IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Airman First Class (E-3)
KEANU D. W. ORTIZ
USAF,
Appellant.

USCA Dkt. No. 16-0671/AF
Crim. App. No. 38839

BRIEF IN SUPPORT OF PETITION GRANTED

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

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 IN 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.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866, affirming the approved findings and sentence on June 1, 2016. JA 8. This Court has jurisdiction to review this case pursuant to Article 67, UCMJ, 10 U.S.C. § 867.

Statement of the Case

On April 15, 2015, Appellant was tried at a general court-martial by a military judge sitting alone at Minot Air Force Base, North Dakota. In accordance with his pleas, Appellant was convicted of three specifications of knowingly and wrongfully viewing child pornography, possessing child pornography and distributing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10

U.S.C. §934 (2012). Appellant was sentenced to a reduction to E-1, total forfeiture of all pay and allowances, confinement for two years, and a dishonorable discharge. JA 107. On June 15, 2015, the convening authority approved the findings and sentence as adjudged.

On July 25, 2016, Appellant filed his petition and supplement to petition for grant of review with this Court. On August 18, 2016, Appellant sought and was granted permission to raise two additional issues in his additional supplement to the petition. This Court granted review of the two issues raised in the additional supplement on October 27, 2016. Subsequently, on December 16, 2016, this Court modified Issue II, and specified Issue III, requesting simultaneous briefings on all three issues.

Statement of Facts

On October 20, 2014, Secretary of Defense Chuck Hagel assigned Colonel Martin T. Mitchell to the United States Court of Military Commission Review (USCMCR)[1] as an "appellate military judge"

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[1] Because Appellant draws substantive distinction between the former agency review board established in the 2006 Military Commissions Act, known as the Court of Military Commission Review (CMCR), and the

pursuant to 10 U.S.C. § 950f(b)(2) (2012). Colonel Mitchell was sworn in as a judge of that Court on October 28, 2014.

The USCMCR was scheduled to hear oral argument in two government interlocutory appeals on November 13, 2014, but the night before oral argument the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued a stay to consider the appellee's petition for a writ of mandamus challenging the composition of the CMCR. *United States v. Al-Nashiri*, 2016 U.S. CMCR LEXIS 1, *2 (C.M.C.R. 2016). Among other challenges, Mr. Al-Nashiri asserted the judges of the USCMCR were principal officers, and that appellate military judges, as inferior officers, could not be assigned to the court without violating the Appoints Clause. *See In re Al-Nashiri*, 791 F.3d 71, 82 (D.C. Cir. 2015).

The D.C. Circuit ultimately declined to issue the writ, but noted "Nashiri's Appointments Clause challenge gives us pause." *Id.* The

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Article I court of record known as the U.S. Court of Military Commission Review, the former will be referred to as "CMCR" and the latter "USCMCR" for purposes of clarity. To avoid confusion, Appellant has attempted to maintain this distinction in quoted matter, *e.g.*, "[US]CMCR."

court suggested that whether the assignment of military appellate judges on the USCMCR pursuant to 10 U.S.C. 950f(b)(2) violated the Appointments Clause of the Constitution was an open question, and invited the government to "put to rest any Appointments Clause questions . . . by re-nominating and re-confirming the military judges to be *CMCR judges*." *In re Al-Nashiri*, 791 F.3d at 86.

The D.C. Circuit's decision in *Al-Nashiri* ground the prosecution of military commissions to a halt, with the Executive Branch seeking Senate confirmation in an apparent effort to satiate the D.C. Circuit. *In re Al-Nashiri*, 791 F.3d. 71, 86 (D.C. Cir. 2015). "At the government's request—which Al-Nashiri did not oppose—the [US]CMCR stayed its proceedings in both interlocutory appeals in June 2015 while the confirmation process was underway." *In re Al-Nashiri*, 835 F. 3d 110, 116 (D.C. Cir. 2016).

The President forwarded Colonel Mitchell's nomination to be a judge on the USCMCR to the Senate on March 14, 2016. 162 CONG. REC. S 1473-74 (daily ed. Mar. 14, 2016). JA 106. Along with Colonel Mitchell's nomination, the President also forwarded the nominations of Captain Donald C. King, U.S. Navy, Colonel Larss G. Celtnieks, U.S.

Army, Colonel James W. Herring, U.S. Army, and Lieutenant Colonel Paulette V. Burton, U.S. Army. *Id.*

The President made these nominations pursuant to 10 U.S.C. § 950f(b)(3), which permits the President, with advice and consent of the Senate, to appoint "additional judges to the United States Court of Military Commission Review." *Id.* The President had previously used § 950f(b)(3) to appoint two civilians, Scott L. Silliman and William B. Pollard, to serve as "additional judges" alongside the "appellate military judges" previously assigned by the Secretary of Defense under 10 U.S.C. § 950f(b)(2). 158 CONG. REC. S4425 (daily ed., June 21, 2012).

On April 28, 2016, the Senate confirmed Colonel Mitchell as an "additional judge" pursuant to § 950f(b)(3). 162 CONG. REC. S2599-2600 (daily ed. Apr. 28, 2016). JA 108. The following day, the government requested the USCMCR lift its stay in light of Judge Mitchell's appointment to the court. *Al-Nashiri*, No. 14-001 (U.S.C.M.C.R. May 18, 2016). Importantly, the government also asked the recently appointed judges to reaffirm the court's previous orders in which assigned appellate military judges had participated, reflecting

the Executive Branch's view that the D.C. Circuit's concerns were alleviated by the nomination, confirmation, and appointment of Judges Mitchell and King. *See id.*

On May 2, 2016, Judge Mitchell took the judicial oath as a CMCR judge. JA 131. The record of Judge Mitchell's oath of office states he had "been duly *appointed* as Appellate Judge of the United States Court of Military Commission Review." *Id.*

On May 18, 2016, in an opinion authored by Judge Mitchell, the USCMCR granted the government's motion to lift the stay and simultaneously affirmed the rulings issued by the appellate military judges previously assigned to the court. *Al-Nashiri*, No. 14-001 (U.S.C.M.C.R. May 18, 2016).

