IN THE UNITED STATES COURT APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Lawrence G. Hutchins III, Appellant.	))))))))	REPLY 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

S. BABU KAZA
Major, U.S. Marine Corps Reserve
Navy-Marine Corps Appellate
Review Activity
The Appellate Defense Division
Suite 100
1254 Charles Morris St SE
Washington, D.C. 20374
(202) 514-5592
babu_kaza@hotmail.com
C.A.A.F. Bar Number: 33773

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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.

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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. Applicability of Unlawful Command Influence Analysis to the Secretary of the Navy

The Government argues that (1) this Court's unlawful command influence (UCI) jurisprudence should not be applied to actions by the Secretary of the Navy, as he is not subject to Article 37, and (2) this Court should apply a "due process" analysis to improper influence from civilian leaders.

1. The Prohibition against unlawful command influence applies to the Secretary of the Navy.

The text of UCMJ Articles 22, 23, 24 and 26 directly contemplate a service Secretary convening a court-martial, in which circumstance the service Secretary's actions would be statutorily constrained by Article 37. Thus, the UCMJ, as enacted by Congress, created an overt statutory limitation on a service Secretary's exercise of military justice authority. Moreover, the Government's brief acknowledges that the Secretary of the Navy can be a convening authority, and acknowledges that all convening authorities are subject to Article 37, thereby conceding, in contradiction to the lower court, that Article 37

does in fact "contemplate an actual UCI paradigm applicable to the secretariat or civilian leadership."[1]

However, while the Government initially agrees that Article 37 *can* apply to the Secretary of the Navy (but posits that it does not apply *in this case*), it then bizarrely and contradictorily argues that Article 37 can *never* apply to the Secretary of the Navy.[2] The Government is thus necessarily arguing that if a service Secretary were to convene a court-martial, he would have *carte blanche* to manipulate it as he saw fit, as he would be immune to any restrictions against unlawful command influence.

Such an argument is facially unreasonable and is unsupported by the text of the UCMJ. Rather, the text of the UCMJ (as well as the legislative history) indicates that Congress intended the operation of military justice proceedings to be free from *any* improper influence. There is no evidence to indicate that Congress was amenable to such improper influence so long as it emanated from civilian leadership rather than military leadership. This is particularly true where Article 37, as drafted, can apply directly to a service Secretary, the Secretary of Defense, and the President of the United States.

[1] *United States v. Hutchins*, unpub. op. No. 200800393 (N-M.Ct.Crim.App. Mar. 20, 2012) at *4; Govt Answer at 21.
[2] Govt Answer at 21-22.

More importantly, the application of Article 37 is ultimately secondary, as UCI is not simply a violation of statute, but is an error of Constitutional dimension.[3] Moreover, this Court's unlawful command influence jurisprudence has been unequivocal in prohibiting UCI from civilian leadership.[4] Thus, regardless of whether the basis for the prohibition is Article 37 or this Court's application of Constitutional principles, civilian leadership may not use their authority to influence military justice proceedings.

The Government does not argue that the Secretary of the Navy lacks the type of command control which could improperly influence military justice proceedings. Nor does the Government explicitly request that this Court overrule as erroneous precedent which applies UCI analysis to civilian leadership. Rather, the Government concedes that the conduct of civilian leadership should be limited, but obliquely argues that this Court should apply an error-specific "due process" analysis rather than a UCI analysis.[5] However, as discussed below, this is a distinction without a difference.

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[3] *See United States v. Biagase*, 50 M.J. 143, 149-50 (C.A.A.F. 1999)(citing *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986).

[4] *See United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003); *United States v. Hagen*, 25 M.J. 78 (C.M.A. 1987).

[5] Govt Answer at 23.

2. The Government's Proposed "Due Process" Analysis

As noted by this Court in *United States v. Thomas*:

> The exercise of command influence tends to deprive servicemembers of their constitutional rights. If directed against prospective defense witnesses, it transgresses the accused's right to have access to favorable evidence. U.S. Const. amend. VI; *cf.* Art. 46, U.C.M.J., 10 U.S.C. § 846. If directed against defense counsel, it affects adversely an accused's right to effective assistance of counsel. *Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); U.S. Const. amend. VI; *cf.* Art. 27, UCMJ, 10 U.S.C. § 827, and Art. 37. If the target is a court member or the military judge, then the tendency is to deprive the accused of his right to a forum where impartiality is not impaired because the court personnel have a personal interest in not incurring reprisals by the convening authority due to a failure to reach his intended result. *Cf. Tumey v. Ohio,* 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927); *United States v. Accordino,* 20 M.J. 102 (C.M.A.1985). This rationale applies equally to command influence[6]

Hence, military law's extant UCI framework, as articulated by this Court in *Biagase*, and most recently in *United States v. Douglas*, is a codification of the Constitutional concerns which arise from unlawful influence, including due process.[7] Notably, the Government does not allege with any particularity the parameters of its proposed alternative due process analysis, or how such an analysis would differ in any way from this Court's UCI jurisprudence. Nor does the Government explain why UCI is an improper mechanism for assessing influence from civilian

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[6] *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

[7] *See Biagase*, 50 M.J. 143; *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2009)

leadership, or why unlawful influence from civilian leadership should somehow be given more deference than unlawful influence from military leadership.

