IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States, *Appellee* v. Airman First Class (A1C) KEANU D.W. ORTIZ United States Air Force, *Appellant*	BRIEF OF AMICUS CURIAE ARMY GOVERNMENT APPELLATE DIVISION IN RESPONSE TO GRANTED ISSUES Crim. App. Dkt. No. 38839 USCA Dkt. No. 16-0671/AF

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TO THE JUDGES OF THE
UNITED STATES COURT OF APPEAL FOR THE ARMED FORCES

Preamble and Interest of Amicus

The Army Government Appellate Division, pursuant to Rule 26 and this Court's order of December 16, 2016, files this amicus curiae brief in support of Appellee and to answer the granted and specified issues in this case.

The Army Government Appellate Division has a strong interest as amicus curiae to this case because it currently faces nearly identical challenges to the status of three of the judges on the Army Court of Criminal Appeals due to their concurrent positions as appellate military judges on the United States Court of Military Commissions Review. As of the date of this filing, this Court has already granted review of these same issues in 74 cases wherein the Army Government Appellate Division is the Appellee. In at least 21 additional cases, appellants have petitioned this Court for grant of review, alleging the same issues. As such, the Court's decision in this case will have a direct impact on a broad range of Army cases, both currently before this Court and going forward.

Issues Presented

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 PRINCIPAL OFFICER ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW.

III. WHETHER JUDGE MARTIN T. MITCHELL WAS IN FACT A PRINCIPAL OFFICER FOLLOWING HIS APPOINTMENT BY THE PRESIDENT TO THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW IN LIGHT OF THE PROVISIONS OF 10 U.S.C. § 949b(4)(C) AND (D), AUTHORIZING REASSIGNMENT OR WITHDRAWAL OF APPELLATE MILITARY JUDGES SO APPOINTED BY THE SECRETARY OF DEFENSE OR HIS DESIGNEE.

Summary of the Argument

Amicus joins with Appellee's analysis of the statutory question in Issue I. Pursuant to 10 U.S.C. § 866, 10 U.S.C. § 950, and 10 U.S.C. § 973, Judge Mitchell's appointment to the USCMCR did not terminate his commission, nor did it affect his continued status as an appellate military judge on the Air Force Court of Criminal Appeals [hereinafter the CCA].

Appellant also fails to show how Judge Mitchell's position as both a USCMCR judge and an appellate military judge presents any constitutional infirmity in light of the Appointments Clause. As a preliminary matter, Judge

Mitchell's "second" appointment as a USCMCR judge was not required by the Appointments Clause because his duties as a USCMCR judge are germane to his duties as an appellate military judge and military officer. Furthermore, the appointment of Judge Mitchell to the USCMCR did not transform him from an inferior to a principal officer because USCMCR judges are inferior officers in light of *Edmond v. United States*, 520 U.S. 641 (1997) and *Morrison v. Olson*, 487 U.S. 654 (1988). Given that both CCA and USCMCR judges are inferior officers, this case does not present Appellant's claimed issue of principal and inferior officers sitting on the same tribunal, which in itself is not a circumstance necessarily barred by the Appointments Clause. Lastly, to the extent that the Military Commissions Act of 2009 gives rise to competing interpretations of Judge Mitchell's status, the doctrine of constitutional avoidance should lead this Court to reject Appellant's unsupported and unconstitutional reading of the statute.

Argument

I. Judge Mitchell was statutorily authorized to sit as an appellate military judge on both the Air Force Court of Criminal Appeals and the United States Court of Military Commissions Review.