A week later, on May 25, 2016, the President and the Secretary of Defense signed Judge Mitchell's commission acknowledging his previous appointment to the USCMCR. *Id.* "The [US]CMCR then ruled on Al-Nashiri's interlocutory appeals in June and July 2016, reversing the military judge's dismissal of the charges related to the *Limburg* and its order excluding evidence. After the resolution of these

appeals, the government asked the military commission to proceed." *In re Al-Nashiri*, 835 F. 3d at 116.

On October 27, 2016, this Court granted review of the granted issues in this case in *United States v. Ortiz*, No. 16-0671/AF (C.A.A.F 2016) (order), JA 2. Subsequently on December 16, 2016, this court modified the issues granted and specified an additional issue. JA 3. On August 19, 2016, The Honorable Jennifer M. O'Connor, Department of Defense General Counsel, signed a memorandum, purporting to approve Judge Mitchell's request "for reassignment to other duties." JA 158.

Additional relevant facts are set forth in the argument section, below.

Summary of the Argument

The President and the Senate elected to "put to rest" open Appointments Clause questions regarding the USCMCR's appellate military judges by nominating and confirming them as additional judges pursuant to 10 U.S.C. § 950f (2012). *Al-Nashiri*, 791 F. 3d at 86. In choosing "to take that tack," *In re Al-Nashiri*, 835 F. 3d 110, 116 (D.C. 2016), the President transferred the Appointments Clause issues raised

in *Al-Nashiri* from the USCMCR to the Courts of Criminal Appeals (CCAs). In the wake of his elevation to the USCMCR, Judge Mitchell was statutorily and constitutionally barred from further assignment to a Court of Criminal Appeals. As a result of Judge Mitchell's appointment to the USCMCR, he became an independent judge on an Article I court, no longer subject to military reassignment regardless of the language contained with 10 U.S.C. § 949b(b)(4)(C) and (D).

Argument

Any discussion of Colonel Mitchell's elevation to principal-officer status must begin with the legislative backdrop that led to his elevation: (1) the 2006 Military Commissions Act, Pub. L. 109-366, 120 Stat. 2600 (Oct. 17, 2006) (2006 MCA) which authorized the Secretary of Defense to create and assign judges to an agency review board, *i.e.*, the Court of Military Commission Review (CMCR) and; (2) the 2009 Military Commission Act, Pub. L. 111-84 (Oct. 28, 2009) (2009 MCA) in which Congress established the USCMCR.

A. Under the 2006 Military Commissions Act, the CMCR was Structurally the Statutory Equivalent to the Courts of Criminal Appeals Under the UCMJ.

In response to the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), Congress and the President enacted the 2006 MCA. The purpose of the 2006 MCA, as President George W. Bush explained, was to establish "a comprehensive statutory structure that would allow for the fair and effective prosecution of captured members of al Qaeda and other unlawful enemy combatants." 152 Cong. Rec. 17,189 (Sep. 6, 2006) (Message from the President).

As part of that structure, Congress agreed with the President's proposal to give the accused a right of appeal. The first level of appellate review was to be conducted by a new entity, the CMCR. 10 U.S.C. § 950f (2006). Congress constructed this tribunal as an agency review board within the Department of Defense, that the Secretary of Defense would establish under his control. 10 U.S.C. § 950f(a) (2006). This was also reflected in the first Manual for Military Commissions, which noted that the CMCR existed "[w]ithin the Office of the Secretary of Defense." Rule for Military Commissions (R.M.C.) 1201(a) (2007 ed.).

Consistent with its status as an agency review board, Congress authorized the Secretary of Defense to exercise complete control over

the composition, and hence the functioning, of the CMCR. The statute made no provision for the appointment of "judges" in the constitutional sense. Instead, the Secretary was authorized to "assign appellate military judges" to the CMCR. *See* 10 U.S.C. § 950f(b) (2006); *see also Weiss v. United States*, 510 U.S. 163, 171-72 (1994) (distinguishing between appointing and assigning appellate military judges). These could be either a commissioned officer in the Armed Forces who was qualified to serve as a judge advocate or "a civilian with comparable qualifications." 10 U.S.C. § 950f(b). The choice was left to the Secretary's discretion.

In either case, the statute placed no conditions on the Secretary's authority to assign or remove a CMCR judge. Indeed, while Congress prohibited unlawful attempts to coerce or influence the actions of a military commission, this protection was expressly limited to adverse personnel actions against panel members, trial and defense counsel, and military trial judges. 10 U.S.C. §949b(a) (2006). The members of the CMCR were, like their counterparts of the Courts of Criminal Appeals, removable without cause. *See Edmond v. United States*, 520 U.S. 651, 664 (1997).

Finally, although the CMCR was intended to adjudicate the rights of an accused, it did not enjoy many of the attributes traditionally associated with a court. For example, the Secretary interpreted the statute to deprive the CMCR of any authority under the All Writs Act, which extends to "all courts established by Act of Congress." 28 U.S.C. § 1651. *See* Rule 21(b), CMCR Rules of Practice (2008). Whereas the statute gave the Government a limited right to file interlocutory appeals to the CMCR and to the D.C. Circuit, 10 U.S.C. § 950d (2006), the Secretary promulgated a rule stating that any other "[p]etitions for extraordinary relief will be summarily denied." Rule 21(b), CMCR Rules of Practice (2008).

B. Under the 2009 MCA, Congress Abolished the CMCR and Created the USCMCR, an Article I Court of Record, Equivalent to this Court.

Upon taking office in 2009, President Obama exercised his authority as Commander-in-Chief to halt all military commission proceedings, stating the procedures contained in the 2006 MCA "failed to establish a legitimate legal framework." The White House: Office of the Press Secretary, *Remarks by the President on National Security* (May 21, 2009). JA 169.

