IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Sergeant (E-5) **ROBERT B. BERGDAHL,** United States Army, Appellant	ANSWER ON BEHALF OF APPELLEE TO APPELLANT'S PETITION FOR RECONSIDERATION Crim. App. No. ARMY 20170582 USCA Dkt. No. 19-0406/AR

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

COME NOW the undersigned appellate government counsel and hereby requests this Court deny Appellant's petition for reconsideration. This Court should deny Appellant's petition for reconsideration because this Court properly analyzed and applied the law in its opinion with respect to the issues Appellant now seeks to re-litigate.[1]

Appellant seeks reconsideration, in part, on the basis that this Court misapplied the test for apparent unlawful command influence (UCI) by "blurring the distinction" between apparent and actual UCI. (Appellant's Pet. 4). This Court

[1] Appellant repeatedly mischaracterizes this Court's opinion as a "plurality opinion" in his petition for reconsideration. No portion of the Opinion of the Court authored by Judge Ohlson commanded less than a majority of the Court.

did no such thing. Rather, this Court clearly and correctly stated the apparent UCI test and framed its analysis in accordance with such test. *United States v. Bergdahl*, No. 19-0406, slip op. at 5 (C.A.A.F. 2020).

Appellant's circular suggestion that the split among judges bears on whether the government ultimately met its burden (Appellant's Pet. 3) is simply nonsensical and has no basis in the law. *See United States v. Criswell*, 78 M.J. 136 (C.A.A.F. 2018) (finding that the government carried its burden to prove harmlessness beyond a reasonable doubt over the dissent of two judges of this Court); *United States v. Torres*, 74 M.J. 154 (C.A.A.F. 2015) (same). In any event, the presence of a dissent has no bearing on whether grounds for reconsideration exist in light of the majority's application of the law analysis of the facts in this case.

While attempting to demonstrate that this Court erred in its application of apparent UCI doctrine, Appellant seemingly advocates for a standard of a fully informed observer who is only fully informed of the facts and circumstances that are helpful to him.[2] (Appellant's Pet. 7–23). When determining whether a

[2] Appellant faults the Opinion of the Court as both over-inclusive and under-inclusive. (Appellant's Pet. 8, 17). Under the standard advocated by Appellant in the instant petition—but not in his briefs or oral argument—the "fully informed observer" could not know that convening authorities frequently make disposition determinations at odds with the preliminary hearing officer, (Appellant's Pet. 8), but would know television catch-phrases. (Appellant's Pet. 23). This inventive standard is unworkable and unhelpful to guiding lower courts as to which facts it

reasonable observer fully informed of all the facts would harbor a significant doubt about the fairness of Appellant's court-martial, this Court appropriately considered, in juxtaposition with the comments at issue, the highly relevant facts that: 1) Appellant pleaded guilty to offenses that carried a significant maximum punishment; 2) Appellant chose not to withdraw his plea after the military judge gave him such opportunity; and 3) Appellant himself requested a dishonorable discharge for his serious misconduct.

This Court also gave appropriate weight to Appellant's argument concerning the alleged "policy" of not prosecuting repatriated prisoners of war. (Appellant's Pet. 20–21). Even if such a purported "policy" existed, it has little, if any, bearing on whether the comments by President Trump and Senator McCain placed an intolerable strain on the military justice system. As much as Appellant wishes it were so, the fact that he was subsequently captured and held by the Taliban does not absolve him from criminal liability for his conscious decision to intentionally leave his combat observation post, which it was his duty to defend, without authority. This Court correctly recognized, in pleading guilty to the offenses of

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should cherry pick and ascribe to the informed observer—who would necessarily no longer be "fully informed." Instead, this Court properly looked to determine whether "'an objective, disinterested observer, *fully informed of all the facts and circumstances* would harbor a significant doubt about the fairness of the proceeding.'" *Bergdahl*, No. 19-0406, slip op. at 2 (quoting *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017)).

desertion with intent to shirk hazardous duty and misbehavior before the enemy, Appellant "explicitly agreed in open court that he was voluntarily pleading guilty *because he was in fact guilty* and not for any other reason," and correctly recognized the limitations of the "policy" that Appellant purports to exist.[3] *Bergdahl*, No. 19-0406, slip op. at 14–15 n. 10, 20.

Appellant also requests reconsideration on the basis that this Court's decision "will not deter political UCI" and "will only encourage more political UCI." (Appellant's Pet. 23–26). As an initial matter, no military court has ever held there exists a concept such as "political UCI." Unlawful command influence is clearly defined by Article 37, U.S.C. § 837 (UCMJ) (2012), and Rule for Courts-Martial 104 as interpreted by this Court's precedent. Further, Appellant's desire for a policy-oriented result has no bearing on this Court's application of the apparent UCI doctrine to the facts of this case. *See Universal Health Servs. v. United States*, 579 U.S. __, 136 S. Ct. 1989, 2002 (2016) ("[P]olicy arguments cannot supersede the clear statutory text"). To be sure, rather than encourage "more political UCI," this Court clearly expressed the dangers of commentary about pending cases by those capable of committing UCI. *See Bergdahl*, No. 19-0406, slip op. at 13–14. As perilous as such improper statements may be, their

[3] Among those limitations, this Court appropriately found that the source upon which Appellant relied to claim the existence of the purported "policy" did not support Appellant's assertion. *Bergdahl*, No. 19-0406, slip op. at 14–15 n. 10.

mere utterance does not, and cannot, lead this Court to completely disregard the parameters of the law. Instead, this Court should continue to follow Article 37, UCMJ, R.C.M. 104, and its own apparent UCI analysis as applied to the unique facts and circumstances of each case before it. Here, this Court correctly considered all of the relevant facts and circumstances to conclude that the comments by President Trump and Senator McCain "did not place an intolerable strain on the public's perception of the military justice system *in this particular case*." *Bergdahl*, No. 19-0406, slip op. at 24–25 (emphasis added).

With respect to the remaining points Appellant raises in the petition for reconsideration, the government rests on its brief and its oral argument, concedes none of those points, and opposes all of them. This Court did not err in its application of the law or rely on any clearly erroneous facts in Part II.C. of its opinion, and no other circumstances exist that warrant this Court to reconsider its opinion. Accordingly, this Court should deny the petition for reconsideration.

CONCLUSION

WHEREFORE, the United States prays that this Honorable Court deny Appellant's petition for reconsideration.

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September 11, 2020

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on September 11, 2020.

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