

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,)	
<i>Appellee,</i>)	FINAL BRIEF ON BEHALF
)	OF THE UNITED STATES
v.)	
)	
Airman First Class (E-3))	Crim. App. No. 38839
KEANU D. W. ORTIZ,)	
United States Air Force)	USCA Dkt. No. 16-0671/AF
<i>Appellant.</i>)	

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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<i>Appellant.</i>)	

**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 ON THE
UNITED STATES COURT OF MILITARY
COMMISSION REVIEW.**

SPECIFIED ISSUE

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 (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Colonel Martin Mitchell became an appellate military judge at the Air Force Court of Criminal Appeals (AFCCA) in June 2013 after being assigned by The Judge Advocate General.¹ On 28 October 2014, Secretary of Defense Chuck Hagel assigned Colonel Mitchell to the United States Court of Military Commission Review (C.M.C.R.) as an appellate military judge pursuant to 10 U.S.C. §950f(b)(2). On 11 March 2016, the President of the United States

¹ See http://afcca.law.af.mil/content/afcca_data/cp/past_judges_-_alphabetical_rev_17_oct_16.pdf.html (last visited January 24, 2017).

nominated Colonel Mitchell to the C.M.C.R. in the following fashion:

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

To be colonel

MARTIN T. MITCHELL

(J.A. at 106.) (emphasis added). On 28 April 2016, the Senate confirmed Colonel Mitchell's nomination. (J.A. at 108.). Along with Colonel Mitchell, Captain Donald King, a Navy judge advocate and appellate military judge on the United States Navy-Marine Corps Court of Criminal Appeals, was nominated by the President and confirmed by the Senate in similar fashion. (Id.)

On 16 May 2016, the accused in the case of United States v. Abd Al Rahim Hussayn Muhammad Al-Nashiri filed a motion at the C.M.C.R. seeking to disqualify Colonel Mitchell and Captain King from the case and to recuse Colonel Mitchell and Captain King from deciding the disqualification motion. Two days

later, on 18 May 2016, the motion to recuse and the motion to disqualify were denied in an order holding that “Dispositions of violations of the law of war by military commissions is a classic military function and Judges Mitchell and King do not occupy a ‘civil office’ when serving as appellate military judges on the Court of Military Commission Review.”²

On 24 May 2016, Al-Nashiri petitioned the U.S. Court of Appeals for the District of Columbia Circuit for a writ of mandamus and prohibition, reiterating the arguments he presented to the C.M.C.R. Three days later, the D.C. Circuit denied the writ petition without requiring the government to respond. Per Curiam Order, In re Al-Nashiri, No. 16-1152 (D.C. Cir. May 27, 2016), ECF No. 1615339.

On 25 May 2016, the President appointed Colonel Mitchell to the C.M.C.R. *See* J.A. at 132; *see also* United States v. Dalmazzi, ___ M.J. ___, at 3, No. 16-0651/AF (C.A.A.F. December 15, 2016).

On 1 June 2016, AFCCA issued its opinion in this case affirming Appellant’s findings and sentence. (*See* J.A. at 5; United States v. Ortiz, ACM 38839 (A.F. Ct. Crim. App. 1 June 2016). Notably, Appellant submitted his case “on the merits” to AFCCA, raising no substantive issues. While his case was under review at AFCCA, Appellant never challenged Colonel Mitchell’s ability to

² *See* Order at [http://www.mc.mil/Portals/0/pdfs/Nashiri15-002/USCMCR%2014-001%20Nashiri%20Order%20Re%20Oral%20Argument%20\(05182016\).pdf](http://www.mc.mil/Portals/0/pdfs/Nashiri15-002/USCMCR%2014-001%20Nashiri%20Order%20Re%20Oral%20Argument%20(05182016).pdf) (last visited January 24, 2017).

review his case or standing to serve at AFCCA, either by filing a motion to disqualify Colonel Mitchell immediately following Colonel Mitchell's appointment, before AFCCA ruled on his case, or even after AFCCA issued the decision.

On 19 July 2016, Colonel Mitchell ended his tenure as an AFCCA appellate military judge.³ Pursuant to his Article 6, UCMJ authority, the Air Force Judge Advocate General reassigned Colonel Mitchell from AFCCA to become the Director of the Civil Law & Litigation Directorate, Air Force Legal Operations Agency, Joint Base Andrews. Colonel Mitchell currently serves in that position.

On 25 July 2016, Appellant filed his Petition for Grant of Review with this Honorable Court. In his Supplement to the Petition for Grant of Review, Appellant submitted the case "on its merits," raising no substantive issues. (J.A. at 6.) Again, Appellant raised no issues to this Court related to Colonel Mitchell's ability to serve at AFCCA or to review his case.

