine Corps SJAs, following the CMC “guidance,” have interfered with Captain Clement’s right in accordance with his Sixth Amendment rights to take in private the witness statements from the senior Generals and personnel that were encouraged by this court.

GG. Despite numerous discovery requests beginning on 22 February 2013, including requests for all communications in whatever form seeking evidence of UCI and *Brady* material, nothing was produced on the LtGen Waldhauser affair until 28 June 2013. Production did not occur until after the defense counsel contacted LtGen Waldhauser on 15 June 2013 and learned that CMC had engaged in intentional unlawful command influence, fired LtGen Waldhauser for not submitting to his demands for General Courts-Martial, threatened to replace him and then concealed these events from all of the accused, their counsel, his Generals and, most of all, the Marines he scolded on his Heritage Tour about integrity, honor and accountability. Further, as will be more specifically disclosed in the Motion to Compel discovery, the government has failed to produce all of the discovery requested by Captain Clement.

HH. No reasonable member of the American public would countenance such conduct or trust the obvious subversion of the Uniform Code of Military Justice.

3. DISCUSSION.

A. UCI CHAPTER I: Poisoning the Public Atmosphere.

1. Prejudicial Public Statements by the Theater Commander, CMC, and Senior Defense Officials.

After the 10 January 2012 internet release on YouTube of the video of Marines urinating on human remains, a chorus of senior defense officials condemned the urination and called for punitive actions against all those involved:

Statements of General John R. Allen, USMC, then commander of the International Security Assistance Force and U.S. Forces Afghanistan. On 13 January 2012, General Allen told the Associated Press: "Such acts in no way reflect the high moral standards and values we expect of our armed forces on a daily basis." Exhibit 2; *see also* Exhibit 3.

Statements of General James Amos, Commandant of the Marine Corps. On 11 January 2012, CMC was quoted by CBS – 9 WNCT Greenville, North Carolina, as having said: [conduct on the video is]"wholly inconsistent with the high standards of conduct and warrior ethos." Exhibit 4. Additionally, on 7 May 2012, the CMC was quoted in the *Marine Corps Times*: "the undisciplined conduct represented in these incidents threatens to overshadow all our good work and sacrifices." It represents "the 'blatant disregard for the unambiguous direction' outlined in CENTCOM General Order 1B which governs the dos and don'ts and overall standards of behavior for US Troops on duty in the war zone. Exhibit 5.

Statements of Secretary of Defense, the Honorable Leon Panetta. The previous Secretary of Defense (SECDEF), the Honorable Leon Panetta, was the most senior civilian in the Department of Defense (DOD). He made several public statements concerning the video of the Marines urinating on the enemy dead. For example, in the 12 January 2012 Congressional Quarterly, the SECDEF was quoted as stating: "I condemn it in the strongest possible terms... I have ordered the USMC and ISAF commander Gen John Allen to immediately and fully investigate this incident. This conduct is entirely inappropriate for members of the US military and does not reflect the standards or values our armed forces are sworn to uphold. Those found to have engaged in such conduct will be held accountable to the fullest extent." Exhibit 7; *also* Exhibits 3, 6 and 8.

Statements of the Secretary of the Navy, the Honorable Ray Mabus. On 13 January 2012, the Secretary of the Navy (SECNAV), the Honorable Ray Mabus, made these remarks to the Congressional Quarterly in referring to the urination video: it was "appalling and outrageously offensive." Exhibit 7.

Statements of Secretary of State, Hilary Clinton. On 12 January 2012, the Secretary of State was quoted in CNN Wire as having said about the urination video: "total dismay at the story ...;" described the behavior as "deplorable." "Anyone found to have participated or known about it [urination], having engaged in this kind of conduct, must be held fully accountable." Exhibit 9; *see also* Exhibit 3.

2. **CMC Appoints the Consolidated Disposition Authority and the Investigations Begins.**

On 11 January 2012, the Marine Corps announced that it was investigating the actions depicted on the video ("This matter (video) will be fully investigated."). Also on 11 January 2012, LtGen Thomas D. Waldhauser, CG MARCENT, informed LtGen Tryon that "MARCENT will assume jurisdiction of this case. We will take steps to initiate an NCIS investigation as well as make the appropriate Law of War notifications." LtGen Waldhauser 11 January 2012 e-mail to LtGen Tryon, copying CMC among others, Exhibit 10.

On 13 January 2012, the CMC put 3/2 on legal hold and appointed LtGen Waldhauser as consolidated disposition authority ("CDA") to initiate any necessary investigation and take "appropriate administrative or disciplinary actions," further providing that the "appropriate disposition of any allegations is within [LtGen Waldhauser's] sole and unfettered discretion." 13 January 2013 Commandant of the Marine Corps Designation of Consolidated Disposition Authority for Any Appropriate Action Relative to the Alleged Desecration of Corpses by U.S. Marines in Afghanistan, Exhibit 11.

On 13 January 2013, LtGen Waldhauser appointed LtGen Steven Hummer as investigating officer for the matter, with Col Bligh appointed legal advisor. LtGen Waldhauser 13 January 2012 e-mail to Generals Mattis and Allen, copying CMC, Exhibit 12. After his 13 January 2012 designation as CDA, the CMC provided LtGen Waldhauser updates regarding developments in the NCIS investigation. *See* CMC 13 January 2012 e-mail to LtGen Waldhauser and Gen Allen, Exhibit 13; CMC 15 January 2012 e-mail to LtGen Waldhauser, Gen Allen, and Gen Mattis, Exhibit 14. LtGen John Paxton likewise was providing CMC with status reports, while indicating that CMC may be the same “info you may be getting from Tom...” LtGen Paxton 16 January 2012 e-mail to CMC, copying among others, LtGen Waldhauser, Exhibit 15.

CMC responded to LtGen Paxton’s e-mail, indicating that he had other sources of information regarding the investigation:

OK Jay ... thanks much. I’ve got a different story on the rank structure but we are close and will let NCIS sort it out. Regardless they [sic] are more senior Marines which is troubling for all of the obvious reasons.

See CMC 16 January 2012 e-mail to LtGen Paxton, copying among others LtGen Waldhauser, Exhibit 15.

CMC also communicated with LtGen Waldhauser about providing information to LtGen John Kelly to brief the Secretary of Defense. CMC 29 January 2012 e-mail to LtGen Waldhauser, LtGen Hummer, copying others, Exhibit 16; CMC 4 February 2012 e-mail to LtGen Waldhauser, LtGen Hummer, LtGen Kelly, and MajGen Vaughn Ary, (“[N]eeds to be sufficient to ensure that SecDef has ground truth as we know it today...”), Exhibit 17. The CMC or his staff was subsequently kept up to date on the information about the investigation being developed for the SecDef. Col Gillette 4 February 2012 e-mail to LtGen Waldhauser and MajGen Ary, and e-mails attached thereto, Exhibit 18; Col Brassaw 4 February 2012 e-mail to

LtGen Waldhauser, Col Gillette, and MajGen Ary, and e-mails attached thereto, Exhibit 19; MajGen Ary 4 February 2012 e-mail to LtGen Waldhauser and Col Gillette, and e-mails attached thereto, Exhibit 20; MajGen Ary 4 February 2012 e-mail to LtGen Kelly, copying CMC, LtGen Waldhauser, and LtGen Hummer, and e-mails attached thereto, Exhibit 21; CMC 4 February 2012 e-mail to MajGen Ary and LtGen Kelly, copying LtGen Waldhauser and others, and e-mails attached thereto, Exhibit 22; CMC 4 February 2012 e-mail to MajGen Ary and Gen Dunford, and e-mails attached thereto, Exhibit 23.

