

The Philadelphia Inquirer

August 3, 2006 Thursday

SECTION: NATIONAL; Pg. A01

LENGTH: 1038 words

HEADLINE: A two-front war for Murtha;
He's under attack by those livid about his Iraq criticism.

BYLINE: Tom Infield, Inquirer Staff Writer

BODY:

In May, U.S. Rep. John P. Murtha roused the anger of some in the military and on the political right by saying that American Marines had "killed innocent civilians in cold blood" in Iraq.

Now, the Western Pennsylvania Democrat - who hopes to become majority leader if his party captures the House in the fall election - finds himself under fire on two fronts as a result of his comment, which dealt with a still-unresolved incident in Haditha, Iraq, late last year in which 24 people died.

Politically, Murtha is under attack from a few of the veterans who during the 2004 presidential campaign led an assault on U.S. Sen. John Kerry's record in the Vietnam War. Their campaign - right down to images on their Web site, www.bootmurtha.com - deliberately echoes what Democrats have called the "swiftboating" of Kerry.

Legally, Murtha faces a lawsuit filed yesterday in federal court in Washington in which a 26-year-old Marine sergeant contends that Murtha defamed him and his unit.

Amid all of this, the facts of the Haditha incident remain clouded.

No one has been charged with a crime, although the Associated Press quoted unnamed Pentagon sources yesterday saying that evidence supports the contention that Marines shot the 24 people deliberately and that they were not killed amid a house-to-house gun battle, as was claimed in the libel suit filed by Staff Sgt. Frank D. Wuterich, a member of the 3d Battalion, 1st Marine Regiment.

Murtha, 74, a 26-year House member and the top Democrat on the Armed Services Committee, has become a lightning rod for Iraq controversy because of his persistent calls for the U.S. to pull out of Iraq.

"The war cannot be won militarily," he said yesterday.

He is a tough-talking Marine Corps veteran of the Vietnam War with two Purple Hearts for wounds received in combat. But some bloggers on the right have raised vague questions about the legitimacy of his combat medals, just as some questioned Kerry's three Purple Hearts from Vietnam when he was the Democratic nominee for president in 2004.

Murtha, in a phone interview yesterday, said such questions were "ridiculous" and nothing but efforts "stop me from talking" about what he sees as failed U.S. policy in Iraq.

In a prepared statement on the lawsuit, he commented: "I don't blame the staff sergeant for lashing out. When I spoke up about Haditha, my intention was to draw attention to the horrendous pressure put on our troops in Iraq and to the cover-up of the incident."

Among other things, the lawsuit seeks to smoke out the military officials who gave him the information on which he based his charge that Marines had killed innocent civilians.

Asked about this in the interview, Murtha said the information came from Gen. Michael Hagee, the commandant of the Marine Corps, in a one-on-one conversation the day before Hagee made a trip to Iraq. **Hagee did not use the term "in cold blood," he added.**

Col. Dave Lapan, a Marine spokesman, disputed Murtha's account.

He said the commandant did brief Murtha about the Haditha incident. But he said that was on May 24, a week after Murtha made his public comment. The next day, May 25, Hagee left for Iraq, he said.

In Johnstown today, a group calling itself Vets for the Truth planned to hold a news conference in front of Murtha's congressional office to announce plans for an anti-Murtha rally Oct. 1. Murtha's Republican opponent, Diana Irey, who faces an uphill battle, said in an interview that she, too, was upset by Murtha's comment about the Haditha Marines.

The veterans' group is led by retired Navy Capt. Larry Bailey of Chocowinity, N.C., a former Navy SEAL who once commanded the Naval Special Warfare Center in Coronado, Calif.

Bailey was president of the anti-Kerry Vietnam Vets for the Truth, which sponsored a 2004 rally on Capitol Hill. The group called attention to what it said were Kerry's lies in the 1970s about atrocities committed by U.S. troops in Vietnam.

Its Web site carries an image of Murtha on a made-up book cover bearing the same title and same look as a book written about Kerry in 2004, *Unfit for Command*.

Unfit for Command was co-written by John E. O'Neill, a Texas lawyer who co-led a group of anti-Kerry swift boat veterans, some of whom Kerry had served with as a Navy officer in Vietnam.

Bailey said his group, which so far consists only of "five or six" veteran members, is not related to the former Swift Boat Veterans for Truth. But he said he had asked O'Neill to speak at the fall anti-Murtha rally.

O'Neill, reached at his law office in Houston on Tuesday, said he had no comment on the request or the group's activities.

Bailey said his group raised \$150,000 in 2004, while the larger swift-boat group raised millions. The two were unrelated but worked in harmony, he said.

He said he was furious when Murtha "slandered" the Haditha Marines without knowing all that had happened.

"No intelligent patriot would make a statement like that until the facts were in," he said.

This time around, Vets for the Truth had just \$15,000 in the bank as of Tuesday, Bailey said.

But he said his group has become part of another group, Iowa Presidential Watch, which is registered with the Federal Election Commission and IRS to accept contributions. That group is led by Roger Hughes, the Republican Party leader of Hamilton County, Iowa.

Hughes, in an interview, said, "I think there is a potential for many people in the country to rally to this cause."

In comments attributed to him on the Web site www.iowapresidentialwatch.com, Hughes says Murtha's ambition to be House majority leader gives him "the potential to hurt America's security more than in the past."

"He has taken upon himself the role of being in the front line of the assault on America's security," the Web site quotes Hughes as saying. "His 'fifth-column' efforts in former years have not resulted in any significant weakening of America's strength, but now it is different!"

Merriam-Webster's Collegiate Dictionary defines *fifth column* as "a group of secret sympathizers or supporters of an enemy that engage in espionage or sabotage within defense lines or national borders."

Said Murtha: "To call me a fifth-columnist, I cannot believe that."

Contact Tom Infield at 610-313-8205 or tinfield@phillynews.com.