In light of the unique and treacherous potential for command authority to impact the military justice process (from both civilian and military leadership), military law has determined that the statutory and Constitutional dimensions of command influence are properly assessed under the *Biagase* UCI framework. The Government fails to provide any coherent justification for an alternative approach. Accordingly, this Court should continue to assess any actions by civilian leadership which have the potential to impact military justice proceedings under the UCI rubric.

B. The Government misrepresents and minimizes Secretary Mabus' conduct in order to argue that there was no UCI.

Secretary Mabus' November 2009 statements regarding the Hamdania cases indicated specific determinations as to which facts were established at trial, which sentences would be commensurate with the offenses, and which clemency was appropriate.[8] At the time of these statements, Sgt Hutchins' case was under review and potential review by several reviewing authorities. Each of these reviewing authorities was subordinate to Secretary Mabus, and would be required to make

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[8] JA at 1165-76.

putatively independent determinations about the case which could potentially conflict with Secretary Mabus' findings. These reviewing authorities included the lower court, the Judge Advocate General of the Navy, the Naval Clemency and Parole Board, and officers/officials delegated clemency authority under Articles 74 and 75 of the UCMJ.

In arguing that Secretary Mabus' conduct was not UCI, the Government, as did the lower court, scrupulously avoids repeating Secretary Mabus' actual words, and scrupulously avoids referencing Secretary Mabus' orders to separate the remaining members of Sgt Hutchins' squad from active-duty, and to direct a Board of Inquiry against Lt Phan. Instead, the Government generally argues that Secretary Mabus merely made a decision which was "his alone," and which did "not undermine the fairness of the military justice system" as it created "transparency."[9] The Government further argues that nothing in Secretary Mabus' statements could be seen as "censuring, reprimanding or admonishing," as he merely left "previous decisions in place."[10]

In arguing that Secretary Mabus made a decision which was "his alone" and which did not "undermine the fairness of the military justice system," the Government deliberately evades consideration of the reviewing authorities subordinate to

[9] Govt Answer at 24-25.
[10] *Id.*

Secretary Mabus who were (and are) directly impacted by his pronouncements. Similarly, in arguing that Secretary Mabus did not censure, reprimand or admonish, and left the "previous decisions in place" the Government evades consideration of Secretary Mabus' expressed displeasure at the perceived leniency in the outcome of the Hamdania cases.

Specifically, by expressing displeasure that several squad members were not discharged, and/or did not serve significant post-trial confinement, Secretary Mabus implicitly reprimanded, censured and admonished the collective decisions of the convening authorities, members, military judges (and SJAs) which had led to those outcomes. Indeed, Secretary Mabus' public outrage and order to separate the members of the squad still on active duty (as well as Lt Phan) was a direct response to these prior decisions.

More egregiously, by indicating that he had reviewed the records of trial for all eight cases, and thereafter pronouncing all of the members of the squad guilty of both premeditated murder and of specifically conspiring to kill any random Iraqi who could be found, Secretary Mabus directly contradicted and implicitly censured and admonished "not guilty" findings by members, and decisions by the convening authority to dismiss

certain charges and specifications.[11] Finally, given that Secretary Mabus reviewed Sgt Hutchins' appellate record, he was by definition aware of the existence of post-trial review, and his statements can therefore only be interpreted as an undisguised attempt to ensure that post-trial review conformed with his pronouncements.

The Government's only response to these facts is to ignore them--they are not to be found anywhere in the Government brief. The Government instead lauds Secretary Mabus for his "transparency" in "explaining his decision."[12] Presumably, the Government would similarly laud the convening authority in *United States v. Gore*, for simply "explaining" to a subordinate that they should not participate as a defense witness based on defense counsel's conduct.[13] Or the Government would laud the senior staff non-commissioned officer in *United States v. Douglas* for merely "explaining" to the accused that he should

[11] As Secretary Mabus professed to have reviewed the record of trial in each of the eight Hamdania cases, he and his staff were undoubtedly aware of the varied findings. He and his staff were also undoubtedly aware that *there were no convictions of premeditated murder*, as that charge was dismissed as part of a pretrial agreement, or in the cases of Sgt Hutchins, Cpl Thomas and Cpl Magincalda, they were found "not guilty" of that charge by the members.
[12] Govt Answer at 25.
[13] *See United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004).

not disrupt daily operations by speaking to his colleagues about becoming defense witnesses.[14]

