IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	APPELLANT'S REPLY TO
	)	ANSWER TO PETITION
Appellee,	)	FOR RECONSIDERATION
	)	
v.	)	
	)	Crim. App. Dkt. No.
ROBERT B. BERGDAHL	)	ARMY 20170582
Sergeant (E-5)	)	
U.S. Army,	)	USCA Dkt. No. 19-0406/AR
	)	
Appellant.	)	September 18, 2020

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

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Reply

The government is right about one thing[1] but wrong about everything else. It has made no effort to respond to, much less rebut, a variety of substantial points in the petition, including our showing that the Court's "intolerable strain" analysis was in fact an application of actual-UCI doctrine, despite its invocation of the apparent UCI test. This latter serves to explain why the Court's analysis seems strained.

1. The core of the "intolerable strain" analysis has two components. One is the characteristics attributed to the observer. *See* Petition for Reconsideration at 7. The other is the "evidentiary burden" the government must meet. *See United States v. Boyce*, 76 M.J. 242, 250 (C.A.A.F. 2017) (Ohlson, J.). Neither of those words is surplusage; both do work. Bryan Garner's first definition of "evidentiary" is "Having the quality of evidence; constituting evidence; evidencing." BLACK'S LAW DICTIONARY 640 (Bryan A. Garner ed., 9th ed. 2009). An evidentiary matter is something that is proven by lawful evidence or of which judicial notice may be taken. Mil. R. Evid. 201; *see also* C.A.A.F. 30A(b).[2] To treat as "evidentiary" propositions

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[1] The Opinion of the Court was not a plurality opinion: three Judges joined section II.C. (including its acknowledgement that the "intolerable strain" issue was a "close question" that "give[s] great pause," requiring "long consideration").

[2] The government never asked at trial, at the Army Court, or here for judicial notice of any of the matters on which the Court's intolerable strain analysis relies. Nor does the opinion purport to take judicial notice. *See* Mil. R. Evid. 201(c).

that are merely *conceivable* or that can merely be *posited* is to transform the most critical part of apparent UCI analysis into something more akin to rational basis review. Rational basis review, however, has no place in the adjudication of a criminal charge. Moreover, such a transformation would turn one party's ostensible beyond-a-reasonable-doubt burden into the other party's burden to prove that some proposition could not possibly be true. It is difficult to imagine a more dramatic or unwarranted inversion of this Court's settled law.

Similarly, the word "burden" indicates that it is incumbent on a party, not the Court, to assemble the propositions it claims (and must prove) take a case out of the "intolerable strain" zone. As the petition repeatedly notes, key elements on which the decision rests were never advanced by the government. Whether or not those elements would have justified a no-intolerable-strain holding in the abstract, it was for the government to prove them, rather than for the Court to do its work for it. This defect is not cured by a government submission that in turns says the majority's assemblage is correct. It is for the Court to approve a government submission rather than the other way around.

2. The most revealing sentence in the government's answer appears on page 4: "[N]o military court has ever held there exists a concept such as 'political UCI.'" From this we learn that the government considers UCI an essentially static doctrine, a view that is conclusively refuted by the cornucopia of UCI issues with which the

Court has had to wrestle over its entire existence. It also suggests that the government has learned nothing from this case or even from the op-ed recently published by its own trial counsel or the cautionary letter to the editor that former Secretary Chuck Hagel sent in response. Its resistance to the very idea that a new and pernicious form of UCI—one that can be defined as "UCI committed for the purpose of achieving a political end"—might arise shows the importance of what the Court does in this case, not merely what it says. What makes political UCI especially concerning is that those civilian officials whose words or deeds give rise to it–unless they fortuitously happen to be retired regulars subject to the Code, like the late Senator McCain–are beyond the reach of Article 131f, UCMJ. *See Manual for Courts-Martial, United States* (2019 ed.), pt. IV, ¶ 87.c.(2). If the Court has never seen a case like this, it is not because the law doesn't cover it, but because misbehavior as blatant as that of the President and Senator McCain has never happened.

It is not wrong to take account of a decision's "grave implications." *See, e.g., United States v. Bess*, 80 M.J. 1, 21 (C.A.A.F. 2020) (Ohlson, J., dissenting). This is unquestionably such a case.

