IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Sergeant ROBERT B. BERGDAHL U.S. Army, *Appellant*. v. UNITED STATES, *Appellee*.	))))))))))	WRIT-APPEAL PETITION FOR REVIEW OF U.S. ARMY COURT OF CRIMINAL APPEALS OPINION AND ACTION ON PETITION FOR WRIT OF ERROR CORAM NOBIS Crim. App. Misc. Dkt. No. 20200588 USCA Misc. Dkt. No. _____/AR

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

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Preamble

Sergeant Robert B. Bergdahl respectfully prays that the Court reverse the December 11, 2020 opinion and action of the U.S. Army Court of Criminal Appeals denying his petition for a writ of error coram nobis. The Army Court never addressed the merits. Instead, it denied the petition on a single threshold ground: that Sergeant Bergdahl should have raised his claim in the course of Article 66, UCMJ, review. In doing so, it misapplied settled coram nobis jurisprudence.

If the decision below is permitted to stand, accused personnel will be unable to take a military judge's word for critical matters and defense counsel will have to employ the Freedom of Information Act, 5 U.S.C. § 552, to make sure they are not being misled. If they fail to do so, their clients' right to object would be forfeited. No member of the armed forces should ever be penalized for taking a military judge at his word.

It is difficult to imagine a more effective way to undermine confidence in the trial bench or the cordial relations that are not only essential to the efficient administration of justice but have also long been a particular hallmark of American military justice. To invoke such a rule after the fact is especially disturbing and unfair.

This Court should reverse the decision below, grant the writ, and dismiss the charges and specifications with prejudice. This relief should be granted both under

the doctrine of apparent unlawful command influence (UCI) and because Sergeant Bergdahl was denied his Fifth Amendment right to a fair trial.

The record now before the Court includes material evidence that was not before it on plenary review under Article 67(a)(3), UCMJ. That evidence, the decision below, and parties' submissions to the Army Court are included in the Appendix in accordance with C.A.A.F.R. 27(b).

The Army Court's authority over Sergeant Bergdahl's petition rested on the All Writs Act, 28 U.S.C. § 1651. *United States v. Denedo*, 66 M.J. 114, 124 (C.A.A.F. 2008), *aff'd & remanded*, 556 U.S. 904, 914-15 (2009). This Court has authority over his writ-appeal petition under the same statute. *See* C.A.A.F.R. 4(b)(2).

I

History of the Case

In 2017, a military judge sitting as a general court-martial convicted Sergeant Bergdahl, in accordance with his pleas, of one specification of short desertion in violation of Article 85, UCMJ, and one specification of misconduct before the enemy in violation of Article 99(3), UCMJ. The offenses arose from a single unauthorized absence in Afghanistan on June 30, 2009. There was no pretrial agreement. Sergeant Bergdahl was sentenced to a dishonorable discharge, reduction to E-1, and forfeiture of $10,000 pay. The convening authority approved the findings

and sentence. The Army Court affirmed. *United States v. Bergdahl*, 79 M.J. 512 (A. Ct. Crim. App. 2019). Judge Ewing would have granted partial relief based on one aspect of Sergeant Bergdahl's contention that the case came within the doctrine of apparent UCI. *Id*. at 531-34.

This Court granted review, *United States v. Bergdahl*, 79 M.J. 307 (C.A.A.F. 2019) (mem.), and on August 27, 2020 affirmed by a vote of 3-2. *United States v. Bergdahl*, 80 M.J. 230 (C.A.A.F. 2020). The Court was closely divided as to whether the government had proved beyond a reasonable doubt that a disinterested member of the general public, fully informed of the facts and circumstances, would harbor a significant doubt as to the fairness of the proceedings. *See generally United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017). It noted that the issue was a close one, requiring "long consideration." 80 M.J. at 239-40. Chief Judge Stucky and Judge Sparks dissented. *Id*. at 244, 245.

Sergeant Bergdahl filed a timely petition for reconsideration and, based on documents obtained under FOIA, a motion to supplement the record. The Court denied both "without prejudice to [his] right to file a writ of error coram nobis with the appropriate court." *United States v. Bergdahl*, No. 19-0406/AR, 2020 CAAF LEXIS 565 (C.A.A.F. Oct. 14, 2020) (order).

Sergeant Bergdahl filed a petition for a writ of error coram nobis with the Army Court on October 23, 2020. He also moved to recuse Judge Elizabeth A.

Walker, who had been assigned to the panel when Judge Deidra J. Fleming recused. The Army Court denied the motion without explanation on October 28, 2020 and denied the petition without oral argument on December 11, 2020. *Bergdahl v. United States*, Dkt. No. ARMY MISC 20200588, 2020 WL 7316058 (A. Ct. Crim. App. Dec. 11, 2020). It never addressed most of the six threshold criteria or the merits of Sergeant Bergdahl's apparent UCI and fair-trial claims. Rather, invoking only the third threshold criterion (and perhaps the fourth, *see* p. 12 *infra*), it found that he had not presented "a sound reason why he failed to pursue [his] claim while his case was pending Article 66 review" at the Army Court." *Id*. at *3.

