IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Sergeant (E-5) **ROBERT B. BERGDAHL**, United States Army, Appellant	RESPONSE TO 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. Army 20200588 USCA Dkt. No. 21-0091/AR

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

I
Preamble

The United States Army Court of Criminal Appeals (Army Court) denied Appellant's petition for a writ of error coram nobis. *Bergdahl v. United States*, ARMY MISC 20200588, 2020 CCA LEXIS 443 (A. Ct. Crim. App. Dec. 11, 2020) (mem. op.). This Court reviews decisions of a service court on a petition for extraordinary relief as a writ-appeal under Rules 4(b)(2) and 18(a)(4) of this Court's Rules of Practice and Procedure (Rules). The government files this answer pursuant to Rules 27(b) and 28(b)(2).

II
History of the Case

Appellant filed a petition for extraordinary relief in the form of a writ of error coram nobis with the Army Court on October 23, 2020. The Army Court denied the petition on December 11, 2020. *Id*. at *2. Appellant filed the instant writ-appeal petition with this Court on December 21, 2020.

III
Relief Sought

Appellant requests this Court dismiss the charges and specifications with prejudice and suggests this Court order a hearing. (Appellant's Br. 4, 29). The government respectfully requests this Court deny Appellant's writ-appeal petition,

and contends that a hearing is unnecessary. The pertinent facts and issues have been fully briefed. In the interest of judicial economy, this Court should resolve this case now based on the written submissions by both parties.

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

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 (UCMJ), 10 U.S.C. §§ 885, 899 (2012). *United States v. Bergdahl*, 80 M.J. 230, 232–33 (C.A.A.F. 2020). That same day, the military judge applied for a position as an immigration judge with the Executive Office for Immigration Review (EOIR).[1] (Pet. App'x C).[2] The EOIR announced nineteen open positions for immigration judge on September 25, 2017.

[1] There is no indication in the materials provided by Appellant whether the military judge submitted the application before or after Appellant's guilty plea.
[2] "Pet. App'x" refers to the appendix attached to Appellant's petition to the Army Court, which is included in Appellant's writ-appeal petition.

(Gov. App. Ex. A). October 16, 2017—the day the military judge submitted his application—was the closing date for applications to be submitted through USAJOBS. (Gov. App. Ex. A). The military judge included his February 24, 2017, ruling on Appellant's first motion alleging apparent unlawful command influence (UCI)—relating to President Donald Trump's campaign comments[3]—as a writing sample in the application. (Pet. App'x C).

Appellant subsequently filed a second motion alleging apparent UCI on October 17, 2017, based on a statement made by President Trump after Appellant's guilty plea the day prior.[4] *United States v. Bergdahl*, 79 M.J. 512, 519 (A. Ct. Crim. App. 2019), *aff'd*, 80 M.J. 230. In his ruling on that motion, the military judge concluded the defense met its burden to present some evidence that UCI occurred, but found that the "government met its burden to prove beyond a reasonable doubt that the UCI would not be an intolerable strain on the public's perception of the military justice system." *Id*. at 520. Despite finding there was no

[3] While he was a candidate for President, President Trump expressed his belief that Appellant "was a deserter and a traitor who should be severely punished." *Bergdahl*, 80 M.J. at 244.

[4] On October 16, 2017, after Appellant pleaded guilty, President Trump commented in response to a reporter's question during a press conference in the Rose Garden, "Well, I can't comment on Bowe Bergdahl because he's—as you know, they're—I guess he's doing something today, as we know. And he's also—they're setting up sentencing, so I'm not going to comment on him. But I think people have heard my comments in the past." *Bergdahl*, 80 M.J. at 238.

apparent UCI, "[t]he military judge stated that he would consider the President's comments as mitigation evidence on sentencing." *Id.*

The military judge sentenced Appellant on November 3, 2017, to a dishonorable discharge, reduction to the grade of E-1, and forfeiture of $1,000 per month for ten months. *Id.* at 520; *Bergdahl*, 80 M.J. at 233. The military judge subsequently retired from the Army in 2018. (Pet. App'x C). On September 28, 2018, the EOIR published a press release stating that the Attorney General appointed the military judge as an immigration judge with the EOIR. (Pet. App'x C).

On direct appeal before the Army Court and this Court, Appellant claimed that statements about him by the late Senator John McCain[5] and President Trump amounted to apparent UCI and requested the Army Court and this Court dismiss his conviction with prejudice. *See generally Bergdahl*, 79 M.J. 512; *Bergdahl*, 80 M.J. 230. On July 16, 2019, the Army Court rejected Appellant's claims and affirmed Appellant's conviction and sentence. *Bergdahl*, 79 M.J. at 520–27. On August 27, 2020, this Court affirmed the Army Court's decision, finding no apparent UCI. *Bergdahl*, 80 M.J. at 244.

[5] Senator McCain, while chairman of the Senate Armed Services Committee, told a reporter while Appellant's case was pending a referral decision, "If it comes out that [Appellant] has no punishment, we're going to have a hearing in the Senate Armed Services Committee." *Bergdahl*, 80 M.J. at 236.

