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 BRIEF Crim. App. Dkt. No. ARMY 20170582 USCA Dkt. No. 19-0406/AR

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

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Summary of Argument

Never mentioning Judge Ewing's dissent, the government seeks in various ways to avoid the clear application of this Court's apparent UCI jurisprudence. Sergeant Bergdahl is entitled to the relief requested because of the apparent UCI of Sen. McCain and President Trump.

Argument

1. On critical points the government offers either no resistance or none that is persuasive. It has not disputed our submission this country's defense policy has long been not to prosecute returning prisoners of war except for offenses committed in captivity. It never contends that SGT Bergdahl was not a POW and therefore not entitled to the benefit of that humane policy. Instead, it claims (at 33) that his "desertion and misbehavior before the enemy makes this case different from a typical POW case." But it cites no authority (and we know of none) for the proposition that some pre-captivity offenses are exempt from the returning-POWs policy while others are not. It also cites no individual cases (once again, we know of none) that might show empirically that service practice over the last half-century has recognized exceptions, and, if it did, what the guiding criteria were.

On these facts, a reasonable observer would have substantial grounds for questioning the disposition and post-trial clemency decision making in SGT Bergdahl's case. The government does not dispute the Army Court's finding that he acted

to thwart the enemy's malign plans by escape attempts, JA003. As our main brief explained (at 4-5, 12) his behavior in captivity fully comported with the Code of Conduct.[1] Both the clear departure from overall policy and SGT Bergdahl's specific meritorious behavior despite the brutal conditions of his captivity are highly pertinent to whether he was a viable candidate for CA clemency.

2. A persistent flaw in the government's argument is the failure (at 29, 31, 33, 41, 44) to distinguish between actual and apparent UCI. This is an apparent UCI case, and was tried on that basis under the framework set out in *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017).[2] To argue, as the government does (at 29), that neither Sen. McCain nor President Trump "leveraged" their authority "to affect the careers of the convening authority, the SJA, military judges, or the judges of the Army Court" is to say SGT Bergdahl never proved actual UCI. *See also id*. at 31

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[1] The government effectively concedes that SGT Bergdahl's offense was not motivated by cowardice or "shirking" in the ordinary sense, since it notes (at 2) that he left OP Mest to travel overland through dangerous territory "to go to Forward Operating Base (FOB) Sharana." The Army Court found that "[h]is plan was to walk to his higher headquarters . . . to complain about the treatment of his platoon." JA002.

[2] Section 532 of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019), amended Art. 37, UCMJ. Under § 532(c), the amendments "shall take effect on the date of the enactment of this Act and shall apply with respect to violations of section 837 of title 10, United States Code (article 37 of the Uniform Code of Military Justice), committed on or after such date." Since all of the UCI at issue occurred before the President signed the measure into law on December 20, 2019, the amendments do not apply.

(military justice system can withstand "public, political commentary by members of Congress or the President when those individuals have not actually leveraged their authority over the individuals involved in a courts-martial [*sic*] as a means to extort or exhort a particular action"). Actual UCI was not the issue at trial and is not the issue now.[3]

3. The government repeatedly argues (at 18, 31, 41, 48) that SGT Bergdahl is entitled to no relief because his sentence was consistent with what he asked for at trial. This argument ignores everything that came before and after sentencing. The reasonable observer, on the other hand, is deemed to be aware of that context.

That observer would note that when SGT Bergdahl reached the inflection point of his pleas, the fact that he had been charged *at all* was, as previously noted, without precedent and contrary to DoD policy. The gravity of the charges and their multiplicity were unusual. One of them (Charge II) was highly bespoke. The charges had, unusually, been preferred against the recommendation of the hearing officer and, most unusually, after the threat of a Senate hearing unless SGT Bergdahl was punished. The observer would also have known that President Trump had for months

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[3] The government insists (at 17-18) that "theoretical pressure and the mere potential" that the President and Sen. McCain could enforce their will on the proceedings is "insufficient for a finding of apparent UCI." But the expressed desire and ability to enforce that will is precisely what gave rise to the appearance of UCI—which the government fatally failed to overcome with evidence beyond a reasonable doubt.

vilified SGT Bergdahl in an unprecedented manner (on occasion pantomiming his execution), and had reminded the public of his views only weeks before sentencing.