This writ-appeal petition is timely filed. C.A.A.F.R. 19(e).

II

Reasons Relief Was Not Sought Below [inapplicable]

III

Relief Sought

The charges and specifications should be dismissed with prejudice.

IV

Issues Presented

A. WHETHER THE PETITION SATISFIES THE THRESHOLD CRITERIA FOR A WRIT OF ERROR CORAM NOBIS

B. WHETHER SERGEANT BERGDAHL HAS A CLEAR AND INDISPUTABLE RIGHT TO THE WRIT

V

Statement of Facts

1. Colonel Jeffery R. Nance was the military judge. On January 12, 2016, in response to *voir dire* questions by the defense, he stated that he had a mandatory retirement date of November 2018 and was unaware of any matter which might be grounds for challenging him. R. at 13-14.

2. On October 16, 2017, Judge Nance accepted Sergeant Bergdahl's guilty pleas. R. at 1676.

3. On October 16, 2017, President Trump made remarks in the Rose Garden about Sergeant Bergdahl and this court-martial. Those remarks ratified the many disparaging comments he had made about Sergeant Bergdahl before the 2017 Inauguration. 80 M.J. at 238.

4. On that same day, October 16, 2017, Judge Nance applied to be a Department of Justice immigration judge. His application highlighted the fact that he was the "presiding judge in U.S. v. SGT Robert Bergdahl . . . [and] [s]uffice it to say, it has received significant national and international media attention and involves many complex issues." The sole writing sample he submitted was his February 24, 2017 ruling denying Sergeant Bergdahl's January 20, 2017 apparent UCI motion concerning President Trump. AE 36; D APP 56.

5. The Justice Department is an executive department. As such, it falls under

the President's control and overall supervision. The Executive Office of Immigration Review hires attorneys to serve as immigration judges. These hiring decisions are discretionary, and appointments are made personally by the Attorney General. He is a member of the Cabinet, serves at the pleasure of the President, and advises the President on all matters arising under the laws of the United States, 28 U.S.C. § 511, including matters of military justice such as changes to the *Manual for Courts-Martial*, *see* Exec. Order No. 11,030; 28 C.F.R. § 0.25(b), and clemency. *See* Margaret Colgate Love, *War Crimes, Pardons and the Attorney General*, LAWFARE, May 22, 2019.

6. Immigration judges are management officials. *U.S. Dep't of Justice, Exec. Off. for Immigration Review v. Nat'l Ass'n of Immigration Judges*, 71 FLRA No. 207, 1046, at 1049 (Nov. 2, 2020), *available at* https://www.flra.gov/decisions/authority-decisions?volume=71&issuancenumber=207.

7. Immigration has been one of President Trump's signature issues throughout his term of office. It is an issue with which he is personally identified.

8. On October 17, 2017, Sergeant Bergdahl filed a renewed motion to dismiss based on President Trump's ratification of his pre-Inauguration statements vilifying Sergeant Bergdahl. D APP 108.

9. Judge Nance conducted a hearing on the renewed motion on October 23,

2017. In that hearing, trial counsel was afforded an opportunity to conduct further *voir dire* of the military judge. Judge Nance stated: "I'm what's referred to as a terminal Colonel, which means I'm not going anywhere but the retirement pastures. And that's in almost a year from now." R. at 1724. Regarding his susceptibility to outside influence, he said: "So that's a long way of saying, 'No, no effect on me whatsoever.' I don't expect to go anywhere but back home as soon as the Army is done with me in a year." *Id.* He did not disclose that, only a week before, he had applied for a position with the Justice Department; that his application had highlighted his role in Sergeant Bergdahl's case; or that he had made his earlier rejection of the January 20, 2017 motion to dismiss based on President Trump's actions the centerpiece of his application.

10. On October 30, 2017, Judge Nance denied the renewed motion to dismiss. AE 65. He found as a fact that while Sergeant Bergdahl had elected trial by judge alone, and that President Trump is the commander in chief over all of the military, including himself, "I have no hope for or ambition for promotion beyond my current rank. . . . I am completely unaffected by any opinions President Trump may have about SGT Bergdahl. . . . As far as I know, President Trump has never said anything about me as a military judge or otherwise." *Id*. ¶ 2(i). He concluded that the government had met its evidentiary burden of proving beyond a reasonable doubt that President Trump's statements did not create an intolerable strain on public

confidence in the military justice system and that an objective, informed observer would not harbor a significant doubt about the fairness of the proceedings. *Id*. ¶ 6(c). In support of this conclusion, Judge Nance wrote: "The evidence establishes beyond a reasonable doubt that I … hold no fear of any repercussions from anyone if they do not agree with my sentence in this case." *Id*.

