IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*, *v.* KEANU D.W. ORTIZ, Airman First Class, USAF *Appellant*.	BRIEF OF *AMICUS CURIAE* THE MILITARY COMMISSIONS DEFENSE ORGANIZATION IN SUPPORT OF NEITHER PARTY USCA Dkt. No. 16-0671/AF Crim. App. No. 38839

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

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INTEREST OF AMICUS

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 Act of 2009. Regulation for Trial by Military Commissions ("RTMC"), Chapter 9-1 (Appendix ("Ap.") 1). 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. 1).

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. This case presents questions that go directly to the legality of that court as currently constituted. 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. 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.

ISSUE PRESENTED BY APPELLANT

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.

ISSUE SPECIFIED BY COURT

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 ARGUMENT

Addressing the Specified Issue first, all judges appointed to the USCMCR pursuant to 10 U.S.C. § 950f(b)(3) are principal officers. The provisions of 10 U.S.C. § 949b(b)(4) have no effect on the status of an appointed judge.

With respect to the issue presented by Appellant, service as an appointed judge on the USCMCR is incompatible with service as an assigned judge on a Court of Criminal Appeals ("CCA").

ARGUMENT

A. A judge appointed to the United States Court of Military Commission Review pursuant to 10 U.S.C. § 950f(b)(3) is a principal officer.

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 ("USCMCR"). 10 U.S.C. § 950f(a). Congress provided two mechanisms for placing judges on this court. First, the Secretary of Defense "may assign persons who are appellate military judges." 10 U.S.C. § 950f(b)(2). Alternatively, the "President may appoint, by and with the advice and consent of the Senate, additional judges." 10 U.S.C. § 950f(b)(3).

As this Court recently explained, the § 950f(b)(3) appointment mechanism was first used to place military judges on the USCMCR in 2016. *United States v. Dalmazzi*, 2016 WL 7324308, at *2-3 (C.A.A.F. Dec. 15, 2016). This was done apparently in response to the D.C. Circuit's expression of concern over the constitutionality of assigned military officers serving on the court. *Id.*

It is unlikely that Congress intended the appointment mechanism to be used to place a military judge on the USCMCR. First, there are few military offices that require a separate appointment and they are unlike this one. *See Weiss v. United States*, 510 U.S. 163, 171 (1994) (collecting military offices requiring separate appointment). Being mostly positions of significant command responsibility, only

a handful are legal positions and none is a judicial position. *Id*. Second, there appears to be no other instance of Congress providing such disparate mechanisms for placing the same group of eligible persons into an office. Third, there is no evidence that Congress intended there to be two classes of military judge on the USCMCR, one assigned the other appointed. Fourth, there would be little reason for Congress to require that assigned military officers be "appellate military judges" but place no qualifications on appointed judges. Finally, there was no need for an alternate mechanism until after the D.C. Circuit expressed concern with the constitutionality of assigning military judges to the USCMCR. *See In re Al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015).

Despite not being intended for the purpose there is nothing that precludes use of the appointment mechanism to place military officers on the USCMCR. But neither is there anything that distinguishes an appointed military officer from any other appointed judge once on the court. *See United States v. Khadr*, Case No. 13-005, Opinion and Order, at *5 (U.S.C.M.C.R. Nov. 13, 2015) (Ap. 11) (*citing Khadr v. United States*, 62 F.Supp. 3d 1314, 1319-20) (U.S.C.M.C.R. 2014)) ("Our authority to act as judges comes from our appointment, as principal officers, to the Court by the President with the advice and consent of the Senate pursuant to 10 U.S.C. § 950f(b)(3). The Secretary has no control over our judicial duties or

conduct. He may not review our decisions, nor may he discharge us at his discretion.").

1. USCMCR judges are principal officers.

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]

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); *Nashiri*, 791 F.3d at 74. 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, in the same way that this Court "reviews decisions of other Defense Department entities" with respect to the conduct of courts-martial. *Kuretski v. C.I.R.*, 755 F.3d 929, 944 (D.C. Cir. 2014). Such independence from

[1] As quoted above, the USCMCR itself has held that judges appointed pursuant to 10 U.S.C. § 950f(b)(3) are principal officers under the Appointments Clause. *Khadr*, Case No. 13-005, Opinion and Order, at *5 (Ap. 11).

