IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	REPLY TO AMENDED
	)	ANSWER TO MOTION TO
Appellee,	)	SUPPLEMENT THE RECORD
	)	
v.	)	
	)	Crim. App. Dkt. No.
ROBERT B. BERGDAHL	)	ARMY 20170582
Sergeant (E-5)	)	
U.S. Army,	)	USCA Dkt. No. 19-0406/AR
	)	
Appellant.	)	September 29, 2020

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

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I

SERGEANT BERGDAHL HAS SHOWN GOOD CAUSE

A party moving to supplement must show good cause. C.A.A.F. Rule 30A(a). Sergeant Bergdahl has done so. The documents he obtained under the Freedom of Information Act, 5 U.S.C. § 552, pertain to the informed observer analysis with which the Court has wrestled and which is the subject of the pending petition for reconsideration. Points 1 and 2 of the government's amended answer argue that the FOIA documents should not be considered. Those reasons are unpersuasive.

First, the government suggests that the motion to supplement comes too late. The point is not well taken. The Court's rules set no deadline for such motions. If the government's claim is, in substance, that Sergeant Bergdahl is guilty of laches, that requires a showing of prejudice. *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). The government has not claimed that its ability to respond to the FOIA documents has been compromised in any way by the timing of the motion to supplement. It argues (at 4) that Sergeant Bergdahl has raised "an entirely new argument," but he has simply proffered new evidence in support of a very old one. That evidence bears on the issue on which the Court granted review (and as to which the government bears the burden). That public confidence in the administration of military justice is vital, and that the new evidence bears upon it, establish good cause to supplement

the record. *See United States v. Barry*, 76 M.J. 407 (C.A.A.F. 2017) (mem.) (granting reconsideration and leave to supplement the record in a UCI case), *noted in* EUGENE R. FIDELL & DWIGHT H. SULLIVAN, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES § 30A.03[2], at 315-16 (19th ed. 2020). On the merits, a similar issue, sounding in judicial conflict of interest rather than apparent UCI, is before the Court in another case. *See* Supplement to Petition for Review (Revised), *United States v. Snyder*, No. 20-336/AF (filed Sept. 24, 2020), at 6-7, 31-35. There are presumably other cases with the same issue in one posture or another given the number of military judges who sought and obtained appointment as immigration judges.

Contrary to the implication in its footnote 1, the government has suffered no unfairness. Timing does not seem to have concerned the government: it filed early, *see* C.A.A.F. R. 30(b), 34(a), it does not protest that it needs more time to marshal evidence from the military judge or other percipient witnesses, and it sought no additional time under Rule 33.

Critically, the amended answer is silent as to when the government learned that Judge Nance's representations on the record were incorrect, that he had applied for a position as an immigration judge, or that he had been hired. In the absence of any representations on these matters, much less any supporting evidence, it does not lie in the government's mouth to complain about the timing of our FOIA request.

This is especially true because, if any member of the trial counsel team, the appellate government team, or the Office of The Judge Advocate General of the Army (which deals with retirements among other personnel matters) was aware of Judge Nance's application or hiring, the government had a duty to inform the defense. *It never did.*

Instead, the government says only that Sergeant Bergdahl should have made his FOIA request earlier. But Judge Nance's undisclosed job application wasn't some routine discovery matter. It relates to an issue as to which both the government and the military judge had *an affirmative duty of disclosure*. Sergeant Bergdahl had a right to rely on the military judge's assurances, and should certainly not be penalized for accepting them at face value.

The government's duty to inform the defense is settled law. "[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *See also United States v. Behenna*, 71 M.J. 228, 237-38 (C.A.A.F. 2012) (same). There are three components to a *Brady* violation: the evidence must be favorable to the accused (either exculpatory or impeaching); it must have been suppressed (either willfully or inadvertently); and prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). These standards do not require that the defendant make a request or could have sought the information on his own. The

Supreme Court has firmly rejected the notion that defense counsel should have uncovered *Brady* information, stating that counsel are entitled to rely on the representations of the prosecutor and, more generally, on the prosecutor's constitutional duty of disclosure. *Strickler*, 527 U.S. at 283 n.23, 284. "A rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 688, 695-98 (2004).