The Military Commissions Act [hereinafter MCA] of 2009 replaced the Court of Military Commissions Review (CMCR), which was previously established by the MCA of 2006, with the United States Court of Military Commissions Review (USCMCR). *Compare* 10 U.S.C. § 948a (2006) et seq. *with*

10 U.S.C. § 948a (2009) et seq. Under 2006 statute, the Secretary of Defense could assign either qualified military judges or "civilian[s] with comparable qualifications" to be appellate military judges on the CMCR. 10 U.S.C. § 950f(b) (2006). Under the MCA of 2009, the Secretary of Defense continued to retain his authority to assign "persons who are appellate military judges" to the USCMCR, so long as they were qualified military judges and commissioned officers. 10 U.S.C. § 950f(b)(2). In addition, the 2009 statute allowed the President to appoint, with Senate advice and consent, "additional judges" to the USCMCR. 10 U.S.C. § 950f(b)(3).

In this case, Judge Mitchell was properly assigned as an appellate military judge to the USCMCR under 10 U.S.C. § 950(f)(2). The statute expressly contemplates and provides for his dual service as both an appellate military judge on the Court of Criminal Appeals [hereinafter CCA] and a USCMCR judge. That he was later appointed by the President to the same position on the USCMCR neither terminated his commission nor affected his status as an appellate military judge on the CCA.

A. Judge Mitchell's appointment as an appellate military judge to the USCMCR did not terminate his commission.

On 25 May 2016, Judge Mitchell was appointed by the President as "an Appellate Military Judge of the United States Court of Military Commission Review." (Appointment Certificate). Yet Appellant misguidedly argues that this

appointment automatically terminated Judge Mitchell's commission as a military officer because 10 U.S.C. § 973 generally prohibits active duty officers from holding a civil office in the United States Government.

The relevant statute provides

> *Except as otherwise authorized by law*, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States . . . (ii) that requires an appointment by the President by and with the advice and consent of the Senate . . . .

10 U.S.C. § 973(b)(2)(A) (2012) (emphasis added). The subsection applies to active-duty officers. 10 U.S.C. § 973(b)(1)(A). When originally enacted, § 973 provided that "[t]he acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment." Act of Jan. 2, 1968, Pub. L. No. 90-235, § 4(a)(5)(A), 81 Stat. 753. In 1983, Congress repealed the automatic termination provision, replacing it with language that reads substantially as the statute now reads. Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, § 1002(a), 97 Stat. 655. Additionally, "[n]othing in [§ 973(b)] shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. § 973(b)(5).

Appellant's argument thus fails for three reasons. First, Appellant fails to show how the position of a USCMCR judge constitutes a "civil office" that cannot be held by a commissioned active-duty officer under 10 U.S.C. § 973, when it is in

fact explicitly "authorized by law." Specifically, the MCA of 2009 authorizes appellate military judges, who are commissioned military officers, to be assigned as USCMCR judges. *See* 10 U.S.C. § 950f(b)(2).

Second, even if service on the USCMCR by an active duty officer did constitute the prohibited holding of a civil office, such service would not result in the *automatic* termination of the military officer's commission. Congress repealed the automatic termination provision in 1983. To effectuate the statute's prohibition and to terminate the commission, the military must take administrative action to discharge or retire the officer holding the prohibited civil office. Because no such administrative action had been taken against Judge Mitchell when the CCA rendered its decision, he retained his military commission, and there is no infirmity in the CCA's decision.

Lastly, assuming still that the position of a USCMCR judge is a prohibited civil office, the CCA's decision in this case is unaffected because of § 973's savings provision, subsection (b)(5). While Congress sought to prohibit military officers from holding certain civil offices, the plain language of subsection (b)(5) shows that it also sought to protect any action undertaken by such an officer as part of his official military duties. Judge Mitchell's actions in this case were undertaken as part of his official military duties as an appellate military judge.

Accordingly, 10 U.S.C. § 973 should not be read to invalidate his service on the CCA, and does not impact the validity of the CCA's decision in this case.

B. Judge Mitchell's confirmation as a USCMCR judge does not impact his continued eligibility to serve as an appellate military judge on the CCA.