On the same day this Court affirmed the Army Court's decision, Appellant submitted a Freedom of Information Act (FOIA) request to the EOIR seeking "records related to Immigration Judge [JN's] application for employment at EOIR." (Pet. App'x C). Appellant filed a petition for reconsideration, on other grounds, on September 7, 2020. (Gov. App'x).[6] Appellant received a response to his FOIA request on September 15, 2020. (Pet. App'x C). These materials included the military judge's application and affiliated documents. (Pet. App'x C). Before this Court, Appellant requested to supplement the record with the military judge's application materials and that the materials be considered in conjunction with his petition for reconsideration. (Pet. App'x C). This Court denied the petition for reconsideration and motion to supplement the record on October 14, 2020. *United States v. Bergdahl*, No. 19-0406/AR, 2020 CAAF LEXIS 569 (C.A.A.F. 2020).

Appellant filed a petition for a writ of coram nobis with the Army Court on October 23, 2020, claiming that Appellant did not receive a fair trial because the military judge presiding over his court-martial failed to disclose his application for employment as an immigration judge with the EOIR. The Army Court denied the petition on December 11, 2020. *Bergdahl*, 2020 CCA LEXIS 443, at *2. The

[6] "Gov. App'x" refers to the appendix attached to the government's response to Appellant's petition to the Army Court, which is included in Appellant's writ-appeal petition.

Army Court found that Appellant's writ failed to "meet the threshold criteria for *coram nobis* review" because there was "no valid reason for [Appellant's] failure to raise this issue and seek relief earlier." *Id.*

VI
Reasons Why Writ Should Not Issue

A writ of coram nobis is "'an extraordinary remedy'" which "'should not be granted in the ordinary case.'" *United States v. Denedo*, 556 U.S. 904, 917 (2009) (quoting *Nken v. Holder*, 556 U.S. 418, 437 (2009) (Kennedy, J., concurring)) (*Denedo II*). It may be used to address "fundamental" errors which must be corrected in order "'to achieve justice.'" *Denedo II*, 556 U.S. at 911 (quoting *United States v. Morgan*, 346 U.S. 502, 511 (1954)). "Because *coram nobis* is but an extraordinary tool to correct a legal or factual error, an application for the writ is properly viewed as a belated extension of the original proceeding during which the error allegedly transpired." *Denedo II*, 556 U.S. at 912–13. This Court's and the Army Court's jurisdiction to entertain Appellant's writ "derives from the earlier jurisdiction it exercised . . . on direct review." *Id.* at 914.

Before considering the merits of the petition, a court must be satisfied that the petition meets the stringent "threshold criteria" for consideration. *Denedo v. United States*, 66 M.J. 114, 126 (C.A.A.F. 2008) (*Denedo I*), *aff'd* 556 U.S. 904. Coram nobis relief requires a petitioner to show:

> (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.

Id. A petitioner bears the burden of establishing each of these threshold criteria. *See id.* "Because these requirements are conjunctive, the failure to meet any one of them is fatal." *Matus-Leva v. United States*, 287 F.3d 758, 760 (9th Cir. 2002).

If a petition satisfies the threshold criteria, a petitioner still must demonstrate a "clear and indisputable right to the requested relief" in order to prevail on the merits. *Denedo I*, 66 M.J. at 126 (citing *Cheney v. United States Dist. Court*, 542 U.S. 367, 381 (2004)). Courts must also be mindful that "judgment finality is not to be lightly cast aside;" and grant extraordinary writ relief only in "extreme cases." *Denedo II*, 556 U.S. at 916.

In this case, the Army Court appropriately concluded that Appellant's petition failed to "meet the threshold criteria for *coram nobis* review" because there was "no valid reason for [Appellant's] failure to raise this issue and seek relief earlier." *Bergdahl*, 2020 CCA LEXIS 443, at *2. Even if the Army Court was incorrect and the petition satisfies the threshold criteria for review, Appellant fails to demonstrate that his entitlement to relief is clear and indisputable,

undermining his claim to relief on the merits. Accordingly, this Court should deny the writ-appeal petition.

A. The Army Court reasonably concluded that the petition failed to meet the coram nobis threshold criteria.

Appellant's writ-appeal petition should be denied because he fails to provide "a sound reason why he failed to pursue this claim while his case was pending Article 66 review at [the Army Court], when such a claim could have been reasonably raised." *Bergdahl*, 2020 CCA LEXIS 443, at *6, 11. Thus, just as the Army Court appropriately determined, Appellant's petition was not entitled to review because it failed to meet the third threshold showing that "'valid reasons exist for not seeking relief earlier . . . .'" *Id.* at *6, 11 (quoting *Denedo I*, 66 M.J. at 126).

The Army Court's conclusion was soundly based on the timeline of events in the case. *Id*. at *6–7. "The military judge's new employment as an immigration judge became public knowledge on 28 September 2018." *Id*. Appellant's "case was pending direct review at [the] [Army Court] from 8 June 2019 through 16 July 2019[,]" the day the Army Court issued its opinion. *Id*. at *7. During that time, Appellant "submitted two briefs, claiming a total of five assigned errors, none of which alluded to any concerns with the military judge seeking employment as an immigration judge." *Id*.

