No. 16-____

IN THE

Supreme Court of the United States

KEANU D.W. ORTIZ,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since shortly after the Civil War, federal law has required specific authorization from Congress before active-duty military officers may hold a "civil office," including positions that 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).

After President Obama nominated and the Senate confirmed Colonel Martin T. Mitchell as an "additional judge" of the Article I U.S. Court of Military Commission Review (CMCR), Judge Mitchell continued to serve as an appellate military judge on the U.S. Air Force Court of Criminal Appeals (AFCCA), including on the panel that heard (and rejected) Petitioner's appeal of his conviction by court-martial. The U.S. Court of Appeals for the Armed Forces (CAAF) rejected Petitioner's objections to such dual-officeholding, concluding that any statutory or constitutional infirmities with such dual service implicated Judge Mitchell's CMCR position, and not his eligibility to continue to serve on the AFCCA.

The Questions Presented are:

1. Whether Judge Mitchell's service on the CMCR disqualified him from continuing to serve on the AFCCA under 10 U.S.C. § 973(b)(2)(A)(ii).

2. Whether Judge Mitchell's simultaneous service on both the CMCR and the AFCCA violated the Appointments Clause.

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PETITION FOR A WRIT OF CERTIORARI

Keanu D.W. Ortiz respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 76 M.J. 189 (C.A.A.F. 2017). It is reprinted in the Appendix at Pet. App. 1a. The opinion of the U.S. Air Force Court of Criminal Appeals is not reported. It is available at 2016 WL 3681307, and is reprinted in the Appendix at Pet. App. 23a.

JURISDICTION

The Court of Appeals granted Petitioner's petition for review on October 27, 2016, Pet. App. 21a, issued an order and judgment on February 9, 2017, Pet. App. 16a, and issued an opinion respecting that judgment on April 17, 2017. Pet. App. 1a. On April 26, 2017, the Chief Justice granted Petitioner's application for an extension of time within which to file this Petition until June 9, 2017. The Court has jurisdiction under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause provides that the President:

> shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . 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.

U.S. CONST. art. II, § 2, cl. 2. The Commander-in-Chief Clause provides that "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." *Id.* art. II, § 2, cl. 1.

As relevant here, the military dual-officeholding statute provides that:

> Except as otherwise authorized by law, an officer to whom this subsection applies [including "a regular officer of an armed force on the active-duty list"] may not hold, or exercise the functions of, a civil office in the Government of the United States . . . 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). A 1983 amendment to the statute further provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." *Id.* § 973(b)(5).

INTRODUCTION AND STATEMENT OF THE CASE

The Questions Presented are already before the Court in *Dalmazzi* v. *United States*, No. 16-961, and *Cox* v. *United States*, No. 16-1017. Unlike those cases, however, the Court of Appeals in Petitioner's case reached the merits of (and rejected) the statutory and

constitutional objections to Judge Mitchell's dual officeholding. *See* Pet. App. 6a–13a. Thus, although this Court can—and should—reach the merits in *Dalmazzi*, this Petition provides an additional vehicle for ensuring that the important statutory and constitutional questions raised in all three petitions are promptly resolved. *See* Brief for the United States in Opposition at 22, *Dalmazzi* v. *United States*, No. 16-961 (U.S. filed May 15, 2017) [hereinafter "U.S. *Dalmazzi* Brief"] (explaining that this case presents the same questions as *Dalmazzi* and *Cox*, but "without the threshold jurisdictional obstacle [on which CAAF relied] and in a case in which the CAAF passed upon the relevant claims"). It should therefore be granted regardless of whether certiorari is granted in *Dalmazzi* and *Cox*.

A. Legal Background

Since shortly after the Civil War, Congress has generally prohibited active-duty military officers from holding a second non-military position within the Executive Branch. *See* Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319. Although subsequent measures have carved out a handful of express exceptions to this dual-officeholding ban, the general prohibition remains in force. *See* 10 U.S.C. § 973(b).

More than an antiquated technical provision, the dual-officeholding ban is designed "to assure civilian preeminence in government, *i.e.*, to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975); *see also Memorandum for the General Counsel, Gen. Servs. Admin.*, 3 OP. O.L.C. 148, 150 (Apr. 10, 1979) [hereinafter "1979 OLC Memo"] ("That

section embodies an important policy designed to maintain civilian control of the Government."). As the Office of Legal Counsel (OLC) explained in 1983, "the provision 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." 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 (May 17, 1983) [hereinafter "1983 OLC Memo"] (emphasis added).[1] This was so because "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)).