11. Judge Nance sentenced Sergeant Bergdahl on November 3, 2017, R. at 2704, and authenticated the record on April 28, 2018.

12. Judge Nance never disclosed to the defense that he had applied to become an immigration judge.

13. Sometime between October 16, 2017 and September 28, 2018 the Justice Department hired Judge Nance. A September 28, 2018 press release listed new hires and stated in part, "Attorney General Jeff Sessions appointed Jeffery R. Nance to begin hearing cases in October 2018."

14. Judge Nance retired from the Army on November 1, 2018.

15. Sergeant Bergdahl's counsel received Judge Nance's application from the Justice Department on September 15, 2020.

16. In the Army Court, appellee submitted the Justice Department's job announcement, but nothing from Judge Nance or anyone else regarding what the Army, to include the numerous judge advocates on the prosecution team, the TJAG and DJAG, the Criminal Law Division, and the Trial Judiciary, knew, and when,

about his post-retirement plans and his efforts to obtain a job with the Justice Department.

VI

Reasons Why The Writ Should Issue

Introduction

The Army Court denied Sergeant Bergdahl's petition solely on the ground that he failed to present a sound reason for not pursuing his claims when the case was before it for Article 66, UCMJ, review. It asserted that it therefore "need not decide the five remaining *coram nobis* writ's criteria," 2020 WL 7316058 at *5 n.7, or "address the merits of his petition." *Id*. at *3 n.4.

As a result, contrary to the purposes of Rule 4(b)(1)'s exhaustion requirement,[1] this Court will not have the benefit of the Army Court's analysis.

[1] "Even if relief is denied by the Court of Criminal Appeals, their consideration may help to frame the issues and develop a record. Both of these factors will facilitate efficient and intelligent review by the Court of Appeals for the Armed Forces." Proposed Changes to U.S. Court of Appeals for the Armed Forces Rules, 60 Fed. Reg. 4893, 4895 (Jan. 25, 1995) (Rules Advisory Comm. report on proposed amendment of C.A.A.F.R. 4).

Because that court's decision is in any event not entitled to deference,[2] we have not sought a remand on the basis of Judge Walker's unexplained failure to recuse.[3]

Both this Court and the Army Court decided Sergeant Bergdahl's case on direct review based on an incomplete factual record. Because the military judge omitted critical information that called into question the basis for his claim to be impervious to UCI, both courts were denied a full opportunity to conduct the required holistic review on what all will agree is the central tenet of American military jurisprudence. Having afforded Sergeant Bergdahl the opportunity to seek coram nobis, the Court should now examine the merits of his UCI claim (as well as his due process claim) in light of the expanded body of evidence.

A

THE PETITION SATISFIES THE THRESHOLD CRITERIA

The threshold criteria for writs of error coram nobis are set forth in *Denedo*, 66 M.J. at 126:

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[2] On a writ-appeal petition, this Court makes its own determination as to whether relief should be granted, rather than reviewing the Court of Criminal Appeals' decision for abuse of discretion. *See* Brief for the United States in Opposition, 2020 WL 1433220, *Richards v. Barrett*, 140 S. Ct. 2760 (2020) (mem.), at 12-13 & n.5 (collecting cases).

[3] She is married to the chief of the Criminal Law Division, a part of the Office of the Judge Advocate General with pervasive military justice responsibilities. *See* AR 27-10, Legal Services: Military Justice *passim* (20 Nov 2020). A reasonable member of the general public would find the circumstances too close for comfort, especially because the underlying merits themselves squarely implicate R.C.M. 902.

> (1) the alleged error is of the most fundamental character; (2) no remedy other than coram nobis is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist.

Sergeant Bergdahl's petition meets these criteria.

1. The First Criterion

The errors complained of are unquestionably of "the most fundamental character." The case implicates not only the right to an impartial judge and the right to conduct *voir dire* to ensure that the judge is impartial, but also the high interest in ensuring public confidence in the administration of justice. That interest is reflected both in the doctrine of apparent UCI and in the broader teaching of the third *Liljeberg* factor. *See Liljeberg v. Health Svcs. Acquisition Corp*., 486 U.S. 847, 862 (1988). As Judge Sparks wrote, "the facts of this case raise a serious due process issue." 80 M.J. at 246 (Sparks, J., concurring in part and dissenting in part). If questions such as these are not "of the most fundamental character," nothing is.

2. The Second Criterion

No remedy other than coram nobis is available to rectify the consequences of the error.

3. The Third and Fourth Criteria

Valid reasons exist for not seeking relief earlier. Until the defense received a copy of Judge Nance's job application from the Justice Department on September 15, 2020, there was no basis for seeking relief. To have raised the issue without a basis would have been unfair to Judge Nance and an abuse of the appellate process. We brought the matter to this Court's attention three days after receiving his job application. This is the short and dispositive answer to the Army Court's rationale.