On 31 January 2012, LtGen Waldhauser set forth a report and plan for CMC to discipline the Marines responsible for the desecration. LtGen Waldhauser 31 January 2012 e-mail to CMC, Exhibit 24. LtGen Waldhauser and CMC agreed to meet overseas to discuss further.

B. UCI CHAPTER II: The CDA Is Fired by CMC Because He Refuses to Comply with CMC's Demand to Send the Accused Marines to a GCM.

After a month of successfully executing his duties as CDA, the CMC fired LtGen Waldhauser on 10 February 2012 because he refused to be influenced by the CMC's demands to send all of the first cases to General Courts-Martial. In a sworn Declaration, LtGen Waldhauser explains that he was fired because he refused to abandon his duty to act impartially:

- 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. Declaration of LtGeneral Thomas D. Waldhauser, USMC, at ¶ 9, Exhibit 25.

- 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. Declaration of LtGeneral Thomas D. Waldhauser, USMC, at ¶ 10, Exhibit 25.
- 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.

Declaration of LtGeneral Thomas D. Waldhauser, USMC, at ¶ 11, Exhibit 25.

- 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 move 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. Declaration of LtGeneral Thomas D. Waldhauser, USMC, at ¶ 12, Exhibit 25.
- 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.

Declaration of LtGeneral Thomas D. Waldhauser, USMC, at ¶ 13, Exhibit 25.

- 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. 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 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. Declaration of LtGeneral Thomas D. Waldhauser, USMC, at ¶ 14, Exhibit 25.
- 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. Declaration of LtGeneral Thomas D. Waldhauser, USMC, at ¶ 15, Exhibit 25.

On 10 February 2012, CMC issued a written order appointing LtGen Mills,² the CG MCCDC for any appropriate action relative to the alleged desecration of enemy corpses by U.S. Marines in Afghanistan. The order further “encouraged” LtGen Mills to consider all command recommendations in the exercise of his “sole and unfettered discretion.” Exhibit 27.

Thereafter, as more fully set forth below, the investigation and the disposition decisions were closely supervised by the CMC and his counsel. LtGen Mills regularly reported the progress of the investigations and dispositions to the CMC. On 23 March 2012, CDA Mills sent a report to the CMC that the Command (Hummer) investigation was thorough and complete when in fact it was seriously flawed. *See* Exhibit 28.

C. UCI CHAPTER III: CMC and His Staff Take Steps to Conceal CMC’s Unlawful Command Influence.

1. The Investigation Is Changed From Unclassified To Classified.

From 13 January 2012 to 29 February 2012, this investigation and its materials were unclassified. Declaration of LtGeneral Thomas D. Waldhauser, USMC, at ¶ 5, Exhibit 25.

On 29 February 2012, without any authority or any consultation with LtGen Mills whatsoever, Robert Hogue, counsel to the CMC, ordered the investigation to be classified as secret. Exhibit 29.

Though classified as secret as a result of the request by Mr. Hogue, questions persisted about whether the classification was appropriate. Robert Hanson, the Command Security Manager, Designated Disclosure Authority, MCBQ/MCCDC, Quantico, questioned the

² In an e-mail of 20 February 2013 Col Gruter, SJA MCCDC advised his colleagues in HQMC that on 9 February 2012 he was told that the change was none of his concern. He does not disclose who told him. We know the Judge Advocate Division in HQMC knew and, of course, LtGen Mills was aware because he was the new CDA for the desecration cases. Exhibit 26.

classification, stating: “From my perspective; The attached action memo [referring to Mr. Hogue’s 29 February request] does not state the reason for the classification decision, nor does it address anything about trial proceedings (assuming there will be) that would include testimony for or against.” Robert Hanson 6 March 2012 e-mail to William Potts, copying Leslie Bethune, Exhibit 30.

After receiving Mr. Hanson’s e-mail, Mr. Potts [Manager, Information & Personnel Security Program] responded, “We weren’t consulted on this process but we’re engaged trying to get it fixed. No effort to turn anything into a class guide and you are correct, it was done improperly. The primary problem is that lawyers were engaged to try and make or advice the Commandant and PP&O on classification issues instead of our office.” William Potts 6 March 2012 e-mail to Robert Hanson, copying Leslie Bethune, Exhibit 30.

Ms. Bethune [Security Manager, HQMC] also responded to the e-mail, stating: “You are absolutely right about the information that is being classified falling in the area of EO 13536 Sec 1.7. This is not a classification guide and the information that is classified SECRET/NOFORN I believe was not classified using any classification guides nor do I believe there are any SCGs out there that would cover this information. This is going to come back and [sic] bite them. I’m just saying...” Leslie Bethune 6 March 2012 e-mail to Mr. Hanson and Mr. Potts, Exhibit 31.

Mr. Hanson then advised Maj Weirick and LtCol Gruter that “[p]ersonally, I am not convinced that the subject matter of this investigation should be classified at any level because a definitive reason for a classification decision has not been determined per EO 13526.) Mr. Hanson 6 March 2012 e-mail to Maj Weirick, copying LtCol Gruter, Exhibit 31.

Mr. Potts, as far back as March 2012, understood exactly where the improper classification of the investigation was headed, when he responded to an e-mail for Major James Weirick: “If

this goes to the next level of administration or judicial action, there are some additional considerations that a lawyer, versed in classification issues, might be able to use to shoot holes in our whole process and bring the whole decision making process into question. **In the interest of keeping the Marine Corps from looking like a box of buffoons, I'd hope the question of punishment remains in the area of a swift kick in the ass.** NJP, with the ever present option of court-martial, would open that box and spread us all over the media; would probably get Steven Aftergood, Project on Government Secrecy, involved and he knows the rules probably as well as anyone around. **He'd make us look silly if he supported a defense contention that the video was improperly classified."** William Potts 14 March 2012 e-mail to Maj Weirick (emphasis added), Exhibit 32.

Major Weirick also advised his superiors of the issues raised by the classification of the videos/investigation, stating:

"The Memo does not give enough detail about the classification...

The information may not qualify for classification ... [because] the videos were not produced by the Gov ... [t]he Gov is unable to account for all of the versions of the videos ... The Memo does not document the classification decision nor does it provide a 'concise reason for classifying each item ...

It has been suggested that the classification decision may be revisited if there are courts-martial, *i.e.*, the videos will be made unclassified for trial. This could be viewed as delaying the release of information."

Maj Weirick 21 March 2012 e-mail to Col Mark Jamison, copying LtCol Jesse Gruter, Exhibit 33.³

³ The improper classification of the investigation and its materials is the subject of two sworn complaints filed by Deputy SJA MCCDC, Major James Weirick, with the DOD IG dated 14 March 2013 and the Navy IG dated 18 April 2013. Exhibit 69.