President Obama urged Congress to reform the system in order to make "military commissions a more credible and effective means of administering justice." *Id.* In response, Congress enacted the 2009 MCA, one of the principal goals of which was to "strengthen the military commissions system during appellate review." *See Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War: Before the Sen. Comm. on Armed Services*, 111th Cong. 5 (2009) (Statement of Sen. McCain).

The most significant structural reform made by the 2009 MCA was the abolition of the CMCR as an agency review board under the Secretary's supervision and the establishment of a new USCMCR as the fifth independent Article I court of record in the federal system.[2]

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[2] There are currently four other Article I courts of record: (1) the U.S. Court of Appeals for the Armed Forces (10 U.S.C. § 941); (2) the U.S. Tax Court (26 U.S.C. § 7441); (3) the U.S. Court of Federal Claims (28 U.S.C. § 171); and (4) the U.S. Court of Appeals for Veterans Claims (38 U.S.C. § 7251). This designation has also been used with respect to territorial courts established under Article IV. See 48 U.S.C. § 1424(a)(3) (District Court of Guam); 48 U.S.C. § 1611(a) (District Court for the Virgin Islands); 48 U.S.C. § 1821(a) (District Court for the

See 10 U.S.C. § 950f(a) (establishing the current USCMCR as a "court of record"); *see also* RMC 1201(a) (2012). The phrase "court of record" is a term of art Congress uses when it intends to establish an adjudicatory tribunal that is functionally independent of the Political Branches. The 2009 Act followed this settled usage.

The USCMCR exercises judicial powers to the exclusion of any other function. Absent a timely election by the accused to waive his appellate rights, the court is obligated to "review the record in each case … with respect to any matter properly raised by the accused." 10 U.S.C. § 950f(c) (2012). Congress endowed the court with the power to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses." *Id*. § 950f(d).

Finally, the USCMCR's decisions are binding on the United States, without the review or approval of any Executive Branch official. *Cf. United States v. Miller*, 47 M.J. 352, 361 (C.A.A.F. 1997) (providing

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Northern Mariana Islands). The judges on these courts have statutory tenure to ensure their judicial independence.

the "decisions of this Court and the [Courts of Criminal Appeals] are 'not self-executing'"). Instead, like the judgments of a federal district court or this Court, the USCMCR's decisions are appealable only to the Court of Appeals for the District of Columbia Circuit and the Supreme Court. 10 U.S.C. § 950g (2012).

Consistent with the USCMCR's elevated status, the 2009 MCA requires the President to appoint civilian judges through the formal mechanism of the Appointments Clause.[3] *See* 10 U.S.C. § 950f(b)(3) (providing that the President "may appoint, by and with the advice and consent of the Senate, additional judges" to the USCMCR).

The 2009 MCA retained the Secretary's authority, however, to assign "commissioned officers of the armed forces" to also serve as USCMCR judges. 10 U.S.C. § 950f(b)(2). But to afford these officers the same degree of judicial independence enjoyed by the civilian appointees to the USCMCR, Congress prohibited the President or the Secretary

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[3] U.S. Const., art. II § 2, cl. 2, puts three conditions on the appointment of so-called "principal officers." The position must be (1) "established by law", (2) the appointee must be nominated to that particular office by the President, and (3) the Senate must confirm the appointee to the particular office.

from reassigning these officers at will. In contrast to the CCAs convened by the various services under the Uniform Code of Military Justice, 10 U.S.C. § 866(a), the 2009 MCA imposes a good-cause removal standard for military officers assigned to the USCMCR. *See* 10 U.S.C. § 949b(b)(4)(D) (2012) ("No appellate military judge … may be reassigned to other duties, except … for good cause consistent with applicable procedures under [the UCMJ]."). The statute also prohibits any person from attempting to influence (by threat of removal or otherwise) "the action of a judge" in an individual proceeding before the USCMCR. *Id*. § 949b(b)(1)(a). Furthermore, no one may "censure, reprimand, or admonish a judge … with respect to any exercise of their functions in the conduct of proceedings." *Id*. § 949b(b)(2).

Accordingly, the decision of the President, with the advice and consent of the Senate, to appoint Judge Mitchell to the USCMCR, where he had previously been merely assigned, created statutory and constitutional impediments to his continued service on the Air Force Court of Criminal Appeals.

I.

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

USCMCR Judge Mitchell is not statutorily authorized to sit on the CCA for two reasons. First, Judge Mitchell's military commission terminated upon his acceptance of a civil office. Second, the UCMJ does not authorize the Judge Advocates General to assign judges appointed to the USCMCR to the CCAs.

A. Judge Mitchell's Military Commission Terminated Upon Accepting Appointment to the USCMCR.

Federal law prohibits active-duty officers holding civil office in the Government of the United States. 10 U.S.C. § 973 (2012). The statute defines civil office broadly, and includes positions that require "an appointment by the President by and with the advice and consent of the Senate." *Id.* § 973(b)(2)(A)(ii). The broad sweep of § 973's prohibition dates to its inception in 1870, and has long been determined to implicate "a very liberal interpretation of the phrase 'civil office.'" Army Officer Holding Civil Office, 18 U.S. Op. Atty. Gen. 11 (1884).

