IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States Army, *Appellee* v. Second Lieutenant (O-1) NICOLE A. DALMAZZI United States Air Force, *Appellant*	) BRIEF OF AMICUS CURIAE) ARMY GOVERNMENT APPELLATE) DIVISION IN RESPONSE TO GRANTED) ISSUES)) Crim. App. Dkt. No. 38708)) USCA Dkt. No. 16-0651/AF))

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

Preamble

The Army Government Appellate Division, pursuant to Rule 26 and this Court's order of August 18, 2016, files this amicus curiae brief to answer whether the appellate military judge on the Air Force Court of Criminal Appeals (AFCCA) is authorized to sit on AFCCA after having been appointed to the United States Court of Military Commission Review (USCMCR) and whether the appellate military judge's service on both courts violates the Appointments Clause.

Issue 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.

Argument

Amicus joins with Appellee's analysis of the statutory question. Colonel Mitchell did not lose his military commission because his appointment to the USCMCR[1] is not a prohibited civil office and, even if it is, military officers do not automatically lose their commissions upon taking a prohibited civil office. Even if Colonel Mitchell's appointment does constitute a prohibited civil office requiring that he forfeit his military commission, the result of the CCA's review in this case is not affected.

The statute at issue provides:

> Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States—
>
> (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 sections 5312 through 5317 of title 5.

[1] This brief assumes that Judge Mitchell was appointed to the USCMCR. Amicus takes no position on the factual question posed by this Court's order of October 28, 2016, regarding whether Judge Mitchell was, in fact, appointed to the USCMCR after his confirmation by the Senate.

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 When originally enacted, § 973 provided that "[t]he acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment."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 In 1983, Congress repealed the automatic termination provision, replacing it with language that reads substantially as the statute now reads.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

Here, Judge Mitchell's appointment to the USCMCR does not affect the CCA's decision in this case for three reasons. First, as Appellee ably demonstrates, Judge Mitchell's service on the USCMCR does not constitute holding a prohibited "civil office" within the meaning of § 973. (Appellee's Br. 9-16). Second, even assuming service by a USCMCR judge is a prohibited civil office, such service does not result in the *automatic* termination of the military officer's commission. Congress repealed the automatic termination provision in 1983. Instead, to effectuate the statute's prohibition and to terminate the commission, the military must take administrative action to discharge or retire the officer holding the prohibited civil office. Because no such administrative action

had been taken against Judge Mitchell when the CCA rendered its decision, he retained his military commission, and there is no infirmity in the CCA's decision.

Finally, assuming still that service on the USCMCR is a prohibited civil office, the CCA's decision in this case is unaffected because of § 973's savings provision, subsection (b)(5). While Congress sought to prohibit military officers from holding certain civil offices, the plain language of subsection (b)(5) shows that it also sought to protect any action undertaken by such an officer as part of his official military duties. In this regard, Appellant's reliance on constitutional cases to conclude that this Court must vacate the CCA's decision because of the purported statutory violation is misplaced. (Appellant's Br. 14 (citing *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)). In *Jones* and *Janssen*, the error was constitutional, and this Court concluded that the decisions below would be vacated. Here, Appellant's claim is statutory and Congress explicitly protected the CCA's decision.

Because Judge Mitchell did not lose his military commission through his service on the USCMCR and, even if he held a prohibited civil office through such service, there is no infirmity in the CCA's decision, this Court should affirm the CCA's decision.

Issue Presented

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

Summary of the Argument

Amicus joins with Appellee's analysis and conclusion that "the distinction of 'principal' versus 'inferior' officer status for USCMCR judges had no effect on Judge Mitchell's status at AFCCA." (Appellee's Br. 29). As Appellant only has standing to question the judge's status on AFCCA, resolving the statutory question in favor of Appellee should end the inquiry.

Even if this Court it necessary to address the constitutional question, Judge Mitchell's service on both the CCA and the USCMCR does not violate the Appointments Clause for three reasons. First, the appointment of Judge Mitchell to the USCMCR did not elevate him to the status of a principal officer because USCMCR judges are inferior officers under both *Edmond v. United States*, 520 U.S. 641 (1997) and *Morrison v. Olson*, 487 U.S. 654 (1988). Second, given that both CCA and USCMCR judges are inferior officers, the present case does not present the claimed issue of principal and inferior officers sitting on the same

tribunal, a circumstance which in itself is not barred by the Appointments Clause. Third, to the extent that there are competing interpretations of the statute under which Congress has allowed Judge Mitchell's service as both a CCA and USCMCR judge, the doctrine of constitutional avoidance should lead this Court to read the statute in a constitutional manner.

