Nos. 16-961, 16-1017, and 16-1423

IN THE

Supreme Court of the United States

NICOLE A. DALMAZZI, *Petitioner*,

v.

UNITED STATES, *Respondent*.

LAITH G. COX, *ET AL.*, *Petitioners*,

v.

UNITED STATES, *Respondent*.

KEANU D.W. ORTIZ, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

Federal law requires specific authorization from Congress before active-duty military officers may hold a "civil office" that requires "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii). After President Obama nominated and the Senate confirmed five such officers to serve as "additional judges" of the U.S. Court of Military Commission Review (CMCR), four continued to serve as judges on either the Army or Air Force Court of Criminal Appeals (CCA), including on panels that ruled on some aspect of each of the Petitioners' court-martial appeals.

In Nos. 16-961 and 16-1017, the U.S. Court of Appeals for the Armed Forces (CAAF) dismissed Petitioners' statutory and constitutional objections to the four judges' continued CCA service as moot. In No. 16-1423, CAAF rejected the constitutional challenge and held that, even if the statutory claim had merit, it would only affect the judges' CMCR appointments, not their ability to sit on the CCAs.

The Questions Presented are:

1. Whether this Court has jurisdiction in Nos. 16-961 and 16-1017 under 28 U.S.C. § 1259(3).

2. Whether CAAF erred in Nos. 16-961 and 16-1017 in holding that Petitioners' claims were moot.

3. Whether the four judges' CMCR appointments violated § 973(b)(2)(A)(ii), thereby disqualifying them from continuing to serve on the CCAs.

4. Whether the Appointments Clause prohibits a judge from simultaneously serving on both the CMCR and the CCAs.

PARTIES TO THE PROCEEDING

In *Dalmazzi* (No. 16-961), the Petitioner is Nicole A. Dalmazzi. The Respondent is the United States.

In *Cox* (No. 16-1017), the Petitioners are Laith G. Cox, Courtney A. Craig, Andre K. Lewis, Ian T. Miller, Joseph D. Morchinek, and Kelvin I.L. O'Shaughnessy. The Respondent is the United States.

In *Ortiz* (No. 16-1423), the Petitioner is Keanu D.W. Ortiz. The Respondent is the United States.

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INTRODUCTION

This case arises from the appointment of active-duty military officers already serving on the Army or Air Force Courts of Criminal Appeals (CCAs) to also serve on the U.S. Court of Military Commission Review (CMCR), an Article I court of record created to hear appeals from the Guantánamo military commissions. The three petitions consolidate claims of eight servicemembers, each of whom was convicted by a court-martial and had some aspect of their appeal ruled upon by a CCA panel that included at least one of the four judges whose dual officeholding is at issue.[1]

Since 1870, Congress has generally prohibited active-duty military officers from also assuming a second, non-military office within the government. *See* Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319. Among other things, this "dual-officeholding ban" today bars military officers, absent specific congressional authorization, from holding a "civil office" that requires presidential nomination and Senate confirmation. *See* 10 U.S.C. § 973(b)(2)(A)(ii).

The sweeping text of § 973(b)(2)(A) "assure[s] civilian preeminence in government" by "prevent[ing] the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975). In so providing, it "embodies an important policy designed to maintain civilian control of the Government." *Memorandum for the General Counsel, Gen. Servs. Admin.*, 3 Op. O.L.C. 148, 150 (1979) [hereinafter "Harmon Memo"].

1. Similar questions are pending in *Abdirahman* v. *United States*, No. 17-243, and *Alexander* v. *United States*, No. 16-9536.

As the Office of Legal Counsel has explained, when § 973(b)(2)(A) was enacted, it was intended "to bar the appointment of regular military officers to *any* appointive positions in the civil government, irrespective of the importance of the office, the permanence of the appointment, or the likelihood of interference with the officer's military duties." U.S. Dep't of Justice, Off. of Legal Counsel, *Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations* 15 (1983) [hereinafter "Olson Memo"].[2] Otherwise, "allowing active duty regular military officers to hold civil office [would be] 'in conflict with the fundamental principle of republican institutions.'" *Id*. at 11 (quoting Cong. Globe, 41st Cong., 2d Sess. app. 3403 (May 12, 1870) (statement of Sen. Sumner)).

And although Congress has carved out a handful of exceptions to the dual-officeholding ban in the ensuing years, § 973(b)(2)(A) otherwise continues to "prohibit continuation of [an offending officer's] military status . . . upon appointment to a covered position." *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)*, 40 Op. O.L.C. 1, 3 (2016) [hereinafter "Thompson Memo"] (internal quotation marks omitted). Thus, along with the threshold justiciability questions raised in *Dalmazzi* (No. 16-961) and *Cox* (No. 16-1017), the core substantive issue in all three petitions is whether the President's appointments of military officers to the CMCR violated the dual-officeholding ban—and, if so, what consequences follow.

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2. An electronic copy of the Olson Memo is available at https://www.justice.gov/olc/page/file/965131/download.

OPINIONS BELOW

In *Dalmazzi* (No. 16-961), CAAF's opinion is reported at 76 M.J. 1 (C.A.A.F. 2016) (per curiam), and appears at J.A. 5–10. The opinion of the Air Force CCA, which is not reported, is reprinted *id*. at 18–25.

The petition in *Cox* (No. 16-1017) consolidates six cases with materially similar facts to *Dalmazzi*. Three of CAAF's dispositive orders are reported at 76 M.J. 54 (C.A.A.F. 2016) (mem.); the other three are reported at 76 M.J. 64 (C.A.A.F. 2017) (mem.). The orders are reprinted at J.A. 26, 38, 43, 100, 105, and 119. The opinions of the Air Force and Army CCAs in these cases, which are not reported, are reprinted *id*. at 29–37, 41–42, 73–99, 103–04, 108–18, and 122–31.

In *Ortiz* (No. 16-1423), CAAF's opinion is reported at 76 M.J. 189 (C.A.A.F. 2017), and appears at J.A. 132–43. The opinion of the Air Force CCA, which is not reported, is reprinted *id*. at 149–50.

JURISDICTION

In *Dalmazzi*, CAAF granted Petitioner's petition for review on August 18, 2016, *id*. at 14, and issued a final decision on December 15, 2016. *Id*. at 5–10. In each of the six cases consolidated in *Cox*, CAAF granted petitions for review on different dates. *See id*. at 27, 39–40, 44, 101–02, 106–07, and 120–21. CAAF issued a final judgment in three of those cases on December 27, 2016, *see id*. at 43, 105, and 119, and in the others on January 17, 2017. *See id*. at 26, 38, and 100. This Court has jurisdiction over all seven cases under 28 U.S.C. § 1259(3).[3]

3. *See* pp. 23–27, *infra* (discussing this Court's jurisdiction in *Dalmazzi* and *Cox*).

In *Ortiz*, CAAF granted Petitioner's petition for review on October 27, 2016, J.A. 147–48, issued an order and judgment on February 9, 2017, *id*. at 144, and issued an opinion on April 17, 2017. *Id*. at 132–43. On April 26, 2017, the Chief Justice granted Petitioner's application to extend the time within which to file a petition for certiorari until June 9, 2017. This Court has jurisdiction under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the Appendix to this brief. *See* App., *infra*, 1a–14a.

STATEMENT OF THE CASE

1. The Dual-Officeholding Ban

As originally enacted, § 973(b)(2)(A) provided that:

> [I]t shall not be lawful for any officer of the army of the United States on the active list to hold any civil office, whether by election or appointment, and any such officer accepting or exercising the functions of a civil office shall at once cease to be an officer of the army, and his commission shall be vacated thereby.

Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319. This dual-officeholding ban "reflected the hostility toward the military establishment which pervaded the Forty-First Congress." Olson Memo at 9. The sponsor—House Military Affairs Committee Chairman John Alexander Logan—was concerned that "the detailing of military officers to fill civil positions will . . . soon, by precedent, establish the rule that all Army officers may be detailed to fill civil

positions." Hence, Representative Logan warned, "the military will grow to be paramount to the civil, instead of the civil being paramount to the military." Cong. Globe, 41st Cong., 2d Sess. app. 150 (Mar. 10, 1870).

The bill provoked significant debate in Congress—but only with respect to whether, as the original draft had provided, it should also apply to *retired* Army officers. Although that language was excised, there was otherwise widespread agreement that the legislation should and would "create an absolute bar to a military officer's holding *any* appointive or elective office in the civil government." Olson Memo at 10. As OLC has explained, the text and the legislative history "contain[] no suggestion that there should be any distinctions drawn among categories of civil office for which military officers would thenceforth be ineligible." *Id.* at 15–16 (quoting Cong. Globe, 41st Cong. 2d Sess. app. 3321 (May 10, 1870) (remarks of Sen. Wilson)).

Congress left the statute materially unchanged until 1956, when it added the "[e]xcept as otherwise provided by law" proviso to reflect the fact that "other laws enacted after the date of enactment of [the dual-officeholding ban] authorize the performance of the functions of certain civil offices." 10 U.S.C. § 3544 (1958) (Historical and Revision Notes). In 1968, Congress extended the ban to apply to all federal military "officer[s] on the active list." Pub. L. No. 90-235, § 4(a)(5)(A), 81 Stat. 753, 759. *See generally* Olson Memo at 17 n.22 (summarizing revisions).

In 1983, OLC concluded that § 973(b)(2)(A) prohibited the longstanding practice of detailing lawyers in the Judge Advocate General's (JAG) Corps as "Special Assistant U.S. Attorneys" to prosecute

petty civilian offenses committed on military installations. *See* Olson Memo at 30–31. Given how widespread that practice had become,[4] OLC also recommended "legislation to permit regular officers to continue to serve in this capacity," *id.* at 32, which Congress enacted four months later. *See* FY1984 Department of Defense Authorization Act, Pub. L. No. 98-94, § 1002, 97 Stat. 614, 655–56 (1983).

As amended, § 973(b)(2) provides:

> (A) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States—
>
> (i) that is an elective office;
>
> (ii) that requires an appointment by the President by and with the advice and consent of the Senate; or
>
> (iii) that is a position in the Executive Schedule under [5 U.S.C. §§ 5312–17].
>
> (B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that office or to perform those functions.[5]

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4. In 1982 alone, JAG lawyers serving as Special Assistant U.S. Attorneys prosecuted over 70,000 petty offenses committed on military installations. S. REP. NO. 98-174, at 232 (1983).

5. A cognate provision likewise provides that active-duty officers "may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State (or of any political subdivision of a State)." 10 U.S.C. § 973(b)(3).

Among other things, the 1983 amendments sought to allow military officers to exercise the duties of civil offices when lawfully *assigned* to do so—while eliminating any consequences for those, like the JAG lawyers, who had previously done so. *See* H.R. CONF. REP. NO. 98-352, at 233 (1983) ("The clarification was necessary to permit military personnel *assigned* to [JAG] Corps duties to continue assisting attorneys in the Department of Justice with cases related to military installations and other military matters." (emphasis added)). Congress therefore codified two forward-looking and two backward-looking reforms:

1. It narrowed the dual-officeholding ban to apply only to those "civil offices" that also (i) are elective; (ii) require presidential nomination and Senate confirmation; or (iii) are listed in 5 U.S.C. §§ 5312–17. 10 U.S.C. § 973(b)(2)(A).[6]
2. It authorized military officers to be *assigned* or *detailed* to civil offices. *Id.* § 973(b)(2)(B).[7]
3. It eliminated the language providing that "[t]he acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment." *See id.* § 973(b) (1982).
4. It added what CAAF described in *Ortiz* as a "savings clause," J.A. 137: "Nothing in this

6. All undated U.S. Code citations are to the current edition.

7. Congress went even further in the FY1987 Department of Defense Authorization Act by directly incorporating into Article 6 of the Uniform Code of Military Justice (UCMJ) authorization for JAG lawyers assigned or detailed to a civil office to "perform such duties as may be requested by the agency concerned, including representation of the United States in civil and criminal cases." Pub. L. No. 99-661, § 807(a), 100 Stat. 3816, 3909 (1986) (codified at 10 U.S.C. § 806(d)(1)).

subsection shall be construed to invalidate any action undertaken by an officer in furtherance of *assigned* official duties." 10 U.S.C. § 973(b)(5) (emphasis added).

