

White Paper on the Cases of

The MARSOC 3

Daniel Draher, Eric Gilmet, and Joshua Negrón



Perseus Strategies¹
1802 Vernon St. NW, #1046
Washington, D.C. 20009

Updated May 3, 2023

¹ Perseus Strategies serves as international counsel to the MARSOC 3. For further information, please contact Jared Genser at either +1.202.466.3069 or jgenser@perseus-strategies.com. Perseus Strategies would also like to thank Stephanie Herrmann, Brian Tronic, Juan Felipe Wills, Patrick McCabe, Samantha Lombard, Olivia Powell, and Lauren Doyle for their support.

TABLE OF CONTENTS

EXECUTIVE SUMMARY.....	3
I. BACKGROUND INFORMATION ON THE MARSOC 3	6
A. <i>Biography of Gunnery Sergeant Daniel (“Danny”) Draher.....</i>	6
B. <i>Biography of Chief Hospital Corpsman (“HMC”) Eric Gilmet.....</i>	7
C. <i>Biography of Gunnery Sergeant Joshua (“Josh”) Negron.....</i>	8
II. EVENTS OF JANUARY 1, 2019, AND EXONERATING EVIDENCE	9
A. <i>Intoxicated Mr. Rodriguez is Belligerent Towards Eric</i>	10
B. <i>Security Guards Escort Mr. Rodriguez Out of the Establishment</i>	10
C. <i>The MARSOC 3 Exit, Unaware Mr. Rodriguez is Waiting for Them.....</i>	11
D. <i>Mr. Rodriguez is Aggressor and Attacks Danny.....</i>	12
E. <i>Eric Cares for Mr. Rodriguez, and the MARSOC 3 Bring Him to Base</i>	13
F. <i>In the Morning, Mr. Rodriguez is Taken to a Hospital in Erbil</i>	14
1. Mr. Rodriguez Aspirates on His Vomit	15
2. Mr. Rodriguez is Medevac’d First to Baghdad and then to Germany	15
III. WRONGFUL CHARGES AGAINST THE MARSOC 3.....	16
A. <i>Military Ethics Review Creates Pressure to Prosecute MARSOC 3</i>	16
B. <i>Senior Officials Blame the MARSOC 3 Despite Exonerating Evidence</i>	17
1. Command Sources Seek to Discredit MARSOC 3 in Media	17
2. Leadership Further Spread Rumors that MARSOC 3 “Killed” Mr. Rodriguez	18
3. Senior Officials Spread Rumors to Authorities in the MARSOC 3 Case.....	19
C. <i>Intimidation, Fear, and Lies Plague Investigation into the MARSOC 3.....</i>	19
1. Leadership Instructs Witnesses to Be Silent.....	20
2. Leadership Prevents Others from Coming Forward	20
3. Fearing Reprisals, Witnesses Change Their Stories	20
4. Doctor Contradicts Medical Findings to Fit Narrative	21
D. <i>Before Investigation is Over, Leadership Says MARSOC 3 will be Tried</i>	22
E. <i>Despite Exonerating Evidence, the MARSOC 3 are Charged.....</i>	22
1. The MARSOC 3 Face Prosecution but Others Get Slap on Wrist	23
2. U.S. Government Charges Obstruction Without Probable Cause	23
IV. UNJUST PROCEEDINGS AGAINST THE MARSOC 3	23
A. <i>Unjust Proceedings Against Eric Gilmet (2020-Present)</i>	24

1.	Unlawful Command Influence Taints Case Against Eric	24
2.	Defense Attorneys Fear Reprisals for Representing the MARSOC 3	25
3.	Leadership Appears to Obscure Unlawful Command Influence	26
4.	Eric’s Attorney-Client Relationship is Destroyed	27
5.	Eric Forced into Impossible Choice to Release Chosen Counsel	27
6.	Court Finds Unlawful Command Influence and Drops Charges	27
7.	Appeals Court Summarily Reinstates Charges	27
B.	<i>Unjust Proceedings Against Danny and Josh (2020-Present)</i>	28
1.	Unlawful Command Influence Taints Case Against Danny and Josh.....	28
2.	Danny and Josh Make Impossible Choice to Release Chosen Counsel	28
3.	Selective Justice Against Danny and Josh for Alcohol Consumption	29
V.	ANALYSIS	30
A.	<i>The MARSOC 3 Have Been Denied the Presumption of Innocence</i>	30
1.	It was Predetermined that the MARSOC 3 Would be Charged.....	31
2.	It was Predetermined that the MARSOC 3 Would be Tried	33
3.	Prosecution Disregards Evidence Exonerating Danny and Josh	33
4.	The MARSOC 3 Have Been Penalized as Though They Are Guilty	33
B.	<i>The MARSOC 3 Have Been Denied the Right to Equality Before the Courts</i>	34
1.	The MARSOC 3 Face the Unequal Administration of Justice	34
2.	Colonel Shaw’s Threats Undermine the Equality of Arms	34
3.	Political Pressure to Prosecute Hinders General Yoo’s Independence.....	35
4.	Investigation of Colonel Shaw is Neither Independent nor Impartial	35
C.	<i>The MARSOC 3 Have Been Denied Independent Counsel of Their Choice</i>	35

EXECUTIVE SUMMARY

The MARSOC 3, Daniel (“Danny”) Draher, Eric Gilmet, and Joshua (“Josh”) Negron, are highly decorated members of the U.S. Marine Forces Special Operations Command (“MARSOC”). They have each served for over 20 years and have collectively received prestigious accolades for their service such as the Purple Heart Medal, Joint Service Commendation Medal, Navy and Marine Commendation with Valor, Joint Service Achievement Medal, the Navy Achievement Medal, a Bronze Star with a V, and multiple Combat Action Ribbons. In addition to serving their country, they are devoted partners and fathers within their families.

On January 1, 2019, the MARSOC 3 were deployed in Kurdistan, an autonomous region located in Northern Iraq that has a strong U.S. military presence. The MARSOC 3 signed out and left base to attend a New Year’s Eve celebration in Erbil, a nearby city. They arrived after midnight at a local establishment, known for its popularity with U.S. personnel, and stayed for approximately one hour. Security footage shows the MARSOC 3 greeting their colleagues with hugs and handshakes, wishing them a Happy New Year. Unknown to the MARSOC 3, a Lockheed Martin contractor named Rick Rodriguez (“Mr. Rodriguez”) had been at the establishment for four hours before the MARSOC 3 arrived. During that time, Mr. Rodriguez was drinking heavily and instigated a heated verbal altercation with a patron. Once Mr. Rodriguez began to physically antagonize that patron, security guards intervened to prevent him from becoming violent.

The MARSOC 3 did not know Mr. Rodriguez, but as Mr. Rodriguez became more intoxicated, he focused on Eric. He was angry with Eric, because Eric purportedly did not speak to him in the on-base gym. He aggressively asked Eric, “Don’t you respect me?” And although Eric attempted to pacify him, Mr. Rodriguez became even more belligerent. About an hour later, Mr. Rodriguez, swaying on his feet, approached Eric a second time. Initially, Eric gave Mr. Rodriguez a hug and shook his hand. But Mr. Rodriguez suddenly became very angry and physically aggressive toward Eric. Taken aback, Eric put his hands up and stepped away. Security guards intervened, escorting Mr. Rodriguez out of the establishment. These interactions were all captured on video surveillance. According to witness testimony, as Mr. Rodriguez was leaving, he muttered about Eric: “Who is this mother fucker, as soon as he gets outside, I’m going to kick him.”

The MARSOC 3 reconnected and decided to go home for the evening, but they did not know Mr. Rodriguez was waiting for them outside. As the MARSOC 3 started walking toward their vehicle, Danny noticed a group of men in the parking lot whom he recognized. To make sure they were doing okay after the evening’s festivities, he went over to check in. Only once he had arrived at the group did he notice Mr. Rodriguez. Mr. Rodriguez aggressively threatened Danny to “continue” what they “started” inside. Danny became concerned, trying to calm down Mr. Rodriguez, asking why things needed to be “like that.” By this time, Eric and Josh had joined the group, standing at its outskirts and unable to see what Mr. Rodriguez was doing.

Exonerating security footage demonstrates that (1) Mr. Rodriguez attacked Danny, (2) Danny defended himself, and (3) Josh defended Danny. It first shows that Mr. Rodriguez raised

his arm and violently poked Danny in the chest. Danny did not move or react, and his arms remained firmly at his sides. Then, Mr. Rodriguez reared back, and quickly moved forward, as if to headbutt Danny in the head. Anticipating an assault, Danny pushed Mr. Rodriguez away in self-defense. Mr. Rodriguez stumbled backwards, and then charged and attacked Danny, first punching him in the face and then again in the shoulder. After Mr. Rodriguez's second punch, Josh's view was no longer obstructed, and he quickly struck Mr. Rodriguez to defend Danny from an incoming third punch. Mr. Rodriguez then fell to the ground, unconscious.

Once Mr. Rodriguez fell, Eric's view was no longer blocked, and he moved to Mr. Rodriguez's side to provide medical attention. Eric rolled him onto his side and affirmed that he was breathing. Other witnesses began to leave. The MARSOC 3 took Mr. Rodriguez back to base, where Eric asked Danny to get his medical bag, and Eric applied Dermabond to a small cut on Mr. Rodriguez's head. Eric took Mr. Rodriguez to his housing unit and continued to care for him through the night.

Early the next morning, there was no change in Mr. Rodriguez's condition and Eric went home to sleep, asking Mr. Rodriguez's friend to continue watching over him. Later that morning, Mr. Rodriguez suddenly stopped breathing and had to be taken to a nearby military hospital in Erbil. There, the attending physician, Dr. Wiestra, began resuscitation, and Mr. Rodriguez vomited. According to Dr. Wiestra's deposition, he found no evidence of head trauma to Mr. Rodriguez but ascertained that he was aspirating on his vomit and adjusted his airway. However, approximately one hour later, Dr. Wiestra determined that Mr. Rodriguez's airway needed to be readjusted. Between these first and second airway adjustments, the delivery of oxygen to Mr. Rodriguez's lungs was suboptimal. Mr. Rodriguez went into cardiac arrest and was Medevac'd to a hospital in Baghdad and then to Germany, where he died.

On January 2, 2019, the Naval Criminal Investigative Service ("NCIS") opened an investigation into the MARSOC 3. A few days later a group of anonymous "military sources," launched a media campaign that portrayed the MARSOC 3 in numerous news stories as having "pummeled" Mr. Rodriguez and "stomped" him into unconsciousness; none of the stories mentioned he attacked Danny. Meanwhile, according to witness testimony, senior command leadership instructed witnesses not to ask about Mr. Rodriguez and, on one occasion, advised them that it would not be in their best interest to vouch for the MARSOC 3. Witnesses also testified that they feared reprisals and remained silent or lied to the investigating authorities to stay out of trouble. And as witnesses were instructed to remain silent, a senior commander scapegoated the MARSOC 3 in an official training meeting, saying the MARSOC 3 had gotten "drunk" and "killed" Mr. Rodriguez.

NCIS officials also spread a narrative that may have predisposed medical professionals to conclusions about Mr. Rodriguez's cause of death. Mr. Rodriguez's autopsy lists his cause of death as blunt force injury to the head, and the manner of his death as homicide. It appears from Dr. Wiestra's deposition that, after learning the MARSOC 3 were under criminal investigation, he edited his original medical notes about Mr. Rodriguez to include "possible fighting" and "possible falls." Notably, these are medical observations that Dr. Wiestra did not initially make about Mr. Rodriguez – he found no evidence of head trauma. And in determining the manner of

Mr. Rodriguez's cause of death, a forensic pathologist took into account how the NCIS "told" her Mr. Rodriguez had died.

The most damaging narrative blaming the MARSOC 3 was that relayed to the key decisionmakers on the disposition of the MARSOC 3's case. Danny's former direct supervisor, who was also the Senior Enlisted Adviser to Major General Daniel Yoo ("General Yoo"), Commanding General of MARSOC, reviewed the security footage and reassured Danny: "We know this was in self-defense." However, this individual then later told a very different story to General Yoo and others when the General was first briefed on the incident that "Danny assaulted someone, and they died." This action was especially damaging because it matched the false narrative that had been reported in the media by anonymous "military sources." According to witness testimony during the MARSOC 3's Article 32 investigation, General Yoo, the convening authority in the MARSOC 3's case, also felt external pressure to "make an example" of the MARSOC 3. In May 2019, while the NCIS investigation was ongoing and inconclusive (and six months before the MARSOC 3 had an Article 32 investigation), General Yoo remarked on a phone call that the MARSOC 3 would "go to a general court-martial."

Thus, it appeared predetermined at the investigation's outset that the MARSOC 3 would be charged and tried. Each of the MARSOC 3 was criminally charged with involuntary manslaughter, negligent homicide, obstruction of justice, and dereliction of duties – even though their peers received only "non-judicial punishment" for drinking alcoholic beverages and for violating curfew that night. And General Yoo's phone call revealed that the MARSOC 3 would be prosecuted, regardless of what the investigation revealed. Indeed, the MARSOC 3 were referred for courts-martial, and their cases were split into *United States v. Gilmet* (Eric), and *United States v. Draher/Negron* (Danny and Josh).

Since being charged, the MARSOC 3 have also encountered Unlawful Command Influence ("UCI"), "the mortal enemy of military justice," in their cases. UCI occurs when a person "bearing the mantle of command authority" uses that authority to influence judicial outcomes. In November 2021, the Deputy Director of the Judge Advocate Division, Colonel Christopher Shaw, explicitly threatened Eric's defense lawyer, saying, "I know who you are and what cases you are on," and impliedly threatened him; noting there could be "secondary effects," like not being promoted, for zealous defense. Colonel Shaw also threatened other military defense lawyers, saying they were "not protected" from career ramifications. Several of these defense lawyers expressed fear of reprisals for representing their clients, including Eric's lawyer, Danny's lawyer, and Josh's lawyer. Faced with an impossible decision, the MARSOC 3 each reluctantly released their lawyers and have since dealt with a constant rotation of conflicted counsel, giving the prosecution an indisputable advantage in this case.

Although the military investigated the UCI allegation in Eric's case, the investigation was tainted by conflicts of interest, as explained in this white paper. In two concerning irregularities, it appears that the investigator was chosen by Colonel Shaw's division rather than by the Inspector General, possibly creating an incentive to shield him. And the investigator himself was a military appellate judge who allegedly had previously made disparaging remarks about the MARSOC 3's lawyers. Ultimately, this investigation found Colonel Shaw's threats merely unprofessional.

On February 9, 2022, a military court dismissed the charges against Eric after finding UCI had been committed in his case. The government appealed, and on August 15, 2022, a military appeals court summarily reinstated the charges against Eric. Despite the clear impact of Colonel Shaw's threats on the MARSOC 3's lawyers, and on other military defense lawyers, the appellate judge still opined that "an objective, disinterested observer" would not doubt the fairness of the proceedings against Eric.

The U.S. has signed and ratified the International Covenant on Civil and Political Rights. Under this treaty, which has the status of U.S. federal legislation, the MARSOC 3 have suffered severe violations of their human rights. The charges against the MARSOC 3 should be withdrawn, because Mr. Rodriguez was the aggressor, he was struck in defense of another, and the MARSOC 3 provided proper care to Mr. Rodriguez after bringing him back to base – all of which should exonerate the MARSOC 3 from homicide charges. Yet, the MARSOC 3 have been denied the presumption of innocence. Statements by senior command officials and the NCIS narrative helped predetermine that the MARSOC 3 would be charged. And General Yoo's phone call predetermined that the MARSOC 3 would be referred for courts martial, regardless of what an investigation found. The MARSOC 3 have been further denied their human rights to equality before the courts and access to counsel of their choice. Consequently, the MARSOC 3 cannot be fairly tried and if the charges against them are not withdrawn, then they should be dismissed.