Appellant's case had only pended before the Army Court for three months when the military judge's position was announced. *Id*. Ten months elapsed between the announcement and the Army Court's 2019 opinion. *Id*. In the interim, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued its opinion in *In re Al-Nashiri*, 921 F.3d 224, 235 (D.C. Cir. 2019), on April 16, 2019—almost five months before Appellant filed the supplement to his petition for review in this Court and more than six months before this Court granted Appellant's petition in his direct appeal. *Id*; *see also United States v. Bergdahl*, 79 M.J. 307 (C.A.A.F. 2019) (order). Yet, Appellant did not raise his claimed errors concerning the military judge. Appellant waited until this Court denied him relief on direct appeal on August 27, 2020, to request the military judge's employment application from the EOIR. (Pet. App'x C).

Just as the Army Court noted, this timeline is similar to that in *United States v. Kates*, ACM S32018, 2014 CCA LEXIS 360 (A.F. Ct. Crim. App. June 17, 2014) (order). In *Kates*, the Air Force Court of Criminal Appeals (Air Force Court) denied a petition for extraordinary relief in the nature of a writ of error coram nobis where the petitioner alleged he was denied an improper Article 66, UCMJ, review because of Mr. LS's participation in his case as an Air Force Court judge. *Id*. at *3. Mr. LS, then a civilian litigation attorney with the Department of the Air Force, was appointed by The Judge Advocate General of the Air Force to

the position of appellate military judge on the Air Force Court on January 25, 2013, and the Secretary of Defense appointed him to serve the same position on 25 June 2013. *Id*. at *1–2. The *Kates* petitioner raised assignments of error on ordinary appellate review on August 27, 2012—before Mr. LS's appointments. *Id*. Mr. LS participated in the decision issued on July 10, 2013. *Id*. The *Kates* petitioner did not raise the issue of Mr. LS's participation in the case when he petitioned this Court for review, which this Court denied on October 17, 2013. *Id*. In April 2014, this Court issued its decision in *United States v. Janssen*, 73 M.J. 221 (C.A.A.F. 2014), which held that the Secretary of Defense did not have the legislative authority to appoint Mr. LS as a military appellate judge under the Constitution's Appointment Clause, rendering his appointment of Mr. LS to the Air Force Court "invalid and of no effect." *Kates*, 2014 CCA LEXIS 360, at * 3 (quoting *Janssen*, 73 M.J. at 225). The *Kates* petitioner filed a writ of error coram nobis with the Air Force Court on May 9, 2014. *Id*. at *1. The Air Force Court found that the *Kates* petitioner "provide[d] no valid reasons why he did not seek relief on this matter earlier or any proffer as to why the issue of [Mr. LS's] appointment could not have been discovered through the exercise of reasonable diligence prior to the completion of appellate review in this matter." *Id*. at *7. *See also United States v. Roy*, 2014 CCA LEXIS 364, at *9 (A.F. Ct. Crim. App. 17 June 2014) (finding the same when Mr. LS' appointment occurred three weeks

prior to the Air Force Court's issuance of its opinion on direct review); *United States v. Powers*, 2014 CCA LEXIS 363 (A.F. Ct. Crim. App. June 17, 2014) (finding the same when the appointment occurred one month prior to the Air Force Court's issuance of its opinion on direct review).

Appellant offers no convincing basis for this Court to conclude that the Army Court erred in its conclusion that he had reasonable opportunities to seek relief earlier. The sole reason Appellant offers for failing to seek relief earlier was that he "received a copy of Judge [JN]'s job application from the Department of Justice [DOJ] on September 15, 2020 . . . ." (Appellant's Br. 12). But Appellant offers no explanation for why he waited to request that application until the day this Court affirmed the Army Court's judgment, nearly two years after the military judge's appointment with the EOIR was publicly announced. The most Appellant offers concerning the timing of his FOIA request is that it "was filed out of an abundance of caution . . . ." (Appellant's Br. 13). As the Army Court observed, "These explanations do not clarify why [Appellant] did not request the military judge's employment application earlier, and why he did not raise this issue at this court on direct appeal." *Bergdahl*, 2020 CCA LEXIS 443, at *7. The request itself demonstrates that Appellant already knew that the military judge was employed by the EOIR as an immigration judge. *See* Pet. App'x C (requesting "records related to *Immigration Judge* [JN]'s application for employment at EOIR.") (emphasis

added). This Court should not overlook the timing and content of the request when determining that Appellant failed to carry his burden to show that he could have sought relief earlier—prior to the completion of direct appeal—and that the specific information relating to the military judge's employment application obtained through Appellant's FOIA request could have been discovered through the exercise of reasonable diligence prior to the completion of direct appeal. The Army Court correctly determined that the proffered explanations did not satisfy Appellant's burden to demonstrate the third requisite threshold requirement for review of his coram nobis petition. *See Bergdahl*, 2020 CCA LEXIS 443, at *6.

