IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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| **UNITED STATES,**<br><br>*Appellee,*<br><br>v.<br><br>**NICOLE A. DALMAZZI**<br>Second Lieutenant (O-1),<br>U.S. Air Force<br><br>*Appellant.* | **REPLY BRIEF OF APPELLANT**<br><br>Crim. App. No. 38808<br><br>USCA Dkt. No. 16-0651/AF |

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

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Twice in as many years, this Court has been compelled to address the service of a judge on the Air Force Court of Criminal Appeals (AFCCA), and "the fundamental structural provisions devised by the Framers in allocating power within the government they constructed." *United States v. Janssen*, 73 M.J. 221, 222 (C.A.A.F. 2014). While it remains an open question whether the "military judges" *assigned* to the U.S. Court of Military Commission Review (USCMCR) are "principal or inferior officers," *In re Al-Nashiri*, 791 F. 3d 71, 85 (D.C. Cir. 2015), the principal-officer status of the "additional judges," who are appointed by the President with the advice and consent of the Senate, and who may "be removed by the President only for cause and not at will," *In re Khadr*, 823 F.3d 92, 95 (D.C. Cir. 2016), is not.

The President and Senate elected "to put to rest any Appointments Clause questions regarding the CMCR's military judges." *In re Al-Nashiri*, 791 F. 3d at 86. They did so "by re-nominating and re-confirming the military judges to be *CMCR judges*." *Id.* Contrary to the government's argument, the subsequent service of a thus-appointed USCMCR judge on AFCCA is squarely within this Court's jurisdiction. Gov't Br. at 26. As in *Janssen*, the government seeks to reduce Judge Mitchell's appointment to a "matter of 'etiquette or protocol,'" *Janssen*, 73 M.J. at 222 (citing *Edmond v. United States*, 520 U.S. 651, 659 (1997)), repeatedly asserting the Judge has purportedly been "reassigned." Gov't Br. at 4-5, 21. But Judge Mitchell's appointment is constitutionally and statutorily significant, and it runs afoul of safeguards intended to prevent congressional encroachment upon the Executive

and Judicial Branches and assure the civilian preeminence in government.

## Argument

## I.

## USCMCR JUDGE MITCHELL IS NOT STATUTORILY AUTHORIZED TO SIT ON THE AIR FORCE COURT OF CRIMINAL APPEALS.

### *A. The government's waiver argument is unconvincing and ignores controlling authority.*

The government contends that Appellant waived her right to contest whether a judge on the panel deciding her case was statutorily authorized, citing *United States v. Kincheloe*, 14 M.J. 40, 51 (C.M.A. 1982) and *United States v. Burton*, 52 M.J. 223, 225 (C.A.A.F. 2000). *See* Gov't Br. at 6-7. Both of these cases pertain to whether an appellant could question the *impartiality* of a judge who decided their case. The government misapprehends the nature of the issue, which is based not on perceived partiality, but rather on Judge Mitchell's status as a judge on the USCMCR. If Judge Mitchell's status of either holding civil office or being a principal officer precludes him from sitting as a judge on AFCCA, this defect is "of constitutional dimensions – certainly 'fundamental' by any reckoning." *United States v. Jones*, 74 M.J. 95, 97 (C.A.A.F. 2015). Accordingly, it cannot be waived or forfeited. *See id.* (rejecting the de facto officer doctrine where a member of a Court of Criminal Appeals panel was authorized to sit). The government's failure to distinguish *Jones* is dispositive of its waiver argument.

### *B. Judge Mitchell's military commission terminated upon his acceptance of civil office.*

The government contends that Judge Mitchell's commission was not terminated by his acceptance of an appointment to the USCMCR because "the nomination and confirmation state that Colonel Mitchel is 'TO BE COLONEL.'" *See* Gov't Br. at 8. The government's argument amounts to a claim that magic words in the congressional record can override the prohibition found in 10 U.S.C. § 973 (2012). And it ignores that Judge Mitchell was appointed pursuant to the "additional judges" provision found in 10 § 950f(b)3 (2012). JA 71.

Somewhat inartfully, Judge Mitchell's nomination and confirmation (along with officers of other services appointed to the USCMCR) was inserted in the congressional record in the midst of promotions of active duty officers being elevated to a new grade. See JA 71, 73. But prior to his acceptance of an appointment on the USCMCR, however, Judge Mitchell had already attained the grade of Colonel in the United States Air Force. Insertion of the language "TO BE COLONEL"—for the second time—in the congressional record along with the promotion of other active duty officers to higher grades does not change the fundamental nature of an appointment to the USCMCR. Such an appointment is a civil office within the meaning of 10 U.S.C. § 973 (2012), as it requires "an appointment by the President by and with the advice and consent of the Senate." *Id.* § 973(b)(2).