In enacting § 973, Congress sought to codify the common law rule that "acceptance of the second office operates to vacate the first, *ipso facto*." Dwan V. Kerig, *Compatibility of Military and Other Public Employment*, 1 Mil. L. Rev. 21, 23 (1958); *see also Lopez v. Martorell*, 59 F. 2d 176, 178 (1st Cir. 1932) ("[U]nder both the common law and the civil law, and without regard to statute, a[n] office holder was not ineligible to appointment or election to another incompatible office, but acceptance of the latter vacated the former."). The purpose of the common law rule, and now the statute, is to "assure civilian preeminence in government, *i.e.*, to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle v. Warner*, 522 F. 2d 882, 884 (9th Cir. 1975). "Congress was also interested in assuring the efficiency of the military by preventing military personnel from assuming other official duties that would substantially interfere with their performance as military officers." *Id.*

Congress enacted the current definition of civil office in 1983, 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). At the same time, Congress sought to expressly authorize the continued *assignment* of judge advocates to serve as Special Assistant United States Attorneys (SAUSA), a practice dating to 1942, in the wake of an opinion from Department of Justice's Office of Legal Counsel that the practice ran afoul of § 973. *Id.* at 233; 40 Op. O.L.C. 1, 9-10; 2016 OLC LEXIS 3 (Mar. 24, 2016); *see also* 3 Op. O.L.C. 148, 151; 1979 OLC LEXIS 24 (Apr. 10, 1979) (Opining that commissioned officer on active duty was ineligible to serve as "Acting Administrator of General Services and that, in any event, acceptance or the exercise of its functions would result in the termination of his military commission.").

Congress employed identical language in 10 U.S.C. § 950f(b)(2) (2012), which authorizes the Secretary of Defense to *assign* appellate military judges to the USCMCR. By contrast, when Congress has sought to authorize either the assignment or appointment of military officers to civil office, such as the Director of the Central Intelligence Agency, it has done so expressly. *See* 10 U.S.C. § 528(e) (2012) ("the appointment or assignment of an officer of the armed forces to a position covered by this section shall not affect— (1) the status,

position, rank, or grade of such officer in the armed forces; or (2) any emolument, perquisite, right, privilege, or benefit incident to or arising out of such status, position, rank, or grade.").

"The legislative history of the 1983 amendment to § 973(b) confirms that the provision was narrowed in response to the OLC opinion." 40 Op. O.L.C. 1, 9-10; 2016 OLC LEXIS 3 (Mar. 24, 2016), at *9-10. But the legislative history also confirms that Congress sought only to permit the continued use of military SAUSAs, and did "not sanction or endorse any use of military attorneys beyond that permitted under that interpretation." S. Rep. 98-174, at 232 (1983).

Accordingly, the Standards of Conduct Office opined in 2002 that § 973 "as a general rule, requires retirement or discharge for members elected or appointed to a prohibited civil office." DoD SOCO, Advisory Number 02-21, What Constitutes Holding a "Civil Office" by Military Personnel (2002), JA 165.

Although Congress repealed the statutory *automatic* termination of military commissions in 1983, this Court cannot ignore this was done in response to an opinion issued by the Department of Justice's Office of Legal Counsel opining that the assignment of military attorneys ran

afoul of 10 U.S.C. § 973. S. Rep. 98-174, at 232 (1983). The statute was amended to expressly authorize the assignment of military officers to civil office, such as the office of a United States Attorney, and it is no coincidence Congress adopted this same language authorizing the assignment of military judges to the USCMCR. 10 U.S.C. § 973(b)(2)(B); 10 U.S.C. § 950f(b)(2) (2012).

The rule codified in § 973 is "of great antiquity in the common law," *Lopez*, 59 F. 2d at 178, "and it is a cardinal rule of interpretation that the common law continues except as altered by the statute." *Reeves & Co. v. Russell*, 28 N.D. 265, 278 (N.D. 1914).

If it is true that active duty officers may be elected to Congress and accept federal judicial or other appointments subject only to a discharge or retirement, then the military controls the decision to populate the government with active duty military officers. This position is at odds with both the plain language of § 973 and a Department of Justice Office of Legal Counsel Opinion noting the requirement for a statutory exception to § 973. 40 Op. O.L.C. 1, 9-10; 2016 OLC LEXIS 3 (Mar. 24, 2016).

Upon accepting his current office, and by further performing the duties of that office, Judge Mitchell ran afoul of the "prohibition on military officers holding civilian offices in the federal government that had been in force since 1870." *See* 40 Op. O.L.C. 1, 9-10; 2016 OLC LEXIS 3 (Mar. 24, 2016), at 10; *but see United States v. Al-Nashiri,* Case No. 14-001, at *3 (U.S.C.M.C.R. May 18, 2016) (order) (holding Judges Mitchell and King do not occupy 'civil office' and USCMCR judges perform a "classic military function.").

Absent a second Presidential nomination and Senate confirmation of Judge Mitchell to the Air Force Court of Criminal Appeals, Judge Mitchell's service on the lower court—and its decision in this case—is void. *See United States v. Jones*, 74 M.J. 95 (C.A.A.F. 2015); *United States v. Janssen*, 73 M.J. 221 (C.A.A.F. 2014).

B. 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.

Having been confirmed and appointed as an "additional judge" pursuant to the 2009 MCA, § 950f(b)(3), Judge Mitchell no longer meets

the statutory definition of either a "military judge" or "appellate military judge," and the Judge Advocate General is without authority to assign a judge from an Article I, court of record to the Air Force Court of Criminal Appeals. The term "appellate military judge" is a term of art not encompassing every judge of the USCMCR. This was recognized in the only amendment to § 950f(a), which substituted "judges on the Court" for "appellate military judges." 10 U.S.C. § 950f (2012).

The D.C. Circuit has also recognized the two distinct categories of judges serving on the USCMCR. *In re Khadr*, 823 F.3d 92, 95 (D.C. Cir. 2016). The D.C. Circuit observed:

> 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. *See* 10 U.S.C. § 950f(b).
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> The 2009 Act authorizes both military judges and civilians to serve on the U.S. Court of Military Commission Review. *Id*. § 950f(b). The Secretary of Defense may assign appellate military judges from the military justice system to serve on the Court. *Id.* § 950f(b)(2). In addition, the President, with the advice and consent of the Senate, may appoint civilians to serve as judges on the Court. *Id*. § 950f(b)(3).

Id.