Because the deletion of the termination provision was meant to be backward-looking, § 973(b)(2)(A) continues to "prohibit continuation of military status . . . upon [unauthorized] appointment to a covered position." Thompson Memo at 3 (internal quotation marks omitted); *see also id.* ("The Department of Defense ('DoD') holds [this] view.").

To that end, DoD's own regulations provide for the offending officer's separation from the military, whether through "retirement (if eligible), discharge, or release from active duty," or "involuntary discharge or release from active duty." Political Activities by Members of the Armed Forces, DoD Directive 1344.10, §§ 4.6.1 to 4.6.2, at 9 (Feb. 19, 2008);[8] Dep't of Def., Standards of Conduct Off., Advisory No. 02-21, *What Constitutes Holding a "Civil Office" by Military Personnel* (Dec. 16, 2002) [hereinafter "SoCo Advisory 02-21"] ("The directive, as a general rule, requires retirement or discharge for members elected or appointed to a prohibited civil office.").[9]

8. The directive recognizes eight exceptions to the default termination rule—generally covering circumstances in which the officer in question is serving in a forward combat area, is subject to an ongoing administrative or criminal investigation, or is indebted to the United States. *See* DoD Directive 1344.10, §§ 4.6.1.1–4.6.1.8, at 9. The government has never suggested that these exceptions are relevant to this litigation.

9. The directive and the SoCo Advisory are reprinted in the Appendix to this brief. *See* App., *infra*, 15a–23a.

2. The Court of Military Commission Review

Congress authorized the creation of the CMCR in the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, enacted in response to *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006). Although the D.C. Circuit had direct appellate jurisdiction over certain military commission proceedings,[10] the MCA directed the Secretary of Defense to establish the CMCR as an intermediate appellate tribunal between the Guantánamo commissions and the D.C. Circuit, 10 U.S.C. § 950f(a) (2006), just as CCAs sit between courts-martial and CAAF.

The CMCR was not just meant to play a similar hierarchical role as the CCAs; it was expressly modeled on them. *See In re al-Nashiri* ("*al-Nashiri II*"), 835 F.3d 110, 122 (D.C. Cir. 2016), *cert. denied*, No. 16-8966, 2017 WL 1710409 (U.S. Oct. 16, 2017). As one example, it was to be staffed by judges assigned by the Secretary of Defense, who could be military officers or civilians. 10 U.S.C. § 950f(b) (2006); *cf. id.* § 866(a) (authorizing "[e]ach Judge Advocate General" to establish the CCAs and assign judges thereto).

When Congress revised the MCA in 2009, Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2603, a number of the reforms were directed toward bolstering the independence of the

10. In the Detainee Treatment Act of 2005, Congress had for the first time conferred appellate jurisdiction over a military commission—although the scope of the D.C. Circuit's review under the Act was quite narrow. *See* Pub. L. No. 109-148, § 1005(e)(3), 119 Stat. 2680, 2743; *cf. Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864) (holding that Congress had not conferred appellate jurisdiction over military commissions).

CMCR vis-à-vis the Executive Branch.[11] The 2009 Act therefore moved away from the CCA model in numerous, intentional respects, including the reconstitution of the CMCR as an Article I "court of record." 10 U.S.C. § 950f(a).

The 2009 Act also bifurcated the means by which judges could be placed on the CMCR, in effect creating two types of CMCR judges: (1) The Secretary of Defense may "assign" individuals who are already "appellate military judges" (and commissioned military officers) to the CMCR, *see id.* § 950f(b)(2); and (2) the President may, by and with the advice and consent of the Senate, "appoint . . . additional judges" to the CMCR. *Id.* § 950f(b)(3). As to the former category of judges—those assigned to the CMCR by the Secretary of Defense—the 2009 Act also conferred a degree of statutory tenure protection by prohibiting the Secretary from "reassigning" or "withdrawing" them from the CMCR except in four prescribed circumstances. *See id.* § 949b(b)(4).

3. *al-Nashiri I* and the CMCR Appointments

The CMCR appointments at issue here came in direct response to *In re al-Nashiri* ("*al-Nashiri I*"), 791 F.3d 71 (D.C. Cir. 2015). In that case, a military commission defendant sought a writ of mandamus to disqualify two military-officer CMCR judges hearing an interlocutory appeal by the government. In particular, Al-Nashiri argued that CMCR judges are principal Executive Branch officers; that, as such,

11. The CMCR's own website proclaims that "the 2009 MCA is more protective of the independence of appellate judges than the Uniform Code of Military Justice." Off. of Mil. Comm'ns, U.S. Court of Military Commission Review (USCMCR) History (n.d.), http://www.mc.mil/ABOUTUS/USCMCRHistory.aspx.

they require presidential nomination and Senate confirmation; and that the Secretary's *assignment* of military officers to serve as CMCR judges was therefore unconstitutional.

The D.C. Circuit denied the writ, holding that Al-Nashiri could not demonstrate the "clear and indisputable right to relief" necessary to support mandamus. *al-Nashiri I*, 791 F.3d at 85–86. The court nevertheless went out of its way to encourage the political branches to moot Al-Nashiri's constitutional objection ("another reason to pump our judicial brakes," *id.* at 86) by having the President and the Senate formally appoint the CMCR's previously "assigned" judges pursuant to § 950f(b)(3):

> [T]he President and the Senate could decide to put to rest any Appointments Clause questions regarding the CMCR's military judges. They could do so by re-nominating and re-confirming the military judges to be *CMCR judges*. Taking these steps—whether or not they are constitutionally required—would answer any Appointments Clause challenge to the CMCR.

Id.

"The President chose to take that tack." *al-Nashiri II*, 835 F.3d at 116. Thus, in March 2016, President Obama formally nominated five military officers—Army Lieutenant Colonel Paulette Vance Burton, Army Colonel Larss G. Celtnieks, Army Colonel James Wilson Herring, Jr., Navy Captain Donald C. King, and Air Force Colonel Martin T. Mitchell—to serve as appointed CMCR judges under 10 U.S.C. § 950f(b)(3). *See* 126 CONG. REC. S1474 (daily ed., Mar. 14, 2016). On April 28, 2016, the Senate confirmed the

nominees. *Id*. S2599–600 (daily ed., Apr. 28, 2016). And on May 2, the judges took the oath of office as "additional judges" of the CMCR. J.A. 179, 181, 183, and 185. Although, for reasons that remain unclear, President Obama did not sign the judges' commissions until May 25, 2016, *id*. at 180, 182, 184, and 186, collateral challenges to four[12] of the five judges' continuing CCA service immediately ensued,[13] beginning with *Dalmazzi*.

4. *Dalmazzi* v. *United States* (No. 16-961)

Petitioner Nicole A. Dalmazzi is a Second Lieutenant in the Air Force who was convicted of wrongfully using a controlled substance and was sentenced to one month of confinement and dismissal from the Air Force. On May 12, 2016, a three-judge CCA panel that included Judge Mitchell affirmed her conviction. *See* J.A. 18–25. On May 27, 2016 (two days after President Obama signed Judge Mitchell's CMCR commission), Dalmazzi moved for reconsideration before her Air Force CCA panel (including Judge Mitchell), arguing that Judge Mitchell's appointment

12. Captain King was reassigned from the Navy-Marine Corps CCA shortly after his CMCR confirmation—and appears to have issued no CCA rulings provoking the questions presented here.

13. These issues have also arisen directly in the CMCR, which has now considered the question twice. In *United States* v. *Al-Nashiri*, a panel that included Judge Mitchell tersely held that CMCR judges do not hold a "civil office" because they exercise a "classic military function." J.A. 173. And in *United States* v. *Mohammad*, a panel that included Judges Burton and Herring reaffirmed *Al-Nashiri* and also concluded that Congress in any event authorized the appointment of military officers to the CMCR. *Id*. at 149–67. A petition for a writ of mandamus in that case is currently pending. *In re Mohammad*, No. 17-1179 (D.C. Cir. filed July 21, 2017).

to the CMCR violated § 973(b)(2)(A)—and that, if it did not, his continuing service on both courts violated the Appointments Clause. She renewed those arguments in her petition for review before CAAF, which was granted on August 18, 2016. *Id*. at 14–15.[14]

After full briefing and oral argument, CAAF issued an opinion holding that her objections were moot because President Obama did not formally sign Judge Mitchell's CMCR commission until May 25, 2016—13 days after the Air Force CCA decision in her case. *See id*. at 10 ("As Colonel Mitchell had not yet been appointed a judge of the USCMCR at the time the judgment in Appellant's case was released, the case is moot as to these issues."). Dalmazzi timely petitioned for certiorari.

5. *Cox et al.* v. *United States* (No. 16-1017)

The Petition in No. 16-1017 consolidates six cases raising facts materially similar to those presented in *Dalmazzi*. Petitioner Laith G. Cox is a Captain in the U.S. Army who was convicted of a number of serious sexual misconduct offenses and was sentenced to 40 years' confinement and dismissal. On April 29, 2016, an Army CCA panel that included Judges Burton and Herring affirmed his conviction in part and his

14. CAAF treats the 60-day time limit within which to file a petition for review, *see* 10 U.S.C. § 867(b), as jurisdictional. *United States* v. *Rodriguez*, 67 M.J. 110, 116 (C.A.A.F. 2009); *see also id*. at 116 n.10 (explaining why CAAF's approach differs from civilian criminal appeals). After waiting over six weeks for the Air Force CCA to rule on her motion for reconsideration, Petitioner petitioned CAAF for review on July 11, 2016, in order to satisfy § 867(b). The Air Force CCA subsequently concluded that the CAAF petition deprived it of jurisdiction, and dismissed the motion on July 18, 2016. J.A. 16 (citing *United States* v. *Riley*, 58 M.J. 305, 310 n.3 (C.A.A.F. 2003)).

sentence. *See* J.A. 29–37. CAAF granted Cox's petition for review on the same issues as those presented in *Dalmazzi*—and then, after *Dalmazzi*, vacated the grant and denied relief. *See id*. at 26. Cox (and the other five petitioners whose cases were consolidated in No. 16-1017) timely petitioned for certiorari.

Petitioner Courtney A. Craig is a Specialist in the U.S. Army who was convicted of attempted indecent visual recording and was sentenced to a reduction in grade, 20 days' confinement, and a bad-conduct discharge. On May 10, 2016, an Army CCA panel that included Judges Herring and Burton affirmed. *Id*. at 41–42. CAAF granted Craig's petition for review—and then, after *Dalmazzi*, vacated the grant and denied relief. *Id*. at 38.

Petitioner Andre K. Lewis is a Staff Sergeant in the U.S. Air Force who was convicted of making false official statements, aggravated sexual assault, aggravated sexual contact, abusive sexual contact, and assault consummated by a battery. He was sentenced to a dishonorable discharge, confinement for six years, a reduction in grade, and forfeiture of all pay and allowances. On March 29, 2016, a three-judge Air Force CCA panel modified the findings of guilt but affirmed the sentence. *Id*. at 73–99. Lewis's first motion for reconsideration was assigned to a "special panel" that included Judge Mitchell, and was denied on May 17, 2016. *Id*. at 68–70. On May 30, 2016, Lewis again moved for reconsideration, this time on the ground that Judge Mitchell's appointment to the CMCR had disqualified him from continuing to serve on the CCA. The Air Force CCA seems not to have ruled on that motion. CAAF subsequently granted Lewis's petition for review, but, after *Dalmazzi*, vacated the grant and denied relief. *Id*. at 43.

Petitioner Ian T. Miller is a Specialist in the U.S. Army who was convicted of two specifications of sexual assault of a child and was sentenced to a reduction in grade, 20 months' confinement, and a bad-conduct discharge. On May 6, 2016, an Army CCA panel that included Judge Celtnieks affirmed. *Id.* at 103–04. CAAF granted Miller's petition for review, but, after *Dalmazzi*, vacated the grant and denied relief. *Id.* at 100.

Petitioner Joseph D. Morchinek is a Senior Airman in the U.S. Air Force who was convicted of misbehavior before the enemy and a minor drug offense, and was sentenced to a bad-conduct discharge, confinement for two months, forfeiture of $1,021 pay per month for two months, a reduction in grade, and a reprimand. On May 9, 2016, an Air Force CCA panel that included Judge Mitchell affirmed. *Id.* at 108–18. CAAF granted Morchinek's petition for review, but, after *Dalmazzi*, vacated the grant and denied relief. *Id.* at 105.