Nothing in Article 66 disqualifies or prohibits an appellate military judge from sitting on both the CCA and the USCMCR from sitting. Article 66, UCMJ, only requires an "appellate military judge" of the CCA to "be a member of a bar of a Federal court or the highest court of a State." 10 U.S.C. §866. Judge Mitchell easily meets that standard. Moreover, Judge Mitchell was assigned by The Judge Advocate General to the CCA well before his assignment and appointment to the USCMCR. His assignment to the CCA was valid at the time it was made, and it remains as valid today in light of Article 66, UCMJ and the MCA of 2009.

II. Judge Mitchell's service as both an appellate military judge on the CCA and a USCMCR judge does not violate the Appointments Clause of the United States Constitution.

A. The Appointments Clause does not require the "second appointment" of an appellate military judge to the USCMCR because the duties of a USCMCR judge are germane to that of an appellate military judge.

The Appointments Clause of the United States Constitution provides that

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such

> inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. The first half of the clause describes the default method for appointing officers[1] of the United States--meaning, by Presidential nomination with advice and consent of the Senate--which is the required method for appointing principal[2] officers. The second half of the clause, occasionally referred to as the Excepting Clause, authorizes Congress to opt out of this default constitutional appointment process and vest the selection of "inferior officers" in "the President alone, in the Courts of Law, or in the Heads of Departments." The requirements of the Appointments Clause are "among the significant structural safeguards of the constitutional scheme" and are "designed to preserve political accountability relative to important government assignments." *Edmond v. United States*, 520 U.S. at 659, 663 (1997). The clause "is a bulwark against one branch aggrandizing its power at the expense of another branch," *Ryder v. United States*,

[1] An officer of the United States has been described by the Supreme Court as generally "any appointee exercising significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam).

[2] The term "principal" is not expressly employed in the Appointments Clause. However, during the Virginia ratifying convention, James Madison used the term to explaining the Excepting Clause's operation, when he referred to inferior officers as "subordinate officers" in contrast to the "principal offices." Jonathan Elliott, ed., 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 409-10 (Taylor & Maury 2d ed. 1863).

515 U.S. 177, 182, (1995), and in particular, "prevents congressional encroachment upon" the other branches. *Edmond*, 520 U.S. at 659.

Under the Clause, Congress "may create an office," but it "cannot appoint the officer." *Shoemaker v. United States*, 147 U.S. 282, 300 (1893). Nor can Congress "circumvent[] the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office." *Weiss v. United States*, 510 U.S. 163, 174 (1994). However, where Congress has simply "increase[d] the power and duties of" an incumbent position, and the new duties are "germane to the offices already held by" the incumbent, the Supreme Court has found no violation of the Appointments Clause. *Shoemaker*, 147 U.S. at 301.

In *Shoemaker*, Congress had established by law a commission of five members, three of which had to be selected in accordance with the default constitutional appointment process (nominated by the President and confirmed by the Senate), and two of which were designated to be holders of certain existing offices: namely, the Chief of Engineers of the United States Army and the Engineer Commissioner of the District of Columbia. *See Shoemaker*, 147 U.S. at 282 (citation omitted). The Shoemakers objected that these latter "two members of the commission were appointed by Congress" in contravention of the Appointments Clause. In response, the Supreme Court held that a second appointment for these incumbent officers to the commission was not

constitutionally required because the act merely "devolved upon them" what were simply "additional duties, germane to the offices already held by them." *Id.* at 301.

Under the same rationale, the Supreme Court has found that appellate military judges sitting on the service Courts of Criminal Appeals do not require a second appointment because they were already commissioned military officers who were appointed by the President and confirmed by the Senate, and their duties as appellate military judges were germane to their duties as military officers. *Weiss*, 510 U.S. at 165; *see also Edmond*, 520 U.S. at 654. Accordingly, Congress may create a new office and give a military officer the duties of the new office without making a new appointment necessary, so long as the new duties are germane to the military duties of that officer. *Weiss*, 510 U.S. at 173-74 (citing *Shoemaker*, 147 U.S. at 300-01). This is precisely what Congress did in creating the office of the USCMCR judge, which it intended could be filled with appellate military judges who were already commissioned military officers. Just as it did with the civilian members of the commission in *Shoemaker*, Congress imposed only a constitutional appointment requirement for additional judges to the USCMCR who had no prior commission. 10 U.S.C. § 950(f)(b)(3).