The government's *Brady* obligations continued until the convening authority's action. *United States v. Hawkins*, 73 M.J. 605, 612 (Army Ct. Crim. App.), *rev. denied*, 73 M.J. 448 (C.A.A.F. 2014). *Brady* disclosures are especially important after trial where, as here, the investigative resources of the accused are diminished. "[O]nce trial comes, the prosecution may not assume that the defense is still in its investigatory mode." *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001). As the Supreme Court observed in *Banks*, 540 U.S. at 695, "[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."

Judge Nance also had a duty to disclose. His pending application to the Justice Department, the explicit links between that application and this case, his UCI ruling that rested on his claim of invulnerability, and his pecuniary interest in the Justice Department job all mandated disclosure under R.C.M. 902. According to the official Comment to Rule 2.11 of the Code of Judicial Conduct for Army Trial and Appellate

Judges (May 16, 2008), "[a] judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." A failure to disclose "deprive[s] the parties of an adequate foundation for their decisions on whether or not to request recusal" and makes it harder for the military judge to evaluate "those facts crucial to determining whether there was a conflict or appearance of conflict requiring disqualification." *United States v. Quintanilla*, 56 M.J. 37, 79–80 (C.A.A.F. 2001).

The amended answer was not accompanied by any statement from the military judge that might explain the obvious tension between what he said on the record and what he had done. Nor does it shed light on what efforts, if any, the government made, before or after the motion to supplement, to determine who in the Army knew what *and when*. Since the government has (at 6-9) in effect supplemented its answer to the petition for reconsideration, there is no sense in which its ability to respond has been compromised by any delay in submission of the FOIA request that unearthed Judge Nance's job application.

For all these reasons, the government's first two arguments are without merit.

II

THE FOIA DOCUMENTS FURNISH ADDITIONAL GROUNDS FOR CONCLUDING THAT THE GOVERNMENT DID NOT CARRY ITS APPARENT UCI BURDEN OF PROOF

The government's remaining argument is that the FOIA documents "will not change the outcome." That may or may not be true as a predictive matter, but it is not the test. Rules 30A(c) and (d), which concern remands for factfinding and stipulations, respectively, strongly suggest that the test under Rule 30A is whether the proffered matter "*may* affect the Court's resolution of the case" (emphasis added). Nothing in the rule suggests that there is one test for remands and stipulations, but another, harsher one, for all other factfinding.

As Sergeant Bergdahl's motion to supplement explains, the facts and circumstances surrounding Judge Nance's claims that he was impervious to UCI because he was retiring are among the many that would lead an objective observer to harbor a significant doubt about the fairness of the proceedings. *See United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017). They cut against the "no-intolerable-strain" case the government must make beyond a reasonable doubt.

Rather than confront the military judge's inexplicable failure to disclose, the government makes several unpersuasive arguments.

First, it insists (at 6) that an observer would make nothing of the judge's application because immigration judges are appointed and supervised by the Attorney

General rather than by the President. But the Constitution provides for a unitary executive, with the President retaining overall control. The Attorney General is removable by the President with or without cause, as shown by Attorney General Jeff Sessions' removal for having recused himself from certain matters involving the President, as it was his duty to do.[1] The law treats the Attorney General and a handful of other senior officials as the President's *alter ego*. *See, e.g.*, *In re Application for Appointment of Independent Counsel*, 596 F. Supp. 1465, 1470 (E.D.N.Y. 1984), *vacated on other grounds*, 766 F.2d 70 (2d Cir. 1985); *see also Ponzi v. Fessenden*,[2] 258 U.S. 254, 262 (1922) (Taft, C.J.) (Attorney General is "the hand of the President"). Thus, the government's first contention is without merit.

