

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

UNITED STATES,	)	AMICUS CURIAE BRIEF OF THE
Appellee	)	NAVY-MARINE CORPS
	)	APPELLATE GOVERNMENT
v.	)	DIVISION
	)	
Keanu D. W. ORTIZ,	)	Crim.App. Dkt. No. 38839
Airman First Class (E-3)	)	
U.S. Air Force	)	USCA Dkt. No. 16-0671/AF
Appellant	)	

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

**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.**

**II.**

**WHETHER JUDGE MARTIN T. MITCHELL'S SERVICE ON BOTH THE AIR FORCE COURT OF CRIMINAL APPEALS AND THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW VIOLATES THE APPOINTMENTS CLAUSE GIVEN HIS STATUS AS A PRINCIPAL OFFICER ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW.**

## **Specified Issue**

### **III.**

**WHETHER JUDGE MARTIN T. MITCHELL WAS IN FACT A PRINCIPAL OFFICER FOLLOWING HIS APPOINTMENT BY THE PRESIDENT TO THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW IN LIGHT OF THE PROVISIONS OF 10 U.S.C. § 949b(4)(C) AND (D), AUTHORIZING REASSIGNMENT OR WITHDRAWAL OF APPELLATE MILITARY JUDGES SO APPOINTED BY THE SECRETARY OF DEFENSE OR HIS DESIGNEE.**

#### **Statement of Statutory Jurisdiction**

The Air Force Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a dishonorable discharge. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

#### **Statement of the Case**

Appellee's Statement of the Case is accepted.

#### **Statement of Facts**

Appellee's Statement of Facts is accepted.

#### **Summary of Argument**

Pursuant to Rule 26(a)(2) of this Court's Rules of Practice and Procedure, the Navy-Marine Corps Appellate Government Division agrees with and supports the position taken by the Air Force Appellate Government Division on behalf of

Appellee in their Brief on the granted issues. Appellant fails to demonstrate that the plain text of 10 U.S.C. § 973(b)(2) applies to the United States Court of Military Commission Review (U.S.C.M.C.R.), as a judge on that court does not hold or exercise the functions of a “civil office.” Consistent with precedent and practice, this Court should adopt a plain text reading of “civil office.”

### **Argument**

THIS COURT SHOULD REJECT APPELLANT’S PROPOSED BROAD DEFINITION OF “CIVIL OFFICE” AS INCONSISTENT WITH A PLAIN READING OF 10 U.S.C. § 973. A POSITION ON THE COURT OF MILITARY COMMISSION REVIEW IS NOT A “CIVIL OFFICE” UNDER 10 U.S.C. § 973 AS IT DOES NOT RELATE TO THE GENERAL AFFAIRS OF THE PUBLIC, NOR DID CONGRESS REQUIRE THAT COURT TO BE COMPRISED EXCLUSIVELY OF CIVILIANS.

Amicus joins in Appellee’s Brief, and writes to supplement Appellee’s arguments.

- A. A “civil office” in 10 U.S.C. § 973 refers to governmental positions relating to the public’s affairs. But it does not include all positions requiring Presidential appointment and Senate confirmation.

When analyzing a statute, this Court begins with the language of the statute. *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)). “The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.” *Id.* “The inquiry ceases if the

statutory language is unambiguous and the statutory scheme is coherent and consistent.” *Id.* This Court has consistently declined to search outside of the plain meaning of statutes and the Manual for Courts-Martial when analyzing the terms included in the same. *See United States v. Kearns*, 73 M.J. 177, 181-82 (C.A.A.F. 2014) (declining to “graft additional modifiers” onto 18 U.S.C. § 2423(a) and rather abiding by the plain text of the statute); *see also United States v. Wilder*, 75 M.J. 135, 138 (C.A.A.F. 2016) (holding the plain language of R.C.M. 707 controls when analyzing an alleged speedy trial violation under R.C.M. 707); *United States v. Simmermacher*, 74 M.J. 196, 201 n. 4 (C.A.A.F. 2015) (declining to depart from the plain text of R.C.M. 703(f)(2) when determining whether military judge properly abated proceedings when evidence was destroyed).

1. Plainly read, a “civil office” in 10 U.S.C. 973 is a duty relating to the general affairs of the public.

Congress limits the activities of commissioned military officers through a statute that reads:

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 that is an elective office; that requires an appointment by the President by and with the advice and consent of the Senate; or that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.

