IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	APPELLANT'S PETITION
	)	FOR RECONSIDERATION
Appellee,	)	
	)	
v.	)	
	)	Crim. App. Dkt. No.
ROBERT B. BERGDAHL	)	ARMY 20170582
Sergeant (E-5)	)	
U.S. Army,	)	USCA Dkt. No. 19-0406/AR
	)	
Appellant.	)	September 7, 2020

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

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Petition for Reconsideration

Where an appellate court is closely divided on an issue "of the utmost concern" and there is reason to believe its initial decision was erroneous, reconsideration is warranted. *E.g., Reid v. Covert*, 354 U.S. 1, 3 (1957) (on rehearing). This is such a case. Pursuant to Rule 31, Sergeant Bergdahl respectfully requests reconsideration because the Opinion of the Court blurs the distinction between actual and apparent UCI; imputes to the observer knowledge far beyond that of a member of the general public; relies on matters neither asserted nor proven by the government; overlooks or discounts evidence that detracts from the Court's conclusion; and does nothing to deter political UCI. Because the Court overlooked or misapprehended the significant matters set forth below, reconsideration is warranted.

The decision seems to hold that this *cannot* be a case of apparent UCI because it's not a case of actual UCI: "[S]imply stated, it was the totality of the circumstances surrounding Appellant's misconduct rather than any outside influences that foreordained the Army's handling and disposition of the case." Plurality op. at 3. This is unquestionably an assessment of actual UCI. "*Therefore*, an objective, disinterested observer would not harbor any significant doubts about the ultimate fairness of these court-martial proceedings." *Id.* (emphasis added). The one follows from the other ("therefore") only by disregarding the difference in the tests for actual and apparent UCI.

I

THE DECISION MISAPPLIES THE TEST FOR APPARENT UCI

A

The legal standard

The legal standard is whether an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding. *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017). Apparent UCI will be found if that observer "might well be left with the impression," *United States v. Salyer*, 72 M.J. 415, 427 (C.A.A.F. 2013), that the system had been interfered with. *Cf. United States v. Calhoun*, 39 M.J. 485, 488 (C.A.A.F. 1998) ("Similarly, we decline to enshrine a right to private civilian counsel paid for by the Government unless an objective, disinterested observer, with knowledge of all the facts, *could reasonably conclude* that there was at least an appearance of unlawful command influence over all military and other government defense counsel.") (emphasis added).

What the observer would or would not conclude on the basis of any particular set of facts obviously cannot be determined with "technical precision." *United States v. Cruz*, 20 M.J. 873, 882 (A.C.M.R. 1985). One guidepost that reduces the danger that resolution of this critical issue may turn into a mere show of hands is the requirement that the government disprove beyond a reasonable doubt that the observer

would harbor a significant doubt. If the government fails to do so, the Court must find that apparent UCI occurred and proceed to the question of relief. "Any doubt must be resolved in favor of the accused," *United States v. Johnson*, 14 C.M.A. 548, 551, 34 C.M.R. 328, 331 (1964) (citing *United States v. Kitchens*, 12 C.M.A. 589, 31 C.M.R. 175 (1961)).

Three appellate judges have concluded that the government did not carry its burden beyond a reasonable doubt: one on the Army Court, *see United States v. Bergdahl*, 79 M.J. 512, 531 (A. Ct. Crim. App. 2019) (Ewing, J., concurring in part & dissenting in part), and two here. This is not a close case. But even if it were, the very fact that 40 percent of the Judges of this Court remain unpersuaded, coupled with the absence of any suggestion that the dissenting opinions suffer from some glaring error, militates against a finding that the government carried its high burden. *Cf. Scott v. Harris*, 550 U.S. 372, 396 (2007) (Stevens, J., dissenting) ("If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events.").

B

The claimed seriousness of Sergeant Bergdahl's offense and the contrast between the maximum punishment and the sentence relate to relief, not to whether apparent UCI occurred

In the past, the Court has been at pains to distinguish between actual and apparent UCI. *See United States v. Boyce*, 76 M.J. at 247-48; *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006). The decision blurs that distinction. This is apparent not only from the threshold language on page 3 (quoted at page 1 *supra*) and the passages quoted in the margin,[1] but also from the stress the decision lays on that fact that Sergeant Bergdahl pleaded to "very serious offenses" but was not sentenced to confinement. *See* Plurality op. at 3-4, 20 ("cannot be emphasized strongly enough"), 22-24.

