IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*, *v*. NICOLE A. DALMAZZI, Second Lieutenant (0-1), USAF *Appellant*.	*AMICUS CURIAE* BRIEF OF THE MILITARY COMMISSIONS DEFENSE ORGANIZATION IN SUPPORT OF NEITHER PARTY Crim. App. Dkt. No. 38808 USCA Dkt. No. 16-0651/AF Dated: 27 September 2016

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

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INTEREST OF AMICUS

Pursuant to Rule 26(b) of this Court's Rules of Practice and Procedure, *amicus* certifies that all parties have consented to the filing of this brief.

The Military Commissions Defense Organization ("MCDO") is the agency within the Department of Defense established to provide and facilitate legal representation to individuals charged under the Military Commissions Defense Act of 2009, 10 U.S.C. § 948h *et seq*. ("MCA"). Regulation for Trial by Military Commissions ("RTMC"), Chapter 9-1 (Appendix ("Ap.") 4). In addition to military commission proceedings, the MCDO is charged with providing the accused with representation "before the United States Court of Military Commission Review, the United States Court of Appeals for the District of Columbia Circuit, and the Supreme Court." 10 U.S.C. § 950h(c), and, to that end, includes a separate Appellate Section within its organization. RTMC 9-1(a)(17) (Ap. 8).

The MCDO's mission is ensuring that military commissions accused receive a fair hearing at every stage of the process, and thus has a strong interest in the constitutional validity and regularity of the United States Court of Military Commission Review ("USCMCR"). This case presents questions that go directly to the legality of that court as currently constituted. The MCDO's brief brings to

the attention of this Court relevant matters that have arisen in other forums, including in the U.S. Court of Appeals for the District of Columbia Circuit and the USCMCR, that its Appellate Section counsel have addressed on multiple previous occasions. Further, because MCDO defense counsel are likely to continue to raise similar challenges, regardless of its outcome, this Court's decision will have a direct effect on all military commissions going forward. The MCDO requests the opportunity to be heard.

ISSUES PRESENTED BY APPELLANT

I. WHETHER UNITED STATES COURT OF MILITARY COMMISSION REVIEW JUDGE, MARTIN T. MITCHELL, IS STATUTORILY AUTHORIZED TO SIT AS ONE OF THE AIR FORCE COURT OF CRIMINAL APPEALS JUDGES ON THE PANEL THAT DECIDED APPELLANT'S CASE.

II. WHETHER JUDGE MARTIN T. MITCHELL'S SERVICE ON BOTH THE AIR FORCE COURT OF CRIMINAL APPEALS AND THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW VIOLATES THE APPOINTMENTS CLAUSE GIVEN HIS STATUS AS A SUPERIOR OFFICER ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW.

SUMMARY OF ARGUMENT

The answer to both Issues Presented turns on whether the 2016 appointment of Judge Mitchell to the United States Court of Military Commission Review pursuant to 10 U.S.C. § 950f(b)(3) was valid. If the 2016 appointment was valid, Judge Mitchell was rendered ineligible to serve on the Air Force Court of Criminal

Appeals as of the date of that appointment. If the appointment was invalid then Judge Mitchell remained eligible to serve on the Air Force court.

ARGUMENT

A. Appointed USCMCR judges are principal officers on an Article I court of record.

The Military Commissions Act of 2009 ("2009 Act") established a new court of record for military commissions, the United States Court of Military Commission Review. 10 U.S.C. § 950f(a); *see also* R.M.C. 1201(a) (2012) (Ap. 13). The judges appointed to the USCMCR pursuant to 10 U.S.C. § 950f(b)(3) are principal officers bearing all of the hallmarks of principal officer status under the Appointments Clause. *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 684 F.3d 1332, 1338-40 (D.C. Cir. 2012); *Am. Assoc. of Railroads v. DOT*, 821 F.3d 19, 38 (D.C. Cir. 2016); *Soundexchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1226-27 (D.C. Cir. 2009) (Kavanaugh, J., concurring).[1]

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[1] Not surprisingly, the USCMCR itself has held that judges appointed pursuant to 10 U.S.C. § 950f(b)(3) are principal officers under the Appointments Clause. Opinion and Order, *United States v. Khadr*, Case No. 13-005, at *5 (U.S.C.M.C.R. Nov. 13, 2015) (Ap. 16); *see also Khadr v. United States*, 62 F.Supp.3d 1314, 1319-20 (U.S.C.M.C.R. 2014).