This is not to say that a civilian leader can never make public statements concerning a case. But as stated by this Court in *United States v. Simpson*, civilian leaders must "consider not only the perceived needs of the moment, but also the potential impact of specific comments on the fairness of any subsequent proceedings."[15] Thus, rather than his aggressive media blitz, Secretary Mabus could have accomplished many of his same goals and provided "transparency" by instead hypothetically stating the following:

> Upon the request of members of Congress, I have considered a clemency request for Sgt Hutchins. As the Armed Forces of the United States take great pride in their adherence to the laws of war and treatment of Iraqi civilians, this is a very serious case, as it involves allegations that the Law of War was violated. Sgt Hutchins' case is currently under appeal before the Navy-Marine Corps Court of Criminal Appeals, and is also reviewed annually by the Naval Clemency and Parole Board. I trust that the military justice process will review this case with the utmost professionalism. Therefore, to step in and grant clemency at this time would be premature, and would preempt ongoing review.

The above hypothetical should be contrasted with Secretary Mabus' comments to *The Marine Times, The North County Times* and Associated Press, and to his proclaimed use of the administrative separation process to correct lenient trial

[14] *See United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010).
[15] *Simpson*, 58 M.J. at 377.

outcomes which had sent "absolutely the wrong message as to how the nation and Department of the Navy view this incident."[16]

C. The Government ignores the evidence which demonstrates unfairness resulting from Secretary Mabus' UCI

When evaluating the impact of UCI, military courts have acknowledged that the effects can be subtle, and individuals within the military justice process may not be able to "ascertain for themselves" to what extent they have been influenced.[17] In addition, the facts of a criminal case, to a large extent, can be a Rorschach image. How one views the case is inevitably a mixture of past experience, culture, moral values, religious values and personal idiosyncrasies.

Thus, an individual's judgment about a case will be the culmination of his best reasoning, yet this reasoning will always be a prisoner to his personal experience and characteristics. As an added dimension, the military justice system is comprised of uniformed officers, all of whom share an oath to the Constitution and allegiance to the core values of their branch of service. Accordingly, when the leader of a branch of service takes the truly extraordinary and unprecedented public steps to criticize the military justice system's handling of an ongoing case, to present as true one

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[16] JA at 1166.
[17] *United States v. Gerlich*, 45 M.J. 309, 313 (C.A.A.F. 1996)

version of the "facts," and to dictate which outcome is consistent with "core values," he has placed an indelible context and pattern to the Rorschach image. As a result the influence will be pervasive and impossible to isolate.

However, in the instant case, there is tangible evidence that the UCI from Secretary Mabus has caused unfairness in the post-trial review. As discussed below, the Government's brief excludes any discussion or acknowledgment of this evidence.

1. The lower court

The Government argues that "nothing demonstrates that the lower court was influenced," and references the lower court's initial opinion which reversed the findings and sentence (*Hutchins I*).[18] First, the Government does not acknowledge that the lower court's most recent decision *affirmed* the findings and sentence, to include explicitly affirming factual sufficiency and sentence appropriateness (*Hutchins III*).[19] Second, the Government does not address that the improper disregard of "not guilty" findings in both *Hutchins I* and *Hutchins III*

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[18] Govt Answer at 26. The lower court's decision to reverse the findings and sentence was discussed in Sgt Hutchins' initial brief.

[19] The panel which affirmed the findings and sentence in *Hutchins III* consisted of Judge Carberry, Judge Modzelewski and Senior Judge Perlak. Senior Judge Perlak authored the opinion, which was joined by Judge Carberry, Judge Modzelewski. Unlike Senior Judge Perlak and Judge Carberry, Judge Modzelewski was not part of the *en banc* panel which reversed the findings and sentence in *Hutchins I*.

demonstrates adherence to Secretary Mabus' unlawful direction. In addition, *Hutchins III* claimed to have attached certain documents to the record as part of a "full and public vetting of the UCI claim," but those documents were never attached to the record, and were instead returned to counsel.[20] The Government's failure to rebut or distinguish any of this evidence is fatal to its argument. Hence, there is "some evidence" of unlawful command influence. Moreover, given the *Gerlich* presumption and the above-described errors in *Hutchins I* and *Hutchins III*, the Government can never demonstrate *beyond a reasonable doubt* that the lower court's decisions were free from Secretary Mabus' influence.

2. The JAG

The Government argues that "regardless of anything the Secretary of the Navy said, the Judge Advocate General would have certified the case," and that there is "no evidence" to the contrary.[21] However, the Government itself has never offered evidence from the JAG to support this conclusion. And notably absent from the Government's argument is any acknowledgment of the Secretary of the Navy's command authority over the JAG, and their direct senior/subordinate relationship. And it is that very relationship would influence the JAG to not want to take

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[20] *Hutchins* unpub. op. at *5.
[21] Govt Answer at 26-27.

any action which could be perceived as favorable to Sgt Hutchins, as doing so would contradict Secretary Mabus' intent for the Hamdania cases. Additionally, the Government's argument that certification was a foregone and inexorable outcome ignores that the JAG's staff recommended that he not certify the case. Although the lower court refused the defense motion to attach those recommendations to the appellate record, they are a matter of public record.[22] More importantly, the Government was aware of their existence, and should have disclosed to this Court that they contradicted its argument.