Similar to the statute in *Shoemaker*, the MCA of 2009 merely devolved upon appellate military judges "additional duties, germane to the offices already held by them." 147 U.S. at 301. The duties of a USCMCR judge, as prescribed by the

MCA of 2009, are strikingly similar to, and within the sphere of, the duties of an appellate military judge. For one, the purpose of the military commissions is to try alien unprivileged enemy belligerents for violations of law of war and other offenses triable by military commission, which is historically a military function. 10 U.S.C. § 948b. The USCMCR is tasked with reviewing the record "with respect to any matter properly raised by the accused" and its scope is identical to that of the CCAs under Article 66, UCMJ. 10 U.S.C. § 950f(c)-(d). Its procedural rules are based on the rules for courts-martial. 10 U.S.C. § 948(b). Even the D.C. Circuit has called USCMCR judges a "close analog" to appellate military judges, and found this "a similarity the Congress no doubt intended." *In re Al-Nashiri*, 791 F.3d 71, 82, 83 (D.C. Cir. 2015).

Thus, Congress' creation of the USCMCR under the MCA of 2009, which allows the office to be filled by current appellate military judges, does not present a violation of the Appointments Clause. Because the duties of a USCMCR judge are germane to that of an appellate military judge, no second appointment was required of Judge Mitchell.

B. Judge Mitchell's second appointment to, and part-time duty on, the USCMCR does not elevate him to a principal officer.

Judge Mitchell, after being properly assigned to the USCMCR by the Secretary Defense, was reappointed by the President, with advice and consent of

the Senate, to the same position.[3] According to Appellant, this second appointment of Judge Mitchell to the USCMCR somehow transformed him into a principal officer. However, this claim is unsupported because (1) nomination and confirmation to an office in accordance with the Appointments Clause does not, in itself, make one a principal officer; and (2) the USCMCR is a tribunal composed of inferior officers in light of Supreme Court precedent.

1. Judge Mitchell's appointment to the USCMCR does not, in itself, make him a principal officer.

The mere fact that an officer is nominated by the President and confirmed by the Senate does not alone make him a principal officer. Although this is the required manner of appointment for principal officers, it is also the default manner

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[3] Appellant suggests that this happened in response to *In re Al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015), wherein the petitioner had presented an Appointments Clause challenge to the validity of the appellate military judges on the USCMCR. (Addendum at 4). The court declined to issue the writ but stated in dicta:

> Once this opinion issues, the President and the Senate could decide to put to rest any Appointments Clause questions regarding the CMCR's military judges. They could do so by re-nominating and re-confirming the military judges to be *CMCR judges*. Taking these steps--*whether or not they are constitutionally required*--would answer any Appointments Clause challenge to the CMCR.

Id. at 86 (emphasis added). It is important to note that the D.C. Circuit court only suggested this second appointment in view of defending against "any Appointments Clause challenge to the CMCR"--as opposed to a challenge to the Courts of Criminal Appeals--and that it expressly declined to decide whether this second appointment was constitutionally required. As explained in subsection A, this second appointment was constitutionally unnecessary.

for inferior officers (which Congress can forgo in favor of one of the three other prescribed appointment methods listed in the Excepting Clause). *See Edmond*, 520 U.S. at 660 ("The prescribed manner of appointment for principal officers is also the *default* manner of appointment for *inferior* officers."); *Weiss*, 510 U.S. 163, 187 (Souter, J., concurring) (stating the Framers structured "an *alternative* appointment method for inferior officers") (emphasis added).