The Washington Times

May 20, 2006 Saturday

SECTION: EDITORIALS; Pg. A12

LENGTH: 370 words

HEADLINE: Murtha's irresponsible remarks

BYLINE: By THE WASHINGTON TIMES

BODY:

Rep. John Murtha, who last year called for the immediate pullout of U.S. troops from Iraq, this week accused an entire Marine company of murdering 15 Iraqis "in cold blood." Mr. Murtha claims he received his information from sources inside the Pentagon, which is conducting an investigation into the Nov. 15 incident in the town of Haditha. That investigation is not yet completed, which makes Mr. Murtha's accusation not only irresponsible, but an egregious violation of ethical conduct by a sitting congressman.

Mr. Murtha concedes that he has not read any part of the Pentagon's unfinished report. All he has are his "sources." But if Mr. Murtha thinks he can hide behind them, he has severely underestimated the seriousness of his accusation. By turning the presumption of innocence standard on its head, Mr. Murtha is duty-bound to name his sources or provide evidence. Otherwise, he must immediately apologize to the Marines he so recklessly labeled as cold-blooded murderers.

The incident in question occurred when a roadside bomb struck a Humvee carrying Marines from Kilo Company, 3rd Battalion, 1st Marines, killing Lance Cpl. Miguel Terrazas. What happened next is the subject of the Pentagon investigation, but 15 Iraqis were in fact killed. The Marine Corps, meanwhile, has responded to the investigation by suspending three Marine officers involved in the incident. What's important to remember is that if the Marines did act outside the rules of combat, they will be tried by a military court martial not by Jack Murtha, a former Marine who should know better.

Which makes us wonder if there's an ulterior motive behind his indefensible comments: "Our troops overreacted because of the pressure on them and they killed innocent civilians in cold blood," he said. Mr. Murtha is actually accusing the Bush administration of murder, because of the "pressure" it has put on U.S. troops. It bears noting that Mr. Murtha delivered his accusation at a press conference marking the six-month anniversary of his call for the United States to withdraw immediately from Iraq.

Mr. Murtha obviously has a problem with the Bush administration and the Iraq war. Fair enough. But he should leave the troops out of his vendetta.



IRAQ INVESTIGATION

Haditha, Iraq Investigation

Press Statement

The following is the statement made by Col. Stewart Navarre during a press conference held at Camp Pendleton, Calif. at 1:00 p.m., Dec. 21, 2006. Navarre is the Chief of Staff, Marine Corps Installations West, headquartered at Camp Pendleton. The following statement may be attributed to Col. Navarre.

Lieutenant General James Mattis, Commanding General of Marine Corps Forces, Central Command has conducted a thorough review of the investigations into the circumstances of the deaths of Iraqi civilians that took place on 19 November 2005, near Haditha, Iraq, as well as the investigations into the response by the chain of command.

I will describe the events and actions taken so far.

On the morning of 19 November 2005, a four vehicle convoy of Marines from Kilo Company, 3rd Battalion, 1st Marine Regiment, 1st Marine Division was moving through Haditha when it was ambushed by insurgents employing an improvised explosive device and small arms fire.

One Marine was killed and two were wounded by the explosion. Over the next several hours, 24 Iraqi men, women and children died in the vicinity of the IED explosion.

On 20 November 2005, 2nd Marine Division issued a press release stating that 15 Iraqi civilians were killed in an IED explosion, and Marines and Iraqi Army soldiers killed eight insurgents in a follow-on fire-fight.

We now know with certainty the press release was incorrect, and that none of the civilians were killed by the IED explosion.

As the result of a query by a Time magazine reporter in January

2006, there were several distinct but related investigations into the circumstances of the deaths of the 24 Iraqi civilians, and into how the chain of command reported and investigated those deaths.

On 14 February 2006, Lieutenant General Peter Chiarelli, Commander of Multi-National Corps-Iraq, initiated an Army Regulation 15-6 investigation concerning the incident. This investigation focused on the circumstances of the attack and whether the Marines involved followed the Rules of Engagement and Law of Armed Conflict. Colonel Watt was the investigating officer and this investigation closed on 9 March 2006. Colonel Watt recommended further criminal investigation by the Criminal Investigative Division or the Naval Criminal Investigative Service.

On 12 March 2006, in response to the recommendation of the Watt investigation, Major General Richard Zilmer, Commander of coalition forces in Al Anbar, initiated a Naval Criminal Investigative Service investigation, to determine if there was any criminal responsibility for the deaths of the Iraqi civilians.

On 17 March 2006, Lieutenant General Chiarelli, Commander of Multi-National Corps-Iraq, initiated a second Army Regulation 15-6 investigation, appointing Major General Eldon Bargewell as the investigating officer. Major General Bargewell was appointed in order to provide an officer with sufficient seniority to interview the most senior officers in the chain of command in Al Anbar province.

The Bargewell investigation focused on three aspects of the incident: official reporting of the events and follow-on actions by the chain of command; training of Marines in the Rules of Engagement and the Law of Armed Conflict; and whether the command climate in 3rd Battalion, 1st Marine Regiment encouraged the disciplined application of the Rules of Engagement and the Law of Armed Conflict. Major General Zilmer initiated a Judge Advocate General investigation that was ultimately combined with the Bargewell investigation. In May 2006, the Naval Criminal Investigative Service also began a criminal investigation into the follow-on actions of the chain of command.

The Bargewell investigation concluded on 15 June 2006. The Bargewell investigation found that the Marines were adequately trained on the Rules of Engagement and Law of Armed Conflict

but that reporting of the incident up the chain of command was inaccurate and untimely. After endorsement by LTG Chiarelli, on 7 July 2006, it was forwarded to General Casey, Commander, Multi-National Forces – Iraq and then to U.S. Marine Corps Forces, Central Command for appropriate action.

U.S. Marine Corps Forces, Central Command provided a copy of the Bargewell investigation to the Naval Criminal Investigative Service on 17 July 2006. NCIS will continue its investigation until all legal proceedings are concluded.