D. UCI CHAPTER IV: CMC's Prejudicial Comments During the "Heritage Tour."

1. The Commandant's White Paper and Heritage Tour Briefs.

On March 23, 2012, the Commandant issued White Letter 1-12, Leadership and Conduct, addressing "recent, widely-publicized incidents [that] have brought discredit on the Marine Corps" White Letter 1-12, Exhibit 34. Shortly thereafter, the Commandant and the Sergeant Major of the Marine Corps conducted a live tour of most Marine Corps installations. The intent of this tour was "getting the Corps back on a heading of True North." White Letter 3-12, Exhibit 35. During this tour, the Commandant and Sergeant Major "were able to speak face-to-face with the bulk of [the] Corps leadership." Exhibit 35. During this tour, the Commandant and Sergeant Major presented a brief called the "Heritage Brief."

a. CMC's Parris Island "Heritage Brief."

The Commandant's presentation of the Heritage Brief at Marine Corps Recruit Depot Parris Island ("Parris Island") on 19 April 2012 was recorded and transcribed. Transcript of CMC Heritage Brief Parris Island, Exhibit 36. During the Commandant's presentation at Parris Island, the Commandant recalled a conversation he had with General Carl Mundy, USMC (Ret.):

[Gen Mundy] said, "I am talking about what's in here. I'm talking about what makes us different. I am talking about the spiritual well-being of the United States Marine Corps. I am talking about the heart and soul, the thing that makes us different, the thing that causes us to make the right decision each and every time; even if it is difficult; even if it is not popular; even if nobody else wants to go that direction, they all want to go that direction, the Marine will go that direction. You see it in combat, you see it around, you know exactly what I am talking about." He said, "You are responsible for that." And then he said. "And if you should fail to maintain the spiritual health and well-being of the United States Marine Corps, you will have failed as the 35th Commandant."

Exhibit 36, p. 5.

During the Commandant's presentation at Parris Island, the Commandant said:

From my perceptive as the Commandant, the institution that we love, this institution, this uniform that we are wearing today and we will watch so proudly tomorrow morning when those Marines march by on graduation, is under attack from within and without.

Exhibit 36, p. 6.

CMC's Parris Island discussion proceeded to identify the allegations in news reports of Marines urinating on enemy corpses in Afghanistan:

Well, how the hell did we figure out it was okay to take cameras outside the FOB? General Order No. 1 says: you will not take video equipment outside the FOB or the COB ever, unless you are a Combat Camera Marine or you are with public affairs or you are with something and you got authorization. It is clear, unequivocally clear. So when did it come okay that now I am going to take my iPhone out, I am going to take my Droid out and I am going to hold it up and snap pictures? When did that become okay? And then it was not good enough with just that, we had to put helmet cams on people. I mean, it's just like the NFL. When did that become okay? You are saying, it never did, sir. Well, it must have because staff sergeants and first sergeants and captains knew about it, so did the operations officer, so did the battalion commanders. When did that-- when did we turn our back on that, and say we do not have to do that?

Exhibit 36, p. 14.

CMC's Parris Island speech also emphasized "accountability":

But we have got a problem with accountability. I see it across the Marine Corps. I see it in the Boards of Inquiry, they come in, their results and we have got an officer that has done something absolutely disgraceful and heinous and the board-- he goes to-- he goes to a court-martial and he goes before a board of colonels and we elect to retain him. Why? Do I need this captain? Do I need this major? I don't. Why would I want to retain someone like that?

Exhibit 36, p. 13.

I see the same thing with staff NCOs. You go before a board and the board sits around, "milk of human kindness" and misguided

loyalty and says this is a good staff sergeant, this is a good gunny, he's got 17 years in, no mind the fact that he was sleeping with a corporal and he is married, we already took him, we have already hammered him, he's got a letter of reprimand, let's keep him. Why? There is a lack of accountability that just befuddles me with the commanding officers and the senior enlisted in the Marine Corps. And I will tell you that. I am very, very disappointed.

Exhibit 36, p. 13.

Referring to Court-Martials, the CMC stated,

I see this stuff in court-martials, I see it in the behavior and just for the life of me I can't figure out why we have become so ecumenical? Why we have become so soft? Where we're gonna keep a sergeant that absolutely doesn't belong in the United States Marine Corps. Why would we need to do that? And the answer is we don't. We have-- you know, we laugh at the Navy for relieving all of their commanding officers of ships. They relieved 15 last year. And we look among and go, "Hey, it will never happen to us, never happen to us." Well, no offense, but they are holding their captains accountable. I got commanding officers of battalions and squadrons and units that are not.

Exhibit 36, p. 13.

Additionally, the CMC discussed how to "get rid of" Marines:

And I want the staff NCOs in here and I want the officers in here, the commanding officers, and the sergeants major to take a hard look at how we are doing business. If you have a Marine that's not acting right, you've got a Marine that deserves to leave the Corps, then get rid of them; it is as simple as that.⁴

Exhibit 36, p. 13.

Near the end of the Commandant's presentation of the Heritage Brief at Parris Island, the Commandant quoted from a letter written by then-Brigadier General Victor Krulak, USMC, to the then-Commandant, General Randolph Pate, USMC:

[Gen Krulak wrote:] "Likewise, should the people ever lose that conviction as a result of our failure to meet their high, almost

⁴ Of course, he did not include any of his own conduct with LtGen Waldhauser in this family meeting.

*spiritual, standards, the Marine Corps will quickly disappear.”
That is why I am here and that is why Sergeant Major Barrett is
here.⁵*

Exhibit 36, p. 16.

The Commandant then summarized his presentation of the Heritage Brief at Parris Island by stating:

But the truth of the matter is, at the end of the day, if we did what we knew was right inside our hearts, if we didn't turn our back on the things that we knew we should fix and correct, if we held people accountable, if we did all those things that we know is right inside of us, we wouldn't be here, we wouldn't have this issue. We can fix this. This is family business.

Exhibit 36, p. 16.

The Commandant gave a substantially identical presentation “face-to-face” with most Marine leaders. Additionally, a videotaped, edited version of the Heritage Brief was posted on the Marine Corps official website, marines.mil. Exhibit 37.

On 20 April 2012, the day after the Commandant's MCRD-PI speech related above, a number of Marine judge advocates who attended that speech contacted Colonel John Baker, USMC, the Chief Defense Counsel of the Marine Corps (CDCMC), to relate that the Commandant, in his speech, had made remarks they considered troubling and that, in their opinion, rose to the level of UCI. Col Baker 13 June 2012 e-mail to Capt Marquez, *et al.*, Exhibit 38.

The CDCMC spoke with Colonel Brian Palmer, USMC, a judge advocate currently serving as the Commanding Officer, Headquarters and Service Battalion, MCRD-PI, to get his assessment of the Commandant's speech. Col Palmer also said he found the Commandant's

⁵ Again, CMC does not disclose his own UCI conduct in the discussion.

remarks troubling, but could not pinpoint exactly what he found troubling about the speech. Col Baker 13 June 2012 e-mail to Capt Marquez, *et al.*, Exhibit 38.

b. CMC's Washington, D.C. "Heritage Brief."

During the Commandant's presentation in Washington, with the slide behind him showing headlines from the *Washington Post* about the urination issue, the Commandant stated:

"This is one of many, many headlines. You've seen them. You watched the videos. You have seen people broadcast news on tv. The morning talk shows. The evening NBC News with Brian Williams. The Today Show. Newspapers. Magazines. Periodicals. It continues to come up.

