IN THE UNITED STATES COURT APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Lawrence G. Hutchins III, Appellant.	))))))))	BRIEF ON BEHALF OF APPELLANT Crim. App. No. 200800393 USCA Dkt No. 12-0408/MC

TO THE JUDGES OF THE UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

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Index

Table of Authorities

Other Jurisdictions

United States Code

Uniform Code of Military Justice

Rules for Court-Martial

Military Regulations

Federal Authorities

Secondary Sources

Other

Errors for Review

I.

WHETHER THE FINDINGS AND SENTENCE MUST BE DISMISSED WITH PREJUDICE WHERE UNLAWFUL COMMAND INFLUENCE FROM THE SECRETARY OF THE NAVY HAS UNDERMINED SUBSTANTIAL POST-TRIAL RIGHTS OF THE APPELLANT.

II.

THE APPELLANT WAS INTERROGATED BY NCIS CONCERNING HIS INVOLVEMENT IN THE ALLEGED CRIMES, AND TERMINATED THE INTERVIEW BY INVOKING HIS RIGHT TO COUNSEL. APPELLANT WAS THEREAFTER HELD INCOMMUNICADO AND PLACED IN SOLITARY CONFINEMENT, WHERE HE WAS DENIED THE ABILITY TO COMMUNICATE WITH A LAWYER OR ANY OTHER SOURCE OF ASSISTANCE. APPELLANT WAS HELD UNDER THESE CONDITIONS FOR 7 DAYS, WHEREUPON NCIS RE-APPROACHED APPELLANT AND COMMUNICATED WITH HIM REGARDING THEIR ONGOING INVESTIGATION. IN RESPONSE, APPELLANT WAIVED HIS PREVIOUSLY INVOKED RIGHT TO COUNSEL AND SUBSEQUENTLY PROVIDED NCIS A SWORN STATEMENT CONCERNING THE ALLEGED CRIMES.

DID THE MILITARY JUDGE ERR WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS THE APPELLANT'S STATEMENT? *SEE EDWARDS V. ARIZONA*, 451 U.S. 77 (1981) *AND UNITED STATES V. BRABANT*, 29 M.J. 259 (C.M.A. 1989).

Statement of Statutory Jurisdiction

Appellant received a sentence that included a punitive discharge, bringing his case within the lower court's jurisdiction. Art. 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006). Appellant then filed a petition for grant of review properly bringing his case within

this Court's jurisdiction. Art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A general court-martial, composed of members with enlisted representation, tried Sergeant Lawrence G. Hutchins III, U.S. Marine Corps ("Appellant"), from July 23 to August 3, 2007. Contrary to his pleas, he was found guilty of violating Article 81, conspiracy;[1] Article 107, false statement; Article 118, unpremeditated murder; and Article 121, larceny.[2] In accordance with his pleas, he was found not guilty of premeditated murder, assault, housebreaking, kidnapping, obstruction of justice, and one specification of false official statement.[3] Sgt Hutchins was sentenced to be discharged from the U.S. Marine Corps with a dishonorable discharge, to be confined for fifteen years, to be reduced to the pay grade of E-1, and to receive a reprimand. On May 2, 2008, the convening authority approved the findings and sentence as adjudged, with the exception of the reprimand and all confinement in excess of eleven years.

On May 30, 2008, the record of trial was docketed at the Navy-Marine Corps Court of Criminal Appeals (NMCCA) for review pursuant to Article 66, UCMJ. After receiving the pleadings of the government and defense, NMCCA specified two additional

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1 Through exceptions and substitutions.
2 *See* 10 U.S.C. § 881, 907, 918, and 921 (2000).
3 *See* 10 U.S.C. § 907, 918, 928, 930, 934 (2000).

issues for supplemental briefing. On May 20, 2009, upon NMCCA's consideration of the supplemental pleadings, it remanded the case for a *Dubay* hearing, which was conducted at Camp Pendleton on August 18, 19, and 28, 2009. The record was returned to NMCCA on November 2, 2009.

On March 15, 2010, NMCCA, sitting *en banc*, heard oral argument on the supplemental issue. NMCCA issued its opinion on April 22, 2010, setting aside the findings and sentence (*Hutchins I*).[4] On June 7, 2010, the Judge Advocate General of the Navy ("the JAG") certified the case to this Court, and oral argument was held on October 13, 2011. On January 11, 2011, this Court issued its opinion, affirming in part and reversing in part, and remanding the case back to NMCCA for consideration of the remaining issues (*Hutchins II*).[5] The case was re-docketed at NMCCA on February 18, 2011. On March 20, 2012, NMCCA issued an unpublished opinion, affirming the findings and sentence (*Hutchins III*).[6] A petition for grant of review was filed with this Court on March 26, 2012, and granted on July 2, 2012.

Statement of Facts

On January 28, 2006, Sergeant (then Corporal) Larry Hutchins, U.S. Marine Corps, squad leader for 1st squad, 2d platoon, Kilo

[4] *United States v. Hutchins*, 68 M.J. 623 (N-M. Ct. Crim. App. 2010).
[5] *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011).
[6] *United States v. Hutchins,* No. 200800393, unpub. op (N-M. Ct. Crim. App. March 20, 2012)

Company, 3d Battalion, 5th Marine Regiment (3/5) was leading his Marines on a patrol through the Zaidon district of Iraq to conduct a weapons cache sweep. Sgt Hutchins, who represented the third generation of his family to serve in the Marine Corps, was well respected by his Marines and his superiors as a professional and competent combat leader.[7]

During that patrol, Sgt Hutchins and his squad came under heavy enemy fire.[8] After more than two hours of fighting, close air support arrived on station.[9] By that point the enemy had consolidated into a nearby house. Sgt Hutchins' platoon sergeant attempted to guide in an air strike, but misidentified the target house.[10] The air strike destroyed a neighboring house.[11]

Sgt Hutchins was familiar with the family who lived in the neighboring house; he previously used the house as an overwatch position and become friendly with them.[12] As the bomb fell on the house, Sgt Hutchins was in complete shock and could not move; he felt as though time had been suspended.[13] After the house was destroyed, Sgt Hutchins and his Marines swept through a field as they approached the house. During this sweep, they came across two men hiding in a fighting hole who immediately raised their

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[7] Joint Appendix ("JA") at 840.
[8] JA at 964 (Prosecution Exhibit 1).
[9] *Id.*
[10] JA at 965.
[11] *Id.*
[12] *Id.*
[13] JA at 1152 (AE LXI).

hands and surrendered when they saw the Marines approaching.[14] After they tested positive for gunpowder residue, Sgt Hutchins concluded that they had been part of the complex ambush and detained them.[15] However, the battalion judge advocate later told Sgt Hutchins he had decided to let the men go free.[16]

As Sgt Hutchins finally made his way to the house, the first things he could hear were the screams of women and children. He saw one woman crying uncontrollably and throwing dirt on her back to indicate that there were people buried in the rubble of the house.[17] Sgt Hutchins realized an entire family had been killed: a husband, his two wives, and their three children.[18] This incident deeply affected him, and although he began to suffer from adverse mental health consequences, Sgt Hutchins was afraid to discuss his reaction to the incident for fear of appearing weak.[19]

After this incident, Sgt Hutchins' squad and the rest of Kilo Company were transferred in late February 2006 from Zaidon to assume control of the neighboring Hamdaniyah area of operations ("AO") from the Army. Because 2d platoon was operating independently out of its patrol base, which was isolated in the

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[14] *Id.*
[15] *Id.*
[16] JA at 965.
[17] *Id.*
[18] *Id*; JA at 592.
[19] JA at 1152.

midst of hostile territory, operations were continuous, and the Marines received little sleep.[20]

Intelligence sources determined that one of the leaders of the local insurgency, Saleh Gowad, was living within 2d platoon's AO. Saleh Gowad was involved with planting improvised explosive devices ("IEDs"), kidnapping, murder, torture, and recruiting people to serve as suicide bombers.[21] In addition, intelligence reported that Gowad's father and four brothers, who shared a home, were also involved with the insurgency and considered targets.[22] Saleh Gowad was captured by 2d platoon, but only a few days later and with no explanation, the battalion released him.[23] This was the second time the battalion had released a suspected insurgent, captured by 2d platoon, without explanation.[24]

Shortly after these incidents, Lt Phan, the platoon commander, began directing Sgt Hutchins to mistreat suspected insurgents, in an effort to develop more intelligence. During the interrogation of a suspected trigger man for an IED which had killed a U.S. Army soldier, Lt Phan ordered Sgt Hutchins to choke the suspect to unconsciousness. After losing and regaining

[20] JA at 944.
[21] JA at 944, 972.
[22] JA at 802, 973-75.
[23] JA at 779.
[24] JA at 780-81.

consciousness, the suspect began to cry and to provide intelligence.[25]

For Sgt Hutchins, the experience of being ordered to torture the suspect and watching him break down was shattering. Afterwards, he had to step into a different room to try to calm his nerves, as he did not recognize who he was anymore or what he had become.[26] Although he had previously experienced combat, he had never before so intimately and deliberately applied pain to another human being who posed no immediate threat to him.[27]

Lt Phan subsequently and aggressively interrogated the father of a suspected insurgent with the assistance of Sgt Hutchins. Sgt Hutchins was ordered to periodically blood choke the father to unconsciousness.[28] When this tactic did not work, Lt Phan escalated the interrogation and placed his pistol into the father's mouth; Sgt Hutchins could recall hearing Lt Phan's pistol clanking off the teeth of the father.[29]

After this latest interrogation, Lt Phan spoke to Sgt Hutchins about Saleh Gowad.[30] They had recently received information that Saleh Gowad, after his release, had been involved in planting an IED that had killed a Marine just south of the 2d

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[25] JA at 785, 966.
[26] JA at 1152.
[27] *Id.*
[28] JA at 967.
[29] *Id.*
[30] JA at 800, 801, 841, 967.

platoon AO. Lt Phan spoke with Sgt Hutchins about taking matters into their own hands and killing Saleh Gowad. At trial, Lt Phan admitted to having these conversations but attempted to minimize them as merely "idle chit-chat."[31]

On April 26, 2006, Lt Phan assigned Sgt Hutchins' squad to set up an ambush within the vicinity of Saleh Gowad's house.[32] Sgt Hutchins understood this to be the opportunity to execute their plan to kill Saleh Gowad. After discussing the plan with the fireteam leaders, the whole squad was briefed. It was decided that one fireteam would go to Gowad's house, capture him, leave him by the side of the road with an AK-47 and shovel, and the rest of the squad would kill him from their ambush position. This would make it appear as though Gowad was engaged and killed while trying to plant an IED.[33] Each member of the squad individually agreed to participate in the plan, with the understanding that the plan would not be executed if any one of them wanted to back out.[34] With unanimous agreement established, the plan was then executed and a "snatch team" left the ambush position to get Gowad.