The Government also argues that certification was inevitable because the issue decided in *Hutchins I* "had implications beyond this case."[23] However, nearly every appellate opinion has implications beyond its case--that is the nature of a legal system rooted in the common law. Thus, the question is not whether *Hutchins I* had broader implications; the question was whether *Hutchins I* was an appropriate vehicle to raise issues to this Court. The JAG could very well have determined, as did his staff, that the facts in *Hutchins I* were not appropriate for certification, as it was a premeditated murder case in which an essential member of the defense team

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[22] *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/

[23] Govt Answer at 26.

walked away on the eve of trial. The JAG could have concluded that clarity in the law would be better provided from a case with less egregious facts. Indeed, the Government cites three cases in its brief which the JAG could have certified instead of *Hutchins I* for the purpose of addressing counsel severance.[24]

Finally, the Government appears to implicitly argue that a JAG's decision to certify a case must be given complete deference, and is non-reviewable by this Court. However, the Government does not challenge that certification decisions by the JAG are decisions by a "reviewing authority," such that they merit protection against unlawful command influence. In addition, in *United States v. Monett* and *United States v. Schoof*, this Court indicated a willingness to examine challenges to certification decisions, to the extent they raised due process claims.[25] In those cases, the Constitutionality of the certifications was affirmed by referencing the impartiality of the JAG. Accordingly, as Sgt Hutchins has raised an objection based upon the impartiality of the JAG, and as unlawful command influence implicates due process rights, review of the JAG's

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[24] Govt Answer at 26. Moreover, this Court ultimately affirmed the holding in *Hutchins I* that the counsel severance was erroneous. And to the extent the lower court was reversed, this was not as a result of the lower court misapplying precedent. Rather, this Court elected to create new law and promulgated a new test to assess prejudice from counsel severance—-a test which was never raised by the government.

[25] *See United States v. Schoof,* 37 M.J. 96, 98 (C.M.A. 1993); *United States v. Monett,* 16 C.M.A. 179, 181 (1966).

certification in this case is a proper matter for this Court's consideration.

Hence, the senior/subordinate relationship between the Secretary of the Navy and the JAG, combined with the JAG's decision to certify the appeal, provides "some evidence" of unlawful command influence. Moreover, given the *Gerlich* presumption (and the staff recommendations to not certify), the Government can never demonstrate *beyond a reasonable doubt* that the certification decision was free from Secretary Mabus' influence.

3. Article 74 review

The Government initially analogizes civilian case law to argue that Article 74 relief is neither an essential aspect of the military justice process, nor subject to judicial review. However, the Government fails to distinguish or even cite *United States v. Tate*.[26] In *Tate*, this Court noted that Article 74 review was an essential aspect of the UCMJ, as it allowed for some measure of sentence uniformity among an otherwise decentralized military justice process. Thus, Article 74 was intended to address circumstances such as those in the instant case, where different convening authorities exercised different levels of clemency among similarly situated offenders. *Tate*

[26] *See United States v. Tate*, 64 M.J. 269 (C.A.A.F. 2007).

further established that this Court would exercise its authority in order to ensure the free operation of Article 74 review.

Additionally, the Government does not challenge that decisions under Article 74 are decisions by "reviewing authorities" which must be protected from UCI. Instead, the Government argues that all Article 74 authority is retained by Secretary Mabus, and he therefore cannot influence his own decision.[27] This assertion is factually and legally incorrect.

Contrary to the Government's argument, Secretary Mabus has not retained Article 74 authority to himself. As discussed in Appellant's initial brief, Article 74 authority (per its text and per R.C.M. 1206), has been delegated to multiple subordinates via JAGMAN § 0158. Moreover, the lower court rejected a defense motion to attach to the record copies of Sgt Hutchins' clemency requests to the officers delegated that authority. In addition, the Government fails to note that under paragraph 205, SECNAVINST 5815.3J, the Secretary of the Navy has delegated clemency and parole decisions to the Assistant Secretary of the Navy (Manpower and Reserve Affairs) ("ASN (M&RA)").[28] Accordingly, the essential premise of the

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[27] Govt Answer at 29.