First, the 2009 Act established the USCMCR as an Article I "court of record," the fifth[2] in the federal system. *In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016); *In re Al-Nashiri*, 791 F.3d 71, 74 (D.C. Cir. 2015). As an Article I court of record, the USCMCR "sit[s] in 'independent' judgment of other executive actors" with respect to the conduct of military commissions. *Kuretski v. C.I.R.*, 755 F.3d 929, 944 (D.C. Cir. 2014). Such independence from the direction and supervision of Executive Branch officers is the first hallmark of principal officer status. *Intercollegiate*, 684 F.3d at 1337-38.

Second, and relatedly, the USCMCR issues decisions that "are appealable only to a court of the Third Branch," without the review or approval of any other "Executive Branch entity." *In re Al-Nashiri*, 791 F.3d 71, 83 (D.C. Cir. 2015) (citing 10 U.S.C. § 950g(a)). Non-reviewability is a second hallmark of principal officer status. *Intercollegiate*, 684 F.3d at 1340.

Third and most crucially, in order to ensure the independence necessary of a judge on an Article I court of record, Congress provided appointed USCMCR Judges tenure protection. Individuals appointed under §950f(b)(3) "may be

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[2] There are currently four other Article I courts of record: (1) this Court; (2) the United States Tax Court (26 U.S.C. § 7441) (Ap. 3); (3) the United States Court of Federal Claims (28 U.S.C. § 171(a)) (Ap. 3); and (4) the United States Court of Appeals for Veterans Claims (38 U.S.C. § 7251) (Ap. 3).

removed by the President only for cause and not at will." *Khadr*, 823 F.3d at 98. As such, they "cannot … be removed by the President except [for] … inefficiency, neglect of duty, or malfeasance in office," which is tantamount to "good-cause tenure." *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 487, 493 (2010). Non-removability is the third and most significant hallmark of principal officer status. *Intercollegiate*, 684 F.3d at 1339-40.

B. Service by a military officer as a judge appointed to the USCMCR pursuant to 10 U.S.C. § 950f(b)(3) would raise serious statutory and constitutional problems.

In 2014, the accused in the *Al-Nashiri* case moved to disqualify military officers assigned to serve as judges on the USCMCR pursuant to 10 U.S.C. § 950f(b)(2). *Al-Nashiri*, 791 F.3d at 75. The basis of the challenge was that the officers' *assignment* to the USCMCR violated the constitutional requirement that principal officers be *appointed* pursuant to the Appointments Clause. *Id.* The D.C. Circuit found that the challenge was substantial, but denied relief. The court held that resolution of the issues could wait until direct appellate review and that Al-Nashiri had failed to "demonstrate a 'clear and indisputable' right to the writ." *Al-Nashiri*, 791 F.3d at 82.

Following the D.C. Circuit's decision, the prosecution delayed the restart of the *Al-Nashiri* case in the USCMCR while it sought to remedy the constitutional concerns the D.C. Circuit had identified. The instant case arose shortly after the

prosecution moved to have *Al-Nashiri* restarted on the ground that Congress had confirmed five military officers "to be appellate military judges on the USCMCR under 10 U.S.C. § 950f(b)(3)." *United States v. Al-Nashiri*, Case No. 14-001, Motion to Lift the Stay, at 1 (U.S.C.M.C.R., Apr. 29, 2016) (Ap. 24). Colonel Martin T. Mitchell was one of the five.

Counsel for Al-Nashiri raised issues similar to those now before this Court with the USCMCR. Those objections were dispensed with in a summary order. *United States v. Al-Nashiri*, Case No. 14-001, Order, at *3 (U.S.C.M.C.R. May18, 2016) ("*Al-Nashiri* Order") (Ap. 32). Because this was "an unpublished summary order," however, it "has no precedential effect." *United States v. Marshall*, 669 F.3d 288, 294 (D.C. Cir. 2011).