Based on the findings of the investigations, various charges have been preferred against four Marines relating to the deaths of the Iraqi civilians on 19 November 2005. Also, charges have been preferred against four Marines for failure to properly report and/or investigate the deaths of the Iraqi civilians. These charges include murder, dereliction of duty, false official statement and obstruction of justice. A synopsis of the charges and specifications alleged against each Marine are in your press kits.

It is important to note that the accused are presumed innocent. The charges and specifications are only accusations against the individuals.

In order to preserve the integrity of that investigation, and to ensure fair and impartial legal proceedings, we will not discuss evidence or specific findings of the investigations.

We will endeavor to be as open as possible while preserving the rights of the accused and the integrity and fairness of the military justice process.

All Marines are trained in, and are expected to fully comply with the Law of Armed Conflict.

The Marine Corps takes allegations of wrong-doing by Marines very seriously and is committed to thoroughly investigating such allegations. The Marine Corps also prides itself on holding its members accountable for their actions.

We are absolutely committed to holding fair and impartial proceedings in full compliance with the Uniform Code of Military Justice.

MARK S. ZAID, P.C.

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August 4, 2006

VIA FACSIMILE AND MAIL

Honorable John Murtha
2423 Rayburn House Office Building
Washington, D.C. 20515

Re: Wuterich v. Murtha, Civil Action No. 06-1366 (D.D.C.)(RMC)

Dear Congressman Murtha:

As you know my colleague Neal A. Puckett, Esq., and I represent SSgt Frank D. Wuterich in the above referenced libel lawsuit that was filed against you earlier this week. We write to you today to offer an immediate resolution to this dispute, and respectfully invite you to negotiate with us a mutually acceptable statement of apology for public issuance.

Let us be clear. Regardless of what some may think, this lawsuit has nothing to do with partisan politics. Your views on the war are completely irrelevant to our client, as well as to us. Our country was founded on the notion that its populace would challenge the views of the governing Administration, and we encourage you, particularly as an elected official, to continue to express whatever political views you might have as it is your absolute right to do so. This litigation should not and hopefully will not interfere with your stance on the current war. We are only interested in protecting the reputation of SSgt Wuterich and his fellow Marines.

With that said, if we can come to terms on a resolution, we would require that any negotiated statement address the following general points wherein you would apologize for:

- accusing the involved Marines of being “cold-blooded” killers, untrained, overreacting due to the pressure and never having been under fire that day at Haditha;
- analogizing their conduct of that day to the convicted war criminals who callously executed innocent civilians at My Lai, Vietnam;
- publicly prejudging conduct regarding which no official investigation into the actual facts had been completed and recognizing that as a former Marine officer this is something you should not have done; and

- stating that you will obviously await the conclusions and decisions of the Marine leadership to determine whether or not criminal charges should be brought and that if brought these Marines are to be considered innocent until proven guilty.

Please note that we will not permit any text within this apology that addresses broader issues regarding the war. Whether you wish to do so in a separate statement emanating from your Congressional Office is up to you, but of course we would require reviewing it first to ensure you do not implicitly or explicitly denigrate or detract from the apology. Upon the public issuance of a mutually agreed-upon apology statement (and, of course, the removal of the contested remarks from your official Website), SSgt Wuterich will immediately dismiss his lawsuit with prejudice. We will bear our own costs and absorb all fees (none of which, by the way, are being paid for by any politically motivated organization or individuals).

I have publicly stated I would be sending you this proposed settlement offer. Therefore, neither this letter nor your response, if any, need be shielded from the public. However, should you agree to consider negotiating a proposed statement for settlement purposes we would, of course, maintain those discussions as privileged settlement talks.

As is commonplace, this offer will expire on Friday, August 11, 2006. We hope that you will seriously consider this outreach and look forward to hearing from you.

Sincerely,

/s/

Mark S. Zaid

cc: SSgt Frank D. Wuterich
Neal A. Puckett, Esq.

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August 4, 2006

VIA FACSIMILE AND MAIL

Honorable John Kline
1429 Longworth House Office Building
Washington, D.C. 20515

Dear Congressman Kline:

You may be aware that earlier this week on behalf of our client SSgt Frank D. Wuterich my colleague Neal A. Puckett, Esq., and I filed a libel lawsuit against Congressman John Murtha. The impetus for the lawsuit were statements Congressman Murtha made based on tragic events that occurred in Haditha, Iraq on November 19, 2005, which we believe legally defamed SSgt Wuterich, who led the primary squad of Marines who were under fire that day.

I write to you today as a professional courtesy so that you may avoid being named as an additional defendant in the lawsuit. We respectfully extend to you the opportunity to negotiate with us a mutually acceptable statement of apology for public issuance regarding the specific statements (and any others) you made below that we believe equally defamed our client.

The *Los Angeles Times* reported on May 27, 2006, the following statement from you:

Rep. John Kline (R-Minn.), a retired Marine colonel, said there was clearly an attempt to cover up the incident by those involved. But he said he did not think the Marine command was slow in investigating.

"There is no question that the Marines involved, those doing the shooting, they were busy in lying about it and covering it up -- there is no question about it," Kline said. "But I am confident, as soon as the command learned there might be some truth to this, they started to pursue it vigorously. I don't have any reason now to think there was any foot dragging."

Then NBC Channel 9 in Denver, Colorado, also on May 27, 2006, attributed to you the following:

Representative John Kline is a Republican from Minnesota. He said, "When you have Marines who have behaved so abominably as to allegedly shoot Iraqi civilians I'm not surprised that they would lie about it and cover it up."

We would require that any negotiated statement would contain an apology for implicitly accusing the involved Marines of criminal conduct in shooting Iraqi civilians and explicitly asserting that they lied and sought to cover-up what transpired that day. Moreover, the statement must contain language that regrets you publicly prejudged conduct regarding which no official investigation into the actual facts had been completed and recognizing that as a former Marine officer this is something you should not have done. Finally, you must state that you will obviously await the conclusions and decisions of the Marine leadership to determine whether or not criminal charges should be brought and that if brought these Marines are to be considered innocent until proven guilty.