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[1] The following passages also clearly sound in actual UCI:

> [T]he record reflects that the decision-making at each stage of Appellant's court-martial proceedings was unaffected by any outside influences. Therefore, we are confident that an "objective, disinterested observer, fully informed of all the facts and circumstances would [not] harbor a significant about the fairness of these proceedings."

Plurality op. at 25 (citation omitted).

> Ultimately, however, this mitigation evidence does not overcome our firm conviction that the sentence adjudged in this case had nothing to do with the comments made by Senator McCain or President Trump and was instead based solely on the serious offenses to which Appellant pleaded guilty and on the facts established during the Government's case in aggravation.

Id. at 22-23.

There are two major problems with this. First, the seriousness of Sergeant Bergdahl's offenses (which involved a single act charged two different ways) is not fairly judged in the abstract according to the permissible maximum punishment, but in light of the facts and circumstances, including his motives, which were anything but malevolent. *See* Plurality op. at 21 ("good, albeit misguided motives"). Considering the fact that Sergeant Charles R. Jenkins, who, unlike Sergeant Bergdahl, not only defected in order to avoid combat in Vietnam, but collaborated with the enemy by appearing in propaganda leaflets and films and teaching English to North Korean military cadets, and in time enjoyed such benefits as being able to gain North Korean citizenship, marry, and raise a family, was jailed for only 30 days, of which he served 25, *see* Austin Ramzy, *Charles Jenkins, 77, U.S. Soldier Who Regretted Fleeing to North Korea, Dies*, N.Y. TIMES, Dec. 12, 2017, *permalink* https://nyti.ms/2l1oWLI, use of the authorized maximum punishment as the benchmark for determining the seriousness of Sergeant Bergdahl's offenses unfairly distorts the analysis. As the Court noted, "there is simply no evidence that Appellant sought to defect to or otherwise aid the Taliban." Plurality op. at 11.

Second, the offenses of which Sergeant Bergdahl was convicted were no more serious than the rape of which Airman Boyce was convicted. That rape occurred in February 2011. *United States v. Boyce*, ACM 38673, 2016 WL1276663 *1 (A.F. Ct. Crim. App. 2016). At that time, the permissible maximum punishment for rape was

"death or such other punishment as a court-martial may direct." *See Manual for Courts-Martial, United States* (2019 ed.), at A21-11 (former ¶ 45*f*(1)). As the plurality notes, death is an authorized punishment for misbehavior before the enemy, so this case and *Boyce* involved the same degree of seriousness. Neither was referred as capital.

This fact, and the further fact that Sergeant Bergdahl pled guilty while Airman Boyce's case was contested, make it impossible to reconcile the disparate outcomes of the two cases as to whether the government had carried its burden of proof in the face of a claim of apparent UCI. Moreover, the UCI here was far more dramatic, came from a higher official, and unlike *Boyce*, *see* 76 M.J. at 255 (Ryan, J., dissenting), was aimed at this particular accused and this particular case.

What is more, the plurality's stress on the seriousness of the offenses does not sound in apparent UCI. Rather, it implicitly addressed the distinct question of whether he received a windfall when he was sentenced. The parties have briefed and argued whether such a windfall did occur, and we have nothing to add beyond noting that in the court below Judge Ewing correctly observed that "the military judge's ultimate sentence was hardly a windfall." 79 M.J. at 534.

Windfall is certainly a factor, albeit not a dispositive one, to be taken into account fashioning relief. But the question of relief–and hence, of windfall–only arises once the Court has made a finding that apparent UCI occurred. To rely so heavily, even if not *in haec verba*, on the notion that Sergeant Bergdahl somehow "made out like a bandit" in deciding the *antecedent* question whether apparent UCI had even occurred puts the cart before the horse.

Once the alleged seriousness of the offense and the alleged leniency of the sentence are removed from the equation, it becomes even clearer that the government did not carry its burden of proof.