After a significant period of time elapsed, the snatch team came back with a man Sgt Hutchins believed to be Gowad and left

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[31] JA at 801.
[32] JA at 968.
[33] *Id.*
[34] JA at 574.

him on the road with a shovel and AK-47.[35] The squad reported to the platoon headquarters that there was a man digging by the side of the road who had begun firing at them, and then opened fire on the man.[36] The squad subsequently took steps to ensure that the scene was consistent with a man digging by the side of the road and waited for the quick reaction force.[37]

Several days later, local sheiks complained to the coalition that Marines had wrongly kidnapped an Iraqi from his bed and killed him.[38] In response, Naval Criminal Investigative Service (NCIS) launched an investigation.[39] When questioned by NCIS, the squad, including Sgt Hutchins, maintained the original story concerning the April 26th shooting.[40] NCIS soon began to suspect that the incident on April 26th was not as alleged by the squad and, on May 11, 2006, sought to interrogate Sgt Hutchins as a suspect at Camp Fallujah.[41] Sgt Hutchins was read his rights and, in response, he requested to terminate the interview and be provided with the assistance of a lawyer.[42] The interrogation was terminated and Sgt Hutchins was taken to a trailer, where he was

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[35] JA at 969.
[36] *Id.*
[37] *Id.*
[38] JA at 368-69.
[39] JA at 369.
[40] JA at 370-71.
[41] JA at 373-74.
[42] JA at 375.

sequestered and held under guard.[43] He was not permitted to use a phone or otherwise contact a lawyer.[44]

Seven days later on May 18, 2006, the sequestration ceased when NCIS agents unexpectedly entered Sgt Hutchins' trailer. One of the agents was Special Agent John Connelly, who had interrogated Sgt Hutchins during the previous May 11, 2006 interrogation.[45] The agents reminded Sgt Hutchins that they were still investigating him for charges of conspiracy, murder, assault and kidnapping, and indicated that they desired to search his trailer for evidence in support of those charges.[46] They discussed his constitutional rights, to include the right to refuse the search.[47] In response to this discussion, Sgt Hutchins consented to the search and indicated that he would like to talk more about the investigation. The next day NCIS arrived at Sgt Hutchins' trailer and took him to their office, where he made a sworn statement.[48] Sgt Hutchins was thereafter charged at a general court-martial with conspiracy, premeditated murder, and other offenses related to the April 26th shooting.

Sgt Hutchins was subsequently convicted of unpremeditated murder, conspiracy, false official statement and larceny of the

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[43] JA at 375.
[44] *Id.*
[45] *Id.*
[46] JA at 1077.
[47] JA at 172-73.
[48] JA at 376.

AK-47 and shovel.[49] Significantly, however, the members found Sgt Hutchins "not guilty" of premeditated murder, assault, housebreaking and kidnapping, and excepted the concurrent language from the conspiracy charge, thereby rejecting allegations that Sgt Hutchins directed his squad to seize any Iraqi male if Saleh Gowad could not be found.[50]

Sgt Hutchins was sentenced by members to fifteen years confinement and a dishonorable discharge. After clemency, the final approved sentences for Sgt Hutchins and his squad were as follows:

(Table appears on the following page)

[49] JA at 60-68 (CA Action).
[50] *Id.*

Name	*Convictions*	*Type of discharge*	*Confinement*
Sgt Hutchins	Unpremeditated murder Conspiracy False statement Larceny	Dishonorable	**11 years**
2ndLt Phan[51]	None	None	None
Cpl Thomas	Conspiracy Kidnapping	Bad-conduct	None
Cpl Magincalda	Conspiracy Wrongful appropriation Housebreaking	None	449 days
LCpl Pennington	Conspiracy Kidnapping	Bad-conduct	525 days
LCpl Jackson	Conspiracy Aggravated Assault	None	454 days
LCpl Shumate	Obstruction of Justice Assault w/ intent to inflict grievous harm	None	453 days
PFC Jodka	Conspiracy Assault	None	440 days
HM3 Bacos	Conspiracy Kidnapping	None	297 days

After Sgt Hutchins' case was docketed for appellate review, significant appellate issues were raised by the defense and NMCCA. In February 2009, the Naval Clemency and Parole Board examined Sgt Hutchins' case, noted the sentence disparity, and

[51] Although implicated by the evidence and testimony of the squad, 2ndLt Phan was never charged for the Gowad operation. He did, however, receive Non-Judicial Punishment for detainee abuse.

voted to reduce his sentence to 5 years.[52] Significantly, the Assistant Secretary of the Navy rejected that vote.[53]

In November 2009, despite ongoing appellate review and the annual Naval Clemency and Parole Board process, Secretary of the Navy Ray Mabus provided further response to Sgt Hutchins' case. Secretary Mabus issued a press release and gave telephonic interviews as part of a coordinated series of widely disseminated articles appearing, *inter alia*, in the Associated Press,[54] *The Marine Corps Times*,[55] and *The North County Times*.[56] In the *Marine Corps Times* article, it noted that Secretary Mabus had "reviewed transcripts and trial records in each of the eight Hamdaniya prosecutions."[57] During his *North County Times* telephonic interview, Secretary Mabus stated of Sgt Hutchins and his squad: "None of their actions lived up to the core values of the Marine Corps and the Navy. This was not a 'fog of war' case occurring in the heat of battle. This was carefully planned and executed, as was the cover-up. The plan was carried out exactly

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[52] *Hutchins*, unpub. op. at *9.
[53] *Id.*
[54] JA at 1165-67 (Associated Press, "Clemency denied for Plymouth Marine convicted of murder in Iraq," *Patriot-Ledger*, November 19, 2009.) Note: This AP article was reproduced in multiple other media outlets.
[55] JA at 1168-70 (Gidget Fuentes, "SecNav: No clemency in Iraqi murder plot," *The Marine Times*, November 17, 2009).
[56] JA at 1171-74 (Mark Walker, "Navy Secretary boots 4 Pendleton troops involved in Iraqi's killing," *The North Country Times*, November 17, 2009).
[57] JA at 1169.

as it had been conceived."[58] Secretary Mabus also noted that he believed the sentence Sgt Hutchins received was "commensurate" with the offense, that Sgt Hutchins had already received sufficient clemency from the convening authority, and that Sgt Hutchins would not receive additional clemency.[59] As justification (and in contradiction to the members' "not guilty" findings), Secretary Mabus noted to the *Marine Corps Times* that the killing was

> so completely *premeditated*, that it was not in the heat of battle, that not only was the action planned but the cover-up was planned, and that *they picked somebody at random*, just because he happened to be in a house that was convenient. He was murdered. . . *It wasn't somebody coming apart under pressure*. It wasn't in the middle of action, in the middle of battle. It was completely planned and completely executed. That was disconcerting.[60]

Finally, Secretary Mabus noted that he was "surprised" that members of the squad had been permitted to remain on active-duty and directed that they be immediately separated. "I thought that by leaving them on active duty, it degraded the actions of tens of thousands of other Marines and sailors who served . . . and didn't act this way."[61] The interview with Secretary Mabus was the cover story of the Marine Corps Times:

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[58] JA at 1172.
[59] JA at 1168.
[60] JA at 1169 (emphasis added).
[61] JA at 1170.

The Naval Clemency and Parole Board subsequently denied Sgt Hutchins clemency and parole in January 2010.[62]

[62] *Hutchins*, unpub. op. at *9.

On April 22, 2010, the lower Court issued an *en banc* opinion in the case, reversing the findings and sentence due to the improper severance of a detailed defense counsel on the eve of trial. In a separate partial concurrence/partial dissent, Judge Price agreed that the severance was improper, but did not find it prejudicial for findings. Echoing Secretary Mabus' talking points (which rejected the members' findings), Judge Price stated that Sgt Hutchins did not have any valid mental health defense, and had planned "to abduct and kill any nearby military-aged male."[63] Judge Price's inconsistency with the members' "not guilty" findings was not noted by the majority opinion.[64]

Subsequently, the recommendations provided to the Judge Advocate General of the Navy by his principal advisors, to include the Assistant Judge Advocate General for Military Justice, was that he not certify an appeal to this Court.[65] Nevertheless, the Judge Advocate General, who reports directly to Secretary Mabus, certified the appeal, and this Court later reversed the lower court. Additional facts necessary to resolve the issues on appeal are contained within the argument below.

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[63] *Id.*
[64] *Hutchins* 68 M.J. at 631.
[65] *See* Associated Press, "Government Appeals Overturning Marine's Conviction," June 7, 2010, *available at* http://www.foxnews.com/us/2010/06/07/government-appeals-military-courts-overturning-marines-conviction-iraqi-war/

SUMMARY OF ARGUMENT

I.

Secretary of the Navy Ray Mabus violated the prohibition against unlawful command influence through repeated public statements against Sgt Hutchins and his squad. As a matter of actual unlawful command influence, Secretary Mabus' statements directly impacted the ongoing post-trial disposition of Sgt Hutchins' case. As a matter of apparent unlawful command influence, by misusing his authority as leader of the Navy and Marine Corps, Secretary Mabus has fatally compromised the integrity of the military justice process in the eyes of the public. The only appropriate remedy is dismissal with prejudice.