[28] JA at 44. The Government had previously made this same argument to the lower court, and in Sgt Hutchins' Supplemental Reply Brief to the lower court he pointed out that the Government had overlooked the delegation of authority to the Assistant Secretary of the Navy. *See* Supplemental Reply Brief at

Government's argument, which is that Secretary Mabus "retained the final determination to award clemency," is false.[29]

In addition, even if the Government's argument were correct, and Secretary Mabus had retained all authority, his actions were still unlawful. Military law holds that clemency power must be executed with a high level of objectivity and flexibility. In the context of convening authority clemency (which is nevertheless functionally indistinguishable from Article 74 clemency), this Court, in *United States v. Taylor*, stated:

> Post-trial review is an important stage in the court-martial process . . . We have emphasized the importance of ensuring that the convening authorities and legal advisors who carry out "those important statutory responsibilities be, and appear to be, objective." Maintaining these individuals' neutrality protects two important interests: (1) the accused's right to a fair post-trial review; and (2) the system's integrity . . . Concern for both fairness and integrity suggests that these neutral roles cannot be filled by someone who has publicly expressed a view prejudging the post-trial review process's outcome.[30]

In *United States v. Davis*, this Court held that a convening authority was disqualified from taking post-trial action in a

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11. Sgt Hutchins' case has repeatedly been reviewed by the ASN (M&RA). In March 2009, ASN (M&RA) rejected a vote to reduce the sentence to 5 years. In March 2011, the acting ASN (M&RA) approved a vote which gave Sgt Hutchins confinement credit for the time he had spent free in between the lower court's decision in *Hutchins I* and this Court's decision in *Hutchins II*. Most recently, in August 2011 ASN (M&RA) rejected a favorable vote for immediate parole.

[29] Govt Answer at 29.

[30] *United States v. Taylor*, 60 M.J. 190, 193 (C.A.A.F. 2004).

drug case, because of prior briefings in which he had stated that those convicted of drug offenses "should not come crying to him about their situations or their families."[31] *Davis* noted that the convening authority's statements reflected "an inflexible attitude toward the proper fulfillment of post-trial responsibilities," and further noted that, "Where a convening authority reveals that the door to a full and fair post-trial review process is closed, we have held that the convening authority must be disqualified."[32]

Hence, Secretary Mabus' international media blitz, and his misstatements about the convictions in Sgt Hutchins' case improperly compromised the fairness and integrity of his exercise of Article 74 authority. Thus, contrary to the Government's argument, Secretary Mabus was in fact "improperly influencing his own decision." And he further improperly influenced the decisions of all those who had been delegated Article 74 authority.

Accordingly, there is "some evidence" of unlawful command influence. Moreover, given the *Gerlich* presumption and the string of rejected clemency requests from the Naval Clemency and Parole Board, ASN (M&RA) and officers delegated authority under JAGMAN § 0158 (Sgt Hutchins is currently serving his sixth year

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[31] *United States v. Davis*, 58 M.J. 100, 103 (C.A.A.F. 2003)
[32] *Id.*

of confinement), the Government can never demonstrate *beyond a reasonable doubt* that Article 74 review has been free from Secretary Mabus' influence.

D. Apparent Unlawful Command Influence

The Government does not address apparent UCI for the lower court and the JAG. But this is not because it overlooked the concept of apparent UCI, as the Government attempted an apparent UCI analysis for Article 74 review. The Government's decision to avoid an apparent UCI analysis for the lower court and JAG is likely for good reason: the very same facts which the government evaded in its assessment of actual UCI would be dispositive for apparent UCI. As discussed above, the Government assiduously avoided reference to the lower court's affirmance of the findings and sentence, and material misstatements in *Hutchins I* and *Hutchins III* which were consistent with Secretary Mabus' view of the case. An objective member of the public, aware of those facts, and aware that this Court does not have jurisdiction to review the lower court's determinations of factual sufficiency and sentence appropriateness, would have serious doubts about the fairness of the military justice system.

An objective member of the public would also see the JAG's certification decision as little more than a continuation of Secretary Mabus' intent to "get tough" on Hamdania. Although

certification decisions are nominally focused on questions of law, a JAG likely considers the underlying facts of the case when assessing certification. Indeed, the public perception of the JAG certification in this case was that it was a value judgment about the seriousness with which the Department of the Navy took the Hamdania incident. In April 2010, after the lower court's issued its decision in *Hutchins I*, the Associated Press interviewed Thad Coakley, a former Marine judge advocate, who stated that he believed the Government would appeal to this Court, because

> "When you have a serious allegation that at least was substantiated at one point that this squad leader of Marines and a Navy corpsman kidnapped and executed an Iraqi detainee — which is essentially murder — if you don't pursue that, how do you show that you're holding Marines to a standard of accountability?"[33]

In June 2010, after the JAG certified the case to this Court, Gary Solis, a notable former Marine judge advocate who teaches military law at Georgetown University, similarly stated to *The North County Times* that the decision to appeal "reflects the consistent hard-line approach the Marine Corps has taken on these kinds of cases."[34] Thus, an objective member of the public

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[33] Associated Press, "Court dismisses murder conviction of Camp Pendleton Marine in high-profile Iraqi war case," April 23, 2010, *available at* http://www.startribune.com/templates/Print_This_Story?sid=91888284.