Update as of May 3, 2023: The trials for Danny and Josh began in January 2023, and on February 1, 2023, both men were acquitted of all homicide charges, obstruction of justice, and dereliction of duty. It was determined at trial that Mr. Rodriguez likely died as a result of aspirating on his vomit. However, during their trial, Danny and Josh were found guilty of alcohol consumption. They were sentenced to "no legal punishment," and, in a rare move, the judge even recommended clemency to remove this felony conviction from their records. Nonetheless, the court martial's convening authority, MARSOC Commander and Major General Matthew Trollinger, could still choose to process Danny and Josh for administrative separation, which is normally reserved for significantly more egregious offenses. This punishment would be a blatant example of selective justice, shatter their careers, and deprive them of benefits they have earned for their distinguished service.

Virtually all the MARSOC 3's colleagues who were consuming alcohol on New Year's Eve received only "non-judicial punishment" in exchange for their cooperation with prosecutors – whereas only the MARSOC 3 were charged with alcohol consumption, and Danny and Josh were convicted. Danny and Josh's defense attorneys have called upon the convening authority to set aside the conviction – but if he does not, the defense attorneys will appeal the conviction. Separately, the Court of Appeals for the Armed Forces (C.A.A.F.) heard oral arguments on April 18, 2023, on UCI in Eric's case. *Four years* after the MARSOC 3 were attacked by Mr. Rodriguez, they are still fighting for justice.

I. BACKGROUND INFORMATION ON THE MARSOC 3

A. *Biography of Gunnery Sergeant Daniel ("Danny") Draher*

Gunnery Sergeant Daniel (“Danny”) Draher is a husband, a father, and a member of the Marine Forces Special Operations Command (“MARSOC”).² Struck by 9/11’s aftermath, he paused his education and quickly enlisted in the Marine Corps.³ Danny has led a prestigious career in the military despite many social obstacles. Between 2006 and 2008, Danny’s supervisor allegedly repeated racial slurs against him, including the n-word, and targeted Danny for ridicule and punishment.⁴ Nonetheless, in 2014, Danny became the first Black Marine Raider Para-Commando on the Parachuting Demonstration Team at MacDill Airbase.⁵ By 2018, he was one of the senior Black Staff Noncommissioned Officers within his command.⁶ Over the years, Danny served in all three of MARSOC’s operational battalions,⁷ including as Lead Instructor for Direct Operations and Sub-Terranean Operations in the Training Cell and as Battalion Future Operations Chief.⁸ He graduated *summa cum laude* from Norwich University and earned the Purple Heart Medal, Joint Service Commendation Medal, Navy and Marine Commendation with Valor, Joint Service Achievement Medal, Navy Achievement Medal, and the Combat Action Ribbon with a gold star.⁹

On January 1, 2019, when the events leading to wrongful charges against the MARSOC 3 occurred, Danny was serving in Erbil, Kurdistan as the Future Operations Chief for the Special Operations Task Force-North (“SOTF-N”). At the time, Danny also was expecting a child, as well as a professional promotion to Master Sergeant.¹⁰ Yet, Danny’s promotion to Master Sergeant was officially “delayed until legal proceedings are completed.”¹¹

B. Biography of Chief Hospital Corpsman (“HMC”) Eric Gilmet

HMC Eric Gilmet (“Eric”) is a husband, a father, and a member of MARSOC.¹² He joined the U.S. Navy on September 3, 2002, and has served for over 20 years.¹³ He is a graduate of the U.S. Navy’s Hospital Corpsman “A” School and the Field Medical Service School.¹⁴ During his distinguished career, he has been a Team Medic, a Field Medical Service Technician, a platoon Corpsman, a Special Amphibious Reconnaissance Corpsman, a Special Operations Independent Duty Corpsman, a Battalion Chief, and the North Senior Enlisted Medical

² Nick Coffman, *GySgt Danny Draher: From New York to Force Recon, From Marine Raider to Family Man*, UNITED AMERICAN PATRIOTS, Nov. 3, 2020, available at <https://www.uap.org/post/danny-draher-q-a/>.

³ *Id.* and *Background: Danny Draher*, UNITED AMERICAN PATRIOTS, n.d., available at <https://www.uap.org/case/danny-draher/> [hereinafter “*Danny Draher*”].

⁴ Interview with Daniel Draher, Aug. 4, 2022.

⁵ *Danny Draher*, *supra* note 3.

⁶ Interview with Daniel Draher and Phil Stackhouse, Civilian Defense Counsel, Nov. 21, 2022.

⁷ *Danny Draher*, *supra* note 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ Stavros Atlamazoglou, *Will the MARSOC 3 Find Justice?*, 1945, May 17, 2022, available at <https://www.19fortyfive.com/2022/05/will-the-marsoc-3-find-justice/> [hereinafter “*Will the MARSOC 3 Find Justice?*”].

¹¹ Memorandum from Commandant of the Marine Corps to the Commanding Officer of the Marine Raider Regiment of the U.S. Marine Corps Forces, Re Delay of Promotion in the Case of Gunnery Sergeant Daniel A. Draher, Jr., 1254279753/0372 U.S.M.C., Mar. 20, 2019, at ¶ 1 [hereinafter “*Delay of Promotion Memo*”].

¹² *Background: Eric Gilmet*, UNITED AMERICAN PATRIOTS, n.d., available at <https://www.uap.org/case/eric-gilmet/> [hereinafter “*Eric Gilmet*”].

¹³ *Id.*

¹⁴ *Id.*

Advisor.¹⁵ For his service, Eric has earned the Navy and Marine Corps Commendation Medal, two Navy and Marine Corps Achievement medals, and three Combat Action Ribbons.¹⁶ On January 1, 2019, when the events leading to charges against the MARSOC 3 occurred, Eric was serving as Chief Hospital Corpsman – and is well-known as the “go-to” person whenever other medical corpsmen were unsure about something¹⁷ and is trusted as a deeply reliable medical resource.¹⁸

Charges against Eric were dismissed with prejudice on February 9, 2022, after a court found that there had been Unlawful Command Influence (“UCI”) in Eric’s case, and that “the actions of the government have materially prejudiced [his] right to an [individual military counsel] and his right to detailed counsel.”¹⁹ Eric’s lawyer, Captain Matthew Thomas, faced direct threats from a supervisor that zealous defense of his clients would harm his career advancement.²⁰ Nonetheless, charges were reinstated against Eric on August, 15, 2022, when a military appeals court summarily vacated the February ruling.²¹ While awaiting trial, Eric’s special pay for his skillsets has been withheld and his security clearance has been revoked.²² His civilian privileges have been likewise limited – he was denied admission to his advanced degree and the Honors Foundation program.²³

C. Biography of Gunnery Sergeant Joshua (“Josh”) Negron

Gunnery Sergeant Joshua Negron (“Josh”) is a devoted father and a member of MARSOC.²⁴ Josh joined the Marine Corps on December 4, 2000, and he has served for over twenty years.²⁵ Throughout his career, he has been deployed to both Iraq and Afghanistan – serving honorably and earning multiple decorations. From August 2005-March 2006, he deployed to Iraq with the First Reconnaissance Battalion for Operation Iraqi Freedom, earning the Bronze Star with Combat “V.”²⁶ In 2009, he served with the 13th Marine Expeditionary Unit, receiving the Navy and Marine Corps Achievement Medal for his professional performance.²⁷ From October 2018 to January 2019, he deployed in support of Operation Inherent Resolve against the

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Direct Examination of Lance Corporal Beadles, Article 32 Hearing, 1:46 pm, Oct. 28, 2019, at 127 (“So, anytime I needed to go to medical for any kind of reason [Eric] would be in there. I mainly went to Keith Webb, who was also a corpsman out there, and then if he had any questions [or] wasn't sure about something he would refer to [Eric].”) [hereinafter “Direct Examination of Lance Corporal Beadles, Oct. 28, 2019”].

¹⁸ Direct Examination of Staff Sergeant James Phillips, Article 32 Hearing, 9:47 am, Oct. 29, 2019, at 60 (citing Staff Sergeant Phillips’ sworn statement on Jan. 13, 2019, to the U.S. Naval Criminal Investigative Service) [hereinafter “Direct Examination of Staff Sergeant James Phillips, Oct. 29, 2019”].

¹⁹ Ruling on Defense Motion to Dismiss for Unlawful Command Influence, *United States v. Gilmet*, at 1, 17 (Navy-Marine Corps Trial Judiciary, E. Jud. Cir., Gen. Ct.-Martial Feb. 9, 2022) [hereinafter “Appendix I”].

²⁰ *Id.*, at 5, 16-17.

²¹ Ruling on Government Appeal After Defense Motion to Dismiss was Granted, *United States v. Gilmet*, at 1, 16 (Navy-Marine Corps Ct. Crim. App. Aug. 15, 2022) [hereinafter “Appendix II”].

²² *Will the MARSOC 3 Find Justice?*, *supra* note 10.

²³ *Id.*

²⁴ *Background: Joshua Negron*, UNITED AMERICAN PATRIOTS, n.d., *available at*, <https://www.uap.org/case/joshua-negron/> [hereinafter “*Joshua Negron*”].

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

threat of ISIL in Northern Iraq. In addition to the previous accolades, Josh has also earned the Joint Service Commendation Medal and three Combat Action Ribbons.²⁸

On January 1, 2019, when the events leading to charges against the MARSOC 3 occurred, Danny was expecting a promotion to Master Sergeant, and Josh was about to be promoted to be Danny's second-in-command.²⁹ Josh and Danny's cases were later consolidated, and the MARSOC 3's cases were split into two: *United States v. Draher/Negron* and *United States v. Gilmet*. Josh and Danny's trial is currently scheduled for January 17, 2023.

II. EVENTS OF JANUARY 1, 2019, AND EXONERATING EVIDENCE

On January 1, 2019, the MARSOC 3 were deployed in Kurdistan, an autonomous region located in Northern Iraq that has a strong U.S. military presence.³⁰ A New Year's Eve celebration was taking place in Erbil, a relatively safe and wealthy Kurdish city, at a civilian bar which is frequented by tourists and U.S. military personnel.³¹ The MARSOC 3 arrived well after midnight to celebrate the New Year, and stayed for approximately one hour.³² At 3:23 am, a Lockheed Martin contractor named Rick Rodriguez³³ ("Mr. Rodriguez"), who had been at the establishment for around four hours before the MARSOC 3 arrived,³⁴ lost his balance on a stair as he unsteadily approached Eric.³⁵ Mr. Rodriguez had been consuming alcoholic beverages all evening.³⁶ Although he did not know Mr. Rodriguez, Eric greeted him with a one-armed hug before walking away to greet others.³⁷ About 15 minutes later, Eric and Mr. Rodriguez briefly chatted, but Mr. Rodriguez became increasingly agitated, moving erratically and making emphatic hand gestures in conversation with Eric.³⁸

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Will the MARSOC 3 Find Justice?*, *supra* note 10 and Nick Coffman, *MARSOC 3 Trials Postponed Indefinitely*, UNITED AMERICAN PATRIOTS, Apr. 16, 2021, available at <https://www.uap.org/post/marsoc-3-trials-delayed-again/> [hereinafter "*MARSOC 3 Trials Postponed Indefinitely*"].

³¹ Direct Examination of Special Agent Marshall, Article 32 Hearing, 9:06 am, Oct. 28, 2019, at 31 (confirming that the events leading to charges took place at the "T-Bar," Ainkawa District, Erbil, Kurdistan, Iraq) [hereinafter "Direct Examination of Special Agent Marshall, 9:06 am, Oct. 28, 2019"] and Greg Jaffe, *Iraq is a War Zone, But For These Americans in Irbil, It's Quiz Night*, THE WASHINGTON POST, Oct. 3, 2014, available at https://www.washingtonpost.com/world/middle_east/iraq-is-a-war-zone-but-for-these-americans-in-irbil-its-quiz-night/2014/10/03/1e5e6e82-428d-11e4-b47c-f5889e061e5f_story.html.

³² *MARSOC 3 Trials Postponed Indefinitely*, *supra* note 30.

³³ Mr. Rodriguez was reportedly a former member of the U.S. Army Special Forces, also known as the Green Berets.

³⁴ Direct Examination of Special Agent Marshall, Article 32 Hearing, 10:11 am, Oct. 28, 2019, at 3 [hereinafter "Direct Examination of Special Agent Marshall, 10:11 am, Oct. 28, 2019"].

³⁵ Exonerating Security Camera Footage of the MARSOC 3, available at <https://www.youtube.com/watch?v=ZoFKZR5o4j4>, at 3:35 (showing Mr. Rodriguez, intoxicated, falling backward off the step before approaching Eric) [hereinafter "Exonerating Footage"] and Interview with the MARSOC 3, July 22, 2022.

³⁶ Direct Examination of Special Agent Marshall, 10:11 am, Oct. 28, 2019, *supra* note 34, at 3.

³⁷ Interview with the MARSOC 3, July 22, 2022 and Direct Examination of Staff Sergeant James Phillips, Oct. 29, 2019, *supra* note 18, at 59 (referencing Mr. Rodriguez: "[Eric] didn't even know that guy").

³⁸ Interview with the MARSOC 3, July 22, 2022.

Mr. Rodriguez was angry with Eric, because Eric did not speak to Mr. Rodriguez in the on-base gym,³⁹ and Mr. Rodriguez felt disrespected, even though Eric did not know him.⁴⁰ He repeatedly asked Eric, “Don’t you respect me?” as he moved closer to Eric.⁴¹ Eric raised his hands, amicably touched Mr. Rodriguez’s shoulder to calm him down, and walked away.⁴²

A. *Intoxicated Mr. Rodriguez is Belligerent Towards Eric*

At 4:20 am, the MARSOC 3 were standing and talking at the bar⁴³ when Mr. Rodriguez came over, highly intoxicated⁴⁴ and swaying on his feet.⁴⁵ According to another military contractor present at the time, but unbeknownst to Eric, Mr. Rodriguez was still angry with Eric and planned to approach him again. As Mr. Rodriguez approached, at 4:22 am, Eric gave him a “bro-hug” and shook his hand.⁴⁶ Three minutes later, Mr. Rodriguez suddenly became angry and argumentative – he stepped very close to Eric and raised his voice, adopting a swaggering stance, raising his shoulders, puffing out his chest, and becoming animated.⁴⁷ Eric, taken aback and concerned, stepped backward and put his hands up to avoid angering Mr. Rodriguez.⁴⁸ Yet, Mr. Rodriguez became more heated, placing his hands “in [Eric’s] face”⁴⁹ while raising his voice and rocking on his feet.⁵⁰ Danny approached Eric and Mr. Rodriguez, oblivious to this interaction and dancing to music.⁵¹ Josh remained near the bar, engaged in a separate conversation.⁵²

B. *Security Guards Escort Mr. Rodriguez Out of the Establishment*

³⁹ See Cross Examination of William Oh, Article 32 Hearing, 10:51 am, Oct. 29, 2019, at 77 (answering that Mr. Rodriguez seemed particularly angry on New Year’s Eve) and 81 (“But I remember when we were in the gym [Mr. Rodriguez] didn’t like [Eric] so much.”) [hereinafter “Cross Examination of William Oh, Oct. 29, 2019”].

⁴⁰ *Id.*, at 81-82 (explaining why Mr. Rodriguez was angry with Eric: “I think it was something about respect or something . . . Lack of recognition is what it was, I believe”).

⁴¹ Interview with the MARSOC 3, July 22, 2022 and Interview with Daniel Draher and Phil Stackhouse, Civilian Defense Counsel, Oct. 31, 2022.

⁴² Interview with the MARSOC 3, July 22, 2022.

⁴³ Exonerating Footage, *supra* note 35, at 3:41.

⁴⁴ *Id.*, at 3:35-3:41; Direct Examination of Special Agent Marshall, 10:11 am, Oct. 28, 2019, *supra* note 34, at 3, (“Throughout the interview [contractor William Oh] stated that both he, Erby, and Rodriguez had all been drinking alcoholic beverages that evening.”); Cross-Examination of William Oh, Oct. 29, 2019, *supra* note 39, at 77 (“I think [Mr. Rodriguez] was pretty intoxicated.”); Deposition of Canadian Army Major Benjamin Wiestra, Nov. 2, 2021, at 55 (explaining that Mr. Rodriguez was being monitored for alcohol intoxication) [hereinafter “Appendix III”]

⁴⁵ Exonerating Footage, *supra* note 35, at 3:41-3:48.