"[C]oram nobis relief is generally not appropriate for claims that could have been raised on direct appeal." *United States v. Castano*, 906 F.3d 458, 464 (6th Cir. 2018). Appellant had a "'meaningful opportunity'" to pursue and raise the issue of the military judge's employment application before the Army Court and this Court on direct review, yet did not do so. *Bergdahl*, 2020 CCA LEXIS 443, at *9 (quoting *Kates*, 2014 CCA LEXIS 360, at * 9). This opportunity first arose when the EOIR published a press release on September 28, 2018, announcing the military judge's employment as an immigration judge, while this case was on direct appeal before the Army Court. Indeed—in marked contrast to Appellant's two-year delay—another litigant, Al-Nashiri, petitioned for relief based on precisely the same grounds as Appellant only *six days* after EOIR issued the press

release that announced the employment of both the judge presiding over his military commissions case, Judge Spath, as well as the military judge in Appellant's case. *Al-Nashiri*, 921 F.3d at 231–32.[7] As others immediately sought relief and promptly sought to obtain evidence, Appellant could have done so as well.

Even if the information in the press release was not imputed to Appellant immediately upon issuance, he could have raised the issue while his case was pending direct appellate review before this Court in April 2019 when the D.C. Circuit issued its opinion in *Al-Nashiri*—a case in which one of Appellant's counsel was on brief for the amicus curiae Ethics Bureau at Yale in support of Al-Nashiri's petition for a writ of mandamus and prohibition. *See Bergdahl*, 2020 CCA LEXIS 443, at *9–10; *United States v. Al-Nashiri*, USCA Case 18-1279, doc. 1759461 (D.C. Cir. November 9, 2018) (amicus brief of Ethics Bureau at Yale) (Amicus Brief).[8] The D.C. Circuit explicitly considered, referred to, and provided the internet address of the September 28, 2018, EOIR announcement—which included the hiring of the military judge—in its opinion. *Al-Nashiri*, 921 F.3d at 232. Appellant fails to offer any adequate explanation for failing to raise the

[7] Al-Nashiri subsequently submitted the application materials for Judge Spath, obtained through a FOIA request, to the D.C. Circuit after he filed his petition. *Id.*
[8] *Available at*: https://law.yale.edu/sites/default/files/documents/pdf/Clinics/18-1279_brief_of_amicus_curiae.pdf.

instant claims or, at a minimum, pursue his FOIA request, while his case was pending review at the Army Court or this Court.

Appellant's attempt to demonstrate the timeliness of his claim by referencing cases involving greater periods of delay (Appellant's Br. 16–18) also falls flat. Rather, it is a deflection from his failure to offer this Court any explanation for failing to pursue his claim while his case was pending direct appellate review. Appellant did not submit a FOIA request for the military judge's application until *sixteen months* after the opinion in *Al-Nashiri* was issued, and nearly *two years* after the issuance of September 2018 EOIR press release. In light of these facts, Appellant's justification for waiting to pursue the FOIA request on the day of this Court's opinion—"out of an abundance of caution"—is neither a reasonable nor valid justification for using coram nobis as a subterfuge for direct appeal. Even assuming arguendo it was the application materials which provided a basis for the filing of his petition, Appellant offers no reason why could not have earlier submitted the request and raised the information concerning the military judge during the ordinary course of appeal.[9] Indeed, Al-Nashiri promptly filed a

[9] Appellant's failure to reasonably pursue his claim also resulted in his inability to bring this matter to the Army Court's attention within the two-year time limit for filing a petition for new trial under Article 73, UCMJ. The Army Court previously held that "an extraordinary writ cannot be used as an end-run around the two-year time limit for considering a petition for new trial under Article 73, UCMJ." *Murray v. United States*, 2018 CCA LEXIS 47, at *7 (A. Ct. Crim. App. Jan. 31, 2018) (summ. disp.) (finding petitioner not entitled to coram nobis relief in the

petition once he had information that his military judge entered employment with EOIR even before he had the application materials. *Al-Nashiri*, 921 F.3d at 227. Appellant's indifferent approach to pursuing his claim until this Court affirmed the judgment of the Army Court belies his emphasis on the egregiousness of the alleged errors and amounts to an attempt to use coram nobis as a substitute for direct appeal—precisely what coram nobis is not intended for. *See Foont v. United States*, 93 F.3d 76, 79 (2d Cir. 1996) ("*Coram nobis* is not a substitute for appeal").

Appellant further attempts to excuse his failure to pursue his claim earlier by alleging lack of government prejudice. (Appellant's Br. 18). His argument convolutes the equitable defense of laches with the coram nobis threshold requirements. They are two separate analyses. *See Johnson v. United States*, 49 M.J. 569, 573–74 (N.M. Ct. Crim. App. 1998); *United States v. Riedl*, 496 F.3d 1003, 1009 (9th Cir. 2007) (distinguishing between the defense of laches and the requirement a petitioner exercise reasonable diligence); *Foont*, 93 F.3d at 80 ("[W]e do not read *Morgan* as incorporating a laches concept into the analysis of delay in bringing a coram nobis petition. . . . The critical inquiry, then, is whether the petitioner is able to show justifiable reasons for the delay.").

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form of vacating his court-martial findings and sentence based on claim of prosecutorial misconduct because of his failure to seek relief earlier) (citing *Roberts v. United States*, 77 M.J. 615 (A. Ct. Crim. App. 2018)).