Petitioner Kelvin I.L. O'Shaughnessy is an Airman First Class in the U.S. Air Force who was convicted of sexual assault and abusive sexual contact, and was sentenced to a bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and a reduction in grade. On May 5, 2016, an Air Force CCA panel that included Judge Mitchell affirmed. *Id.* at 122–31. CAAF granted O'Shaughnessy's petition for review, but, after *Dalmazzi*, vacated the grant and denied relief. *Id.* at 119.

6. *Ortiz* v. *United States* (No. 16-1423)

Petitioner Keanu D.W. Ortiz is an Airman First Class in the U.S. Air Force who was convicted of knowingly and wrongfully viewing, possessing, and

distributing child pornography, and was sentenced to a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction in rank. On June 1, 2016 (one week after President Obama signed Judge Mitchell's commission), a panel of the Air Force CCA that included Judge Mitchell summarily rejected Ortiz's appeal. *Id.* at 149–50. Ortiz's case therefore became the vehicle for CAAF to reach the merits of the dual-officeholding claims that it had sidestepped in *Dalmazzi* and the cases consolidated in *Cox*.

On February 7, 2017, CAAF heard argument in *Ortiz*. Two days later, it issued a summary "order and judgment" stating only that "the decision of the Air Force Court of Criminal Appeals is hereby affirmed," and that "[t]he opinion of the Court will be issued on a future date." *Id.* at 144. CAAF issued its promised opinion on April 17, 2017. *Id*. at 132–43.

CAAF's opinion in *Ortiz* rejected Petitioner's claim that Judge Mitchell's appointment to the CMCR disqualified him from continuing to serve on the Air Force CCA. The court's analysis turned on two conclusions about the 1983 amendments to § 973(b). *First*, as CAAF noted, the amendments removed from the statute's text the automatic termination rule. *See* 10 U.S.C. § 973(b) (1982) ("The acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment."). The court reasoned that Congress, by deleting this language, "aimed at the holding of 'civil office' . . . rather than the performance of assigned military duty." J.A. 139. Thus, § 973(b)(2)(A) "might prohibit Judge Mitchell from holding office at the USCMCR . . . but nothing in the text suggests that it

prohibits Judge Mitchell from carrying out his assigned military duties at the CCA." *Id.*

Second, CAAF believed that this reading was confirmed by Congress's simultaneous addition of a saving clause. *See* 10 U.S.C. § 973(b)(5) ("Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties."). According to CAAF, that provision "applies by its terms to Judge Mitchell's assigned official duties at the CCA." J.A. 138. Thus, the dual-officeholding ban "may indeed affect Colonel Mitchell's status as a judge of the [CMCR], but that is not for us to decide." *Id.* at 142.

CAAF then held that there was no Appointments Clause problem with Judge Mitchell's dual service—or with having someone who has principal officer status as an "additional judge" on the CMCR sitting alongside inferior officers on a CCA. *Id.* at 141–42. After receiving an extension of time from the Chief Justice, Ortiz timely petitioned for certiorari.

* * *

On September 28, 2017, this Court granted certiorari in *Dalmazzi*, *Cox*, and *Ortiz*, consolidated the petitions for briefing and argument, and added to the questions presented "[w]hether this Court has jurisdiction to review the cases in Nos. 16-961 [*Dalmazzi*] and 16-1017 [*Cox*] under 28 U.S.C. § 1259(3)." *Id.* at 1.

SUMMARY OF ARGUMENT

The core dispute in this case is whether President Obama's appointments to the CMCR of Judges Burton, Celtnieks, Herring, and Mitchell violated § 973(b)(2)(A)'s dual-officeholding ban. Although the

government has objected to this Court reaching the merits in *Dalmazzi* and *Cox*, all three petitions—not only *Ortiz*—properly raise this question.

I. *a.* In all eight of the Petitioners' cases, including *Dalmazzi* and the six cases consolidated in *Cox*, this Court has jurisdiction for the simple reason that CAAF "granted a petition for review under section 867(a)(3) of title 10." 28 U.S.C. § 1259(3). Although the government has argued in *Dalmazzi* and *Cox* that CAAF's subsequent vacaturs of its grants and denials of review divested this Court of jurisdiction, such a "parsimonious" construction of § 1259, *United States* v. *Denedo*, 556 U.S. 904, 909 (2009), is belied by the plain text of § 1259(3), its unambiguous purpose, and the serious constitutional problems that would arise from giving a lower court the power to insulate its interpretations of federal law from this Court's oversight by concluding its merits holdings with a "denial" of a discretionary petition previously granted.

b. *Dalmazzi* and the cases consolidated in *Cox* are not moot. Section 973(b)(2)(A) provides that a military officer "may not hold, *or exercise the functions of*, a civil office in the Government of the United States." It is therefore irrelevant whether Petitioners' CCA appeals had been resolved before President Obama signed the challenged judges' commissions. Because of the dual-officeholding ban's plain text, "any objection" to occupation of an unauthorized civil office "could not depend upon the formality of appointment." Olson Memo at 5 n.9. For purposes of § 973(b)(2)(A), all that matters is that the judges were "exercis[ing] the functions" of appointed CMCR judges by the time they participated in Petitioners' CCA panels. Because each of the judges was so acting by that point, this Court should reach the merits in all three petitions.

II. Congress has long provided that a military officer generally may not hold, or exercise the functions of, a "civil office . . . that requires nomination by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii). A presidentially appointed judgeship on the CMCR is such an office, and Congress has not "otherwise authorized by law" the appointment of military officers to such an office. The four CCA judges' service as "appointed judges" on the CMCR therefore violates the dual-officeholding ban.

a. The CMCR is an Article I court of record. Civilians may (and do) serve as judges on the CMCR, and the court reviews judgments of military commissions against defendants who are not U.S. servicemembers (in many cases, for ordinary, domestic crimes). CMCR judges therefore hold a "civil office" under § 973(b)(2)(A)—a term that the Justice Department has long given "a very liberal interpretation." *Army Officer Holding Civil Office*, 18 Op. Att'y Gen. 11, 12 (1884); *see also* Harmon Memo at 150 n.4 ("The Attorneys General . . . have ruled that . . . the policy of the statute points to a very broad interpretation of the term 'civil officer.'").

b. The "civil office" held by judges presidentially appointed to the CMCR under 10 U.S.C. § 950f(b)(3) also "requires an appointment by the President by and with the advice and consent of the statute," 10 U.S.C. § 973(b)(2)(A)(ii), by virtue of both the MCA and the Constitution. The MCA draws a bright-line distinction between "assigned" and "appointed" judges, and its plain text demands that those falling into the latter category—including the four judges at issue in this case—be appointed by the President with Senate confirmation. In any event, the Appointments Clause

of the Constitution requires that *all* CMCR judges be appointed by the President by and with the advice and consent of the Senate, because CMCR judges are principal Executive Branch officers under both *Morrison* v. *Olson*, 487 U.S. 654 (1988), and *Edmond* v. *United States*, 520 U.S. 651 (1997). CMCR judges are subject to almost no supervision by other Executive Branch officials, and they have the power to render a final decision on behalf of the Executive Branch with respect to military commission proceedings. Thus, whether as a matter of statutory or constitutional command, the CMCR judges at issue in this case hold a "civil office" that requires presidential nomination and Senate confirmation.

c. Congress has not expressly or unambiguously authorized "by law" the presidential appointment of *military officers* to sit as CMCR judges. Although the MCA clearly contemplates that the Secretary of Defense may "assign" certain active-duty military officers to the CMCR, *see* 10 U.S.C. § 950f(b)(2), it says nothing at all about the *appointment* of such military officers to the court. *Id*. § 950(f)(b)(3). "The difference between the power to 'assign' officers to a particular task and the power to 'appoint' those officers is not merely stylistic." *Edmond*, 520 U.S. at 657. Instead, the fact that the MCA only authorizes the *assignment* of military officers to the CMCR "negates any permissible inference that Congress intended that military judges should receive a second *appointment*, but in a fit of absentmindedness forgot to say so." *Weiss* v. *United States*, 510 U.S. 163, 172 (1994) (emphasis added). Congress in the MCA consciously established two distinct categories of CMCR judges, subject to two different rules of selection and removal by two different officers. Congress therefore did *not*

"authorize" military officers to serve on the CMCR as presidentially appointed judges, and President Obama's appointments to the CMCR of Judges Burton, Celtnieks, Herring, and Mitchell violated § 973(b)(2)(A)(ii).

III. For as long as it has been on the books, the default remedy for a violation of § 973(b)(2)(A) has been the offending officer's immediate separation from the military—a codification of the common-law doctrine of incompatibility. That remains true today. *See, e.g.*, Thompson Memo at 3; DoD Directive 1344.10, § 4.6.1, at 9; *see also* SoCo Advisory 02-21 ("The directive, as a general rule, requires retirement or discharge for members elected or appointed to a prohibited civil office.").

In *Ortiz*, CAAF nevertheless concluded that any violation of the dual-officeholding ban would affect these judges' CMCR service, not their ability to serve on the CCAs. CAAF rested its analysis on 10 U.S.C. § 973(b)(5), which provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." But CAAF, like the government, read this provision entirely out of context.

The text of both § 973(b)(5) itself (referring to "assigned official duties") and of adjacent provisions in the 1983 amendments underscore that this language was meant to insulate from collateral attack actions undertaken by military officers in civil offices to which they had unlawfully been *assigned*. But the 1983 amendments also removed such offices from the dual-officeholding ban's coverage going forward—such that § 973(b)(5) would only be retroactive in its application. After and because of the 1983 amendments, it is no

longer possible for a military officer to violate § 973(b)(2)(A) "in furtherance of *assigned* official duties"; indeed, the law today expressly authorizes such assignments. *See id.* § 973(b)(2)(B). Thus, where, as here, the violation results from a second, unauthorized *appointment*, it disqualifies the appointee from continuing to serve in the military (and, as such, on the CCAs).

IV. Any other reading of § 973(b) would give rise to serious constitutional problems under both the Appointments Clause and the Commander-in-Chief Clause. To the former, if the same individual can simultaneously serve on one of the CCAs as an inferior Executive Branch officer and on an Article I court like the CMCR as a principal Executive Branch officer, that would give rise to the kind of unconstitutional incongruity described by this Court in *Ex parte Siebold*, 100 U.S. 371, 398 (1879). *Cf. Dep't of Transp.* v. *Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1239 (2015) (Alito, J., concurring) (identifying an Appointments Clause problem when a multimember body heading an agency included both inferior and principal officers). "[T]he Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time." *Mistretta* v. *United States*, 488 U.S. 361, 404 (1989). Thus, any ambiguity as to whether the MCA authorizes (or § 973(b)(2)(A) does not prohibit) such dual service should be resolved to avoid such a fraught constitutional query. *E.g.*, *Nguyen* v. *United States*, 539 U.S. 69 (2003) (interpreting a statute to not authorize a mixed panel of Article III and Article IV judges in order to avoid constitutional objections).

And because military officers appointed as CMCR judges "may be removed by the President only for

cause and not at will," *In re Khadr*, 823 F.3d 92, 98 (D.C. Cir. 2016), they are not subject to the President's direct superintendence—which raises a serious constitutional question under the Commander-in-Chief Clause. *See, e.g.*, *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850). Interpreting the MCA and § 973(b) to allow the appointment of military officers *qua* military officers to the CMCR would thus raise, rather than avoid, serious constitutional questions.

* * *

Although it has long resided in obscurity, the dual-officeholding ban codified at § 973(b)(2)(A) has served since its enactment as a significant expression of the "traditional and strong resistance of Americans to any military intrusion into civilian affairs." *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972). CAAF's decisions in *Dalmazzi* and the cases consolidated in *Cox* wrongly avoided the merits of the questions presented, and its decision in *Ortiz* got those merits wrong. Indeed, if affirmed, *Ortiz* would deprive § 973(b)(2)(A) of most of its force—and thereby jeopardize "the American constitutional tradition of a politically neutral military establishment under civilian control." *Greer* v. *Spock*, 424 U.S. 828, 839 (1976). The decisions below should be reversed.