3. The government quotes Justice Thomas's opinion for a unanimous Court in *Universal Health Servs. v. United States*, 136 S. Ct. 1989, 2002 (2016), for the proposition that "policy arguments cannot supersede the clear statutory text." All will agree with that proposition, but it has nothing to do with this case or the "intolerable

strain" issue. No statutory text precludes any argument Sergeant Bergdahl has advanced. The Court's UCI jurisprudence grows from Article 37, UCMJ, R.C.M. 104(a)(1), and the Due Process Clause, and not a jot or tittle of the text of any of those sources forbids the Court from taking into account any of the considerations on which the petition relies. If the government had in mind the amended version of Article 37, (a) the actions that gave rise to the apparent UCI here all occurred before the December 20, 2019 effective date, *see* Appellant's Reply Br. at 2 n.2, and (b) no inference can be drawn from the statutory clarification that Congress disapproved of this Court's apparent UCI caselaw. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 & n.12 (1994).

4. The government (at 2) cites *United States v. Criswell*, 78 M.J. 136 (C.A.A.F. 2018), and *United States v. Torres*, 74 M.J. 154 (C.A.A.F. 2015), in support of its insistence that our reference to the divergent judicial views expressed here and on the Army Court is "simply nonsensical and has no basis in the law." Those were, to be sure, 3-2 decisions, in which the Court was divided on whether the government had shown an error to be harmless beyond a reasonable doubt. But there the similarity ends. They are readily distinguishable.

First, in neither case was there a general recognition by all of the Judges who formed the majority that the issue was a close one. Indeed, the only Judges who thought *Torres* was close were the dissenters. *See United States v. Torres*, 74 M.J.

at 159 (Stucky, J., dissenting, joined by Erdmann, J.). This contrasts sharply with the majority's strong acknowledgement that the "intolerable strain" issue was a close one.

Second, neither *Torres* nor *Criswell* involved a claim of apparent UCI. The apparent UCI doctrine vindicates the strong interest in fostering public confidence in the military justice system and properly enjoys a special place in the Court's jurisprudence. It is UCI that impelled Congress to think of this Court as a "bulwark." Neither *Torres* nor *Criswell* called upon the Court to make the kind of informed, objective observer analysis *Boyce* and the other leading cases mandate for apparent UCI claims. The cases the government cites required the Court to directly evaluate harmlessness, rather than to do so through the prism of what a member of the general public would conclude. A close division on the "intolerable strain" issue thus (a) involves a different kind of analysis and (b) vindicates a different interest from the search for individualized prejudice that is required in cases involving conventional matters like the suppression of evidence (*Criswell*) or instructional error (*Torres*). As a consequence, such a division should indeed be a cause for concern.

5. In response to the petition's analysis of the majority's imputation of facts to a member of the general public, the government insists (at 2 n.2) that the "inventive standard is unworkable and unhelpful to guiding lower courts as to which facts it should cherry pick and ascribe to the informed observer." We are at a loss to

understand what "inventive standard" this refers to. What is clear, however, is that the majority's imputation of knowledge to the person-on-the-street observer is so unstructured, limitless, and one-sided that outcomes in apparent UCI cases will be unpredictable. The government suggests (at 5) that it is fine to treat every UCI case as *sui generis*. The result of doing so will be to keep the Courts of Criminal Appeals guessing, along with military judges, convening authorities, staff judge advocates, trial and defense counsel, and, more importantly, even the senior officials, military and civilian, who are entitled to know what they can and cannot do. Where outcomes are unknowable because, to quote Cole Porter, "anything goes" when it comes to what knowledge is imputed to the observer, the battle for deterrence is over before it begins.

6. The government's answer makes no effort to reconcile the outcome here with those in *Boyce* (where, as here, the maximum authorized penalty was death) and *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006) (where, as here, the accused pleaded guilty).

