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