[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); (3) the United States Court of Federal Claims (28 U.S.C. § 171(a)); and (4) the United States Court of Appeals for Veterans Claims (38 U.S.C. § 7251).

the direction and supervision of Executive Branch officers is the first hallmark of principal officer status. *Intercollegiate*, 684 F.3d at 1337-38.

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." *Nashiri*, 791 F.3d at 83 (citing 10 U.S.C. § 950g(a)); *cf. Edmond v. United States*, 520 U.S. 651, 665 (1997) (Because they "have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers" CCA judges are not principal officers.). Non-reviewability is a second hallmark of principal officer status. *Intercollegiate*, 684 F.3d at 1340.

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 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.

2. The reassignment and withdrawal provisions of 10 U.S.C. § 949b(b)(4) are irrelevant to appointed judges.

The Supreme Court has long recognized that an "assignment" is constitutionally distinct from an "appointment". *Edmond*, 520 U.S. at 657-58; *Weiss*, 510 U.S. at 171-72. While the former does not implicate the Appointments Clause, the latter does. *Edmond*, 520 U.S. at 657-58.

Nonetheless, for as long as courts-martial have been reviewed by service appellate courts "appellate military judge" has been the generic statutory designation given to all judges, whether placed on the court by assignment or appointment. 10 U.S.C. 866(a) ("Article 66a") (1968); Article 66(a) (2016). Similarly, for the same period of time Article 66 has purported to authorize the Judge Advocates General to assign appellate military judges to the courts. Despite these statutory provisions, however, the constitutional process still controls judges placed on the court via appointment. *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993).

Because all military officers are commissioned by the President as "inferior officers" and because service on a CCA is an inferior office germane to military service, military officers may be assigned to serve on the CCAs in the ordinary course of their duties. *Weiss*, 510 U.S. at 171. By contrast, a non-military officer may only serve on the CCAs if separately appointed to that inferior office consistent with the terms of the Appointments Clause of the Constitution, Art. II, §

2, cl. 2. *Carpenter*, 37 M.J. at 293-95. Accordingly, while appellate military judges *assigned* to service courts may be reassigned off those courts at the discretion of the appropriate Judge Advocate General, *Weiss*, 510 U.S. at 176, persons *appointed* to be "appellate military judges" on a CCA may only be removed by those who had the authority to appoint them in the first place. *Ex parte Hennen*, 38 U.S. 230, 260 (1839).

The Constitution, applicable statutes, and the nature of the office determine appointment and removal authority. Consequently, when the Secretary of Defense purported to appoint "a civilian employee of the Department of the Air Force, to serve as appellate military judge on the Air Force Court of Criminal Appeals" this Court had no difficulty determining the office to be filled, the claimed basis for the appointment, and the constitutional considerations relevant to deciding that the appointment was invalid. *United States v. Janssen*, 73 M.J. 221, 222-26 (C.A.A.F. 2014).

The same generic usage of the appellation "appellate military judge" was initially carried over to military commissions with respect to judges on the Court of Military Commission Review. 10 U.S.C. § 950f(b) (2006). Both military officers and civilians could be "appellate military judges," although here it was the Secretary of Defense who was to establish the court and "assign" the judges. *Id.* Even after Congress elevated the court to an Article I court of record, and

mandated presidential nomination and Senate confirmation of judicial appointments, the 2009 Act continued to refer to both assigned and appointed judges as "appellate military judges." 10 U.S.C. § 950f(b) (2009).

Congress eventually amended the 2009 Act so that the term "appellant military judge" no longer referred to persons appointed to the USCMCR by the President pursuant to § 950f(b)(3). In the National Defense Authorization Act of 2012 ("NDAA 2012"),[3] Congress replaced "appellate military judge" with "a judge" when referencing any judge on USCMCR, while retaining the term "appellate military judge" with respect to military officers assigned to the USCMCR by the Secretary of Defense pursuant to § 950f(b)(2). NDAA 2012, § 1034 (Ap. 19). The language of § 949b(b)(4), providing the circumstance under which an appellate military judge could be *reassigned* off of the court, was left unchanged.

As of 2012, therefore, the phrase "appellate military judge" refers only to judges assigned to the USCMCR pursuant to § 950f(b)(2). Subsequent to the 2012 NDAA, judges appointed pursuant to § 950f(b)(3) are "additional" judges, in the terms of the statute, or "civilian judges" in the terms of the D.C. Circuit interpreting the statute. *Khadr*, 823 F. 3d at 95-96.