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) (emphasis added); *United States v. Chilcote*, 20 C.M.A. 283, 286 (C.M.A. 1971) ("The disjunctive 'or' and the conjunctive 'and,' as used in a legislative enactment, are not the equivalent of each other and are not to be considered as interchangeable unless reasonably necessary in order to give effect to the intention of the enacting body.") *superseded on other grounds by statute as recognized in United States v. Witt,* 75 M.J. 380 (C.A.A.F. 2016). When it is employed between two terms describing different subjects of power in a statute, the word 'or' usually implies discretion when it occurs in a directory provision, and a choice between two alternatives when it occurs in a permissible provision. *See id.*

And, aside from the plain language of the statute, the D.C. Circuit has explained precisely why Judge Mitchell cannot serve as both an

"appellate military judge" and an "additional judge." At oral argument in *Khadr*, the Department of Defense "expressly represented" to the Court that judges appointed pursuant to § 950f(b)(3) "may be removed by the President only for cause and not at will." *Khadr*, 823 F.3d at 98. USCMCR Judge Mitchell cannot both be subject to reassignment by the Secretary of Defense pursuant to § 950f(b)(2) and removable only by the President for cause having been appointed pursuant to § 950f(b)(3).

It is the Judge Advocate General'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). Article 26, UCMJ, states that a commissioned officer may only perform the duties of military judge when he is certified to be qualified for such duty and "only when he is assigned and directly responsible to the Judge Advocate General[.]" 10 U.S.C. § 826 (2012). The Supreme Court has confirmed this "powerful tool for control" is equally applicable to "appellate military judges" assigned to the Courts of Criminal Appeals by the Judge Advocates General. *Edmond v. United States*, 520 U.S. 651, 664 (1997).

Nothing in the plain language of Article 66, UCMJ, permits a Judge Advocate General to assign judges appointed to Article I courts of record to a Court of Criminal Appeals, and The Judge Advocate General's attempt to do so is no more valid than an attempt to assign a judge from the United States Court of Appeals for Veterans Claims to the CCA. *See* 10 U.S.C. § 866; *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, including representation of the United States in civil and criminal cases.").

Finally, like the statutory exceptions for § 973, Congress undoubtedly knows how to authorize USCMCR judges to sit on the Courts of Criminal Appeals as it has expressly authorized Article III judges to sit on this Court under limited circumstances and when requested by the Chief Judge. 10 U.S.C. § 942(f) (2012). But is has not done so with regard to USCMCR judges.

"Congress specifically provided that civilians could serve as judges on the U.S. Court of Military Commission Review. *See* 10 U.S.C. §

950f(b)(3)." *Khadr*, 823 F.3d at 98. The President, with the advice and consent of the Senate, appointed Judge Mitchell to the USCMCR pursuant to § 950f(b)(3). In the wake of his confirmation to the USCMCR, and upon his performance of the duties of that civil office, Judge Mitchell became statutorily ineligible to serve on the AFCCA. His statutorily unauthorized participation renders the lower court's decision void. *Jones*, 74 M.J. at 95; *Janssen*, 73 M.J. at 221.

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

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.

A. Congress Intended to Establish the USCMCR as an Independent Article I Court.

In the 2009 MCA, Congress exercised its legislative prerogative to establish the CMCR as a "court of record." *See* 10 U.S.C. § 950f(a) (2012). By using this designation, "the clear intent of Congress [was] to

transform" the CMCR from an administrative agency within the Department of Defense "into an Article I legislative court." *See Freytag v. C.I.R.*, 501 U.S. 868, 888 (1991).

The essential attributes of an Article I court are well-settled. *First*, the USCMCR "exercises judicial, rather than executive, legislative, or administrative, power. It was established by Congress to interpret and apply the [2009 MCA] in disputes between [criminal defendants] and the Government. … As an adjudicative body, it construes statutes passed by Congress and regulations promulgated by the [Secretary]." *Freytag*, 501 U.S. at 890-91. By empowering it to adjudicate cases and controversies falling within the scope of its jurisdiction, Congress vested the USCMCR with "a portion of the judicial power of the United States." *Id.* at 891; *see also Shaw v. United States*, 209 F.2d 811, 813 (D.C. Cir. 1954) (observing that the Court of Military Appeals is "a court in every significant respect, rather than an administrative agency.").

Second, Congress intended the USCMCR to be "independent of the Executive and Legislative Branches." *Freytag*, 501 U.S. at 891. Like the judgments of its sister Article I courts, the USCMCR's

"decisions are not subject to review by either Congress or the President," *id.* at 892, but rather are "subject to reversal or change only when challenged in an Article III court." *Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340 (D.C. Cir. 2012). Thus, unlike the service Courts of Criminal Appeals, the USCMCR is neither "directed" nor "supervised" by any other presidentially appointed Executive Branch officials. *Edmond*, 520 U.S. at 663.

Of greatest relevance to this case, Congress also endowed the USCMCR's members with good-cause tenure to shield them from the threat of removal at will by the Executive. The civilian appointees on the USCMCR cannot be removed by the President "except under the *Humphrey's Executor* standard of inefficiency, neglect of duty, or malfeasance in office," which is tantamount to "good-cause tenure." *Free Ent. Fund v. Pub. Co. Acctg. Oversight Bd.*, 130 S.Ct. 3138, 3148-52 (2010) (citing *Humphrey's Executor v. United States*, 295 U.S. 602, 620 (1935)); *see also MFS Securities Corp. v. S.E.C.*, 380 F.3d 611, 619 (2d Cir. 2004) (holding that although the organic statute is silent on removal, it is "commonly understood" that the President's power to

remove an SEC commissioner is limited to "inefficiency, neglect of duty or malfeasance in office.") (citation omitted).