C

What knowledge is imputable?

The observer is deemed to be "a reasonable member of the public," *United States v. Lewis*, 63 M.J. at 415; *United States v. Salyer*, 72 M.J. at 423; *see also United States v. Boyce*, 76 M.J. at 252, rather than a member of the armed forces, a veteran, an attorney, a judge, or anyone else with specialized knowledge. At oral argument, opposing counsel correctly stated that the facts and circumstances to be imputed, apart from the facts of the case, are the "things that are in the [*sic*] general knowledge." Hearing Audio at 39:00-40:05. The decision departs from that standard, relying on matters that do not qualify and overlooking or discounting others that do. Because of the stakes in terms of public confidence and the personal involvement of

the country's highest public official, it is important that the most exacting scrutiny be applied in determining whether the government proved its case beyond a reasonable doubt.

1

The Court's Analysis is Over-Inclusive

In support of its determination that the observer would not harbor a significant doubt as to the fairness of the proceedings, the decision relies on propositions that impute to that observer a variety of arcane propositions that not only cannot be so imputed but also could not be taken judicial notice of by a judge trained in military law.

(a)

For example, the plurality claims, at 16, that "any observer of the military justice system would realize that it is not uncommon for a GCMCA to refer a case to a court-martial in a manner contrary to the recommendation of the Article 32, UCMJ, preliminary hearing officer, even in those instances where there is not a scintilla of unlawful command influence." It cites no authority for the assertion, which is "inside baseball" utterly unknown to the vast majority of Americans, including veterans, and indeed, even non-lawyer military personnel. *See United States v. Cruz, supra* (court "takes into account the unfamiliarity of the public with the military justice system").

This element of the plurality's analysis is also called into question by the changes Congress made in Article 32 in 2013 and 2016; however few Americans know about the old Article 32, even fewer conceivably know about the new one—much less the likelihood under either that a convening authority would reject the investigating or preliminary hearing officer's recommendation. As a result, to permit a proposition such as this to play any role in a matter as to which the government has the burden of proof beyond a reasonable doubt is unjustifiable. Its inclusion "after long consideration," Plurality op. at 16, of what is said to be a "close question," *id.* at 15, suggests that the government's case does not satisfy that burden. Significantly, and in a way to its credit, the government never argued the point made by the plurality.

(b)

Relatedly, the plurality writes, at 16, that "GEN Abrams stated unequivocally in a sworn affidavit that his decisions in this case were 'not impacted by any outside influence.'" It is certainly the case that he signed such an affidavit, but he did so well before the trial was concluded. As a result, his assertion gains the government nothing with respect to his refusal to grant post-trial clemency. His prospective insistence that he would continue to disregard outside influences is merely bravado of little or no probative value with respect to *later* events such as his Commander in Chief's announcement that the sentence was "a complete and total disgrace to our Country

and to our Military." As Judge Ewing observed, GEN Abrams's prior affidavit and testimony "do not project forward with enough force to meet the government's high burden following the President's day-of-sentencing tweet." 79 M.J. at 533.

(c)

In further support of its conclusion that an observer would not harbor a significant doubt (and making yet another claim the government never made), the plurality relies on what the convening authority *would have known*. Thus, it notes, at 18, that "although the preliminary hearing officer was not aware of [the] casualties, GEN Abrams served in military positions where he would be privy to such information." But the opinion cites nothing for the proposition that he was in fact aware of this information. Rather, it lays out a variety of circumstances that suggest that he might have known of the casualties. It asks too much of the observer that she *would* know, as a lay member of the public, that he *did* know of the casualties. To impute to the observer "recogni[tion] that GEN Abrams had ready access to this casualty information at the time he decided to send Appellant's case to a general court-martial rather than to the more limited special court-martial recommended by the Article 32, UCMJ, preliminary hearing officer," Plurality op. at 18-19, is to stretch the inquiry past the breaking point.