⁴⁶ *Id.*, at 4:01; Cross-Examination of Special Agent Marshall, Article 32 Hearing, 12:39 pm, Oct. 28, 2019, at 11 (describing how Eric’s expressions toward Mr. Rodriguez were “glad,” with “a hand on the back, on the shoulder, shaking hands”) [hereinafter “Cross-Examination of Special Agent Marshall, 12:39 pm, Oct. 28, 2019”]; Direct Examination of Special Agent Marshall, 10:11 am, Oct. 28, 2019, *supra* note 34, at 13.

⁴⁷ Exonerating Footage, *supra* note 35, at 4:30-5:01.

⁴⁸ *Id.*, at 4:34-37 and Cross-Examination of Special Agent Marshall, 12:39 pm, Oct. 28, 2019, *supra* note 46, at 11 (describing how “the body posture [of] Mr. Rodriguez is what stood out to me as the most aggressive act in the bar”).

⁴⁹ Direct Examination of Special Agent Marshall, 10:11 am, Oct. 28, 2019, *supra* note 34, at 14.

⁵⁰ Exonerating Footage, *supra* note 35, at 4:46-5:01.

⁵¹ *Id.*, at 4:34-36.

⁵² *Id.*

At 4:26 am, security guards approached and restrained Mr. Rodriguez, who had become belligerent and physically aggressive toward Eric,⁵³ and forced him to leave the establishment.⁵⁴ Immediately after being escorted into the vestibule, Mr. Rodriguez tried to re-enter, arguing with and shoving a security guard while pushing his way back inside.⁵⁵ Unknown to the MARSOC 3, Rodriguez would be waiting in the street outside⁵⁶ and muttered about Eric as he was leaving “who is this mother fucker, as soon as he gets outside, I’m going to kick him.”⁵⁷ Another contractor who left with Mr. Rodriguez, William Oh, testified that he had never seen Mr. Rodriguez so angry and was unable to calm him down.⁵⁸

Mr. Rodriguez exited the establishment into the street at 4:26 am.⁵⁹ This was the second time that night that security guards had to restrain Mr. Rodriguez to prevent him from initiating a violent altercation.⁶⁰ The first occurred earlier in the evening, around two hours before the MARSOC 3 arrived.⁶¹ Mr. Rodriguez was involved in an altercation with another patron, and security guards intervened to break it up.⁶² Video footage of this earlier incident shows Mr. Rodriguez physically harassing the patron, as he did to Eric.⁶³

C. The MARSOC 3 Exit, Unaware Mr. Rodriguez is Waiting for Them

Still inside, Josh approached Danny and Eric, and the MARSOC 3 prepared to go home for the night.⁶⁴ It was late, and others had already started leaving. Danny and Eric moved toward the exit at 4:30 am, but security guards held them up in the vestibule.⁶⁵ Unknown to Danny and Eric, the guards held them up to be sure Mr. Rodriguez and his group had left the premises.⁶⁶ Danny and Eric departed at 4:31 am only after the security guards gave a thumbs-up and said they could leave.⁶⁷ Danny and Eric left the establishment heading to their car, with Danny in the lead, Eric trailing slightly behind him, and Josh following a few seconds later.⁶⁸ It was impossible to get to the MARSOC 3’s car without passing a group of men standing by a

⁵³ *Id.*, at 5:06-25.

⁵⁴ Direct Examination of Special Agent Marshall, 10:11 am, Oct. 28, 2019, *supra* note 34, at 3.

⁵⁵ *Id.*, at 3-4 and Exonerating Footage, *supra* note 35, at 5:20-22.

⁵⁶ Examination by Preliminary Hearing Officer, Article 32 Hearing, 11:39 am, Oct. 29, 2019, at 90.

⁵⁷ Cross-Examination of Special Agent Marshall, 12:39 pm, Oct. 28, 2019, *supra* note 46, at 24 and Dan Lamothe, *A defense contractor died after a bar fight with Marines, and some see a crime. Others see an accident and overzealous prosecution*, THE WASHINGTON POST, August 3, 2020, available at https://www.washingtonpost.com/national-security/a-defense-contractor-died-after-a-bar-fight-with-marines-and-some-see-a-crime-others-see-an-overzealous-prosecution/2020/08/02/d2c6d780-c5fc-11ea-a9d3-74640f25b953_story.html [hereinafter “THE WASHINGTON POST”].

⁵⁸ Cross-Examination of William Oh, Oct. 29, 2019, *supra* note 39, at 81.

⁵⁹ Exonerating Footage, *supra* note 35, at 5:27-28.

⁶⁰ Direct Examination of Special Agent Marshall, 10:11 am, Oct. 28, 2019, *supra* note 34, at 3.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Exonerating Footage, *supra* note 35, at 2:51-3:05 (instigating heated altercation with another patron). *See also* 2:42-47 (harassing and yelling at patrons, generally).

⁶⁴ Exonerating Footage, *supra* note 35, at 5:32.

⁶⁵ Interview with Daniel Draher, Joshua Negron, and Civilian Defense Counsel, Dec. 2, 2022.

⁶⁶ Direct Examination of Special Agent Marshall, 10:11 am, Oct. 28, 2019, *supra* note 34, at 18.

⁶⁷ *Id.*

⁶⁸ Exonerating Footage, *supra* note 35, at 5:51-6:04 (MARSOC 3 walking toward their vehicle).

different vehicle.⁶⁹ Danny, as the Future Operations Chief for SOTF-N and concerned about his colleagues, noticed the group of men in the street and began walking toward them to make sure they were doing all right.⁷⁰ Eric continued his straight path toward the MARSOC 3's car.⁷¹ Josh was still trailing several meters behind Danny and Eric.⁷²

Danny did not see that Mr. Rodriguez was in the group of men and had no reason to think Mr. Rodriguez would be waiting in the street.⁷³ Once Danny reached the group, a drunk and belligerent Mr. Rodriguez came into view and yelled,⁷⁴ asking if Danny would like to “continue” what they had “started” inside.⁷⁵ Danny became concerned about Mr. Rodriguez's wellbeing and attempted to calm him down, asking why things needed to be “like that,”⁷⁶ with his arms firmly at his sides in a passive stance.⁷⁷ By this time, Eric had come over to stand near Danny, but his view of Danny and Mr. Rodriguez's interaction was blocked.⁷⁸ Josh reached the group shortly after Eric, standing next to the group with an obstructed view of Danny and Mr. Rodriguez, and with his hands relaxed at his sides.⁷⁹ The MARSOC 3 had no reason to think Mr. Rodriguez would become violent. The only two people in the group who seemed to know that an altercation would occur were Mr. Rodriguez, the Lockheed Martin contractor who was waiting for Eric in order “to kick him,”⁸⁰ and contractor William Oh, who testified he had never seen Mr. Rodriguez so angry and that he could not be calmed down.⁸¹

D. Mr. Rodriguez is Aggressor and Attacks Danny

Security camera footage exonerates Danny and Josh of the MARSOC 3 from charges of involuntary manslaughter and negligent homicide. Mr. Rodriguez leaned in close to Danny, raising his arm and roughly poking Danny in the chest.⁸² Danny did not move or react.⁸³ Then, Mr. Rodriguez made a quick, overt movement with his head and reared back, as if to headbutt

⁶⁹ *Id.*, at 5:45 (showing Mr. Rodriguez waiting for the MARSOC 3 in the street, on the way toward the MARSOC 3's vehicle) and 5:51-6:04 (showing that Mr. Rodriguez's group was on the way to the MARSOC 3's vehicle).

⁷⁰ *Id.*, at 5:55 and Interview with Daniel Draher, Joshua Negron, and Civilian Defense Counsel, Dec. 2, 2022.

⁷¹ Exonerating Footage, *supra* note 35, at 5:55.

⁷² *Id.*

⁷³ Interview with Daniel Draher, Joshua Negron, and Civilian Defense Counsel, Dec. 2, 2022, and Exonerating Footage, *supra* note 35, at 6:06-08 (showing that Danny had to turn and enter the circle of men to see Mr. Rodriguez was there).

⁷⁴ Cross-Examination of William Oh, 10:51 am, Oct. 29, 2019, *supra* note 39, at 74-75 and *see* Examination by Preliminary Hearing Officer, Article 32 Hearing, 11:39 am, Oct. 29, 2019, at 90-91 (finding that evidence of Mr. Rodriguez's physical and emotional state is clearly before the Judge for his consideration, including evidence . . . that Mr. Rodriguez chose to wait outside the establishment – and, possibly, that he was waiting for the MARSOC 3, and that Mr. Rodriguez appeared to have initiated contact with the MARSOC 3 when they entered the street).

⁷⁵ *Id.* and U.S. Naval Criminal Investigative Service, Interim Report of Investigation, Ctrl 02JAN19-MEJB-0001-7HMA/T, Aug. 21, 2019, at 1-2 [hereinafter “NCIS Interim Report. Aug. 21, 2019”].

⁷⁶ NCIS Interim Report. Aug. 21, 2019, *supra* note 75.

⁷⁷ Exonerating Footage, *supra* note 35, at 6:11-17.

⁷⁸ *Id.*, at 6:08 (showing Eric standing behind Danny and off to the side of the group).

⁷⁹ *Id.*, at 6:11-14 (showing Josh casually walking over, with his arms at his sides and standing at the outskirts of the group).

⁸⁰ Cross-Examination of Special Agent Marshall, 12:39 pm, Oct. 28, 2019, *supra* note 46, at 24 and THE WASHINGTON POST, *supra* note 57.

⁸¹ Cross-Examination of William Oh, Oct. 29, 2019, *supra* note 39, at 81.

⁸² Exonerating Footage, *supra* note 35, at 6:17-29.

⁸³ *Id.*, at 6:29-34 (showing Danny's arms passively at his sides).

Danny in the head.⁸⁴ Danny, anticipating an assault from Mr. Rodriguez, took a short step back with his left foot and then pushed Mr. Rodriguez away in self-defense.⁸⁵ At Danny's preliminary hearing, a witness speculated that Danny had punched, rather than shoved, Mr. Rodriguez.⁸⁶ Yet, when Danny stepped back with his left foot and moved forward as he shoved, Mr. Rodriguez stumbled backward and his head did not snap, as it would have if Danny had punched him.⁸⁷ Additionally, Danny's hands were never even raised and he did not pull back his fist.⁸⁸ After the shove, Danny immediately resumed a passive stance, with his arms at his sides.⁸⁹

Mr. Rodriguez charged and attacked Danny three seconds later, punching Danny in the face.⁹⁰ Danny's head snapped back, and he stumbled backwards.⁹¹ Mr. Rodriguez pursued Danny and punched him a second time in the shoulder.⁹² After Mr. Rodriguez's second punch, Josh's view was no longer obstructed, and he could now see Mr. Rodriguez winding up to punch Danny again.⁹³ Mr. Rodriguez began to throw the punch, and Josh quickly intervened, acting in defense of Danny. Josh used his left hand to push Danny out of harm's way, and his right hand to make a single punch to Mr. Rodriguez's chin to stop the attack.⁹⁴ Mr. Rodriguez fell to the ground, unconscious.⁹⁵ Josh was then immediately punched by another Marine, Corporal Songer, and fell to the ground.⁹⁶

E. Eric Cares for Mr. Rodriguez, and the MARSOC 3 Bring Him to Base

While Mr. Rodriguez was attacking Danny, Eric's view was obstructed – he stood behind Danny with his arms at his sides and did not become involved in any physical altercation.⁹⁷ But as soon as he saw that Mr. Rodriguez was on the ground, he immediately stepped in to render medical care.⁹⁸ According to witnesses, after falling on the ground, Mr. Rodriguez was both

⁸⁴ *Id.*, at 6:36-47 (showing Mr. Rodriguez lunging toward Danny) and Direct Examination of Special Agent Marshall, 10:11 am, Oct. 28, 2019, *supra* note 34, at 26 (“Now he'll make overt movement towards Draher, right there, just before he gets pushed or punched.”).

⁸⁵ Exonerating Footage, *supra* note 35, at 6:48-50.

⁸⁶ *See* Direct Examination of Special Agent Marshall, 10:11 am, Oct. 28, 2019, *supra* note 34, at 26 (commenting that Danny either pushed or punched Mr. Rodriguez, noting “It's hard to say what happened”); *but see* Exonerating Footage, *supra* note 35, at 6:48-50 (showing that Mr. Rodriguez's head did not snap back and that Danny's hands were never raised as he defended himself in apprehension of a headbutt from Mr. Rodriguez).

⁸⁷ Exonerating Footage, *supra* note 35, at 6:48-50 and Cross-Examination of Special Agent Marshall, 12:39 pm, Oct. 28, 2019, *supra* note 46, at 11 (“I didn't see anything that gave me the conclusion that [Mr. Rodriguez's] head snapped back.”).

⁸⁸ Exonerating Footage, *supra* note 35, at 6:48-50.

⁸⁹ *Id.*, at 6:53 (showing Danny's hands at his sides) and Cross-Examination of Special Agent Marshall, 12:39 pm, Oct. 28, 2019, *supra* note 46, at 11 (answering civilian defense counsel's question, “After the push . . . [Draher] doesn't take a fighting stance?” with “No.”).

⁹⁰ Exonerating Footage, *supra* note 35, at 7:00-05 (showing Mr. Rodriguez punches Danny in the face, Danny's head snaps back and he stumbles).

⁹¹ *Id.*, at 7:38-40 (zoomed in).

⁹² *Id.*

⁹³ *Id.*, at 7:41 and Interview with Daniel Draher, Joshua Negron, and Civilian Defense Counsel, Dec. 2, 2022.

⁹⁴ Exonerating Footage, *supra* note 35, at 7:46 and Interview with Daniel Draher, Joshua Negron, and Civilian Defense Counsel, Dec. 2, 2022.

⁹⁵ *Id.*, at 7:49.

⁹⁶ *Id.*

⁹⁷ Direct Examination of Special Agent Marshall, 10:11 am, Oct. 28, 2019, *supra* note 34, at 24 (“[Eric's] not involved in the physical fray at all.”).

⁹⁸ Exonerating Footage, *supra* note 35, at 7:56 and Interview with the MARSOC 3, July 22, 2022.

breathing⁹⁹ and audibly snoring.¹⁰⁰ Eric rolled the intoxicated Mr. Rodriguez onto his side to keep his airway open.¹⁰¹ Both Josh and Danny came over to see if they could help.¹⁰²

Mr. Rodriguez's friends dispersed, in part to avoid any trouble with the local police¹⁰³ – leaving only the MARSOC 3 to care for Mr. Rodriguez.¹⁰⁴ Although Mr. Rodriguez was breathing and snoring, he was not communicating, and, therefore, Eric requested a vehicle to take Mr. Rodriguez back to base.¹⁰⁵ The MARSOC 3 loaded Mr. Rodriguez into Danny's vehicle and drove him back to the base.¹⁰⁶ Danny was in the driver's seat, Josh was in the passenger's seat, and Eric was in the back of the vehicle tending to Mr. Rodriguez.¹⁰⁷ The other witnesses to the scene, including several of Mr. Rodriguez's friends (at least four of them), simply left and returned to base in their own vehicle.¹⁰⁸ The MARSOC 3 arrived back on base with Mr. Rodriguez before 5:00 am and took Mr. Rodriguez directly to his housing unit.¹⁰⁹ Eric then discovered a small laceration on the back of Mr. Rodriguez's head and asked Danny to get his medical bag. Eric then applied Dermabond, "a super-glue to the skin," to the small cut.¹¹⁰ Eric continued to care for Mr. Rodriguez through the night, and Mr. Rodriguez displayed no changes in his condition or any signs of needing emergency care.

