IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. **NICOLE A. DALMAZZI** Second Lieutenant (O-1), U.S. Air Force *Appellant.*	**APPELLANT'S BRIEF ON THE SPECIFIED ISSUE** Crim. App. No. 38808 USCA Dkt. No. 16-0651/AF

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

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Issue Specified

WHETHER THE ISSUES GRANTED FOR REVIEW ARE MOOT WHERE THE RECORD REFLECTS THAT: MARTIN T. MITCHELL TOOK AN OATH PURPORTING TO INSTALL HIM AS A JUDGE OF THE U.S. COURT OF MILITARY COMMISSION REVIEW (CMCR) ON MAY 2, 2016; THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ISSUED AN OPINION IN THE UNDERLYING CASE WITH JUDGE MITCHELL PARTICIPATING IN HIS CAPACITY AS AN AFCCA JUDGE ON MAY 12, 2016; AND THE PRESIDENT DID NOT APPOINT MITCHELL TO THE CMCR UNTIL MAY 25, 2016.

Statement of the Case

In order to determine whether Judge Martin T. Mitchell had been appointed to or "exercise[d] the functions of," 10 U.S.C. § 973(b)(1)(C)(2)(A), a judge on the CMCR before he participated in the May 12, 2016 decision of the AFCCA in Appellant's case, this Court must take full account of Judge Mitchell's actions on the CMCR following his April 28, 2016, confirmation by the Senate, and specifically his participation in two government interlocutory appeals in *United States v. Al-Nashiri*. *See* Order, *United States v. Al-Nashiri*, No. 14-001 (C.M.C.R. May 18, 2016) (Appendix).

The D.C. Circuit's decision in *Al-Nashiri* that identified appointments clause concerns at the CMCR, 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. *See 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 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).

On April 29, 2016, the government requested the CMCR lift its stay in light of Judge Mitchell's (and other new CMCR judges') appointment to the court. Appendix at 2 (*Al-Nashiri*, No. 14-001 (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 April 30, 2016, the CMCR granted an unopposed request by Al-Nashiri for an enlargement of time until May 16, 2016, to answer the government's motion to lift the stay. *Id.*

On May 2, 2016, Judge Mitchell took the judicial oath as a CMCR judge. *Id.* 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." *See* Appellant's Motion to Supplement the Record (Nov. 1, 2016), Appendix at 1 (emphasis added).

On May 18, 2016, in an opinion authored by Judge Mitchell, the CMCR 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. *See* Appendix (*Al-Nashiri*, No. 14-001 (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 CMCR. *See* Appellant's Motion to Supplement the Record (Nov. 1, 2016), Appendix at 26. "The 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.

Argument

JUDGE MITCHELL'S "APPOINTMENT" TO THE CMCR WAS EFFECTIVE, AT MINIMUM, UPON HIM TAKING THE JUDICIAL OATH ON MAY 2, 2016 AND EXERCISING THE FUNCTIONS OF THAT CIVIL OFFICE; UNDER THE SUPREME COURT'S DECISION IN *MARBURY V. MADISON*, HIS COMMISSIONING DOCUMENT IS MERELY "EVIDENCE" OF THE APPOINTMENT

"[T]he commission is not necessarily the appointment; though conclusive evidence of it." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803). These words are the cornerstone of Chief Justice John Marshall's construction of the appointments[1] and commission[2] clauses of the Constitution, formed from his reasoning that it "contemplate[s] three distinct operations": (1) "nomination"; (2)

[1] U.S. Const., art. II, § 2, cl. 2.

[2] U.S. Const., art II, § 3 (providing that the President "shall Commission all the Officers of the United States.").

"appointment"; and (3) "commission." *Id.* at 155-56.

In *Marbury*, of course, the dispute concerned the ability of William Marbury to compel then-Secretary of State James Madison to deliver a judicial commission signed by former President John Adams in a wave of appointments known by history as the "midnight judges." *See* Louise Weinberg, *Our Marbury*, 89 VA. L. REV 1235, 1238 (2003). Framing the question presented, Chief Justice Marshall reasoned, "[i]n order to determine whether [Marbury] is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office." *Marbury*, 5 U.S. at 155. If President Adams had actually appointed William Marbury to his post as justice of the peace, he was "entitled to the possession of those evidences of office," to include the judicial commission. *Id.*

Chief Justice Marshall concluded it "follows" from "the constitutional distinction between the appointment to an office and the commission of an officer," that "if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it." *Id.* at 156.