ARGUMENT

I. This Court May Reach the Merits of All Three Petitions

A. The Court Has Jurisdiction In Each of Petitioners' Cases

Under 28 U.S.C. § 1259(3), "[d]ecisions of [CAAF] may be reviewed by the Supreme Court in . . . [c]ases in which [CAAF] granted a petition for review under

section 867(a)(3) of title 10."[15] All eight of the cases before the Court satisfy the plain text of this provision for the simple reason that, in each one, CAAF granted a petition for review and issued a decision. *See* p. 3, *supra*.

In opposing the *Dalmazzi* and *Cox* petitions,[16] the government argued that § 1259(3) "does not apply here because the CAAF 'vacate[d]' its orders granting review and then 'denied' the petitions for review." *Dalmazzi* Br. Opp. 10. This interpretation cannot be reconciled with the text of § 1259(3) or the context in which it was enacted. Nor does it make any sense; if the government were correct, it would give CAAF the extraordinary power to thwart this Court's oversight of its rulings whenever it sees fit—a power that (1) Congress did not intend to confer; (2) would raise serious constitutional questions; and (3) the government has previously (and successfully) argued doesn't exist.

Turning first to the text, § 1259(3) is a straightforward provision that conditions this Court's jurisdiction on a basic question: Did CAAF exercise its discretion to review the case at issue—to "grant[] *a* review," 10 U.S.C. § 867(a)(3) (emphasis added), and then issue a "decision"? When, as in *Dalmazzi*, CAAF grants a petition, receives briefs on the merits,

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15. Under 10 U.S.C. § 867(a)(3), CAAF has jurisdiction to hear all cases "reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, [CAAF] has granted a review."

16. The government has not contested this Court's jurisdiction in *Ortiz*, and for good reason. There, it is common ground that CAAF "granted a petition for review" within the meaning of § 1259(3). *See Ortiz* Br. Opp. 8 n.1.

conducts oral argument, and issues a decision disposing of the case, the answer must be "Yes," no matter how CAAF characterizes its disposition. Simply put, the plain text of § 1259(3) is satisfied in any case in which CAAF (1) grants a petition for review; and (2) issues a decision, whatever its terms.

The context in which § 1259(3) was enacted reinforces the plain meaning of its text. When Congress first gave this Court appellate jurisdiction over CAAF in the Military Justice Act of 1983, it was reacting to the Executive Branch's well-taken concern that "[t]here is no other federal judicial body whose decisions are similarly insulated from Supreme Court review." *Hearing on S. 974 Before the Military Personnel & Compensation Subcommittees of the S. Comm. on Armed Services*, 97th Cong. 2d Sess. 41 (1982) (written statement of William H. Taft, IV, General Counsel, Dep't of Defense).

To remedy that deficiency, Congress adopted the government's recommendation to balance the need for appellate oversight with the desire to protect this Court's docket. To that end, § 1259 limits "direct Supreme Court review of military justice cases . . . to those *actually considered* by [CAAF]." S. REP. NO. 98-53, at 33 (1983) (emphasis added). In other words, § 1259 was designed to tie this Court's jurisdiction to what CAAF did, not to what its ultimate disposition said. *See id.* at 34 ("[R]estricting direct access to the Supreme Court to cases the Court of Military Appeals *has agreed to hear* is necessary as a practical matter." (emphasis added)).

On the government's contrary reading, CAAF could insulate a decision from this Court's purview simply by vacating a grant of review at the end of any

opinion, no matter how substantive. Lest *Dalmazzi* be cast as an outlier, this indeed appears to be a common practice at least in cases in which, after granting review, CAAF concludes that it lacks jurisdiction. *See, e.g.*, *United States* v. *Moss*, 73 M.J. 64, 69 (C.A.A.F. 2014); *Rodriguez*, 67 M.J. at 116. This Court has construed 28 U.S.C. § 1254 to avoid this exact possibility, *i.e.*, that "decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n.23 (1982).[17] It should do the same for § 1259(3).

Nor can the government reconcile its position in this case with *Denedo*, where it opposed the very construction of § 1259(4) that it now proffers of § 1259(3). *See* Reply Brief for the Petitioner at 5 n.1, *United States* v. *Denedo*, 555 U.S. 1041 (2008) (mem.), 2008 WL 4887709 (criticizing a proffered reading of § 1259(4) that "would provide a means for the CAAF to insulate its own decisions from further review"). The government was as right then as it is wrong now. *See Denedo*, 556 U.S. at 909 (accepting the government's argument and rejecting such a "parsimonious" construction of § 1259(4)).

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17. CAAF has repeatedly granted petitions for review solely to correct typographical errors below. *E.g.*, *United States* v. *Smedley*, 75 M.J. 4, 4 n.* (C.A.A.F. 2015) (mem.); *United States* v. *Mandy*, 74 M.J. 179, 179 n.* (C.A.A.F. 2014) (mem.); *see* Eugene R. Fidell & Dwight H. Sullivan, *Guide to the Rules and Practice for the United States Court of Appeals for the Armed Forces* § 21.03[7], at 193–96 (16th ed. 2017). It would be more than a little odd to conclude that Congress meant for *those* cases to fall within this Court's appellate jurisdiction, but not cases in which CAAF considered and rejected a colorable statutory and constitutional challenge to a criminal conviction and then purported to vacate a grant and "deny" review.

Especially when CAAF hears cases, like these, that present federal questions transcending military law, it would raise serious constitutional concerns if CAAF could shield substantive rulings from this Court's oversight. *See, e.g.*, *Felker* v. *Turpin*, 518 U.S. 651, 667 (1996) (Souter, J., concurring) ("[I]f it should later turn out that statutory avenues . . . for reviewing a [lower-court ruling] were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open.").[18] Thus, even if § 1259(3) is ambiguous as to whether it is satisfied when CAAF purports to vacate an earlier grant of review (and it isn't), any ambiguity should be resolved in a manner that avoids, rather than provokes, constitutional objections. *See, e.g.*, *Clark* v. *Martinez*, 543 U.S. 371, 381–82 (2005). This Court therefore has jurisdiction not just in *Ortiz*, but in *Dalmazzi* and *Cox*, as well.

B. The Petitioners' Claims in *Dalmazzi* and *Cox* are Not "Moot"

CAAF concluded in *Dalmazzi* that the Petitioner's dual-officeholding challenge was "moot" because Judge Mitchell did not serve in a "civil office" triggering § 973(b)(2)(A)(ii) until President Obama signed his commission on May 25, 2017, 13 days after the Air Force CCA ruled on Dalmazzi's appeal. J.A. 10. This conclusion was wrong. Petitioners' claims are not "moot," nor are they otherwise nonjusticiable.

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18. Collateral review of courts-martial via habeas corpus is limited to claims that were not "fully and fairly" considered by the military courts. *See Burns* v. *Wilson*, 346 U.S. 137, 142 (1953) (plurality opinion); *Thomas* v. *U.S. Disciplinary Barracks*, 625 F.3d 667, 671 (10th Cir. 2010). Thus, a CAAF merits ruling accompanied by a vacatur of the underlying grant of review could also serve to preclude collateral relief.

"As long as the parties have a concrete interest . . . in the outcome of the litigation, the case is not moot." *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013) (internal quotation marks omitted). Petitioners, each of whose sentences include significant punishment and dismissal from the military, unquestionably have an interest in pursuing the disqualification of the four judges. Their appeals therefore were not—and are not—"moot."

CAAF's holding in *Dalmazzi* in truth appears not to be predicated on "mootness"—at least in the Article III sense of that term. *See Dalmazzi* Br. Opp. 11–12. Instead, CAAF's analysis rested on an alleged factual inadequacy that goes to the *merits* of the dual-officeholding claim, namely, that the President did not formally appoint Judge Mitchell to the CMCR until 13 days after he participated in Dalmazzi's CCA appeal.

The dual-officeholding ban, however, is not triggered merely once a military officer "holds" a covered civil office; it provides that an active-duty officer "may not hold, *or exercise the functions of*," such an office. 10 U.S.C. § 973(b)(2)(A) (emphasis added). The statute is therefore implicated as soon as a military officer begins to exercise the functions of an unauthorized civil office, regardless of whether (or when) the President signs the commission and thereby formalizes the appointment.

Because of this text, the Justice Department has long (and correctly) taken the position that "any objection" to occupation of such an office "could not depend upon the formality of appointment." Olson Memo at 5 n.9. As Attorney General Williams concluded three years after § 973(b)(2)(A) was first enacted, General Sherman could not even temporarily

assume the office of Secretary of War because "[h]e cannot . . . be appointed to discharge the duties of that office, *nor can he exercise its functions*, without ceasing to be an officer of the Army of the United States." *Acting Secretary of War*, 14 Op. Att'y. Gen. 200, 201 (1873) (emphasis added); *see Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 122 (2007) [hereinafter "Bradbury Memo"] ("[I]t does not follow that a person not commissioned does not hold an office.").

For purposes of § 973(b)(2)(A), then, the relevant question is not when President Obama formally concluded his appointment of the four judges to the CMCR; it is when they began to "exercise the functions" of presidentially appointed CMCR judges. Given that all four judges were confirmed on April 28, 2016, that they each swore oaths of office as presidentially appointed CMCR judges on May 2, 2016, and that they each began participating in CMCR cases immediately thereafter (if not sooner), *see* J.A. 177–78, all four judges were "exercising the functions" of an appointed CMCR judge when they decided Petitioners' CCA appeals.

Each of the seven Petitioners whose cases are consolidated in *Dalmazzi* and *Cox* therefore brought timely challenges to the eligibility of at least one of the judges who participated in their CCA appeals. And "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." *Ryder* v. *United States*, 515 U.S. 177, 182–83 (1995). This Court therefore should reach the merits in *Dalmazzi* and *Cox*, and not just in *Ortiz*.

II. The Appointment of Military Officers to the CMCR Violates § 973(b)(2)(A)(ii)

The central substantive question in these cases is whether President Obama's appointments of Judges Burton, Celtnieks, Herring, and Mitchell to the CMCR violated § 973(b)(2)(A)'s dual-officeholding ban. This question must be answered in the affirmative, because (1) CMCR judges hold a "civil office"; (2) appointments to that office require nomination by the President and confirmation by the Senate; and (3) Congress has not specifically authorized military officers to receive such appointments.

A. CMCR Judges Hold a "Civil Office"

Section 973(b)(2)(A) prohibits active-duty officers from holding certain "civil offices," but does not define the term. The dual-officeholding ban's origins and history, however, "underscore[] the intended breadth of the provision." Olson Memo at 13. Indeed, the political branches have long embraced "a very liberal interpretation of the phrase 'civil office'" in § 973(b)(2)(A). *Army Officer Holding Civil Office*, *supra*, at 12. They have done so for good reason:

> What was intended was a strict separation of the military and civilian establishment through the elimination of any possibility that persons who were part of the military establishment and subject to military discipline could be placed in positions of authority in the civil government.

Olson Memo at 16; *see also* Harmon Memo at 150 n.4 ("The Attorneys General . . . have ruled that . . . the

policy of the statute points to a very broad interpretation of the term 'civil officer.'").[19]

Not only did the Congress that enacted § 973(b)(2)(A) intend for the term "civil office" to be interpreted capaciously, but "Congress's actions in subsequent years attest to its continued endorsement of the expansive definition . . . intended by the 41st Congress." Olson Memo at 16. In particular, Congress has legislated narrow, express exceptions to § 973(b)(2)(A) that encompass a "range of offices," "reflect[ing] Congress's assumption that the law's prohibition extends to all manner of civil office," *id*. at 17, including those nominally *within* the military.

Among many other examples, the Olson Memo cited statutes that expressly authorize the Chiefs of Staff of the Army and Air Force, the Chief of Naval Operations, and the Commandant of the Marine Corps to serve as acting secretary of the relevant service branch in circumstances in which no other designated successor can do so. *See* 10 U.S.C. §§ 3017(4), 5017(4), 5017(5), 8017(4). As these statutes suggest, Congress has consistently treated as civil offices even those with military functions—so long as the office can be held *by* civilians, or includes authority *over* civilians.[20]

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19. As OLC noted in 1983, "[b]oth the Attorney General and the Comptroller General have construed the statutory term 'civil office' broadly, and have generally declined to imply exceptions to § 973(b)'s comprehensive coverage." Olson Memo at 18; *see also id*. at 18–24 & nn.23–28 (citing and discussing nine Attorney General opinions, two OLC opinions, and seven Comptroller General opinions).