10 U.S.C. § 973(b)(2)(A) (2012) (internal quotation omitted). The statute does not define the term “civil office.” 10 U.S.C. § 973.

In the absence of a statutory definition, courts look to the plain meaning of a term. *See Lopez v. Gonzales*, 549 U.S. 47 (2006); *see also Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (“When interpreting a statute, we must give words their ‘ordinary or natural’ meaning.”); *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003) (“[W]ords should be given their common and approved usage.”).

Given the absence of a statutory definition, this Court should look to the dictionary. *See United States v. Kuemmerle*, 67 M.J. 141, 143 (C.A.A.F. 2009) (looking to Merriam Webster’s dictionary to define “distribute” for purposes of the Child Pornography Prevention Act); *see also United States v. Flores*, 729 F.3d 910, 914 (9th Cir. 2013) (looking to the dictionary to define “missile” for purposes of the National Firearms Act); *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) (looking to the dictionary to define “medical condition” for purposes of the Pregnancy Discrimination Act); *L.S. Starrett Co. v. FERC*, 650 F.3d 19, 25 (1st Cir. 2011) (looking to the dictionary to define “construction” for purposes of the Federal Power Act).

The term “civil” means “of, relating to, or involving the general public, their activities, needs, or ways, or civic affairs as distinguished from special (as military or religious) affairs.”<sup>1</sup> The term “office” means “a special duty, charge, or position

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<sup>1</sup> “Civil” Definition, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/civil> (last visited Oct. 25, 2016).

conferred by an exercise of governmental authority and for a public purpose.”<sup>2</sup> Put simply, a “civil office” is a position or duty relating to the general public’s affairs.

2. 10 U.S.C. § 973 does not define the term “civil office.”

Any claim that 10 U.S.C. § 973 defines civil office so broadly as to include *any* position requiring “an appointment by the President by and with the advice and consent of the senate” is a misread of the statute. 10 U.S.C. § 973 does not define “civil office” at all. Rather, Congress merely lists three kinds of “civil offices” that are covered by the statute: (i) elective offices; (ii) those requiring Presidential appointment; and, (iii) positions in the Executive Schedule. 10 U.S.C. § 973(b)(2)(A). But Congress never defines “civil office.”

3. A position does not become a “civil office” under 10 U.S.C. § 973 because it requires Presidential Appointment and Senate confirmation.

Presidential appointment does not render a position a “civil office” under 10 U.S.C. § 973. Similarly, the statute does not prohibit military officers from serving in non-“civil offices” that require Presidential appointment and the advice and consent of the Senate. Rather, the statute prohibits military officers from occupying a “civil office” *that also* requires a Presidential appointment.

Put another way, a plain reading of 10 U.S.C. § 973(b)(2) prohibits officers from holding civil office if that civil office also requires Presidential appointment

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<sup>2</sup> “Office” Definition, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/office> (last visited Oct. 25, 2016).

and Senate confirmation. Yet no officer holds a “civil office” merely because the position requires Presidential appointment and Senate confirmation.

4. Military officers routinely occupy posts that require Presidential appointment and Senate confirmation without invalidating their commissions.

Congress routinely authorizes commissioned military officers to hold offices requiring Presidential appointment and Senate confirmation—without impact upon the officers’ commissions. The Chairman of the Joint Chiefs of Staff is “appointed by the President, by and with the advice and consent of the Senate, from the officers of the regular components of the armed forces.” 10 U.S.C. § 152 (2012). So too, the Vice Chairman, the Commander of the Unified Combatant Command for Special Operations, and various other “positions of importance and responsibility.” *See* 10 U.S.C. §§ 154(a)(1), 167(c), 601(a) (2012). And a commissioned officer may serve as Chief of Staff to the President. 10 U.S.C. § 720 (2012). None of these officers becomes a civilian when assuming these posts.

- B. Judge Mitchell’s position on the Court of Military Commission Review is not constrained by the statutory phrase “civil office,” nor is there any impact on his military commission.