[3] 125 Stat. 1572, Pub. Law 112–81 (Dec. 31, 2011).

Indeed, Congress' clarification of the statute in 2012 confirms that the purported office of "appointed appellate military judge" simply does not exist. 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 the position of appointed appellate military judge has not been "established by law." *Freytag v. C.I.R.*, 501 U.S. 868, 881 (1991). In the context of military commissions the existence of such an office has been precluded. By definition, an appointed judge is something other than an appellate military judge. Since 2012 the appellation "appellate military judge" has no legal significance when used in the context of an appointment to the USCMCR.[4]

Were the reassignment and withdrawal provisions to be applied to appointed military judges then the only difference between assigned and appointed military judges would be the way they are placed on the USCMCR. Congress would have created two different mechanisms, one vastly more burdensome than the other,

[4] While the phrase "appellate military judge" is irrelevant to appointment and removal power, there appears to be little authority as to whether use of the appellation could affect the validity of any appointment. *Cf.* Appointment to Civil Office, 17. Op. Att'y. Gen. 522; 1883 U.S. AG LEXIS 41 ("nomination and confirmation of ineligible person must be treated as *null*")); *but cf.* Rank, Title and Compensation of Officers Serving as Chiefs of Certain Bureaus of Navy Department, 31 Op. Att'y. Gen. 557; 1911 U.S. AG LEXIS 57 (effect on rank ignored where appointment would reset existing date of rank).

simply to put a single pool of officers on a single court so that they could be treated the same way once on the court. It is as difficult to find any other example of such a system being established as it is to understand why Congress would have done so here. The reassignment and withdrawal provisions of § 949b(b)(4) do not and should not apply to any judge appointed pursuant to §950f(b)(3).

3. Applying the reassignment and withdrawal provisions of 10 U.S.C. § 949b(b)(4) to appointed judges would raise constitutional questions.

In *Dalmazzi* this Court discussed the three constitutionally-required steps for an appointment to occur and seemed to conclude that the last of those steps, the President's signing of Judge Mitchell's commission, occurred on May 25, 2016. *Dalmazzi*, 2016 WL 7324308, at *2. If Judge Mitchell was in fact appointed to the USCMCR pursuant to § 950f(b)(3) it would be unconstitutional to use the reassignment provisions of §949b(b)(4) to terminate that appointment.

First, the power to appoint is the power to remove. *Hennen*, 38 U.S. at 260. In vesting the authority to appoint USCMCR judges in the President Congress is presumed to have vested the power to remove those judges in the President as well. *Khadr*, 823 F. 3d at 96, 98 (discussing removal of appointed judges by the President). It would be extraordinary to interpret the § 949b(b)(4) reassignment provision as implicitly authorizing someone else to remove presidentially appointed judges. It is not even clear that Congress could vest someone else with such removal authority. *Edmond*, 520 U.S. at 664 ("The power to remove officers,

we have recognized, is a powerful tool for control."); *but cf. Morrison v. Olson*, 487 U.S. 654, 683 (1988) (Describing scheme for removal by Attorney General of inferior officer appointed by court as "basically a device for removing from the public payroll an independent counsel who has served his or her purpose, but is unwilling to acknowledge the fact.")

Second, the removal of appointed officers is governed by what Congress does or does not provide; because Congress was silent regarding the removal of judges appointed to the USCMCR they are removable by the President only for good cause. *Khadr*, 823 F.3d at 98. Applying the provisions of § 949b(b)(4), allowing removal by the Secretary of Defense or his designee under much more liberal circumstances, would violate Congress' authority to regulate the removal of officers. *Myers*, 272 U.S. at 129. Similarly, § 949b(b)(4) addresses the circumstances under which a USCMCR judge "may be reassigned to other duties." While the effect of that provision is clear regarding the duties of an assigned military judge it says nothing regarding the continued responsibilities of an appointed judge. Reassigning a judge who continues to be appointed to the court would make a mystery of the judge's status on the court and cast a cloud over future proceedings. *Cf. United States v Witt*, 75 M.J. 380, 383 (C.A.A.F 2016) (*citing Laird v. Tatum*, 409 U.S. 824, 837 (1972)) ("Although a judge has a duty

not to sit when disqualified, the judge has an equal duty to sit on a case when not disqualified.").