Perhaps recognizing the infirmity of its approach, the decision posits an alternative argument, also not advanced, much less proven, by the government:

> Even if GEN Abrams had no specific knowledge of any casualties at the time he referred the charges to a general court-martial, he was aware of the following: (1) United States Armed Forces conducted a massive, long-term manhunt for Appellant in hostile territory in Afghanistan; (2) during a search of that scale and in that location, it was likely that at least some casualties occurred; (3) the Article 32, UCMJ, preliminary hearing officer specifically noted in his report that evidence about casualties should be developed prior to making "a final decision on the disposition o[f] SGT Bergdahl's case"; (4) a referral of charges to a general court-martial instead of a special court-martial merely increases the *potential* maximum punishment that can be imposed on an accused and is not a mandate of a minimum punishment; and (5) evidence about casualties could be presented at trial or sentencing, so by referring Appellant's case to a general court-martial, GEN Abrams merely would be empowering the court-martial panel or the military judge to make an appropriate final disposition at that later juncture of the case. Thus, GEN Abrams's referral decision is consistent with the Article 32, UCMJ, preliminary hearing officer's recommendation.

Plurality op. at 19 n.15 (numbering and emphasis in original).

This alternative claim is unavailing because none of these "facts" would be known to the person in the street, and the fourth and fifth would not be known even by most active duty and Reserve Component personnel.[2]

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[2] The fifth point is also difficult to reconcile with the plurality's emphasis elsewhere on the maximum punishment and the seriousness of the charges, since it turns on the notion that, after all, it remained up to the sentencing authority to adjudge a sentence. The Court cannot have its cake and eat it by relying on both propositions to support its conclusion that the government carried its burden of proof as to what an observer would conclude.

(d)

At pages 19-20, the plurality imputes to the observer a complicated chain of propositions that goes even further beyond any imputation this Court has approved in the past. It imputes to the lay civilian knowledge about [1] FORSCOM; [2] GEN Abrams's role as commander of FORSCOM; [3] the mission as described in a 1973 hearing before a subcommittee of the House Committee on Appropriations; and [4] the role of morale in achieving unit cohesion and other goals, as observed in a 1986 decision of the Supreme Court of which few members of the general public have ever heard.

From these premises, the observer is deemed to "recognize" [5] that "if GEN Abrams had chosen to refer Appellant's case to a special court-martial that was not even empowered to adjudge a bad-conduct discharge, his decision would have been devastating to military morale."

Pressing on, the plurality reasons, at 20, that—

> After all, [6] members of the armed forces *would have realized* that GEN Abrams made that referral decision despite the fact that he knew there was overwhelming evidence that Appellant had deserted in a combat zone and had engaged in misbehavior before the enemy, and [7] despite the fact that he knew that other servicemembers were injured or were likely injured in the course of the military's efforts to rescue Appellant from the consequences of his own misconduct. [Bracketed numbering and emphasis added.]

Proposition [6] is an imputation within an imputation: the observer would know something that in turn military personnel would know—*both without proof of*

any kind. Both [6] and [7] are assertions the government did not make, and it is not clear that it could prove them since it never tried to do so. Information about rescue efforts is classified and obviously not imputable to a member of the general public.

(e)

Repeatedly referring to the seriousness of the offenses, the plurality reasons that the observer would have expected the judgment in this case. The reality is that an objective observer would have wanted to know all of the circumstances, extenuating and mitigating as well as aggravating, before making a judgment. An observer who learned that the preliminary hearing officer had recommended a more lenient disposition would have good cause to wonder whether political pressure was the cause.

The decision notes that morale in the armed forces, together with good order and discipline, would demand consequences for the seriousness of the crimes. Here the plurality overlooked a significant point.[3] That morale demands a dishonorable discharge for a serious offense depends on the premise that such an offense had been committed. But even if that premise were correct–that good order and discipline depend on a perception of justice–then morale would be *deeply* offended by heaping

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[3] There is another difficulty with the reliance on morale in the chain syllogism: it effectively shifts the focus from what a member of the general public would make of the circumstances to what a member of the armed forces would make of them.

charges on an accused under external pressure despite the presence of extraordinary mitigating factors.

