1 December 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
Second Lieutenant (O-1) NICOLE A. DALMAZZI, United States Air Force *Appellant.*	)	Crim. App. No. 38708 USCA Dkt. No. 16-0651/AF

FINAL BRIEF OF SPECIFIED ISSUE ON BEHALF OF THE UNITED STATES

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1 December 2016

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. Second Lieutenant (O-1) NICOLE A. DALMAZZI, United States Air Force *Appellant.*	)))))))))	FINAL BRIEF ON BEHALF OF THE UNITED STATES Crim. App. No. 38708 USCA Dkt. No. 16-0651/AF

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

SPECIFIED ISSUE

WHETHER THE ISSUES GRANTED FOR REVIEW ARE MOOT WHERE THE RECORD REFLECTS THAT: MARTIN T. MITCHELL TOOK AN OATH PURPORTING TO INSTALL HIM AS A JUDGE OF THE U.S. COURT OF MILITARY COMMISSION REVIEW (CMCR) ON MAY 2, 2016; THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ISSUED AN OPINION IN THE UNDERLYING CASE WITH JUDGE MITCHELL PARTICIPATING IN HIS CAPACITY AS AN AFCCA JUDGE ON MAY 12, 2016; AND THE PRESIDENT DID NOT APPOINT MITCHELL TO THE CMCR UNTIL MAY 25, 2016.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Colonel Martin Mitchell became an appellate military judge at the Air Force Court of Criminal Appeals (AFCCA) in June 2013 after being assigned by The Judge Advocate General. (J.A. at 40.) On 28 October 2014, Secretary of Defense Chuck Hagel assigned Colonel Mitchell to the United States Court of Military Commission Review (C.M.C.R.) as an appellate military judge pursuant to 10 U.S.C. §950f(b)(2). (J.A. at 40.) On 11 March 2016, the President of the United States nominated Colonel Mitchell to the C.M.C.R. in the following fashion:

> THE FOLLOWING NAMED OFFICER FOR APPOINTMENT IN THE GRADE INDICATED IN THE UNITED STATES AIR FORCE *AS AN APPELLATE MILITARY JUDGE* ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW UNDER TITLE 10 U.S.C. SECTION 950F(B)(3). IN ACCORDANCE WITH *THEIR CONTINUED STATUS AS AN APPELLATE MILITARY JUDGE PURSUANT TO THEIR ASSIGNMENT BY THE SECRETARY OF DEFENSE AND UNDER 10 U.S.C. SECTION 950F(B)(2)*, WHILE SERVING ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW, ALL UNLAWFUL INFLUENCE PROHIBITIONS REMAIN UNDER 10 U.S.C. SECTION 949B(B).
>
> *To be colonel*
>
> MARTIN T. MITCHELL

(J.A. at 71.) (emphasis added). On 28 April 2016, the Senate confirmed Colonel Mitchell's nomination. (J.A. at 73.).

Fourteen days later, on 12 May 2016, AFCCA issued its opinion in this case affirming Appellant's findings and sentence. *See* United States v. Dalmazzi, ACM 38708 (A.F. Ct. Crim. App. 12 May 2016).

On 25 May 2016, 13 days after AFCCA issued its opinion in this case, the President appointed Colonel Mitchell to the C.M.C.R.

SUMMARY OF ARGUMENT

As Colonel Mitchell was not appointed by the President to the C.M.C.R. until after the AFCCA issued its opinion in Appellant's case, the two issues granted in this case are moot.

ARGUMENT

THE TWO ISSUES GRANTED IN THIS CASE ARE MOOT.

From the outset, the Government has argued, and continues to argue, that Colonel Mitchell's appointment by the President to be a C.M.C.R. appellate military judge in no way affected his ability to either sit as one of the AFCCA judges on the panel that decided Appellant's case (Original Granted Issue 1); or that his service on both courts violated the Appointments Clause (Original Granted II).

However, *in arguendo*, if Colonel Mitchell's appointment to the C.M.C.R. did affect either of the questions in the two originally granted issues in some fashion, such an affect is moot in this case since Colonel Mitchell was not yet

appointed to the C.M.C.R. when he participated in the AFCCA decision of Appellant's case.

In Dysart v. United States, 369 F.3d, 1303, 1311 (Fed. Cir. 2004), the Federal Circuit Court of Appeals provided the following detailed background on the appointment process, much of which is cited directly from Marbury v. Madison, 5 U.S. 137, 155-56 (1803):

> The Constitution provides that the President has the authority to nominate and, "by and with the Advice and Consent of the Senate," to appoint "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. Three separate actions are ordinarily required for a person to be appointed to office pursuant to this provision: the President's nomination, confirmation by the Senate, and the President's appointment after Senate confirmation. *See* Marbury v. Madison, 5 U.S. 137, 155-56 (1803). In accordance with this process, the President first selects a nominee and sends the nomination to the Senate. The Senate acts on the nomination and determines whether or not to confirm the nominee. If the nominee is confirmed, the President appoints the officer and signs a commission or performs some other public act as evidence of the officer's appointment. *See* Id. at 157.