II.

Sgt Hutchins' Fifth Amendment right against self-incrimination was violated when he was held incommunicado and his requests to exercise his right to speak with an attorney were not honored. Instead, after seven days of isolation, he was improperly re-approached by NCIS, who reminded him of the charges he was facing. He then relented and agreed to provide a sworn statement. The statement was involuntary and erroneously admitted into evidence. This error was not harmless beyond a reasonable doubt, because the statement was a critical piece of the Government's prosecution.

ARGUMENT

I.
WHETHER THE FINDINGS AND SENTENCE MUST BE DISMISSED WITH PREJUDICE WHERE UNLAWFUL COMMAND INFLUENCE FROM THE SECRETARY OF THE NAVY HAS UNDERMINED SUBSTANTIAL POST-TRIAL RIGHTS OF THE APPELLANT.

A. Standard of Review

Claims of actual and apparent unlawful command influence are reviewed *de novo*. [66]

B. Legal Background

Article 37, UCMJ, defines unlawful command influence (UCI) as actions which "censure," "reprimand," "admonish," "coerce" or otherwise "influence" any party exercising authority within a military justice proceeding, to include the exercise of approving and reviewing functions.[67]

This Court has described unlawful command influence as the "the mortal enemy of military justice . . . [not] because of the number of cases in which such influence is at issue, but rather because of the exceptional harm it causes to the fairness and public perception of military justice when it does arise."[68] Accordingly, "Congress and this court are concerned not only with eliminating actual unlawful command influence, but also

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[66] *See United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006)("We review this issue de novo.").
[67] *See* Art. 37, UCMJ, 10 U.S.C. § 837 (2006).
[68] *United States v. Douglass,* 68 M.J. 349, 355 (C.A.A.F. 2010).

with 'eliminating even the appearance of unlawful command influence at courts-martial.'"[69]

This Court must therefore assess both "actual" and "apparent" UCI. Actual UCI is assessed under *United States v. Biagase*.[70] Under *Biagase,* in order to allege unlawful command influence (UCI), the defense must satisfy the low threshold of providing "some evidence."[71] On appeal, the defense must show: (1) facts, which if true, constitute UCI; (2) that the proceedings were unfair; and (3) that UCI was the cause of the unfairness.[72] If the defense meets its burden, the Government must establish one of the following beyond a reasonable doubt: (1) disprove the predicate facts on which the allegation of unlawful command influence is based; (2) prove that the facts do not constitute unlawful command influence; or (3) prove that the unlawful command influence will not affect the proceedings.[73]

For apparent UCI, the Court's analysis is objective: "We focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. Thus, the appearance of unlawful command influence will

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[69] *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)(quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)).
[70] *See United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999).
[71] *Biagase*, 50 M.J. at 150 (quoting *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995)); *United States v. Simpson*, 58 M.J. 368, 373 (C.A.A.F. 2003).
[72] *See Biagase*, 50 M.J. at 150.
[73] *Id.* at 151.

exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding."[74]

C. The Article 37 prohibition against unlawful command influence applies to the Secretary of the Navy, both statutorily and through military precedent.

1. The Authority of the Secretary of the Navy

The Office of the Secretary of the Navy (SECNAV) dates to 1798, when the Fifth Congress established the Department of the Navy.[75] Congress stipulated formal Secretary of the Navy authority over the United States Marine Corps in 1834, when it passed "An Act for the Better Organization of the United States Marine Corps."[76]

Title 10 provides that the Secretary of the Navy "is responsible to the Secretary of Defense for . . . [t]he functioning and efficiency of the Department of the Navy."[77] As a result, the Secretary of the Navy "may . . . [a]ssign, detail and prescribe the duties of members of the Navy and Marine Corps and civilian personnel of the Department of the Navy."[78]

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[74] *Lewis*, 63 M.J. at 415 (citing *Stoneman*, 57 M.J. at 42).
[75] *See* Act of April 30, 1798; 1 Stat. 553 ("[T]here shall be an executive department under the denomination of the Department of the Navy, the chief officer of which shall be called the Secretary of the Navy").
[76] *See* 23 Cong. Ch. 132; 4 Stat. L. 713.
[77] 10 U.S.C. § 5013; 32 C.F.R. § 700.301.
[78] *Id.* at § 5013(g)(1); 32 C.F.R. § 700.306.

In October 2009, just one month prior to his public attack against Sgt Hutchins, Secretary Mabus made an appearance on *The Daily Show with Jon Stewart*, and reinforced his total authority over the Navy and Marine Corps. When asked by host Jon Stewart, "You are in charge of the Navy but also the Marines?" Secretary Mabus answered, "That's right."[79] Secretary Mabus further highlighted his authority, noting that he could unilaterally end the ban on women in submarines:

> Stewart: Is that something you can change unilaterally? Or what would be the process bureaucratically you would have to go through?
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> Mabus: You decide to do it. [laughter]
>
> Stewart: You don't have to ask anybody?
>
> Mabus: You don't have to ask anybody. You have to tell Congress. [laughter]
>
> Stewart: That's it? . . . So let's say you decide, "You know what, instead of Navy hats we're going to wear birthday hats." Can you just do that? You're like the Emperor of the Navy, you're not the Secretary!
>
> Mabus: This is the coolest job in the world.[80]

2. The Prohibition Against Unlawful Command Influence Applies to the Secretary of the Navy

The lower court asserts that Article 37 does not statutorily apply to Secretary Mabus, because "the statutory

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[79] *The Daily Show with Jon Stewart* (Comedy Central television broadcast Oct. 6, 2009), *available at* http://www.thedailyshow.com/watch/tue-october-6-2009/ray-mabus. The quoted text occurs between 2:08 and 2:47 of the interview.
[80] *Id.*

interplay of Articles 2 and 37, UCMJ (*10 U.S.C. 802* and *837*), does not contemplate an actual UCI paradigm applicable to the secretariat or civilian leadership."[81] This assertion is wrong. Article 37 overtly applies to "any person subject to this chapter" and "any convening authority." Under Article 22, UCMJ, the Secretary of the Navy--as well as the Secretary of Defense and President of the United States--is designated as a general court-martial convening authority.[82] His actions fall directly under the purview of Article 37, placing his actions within the jurisdiction of the UCMJ. Accordingly, in passing the UCMJ Congress specifically intended the actions of the "secretariat or civilian leadership" to be limited by Article 37's prohibitions.

In addition to the statutory basis, the prohibition against unlawful command influence also applies to Secretary Mabus through this Court's precedent. In *United States v. Simpson*, for example, this Court admonished senior civilians within the military establishment to be circumspect when commenting on military justice cases, due to "the prohibition against unlawful

[81] *Hutchins III* at *7-*8.
[82] *See* 10 U.S.C. § 822 (2006); *cf. Mullan v. United States*, 42 Ct. Cl. 157, 162 (1907) (SECNAV convenes general court-martial onboard Washington Navy Yard to try Navy Commander from Pensacola).

command influence."[83] In *United States v. Hagen*, moreover, this Court noted that:

> Command influence is a threat to justice and fairness in the operation of the code. This evil can emanate from within or outside the system.
>
> . . . .
>
> A typical general or flag officer exercising convening-authority power will almost always have superiors, higher-ranking military officers or civilians in policy positions. *These superiors as well must refrain from sending signals down the chain of command as to expected results in a criminal case. . . . It is not only unprofessional but a fraud on the system for a superior to "send the word" down to a convening authority as to a desired result in a criminal case which will please the leadership of our armed forces*.[84]

Thus, as the prohibition against unlawful command influence extends to the Secretary of the Navy both statutorily and through precedent, this Court must assess Secretary Mabus' actions under *Biagase*.

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[83] *Simpson*, 58 M.J. at 377.

[84] *United States v. Hagen*, 25 M.J. 78, 87 (C.M.A. 1987) (Sullivan, J. concurring). Although Judge Sullivan's opinion is styled a "concurring opinion," the majority opinion by Judge Cox notes "I agree with the opinion of my Brother, Judge Sullivan." *Id.* at 86. Additionally, Chief Judge Everett wrote separately to indicate that he concurred with "Judge Sullivan's excellent concurring opinion." *Id.* at 88. As there were only three judges on the Court at the time, the support of Chief Judge Everett and Judge Cox for Judge Sullivan's "concurrence" therefore imbues the concurrence with the full force of legal precedent.

C. *Biagase* Analysis

1. First *Biagase* factor: Secretary Mabus' unprecedented and coordinated campaign to publically condemn the trial dispositions of the Hamdania cases, and to influence the ongoing disposition of Appellant's case, plainly amounts to "some evidence" of unlawful command influence.