With the public issuance of a mutually agreed-upon apology statement, SSgt Wuterich will agree in writing to refrain from adding you as a defendant to his lawsuit.

Neither this letter nor your response, if any, is to be shielded from the public. However, should you agree to consider negotiating a proposed statement for settlement purposes we would, of course, maintain those discussions as privileged settlement talks.

This offer will expire on Friday, August 11, 2006. We hope that you will seriously consider this outreach and look forward to hearing from you.

Sincerely,

/s/

Mark S. Zaid

cc: SSgt Frank D. Wuterich
Neal A. Puckett, Esq.

JOHN KLINE
2ND DISTRICT, MINNESOTA

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COMMITTEES:

ARMED SERVICES

EDUCATION AND THE WORKFORCE

Congress of the United States
House of Representatives

August 14, 2006

Mark S. Zaid, Esquire
Attorney At Law
1920 N Street NW
Suite 300
Washington, D.C. 20036

Dear Mr. Zaid,

Today, I want to express my sincere apology to the Marines of the 1st Squad, 3rd Platoon, Kilo Company, 3rd Battalion, 1st Marine Regiment, and especially SSgt Frank D. Wuterich. On November 19, 2005, in Haditha, Iraq, they were involved in an incident that resulted in the deaths of Iraqi civilians. Some news outlets have promoted incomplete statements attributed to me that gave the false impression that I have concluded those involved committed unlawful acts.

I am, of course, very concerned regarding any allegations surrounding misconduct by U.S. troops in Iraq. Such allegations must be taken seriously, but we should never rush to judgment before all the facts are known and the military criminal justice process is completed. In my capacity as a Member of the House Armed Services Committee, I received preliminary briefings from Brigadier General John F. Kelly, who currently serves as the Legislative Assistant to the Commandant of the Marines. I want to stress, however, that at the time I received these briefings the official investigations were not complete. Conclusions have not been reached.

As a retired Colonel in the U.S. Marines, I am especially proud of the sacrifices our men and women make day in and day out, especially in combat situations. And as a Marine Officer I would never want to publicly insinuate, implicitly or explicitly, that I have prejudged what took place that day on the battlefield or afterwards. I have the utmost faith that the Defense Department is fully investigating the matter and the appropriate decisions will be reached. Should charges be brought against these Marines, and I do not know if they will be, the involved Marines deserve to be considered absolutely innocent until proven guilty.

Should you have further questions regarding this issue, please feel free to contact me directly at (202) 225-2271.

Sincerely,

A handwritten signature in black ink that reads "John Kline". The signature is written in a cursive style.

John Kline
Member of Congress

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KARL ELDERS

Plaintiff

v.

MARIA DIAZ

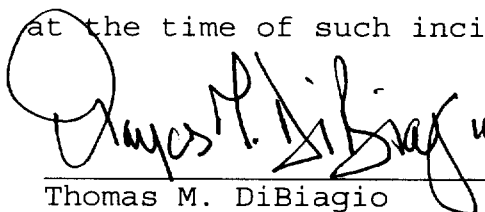
Defendant.

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: Civil No. _____
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CERTIFICATION

The undersigned, United States Attorney for the District of Maryland, pursuant to 28 U.S.C. § 2679, and by virtue of the authority vested in him by the Attorney General under 28 C.F.R. § 15.3, hereby certifies that he has read 1) the Complaint and 2) a November 26, 2002 memorandum from Assistant United States Attorney Tarra DeSheilds. Based on these materials with respect to the incident referred to therein, the undersigned certifies that Defendant Maria Diaz was acting within the scope of her employment as an employee of the Air National Guard, a reserve component of the United States Air Force, at the time of such incident.



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KARL L. ELDERS

*

Plaintiff

*

vs.

* CIVIL ACTION NO. MJG-02-3892

MARIA DIAZ

*

Defendant

*

* * * * *

MEMORANDUM AND ORDER

The Court has before it Defendant's Motion for Summary Judgment [Paper 26] and the materials submitted by the parties related thereto. The Court finds a hearing unnecessary.

I. BACKGROUND

Plaintiff Karl Elders ("Plaintiff" or "Elders"), who was a Maryland Air National Guard (the "Guard") Squadron Commander, contends that Defendant Maria Diaz ("Defendant" or "Diaz"), a Lieutenant Colonel and flight surgeon under Plaintiff's command in the Guard, made false statements alleging that Elders sexually harassed and assaulted her.

On October 25, 2002, Elders filed a defamation suit in the Circuit Court for Baltimore County, Maryland, maintaining that Diaz libeled and slandered him and invaded his privacy when she made statements that Elders sexually harassed and

assaulted her. The United States filed a Notice of Removal on November 29, 2002 and simultaneously filed a motion seeking to substitute the Government as the party-defendant, alleging that Diaz acted in the scope of her employment.¹ On December 7, 2002, Elders filed an Opposition to the Government's Motion to Substitute, arguing that he should be entitled to challenge, through discovery, the propriety of the scope of employment certification. Shortly thereafter, Diaz filed a Motion to Dismiss Elders' claims altogether.

Because the factual allegations in the Complaint were ambiguous, this Court on February 12, 2003, by letter Order, directed Elders to file an Amended Complaint specifying the "third parties" to whom, he alleges, Ms. Diaz made defamatory statements. Plaintiff was to clarify the precise nature of the facts alleged, the context of the alleged actual statements, and clearly set forth the allegedly defamatory statements that were made outside the course of Defendant's Guard employment. Furthermore, the Court instructed the Government that any certification as to the scope of

¹ Pursuant to 28 U.S.C. § 2679(d)(1), the United States obtained certification from the United States Attorney for the District of Maryland that Diaz was acting within the scope of her employment.

employment must address the specific actions alleged by the Plaintiff to be tortious.