Instead, Appellant waited until 18 August 2016, 85 days *after* Colonel Mitchell was appointed by the President, 78 days *after* AFCCA issued its decision in this case, and 24 days *after* his initial filings with this Court to finally raise this

³ See http://afcca.law.af.mil/content/afcca_data/cp/past_judges_-_alphabetical_rev_17_oct_16.pdf.html (last visited January 24, 2017).

issue by filing his Additional Supplement to the Petition for Grant of Review.
(J.A. at 12.)

One day later, on 19 August 2016, the Department of Defense General Counsel, pursuant to 10 U.S.C. §949(b)(4)(A) and her designation as the approval authority for requests from appellate judges for reassignment to other duties, approved Colonel Mitchell's voluntary request for reassignment from the C.M.C.R. (J.A. at 158.)

SUMMARY OF ARGUMENT

Appellant's basis to overturn AFCCA's decision in this case due to Colonel Mitchell's participation is unsupported by both fact and law. Appellant's attempt to paint Colonel Mitchell as a civilian who lost his commission and status as a military officer due to the actions of the President of the United States and the United States Senate is contrary to the very words and actions of the President of the United States and the United States Senate, as well as the letter of the law. Colonel Mitchell's appointment by the President to be a C.M.C.R. appellate military judge in no way affected his ability to sit as an AFCCA judge on the panel that decided Appellant's case nor did it render his service on both courts a violation of the Appointments Clause. Moreover, even if his appointment to the C.M.C.R. was legally deficient, such an issue is mooted by the Secretary of Defense's prior and proper statutory assignment of Colonel Mitchell to the

C.M.C.R. as set forth below, Appellant's claims should be denied.⁴

ARGUMENT

I.

APPELLANT FAILS TO SHOW HOW COLONEL MITCHELL IS NOT STATUTORILY AUTHORIZED TO SIT ON THE AIR FORCE COURT OF CRIMINAL APPEALS.

A. Colonel Mitchell's military commission did not terminate upon his appointment to the C.M.C.R.

Colonel Mitchell's appointment to the C.M.C.R. came as a result of a nomination by the President of the United States, the confirmation of that nomination by the United States Senate, and the appointment by the President. Both the nomination and confirmation state that Colonel Mitchell is "TO BE COLONEL." (*See* J.A. at 106, 108.) Yet, from the outset, Appellant erroneously

⁴ From the outset, the Government has argued, and continues to argue, that Appellant forfeited these issues by not raising them in a timely manner. Those arguments are contained in full in the Government's Answer to Additional Supplement to Petition in this case. (*See* J.A. at 55-58, 71.) As decided by the D.C. Circuit in 2009, "[a]n Appointments Clause challenge is 'nonjurisdictional'" and thus may be forfeited by a failure to raise it below. Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 574 F.3d 748, 755-56 (D.C. Cir. 2009). While the Government certainly does not concede Appellant's forfeiture in this case, the Government also wishes to bring the issues related to Colonel Mitchell's service on the C.M.C.R. to closure both in this case as well as in the over 80 other cases, spanning all Services, that face similar issues. Thus, in the interest of judicial economy, the Government respectfully asks this Court to decide on the granted issues and specified issue assuming, *in arguendo*, that Appellant did not forfeit these issues.

attempts to paint Colonel Mitchell as a newfound civilian, stripped of his well-earned military rank and commission, because of this very appointment. Appellant is incorrect in this assertion.

First, citing 10 U.S.C. §973 and §973(b)(2), Appellant states that federal law “prohibit[s] active-duty officers holding civil office in the Government of the United States” and that this “include[s] positions that require an appointment by the President by and with the advice and consent of the Senate.” (J.A. at 25.)⁵ However, Appellant fails to show that Colonel Mitchell’s position as an appellate judge on the C.M.C.R. is a “civil office,” or, even if it is a “civil office,” that it is not “otherwise authorized by law” to allow a military officer to hold it.

10 U.S.C. §973(a) states, “No officer of an armed force on active duty may accept employment if that employment requires him to be separated from his organization, branch, or unit, or interferes with the performance of his military duties.” 10 U.S.C. §973(b)(2)(A) states, “Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States (i) that is an elective office; (ii) that requires an appointment by the President by and with the advice and consent of the Senate; or (iii) that is a position in the Executive Schedule under

⁵ As this Honorable Court ordered that final briefs be filed simultaneously, references to Appellant’s position in this case are, by necessity, to his Additional Supplement to Petition for Grant of Review.

sections 5312 through 5317 of title 5.”⁶

Appellant fails to show how the position of a C.M.C.R. appellate judge is a “civil office,” let alone a “prohibited civil office.” (*See* J.A. at 26.) Appellant further fails to provide any evidence that Congress intended commissioned officers appointed as appellate military judges to the C.M.C.R. to occupy a “civil office.”

Instead, Appellant relies on Riddle v. Warner, 522 F.2d 882 (9th Cir. 1975) and a variety of Department of Justice and Department of Defense advisory opinions, in claiming that “Judge Mitchell terminated his military commission upon accepting his current office.” (J.A. at 25.) Yet, the law and facts of Riddle and those opinions actually undermine Appellant’s claim.