The sole purpose of giving Article I judges statutory tenure is to ensure they are able to "operate free of presidential direction and supervision." *In re Aiken County*, 645 F.3d 428, 440 (D.C. Cir. 2011) (Kavanaugh, J., concurring); *see also Morrison v. Olson*, 487 U.S. 654, 693 (1988) (noting that limits on the removal power are "essential … to establish the necessary independence of the office"); *Wiener v. United States*, 357 U.S. 349, 356 (1958) (describing good-cause tenure as "involving the rectitude of the member of an adjudicatory body"). The Supreme Court has long recognized that "one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor,* 295 U.S. at 629.

The provision of statutory tenure is "not an end in itself," but rather "a means of promoting judicial independence, which in turn helps to ensure judicial impartiality." *Weiss*, 510 U.S. at 179. The core meaning of "impartiality" in this context is "being free from any personal stake in the outcome of the cases to which [a judge] is

assigned." *Repub. Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (O'Connor, J., concurring); *see also id.* at 776 (collecting cases). If a military judge on the USCMCR knows their professional future lies in the unfettered discretion of one of the parties to a dispute before him, it is difficult to believe he will not have a personal stake in the outcome, especially given the politically contentious nature of military commission proceedings. *Id.* at 789. Moreover, "the public's confidence" in the system is arguably "undermined simply by the possibility that judges would be unable" to suppress such parochial concerns. *Id.*

Accordingly, when Congress designated the USCMCR as a court of record, it signaled its intent to enhance the credibility of the system of appellate review by giving the accused a heightened level of due process. The procedural integrity associated with a court of record, coupled with its authority to exercise "broad remedial powers" within the scope of its jurisdiction, gives reviewing courts "greater confidence in the judgment's validity." *Boumediene v. Bush*, 553 U.S. 723, 782 (2008). Congress, therefore, subjected the findings and sentences of military commissions, which are not courts of record, to direct review by an Article I court intended to be "disinterested in the outcome and

committed to procedures designed to ensure its own independence." *Id.* at 783.

B. Assigning a Principal Officer Appointed to an Independent Article I Court to a Court of Criminal Appeals Comprised of Inferior Officers Violates the Appointments Clause.

Generally speaking, military officers, "because of the authority and responsibilities they possess, act as 'Officers' of the United States" in the constitutional sense of the term. *Weiss*, 510 U.S. at 169. As such, military officers, including "those serving as military judges must be appointed pursuant to the Appointments Clause." *Id.* at 170. There is also no dispute that "[m]ilitary officers performing ordinary military duties are inferior officers," since "no analysis permits the conclusion that each of the [thousands of] active military officers … is a principal officer." *Id.* at 182 (Souter, J., concurring) (emphasis added). Ordinarily, then, an active duty military officer's commission to his current rank, which always requires a Presidential appointment, is sufficient to satisfy the strictures of the Appointments Clause. *See* 10 U.S.C. § 531(a) (original appointments); *id.* §624(c) (promotions).

In *Weiss*, the Supreme Court concluded that military officers assigned to sit as appellate judges on the service Courts of Criminal Appeals act as inferior officers. This finding was rooted in (1) the total oversight over the military officers assigned to sit on the services respective Courts of Criminal Appeals from within the Executive Branch and (2) the fact that their judicial duties to regulate the good order and discipline of service members under the UCMJ was consistent with the general responsibilities given to all other commissioned officers. *Id.* at 170-71, 174-76; *id.* at 196 (Scalia, J., concurring). Thus, a military officer's assignment to an intermediate service court does not offend the Appointments Clause because they are performing duties within the scope of an office to which they were properly appointed, and supervised at all times by superior officers within the Executive Branch.

Three years later, in *Edmond v. United States*, 520 U.S. 651 (1997), the Supreme Court reiterated that *none* of the judges on the services' Courts of Criminal Appeals, including civilians appointed by a Department Head, qualify as principal officers. The Court reached this conclusion for two reasons. First, these judges are subject to

substantial administrative supervision and oversight by the Judge Advocates General of their respective services. In particular, a Judge Advocate General may "remove a Court of Criminal Appeals judge from his judicial assignment without cause," which "is a powerful tool for control." *Edmond*, 520 U.S. at 664. Secondly, these judges are powerless "to render a final decision" binding on the United States "unless permitted to do so by other Executive officers," namely this Court, which, like the USCMCR, is an Article I court of record composed of Presidential appointees. *Id.* at 665; *see also* 34 Op. O.L.C. __, 2010 OLC LEXIS 8, at *7-8 (Nov. 5, 2010) (opining that the Special Master is an inferior officer because he "is removable at will by the Treasury Secretary" and nothing "preclud[es] the Treasury Secretary from reviewing and revising [his] determinations.").

The consequence in this case is clear. "If military judges were principal officers, the method of selecting them … would [have] amount[ed] to an impermissible abdication by both political branches of their Appointments Clause duties." *Weiss*, 510 U.S. at 189-90 (Souter, J., concurring); *see also United States v. Libby*, 429 F.Supp.2d 27, 43 n.15 (D.D.C. 2006) (holding the United States Attorney is an inferior

officer and thus "cannot be given duties [by the Attorney General] that would elevate him to a 'principal officer.'").

By contrast, USCMCR judges are "principal" officers for Appointments Clause purposes. *See Copyright Royalty Bd.*, 684 F.3d at 1338-40 (holding that Copyright Royalty Board judges were principal officers because they were not removable at will by the Librarian of Congress and their decisions were not reversible by any Executive Branch official); *Soundexchange, Inc. v. Librarian of Congress*, 571 F.3d 1227, 1226-27 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (same); *United States v. Libby*, 498 F.Supp.2d 1, 13 (D.D.C. 2007) ("[I]f the scope of authority given to the Special Counsel by the [Attorney General] encompassed duties that no inferior officer could possess, this [would be] strong evidence that the Special Counsel is a principal officer for Appointments Clause purposes.").