Elders filed an Amended Complaint on March 3, 2003. The Government, on behalf of Diaz, filed the instant Motion for Summary Judgment on April 10, 2003.²

Elders alleges that

1. Diaz made statements accusing him of sexual harassment to fellow Guard officers, which occurred purely because of the personal friendships with these individuals and/or her desire to intentionally harm Elders, and not because of anything to do with official military business. Am. Compl. at ¶ 8.
2. Diaz repeated false allegations concerning Elders to her civilian office secretary and co-workers at Franklin Square Hospital. Plaintiff lists alphabetically the name of every doctor in the General Surgery Department of the hospital. Id. at ¶ 9.
3. Diaz repeated her false allegations concerning Elders to individuals who are her close personal friends, and members of her family household, including her husband and nanny. Id. at ¶ 10.

Defendant argues that Elders failed to assert with particularity facts supporting his claim that Diaz made

² The Government has not filed a separate Motion for Substitution and instead incorporates its Motion by reference in the instant Motion for Summary Judgment.

defaming statements to persons unrelated or outside the Guard employment context. Elders argues that Defendant's Motion for Summary Judgment is premature, and that he should be permitted to conduct discovery to buttress his allegations that Diaz's statements were made outside the scope of her employment with the Guard, and were not subject to any immunity.

II. DISCUSSION

Diaz seeks summary judgment based upon the following grounds:

1. The intramilitary immunity doctrine, first articulated in Feres v. United States, 340 U.S. 135 (1950), bars Elders' claim;
2. The Court lacks subject matter jurisdiction because the United States has not waived its sovereign immunity;
3. Elders has failed to exhaust his administrative remedies;
4. Diaz's statements to fellow Guard members and her spouse are privileged.

Once again, Diaz declines to address the claims actually made by Elders. If, as asserted by Diaz, Elders was seeking recovery for statements made by Diaz in the course of her employment in the National Guard, Diaz would prevail as a matter of law. However, Elders has pleaded – albeit broadly –

that Diaz made statements outside the scope of her employment. Elders is not seeking recovery for any statements that may be privileged.³

Of course, when a federal employee is sued in his or her individual capacity for a wrongful or negligent act, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act") provides that the United States is substituted as the party-defendant in place of the federal employee upon certification that the employee was acting within the scope of his/her employment at the time of the incident out of which the claim arose. 28 U.S.C. § 2679 (d)(1). Moreover, as Elders concedes, to the extent that substitution is proper, Plaintiff cannot recover because the United States has not waived its sovereign immunity with regard to the claims asserted in this case. Opp. to Def. Mot. at 25; 28 U.S.C. § 2680(h). However, Elders challenges the validity of the certification. Therefore Elders must prove that Diaz was – in whole or part – not acting within the scope of her employment. See Maron v. United States, 126 F.3d 317, 323 (4th Cir. 1997).

³ Elders does not contend that statements between Diaz and her spouse or statements made by Diaz as part of an official investigation are actionable. Opp. to Def. Mot. at 39.

"To carry [his] burden, the plaintiff must submit 'specific evidence or the forecast of specific evidence that contradicts the Attorney General's certification decision, not mere conclusory allegations and speculation.'" Borneman v. United States, 213 F.3d 819, 827 (4th Cir. 2000) (citing Gutierrez de Martinez v. Drug Enforcement Admin., 111 F.3d 1148, 1155 (4th Cir. 1997)). However, the plaintiff should be afforded the chance to conduct limited discovery regarding the scope of employment issue.

Elders should, also, be entitled to engage in discovery by virtue of Rule 56(f) of the Federal Rules of Civil Procedure. This Rule provides, in pertinent part:

Should it appear from the affidavits of a party opposing [a summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may [permit]...discovery to be had or make such other order as is just.

Elders has made an adequate showing under Rule 56(f).

Accordingly, the instant summary judgment motion shall be denied without prejudice. Elders may engage in limited discovery as set forth herein.

III. CONCLUSION

For the foregoing reasons:

1. The Motion of Defendant Maria C. Diaz for Summary Judgment [Paper 26] is DENIED WITHOUT PREJUDICE.
2. The Motion to Substitute Defendant [Paper 26] is DENIED WITHOUT PREJUDICE.
3. Plaintiff shall, by November 21, 2003, submit to the Court and Defendant a Statement of Requested Depositions relating to the question of whether Diaz made any allegedly defaming statements outside the scope of her employment and/or any privilege, setting forth, as to each deponent, including Diaz,
 - a. The identity of the deponent;
 - b. The place of employment or other connection with Diaz;
 - c. The asserted basis for believing this person has relevant knowledge;
 - d. The duration of the deposition requested.
4. Plaintiff's counsel shall arrange a telephone conference with the Court and Defense counsel to be held by November 28, 2003 to discuss the extent of discovery to be permitted.

SO ORDERED, on Tuesday, 4 November, 2003.

/ s /
Marvin J. Garbis
United States District Judge

DEPARTMENT OF THE ARMY
Headquarters, Multi National Division – Baghdad
Camp Liberty, Iraq
APO AE 09344

AFYB-STB-MiTT

3 March 2006

MEMORANDUM FOR Commander, Multi National Corps – Iraq, Camp Victory,
Baghdad, Iraq, APO AE 09342

SUBJECT: AR 15-6 Investigation of 3/1 Marine 19 Nov 05 Haditha Complex Attack

I. General:

a. On 14 February 2006, I was assigned as an Investigating Officer and directed to conduct an AR 15-6 Informal Investigation into allegations surrounding events regarding the 3/1 Marine 19 November 2005 Haditha Complex Attack. I was supported by MAJ David Mendelson, MNC-I SJA; ENS Clyde LeGaux, MNC-I SJS; and CPL Roger Tohme, MND-B Translator. We departed the Victory Base Complex on 17 February 2006 and arrived at Al Asad the same day. That evening we had an office call with Col Steven Davis, Commanding Officer of RCT 2. The next morning we departed for the HQ's 3/1 MAR at Haditha Dam. We spent the next eight days conducting interviews and site surveys before returning to VBC, conducting the analysis, and producing the following findings.