Second, the government claims (at 6-7) that the decision Judge Nance submitted as his writing sample to become an immigration judge was actually critical of President Trump. Despite its softball treatment of the Commander in Chief, that decision was unquestionably adverse to Sergeant Bergdahl. Not only were no charges dismissed, but President Trump remained free to disregard the most fundamental principles of UCI in his Rose Garden ratification and later in the "disgrace" tweet.

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[1] This matter is sufficiently notorious, easily confirmed, and beyond reasonable dispute that the Court can take judicial notice of it. Mil. R. Evid. 201(b).

[2] Yes: *that* Ponzi.

Judge Nance was hired after those events and, notably, after he had denied Sergeant Bergdahl's renewed motion to dismiss. An informed observer would know that he was a commissioned officer on active duty and hence subject to Art. 88, UCMJ, *see* Art. 2(a)(1), UCMJ, and that truth would not have been a defense, *see Manual for Courts-Martial, United States* (2019 ed.), pt. IV, ¶ 14.c., had he employed the harsher language President Trump's UCI deserved.

Third, the government takes solace in the fact that Judge Nance acquitted Sergeant Bergdahl of all but one day of the years-long period of desertion the government alleged in the specification to Charge I. This is a desperate argument. Judge Nance had denied Sergeant Bergdahl's motion in limine concerning duration, deferring the question to the trier of fact. App. Ex. 48. When Sergeant Bergdahl pleaded guilty to a one-day-duration desertion, the government made a perfunctory attempt to prove the longer period. R. at 1678-79, 1706. Because Judge Nance had no choice but to acquit as to that longer period, the partial acquittal he adjudged is no evidence of his independence. As a result, it does not help the government carry its burden.

Fourth, the government insists that Judge Nance's claim that he would take President Trump's comments into account in sentencing does not answer the mail. His denial of the renewed motion to dismiss was incorrect, and, tellingly, he refused, in the face of a specific argument by defense counsel, JA 513, to state separately whatever sentencing discount he was giving in respect of President Trump's latest

UCI. As a result, neither Sergeant Bergdahl, President Trump, this Court, nor the objective observer can ascertain whether the sentence was in fact adjusted. We had cautioned that "[s]ubmerging UCI relief into a sentence blunts the message and thwarts meaningful review," JA 513, but that is precisely what will have happened if the Court accepts this part of the government's claim. Worse yet, it effectively gives Judge Nance credit for awarding UCI relief in a case in which he explicitly found that the government had carried its burden.

Fifth, the government cites (at 7) the fact that Judge Nance deliberated for seven hours. All we know is that court was in recess that long. The record does not reveal how much of that recess was actually spent deliberating, as opposed to going through and/or sending emails, making and answering phone calls, having lunch, checking on his job application, or performing other functions.

Sixth, the government points (at 7-8) to the fact that Sergeant Bergdahl was not sentenced to confinement. An objective observer could nonetheless harbor a significant doubt for all the reasons we have previously explained.

Finally, the government has the chutzpah (at 8) to cite the "disgrace" tweet as somehow assuaging the reasonable observer's doubts. It does no such thing, and the government's imaginative contrary suggestion is perverse. The military judge's failure to grant either of Sergeant Bergdahl's motions to dismiss because of President Trump's words and deeds only emboldened the President to continue to do precisely

as he pleased, to include the "disgrace" tweet, a textbook violation of R.C.M. 104(a)(1) if there ever was one.

Conclusion

For the foregoing reasons and those previously stated, the Court should grant the motion to supplement the record. In light of the record as now supplemented and the resumption of regular hearings, the Court may wish to set the case for rehearing.

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

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Certificate of Filing and Service

I certify that I filed and served the foregoing Reply on September 29, 2020, by emailing copies thereof to the Clerk of the Court, the Government Appellate Division, and the *amici curiae*.

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