Secretary Mabus' widely disseminated public statements were designed to inform the Marine Corps and the general public[85] that (1) the military justice process did not dispose of the Hamdania cases harshly enough; (2) any perceived leniency for Sgt Hutchins and his squad was inconsistent with his expectations for the Department of the Navy, and that the prior perceived leniency they had received was unacceptable; (3) he would begin to rectify the prior leniency by ordering the separation of the remaining members of Sgt Hutchins' squad; (4) the evidence was sufficient to demonstrate Sgt Hutchins committed premeditated murder, and there was no valid mitigation evidence from the

[85] Notably, Secretary Mabus and his staff took action to ensure the widest possible dissemination of his statements, and also carefully targeted the dissemination to ensure those who had been involved in the Hamdania courts-martial received his admonishment. And while Secretary Mabus' spokesman utilized the international reach of the Associated Press, Secretary Mabus sent a further message by giving personal telephone interviews to only two media outlets: *The Marine Corps Times* and *The North County Times*. As Secretary Mabus was certainly aware, *The Marine Corps Times* is available at Marine Corps installations worldwide, and is widely read by Marines of all ranks. As for *The North County Times*, it directly serves Camp Pendleton, which was the location of Sgt Hutchins' unit, the location of the trial, and the location of the convening authority.

combat environment; (5) the evidence was sufficient to demonstrate that Sgt Hutchins specifically planned to have a random Iraqi seized and killed; (6) based on his review of the record Sgt Hutchins' adjudged sentence was appropriate, and "commensurate" with the offenses;[86] (7) neither Sgt Hutchins nor anyone else from his squad should remain in the Navy or Marine Corps; and (8) Sgt Hutchins had already received "greatly substantial" clemency and should not receive any additional clemency.[87]

Accordingly, Secretary Mabus, in direct violation of the prohibition against unlawful command influence, spoke in his capacity as the leader of the Navy and Marine Corps to "censure," "reprimand," and "admonish" the prior decisions of the convening authorities, court-martial members, military judges, counsels, and staff judge advocates with regards to the prosecutions of Sgt Hutchins and his squad.[88] In further violation, Secretary Mabus' assessment of sentence appropriateness and promulgation of factual/legal findings (in contradiction to "not guilty" findings), unlawfully influenced

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[86] JA at 1168.
[87] *Id.*
[88] *Cf.* 10 U.S.C. § 837a (2006)("No authority convening a general, special, or summary court-martial, nor any other commanding officer, may *censure, reprimand, or admonish* the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding.")(emphasis added).

the military justice process' ongoing post-trial review of Sgt Hutchins' case: at the time of Secretary Mabus' comments, the findings and sentence from Sgt Hutchins' court-martial were not final, and his case was under the cognizance of multiple reviewing authorities, to include the lower court, the JAG, and the officers delegated clemency/parole authority under Articles 74 and 75 of the UCMJ.[89]

Consequently, under the first *Biagase* factor, Secretary Mabus, the senior leader in the Navy and Marine Corps, exerted unlawful command influence over Sgt Hutchins' case through his media blitz and through his related order separating members of Sgt Hutchins' squad from active-duty.

2. Second and Third *Biagase* factors: The disposition of Appellant's case by the reviewing authorities was unfair due to Secretary Mabus' unlawful command influence

Secretary Mabus' November 2009 statements unlawfully influenced the lower court, the JAG, and the officers delegated clemency/parole authority under Articles 74 and 75.

[89] *Cf.* 10 U.S.C. § 837a (2006). ("No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, *or the action of any convening, approving, or reviewing authority with respect to his judicial acts*.")(emphasis added).

a) The lower court

i. UCI presumption

Military judges, to include the judges of the lower court, would ordinarily be presumed unaffected by unlawful command influence. In *United States v. Rivers*, this Court noted that "we have no reason to believe that the military judge would be affected by unlawful command influence unless there is evidence to the contrary."[90] However, this holding presumed that the military judge would be independent to the source of the unlawful command influence. As noted in *Rivers*, "The findings and sentence were determined by a military judge *who was not a member of the local command, and there is no evidence that the military judge was influenced by the actions of [the officers who engaged in unlawful command influence]*."[91] Additionally, *Rivers* relied on *United States v. Thomas*, which was more explicit in clarifying that military judges are only presumed to be unaffected by unlawful command influence when they are *independent of the source of the influence*: "In cases tried by military judge alone, we have no reason to believe that the command influence would have had any impact on the judges, *who were completely independent of [the General who engaged in*

[90] *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998).
[91] *Id.* at 443 (emphasis added).

unlawful command influence] and of other commanders in the field."[92]

As military judges are independent from field commanders, they are generally insulated from unlawful command influence. However, military judges are still subject to military authority and a chain of command, which flows from a Chief Judge and reaches the Judge Advocate General. For judges of the Navy and Marine Corps, to include the judges of the lower court, their reporting chain reaches the Judge Advocate General of the Navy--who retains the power to reassign judges to new duties, extend tours, and professionally discipline.[93]

And as a matter of statutory federal law and military regulation, the JAG reports directly to the Secretary of the Navy. Accordingly, unlawful command influence emanating from a Chief Judge, the JAG, or the Secretary of the Navy, would uniquely fall outside of the *Rivers* and *Thomas* presumption.[94] Thus, as a matter of law, the judges of the lower court are *not*

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[92] *United States v. Thomas*, 22 M.J. 388, 396 (C.M.A. 1986).
[93] *See* 10 U.S.C. § 866a (2006); JA at 47-52 (JAGINST 5815); *United States v. Allen*, 31 M.J. 572 (N-M.C.M.R. 1990)(discussing JAG authority over NMCCA).
[94] Article 26(c), UCMJ acknowledges that the service Secretary and President of the United States would always be within a military judge's chain of command, and would be uniquely permitted to prepare performance evaluations of any military judge detailed to a court-martial they had convened. *See* 10 U.S.C. § 826(c) (2006).

legally presumed to be unaffected from unlawful command influence when it issues from the Secretary of the Navy.

Further challenging any such presumption, *Hutchins I* and *Hutchins III* both provide clear and convincing evidence that the lower court was unlawfully influenced by Secretary Mabus. Specifically, *Hutchins III* held against Sgt Hutchins on every assignment of error (to include factual sufficiency and sentence appropriateness), and both *Hutchins I* and *Hutchins III* adhered to Secretary Mabus' unlawful direction by disregarding the members' "not guilty" findings.

ii. *Hutchins I*

In *Hutchins I*, the lower court set aside the findings and sentence. However, the court's ruling did not require a factual assessment of the case; it only required an application of existing case law to the established facts of an improper counsel severance. And under established case law at the time, an improper severance of counsel required reversal. Indeed, in the Government's subsequent appeal to this Court, it explicitly acknowledged that existing case law required the lower court's result, but that case law should instead be overruled.[95] Thus,

[95] JA at 59 ("To the extent that the lower Court relied upon *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988), as the basis to presume prejudice for non-structural errors, such reliance is misplaced. *Baca* does not represent the state of the law, is contrary to the mandates of this Court and the Supreme Court, and should be overruled.")

with the facts it was presented, the lower court was constrained by binding precedent to set aside the findings and sentence. As a result, Secretary Mabus' statements (which indicated that the evidence was sufficient to prove Appellant guilty of the premeditated murder of a randomly selected victim, and that the sentence was appropriate) were not implicated by the analysis in *Hutchins I*.

However, *Hutchins I* nonetheless contains direct evidence that the lower court was unlawfully influenced by Secretary Mabus. First, *Hutchins I* falsely indicated in its statement of facts that Sgt Hutchins had conspired to "kidnap" an Iraqi male.[96] As discussed, the members excepted the kidnapping (and housebreaking) predicate offense language from the conspiracy charge, and also found Sgt Hutchins "not guilty" of the stand-alone kidnapping charge. Second, Judge Price's separate partial concurrence/partial dissent *directly* echoed Secretary Mabus' misstatements and assertions from the November 2009 media articles.

Secretary Mabus had noted to the *Marine Corps Times* that the killing was

> so completely premeditated, that it was not in the heat of battle, that not only was the action planned but the cover-up was planned, and that they picked somebody at random, just because he happened to be in a house that was convenient. He was murdered. . . It

[96] *Hutchins*, 68 M.J. at 624.

> wasn't somebody coming apart under pressure. It wasn't in the middle of action, in the middle of battle. It was completely planned and completely executed. That was disconcerting.[97]

Similarly, Judge Price, without any reference to the members' "not guilty" findings, determined that there was no valid mental health defense (i.e. Appellant had not "come apart under pressure"), and determined that Appellant had targeted a man "with no suspected insurgent ties because he was a military-aged male who lived near a suspected insurgent, after their plan to kill a suspected insurgent was compromised."[98] Judge Price later reinforced that Appellant's conspiracy, "included contingency planning to abduct and kill any nearby military-aged male in the event their efforts to abduct suspected insurgent(s) was compromised."[99] The majority opinion, which itself had improperly stated the findings, did not note Judge Price's inconsistency with the members' findings, and only reiterated that the improper severance of counsel was not amenable to a speculative prejudice analysis.[100]

Hutchins I made these errors despite having previously received multiple pleadings from Sgt Hutchins in which he vociferously objected to any allegations that he was found

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[97] JA at 1169.
[98] *Hutchins*, 68 M.J. at 636-37.
[99] *Id.*
[100] *Hutchins* 68 M.J. at 631.

guilty of conspiring to kill a randomly selected victim, and drew the lower court's attention to the members' findings.[101] Accordingly, *Hutchins I* wholly endorsed Secretary Mabus' promulgation of false facts.

iii. *Hutchins III*

Hutchins III, unlike *Hutchins I*, was specifically required to make determinations regarding the underlying facts of the case, and, moreover, was required to explicitly assess factual sufficiency and sentence appropriateness. The factual misrepresentations in *Hutchins I* were explicitly raised as an issue by Sgt Hutchins, but those concerns were indifferently dismissed by *Hutchins III* as "unsupported."[102] *Hutchins III* instead perpetuated the misrepresentations from *Hutchins I*, writing:

> The court-martial received testimony from several members of the squad that indicated the intended ambush mission morphed into a conspiracy to deliberately capture and kill a high value individual (HVI), believed to be a leader of the insurgency. *The witnesses gave varying testimony as to the depth of their understanding of alternative targets, such as family members of the HVI or another random military-aged Iraqi male*.[103]

While gratuitously noting the "varying" testimony, *Hutchins III* failed to anywhere recite the charges, specifications and

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[101] JA at 56-58.
[102] Supplemental Reply brief at 6-10; *Hutchins*, unpub. op. at *10.
[103] *Hutchins*, unpub. op. at *4-5 (emphasis added).

language to which Sgt Hutchins was found "not guilty." Such a recitation would have conclusively demonstrated that the members resolved the "varying" testimony in favor of Sgt Hutchins (and against Secretary Mabus).[104]

Beyond misrepresentation of the trial findings, *Hutchins III* held against Sgt Hutchins on every issue, and did not otherwise provide any indication that it was free from Secretary Mabus' influence. Rather than engage in any substantive analysis of Secretary Mabus' statements, *Hutchins III* misleadingly indicated in a footnote that Secretary Mabus' statements were limited to expressing "surprise and disappointment with the sentences awarded and the prospect of continuing service for the personnel involved in this case."[105]