Argument

A. Judge Mitchell's part-time duty on the USCMCR does not elevate him to a principal officer because the USCMCR is a tribunal composed of inferior officers.

The Appointments Clause provides for offices of the United States to be "established by law," and provides four specific means of appointing all "Officers of the United States." *See* U.S. CONST. art. II, § 2, cl. 2. While the appointment of principal officers requires the nomination of the President, with advice and consent of the Senate, the appointment of "inferior officers" may be vested by Congress "in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

Appellant's entire constitutional argument is based on the faulty premise that a USCMCR judge is a principal officer. However, this is neither supported by the Supreme Court's analyses in *Edmond* or *Morrison*, nor by Appellant's argument that the "court of record" language in the statute designates the USCMCR as a principal office.

1. The office of a USCMCR judge is an inferior one in light of both *Edmond* and *Morrison*.

"The line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn." *Morrison*, 487 U.S. at 671. "The Constitution does not use the term 'inferior' 'in the sense of petty or unimportant' but in the sense of a subordinate to a principal officer."[2] *United States v. Gantt*, 194 F.3d 987, 999 (9th Cir. 1999) (quoting *United States v. Collins*, 14 Ct. Cl. 568, 574 (1878)). Appointment by the President with confirmation by the Senate does not answer the question of whether an officer is principal or inferior. *Edmond*, 520 U.S. at 660 ("The prescribed manner of appointment for principal officers is also the *default* manner of appointment for *inferior* officers." *Id.* (emphasis added)).

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[2] Dictionaries in use at the time of the Constitutional Convention gave the word "inferior" two meanings: (1) lower in place, rank, value; or (2) subordinate. *Morrison*, 487 U.S. at 719 (Scalia, J., dissenting) (quoting Samuel Johnson, Dictionary of the English Language (6th ed. 1785)). Justice Scalia emphatically stated, "In a document dealing with structure (the constitution) of a government, one would naturally expect the word to bear the latter meaning—indeed, in such a context it would be unpardonably careless to use the word *unless* a relationship of subordination was intended." *Id.* If the definition of "lower in rank or value" was intended, then the Framers would have used a term such as "lesser officers." *Id.* "At the only other point in the Constitution at which the word 'inferior' appears, it plainly connotes a relationship of subordination. Article III vests the judicial power of the United States in 'one supreme Court, and in such *inferior* Courts as the Congress may from time to time ordain and establish.'" *Id.* at 719-20 (quoting U.S. CONST., art. III, § 1). In the Federalist Papers, inferior courts were described as subordinate courts to the Supreme Court. *Id.* at 720.

The fact that Judge Mitchell was nominated by the President and confirmed with the advice of the Senate does not transform him from an inferior officer to a principal officer. *Id.* The general rule is that "[m]ilitary officers performing ordinary military duties are inferior officers . . . . Though military officers are appointed in the manner of principal officers, no analysis permits the conclusion that each of the more than 240,000 active military officers . . . is a principal officer." *Weiss v. United States*, 510 U.S. 163, 182 (1994) (Souter, J., concurring).

In determining whether an officer is an inferior officer, the Supreme Court has declined to adopt a bright line test and has instead applied different analyses and criteria which are characteristic of inferior officers. *Edmond*, 520 U.S. at 663; *Morrison*, 487 U.S. at 671-72. Under neither the *Edmond* nor *Morrison* analysis is Judge Mitchell a principal officer appointed under the Appointments Clause.

In *Weiss*, the Supreme Court held military judges are inferior officers not requiring an additional appointment. *Weiss*, 510 U.S. at 165; *Id.* at 181 (Souter, J., concurring). The Court reasoned that since military judges had previously already been appointed by the President as commissioned officers, their subsequent assignment as military judges did not require an additional appointment under the Appointments Clause. *Id.* at 165; *see also Edmond*, 520 U.S. at 654. The Court went on to note that military judges are selected by the Judge Advocate General of their branch of the service, do not serve for fixed terms, and may perform judicial

duties only when assigned to do so by the Judge Advocate General. *Weiss*, 510 U.S. at 165. Additionally, "[t]he entire system, finally, is overseen by the Court of Military Appeals which is composed entirely of civilian judges who serve for fixed terms of 15 years." *Id.* at 181 (Souter, J., concurring). The Court in *Weiss* noted that the Court of Military Appeals "demonstrated its vigilance in checking any attempts to exert improper influence over military judges." *Id.* Military judges are also distinct from federal judges, formally called "judge[s] of the United States" and who are principal officers governed by 28 U.S.C. § 451, because military judges are limited in tenure. *United States v. Rachels*, 6 M.J. 232 (C.M.A. 1979).