Third, the authority to act on appointments may not be delegated. *Carpenter*, 37 M.J. at 294, *vacated on other grounds*, 515 U.S. 1138 (1995). Appointments Clause powers may be vested only in the President, the Heads of Departments, and the Courts of Law. *Id.* To do otherwise is "inconsistent with the intent of the framers of the Constitution to prevent 'the diffusion of the appointment power.'" *Id.* (quoting *Freytag*, 501 U.S. at 878). Authority to act under § 949b(b)(4), however, is given to "the Secretary of Defense, or the designee of the Secretary."[5] It must be presumed that Congress would not authorize an unconstitutional delegation of power; § 949b(b)(4) should not be interpreted as applying to the removal of appointed officers.

B. Appointment to the United States Court of Military Commission Review is incompatible with continued assignment to the Air Force Court of Criminal Appeals.

In 2014, the military commission accused in the *Nashiri* case moved to disqualify military officers assigned to serve as judges on the USCMCR pursuant to 10 U.S.C. § 950f(b)(2). *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

[5] The Secretary of Defense has in fact made such a delegation. RTMC 25-2g (Ap. 8).

Clause. *Id.* The D.C. Circuit found that the challenge was substantial, but denied relief, in part so that the government could resolve the significant constitutional doubts created by the *assignment* of these judges to the USCMCR by *appointing* additional judges. *Id.* at 86.

Following the D.C. Circuit's decision, the prosecution delayed the restart of the *Nashiri* case in the USCMCR while it sought to remedy the constitutional concerns the D.C. Circuit had acknowledged. The Appointments Clause issues in this Court arose shortly after the prosecution moved to have *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. 21). Colonel Martin T. Mitchell was one of those five judges, *id.*, and one of the three judges who decided the case.

Counsel for Nashiri raised issues similar to those now before this Court with the USCMCR. But those objections were dispensed with in a summary order stating only that the military officers now serving on the USCMCR had been appointed as appellate military judges. *United States v. Al-Nashiri*, Case No. 14-001, Order, at *3 (U.S.C.M.C.R. May 18, 2016) ("*Nashiri* Order") (Ap. 29). Because this was "an unpublished summary order," it provided no reasoning to

substantiate this conclusion and, as a consequence, "has no precedential effect." *United States v. Marshall*, 669 F.3d 288, 294 (D.C. Cir. 2011).

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

The service of a commissioned officer in 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 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 covered 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." *Nashiri* Order at *3(Ap. 29). 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). If no exception is made specifically authorizing a military officer to be appointed to an office, then it is a civil office.

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 655, § 1002 (1983) (Ap. 35). 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. 37). In response to an interpretation of "civil office" that foreclosed what had been a common military assignment, 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).[6]

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

[6] 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. 37). Accordingly, Congress amended Title 10 "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).

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.[7] Hence, § 973(b) categorically prohibits a military officer from holding an "appointment" to the office of USCMCR judge.

2. A person cannot simultaneously fulfill the functions of appointed USCMCR judge and assigned AFCCA judge.

While the President appoints officers, *Shoemaker v. United States*, 147 U.S. 282, 300 (1893), "[t]o Congress under its legislative power is given the establishment of offices [and] the determination of their functions." *Myers*, 272 U.S. at 129. Where Congress does not define the duties of an office it presumes that they are "so well understood as to not require specific mention." Detail of Staff Officers of Marine Corps to Duty Outside of Washington, 30 U.S. Op. Att'y. Gen. 234 (1913), 1913 U.S. AG LEXIS 3. When an office is filled the default rule

[7] Another basis for concluding that judges appointed pursuant to § 950f(b)(3) hold a civil office is 28 U.S.C. § 454. That statute states that any judge "appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor." Relatedly, the U.S. Constitution provides for the removal from office of "All Civil Officers of the United States . . . on Impeachment for, and Conviction of Treason, Bribery or other high Crimes and Misdemeanors." Article II, § 4. So, if § 454 applies to appointed USCMCR judges, an issue the D.C. Circuit declined to decide in *Khadr*, it follows that such judges are "Civil Officers of the United States."

is that other duties may not interfere with the incumbent's ability to perform the duties of the office. *Id.* Absent congressional authorization it is impermissible to permanently impose other responsibilities that would prevent the exercise of the functions of the office. *Id.* Any regulation to the contrary is invalid. *Id.*

Consistent with this rule, Congress has provided that trial judges of both courts-martial and military commissions may be tasked with other duties. 10 U.S.C. 826(c); § 948j(e). This authorization was one of the factors remarked on by the Supreme Court when it observed that "the position of military judge is less distinct from other military positions than the office of full-time civilian judge is from other offices in civilian society." *Weiss*, 510 U.S. at 175-76.