20. The breadth of the term "civil office" in § 973(b)(2)(A) is why Congress added three narrowing conditions to the statute in 1983—including the requirement at issue here, *i.e.*, that the civil

The Justice Department has gone even further, concluding that "[i]f the position is one established by statute, and if its duties involve the exercise of 'some portion of the sovereign power,' it is a 'civil office' within the prohibition of § 973(b)." Olson Memo at 24; *see also* 44 Comp. Gen. 830, 832 (1965) ("The specific position must be created by law; there must be certain definite duties imposed by law on the incumbent; and they must involve some exercise of the sovereign power.").

Judges appointed by the President to the CMCR under § 950f(b)(3) easily satisfy this definition. The position is established by statute (the MCA);[21] it has definite duties imposed by law (entertaining and adjudicating appeals from the military commissions); and it involves a clear exercise of the sovereign power of the United States. As noted above, civilians can (and do) serve as CMCR judges,[22] and the exclusive

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office require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii).

21. The 2009 amendments to the MCA reconstituted the CMCR as an Article I "court of record," 10 U.S.C. § 950f(a), in contrast to its prior status solely within the Department of Defense. *See Khadr*, 823 F.3d at 96. As in *Freytag* v. *C.I.R.*, "the clear intent of Congress [was] to transform" the CMCR from an entity wholly within the Executive Branch "into an Article I legislative court," 501 U.S. 868, 888 (1991).

The CMCR therefore far more closely resembles CAAF itself, *see* 10 U.S.C. § 941, and the U.S. Court of Appeals for Veterans' Claims, *see* 38 U.S.C. § 7251, than either the CCAs or the trial-level courts-martial or military commissions.

22. A "military office," in contrast, may only be filled by servicemembers. *See, e.g.*, 10 U.S.C. § 152(a)(1) (creating the office of Chairman of the Joint Chiefs of Staff); *cf. Smith* v. *United States*, 26 Ct. Cl. 143, 147 (1891) (noting that the "indicia of military . . . office" are "[r]ank, title, pay, and retirement"). As

function of the CMCR is to adjudicate appeals in criminal cases against individuals not part of the U.S. armed forces. *See* 10 U.S.C. § 948c (limiting military commission jurisdiction to offenses committed by "alien unprivileged enemy belligerents").

In opposing certiorari in *Ortiz*, the government nevertheless argued that, although the position of CMCR judge is an "office," *see Ortiz* Br. Opp. 12, it is not a *civil* office because "adjudication of violations of the law of war by military commissions is 'a classic military function,'" *id.* at 11 (quoting *Ortiz* Pet. App. 30a–31a). The fact that military officers have historically adjudicated law-of-war charges, however, hardly establishes that CMCR judgeships are not "civil" offices, especially when, as here, they are established by statute. After all, civilian triers of fact can adjudicate violations of the law of war, too. *See, e.g.*, 18 U.S.C. § 2441.

What's more, judges on the CMCR do not principally adjudicate whether defendants violated the law of war. Instead, they most often assess whether military commissions complied with *domestic* law established by Congress, including domestic-law criminal offenses defined in the MCA. *E.g.*, *United States* v. *Al Bahlul*, 820 F. Supp. 2d 1141 (Ct. Mil. Comm'n Rev. 2011), *aff'd in part on other grounds*, 840 F.3d 757 (D.C. Cir. 2016) (en banc) (per curiam), *cert. denied*, No. 16-1307, 2017 WL 1550817 (U.S. Oct. 10, 2017). And any argument that appellate oversight of military commissions is part of a "classic military

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OLC has explained, "military offices . . . are primarily characterized by the authority to command in the Armed Forces—commanding both people and the force of the government." Bradbury Memo at 91.

function" is belied by the novelty of such review—which did not exist until 2005. *See* p. 9 n.10, *supra*.

The government has also argued that CMCR judges "do not hold a 'civil office' because they act pursuant to military, rather than civil, authority." *Ortiz* Br. Opp. 12. It is not clear what the government means by this distinction, or why its resolution would determine whether an office is "civil" for purposes of § 973(b)(2)(A). In any event, CMCR judges *do* in fact act "pursuant" to "civil" authority: they are responsible for applying the MCA itself—a statute enacted by Congress that, among other things, created their office. Nor are CMCR judges answerable to, or removable by, any "military" authority; assigned judges can only be reassigned or withdrawn by the Secretary of Defense, and appointed judges can only be removed by the President.

For all of these reasons, CMCR judges hold a "civil office" for purposes of § 973(b)(2)(A).

B. Judges Appointed to the CMCR Require Presidential Nomination and Senate Confirmation

CMCR judges such as the four at issue here, who were appointed to the CMCR by the President by and with the advice and consent of the Senate, hold a "civil office" that "requires an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii). This criterion for triggering the dual-officeholding ban can be satisfied in either of two different ways: (i) if the statute creating the position itself requires such an appointment; or (ii) if the Constitution does so. Here, both the MCA and the Appointments Clause require that the judges receive such an appointment.

1. As for the statute, the text of the MCA could not be clearer: "The President may appoint, by and with the advice and consent of the Senate, additional judges to the [CMCR]." *Id.* § 950f(b)(3). Entirely to avoid the Appointments Clause problem identified in *al-Nashiri I*, the President *appointed* each of Judges Burton, Celtnieks, Herring, and Mitchell, by and with the advice and consent of the Senate, to the CMCR—utilizing the *exclusive* statutory mechanism for presidential appointment to such an office.

To be sure, as the government argued in opposing certiorari, *see, e.g.*, *Ortiz* Br. Opp. 12–13, the MCA creates a mechanism by which the Secretary of Defense can "assign" military officers to be CMCR judges without a new, distinct presidential nomination and Senate confirmation. The statutory system of dual appointment methods, however, merely demonstrates that Congress gave the Executive Branch the power to staff two different types of judges on the CMCR: (1) military officers who have *previously* been appointed with the advice and consent of the Senate, *see Weiss*, 510 U.S. 163, but who are assigned to the CMCR by the Secretary of Defense; and (2) other judges who are appointed to the court by the President, with the Senate's approval. Although these two types of CMCR judges—"assigned" and "appointed"—serve alongside each other on the same court, that does not mean that they hold the same "office" for statutory or constitutional purposes. *See, e.g.*, 28 U.S.C. § 1 (distinguishing between the Chief Justice of the United States and the Associate Justices of the Supreme Court).

Nor are the two categories of CMCR judges interchangeable. Only the "appointed" judges may be civilians, for example. And, importantly, whereas the

Secretary or his designee may reassign or "withdraw" assigned judges from the CMCR, 10 U.S.C. § 949b(b)(4)(C), (D), only the President may remove CMCR judges who were appointed pursuant to § 950f(b)(3). *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) ("Under the traditional default rule, removal is incident to the power of appointment."); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259–60 (1839).

Moreover, the Secretary's authority to reassign or "withdraw" judges who have been "assigned" to the CMCR is procedurally constrained in a way that the President's authority to remove appointed CMCR judges is not. *See* 10 U.S.C. § 949b(b)(4)(C), (D) (providing that the Secretary may reassign or "withdraw" an assigned judge from the CMCR only after "consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member").[23]

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23. There is also a meaningful difference in the substantive grounds for removal of the two types of CMCR judges. The Secretary may reassign an assigned CMCR judge only "based on military necessity and . . . consistent with service rotation regulations," 10 U.S.C. § 949b(b)(4)(C), and only "for good cause consistent with applicable procedures under chapter 47 of this title." *Id.* § 949b(b)(4)(D).

By contrast, the statute is silent on the grounds for presidential removal of *appointed* judges. Because CMCR judges' functions are adjudicative, it follows that there are at least some "good cause" limits on the President's ability to remove those whom he appointed thereto. *Wiener* v. *United States*, 357 U.S. 349, 356 (1958); *see Khadr*, 823 F.3d at 98 ("[T]he Department [of Justice] has expressly represented that [CMCR judges appointed under § 950f(b)(3)] may be removed by the President only for cause and not at will.").

2. In any event, even if the MCA were construed to establish an undifferentiated, single office that does not "require[] an appointment by the President by and with the advice and consent of the Senate" for purposes of § 973(b)(2)(A), the Appointments Clause requires that *all* CMCR judges, assigned and appointed alike, be nominated by the President by and with the advice and consent of the Senate—because such judges are principal Executive Branch officers.

This Court's cases "have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." *Edmond*, 520 U.S. at 661. But under the tests applied in either of this Court's leading precedents—*Morrison* and *Edmond*—CMCR judges are not "inferior" officers.

In *Morrison,* the Court held that the independent counsel created by provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 591–99 (1996), was an inferior officer based upon four factors: that a higher officer other than the President (the Attorney General) could remove her; that she performed only limited duties that did not include policymaking; that her jurisdiction was narrow; and that her tenure was limited. *See* 487 U.S. at 671–72. At least the last two of these four factors (and possibly the second, as well) do not describe CMCR judges, even when they are assigned to such an office by the Secretary of Defense. Their tenure is not limited to a single task at the end of which the office is terminated. Nor is their jurisdiction limited to reviewing the trials and judgments of only a discrete, known set of individuals and alleged offenses. *See Edmond*, 520 U.S. at 661. *Morrison*, therefore, does not support the conclusion that CMCR judges are inferior officers.

And *Edmond* all-but proves that they are not. In that case, the Court held that judges of the Coast Guard CCA were inferior officers because of two key characteristics: they were removable without cause by another, presidentially appointed officer (the Judge Advocate General); and, most importantly, all of their decisions were subject to review by another *Executive Branch* entity, to wit, CAAF. *Id.* at 664. "What is significant," Justice Scalia wrote for the unanimous Court, "is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.* at 665.

That is decidedly not the case for the CMCR, whose decisions are the final word of the Executive branch on military commission cases—and who "render a final decision on behalf of the United States" in review of a criminal conviction.[24] *al-Nashiri I*, 791 F.3d at 83 (explaining why CMCR judges more closely resemble principal officers under *Edmond*); *see also Intercollegiate Broadcasting Sys., Inc.* v. *Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (D.C. Cir. 2012) (identifying the three factors *Edmond* used to differentiate between principal and inferior officers); *SoundExchange, Inc.* v. *Librarian of Congress*, 571 F.3d 1220, 1226–27 (D.C. Cir. 2009) (Kavanaugh, J.,

24. It is also significant for purposes of the Appointments Clause that no other officer may remove "assigned" CMCR judges *without* cause. *See ante* at 36 & n.23 (describing substantive conditions for the Secretary's "reassignment" or "withdrawal" of assigned judges from the CMCR). *Compare Edmond*, 520 U.S. at 664 ("It is conceded by the parties that the Judge Advocate General may also remove a [CCA] judge from his judicial assignment without cause. The power to remove officers, we have recognized, is a powerful tool for control.").

concurring). Under *Edmond*, then, CMCR judges are principal officers, and must, under the Appointments Clause, be appointed to the CMCR by the President, by and with the advice and consent of the Senate. *Edmond*, 520 U.S. at 659–61; *Myers* v. *United States*, 272 U.S. 52, 129 (1926); *see also Weiss*, 510 U.S. at 189–91 (Souter, J., concurring).

C. The Appointment of Military Officers to Serve as CMCR Judges is Not "Otherwise Authorized by Law"

Section 973(b)(2)(A) allows military officers to hold, or exercise the functions of, a covered civil office where Congress has "otherwise authorized" it "by law." 10 U.S.C. § 973(b)(2)(A). This proviso codifies the background rule that a later Congress is not bound to adhere to the law enacted by an earlier Congress—that it may amend, or temper, that earlier enactment as it sees fit. In order to do so, however—to establish the statutory "authoriz[ation]" to which § 973(b)(2)(A) refers—Congress must make its intent pellucid. *See, e.g.*, 10 U.S.C. § 528. As OLC explained in 1979, the policy behind the dual-officeholding ban "cannot be overcome implicitly by a broad and vague statutory authority to designate [a civil officer] in the absence of express language stating that such designation is to be effective notwithstanding the mandate of 10 U.S.C. § 973(b)." Harmon Memo at 150; *see also id.* ("Where Congress wishes to permit a military officer to occupy a civilian position . . . without forfeiting his commission, it has done so explicitly.").