In this case, Judge Mitchell was appointed or assigned to an inferior office in at least three instances: (1) when he was first appointed by the President and confirmed by the Senate as a commissioned military officer; (2) when he was assigned by The Judge Advocate General as an appellate military judge; and (3) when he was assigned by the Secretary of Defense as a USCMCR judge. His reappointment by the President to the same position he already held on the USCMCR did not change his continued status as an inferior officer. If anything, it only further insulated him from "any Appointments Clause challenge to the CMCR." *In re Al-Nashiri*, 791 F.3d at 86.

2. The USCMCR is a tribunal composed of inferior officers.

Appellant's constitutional argument relies on the faulty premise that the USCMCR judge is a principal officer, even though this question has not yet been directly addressed, much less settled. Moreover, Supreme Court precedent

strongly supports the opposite conclusion: that a USCMCR judge is, in fact, an inferior officer.[4]

In determining whether an officer is an inferior or principal one, the Supreme Court has declined to adopt a bright line test. *Edmond*, 520 U.S. at 661 ("Our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointment Clause purposes."); *Morrison*, 487 U.S. at 671 ("the Framers provided little guidance into where [the line between inferior and principal officers] should be drawn."). However, the Court's analyses

[4] As Justice Breyer has stated, "[e]fforts to define [the term "inferior officer"] inevitably conclude that the term's sweep is unusually broad." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 539 (2010) (Breyer, J., dissenting). This is evident by the range of positions that the Supreme Court has deemed to constitute an "inferior office." *See, e.g. In re Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839) (a district court clerk); *United States v. Moore*, 95 U.S. 760, 762 (1877) (an "assistant-surgeon"); *United States v. Germaine*, 99 U.S. 508, 511 (1878) ("thousands of clerks in the Departments of the Treasury, Interior, and the othe[r]" departments); *Ex parte Siebold*, 100 U.S. 371, 397-98 (1879) (an election supervisor and a federal marshal); *United States v. Perkins*, 116 U.S. 483, 484-85 (1886) (a "cadet engineer" appointed by the Secretary of the Navy); *United States v. Allred*, 155 U.S. 591, 594-96 (1895) (a "commissioner of the circuit court"); *United States v. Eaton*, 169 U.S. 331, 343 (1898) (a vice consul temporarily exercising the duties of a consul); *Rice v. Ames*, 180 U.S. 371, 378 (1901) (extradition commissioners); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-54 (1931) (a United States commissioner in district court proceedings); *Buckley*, 424 U.S. at 126 (1976) (citing *Myers v. United States*, 272 U.S. 52 (1926)) (a postmaster first class and Federal Election Commission commissioners); *Morrison v. Olson*, 487 U.S. at 671 (1988) (an independent counsel); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 881-82 (1991) (Tax Court special trial judges).

in *Edmond* and *Morrison* both support the conclusion that USCMCR judges are inferior officers, rather than principal ones.

In *Edmond*, the Supreme Court defined inferior officers as "officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663; *see also United States v. Gantt*, 194 F.3d 987, 999 (9th Cir. 1999) (citation omitted) ("The Constitution does not use the term 'inferior' 'in the sense of petty or unimportant' but in the sense of a subordinate to a principal officer."). The Court eventually concluded that the appellate military judges on the CCAs are inferior officers, after pointing out various indicators of these judges' subordinate relationship to other officers.

In the same way that appellate military judges on CCA are supervised by their respective Judge Advocate General, *Edmond*, 520 U.S. at 663, appellate military judges on the USCMCR are supervised by the Secretary of Defense and the Judge Advocate General of their service. *See* 10 U.S.C. § 949b. Just as an appellate military judge on the CCA may be removed by The Judge Advocate General, a USCMCR judge may also be removed for good cause or be "reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General . . . based on military necessity . . . ." 10 U.S.C. § 949b(4)(C)-(D). This military necessity can simply

be part of the normal change of duty assignment "consistent with service rotation regulations." 10 U.S.C. § 949b(4)(D); *see also In re Al-Nashiri*, 791 F.3d at 83 ("This additional removal authority is non-trivial; we would likely give the Executive Branch substantial discretion to determine what constitutes military necessity.").