In *Edmond*, the Supreme Court held that appellate military judges on the CCAs are inferior officers. *Edmond*, 520 U.S. at 665. "'[I]nferior officers' are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663. Appellate military judges are supervised by the Judge Advocate General and the CAAF. *Id.* at 664. The Judge Advocate General can remove a CCA judge from his judicial assignment without cause, which is a "powerful tool for control." *Edmond*, 520 U.S. at 664 (citing *Bowsher v. Synar*, 478 U.S. 714, 727 (1986); *Myers v. United States*, 272 U.S. 52, 71 (1926)). And while the Judge Advocate General cannot attempt to influence the proceedings or

reverse the decisions of the court, the CAAF has extensive review authority of the CCA's decisions under Article 67, UCMJ.

The conclusion that the judges of the USCMCR are inferior officers also results from application of *Edmond*'s supervision and direction test. Appellate military judges on the USCMCR are supervised by the Secretary of Defense and the Judge Advocate General of their service. 10 U.S.C. § 949b. Not only can an appellate military judge be removed for good cause, but he can be "reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General . . . based on military necessity . . . ." 10 U.S.C. § 949b(4)(C)-(D). This military necessity can simply be part of the normal change of duty assignment "consistent with service rotation regulations." 10 U.S.C. § 949b(4)(D); *see also In re Al-Nashiri*, 791 F.3d 71, 83 (D.C. Cir. 2015) ("This additional removal authority is non-trivial; we would likely give the Executive Branch substantial discretion to determine what constitutes military necessity."). Finally, USCMCR judges are also supervised by the Court of Appeals for the District of Columbia Circuit, a court with judges who were appointed by presidential nomination with the advice and consent of the Senate. 10 U.S.C. § 950g(d); *Al-Nashiri*, 791 F.3d at 83 (reviewing the USCMCR's decisions "under a review provision virtually identical to the CAAF's") (citing 10 U.S.C. § 867(c)).

In *Al-Nashiri*, the court called the USCMCR judges a "close analog" to the CCA judges who are inferior officers. *In re Al-Nashiri*, 791 F.3d at 82. The court called this "a similarity the Congress no doubt intended." *Id.* at 83. The procedural rules are based on the rules for courts-martial. *Id.* (citing 10 U.S.C. § 948(b)). Additionally, like the Judge Advocates General of the services, the Secretary of Defense supervises the USCMCR by promulgating its procedures. *Id.* (citing 10 U.S.C. § 950(f)).

In *Morrison*, the Supreme Court used a four-factor test to determine that an independent counsel appointed by the Attorney General was an inferior officer. *Morrison*, 487 U.S. at 671. First, the independent counsel was subject to removal by a higher Executive Branch official, indicating the independent counsel was inferior in rank and authority. *Id.* Second, the independent counsel was empowered only to perform certain, limited duties. *Id.* Third, the independent counsel was limited in jurisdiction. *Id.* at 672. Fourth, the independent counsel's office was limited in tenure: it was temporary because whenever the task of investigation or prosecution was completed, the office was terminated with the independent counsel having no ongoing responsibilities. *Id. See also Samuels, Kramer, & Co. v. Comm'r*, 930 F.2d 975, 985-86 (2d Cir. 1991) (applying the *Morrison* test in determining that a special trial judge on the Tax Court is an inferior officer).

Although the *Edmond* analysis is more analogous since it was applied to appellate military judges, even under the *Morrison* test USCMCR judges are inferior officers. Again, appellate military judges are subject to removal by the Secretary of Defense and can be reassigned by the Judge Advocate General. 10 U.S.C. § 949b. The military commissions have limited jurisdiction to try alien unprivileged enemy belligerents and the USCMCR is tasked with reviewing the record "with respect to any matter properly raised by the accused" and its scope is identical to that of the CCAs under Article 66, UCMJ. 10 U.S.C. § 950f(c)-(d). Not only are appellate military judges limited in tenure simply due to assignment cycles, but, theoretically, the necessity of military commissions in general is also limited. Also, further supporting the argument that appellate military judges on the USCMCR are inferior officers, they serve on the USCMCR on a "part-time, as-needed" basis. *Khadr v. United States*, 62 F. Supp. 3d 1314, 1316 (C.M.C.R. 2014).