The MCA does not expressly provide—or even unambiguously imply—that the President may appoint military officers to serve as "additional judges" under 10 U.S.C. § 950f(b)(3). Indeed, if

§ 950f(b)(3) stood alone as the only means of designating individuals to be CMCR judges, the government would presumably concede that its language would not suffice to establish the sort of "authoriz[ation]" that § 973(b)(2)(A) requires.

To be sure, Congress has expressly indicated that military officers might serve as CMCR judges in *another* subsection of § 950f, authorizing the Secretary of Defense to "*assign* persons who are appellate military judges to be judges on the [CMCR]" so long as they are "commissioned officer[s] of the armed forces." 10 U.S.C. § 950f(b)(2) (emphasis added). That provision, however, does not authorize the President (or anyone else, for that matter) to "appoint" such judges, military or otherwise; it merely authorizes the Attorney General to bestow additional duties upon officers already confirmed to an existing, inferior office. *See Weiss*, 510 U.S. at 171–72.

As Justice Scalia wrote for a unanimous Court in *Edmond*, "[t]he difference between the power to 'assign' officers to a particular task and the power to 'appoint' those officers is not merely stylistic." 520 U.S. at 657; *see also id.* ("Conspicuously absent from [the provision at issue], however, is any mention of the 'appointment' of military judges."). And it is familiar doctrine that, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983); *see also Lindh* v. *Murphy*, 521 U.S. 320, 331 (1997) (noting "the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already

been joined together and were being considered simultaneously when the language raising the implication was inserted"). Thus, the fact that the MCA provision that *does* contemplate service by military officers (§ 950f(b)(2)) only allows their "assignment" by the Secretary of Defense "negates any permissible inference that Congress intended that military judges should receive a second *appointment*, but in a fit of absentmindedness forgot to say so." *Weiss*, 510 U.S. at 172 (emphasis added).

Nor is this simply a technical, formal distinction. Congress may have had very good reasons to allow the Secretary to assign military officers to the CMCR, but not to intend for the President to be able to appoint them to a new office on the same court. Among other things, judges "appointed" under § 950f(b)(3) are subject to the Senate's review (and influence); they are removable by a different actor than those "assigned" under § 950f(b)(2) (the President instead of the Secretary of Defense); and their removal comes with distinct substantive and procedural restrictions.

Thus, although the two types of CMCR judges might be "substantively identical" in terms of their duties, *Ortiz* Br. Opp. 10, Congress has treated them as two distinct positions—one that requires a second appointment, and one that does not. Congress thus did *not* "authorize" military officers to hold office on the CMCR in the capacity in which Judges Burton, Celtnieks, Herring, and Mitchell are now serving.

* * *

When Judges Burton, Celtnieks, Herring, and Mitchell were nominated and confirmed to the CMCR under § 950f(b)(3) and began exercising the functions of those offices, that may well have cured the

Appointments Clause defect flagged by the D.C. Circuit in *al-Nashiri I*. But the appointments violated § 973(b)(2)(A)'s dual-officeholding ban in the process.

III. The Proper Remedy for a § 973(b)(2)(A) Violation is the Officers' Immediate Termination from the Military

CAAF held in *Ortiz* that, even if the appointments of these four judges to the CMCR violated § 973(b)(2)(A), that would only affect the validity of *those* appointments, not the judges' military status or their continuing service on the CCAs. The history of § 973(b)(2)(A), the purpose of the 1983 amendments thereto, and the government's consistent practice since then, each demonstrate that CAAF erred, and that the appointments of these four military officers on the CMCR should have resulted in their immediate termination from the military—thereby disqualifying them from continuing to serve on the CCAs.

A. An Officer Who Accepts a Second, Incompatible Office Must Generally Forfeit the First Office

As initially enacted (and until 1983), § 973(b)(2)(A) expressly provided that a military officer "accepting or exercising the functions of a civil office shall at once cease to be an officer of the Army, and his commission shall be vacated thereby." *See* pg. 4, *supra*. In so providing, the dual-officeholding ban codified the common-law doctrine of incompatibility, under which "an office holder was not ineligible to appointment or election to another incompatible office, but *acceptance of the latter vacated the former*." *Lopez* v. *Martorell*, 59 F.2d 176, 178 (1st Cir. 1932) (emphasis added). *See generally* Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* §§ 419–31, at 267–76

(Callaghan & Co. 1890) (describing the origins and scope of the doctrine of incompatibility). As Mechem explains, "[i]t is a well settled rule of the common law that he who, while occupying one office, accepts another incompatible with the first, *ipso facto* absolutely vacates the first office and his title is thereby terminated without any other act or proceeding." Mechem, *supra*, § 420, at 267–68; *see also id.* § 429, at 272 (explaining that the same default rule applies in cases in which the incompatibility is created by the Constitution or statute).

It is certainly correct, as CAAF observed in *Ortiz*, that Congress deleted the automatic termination language from § 973(b)(2) when it amended that provision in 1983. But there is no indication that Congress did so in order to prospectively overturn that common-law rule—which would have attached to the dual-officeholding ban even if Congress had never expressly referred to it. And "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). Not only do the text and legislative history of the 1983 amendments evince no such sweeping congressional purpose, they point rather squarely in the opposite direction—a conclusion that, outside of this litigation, at least, the government has continued to share.

For example, the same section of the statute that amended § 973(b)(2)(A) separately authorized the President to appoint an active-duty military officer to serve as Chairman of the Red River Compact Commission, and provided that acceptance of such an appointment "shall not terminate or otherwise affect

[the appointee's] appointment as a military officer." 1984 DoD Authorization Act § 1002(d), 97 Stat. at 656; *see also* S. REP. NO. 98-174, at 258. If Congress had, as CAAF held in *Ortiz*, eliminated termination as the default remedy for violations of § 973(b)(2)(A), there would have been no need for section 1002(d)—part of the same section of the same statute—to so provide.

More generally, the principal impetus for the 1983 amendments to the dual-officeholding ban was the need to address two problems that had arisen from the assignment of JAG lawyers to serve as Special Assistant U.S. Attorneys. Congress thus sought to narrow the scope of § 973(b)(2)(A) to exclude Special Assistant U.S. Attorneys going forward; to preclude potentially thousands of retrospective challenges to civilian criminal convictions obtained by military officers who, according to OLC, had been unlawfully assigned to hold a "civil office"; and to protect those officers from what would otherwise have been their mandatory termination from the military. *See* S. REP. NO. 98-174, at 233–34 (describing the purposes of the provision as addressing the concerns raised by the Olson Memo); H.R. CONF. REP. NO. 98-352, at 233 ("The clarification was necessary to permit military personnel assigned to Judge Advocate General's Corps duties to continue assisting attorneys in the Department of Justice with cases related to military installations and other military matters."). And as CAAF explained in *Ortiz*, "[t]he report language on the provision does not go beyond that situation." J.A. 138 n.1; *see also* S. REP. NO. 98-174, at 233 ("This provision does not sanction or endorse any use of military attorneys beyond that permitted under [the Olson Memo's] interpretation.").

So construed, the 1983 amendments to § 973(b) provide no indicia of Congress's intent to eliminate the common-law incompatibility rule as the *forward-looking* remedy for violations of § 973(b)(2)(A). Instead, Congress meant to—and did—eliminate termination as a default remedy for violations that pre-dated the amendments, exactly as OLC had recommended. *See* 10 U.S.C. § 973 note; Olson Memo at 6 ("§ 973(b) as construed in this opinion should be given only prospective application to the practice in question.").[25]

B. Section 973(b)(5) Is Not to the Contrary

CAAF's rejection of the dual-officeholding claim in *Ortiz* was predicated on its reading of § 973(b)(5), which provides that "Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." According to CAAF, the "assigned official duties" encompassed by this clause are all future duties undertaken by the offending officer in their *military* office—a result that would directly contradict the common-law automatic disqualification rule. *See* J.A.

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25. The government's regulations reinforce the conclusion that immediate separation from the military remains the default remedy for violations of § 973(b)(2)(A). *See* p. 8 & n.8, *supra* (discussing DoD Directive 1344.10). Thus, DoD's Standards and Conduct Office has made clear that "the directive, as a general rule, *requires* retirement or discharge for members elected or appointed to a prohibited civil office." SoCo Advisory 02-21, *supra* (emphasis added). Consistent with this understanding, OLC recently reiterated that, absent statutory authorization, the current version of § 973(b)(2)(A) "prohibit[s] continuation of military status . . . upon appointment to a covered position." Thompson Memo at 3 (internal quotation marks omitted).

139; *see also Ortiz* Br. Opp. 13 ("[A] violation of Section 973(b) [does] not entitle petitioner to relief.").

This analysis misreads the 1983 amendments, however, which were, in this respect, designed to address a discrete retrospective problem, not to abrogate the well-established common law rule for all future violations of the dual-officeholding ban. And unless a violation could now be ameliorated by disqualifying the officer from the unauthorized *civil* office,[26] it would also deprive § 973(b)(2)(A), which "embodies an important policy designed to maintain civilian control of the Government," Harmon Memo at 150, of most of its teeth.

Congress, however, "does not . . . hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). And there is no indication that Congress in 1983 either intended or effected such a fundamental sea change in civil-military relations. Taking § 973(b)(5) first, the government stresses its reference to "*any* action," *Ortiz* Br. Opp. 14, while ignoring the qualifier: "in furtherance of assigned official duties." This latter phrase is crucial to understanding the purpose of the provision.

The government agrees that § 973(b)(5) was prompted by a desire to preclude challenges to criminal convictions obtained by military officers who, prior to the 1983 amendments to § 973(b), had been *assigned* to hold a "civil office" as Special Assistant U.S. Attorneys. *See Ortiz* Br. Opp. 14. Thus,

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26. To the contrary, the government has argued that § 973(b)(5) also insulates the four judges' *CMCR service* from legal challenge. *See* Brief for the United States in Opposition at 20–21, *In re Mohammad*, No. 17-1179 (D.C. Cir. filed Aug. 25, 2017), *available at* https://perma.cc/QS4J-XUYC.

Congress's focus was on immunizing those officers' actions in the civil office to which they had (unlawfully, as OLC concluded) been assigned, not on actions taken in their military capacity subsequent to their assignment to the unauthorized civil office.

Indeed, thanks to the 1983 amendments, it is no longer a violation of § 973(b)(2)(A) for an officer to hold or exercise the functions of a civil office "in furtherance of *assigned* official duties"; a prohibited civil office requires an election or an appointment. *See* 10 U.S.C. § 973(b)(2)(B) ("An officer to whom this subsection applies may hold or exercise the functions of a civil office . . . *when assigned or detailed* to that office or to perform those functions." (emphasis added)). This is why, as the Air Force JAG has explained, the saving clause would only have allowed an offending officer "to continue to serve [in the military] if elected or appointed [to an unauthorized civil office] before September 24, 1983," *i.e.*, the day on which § 973(b)(5) entered into force. *Reserve Officer Holding Civil Office*, 4 Civ. L. Op. JAG A.F. 391, 391 (Feb. 14, 1991). Congress's focus on "assigned" duties in § 973(b)(5) therefore demonstrates that the provision was only meant to have retroactive effect.

This reading of § 973(b)(5)'s text is confirmed by two additional provisions of the same statute—neither of which CAAF or the government has acknowledged. First, after amending § 973(b) in section 1002(a) of the 1984 DoD Authorization Act, Congress separately provided that the JAG lawyers would suffer no consequence by dint of their unlawful assignment to serve as civilian prosecutors—expressly overruling, for these limited purposes, the automatic disqualification rule:

> Nothing in [§ 973(b)], as in effect before the date of the enactment of this Act, shall be construed . . . to have terminated the military appointment of an officer of an Armed Force by reason of the acceptance of a civil office, or the exercise of its functions, by that officer *in furtherance of assigned official duties*.

1984 DoD Authorization Act § 1002(b), 97 Stat. at 655 (codified at 10 U.S.C. § 973 note) (emphasis added).

Thus, in the very next subsection of the same statute, Congress (1) expressly solved the problem to which CAAF claimed § 973(b)(5) was implicitly addressed; (2) expressly overruled the common-law automatic disqualification rule in a limited class of cases; and (3) used the same phrase ("in furtherance of assigned official duties") to unambiguously refer to actions undertaken by military officers in the civil office to which they had previously been *assigned* without authorization. As the Court explained in *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427 (1932), "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Id*. at 433. If "in furtherance of assigned official duties" has the same meaning in section 1002(a) that it clearly has in section 1002(b), then § 973(b)(5) does not apply here.