[34] Mark Walker, "Father's Day special for Hamdania Marine" *The North County Times*, June 20, 2010, *available at*

would have serious doubts about the impartiality of the JAG's decision to certify the appeal.

Finally, the Government argues that there was no apparent UCI for Article 74 review, as Sgt Hutchins received Article 60 clemency from the convening authority, and members of Congress requested additional clemency from the Secretary of the Navy. The Government overlooks the apparent UCI against the JAGMAN § 0158 designees, the Naval Clemency and Parole Board, and the ASN (M&RA). Moreover, the Government overlooks the evidence (which was not attached to the record by the lower court) which demonstrated that Secretary Mabus' public diatribes about Sgt Hutchins were raised during all subsequent reviews by the Naval Clemency and Parole Board and during the reviews by the JAGMAN § 0158 designees. Thus, the Government's argument that there is no apparent UCI is unsupported and unpersuasive.

E. Remedy

The Government offers no argument as to the appropriate remedy, perhaps conceding that once Secretary Mabus' conduct is acknowledged as actual and/or apparent UCI, the only proper remedy is dismissal with prejudice. Simply put, the entire military justice process has been fatally compromised. This is

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http://www.nctimes.com/news/local/military/article_3e4b332f-d7da-52e7-abfb-386744abd3ea.html

most starkly seen in the lower court and Government's wholesale adoption of Secretary Mabus' disregard of the members findings.

The members found Sgt Hutchins "not guilty" of the following:

1. **Article 81, Conspiracy**: The words "housebreaking" and "kidnapping," as predicate offenses, and the following four overt acts (lettering in the original):

    c. Cpl Magincalda, Cpl Thomas, LCpl Pennington, HM3 Bacos did walk from Saleh Gowad's house to the dwelling house of an unknown Iraqi man, located at or near Hamdaniyah, Iraq, and Cpl Magincalda and Cpl Thomas did enter the man's house

    d. Cpl Magincalda and Cpl Thomas did take an unknown Iraqi man from his house against his will

    m. Sgt Hutchins did, on make a false official statement to SSgt O. A. Bowen, USMC, regarding the facts and circumstances related to the unknown Iraqi man's death

    r. Sgt Hutchins did, on or about 8 May 06, make a false statement to SA James H. Connolly and SA Steve Logan, NCIS, regarding the facts and circumstances related to the unknown Iraqi man's death

2. **Article 107, False Official Statement:** One specification (lying to Special Agent Connolly on May 8, 2006);

3. **Article 118, Murder**: The word "Premeditation"

4. **Article 128, Assault** ("force an unknown Iraqi man to the ground and bind his hands and feet")

5. **Article 130 Housebreaking** ("unlawfully enter a dwelling, the property of an unknown Iraqi man with the intent to commit a criminal offense, to wit: kidnapping, therein")

6. **Article 134 Kidnapping** ("wrongfully seize and carry away an unknown Iraqi male against his will")

7. **Article 134, Obstruction of justice:** Sgt Hutchins was instead found guilty of the conspiracy charge as a greater offense.

The disregard of these "not guilty" findings in *Hutchins I* and *Hutchins III* is discussed above, and in Sgt Hutchins' initial brief. The Government's brief never acknowledges the misrepresentation of the members' findings in *Hutchins I* and *Hutchins III* as errors, and, to the contrary, embraces them in its Statement of Facts.

Specifically, the Government brief's "Statement of the Case" fails to reference the "not guilty" findings to the 4 overt acts from the Conspiracy charge.[35] In addition, the "Statement of Facts" in the Government's brief indicate that Sgt Hutchins planned to kill any military age male if Saleh Gowad could not be found; indicate that squad members left Saleh Gowad's house and went to a different house; and indicate that the squad members entered that house, seized an Iraqi man, bound and gagged him, and then led him from his house.[36] As seen from the above, the members found Sgt Hutchins "not guilty" of all of those facts. In addition, although the charge sheet only identifies the alleged victim as "unknown Iraqi male," and

[35] Govt Answer at 2.
[36] Govt Answer at 5-6.

although no evidence of his identity was ever offered at trial, the Government names the victim as "Hashim Awad."[37]

While these portions of the Government's brief are wholly inconsistent with the members, they are wholly consistent with Secretary Mabus' November 2009 statements. Accordingly, rather than acknowledge that the integrity of the members' findings has been compromised, the U.S. Government has instead elected to go "all in" with Secretary Mabus. Under these circumstances dismissal with prejudice must be the only remedy: the U.S. Government now lacks credibility to ensure that any possible future military justice proceedings would provide Sgt Hutchins with basic Constitutional protections and due process of law.