Hutchins III further stated,

> We hold that under the circumstances present in this case, the comments by the Secretary of the Navy related to his prerogatives in clemency, were separate and legally distinct from proceedings under *Article 66*, UCMJ, and could not reasonably be perceived by a disinterested member of the public as UCI or otherwise indicative of an unfair proceeding in this court-martial.[106]

However, *Hutchins III* omits any reference to Secretary Mabus' declaration that he had specifically reviewed the transcript in Sgt Hutchins' case, his promulgation of factual findings, and

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[104] *Compare Hutchins*, unpub. op. at *4-*6, *with* CA Action (indicating the members' findings).
[105] *Hutchins*, unpub. op. at *6.
[106] *Hutchins*, unpub. op. at *11.

his commentary on sentence appropriateness—all of which directly address Article 66 review. Nor has Secretary Mabus ever taken remedial action to limit the scope of his unlawful command influence. *Hutchins III* also indicated that all of Appellant's motions to attach UCI-related documents to the record were granted, in order for the lower court to conduct a "full and public vetting" of the UCI claim. Those motions were in fact denied.[107]

Thus, *Hutchins III* improperly ratified Secretary Mabus' actions, and improperly affirmed the findings and sentence. Under the second and third *Biagase* factors, then, the Article 66 review in Sgt Hutchins' case was unfair. This unfairness was caused by Secretary Mabus' unlawful command influence.

b) The JAG

In April 2010, after *Hutchins I* set aside the findings and sentence, Sgt Hutchins' case came under the review of the JAG to assess whether an appeal to this Court should be certified under Article 67. A service JAG's decision to certify an appeal under Article 67 is by definition a "judicial act" by a "reviewing authority," and is therefore protected by Article 37.

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[107] *Hutchins*, unpub. op. at *9. On April 26, 2012, with the assistance of Mr. DeCicco, undersigned counsel reviewed the original record of trial docketed with this Court, and verified that the lower court had in fact stamped "Denied" on the motions to attach, and the documents for one of the motions had been returned to counsel and was not present in the record.

Under 10 U.S.C. § 5148 and SECNAVINST 5430.27C, the JAG reports *directly* to the Secretary of the Navy, and carries the additional title of Staff Assistant to the Secretary of the Navy.[108] Thus, under statutory federal law and Navy regulations, the JAG is in a direct senior/subordinate relationship with Secretary Mabus. As a result, the JAG's decision to certify the appeal cannot be divorced from Secretary Mabus' unlawful influence.

A JAG's discretion to certify an appeal is not unfettered, and it must be a disinterested judicial decision. Indeed, precedent reinforces the fact that the JAG must remain neutral in order to properly exercise his responsibilities. In *United States v. Schoof*, this Court opined that JAG certification was constitutionally permissible, and not an unfair advantage to the Government, as it was "party neutral."[109]

Moreover, Congress never intended JAG certification to simply be a guaranteed method for the Government to appeal to this Court. Rather, JAG certification was solely intended to allow a service JAG to address inconsistent or abusive rulings from a service appellate court.[110] Certification decisions made

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[108] *See* 10 USC § 5148; JA at 45 (SECNAVINST 5430.27C).
[109] *United States v. Schoof*, 37 M.J. 96, 98 (C.M.A. 1993).
[110] *See, e.g.,* Lieutenant Colonel Robert M. Mummey, *Judicial Limitations upon a Statutory Right: The Power of the Judge Advocate General to Certify Under Article 67(b)(2)*, 12 Mil. L. Rev. 193, 194-99 (1961). Notably, congressional debate on

for any other purpose are improper, contravene Congressional intent, and are of doubtful constitutional validity.

The decision to certify an appeal of *Hutchins I* was not based on a desire to correct an abusive service court ruling; it was the unfair result of Secretary Mabus' unlawful influence and command authority over the JAG.[111]

c) Article 74 review

In addition to his rights under Article 66, in November 2009 Sgt Hutchins also had rights under Articles 74 and 75 of the UCMJ. Those rights made him eligible to receive sentencing relief from: (1) the Naval Clemency and Parole Board and Assistant Secretary of the Navy (Manpower and Reserve Affairs)

Article 67(a)(2) centered around concerns that it did not go far enough to protect the rights of the accused. *See, e.g.*, *Bills to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on S. 857 and H.R. 4080 Before the Subcomm. of the H. Comm. on Armed Serv.s*, 81st Cong. 252-54 (1949) (statement of Prof. Arthur Keeffe).

[111] Documents which the lower court refused to attach to the record, but which were referenced in publically available news articles, revealed that **the principal advisors to the JAG recommended against certifying the appeal**. *See, e.g.*, Associated Press, "Government Appeals Overturning Marine's Conviction," June 7, 2010, *available at* http://www.foxnews.com/us/2010/06/07/government-appeals-military-courts-overturning-marines-conviction-iraqi-war/. Sgt Hutchins was aware of these recommendations, and consequently attempted to negotiate a pretrial agreement with the convening authority in order to provide further reason for the case to not be certified. The lower court denied a motion to attach to the record documents recounting these negotiations, and the extent to which they were impacted by unlawful command influence.

via SECNAVINST 5815.3J, and (2) officers delegated Article 74 authority via JAGMAN § 0158.[112]

As noted by this Court in *United States v. Tate*, the opportunity to be fairly considered for clemency under Article 74, UCMJ is a fundamental post-trial right: "Congress identified greater uniformity as one of the central goals in enacting the UCMJ; post-trial and appellate procedures formed a critical element of the structure created by Congress to achieve uniformity; and Congress viewed the clemency process as the 'ultimate control of sentence uniformity.'"[113] Thus, Secretary Mabus' statements that Sgt Hutchins should not receive additional clemency and had received an appropriate sentence, directly prejudiced the exercise of delegated Article 74 authority.

The lower court denied motions to attach documents to the record, which demonstrated that review by the Naval Clemency and Parole Board and the designated officers under JAGMAN § 0158 was unlawfully influenced. Despite the denial of these motions, *Hutchins III* still references that in March 2009, the Naval Clemency and Parole Board voted to reduce Sgt Hutchins' sentence to five years--a vote that was later rejected by the then Acting Assistant Secretary of the Navy--but subsequent to Secretary

[112] JA at 40-44.
[113] *United States v. Tate*, 64 M.J. 269 (C.A.A.F. 2007)

Mabus' November 2009 statements had voted *against* Sgt Hutchins' clemency requests.[114] Accordingly, Secretary Mabus' unlawful influence of Article 74 review has unfairly prevented Sgt Hutchins from receiving clemency.

3. As there is "some evidence" of unlawful command influence, and "some evidence" that it has caused the post-trial review of this case to be unfair, the burden must shift to the Government.

Once the burden has shifted, the Government must prove beyond a reasonable doubt that the predicate facts are false, that they do not constitute unlawful command influence, or that the unlawful command influence has not affected the proceedings.

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[114] *Hutchins*, unpub. op. at *9. In addition, the documents rejected by the lower court also indicated that Secretary Mabus' statements were discussed at the Naval Clemency and Parole Board hearings in 2010 and 2011, and that in January 2011, pursuant to JAGMAN § 0158, Sgt Hutchins requested time-served clemency from the general court-martial convening authorities in his chain of command. The JAGMAN § 0158 clemency requests identified the factual inaccuracies in Secretary Mabus' public statements about the case, and urged that those statements be disregarded, but they were nevertheless denied and Sgt Hutchins returned to confinement. Although the lower court did not attach this information to the record of trial, the fact that JAGMAN §0158 clemency requests were denied by the general court-martial convening authorities is a matter of public record. *See, e.g.*, Tony Perry, *Clemency denied, Marine sergeant ordered back to prison in killing of Iraqi man in 2006*, Los Angeles Times, February 15, 2011, *available at* http://latimesblogs.latimes.com/lanow/2011/02/marine-sergeant-ordered-back-to-prison-in-killing-of-iraqi-man-in-2006.html. Thus, there can be no question that Secretary Mabus' unlawful influence has been "injected" into Article 74 review. *See United States v. Ayers*, 54 M.J. 85, 95 (C.A.A.F. 2000)(holding that the views of senior leadership must be "injected into the appellant's court-martial, by arguments of counsel or otherwise" for there to be unlawful command influence); *United States v. Kirkpatrick*, 33 M.J. 132, 133 (C.M.A. 1991).

As discussed below, given the evidence already in the record, it is impossible for the Government to meet this burden.

a. Disprove the predicate facts

Secretary Mabus' statements are an indisputable and widely disseminated matter of public record.

b. Prove that the facts do not constitute unlawful command influence

As discussed above, Secretary Mabus is the leader of the Navy and Marine Corps, and his official statements specifically delineated factual findings and commented on sentence appropriateness/clemency for Sgt Hutchins' case. These statements targeted Marine Corps base newspapers and were disseminated on an international scale. Accordingly, it is impossible for the Government to prove beyond a reasonable doubt that Secretary Mabus' statements did not constitute unlawful command influence.

c. Prove that the proceedings have not been affected by unlawful command influence

Subsequent to Secretary Mabus' November 2009 public statements (which were never retracted or subject to any remedial action), Sgt Hutchins has had requests for clemency denied, the JAG certify an appeal to this Court, and the findings and sentence from his court-martial affirmed by the lower court. It is facially impossible, then, for the

Government to demonstrate *beyond a reasonable doubt* that unlawful command influence has not affected the proceedings.

This conclusion is particularly true in light of *United States v. Gerlich*, which cites longstanding military law that where there has been unlawful command influence from a superior, a subordinate is not capable of "ascertaining for himself" the impact of that influence.[115] Consequently, any potential future statements or testimony from those involved in the post-trial review of Sgt Hutchins' case disclaiming any impact from Secretary Mabus' public admonishments would be unpersuasive and irrelevant as a matter of law. At a minimum, they could never satisfy the "beyond a reasonable doubt" standard.