We were down at Camp Lejeune, and we were about ready to walk into to talk to about 4,000 Marines. And I got up early and I did, I did, I was working out. So I had the tv on watching the news. And sure enough, they talked about, about that time that the issues, other issues had popped up in Afghanistan. Some of our fellow services, and you know exactly what I am talking about. Some deaths of civilians, just the whole series of things that had happened in Afghanistan. And whoever was on the morning, I think it was the Today show, was talking about it. And they showed pictures of all this stuff. And they showed pictures of the bodies of kids and civilians that had been, that had been killed. And they showed pictures of the Koran burning and they had other instances. Then they showed pictures of Marines. This (pointing to the slide). And then they showed pictures of the Marines right there in front of the, that Scout Sniper platoon in front of the SS flag standing there. And then they went on with some of the other things that had happened in theatre.

But we are right smack in the middle of it. We're lumped right in there with everybody. I don't want to be lumped in with anybody else. We are United States Marines. We're different. Our DNA is different. I don't want to be lumped in with anybody else. We've got issues; we'll solve it. We'll take care of it ourselves. And we will police ourselves. But this continues to come up almost daily. It comes up. You know exactly what I am talking about.

Exhibit 37, p. 2 line 2-p. 3 line 19 (CD of the Heritage Brief and transcript excerpt).

During the same presentation in Washington, another slide was displayed during the Commandant's speech: a picture of the Marines urinating on the enemy dead, with the slide titled "We Are Better Than This." With the slide as background, the Commandants stated:

You know what absolutely broke my heart. What absolutely made my blood boil. I looked at those Marines on that video.

Exhibit 37, p. 4 lines 5-8 (CD of the Heritage Brief and transcript excerpt).

c. Aware of UCI, CMC Prevents Video Coverage of Subsequent "Heritage Briefs."

On or about 21 April 2012, the CDCMC spoke with Major General Vaughan A. Ary, USMC, the Staff Judge Advocate (SJA) to the Commandant, and relayed his concerns about the content of the Commandant's speeches on the East Coast, and the potential UCI arising there from. The CDCMC said that he had not yet heard the audio or reviewed a transcript and so was not completely sure of exactly what the Commandant had said, but suggested that the SJA to the Commandant engage the Commandant on the issue. Col Baker 13 June 2012 e-mail to Capt Marquez, *et al.*, Exhibit 38.

On 15 May 2012, the planning for the Commandant's West Coast trip was underway. On that date, Lieutenant Colonel Joseph Plenzler, USMC, the Public Affairs Officer (PAO) to the Commandant, sent an e-mail to various PAO officers on the West Coast. In his email, the PAO to the Commandant wrote, "CMC's sessions with your officers and SNCOs are closed to the media...and please no internal coverage of these sessions either." LtCol Plenzler 15 May 2012 e-mail to Maj Punzel, *et al.*, Exhibit 39.

On 17 May 2012, the PAO to the Commandant sent another email to various PAO officers on the West Coast, specifically addressing the Commandant's upcoming trip to I MEF for his speech. He wrote, "I spoke to CMC about his upcoming I MEF trip. Here's the "guidance": There is to be NO coverage of CMC's sessions w/his officers and SNCOs. These sessions are

Marines only ...so that CMC can talk ‘inside the family’ business with his leaders.” LtCol Plenzler 17 May 2012 e-mail to Maj Punzel, *et al.* (emphasis in original), Exhibit 40.

In that email, the PAO to the Commandant stated to the local PAO officers, “You can characterize CMC’s Heritage Briefs (meetings w/his officers and SNCOs) as the Commandant traveling around the Corps to personally emphasize his expectations for leadership and conduct. Leave it at that for now. . . . Think of this more as a football coach grabbing his team by their helmets, pulling them in close, and telling them where they need to improve.” LtCol Plenzler 17 May 2012 e-mail to Maj Punzel et al. (emphasis in original), Exhibit 40.

On 22 May 2012, Chief Warrant Officer-3 Judy A. Munoz-Lollar, USMC, the OIC of Combat Camera at Camp Pendleton, California, e-mailed the PAO to the Commandant seeking clarification of her authorization to provide video coverage of the CMC’s speech aboard CamPen, having been tasked by I MEF Protocol to provide such support. Email traffic re: video support at CamPen of 22 May 2012, Exhibit 41. The PAO to the Commandant responded, saying, “Obviously tight control of the recording would be necessary. I don’t see the harm in still photos as they would only depict CMC interacting with his Marines.” The PAO to the Commandant copied Lieutenant Colonel Jon Lauder, USMC, the Aide to the Commandant, on this e-mail, and asked, “Jon, can you pls ask CMC his desires in this regard? I MEF would like to video his session tomorrow for internal purposes.” 22 May 2012 e-mail traffic re: video support at CamPen, Exhibit 41. The Aide to the Commandant replied simply, “From the Commandant: no still photography, no video in the Heritage Brief.” 22 May 2012 e-mail traffic re: video support at CamPen, Exhibit 41.

d. CMC Disregards Legal Advice to Reduce the Impact of UCI.

On 23 May 2012, after having received and listened to the audio recording of the Commandant's MCRD-PI speech, the CDCMC sent an e-mail to the SJA to the Commandant. Col Baker 23 May 2012 e-mail to MajGen Ary, Exhibit 42. In that e-mail, the CDCMC identified "problematic" portions of the speech and expressed his hope that the SJA to the Commandant would "shape future speeches . . . to remove what appears to me to be UCI." Col Baker 23 May 2012 e-mail to MajGen Ary, Exhibit 42.

On 22 and 23 May 2012, the CMC repeated the same performance at the Recruit Depot in San Diego California and expressly indicated he was disregarding his counsel's advice on UCI. See Affidavits of attached as Exhibits 43, 44, and 45.

On 1 June 2012, the Commandant and the SgtMaj of the Marine Corps arrived at Marine Corps Base Quantico. Much earlier, the Commandant's staff had secured the services of Combat Visual Information Center (CVIC) at Quantico to videotape and memorialize the Commandant's speech. CVIC Marines and their equipment were staged and ready in the base theater, prepared to carry out their assigned mission of recording the Commandant's speech to the officers and SNCOs aboard Quantico, as had been done at MCRD-PI and elsewhere. The recording was not permitted per order of CMC because CMC was aware that his Heritage Briefs were receiving push back. *See also* Exhibits 46 and 47. Eventually acknowledging the UCI concerns, the CMC substantially changed his "Heritage Brief" at 8th & I - Marine Barracks. *See* Exhibit 37.

E. UCI CHAPTER V: The Generals Agree to Follow CMC's May 2012 "Guidance" to Remove the Accused Marines from the Marine Corps.

The evidence reveals that there were several meetings in Quantico between various senior Marine Corps Generals who expressly agreed to follow the CMC's "Guidance" on handling the V3/2 cases, including Captain Clement's. Specifically, several e-mails and correspondence

regarding the Quantico meetings on or about May 10, 16 and 30, 2012, crystallize that the CMC's change in the CDA authority was the result of UCI. The decisions reflected in the attached papers and subsequent e-mail traffic clearly demonstrate that the facts found in the investigation were irrelevant to the decisions to charge certain Marines and release others. What was critical was to carry out the "guidance" of the Commandant and his lawyers to charge Marines to show the public something was being done.