On close reading, however, that rationale, while cast in terms of the third criterion, was actually an effort to invoke the fourth: whether the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the "original judgment." Here the decision below fares no better.

The "original judgment" referred to in *Denedo*, 66 M.J. at 127, is the court-martial. During the court-martial, Sergeant Bergdahl had every reason to take Judge Nance at his word when he said he assured that he was heading to retirement pastures and going back home, even though he had secretly applied for a job as an immigration judge. He had had a long career on the bench. He was a senior officer with a good reputation. Even when the defense later became aware he had been hired as an immigration judge, there was no way to know he had applied for that or any other job *during the trial*. Until we received a response to our FOIA request, there was, given his representations, no reason to imagine no reason to imagine that his

representations used to justify his denial of the renewed UCI motion were false. And until appellee filed the Justice Department's job announcement at the Army Court, the defense had no reason to know when the application process had either begun or ended. Our FOIA request was filed out of an abundance of caution and we were shocked by the documents we received.

Parties should not be encouraged to investigate the personal affairs of military judges. *See United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013). By appellee's own account below, "[t]he government is unaware of an unending duty to independently investigate every facet of a military judge's life." Gov't Coram Nobis Ans. at 7 n.5. This disposes of any claim that Sergeant Bergdahl did not exercise reasonable diligence. Neither the government nor the Army Court cited any authority for the proposition that a litigant whose case is still on direct appellate review must not only assume that a respected sitting judge has been disingenuous but also to proceed on that premise to invoke FOIA in order to be deemed to have exercised reasonable diligence for purposes of a *possible* coram nobis petition sometime in the future. Surely this Court does not want to impose upon defense counsel in every court-martial a duty to file FOIA requests regarding the military judge where, as here, the judge says things that are plausible, if self-serving.[4] It should certainly not do so

[4] Such a duty would extend to the appellate military judges whom the Army exempts from *voir dire*. *See* Code of Judicial Conduct for Army Trial and Appellate Judges R. 2.11 [cmt.] (May 16, 2008). That exemption is open to question because it is in

when those things prove either untrue or misleading after having lulled the accused and defense counsel into a false sense of security.

The sole authority the Army Court invoked in support of its conclusion that Sergeant Bergdahl's petition failed one of the threshold criteria is *United States v. Kates*, ACM S32018, 2014 CCA LEXIS 360 (A.F. Ct. Crim. App. June 17, 2014) (order), *writ-appeal pet. denied*, 73 M.J. 456 (C.A.A.F. 2014). *See* 2020 WL 7316058 at *3-4.

Kates is inapposite. The Air Force Court held that A1C Kates was chargeable with knowledge that a specific member of that court, Laurence M. Soybel, who had sat on the *Kates* C.C.A. panel, had been appointed in violation of the Appointments Clause. U.S. Const. art. II, § 2, cl. 2.

Here, in contrast, the military judge known to have applied for appointment as an immigration judge was not Judge Nance, but Air Force Chief Judge Vance Spath, who was the trial judge in the *Al-Nashiri* military commission. Sergeant Bergdahl did not know there was a potential issue as to Judge Nance and had no reason, even after it became known that he too had been hired by the Justice Department, to believe—contrary to his "I'm-retiring" response to the renewed UCI motion—that *he had applied before Sergeant Bergdahl's trial concluded*.

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tension with R.C.M. 902(d)(2). *See United States v. Williams*, 23 M.J. 362 (C.M.A. 1987); *United States v. Kelson*, 3 M.J. 139 (C.M.A. 1977).

The Army Court insists (at *8) that "the issue of the military judge's employment as an immigration judge was a known appellate issue at either the date of the EOIR's press release [September 28, 2018], or at least when Al-Nashiri submitted his pleadings challenging the judge in his case." Not so. It was a "known appellate issue" *as to Judge Spath*,[5] but it was emphatically not one *as to Judge Nance*, since no information had become public as to *when* he had applied for a job as an immigration judge until we obtained his application package. It was in no way unreasonable for Sergeant Bergdahl to continue to assume that Judge Nance had been truthful and forthcoming in his retirement comments. For all Sergeant Bergdahl knew, and taking Judge Nance at his word, the judge could have applied after the trial.