F. In the Morning, Mr. Rodriguez is Taken to a Hospital in Erbil

Early the next morning, there was no change in Mr. Rodriguez's condition and Eric went home to sleep, asking Mr. Rodriguez's friend to continue watching over him.¹¹¹ Later that morning, Mr. Rodriguez suddenly stopped breathing, and he then needed emergency medical attention.¹¹² Once a truck arrived at Mr. Rodriguez's housing unit, Eric and another marine loaded him into the vehicle,¹¹³ and Eric continued chest compressions on Mr. Rodriguez in the

⁹⁹ Direct Examination of Gunnery Sergeant Derek Siegel, Article 32 Hearing, 1:46 pm, Oct. 28, 2019, at 62, 78 [hereinafter "Direct Examination of Gunnery Sergeant Derek Siegel"].

¹⁰⁰ Direct Examination of Lance Corporal Beadles, *supra* note 17, at 120.

¹⁰¹ Exonerating Footage, *supra* note 35, at 8:03 and Interview with the MARSOC 3, July 22, 2022.

¹⁰² Exonerating Footage, *supra* note 35, at 8:02-03 and Interview with the MARSOC 3, July 22, 2022.

¹⁰³ Direct Examination of Gunnery Sergeant Derek Siegel, *supra* note 99, at 81.

¹⁰⁴ Direct Examination of Lance Corporal Beadles, *supra* note 17, at 121.

¹⁰⁵ *Id.*, at 127 (testifying that Eric's actions with respect to Mr. Rodriguez – attempting to communicate with him and requesting a vehicle to transport him back to base – seemed appropriate); *see also* Rep. Brian Mast, *The Corps should drop manslaughter charges against MARSOC Marines, corpsman*, MARINE CORPS TIMES, May 19, 2022, available at <https://www.marinecorpstimes.com/opinion/2022/05/19/why-the-corps-should-drop-manslaughter-charges-against-these-marsoc-marines/>.

¹⁰⁶ Cross-Examination of Special Agent Marshall, 10:11 am, Oct. 28, 2019, *supra* note 46, at 31.

¹⁰⁷ *Id.*

¹⁰⁸ Direct Examination of Gunnery Sergeant Derek Siegel, *supra* note 99, at 81 (testifying that he and Mr. Rodriguez's other friends quickly departed the establishment, in part to avoid any trouble with the local police).

¹⁰⁹ Cross-Examination of Special Agent Marshall, 10:11 am, Oct. 28, 2019, *supra* note 46, at 31-32.

¹¹⁰ *Id.* It was later determined that Mr. Rodriguez sustained a skull fracture, although it is unclear where or when sustained it. When he later went into cardiac arrest and was brought into a hospital in Erbil, the doctor who first examined Mr. Rodriguez testified that he found no evidence of brain injury, cranial swelling, deep skull fractures, raccoon eyes, or bruising behind the ears, nor did he find any blood on Mr. Rodriguez's head or body. Appendix III, Deposition of Canadian Army Major Benjamin Wiestra, Nov. 2, 2021, at 84-85, and 88 (testifying Mr. Rodriguez was not displaying any symptoms of brain injury when he arrived at the hospital).

¹¹¹ Cross-Examination of Special Agent Marshall, 10:11 am, Oct. 28, 2019, *supra* note 46, at 32.

¹¹² *Id.*, at 31-32.

¹¹³ *Id.*, at 55.

backseat. Five minutes later, they arrived at a medical facility in Erbil that was under the leadership of the Canadian military.¹¹⁴ Medical staff at the facility took over providing CPR.¹¹⁵

1. Mr. Rodriguez Aspirates on His Vomit

When resuscitation efforts began at the Canadian medical facility in Erbil, Mr. Rodriguez vomited.¹¹⁶ Dr. Benjamin Wiestra, a Canadian physician, was the medical professional resuscitating Mr. Rodriguez and the first medical professional off base to treat Mr. Rodriguez.¹¹⁷ In his deposition, Dr. Wiestra explained that treatment of Mr. Rodriguez involved first placing him in a resuscitation bay.¹¹⁸ Then, Dr. Wiestra and his team used a tool, a “glide scope,” to view Mr. Rodriguez’s throat, and especially his endotracheal tube, which must be open for a person to breathe properly.¹¹⁹ Dr. Wiestra found a “fairly large amount” of soiled vomit in Mr. Rodriguez’s endotracheal tube.¹²⁰ Using suction, Dr. Wiestra cleared Mr. Rodriguez’s airway so he would stop aspirating on his vomit, and Mr. Rodriguez had a spontaneous return of blood circulation,¹²¹ but Dr. Wiestra did not notice until around an hour later that Mr. Rodriguez’s airway needed to be further adjusted to optimize his breathing.¹²² Dr. Wiestra readjusted the airway, but between the first and second adjustments, Mr. Rodriguez was not getting optimal oxygen to his lungs.¹²³ Importantly, in examining Mr. Rodriguez, Dr. Wiestra *never* found any evidence of head trauma to Mr. Rodriguez, including lacerations or swelling.¹²⁴

2. Mr. Rodriguez is Medevac’d First to Baghdad and then to Germany

Mr. Rodriguez was to be Medevac’d to Baghdad, where there would be more capacity to assist him. However, his condition deteriorated as Dr. Wiestra and his team attempted to move him to a mobile ventilator for the Medevac.¹²⁵ After arriving at a hospital in Baghdad, Mr. Rodriguez was Medevac’d to Germany. Ultimately, Mr. Rodriguez was pronounced dead at Landstuhl Regional Medical Center in Germany on January 4, 2019, shortly after his family requested that he be taken off life support.¹²⁶ A U.S. military forensic pathologist assessing Mr. Rodriguez’s brain scan highlighted the possibility that Mr. Rodriguez had died of an “oxygenate” injury, such as aspirating on his vomit.¹²⁷ The forensic pathologist noted that she “[took] into consideration” how she “[was] told” Mr. Rodriguez’s injuries occurred in determining the cause

¹¹⁴ *Id.*, at 55.

¹¹⁵ Cross-Examination of Special Agent Marshall, 10:11 am, Oct. 28, 2019, *supra* note 46, at 33.

¹¹⁶ Direct Examination of Commander and Forensic Pathologist Carol Solomon, Article 32 Hearing, 8:31 am, Oct. 29, 2019, at 10 [hereinafter “Direct Examination of Carol Solomon”].

¹¹⁷ Appendix III, *supra* note 44, at 17.

¹¹⁸ *Id.*, at 18-19.

¹¹⁹ *Id.*, at 20.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*, at 48.

¹²³ *See id.*, at 44-45.

¹²⁴ *Id.*, at 28, 51.

¹²⁵ *Id.*, at 27.

¹²⁶ Direct Examination of Carol Solomon, *supra* note 116, at 10.

¹²⁷ *Id.*, at 7-8 (commenting on radiologist Captain Aaron Taylor’s scan and assessment of Mr. Rodriguez’s pre-death head injury and noting that Mr. Rodriguez had pulmonary edema, a lung complication, and that it “may be the case” that Mr. Rodriguez had an “oxygenate” injury that affected his brain oxygen levels).

and manner of his death,¹²⁸ which was determined to be blunt force trauma to the head by homicide.¹²⁹ And she was told by the Naval Criminal Investigative Service (“NCIS”), the entity criminally investigating the MARSOC 3, that Mr. Rodriguez “was struck, and that he fell, and his head hit the ground.”¹³⁰ Despite this explanation, Dr. Wiestra never found any evidence of head trauma to Mr. Rodriguez.¹³¹

III. WRONGFUL CHARGES AGAINST THE MARSOC 3

A. Military Ethics Review Creates Pressure to Prosecute MARSOC 3

In early 2019, a critical military review was taking place – the U.S. Special Operations Forces Culture and Ethics Review (“SOCOM Culture and Ethics Review”), which includes oversight of the MARSOC forces.¹³² Normally, the SOCOM Culture and Ethics Review takes place annually and is mandated by the U.S. Congress.¹³³ The premise for this review is that the U.S. Special Operations command has “come under greater scrutiny,” and “incidents of misconduct and unethical behavior have caused the public and government leaders to question the culture and ethics of the [Special Operations Forces] community.”¹³⁴ However, the U.S. Special Operations Command internally initiated an early 2019 SOCOM Culture and Ethics Review since “[r]ecent incidents . . . threaten the trust placed in us.”¹³⁵ The review was ordered due to a spate of recent scandals in the MARSOC command and a perception within Special Operations leadership that not enough forces were being held accountable for misconduct.¹³⁶ In light of the early 2019 SOCOM Culture and Ethics Review, there was pressure on MARSOC leadership to “make an example” of anyone allegedly committing disciplinary infractions.¹³⁷

In particular, the SOCOM Culture and Ethics Review created strong pressure to prosecute the MARSOC 3 to “make an example . . . of [the MARSOC 3]” and to show that

¹²⁸ *Id.*, at 14.

¹²⁹ Autopsy Report of Richard Anthony Rodriguez at Landstuhl Regional Medical Center, Autopsy No. ME19-0003, Defense Health Agency, Jan. 6, 2019, at 1.

¹³⁰ Direct Examination of Carol Solomon, *supra* note 116, at 14.

¹³¹ Appendix III, *supra* note 44, at 28.

¹³² Nick Turse, *Can U.S. Special Operations Command Be Held Accountable?*, FAIR OBSERVER, May 20, 2020, available at https://www.fairobserver.com/more/international_security/nick-turse-us-special-operations-forces-command-deployments-crimes-accountability-news-14311/ [hereinafter “FAIR OBSERVER”].

¹³³ UNITED STATES SPECIAL OPERATIONS COMMAND COMPREHENSIVE REVIEW, USSOCOM, Jan. 23, 2020, at 4, available at <https://sof.news/pubs/USSOCOM-Comprehensive-Ethics-Review-Report-January-2020.pdf>.

¹³⁴ *Id.* and John Friberg, *USSOCOM Report on SOF Culture and Ethics*, SOF NEWS, Jan. 29, 2020, available at <https://sof.news/ussocom/ussocom-sof-culture-ethics-report-2020/>.

¹³⁵ Letter from General and U.S. Army Commander Richard D. Clarke to All Members of U.S. Special Operations Command Re Special Operations Forces Culture and Ethics Comprehensive Review, available at <https://www.socom.mil/Documents/SOCOM%20Comprehensive%20Review.pdf>.

¹³⁶ Ryan Pickrell, *The Head of U.S. Special Operations Command Is Ordering a Sweeping Review After Recent Navy SEAL Scandals*, BUSINESS INSIDER, Aug. 12, 2019, available at <https://www.businessinsider.com/socom-head-orders-culture-ethics-review-after-scandals-2019-8> [hereinafter “BUSINESS INSIDER”].

¹³⁷ FAIR OBSERVER, *supra* note 132; Direct Examination, Master Gunnery Sergeant Deryck Dervin, Article 39(a) Hearing, July 13, 2022, at 50-53 [hereinafter “Direct Examination, Master Gunnery Sergeant Deryck Dervin”]; Interview with Daniel Draher, Aug. 4, 2022; Interview with the MARSOC 3, July 22, 2022; see also Thomas Brennan, “*It’s All Bullshit: Broken Military Justice System Jeopardizes Trust and Puts Service Members at Risk*,” THE WAR HORSE, May 6, 2022, available at <https://thewarhorse.org/marine-corps-jeopardized-by-broken-justice-system/>.

allegations of misconduct were “not going to be tolerated.”¹³⁸ This pressure foreshadowed that a criminal investigation into the MARSOC 3 would result in a court martial – no matter what such an investigation revealed. According to *The Washington Post*, “[t]he lack of transparency, as well as inaccurate rumors about the [MARSOC 3’s] case that spread in the Special Operations community, has stoked suspicions that the Marine Corps is hellbent on obtaining convictions to send a message.”¹³⁹

B. Senior Officials Blame the MARSOC 3 Despite Exonerating Evidence

Despite the exonerating security camera footage discussed in Section II above, senior officials spread rumors about the January 1, 2019, events that blamed the MARSOC 3 for Mr. Rodriguez’s death.¹⁴⁰ These rumors were totally unsubstantiated and helped convince leadership, before an official investigation was complete and before a determination of probable cause to bring charges against the MARSOC 3, of the need for a court martial.

1. Command Sources Seek to Discredit MARSOC 3 in Media

In the days following January 1, a disinformation campaign was launched against the MARSOC 3 as anonymous military sources gave false reports to wide range of media outlets. The story initially broke in an objective way on January 7, 2019, when the *New York Times* simply reported “[t]wo Marines and a Navy corpsman stationed in northern Iraq are being investigated in the death of an American civilian contractor.”¹⁴¹ The article further explained “two Defense Department officials confirmed the [Rodriguez’s] death on the condition of anonymity because they were not authorized to discuss the continuing investigation.” But then the floodgates of disinformation opened wide. The next day, the *Daily Beast* reported from “military sources,” who said there were “lots of witnesses,” that Rodriguez’s death resulted from “an atmosphere of bravado and trash-talking, involving multiple people, spilled over into a brawl that left the contractor pummeled and then stomped into unconsciousness.”¹⁴² The *Daily Mail* repeated the narrative that Mr. Rodriguez was “pummeled” to death by the MARSOC 3 and the *Business Insider* said he died in a “violent brawl.”¹⁴³ *SOFREP*, describing the situation as “the latest black eye” for U.S. Special Operations Command, said Mr. Rodriguez was killed in Iraq,

¹³⁸ Re-Cross Examination, Gunnery Sergeant Steven Kelsaw, Article 39(a) Hearing, July 13, 2022, at 132-33 [hereinafter “Re-Cross Examination, Gunnery Sergeant Steven Kelsaw”].

¹³⁹ THE WASHINGTON POST, *supra* note 57.

¹⁴⁰ See Direct Examination of Captain Blake Tonking, Article 39(a) Hearing, Jul. 13, 2020, at 18 [hereinafter “Direct Examination of Captain Tonking”] and Direct Examination, Gunnery Sergeant Steven Kelsaw, Article 39(a) Hearing, July 13, 2022, at 111 [hereinafter “Direct Examination, Gunnery Sergeant Steven Kelsaw”].

¹⁴¹ Thomas Gibbons-Neff, *Two Marines and Navy Sailor Are Investigated in Contractor’s Death*, NEW YORK TIMES, Jan. 7, 2019, available at <https://www.nytimes.com/2019/01/07/world/middleeast/us-contractor-killed-iraq.html>.

¹⁴² Adam Rawnsley, *Ex-Green Beret Pummeled to Death in Apparent Fratricide*, DAILY BEAST, Jan. 8, 2019, available at <https://www.thedailybeast.com/military-contractor-slain-in-apparent-fratricide-was-ex-green-beret>.

¹⁴³ Ariel Zilber, *Ex-Green Beret and Father of Four Who Worked for Lockheed Martin Dies After Being ‘Pummeled Into Unconsciousness by Two Marines During Gym Altercation’ While Working in Iraq*, THE DAILY MAIL, Jan. 8, 2019, available at <https://www.dailymail.co.uk/news/article-6567705/American-defense-contractor-Iraq-DIES-pummeled-unconsciousness-Marines.html>; Caitlin Foster, *What We Know About the Death of a Former Green Beret in Iraq, Who Was Reportedly Injured in a Brawl With U.S. Troops*, BUSINESS INSIDER, Jan. 11, 2019, available at <https://www.businessinsider.com/former-green-beret-soldier-reportedly-wounded-by-us-troops-in-a-fight-2019-1>.

“not in combat . . . [b]ut by the hands of our own troops” where he was “beaten by the men and left unconscious.”¹⁴⁴ And *Stars and Stripes* repeated the same false narrative adding the “contractor death is the latest in a series of high-profile episodes that have raised concerns about misconduct among elite troops.”¹⁴⁵

And yet no U.S. military personnel were authorized to speak to the media, except for MARSOC Spokesman Major Nick Mannweiler, who simply said “MARSOC is providing all requested support to investigators as they look into this incident.”¹⁴⁶ Most importantly, these reports are totally inconsistent with both the exonerating video evidence,¹⁴⁷ as well as witness testimony as to Mr. Rodriguez’s emotional state that evening.¹⁴⁸ The number and timing of these articles and the repeated citations to information coming from “military sources” demonstrates an intentional, coordinated, and concerted effort to project a false narrative onto the evening’s events which would discredit any future claims of self-defense by the MARSOC 3.