b. **Haditha Triad Threat Assessment:** Since early 2005, cells from Ansar al Sunna (AAS) and AQIZ had established the Triad (Haditha, Barwana, Haqlaniyah) as a safe haven and key line of communication (LOC) between the border and points east, such as Ramadi and Mosul. Operation River Gate resulted in many mid-high level insurgents fleeing the three cities. While CF conducted detailed clearing operations throughout the AO, most local AAS operatives likely remained in outlying areas such as Bani Dahir, Albu Hyatt, Cykla, Anah, and Rawah. While overall insurgent activity dropped precipitously, this was likely a result of overwhelming numbers of CF on the ground within the Triad. As CF transitioned from offensive operations to a continuing security and stability mission, they expected these operatives to re-infiltrate the cities, reestablish contact with local criminal level insurgents, and conduct planning for attacks on CF firm bases and patrols. CF began to see an increase in probing attacks of the firm bases, small caliber IDF at close range, SAF attacks within the city, and VBIED/IED attacks within the city. CF also expected that local AAS operatives would establish contact with high-level foreign fighters and begin planning for spectacular attacks (SVBIED, coordinated ambush) against CF in Haqlaniyah, in an attempt to preserve access to a vital LOC. AAS has begun re-infiltrating from outlying areas into Haditha, establishing contact with local criminal and insurgent operatives. They have continued intelligence gathering and passive observation of CF patterns throughout the city, while determining remaining resources that have not been discovered by CF. Insurgents continue to conduct attacks of opportunity, including IED, SAF, and small caliber IDF

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from covered and concealed positions, while planning for spectacular attacks in order to attrit CF, establish legitimacy with the local populace, and erode the CF will to fight.

During the previous 6 months, while 3rd Bn 25th Marines owned the battle space they lost approximately 50 Marines. During the last 6 months while 3rd Bn 1st Marines owned the battle space, they lost approximately 4 Marines. During the week of this investigation, 3/1 MAR was attacked with IEDs every day and two on the last day. These IED attacks frequently included SAF, including from the local hospital we visited. Several Marines were injured during these attacks. Also a local Sheik and his son were gunned down about 500m's from K/3/1 MAR's CP. Haditha is still a very hostile environment.

2. Allegations: (CPICs MFR outlining Tim McGirk's issues)

After a Marine patrol hit an IED they raided three nearby houses and killed the occupants. Marines also allegedly stopped a passing taxi nearby that was carrying students and killed the occupants. The details of each allegation are enumerated.

- a. Home of Abdull Hameed Hasan Ali: Marines entered and killed Abdull Hameed Hasan Ali, his wife Khamisa Tohme Ali, three sons, (Waleed, Mujahid, and Rasheed), and Waleed's wife, Asmaa Salman Raseef and child, Abdullah Waleed Abdul Hameed. (For the purpose of this investigation this house is referred to as HOUSE #1)
- b. Home of Yunis Salim Raseef: Marines entered and killed Yunis Salim, his wife Aida Yassen Ahmed, his wife's sister Huda Yaseen Ahmed and five children, Mohammed, Noor, Sabaa, Zainab, and Aisha. (For the purpose of this investigation this house is referred to as HOUSE #2.)
- c. Home of Ayed Ahmed: Marines entered and killed Ayed Ahmed and his four sons, Jamal, Marwan, Kahtan, and Jasib. (For the purpose of this investigation this house is referred to as HOUSE #4).
- d. Home of Hasan Ahmed: Marines entered and arrested family members; no reported deaths. (For the purpose of this investigation this house is referred to as HOUSE #3).
- e. Taxi and passengers: Marines stopped the taxi and killed the occupants identified as Ahmed Fanr Moslih, Mohammed Tabbal, Wajdee Eiada and Khalid Eiada. (For the purpose of this investigation this taxi is referred to as WHITE CAR).

3. Facts:

- a. 1st Sqd, 3rd Plt, K Co, 3 Bn, 1 MAR four vehicle patrol was ambushed on 19 Nov 05 on RTE CHESTNUT, vic 38S KC 5844 7944, by an IED and SAF from multiple positions which were mutually supporting. (Assessment: This was a

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coordinated attack, initiated by an IED, and supported by anti-CF SAF from at least 3-4 mutually supporting positions).

- b. Initial IED detonation resulted in 1x FKIA (LCPL Terazzas) and 2x FWIA (LCPL Guzman and LCPL Crossan).
- c. 1st Sqd, 3rd Plt dismounted, secured perimeter and reacted to contact. (Assessment: The 12x man Marine Squad was quickly overwhelmed between the loss of 3x Marines, the employment of a Fire Team of 2-3x Marines to the North, 3x Marines w/ 3-4x IA left securing vehicles; leaving only 5x Marines to clear 4x Bldgs. They were stretched thin; the rest of K Co was engaged at other locations in Haditha near simultaneously).
- d. 1/3/K engaged a hostile threat in three homes (HOUSES #1, 2, and 4) and a perceived threat from one car (WHITE CAR).
- e. 1/3/K entered and cleared multiple structures. During consolidation and reorganization, 26x deceased were delivered to the Haditha Hospital Morgue.
- f. Between the S2, the HET, and the CAG it was determined that there were 15x NKIA and 8x EKIA.
- g. Solatia payments were made for 15x NKIA and 2x NWIA totaling \$38K.

4. Findings:

a. Determine whether any law of armed conflict violations were committed.

(1) Determine whether Coalition Forces intentionally targeted, engaged and killed non-combatants.

No, there are no indications that CF intentionally targeted, engaged and killed non-combatants. There is no denying that civilians died during the insurgent's coordinated attack on the Marines on 19 Nov 05; however, there is no evidence that the Marines intentionally set out to target, engage, and kill non-combatants.

Outlined below are four synopses of the incidents in which civilians were killed. Each establishes that the Marines engaged hostile acts from the three aforementioned HOUSES and perceived hostile threat from a WHITE CAR.