Besides acting as "a bulwark against one branch aggrandizing power at the expense of another branch," the Appointments Clause is designed to "preserve[] another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Ryder v. United States*, 515 U.S. 177, 182 (1995) (quotation omitted). "In the

Framers' thinking," the Clause's "strict requirements" for choosing the highest ranking positions in the Government promotes democratic accountability by forcing the President and the Senate to publicly share the responsibility "for injudicious appointments." *Weiss*, 510 U.S. at 186 (Souter, J., concurring); *Edmond*, 520 U.S. at 663 (the Clause was "designed to preserve political accountability relative to important Government assignments"). The Constitution endeavors to make the "officers of the United States … the choice, though a remote choice, of the people themselves." The Federalist No. 39 (Madison).

The assignment of inferior officers and appointment of principal officers to a single judicial tribunal itself violates the Appointments Clause. *Cf. Nguyen v. United States*, 539 U.S. 69 (2003) (interpreting statute to bar an Article IV federal judge from sitting on Ninth Circuit panel otherwise comprised of Article III judges in order to avoid question of whether such an assignment was constitutional). A mixed body of this sort is constitutionally suspect for two basic reasons.

First, the inferior officers are necessarily subordinate to some other principal officer in the Executive Branch. *Edmond*, 520 U.S. at 662 ("Whether one is an 'inferior' officer depends on whether he has a

superior."). It is unclear, to say the least, how an inferior officer is supposed to exercise supervisory authority over a principal officer on the same judicial tribunal. For the military officers at issue here, that superior is the Judge Advocate General of their service. They are all, therefore, mere agents of the Judge Advocate General. Insofar as he can pack the Court of Criminal Appeals with military officers, the Judge Advocate General is able to exercise an indirect veto over the President's Senate-confirmed appointees on all matters coming before the Court of Criminal Appeals. This kind of super-principal officer, whose will is expressed entirely *sub rosa* through a multiplicity of subordinates in tandem with Presidential appointees muddles the very lines of accountability the Appointments Clause aims to make transparent.

Second, it allows the Executive Branch to use rulemaking to structure government offices in a way that marginalize, if not directly subordinate, the principal officers Congress believed would be actually responsible for policy making. Indeed, unless appointed by the President and confirmed by the Senate, the judges of the CCAs operating within the Department of Defense must be military officers.

Janssen, 73 M.J. at 225. And the Judge Advocate General selects from these "appellate military judges" and designates one of them Chief Judge. *See* 10 U.S.C. 866(a) (2012). Thus, aside from the sheer numerical superiority of the military officers on the CCA, Article 66, UCMJ, is being implemented in a way that puts military officers, and by extension the Judge Advocate General, in the position to exercise a formal supervisory authority over the lone principal officer on the CCA.

Indeed, Justice Alito highlighted precisely this problem in *DoT v. Association of American Railroads*, 135 S.Ct. 1225, 1239 (2015). The assignment of Amtrak's President raised constitutional problems similar to those in this case, insofar as Amtrak's board operates, much like the Courts of Criminal Appeals, as an independent multimember body. Justice Alito concluded any member could "cast the deciding vote with respect to a particular decision. One would think that anyone who has the unilateral authority to tip a final decision one way or the other cannot be an inferior officer." *Id.*

Finally, the duties of a Court of Criminal Appeals judge are not germane to those of the judges of USCMCR. *United States v. Weiss*, 36 M.J. 224, 228 (C.M.A. 1992) (holding a second appointment required if

duties of appointed officer are not germane to the duties of the appointed office). While Congress has the unquestioned power to try alien, unprivileged belligerents under the UCMJ, *Hamdan*, 548 U.S. 557 (2006); Article 21, UCMJ, it has established an alternate criminal code applicable only to non-citizens. *See* 10 U.S.C. § 948a (2012). Thus there is no overlap in jurisdiction between the jurisdiction of the Court to which Judge Mitchell has been appointed and the Court of Criminal Appeals. Indeed, Congress stripped military commissions of key attributes of military justice such as Articles 10 and 31, UCMJ. *See* 10 U.S.C. § 948b (2012).

Moreover, the "judicial construction and application" of the UCMJ by the Courts of Criminal Appeals and this Court, "while instructive, is therefore not of its own force binding" on Judge Mitchell and his fellow judges of the USCMCR. *Id*. This has led the USCMCR to abandon long-standing military precedent, and created a split between this Court and the USCMCR. *See, e.g. United States v. Al-Nashiri*, 62 F. Supp. 3d 1305, 1310 (U.S.C.M.C.R. 2014) ("We are faced with choosing between a strict, literal application of the five-day rule in a fashion equivalent to that employed under Article 62 of the UCMJ, and the less

literal computation of time rule applied by federal circuit courts of appeal when resolving timeliness appellate questions under 18 U.S.C. § 3731."). In short, Judge Mitchell has been appointed to a Court with personal jurisdiction only over aliens, subject matter jurisdiction over statutorily defined crimes against the law of war, and that is not constrained by the decisions of this Honorable Court. His duties on the AFCCA are not constitutionally germane to his status as an appointed Article I judge.

"The Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Janssen*, 73 M.J. at 221 (citation omitted). In the wake of his appointment to an Article I Court, Judge Mitchel's participation in this case renders the AFCCA's decision void.

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

III.

IN 10 U.S.C. § 949b(4)(C) AND (D), CONGRESS PROVIDED "GOOD-CAUSE" TENURE TO THE APPELLATE MILITARY JUDGES ASSIGNED TO THE

USCMCR. JUDGE MARTIN T. MITCHELL IS A PRINCIPAL OFFICER REGARDLESS OF WHETHER HE IS AN ASSIGNED APPELLATE MILITARY JUDGE OR AN APPOINTED ADDITIONAL JUDGE OF THE USCMCR OR, AS THE GOVERNMENT SUGGESTS, BOTH.