To Chief Justice Marshall—and the unanimous Supreme Court in *Marbury*—these were bedrock principles that informed the more difficult question whether Marbury was entitled to demand delivery of his Presidentially signed commission when it was "evidenced by no act but the commission itself." *Id.* at 157. As to the

merits of Marbury's case, Chief Justice Marshall's chief task was to rebut the plausible theory of President Thomas Jefferson that "Marbury's appointment had not been perfected, since his commission had never been delivered, and was therefore ineffective." Weinberg, 89 VA. L. REV. at 1344 (citing Letter from Thomas Jefferson to George Hay (June 2, 1807), in 5 The Writings of Thomas Jefferson 396-97 (H.A. Washington ed., 1853)). This theory was inadvertently given credence by Marbury's advocate, Charles Lee, the former Attorney General of the United States, who had framed the issue procedurally as a motion for delivery of the commission. *Id.*; *see also Marbury*, 5 U.S. at 157. Instead of simply resting on the foundational principle that the commission was evidence of the appointment rather than the appointment itself, Chief Justice Marshall proceeded to decommission the opposing theory "proceeding on the assumption that Jefferson was correct." *Id.*

Chief Justice Marshall thus hypothesized "that the commission may have been assimilated to a deed, to the validity of which, delivery is essential," and "for the purpose of examining this objection fairly," allowed it to "be conceded, that the principle, claimed for its support, is established." *Marbury*, 5 U.S. at 159. From this ground, Chief Justice Marshall defended his ultimate conclusion that William Marbury's appointment was complete, at minimum, when the President had done all that can be done, *i.e.*, signed the commission. *See Marbury*, 5 U.S. at 157 ("Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last

act to be done by the President was performed, or, at furthest, when the commission was complete.").[3] Chief Justice Marshall rejects the notion that completion of the commission by affixing the seal is necessary, because the neglect of the Secretary of State in performing a ministerial act cannot defeat an otherwise valid appointment. *Id.* at 158.

Even so, as the existence of Marbury's signed and sealed commission had been proven in a hearing before the Court,[4] Chief Justice Marshall assumes the point and proceeds to address delivery: "A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry." *Id.* at 160. Reducing the opposition's theory to absurdity, Chief Justice Marshall reasons that "[i]f delivery were necessary, then loss of the commission would lose the office." *Id.*

But what of Judge Mitchell's commission, then, if it was not signed by the President until May 25, 2016—was he appointed to the CMCR on the date of his

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[3] It is in this context that Chief Justice Marshall's later statement that "when a commission has been signed by the President, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state," i*d.* at 162, must be understood.

[4] Mr. William Lincoln, the acting Secretary of State stated "he had seen the commissions of the justices of the peace . . . signed by Mr. Adams, and sealed with the seal of the United States," although he did not recollect whether Marbury's name appeared on them. *Marbury*, 1803 US LEXIS 352, *13, 16. The Supreme Court did not require Lincoln to testify as to what had been done with the commissions. *Id.*

commission, and no earlier? Through *Marbury*'s lens, the answer under this record must be to the contrary. By taking the oath of office and "the performance of such public act[s]" as receiving pleadings and issuing rulings in his new capacity, where the Executive Branch treated his rulings as authoritative, Judge Mitchell demonstrated he had indeed been appointed by the President and had either the "right to his commission," or authority "to perform the duties [of his new office] without it." *Id.* at 156; *see also Dysart v. United States*, 369 F.3d 1303, 1312 (Fed. Cir 2004) (quoting *Marbury*, 5 U.S. at 156 "if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer").

In this regard, it must be observed that the existence of a commissioning document is ultimately so unessential to consummation of a valid appointment that Justice Robert Jackson referred to the President's authority to issue commissions as "trifling." *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring). Likewise, Justice Joseph Story explained, that the commission clause contained a Presidential "duty" as follows:

> The President cannot lawfully refuse [to commission all officers of the United States], or neglect it in any case, where it is required by law. It is not designed, as some have incorrectly supposed, to give him a control over all appointments; but to give to the officers a perfect voucher of their right to office. In this view, it is highly important, as it introduces uniformity and regularity into all the departments of the government, and furnishes an indisputable evidence of a rightful appointment.

Joseph Story, *A Familiar Exposition of The Constitution of the United States*

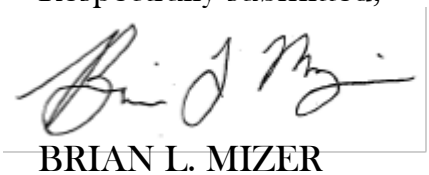
§ 293 (1840).