In Riddle, the Court opined on whether a Navy judge advocate’s commission as a notary public violated the 10 U.S.C. §973(b) prohibition on holding a “civil office.” It ruled it did not. Riddle, 522 F.2d at 884. In coming to this conclusion, the Court examined the legislative history and intent of the statute,

⁶ Notably, none of these prongs apply to the Secretary of Defense’s 2014 assignment of Colonel Mitchell to the C.M.C.R., again raising the issue of mootness as it relates to any impact of any appointment by the President. Also, the government maintains that the position of an appellate military judge on the C.M.C.R. does not require appointment by the President by and with the advice and consent of the Senate. Accordingly, the restriction on holding civil offices in Section 973 does not apply to appellate military judges on the C.M.C.R. *See* 10 U.S.C. 973(b)(2)(A)(ii) (providing that the prohibition applies to a civil office “that requires an appointment by the President by and with the advice and consent of the Senate”) (emphasis added).

dating back to its 1870 enactment. As quoted by Appellant in his supplement brief, the Court noted “a principal concern of the bill’s proponents was 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.” Id. (citations omitted). The Court also stated that “the 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.

Notably, the Court there cited specific examples of positions determined to be a “civil office,” including the Philadelphia Parks Commissioner, trustees of the Cincinnati Southern Railway, and the head of Louisiana State University. Id. Ultimately, the Court found “the office of the notary public when held by a military officer cannot be said to offend either of the purposes underlying the statute,” explaining, “Certainly there would be no danger that military officers becoming notaries public would threaten the civilian preeminence in government...[n]or would the responsibilities of a notary public adversely affect the efficiency of a military officer.” Id.

Returning to this case, as noted in 10 U.S.C. §948b, the limited purpose of the military commissions is to try alien unprivileged enemy belligerents for violations of law of war and other offenses triable by military commission. As

described in 10 U.S.C. §948d, the military commissions “shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, . . . , or the law of war, whether such offense was committed before, on, or after September 11, 2001”

10 U.S.C. §950f(a), in establishing the C.M.C.R., states, “There is a court of record to be known as the “United States Court of Military Commission Review” (in this section referred to as the “Court”). The Court shall consist of one or more panels, each composed of not less than three judges on the Court. For the purpose of reviewing decisions of military commissions under this chapter, the Court may sit in panels or as a whole, in accordance with rules prescribed by the Secretary of Defense.” Per 10 U.S.C. §950f(b)(2), “The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court” so long as they are commissioned officers and meet the qualifications for military judges. 10 U.S.C. §950f(b)(3) also allows the President to appoint, by and with the advice and consent of the Senate, additional judges to the United States Court of Military Commission Review.”

Using the analysis used in Riddle, an appellate military judge for the C.M.C.R. is not a “civil office” within the intended meaning of 10 U.S.C. §973(b). Given the C.M.C.R.’s limited jurisdiction and focus on violations of the law of war, performing the judicial duties of a C.M.C.R. appellate military judge does not

substantially interfere with a military officer's duty and, using the language in Riddle, "there would be no danger that military officers" becoming appellate military judges on the C.M.C.R. "would threaten the civilian preeminence in government". See Riddle, 522 F.2d at 884-85. This view is consistent with the express intent of Congress when they specifically allowed military officers to serve as appellate judges by enacting 10 U.S.C. §950f(b). The position of a C.M.C.R. appellate military judge, whether by assignment, appointment, or both, is simply not a "civil office" as envisioned by 10 U.S.C. §973(b).

Appellant next cites to a 37-year-old Department of Justice Office of Legal Counsel opinion that states a military officer cannot be designated as the Acting Administrator of General Services. (J.A. at 26.) Appellant's attempt to analogize the position of a C.M.C.R. appellate judge to the position of the General Services Administration's (GSA) Administrator, particularly in the context of determining what constitutes a "civil office," is severely misplaced.

GSA's government website describes its history and current purpose as follows:

GSA was established by President Harry Truman on July 1, 1949, to streamline the administrative work of the federal government. GSA consolidated the National Archives Establishment, the Federal Works Agency, and the Public Buildings Administration; the Bureau of Federal Supply and the Office of Contract Settlement; and the War Assets Administration into one federal agency tasked with administering supplies and providing

workplaces for federal employees.

Today, through its two largest offices - the Public Buildings Service and the Federal Acquisition Service - and various staff offices, GSA provides workspace to more than 1 million federal civilian workers, oversees the preservation of more than 480 historic buildings, and facilitates the federal government's purchase of high-quality, low-cost goods and services from quality commercial vendors.⁷

Another page on the GSA government website states, “GSA provides centralized procurement for the federal government, offering billions of dollars’ worth of products, services, and facilities that federal agencies need to serve the public.”⁸

Certainly, the circumstances before the Department of Justice’s Office of Legal Counsel in determining that the role of “Acting Administrator” of the GSA is much different than that of an appellate judge on the C.M.C.R. Where “the civilian preeminence of government” could be threatened by a military officer in charge of such a wide berth of responsibility affecting over 1 million federal workers, 480 buildings, and the “centralized procurement for the federal government,” a C.M.C.R. appellate judge is in charge of no person, building, or procurement of anything. Further, where performing the duties of the GSA administrator would almost certainly “substantially interfere with their

⁷ See <http://www.gsa.gov/thisisgsa/#/who-we-are> (last visited January 24, 2017).