Among other things, § 973(b) makes it unlawful for an active-duty military officer to "hold, or exercise the functions of, a civil office in the Government of the United States . . . that requires an appointment by the President by and with the advice and consent of the Senate," except where such service is "otherwise authorized by law." 10 U.S.C. § 973(b)(2)(A)(ii). Thus, as relevant here, the dual-officeholding ban applies to all "civil offices" held either by principal Executive Branch officers, *see Myers* v. *United States*, 272 U.S. 52 (1926), or by inferior officers whose appointment has not properly been vested in some other body. *See* U.S. CONST. art. II, § 2, cl. 2 (requiring presidential nomination and Senate advice and consent for inferior

1. The 1983 OLC Memo is available at https://perma.cc/YLM8-KTR6.

officers the appointment of whom Congress has not vested "in the President alone, in the courts of law, or in the heads of departments").

The dual-officeholding claim in this case arises from the unique structure of the U.S. Court of Military Commission Review (CMCR). That court was created in 2006 (and substantially reformed in 2009) to serve as an intermediate appellate court between military commissions convened under the Military Commissions Act (MCA), 10 U.S.C. §§ 948a–950t, and the U.S. Court of Appeals for the District of Columbia Circuit. *Id*. § 950f.

In the MCA, Congress provided two different mechanisms for staffing the CMCR with judges. First, the Secretary of Defense was empowered to "*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." *Id*. § 950f(b)(2) (emphasis added). This provision apparently contemplates the assignment of judges already serving on the service-branch-specific Courts of Criminal Appeals (CCAs) within the military justice system. *See id*. § 866(a) (referring to "appellate military judges").

CCA judges are Executive Branch inferior officers for purposes of the Appointments Clause, *Edmond* v. *United States*, 520 U.S. 651, 661–66 (1996). Active-duty military officers (who are already Executive Branch inferior officers) may thus be "assigned" to the CCAs as judges, rather than "appointed" thereto. *See Weiss* v. *United States*, 510 U.S. 163, 174–76 (1994). But because the CMCR, unlike the CCAs, is not subject to appellate (or other) supervision within the Executive Branch, CMCR judges are almost certainly

principal officers, for reasons the D.C. Circuit detailed (while reserving a ruling) in *In re Al-Nashiri*, 791 F.3d 71, 82–85 (D.C. Cir. 2015), and to which the Court of Appeals alluded below. *See* Pet. App. 13a.

CMCR judges therefore hold an 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), a conclusion the Executive Branch seems to share. Thus, in direct response to the D.C. Circuit's ruling in *Al-Nashiri* (and after initially having been "assigned" to the CMCR in 2014), Judge Mitchell was "appointed" to the court using the MCA's second staffing mechanism. *See* 10 U.S.C. § 950f(b)(3). That provision authorizes the President to "*appoint*, by and with the advice and consent of the Senate, additional judges to the [CMCR]." *Id.* (emphasis added). Every judge who has joined the CMCR since the D.C. Circuit's ruling in *Al-Nashiri* has similarly been "appointed" to that court.[2]

CMCR judges also hold a "civil office." The political branches have long embraced "a very liberal interpretation of the phrase 'civil office'" in § 973(b). *Army Officer Holding Civil Office*, 18 OP. ATT'Y GEN. 11, 12 (1884); *see* 1979 OLC Memo, *supra*, at 150 n.4 ("The Attorneys General . . . have ruled that . . . the policy of the statute points to a very broad

2. Even if CMCR judges are inferior officers, the appointment of active-duty military officers to such positions still triggers § 973(b)(2)(A)(ii) because *appointments* to the CMCR (unlike *assignments* to it) may only be made by the President "by and with the advice and consent of the Senate." 10 U.S.C. § 950f(b)(3). As a result, Petitioner's statutory argument does not turn on whether "additional" CMCR judges are principal or inferior officers for purposes of Article II; either way, they hold a "civil office" within the meaning of § 973(b)(2)(A)(ii).

interpretation of the term 'civil officer.'"). To that end, the Justice Department has concluded 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)." 1983 OLC Memo, *supra*, 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 to the CMCR under § 950f(b)(3) easily meet this definition; the position is created by law, it has definite duties imposed by law, and it involves a clear exercise of sovereign (judicial) power.

The very breadth of the term "civil office" is why Congress in 1983 added three narrowing conditions to § 973(b)—including the requirement at issue here, *i.e.*, that the civil 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); *see also 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, 9–10 (Aug. 2, 2016) [hereinafter "2016 OLC Memo"] (describing the motivation and purpose of the 1983 amendments to § 973(b)).