These comments, made totally outside the chain of command, were not simply unauthorized and unfortunate. They were a flagrant violation of the rights of the MARSOC 3 to the presumption of innocence and potentially a violation the Uniform Code of Military Justice, which states “all conduct of a nature to bring discredit upon the armed forces . . . of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of the court.”¹⁴⁹ By presenting a false narrative to journalists that the MARSOC 3 pummeled Mr. Rodriguez to death, these anonymous military sources portrayed the incident as another scandal for MARSOC command. There are two reasons it appears that these sources were in command positions. First, the false narrative pushed to the media was consistent with the false narrative leadership adopted at the same time. And second, there is no evidence that anyone was investigated, disciplined, or prosecuted for spreading false information to the media anonymously and outside the chain of command.

2. Leadership Further Spread Rumors that MARSOC 3 “Killed” Mr. Rodriguez

In the days following January 1, the MARSOC 3’s colleagues were told by a supervising commander during an official training meeting that “[the MARSOC 3] got drunk out in town in Erbil and killed a military contractor.”¹⁵⁰ As this rumor spread, it both (1) alienated Danny, Josh, and Eric from colleagues who could testify on their behalf and (2) helped ensure that leadership

¹⁴⁴ Steve Balestrieri, *A SF Soldier Dead, Two Marines, One Sailor Under Investigation*, SOFREP, Jan. 11, 2019, available at <https://sofrep.com/specialoperations/a-sf-soldier-dead-two-marines-one-sailor-under-investigation/>

¹⁴⁵ Chad Garland, *Three Service Members Under Investigation in Death of U.S. Contractor in Iraq, Report Says*, Jan. 8, 2019, available at https://www.stripes.com/theaters/middle_east/2019-01-08/Three-servicemembers-under-investigation-in-death-of-US-contractor-in-Iraq-reports-say-1520409.html.

¹⁴⁶ *Id.*

¹⁴⁷ Exonerating Footage, *supra* note 35, at 7:00-05 (showing Mr. Rodriguez pummeling Danny as he punches Danny in the face, Danny’s head snaps back and he stumbles).

¹⁴⁸ Cross-Examination of William Oh, Oct. 29, 2019, *supra* note 39, at 81 (describing how Mr. Rodriguez was angrier on January 1, 2019, than his friends had ever seen him, and that he could not be calmed down). Yet, media reports questionably describe Mr. Rodriguez as a peacemaker in the days following January 1. See Steve Balestrieri, *A SF Soldier Dead, Two Marines, One Sailor Under Investigation*, SOFREP, Jan. 11, 2019, available at <https://sofrep.com/specialoperations/a-sf-soldier-dead-two-marines-one-sailor-under-investigation/>.

¹⁴⁹ Uniform Code of Military Justice, 10 U.S.C. 47 § 934, Art. 134.

¹⁵⁰ Direct Examination of Captain Tonking, *supra* note 140, at 18.

would prematurely conclude to prosecute the MARSOC 3.¹⁵¹ Disturbingly, this narrative was directly contradicted by witness testimony.¹⁵² Moreover, witnesses testified only to Mr. Rodriguez being heavily intoxicated.¹⁵³

3. Senior Officials Spread Rumors to Authorities in the MARSOC 3 Case

Leadership reviewed the security footage and reports from the January 1, 2019, events. Within the group of reviewers was Danny's former direct supervisor who allegedly called him the n-word on previous occasions.¹⁵⁴ This individual was also the Senior Enlisted Adviser to Major General Yoo ("General Yoo"), who was the Commanding General of MARSOC. This person saw the video footage of Mr. Rodriguez attacking Danny and reportedly told him: "We know this was in self-defense."¹⁵⁵ But later, he told a very different story to senior officials that "Danny assaulted someone, and they died."¹⁵⁶ Specifically, he told this to General Yoo ("General Yoo"), the original "convening authority" in the MARSOC 3's case, who had the power to decide on the disposition of cases to investigation and court-martial.¹⁵⁷ This person had special influence with General Yoo as he was the top Marine special operator in MARSOC by rank and billet and was his Senior Enlisted Adviser there to represent the perspective of all the enlisted special operators.

C. Intimidation, Fear, and Lies Plague Investigation into the MARSOC 3

The Naval Criminal Investigative Service ("NCIS") began an investigation into the MARSOC 3 on January 2, 2019.¹⁵⁸ Political pressure from both SOCOM itself, the oversight body for MARSOC, and the Culture and Ethics Review created a culture rife with secrecy, intimidation, and fear that plagued this investigation and predetermined its outcome. The MARSOC 3's colleagues even described themselves as fearing "some type [of] reprisal" during the investigation.¹⁵⁹ It appears that MARSOC leadership created a culture that silenced witnesses and prevented them from testifying on behalf of the MARSOC 3. Witnesses feared that they could face reprisals for being honest, leading them to lie both to the authorities investigating the MARSOC 3 and while testifying.

¹⁵¹ Interview with Daniel Draher, Joshua Negron, and Civilian Defense Counsel, Dec. 2, 2022, and *see* Direct Examination, Gunnery Sergeant Steven Kelsaw, *supra* note 140, at 111 ("I'd heard that there was there were other people who were willing to come or – they wanted to come and say something on [Josh's] behalf or provide some type of statement. And they received word from someone else that that might not be in their best interest.").

¹⁵² Cross Examination of Staff Sergeant James Phillips, Article 32 Hearing, Oct. 29, 2019, at 58 (noting that he never smelled alcohol on Eric's breath).

¹⁵³ Direct Examination of Special Agent Marshall, Oct. 28, 2019, *supra* note 34, at 3 and Cross-Examination of William Oh, Oct. 29, 2019, *supra* note 39, at 77 (answering civilian defense counsel's question about Mr. Rodriguez's level of intoxication with "I think he was pretty intoxicated.").

¹⁵⁴ Interview with Daniel Draher, Aug. 4, 2022.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* and Interview with the MARSOC 3, July 22, 2022.

¹⁵⁷ Interview with the MARSOC 3, July 22, 2022.

¹⁵⁸ Report of Investigation (Interim), 2JAN19-MEBJ-001-7HMA (U.S. Naval Criminal Investigative Service, Jan. 31, 2019) [hereinafter "January NCIS Report"].

¹⁵⁹ Direct Examination, Gunnery Sergeant Steven Kelsaw, *supra* note 140, at 111.

Additionally, the rumors about the MARSOC 3, discussed in Sections III(B)(1) and (2) above, led Dr. Wiestra, the physician who treated Mr. Rodriguez at the Erbil hospital, to contradict his original medical findings about Mr. Rodriguez. Dr. Wiestra examined the MARSOC 3 on January 3, 2019, at the NCIS's request.¹⁶⁰ When Dr. Wiestra first examined Mr. Rodriguez on January 1, he found no evidence of head trauma.¹⁶¹ Yet, on January 3, after Dr. Wiestra learned that the MARSOC 3 were being criminally investigated, he edited his prior notes on Mr. Rodriguez's physical condition to include "possible fighting" and "possible falls" – findings he (1) never made, and (2) which appeared to contradict his original medical findings.¹⁶²

1. Leadership Instructs Witnesses to Be Silent

Witnesses to the January 1, 2019, altercation when Mr. Rodriguez attacked Danny were told to be silent by senior MARSOC officials.¹⁶³ Gunnery Sergeant Siegel testified that when he asked a senior Sergeant about Mr. Rodriguez's injuries, he "[was] instructed not to talk about it."¹⁶⁴ Further, another witness testified that he was likewise told by a Gunnery Sergeant not to ask about Mr. Rodriguez.¹⁶⁵ Neither of these witnesses was told that the U.S. Navy was conducting an investigation into that night's events.¹⁶⁶

2. Leadership Prevents Others from Coming Forward

In one instance, a Gunnery Sergeant testified that his superior said it would "not be in [his] best interest" to testify on Josh's behalf.¹⁶⁷ Several other MARSOC members also expressed concern that involvement in the MARSOC 3's case would cause reputational damage affecting their career potential.¹⁶⁸ Command culture at the time the MARSOC 3 were being investigated was such that their colleagues feared reprisals from leadership.¹⁶⁹

3. Fearing Reprisals, Witnesses Change Their Stories

Witnesses feared being targeted for punishment and lied to the investigative authorities. An eyewitness to the January 1, 2019, events first stated to the NCIS that he "didn't really

¹⁶⁰ Appendix III, *supra* note 44, at 71.

¹⁶¹ *Id.*, at 84-85 (finding no evidence of brain injury, cranial swelling, deep skull fractures, raccoon eyes, bruising behind the ears, etc.) and 85 (finding that there was no blood anywhere on Mr. Rodriguez's head or body).

¹⁶² *See id.* at 88 ("everything we observed is consistent with losing oxygen") and 72-73 (testifying that he made a "late entry" into his notes, adding ethanol, possible fighting, and possible falls); *but see id.* at 84-85 (previously finding zero evidence of a head injury); *see also* at 73 (explaining that Dr. Wiestra totally failed to describe needing to adjust the tracheal tube in his original notes about Mr. Rodriguez, taken on January 1, 2019).

¹⁶³ Direct Examination of Gunnery Sergeant Derek Siegel, *supra* note 99, at 142 ("Gunnery Sergeant Tompkins. He said not to talk about the incident and then that's when I had asked about Mr. Rodriguez and how he was doing. And I was told not to ask.").

¹⁶⁴ *Id.*

¹⁶⁵ Direct Examination of Lance Corporal Beadles, *supra* note 17, at 151-152.

¹⁶⁶ *Id.*, at 150-52 and Direct Examination of Gunnery Sergeant Derek Siegel, *supra* note 99.

¹⁶⁷ Redirect Examination, Gunnery Sergeant Steven Kelsaw, Article 39(a) Hearing, July 13, 2022, at 127.

¹⁶⁸ *See* Direct Examination, Master Gunnery Sergeant Deryck Dervin, *supra* note 137, at 58 and Direct Examination, Gunnery Sergeant Steven Kelsaw, *supra* note 140, at 111 (noting that he and his colleagues fear "some type [of] reprisal").

¹⁶⁹ Direct Examination, Gunnery Sergeant Steven Kelsaw, *supra* note 140, at 111.

remember anything [from that night] and didn't know what happened,"¹⁷⁰ but then subsequently testified at the MARSOC 3's preliminary hearing that he "lied" to the NCIS because he was scared to get into trouble for being off base.¹⁷¹ Additionally, that same witness initially testified at the preliminary hearing that no one ever instructed him not to talk about Mr. Rodriguez.¹⁷² Mere minutes later, he appeared to testify that a Gunnery Sergeant had instructed him not to ask about Mr. Rodriguez.¹⁷³

4. Doctor Contradicts Medical Findings to Fit Narrative

On January 3, 2019, the NCIS contacted Dr. Wiestra, the first physician to treat Mr. Rodriguez at the hospital in Erbil, and asked him to examine the MARSOC 3 in a "hurried fashion," outside regular hours.¹⁷⁴ As discussed in Section II(F)(1) above, Dr. Wiestra found that Mr. Rodriguez was aspirating on his vomit and adjusted his endotracheal tube to improve his breathing, but he never found any evidence of head trauma.¹⁷⁵ Around an hour later, Dr. Wiestra realized that Mr. Rodriguez's endotracheal tube still was not in the right place, and he needed to adjust it again to help Mr. Rodriguez breathe properly.¹⁷⁶ Dr. Wiestra never recorded in his medical notes needing to adjust this tube – or the time he waited to readjust it – and Mr. Rodriguez was not receiving optimal oxygen to his lungs during this time.¹⁷⁷

i. Doctor Edits His Notes to Include Observations He Never Made

According to his deposition, by the time Dr. Wiestra examined the MARSOC 3, he was aware they were being investigated by law enforcement.¹⁷⁸ After examining them on January 3, Dr. Wiestra appeared to have edited his medical notes on Mr. Rodriguez to include "possible fighting" and "possible falls," even though (1) Dr. Wiestra found no evidence of head injury to Mr. Rodriguez on January 1: "No evidence of brain injury, no swelling, no signs of deep skull fractures, no raccoon eyes, no signs of bruising behind the ears . . ." ¹⁷⁹ and (2) Dr. Wiestra's original medical findings about Mr. Rodriguez were consistent with "lack of oxygen in the airway," which he appears to have omitted from his original notes.¹⁸⁰

ii. Doctor Contradicts His Medical Findings When Speaking to Prosecutor in MARSOC 3 Case

Further, Dr. Wiestra contradicted his original medical findings about Mr. Rodriguez when he was interviewed by the prosecutor in the MARSOC 3's case. In an interview on

¹⁷⁰ Direct Examination of Lance Corporal Beadles, *supra* note 17, at 149-150.

¹⁷¹ *Id.*, at 150; Direct Examination of Staff Sergeant James Phillips, *supra* note 18, at 50-52 (noting that locators and spreadsheets, mechanisms to track which marines were out and when, were not formally used, stored, or tracked prior to New Year's Day, January 1, 2019).

¹⁷² Direct Examination of Lance Corporal Beadles, *supra* note 17, at 151-152.

¹⁷³ *Id.*

¹⁷⁴ Appendix III, *supra* note 44, at 71.

¹⁷⁵ *Id.*, at 43-45.

¹⁷⁶ *Id.*, at 45-49.

¹⁷⁷ *Id.*, at 45, 73.

¹⁷⁸ Appendix III, *supra* note 44, at 73.

¹⁷⁹ *Id.*, at 84-85.

¹⁸⁰ *Id.*, at 65, 73.

November 10, 2020, Dr. Wiestra told the prosecutor that he was unaware of any injuries to Mr. Rodriguez or how they were sustained.¹⁸¹ But on September 29, 2021, when Dr. Wiestra was interviewed a second time, he told the Prosecutor that Mr. Rodriguez had been knocked unconscious.¹⁸² Dr. Wiestra amended his original medical findings to fit a specific narrative about the January 1, 2019, events, and this helped predetermine that the MARSOC 3 would be charged and court martialled.

D. Before Investigation is Over, Leadership Says MARSOC 3 will be Tried

Pressure to prosecute more cases within MARSOC, generally, also extended to General Yoo, who had the power to decide on the disposition of the MARSOC 3's case to investigation and trial.¹⁸³ As discussed in Section III(A) above, the SOCOM Culture and Ethics Review created pressure to vigorously prosecute any case of alleged misconduct. And among the MARSOC 3's colleagues, this pressure created a command culture from "top to bottom, from General Yoo down" to demonstrate "accountability."¹⁸⁴ And as discussed in Section III(B)(2) above, Danny's supervisor spread to General Yoo the rumor that "Danny assaulted someone, and they died,"¹⁸⁵ even though that supervisor knew Danny acted in self-defense.

This culture, combined with the rumor, caused General Yoo to conclude that the MARSOC 3 would be tried while the NCIS investigation was ongoing and before an Article 32 investigation to determine probable cause. In May 2019, General Yoo made a phone call, on which he said the MARSOC 3 were "going to go to a general court martial."¹⁸⁶ This is the equivalent of a criminal suspect being told he is going to trial without ever having been charged or indicted.

E. Despite Exonerating Evidence, the MARSOC 3 are Charged

A full nine months after New Year's, on September 18, 2019, the MARSOC 3 were charged. Danny and Josh were charged with Involuntary Manslaughter, Negligent Homicide, Obstruction of Justice, Violation of a Lawful General Order, and Violation of a Lawful Order under the Universal Code of Military Justice ("UCMJ").¹⁸⁷ Eric was charged with Involuntary Manslaughter; Negligent Homicide; Obstructing Justice (on the theory that Eric returned Mr. Rodriguez "to his living quarters to avoid the command discovering [Eric's] alcohol consumption, curfew violation, and fight with a contractor, with intent to obstruct...justice" against himself, Draher and Negron); and Violation of a Lawful General Order, Specification 1, for allegedly consuming an alcoholic beverage, and Specification 2, for allegedly "remaining off base past the established curfew" of 11:59 pm.¹⁸⁸

¹⁸¹ *Id.*, at 58.