Even if the "original judgment" were deemed to be the convening authority's action on June 4, 2018, a person in Sergeant Bergdahl's position would still have had no reason to inquire into whether Judge Nance had applied for a job in 2017 or

[5] The Army Court correctly notes (at *4 n.6) that counsel for Sergeant Bergdahl filed an *amicus* brief in *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019), on behalf of the Ethics Bureau at Yale (EBaY). Neither that brief, filed on November 14, 2018, nor the District of Columbia Circuit's decision the next year makes any reference to Judge Nance. *See* Brief of the Ethics Bureau at Yale as Amicus Curiae in Support of Petitioner's Petition for a Writ of Mandamus and Prohibition, *In re Al-Nashiri*, 2018 WL 5994080 (D.C. Cir. 2019). At the time that brief was written, counsel was unaware that Judge Nance had become an immigration judge. His employment was never an issue in *Al-Nashiri*.

to doubt the accuracy of his statements in 2017 about his future plans as buttressing for his claim to immunity from presidential UCI. The press release announcing his hiring did not come out until September 28, 2018, months after the convening authority action. Sergeant Bergdahl had no reason to monitor Justice Department press releases. The Department's process for hiring Judge Nance was conducted in private. Neither he nor anyone else disclosed it to the defense. Sergeant Bergdahl had no reason—and certainly no duty—to go on a fishing expedition into the judge's private business.

What is more, even if knowledge of the press release were imputed to Sergeant Bergdahl as of its date of issuance, his submission of a FOIA request on August 27, 2020—less than two years later—is not even close to the kind of delay that precludes a writ of error coram nobis. And in any event, that is not the proper starting point for gauging diligence. *Al-Nashiri* was decided on April 16, 2019. Sergeant Bergdahl submitted his FOIA request 16 months later and brought the fruits of that request to this Court's attention within three days of receiving them.

If the Army Court's decision were upheld, the period of delay deemed excessive would be, with a single questionable exception,[6] the shortest on record.

[6] The exception is *Roy v. United States*, 2014 CCA LEXIS 364 (A.F. Ct. Crim. App. June 17, 2014). The Appointments Clause ruling that prompted Airman Roy to seek coram nobis, *United States v. Janssen*, 73 M.J 221 (C.A.A.F. 2014), was issued on April 15, 2014. The opinion does not reveal when he filed his petition, but the decision itself came down only two months later, on June 17, 2014. Whether

See, e.g., Gray v. United States, 76 M.J. 579, 588-89 (A. Ct. Crim. App.) (coram nobis petition *held* untimely when the issue was ripe 16 years earlier and a jurisdictional question had been settled for over five years), *app. dismissed for lack of jurisdiction*, 77 M.J. 5 (C.A.A.F. 2017), *cert. denied*, 138 S. Ct. 2709 (2018); *Willenbring v. McCarthy*, ARMY MISC 20200430, slip op. at 3 n.3 (A. Ct. Crim. App. Oct. 26, 2020) (coram nobis petition *held* untimely when filed 18 months after denial of petition for review and more than two years after pertinent ruling), *writ-app. pet. filed*, No. 21-0056/AR, 2020 WL 7065228 (C.A.A.F. Nov. 16, 2020).[7]

The civilian federal cases are instructive. *See* Art. 36(a), UCMJ. In *Blanton v. United States*, 94 F.3d 227, 231-32 (6th Cir. 1996), the Sixth Circuit held that "[t]hree years was not an unduly long delay." In granting coram nobis in *United States v. Jackson*, 371 F. Supp.2d 257, 265 (E.D. Va. 2019), Judge Ellis described a 17-month delay as "a reasonably short time." When coram nobis is denied on delay grounds, far longer periods are typical.[8] The Court should reject any effort to impose,

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diligence is calculated on that basis, or as the Air Force Court did, on the extreme basis that he should have raised the issue at this in the three weeks between Mr. Soybel's defective appointment and when he filed his petition for a grant of review, *Roy*, *supra*, at *9, the case—which has never been cited by any court—is a clear and serious outlier and the delay part of its rationale is unsound. The Air Force Court's "Special Panel" did well to moot the issue.

[7] *Willenbring* and *Gray* are also distinguishable because, unlike this case, they were no longer on direct appellate review.

[8] For example, in *United States v. Durrani*, 294 F. Supp.2d 204, 213-15 (D. Conn. 2003), *aff'd*, 115 Fed. Appx. 500 (2d Cir. 2004), Judge Underhill found that a

especially after the fact, a harsher standard for delay than the overall pattern in the federal cases supports.

Even if the Court were to find unreasonable delay, any claim that Sergeant Bergdahl had not met the threshold criterion fails because appellee has never even claimed it has been prejudiced by delay. Laches is an affirmative equitable defense in coram nobis proceedings. *Johnson v. United States*, 49 M.J. 569, 573-74 (N-M. Ct. Crim. App. 1998)). Like laches generally, coram nobis requires a showing of prejudice. *Id.*; *Jackson, supra*, 371 F. Supp.2d at 265 (noting that the government "has not identified any evidence the government was unable to produce" and "was fully able to oppose defendant's *coram nobis* petition"). The same is true here.