In charging duplicative offenses, the government overreached, and it involves no stretch of the imagination to conclude that the observer would grasp that. She would have good reason to suspect that the government, in this highly politicized case, yielded to pressure and ratcheted a simple one-day UA into two offenses contrary to R.C.M. 307(c)(4), sent the case to a distant hand-picked command with which the accused had no relationship, and dedicated some 50 lawyers to the prosecution, *see* D APP 94, as if Sergeant Bergdahl had committed the crime of the century.

But suppose the fair-minded observer accepts the plurality's observation at 14 n.10 that the policy of not charging returning POWs who did not misbehave in captivity is unsettled. The appearance of *over*charging such a POW—especially one who had endured extraordinary hardship in captivity—under pressure from one of the most powerful figures in the specific part of the Legislative Branch that oversees not merely the armed forces but officer promotions remains inescapable here. In short, the "seriousness of the crimes" is at worst a two-edged sword that contributes nothing to the showing the government needed to make beyond a reasonable doubt.

(f)

The plurality places great weight on Sergeant Bergdahl's pleas, noting that they "cannot be emphasized strongly enough." Plurality op. at 20. But the validity of the pleas was a matter of heated controversy. The fact that the Court denied review on those issues as well as the unreasonable multiplication of charges does not remove them from the universe of matters that, in fairness, may be imputed to the observer under the plurality's excessively wide aperture.[4] Given the legal arcana the decision imputes to the observer for the undeserved benefit of the government, it should have taken the controversy over Sergeant Bergdahl's pleas into account on the *other* side of the equation. It did not do so.

Setting aside whether it is proper to impute knowledge of Sergeant Bergdahl's pleas to the observer without also imputing knowledge of his claim that they were improvident because of incorrect rulings by the military judge, they should have been counted, if anything, in the plus column for Sergeant Bergdahl. Especially given the arcane matters the decision imputes to the observer; it should also have imputed to the observer knowledge that a plea of guilty is a sign of contrition[5] and a

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[4] Failure to grant review of an issue implies no judgment on the merits. *United States v. McGriff*, 78 M.J. 487 (C.A.A.F. 2019) (per curiam).

[5] The record does not support the assertion, Plurality op. at 21, that "it was the strength of the Government's evidence that caused [Sergeant Bergdahl] to" plead guilty. If the government's case was strong it was because he had voluntarily given

laudable step on the road to rehabilitation. For this reason, even if Sergeant Bergdahl's pleas were deemed to assist the government on the referral issue, they do not do so on the clemency issue. The pleas thus prove to be at worst a wash for purposes of what an observer would conclude as to the fairness of the proceedings.

(g)

Finally, the plurality relies (at 24) on the fact that "the United States government was required to exchange five members of the Taliban who had been held at the U.S. detention facility in Guantanamo Bay, Cuba, in order to secure Appellant's release." The government made no such claim in seeking the defend the decision below, presumably because whether or not Taliban members were released in exchange for Sergeant Bergdahl has no bearing on whether the complete denial of convening authority clemency was "a foregone conclusion." The prisoner exchange triggered a political firestorm almost immediately. Because Sergeant Bergdahl played no role in its negotiation, it cannot be relied on as a factor in validating the failure to afford him any clemency. An informed observer would in any event know that the

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a full account of his conduct during the 2014 AR 15-6 investigation. He expressed contrition. If anything other than that and his overwhelming–and overwhelmingly understandable–desire (following five years of brutal Taliban captivity) not to be sent to prison can be said to have led him to plead guilty, it was not the strength of the government's case but the denial of his pretrial motions and the politicization of the entire matter. Having preserved his legal objections, there was no reason to withdraw his plea as long as the judge's rulings were intact.

United States brings home its own whenever possible and without punishing those who have not cooperated with the enemy.

* * *

In preparing this Petition, we carefully reviewed the government's briefs here and below as well as the recording of the oral argument. In neither the briefs nor the hearing did the government suggest that the Court should impute to the observer the numerous matters to which we refer here. Because the evidentiary onus was both heavy and on the government, this is fatal.

2

The Court's Analysis is Under-Inclusive

In deciding whether the government carried its high end-stage burden, the Court must consider not only those matters that support the government's no-intolerable-strain UCI defense (for that is what it is), but also those that point in the opposite direction. The decision appears either not to have done so or to have done so incompletely.