In addition, dismissal with prejudice would not be an undeserved windfall for Sgt Hutchins: given that he has served over 6 years in confinement, whereas no one else from his squad served more than 18 months, he has already paid a steep price for whatever happened on April 26, 2006. Additionally, Sgt Hutchins has been repeatedly excoriated in the media for his alleged crimes, and as discussed, was publically excoriated by the Secretary of the Navy for crimes of which he was found "not guilty." Sgt Hutchins has borne these burdens through his release and later re-incarceration.

[37] Govt Answer at 6-7.

Dismissal with prejudice will not restore the years Sgt Hutchins has already spent in confinement. Dismissal with prejudice will not alter the social opprobrium from the Secretary of the Navy, or remove the stigma from Sgt Hutchins' life. Whether he has a legal conviction or not, Sgt Hutchins will always be convicted of *premeditated* murder in the eyes of the public, and be considered a dishonorable Marine. The time Sgt Hutchins has lost from his family, the emotional turmoil, the cruelty of becoming a father again to his daughter only to be re-confined; none of that will leave him even if the case is dismissed with prejudice.

Secretary Mabus has yet to take any remedial action, and quite to the contrary, has expanded his secondary political review of courts-martial and convening authority decisions. Perhaps emboldened by the lower court's validation of his November 2009 statements, on April 19, 2012, Secretary Mabus issued a press release announcing that "after reviewing all the military justice cases in the Haditha incident" he was directing the administrative separation of two Marine Sergeants who had made alleged false statements. Secretary Mabus' press release indicated that the Sergeants' conduct was "wholly inconsistent with the core values of the Department of the Navy."[38]

[38] Gidget Fuentes, "Mabus: Kick out Marines who lied about Haditha," *The Marine Corps Times*, April 19, 2012, *available at*

In determining a remedy in this case, this Court must consider what precedent will be set for future attempts by civilian leadership to influence military justice proceedings. In this case there has been command interference which has reverberated internationally, and a complete refusal by the leadership to take any remedial action. Any consequence short of dismissal with prejudice will be insufficient to deter future civilian interference, and insufficient to restore the credibility and independence of the military justice system.

WHEREFORE, Appellant request this Court dismiss the case with prejudice.

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http://www.marinecorpstimes.com/news/2012/04/marine-mabus-hadithah-separation-041912/.

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. Sgt Hutchins' sworn statement was not voluntary

The Government's brief fails to appreciate that Sgt Hutchins' incommunicado confinement and the deprivation of his access to counsel are essential factors to be considered for a voluntariness analysis under *Miranda*.[39] *Miranda* was undoubtedly highly sensitive to the coercive impact such treatment would have on a suspect's ability to render a voluntary statement. Yet the Government alleges that the incommunicado confinement and deprivation of access to counsel are "irrelevant" and argues

[39] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

that considering these factors for voluntariness would be "a vast expansion of the *Edwards* rule."[40]

But as noted by the Supreme Court in *Oregon v. Bradshaw*, an *Edwards* analysis is distinct, and does not preclude or replace a voluntariness analysis:

> [T]he Oregon Court of Appeals was wrong in thinking that an 'initiation' of a conversation or discussion by an accused not only satisfied the *Edwards* rule, but *ex proprio vigore* sufficed to show a waiver of the previously asserted right to counsel. The inquiries are separate, and clarity of application is not gained by melding them together.[41]

The military judge's ruling made the same error as the Government, and failed to properly address the impact of the incommunicado confinement on the voluntariness of Sgt Hutchins' confession.

During the suppression hearing, the military judge noted that the law did not require the Government to provide a lawyer to a suspect immediately after a rights invocation.[42] The military judge concurrently opined that deprivation of access to counsel was simply an administrative matter under R.C.M. 305 which could entitle an accused to additional confinement credit, and failed to appreciate that this was an issue of

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[40] Govt Answer at 34.
[41] *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983).
[42] JA at 214.

Constitutional magnitude.[43] This skewed perspective is also seen in his findings of fact and conclusions of law.

The military judge noted in his findings that there was incommunicado confinement, but did not assess it for psychological coerciveness. Instead, the military judge paradoxically held that the 7 days of isolation was evidence that the investigators "scrupulously honored [Sgt Hutchins'] request to terminate the interview and to speak with an attorney."[44] The remainder of the military judge's analysis of this issue was erroneously limited to the conduct of the investigators, and did not assess the impact of the isolation on Sgt Hutchins.[45] Thus, in failing to properly assess the totality of circumstances the military judge erred in finding Sgt Hutchins' sworn statement voluntary.