1. The position of appointed appellate military judge on the USCMCR does not exist in the law.

The Supreme Court has consistently held that the establishment of all governmental offices, along with the mode of their officers' appointment and the qualifications of those who may serve, is constitutionally entrusted to Congress and must be specified expressly by statute. *Myers v. United States*, 272 U.S. 52, 129 (1926). Here, no such office as appointed appellate military judge on the USCMCR has been "established by Law." *Freytag v. C.I.R.*, 501 U.S. 868, 881 (1991).

Congress has specifically authorized the Secretary of the Department that houses the United States Coast Guard to appoint "civilian employees" of that department "as appellate military judges, available for assignment to the Coast Guard Court of Criminal Appeals." 14 U.S.C. § 153; *see also United States v. Ryder*, 44 M.J. 9, 11-12 (1996) (affirming Secretary's appointment of civilians under Appointments Clause solely because CGCCA judge is an inferior office). The narrowness of that lone exception proves the general rule. The United States Code does not otherwise authorize the "appointment" of military appellate judges or mention the position of "appointed appellate military judge"; instead, it requires their "assignment" or "detail." *See e.g.* 10 U.S.C. § 866 (assignment of appellate military judges to service Courts of Criminal Appeals). More specifically, no statute authorizes the "appointment" of an "appellate military judge" to the USCMCR.

Indeed, a Presidential appointment as an "appellate military judge" pursuant to §950f(b)(3) is irreconcilable with the statutory scheme governing the USCMCR. As the D.C. Circuit held subsequent to the USCMCR's summary order in the *Al-Nashiri* case, the "Secretary of Defense may *assign* appellate military judges from the military justice system to serve on the Court" pursuant to §950f(b)(2), or "the President, with the advice and consent of the Senate, may *appoint* civilians to serve

as judges on the Court" pursuant to §950f(b)(3). *Khadr*, 823 F.3d at 96 (emphasis added). This assignment/appointment dichotomy reflects the longstanding distinction between the assignment of inferior officers, such as those on the Courts of Criminal Appeal, and the appointment of principal officers, such as the judges on this Court.

Furthermore, when Congress creates military positions that require a specific appointment, such as Chairman of the Joint Chiefs of Staff, the second appointment to that position is specifically provided for by statute. "Congress has not hesitated to expressly require the separate appointment of military officers to certain positions." *Weiss*, 520 U.S. 163, 171 (1994). Unlike §950f(b)(3), however, those statutes make clear that the appointment is open to military officers. *Id*. (collecting statutes requiring a second appointment to certain military offices). Similarly, those positions lack the good cause tenure protection that would render them principal offices, again unlike §950f(b)(3). These differences "negate[] any permissible inference that Congress intended that military judges should receive a second appointment [on the USCMCR], but in a fit of absentmindedness forgot to say so." *Id*. at 172.

Congress has established separate procedures for how military officers and civilians may serve on the USCMCR – assigning the former, appointing the later.

It did not authorize the two provisions to be haphazardly muddled together to create the position of "appointed" "appellate military judge" as a matter of government convenience.[3]

2. Section 973(b) of Title 10 bars military officers from holding an appointment to the USCMCR.

The appointment of a commissioned officer to the principal office of USCMCR Judge pursuant to §950f(b)(3) is statutorily barred by 10 U.S.C. § 973(b). Section 973(b) is a longstanding feature of military law that explicitly forbids dual office holding by military officers, including any "civil office … that requires an appointment by the President by and with the advice and consent of the Senate." *Id*. This is "a statutory expression of the incompatibility inherent in the