Upon initial contact, indications are that a WHITE CAR, moving along RTE CHESTNUT from west to east, approached the 1/3 Mounted Patrol. It was directed to move to the side of the road. By the time the WHITE CAR stopped moving, indications are it was south of the patrol and stationary somewhere between the lead HMMWV and the HMMWV second in the order of march. Indications are that when the IED exploded

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and the enemy initiated SAF against the 3/1 Patrol, the four military aged males in the WHITE CAR got out, failed to comply with orders and instructions from the Marines and proceeded to run away. They were engaged and killed by the Marines.

Marines reacted to contact (SAF from HOUSE #1) by returning SAF to include a M203 HEDP round to cover their movement and approach to HOUSE #1. Hostile actions from HOUSE #1 required a forced entry. Indications are that enemy weapons were being charged and then offensive room clearing techniques were conducted. These room clearing techniques included the use of fragmentary grenades. During the clearing of HOUSE #1, 7x non-combatants were killed.

While HOUSE #1 was being cleared, Marines started receiving fire from the adjacent house, HOUSE #2. This forced the Marines to approach, conduct a forced entry and clear HOUSE #2. During the course of clearing HOUSE #2, small arms and grenades were again used. During the clearing of HOUSE #2, 8x non-combatants were killed.

While Marines took a tactical pause in a house used to over watch the area, they started receiving small arms fire from the northwest, HOUSE #4. Marines returned fire with small arms and fired a M203 HEDP round to cover their movement toward the house. Marines initially entered the adjoining house, HOUSE #3, established a foothold, and identified that it was occupied by women and children. A guard was left to secure these individuals as Marines proceeded to the adjoining house, HOUSE #4. While inside HOUSE #4, Marines identified four MAMs, two with weapons and engaged and killed them.

(2) Determine whether Coalition Forces attempted to distinguish combatants from non-combatants.

Anti-CF were indistinguishable from non-combatants. There are clear indications that throughout the Marine's response to the insurgent attack that they attempted to distinguish between combatants and non-combatants. However, in part due to the insurgent's tactical use of civilian homes for cover and concealment, this became much more difficult as the Marines entered and cleared houses, room-by-room.

(3) Determine if the amount of force used was proportional to the threat.

The amount of force used was proportional and provided overmatch in order to insure mission accomplishment of the task at hand without putting Marines at risk. This overmatch was appropriate in nature, scope and duration.

(4) Determine whether Coalition Forces provided adequate medical care for non-Coalition Forces casualties when the situation permitted.

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CF did provide adequate medical care for non-CF casualties when the situation permitted. One MAM (unidentified) and two children (Iman Waleed and Abdul Waleed) were triaged and evacuated to medical facilities.

b. Determine whether Coalition Forces complied with the Rules of Engagements in effect at that time.

(1) Determine whether Coalition Forces positively identified (PID) insurgents prior to engaging them.

Overall, there are indications that PID was conducted, in order to, determine with reasonable certainty that the target demonstrated hostile intent and/or hostile action toward the Marines prior to engagement. However, in the course of certain discreet events (clearing HOUSE #1 and #2 and clearing respective rooms), the Marines did not discriminate individual targets prior to engagement, which resulted in the deaths of several non-combatants.

WHITE CAR: The response by the occupants of the White Car was not what would be expected of normally prudent MAMs in combat making PID extremely difficult and it was reasonable for the Marines to consider these MAMs to be legitimate military targets. Upon initial contact, indications are that a White Car, moving along RTE CHESTNUT from west to east approached the 1/3 Mounted Patrol. It was directed to move to the side of the road. By the time the vehicle stopped moving, indications are it was south of the patrol and stationary somewhere between the lead HMMWV and the HMMWV second in the order of march. Indications are that when the IED exploded and the enemy initiated SAF against the 3/1 Patrol, that the four MAMs in the White Car got out, failed to comply with instructions issued by the Marines and proceeded to run away. They were engaged and killed by the Marines. During consolidation and reorganization, four bodies were recovered from vicinity the WHITE CAR. Using the death certificates provided by the Haditha Hospital, it is determined that these four MAMs are Ahmed Fanr Moslih, Mohammed Tabbal, Wajdee Eiada and Khalid Eida. Marine statements support that SGT Wuterich, CPL Salinas, CPL Dela Cruz and IA soldiers were involved in this engagement.

In HOUSE #1 and #2 hostile actions set conditions that made it difficult for CF to PID/discriminate while executing offensive room clearing techniques in HOUSE #1 and HOUSE #2. Under these conditions, individual PID may have been unrealistic to expect. Marines reacted to contact, SAF from HOUSE #1 by returning fire to include a M203 HEDP round to cover their movement and approach to HOUSE #1. Hostile actions from HOUSE #1 required a forced entry. Indications are that enemy weapons were being charged and then offensive room clearing techniques were conducted. These room clearing techniques included the use of fragmentary grenades. The Marines did not discriminate individual targets prior to engagement in each room prior to engaging. During the clearing of HOUSE #1, 7x non-combatants were killed. Using the death certificates provided by the Haditha Hospital it was determined that the occupants of HOUSE #1 were Abdul Hameed, Khamisa Tohme Ali, Waleed, Abdullah Waleed Abdul

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Hameed, Mujahid, Rasheed, Asmaa Salman Raseef. Marine statements support that SGT Wuterich, CPL Salinas, LCPL Mendoza, LCPL Tatum, and LCPL Sharratt were involved in this engagement.

While HOUSE #1 was being cleared, Marines started receiving SAF from the adjacent house, HOUSE #2. This forced the Marines to approach, conduct a forced entry and clear HOUSE #2. During the course of clearing HOUSE #2, small arms and grenades were again used. The Marines did not discriminate individual targets prior to engagement in each room prior to engaging. During the clearing of HOUSE #2, 8x non-combatants were killed. Using the death certificates provided by the Haditha Hospital it was determined that the occupants of HOUSE #2 were Yunis Salim, Aida Yaseen Ahmed, Mohammed, Noor, Sabaa, Zainab, Aisha, and Huda Yaseen Ahmed. Marine statements support that SGT Wuterich, CPL Salinas, LCPL Mendoza, LCPL Tatum, and LCPL Sharratt were involved in this engagement.