For example, in a 31 May 2012 e-mail from LtGen John Paxton⁶ (with copies to LtGens Waldhauser and Mills) to Gen Amos, attaching recommendations for taking action against those allegedly involved in events surrounding the urination incident, which included pursuing an Article 32 proceeding against Captain Clement, LtGen Paxton states:

Attached is the point paper with recommendations and enclosures on the V32 LOAC Video which we discussed after the EOS and again this afternoon...Your guidance after the EOS was clear and it was communicated and was being executed... In no way was there ever intent to deviate from your guidance or present a fait accompli on any individual or case... Per the recommendations proffered in the attachment, please know that all of us are united and convinced that these COAs are best for our Corps as an institution, for you as our Commandant, and for all individuals in the proper execution of due diligence and justice.

See LtGen Paxton 31 May 2012 e-mail to Gen Amos, Subj - V32 UPDATE AND RECOMMENDATION (Final) 31 May 2012, Exhibit 48.

The 31 May 2012 attachment referred to in the e-mail clearly indicates the extent of unlawful command influence in this matter. The attachment is a letter addressed to the "Commandant of the Marine Corps" from LtGen Paxton, with the subject being "V32 Update and Recommendations." The attachment provides a status of the actions against the individual

⁶ It is not clear why LtGen Paxton is taking the lead when LtGen Mills purports to be the CDA except as per order of CMC.

Marines involved in the 27 July 2011 patrol, indicating that "LtGen Mills intends to pursue Article 32 proceedings in the case of nine individuals," (including Captain Clement). Exhibit 48.

Major James Conway and Lt Leslie were culled out of the legal hold. General Paxton wrote, as to Conway and Leslie:

"There are neither facts, evidence, nor opinions that these two officers were aware of the urination incident nor the photography of it."

Exhibit 48. This was also true of Captains Clement and Thornton but they were not culled out.

They were charged. General Paxton then wrote further about Conway and Leslie:

"In addition the scope of their responsibilities, geographic location and battlefield circulation did not put them in contact with or have influence over the Scout Sniper Team."

Exhibit 48.

The interviews of Major Conway and Lt Leslie by LtGen Hummer, the investigating officer and NCIS, reveal Major Conway, the senior officer on board, watched the sniper patrol into Sandala from the Battalion COC, was aware that the bodies were ordered brought back over the objection of the patrol leader, and participated in the after action briefings on 27 July 2011 from the sniper NCOs. Major Conway was also instrumental in establishing the command climate of 3/2 which created a separate sniper platoon of 40 snipers led by a Staff Sergeant (not an officer) and gave the sniper platoon the run of the battlefield. Major Conway received the enemy bodies ordered by the Battalion COC, helped remove them from the tanks and inspected them. Maj Conway 18 January 2012 Handwritten Sworn Statement, Exhibit 49. But Major Conway was never asked by LtGen Hummer or NCIS why he ignored the objections of the Patrol leaders about the recovery of the bodies and he was never asked whether he smelled urine on the enemy bodies. If no corpses were recovered, no urination would have happened.

Lt. now-Captain Edward Leslie has testified before LtGen Hummer and in the Article 32 hearings of Sgt Richards⁷ and Capt Clement. Captain Leslie, who was in the Company COC during the patrol and on the radio with Capt Clement from 0600 to 1300, told LtGen Hummer that there was enemy fire and enemy engaged by the snipers in Sandala.⁸ After viewing the video, he has been singing a different tune. His interview with LtGen Hummer is classified and not publicly available.

At the end of the memo, Gen Paxton wrote to CMC: "Pending your approval/guidance, we will execute as appropriate..." CMC initialed the letter approving and authorizing the proceedings against Captain Clement. Exhibits 48 and 48A.⁹

Subsequent e-mails further support the contention that the Commandant was exerting unlawful command influence in these cases. In a 4 June 2012 e-mail to MajGen Vaughn Ary, LtGen Paxton 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 the head nod to start to do so.

Exhibit 50.

The unlawful command influence of CMC reflected in these documents is made very apparent by MajGen Ary's attempt to put the cat back in the bag. After receiving LtGen Paxton's e-mail, MajGen Ary replied in a 4 June 2013 e-mail:

⁷ Portions of the Sgt Richards Article 32 hearing remain classified although the entire proceeding took place in public.

⁸ During Clement Article 32 hearing, Capt Leslie testified that "I don't know what you mean by influence because at the time I would have been the one supporting (Unintelligible) and just observing everything and reporting. I was watching those incidents. I definitely had the ability to influence events by reporting to them what I was seeing. Q. You certainly had contact with them? A. Yes, sir. Q. And you had contact with them on 27 July? A. Yes, sir." Testimony of Capt EJ Leslie at Clement Art. 32 Transcript, p. 75. Exhibit 67.

⁹ The defense received the fully executed edition of the Paxton letter to CMC on 17 July 2013, Exhibit 48A, after making a specific demand on 13 July 2013. The unexecuted edition, Exhibit 48, was produced to the defense in discovery on 19 February 2013 along with LtGen Ary's e-mail of 4 June 2013, Exhibit 50, leaving the false impression that the CMC had not signed off.

“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 and¹⁰ dirlauth necessary to resolve this issue without any additional involvement of CMC.”

Exhibit 50. MajGen Ary’s comments, rather than clarifying what was not intended by the 31 May letter, clearly demonstrates that unlawful command influence was at work here in directing the actions taken against Captain Clement, treating him differently than others who also had no knowledge of the urination and trophy photos.¹¹

After the CMC’s “guidance” was clear, it then became evident that that the classification was not genuine or proper and the investigation and materials were declassified. *See* MajGen Karl Horst 22 June 2012 Memorandum, “Classification Determination of Marine Videos,” (“In my capacity as a TOP SECRET Original Classification Authority, I have now thoroughly reviewed the team’s complete proposal and videos, and personally adopt their various classification and declassification recommendations in their entirety.”), Exhibit 51; Col Gregg Brinegar 17 July 2012 e-mail to Robert Hanson (“What’s the status of the declassification project?”), Exhibit 52; Robert Hanson 17 July 2012 e-mail to Col Brinegar (“Based on the classification guidance attained, the review is going well ...”), Exhibit 52; Maj Weirick 23 July 2012 e-mail to Col Brinegar (“As of this morning, 23JUL12, the first investigation, without enclosures, has been reviewed and the classified portions removed.”) Exhibit 53; Col Jesse Gruter 24 July 2012 e-mail to Col Brinegar (“The CG pulled me in his office this morning – your door was closed and he caught me. BLUF: He reiterated his desire to speed up the process of

¹⁰ The Command Authority was allegedly established on 13 January 2012.