Furthermore, just as Judge Advocates General of the services supervise appellate military judges by promulgating the rules of their CCAs, the Secretary of Defense supervises the USCMCR by promulgating its procedures. *In re Al-Nashiri*, 791 F.3d at 83 (citing 10 U.S.C. § 950(f)). Finally, similar to the CAAF's review authority over the CCAs, the work of the USCMCR is also supervised by the Court of Appeals for the District of Columbia Circuit, a court with judges who were appointed by presidential nomination with the advice and consent of the Senate. 10 U.S.C. § 950g(d); *In re Al-Nashiri*, 791 F.3d at 83 (reviewing the USCMCR's decisions "under a review provision virtually identical to the CAAF's") (citing 10 U.S.C. § 867(c)).

In *Morrison*, the Supreme Court held that an independent counsel was an inferior officer by relying on "several factors: that the independent counsel was subject to removal by a higher officer (the Attorney General), that she performed only limited duties, that her jurisdiction was narrow, and that her tenure was limited." *Edmond*, 520 U.S. at 661 (citing *Morrison*, 487 U.S. at 671-72); *see also*

Samuels, Kramer, & Co. v. Comm'r, 930 F.2d 975, 985-86 (2d Cir. 1991) (applying the *Morrison* test in determining that a special trial judge on the Tax Court is an inferior officer). These factors, while not dispositive,[5] may nonetheless be instructive in demonstrating why USCMCR judges are inferior officers. First, as mentioned above, appellate military judges on the USCMCR are subject to removal by the Secretary of Defense and can be reassigned by the Judge Advocate General. 10 U.S.C. § 949b. Their tenure is limited simply due to assignment cycles, and, theoretically, the necessity and duration of military commissions in general is also limited. Second, the jurisdiction of the USCMCR is limited to the review of military commissions convened for the specific purpose of trying unprivileged enemy belligerents. And third, the scope of their review authority matches that granted to appellate military judges on the service CCAs, which are tribunals of inferior officers under *Weiss* and *Edmond*.

Of additional note, the Military Commissions Act of 2009 amended Article 39 of the UCMJ to make any holding or decision of the USCMCR *non-precedential* for courts-martial. 10 U.S.C. § 839(d) ("The findings, holdings, interpretations, and other precedents of military commissions . . . may not be introduced or considered in any hearing, trial or other proceedings of a court-

[5] As *Edmond* later demonstrated, even offices that are not "limited in tenure" or "limited in jurisdiction"--such as that of appellate military judges--may be inferior for Appointments Clause purposes. *See Edmond*, 520 U.S. at 665.

martial . . . and may not form the basis of any holding, decision, or other determination of a court-martial."). This amendment is a strong indication of Congress' intent to limit the authority of the USCMCR and its holdings. Lastly, appellate military judges on the USCMCR only serve on a "part-time, as-needed" basis, which further supports the finding that they are inferior officers. *Khadr v. United States*, 62 F. Supp. 3d 1314, 1316 (C.M.C.R. 2014).

Both *Edmond* and *Morrison* support the conclusion that a USCMCR judge constitutes an inferior office for Appointments Clause purposes. As such, Judge Mitchell's appointment to the USCMCR did not elevate him into a principal office, but only continued his status as an inferior officer.

C. Even assuming Judge Mitchell was a principal officer serving among inferior officers on the CCA, there is no prohibition on principal and inferior officers serving on the same body.

Appellant argues that "[a]ssigning inferior officers and appointing principal officers to a single judicial tribunal itself violates the Appointments Clause." Because Judge Mitchell's appointment as an appellate military judge to the USCMCR does not make him a principal officer, but instead constituted an inferior-to-inferior office assignment, the present case does not pose the issue raised by Appellant.