D. Apparent Unlawful Command Influence

Even if there is not actual unlawful command influence, this Court should find apparent unlawful command influence tainted the post-trial review of Sgt Hutchins' case. This Court is equally vigilant concerning apparent unlawful command influence, and will remedy even "the appearance of evil."[116] "Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an

[115] *United States v. Gerlich*, 45 M.J. 309, 313 (C.A.A.F. 1996).
[116] *Stoneman*, 57 M.J. at 42.

'intolerable strain on public perception of the military justice system.'"[117]

1. Apparent UCI is analogous to the accuser concept

The concept of apparent UCI is analogous to the "accuser concept" as both concepts reflect the insidious nature of command authority. Additionally, both concepts seek to protect the fundamental fairness of a court-martial and its subsequent review. Given hierarchical military society, wherever there is a possibility that rank structure may be used improperly with regards to military justice, there need not be any demonstrated impact for remedial action. Thus, where a superior is deemed to be an accuser, all subordinates are mandatorily disqualified from exercising authority over the case.[118] Hence, were Secretary Mabus to be considered an accuser based upon his improper statements regarding Sgt Hutchins, all those subordinate to his authority would be *per se* disqualified from taking any action related to Sgt Hutchins' case.

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[117] *Id.* at 42,43 (quoting *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001)).

[118] Article 1(9), UCMJ, defines accuser, in part, as "any person who . . . has an interest other than an official interest in the prosecution of the accused."[118] 10 U.S.C. § 801. Article 23(b) then provides, "If any such officer is an accuser, the court shall be convened by superior competent authority. . . ."

2. Through his words and actions, Secretary Mabus has placed an intolerable strain on public perception of the military justice system.

In seeking to safeguard the public integrity of the military justice process this Court should note that Secretary Mabus made clear to the public that his personal review of the trial records in each Hamdania case led him to find that all were guilty of charges which were either withdrawn or subject to "not guilty" findings. This Court should consider that Secretary Mabus' calculated public condemnation amounts to unauthorized additional punishment for Sgt Hutchins' convictions. Undoubtedly, specific public censure by the Secretary of the Navy (to include condemnation for conduct that was subject to "not guilty" findings) is an irrevocable and severe negative consequence. In the eyes of the public, the political leadership has a predetermined goal and result for the Hamdania cases.

An objective member of the public, aware that every member of the Navy and Marine Corps ultimately reports to the Secretary of the Navy, and aware of his unprecedented public statements, would "harbor a significant doubt" about the fairness of the review of Sgt Hutchins' case by these very same individuals--whether it is the lower court's Article 66 review, a

certification decision by the JAG under Article 67, or Article 74 review for clemency or parole.[119]

An objective member of the public would also notice the factual misrepresentations in *Hutchins I* and *Hutchins III*, and conclude that those misrepresentations were consistent with Secretary Mabus' public statements. They would observe *Hutchins III*'s minimization and justification of Secretary Mabus' admonishments, and observe that it affirmed the findings and sentence. An objective member of the public would also observe that the favorable decision in *Hutchins I* was certified for appeal by the JAG, who reports directly to Secretary Mabus. Finally, an objective member of the public would perceive that Secretary Mabus' comments were made in the wake of the Naval Clemency and Parole Board's (overruled) recommendation to reduce the sentence to five years, and that since Secretary Mabus' comments there has not been a similar recommendation, nor was Sgt Hutchins able to receive clemency under JAGMAN § 0158.

In *United States v. Reed*, this Court identified specific factors to consider when assessing apparent unlawful command influence, to include "means and scope of dissemination" and "remedial action within the command in general."[120] The means and scope of initial dissemination of Secretary Mabus'

[119] *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).
[120] *United States v. Reed*, 65 M.J. 487, 492 (C.A.A.F. 2008).

statements was designed to have the broadest possible impact within the Marine Corps. And as seen in the Appendix, subsequent to November 2009, Secretary Mabus' comments have been consistently reproduced in multiple media outlets over the past three years, to include international outlets such as Al-jazeera.[121] To date there has been no remedial action by Secretary Mabus. Neither Secretary Mabus, the Department of the Navy, nor any senior judge advocate has taken any public action to clarify, limit or rebuke Secretary Mabus' statements and actions.

E. Remedy

The post-trial review of this case has been fatally compromised; the only appropriate remedy is dismissal with prejudice. In *United States v. Gore*, this Court held that dismissal with prejudice was an appropriate remedy for unlawful command influence, particularly where further proceedings would continue to be tainted by the prejudice.[122] In *Gore*, all of the key witnesses for the findings and sentencing portion of the case fell under the control of the same convening authority who had exercised unlawful command influence. Similarly, in the present case, simply setting aside the findings and ordering a re-trial would not remove the taint of unlawful command

[121] JA at 1185-93.
[122] *Gore*, 60 M.J. at 189.

influence; all potential re-trial participants would continue to fall under the control of the Secretary of the Navy, to include the military judge, counsel, staff judge advocate, and convening authority. [123] In *United States v. Lewis*, this Court determined that dismissal with prejudice was an appropriate remedy for unlawful command influence where "the Government has accomplished its desired end."[124] Secretary Mabus has already accomplished his objective: public condemnation of Sgt Hutchins and his squad, the use of his Secretariat mantle of authority to publicly disregard the findings of members and decree his own evidentiary findings, and public condemnation and undermining of the results of the military justice process as inconsistent with "core values." No remedial action can change this public record.

More importantly for this Court, no action short of dismissal with prejudice would serve as an appropriate response

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[123] As stated to the lower court, although undersigned counsel has continued to represent the Appellant, the Secretary of the Navy's unlawful influence has created a conflict of interest. Undersigned counsel constantly assesses what impact his representation of Appellant has had or will have on his future career in the Marine Corps Reserve due to the necessary opposition to Secretary Mabus. However, as Appellant's parents were essentially bankrupted by the legal bills from the civilian trial defense counsel, they have no funds to pay for civilian appellate counsel. And as any other military counsel would have the same conflict of interest as undersigned counsel, undersigned counsel has remained on this case despite the conflict.

[124] *Lewis*, 63 M.J. at 416.

to Secretary Mabus' attack against the military justice system and restore its independence and credibility in the eyes of the public. Dismissal with prejudice will permanently etch into the minds of the civilian leadership, as well as the troops on the ground, that the military justice system is independent and fair. It is not a tool to be politically manipulated to achieve a desired end.

WHEREFORE, Appellant request this Court dismiss the findings and sentence with prejudice.

II.

THE APPELLANT WAS INTERROGATED BY NCIS CONCERNING HIS INVOLVEMENT IN THE ALLEGED CRIMES, AND TERMINATED THE INTERVIEW BY INVOKING HIS RIGHT TO COUNSEL. APPELLANT WAS THEREAFTER HELD INCOMMUNICADO AND PLACED IN SOLITARY CONFINEMENT, WHERE HE WAS DENIED THE ABILITY TO COMMUNICATE WITH A LAWYER OR ANY OTHER SOURCE OF ASSISTANCE. APPELLANT WAS HELD UNDER THESE CONDITIONS FOR 7 DAYS, WHEREUPON NCIS RE-APPROACHED APPELLANT AND COMMUNICATED WITH HIM REGARDING THEIR ONGOING INVESTIGATION. IN RESPONSE, APPELLANT WAIVED HIS PREVIOUSLY INVOKED RIGHT TO COUNSEL AND SUBSEQUENTLY PROVIDED NCIS A SWORN STATEMENT CONCERNING THE ALLEGED CRIMES.

DID THE MILITARY JUDGE ERR WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS THE APPELLANT'S STATEMENT? *SEE EDWARDS v. ARIZONA*, 451 U.S. 77 (1981) *AND UNITED STATES v. BRABANT*, 29 M.J. 259 (C.M.A. 1989).

A. Standard of Review

A military judge's decision to admit an accused's statement into evidence is reviewed for an abuse of discretion; the

findings of fact will not be disturbed unless they are clearly erroneous, but the conclusions of law are reviewed *de novo*.[125]

B. Legal Background

In *Miranda v. Arizona*, the Supreme Court articulated the fundamental conflict between custodial interrogations and the 5th Amendment right against self-incrimination:

> The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles -- that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.
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> Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."[126]

Miranda affirmed that even absent physical abuse, "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals," and quoted the following excerpt from a police interrogation manual:

> If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived

[125] *See United States v. Chatfield*, 67 M.J. 432 (C.A.A.F. 2008).
[126] *Miranda v. Arizona*, 384 U.S. 436, 457-58 (1966)(quoting *Mapp v. Ohio*, 367 U.S. 643, 685 (1961)(Harlan, J., dissenting)).

> of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. *The atmosphere suggests the invincibility of the forces of the law.*[127]

Thus, given the inherent coercive nature of a custodial interrogation, *Miranda* required suspects to be advised of their rights, which included the right to remain silent and the right to counsel.[128]

In *Edwards v. Arizona*, the Supreme Court further held that once a suspect invokes his right to an attorney during an interrogation, all questioning must stop until: (1) an attorney is provided, or (2) the suspect himself initiates further communication with the police.[129] *Edwards* was specifically intended to ensure that once a suspect initially invoked his right to counsel, any subsequent waiver and statements were "not the result of coercive pressures."[130] Moreover, *McNeil v. Wisconsin* confirmed that once a suspect has requested counsel, if

> the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as

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[127] *Id.* at 449-450 (emphasis added).
[128] *Id.* at 478-79.
[129] *Edwards v. Arizona,* 451 U.S. 477, 484-85 (1981).
[130] *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990).

> substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.[131]

Oregon v. Bradshaw noted that *Edwards* did not prevent a confined suspect from waiving a previously invoked right to counsel, but instead limited the police to communicating with the suspect only concerning matters "incident to confinement" and not "relating directly or indirectly to the investigation."[132]

Hence, any confession made after an initial invocation of rights must be assessed to determine the source of re-initiation, whether the rights waiver was knowing and intelligent, and whether the statement was voluntary.