Sergeant Bergdahl did not unreasonably delay and, even if he did, appellee was not prejudiced. It would be particularly unconscionable to rule that he had unreasonably delayed while permitting appellee to remain silent about whether and when those with a duty to disclose learned of what Judge Nance had withheld from the defense. Under AR 27-10, Legal Services: Military Justice ¶ 5-68 (20 Nov

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petitioner's "tremendous delay" was excessive where it could be viewed as having lasted six, seven, or 10 years. The shortest unacceptable delay instance he found was three years, or half again as long as the worst-case delay here. Others ran from four years and eight months all the way up to 15 years. The Second Circuit treated Durrani's as a 10-year delay. 115 Fed. Appx. at *503. *Rossini v. United States*, 2014 WL 5280531, at *4 (D.D.C. 2014), found excessive delay where the petition was not filed until 2014, even though the grounds had been apparent for five years.

2020),[9] Judge Advocate Legal Service personnel have a duty to report evidence that might affect the findings or sentence. Months ago, we questioned who in the Army knew what, and when, about Judge Nance's job application. *See* Reply to Amended Answer to Motion to Supplement the Record at 3-5. Appellee's silence on this score has been deafening. It never submitted anything from Judge Nance or anyone else who had a reporting obligation under either *Brady v. Maryland*, 373 U.S. 83 (1963), or AR 27-10.

4. The Fifth Criterion

The petition does not seek to reevaluate the previously considered evidence or legal issues. Rather, as to the apparent UCI claim, there is new evidence. That evidence must be considered in determining *on the augmented record as a whole* whether an intolerable strain has been placed on public confidence. That whole-record review has not yet been conducted. As to the fair-trial claim, that issue has not previously been addressed by the Court. The fifth threshold criterion is therefore satisfied.

5. The Sixth Criterion

The sixth criterion is inapposite because Sergeant Bergdahl was not sentenced to confinement. The consequences of his conviction persist since he has forfeited

[9] The comparable provision in the May 11, 2016 edition of AR 27-10 was ¶ 5-51.

$10,000 and been reduced to E-1, will receive a highly stigmatizing dishonorable discharge, and will be ineligible for all benefits administered by the Department of Veterans Affairs. 80 M.J. at 243.

The writ-appeal petition calls upon the Court to consider the *incremental* effect of the newly obtained information on whether it remains the case, as the Court previously held by a 3-2 vote, that there is proof beyond a reasonable doubt that a disinterested, informed member of the public would not harbor a significant doubt as to the fairness of the proceedings. It also calls upon the Court to address whether, in light of the new evidence, Sergeant Bergdahl was denied his Fifth Amendment due process right to a fair trial.

B

SERGEANT BERGDAHL HAS A CLEAR
AND INDISPUTABLE RIGHT TO THE WRIT

A party seeking a writ of error coram nobis must have a clear and indisputable right to the writ. *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380–81 (2004). Sergeant Bergdahl has such a right for two reasons. These reflect distinct legal claims but arise from a common nucleus of operative fact.

First and foremost, the military judge failed to abide by the disclosure requirements of R.C.M. 902(a) and the Rule 2.11 of the Army's Code of Judicial Conduct. Worse yet, he affirmatively misled the defense in a way that thwarted Sergeant Bergdahl's ability to conduct *voir dire* that, had the judge's job application

been known, we certainly would have exercised. Indeed, it would have been derelict not to have done so. The undisputed facts make this an open-and-shut matter.

A second aspect of the case is also compelling: the additional information, when added to the matters this Court imputed to the reasonable observer, plainly affects the UCI balance in Sergeant Bergdahl's favor. That information is sufficiently salient that what was previously a "close case" is no longer close at all.

Both here and in the Army Court, appellee cited Judge Nance's representations as evidence of his imperviousness to UCI (page 30 of its April 2, 2019 brief to the Army Court; page 13 of its January 3, 2020 brief to this Court). The new evidence not only reduces the overall evidence on which the government relied in attempting to carry its high burden of proof, but in fact provides an additional data point that—along with everything else—would lead a reasonable member of the general public to harbor a significant doubt about the fairness of the proceedings. *The new evidence is thus doubly inimical to appellee's UCI defense: it both weakens appellee's case and strengthens Sergeant Bergdahl's*.

Where, as with apparent UCI, the burden is on the government to prove a matter beyond a reasonable doubt, even a modest change in the factual record shatters any prior evaluation. Here, the change in the evidence is not modest; it is devastating because it entails a plain violation of both a governing *Manual* provision and an equally binding Army rule of judicial conduct.

Al-Nashiri is a compelling precedent. Appellee relied below on *United States v. Snyder*, 2020 CCA LEXIS 117 (A.F. Ct. Crim. App. Apr. 15, 2020), *pet. denied*, No. 20-0336/AF, 2020 CAAF LEXIS 628 (C.A.A.F. Nov. 13, 2020), as a basis for limiting *Al-Nashiri* to military commissions. That claim was misplaced.