The Government's analysis of the totality of the circumstances is rather curious, as it essentially argues that the pressures of the isolated confinement ultimately caused Sgt Hutchins to lose resolve and reach out to NCIS.[46] The Government euphemistically refers to this as a "change of heart."[47] Accordingly, to the extent the Government is admitting that the confinement conditions and lack of access to outside help led

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[43] JA at 213.
[44] JA at 375, 385.
[45] JA at 385.
[46] Govt Answer at 32.
[47] *Id.*

Sgt Hutchins to have a "change of heart," and to waive his previously invoked right to counsel, there is no disagreement from the defense.

B. Reinitiation

The Government argues that resolution of the *Edwards v. Arizona* issue in this case is a question of fact. However, for purposes of this appeal, the facts are not in dispute, as the analysis is whether the NCIS reapproach of Sgt Hutchins should legally qualify as a reinitiation. As discussed in the initial brief, Sgt Hutchins maintains that once there has been an invocation of counsel, then under *Oregon v. Bradshaw* any law enforcement statements which are not "incident to confinement," or which are "directly related to the investigation" are impermissible and need not rise to the level of actual interrogation to be *Edwards* violations. If, however, actual interrogation is required, the standard is under *Rhode Island v. Innis*: "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[48]

The Government argues that as the NCIS communication was part of a 4th Amendment search, there is no 5th Amendment violation.[49] However, simply invoking the phrase "4th Amendment

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[48] *Rhode Island v. Innis*, 446 U.S. at 301.
[49] Govt Answer at 37.

search" as a talisman does not end an *Edwards v. Arizona* analysis. Even if a law enforcement action is intended to be a 4th Amendment search, the specific circumstances of its execution could amount to an impermissible communication under *Oregon v. Bradshaw* or *Rhode Island v. Innis*.[50] Even the federal case law cited by the Government acknowledges that a permissible search can transform into an impermissible interrogation.[51]

Thus, this Court must consider the totality of the circumstances on May 18, 2006, and not simply that NCIS ostensibly intended to conduct a search. The totality of the circumstances indicates that Sgt Hutchins, who had been in isolation for 7 days, was abruptly faced with SA Connolly, the same agent who had interrogated him.

As a hypothetical, if SA Connolly had merely stuck his head into Sgt Hutchins' trailer and stated, "Just here to remind you that we are still investigating you for murder, conspiracy and kidnapping," and Sgt Hutchins responded by asking if he could still tell his side of the story, then there can be little argument that SA Connolly had made statements which were not incident to confinement and which would be directly related to the investigation. Moreover, there could be little argument

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[51] *See United States v. Smith*, 3 F.3d 1088 (7th Cir. 1993).

that SA Connolly knew or should have known that his statements were likely to elicit a response.

Thus, it is unclear why SA Connolly's actions would be legitimized if in addition to stating, "Just here to remind you that we are still investigating you for murder, conspiracy and kidnapping," he had then stated "We would like you to allow us to search your belongings so we can find more evidence against you." If anything, the addition of the search language makes SA Connolly's communication more invasive, and more violative of *Oregon v. Bradshaw* and more of an interrogation under *Rhode Island v. Innis*. Yet, as discussed in Appellant's initial brief, the above scenario are the exact facts of this case as found by the military judge and as seen in the NCIS PASS form.

Accordingly, NCIS reinitiated contact with Sgt Hutchins in violation of his right to counsel as articulated in *Edwards v Arizona*.

C. Prejudice

The Government makes no prejudice argument, apparently conceding that in this case, where there are mixed findings from the members, and it is clear that (1) the memebrs did not believe the government witnesses or accept the prosecution's theory of the case, and (2) the members had serious doubts about the existence of *mens rea* and found mental health evidence

credible, then it is impossible to demonstrate that the admission of a confession is harmless beyond a reasonable doubt.

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

/S/
S. BABU KAZA
Major, U.S. Marine Corps Reserve
Navy-Marine Corps Appellate
Review Activity
The Appellate Defense Division
Suite 100
1254 Charles Morris St SE
Washington, D.C. 20374
(202) 514-5592
Babu_Kaza@hotmail.com
C.A.A.F. Bar Number: 33773

Certificate of Compliance with Rule 24 (d)

1. This brief complies with the type-volume limitations of Rule 21(b) and Rule 24(d) because: This brief contains six-thousand six-hundred and sixty-nine (6969) words.

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/s/
S. BABU KAZA
Major, U.S. Marine Corps Reserve
Navy-Marine Corps Appellate
Review Activity
The Appellate Defense Division
Suite 100
1254 Charles Morris St SE
Washington, D.C. 20374
(202) 514-5592
babu_kaza@hotmail.com
C.A.A.F. Bar Number: 33773

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 October 4, 2012.

/s/
S. BABU KAZA
Major, U.S. Marine Corps Reserve
Navy-Marine Corps Appellate
Review Activity
The Appellate Defense Division
Suite 100
1254 Charles Morris St SE
Washington, D.C. 20374
(202) 514-5592
babu_kaza@hotmail.com
C.A.A.F. Bar Number: 33773