Finally, as an additional fact that supports the conclusion that USCMCR judges are inferior officers, the Military Commissions Act of 2009 also amended Article 39 of the UCMJ to make any holding or decision of the USCMCR *non-precedential* for courts-martial. UCMJ art. 39(d) ("The findings, holdings, interpretations, and other precedents of military commissions . . . may not be introduced or considered in any hearing, trial or other proceedings of a court-

martial . . . and may not form the basis of any holding, decision, or other determination of a court-martial."). In addition to satisfying the analyses of *Edmond* and *Morrison* for inferior officers, this amendment to the UCMJ is a strong indication that Congress intended for the USCMCR and its holdings to be limited to the very narrow area of reviewing the military commissions of alien unprivileged enemy belligerents. Thus, this prohibition on using USCMCR holdings even in the analogous CCAs is another indication that the judges of the USCMCR are inferior officers.

2. The language "court of record" does not grant Article III protections to an Article I court.

The Military Commissions Act of 2009 stated, "There is a court of record to be known as the 'United States Court of Military Commission Review.'" 10 U.S.C. § 950f(a). However, the phrase "court of record" does not have the transformative properties to rebrand an Article I court as a court with Article III court protections, as Appellant suggests. (Appellant's Br. 7-11).

Similar arguments were made in *Samuels, Kramer & Co.* and *Kuretski v. Comm'r of IRS*, 755 F.3d 929, 940 (D.C. Cir. 2014). The United States Tax Court was originally established by statute as the Board of Tax Appeals and was designated as an executive agency. *Samuels, Kramer & Co.*, 930 F.2d at 991. Congress changed the name of the court to the United States Tax Court in the Tax Reform Act of 1969 and stated that it was a "court of record." *Id.* However, the

nomenclature of "court of record" is not determinative for separation-of-powers or Appointments Clause analysis. *Id.* at 989. "There is no indication, however, that by prescribing the Tax Court had been established under Article I, Congress somehow converted what had been an Executive Branch tribunal into an Article *III* Court." *Kuretski*, 755 F.3d at 940 (citing S. Rep. No. 91-552, at 304 n.2 (1969)) ("'limitations of Article III of the Constitution, relating to life tenure and maintenance of compensation,' do not apply to Tax Court judges."). "Congress' desire to create a 'court' is not inconsistent with the conclusion that for purposes of the Appointments Clause the Tax Court is a department associated with the Executive Branch." *Samuels, Kramer & Co.*, 930 F.2d at 991. Similarly, in this case, for purposes of the Appointments Clause, the USCMCR is associated with the Executive Branch, originally conceived of as and remaining a body of inferior officers. The USCMCR initially began as a review panel of three military officers whose decisions were only reviewed by the Secretary of Defense. Department of Defense Military Commission Order No. 1, paras. 6(H)(4)-(5) (Aug. 31, 2005). Congress' change to call it a "court of record" was indicative of its intent to establish it as an Article I court, but status as an Article I court does not equal principal officer status. *See Edmond*, 520 U.S. at 665 (military judges on the CCAs, Article I courts, are inferior officers). Calling the USCMCR a "court of

record" did not remove limited tenure for USCMCR judges and did not add a provision for maintenance of compensation.

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

Appellant asserts that the "assignment of inferior officers and appointment of principal officers to a single tribunal itself violates the Appointments Clause," citing *Nguyen v. United States*, 539 U.S. 69 (2003). (Appellant's Br. 25). However, in the parenthetical immediately following the citation, Appellant admits that the Court in *Nguyen* did not reach the constitutional question. (*Id.*) The *Nguyen* Court did not even resort to the constitutional avoidance canon to resolve the statutory question at issue there, as Appellant suggests. (*Id.*). Rather, the court simply declined to answer the constitutional question because the statutory question was so easily answered. *Nguyen*, 539 U.S. at 74-75. Appellant thus has no authority for the argument that principal and inferior officers may not serve on the same body.

Instead, what precedent exists on this subject suggests that officers appointed with advice and consent may serve on the same body as inferior officers. *See Shoemaker v. United States*, 147 U.S. 282, 301 (1893). In *Shoemaker*, Congress passed an act authorizing the establishment of Rock Creek Park. *Shoemaker*, 147 U.S. at 282 (citing Act of Sept. 27, 1890, ch. 1001, sec 2, 26 Stat.