(a)

For example, the single paragraph the decision devotes to what the observer would make of the convening authority's failure to grant clemency, *see* Plurality op. at 24, takes no account of the contrary considerations cited by the defense. Sergeant Bergdahl received the severe punishment of a stigmatizing dishonorable discharge,

a five-pay-grade demotion, and the forfeiture of $10,000.[6] The considerations favoring clemency were substantial. Echoing a misleading government claim, *see* Gov't Br. at 51 (appellant "did not request any formal clemency"), and quoting the Army Court majority, 79 M.J. at 526, the plurality observes at 24 & n.5 that "Appellant's post-trial matters submitted to the convening authority were 'absent of any formal request for clemency in the form of a sentence reduction.'"

The language the plurality quoted fails to take proper account of the record. Sergeant Bergdahl's post-trial submission set out numerous considerations that in his view militated in favor of clemency. JA 643-44. As we explained at the hearing, Hearing Audio at 22:00-23:10, it did so in the context of a claim that the convening authority and SJA were disqualified because they were material witnesses as a result of their role in the spoliation of over 100 letters GEN Abrams had received about

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[6] The plurality suggests, at 23, that the military judge's refusal to sentence Sergeant Bergdahl to confinement shows that the observer would conclude that the military judge was "impervious" to Senator McCain's hearing threat. This subtly recharacterizes that threat: Senator McCain did not threaten a hearing if Sergeant Bergdahl "did not receive a sentence to his liking." His precise words were "if it comes out that Sergeant Bergdahl has no punishment." JA 60. Sergeant Bergdahl's sentence may not have sent him to the U.S. Disciplinary Barracks, but it did include a punitive discharge that carries a lifelong stigma and precludes VA benefits. He has also suffered a five-figure forfeiture that, even allowing for inflation, most members of the general public would consider a significant penalty for a case that did not involve ill-gotten gains. The lack of a sentence to confinement is therefore no evidence that an observer would conclude that Senator McCain's threat had no effect.

the case but destroyed without furnishing copies to the defense. *See* JA 308-14, 321-23 (convening authority's testimony about spoliation). The SJA fully understood this context and made sure the convening authority did as well. *See* JA 655-56.

Plainly, before *anyone* could consider clemency, there had to be a decision on whether GEN Abrams (and the SJA) were disqualified. Hence, the defense asked that the time for post-trial submissions be deemed tolled pending action on the disqualification request. JA 647 (¶ 6). But to claim, as the Army Court majority did, that there was no "formal request" in the sense that Sergeant Bergdahl needed to state precisely *what* clemency he thought was warranted is not only to disregard his disqualification request but to engage in word play that should have no role in the adjudication of a matter as central to the administration of justice as a claim of apparent UCI. To imply that the absence of a "sum-certain" clemency request on these facts in any measure discounts the observer's consideration of the possibility that clemency had been denied because of UCI is indefensible.

We request that the Court re-examine the handful of pertinent pages of the Joint Appendix and see if it still comes away satisfied that it is fair to say Sergeant Bergdahl had not sufficiently indicated that he thought clemency was warranted; the only question was whether that would be decided by GEN Abrams or some other general officer who was not a disqualified material witness. To resolve any lingering doubt as to whether he and his SJA fully understood that Sergeant Bergdahl was

seeking clemency, one need look no further than the undated Addendum to the SJAR, where the SJA wrote: "I have considered the submissions by the defense, and in my opinion, clemency is not warranted." JA 655, at 657 (¶ 6). The Army Court majority's claim, which the plurality quotes with apparent approval, thus provides no basis for the plurality's failure to make a thorough examination of whether GEN Abrams's denial of clemency was indeed "a foregone conclusion."

Judge Ewing correctly observed below that "[a]s a matter of fact, appellant's chances at post-trial clemency were *not illusory*." 79 M.J. at 533 (emphasis added).[7] Given the applicable burden of proof and which party bears it, there is no way this Court can reach a different conclusion–unless GEN Abrams had an inelastic "no clemency" policy regarding the punishment of deserters. If he did, of course, that would raise yet other issues.

