19 October 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
Second Lieutenant (O-1) NICOLE A. DALMAZZI, United States Air Force *Appellant.*	)	Crim. App. No. 38708 USCA Dkt. No. 16-0651/AF

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. Second Lieutenant (O-1) NICOLE A. DALMAZZI, United States Air Force *Appellant.*	)))))))))	FINAL BRIEF ON BEHALF OF THE UNITED STATES Crim. App. No. 38708 USCA Dkt. No. 16-0651/AF

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

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. (J.A. at 40.) 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). (J.A. at 40.) On 11 March 2016, the President of the United States 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 71.) (emphasis added). On 28 April 2016, the Senate confirmed Colonel Mitchell's nomination. (J.A. at 73.).

Fourteen days later, on 12 May 2016, AFCCA issued its opinion in this case affirming Appellant's findings and sentence. *See* United States v. Dalmazzi, ACM 38708 (A.F. Ct. Crim. App. 12 May 2016). Appellant never challenged Colonel Mitchell's ability to review her case or standing to serve at AFCCA either immediately following Colonel Mitchell's confirmation or before AFCCA ruled on her case. Instead, Appellant would wait 15 days after AFCCA ruled on her case to first challenge Colonel Mitchell.

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 from the case and to recuse Colonel Mitchell 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 Judge Mitchell do not occupy a 'civil office' when serving as

appellate military judges on the Court of Military Commission Review."[1]

Instead of filing a motion to disqualify Colonel Mitchell at AFCCA immediately following Colonel Mitchell's confirmation, Appellant waited until 27 May 2016, 29 days *after* Colonel Mitchell was confirmed by the Senate and 15 days *after* AFCCA issued its decision in this case, to file her "Motion to Vacate Decision Due to Participation of [C.M.C.R.] Judge Mitchell" at AFCCA (J.A. at 18.) The United States responded and opposed the motion on 22 June 2016. (J.A. at 40.)

In July 2016, 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 11 July 2016, Appellant filed her Petition for Grant of Review with this Honorable Court. Apparently seeking to litigate her case before two military appellate courts simultaneously, Appellant filed her petition for review at this Court before AFCCA could rule on her motion to vacate. On 18 July 2016, AFCCA dismissed Appellant's Motion to Vacate because Appellant had "filed a petition for grant of review of her case with the United States Court of Appeals for

[1] *See* Order at http://www.mc.mil/Portals/0/pdfs/Nashiri15-002/USCMCR%2014-001%20Nashiri%20Order%20Re%20Oral%20Argument%20(05182016).pdf (last visited October 19, 2016).

the Armed Forces" and that "[g]iven this petition, this Court no longer possesses jurisdiction over Appellant's case." (J.A. at 69.) As a result, Appellant's motion to vacate filed at AFCCA can only be viewed as proforma attempt to challenge Judge Mitchell's qualifications as an AFCCA judge.

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. (*See* Appellant's Motion to Supplement the Record (19 September 2016) (Appendix)).

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. As an initial matter, this Court should find Appellant waived this issue by not raising it in a timely manner. Additionally, 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. As set forth below, Appellant's claims should be denied.

ARGUMENT

I.

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

A. Appellant waived review of this issue by not raising it in a timely manner.

As an initial matter, this Court should find Appellant waived this issue by not raising it in a timely manner. Appellant's untimely delay in objecting to Colonel Mitchell's involvement in this case is tantamount to a waiver of this issue. *See* United States v. Kincheloe, 14 M.J. 40, 51 (C.M.A. 1982). Appellant did not question Colonel Mitchell's fitness to serve on this case at the time of his Senate confirmation on 28 April or *before* AFCCA issued its opinion in this case on 12 May 2016. Such glaring silence indicates one of two things: either (1) Appellant did not believe Colonel Mitchell's confirmation invalidated his standing as a judge on this case; or (2) Appellant made a concerted decision to delay raising this issue until after AFCCA's decision in hopes that the decision would be to Appellant's benefit. Only after that decision was released and was to Appellant's detriment did Appellant finally raise her now untimely issue. Appellant's gamble in such a delay should not be rewarded.

Appellant's inaction on this issue until 29 days after Colonel Mitchell's confirmation and 15 days after AFCCA's decision indicated her belief that Colonel Mitchell's confirmation did not invalidate his standing as a judge on her case. *See* United States v. Burton, 52 M.J. 223, 226 (C.A.A.F. 2000) ("Failure of the defense to challenge the impartiality of a military judge may permit an inference that the defense believed the military judge remained impartial.") Simply put, if Appellant felt Colonel Mitchell was no longer a valid AFCCA judge as soon as he was confirmed as a C.M.C.R. judge by the Senate on 28 April, Appellant should have immediately filed a motion to disqualify Colonel Mitchell from participating in the review of this case, a filing that would have come *before* AFCCA issued its opinion. Here, AFCCA did not issue an opinion until two weeks *after* Colonel Mitchell was confirmed by the Senate, plenty of time for Appellant to challenge Colonel Mitchell's participation in this case *before* an opinion was rendered. Instead, Appellant waited another 15 days after AFCAA issued its decision in this case, a decision not in Appellant's favor, to finally file any opposition to Colonel Mitchell's standing.