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[3] The results of that muddling are apparent in a recent USCMCR proceeding. At some point while the *Al-Nashiri* USCMCR appeals were stayed to allow the government to seek his appointment to the USCMCR following the D.C. Circuit's opinion, Judge Donald King, USN, "voluntarily requested release from the U.S. Court of Military Commission Review (USCMCR) because he was seeking a new assignment." *Al-Nashiri v. United States*, Case No. 16-001, Order, (U.S.C.M.C.R. August 23, 2016), at 2(Ap. 38). Despite not being subject to the direction or supervision of any other Executive Branch actor, Judge King was required to seek approval from the Department of Defense General Counsel, via the service Judge Advocate General. *Id.* The General Counsel eventually allowed Judge King to depart the USCMCR, and even claimed the ability to make that departure retroactive. *Id.* Thus, even as the government claimed Judge King was an "appointed" judge it continued to treat him as if his position on the USCMCR was merely an assignment.

holding of a civil office – state or federal – by an army officer on the active list." Public Health Service Officers – Extent of Assimilation with Army Officers, 20 Comp. Gen. 885, 888 (1941); 1941 U.S. Comp. Gen. LEXIS 170.

When enacted in 1870, the statute did not define "civil office," but instead relied on its meaning in the common law, which encompassed any federal officer who served during good behavior. Following Joseph Story's analysis of the term at common law, the statute was understood to cover the "most important civil officers," including those "connected with the administration of justice [and] the collection of the revenue." Joseph Story, 3 Commentaries on the Constitution § 1530 (1833).

The phrase "civil office" was understood by way of "contrast to the term 'military office.' An 'officer of the Army,' holding, as he does, the latter, is to be inhibited from holding also the former. The two are antithetical; their duties are, if not inconsistent, at any rate, widely different, and there is to be no point where they include or overlap each other." Acceptance of Office in National Guard of a State by Officer on Active List of the Regular Army, 29 U.S. Op. Att'y Gen. 298, 299 (1912); 1912 U.S. AG LEXIS 63. The distinguishing elements that define a military office are familiar: "Rank, title, pay, and retirement are the indicia of military, not civil, office." *Smith v. United States*, 26 Ct.Cl. 143, 147 (Ct.Cl. 1891).

Accordingly, if a government position does not *require* a commission in the uniformed service (i.e., if it can be held by a civilian), then it is a civil office. *Winchell v. United States*, 28 Ct.Cl. 30, 35 (Ct.Cl. 1892).

In its summary order, the USCMCR disregarded the relevance of §973 on the ground that the role of a USCMCR judge is a "military function." *Al-Nashiri* Order at *3(Ap. 32). But the nature of the officeholder's duties is irrelevant to the question of whether an office is civil or military. Army Officer Accepting Temporary Civilian Employment, 25 Comp. Gen. 377, 381 (1945); 1945 U.S. Comp. Gen. LEXIS 251 ("The statute makes the two positions incompatible as a matter of law, without qualification and without regard to any showing of compatibility in fact by reason of leave of absence, or otherwise, with respect to a particular officer and a particular position."). For example, the Supreme Court concluded that the Secretary of War held a "civil office," despite its military functions and place within the chain-of-command, because the Secretary "is a civil officer with civil duties to perform, as much so as the head of any other of the executive departments." *United States v. Burns*, 79 U.S. 246, 252 (1870). Similarly, the Attorney General opined that General William Tecumseh Sherman could not even temporarily serve as acting Secretary of War "because it is a civil

office." Acting Secretary of War, 14 U.S. Op. Att'y Gen. 200 (1873); 1873 U.S. AG LEXIS 48.

Instead, when Congress creates exceptions to §973 that make both military officers and civilians eligible for the same office, such as the Director of the CIA, it expressly provides for that special case. 10 U.S.C. § 528(e); *see also* Memorandum for the General Counsel, General Services Administration, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, 3 Op. OLC. 148, 150 (1979); 1979 OLC LEXIS 24 ("Where Congress wishes to permit a military officer to occupy a civilian position on an acting basis without forfeiting his commission, it has done so explicitly."); Dwan V. Kerig, *Compatibility of Military and Other Public Employment*, 1 Mil. L. Rev. 21, 85 (1958) (collecting offices for which military officers are statutorily eligible for dual appointments).