The import of Appellant's lack of timeliness in this case is not a matter of laches, but a failure to satisfy the third and fourth coram nobis threshold requirements. *See United States v. Iovine*, 2004 U.S. Dist. LEXIS 19459, at *8 (N.D. Ill. Sept. 24, 2004) (observing that the requirement that a petitioner provide sound reason for a delay "encourages the efficient allocation of judicial resources and supports the systemic interest in judgment finality."). "[T]o entertain [Appellant's] petition notwithstanding his unjustifiable delay would be an unwarranted infringement upon the government's interest in the finality of convictions." *Foont*, 93 F.3d at 80; *see also Chapel v. United States*, 21 M.J. 687, 689 (AC.M.R. 1985) ("Society has a strong interest in preserving the finality of judgments and providing an end to appellate review."). Here, irrespective of any prejudice to the government, Appellant defaulted on his ability to pursue *coram nobis* review of claim when, despite having a meaningful opportunity to do so, he failed to pursue and raise the instant claims on direct appeal. This Court should deny the writ-appeal petition.

B. Appellant fails to establish a clear and indisputable right to relief.

Even if this court determines that the Army Court erred and the petition satisfies the *coram nobis* threshold criteria, Appellant fails to establish a clear and indisputable right to relief. The military judge was not disqualified from presiding over Appellant's court-martial simply because he sought employment with the

EOIR. The fact that he sought such employment has no correlation with Appellant's allegation of apparent UCI raised on direct appeal. Accordingly, Appellant is not entitled to relief.

1. The military judge was not disqualified because of his pending employment application with the EOIR.

The military judge neither had a pecuniary interest that could be "substantially affected by the outcome of" Appellant's court-martial nor created a circumstance where his "impartiality might reasonably be questioned" by virtue of his application for employment with the EOIR. *See* R.C.M. 902 (a); R.C.M. 902(b)(5)(B).[10] Accordingly, the military judge was not disqualified from presiding over Appellant's court-martial. Even if he was, the facts of this case should lead this Court to conclude that Appellant was not prejudiced.

a. The military judge was not disqualified.

"'[W]hen a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt' by the military judge's actions." *United States v. Martinez*, 70 M.J. 154, 157–58 (C.A.A.F. 2011) (quoting *United*

[10] Rule for Courts-Martial 902(a) provides that "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." Additionally, a military judge is disqualified under R.C.M. 902(b)(5)(B) when he has "an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding."

States v. Burton, 52 M.J. 223, 226 (C.A.A.F. 2000)). "The appearance of impartiality is reviewed [] objectively and is tested under the standard set forth in *United States v. Kincheloe*, [14 M.J. 40, 50 (C.M.A. 1982)], i.e., '[a]ny conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification.'" *Martinez*, 70 M.J. at 158. One instance when a military judge's impartiality might reasonably be questioned is where one party to the proceeding before the military judge is a prospective employer. *See Al-Nashiri*, 921 F.3d at 235.

Appellant avers that "this remains a stronger case than *Al-Nashiri*" and that because "Al-Nashiri had a clear and disputable right to relief, so does [Appellant]." (Appellant's Br. 23). To the contrary, this case has none of the hallmarks that the D.C. Circuit found warranted disqualification of Judge Spath in *Al-Nashiri*. Judge Spath was disqualified in Al-Nashiri's military commission because the "average, informed observer would consider" him to have presided over a case "in which his potential employer [the DOJ] appeared . . . ." *Id*. at 235–36. The D.C. Circuit reasoned that the "Attorney General himself is *directly involved* in selecting and supervising immigration judges," and "was a participant in Al-Nashiri's case from start to finish: he has consulted on commission trial procedures, he has loaned out

one of his lawyers [to prosecute Al-Nashiri], and he will play a role in defending any conviction on appeal . . . ." *Id*. at 235–36 (emphasis added).

Al-Nashiri is "compelling precedent" (Appellant's Br. 22) for this Court to find that the military judge in this case was *not* disqualified because attorneys in the employ of the EOIR/DOJ did not appear and litigate the government's position before the military judge in during Appellant's court-martial. The EOIR/DOJ was not a party to Appellant's court-martial and had no connection to the issues raised in his court-martial.[11] Further, there is no evidence that Attorney General had taken an interest—personal or otherwise—in the disposition of charges against Appellant. Simply put, the factor that led to Judge Spath's disqualification—his application for employment with the DOJ while the DOJ was litigating a case in front of him—has no basis in fact in Appellant's court-martial.

Furthermore, Appellant misconstrues the government's reliance on *United States v. Snyder*, 2020 CCA LEXIS 117 (A.F. Ct. Crim. App. Apr. 15, 2020) (unpub. op.), *rev. denied*, 2020 CAAF LEXIS 628 (C.A.A.F. Nov. 13, 2020), in its pleading before the Army Court. (Appellant's Br. 22). The government's position is not that *Snyder* suggests that *Al-Nashiri* is "limited to military commissions." (Appellant's Br. 22). Rather, *Snyder* is illustrative of the circumstances in which a

[11] The EOIR is a sub-organization of the DOJ responsible for adjudicating immigration cases. Executive Office for Immigration Review, *About the Office*, https://www.justice.gov/eoir/about-office (last visited Dec. 23, 2020).

military judge's employment application with the EOIR does not warrant disqualification—circumstances which likewise exist in this case. The Air Force Court found in *Snyder* that Judge Spath was not disqualified based on his application with the EOIR because:

> The DoJ was not a party to [the] [a]ppellant's trial and did not have an identifiable interest in its result, nor was the Attorney General or anyone in the DoJ a participant. Neither the DoJ nor the Attorney General had a close association with military courts-martial generally, or in [the] [a]ppellant's case specifically.