¹¹ We have requested as part of our discovery that the Marine Corps produced a variety of different e-mails and correspondence between (1) the Commandant and LtGen Waldhauser and (2) the Commandant and General Mills relating to the alleged acts involved in the 27 July 2011 mission, as well as any other documents that relate to any meetings attended by the Commandant in which the 27 July mission was discussed. To date we have not received any materials other than what is referred to above and attached.

declassification...” Exhibit 54; Maj Weirick 1 August 2012 e-mail to Maj Libretto (“Our security manager, Mr. Hanson, has completed the classification review and remaking of the two command investigations. The review was necessary after CENTCOM reviewed the initial classification by PP&O.” Exhibit 55; *see* Raymond Geoffroy, Assistant Deputy Commandant, Security, 24 August 2012 Rescission of Original Classification Decision Regarding Videos of Marine Corps Operations in Afghanistan, Exhibit 56.

While steps were underway to declassify the materials, direction was given to Trial Counsel “to let those DC’s know who have been extended the NJP deal pre-preferral that if they allow this investigation to go unclass, their clients will probably be looking at preferred charges. This needs to be moving and right now the only way to move this is through the pre-preferral NJP deals. That will no longer be the case once the investigation becomes unclassified.” LtCol Gruter 23 July 2012 e-mail to Major Weirick, Exhibit 53.

Later in August 2012, LtGen Mills conducted the first NJPs but he was unable to satisfy CMC regarding the information included in “our” press release. On 27 August 2012, CMC e-mailed LtGen Mills and said:

“Rich ... if this is our official press release then I don't like it at all. We routinely publish NJPs in base newspapers to include the specific charges, the names, and the punishments allotted. This smacks of us not doing anything punitively ... ie, ‘an administrative procedure’... and it looks like we are trying to hide the evidence. I want somebody to come back to me this afternoon to talk about this.”

Exhibit 57.

F. UCI CHAPTER VI: CMC “Guidance” Results in Extracting False Witness Testimony and Concealing UCI and Exculpatory Evidence from the Defense.

Executing CMC’s May “guidance,” deals with witnesses were made to extract false testimony. During the summer of 2012, LtGen Mills and trial counsel engaged a number of the

accused snipers in negotiations for pre-trial agreements to resolve charges against them, conditioning such agreements on the accused testifying against Captain Clement. They were required to execute the attached Stipulations of Fact for SSgt Deptola and SSgt Chamblin, drafted by Marine Corps trial counsel as part of their pre-trial agreements that were inaccurate. *See* PTA's, Stipulations and Draft Stipulations of Fact, Exhibit 58.

The pressure brought to bear on these snipers to execute these stipulations of fact is obvious. Indeed, some of the facts contained in these Stipulations are false. For example, the Stipulation of Facts executed by Sgts Deptola and Chamblin as part of their plea deal drafted by lead Trial Counsel state that Captain Clement never reported the discharge of the M203 when in fact he did discuss it with his Company Commander. This report was well known to trial counsel from interviews of Captains Thornton and Olmstead. Sgts Chamblin and Deptola were both asked by trial counsel to testify falsely that Captain Clement was witness to the urination. For the most part, the snipers declined to agree to the false narrative being advanced by trial counsel. *See* Memorandum in Support of Captain Clement's Position to Dismiss the Charges, Exhibit 59.

There were further repugnant efforts to corrupt the system. Upon the order of the SJA of the Marine Corps, CMC's military lawyer ordered the SJA at MCCDC to direct the trial counsel to secure the PTAs from the sniper/urinators prior to disclosing the Generals' May meeting to follow the CMC "guidance" on the dispositions. Declaration of Major James Weirick, ¶ 3, Exhibit 60. Trial Counsel was further instructed to sign up the Snipers, then produce the May 2012 e-mails and correspondence and secure a waiver of the UCI defense from the snipers. Trial counsel was instructed if they did not waive, the PTAs would be cancelled. *See* Exhibit 68, 8 November 2013 Col Gruter e-mail to Major Libretto, which in part states:

“This successfully encapsulates what we've struggled with this past week. I believe the proper sequence is struck in COA C - signing the deals, disclosure and then seeking the waiver (however, I wonder if COA D might become a more appealing option after presenting all matters to the CDA). If they will not waive, which I think is a 50-50 proposition, then we will need to reevaluate our present course of action. The defense will need to understand that if they do not waive, withdrawal from the PTA is the likely recourse of the CDA as all benefits to the government are lost without a waiver.”¹²

See also Declaration of Major James Weirick, ¶ 3, Exhibit 60. The snipers refused to sign the waivers which were never produced in discovery. Declaration of Major James Weirick, ¶ 3, Exhibit 60.

The CMC and his counsel (as evidenced by the “JA” for Judge Advocate) also deliberately failed to produce the 10 February 2012 letter firing LtGen Waldhauser to the snipers and their counsel in response to their discovery requests. Instead of producing the letter, though CMC and his counsel were fully aware of the implications the 10 February 2012 letter had on demonstrating UCI, Major King, counsel for Sgt Chamblin, was informed on 4 December 2012 that he had received all responsive materials. 4 December 2012 Response to Discovery Request in the Case of *United States v. Staff Sergeant Joseph W. Chamblin*, Exhibit 61. In accordance with the CMC May “guidance,” all of the snipers received dispositions exceeding what LtGen Waldhauser had planned and was prepared to agree to with counsel.

G. UCI CHAPTER VII: CMC “Guidance” for the Officers.

On 29 January 2013, LtGen Mills reported to CMC that he was charging Captain Clement, Captain Thornton and Sgt Richards, suggesting that they took no action to stop the misconduct by others. He suggested that a General Court-Martial may be in the offing after an

¹² We have not received copies of the “COAs” referred to in this e-mail.

Article 32 hearing and issued a press release on 8 February 2013 identifying Captain Clement, in violation of Article 142 of the JAG Manual. LtGen Mills 29 January 2012 report to the CMC, Exhibit 62; 8 February 2013 Press Release, Exhibit 63.

In a 5 February 2013 e-mail, LtGen Paxton, the new ACMC, reported the contents of several meetings by LtGen Mills in which the status of cases and new information was reported, also indicating that the CMC expressed his “concern that all cases are fully litigated.” Exhibit 64.

On 8 February 2013, LtGen Mills reported on the charging of Captain Thornton and falsely reported to CMC that Captain Thornton was aware of the urination and trophy pictures when the results of all investigations shows that Thornton was utterly unaware of the urination and pictures. Exhibit 63. Captain Thornton further denied the same under oath in the presence of LtGen Mills at his NJP. Exhibit 65. The NJP hearing of Capt Thornton was a staged travesty of justice of a fine Marine, but it fit the CMC guidance to get these Marines out of the Corps.

On 14 March 2013, the charges under Articles 133 and 107 were dismissed against Captain Clement. On 9 April an Article 92 charge was dismissed against Captain Clement. On 24 June another Article 133 charge was dismissed against Captain Clement. No press releases were issued on each of those occasions.

On 10 April 2013, an Article 32 hearing was held on Captain Clement. Captain Clement was unable to present evidence in his favor and to cross-examine a witness because the materials were erroneously classified. The trial counsel made no recommendation for disposition. The Article 32 officer did not recommend a court martial. He recommended NJP on the one charge involving excessive and indiscriminate fire. Captain Clement objected to the finding in a letter

to LtGen Mills, requested a meeting with LtGen Mills and declined NJP. See April 22, 2012 letter to LtGen Mills, Exhibit 66.

In accordance with the May 2012 CMC guidance, LtGen Mills, refused to meet, did not respond to the letter and referred, contrary to the advice of trial counsel and the Article 32 officer, the remaining two specifications to a Special Court Martial.