Notably, Appellant offers no reason why she did not immediately raise this issue to this Honorable Court and, instead, waited 29 days after Colonel Mitchell's Senate confirmation and 15 days after this Court's decision in this case to challenge Colonel Mitchell's seat at this Honorable Court. Further, Appellant has

not raised any issue of ineffective assistance of counsel against her appellate counsel. Without raising an ineffective assistance of counsel issue, this Court must assume Appellant is satisfied that she has received effective assistance from her appellate counsel.

If that is the case, she is responsible for the untimely raising of this issue and the consequences of such inaction, namely the waiver of the issue. Appellant has failed to either establish "good cause" as to why she failed to raise this issue immediately or establish any showing of a "manifest injustice." *See* United States v. Johnson, 42 M.J. 443, 447 (C.A.A.F. 1995) (Crawford, J. concurring in the result) ("Absent a showing of good cause for failure to raise an issue or manifest injustice, this Court should not exercise its discretion to entertain an issue raised for the first time before this Court.") Appellant has waived this issue.

B. 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 and the subsequent confirmation of that nomination by the United States Senate. Both the nomination and confirmation state that Colonel Mitchell is "TO BE COLONEL." *(See* J.A. at 71, 73.) Yet, from the outset, Appellant erroneously 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." (App. Br. at 11.) 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 sections 5312 through 5317 of title 5."

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." 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." (App. Br. at 11-14.) 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, dating back to its 1870 enactment. As quoted by Appellant in her 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 passing 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. (App. Br. at 12.) 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.[2]

Another page on the GSA government website states, "GSA provides centralized

[2] *See* http://www.gsa.gov/thisisgsa/#/who-we-are (last visited October 19, 2016).

procurement for the federal government, offering billions of dollars' worth of products, services, and facilities that federal agencies need to serve the public."[3]

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 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

[3] *See* http://www.gsa.gov/portal/content/104774 (last visited October 19, 2016).

to it. At any given time, therefore, the Court's judges may have very little to do."[4] 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.

Appellant next states that "when Congress has sought to authorize either the assignment or appointment of military officers to civil office, such as the Director of the Central Intelligence Agency, it has done so expressly." (App. Br. at 13.) Again, attempting to analogize the position of a C.M.C.R. appellate judge to the position of the Central Intelligence Agency Director is misplaced in this context. Moreover, Appellant's statement only further proves the opposite; the lack of any "express" language by Congress relating to C.M.C.R. judges being a "civil" position is all the more evidence to prove Congress never intended it to be seen as such.

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

[4] 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.

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 nomination and appointment 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.

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.

Lastly, Appellant cites and quotes to a separate Department of Justice Office of Legal Counsel opinion, one from earlier this year, when she claims, "Upon accepting his current office, and by further performing the duties of that office, Judge Mitchell ran afoul of the 'prohibition on military officers holding civilian offices in the federal government that had been in force since 1870.'" (App. Br. at 14.) This quote, taken from an opinion entitled "Whether a Military Officer May

Continue on Terminal Leave After He is Appointed to a Federal Civilian Position Covered by 10 U.S.C. §973(b)(2)(A)," is again taken out of context and, when given a more complete analysis, again cuts at Appellant's own argument. While the opinion does state that "the prohibition on military officers serving in federal civilian offices has existed in some form since 1870," the opinion makes it plainly clear that the 1983 amendment to §973(b) was enacted to "narrow" or "limit the offices that active duty military officers were prohibited from holding." 40 Op. O.L.C. 5, 9-10; 2016 OLC LEXIS 3 (Mar. 24, 2016). Moreover, the ultimate conclusion of this opinion was that "an active duty military officer on terminal leave who meets the requirements of 5 U.S.C. §5534a *may continue on terminal leave status* after his appointment or election to a position covered by §973(b)(2)(A)." Id. at 11. (emphasis added.) If such an active duty officer can remain on terminal leave status even after an appointment or election to a position covered by 10 U.S.C. §973(b)(2)(A), one can easily surmise their military commission was certainly not terminated as a matter of law by them simply accepting that position.

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, her

claim should be denied.[5]

C. 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." (App. Br. at 14.) Thus, according to Appellant, "Judge Mitchell is now statutorily ineligible to serve on the AFCCA." (Id. at 17.) 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 USCMCR when the statute expressly provides, '[j]udges on the Court shall be assigned or appointed[.]" (Id. at 15.) She continues in her next paragraph that "aside from the plain language of the statute, the D.C.