At the outset, Appellant must reiterate the USCMCR is comprised of two distinct categories of judges: (1) "appellate military judges" assigned by the Secretary of Defense, and (2) "additional judges" appointed by the President, by and with the advice and consent of the Senate. 10 U.S.C. § 950f (2012). Nothing in the plain language of the reassignment provisions found in 10 U.S.C. § 949b(4) suggests its provisions are applicable to the "additional judges" appointed to the USCMCR pursuant to 10 U.S.C. § 950f(b)(3). *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007) ("The plain language will control, unless use of the plain language would lead to an absurd result."). Such language would be superfluous given that quasi-judicial officers appointed by the President, with the advice and consent of the Senate, can only be removed by the President for cause. *Kuretski v. Comm'r of IRS*, 755 F. 3d 929, 943 (D.C. Cir. 2014) (citing *Humphrey's Executor*, 295 U.S. at 629-30.).

Nevertheless, the statutory good-cause tenure provided for in 10 U.S.C. § 949b(4) confirms Judge Mitchell was a principal officer following his appointment by the President to the USCMCR.

A. Congress Enacted the "Good-Cause" Tenure Provisions Found in 10 U.S.C. § 949b(4)(C) and (D) in Order to Elevate Assigned Appellate Military Judges to Principal Officers Equivalent to their Appointed Counterparts.

In exercising its legislative prerogative and establishing the USCMCR as a "court of record," Congress intended to elevate it to "an Article I legislative court." *See Freytag,* 501 U.S. at 888. At the same time, Congress abandoned the at-will judiciary formerly set forth in 10 U.S.C. § 950f (2006), in favor of appointed additional judges and assigned appellate military judges, with the latter being given statutory good-cause tenure. 10 U.S.C. § 949b(b)(4) prohibits the removal of appellate military judges except for good cause or military necessity:

> (C) The appellate military judge is reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, based on military necessity and such reassignment is consistent with service rotation regulations (to the extent such regulations are applicable).

> (D) The appellate military judge is withdrawn by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, for good cause consistent with applicable procedures under chapter 47 of this title (the Uniform Code of Military Justice).

10 U.S.C. § 949b(b)(4)(C) and (D) (2012).

Congress' decision in the 2009 MCA to abolish the CMCR as an agency review board comprised of an at-will judiciary modelled on the CCAs in favor of an independent court comprised of judges with good-cause tenure "is constitutionally significant." *In re Al-Nashiri*, 791 F. 3d at 83. The intentional removal of this "powerful tool for control," *Edmond*, 520 U.S. at 664, while simultaneously removing the USCMCR from review of "another Executive Branch entity," *id.* at 664 n. 2, elevated the assigned appellate military judges from inferior to principal officers. Unlike the CCAs, where the Judge Advocates General may "order any decision submitted for review," *Id.* at 666, the decisions of the USCMCR are "appealable only to courts of the Third Branch." *Id.*

The only vestige of the CCA model retained by Congress in the 2009 MCA is the authority of the Secretary of Defense, like the Judge

Advocates General, to promulgate the rules and procedures for the USCMCR. 10 U.S.C. § 950f(c) (2012). But like the Copyright Royalty Judges (CRJs) at issue in *Intercollegiate*, "this limited supervision does not render the CRJs inferior officers because the [Librarian of Congress] does not 'play an influential role in their substantive decisions.'" *In re Al-Nashiri*, 791 F. 3d 83 (quoting *Intercollegiate*, 684 F. 3d at 1338.). Indeed, it could not seriously be argued that the principal-officer status of the judges of this Court hinges upon its retention of its rulemaking authority in Article 144, UCMJ. 10 U.S.C. § 944 (2012).

Admittedly, and as noted in *In re Al-Nashiri*, the Secretary of Defense's ability to remove appellate military judges for "military necessity" is "non-trivial." 791 F. 3d at 83. While it is difficult to imagine a scenario where military necessity would require the reassignment of a single appellate military judge, the removal authority set forth in § 949b(b)(4)(C) is not unfettered as is the case with respect to judges assigned to the CCAs. The Secretary of Defense must consult with the relevant Judge Advocate General, and the

reassignment must not only be based upon military necessity, but also be consistent with service rotation regulations. *See* § 949b(b)(4)(C).

Like the "non-trivial" ability of the Register of Copyrights to "review[] and correct[] any legal errors in the CRJs' determinations," the impact of the Secretary of Defense's limited removal authority on the substantive work of the USMCR "is likely to be quite faint," and would "still fall short" of rending the assigned appellate military judges inferior officers. *Intercollegiate*, 684 F. 3d at 1339. And while Executive Branch would be given "substantial discretion to determine what constitutes military necessity" justifying the removal of an assigned appellate military judge, *In re Al-Nashiri*, 791 F. 3d at 83-84, that discretion nevertheless remains subject to judicial review.

Finally, the fact that the Secretary of Defense has apparently not utilized his "military necessity" removal authority since the inception of the USCMCR, and during a period of armed conflict,[4] supports Appellant's argument it is unlikely to be ever exercised, and calls into

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[4] *Hamdan v. United States*, 696 F. 3d 1238, 1240 (D.C. Cir. 2012) ("The United States is at war against al Qaeda, an international terrorist organization.").

question the D.C. Circuit's conclusion it is "non-trivial." *In re Al-Nashiri*, 791 F. 3d at 83.

Presiding as an appellate judge on an independent Article I court of record is the quintessential domain of principal officers. Not only are their interpretations of law binding and therefore of significant importance to the functioning of the government, its judges answer to no one within the Executive Branch with respect to their judicial duties. Congress intended the judges of the USCMCR, who will be deciding difficult and controversial legal questions of first impression, to be principal officers insulated from manipulation by the Executive Branch.

Congress decided to accept the use of military officers as appellate judges on the USCMCR, but did so on the condition they would become principal officers and therefore independent and no longer subject to reassignment at the whim of the executive.

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

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CERTIFICATE OF FILING AND SERVICE

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 January 24, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 24

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

X This brief contains 8,602 words,

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

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