C. Facts

On May 10, 2006, while at Abu Ghraib, Sgt Hutchins informed his platoon sergeant that he wanted to speak to an attorney concerning the ongoing NCIS investigation.[133] Sgt Hutchins was informed by his platoon sergeant to wait until later in the day, and then he could contact an attorney.[134] However, before being given that opportunity, Sgt Hutchins was confined to a warehouse along with his squad, and they were transported via ground convoy to Camp Fallujah.[135] During the convoy Sgt Hutchins did not have his weapon, and was not permitted to communicate with

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[131] *McNeil v. Wisconsin*, 501 U.S. 171, 176-77 (1991).
[132] *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983).
[133] JA at 374.
[134] *Id.*
[135] JA at 261, 374.

any of the others.[136] Once at Camp Fallujah, Sgt Hutchins was immediately placed into a locked billeting trailer, where he was kept in solitary confinement and under constant guard.[137] He was not given access to a phone, mail or any other source of communication.[138]

The next day Sgt Hutchins was taken to the NCIS trailer and interrogated by Special Agent John Connelly and Special Agent Ken Casey.[139] After initially agreeing to speak to the agents, Sgt Hutchins unequivocally invoked his right to speak to counsel once the interrogation became combative.[140] At that point the interrogation was terminated. During the suppression hearing, Special Agent Connelly acknowledged he did not take any subsequent steps to ensure Sgt Hutchins had the opportunity to consult with counsel, because, in his words, "That wouldn't be my job." However, Special Agent Casey testified that after the interrogation ended, he informed Sgt Hutchins' chain of command that Sgt Hutchins had requested to speak to an attorney.[141]

Sgt Hutchins' command returned him to confinement in his trailer, but he was not given the opportunity to exercise his

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[136] JA at 261-263, 374.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] JA at 375.
[141] JA at 307.

invoked right to speak to an attorney.[142] He was instead kept in solitary confinement for the next seven days, and continued to be deprived of any means of communication.[143] Other than an approximate four-minute non-substantive conversation with a Chaplain (who happened to see Sgt Hutchins standing outside his trailer for a smoke break and stopped to talk to him),[144] during this time Sgt Hutchins had no social contact with anyone beyond his guards.[145] Sgt Hutchins was not even permitted to eat at the chow hall, as all of his meals were brought to the trailer.[146] While confined, Sgt Hutchins continued to suffer from the PTSD and recurrent nightmares which had begun after the January 28 patrol and death of the Iraqi family--conditions for which he would later be medicated.[147]

On May 18, 2006, Special Agent Connelly, this time accompanied by Special Agent Kelly Garbo, re-initiated contact with Sgt Hutchins by going to his trailer to search his belongings.[148] They both later testified that this was done in furtherance of their criminal investigation and in hopes of

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[142] JA at 375.
[143] *Id.*
[144] JA at 339 ("But as far as going into the meat of things that happened or – we never touched upon that.").
[145] JA at 375.
[146] JA at 159-60, 264.
[147] JA at 1149-63.
[148] JA at 375.

finding incriminating evidence.[149] After arriving at the trailer, Special Agent Connelly discussed with Sgt Hutchins a form which granted NCIS "Permissive Authorization for Search and Seizure" (PASS).[150] The PASS indicated that Sgt Hutchins was being investigated by NCIS for the crimes of Conspiracy, Murder, Assault, and Kidnapping.[151] After listening to Special Agent Connelly's explanation, Sgt Hutchins read the form. According to Special Agent Connelly's later testimony, "[A]s he was reading the form to himself he asked if there was still an opportunity to talk to NCIS and give his side of the story."[152]

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[149] JA at 164, 198.
[150] JA at 128, 173, 375, 1077.
[151] JA at 128, 173.
[152] JA at 173. Sgt Hutchins' affidavit disputes Special Agent Connelly's version of events. JA at 1123. In particular, the affidavit states that after discussing the PASS, Special Agent Connelly told Sgt Hutchins that the decision to invoke the right to counsel had been a mistake, and Sgt Hutchins still had a chance to offer his side of the story, as Lt Phan was the true culprit. *Id.* Although Special Agent Connelly denied making any such statements at the suppression hearing, he nevertheless admitted that at the time of the search he believed he was free to re-interrogate Sgt Hutchins. Special Agent Connelly specified that under "new case law" he was allowed to re-approach a suspect who had invoked their right to counsel, so long as a "substantive amount of time" had elapsed. JA at 163-64. He testified that 72 hours was a sufficient such period of time. *Id.* Accordingly, Special Agent Connelly, by his own admission, believed he was free to re-interrogate Sgt Hutchins on May 18, 2006. Given these facts, it is hard to believe that he would not have made the statements recounted in the affidavit. Indeed, an experienced criminal investigator would have been negligent if he did *not* take advantage of a perceived lawful opportunity to reinitiate a key suspect in a murder case.

In response, Special Agent Connelly said that as it was already late, they would have to wait until the next day.[153]

On May 19, 2006, Special Agent Connelly and Special Agent Casey picked up Sgt Hutchins and drove him to the NCIS trailer.[154] Once there, they had him complete a rights waiver and then interrogated him.[155] He ultimately completed and signed a sworn statement.[156]

D. Discussion

The circumstances of Sgt Hutchins' confinement and isolation are sufficient to demonstrate that his May 19, 2006 rights waiver and sworn statement were involuntary. In addition, an *Edwards v. Arizona* violation was perfected once NCIS communicated with Sgt Hutchins about subject matter which was not "incident to confinement," but was instead related "directly . . . to the investigation."[157]

1. Voluntariness

Voluntariness of a confession is a question of law reviewed *de novo* by examining the totality of the circumstances, including the details of the interrogation and the characteristics of the suspect.[158] Here, the totality of the

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[153] JA at 376.
[154] JA at 130-33, 376.
[155] JA at 376; PE 1.
[156] JA at 376.
[157] *Bradshaw*, 462 U.S. at 1045.
[158] *United States v. Ellis*, 57 M.J. 375, 378 (C.A.A.F. 2002).

circumstances demonstrate that Sgt Hutchins' May 19, 2006, rights waiver and statement were involuntary.

As noted in *Miranda*, incommunicado detention is psychologically coercive, and intensive safeguards must be maintained in order to ensure that a suspect's will is not overborne. In *Michigan v. Jackson*, the Supreme Court observed that "[T]he simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly."[159] Accordingly, if a suspect indicates that he needs the assistance of a lawyer in order to communicate with the police, he must be given a "full and fair opportunity" to exercise that right and secure such assistance.[160]

Under Federal Rule of Criminal Procedure 5(a) and 5(c), an individual who is arrested must be taken before a magistrate judge "without unnecessary delay," and the magistrate is required to provide the defendant a "reasonable opportunity to consult with counsel."[161] Military law provides servicemembers with even more explicit protection, as Rule for Courts-martial 305(f) mandates that any confined servicemember who requests the

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[159] *Michigan v. Jackson*, 475 U.S. 625, 633-34, n.7 (1986)(quoting *Michigan v. Bladel*, 365 N.W.2d 56, 67 (Mich. 1984)).
[160] *United States v. Seay*, 60 M.J. 73, 79 (C.A.A.F. 2004) (quoting *Michigan v. Mosley*, 423 U.S. 96, 104-05 (1975)).
[161] FED. R. CRIM. P. 5.

assistance of counsel will be assigned a military attorney within 72 hours.[162]

Despite these explicit protections, Sgt Hutchins' multiple requests for the opportunity to speak with counsel went unheeded by the Government. Nor was he assigned a military attorney within 72 hours of his May 11, 2006 rights invocation, as required by R.C.M. 305.[163] Thus, far from providing an opportunity for Sgt Hutchins to relieve the psychological coercion of his confinement, his failed efforts to secure counsel only served to reinforce his powerlessness before the Government.[164]

In light of *Miranda*, the Government's deliberate seven-day deprivation of any opportunity for Sgt Hutchins to exercise his invoked right to counsel should render his waiver and statement *per se* involuntary. To the extent that it does not, consideration of all of the remaining circumstances dispels the

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[162] *See* R.C.M. 305(f).

[163] Although the Regimental Judge Advocate characterized these conditions as "pretrial restraint," they were confinement under any standard, as acknowledged by the Government at trial. *See* JA at 1147-48 (Maj Harvey e-mail), 327 (concession from the trial counsel); *Hutchins*, unpub. op. at *15. Moreover, the fact that Sgt Hutchins and his squad were immediately placed in pretrial confinement upon their return to Camp Pendleton corroborates that the command intended the conditions of "restraint" at Camp Fallujah to be the equivalent of confinement.

[164] The record does not indicate why the Government failed to appoint Sgt Hutchins an attorney or, at the very least, provide him access to one.

possibility that the statement was the product of anything other than improper coercion.

The totality of circumstances evidence that Sgt Hutchins' waiver of his right to counsel and sworn statement were the involuntary result of coercive pressure, to wit: he was suffering from PTSD and nightmares; he was told he was facing serious criminal charges, to include murder; his request to his platoon sergeant that he be permitted to contact a lawyer was ignored; he was stripped of his weapon in a combat zone, and then sent unarmed on a ground convoy through hostile territory; he was abruptly ripped from the organic and combat-forged brotherhood of his infantry squad and isolated in a locked trailer; he was subject to a combative custodial interrogation by NCIS; his request to speak to an attorney was again ignored, and he instead remained incommunicado and in solitary confinement, with no hope of communicating with any source of help; and after seven days of these conditions, NCIS unexpectedly arrived at his trailer late at night, specifically reminded him that he was the subject of an ongoing criminal investigation, re-stated the charges he was facing, and requested to search his belongings so they could gather further evidence against him. In response to these compelling factors, Sgt Hutchins agreed to submit to interrogation. The next day he provided a sworn statement.