[5] The *amicus curiae* brief filed by the Military Commissions Defense Organization (MCDO) makes 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.

Circuit has explained precisely why Judge Mitchell cannot serve as both an 'appellate military judge' and an 'additional judge.'" (Id. at 16.) However, 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. Moreover, Appellant has no standing to challenge Colonel Mitchell's participation on the C.M.C.R.[6] 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 has or had on the C.M.C.R., this Court can be absolutely sure that Colonel Mitchell's service on this Court is valid and that he may serve simultaneously on

[6] As noted above, the *amicus curiae* brief filed by the MCDO makes three arguments before this Court. (MCDO Br. at i.) The second argument alleges that "Service by a military officer as a judge appointed to the USCMCR pursuant to 10 U.S.C. §950f(b)(3) would raise serious statutory and constitutional problems." The argument includes three sections that claim (1) "The position of appointed appellate military judge on the USCMCR does not exist in the law;" (2) "Section 973(b) of Title 10 bars military officers from holding an appointment to the USCMCR;" and (3) "Service of a military officer as an appointed judge on the USCMCR would violate the Commander-in-Chief Clause." (Id.) Notably, all three of these claims 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.

this Honorable Court 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.

Appellant next claims "It is the Judge Advocate General's inability to reassign Judge Mitchell that places him outside the scope of Articles 6, 26, and 66, UCMJ, and therefore makes him statutorily ineligible to serve on the AFCCA." (App. Br. at 16.) Yet, 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 over two months before Appellant filed her Final Brief with this Honorable Court, and Appellant neither mentioned this reassignment nor took any issue with its validity in her brief.

Appellant next cites to Article 26, UCMJ, in arguing that Colonel Mitchell does not meet the definition of "military judge." (Id.) 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 military judge"

on AFCCA is not dependent on Article 26.[7]

However, Appellant attempts to insinuate it does when, after citing a passage from Article 26 relating to a military judge of a general court-martial performing "such duties only when he is assigned and directly responsible to the Judge Advocate General," Appellant begins the next sentence by saying, "The Supreme Court has confirmed this 'powerful tool for control' is equally applicable to 'appellate military judges' assigned to the Courts of Criminal Appeals by the Judge Advocates General." (App. Br. at 16.) Appellant cites to United States v. Edmond, 520 U.S. 651, 666 (1997), in making such a claim.

Yet, Edmond makes no mention of Article 26 at any point in the opinion. In fact, the "powerful tool for control" language used by the Supreme Court is a reference to The Judge Advocate General's "power to remove officers," a clear reference to Article 6, not Article 26. And, as shown in this case specifically, the Air Force Judge Advocate General maintained Article 6 authority to reassign Colonel Mitchell from AFCCA throughout this process.

Appellant next 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

[7] 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.

no more valid than an attempt to assign a judge from the United States Court of Appeals for Veterans Claims to the AFCCA." (App. Br. at 17.) Appellant, while noting that "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.

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 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.

In a final and somewhat confusing note in this section, Appellant claims "The President, with the advice and consent of the Senate, appointed USCMCR Judge Mitchell to the AFCCA pursuant to §950f(b)(3)." (App. Br. at 17.) Appellant, however, fails to provide a citation or date as to when such an appointment to AFCCA occurred.

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. Appellant waived this issue by not raising it in a timely manner.

For the same reasons set forth in Issue I above, Appellant waived this issue by not raising it in a timely manner.

B. 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 her 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." (App. Br. at 21-28.) Each are based upon unsettled case law, unsupported by the facts of this case, or both.

In her 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. (App. Br. at 21-23, citing United States v. Weiss, 510 U.S. 163, 170-74, 174-76 (1994), and Edmond, 520 U.S. at 666).

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, 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). Her 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 when 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 fully outside the scope of this Court's jurisdiction and irrelevant for the purposes of this case.[8] The question before this Court is whether Colonel Mitchell, with his recent and subsequent appointment to the C.M.C.R., can 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 70.) 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

[8] As noted above, the *amicus curiae* brief filed by the MCDO makes three arguments before this Court. (MCDO Br. at i.) The first argues that "Appointed USCMCR judges are principal officers on an Article I court of record." The MCDO very briefly cites to the same or similar cases and in making essentially the same argument as Appellant. For the same reasons explained above, this argument is fully outside the scope of this Court's jurisdiction and irrelevant for the purposes of this case.

Appointments Clause." (App. Br. at 25.) 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." (App. Br. at 25.) 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 not 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 decision in her case.

Conversely, while she 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 her case. (*See* App. Br. at 26.) 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 3.)

All told, 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 preside on Appellant's case. Thus, Appellant's claim is meritless and must fail.

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

In her final 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." (App. Br. at 27.) 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.

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 Force Appellate Defense Division on 19 October 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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