⁸ See <http://www.gsa.gov/portal/content/104774> (last visited January 24, 2017).

performance as military officers,” the duties of a C.M.C.R. appellate judge shows no such interference.

In fact, it shows the opposite. In their recent opinion in In re: Omar Khadr, 823 F.3d 92 (D.C. Cir. 2016), the District of Columbia Circuit Court of Appeals stated, “The U.S. Court of Military Commission Review is an unusual court in that its caseload depends on the number of military commission proceedings appealed to it. At any given time, therefore, the Court’s judges may have very little to do.”⁹ This is in stark contrast to the duties required for the Administrator of the General Service and is more comparable to the position at issue in Riddle, one where the notary position “perhaps enhanced” Riddle’s value and efficiency as a military officer. *See Riddle*, 522 F.2d at 885.

Yet, even if C.M.C.R. judges were found to hold “civil offices,” Appellant’s argument would still fail. First and foremost, as noted above, 10 U.S.C. §973(b)(2)(A) begins with the phrase “Except as otherwise authorized by law.” Here, the authorization is found in 10 U.S.C. §950f(b)(2), which specifically allows “appellate military judges” who are “commissioned officers” to serve as C.M.C.R. appellate judges. Congress clearly authorized military officers to serve on the C.M.C.R. Further, this language was specifically referenced in the

⁹ Notably, the Court continued, “Consistent with that reality, the military judges who serve on the U.S. Court of Military Commission Review also continue to serve on the military appeals courts from which they are drawn.” Id.

nomination and confirmation of Colonel Mitchell. This clear language by Congress in establishing the C.M.C.R. and in describing the appointment of military officers to serve as appellate judges provides firm legal authorization for commissioned officers to serve as appellate military judges. Thus, Colonel Mitchell retains his military commission and status.

Moreover, even if it were not expressly “otherwise authorized by law,” Appellant’s argument would still fail since it relies on case law that was predicated on a part of 10 U.S.C. §973 that is no longer in existence. 10 U.S.C. §973(b) formerly stated, “The acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment.” However, this sentence was deleted from 10 U.S.C. §973(b) in 1983. Nothing in the current version of 10 U.S.C. §973 even hints that acceptance of a civil office would automatically terminate an officer’s commission. In fact, a Department of Justice Office of Legal Counsel opinion from last year stated that “Congress amended section 973(b) to limit the offices that active duty military officers were prohibited from holding” in response to a 1983 OLC opinion that found §973(b) barred judge advocates from being appointed as Special Assistant United States Attorneys. 40 Op. O.L.C. 5, 9-10; 2016 OLC LEXIS 3 (Mar. 24, 2016). The opinion continued, “The legislative history of the 1983 amendment to section 973(b) confirms that the provision was narrowed in response to the [1983] OLC opinion.” Id.

Indeed, the DoD SOCO Advisory cited by Appellant states only that Department of Defense Directive 1344.10 (rather than §973 itself as Appellant claims), “*as a general rule*, requires retirement or discharge for members elected or appointed to a prohibited civil office.” (emphasis added). This language certainly does not imply that termination of an officer’s commission is automatic in such situations. The SOCO Advisory further states, “Failure to [decline to serve in the civil office] may result in adverse administrative or disciplinary action,” but the Advisory says nothing at all about the officer forfeiting his or her commission as a matter of law.

In fact, paragraph 4.6.3 of DoD Directive 1344.10, which interprets and implements 10 U.S.C. §973, reads,

No actions undertaken by a member in carrying out assigned military duties shall be invalidated solely by virtue of such member having been a candidate or nominee for a civil office in violation of the prohibition of paragraph 4.2. or having held or exercised the functions of a civil office in violation of the prohibitions of paragraphs 4.4. or 4.5.

Therefore, even if Judge Mitchell’s appointment to the C.M.C.R. constituted his holding of a civil office, this in no way invalidated his performance of his pre-existing assigned military duties on AFCCA.

All told, Appellant has failed to show how Colonel Mitchell’s military commission was terminated upon his appointment to the C.M.C.R.; therefore, his

claim should be denied.¹⁰

B. Even after his confirmation, Colonel Mitchell continues to meet the statutory definition of an “appellate military judge” and is statutorily eligible for service on AFCCA.