In short, these circumstances broke Sgt Hutchins; after seven days of forced isolation his will was finally overborne, and he surrendered to the human contact and release provided by NCIS. This is particularly seen in Sgt Hutchins' physical and emotional response after completing the May 19, 2006, sworn statement. Regarding Sgt Hutchins' demeanor after the statement was completed, Special Agent Connelly remarked:

> You know, it kind of appeared to me like there was a relief, relaxation, or whatever. It was like a big burden off your shoulders.[165]

As noted in *Miranda*:

> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. *In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so*.[166]

2. Initiation

Underpinning *Edwards* and its progeny is the protection from police interference of a suspect's determination that "he is not competent to deal with the authorities without legal advice."[167] There is no dispute that Sgt Hutchins invoked his right to counsel, but was later interrogated without counsel and provided

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[165] JA at 135.
[166] *Miranda*, 384 U.S. at 475 (emphasis added).
[167] *Brabant*, 29 M.J. at 262 (quoting *Michigan v. Mosley*, 423 U.S. 96, 110 (1975)(White, J., concurring)).

a sworn statement. The Government must prove that this second interrogation was not the result of a police-initiated encounter, and any statements the police made to Sgt Hutchins were limited to matters "incident to confinement" and not "relating directly or indirectly to the investigation."[168]

a. NCIS initiated the encounter on May 18, 2006

As an initial matter, if the contact between Sgt Hutchins and NCIS on May 19, 2006 were to be considered independent of the contact on May 18, 2006, then his statement would be *de facto* inadmissible. Specifically, on May 19, 2006, NCIS directed Sgt Hutchins to be taken to Battalion headquarters, and from there picked him up to drive him to the NCIS trailer.[169] Once at their trailer, the NCIS agents asked Sgt Hutchins to waive his previously invoked right to counsel, submit to interrogation, and provide a sworn statement. If these were the only facts, his statement would be the inadmissible product of a quintessential *Edwards v. Arizona* violation. Accordingly, the Government must argue that the May 19 interrogation was not an independent event, and was instead a continuation of the May 18 interaction between Sgt Hutchins and Special Agent Connelly.

But the May 18 interaction was indisputably initiated by NCIS, as Special Agents Connelly and Garbo went to Sgt Hutchins'

[168] *Bradshaw*, 462 U.S. at 1045.
[169] JA at 376.

trailer uninvited and of their own initiative. Concurrently, their communications with Sgt Hutchins were not limited to administrative matters incident to confinement, *i.e.* food quality or room temperature. Rather, the subject matter was constitutional rights, and they provided Sgt Hutchins a waiver form (PASS) in order for him to waive his Fourth Amendment right to refuse a warrantless search. In addition, the PASS explicitly stated that the search was in furtherance of an NCIS investigation into Sgt Hutchins for Conspiracy, Murder, Assault and Kidnapping--the very investigation for which he had previously invoked his right to counsel.

Hence, under *Oregon v. Bradshaw*, the NCIS communication with Sgt Hutchins on May 18, 2006, was in violation of his Fifth Amendment rights. First, the communication concerned matters beyond those which were "incident to confinement."[170] Second, and most egregiously, the communication was "directly related" to the criminal investigation.[171]

b. Under the unique circumstances of this case the NCIS PASS request was an interrogation.

Oregon v. Bradshaw holds that once a suspect has invoked his right to counsel, police communication which could be considered a "generalized discussion of the investigation" is

[170] *Id.*
[171] *Id.*

prohibited[172] Thus, regardless of whether the NCIS PASS could be specifically characterized an "interrogation," it falls within the larger class of "generalized discussions" and was an improper communication.

That said, even if a request for a Fourth Amendment search is not normally considered an interrogation, under the unique facts of this case, Special Agent Connelly and Garbo's arrival at Sgt Hutchins trailer and communication with him were in fact an interrogation. As a result of Sgt Hutchins' continuous incommunicado confinement, the coercive environment from the initial May 10, 2006, interrogation was never dissipated.

In *United States v. Brabant*, this Court noted that the inherent pressures of an interrogation continued while Brabant remained in continuous custody and was not given the opportunity to consult with counsel as he had requested.[173] As a result, when Brabant's Captain spoke generally to Brabant five hours later about his rights, the Court held that to be an improper interrogation. Similarly, when the same agent from Sgt Hutchins' initial interrogation approached Sgt Hutchins after seven days of coercive isolation, and reminded Sgt Hutchins that

[172] *Bradshaw*, 462 U.S. at 1046.
[173] *See United States v. Brabant*, 29 M.J. 259, 263 (C.M.A. 1989).

he was being investigated for murder, it was the "functional equivalent of a 'reinitiation of interrogation.'"[174]

c. Sgt Hutchins' agreement to provide a sworn statement was the direct result of NCIS action.

Special Agents Connelly and Garbo approached Sgt Hutchins to request his waiver of legal rights for the furtherance of their murder investigation. And it was only in direct response to this impermissible communication that Sgt Hutchins asked if he could talk to NCIS further about their investigation. Crucially, Special Agent Connelly's own testimony was that Sgt Hutchins' request occurred only after they had orally discussed the search, and *while Sgt Hutchins was reading the PASS form*.[175] Hence, the indisputable evidence is that the NCIS initiation of communication with Sgt Hutchins, to include reminding him of the charges he was facing, led directly to the request to waive his previously invoked right to counsel.

Despite this evidence, the lower court and military judge held that Sgt Hutchins' May 18, 2006, request to speak further to NCIS was "unprompted."[176] In other words, even if NCIS had not arrived at Sgt Hutchins' trailer that night, he still would have *sua sponte* stood up at approximately 2235, and decided that he

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[174] *See id.* (citations omitted); *See also Rhode Island v. Innis*, 446 U.S. 291 (1980)(the definition of interrogation includes actions which foreseeably will induce the making of a statement).
[175] JA at 173.
[176] JA at 376; *Hutchins*, unpub. op. at *15.

wanted to waive his previously invoked right to counsel and provide NCIS a sworn statement. Such a holding is unsupported by any interpretation of the record. Rather, the record conclusively demonstrates that Sgt Hutchins' request to speak to NCIS was the direct result of NCIS' "generalized discussion about the investigation."[177]

Hence, under *Edwards v. Arizona* and its progeny, Sgt Hutchins' waiver of his right to counsel was invalid, and his subsequent statement was erroneously admitted into evidence at trial.

E. Prejudice

The admission into evidence of a statement obtained in violation of the 5th Amendment is an error of constitutional dimension, and is tested for prejudice under the "harmless beyond a reasonable doubt" standard.[178] "For error to be found harmless beyond a reasonable doubt, an appellate court must be convinced that there was no reasonable likelihood that the erroneously admitted evidence contributed to the verdict."[179] In this case, given the members' findings and the prosecution's widespread reference to the statement at trial, the Government cannot meet the "beyond a reasonable doubt" burden.

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[177] *Bradshaw*, 462 U.S. at 1046.
[178] *See United States v. Mitchell*, 51 M.J. 34 (C.A.A.F. 1999); *see also Arizona v. Fulminate*, 499 U.S. 279 (1991).
[179] *Mitchell*, 51 M.J. at 240 (quoting *United States v. Bins*, 43 M.J. 79, 86-87 (C.A.A.F. 1995).

For example, the Government extensively referenced Sgt Hutchins' statement in its opening statement and closing argument. In its opening statement, the statement was used to corroborate the Government's theory, and was also used to attack Sgt Hutchins' character.[180] This theme was reiterated in the closing argument, where trial counsel argued that Sgt Hutchins (who did not testify at trial) "does not take full responsibility for what he did," as his statement "is full of finger pointing."[181] The trial counsel then went through the statement in detail, highlighting for the members where he believed it showed the "finger pointing."[182] In rebuttal, trial counsel used the statement in an effort to undermine Dr. Bailey, the defense expert:

> [Dr. Bailey's] opinion is based primarily upon the interview he had with Sergeant Hutchins, who has given conflicting statement, after conflicting statement. And as you review his 19 May statement, he has demonstrated that he will do anything to get out from underneath this.[183]

For sentencing, the primary theme of trial counsel was Sgt Hutchins' alleged lack of remorse: "No regret, no remorse, no sorrow, no apology."[184] Although not explicitly referenced, Sgt Hutchins' statement served to buttress this argument. The

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[180] JA at 496.
[181] JA at 858.
[182] JA at 858-860.
[183] JA at 887.
[184] JA at 950.

statement was therefore a powerful weapon in the trial counsel's arsenal, and was used to compromise the defense expert and the good military character evidence.

However, the most significant impact of the statement was in providing the members evidence of Sgt Hutchins' alleged state of mind. The members' "not guilty" findings indicate that they did not accept the Government's theory of the case, nor did they find all of the Government's witnesses credible.[185] In addition, their paradoxical findings revealed that they had serious questions and doubts concerning Sgt Hutchins' state of mind. In particular, their guilty finding for conspiracy (through exceptions) was facially inconsistent with the "not guilty" finding for premeditation in the murder charge.[186]

Given this contradiction, there is a strong possibility that state of mind was an essential issue, and that Sgt Hutchins' statement weighed heavily in their deliberations. Without the statement, it is certainly possible that the members would have found Sgt Hutchins guilty of manslaughter, rather than conspiracy and murder. But there is also the possibility that the members would have found that the totality of circumstances within the combat environment did not support the existence beyond a reasonable doubt of criminal *mens rea*, and

[185] JA at 60-65 (C A's Action).
[186] *Id.*

simply acquitted Sgt Hutchins of some or all charges. As seen in the Convening Authority's Action, neither Cpl Magincalda nor Cpl Thomas were found guilty of murder.[187]

Accordingly, the erroneous admission of Sgt Hutchins' statement was highly prejudicial, and its impact so pervasive that it is not possible to determine beyond a reasonable doubt to what extent it impacted the members. The only remedy is to set aside the findings and sentence.

WHEREFORE, Appellant request this Court set aside the findings and sentence.

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[187] *Id.*

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Certificate of Service

I certify that the foregoing in the case of *United States v. Hutchins* was delivered to the Court and a copy served on opposing counsel on August 16, 2012.

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