Congress provided no such authorization for USCMCR judges to perform additional duties.[8] By regulation the Secretary of Defense purported to allow "[a]ppellate military judges serving on the USCMCR [to] perform other military or legal duties, but USCMCR duties should take priority over all other duties."[9] RTMC 25-2c (Ap. 8).

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[8] Likewise, there is no provision in the UCMJ allowing judges on service courts of criminal appeals to be tasked with additional duties.

[9] In addition to being unauthorized by Congress, this regulation fails to recognize that the USCMCR would have to take priority over others duties if the assignment of other duties were permissible. *Cf.* JAGINST 5815, *Navy-Marine Corps Court of Criminal Appeals*, para 3d ("Upon appointment, duty on [the USCMCR] shall become [a] judge's primary duty.") (Ap. 39).

The duties of an appointed USCMCR judge are not limited as to duration, time, or location. Further, all three are at least somewhat at the discretion of the Secretary of Defense – as the default Convening Authority for military commissions the Secretary has some ability to affect case load, as the assigning authority he has complete discretion regarding the number and tenure of appellate military judges and thus significant ability to affect workloads, and in his capacity as rule maker for the USCMCR he appears to have total control over work location.

The duties of a CCA judge are similarly not limited as to duration, time, or location. And assignment to a CCA affords the service Judge Advocate General significant control over a judge's duties. Article 66.

The duties of both USCMCR and CCA judge are well understood; neither carries with it the duties of the other. Even inferring authorization for simultaneous service from Congress' requirement that assigned USMCR judges be "appellate military judges,"[10] no such inference is possible with respect to appointed USCMCR judges.

A service Judge Advocate General cannot be allowed the power to permanently impose duties that interfere with the performance of the office of

[10] *But see* RTMC 25-2(a) (Interpreting this provision as requiring that the judge "either be serving or have served as an appellate military judge on a service's Court of Criminal Appeals") (Ap. 8).

appointed USCMCR judge. And the Secretary of Defense may not divert the office of appointed USCMCR judge to the performance of duties neither assigned nor sanctioned by Congress. Upon appointment to the USCMCR the obligation to fulfill duties imposed by a preexisting assignment to a CCA must cease.

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 makes the President "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).[11] This traditional understanding of the President's constitutional authority over the military goes back to the Founding and has never been seriously

[11] *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."); *Swaim v. United States*, 28 Ct.Cl.173, 221 (Ct.Cl. 1893), *affirmed* 165 U.S. 553 (1897)) ("[T]he President is always the commander in chief . . . It is true that the Constitution has conferred upon Congress the exclusive power 'to make rules for the government and regulation of the land and naval forces;' but the two powers are distinct; neither can trench upon the other . . . Congress can not in the disguise of 'rules for the government' of the Army impair the authority of the President as commander in chief . . . . A military officer can not be invested with greater authority by Congress than the commander in chief.") (internal punctuation removed); 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.").

questioned.[12] Indeed, even skeptics of presidential power concede that it would be 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 inconsistent with the scheme of

[12] 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. 45). 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 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.

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 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."). 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 could prevent 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 vacates any prior office and strips them of their commission or (2) is *ab initio* void, leaving them at their prior rank, grade, and duties.

1. A military officer's appointment to the USCMCR automatically vacates any prior office and 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 also 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) ("as a general rule, [§ 973] requires retirement or discharge for members elected or appointed to a prohibited civil office.") (Ap. 46).

Assuming that military officers have, in fact, been appointed to the principal office of USCMCR judge under § 950f(b)(3), then those officers vacated their prior judicial assignments, and 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) ("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.") (Ap. 48). These regulations are mandatory and enforceable under the U.C.M.J. *Id.* §4.6.4. Nothing in the record indicates that any of the five officers appointed to 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*.

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 any preexisting office was vacated and they automatically resigned their military commissions by operation of law. Alternatively, if the appointments are construed as *ab initio* void, then they 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 it contains 6,916 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it 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 Brief of Amicus Curiae the Military Commissions Defense Organization was electronically mailed to the Court, to Counsel for Appellant (Major Johnathan D. Legg), and to Counsel for Appellee (Gerald R. Bruce), on 24 January 2017.

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