Judges Spath and Nance were members of the same pool of military judges. It makes no difference that the one (a sister service's Chief Military Judge) was presiding over a military commission while the other was presiding over a general court-martial. And in *Snyder*, as in *Al-Nashiri*, there was no suggestion that the military judge had affirmatively misled the defense. *See* 2020 CCA LEXIS 117 at *55-63.

The Air Force Court purported to distinguish *Al-Nashiri* on the ground that "[t]here is not reason to believe that a DoJ hiring official would hear about [a ruling that implicated DOJ because it concerned SORNA] would be pleased or displeased, or that Judge Spath believed a DoJ hiring official would be aware of his ruling or that it would be any matter of consequence." *Id*. at *61. Here, in contrast, Judge Nance not only highlighted his role in *this specific high-profile case*, but attached as his one writing sample a ruling that just happened to concern the very official to whom the Attorney General reports. Thus, the Air Force Court's decision rested on a distinction that makes *Al-Nashiri* more, rather than less, pertinent here.

Plainly, there are distinctions, but this remains a stronger case than *Al-Nashiri*. Judge Spath had not made the kind of misleading statements Judge Nance put on the record in claiming to be impervious to presidential influence. This affirmatively lulled the defense into a false sense of security and deprived Sergeant Bergdahl of key information needed to recognize the need for (and to seek an opportunity to conduct) additional focused *voir dire* of the judge. If, as the District of Columbia Circuit unanimously held, Al-Nashiri had a clear and indisputable right to relief, so does Sergeant Bergdahl.

We address the apparent UCI issue first, and then the due process claim. Sergeant Bergdahl is entitled to prevail on each.

1

In Light Of Judge Nance's Failure To Disclose His Job Application, Together With The Matters Previously Considered By This Court, The Government Did Not Carry Its UCI Burden Of Proof

When additional information that bears on whether a disinterested, objective, and fully informed member of the general public would harbor a significant doubt as to the fairness of the proceedings, this Court may revisit that issue and determine that the record, when supplemented with the new evidence and *taken as a whole*, does not satisfy the requirement of proof beyond a reasonable doubt.

The Court plainly struggled with whether the government had carried its burden. The additional facts concerning Judge Nance's undisclosed job application,

coupled with his disingenuous account of his post-retirement plans as an explicit basis for denying Sergeant Bergdahl's renewed UCI motion, are substantial evidence that, taken together with everything that had already made the UCI question such a close one, plainly raises a reasonable doubt.

A pivotal portion of the Court's decision on direct review relied on Judge Nance's apparent independence and immunity from outside influence:

> Thus, an objective, disinterested observer would conclude that *rather than being swayed by outside forces, the military judge was notably impervious to them*. Indeed, it can be said that this result—whether one agrees with it or not—stands as a testament to the strength and *independence of the military justice system*. Therefore, assertions of an appearance of unlawful command influence are once again unavailing.

80 M.J. at 244 (emphasis added).

In light of the documents the parties put before the Army Court and that are now before this Court, an objective observer apprised of all of the facts and circumstances would know that in the middle of Sergeant Bergdahl's trial Judge Nance submitted a job application for a management position in an agency of the Justice Department that was specifically concerned with one of President Trump's signature issues. Judge Nance denied the renewed UCI motion based on his personal assurance that he was immune to improper influence. These facts must be considered in determining whether the government carried its evidentiary burden with respect to Sergeant Bergdahl's apparent UCI claim.

A reasonable member of the public would harbor a significant doubt about the

fairness of the proceedings if she knew that Judge Nance had (1) concealed his DOJ job application from the defense, (2) affirmatively stated that he was UCI-proof because he was fixing to go home and retire, and (3) attached as his sole writing sample–plucked by him from the hundreds he surely penned in the more than 500 cases he tried over the course of his 12 years on the bench–the only one that happened to reject a claim of presidential UCI leveled against the then-incumbent.

Applying the same expansive standard of imputation that the Court previously applied, the disinterested observer would also know that a military judge should "disqualify himself or herself in any proceedings in which that military judge's impartiality might reasonably be questioned," R.C.M. 902(a), and that Judge Nance failed to disclose information that would have led to midstream *voir dire* and could have led to recusal. This imputed knowledge precludes a finding that the government carried its burden.

Mere nondisclosure of the job application and the telling choice of a writing sample would certainly raise a question. The problem goes deeper, however. Judge Nance actively buttressed his denial of the renewed motion to dismiss with the claim that as a retiring colonel he was immune to improper influence. "I'm what's referred to as a terminal Colonel, which means I'm not going anywhere but the retirement pastures. And that's in almost a year from now." R. at 1724. Regarding his susceptibility to outside influence, he said: "So that's a long way of saying, 'No, no

effect on me whatsoever.' I don't expect to go anywhere but back home as soon as the Army is done with me in a year." *Id.* When he made those statements in open court, the ink was barely dry on the job application he had filed only days before. The reasonable observer would have great difficulty reconciling Judge Nance's words and deeds.