The government next contends that acceptance of an appointment on the USCMCR is not a "civil office" or alternatively that it is "otherwise authorized by law" for a military officer to hold such an office. *See* Gov't Br. at 9. The government appears to coin a new term, *i.e.*, "prohibited civil office," which is not used in the statute. *See* Gov't Br. at 9. The government argues that acceptance of the appointment as a judge on the USCMCR is more analogous to the office of notary public, as in *Riddle v. Warner*, 522 F.2d 882 (9th Cir. 1975), rather than the position of Acting Administrator of General Services. *See* Gov't Br. at 10-14.

The court's holding in *Riddle* is unsurprising because, while many states recognize a notary public as a public officer, "it is also abundantly clear that he is not a public officer in the ordinary sense that that term is customarily used." *Transamerica Ins. Co. v. Valley Nat'l Bank*, 462 P. 2d 814, 817 (Ariz. Ct. App. 1969). More importantly, Congress amended 10 U.S.C. § 973 eight years after *Riddle* in response to criticism that "the term 'civil office' presently used in § 973(b) is not clearly defined in that statute[.]" S. Rep. 98-174, at 232 (1983). Today, both Judge Mitchell and the Administrator of the General Services Administration hold "civil office" because they hold an office requiring appointment by the President with the advice and consent of the Senate, regardless of the size or scope of their responsibilities. 10 U.S.C. § 973(b)(2)(ii) (2012).

The fact that Judge Mitchell "is in charge of no person, building, or

procurement of anything," Gov't Br. at 14, is irrelevant even if one could ignore the significant judicial responsibility the USCMCR wields and in light of the history of that court and its elevation to a court of record. *See e.g., United States v. Al-Nashiri*, 2016 U.S. CMCR LEXIS 1 (USCMCR June 9, 2016) (reinstating capitally referred murder charges dismissed by military judge for lack of jurisdiction after government interlocutory appeal).

The government next argues that simultaneous service on a military Court of Criminal Appeals (CCA) and the USCMCR is statutorily authorized by 10 U.S.C. §950f(b). *See* Gov't Br. at 12. But this contention fails to explain why Congress has expressly sought to authorize the assignment or appointment of military officers to civil office when it so desires. *See* 10 U.S.C. § 528(e) (providing that an officer of the armed forces may be appointed or assigned to the position of CIA director without any effect on their status as an officer); 5 U.S.C. § 5534a (providing that a member of the uniformed services "who is on terminal leave . . . may accept a civilian office").

Contrary to the government's argument, the plain language of § 950f(b), which states judges of the USCMCR shall be "assigned or appointed," does not authorize appellate military judges be assigned *and* appointed. (Gov't Br. at 12.) "The U.S. Court of Military Commission Review consists of two categories of judges: (i) appellate military judges in the military justice system who are designated by the Secretary of Defense to serve on the Court and (ii) civilians who are appointed by

the President with the advice and consent of the Senate to serve as judges on the Court." *In re Khadr*, 823 F.3d at 95. Here, the government not only seeks to manufacture a third category of judges—appointed military appellate judges—but also implicitly relies upon this non-existent statutory authority to assert appointed military judges are "otherwise authorized by law." Gov't Br. at 9, 12. Neither §950f(b) nor § 973 can be read to support this proposition.

Accordingly, acceptance of an appointment on the USCMCR operates to vacate the first office. *See Lopez v. Martorell*, 59 F.2d 176, 178 (1st Cir. 1932). The government correctly notes that the 1983, amendments to § 973 struck language codifying the common-law, which provided for the termination of a military appointment upon the assumption of military office. Gov't Br. at 16. But the stated congressional purpose behind that amendment was to expressly authorize the *assignment* of military attorneys as Special Assistant United States Attorneys. S. Rep. 98-174, at 232 (1983). "This provision does not sanction or endorse any use of military attorneys beyond that permitted under that interpretation." *Id.*

Congress intended to protect the "military commissions of such officers," from "acts previously performed by military officers in furtherance of their assigned duties[.]" *Id.* Nevertheless, the government concedes the Department of Justice Office of Legal Counsel addressed the continuing prohibition on officers otherwise holding civil office earlier this year. Gov't Br. at 17. And the parties apparently agree

that Congress narrowed § 973 in 1983 to prohibit military officers from serving in an office that "requires an appointment by the President by and with the advice and consent of the Senate." 40 Op. O.L.C. 1, 9-10; 2016 OLC LEXIS 3 (Mar. 24, 2016). The parties apparently only disagree that Judge Mitchell's appointment pursuant to § 950f(b)(3), which authorizes the presidential appointment of USCMCR judges with the advice and consent of the Senate, is in fact an office that "requires an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(ii).