To the extent there was any ambiguity over what dual office holding §973 prohibited, Congress removed all doubt in 1983. Department of Defense Authorization Act of 1984, 97 Stat 614, § 1002 (1983) (Ap. 47). One of Congress' principal concerns in amending §973 was that "the term 'civil office' presently used in section 973(b) is not clearly defined in that statute." S. Rep. 98-174, p 232 (1983) (Ap. 11). In response to an interpretation of "civil office" that foreclosed what had been an accepted practice, Congress allowed military officers to be

"assigned" to certain civil offices as part of their military duties in §973(a), but preserved §973(b)'s basic purpose to "prohibit [active duty] officers from *holding* any elective office in the federal government, any federal office requiring appointment by the President with the advice and consent of the Senate, and any position in the executive schedule." *Id*. at 233 (emphasis added).[4]

The position of USCMCR judge under §950f(b)(3) is unambiguously and exclusively a civil office. *Khadr*, 823 F.3d at 96 (holding that it is the means by which the President "appoint[s] civilians to serve as judges on the Court."). It lacks any provision for "rank, title, pay, and retirement." It is a principal office on an Article I court, solely concerned with the "administration of justice," that has all three elements of a "civil office" at common law. It is a federal office that requires Presidential appointment and Senate confirmation. And it is an office to which civilians can and have been appointed. Hence, §973(b) categorically prohibits the

[4] The Office of Legal Counsel had determined that the assignment of Judge Advocates to serve as Special Assistant U.S. Attorneys ran afoul of §973. S. Rep. 98-174, p. 233 (1983) (Ap. 11). Accordingly, Congress amended §973(b) "to permit the continuation of this practice of utilizing military attorneys as Special Assistant United States Attorneys. … This provision does not sanction or endorse any use of military attorneys beyond that permitted under that interpretation." *Id.*; *see also* 10 U.S.C. § 806(d)(1) ("A judge advocate who is *assigned* or *detailed* to perform the functions of a civil office in the Government of the United States under section 973(b)(2)(B) of this title may perform such duties as may be requested by the agency concerned") (emphasis added).

"appointment" of any military officer to the office of USCMCR judge under §950f(b)(3).

3. Service by a military officer as an appointed judge on USCMCR would violate the Commander-in-Chief Clause.

Accepting an appointment as a federal appellate judge on an independent Article I court of record is constitutionally incompatible with the status of a serving commissioned officer. Judges appointed to the USCMCR under §950f(b)(3) cannot be reassigned or otherwise removed from the USCMCR for any reason other than good cause. This level of tenure protection, only slightly below the "good Behaviour" tenure of an Article III judge, is irreconcilable with the President's constitutional authority as Commander-in-Chief.

The Constitution declares that the President "shall be Commander in Chief of the Army and Navy of the United States." U.S. Const., art. II, § 2, cl. 1. This clause "vest[s] in the President the supreme command over all the military forces." *United States v. Sweeny*, 157 U.S. 281, 284 (1895). By necessity this includes the power to instruct every member of the armed forces what to do and when. *Fleming v. Page*, 9 How. 603, 615 (1850) ("As commander in chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual[.]"). This applies with equal weight to officers serving in professional

capacities. *Brown v. Glines*, 444 U.S. 348, 357 n.14 (1980) ("[M]embers of the Armed Services, wherever they are assigned, may be transferred to combat duty or called to deal with civil disorder or natural disaster.").

There simply is no such thing as "independence" from the chain-of-command for commissioned military officers. *Martin v. Mott*, 12 Wheat. 19, 30-31 (1827).[5] This traditional understanding of the President's constitutional authority over the military goes back to the Founding and has never been seriously questioned.[6] Indeed, even skeptics of presidential power concede that it would be

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[5] *See also El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 858-59 (D.C. Cir. 2010) (Kavanaugh, J., concurring) ("In the national security realm … courts have generally accepted that the President possesses exclusive, preclusive power under the Commander-in-Chief Clause … to command troop movements during a congressionally authorized war."); Memorial of Captain Meigs, 9 U.S. Op. Att'y Gen. 462, 468 (1860); 1860 U.S. AG LEXIS 23 ("As commander-in-chief of the army it is [the President's] right to decide according to [his] own judgment what officer shall perform any particular duty … Congress could not, if it would, take away from the President, or in anywise diminish the authority conferred upon him by the Constitution."); Disbursements by Quartermasters to Militia, 2 U.S. Op. Att'y Gen. 711, 712 (1835); 1835 U.S. AG LEXIS 12 ("The President, as Commander in Chief, … may lawfully require any officer of the United States to perform the appropriate duties of his station in the militia when in the service of the United States whenever the public interest shall so require.").