However, if we assume that Judge Mitchell's appointment to the USCMCR made him a principal officer, Appellant provides no authority for why this is

constitutionally prohibited. In fact, the Appointments Clause is entirely silent on several of the premises underlying Appellant's claim: (1) whether one may simultaneously hold a part-time principal office in one capacity and an inferior office in another; (2) whether one's principal officer status in one position transfers to and thereby transforms his inferior officer status on another; and (3) whether inferior and principal officers may serve on the same tribunal.

What precedent exists suggests that the Appointments Clause does not prohibit principal officers from serving on the same body as inferior officers. In *Shoemaker*, for instance, the Supreme Court found no infirmity with a commission that was composed of three citizens, who were to be appointed by the President with the advice and consent of the Senate, and the Army Chief of Engineers and the Engineer Commissioner of the District of Columbia, both of whom did not require a second appointment to the Commission. *Id.* at 297. If this Court accepts Appellant's argument that nomination by the President and confirmation by the Senate results in the creation of a principal office, then the commission in *Shoemaker* would have contained a mixture of principal and inferior officers. The Army Chief of Engineers, as a military officer without a second appointment, would have remained an inferior officer and, at least under Appellant's rationale, the three citizen appointees would have been principal officers on the *Shoemaker* commission. Appellant provides no authority that suggests that this commission,

which under his theory would have been composed of both inferior and principal officers, would have been barred by the Appointments Clause. Although the Court in *Shoemaker* did not discuss whether the commission was composed of inferior or principal officers, or both, it did uphold Congress' establishment of the commission as constitutionally permissible for Appointments Clause purposes. As such, even assuming that Judge Mitchell became a principal officer when he was appointed to the USCMCR, Appellant's claim that the Appointments Clause bars his continued service as an appellate military judge is ultimately untenable and unsupported by the law.

D. The doctrine of constitutional avoidance should compel this court to reject Appellant's unsupported and unconstitutional interpretation of the statute.

Under the canon of constitutional avoidance, "every reasonable [statutory] construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007). With the MCA of 2009, Congress established the office of the USCMCR judge, which could be filled either by appellate military judges, or additional judges appointed by the President with advice and consent of the Senate. Appellant's underlying claim that the USCMCR constitutes a principal office for Appointments Clause purposes potentially renders the statute unconstitutional in light of the constitutional challenges raised by Appellant. To the extent that Appellant invites

this Court to interpret the MCA of 2009 in such a way that would violate the Appointments Clause, this Court should reject that interpretation in favor of another reasonable one, in light of the doctrine of constitutional avoidance. *See Edmond*, 520 U.S. at 658 ("[W]e see no other way to interpret Article 66(a) that would make it consistent with the Constitution. . . . [I]f petitioners are asking us to interpret Article 66(a) in a manner that would render it clearly unconstitutional . . . we must of course avoid doing so if there is another reasonable interpretation available."); *see also Gonzalez*, 550 U.S. at 132. As discussed above, a far more reasonable interpretation is that Congress created an inferior office with the USCMCR. As such, Judge Mitchell's assignment to the USCMCR as an appellate military judge, then subsequent and unnecessary appointment to the same position, was legally and constitutionally permissible.

Conclusion

WHEREFORE, amicus respectfully requests this Honorable Court hold that Judge Mitchell's status as a USCMCR judge does not statutorily or constitutionally disqualify him as a CCA judge and affirm the decision of the court below.

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24 January 2017

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing amicus curiae brief in support of appellee, United States v. Ortiz, Crim. App. Dkt. No. 38839, USCA Dkt. No. 16-0671/AF was electronically filed with the Court to (efiling@armfor.uscourts.gov) on 24 January 2017 and contemporaneously served on counsel for appellant, counsel for appellee, and amicus counsel.

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