### *C. Even if Judge Mitchell Retained His Military Commission upon Accepting His Current Office, the UCMJ Does Not Authorize the Judge Advocate General to Assign Judges of the United States Court of Military Commission Review to the Air Force Court of Criminal Appeals.*

USCMCR Judge Mitchell cannot simultaneously serve as an "appellate military judge" and an "additional judge" to the assigned "appellate military judges" on the USCMCR when the statute expressly provides, "[j]udges on the Court shall be assigned *or* appointed[.]" 10 U.S.C. § 950f(b)(1) (2012). The government's response to this argument amounts to a claim that this Court does not have the power to resolve the issue. *See* Gov't Br. at 20. The government cites no authority for this proposition. Underscoring Appellant's argument is Judge Mitchell's Oath of Office, which states he has "been duly *appointed* as *Appellate Judge* of the United States Court of Military Commission Review. . . ." See Motion to Supplement the Record

(Nov. 1, 2016) (Appendix) (emphasis added); see also *In re Khadr*, 823 F.3d at 95 (providing that the USCMCR "consists of two categories of judges"). The government contends, that the Judge Advocate General (TJAG) has already reassigned USCMCR Judge Mitchell to duties other than the CCA, thus proving his authority under Article 6, UCMJ. *See* Gov't Br. at 21. Appellant's argument relates to whether TJAG has the legal power of assignment, not whether certain officials may or may not have acquiesced to unauthorized reassignments. It is TJAG's inability to reassign Judge Mitchell that places him outside the scope of Articles 6, 26, and 66, UCMJ, and therefore makes him statutorily ineligible to serve on the AFCCA. *See* 10 U.S.C. §§ 806; 826; 866 (2012).

## II.

## EVEN IF USCMCR JUDGE MITCHELL IS STATUTORILY AUTHORIZED TO BE ASSIGNED TO THE AIR FORCE COURT OF CRIMINAL APPEALS, HIS SERVICE ON BOTH COURTS VIOLATES THE APPOINTMENTS CLAUSE GIVEN HIS NEWLY ATTAINED STATUS AS A PRINCIPAL OFFICER.

The government concedes that military officers assigned to CCAs are inferior officers. *See* Gov't Br. at 25. The government contends, however, that deciding the appointments clause issues presented by Judge Mitchell's attempted deliberation on both a CCA and the USCMCR is "fully outside the scope of this Court's jurisdiction and irrelevant for the purposes of this case." *See* Gov't Br. at 26. The government cites no authority for this claim. In her opening brief, Appellant explained why

Judge Mitchell is a principal officer based on his acceptance of an appointment to an Article I "court of record." *See* 10 U.S.C. § 950f(a) (2012).

In *Weiss v. United States*, 510 U.S. 163, 191 (1994) (Souter J., concurring), Justice Souter asserted the "Appointments Clause forbids the creation of such a single office that combines inferior-and principal-officer roles, thereby disregarding the special treatment the Constitution requires for the appointment of principal officers." *Id.* And the Solicitor General conceded that if military judges were principal officers, their assignment military judges would "raise a serious Appointments Clause problem indeed[.]" *Id.* It is this "serious Appointments Clause problem" that now confronts this Court.

It is only if this Court concludes Judge Mitchell was appointed as an inferior officer that the germaneness requirements for inferior-to-inferior assignments are triggered. The government contends that USCMCR Judge Mitchell's duties on that court are constitutionally germane to service on a CCA because "review of appeals by an accused convicted of the law of war is a classic military function." *See* Gov't Br. at 31. The government cites no authority for this proposition because the direct appellate review of a conviction for war crimes at a military commission never existed before the Military Commissions Act of 2006. Indeed, six of the eight Nazi saboteurs in *Ex parte Quirin*, 317 U.S. 1 (1942) were executed more than two months before the Court issued its opinion on collateral attack of their death sentences. Nothing about the USCMCR can be described as "classic."

WHEREFORE, Appellant respectfully requests this Court set aside the AFCCA's decision and remand her case for a complete appellate review in accordance with Article 66, UCMJ.

Respectfully submitted,

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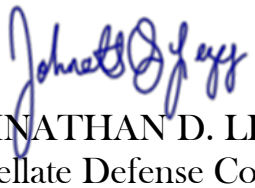
I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 31 October 2016.



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