IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	ANSWER TO APPELLANT'S MOTION TO SUPPLEMENT THE RECORD
v.	
Sergeant (E-5) **ROBERT B. BERGDAHL,** United States Army, Appellant	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 that this Court deny Appellant's motion to supplement the record.

Procedural Posture and Facts

On October 16, 2017, a military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of desertion with intent to shirk hazardous duty and misbehavior before the enemy in violation of Articles 85 and 99, Uniform Code of Military Justice, 10 U.S.C. §§ 885, 899 (2012). According to Appellant's motion to supplement the record, the military judge applied for a position as an immigration judge with the Department of Justice (DOJ) on the day of Appellant's guilty plea and included his February 24, 2017, ruling on unlawful command influence (UCI)—relating to President Trump's campaign comments—as a writing sample. On September 28, 2018, well after the military judge

sentenced Appellant, the DOJ published a press release stating that the Attorney General appointed the military judge as an immigration judge.

On December 21, 2018, Appellant filed his opening brief before the Army Court of Criminal Appeals (Army Court). The Army Court affirmed appellant's sentence on July 16, 2019. *United States v. Bergdahl*, 79 M.J. 512 (A. Ct. Crim. App. 2019). This Court affirmed the judgment on August 27, 2019. *United States v. Bergdahl*, No. 19-0406, slip. op. (C.A.A.F. 2020). On the same day that this Court affirmed, Appellant's counsel sent a Freedom of Information Act (FOIA) request to the DOJ for the military judge's employment application.

On September 7, 2020, Appellant timely filed a petition for reconsideration. The petition did not mention the military judge's employment even though the DOJ had issued a press release announcing it in September 2018. Appellant's petition also did not reference his pending FOIA request. Appellee filed a timely answer to the petition on September 11, 2020. Appellant filed an untimely reply to Appellee's answer to the petition on September 18, 2020.[1] *See* Rule 31(c) ("A reply to an answer to a petition may be filed no later than 5 days after the filing of

[1] The Court should consider striking Appellant's untimely reply for failure to comply with Rule 31(c). Appellant neither sought nor received permission from this Court to depart from Rule 31(c). *See* Eugene Fidell, *et al.*, *Guide to the Rules of Prac. and Proc. for the U.S. Court of Appeals for the Armed Forces* § 30.03[1] (19th ed. 2020) ("The Court is particular about compliance with its rules. Leave should be sought, by motion that complies with Rule 30, for any departure.").

an answer"). Appellant's untimely reply did not raise the information contained in his motion to supplement the record. (Reply Br. 10).

Law and Argument

1. The Motion Fails To Establish The Requisite Good Cause To Supplement The Record.

This "Court will normally not consider any facts outside of the record established at the trial and the Court of Criminal Appeals." Rule 30A(a). This Court "is generally unreceptive to motions . . . to supplement the record. *E.g.*, *United States v. Bergdahl*, [79] M.J. [435], No. 19-0406/AR, 2020 CAAF LEXIS 46 (C.A.A.F. Jan. 29, 2020) (mem.); *United States v. Bergdahl*, 79 M.J. 307 (C.A.A.F. 2019) (mem.)." Fidell, *Guide to the Rules* § 30A.03[1] (additional internal citations omitted). This Court may grant an exception to the general rule "only for good cause shown[,]" Rule 30A(a), and denies motions to supplement the record that do not meet the requisite good cause. *United States v. Stefan*, 69 M.J. 256, 257 n.1 (C.A.A.F. 2010).

Here, Appellant fails to establish good cause for this Court to consider the extra-record material he seeks to attach. Although Appellant received the material on September 15, 2020, the DOJ publicized the hiring of the military judge in September 2018, three months prior to Appellant filing his opening brief with the Army Court. Yet, Appellant waited until the day this Court issued its opinion to even seek the material he now wishes to be considered by this Court. Appellant

does not offer good cause for the belated supplementation of the record after the issuance of this Court's opinion. Accordingly, the motion should be denied for failure to establish the requisite good cause.

2. The Proffered Material Will Not Assist This Court To Conduct A Proper Reconsideration.

This Court should deny the motion because the proffered material will not assist this Court to conduct a proper reconsideration. A petition for reconsideration "shall state with particularity the . . . fact which, in the opinion of the party seeking reconsideration, the Court has overlooked or misapprehended . . . ." Rule 32. "Overlook" means to look past, miss, ignore, or excuse. MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/overlook>, (last visited Sep. 21, 2020). "Misapprehend" means to misunderstand. MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/misapprehend>, (last visited Sep. 21, 2020).

The Court neither overlooked nor misapprehended any fact contained in the record at the time it decided this case. Rather, Appellant seeks to use his motion to supplement the record as a vehicle to: 1) introduce extra-record available since at least September 2018 yet not requested or provided for consideration until this Court issued its opinion that denied Appellant relief; and 2) allege an entirely new argument for reconsideration beyond the deadlines prescribed by this Court's rules. *See* Rule 31. In doing so, Appellant seeks to use reconsideration in the precise

manner for which is it not intended: "A motion for reconsideration should not be used as a vehicle to present evidence that was available when the matter was initially adjudicated." *United States v. Luger*, 837 F.3d 870, 875 (8th Cir. 2016) (citations omitted); *see also Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 252 (3d Cir. 2010) (explaining that "'new evidence' for reconsideration purposes does not refer to evidence that a party obtains or submits to the court after an adverse ruling."). Although Appellant declined to request the military judge's employment application for the first twenty-three months after the DOJ publicized his appointment, Appellant received the requested documentation in less than twenty days after his request. Consequently, it is apparent that Appellant could have supplied this information at a far earlier date. Granting Appellant's motion would only incentivize litigants to ignore potential evidence until after the opponent can no longer respond.[2] Simply put, Appellant's failure to previously supply this Court with additional information to consider does not justify further expanding the record with information that he declined to seek for two years for purposes of reconsideration.