In HOUSE #3, PID was conducted. While Marines took a tactical pause in a house used to over watch the area, they started receiving small arms fire from the northwest. Marines initially entered HOUSE #3, in order to establish a foothold. They identified that it was occupied by women and children. The occupants of HOUSE #3 were asked where the men were and they indicated that they were next door. A guard (CPL Salinas) was left to secure these individuals as Marines (SGT Wuterich and LCPL Sharratt) proceeded to the adjoining house, HOUSE #4.

In HOUSE #4, hostile actions, during close quarter's battle, supported PID being conducted. While inside HOUSE #4, Marines identified four military aged males, two with weapons and engaged and killed them. Using the death certificates provided by the Haditha Hospital it was determined that these four are Jamal, Marwan, Kahtan, and Jasib. Marine statements support that SGT Wuterich, CPL Salinas, LCPL Sharratt were involved in this engagement.

(2) Determine whether the use of fixed wing and rotary wing CAS complied with the ROE.

RWCAS and FWCAS was not an element involved in the response to the complex attack on 1/3/K on RTE Chestnuts.

c. Were any violations of the law of armed conflict committed by insurgents? Specifically did insurgent's target, engage, and kill non-combatants?

Indications are that insurgents fought from homes occupied by non-combatants and used these homes for cover and concealment. Statements by numerous Marines support that they received hostile SAF from HOUSE #1, HOUSE #2, and HOUSE #4 (as well as a house identified as a possible trigger house). Marine statements indicate that these anti-CFs did not distinguish themselves from non-combatants.

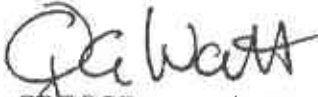
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5. Recommendations:

- a. MNC-I: Recommend further investigation by CID/NCIS, however given time lapsed, Solatia payments, RIP/TOAs, renovations of HOUSE #1 and HOUSE #2, obtaining more prosecutable evidence will be extremely difficult.
- b. MNC-I: Prepare PAO response to TIME, independent and video allegations Acknowledge event occurred; the Marine reaction to the ambush/coordinated attack was LAW published doctrine and TTP; Non-Combatants were killed while Marines cleared houses that they had been fired on from; and Solatia Payments were made for damages
- c. MNF-W: K/3/1 MAR Review ROE
- d. MNF-W: K/3/1 MAR Review and comply with PID TTPs
- e. MNF-W: K/3/1 MAR Review and rehearse Room Clearing Techniques

Steadfast and Loyal


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HEADLINE: Murtha jumps gun on Haditha

BODY:

Democrat Rep. John Murtha thinks he knows the truth about Haditha -- and he has been blabbing it to every last cable show host that will host him.

The loose-lipped former Marine has accused troops of wantonly killing some two dozen civilians, including children, "in cold blood" in the terrorist stronghold in Iraq last November. There are two ongoing military investigations into the incident itself and the actions of higher-ups in the Haditha aftermath.

Let me repeat that: The investigations are ongoing. Not complete. Official reports aren't expected for several weeks.

I do not know the truth about Haditha. Neither do Murtha and the media outlets calling the alleged massacre a massacre before all the facts are in. It would be helpful if they could handle these grave charges without serving as al Jazeera satellite offices. GOP Sen. John Warner, who like Murtha also served in the Marines, struck the right tone over the weekend -- refusing, unlike Murtha, to render a verdict against the Marines before trial and avoiding Bush Derangement Syndrome, but also taking the allegations very seriously.

I do know this. Children are dead. Other children have been orphaned. There are pictures of bullet holes and bloodied homes. There are evolving stories about what happened last Nov. 19 and serious allegations of a possible cover-up.

I also know this: Lance Cpl. Miguel Terrazas, the Marine who was killed by a roadside IED (improvised explosive device) that day, followed a proud family tradition of military service. He had received a commendation for bravery on his first tour of duty in Iraq in 2004. One of his fellow Marines said Terrazas's body was split in two by the bomb explosion that rocked his Hummer while on patrol that morning.

And there's this: Haditha is crawling with terrorists. The Associated Press points out that "in just three days last August, six Marine snipers were killed in Haditha and 14 Marines died in nearby Parwana in the deadliest roadside bombing of the war." Most-wanted al Qaeda leader Abu Musab al-Zarqawi is reported to have lived in Haditha. The Washington Post quoted a military lawyer noting that Nov. 19 was the Marine 3rd Battalion's "hottest day" in Iraq.

"In addition to drone surveillance that day," the paper reported, "AV-8 Harriers were dropping bombs, helicopters were evacuating wounded, and a large firefight occurred about one-third of a mile from the site of the civilian shootings, said several people familiar with the investigation." Audio of radio traffic that day reportedly contradicts Rep. Murtha's claim that the Marines did not come under small-arms fire after the roadside explosion, according to one of the Post's military sources.

We know this, too: Naval Criminal Investigative Service officials have not turned their backs. Time magazine, which initially broke the story of survivors' accounts that prompted the military probe, reports that Haditha residents -- who have yet to be visited by any of Iraq's own officials - - "were gratified by the investigation's thoroughness" and "were especially impressed by the NCIS investigators" conducting three separate enquiries.

Finally, there is this incontrovertible fact: There are anti-war zealots on the American Left rooting for failure. They believe the worst about the troops. They've blindly embraced frauds who've lied about their military service and lied about wartime atrocities. They've allied themselves with socialist kooks and coddled murderous dictators. They are looking for any excuse to pull out, abandon military operations and reconstruction, and impeach the president.

They insist on giving suspected foreign terrorists more benefit of the doubt than our own men and women in uniform.

And that, I know, I am not willing to do.

I will wait. I will pray. And I will remind you that while the murder of civilians is and remains an anomaly in American military history, it is the jihadists' way of life.