(b)

A second example of under-inclusion is found in footnote 16, where the Court "conclude[d] that an objective, disinterested observer would give little weight" to Sergeant Bergdahl's suggestion that his prosecution ran counter to American policy

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[7] Judge Ewing was alert to the danger of actual-UCI analysis seeping into apparent-UCI analysis, cautioning that it is "not dispositive to assume *arguendo*, based on the convening authority's prior testimony and affidavit, that he was not actually influenced by the tweet, as that would only address *actual* UCI, and would leave as an open question the question of the appearance of UCI." 79 M.J. at 533.

with respect to the prosecution of returning POWs. The decision offers three reasons never advanced by the government: the OSD publication "is less than clear about the parameters of this so-called 'practice'"; the practice didn't apply to post-Vietnam armed conflicts; and we cited no specific instance in which the practice was invoked when the returned POW was a deserter and soldiers had been wounded in rescue efforts.

The government never denied that there was a longstanding policy not to prosecute returning POWs unless they misbehaved in captivity. Nor did it ever suggest that the policy had fallen into desuetude in the years since Senator McCain, Vice Admiral James B. Stockdale, Colonel Bud Day, and the other Vietnam Era POWs were repatriated. What is more, it had ample opportunity to examine its records of disciplinary actions in the post-Vietnam era and respond if our understanding of the policy was incorrect. The best it could do is insist, without reference to any evidence, that the policy somehow didn't apply to cases like this. *Compare* Gov't Br. at 33 *with* Appellant's Reply Br. at 1.[8] It is unreasonable, in a context in which the government has the burden of proof, to ask Sergeant Bergdahl to prove the negative proposition that there was no other case in which a Soldier deserted, others were

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[8] The case of Sergeant Jenkins, to which we refer at page 5 *supra*, is readily distinguishable because he (a) was a defector and (b) collaborated with the enemy.

wounded looking for him, and he was later repatriated.

(c)

A third example of under-inclusion concerns the fact that the Army granted a waiver to permit Sergeant Bergdahl to enlist without first obtaining a psychological evaluation, as advised by the U.S. Coast Guard when he was disenrolled from boot camp. This is one of the "facts and circumstances" knowledge of which is properly imputed to the observer. While the plurality notes this history, Plurality op. at 21, it takes no account of it in assessing whether a member of the public would have harbored a significant doubt as to the fairness of the military justice process, even though the Army's failure was pertinent to both referral and clemency.

The opinion states that "the Army was not aware" of the Coast Guard's warning, Plurality op. at 21, but cites no evidence to that effect. The Army granted a waiver to permit Sergeant Bergdahl to enlist. It needed to do so because his DD214 included a reenlistment code (RE3L) that required one. *See* AR 15-6 Report 8.

(d)

Finally, the plurality fails to impute to the observer knowledge about President Trump and the late Senator McCain that bears on whether uniformed decision makers were "bombproof." As we have explained, an observer would have reason to know from relatively recent published sources that Senator McCain was perfectly willing to make good on threats to withhold favorable action on military promotions

unless he got his way. For his part, President Trump remains widely known for his long-running reality television program "The Apprentice," in which his star turn repeatedly involves firing people. *See generally* The Apprentice (American TV Series), WIKIPEDIA, https://en.wikipedia.org/wiki/The_Apprentice_(American_TV_series). A member of the public would also know of the steady flow of senior and not-so-senior officials he has fired since taking office.

This background, the convening authority's eligibility for assignment to even more prestigious assignments, and the fact that he was given such an assignment after refusing the grant Sergeant Bergdahl clemency, materially detract from the claim that an observer would not harbor a significant doubt about the fairness of the proceedings.