[6] In the pre-ratification period, Congress exercised the commander-in-chief power. The Second Continental Congress appointed George Washington to be "General and Commander in chief of the army of the United Colonies." 2 J. Cont. Cong. 96 (1775) (Ap. 40). This delegation authorized him to "require all Officers and Soldiers, under [his] command, to be obedient to [his] orders, and diligent in the exercise of their several duties," subject to "such orders and directions" as he

unconstitutional to "insulate [a military] officer from presidential direction or removal." David Barron & Martin Lederman, *The Commander-in-Chief at Its Lowest Ebb: A Constitutional History*, 121 Harv. L. Rev. 941, 1103-04 (2008).

To the contrary, service members must follow – on pain of death in wartime – every order that is not manifestly criminal, regardless of whether their superior had good reasons, bad reasons, or no reason at all for issuing it. 10 U.S.C. § 890(2). And the basic premise of the military establishment's constitutional design is presidential direction and supervision of that chain-of-command. *United States v. Ezell*, 6 M.J. 307, 316 (C.M.A. 1979) ("[A]s Commander in Chief of the Armed Services under Article II of the Constitution, the President has powers … to deploy troops and assign duties as he deems necessary.").

Even if Congress had contemplated the "appointment" of military officers to the principal office of USCMCR Judge – which is clearly inconsistent with the scheme of 10 U.S.C. § 950f – the good cause tenure that accompanies such an appointment would be an unconstitutional encroachment on the President's ability to direct and supervise the duties of those in the chain-of-command. *Zivotofsky ex*

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might "receive from this, or a future, Congress." *Id*. The Articles of Confederation also reserved to Congress the power of "appointing all officers" in the land and naval forces and "directing their operations." Art. of Conf., Art. IX. The Framers made a considered decision to give these powers to the President.

rel. Zivotofsky v. Kerry, 135 S.Ct. 2076, 2095 (2015) ("[W]hen a Presidential power is 'exclusive,' it 'disabl[es] the Congress from acting upon the subject.'") (citation omitted); Relation of the President to the Executive Departments, 7 U.S. Op. Att'y Gen. 453, 464 (1955); 1855 U.S. AG LEXIS 35 ("No act of Congress … can … authorize or create any military officer not subordinate to the President.").

Unsurprisingly, there is no precedent for military officers simultaneously serving as principal officers with the attendant tenure protections from the chain-of-command. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (failing to find a single "case where this Court has assumed to revise duty orders as to one lawfully in the service."). Indeed, it is probably no coincidence that 10 U.S.C. § 973(b), discussed above, has long been a bar to military members' simultaneous holding of civil offices that would bar their reassignment by their military chain of command.

C. A military officer's appointment to the USCMCR under 10 U.S.C. § 950f(b)(3) either (1) automatically strips them of their commission, rendering them a civilian, or (2) is *ab initio* void, leaving them at their prior rank and grade.

1. A military officer's appointment to the USCMCR automatically resigns their commission.

Under the common law of incompatibility, the acceptance of an appointment to a second office constituted a vacatur of the first office by operation of law. *Lopez v. Martorell*, 59 F.2d 176, 178 (1st Cir. 1932) ("At that time both under the common law and the civil law, and without regard to statute, an office holder was

not ineligible to appointment or election to another incompatible office, but acceptance of the latter vacated the former.”). Traditionally, this common law rule was the exclusive remedy for a violation of §973(b). Automatic removal was inflexibly mandated by §973(b) until 1983 and remains the default means of preventing dual office holding. DoD SOCO, Advisory Number 02-21, *What Constitutes Holding a “Civil Office” by Military Personnel* (Dec. 16, 2002) (Ap. 14) (“as a general rule, [§973] requires retirement or discharge for members elected or appointed to a prohibited civil office.”).