Second, as noted above, section 1002(d) of the 1983 Act also authorized the appointment of an active-duty military officer to the Red River Compact Commission, and specified that acceptance of that appointment "shall not terminate or otherwise affect such officer's appointment as a military officer." 1984 DoD Authorization Act § 1002(d), 97 Stat. at 656.

Again, if § 973(b)(5) had the meaning claimed by CAAF and the government, this provision would have been wholly unnecessary. *See Arlington Cent. Sch. Dist. Bd. of Ed.* v. *Murphy*, 548 U.S. 291, 299 n.1 (2006) ("[I]t is generally presumed that statutes do not contain surplusage"). Instead, it underscores the conclusion that § 973(b)(5) has no bearing here.

* * *

Because termination from the military remains a necessary consequence of exercising the duties of an unauthorized civil office under § 973(b)(2)(A), the CMCR appointments of Judges Burton, Celtnieks, Herring, and Mitchell should have resulted in their immediate separation from the military—and, as such, their disqualification from hearing the Petitioners' CCA appeals.[27] As such, all CCA decisions in which they participated after the dual-officeholding ban was triggered are not just voidable, but void. *See United States* v. *Jones*, 74 M.J. 95, 97 (C.A.A.F. 2015); *see also Ryder*, 515 U.S. at 182–83.

Nor can decisions by unlawfully constituted CCA panels be salvaged by the *de facto* officer doctrine. *See Nguyen* v. *United States*, 539 U.S. 69, 77 (2003) ("Whatever the force of the *de facto* officer doctrine in other circumstances, an examination of our precedents concerning alleged irregularities in the assignment of judges does not compel us to apply it in these cases."). The Petitioners are therefore entitled to new CCA appeals of their court-martial convictions.

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27. Civilians may serve on the CCAs, 10 U.S.C. § 866(a), but they must be appointed by the President and confirmed by the Senate. *United States* v. *Janssen*, 73 M.J. 221, 225 (C.A.A.F. 2014). None of the four judges at issue here was so appointed.

IV. Any Other Reading of § 973(b) Raises Serious Constitutional Questions

Finally, if § 973(b) is read to permit military officers to hold office simultaneously on the CMCR and the CCAs, that interpretation would give rise to serious constitutional questions under both the Appointments Clause and the Commander-in-Chief Clause.

A. Simultaneous Service on Both the CCAs and the CMCR Violates the Appointments Clause

With regard to the Appointments Clause, allowing the same individual to simultaneously hold office on one of the CCAs as an inferior Executive Branch officer and on an Article I court like the CMCR as a principal Executive Branch officer creates an unconstitutional "incongruity" akin to that Court identified in *Siebold*, 100 U.S. at 398. *See Morrison*, 487 U.S. at 675–76. In *Ortiz*, CAAF rejected this objection, contending that it wrongly "presumes that Col. Mitchell's status as a principal officer on the USCMCR somehow carries over to the CCA, and invests him with authority or status not held by ordinary CCA judges." J.A. 141. In CAAF's view, there is no Appointments Clause problem any time an Executive Branch principal officer also holds a separate position as an inferior officer.

The problem with this reasoning is that, in the process, CAAF wholly ignored the possibility that the two positions, while not formally incompatible, might be functionally incompatible. After all, if a CMCR judge (as a principal officer) could serve alongside an Air Force CCA judge (as an inferior officer), the same logic would allow the President to nominate (and the

Senate to confirm) the sitting Secretary of Defense (or an Article III judge) to serve on the Air Force CCA.

But in that scenario, there is an obvious incongruity in having an individual with such authority (1) holding a second position through which he is subordinate to other Executive Branch officers; while at the same time (2) sharing decisionmaking authority with inferior officers who may well be unduly influenced by—or unduly seek to influence—his principal office. *Cf. Ass'n of Am. Railroads*, 135 S. Ct. at 1239 (Alito, J., concurring) (identifying an Appointments Clause problem when a multimember body heading an agency included both inferior and principal officers).

This concern is especially acute where, as here, the distinct offices are both *judgeships*, and involve overlapping personnel within the same department—in contrast to circumstances in which an individual simultaneously holds offices in two unrelated Executive Branch entities. "[T]he Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time." *Mistretta*, 488 U.S. at 404; *see also* Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1122–46 (1994) (summarizing—and endorsing—the "tradition of Judicial-Executive incompatibility").[28]

Whether such an arrangement rises to the level of functional incompatibility that is prohibited by the

28. This Court in *Mistretta* rejected a challenge to judges also serving on independent commissions, but entirely because the latter function was "extrajudicial." *See* 488 U.S. at 397–404. Here, in contrast, both functions are quintessentially "judicial."

Appointments Clause (or the separation of powers, more generally) is a difficult question of first impression. In *Nguyen*, this Court suggested that it would "call into serious question the integrity as well as the public reputation of judicial proceedings" if an Article IV judge was allowed to participate alongside two Article III judges on a Ninth Circuit panel—but avoided the constitutional question by interpreting the relevant statute to not authorize such a mixed court. *See* 539 U.S. at 83 & n.17.

It is true, as the government argued in opposing certiorari in *Ortiz*, that Petitioners can "cite no authority holding that the Appointments Clause prohibits this sort of simultaneous service." *Ortiz* Br. Opp. 18. But it is equally true that the government has not identified a single prior example of an individual holding office and serving as both an inferior and a principal officer on two different federal courts—let alone precedent holding that such simultaneous service is constitutional. And "[p]erhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent." *Free Enterprise Fund*, 561 U.S. at 505 (citation and internal quotation marks omitted).

Petitioners therefore submit that such simultaneous service is unconstitutional. But insofar as there is any ambiguity in whether § 973(b)(2)(A) permits the appointment of an active-duty military officer to serve as an "additional judge" on the CMCR, or in whether § 973(b)(5) immunizes subsequent actions of the officer in his military capacity, the ambiguity can and should be resolved so as to avoid even having to ask—let alone answer—such a difficult and novel constitutional question. *INS* v. *St. Cyr*, 533 U.S. 289, 301 n.13 (2001).

B. Service by Military Officers as CMCR Judges Also Raises a Serious Question Under the Commander-in-Chief Clause

"Additional judges" appointed to the CMCR under § 950f(b)(3) "may be removed by the President only for cause and not at will." *Khadr*, 823 F.3d at 98. Unlike CCA judges, then, they "cannot . . . be removed by the President except [for] . . . inefficiency, neglect of duty, or malfeasance in office." *Free Enterprise Fund*, 561 U.S. at 487; *see also Wiener*, 357 U.S. at 356. Where, as here, the CMCR judge at issue is an active-duty military officer, such a constraint on the President's power raises a Commander-in-Chief Clause concern of the first order. *See, e.g.*, *Fleming*, 50 U.S. (9 How.) at 615 ("As commander in chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual[.]").

"Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power . . . in . . . military positions." *Orloff* v. *Willoughby*, 345 U.S. 83, 91 (1953); *see also Relation of the President to the Executive Departments*, 7 Op. Att'y Gen. 453, 465 (1855) ("No act of Congress . . . can, by constitutional possibility, authorize or create any military officer not subordinate to the President."). Yet if the dual-officeholding ban does *not* prohibit active-duty military officers from appointment to the CMCR, then the good-cause removal protection for judges appointed under 10 U.S.C. § 950f(b)(3) would have exactly that unconstitutional effect.

If the only infirmity with the appointment of active-duty military officers to the CMCR stems from the Commander-in-Chief Clause, that argument would provide no benefit to the Petitioners here, who are challenging those officers' continuing service as CCA judges. But the only way to avoid this constitutional problem is to interpret § 973(b)(2)(A) as the political branches, until this litigation, always had, and as the Petitioners do—as compelling these CMCR judges' termination from the military upon their exercise of the duties of a covered civil office.[29]

* * *

To be sure, these cases present the specific and narrow issue of active-duty military officers who have been appointed to the CMCR. But § 973(b)(2)(A) has historically swept far more broadly, and continues today to circumscribe the ability of men and women in uniform to simultaneously hold almost all Cabinet positions and thousands of other federal, state, or local civil offices requiring an appointment or an election. On the government's novel reading of the relevant statutes, the dual-officeholding ban would no longer serve that vital purpose in any context, let alone with respect to the CMCR. Such a result would frustrate the unambiguous purpose of § 973(b)(2)(A); it would have profound—and potentially deleterious—implications for the future of civil-military relations; and it would fly in the face of the "traditional and strong resistance of Americans to any military intrusion into civilian affairs." *Laird*, 408 U.S. at 15.

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29. Such a reading would also dispel with any continuing objection under § 973(b)(2)(A) to these judges' CMCR service; on Petitioners' view, they became civilians at the moment they began exercising the duties of appointed CMCR judges.

CONCLUSION

For the foregoing reasons and those previously stated, the decisions below should be reversed.

Respectfully submitted,

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November 7, 2017

APPENDIX

APPENDIX

I. CONSTITUTIONAL PROVISIONS

A. The Commander-in-Chief Clause, U.S. Const. art. II, § 2, cl. 1:

The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States.

B. The Appointments Clause, U.S. Const. art. II, § 2, cl. 2:

[The President] . . . by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

II. U.S. CODE PROVISIONS

A. 10 U.S.C. § 867. Review by the Court of Appeals for the Armed Forces.

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for

the Armed Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

B. 10 U.S.C. § 949b. Unlawfully influencing action of military commission and United States Court of Military Commission Review.

(a) Military commissions.

(1) No authority convening a military commission under this chapter [*10 USCS §§ 948a* et seq.] may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military

commission, or with respect to any other exercises of its or their functions in the conduct of the proceedings.

(2) No person may attempt to coerce or, by any unauthorized means, influence—

(A) the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case;

(B) the action of any convening, approving, or reviewing authority with respect to their judicial acts; or

(C) the exercise of professional judgment by trial counsel or defense counsel.

(3) The provisions of this subsection shall not apply with respect to—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

(B) statements and instructions given in open proceedings by a military judge or counsel.

(b) United States Court of Military Commission Review.

(1) No person may attempt to coerce or, by any unauthorized means, influence—

(A) the action of a judge on the United States Court of Military Commissions Review in reaching a decision on the findings or sentence on appeal in any case; or

(B) the exercise of professional judgment by trial counsel or defense counsel appearing before the United States Court of Military Commission Review.

(2) No person may censure, reprimand, or admonish a judge on the United States Court of Military Commission Review, or counsel thereof, with respect to any exercise of their functions in the conduct of proceedings under this chapter.

(3) The provisions of this subsection shall not apply with respect to—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

(B) statements and instructions given in open proceedings by a judge on the United States Court of Military Commission Review, or counsel.

(4) No appellate military judge on the United States Court of Military Commission Review may be reassigned to other duties, except under circumstances as follows:

(A) The appellate military judge voluntarily requests to be reassigned to other duties and the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, approves such reassignment.

(B) The appellate military judge retires or otherwise separates from the armed forces.

(C) The appellate military judge is reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, based on military necessity and such reassignment is consistent with service rotation regulations (to the extent such regulations are applicable).

(D) The appellate military judge is withdrawn by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, for good cause consistent with applicable procedures under chapter 47 of this title (the Uniform Code of Military Justice).

(c) Prohibition on consideration of actions on commission in evaluation of fitness. In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of any such officer or whether any such officer should be retained on active duty, no person may—

(1) consider or evaluate the performance of duty of any member of a military commission under this chapter; or

(2) give a less favorable rating or evaluation to any commissioned officer because of the zeal with which such officer, in acting as counsel, represented any accused before a military commission under this chapter.

C. 10 U.S.C. § 950f. Review by United States Court of Military Commission Review.

(a) Establishment. 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.

(b) Judges.

(1) Judges on the Court shall be assigned or appointed in a manner consistent with the provisions of this subsection.

(2) 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.

(3) The President may appoint, by and with the advice and consent of the Senate, additional judges to the United States Court of Military Commission Review.

(4) No person may serve as a judge on the Court in any case in which that person acted as a military judge, counsel, or reviewing official.

(c) Cases to be reviewed. The Court shall, in accordance with procedures prescribed under regulations of the Secretary, review the record in each case that is referred to the Court by the convening authority under section 950c of this title with respect to any matter properly raised by the accused.