Id. at *60. If the DOJ—for some peculiar reason—appeared in Major Snyder's court-martial, then *Al-Nashiri* and R.C.M. 902 might have required a different result. Furthermore, the Air Force Court found there was no tie between Judge Spath's employment application and his exclusion of materials that referenced sex offender registration—specifically, the Sexual Offender Registration and Notification Act (SORNA), "which the DoJ has a role in overseeing"—because the connection between the two was "tenuous." *Id*. at *61.

Similarly, this Court should not conclude the military judge had pecuniary interest that could be affected by the outcome of Appellant's proceeding or that his impartiality might reasonably be questioned because he applied for employment with the EOIR during Appellant's court-martial. Appellant's attempts to connect the military judge's application and his inclusion of his first UCI ruling with his prospect for employment with the EOIR (Appellant's Br. 22) is as "tenuous" as the

connection between Judge Spath's EOIR application and his SORNA ruling in *Snyder*. Appellant's argument also fails to appreciate the extensive hiring process that immigration judges go through and the way in which they are supervised.

Although immigrations judges are ultimately appointed by the Attorney General,[12] they go through an extensive hiring process consisting of two interviews before different interview committees. The first before a panel composed of three EOIR supervisory immigration judges, and the second before the Finalist Panel composed of "the Assistant Attorney General of Administration (AAG/A) (or a career-SES appointed employee designated by him), an employee designated by the Deputy Attorney General, and the EOIR director (or other senior EOIR official designated by the Director)." Memorandum from James R. McHenry III, Director [EOIR] to the Attorney General, Subject: Immigration Judge and Appellate Immigration Judge Hiring Process, *available at* https://www.justice.gov/eoir/page/file/1280781/download. Neither panel includes the Attorney General or President. Furthermore, once appointed, immigration judges are supervised by an internal director who is neither the President nor the Attorney General. Executive Office for Immigration Review, *Office of the Director*, https://www.justice.gov/eoir/office-of-the-director (last visited Dec. 30,

[12] 8 C.F.R. § 1003.10(a) (2014); *see also* 8 U.S.C. § 1101(b)(4) (noting that immigration judges are appointed by the Attorney General).

2020) ("EOIR is headed by a Director who is responsible for the supervision of . . . all agency personnel in the execution of their duties in accordance with 8 CFR Part 1003.").[13]

Appellant's assertion that the military judge misled Appellant or was not candid about his post-retirement plans takes his statement out of context and is completely speculative. (Appellant's Br. 25–26). These statements—referencing the military judge's retirement from the Army—were made in response to Appellant's allegation that the President's statements amounted to apparent unlawful command influence because that the military judge—as an officer in the Army—was under pressure from the President—as Commander-in-Chief—to make certain decisions against Appellant to avoid potential consequences to his military career. (Gov. App'x). Furthermore, the military judge's statement during voir dire on October 23, 2017, that he "does not expect to go anywhere but back home as soon as the Army is done with" him, (Pet. App'x F), is not incongruent with the act of merely submitting an employment application when there has been

[13] Although they are subject to supervision by the Director, EOIR, immigration judges are required to exercise their own independent judgment in the execution of their duties. 8 C.F.R. § 1003.10(b). ("In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases."). Decisions by immigration judges "are subject to review by the Board of Immigration Appeals. . . ." 8 C.F.R. § 1003.10(c).

no offer or acceptance of employment. The military judge's subjective assessment that he is unaffected by President Trump's opinions made on the record and in his October 17, 2017, UCI ruling is a further testament to the independence exercised by the military judge even in the context of his pending application of the EOIR, an application which informs his prospective employer that the military judge was so independent that he publicly castigated the sitting President of the United States. (Pet. App'x C).

"There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001) (citation omitted). Appellant has not met this "high hurdle." *Id.* An objective, reasonable person would not believe that the military judge's impartiality was in jeopardy based on these circumstances. Accordingly, Appellant fails to establish any error, let alone clear and indisputable error, with respect to the military judge's impartiality or qualification to preside over his court-martial.

b. Even if the military judge was disqualified, Appellant was not prejudiced.

Even if the military judge was disqualified under R.C.M. 902, Appellant is not entitled to relief because the error did not result in material prejudice. *See Martinez*, 70 M.J. at 159–60 (testing the disqualification of a military judge for

prejudice under Article 59(a), UCMJ, under the plain error standard of review). Appellant makes the circular claim that he was prejudiced because he was denied the "opportunity to conduct additional *voir dire* [and] seek recusal." While voir dire may allow an opportunity for a party for object to a military judge's qualification under R.C.M. 902, it is the rule itself—and not the demand of a party to the court-martial—which governs when a military judge must disqualify himself. Accordingly, this cannot be the basis for a finding of prejudice. (Appellant's Br. 25). Appellant's assertion that he was prejudiced because he was denied the opportunity to "intelligently consider forum selection, and make an informed decision as to how to plead" are also unconvincing. From even before the Article 32, UCMJ, hearing in this case, the record demonstrates numerous attempts by Appellant to enter into an offer to plead guilty with the convening authority prior to voluntarily choosing to plead guilty without an agreement "*because he was in fact guilty* and not for any other reason." *Bergdahl*, 80 M.J. at 242 (emphasis in original).

