IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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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