Appellant next claims that even if Colonel Mitchell retained his military commission, he still does not meet “the statutory definition of either a ‘military judge’ or ‘appellate military judge’ and [T]he Judge Advocate General is without authority to appoint a judge from an Article I, [sic] court of record to the Air Force Court of Criminal Appeals.” (J.A. at 27.) Thus, according to Appellant, “Judge Mitchell is now statutorily ineligible to serve on the AFCCA.” (Id. at 29.)

Appellant is wrong on all counts.

Appellant begins by stating that “Judge Mitchell cannot simultaneously serve as an ‘appellate military judge’ and an ‘additional judge’ to the assigned ‘appellate military judges’ on the C.M.C.R. when the statute expressly provides, “[j]udges on the Court shall be assigned or appointed[.]” (Id. at 28.) However,

¹⁰ The *amicus curiae* brief filed by the Military Commissions Defense Organization (MCDO) in this case made three arguments before this Court. (MCDO Br. at i.) The third argues that “A military officer’s appointment to the USCMCR under 10 U.S.C. §950f(b)(3) either (1) automatically strips them of their commission, rendering them a civilian, or (2) is *ab initio* void, leaving them at their prior rank and grade.” The MCDO very briefly cites to the same or similar cases and publications as Appellant while making essentially the same argument. For the same reasons above, this argument fails to support either of the MCDO’s claims.

Appellant fails to explain how Colonel Mitchell's status with the C.M.C.R., whether by assignment, appointment, or both, somehow invalidates his service on AFCCA.

The validity of whether Colonel Mitchell can serve on the C.M.C.R. by assignment, appointment, or both, is not a question before this Honorable Court, is outside the scope of this Court's jurisdiction and irrelevant to this case. The question before this Court is whether Colonel Mitchell's service on AFCCA is valid. That answer is yes. Regardless of the type of service Colonel Mitchell had on the C.M.C.R. (he in fact was both assigned and appointed there), this Court can be absolutely sure that Colonel Mitchell's service at AFCCA was valid and that he could serve simultaneously at AFCCA as well as on the C.M.C.R. 10 U.S.C. §950f(b) specifically authorizes it, as does the language of the President of the United States in his nomination.

Moreover, Appellant has no standing to challenge either Colonel Mitchell's participation on the C.M.C.R. or his status as either an "appointed" or "assigned" appellate military judge.¹¹ Appellant has never challenged the Secretary of

¹¹ As noted above, the *amicus curiae* brief filed by the MCDO made three arguments before this Court. (MCDO Br. at i.) The second argument alleges that "Appointment to the United States Court of Military Commission Review is incompatible with continued assignment to the Air Force Court of Criminal Appeals." The argument includes three sections that claim (1) "Section 973(b) of Title 10 bars military officers from holding an appointment to the USCMCR;" (2) "A person cannot simultaneously fulfill the functions of appointed USCMCR

Defense's assignment of Colonel Mitchell to the C.M.C.R., nor can he. Yet, even assuming *arguendo* there is some legal deficiency in Colonel Mitchell's appointment to that court, any such issue is mooted as Colonel Mitchell's status at the C.M.C.R. would simply return to an "assigned" appellate military judge based on his prior and proper statutory assignment by the Secretary of Defense.

Likewise, Appellant's issues in this case also become moot as Appellant has never argued Colonel Mitchell's status as an "assigned" appellate military judge to the C.M.C.R. invalidated his ability to serve as an AFCCA judge.

Appellant next cites to Article 26, UCMJ, in arguing that Colonel Mitchell does not meet the definition of "military judge." (J.A. at 27.) Article 26 plainly relates to commissioned officers who are "certified to be qualified for duty as a military judge of a general court-martial...." *See* 10 U.S.C. §826. Here, Colonel Mitchell is assigned to AFCCA as an "appellate military judge," not as a "military judge of a general court-martial." Colonel Mitchell's service as an "appellate

judge and assigned AFCCA judge;" and (3) "Service of a military officer as an appointed judge on the USCMCR would violate the Commander-in-Chief Clause." (Id.) Notably, sections (1) and (3) question one's ability to serve on the C.M.C.R., not on AFCCA. Thus, for the same reasons explained above, this entire argument is outside the scope of this Court's jurisdiction and irrelevant for the purposes of this case. As to section (2), the MCDO makes similar arguments as Appellant as to Colonel Mitchell's service at both the CMCR and AFCCA. For the same reasons identified in this brief, this argument fails.

military judge” on AFCCA is not dependent on Article 26.¹²

Appellant then turns to Article 66 by arguing it does not permit “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 to the AFCCA from the United States Court of Appeals for Veterans Claims.” (J.A. at 28.) Appellant, while noting that “the plain language of Article 66” does not permit a “Judge Advocate General to assign judges appointed to Article I Courts of Record to a Court of Criminal Appeals,” likewise fails to state where Article 66 expressly forbids such an action. In fact, Appellant wholly fails to cite to any authority for such a claim.