At this inflection point, this returned POW (who had already suffered five years of horrendous captivity) faced the prospect, if the prosecution had its way, of another 14 years' confinement, this time at the USDB. Given his psychological and physical injuries, it should surprise no one that SGT Bergdahl felt an urgent imperative to minimize the risk of imprisonment of any duration. An observer who was fully informed of the facts and circumstances would have no difficulty seeing this.

Once SGT Bergdahl's pleas are placed in their proper context, the government could not and did not prove that a reasonable observer would have been confident that there was no causal relationship between those pleas and the expressed desires of two powerful elected federal officials. Nor can the fact of the pleas or the defense's sentencing submission overcome the point that troubled Judge Ewing: SGT Bergdahl was entitled to both the reality *and the appearance* of a fair and independent clemency review. A repatriated POW whose behavior in prolonged enemy captivity was above reproach, who cooperated fully with investigators without seeking immunity, and who accepted responsibility and pleaded without a pretrial agreement is a viable candidate for clemency.

Given the undisputed facts, the President's immediate denunciation of the sentence, and the CA's opaque denial of relief during the ensuing clemency phase, the

appearance of UCI was sufficient to trigger the government's exacting final-step burden of proof beyond a reasonable doubt. The government never carried that burden.

4. Was Sen. McCain subject to the UCMJ? The government never takes a clear position on this, contenting itself instead with an argument that begins "Assuming that Senator McCain was subject to Article 37(a)." In a footnote, it observes (at 35 n.14) that the military judge found that he retired from the Navy in 1981 "but made no finding as to his pay status." It quotes Art. 2(a)(4), UCMJ, which makes subject to the Code "[r]etired members of a regular component of the armed forces who are entitled to pay."

Citing the Army Court's decision, the government observes that "[a]bsent Senator McCain's status as a retiree, his service in Congress does not subject him to" Art. 37, UCMJ. This is a red herring. Whether or not his status as Ranking Member and then Chairman of the Senate Armed Services Committee, without more, brought him within the ambit of UCI doctrine, he was unquestionably a retired regular. He graduated from the U.S. Naval Academy in 1958 and served continuously on active duty until April 1, 1981, when he was voluntarily retired. *See* Sean Wilentz, *John McCain, United States Senator*, ENCYCLOPÆDIA BRITANNICA, https://www.britannica.com/biography/John-McCain. Naval officers who retire with 20 or more years of active duty (at least 10 as a commissioned officer) are "entitled to" retired

pay. 10 U.S.C. §§ 8323(e), 8333.[4] There is no doubt that he was subject to the Code, including Art. 37(a).[5]

5. The government (at 41-42) takes issue with the Army Court's reliance on R.C.M. 104(a)(1). *See* JA014. As a textual matter, that rule plainly forbade the "disgrace" tweet. Because the Judge Advocate General did not cross-certify the validity of the rule, the government's argument is barred by the law of the case. In any event, it is unpersuasive. The regulatory history, which we presented below in response to questions specified by the Army Court, *see* Appellant's Brief on Specified Issues (filed June 10, 2019), reveals that for 50 years the important constraint imposed by what is now R.C.M. 104(a)(1) applied regardless of whether the official violating it or someone else had convened the particular court-martial. *See* JA118-29. Under settled principles of administrative law usefully addressed by Professors Fissell and

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[4] It makes no difference given the statutory text, but Sen. McCain did receive retired pay. *See* U.S. Senate, Financial Disclosures, Annual Report for Calendar Year 2016, Hon. John McCain (filed May 15, 2017), Pt. 2, No. 1 ($73,488 pension payment from U.S. Navy Finance Center), http://pfds.opensecrets.org/N00006424_2016.pdf.