¹⁸² *Id.*

¹⁸³ Direct Examination, Master Gunnery Sergeant Deryck Dervin, *supra* note 137, at 53.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* and Interview with the MARSOC 3, July 22, 2022.

¹⁸⁶ Direct Examination of Major James Capers, Article 39(a) Hearing, July 13, 2022, at 72.

¹⁸⁷ Charge Sheet, Marine Raider Battalion, Marine Raider Regiment, Marine Corps Forces Special Operations Command, Camp Lejeune, North Carolina, Sep. 18, 2019 [hereinafter "Charge Sheet"].

¹⁸⁸ Charge Sheet, *supra* note 187.

1. The MARSOC 3 Face Prosecution but Others Get Slap on Wrist

On November 25, 2019, the MARSOC 3 were charged with Dereliction in the Performance of Duties¹⁸⁹ for allegedly missing curfew.¹⁹⁰ The MARSOC 3 were the only ones out to celebrate New Year's Eve who had asked permission to go into town and followed the mandated procedure for leaving base.¹⁹¹ Yet, other witnesses to the January 1, 2019, events who were on active duty received only non-judicial punishment (“NJP”) for violating curfew and drinking alcoholic beverages.¹⁹²

2. U.S. Government Charges Obstruction Without Probable Cause

On October 28-29, 2019, General Yoo convened an Article 32 investigation, or probable cause hearing, for the MARSOC 3.¹⁹³ The Preliminary Hearing Officer (“PHO”) found no probable cause for the obstruction of justice charge and recommended that General Yoo “strongly consider the evidence of self-defense, defense of another, and accident” when deciding whether to refer the MARSOC 3’s charges to a court-martial. The prosecution disregarded the PHO’s findings and pushed forward with all original charges.¹⁹⁴ The MARSOC 3 were referred to courts-martial, with a recommendation that Danny and Josh be tried together, *United States v. Draher/Negron*, and Eric be tried separately, *United States v. Gilmet*,¹⁹⁵ perhaps as a prosecutorial strategy to experiment with different theories of the case or to entice the MARSOC 3 testify against each other. In any event, the MARSOC 3 subsequently suffered revoked privileges, including being removed from their teams, having their security clearances suspended, having their special assignment pay revoked,¹⁹⁶ and, in Danny and Eric’s cases, having their promotions indefinitely delayed.

IV. UNJUST PROCEEDINGS AGAINST THE MARSOC 3

The unjust proceedings against the MARSOC 3 not only follow wrongful charges but have been tainted by alleged Unlawful Command Influence (“UCI”), or leadership’s coercion of and threats against the MARSOC 3’s counsel. Political pressure from above created a

¹⁸⁹ Charge Sheet, Marine Raider Battalion, Marine Raider Regiment, Marine Corps Forces Special Operations Command, Camp Lejeune, North Carolina, Nov. 25, 2019 [hereinafter “Supplemental Charge Sheet”].

¹⁹⁰ *Id.* (dismissing Eric’s Specification 2 charge and changing it to “Dereliction in the Performance of Duties” for missing curfew).

¹⁹¹ Interview with Daniel Draher, Joshua Negron, and Civilian Defense Counsel, Dec. 2, 2022.

¹⁹² Direct Examination, Corporal Adam Songer, Article 32 Hearing Transcript, 1:46 pm, Oct. 28, 2019, at 6 (explaining that Corporal Songer received only an NJP for violating curfew, drinking, and falsifying an official statement).

¹⁹³ Preliminary Hearing Officer’s Report, DD Form 457, Supplement, *United States v. GySgt Joshua S. Negron*, USMC; GySgt Daniel A. Draher, USMC; and HMC/CPO Eric S. Gilmet, USN, at 8 (Colonel G. R. Hines, Nov. 13, 2019) [hereinafter “PHO Report”].

¹⁹⁴ Pretrial Advice in the Cases of *United States v. GySgt Joshua S. Negron*, USMC; GySgt Daniel A. Draher, USMC; and HMC/CPO Eric S. Gilmet, USN, at 2 (Major D. M. Rock, U.S. Marine Corps Staff Judge Advocate, Dec. 5, 2019) [hereinafter “Pretrial Advice”].

¹⁹⁵ *Id.* at 19.

¹⁹⁶ *See* Termination of Special Duty Assignment Pay in Case of Gunnery Sergeant Daniel A. Draher 1254279753/0372 USMC, Commanding Officer 3rd Marine Raider Battalion (U.S. Marine Corps 3D Marine Raider Battalion Marine Raider Regiment U.S. Marine Corps Forces, Special Ops. Command, Apr. 4, 2019).

threatening environment for military defense attorneys, and leadership directly threatened Eric’s counsel. Other defense attorneys, including Danny’s and Josh’s counsel, felt political pressure that their careers would be harmed through representing the MARSOC 3. Consequently, the MARSOC 3 have dealt with a constant rotation of conflicted counsel for the past two years as lawyers desert their case, fearing career reprisals.

A. *Unjust Proceedings Against Eric Gilmet (2020-Present)*

On February 24, 2020, Eric was arraigned on the unwarranted charges against him.¹⁹⁷ One month later, his case was continued indefinitely due to both the COVID-19 pandemic and the unavailability of a key witness, Dr. Wiestra, who was unable to travel to the U.S. from Canada during the pandemic.¹⁹⁸ On April 20, 2020, the U.S. Marine Corps Regional Defense Counsel approved Eric’s request to appoint Judge Advocate Captain Matthew Thomas (“Captain Thomas”) as his Individual Military Counsel (“IMC”), since Captain Thomas possessed “particular experience, training, and education” that Eric trusted.¹⁹⁹

1. *Unlawful Command Influence Taints Case Against Eric*

When Captain Thomas was appointed as Eric’s IMC, Colonel Christopher Shaw (“Colonel Shaw”) managed the case assignment process for Marine Judge Advocates and directly supervised Captain Thomas.²⁰⁰ From November 15-18, 2021, Colonel Shaw visited Camp Lejeune to assist with “oversight and supervision of the provision of legal advice and legal services,” and held a meeting with members of the Defense Service Office, including Captain Thomas.²⁰¹ The Defense Service Office includes Judge Advocates who are either appointed by the U.S. Military or requested as IMC to represent accused service members. By this time, Colonel Shaw had heard the false rumor from Danny’s supervisor and the false narrative about the MARSOC 3 and was concerned with the case coming out “the right way.”²⁰²

i. Leadership Threatens Military Defense Lawyers: “You Think You are Protected but That is a Legal Fiction”

Colonel Shaw began his meeting with the defense attorneys by referencing protections created for attorneys within the Defense Services Organization, such as having their fitness reports authored by other members.²⁰³ Then Colonel Shaw dismissed these protections as disingenuous, stating that defense attorneys “may think they are shielded, but they are not

¹⁹⁷ Appendix I, *supra* note 19, at 3.

¹⁹⁸ Defense Motion to Dismiss for Unlawful Command Influence, *United States v. Gilmet*, at 4, (Navy-Marine Corps Trial Judiciary, E. Jud. Cir., Gen. Ct.-Martial), [hereinafter referred to as “Motion to Dismiss”].

¹⁹⁹ Chief Petty Officer Eric S. Gilmet, U.S. Navy to Regional Defense Counsel, Camp Lejeune, NC, Request for Individual Military Counsel in the Case of *United States v. Gilmet*, Mar. 25, 2020.

²⁰⁰ Appendix I, *supra* note 19, at 3.

²⁰¹ *Id.*, at 4.

²⁰² Interview with the MARSOC 3, July 22, 2022, and Interview with Daniel Draher, Aug. 4, 2022.

²⁰³ Appendix I, *supra* note 19, at 5.

protected.”²⁰⁴ Then, Colonel Shaw directly threatened the defense attorneys’ careers – “You think you are protected but that is a legal fiction.”²⁰⁵

ii. *Leadership Directly Threatens Eric’s Lawyer: “I Know Who You Are and What Cases You are On”*

After speaking to all present defense attorneys, Colonel Shaw then looked directly at Captain Thomas, Eric’s attorney. Colonel Shaw made eye contact, squared his shoulders toward Captain Thomas, and said, “Captain Thomas, I know who you are and what cases you are on, and you are not protected.”²⁰⁶ Colonel Shaw continued “the [review] process may shield you, but you are not protected. Our community is small and there are promotion boards and the lawyer on the promotion board will know you.”²⁰⁷ Colonel Shaw went on to describe how prior defense attorneys had “secondary effects,” such as not being promoted.²⁰⁸ Colonel Shaw implied this would happen to Captain Thomas, explaining the lawyer on the promotion board will know what “you did.”²⁰⁹

2. Defense Attorneys Fear Reprisals for Representing the MARSOC 3

Colonel Shaw’s threats made the MARSOC 3’s lawyers concerned about reprisals for representing them. Captain Thomas said in a sworn statement that Colonel Shaw’s threats “have made me concerned that my continued representation of [Eric] . . . may be detrimental to my career.”²¹⁰ Similarly, Lieutenant Commander Jennifer Luce, Danny’s former military defense lawyer, stated, “I cannot say with certainty that Col Shaw could not have some negative impact on my career in the future. I also cannot say with certainty that these concerns would not be in the back of my mind during my representation of [Danny].”²¹¹

Other defense attorneys who attended the meeting testified that they subsequently feared retaliation for representing accused service members. One defense attorney said in a sworn statement, “I left this meeting [Camp Lejeune] highly concerned about the comments made by Col. Shaw in regards to defense attorneys. To an extent, it makes me worried my representation of clients . . . will carry a negative connotation for me personally and professionally.”²¹² Another defense attorney said, “. . . I expect we will all experience some form of unseen ‘soft’ retaliation in the form of being passed over for desirable future billets, deployments, competitive boards . . .”²¹³ Still another attorney stated “[T]he meeting highlighted that those who represent the

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *See id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Affidavit of Capt. Matthew Thomas, *United States v. Gilmet*, at ¶ 6, (Navy-Marine Corps Trial Judiciary, E. Jud. Cir., Gen. Ct.-Martial, Dec. 6, 2021) [hereinafter referred to as “Thomas’s Affidavit”].

²¹¹ Affidavit of LCDR Jennifer Luce in Support of Motion to Dismiss for Unlawful Command Influence, *United States v. Draher*, at ¶ 4, (Navy-Marine Corps Trial Judiciary, E. Jud. Cir., Gen. Ct.-Martial, Dec. 15, 2021) [hereinafter “Luce’s Affidavit”].

²¹² Affidavit of Capt. Steven M. Trottier, *United States v. Gilmet*, at ¶ 6, (Navy-Marine Corps Trial Judiciary, E. Jud. Cir., Gen. Ct.-Martial, Dec. 7, 2021).

²¹³ Affidavit of Capt. Michael E. Blackburn, *United States v. Gilmet*, at ¶ 4, (Navy-Marine Corps Trial Judiciary, E. Jud. Cir., Gen. Ct.-Martial, Dec. 7, 2021).

Constitutional rights of the [a]ccused are, at the highest levels of this organization, viewed in a negative light and their careers are likely to suffer because of it.”²¹⁴

3. Leadership Appears to Obscure Unlawful Command Influence

i. *Colonel Who Threatened Eric’s Lawyer Contradicts His Own Story*

Colonel Shaw submitted a signed statement²¹⁵ asserting that “[he did] not know Captain Thomas, nor [did he] recall speaking with him.”²¹⁶ Yet, Colonel Shaw’s text messages later revealed that he texted his subordinates about Captain Thomas, mere hours before meeting with Captain Thomas and the other defense attorneys.²¹⁷

ii. *Investigation into Unlawful Command Influence Exposes Conflicts of Interest*

Following an anonymous UCI complaint against Colonel Shaw, the Marine Corps opened an investigation. The conduct of this investigation exposed conflicts of interest jeopardizing the MARSOC 3’s right to a fair trial. First, the investigator was not objectively chosen. In an unprecedented move, the investigator was subjectively hand-picked by Colonel Shaw’s division, the Judge Advocate Division, rather than by the objective Inspector General.²¹⁸ And second, the order appointing the investigator was allegedly “shaped” by Colonel Shaw’s supervisor,²¹⁹ who was previously the judge in Danny and Josh’s cases.²²⁰ The structure of the investigation enabled the Judge Advocate Division to control all aspects and arguably created an incentive to shield Colonel Shaw. In another unprecedented move, the investigator, Peter Houtz, allegedly made disparaging comments about the MARSOC 3’s lawyers.²²¹

Despite sworn statements from defense attorneys who (1) witnessed Colonel Shaw’s threats, (2) described them in detail, and (3) feared reprisals for zealously representing their clients,²²² the investigation found that Colonel Shaw “did not intend to influence, impede, or obstruct any pending proceeding” and that his threats towards Eric’s lawyer were merely

²¹⁴ Affidavit of Jonathan M. Bunker, *United States v. Gilmet*, at ¶ 5, (Navy-Marine Corps Trial Judiciary, E. Jud. Cir., Gen. Ct.-Martial, Dec. 10, 2021).

²¹⁵ Appendix I, *supra* note 19, at 7 (discussing a signed statement by Colonel Shaw submitted in Danny and Josh’s case, *United States v. Draher/Negron*). As will be discussed in Section IV(B) shortly, Danny and Josh’s lawyers learned of Colonel Shaw’s threatening comments and became conflicted counsel through UCI. Danny and Josh filed a motion to dismiss their case because of UCI, and to oppose their motion, the Government submitted the signed statement from Colonel Shaw. However, the signed statement had ramifications in Eric’s case, namely, that Colonel Shaw contradicted himself in a subsequent statement.

²¹⁶ Statement of Col. Christopher B. Shaw, U.S.M.C., Command Investigation of the Facts and Circumstances into Allegations Against Colonel Christopher B. Shaw, U.S.M.C., U.S. Marine Corps, Dec. 30, 2021, at 44.

²¹⁷ Appendix I, *supra* note 19, at 7.

²¹⁸ Defense Affidavit, *United States v. Gilmet*, at 2-3 (Navy-Marine Corps Trial Judiciary, E. Jud. Cir., Gen. Ct.-Martial, Dec. 20, 2021) [hereinafter “Defense Affidavit”].

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Interview with Daniel Draher, Aug. 4, 2022, and Interview with MARSOC 3 and Civilian Defense Counsel, Jul. 22, 2022.

²²² Peter Houtz, Command Investigation into the Facts and Circumstances into Allegations Against Colonel Christopher B. Shaw, U.S.M.C., U.S. Marine Corps, Marine Corps Installation Command, Dec. 30, 2021, at 69.

“misguided hypotheticals and anecdotes.”²²³ Thus, the investigation contradicted all witness accounts and appeared to brush Colonel Shaw’s veiled threats under the rug.