Appellant also fails to show how Colonel Mitchell does not meet the definition of “appellate military judge.” In fact, Appellant fails to state a definition of “appellate military judge” based on Article 66. Article 66 only requires an “appellate military judge” to “be a member of a bar of a Federal court or the highest court of a State.” Colonel Mitchell easily meets that standard. Appellant’s claim on this point is unsupported by fact or law and must fail. It is also irrelevant to this particular case since here, The Judge Advocate General did not assign Colonel Mitchell to AFCCA *after* he was appointed to an Article I court. In

¹² Here, Appellant’s Article 26 claim has no merit because it is irrelevant to the qualifications of a military appellate judge, like Colonel Mitchell, and because he has no standing to challenge Colonel Mitchell’s status on the C.M.C.R.

Appellant's case, Colonel Mitchell was assigned by The Judge Advocate General to AFCCA nearly three years *before* he was appointed to the C.M.C.R. Again, Appellant's argument fails.

Furthermore, the Appointments Clause does not bar The Judge Advocate General from reassigning Colonel Mitchell from the AFCCA to other positions within the Air Force Judge Advocate General Corps. In fact, the Air Force Judge Advocate General has already done just that when he, pursuant to his authority under Article 6, reassigned Colonel Mitchell from his position at AFCCA to another position within the Air Force Judge Advocate General's Corps in July 2016. Notably, this reassignment occurred nearly two months before Appellant filed his Additional Supplement to the Petition for Grant of Review with this Honorable Court, and Appellant neither mentioned this reassignment nor took any issue with its validity in his brief.

In the end, Colonel Mitchell met the statutory definition of an "appellate military judge" and was statutorily eligible for service on AFCCA when he participated in Appellant's decision. Appellant's argument, therefore, must fail.

II.

APPELLANT FAILS TO SHOW HOW COLONEL MITCHELL'S SERVICE ON BOTH AFCCA AND THE C.M.C.R. VIOLATES THE APPOINTMENTS CLAUSE.

A. The distinction of “principal” versus “inferior” officer status for C.M.C.R. judges is still unsettled; regardless, this distinction has no effect on Colonel Mitchell’s status at AFCCA.

As to the substance of this issue, Appellant turns his attention to the Appointments Clause by arguing that (1) C.M.C.R. judges are “principal” officers and, thus, cannot serve alongside “inferior” officers on AFCCA; and (2) the “duties of a Court of Criminal Appeals judge are not germane to those of the judges of C.M.C.R.”¹³ (J.A at 33-40.) Each are based upon unsettled case law, unsupported by the facts of this case, or both.

In his brief, Appellant rightfully states that the Supreme Court has concluded that military officers assigned to sit as appellate judges on service Courts of Criminal Appeals act as inferior officers. (J.A. at 33, citing United States v. Weiss, 510 U.S. 163, 170-74, 174-76 (1994), and United States v. Edmond, 520 U.S. 651, 666 (1997).)

However, Appellant’s claim that “C.M.C.R. judges are ‘principal’ officers for Appointments Clause purposes” is misplaced, especially when that contention is based on two citations to District of Columbia Circuit Court of Appeals cases,

¹³ Again, Appellant has failed to explain how his Appointments Clause claim is not mooted by SECDEF’s prior assignment of Colonel Mitchell to the C.M.C.R., which Appellant has not and cannot challenge. As noted above, any deficiency with Colonel Mitchell’s “appointed” status to the C.M.C.R. does not invalidate his prior and proper statutory “assigned” status, a status Appellant has never argued invalidated his ability to serve as an AFCCA judge.

Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1338-40 (D.C. Cir. 2012), and SoundExchange, Inc. v. Librarian of Congress, 571 F.3d 1220, 1226-7 (D.C. Cir. 2009). His citation to these cases insinuates that District of Columbia Circuit Court of Appeals has settled whether C.M.C.R. judges are “principal” officers; it has not.

In In re Al-Nashiri, 791 F.3d 71, 82 (D.C. Cir. 2015), the District of Columbia Circuit Court of Appeals plainly states, “This Court has not addressed whether CMCR judges are principal or inferior officers.” After discussing reasons why C.M.C.R. judges could be either “principal” or “inferior” officers, the Court states, “In short, neither the CCAs (Edmond) nor the Copyright Royalty Board (Intercollegiate) is a perfect analog of the C.M.C.R. This is unsurprising, as ‘[t]he line between ‘inferior’ and ‘principal’ officers’ is ‘far from clear’ and highly contextual.” Id. at 84 (citation omitted). Ultimately, the Court did not resolve the question.

Determining whether a C.M.C.R. judge is a “principal” or “inferior” officer is unnecessary for the purposes of this case.¹⁴ The essential question before this

¹⁴ As noted above, the *amicus curiae* brief filed by the MCDO made three arguments before this Court. (MCDO Br. at i.) The first argues that “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.” For the same reasons explained above and in the specified issue below, such a determination is unnecessary for the purposes of this case.