Notwithstanding the declassification of the videos and investigation and as reflected above, many materials remain classified. Thus, Captain Clement has been crippled in this case by his inability to gain access to favorable evidence, exculpatory evidence and evidence of false testimony by government witnesses. Classified materials have just been delivered to Quantico in the last week. The classification issue remains an enigma.

The SJAs of the Marine Corps, following the CMC “guidance,” have interfered with Captain Clement’s right to take witness statements encouraged by this court in accordance with his Sixth Amendment rights.¹³

Despite numerous discovery requests beginning on 22 February 2013, including requests for all communications in whatever form seeking evidence of UCI and *Brady* material, nothing was produced on the LtGen Waldhauser affair until 28 June 2013, after the defense counsel contacted LtGen Waldhauser on 15 June 2013 and we all learned that CMC had engaged in intentional unlawful command influence, fired LtGen Waldhauser for not submitting to his demands for General Courts-Martial and threats to replace him, and then concealed from all the accused, their counsel, his Generals and, most significantly of all, the Marines he scolded on his

¹³ See *United States v. Irwin*, 30 M.J. 87, 94, 1990 CMA LEXIS 549 (C.M.A. 1990)(“We, too, are compelled to conclude that, in light of the provisions of the Manual and the Code regarding equality of access to witnesses and evidence and the lack of need for the consent of opposing counsel to pretrial interviews of witnesses, it is beyond the authority of the United States to interpose itself between the witness and the defense counsel and require, as a condition of granting such interviews, that a third party be present.”)

Heritage Tour about integrity, honor and accountability. A motion to compel the discovery withheld by the government will be filed shortly.

4. LEGAL ANALYSIS.

A. Unlawful Command Influence Generally.

Article 37, UCMJ, was enacted by Congress to expressly prohibit various types of UCI by convening authorities and commanders, but also, by any person subject to the code: “No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal, or any member thereof in reaching the findings or sentence in any case . . .” Article 37, UCMJ. UCI has been labeled “the mortal enemy of military justice.” *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986); *see also United States v. Sullivan*, 26 M.J. 442, 444 (C.M.A. 1988) (quoting Thomas); *United States v. Carlucci*, 26 M.J. 328, 332 (C.M.A. 1988) (same); *United States v. Gleason*, 39 M.J. 776, 782 (A.C.M.R. 1994), rev’d, 43 M.J. 69 (1995) (unlawful command influence is a malignancy that eats away at the fairness of our military justice system).

Actual UCI is, as the term itself implies, an act that has some form of substantive influence on the independent role of one or more of the actors in the process, or in the process itself.

Apparent UCI requires an objective consideration of “the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public.” *United States v. Lewis*, 63 M.J. 405, 415 (2006). Apparent UCI exists where “an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.” *Id.*

B. Actual Unlawful Command Influence.

The Court of Appeals for the Armed Forces has provided the framework for examining the issue of unlawful command influence. *United States v. Biagase*, 50 M.J. 143 (1999). The defense must offer something more than mere allegation or speculation, and must show “some evidence” that if true would constitute unlawful command influence which has a logical connection to the case at bar in terms of potential to cause unfairness in the proceedings. *Id.* at 150.

Once the defense has properly raised the issue, then the burden shifts to the government to prove beyond a reasonable doubt that:

- 1) The facts upon which unlawful command influence is alleged are inaccurate;
- 2) The facts, while accurate, do not constitute unlawful command influence;
- 3) Even if the facts are accurate, and do constitute unlawful command influence, they will have no impact on the proceedings.

Id. at 151; *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

C. Apparent Unlawful Command Influence.

Apparent UCI exists where “an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceedings.” *Lewis, supra*, 63 M.J. at 415. Alternatively, whether a reasonable and fully informed member of the public “would have a loss of confidence in the military justice system and believe it to be unfair.” *Id.* Military judges have the responsibility to avoid even the appearance of unlawful command influence in the court room. *United States v. Rosser*, 6 M.J. 267, 273 (C.M.A. 1979).

D. CMC's Actual and Apparent UCI Cannot Be Purged from Captain Clement's Court-Martial.

The actions of the Commandant of the Marine Corps constitute actual unlawful command influence, which has a logical connection to this court-martial in that it has the potential to cause unfairness in the proceedings of this court-martial. The Commandant's hiring, then firing, of LtGen Waldhauser and the concealment of those communications is unlawful command influence per se. His demand that he wanted these Marines out of the Marine Corps is unlawful command influence. Attempts by a superior to direct a subordinate to prefer charges may also result in a finding of unlawful command influence. *United States v. Weasler*, 43 M.J. 15 (1995) (captain directed lieutenant how to prefer charges in her absence as commander).

It is UCI because it reveals the intent of the Commandant and thus colors and permeates all of his subsequent actions and those of his new CDA. His failure to reveal it during his Heritage brief about integrity and accountability is stunning. His efforts to conceal his letter and count on the silence by humiliation from LtGen Waldhauser is appalling. His failure to reveal his subversive efforts to control the disposition of Captain Clement's case and take affirmative it and take affirmative steps to deny all of his accused Marines the lawful benefit of an uninfected legal process is unacceptable. By their failure to reveal the obvious, it is clear that the Judge Advocate Division was intimidated by the CMC. The Commandant's description of the Heritage Brief as an effort to "get [] the Corps back on a heading of True North," implies that any incident of misconduct is a failure of the entire Marine Corps. In that context, the Commandant invoked his responsibility for "the spiritual well-being of the United States Marine Corps . . . the heart and soul, the thing that makes us different," as well as the potential for his "fail[ure] as the 35th Commandant," in order to incite a deep emotional response in his audience based on the high level of respect and reverence given to the Commandant by all Marines.

Then, in a personal appeal to the potential members of this court-martial (“the bulk of [the] Corps leadership”), the Commandant gave his “perspective . . . [that] the institution that we love, this institution, this uniform that we are wearing . . . is under attack from within and without.” By addressing matters of misconduct with these highly inflammatory remarks, the Commandant was sowing prejudice into those who would judge the accused Marines and clearly compromised any semblance of a fair adjudication of this case.

During the Heritage Brief, the Commandant specifically admonished courts-martial and boards of inquiry for seemingly lenient determinations. He characterized decisions of administrative boards to retain Marines as “a problem with accountability,” and “a lack of accountability that just befuddles me.” He sarcastically referred to the actions of courts-martial as “ecumenical,” and wondered “why we have become so soft.” He cautioned that officers and staff noncommissioned officers— the grades most-likely to serve as members of this court-martial — need “to take a hard look at how we are doing business,” and “if you have a Marine that’s not acting right, you’ve got a Marine that deserves to leave the Corps, then get rid of them; it is as simple as that.” These comments clearly communicated the Commandant’s desire that courts and boards be less lenient to respondents and accused Marines. Then the Commandant wondered, “when did it become okay to disobey orders?” a juxtaposition that makes the Commandant’s desire for more-punitive outcomes an apparent order issued to the entire Marine Corps. By expressing his displeasure of leniency in courts and boards, and apparently ordering its reduction, the Commandant created a high likelihood of unfairness in the adjudication of this case.