II

THE DECISION WILL NOT DETER POLITICAL UCI

The Chief Judge expressed a view that anyone familiar with this case will share: "Let us hope that we shall not see [the] like [of this case] again." But hope alone is not what Congress intended when it created the Court as a "bulwark" against UCI. *See United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). According to the *OED*, it is, among other things, "[a] powerful defence [*sic*] or safeguard." 1 OXFORD ENGLISH DICTIONARY 294 (Compact ed. 1987). Although the word can also imply a fixed structure, such as a rampart, a breakwater, or an extension of a ship's

sides above the level of the deck, *id.*, when applied to UCI the concept must be as malleable as the diverse UCI scenarios chronicled in the *Military Justice Reporter*. If "the vagaries of human nature" suggest that total success in eradicating UCI may never be realized, *United States v. Cole*, 17 C.M.A. 296, 297, 38 C.M.R. 94, 95 (1967), it is all the more important that the Court be alert to the changing realities of American life. Measures that may have seemed sufficient in one era–be it cultural, technological, or political–may be insufficient in the next.

Change in all three spheres has been swift, pervasive, and dramatic. Means of instant communication (and therefore vilification) are now broadly available, whether through social media or electronic mail. Not long ago, one would have noted with surprise that a political leader was "tweeting" on a social media platform. Today it is remarkable to find a politician who does not do so. Political actors are close students—and early adopters—of strategies they think will appeal to their base.

Adding to this volatile mix is the erosion of traditional news media with agreed-upon standards coupled with the explosive growth of cable news and the blogosphere, where those standards are at best severely diluted and at worst entirely missing. These are concerning and pertinent developments where, as here, a case has been politically charged from the beginning.

"We live in a time where truth falls victim to politically charged rhetoric and cable news trends more toward being entertainment than evidence-based journalism."[9] Previously observed norms have been abandoned. This phenomenon is not confined to President Trump, as witness Senator McCain's meddling and the willingness of scores of federal legislators to put their names on blatantly unconstitutional bills that seek to extract pounds of flesh from Sergeant Bergdahl. *See* Appellant's Br. at 43 & n.23; *see also* Chuck Hagel, Letter to the Editor, *Don't Politicize Our Judicial System*, WASH. POST, Sept. 4, 2020, *available at* https://www.washingtonpost.com/opinions/letters-to-the-editor/dont-politicize-our-judicial-sytem/2020/09/04/f2c11968-ed68-11ea-bd08-1b10132b458f_story.html (noting attempts by members of Congress to politicize the judicial system).

"Our government," Justice Brandeis wrote in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) "is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." So too, this Court models for other actors in the military justice process. The rigor with which it

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[9] Justin Oshana, Opinion, *I Led the Prosecution Against Bowe Bergdahl. Trump Made My Job Much Harder*, WASH. POST, Aug. 31, 2020, *available at* https://www.washingtonpost.com/opinions/2020/08/31/i-led-prosecution-against-bowe-bergdahl-trump-made-my-job-much-harder/#comments-wrapper.

approaches UCI sends a message throughout the armed forces.[10] It also influences actors in the political branches, who will continue to feel the temptation to score political points by meddling in the retail administration of military justice in ways they would never dare to do with respect to cases in the Article III courts. Left undisturbed, the Court's decision will only encourage more political UCI.

Conclusion

When a key proposition of considerable moment to public confidence in the administration of justice and with constitutional overtones must be proven beyond a reasonable doubt, and as to which doubts are to be resolved in the accused's favor; where the matter is at best "a close question" that "give[s] great pause," requires "long consideration" and elaborate explanation, and in the end does not command more than a bare majority; that proposition should not be embraced.

The Court should grant the Petition for Reconsideration, determine that the government failed to satisfy its burden beyond a reasonable doubt, and order the charges and specifications dismissed with prejudice.

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[10] The preliminary hearing officer has written that "[b]oth Congress and senior commanders should be cognizant of unintended messages that their actions send. . . ." Mark Visger, *The Canary in the Military Justice Mineshaft: A Review of Recent Sexual Assault Courts-Martial Tainted by Unlawful Influence*, 41 HAMLINE L. REV. 59, 98 (2019). The same principle applies to this Court.

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Certificate of Compliance with Rule 37(a)

This Petition for Reconsideration complies with the typeface and type style requirements of Rule 37(a).

Eugene R. Fidell

Certificate of Filing and Service

I certify that I filed and served the foregoing Petition for Reconsideration on September 7, 2020, by emailing copies thereof to the Clerk of the Court, the Government Appellate Division, and the *amici curiae*.

Eugene R. Fidell