Court is whether Colonel Mitchell, with his assignment or his appointment to the C.M.C.R., could still remain an appellate military judge on AFCCA. That answer is a resounding yes.

Twice in his nomination, the President of the United States specifically nominated Colonel Mitchell “as an appellate military judge”; in fact, the second mention states, “In accordance with their continued status as an appellate military judge pursuant to their assignment by the Secretary of Defense and under 10 U.S.C. Section 950f(b)(2).” (J.A. at 106.) One need only look to the actions of the United States President, in this nomination, and the United States Senate, in their confirmation of it, to see the intent of both for Colonel Mitchell to remain an appellate military judge with AFCCA after his appointment to the C.M.C.R as authorized by statute.

Appellant then claims that the “assignment of inferior officers and appointment of principal officers to a single judicial tribunal itself violates the Appointments Clause.” (J.A. at 37.) Again, this Honorable Court faces no such issue since no person has been “appointed” as a “principal officer” to AFCCA.

Next, Appellant mistakenly claims that since The Judge Advocate General is the superior for military officers assigned to AFCCA, those military officers are “all therefore mere agents of the Judge Advocate General. Insofar as he can pack the Court of Criminal Appeals with military officers, he is able to exercise an

indirect veto over the President’s Senate-confirmed appointees on all matters coming before the Court of Criminal Appeals.” (Id. at 37.) Appellant continues, “This kind of super-superior 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.”

Again, although the President appoints all military officers generally and without regard to position held, the President has neither nominated nor appointed, nor has the Senate confirmed, any judge to AFCCA. Even if it had, the notion that The Judge Advocate General would “pack” a court with military appellate judges in an effort to “exercise an indirect veto,” or act as a “kind of super-superior officer, whose will is expressed entirely *sub rosa* through a multiplicity of subordinates,” is a baseless charge. Such an insinuation that the independent judges of AFCCA would violate their judicial oaths or that The Judge Advocate General would expect such a thing, is a completely unfounded allegation and warrants no further discussion.

Finally, even if this Court finds Colonel Mitchell became a “principal” officer based on his appointment to the C.M.C.R., Appellant identifies no case that holds, or even suggests, that the Appointments Clause bars his continued service at AFCCA alongside “inferior” officers. Appellant has also failed to show, as it is

simply not factual, that Colonel Mitchell, as a purported “principal” officer, had any supervisory role over any other AFCCA judge or that he had the ability to review or modify any AFCCA decision or overrule, trump, or subordinate the other AFCCA judges to his wishes. Moreover, even if Colonel Mitchell possessed such an ability, Appellant has further failed to show such actions actually occurred or in any way impacted AFCCA’s “merits” decision in his case.

Conversely, while he alleges that “the sheer numerical superiority of the military officers on the Court of Criminal Appeals, Article 66, UCMJ, is being implemented in a way that puts military officers . . . in the position to exercise a formal supervisory authority over the lone superior officer on the Court of Criminal Appeals,” Appellant fails to show such a scenario actually occurs, let alone that it occurred in his case. (*See* J.A. at 38.) The fact that Colonel Mitchell, a purported “principal” officer, might be outvoted by his “inferior” AFCCA colleagues in an opinion simply does not equate to those “inferior” officers exercising “formal supervisory authority” over the purported “lone superior officer on the Court of Criminal Appeals.” Moreover, even if such a scenario was plausible, it certainly did not occur in this case since the panel, including Colonel Mitchell, decided unanimously (3-0) to affirm Appellant’s findings and sentence. (J.A. at 5.)

In summation, the distinction of “principal” versus “inferior” officer status for C.M.C.R. judges had no effect on Colonel Mitchell’s status at AFCCA and his ability to participate on Appellant’s case. Thus, Appellant’s claim is meritless and must fail.

B. The duties of a Court of Criminal Appeals judge are germane to those of the judges of C.M.C.R.

In his next attempt to prevail on this issue, Appellant states, “*Finally*, the duties of a Court of Criminal Appeals judge are not germane to those of the judges of C.M.C.R.” (J.A. at 39.) Appellant believes that Colonel Mitchell’s appointment to the C.M.C.R., one Appellant believes is not germane to AFCCA, invalidates his ability to sit on AFCCA. (Id.) In making such a claim, Appellant cites to United States v. Weiss, 36 M.J. 224, 228 (C.M.A. 1992) and summarizes that case by stating, “[H]olding a second appointment required if duties of appointed officer are not germane to the duties of the appointed office.” (App. Mot. at 24.)

While Appellant believes the Courts of Military Appeals held that germaneness is a requirement of the Appointments Clause, the Supreme Court, in its review of the same case, did not. As stated by the District of Columbia Circuit Court of Appeals in Nashiri, “Weiss is more complicated, however, than the Court’s unanimity might ordinarily suggest. Notably, the Court declined to *hold* that ‘germaneness’ is required by the Appointments Clause; instead, it ‘assume[d], *arguendo*, that the principle of ‘germaneness’ applies.” Nashiri, 791 F.3d at 85

(citation omitted). While the Court noted that the concurring opinion of Justice Scalia and Thomas explained why they believed germaneness is constitutionally required, “the majority opinion found it unnecessary to decide that question.” Id.