4. Eric’s Attorney-Client Relationship is Destroyed

On December 10, 2021, Eric filed a motion to dismiss all charges against him due to UCI by Colonel Shaw.²²⁴ At the December 21, 2021, hearing on this motion, the Court asked Eric’s military appointed lawyer and IMC, Captain Thomas, if they believed they faced a conflict of interest.²²⁵ They believed they did, since Colonel Shaw clearly indicated that their careers would suffer for representing Eric.²²⁶ Captain Thomas even said in a sworn statement, “Colonel Shaw’s comments have made [Eric] question my undevoted loyalty to him and his defense because they have created at least the appearance that I may have a personal interest in not defending him to the best of my ability.”²²⁷

5. Eric Forced into Impossible Choice to Release Chosen Counsel

Based upon Colonel Shaw’s threats and the impact they had on his lawyer, Eric testified, “I believe Captain Thomas has a personal interest that is inconsistent with his representation of me in this court-martial.”²²⁸ “I no longer believe Captain Thomas is able to provide legal representation without consciously or subconsciously being influenced by Colonel Shaw’s comments and the possible impact that his continued representation would have on his career progression.”²²⁹ Eric reluctantly agreed to Captain Thomas’s withdrawal as his lawyer, explaining “I did not know what to do. I did not feel like I had much of a choice.”²³⁰

6. Court Finds Unlawful Command Influence and Drops Charges

The unwarranted charges against Eric were dismissed with prejudice on February 9, 2022, after a court found that there had been UCI in Eric’s case, and that “the actions of the government have materially prejudiced [his] right to an [individual military counsel] and his right to detailed counsel.”²³¹

7. Appeals Court Summarily Reinstates Charges

Charges against Eric were wrongly reinstated on August 15, 2022, when a military appeals court summarily vacated the February ruling.²³² The appeals court falsely reasoned that because Colonel Shaw’s threats were “patently untrue” and he lacked power to act on his words,

²²³ *Id.*, at 9.

²²⁴ Motion to Dismiss, *supra* note 198, at 1.

²²⁵ Appendix I, *supra* note 19, at 7.

²²⁶ *Id.*

²²⁷ Thomas’s Affidavit, *supra* note 210, at ¶ 6.

²²⁸ Affidavit of Eric Gilmet, Chief Petty Officer, *United States v. Gilmet*, at ¶ 10, (Navy-Marine Corps Trial Judiciary, E. Jud. Cir., Gen. Ct.-Martial, Dec. 10, 2021)

²²⁹ *Id.* at ¶ 12.

²³⁰ Appendix I, *supra* note 19, at 8.

²³¹ Appendix I, *supra* note 19, at 1, 17.

²³² *See* Appendix II, *supra* note 21, at 1, 16.

the defense attorneys were not actually coerced.²³³ Yet, the defense attorneys would not have known that Colonel Shaw lacked this power – he controlled case assignments, and he was the Deputy Director of the Judge Advocate Division (which oversees the Defense Services Organization).²³⁴ The court utterly failed to consider the critical witness accounts of Captain Thomas (Eric’s lawyer), Lieutenant Commander Jennifer Luce (Danny’s lawyer), and several others when assessing whether Colonel Shaw’s threats would cause a “disinterested, objective observer, fully informed of all the facts” to doubt the fairness of proceedings against Eric. The Court of Appeals for the Armed Forces (C.A.A.F.) heard oral arguments on Eric’s case on April 18, 2023.

B. Unjust Proceedings Against Danny and Josh (2020-Present)

Danny and Josh’s cases were combined into one, *United States v. Draher/Negron*, on November 9, 2020.²³⁵ Their proceedings were impacted by Eric’s case. For instance, like Eric, Danny and Josh filed a motion to dismiss the charges against them on December 6, 2021, since Colonel Shaw’s threats also affected their attorney-client relationships and destroyed their chances of a fair trial.²³⁶

1. Unlawful Command Influence Taints Case Against Danny and Josh

Danny’s and Josh’s lawyers learned of Colonel Shaw’s threats against Eric’s lawyer (described in Sections IV(A)(1-2) above). Consequently, their lawyers no longer felt they could zealously represent Danny and Josh without suffering career reprisals (described in Sections IV(A)(4-5) above). Lieutenant Commander Jennifer Luce, Danny’s former lawyer, said in a sworn statement that Colonel Shaw could have some negative impact on her career, and “I cannot say with certainty that these concerns would not be in the back of my mind during my representation of [Danny].”²³⁷

2. Danny and Josh Make Impossible Choice to Release Chosen Counsel

During a hearing on February 17, 2022, Danny and Josh faced the same “Hobson’s choice” as Eric and felt forced into releasing their lawyers, who feared reprisals for representing them.²³⁸ New lawyers were appointed for Danny and Josh in March 2022.²³⁹ On June 24, 2022, there was a hearing on Danny and Josh’s motion to dismiss the charges against them because of UCI in their case. At this hearing, they requested more time to give their new lawyers, who were

²³³ *Id.*, at 10.

²³⁴ See Appendix I, *supra* note 19, at 3-7.

²³⁵ Certificate of Withdrawal Filing, *United States v. Draher*, (Navy-Marine Corps Trial Judiciary, E. Jud. Cir., Gen. Ct.-Martial, Nov. 9, 2020).

²³⁶ Defense Motion for Appropriate Relief (UCI), *United States v. Draher/Negron*, at 1 (Navy-Marine Corps Trial Judiciary, E. Jud. Cir., Gen. Ct.-Martial, Dec. 6, 2021).

²³⁷ Luce’s Affidavit, *supra* note 211, at ¶ 4.

²³⁸ Ruling on GySGT Negron Request for a Continuance of the 24 June 2022 Article 39a Session, *United States v. Draher/Negron*, at 1-2 (Navy-Marine Corps Trial Judiciary, E. Jud. Cir., Gen. Ct.-Martial, Jun. 7, 2022) [hereinafter “Ruling on Motion Hearing Continuance Request”].

²³⁹ *Id.*

unfamiliar with their case, the chance to formulate a strategy²⁴⁰ but the court denied this request.²⁴¹

3. Selective Justice Against Danny and Josh for Alcohol Consumption

The general court-martial against Danny and Josh began on January 17, 2023.²⁴² On January 26, a judge agreed to dismiss the obstruction of justice charges against them based upon a lack of evidence.²⁴³ On January 31, the prosecution withdrew one of the involuntary manslaughter specifications, or a description of the alleged act, against Danny.²⁴⁴ At trial, the defense examined witnesses to support theories that Mr. Rodriguez likely died as a result of aspirating on his own vomit and a lack of oxygen to his brain – rather than as a result of any actions by the MARSOC 3, and that Danny acted in self-defense and Josh defended Danny.²⁴⁵ **Finally, on February 1, 2023, following the court-martial, Danny and Josh were acquitted of all charges except alcohol consumption.²⁴⁶ Nonetheless, in the statement of trial results, Judge Eric Catto explicitly and specifically answered “did the military judge recommend suspension of the sentence or clemency?” with “yes.”²⁴⁷ He further recommended that the Convening Authority “accept a post-trial plea agreement to a forum lower than [general court martial] given the service record of the accused, the nature of the conviction (orders violation for alcohol consumption) and the collateral consequences accompanying a [general court martial] conviction.”²⁴⁸**

Judge Catto unequivocally recognized that for Danny and Josh to have felony convictions permanently on their records for this one, narrow offense would be grossly unjust in light of their service records. Although they were sentenced to “no legal punishment” for alcohol consumption, they could still be unfairly punished. General Trollinger, the convening authority, could still choose to process Danny and Josh for administrative separation, which is normally reserved for significantly more egregious offenses.²⁴⁹ This punishment would shatter their careers and deprive them of benefits they have earned for their distinguished service. Thus, Judge Catto specifically requested that General Trollinger set aside the conviction and punish Danny and Josh administratively, which would enable them to leave the military with their service records intact and as they existed before they were accused of these crimes. Likewise,

²⁴⁰ Congressional Letter, *Scheduling date for unlawful command influence (UCI) motions hearing for Gunnery Sergeant (GySgt.) Daniel A. Draher Jr. and GySgt. Joshua S. Negron*, Jun. 6, 2022.

²⁴¹ Ruling on Motion Hearing Continuance Request, *supra* note 238, at 8.

²⁴² Jeff Schogol, *What You Need to Know About the ‘MARSOC 3’ Trial*, TASK & PURPOSE, Jan. 27, 2023, available at <https://taskandpurpose.com/news/marines-marsoc-3-trial/>.

²⁴³ *Id.*, and Irene Loewenson, *2 Marines Found Not Guilty of Homicide in Green Beret Veteran’s Death*, MARINE CORPS TIMES, Feb. 2, 2023, available at <https://www.marinecorpstimes.com/news/your-marine-corps/2023/02/02/2-marines-found-not-guilty-of-homicide-in-green-beret-veterans-death/> [hereinafter “Loewenson”].

²⁴⁴ Loewenson, *supra* note 243.

²⁴⁵ Irene Loewenson, *Prosecution Experts in ‘MARSOC 3’ Trial say Fistfight Killed Army Vet*, MARINE CORPS TIMES, Jan. 28, 2023, available at <https://www.marinecorpstimes.com/news/your-marine-corps/2023/01/28/prosecution-experts-in-marsoc-3-trial-say-fistfight-killed-army-vet/>.

²⁴⁶ Loewenson, *supra* note 243.

²⁴⁷ *U.S. v. Draher and Negron*, Statement of Trial Results for Daniel Draher, Feb. 2, 2023, at 1 [hereinafter “Appendix 4”] and *U.S. v. Draher and Negron*, Statement of Trial Results for Joshua Negron, Feb. 2, 2023, at 1 [hereinafter “Appendix 5”].

²⁴⁸ *Id.*

²⁴⁹ Loewenson, *supra* note 243.

Danny and Josh’s defense attorneys have called upon General Trollinger to set aside the conviction – but if he does not, they will appeal it.²⁵⁰ And General Trollinger should set aside the conviction, because it is an egregious example of selective justice. The MARSOC 3’s colleagues who were consuming alcohol on New Year’s Eve received only “non-judicial punishment” in exchange for their cooperation with prosecutors – whereas only the MARSOC 3 were criminally charged, and Danny and Josh were convicted.²⁵¹

V. ANALYSIS

The U.S. Senate ratified the International Covenant on Civil and Political Rights (“ICCPR”) in 1992,²⁵² giving this human rights treaty the force of federal legislation under the U.S. Constitution’s Supremacy Clause.²⁵³ The ICCPR’s provisions apply to proceedings in U.S. military courts.²⁵⁴ Consequently, U.S. military courts must adhere to both the fair trial requirements of the U.S. Constitution, as well as the ICCPR’s requirements for the right to a fair trial, access to counsel, non-discrimination, and due process of law.²⁵⁵ For the reasons set forth below, the MARSOC 3 have suffered numerous violations of their rights under international law that have severely undermined their human right to a fair trial.

A. The MARSOC 3 Have Been Denied the Presumption of Innocence

Article 14(2) of the ICCPR guarantees that “[e]veryone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.”²⁵⁶ This right

²⁵⁰ *Id.*

²⁵¹ See Direct Examination, Corporal Adam Songer, *supra* note 192, at 6.

²⁵² International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, [hereinafter “ICCPR”]; Ratification Status for the United States, UN Treaty Body Database, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *accessed* Sept. 20, 2022, *available at* https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=137&Lang=EN; RESOLUTION OF RATIFICATION: SENATE CONSIDERATION OF TREATY DOC. 95-20, U.S. SENATE, Apr. 2, 1992, available at https://www.congress.gov/treaty-document/95th-congress/20/resolution-text.

²⁵³ U.S. CONST. Art. VI, Cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land [...]”). The U.S. Supreme Court has also looked to the ICCPR to interpret obligations under the U.S. Constitution. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 663 (2006) (using the ICCPR in the plurality opinion to interpret fair trial obligations under the Geneva Conventions); *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (referencing the ICCPR in determining constitutionality of death penalty for children); *Thompson v. Oklahoma*, 487 U.S. 815, 838 n.34 (1988) (holding application of death penalty to be unconstitutional as applied to a defendant who was fifteen years old at the time of the killing and referring to ICCPR standard of prohibiting death penalty for juveniles).

²⁵⁴ *General Comment No. 32 on Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, HUMAN RIGHTS COMM., U.N. Doc. CCPR/C/GC/32, Aug. 23, 2007, at ¶ 22, *available at* <http://hrlibrary.umn.edu/gencomm/hrcom32.html#:~:text=The%20right%20to%20equality%20before,a%20series%20of%20specific%20rights> [hereinafter “General Comment No. 32”].

²⁵⁵ *Id.*; Gabriela Knaul, REPORT OF THE SPECIAL RAPporteur ON THE INDEPENDENCE OF JUDGES AND LAWYERS, U.N. Doc. A/68/265, Aug. 7, 2013, at ¶ 88, *available at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/421/29/PDF/N1342129.pdf?OpenElement> [hereinafter “A/68/265”]; Emmanuel Decaux, REPORT OF THE SPECIAL RAPporteur OF THE SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS, U.N. Doc. E/CN.4/2006/58, Jan. 13, 2006, at 8, *available at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/106/77/PDF/G0610677.pdf?OpenElement> [hereinafter “Decaux Principles”].

²⁵⁶ ICCPR, *supra* note 252, at Art. 14(2).

is both reiterated in the Universal Declaration of Human Rights (“UDHR”),²⁵⁷ to which the U.S. was an original signatory, and recognized as a “bedrock” principle of U.S. criminal law.²⁵⁸ The presumption of innocence is non-derogable in all circumstances,²⁵⁹ applies at all stages of criminal proceedings,²⁶⁰ and is essential to protecting the human right to a fair trial.²⁶¹ Notably, the right to the presumption of innocence is guaranteed both prior to the filing of criminal charges and during an investigation relating to the trial of an accused person.²⁶² Further, all persons must be treated in accordance with the presumption of innocence.²⁶³ It is “a duty for all public authorities to refrain from prejudging the outcome of a trial.”²⁶⁴ State officials must also abstain from public comments affirming guilt of the accused.²⁶⁵

1. It was Predetermined that the MARSOC 3 Would be Charged

Senior officials made numerous statements to the media, within the command, and to its leadership, who would decide the course of the MARSOC 3’s case, blaming the MARSOC 3 for Mr. Rodriguez’s death before an investigation was completed. First, a group of anonymous military sources launched a disinformation campaign portraying the MARSOC 3 as having pummeled and stomped Mr. Rodriguez to death.²⁶⁶ The number and timing of these articles and

²⁵⁷ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, *adopted* 1948, at Art. 10 [hereinafter “Universal Declaration of Human Rights”].

²⁵⁸ *In re Winship*, 397 U.S. 358, 363 (1970) (citing *Coffin v. United States*, 156 U.S. 432, 453 (1895) (describing the presumption of innocence as “that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law’)).

²⁵⁹ *General Comment No. 29 on Article 4: Derogations During a State of Emergency*, HUMAN RIGHTS COMM., U.N. Doc. CCPR/C/GC/29, Aug. 31, 2001, at ¶ 11 *available at* <https://www.refworld.org/docid/453883fd1f.html> (“States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of . . . fundamental principles of fair trial, including the presumption of innocence.”) and *General Comment No. 32, supra* note 254, at ¶ 6.

²⁶⁰ *See General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or In Relation to Declarations Under Article 41 of the Covenant*, HUMAN RIGHTS COMM., U.N. Doc. CCPR/C/GC/24, Nov. 4, 1994, at ¶ 8 *available at* <https://www.refworld.org/docid/453883fc11.html> (interpreting the non-derogable nature of the presumption of innocence under the ICCPR means that “a State may not reserve the right . . . to presume a person guilty unless he proves his innocence” without specifying that the presumption applies only to the trial stage); *see also* AMNESTY INTERNATIONAL FAIR TRIAL MANUAL, 2d Ed., at 125-26 (2014), *available at* <https://www.amnesty.org/en/wp-content/uploads/2021/06/pol300022014en.pdf> and Michelle Coleman, *THE PRESUMPTION OF INNOCENCE IN INTERNATIONAL HUMAN RIGHTS AND CRIMINAL LAW*, at 33 (Routledge, 2021) (explaining that the presumption of innocence applies to all criminal proceedings but is not strictly limited to trial) [hereinafter “Coleman”].

²⁶¹ *General Comment No. 32, supra* note 254, at ¶ 6.

²⁶² Alex Conte & Richard Burchill, *DEFINING CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE*, at 176 (2009) and MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY*, AT 254 (N.P. Engel, 2nd ed., 2005).

²⁶³ Coleman, *supra* note 260, at 33-38.

²⁶⁴ *General Comment No. 32, supra* note 254, at ¶ 30.