Appellant also fails to demonstrate that dismissal—let alone dismissal with prejudice—is warranted under the three-part test in *Liljeberg v. Health Servs. Acquisition Corp*: "[1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the

risk of undermining the public's confidence in the judicial process." 486 U.S. 847, 862 (1988).[14]

First, there is no risk of injustice to Appellant in this case. Appellant pleaded guilty—"*because he was in fact guilty*"—on his own accord. *Bergdahl*, 80 M.J. at 242. There was also no risk of injustice to Appellant in respect to the sentencing phase of his court-martial because: 1) the military judge gave Appellant relief in his post-guilty plea UCI ruling by considering the President's comments as evidence in mitigation; 2) the military judge rejected the far more severe punishment argued for by the trial counsel[15] and by the President; and 3) Appellant received the sentence he requested. (Gov. App'x). These same facts also support a conclusion that Appellant did not suffer material prejudice under Article 59(a), UCMJ. As this Court observed:

> [I]t is wholly unrealistic to believe there was any scenario where: (1) upon his return to the United States, Appellant would not have been held accountable at a general court-martial for his offenses (to which he voluntarily pleaded guilty); and (2) Appellant would not have received the

[14] The analysis for the third *Liljeberg* factor is "similar to the standard applied in the initial R.C.M. 902(a) analysis." *Martinez*, 70 M.J. at 159–60. This analysis, however, is broader because this Court's review is not limited "to facts relevant to recusal, but rather review the entire proceedings, to include any post-trial proceeding, the convening authority action, the action of the Court of Criminal Appeals, or other facts relevant to the *Liljeberg* test." *Id.*

[15] The trial counsel requested the military judge sentence Appellant to fourteen years of confinement and a punitive discharge, which was considerably less than the maximum punishment. (Gov. App'x).

> dishonorable discharge he himself subsequently requested.

Id. at 233. Thus, even if this Court determines that the military judge was in fact disqualified, this Court's decision on direct appeal recognizes that any military judge would have imposed the dishonorable discharge Appellant requested.

Second, given the unique circumstances of this case, it is also not necessary to reverse Appellant's conviction to preserve justice in other cases. *Id.* at 245 (Stucky, C.J., concurring in part and dissenting in part) ("This case is unique in modern American military jurisprudence."). Granting relief here would not dissuade similar conduct because this Court recognized the singularity of the facts.

Finally, dismissal is not required to preserve confidence in the military justice system. Even if the military judge applied for the position with the EOIR immediately before Appellant's guilty plea on October 16, 2017, any risk the public would perceive injustice as to the finding of Appellant's guilt was non-existent, or at a minimum, considerably diminished, because Appellant pleaded guilty and the military judge acquitted him of the only contested portion of the case.[16] Any risk the public would perceived injustice as to Appellant's sentence was considerably diminished when the military judge sentenced Appellant in

[16] Appellant pleaded guilty to a single day of desertion instead of the entire charged period approximating five years. (Gov. App'x). The government attempted to prove the full five-year period of desertion, but the military judge acquitted Appellant as to that period. (Gov. App'x).

accordance with his request. *Id*. at 233. Accordingly, reversal or dismissal with prejudice is not warranted should this Court find that the military judge was disqualified.

2. There was no apparent UCI in this case.

During his court-martial and on appeal, Appellant alleged that statements made by Senator McCain and President Trump amounted to apparent UCI that warranted his case be dismissed with prejudice. *Id*. at 233. To overcome a prima facie case of apparent command influence, the government must prove "beyond a reasonable doubt that the [UCI] did not place an intolerable strain upon the public perception's of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would [*not*] harbor a significant doubt about the fairness of the proceeding." *Id*. at 234 (internal quotations and citations omitted) (alteration and emphasis in original).

Here, Appellant merely attempts to re-litigate his claim that apparent UCI resulted from Senator McCain's and President Trump's comments concerning Appellant—a claim that the Army Court and this Court has already rejected. The military judge's application for employment with the EOIR or failure to disclose the submission of that application has no bearing on whether there was apparent

UCI by Senator McCain and President Trump.[17] The military judge did not apply to work for President Trump. A conclusion that the military judge's application with the EOIR[18] subjected him to "outside influence" by President is even less convincing than the failed, bare assertion that there was apparent unlawful influence on the military judge by virtue of his position as an Army officer and the President as Commander-in-Chief. *See Bergdahl*, 79 M.J. at 518; *Bergdahl*, 80 M.J. at 235-36; (Gov. App'x).

None of the military judge's actions cast substantial doubt about the fairness of Appellant's trial in the context of Appellant's UCI allegation. Appellant's assertion that this Court's characterization of the military judge as "impervious"

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[17] The government solely focuses on alleged apparent UCI at the phases of the proceeding involving the military judge: the guilty plea and sentencing phases. Appellant's claim does nothing to disrupt this Court's finding of no apparent UCI with respect to the investigative, preferral, referral, convening authority action or appellate review of the case. *Id.* at 239–44.