1. Judge Mitchell holds no “civil office” at the Court of Military Commission Review.

Congress directed that the Court of Military Commission Review “shall, in accordance with procedures prescribed under regulations of the Secretary [of Defense], review the record in each case that is referred to the Court by the

convening authority under [10 U.S.C. § 950c] with respect to any matter properly raised by the accused.” 10 U.S.C. § 950f(c). No affairs of that court relate to the general affairs of the public. *See* 10 U.S.C. §§ 948a et seq. (2012) (establishing military commissions). Thus, the “civil office” restrictions of 10 U.S.C. § 973 do not apply to that court, and Judge Mitchell’s commission was not terminated upon his acceptance of the position on that court.

Nothing supports a contention otherwise, particularly given this Court’s practice of adopting the plain meaning of statutes and rules. *See Kearns*, 73 M.J. at 181-82; *Wilder*, 75 M.J. at 138; *Simmermacher*, 74 M.J. at 201 n.4. Judge Mitchell therefore does not hold a “civil office” under 10 U.S.C. § 973.

2. Judge Mitchell’s service on the Court of Military Commission Review has no impact on his commission. Congress declined to require that court be comprised only of civilians.

In addition to the plain meaning of the term “civil office,” the specific language of 10 U.S.C. § 950f and the overall structure of Title 10 indicate that commissioned military officers may serve on that court.

First, Congress specifically authorized commissioned officers to be judges on the court. 10 U.S.C. § 950f(b)(2) (2012). Second, Congress imposed no restrictions on the military status of judges. When Congress wants Title 10 positions to be occupied exclusively by civilians, it knows how to say so: Congress explicitly requires that Presidential appointees to Title 10 positions of, e.g.,



Secretary of Defense, Assistant Secretaries of Defense, General Counsel of the Department of Defense, and Judges of this very Court, be “from civilian life.” *See* 10 U.S.C. §§ 113(a), 138(a)(2), 140(a), 942(b)(1) (2012).

Yet Congress used no such language when establishing the Court of Military Commission Review, and instead specifically permitted the assignment of commissioned military officers to serve on that court. 10 U.S.C. § 950f(b)(2). Thus, no civilian restriction applies to Judge Mitchell, and Appellant’s argument fails.

### **Conclusion**

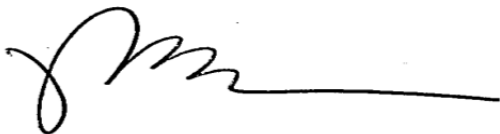
WHEREFORE, Amicus respectfully requests that this Honorable Court deny Appellant’s claims and affirm the decision of the lower court.



JUSTIN C. HENDERSON  
Lieutenant Commander, JAGC, USN  
Appellate Government Counsel  
Navy-Marine Corps Appellate  
Review Activity  
Bldg. 58, Suite B01  
1254 Charles Morris Street SE  
Washington Navy Yard, DC 20374  
(202) 685-7679, fax (202) 685-7687  
Bar no. 36640



JAMES M. BELFORTI  
Lieutenant, JAGC, USN  
Senior Appellate Counsel  
Navy-Marine Corps Appellate  
Review Activity  
Bldg. 58, Suite B01  
1254 Charles Morris Street SE  
Washington Navy Yard, DC 20374  
(202) 685-7433, fax (202) 685-7687  
Bar no. 36443



BRIAN K. KELLER  
Deputy Director  
Appellate Government Division  
Navy-Marine Corps Appellate  
Review Activity  
Bldg. 58, Suite B01  
1254 Charles Morris Street SE  
Washington Navy Yard, DC 20374  
(202) 685-7682, fax (202) 685-7687  
Bar no. 31714



VALERIE C. DANYLUK  
Colonel, USMC  
Director, Appellate Government  
Navy-Marine Corps Appellate  
Review Activity  
Bldg. 58, Suite B01  
1254 Charles Morris Street SE  
Washington Navy Yard, DC 20374  
(202) 685-7427, fax (202) 685-7687  
Bar no. 36770

### **Certificate of Filing and Service**

I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on January 24, 2017.



JAMES M. BELFORTI  
Lieutenant, JAGC, USN  
Appellate Government Counsel  
Navy-Marine Corps Appellate  
Review Activity  
Bldg. 58, Suite B01  
1254 Charles Morris Street SE  
Washington Navy Yard, DC 20374  
(202) 685-7678  
james.belforti@navy.mil  
Bar No. 36443