The Court should determine, on the basis of the entire record, that the government has not carried its burden, that the totality of the circumstances impose an intolerable strain on public confidence, and that the charges and specifications should be dismissed with prejudice. Only such relief will vindicate the strong interest in fostering public confidence in the administration of military justice and deter similar conduct in the future.

2

Apparent UCI Aside, Judge Nance's Failure To Disclose His Job Application Denied Sergeant Bergdahl A Fair Trial

Judge Nance had a duty to disclose. His pending application to the Justice Department, the explicit links between that application and this case, his claim of invulnerability, and his pecuniary interest in the job for which he had secretly applied mandated disclosure under R.C.M. 902(a).[10] A failure to disclose "deprive[s] the

[10] *See also* Code of Judicial Conduct, *supra* note 4, R. 2.11 [cmt.] ("[a] judge should disclose on the record information that the judge believes the parties or their lawyers

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).

By failing to disclose his job application while claiming that he was impervious to UCI because he was retiring, Judge Nance deprived Sergeant Bergdahl of the opportunity to conduct additional *voir dire*, seek recusal, intelligently reconsider forum selection, and make an informed decision as to how to plead. All of this was prejudicial.

Judge Nance had a financial interest in post-retirement employment at the Justice.[11] In *Tumey*, Chief Justice Taft wrote:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.

273 U.S. at 532. Judge Nance should therefore have disclosed the pendency of his job application. Failing to do so deprived Sergeant Bergdahl of a fair trial.

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might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.")

[11] That his pecuniary interest was undisclosed makes this an *a fortiori* case to *Tumey v. Ohio*, 273 U.S. 510 (1927). There a litigant would have had notice that the judge was sharing in the fines because it was right there for all to see in the village ordinance. *Id*. at 518-20.

Whether analyzed under R.C.M. 902(a) or under the "much broader" scope of the third *Liljeberg* factor, Sergeant Bergdahl's court-martial can only be sustained if "one can say *with certainty* that a reasonable person knowing the entire record would have confidence in the judicial process." *United States v. Lopez*, 2020 CCA LEXIS 161 at *12-13 (A. Ct. Crim. App. May 11, 2020) (emphasis added). That certainty is impossible on the facts of this case.

As with the apparent UCI issue addressed in Point A, the proper remedy is dismissal with prejudice. The Court may enter such an order in the interests of justice. *E.g., United States v. Hilton*, 33 M.J. 393, 394 (C.M.A. 1991).

The offenses occurred 11 and a half years ago. The misconduct was a result of "good, albeit misguided, motives," rather than ill intent. 80 M.J. at 243; *see also id*. at 232. Sergeant Bergdahl was held captive by the enemy for five years under "abominable" and "brutal" conditions. *Id*. at 232, 243. He behaved courageously in captivity, including repeated escape attempts leading to even more brutal treatment. R. at 2164-66, 2170-77, 2193-2210, 2224-2226. He suffers from medical and psychological ailments as a result. R. at 2495-97, 2505, 2510-2514. His life has been on hold since his return from captivity six and one-half years ago. He had no prior disciplinary record. His enlistment would normally have expired long ago. *See United States v. King*, 5 M.J. 1040 (C.M.A. 1976) (mem.).

Further proceedings would be costly, time-consuming, and (for Sergeant Bergdahl) excruciating. Moreover, since he pleaded without the protection of a pre-trial agreement, such proceedings could not produce a more severe sentence. R.C.M. 810(d)(1) (2012 ed.); Art. 63, UCMJ. There is no point in prolonging the litigation. *Cf. United States v. Stoffer*, 53 M.J. 26, 28 (C.A.A.F. 2000). A dismissal with prejudice would serve the interests of justice.

VII

Appellee's Contact Information

Appellee is represented by the Government Appellate Division.

Conclusion

The Court should issue a writ of error coram nobis and dismiss the charges and specifications with prejudice. Given the divided vote on direct appellate review as to the UCI issue, the appointment of a new Judge, and, above all, the importance of both issues from the standpoint of fostering public confidence in the administration of justice, the Court may wish to order a hearing. *See* C.A.A.F.R. 40(a).

Respectfully submitted.

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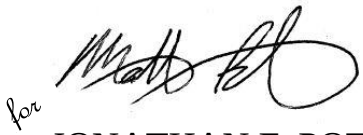

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Certificate of Compliance with Rule 24(d)

I certify that the foregoing writ-appeal petition complies with the type-volume limitation of Rule 24(d) because it contains 7,084 words. It also complies with the typeface and type style limitations of Rule 37.

Matthew D. Bernstein

Certificate of Filing and Service

I certify that a copy of the foregoing writ-appeal petition was sent via electronic submission to the Clerk of the Court and the Government Appellate Division on December 17, 2020.

Matthew D. Bernstein