[18] Appellant places great significance on the fact that the military judge used his February 24, 2017, UCI ruling as the writing sample in his application, but disregards the fact that the only other time the military judge mentioned Appellant's case was in his explanation of "[e]xperience handling complex legal issues." (Pet. App'x C). In that section of the application, the military detailed numerous other courts-martial he presided over; the military judge last referred to Appellant's case as a high-profile case with "many complex issues" that he was currently presiding over, and therefore could not "give details about the issues or parties involved." (Pet. App'x C). Immediately prior to mentioning Appellant's case, the military judge emphasized that he has "always been able to properly balance the rights of the accused, the victim and the interest of society to ensure that justice is done in every case." (Pet. App'x C). Appellant's case is not mentioned at all on the military judge's resume. (Pet. App'x C).

was in error because of his application for employment with a sub-agency (EOIR) of an executive agency (DOJ) that is overseen by an internal director (Director, EOIR) is untenable, particularly in light of the reason why this Court described the military judge as "impervious":

> We underscore the fact that despite the sensational nature of this case, despite the public calls for the lengthy imprisonment of Appellant, despite Senator McCain's threat that he would hold a hearing if Appellant did not receive a sentence to his liking, and despite the Commander in Chief's ratification of his statements that [petitioner] was a traitor who should be severely punished, the military judge imposed on Appellant *no prison time whatsoever*. Thus, an objective, disinterested observer would conclude that rather than being swayed by outside forces, the military judge was notably impervious to them.

Bergdahl, 80 M.J. at 244–45 (emphasis in original). Nothing submitted in support of Appellant's writ-appeal undermines this Court's record-based logic as to the military judge's independence.

If the military judge's application with the EOIR had any nexus to the Appellant's UCI allegations against President Trump, one would expect that the military judge would condone the President's comments. He did not. In fact, in the very writing sample the military submitted with his application—his February 24, 2017, UCI ruling concerning the President's campaign comments—he publicly condemned the President's words and actions as "troubling[,]" "disturbing[,]" and "disappointing." (Pet. App'x C). The military judge "recognize[d] the

problematic potential created by" the President's "conclusive and disparaging comments" and indicated that he would "take special care to ensure the comments [did] . . . not invade the trial." (Pet. App'x C). The military judge put words into action in his ruling on Appellant's October 17, 2017, UCI motion—after the he submitted his application—when he gave a form of relief based on the President's October 16, 2017, Rose Garden comment despite finding no apparent UCI. (Gov. App'x). The military judge offered Appellant the opportunity to withdraw his guilty plea and admitted all of the President's comments *as mitigation* during sentencing. *Bergdahl*, 79 M.J. at 520.

The military judge's actions with respect to the guilty plea and sentencing phases of Appellant's court-martial dispel any notion a fully-informed, objective observer would harbor a substantial doubt as to the fairness of his proceeding in light of the President's comments simply because of the additional fact that the military judge applied for employment with the EOIR.

First, Appellant was found guilty of desertion with the intent to shirk hazardous duty and misbehavior before the enemy because he *pleaded guilty*. "In doing so, he explicitly agreed in open court that he was voluntarily pleading guilty *because he was in fact guilty* and not for any other reason." *Bergdahl*, 80 M.J. at 242 (emphasis in original). Based on Appellant's own words during his plea colloquy, "no impartial observer would conclude that it was the comments

made by the President of the United States and/or by" Senator McCain "that caused Appellant to pled guilty; rather it was the strength of the Government's evidence that caused him to take that step." *Id*.

Second, 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. (Gov. App'x).

Third, despite the seriousness of Appellant's offenses, the military judge, after a seven-hour deliberation, "imposed as a sentence *only* a dishonorable discharge, a reduction in rank, and partial forfeitures of pay after Appellant specifically asked to receive a dishonorable discharge." *Id.* at 244 (emphasis added). This sentence was in accordance with Appellant's request and completely in disaccord with the punishment suggested by the President. (Gov. App'x). This sentence "based solely on the serious offenses to which Appellant pleaded guilty and on the facts established during the Government's case in aggravation," such that even Appellant "recognized he was deserving of punishment when he asked to have a dishonorable discharge imposed upon him." *Id*. at 243 ("'*But punishment is warranted for his actions, and the defense would request that you give Sergeant Bergdahl a dishonorable discharge . . . .*'") (quoting defense counsel). Accordingly, "it would be difficult to discern how an impartial observer would

conclude that" Appellant's sentence was unfair given the serious offenses to which Appellant pleaded guilty, the evidence in aggravation, Appellant's own request for a dishonorable discharge, and the military judge's subsequent imposition of that specific punishment on him. *Id*. at 244.

These facts reinforce the military judge's commendable judicial independence and dispel the appearance of any association between his actions in Appellant's case, his future employment prospects with the EOIR, and Appellant's allegation of apparent UCI by the President. Based on these circumstances, this Court should reject Appellant's claim that an "objective, disinterested observer, fully informed of all the facts and circumstances," including the military judge's employment application, "would harbor a significant doubt about the fairness of the proceeding." *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017).

VII
Conclusion

This Court should deny the petition because the Army Court correctly determined that Appellant failed to meet the requisite threshold criteria for review of his coram nobis petition.

WHEREFORE, the government respectfully requests that this Court deny the writ-appeal petition.

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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 January 4, 2021.

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