Assuming that military officers have, in fact, been appointed to the principal office of USCMCR judge under §950f(b)(3), then those officers resigned their commissions, effective on the date their appointments to the USCMCR were finalized.

2. Alternatively, a military officer’s appointment to the USCMCR is *ab initio* void.

While automatic resignation of a military officer’s commission remains the default rule, acceptance of a second appointment to the USCMCR can alternatively be deemed *ab initio* void. This result is contemplated both by equitable considerations and the current statutory scheme implemented by §973.

In the mid-20th century, §973 was criticized on the ground that “its penalty (automatic termination of an officer’s appointment) [was] excessive and

unnecessarily rigid." John H. Stassen, *The Civil Office Prohibition (10 U.S.C. § 973(b): Applicability to Office of Notary Public*, 26 JAG J. 268, 278 (1972). Cognizant of these concerns, Congress struck the automatic removal language from §973 on the understanding that the statute's purposes could be equally well served by rendering any second appointment void. Congress therefore gave the Department of Defense the power to enforce §973's prohibitions *ex ante* through regulation.

Departmental regulations now prevent violations of §973 with extensive procedural safeguards, including the requirement that military officers nominated for any Presidential appointment obtain the express and personal pre-approval of the relevant service Secretary. Political Activities by Members of the Armed Forces, DoDD 1344.10 § 4.2.2.4 (2008) (Ap. 47) ("The member must understand that if the Secretary concerned does not grant permission, then the member must immediately decline the nomination or withdraw as a candidate."). Nothing in the record indicates that any of the five officers appointed to the USCMCR complied with DoDD 1344.10. Consequently, this Court may conclude that these officers'

appointments to the USCMCR were *ab initio* void, thereby returning them to the status quo *ante*.[7]

CONCLUSION

The USCMCR is an Article I court of record whose judges are principal officers. The only question here is what effect should be given to the appointment of five military officers to be USCMCR judges pursuant to §950f(b)(3). If these appointments are construed to have validly elevated the individuals to the position of USCMCR Judge, then they automatically resigned their military commissions by operation of law and ceased to be eligible to perform military duties. Alternatively, if the appointments are construed as *ab initio* void, then they

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[7] This result is arguably bolstered by ambiguity in the Congressional Record relating to the nature of these officers' appointments. The nomination papers submitted by the President refer to their service as "appellate military judges" and cite to §950f(b)(3), which is the only statutory basis for any Presidential appointment to the USCMCR. *Eg.* 162 Cong. Rec. S1474 (daily ed., Mar. 14, 2016) (Ap. 43) (nomination of Martin T. Mitchell). According to the Congressional Record, however, the Senate confirmed the five officers not to the position of USCMCR judge, but to their existing ranks as part of an *en masse* confirmation of routine military appointments. *Eg.* 162 Cong. Rec. S2599-2600 (daily ed., Apr. 28, 2016) (Ap. 45) (confirmation of Martin T. Mitchell). This is by way of contrast to both Judges Pollard and Silliman's explicit confirmations "to be a judge of the [USCMCR]." 158 Cong. Rec. S4425 (daily ed., June 21, 2012) (Ap. 42). It also contrasts, for example, with General Michael Hayden's confirmation as Director of the CIA in his then-current rank. 152 Cong. Rec. S5318 (daily ed., May 26, 2006) (Ap. 41).

continued in their same rank and grade and remained eligible to perform their assigned military duties.

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CERTIFICATE OF COMPLIANCE WITH RULES 24, 26, and 37

1. This brief complies with the type-volume limitation of Rules 24 and 26 because this brief contains 4,822 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been prepared in a monospaced typeface using Microsoft Word Version 2010 with Times New Roman, using 14-point type.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that a copy of the foregoing Amicus Curiae Brief was electronically mailed to the Court, to Counsel for Appellant (Major Johnathan D. Legg), and to Counsel for Appellee (Gerald R. Bruce), on September 27, 2016.

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