492, 492 (1890)). A commission was comprised of five people—the Army Chief of Engineers, the Engineer Commissioner of the District of Columbia, and three citizens. *Id.* at 297. The three citizens were to be appointed by the President with the advice and consent of the Senate. *Id.* at 297. The Court held as obvious that a second appointment for the Army Chief of Engineers was not necessary to carry out a similar function: "It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed." *Shoemaker*, 147 U.S. at 301. The Court did not discuss whether the commission was composed of inferior and principal officers.

If this Court accepts Appellant's argument that nomination by the President and confirmation by the Senate results automatically in the creation of a principal office, then the commission in *Shoemaker* contained a mixture of principal and inferior officers. The Army Chief of Engineers was an inferior officer and, at least under Appellant's rationale, the three citizens were principal officers. Accordingly, even assuming arguendo that Judge Mitchell became a principal officer when he was appointed to the USCMCR, Appellant has offered no support in case law for her proposition that the Appointments Clause should have barred Judge Mitchell's continued service on AFCCA as an inferior officer while also

being a part-time, principal officer on the USCMCR, and *Shoemaker* suggests the opposite.

C. Under the doctrine of constitutional avoidance, this Court should reject Appellant's unsupported and unconstitutional interpretation of the Military Commissions Act of 2009.

To the extent that Appellant's argument poses a competing interpretation regarding the assignment of appellate military judges to the USCMCR under the Military Commissions Act of 2009,[3] this Court should apply the doctrine of constitutional avoidance to interpret the Military Commissions Act of 2009 such that Judge Mitchell was not made a principal officer. *See Gonzalez v. Carhart*, 550 U.S. 124, 154 (2007). "[U]nder the canon of constitutional avoidance, 'every reasonable [statutory] construction must be resorted to, in order to save a statute from unconstitutionality.'" *United States v. Libby*, 498 F. Supp. 2d 1, 13-14 (D.D.C. 2007) (quoting *Gonzales*, 550 U.S. at 153). Applying this principle of constitutional avoidance, the far more reasonable interpretation is that since Judge Mitchell could have been *assigned* as an appellate military judge to the USCMCR pursuant to 10 U.S.C. § 950f , his subsequent and unnecessary *appointment* did not

[3] Appellant's view is that Judge Mitchell was appointed as an "additional judge" pursuant to 10 U.S.C. § 950f(b)(3) and therefore no longer meets the statutory definition of either a military judge or appellate military judge. (Appellant's Br. 14). Appellee asserts that the President nominated Judge Mitchell "as an appellate military judge" and notes his continued status as an appellate military judge. (Appellee's Br. 26).

result in him losing the very characteristic for which he was chosen. 10 U.S.C. § 950f (b)(1) ("Judges on the Court shall be assigned or appointed . . . .") ; *see Edmond*, 520 U.S. at 658 ("[W]e see no other way to interpret Article 66(a) that would make it consistent with the Constitution. . . . [I]f petitioners are asking us to interpret Article 66(a) in a manner that would render it clearly unconstitutional . . . we must of course avoid doing so if there is another reasonable interpretation available."); *see also Gonzalez*, 550 U.S. at 132. Therefore, this Court should interpret the Military Commissions Act of 2009 in a way that does not violate the Appointments Clause of the Constitution, by reading the act so that Judge Mitchell was an "appellate military judge," not an "additional judge," or some hybrid unknown to the statute.

Conclusion

Judge Mitchell did not lose his military commission through his service on the USCMCR, but even if he held a prohibited civil office through such service, there is no infirmity in the CCA's decision, and this Court should affirm the CCA's decision. Additionally, Judge Mitchell's service on both AFCCA and the USCMCR does not violate the Appointments Clause for three reasons: Judge Mitchell's second appointment did not elevate him into a principal officer; all officers who sit on the CCAs and USCMCR are inferior officers; and the doctrine

of constitutional avoidance should lead this Court to read the statute in a constitutional manner.

WHEREFORE, amicus respectfully requests this Honorable Court affirm the CCA.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing amicus curiae brief in support of appellee, United States v. Dalmazzi, Crim. App. Dkt. No. 38708, USCA Dkt. No. 16-0651/AF was electronically filed with the Court to (efiling@armfor.uscourts.gov) on 31 October 2016 and contemporaneously served on counsel for appellant, counsel for appellee, and amicus counsel.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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

This brief contains **4,276** words and **419** lines of text.

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31 October 2016