The Executive Branch's conduct in this case, which treated Judge Mitchell as a properly appointed CMCR judge, demonstrates its understanding that his appointment had been consummated by the President and ultimately resolved, in the Executive's mind at least, the appointments clause concerns articulated by the D.C. Circuit. Otherwise, there would have been no reason for the government to request that the stay of proceedings be lifted upon Judge Mitchell's confirmation. Accordingly, for purposes of this case, by the time he took the judicial oath on May 2, 2016 and began "exercise[ing] the functions of" his new civil office, *see* 10 U.S.C. § 973(b)(1)(C)(2)(A), such conduct being recognized by the Executive Branch as appropriate and authoritative based on its actions in the *Al-Nashiri* case, the appointment of Judge Mitchell was consummated.

The issues granted, therefore, are not mooted by the President's later delivery of Judge Mitchell's judicial commission, because the commission is merely evidence of his prior appointment. As mootness is not ultimately a barrier to this Honorable Court reaching the merits, it should not hesitate "to say what the law is" with respect to the granted issues. *See* Marbury, 5 U.S. at 177.

WHEREFORE, Appellant respectfully requests this Court set the granted issues for oral argument.

Respectfully submitted,



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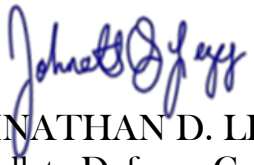
CERTIFICATE OF FILING AND SERVICE

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 1 December 2016.



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Appendix

UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

UNITED STATES, Appellant v. ABD AL RAHIM HUSSAYN MUHAMMAD AL-NASHIRI, Appellee	))))))))))	ORDER LIFTING STAY AFFIRMING PRIOR ORDERS DENYING DISQUALIFICATION AND RECUSAL MOTIONS SETTING ORAL ARGUMENT CMCR Case No. 14-001 May 18, 2016

BEFORE:

MITCHELL, PRESIDING Judge
KING, SILLIMAN Judges

On October 15, 2014, appellant requested oral argument. On October 16, 2014, appellee replied and did not object to oral argument. Oral argument was scheduled for November 13, 2014.

On October 14, 2014, appellee filed a petition for a writ of mandamus and prohibition in the Court of Appeals for the District of Columbia Circuit asking that court to order the disqualification of Judges Weber and Ward, the two military judges then on the panel assigned to hear the appeal. Appellee contended their assignment by the Secretary of Defense to our court violates the Commander-in-Chief Clause and the Appointments Clause of the U.S. Constitution. *See* Appellee's Pet. for Writ of Mandamus & Prohibition, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Oct. 14, 2014).

On the eve of the oral argument, the Court of Appeals for the District of Columbia Circuit granted a stay in the proceedings for the purpose of giving it sufficient opportunity to consider appellee's mandamus petition. Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Nov. 12, 2014).

On June 23, 2015, the Court of Appeals for the District of Columbia Circuit denied the appellee's mandamus petition, remanded the case back to our court, and lifted that Court's stay. *In re Al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015); Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. June 23, 2015).

On June 26, 2015, we granted the requests to hold this case in abeyance pending possible presidential nomination and Senate confirmation of the military appellate judges. *See In re Al-Nashiri*, 791 F.3d at 86 (suggesting such nomination and confirmation would "put to rest any Appointments Clause questions"). On March 14, 2016, the Senate received the nominations of Judges Mitchell and King to our court.[1] The Senate confirmed Judges Mitchell and King on April 28, 2016,[2] and they were sworn as USCMCR judges on May 2, 2016.

On April 29, 2016, appellant requested that we lift the stay and reaffirm our previous orders. Our court issued several procedural orders involving stays, extensions, recusals, and assignment of judges as well as the following substantive orders: granting on September 25, 2014, appellant's motion for leave to file an outsized brief; denying on October 6, 2014, appellee's motion to recuse the two military judges on the panel, alleging they were assigned to the USCMCR in violation of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and could not be freely removed in violation of the Commander-in-Chief Clause, *id*. cl. 1; denying on October 6, 2014, appellee's motion to "terminate the devolution of its judicial responsibilities onto the Clerk of Court."; denying on October 10, 2014, appellee's motion to dismiss the appeal as untimely; and granting on October 20, 2014, appellant's motion to attach documents to the appendix accompanying its brief.

On April 30, 2016, appellee filed an unopposed request for an extension until May 16, 2016, to respond to appellant's motion, and we approved the extension request.

On May 16, 2016, we received appellee's response. Appellee moved to continue the stay; to disqualify the military judges, Judges Mitchell and King; and to recuse Judges Mitchell and King from deciding the disqualification motion. As one of several alternatives to disqualification, Appellee seeks an order "confirming Col Mitchell and CAPT King's newfound civilian status[.]" Appellee cites 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016)[3] and 10 U.S.C. 973(b) as the basis for disqualification. Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of

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[1] *See* 162 CONG. REC. S1474 (daily ed. Mar. 14, 2016) (indicating receipt of President's nominations of Colonel Martin T. Mitchell, U.S. Air Force, and Captain Donald C. King, U.S. Navy, as appellate military judges on the United States Court of Military Commission Review).