[5] The government (at 38 n.17) quotes page 44 of our main brief to the effect that SASC's authority is confined to "systemic oversight, appropriation of funds, and the passage of substantive legislation." As our brief noted (at 6), however, SASC also wields confirmation power over commissioned officers. That includes military trial and appellate judges. (Nominations for appointment to this Court of course also come before SASC.)

Paradis as *amici*, the President is bound by the rule until he revokes or amends it.[6] President Trump merely violated it.

6. A remarkable aspect of the government's case is its reliance on the My Lai Massacre case. *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973), *aff'd*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973), a war-crime prosecution, bears no resemblance to this case. It came here as, among other things, a pretrial publicity case, and was decided at a time when UCI doctrine was far less developed than it has become over the intervening decades. It is also readily distinguishable on the facts. President Nixon's initial comment—wrong as it was—about My Lai, is a far cry from the prolonged vilification Mr. Trump directed specifically at SGT Bergdahl as a candidate and ratified after becoming President.[7] Alert to public opinion, President Nixon ultimately took action favorable to 1LT Calley, *see* Rick Perlstein, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 555-57 (2008), while Pres-

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[6] *E.g., Service v. Dulles*, 354 U.S. 363 (1954); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Vitarelli v. Seaton*, 359 U.S. 535 (1959). The military cases are to the same effect. *E.g., United States v. McGraner*, 13 M.J. 408, 414-15 (C.M.A. 1982); *United States v. Dunks*, 1 M.J. 254 (C.M.A. 1976); *United States v. Russo*, 1 M.J. 134, 135 (C.M.A. 1975).

[7] That Sen. McCain and President Trump each focused specifically on SGT Bergdahl's case distinguishes *United States v. Ayers*, 54 M.J. 85 (C.A.A.F. 2000), on which the government also relies (at 23-24).

ident Trump has never changed course with respect to SGT Bergdahl, and, as explained in our main brief (at 14-16, 43), has continued to disparage him by name even during the pendency of appellate review.[8]

7. The government seeks (at 12-13, 45) to derive some benefit from the Statement Regarding Military Justice that the White House Press Office, with the assistance of trial counsel, *see* D App 95 at 11-12, generated in an effort to defuse President Trump's Rose Garden comments. Our main brief explained (at 41-42) that the Statement was generic, never mentioned SGT Bergdahl, and was soon proved to be a sham when the President famously tweeted that the adjudged sentence was a "complete and total disgrace to our Country and to our Military."

8. The government twice (at 44, 52) uses the phrase "purely political" as if that label somehow immunizes what would otherwise be clear UCI. But the obvious

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[8] The Nixon White House was quite aware that presidential statements could constitute UCI. In an April 1, 1971 memorandum to Domestic Affairs Advisor John Ehrlichman and Chief of Staff H. R. Haldeman following 1LT Calley's conviction but before CA action, White House Counsel John Dean advised (at 5): "Any Presidential statement about the specifics of this case would be subject to criticism as an exertion of command influence, especially since there are currently two levels of mandatory review which permit the prerogative of fact finding as well as a review of the legality of the trial proceedings." He further advised (at 6) that "care must be taken that any statement by the President does not indicate a judgment as to the culpability of Lieutenant Calley or any other individuals currently awaiting trial on similar charges." We are submitting a motion for leave to file Mr. Dean's memorandum with this brief.

political motives here were integral to the apparent UCI. The hypothetical observer knew that SGT Bergdahl came home as part of a prisoner exchange carried out by President Obama and that Sen. McCain and President Trump were animated by a shared opposition to President Obama, hoping to depict that exchange as unwise. What better way to do that than to see to SGT Bergdahl's conviction and incarceration? Their efforts gave rise to an appearance of UCI that the government never overcame. The political impulse that inspired those efforts militates *in favor of* rather than, as the government contends, *against* relief. It certainly does nothing to excuse their cavalier treatment of the military justice system.