The Commandant concluded his presentation of the Heritage Brief with a discussion of potential collateral consequences of lenient outcomes. He observed that “should the people ever

lose that conviction as a result of our failure to meet their high, almost spiritual, standards, the Marine Corps will quickly disappear,” and then he unequivocally stated “that is why I am here and that is why Sergeant Major Barrett is here.” He also characterized the matter as “family business.” By injecting the possibility of the Marine Corps “quickly disappear[ing]” into his discussion of the results of courts and boards, and characterizing it as a familial matter, the Commandant created a high likelihood of unfairness in the adjudication of this case. It is ironic that the Commandant invokes the perception of the Marine Corps in the public eye when he himself destroyed, by his secret actions, any notion of fairness, and the public perception of fairness, within the military justice system.

“A judicial system operates effectively only with public confidence -- and, naturally, that trust exists only if there also exists a belief that triers of fact act fairly. This appearance of impartiality cannot be maintained in a trial unless the members of the court are left unencumbered from powerful external influences.” *United States v. Fowle*, 22 C.M.R. 139, 142, 7 U.S.C.M.A. 349, 352 (C.M.A. 1956) (internal citation omitted). The Commandant is one of the powerful external influences that caused the Court of Military Appeals such concern. By his firing a fair and independent CDA; by imposing a bogus classification upon the investigation; by his inflammatory appeal, instructions against leniency, and invocation of collateral consequences during the Heritage Brief, and by the imposition of his “guidance” upon his subordinate Generals, including the new CDA, the Commandant actually encumbered the potential members of this court-martial, and affected the appearance of their ability to act fairly. Accordingly, the Commandant’s actions constitute unlawful command influence of this court-martial.

Furthermore, the facts strongly suggest that the Commandant, at least shortly after the MCRD-PI speech, knew or had been advised that the content of his speeches might be improper

under the law. But his desire to convey the message apparently outweighed any concerns for propriety. The Commandant apparently instructed his staff to put a lid on any video or audio recordings, and at least at the Quantico speech, his staff ordered the destruction of videos already recorded. No external or even internal coverage (*i.e.*, evidence) would now be allowed.

CAAF has noted, “That an inference of consciousness of guilt can be drawn from the destruction of evidence is well-recognized in the law.” *United States v. Moran*, 65 M.J. 178, 188 (C.A.A.F.2007). The reasonable conclusion to be drawn in this instance is that the Commandant believed his comments constituted UCI. And if the Commandant believed his comments constituted UCI, then that independently supports a finding in *this* case that his comments did, in fact, constitute UCI.

If there were any further doubt about the denigration and subversion of the process, one only has to witness the secret replacement of LtGen Waldhauser as CDA by CMC and the agreement of the new CDA and his fellow General officers to adhere to the “guidance” of CMC and his counsel to ignore the facts and get some dispositions to satisfy the public outcry that CMC helped create. They were confident the “guidance” would work because CMC had demanded zero defect accountability on his terms at every installation in the Marine Corps. LtGen Waldhauser followed his oath to administer justice and “keep his honor clean.” And for that he was removed by CMC for not adhering to the “guidance.” The new CDA knew what had happened. The JA Division knew what happened. The SJA at MCCDC was told that it was none of his concern. To make sure no more Marine General officers wandered off the reservation, they convened at Quantico under the “guidance” of CMC and put the UCI plan in writing in General Paxton’s factually flawed letter. The facts did not matter because the process was rigged and concealed from public view by the imposition of the bogus and unauthorized

secret classification on the videos and investigative materials. There is simply no other lawful explanation for the factually inaccurate accusations against Captains Clement and Thorton.

Likewise, there is no lawful explanation for the CMC's hand-picked CDA to ignore the advice of his trial counsel and Article 32 officer. Further, there is no lawful explanation for the CMC's nepotism in sheltering Major Conway and Lt Leslie's active participation in the very patrol that now serves as the basis of criminal charges against Captain Clement. Equally troubling, there is no lawful justification for the order to deny the snipers a UCI defense coupled with the extortive threat to deny a PTA if they did not follow the government's demands to provide misleading information about Captain Clement.

It was thus no surprise that subordinate officers witnessing the subversion would attempt to coerce the accused snipers who had no defense to the charge of desecration to agree to give false testimony implicating Captain Clement well knowing that Captain Clement had done nothing wrong. It is why at the Article 32 hearings, trial counsel could not bring themselves to recommend any charges or disposition.

Given the facts, and the foregoing analysis of the actual unlawful command influence that is present here, how can it even be reasonably argued by the government that an objective member of the public would not have a loss of confidence in the fairness our system?

5. Relief Requested.

Because the Commandant of the Marine Corps, and civilian leaders within the Department of the Navy, Department of Defense, and the Federal Government as a whole have engaged in unlawful command influence which must necessarily impact the actual and perceived fairness of this court-martial, the defense respectfully requests that this court dismiss all charges with prejudice, or other such relief as the court finds appropriate. The Defense also requests the hearing on this motion be heard in Quantico, Virginia, where most of the witnesses are located.

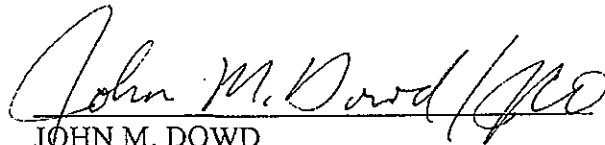
6. Evidence and Burden of Proof.

The evidence in support of this motion are the exhibits previously identified and referred to throughout the motion.

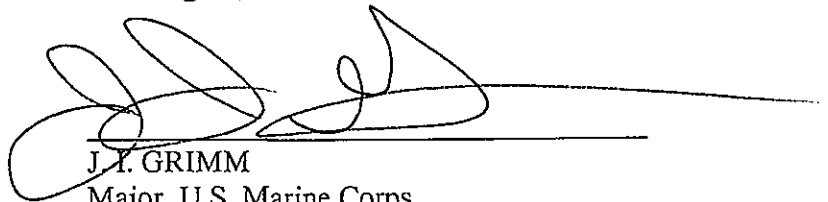
Initially, the burden of proof rests with the defense to present "some evidence," beyond mere allegation or speculation that UCI exists and is logically connected to this case, in terms of its potential to cause unfairness in the proceedings. The burden then shifts to the government, using a beyond a reasonable doubt standard, to disprove the existence of UCI or, in the alternative, to prove that it will not affect the proceeding.

7. Argument.

Oral argument is requested.

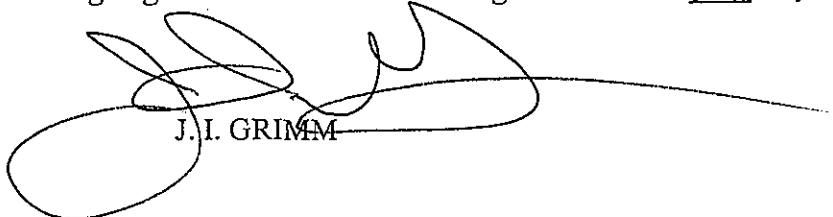


JOHN M. DOWD
JAMES C. OSBORNE, JR.
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036



J.I. GRIMM
Major, U.S. Marine Corps
Detailed Defense Counsel

I hereby certify that a copy of the foregoing motion was served on the government on 23 July 2013



J.I. GRIMM