[2] Appellant seeks to have this Court consider the additional information contained in the motion "in connection with the petition for reconsideration" (Mot. to Supp. 1), after Appellee already filed its response to the petition. *See Herbert v. Nat'l Academy of Sciences*, 974 F.2d 192, 196 (D.C. Cir. 1992) (explaining that appellate courts decline to consider new arguments raised for the first time in reply briefs because to do so "would be manifestly unfair to the appellee who, under [procedural] rules, has no opportunity for a written response.").

3. The Proffered Material Will Not Change The Outcome.

This Court should deny the motion because the proffered materials would have no impact on the outcome of this case. The military judge's employment application with the DOJ bears no nexus to whether the President's comments placed an "intolerable strain" on the public's perception of the military justice system.[3] *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017). It does not bring into question this Court's conclusion that the military judge was impervious to outside forces, including the President's comments. Although the DOJ is an executive agency, immigration judges—the position for which the military judge applied—are appointed and supervised by the Attorney General, not the President. *See* 8 U.S.C. § 1101(b)(4). Even if the DOJ's status as an executive agency was of import, the materials Appellant seeks to attach shows that the military judge, directly informed this agency that he publicly found the President's actions inappropriate through his submission of his February 24, 2017, ruling on the

[3] Appellant's attempt to equate this case with *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019) is unavailing. *In re Al-Nashiri* addressed a different legal issue—judicial disqualification—than the issue before this Court in this case. The question before this Court is not whether "a reasonable person would question the impartiality of Judge Nance in *Bergdahl*," (Mot. to Supp. 9), but rather whether the comments by President Trump and the late Senator McCain amounted to apparent UCI. Even still, the D.C. Circuit concluded that Judge Spath was disqualified from serving as a Military Commissions judge because he presided over a case in which his potential employer, the DOJ, was a participant; a fact not found in the current case. *Al-Nashiri*, 921 F.3d at 236-37.

President's campaign comments. The ruling highlighted the military judge's belief that the President's campaign comments were "troubling[,]" "disturbing[,]" and "disappointing." (JA 82-84). By no means did the military judge condone the comments in that ruling: "[W]e have a man who eventually became President . . . making conclusive and disparaging comments, while campaigning for election . . . . The Court recognizes the problematic potential created by these facts." (JA 82-84). Rather, the military judge indicated that he would "take special care to ensure the comments by Mr. Trump do not invade the trial." (JA 83).

The military judge's actions between Appellant's guilty plea and sentencing dispel any perception that the military judge was influenced, or appeared to be influenced by President Trump's comments by virtue of his pending DOJ employment application. On the same day the military judge submitted his application—and after having been informed of the President's views by Appellant's previous UCI motion concerning his campaign comments—the military judge acquitted Appellant of the sole portion of the charges that he contested. After the President's October 16, 2017, Rose Garden comment, the military judge offered Appellant the opportunity to withdraw his guilty plea and admitted all of the President's comments *as mitigation* during sentencing. Weeks later, in November 2017, after a seven-hour deliberation, the military judge adjudged a sentence that included a dishonorable discharge and no confinement—

precisely in accordance with Appellant's request and completely in disaccord with the punishment suggested by the President. (R. at 2693-2694, 2701-2703; Appellee Br. 48-49). Eleven months later, despite the military judge's condemnation of the President's comments and issuance of a sentence the President called a "disgrace," he began his employment with the DOJ.

Under these circumstances, the pendency of the military judge's employment application reinforce that he was not influenced by the President's comments—or that there was a perception thereof—and that his commendable judicial independence did not—or appear to—impact his future federal employment prospects. The President's comments would not lead an "objective, disinterested observer, fully informed of all the facts and circumstances," including the military judge's employment application, to "harbor a significant doubt about the fairness of the proceeding[,]" given the unique facts of this case. *Boyce*, 76 M.J. at 249. Appellant's conviction and sentence—including a dishonorable discharge and no confinement—in this case did not appear to be the result of the President's comment's, but was the result only of his guilty plea admitting that he was in fact guilty of the charged offenses and requested sentence of a dishonorable discharge and no confinement. Accordingly, because this information will not affect the outcome in this case, this Court should not take the extraordinary step of

attaching new documents to the record after the issuance of its opinion and the filing of a petition for reconsideration.

CONCLUSION

WHEREFORE, the United States prays that this Honorable Court deny Appellant's motion to supplement the record and determine the petition for reconsideration, if granted, based upon the record on which it decided the appeal.

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Certificate of Compliance with Rule 37(a)

This motion complies with the typeface and type style requirements of Rule 37(a).

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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 23, 2020.

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