Absent full-throated condemnation and meaningful relief here, elected officials who see the chance of political gain from meddling in specific courts-martial will feel free to do so in the next case and the ones after that. Affirmance risks transforming the military justice system into an instrument for the achievement of political ends rather than (as Congress has intended and as the Supreme Court eloquently confirmed in *Ortiz v. United States*, 138 S. Ct. 2165, 2176 n.5 (2018)) a serious, independent, impartial judicial institution of which the Nation can be proud. It goes without saying that neither R.C.M. 104(a)(1) nor Article 37 contains a "political motive" exception.

9. The government (at 55; *see also id*. at 15, 51) muddies the waters by suggesting that UCI was the basis for SGT Bergdahl's request that the SJA and convening authority recuse themselves, so as to suggest that it might be sufficient relief simply to send the case back for a new SJA review and CA action. This is quite misleading. The explicit basis for requesting these officers' recusal was not UCI. It was their participation in the spoliation of evidence, JA644 (¶ 3c), JA646 (¶ 4a)—participation that made them material witnesses and as such disqualified from post-trial involvement in the case. JA643, 646-47. UCI was mentioned only as the 12th and final basis on which clemency was warranted, JA644 (¶ 3b), rather than as the basis for recusal. Unfortunately, the President's vilification of SGT Bergdahl and of the military judge casts too dark a shadow over the CA's denial of clemency.

Beyond this, over a decade has elapsed since the events that gave rise to the case; it has been over four years since referral. Given the massive record—much of which is classified—a new SJA review and CA's action, as well as new detailed and/or individual military defense counsel to review the record and prepare a fresh set of R.C.M. 1105 and 1106 submissions, would consume many months. That would be followed—if the findings or current sentence remain—by the detail of new appellate counsel for a second review by the Army Court (where a new panel of non-recused and non-retired judges would need to be assembled). The costs to the government as well as the emotional cost to SGT Bergdahl would be exorbitant, cruel

to him, and impossible to justify. The Court should resolve this case once and for all.

Conclusion

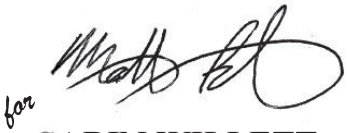
The decision below should be reversed and the charges and specifications dismissed with prejudice. In the alternative, a sentence of No Punishment should be approved or other meaningful relief granted.

Respectfully submitted,

EUGENE R. FIDELL
CAAF Bar No. 13979
Feldesman Tucker Leifer Fidell LLP
1129 20th St., N.W., Ste. 400
Washington, DC 20036
(202) 256-8675 (mobile)
efidell@feldesmantucker.com

STEPHEN A. SALTZBURG
CAAF Bar No. 26415
2000 H St., N.W.
Washington, DC 20052
(202) 994-7089
ssaltz@law.gwu.edu

MATTHEW D. BERNSTEIN
Major, JA
CAAF Bar No. 35859
Defense Appellate Division
(202) 838-7894
matthew.d.bernstein9.mil@mail.mil



SABIN WILLETT
CAAF Bar No. 37214
CHRISTOPHER L. MELENDEZ
CAAF Bar No. 37216
SEAN T. BLIGH
CAAF Bar No. 37215
Morgan, Lewis & Bockius LLP
One Federal St.
Boston, MA 02110-1726
(617) 951-8775
sabin.willett@morganlewis.com

Appellate Defense Counsel

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Matthew D. Bernstein

Certificate of Filing and Service

I certify that I served and filed the foregoing Reply Brief on January 13, 2020, by emailing copies thereof to the Clerk of the Court, the Government Appellate Division, and counsel for all *amici curiae*.

Matthew D. Bernstein