Thus, the germaneness question is still very much that - a question. Even the Court in Nashiri asked “Likewise, what role, if any, does ‘germaneness’ play in the constitutional analysis?” Id. Like the question of “principal” versus “inferior” officers, that Court rightfully refrained from answering this issue as well.

However, even assuming, *arguendo*, that the principle of germaneness does apply, the duties of an appellate judge at the C.M.C.R. are certainly germane to those of a military appellate judge sitting on AFCCA. As previously noted, the purpose of the military commissions is to try alien unprivileged enemy belligerents for violations of law of war and other offenses triable by military commission.” *See* 10 U.S.C. §948b. As described in 10 U.S.C. §948d, the military commissions “shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, . . . , or the law of war, whether such offense was committed before, on, or after September 11, 2001” Trials by military commissions to adjudicate violations of the law of war is a classic military function; likewise, the review of appeals by an accused convicted of law of war violations is also a classic military function. The duties of the two positions are germane; therefore, Appellant’s claim must fail.

III.

COLONEL MITCHELL WAS NOT A PRINCIPAL OFFICER FOLLOWING HIS ASSIGNMENT BY THE SECRETARY OF DEFENSE OR HIS APPOINTMENT BY THE PRESIDENT TO THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW.

The United States asserts Colonel Mitchell was authorized to serve as an AFCCA appellate military judge in Appellant's case regardless of his status as either a "principal" or "inferior" officer at the C.M.C.R. Thus, a determination as to whether Colonel Mitchell was in fact a principal officer following his appointment by the President to the C.M.C.R. is unnecessary for this Court to resolve. However, should this Court decide that such a determination must be made, the record is quite clear that Colonel Mitchell's status was never elevated to that of "principal officer" upon his assignment or his appointment to the C.M.C.R.

The reasons for this are quite numerous. First, as noted in the specified issue, §949b(4)(C) and (D) authorizes the reassignment or withdrawal of appellate military judges by the Secretary of Defense or his designee. While the Secretary or his designee must follow certain procedures to either reassign or withdraw an appellate military judge, namely that a reassignment must be based on military necessity and consistent with service rotation regulations and that a withdrawal must be for good cause, the fact remains that the President's subordinate officer, namely the Secretary of Defense, or the subordinate officer's designee may

reassign or withdraw an appellate military judge. Such a construct is not present in any of the multitude of examples presented by Appellant of “principal” officers. Moreover, the United States position that Colonel Mitchell was never a principal officer is strengthened by the fact that the Secretary possesses separate statutory authority to assign CCA judges to the CMCR and, in fact, exercised that assignment authority in Colonel Mitchell’s case well before the appointment.

Of particular interest is the ability to reassign appellate military judges based on military necessity and service rotation regulations. While noting that C.M.C.R. judges had “added insulation” in the form of “good cause” and “military necessity,” the District of Columbia Circuit Court stated, “This additional removal authority is non-trivial; we would likely give the Executive Branch substantial discretion to determine what constitutes military necessity.” Nashiri, 791 F.3d at 83. Such free and discretionary conditions for removing military appellate judges from the C.M.C.R. weigh heavily against such positions being “principal” in nature.

In addition to their removability by the Secretary of his designee, the Nashiri court also noted the Secretary was also responsible for “promulgating its procedures.” Id. at 82. In fact, §950d and §950f detail the tremendous involvement of the Secretary in the administration of the C.M.C.R. Among the oversight responsibilities, the Secretary also prescribes regulations for how an

appeal shall be forwarded to the C.M.C.R., how the C.M.C.R. “may sit in panels or as a whole,” and how the C.M.C.R. shall “review the record in each case,” as well as, of course, assigning appellate military judges to the court. *See* §950d(c), §950f(b)(2), §950f(c).

Finally, the supervising review body of the C.M.C.R., the District of Columbia Circuit Court, is a court of judges “appointed by president nomination with the advice and consent of the Senate” that “reviews the CMCR’s decisions under a review provision virtually identical to the CAAF’s.” Nashiri, 791 F.3d at 83. While the Circuit Court is part of the “Third Branch” and not “another *Executive Branch* entity,” the similarities in the constructs between this Honorable Court’s review of the Service CCA’s and its own review of the C.M.C.R. was not lost on the Nashiri court. Id.

For the foregoing reasons, should this Court determine that a decision as to whether Colonel Mitchell was a principal or inferior officer must be made, the record is quite clear that Colonel Mitchell’s status was never elevated to that of “principal officer” upon his assignment or appointment to the C.M.C.R. As such, each of Appellant’s issues must fail.

CONCLUSION

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



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air
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/s/

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