[2] U.S. Cong., Nominations of 114th Cong., PN 1219, https://www.congress.gov/nomination/114th-congress/1219 (Judge Mitchell), and PN 1224, https://www.congress.gov/nomination/114th-congress/1224 (Judge King). (Encl. 1, 2)

[3] The language of the 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016) is that the Senate confirmed the "Air Force nomination of Martin T. Mitchell, to be colonel" and "Navy nomination to Donald C. King, to be Captain." It mirrors the closing phrase of PN 1219 and 1224.

the nomination and confirmation process. Moreover, the Senate previously confirmed Judge Mitchell to Colonel, and Judge King to Captain more than two years ago. On April 28, 2016, the Senate confirmed Judges Mitchell and King as appellate military judges in accordance with the Secretary of Defense's recommendation and the President's nomination. *See* note 2, *supra*.

Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of the nomination and confirmation process.

Title 10 U.S.C. § 973(b)(2)(A) provides, "Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States-- . . . (ii) that requires an appointment by the President by and with the advice and consent of the Senate." Appellate military judges are specifically authorized by law under 10 U.S.C. § 950f(b)(2), and 10 U.S.C. § 973(b)(2) does not prohibit Judges Mitchell and King from acting as appellate military judges.[4] Title 10 U.S.C. §§ 950f(b)(2) and 973(b)(2) do not define the term "civil office", and there is no evidence that Congress intended commissioned officers appointed as appellate military judges to the Court of Military Commission Review to occupy a civil office.[5] The 2009 Military Commissions Act states, "The Court shall consist of one or more panels, each composed of not less than three appellate military judges." 10 U.S.C. § 950f(a). Military commissions are used "to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. § 948b(a). Disposition 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.

Therefore, it is hereby

ORDERED that appellant's April 29, 2016 request to lift our stay of litigation of appellant's appeals, which were initially filed on September 19, 2014 and March 27, 2015, is **GRANTED**.

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[4] Title 10 U.S.C. § 950f(b)(2) states, "The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title."

[5] *See* Department of Defense Directive Number 1344.10, Political Activities by Members of the Armed Forces (Feb. 19, 2008) Section E2.3. (defining "civil office" as "A non-military office involving the exercise of the powers or authority of civil government, to include elective and appointed office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof. This term does not include a non-elective position as a regular or reserve member of civilian law enforcement, fire, or rescue squad.").

ORDERED that appellant's motion that we reconsider the orders our Court previously decided in this case is **GRANTED**.

ORDERED that orders our Court previously decided are **AFFIRMED**.

ORDERED that Judges Mitchell and King have considered appellee's May 16, 2016 motion to recuse. Judges Mitchell and King have declined to recuse themselves. The motion to recuse is **DENIED**.

ORDERED that appellee's May 16, 2016 motion to disqualify Colonel Mitchell and Captain King is **DENIED**.

ORDERED that oral argument will be heard at 10:00 a.m. Eastern Time on June 2, 2016, in Courtroom 201, United States Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Washington, DC.

FOR THE COURT:

Mark Harvey
Clerk of Court, U.S. Court of Military Commission Review

PN1219 — Martin T. Mitchell — Air Force

114th Congress (2015-2016)

NOMINATION Hide Overview

Confirmed on 04/28/2016.

Description
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

Organization
Air Force

Latest Action
04/28/2016 - Confirmed by the Senate by Voice Vote.

Date Received from President
03/14/2016

Committee
Senate Armed Services

Actions: PN1219 — 114th Congress (2015-2016)

Sort by Newest to Oldest GO

Date	Senate Actions
04/28/2016	Confirmed by the Senate by Voice Vote.
04/26/2016	Placed on Senate Executive Calendar. Calendar No. DESK.
04/26/2016	Reported by Senator McCain, Committee on Armed Services, without printed report.
03/14/2016	Received in the Senate and referred to the Committee on Armed Services.

PN1224 — Donald C. King — Navy

114th Congress (2015-2016)

NOMINATION Hide Overview

Confirmed on 04/28/2016.

Description
The following named officer for appointment in the grade indicated in the United States Navy 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 Captain
Donald C. King

Organization
Navy

Latest Action
04/28/2016 - Confirmed by the Senate by Voice Vote.

Date Received from President
03/14/2016

Committee
Senate Armed Services

Actions: PN1224 — 114th Congress (2015-2016)

Sort by Newest to Oldest GO

Date	Senate Actions
04/28/2016	Confirmed by the Senate by Voice Vote.
04/26/2016	Placed on Senate Executive Calendar. Calendar No. DESK.
04/26/2016	Reported by Senator McCain, Committee on Armed Services, without printed report.
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