²⁶⁵ *Id.*

²⁶⁶ Adam Rawsley, *Ex-Green Beret Pummeled to Death in Apparent Fratricide*, DAILY BEAST, Jan. 8, 2019, *available at* <https://www.thedailybeast.com/military-contractor-slain-in-apparent-fratricide-was-ex-green-beret>; Ariel Zilber, *Ex-Green Beret and Father of Four Who Worked for Lockheed Martin Dies After Being ‘Pummeled Into Unconsciousness by Two Marines During Gym Altercation’ While Working in Iraq*, THE DAILY MAIL, Jan. 8, 2019, *available at* <https://www.dailymail.co.uk/news/article-6567705/American-defense-contractor-Iraq-DIES-pummeled-unconsciousness-Marines.html>; Caitlin Foster, *What We Know About the Death of a Former Green Beret in Iraq, Who Was Reportedly Injured in a Brawl With U.S. Troops*, BUSINESS INSIDER, Jan. 11, 2019, *available at*

the demonstrates an intentional, coordinated, and concerted effort to project a false narrative onto the evening's events.

Second, senior U.S. military officials and investigators working with law enforcement and the prosecution made statements affirming the MARSOC 3's guilt. During an official training meeting, a U.S. supervising commander told the MARSOC 3's colleagues, "[the MARSOC 3] got drunk out in town in Erbil and killed a military contractor."²⁶⁷ Not only did this statement explicitly blame the MARSOC 3 for Mr. Rodriguez's death, it alienated them from their colleagues and deterred additional witnesses from coming forward for fear of reprisals.²⁶⁸ In fact, one witness cited "what he had heard" as a reason he feared coming forward to testify.²⁶⁹ Senior officials also implied that the MARSOC 3 were guilty by instructing witnesses to be silent and not to ask about Mr. Rodriguez²⁷⁰ and by telling another of the MARSOC 3's colleagues that it would "not be in [his] best interest" to testify on Josh's behalf.²⁷¹

Third, the NCIS may have predisposed key medical actors to conclusions about Mr. Rodriguez that fit its narrative against the MARSOC 3. For example, Dr. Wiestra, the physician at the Erbil hospital, never found any indication of head trauma to Mr. Rodriguez.²⁷² Nonetheless, after learning the MARSOC 3 were under investigation, he retroactively edited his medical notes about Mr. Rodriguez to include "possible fighting" and "possible falls" – medical observations he never made.²⁷³ Dr. Wiestra later told the Prosecutor that Mr. Rodriguez had been "knocked unconscious," a statement which contradicted his original medical findings.²⁷⁴ Additionally, the forensic pathologist "[took] into consideration" how she "[was] told" by NCIS that Mr. Rodriguez's injuries occurred, and she was told that Mr. Rodriguez "was struck, and that he fell, and his head hit the ground."²⁷⁵ NCIS's statements may have strongly influenced the medical evidence it received, but at worst, helped predetermine that the MARSOC 3 would be blamed.

And finally, Danny's direct supervisor allegedly made a false statement that "Danny assaulted someone, and they died" to command leadership, including to decisionmakers in the MARSOC 3's case, even though he later told Danny, "We know this was in self-defense."²⁷⁶ Critically, proving self-defense and defense of others would exonerate Danny and Josh of the homicide charges against them. Furthermore, Danny's direct supervisor allegedly had a history

<https://www.businessinsider.com/former-green-beret-soldier-reportedly-wounded-by-us-troops-in-a-fight-2019-1>; Steve Balestrieri, *A SF Soldier Dead, Two Marines, One Sailor Under Investigation*, SOFREP, Jan. 11, 2019, available at <https://sofrep.com/specialoperations/a-sf-soldier-dead-two-marines-one-sailor-under-investigation/>; Chad Garland, *Three Service Members Under Investigation in Death of U.S. Contractor in Iraq, Report Says*, Jan. 8, 2019, available at https://www.stripes.com/theaters/middle_east/2019-01-08/Three-servicemembers-under-investigation-in-death-of-US-contractor-in-iraq-reports-say-1520409.html.

²⁶⁷ Direct Examination of Captain Tonking, *supra* note 140, at 18.

²⁶⁸ See and Direct Examination of Lance Corporal Beadles, *supra* note 17, at 150 (expressing fear that coming forward would lead to reprisals).

²⁶⁹ Direct Examination, Gunnery Sergeant Steven Kelsaw, *supra* note 140, at 109 (citing "what he had heard" in reference to rumors about the MARSOC 3 as one of the reasons he hesitated to come forward on Josh's behalf).

²⁷⁰ Direct Examination of Gunnery Sergeant Derek Siegel, *supra* note 99, at 142.

²⁷¹ Redirect Examination, Gunnery Sergeant Steven Kelsaw, *supra* note 167, at 127.

²⁷² Appendix III, *supra* note 44, at 84-85.

²⁷³ *Id.*

²⁷⁴ *Id.*, at 58.

²⁷⁵ Direct Examination of Carol Solomon, *supra* note 116, at 14.

²⁷⁶ Interview with Daniel Draher, Aug. 4, 2022.

of repeating racial slurs, including the n-word, at Danny, and singling him out for punishment at every opportunity.²⁷⁷ False statements to command leadership paved the way for the MARSOC 3 to be charged, despite Danny's and Josh's actions in self-defense and defense of others.

2. It was Predetermined that the MARSOC 3 Would be Tried

The 2019 SOCOM Culture and Ethics Review both generated press and created a culture within the command to “make an example” of anyone allegedly committing misconduct.²⁷⁸ This culture generated political pressure for the command to prosecute the MARSOC 3. Indeed, the *Washington Post* reported in the MARSOC 3's case that “[t]he lack of transparency, as well as inaccurate rumors about the [MARSOC 3] case that spread in the Special Operations community, has stoked suspicions that the Marine Corps is hellbent on obtaining convictions to send a message.”²⁷⁹ These suspicions were confirmed in May 2019, before the investigation against the MARSOC 3 was complete and six months before the Article 32 investigation was even convened to determine probable cause. General Yoo, a decision-maker with authority to decide the MARSOC 3's case disposition to investigation and trial, made a phone call on which he said that the MARSOC 3 were “going to go to a general court martial.”²⁸⁰ This is the equivalent of a criminal suspect being told he is going to trial without ever having been charged or indicted, and signals General Yoo's clear predisposition that the MARSOC 3 were guilty of a crime.

3. Prosecution Disregards Evidence Exonerating Danny and Josh

On October 28-29, 2019, General Yoo convened a Preliminary Hearing to determine probable cause for the charges against Danny and Josh.²⁸¹ Although this hearing found that there was no probable cause for the obstruction of justice charge,²⁸² and advised the prosecution to consider evidence of “self-defense, defense of another, and accident,” the prosecution disregarded these findings and pushed forward with all original charges.²⁸³ This action is a further demonstration that the MARSOC 3 were always going to be prosecuted.

4. The MARSOC 3 Have Been Penalized as Though They Are Guilty

While the NCIS investigation was ongoing and before any charges had been filed, the MARSOC 3 suffered revoked privileges, including being removed from their teams, having their security clearances suspended, and having their special assignment pay revoked.²⁸⁴ Danny's

²⁷⁷ Interview with Daniel Draher, Aug. 4, 2022.

²⁷⁸ See, e.g., BUSINESS INSIDER, *supra* note 136; FAIR OBSERVER, *supra* note 132; THE WASHINGTON POST, *supra* note 57.

²⁷⁹ THE WASHINGTON POST, *supra* note 57.

²⁸⁰ Direct Examination of Major James Capers, *supra* note 186, at 72.

²⁸¹ PHO Report, *supra* note 193, at 8.

²⁸² *Id.*

²⁸³ Pretrial Advice, *supra* note 194, at 2, 19.

²⁸⁴ See Termination of Special Duty Assignment Pay in Case of Gunnery Sergeant Daniel A. Draher 1254279753/0372 USMC, Commanding Officer 3rd Marine Raider Battalion (U.S. Marine Corps 3D Marine Raider Battalion Marine Raider Regiment U.S. Marine Corps Forces, Special Ops. Command, Apr. 4, 2019).

promotion was indefinitely delayed.²⁸⁵ These punishments are the equivalent of the MARSOC 3 being summarily found guilty.

B. The MARSOC 3 Have Been Denied the Right to Equality Before the Courts

Article 14(1) of the ICCPR guarantees “[a]ll persons shall be equal before the courts and tribunals.”²⁸⁶ This right is affirmed under the UDHR: “All are equal before the law and are entitled without any discrimination to equal protection of the law.”²⁸⁷ This right is also protected by the U.S. Constitution.²⁸⁸ The Human Rights Committee has stated, “[e]quality before courts and tribunals also requires that similar cases are dealt with in similar proceedings.”²⁸⁹ The right to equality before the courts also includes the right to equality of arms, to ensure that the parties to the proceedings in question are treated without discrimination.²⁹⁰ In military proceedings, the role and functions of convening officers in military proceedings must be clearly defined to avoid interference and external pressure that may hinder the independent and impartial administration of justice.²⁹¹

1. The MARSOC 3 Face the Unequal Administration of Justice

In violation of the requirement that similar cases are dealt with in similar proceedings, the MARSOC 3 have been criminally charged while other witnesses received merely a slap on the wrist for the same alleged offense.²⁹² On November 25, 2019, the MARSOC 3 were charged with Dereliction in the Performance of Duties for allegedly missing curfew.²⁹³ In comparison, Corporal Songer, who punched Josh, received only non-judicial punishment for violating curfew, drinking alcohol, and falsifying an official statement.²⁹⁴ Later, **Danny and Josh were selectively convicted for alcohol consumption on February 1, 2023.**²⁹⁵

2. Colonel Shaw’s Threats Undermine the Equality of Arms

Moreover, Colonel Shaw’s threatening statements during proceedings against the MARSOC 3 were aimed not only at their own lawyers (discussed in Subsection C, below), but at all lawyers in the Defense Services Organization.²⁹⁶ Colonel Shaw threatened the defense lawyers’ careers, noting that they “may think they are shielded, but they are not protected,” and that “You think you are protected but that is a legal fiction.”²⁹⁷ Consequently, the defense

²⁸⁵ Delay of Promotion Memo, *supra* note 11.

²⁸⁶ ICCPR, *supra* note 252, at Art. 14(1).

²⁸⁷ UDHR, *supra* note 257, at Art. 7.

²⁸⁸ U.S. CONST. 14th Amend.

²⁸⁹ *General Comment No. 32*, *supra* note 254, at ¶ 14.

²⁹⁰ *Id.*, at ¶ 8.

²⁹¹ A/68/265, *supra* note 255, at ¶ 42.

²⁹² Direct Examination, Corporal Adam Songer, *supra* note 192, at 6.

²⁹³ Supplemental Charge Sheet, *supra* note 189.

²⁹⁴ Direct Examination, Corporal Adam Songer, *supra* note 192, at 6.

²⁹⁵ Loewenson, *supra* note 243.

²⁹⁶ Appendix I, *supra* note 19, at 5.

²⁹⁷ *Id.*

lawyers feared reprisals for zealously representing accused service members. The result of Colonel Shaw's threats is unfairly advantageous the prosecution in any given case.

3. Political Pressure to Prosecute Hinders General Yoo's Independence

General Yoo, as convening authority in a military case, would decide the disposition of the MARSOC 3's case to investigation and trial.²⁹⁸ As discussed in Section V(A)(2) above, the SOCOM Culture and Ethics Review created pressure to vigorously prosecute any case of alleged misconduct and caused General Yoo to conclude the MARSOC 3 would be tried before an investigation was completed. The MARSOC 3's colleagues testified that SOCOM created a command culture from "top to bottom, from General Yoo down" to demonstrate "accountability"²⁹⁹ through zealous prosecution of alleged misconduct. Such political pressure hinders independent decision-making.

4. Investigation of Colonel Shaw is Neither Independent nor Impartial

Peter Houtz, the investigator chosen to assess whether Colonel Shaw's threats against Eric's counsel constituted UCI, was selected in part by the former Judge in Danny and Josh's cases who was also Colonel Shaw's supervisor,³⁰⁰ rather than objectively chosen by the Inspector-General. Additionally, Houtz was a military appellate judge who had previously made disparaging comments about the MARSOC 3's lawyers.³⁰¹ The investigation casts serious doubt on the independence of judges in the MARSOC 3's cases, as well as their predispositions against the MARSOC 3's lawyers and toward prosecuting the MARSOC 3.

C. The MARSOC 3 Have Been Denied Independent Counsel of Their Choice

Article 14(3)(b) of the ICCPR protects the right of an accused "[t]o have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing."³⁰² This right is reiterated in the UN Basic Principles on the Role of Lawyers, which states that "[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them [...]."³⁰³ Further, the independence of lawyers has been widely recognized as reinforcing equality before the courts.³⁰⁴ "Governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference," and that lawyers "shall not suffer,

²⁹⁸ Direct Examination, Master Gunnery Sergeant Deryck Dervin, *supra* note 137, at 53.

²⁹⁹ *Id.*

³⁰⁰ Defense Affidavit, *supra* note 218, at 2-3.

³⁰¹ Interview with Daniel Draher, Aug. 4, 2022, and Interview with MARSOC 3 and Civilian Defense Counsel, Jul. 22, 2022.

³⁰² ICCPR, *supra* note 252, at Art. 14(3)(b).

³⁰³ Basic Principles on the Role of Lawyers, U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *adopted* Sep. 7, 1990, at Principle 1, available at <https://www.refworld.org/docid/3ddb9f034.html>.

³⁰⁴ *See* A/68/265, *supra* note 255, at ¶ 42 and Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers, Human Rights Council Res. 35/12, U.N. Doc. A/HRC/RES/35/12, *adopted* Jul. 10, 2017, at ¶ 1 [hereinafter "HRC Resolution 35/12"].

or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”³⁰⁵

The MARSOC 3 have been denied access to counsel of their choice because Colonel Shaw’s threats against their lawyers undermined their respective attorney-client relationships. Each of the MARSOC 3 made an impossible choice and felt compelled to release their counsel. Eric chose Captain Thomas as his Individual Military Counsel.³⁰⁶ Yet, Colonel Shaw, the Deputy Director of the Judge Advocate Division and with the power to oversee case assignments, threatened Captain Thomas’s career, saying “I know who you are and what cases you are on, and you are not protected,”³⁰⁷ and suggesting Captain Thomas would face “secondary effects,” like not being promoted, for representing Eric.³⁰⁸

Moreover, Colonel Shaw’s threats undermined the independence of the MARSOC 3’s lawyers. Captain Thomas testified that he was “concerned that my continued representation of [Eric] . . . may be detrimental to my career.”³⁰⁹ And Eric testified, “I believe Captain Thomas has a personal interest that is inconsistent with his representation of me [. . .].”³¹⁰ Similarly, Lieutenant Commander Jennifer Luce testified that Colonel Shaw’s threats would affect her zealous representation of Danny.³¹¹ Josh also later released his lawyers for the same reasons. Since then, the MARSOC 3 have been through a constant rotation of conflicted lawyers, which has also hindered their facilities to prepare an adequate defense.

³⁰⁵ Basic Principles on The Role of Lawyers, U.N. Doc. A/CONF.144/28/Rev.1, *adopted* Sept. 7, 1990, at Art. 16 and Diego García-Sayán, REPORT OF THE SPECIAL RAPporteur ON THE INDEPENDENCE OF JUDGES AND LAWYERS, U.N. Doc. A/HRC/50/36, Apr. 22, 2022, at ¶ 1, *available at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/327/15/PDF/G2232715.pdf?OpenElement>.

³⁰⁶ Request for Individual Military Counsel in *United States v. Gilmet*, *supra* note 199.

³⁰⁷ Appendix I, *supra* note 19, at 5.

³⁰⁸ *Id.*

³⁰⁹ Thomas’s Affidavit, *supra* note 210, at ¶ 6.

³¹⁰ Gilmet’s Affidavit, *supra* note 228, at ¶ 10.

³¹¹ Luce’s Affidavit, *supra* note 211, at ¶ 4.