(d) Standard and scope of review. In a case reviewed by the Court under this section, the Court may act only with respect to the findings and sentence as approved by the convening authority. The Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses.

(e) Rehearings. If the Court sets aside the findings or sentence, the Court may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If the Court sets aside the findings or sentence and does not order a rehearing, the Court shall order that the charges be dismissed.

D. 10 U.S.C. § 973. Duties: officers on active duty; performance of civil functions restricted

(a) 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.

(b) (1) This subsection applies—

(A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);

(B) to a retired regular officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 270 days; and

(C) to a reserve officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 270 days.

(2) (A) 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.

(B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph

(A) when assigned or detailed to that office or to perform those functions.

(3) Except as otherwise authorized by law, an officer to whom this subsection applies by reason of subparagraph (A) of paragraph (1) may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State (or of any political subdivision of a State).

(4) (A) An officer to whom this subsection applies by reason of subparagraph (B) or (C) of paragraph (1) may not hold, by election or appointment, a civil office in the government of a State (or of any political subdivision of a State) if the holding of such office while this subsection so applies to the officer—

(i) is prohibited under the laws of that State; or

(ii) as determined by the Secretary of Defense or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, interferes with the performance of the officer's duties as an officer of the armed forces.

(B) Except as otherwise authorized by law, while an officer referred to in subparagraph (A) is serving on active duty, the officer may not exercise the functions of a civil office held by the officer as described in that subparagraph.

(5) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

(6) In this subsection, the term "State" includes the District of Columbia and a territory, possession, or commonwealth of the United States.

(c) An officer to whom subsection (b) applies may seek and hold nonpartisan civil office on an independent school board that is located exclusively on a military reservation.

(d) The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating in the Navy, shall prescribe regulations to implement this section.

E. 28 U.S.C. § 1259. Court of Appeals for the Armed Forces; certiorari

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.

(2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.

(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.

(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

III. PUBLIC LAWS

A. Department of Defense Authorization Act, 1984, Pub. L. 98-94 (Sept. 24, 1983)

PERFORMANCE OF CIVIL FUNCTIONS BY MILITARY OFFICERS

SEC. 1002. (a) Section 973 of title 10, United States Code, is amended by striking out subsection 0t)) and inserting in lieu thereof the following:

"(b)(1) This subsection applies—

"(A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);

"(B) to a retired regular officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 180 days; and

"(C) to a reserve officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 180 days.

"(2)(A) 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.

"(B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that office or to perform those functions.

"(3) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State, the District of Columbia, or a territory, possession, or commonwealth of the United States (or of any political subdivision of any such government).

"(4) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

"(c) The Secretary of Defense, and the Secretary of Transportation, with respect to the Coast Guard when it is not operating in the Navy, shall prescribe regulations to implement this section.". [sic]

(b) Nothing in section 973(b) of title 10, United States Code, as in effect before the date of the enactment of this Act, shall be construed—

(1) to invalidate any action undertaken by an officer of an Armed Force in furtherance of assigned official duties; or

(2) to have terminated the military appointment of an officer of an Armed Force by reason of the acceptance of a civil office, or the exercise of its functions, by that officer in furtherance of assigned official duties.

(c) Nothing in section 973(b)(3) of title 10, United States Code, as added by subsection (a), shall preclude a Reserve officer to whom such section applies from

holding or exercising the functions of an office described in such section for the term to which the Reserve officer was elected or appointed if, before the date of the enactment of this Act, the Reserve officer accepted appointment or election to that office in accordance with the laws and regulations in effect at the time of such appointment or election.

(d) The Act entitled "An Act to grant the consent of the United States to the Red River Compact among the States of Arkansas, Louisiana, Oklahoma, and Texas", approved December 22, 1980 (94 Stat. 3305), is amended by adding at the end thereof the following new section:

> "SEC. 5. (a) The President may appoint a regular officer of the Army, Navy, Air Force, or Marine Corps who is serving on active duty as the Federal Commissioner of the Commission.
>
> "(b) Notwithstanding the provisions of section 973(b) of title 10, United States Code, acceptance by a regular officer of the Army, Navy, Air Force, or Marine Corps of an appointment as the Federal Commissioner of the Commission, or the exercise of the functions of Federal Commissioner and chairman of the Commission, by such officer shall not terminate or otherwise affect such officer's appointment as a military officer.". [*sic*]

IV. FEDERAL REGULATIONS

A. DoD Directive 1344.10

[SEAL] Department of Defense Directive

Number 1344.10

February 19, 2008

USD(P&R)

SUBJECT: Political Activities by Members of the Armed Forces

References:

(a) DoD Directive 1344.10, "Political Activities by Members of the Armed Forces on Active Duty," August 2, 2004 (hereby canceled)

(b) Sections 973, 888, 101, and Chapter 47 of title 10, United States Code

(c) DoD Instruction 1334.1, "Wearing of the Uniform," October 26, 2005

(d) Section 441a of title 2, United States Code

(e) through (i), see Enclosure 1

1. PURPOSE

This Directive:

1.1. Reissues Reference (a) to update policies on political activities of members of the Armed Forces.

1.2. Implements section 973(b) through (d) of Reference (b).

2. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense, the Military Departments (including the

Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the "DoD Components"). Paragraph 4.3. applies to members of the National Guard, even when in a non-Federal status. Other provisions apply to members of the National Guard while on active duty, which, for purposes of this Directive only, also includes full-time National Guard duty.

3. DEFINITIONS

The terms used in this Directive are defined in Enclosure 2.

4. POLICY

It is DoD policy to encourage members of the Armed Forces (hereafter referred to as "members") (including members on active duty, members of the Reserve Components not on active duty, members of the National Guard even when in a non-Federal status, and retired members) to carry out the obligations of citizenship. In keeping with the traditional concept that members on active duty should not engage in partisan political activity, and that members not on active duty should avoid inferences that their political activities imply or appear to imply official sponsorship, approval, or endorsement, the following policy shall apply:

4.1. [OMITTED]

4.2. [OMITTED]

4.3. [OMITTED]

4.4. Holding and Exercising the Functions of a U.S. Government Civil Office Attained by Election or Appointment

4.4.1. Paragraph 4.4. applies to a civil office in the U.S. Government that:

4.4.1.1. Is an elective office;

4.4.1.2. Requires an appointment by the President; or

4.4.1.3. Is in a position on the executive schedule under sections 5312-5317 of Reference (i).

4.4.2. A regular member, or retired regular or Reserve Component member on active duty under a call or order to active duty for more than 270 days, may not hold or exercise the functions of civil office set out in subparagraph 4.4.1. unless otherwise authorized in paragraph 4.4. or by law.

4.4.3. A retired regular member, or a Reserve Component member on active duty under a call or order to active duty for 270 days or fewer, may hold and exercise the functions of a civil office provided there is no interference with the performance of military duty.

4.4.4. A member on active duty may hold and exercise the functions of a civil office under paragraph 4.4. when assigned or detailed (while on active duty) to such office to perform such functions, provided the assignment or detail does not interfere with military duties.

4.4.5. Any member on active duty authorized to hold or exercise or not prohibited from holding or exercising the functions of office under paragraph

4.4. are still subject to the prohibitions of subparagraph 4.1.2.

4.5. [OMITTED]

4.6. Actions When Prohibitions Apply

4.6.1. Members affected by the prohibitions against being a nominee or candidate or holding or exercising the functions of a civil office may request retirement (if eligible), discharge, or release from active duty. The Secretary concerned may approve these requests, consistent with the needs of the Service, unless the member is:

4.6.1.1. Obligated to fulfill an active duty service commitment.

4.6.1.2. Serving or has been issued orders to serve afloat or in an area that is overseas, remote, a combat zone, or a hostile pay fire area.

4.6.1.3. Ordered to remain on active duty while the subject of an investigation or inquiry.

4.6.1.4. Accused of an offense under Chapter 47 of Reference (b) or serving a sentence or punishment for such an offense.

4.6.1.5. Pending other administrative separation action or proceedings.

4.6.1.6. Indebted to the United States.

4.6.1.7. In a Reserve Component and serving involuntarily under a call or order to active duty that specifies a period of active duty of more that 270 days during a period of declared war or national

emergency; or other period when a unit or individual of the National Guard or other Reserve Component has been involuntarily called or ordered to active duty as authorized by law.

4.6.1.8. In violation of this Directive or an order or regulation prohibiting such member from assuming or exercising the functions of civil office.

4.6.2. Subparagraph 4.6.1. does not preclude a member's involuntary discharge or release from active duty.

4.6.3. 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.

4.6.4. This is a lawful general regulation. Violations of paragraphs 4.1. through 4.5. of this Directive by persons subject to the Uniform Code of Military Justice are punishable under Article 92, "Failure to Obey Order or Regulation," Chapter 47 of Reference (b).

5. RESPONSIBILITIES

5.1. The Under Secretary of Defense for Personnel and Readiness shall administer this Directive.

5.2. The Secretaries of the Military Departments shall issue appropriate implementing documents for their respective Departments.

6. RELEASABILITY

UNLIMITED. This Directive is approved for public release. Copies may be obtained through the Internet from the DoD Issuances Web Site at http://www.dtic.mil/whs/directives.

7. EFFECTIVE DATE

This Directive is effective immediately.

[signature]

Gordon England

[ENCLOSURES OMITTED]

V. OTHER MATERIALS

A. SoCo Advisory 02-21

SOCO Advisory

Department of Defense
December 16, 2002

Office of General Counsel
Number 0221

Standards of Conduct Office

1. What Constitutes Holding a "Civil Office" by Military Personnel.

We have received several inquiries from Reservists, who have been activated, regarding the restrictions on their holding of civil offices, often elected offices, during their active duty. The following is a brief summary of the Federal law and DoD policy pertaining to the holding of civil office by military personnel:

--Regular officers, and reserve officers serving on active duty under a call or order to active duty for a period in excess of 270 days, may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State, the District of Columbia, or a territory, possession, or commonwealth of the United States (or of any political subdivision of any such government). 10 U.S.C. § 973 (b).

--DoD has issued a directive regulating political activities that implements this and other laws by providing policy guidance and procedures governing all members of the Armed Forces on active duty. The directive defines civil office as all nonmilitary offices involving the exercise of the powers or authority of

civil government. DoD Directive 1344.10, June 15, 1990.

--Exceptions are made for reserve officers on active duty for less than 270 days and all enlisted members, if there is no interference with the performance of military duties. In addition, all enlisted members may hold nonpartisan civil office as a notary public or member of a school board or similar local agency, and all officers may serve as members of independent school boards located exclusively on military installations.

--The directive, as a general rule, requires retirement or discharge for members elected or appointed to a prohibited civil office. However, retirement or separation is not an option during periods of national emergency, or when reservists have been called up, such as at the present. In these circumstances, the directive requires members holding a prohibited civil office to decline to serve in the civil office. Failure to do so may result in adverse administrative or disciplinary action. **The directive does not define the term "decline to serve," but DoD has interpreted it to mean the member must refuse to perform any civil functions, or otherwise to take any act in furtherance of their civil office responsibilities or duties. DoD defers to other Federal, state, and local civil authorities, as appropriate, on the question of whether members must resign from prohibited civil office or whether a leave of absence or similar arrangement while the member is on active duty is sufficient.**

--According to the regulation, retirement or separation is also not an option and the member must decline to serve in the civil office when the member is:

--Obligated to fulfill an active duty (AD) service commitment.

--Serving or has been issued orders to serve afloat or in an area that is overseas, remote, a combat zone, or a hostile fire pay area.

--Ordered to remain on AD while the subject of an investigation or inquiry.

--Accused of an offense under the UCMJ or serving a sentence or punishment for such offense.

--Pending administrative separation action or proceedings.

--Indebted to the United States.

--In violation of an order or regulation prohibiting such member from assuming or exercising the functions of civil office.

2. End of the Year Matters.

OGE Annual Questionnaire: The Annual Office of Government Ethics Questionnaire must be completed and returned to the Office of Government Ethics (OGE) by February 1, 2003. The Questionnaire is available at the OGE web site: www.usoge.gov.

Annual Training Plan: Each agency must prepare its written annual ethics training plan for 2003 by December 31, 2002, and retain it with its training records. (5 C.F.R. 2638.706).

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DOD STANDARDS OF CONDUCT OFFICE