The Court is Dysart continued its analysis by citing to an early opinion of the United States Attorney General which stated:

> To constitute an appointment under [Article II], it is necessary--1st, that the President should nominate the person proposed to be appointed; 2d, that the Senate should advise and consent that the nominee should be appointed; and, 3d, that, in pursuance of such nomination and such advice and consent, the appointment should be actually made.

> The nomination is not an appointment; nor is that nomination followed by the signification of the advice and consent of the Senate, that it should be made sufficient of themselves to confer upon a citizen an office under the constitution. They serve but to indicate the purpose of the President to appoint, and the consent of the Senate that it should be effectuated; but they do not divest the executive authority of the discretion to withhold the actual appointment from the nominee. To give a public officer the power to act as such, an appointment must be made in pursuance of the previous nomination and advice and consent of the Senate, the commission issued being the evidence that the purpose of appointment signified by the nomination has not been changed. 4 Op. Atty. Gen. 217, 219-20 (1843).

Referring back to Marbury and its effect on judicial officers, the Dysart opinion continued:

> For judicial officers, such as those involved in Marbury itself, the appointment is manifested by the President's signing of a commission. *See also* United States v. Le Baron, 60 U.S. 73, 78, (1856). However, the granting of a commission is not always required for a Presidential appointment. The Court noted that, "in order to determine whether [an officer] is entitled to [a] commission, it becomes necessary to enquire whether he has been appointed to the office." Marbury, 5 U.S. at 155. The Court ruled:
>
> > The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done every thing to be performed by him.
> > . . . .
> > Some point of time must be taken when the power of the executive over an officer . . . must cease. That point of time must be when the

> constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. Id. at 157.
>
> In Marbury, the "last act to be done by the president" to show that Marbury had in fact been appointed was "the signature of the commission." Id. However, the Court noted that, "if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer." Id. at 156.

Dysart, 369 F.3d at 1311-12.[1] As Judge Marshall stated in Marbury, such an appointment is "evidenced by an open, unequivocal act" by the person making the appointment. Marbury, 5 U.S. at 157.

In this case, the only evidence of any act by the President to actually appoint Colonel Mitchell to the C.M.C.R. after the Senate's confirmation of Colonel Mitchell's nomination is the Certificate of Appointment signed by the President on 25 May 2016. The record is devoid of any evidence that the President exercised his constitutional power of appointment by performing a "public act," an "open, unequivocal act," or any other such action to actually effectuate Colonel Mitchell's

[1] In Dysart, the President removed the plaintiff naval officer from the promotion list for the grade of rear admiral. The officer sued asserting that he had been automatically promoted before the president's removal and was entitled to the corresponding pay and benefits. Even though the naval officer had been nominated by the President, confirmed by the Senate, and placed on the promotion list, the court held that because there was no evidence that an appointment letter was signed and issued, the naval officer was never appointed and had not been promoted to rear admiral. Dysart, 369 F.3d at 1306-08, 1313.

appointment prior to his signature on the Certificate of Appointment on 25 May 2016.

Thus, when AFCCA issued its decision in Appellant's case on 12 May 2016, Colonel Mitchell was not yet appointed as a C.M.C.R. appellate military judge. While Colonel Mitchell had been nominated by the President and confirmed by the Senate to be an appointed appellate military judge on the C.M.C.R. by the time AFCCA issued its decision on 12 May 2016, the President had not yet actually appointed him as a C.M.C.R. appellate military judge. That appointment would not come until 13 days later on 25 May 2016.

As Colonel Mitchell was not yet an appointed C.MC.R. appellate military judge when he participated as an AFCCA appellate judge in Appellant's AFCCA decision on 12 May 2016, any issues related to Colonel Mitchell's appointment to the C.M.C.R. are moot as it relates to either Appellant's AFCCA decision or Colonel Mitchell's participation in that decision.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Court deny Appellant's claims as moot and affirm AFCCA's decision.

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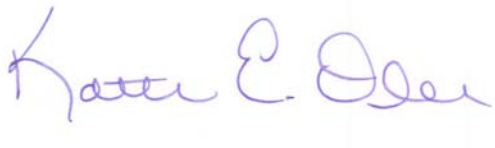

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 1 December 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because:

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2. This brief complies with the typeface and type style requirements of Rule 37 because:

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/s/
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Date: 1 December 2016