Given the stress the majority put on Sergeant Bergdahl's pleas, it is not surprising that the government too would emphasize them (at 3-4). We have already shown why those pleas do not support a no-intolerable-strain determination or at worst are a wash on that issue. Petition for Reconsideration at 15-16. We would only

add that allowing a guilty plea to drive the intolerable-strain analysis erodes the principle that a litigated UCI claim is not waived by such a plea. What is more, President Trump's R.C.M.-violative tweet describing the sentence as "a complete disgrace to our Nation and to our Military" came *after* pleas and prior to convening authority action. As a result, it is especially clear that Sergeant Bergdahl's pleas provide no support for a finding in the government's favor in respect of the refusal of clemency, as Judge Ewing noted below.

7. The government refers (at 4 n.3) to the Court's footnote regarding Sergeant Bergdahl's reliance on the Department of Defense policy against prosecuting returning POWs unless they misbehaved in captivity. He has repeatedly invoked this policy.[3] In the intervening years, the government has never pointed to a single document or disciplinary action that refutes this account of the policy. Despite untrammeled access to the records, it has reported no case in which a POW who, like Sergeant

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[3] *E.g.,* D APP 66, at 9 (quoting 2000 OSD history) ("Since the 1960s, Defense Department policy has disfavored the prosecution of returning POWs except those who collaborated with the enemy. When former New York Governor W. Averell Harriman served as POW coordinator during the Vietnam War, he stressed to Secretary McNamara the 'prudence of greeting any release or escapee with open arms and, except in the most flagrant instances of wrongdoing or outright collaboration, refraining from taking legal action against repatriated prisoners.' Harsh treatment of returned captives, he wrote, was 'unnecessarily heartless.'").

Bergdahl, behaved properly in captivity was prosecuted for misconduct that occurred prior to being taken prisoner. Its failure even to comment on the plainly distinguishable case of Sergeant Jenkins, to which we have referred, speaks volumes.

In the briefing, the government did not dispute that there was such a policy. Instead, it claimed without elaboration that Sergeant Bergdahl's "desertion and misbehavior before the enemy makes this case different from a typical POW case." Gov't Br. at 33. Apparently emboldened by the Court's decision, it now claims (at 3) that even if there were such a policy, "it has little, if any, bearing on whether the comments by President Trump and Senator McCain placed an intolerable strain of the military justice system."

We respectfully disagree. First, that policy would be a factor the convening authority would properly take into account in deciding on clemency, and hence goes to whether a denial of clemency was indeed a foregone conclusion. This in turn goes to whether the government had carried its burden beyond a reasonable doubt. Second, the Court must apply the same standard when deciding what considerations militate—in the observer's eyes—for and against a finding of "intolerable strain." The policy to which we have referred is as least as appropriate for imputation to the observer as the rather obscure sources in the Court's chain syllogism about the effect of non-prosecution on troop morale. If a returning POW did not misbehave in cap-

tivity, the policy disfavors prosecution, and prosecution of such a POW would adversely affect the morale of POWs. It is difficult to see that consideration as materially less salient (and imputable to the observer) than the morale effect of not prosecuting a Solder who, like Sergeant Bergdahl, leaves his place of duty without authority but for reasons that all agree were well-intentioned.

Conclusion

Just as a total denial of clemency was not inevitable, neither was referral of charges to a court-martial. The Army knew in 2009 that Sergeant Bergdahl had gone outside the wire without authority. It knew in 2009 about the search effort. Yet for five years it afforded him a variety of benefits. He was always deemed to be in a duty status, and was not listed as either AWOL or a deserter. The Army paid him, promoted him twice, and awarded him a Good Conduct Medal. Only after the political firestorm stoked by news outlets, Mr. Trump, and Senator McCain erupted did the Army reverse engines and turn Sergeant Bergdahl's case into the military crime of the century. What observer would *not* wonder what had changed?

For the foregoing reasons and those previously stated, the Court should grant the petition, determine that the government failed to satisfy its burden beyond a reasonable doubt, and order the charges and specifications dismissed with prejudice.

A separate motion to supplement the record is being submitted with this reply. We have omitted any reference to the matter proffered with that motion in preparing this reply.

Respectfully submitted,

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September 18, 2020

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This Reply 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 Reply on September 18, 2020, by emailing copies thereof to the Clerk of the Court, the Government Appellate Division, and the *amici curiae*.

Eugene R. Fidell