Any doubt that CMCR judges hold a "civil office" is resolved by the 2009 amendments to the MCA, which reconstituted the CMCR as an Article I "court of record." 10 U.S.C. § 950f(a); *see also In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016).[3] Thus, as in *Freytag* v.

3. Indeed, the position of "appointed judge" on the CMCR under § 950f(b)(3) was *created* by the 2009 statute. Under the MCA as originally enacted in 2006, judges could only be "assigned" to the CMCR. *See* Military Commissions Act of 2006,

C.I.R., 501 U.S. 868 (1991), "the clear intent of Congress [was] to transform" the CMCR from an entity wholly within the Executive Branch "into an Article I legislative court," *id.* at 888, the judges of which hold a quintessential "civil office." *See, e.g.*, *Winchell* v. *United States*, 28 Ct. Cl. 30, 35 (1892).[4]

Nor is service by military officers as "additional judges" of the CMCR under 10 U.S.C. § 950f(b)(3) "otherwise authorized by law." Congress added that clause in 1956 to reflect the fact that "other laws enacted after the date of enactment of [5 U.S.C. § 5534a] authorize the performance of the functions of certain civil offices." 10 U.S.C. § 3544 (1958) (Historical and Revision Notes). What these other laws have in common is clear and unambiguous indicia of Congress's intent to override the dual-officeholding ban. *See, e.g.*, *id.* § 528 (expressly allowing appointment of certain military officers to positions within the CIA or the Office of the Director of National Intelligence). *See generally* 1983 OLC Memo, *supra*, at 16–17 n.21 (collecting examples); Dwan V. Kerig, *Compatibility of Military and Other Public Employment*, 1 MIL. L. REV. 21, 85 (1958) (same).

As OLC concluded in 1979, the policy behind the dual-officeholding ban "cannot be overcome implicitly by a broad and vague statutory authority to designate

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Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2621 (formerly codified at 10 U.S.C. § 950f(b)).

4. Notwithstanding the breadth of the term "civil office," the CMCR tersely concluded in *Al-Nashiri* that its judges do not hold a "civil office" under § 973(b) because "[d]isposition of violations of the law of war by military commissions is a classic military function." Pet. App. 30a.

[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)." 1979 OLC Memo, *supra*, 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.").

In contrast, the MCA says nothing about appointing military officers, as such, to serve in a "civil office" as "additional judges" under 10 U.S.C. § 950f(b)(3). The only language in § 950f that refers to military officers is the authority provided to 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).

Section 950f(b)(3), in contrast, includes no similar indicia of legislative intent. This Court has recognized a well-settled—and constitutionally significant—difference between the words "assign" and "appoint" in this context. Thus, the fact that § 950f(b)(2) refers only to the former "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). The MCA's reference in § 950f(b)(2) to "appellate military judges" therefore comes nowhere near to providing the type of specific authorization required for active-duty military officers to also hold office as "additional judges" under § 950f(b)(3). *See, e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here 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.").

This understanding is confirmed by the history of § 950f(b), the language of which was first enacted in the 2006 MCA—under which the CMCR was not a court of record. If Congress did not express an intent to override § 973(b) when it created the CMCR in 2006, such an intent cannot be inferred from reenactment of the same language as part of its 2009 overhaul of the MCA.

Despite these understandings, three of the five judges currently appointed to the CMCR also serve as active-duty military officers (and, indeed, active judges of the Army Court of Criminal Appeals), regularly hearing cases on both courts. This Petition, like the petitions in *Dalmazzi* and *Cox*, calls upon the Court to determine the legality and constitutionality of this novel arrangement.

B. Procedural History

Petitioner, an Airman First Class in the U.S. Air Force, was convicted of knowingly and wrongfully viewing, possessing, and distributing child pornography in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. He was sentenced to a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction in rank. Because of the sentence, his appeal was referred to the Air Force Court of Criminal Appeals (AFCCA).

On June 1, 2016, a three-judge AFCCA panel that included Judge Mitchell summarily rejected Petitioner's appeal. Pet. App. 23a. Judge Mitchell had also been serving on the CMCR since October 28,

2014, when he was "assigned" to that court under 10 U.S.C. § 950f(b)(2). But after the D.C. Circuit in *Al-Nashiri* called into question the constitutionality of such an "assignment," he was nominated by President Obama under 10 U.S.C. § 950f(b)(3) to an "appointment" as an "additional judge" on the CMCR. 162 CONG. REC. S1474 (daily ed. Mar. 14, 2016) (nomination of Col. Mitchell to be CMCR judge "under 10 U.S.C. Section 950f(b)(3)"). The Senate confirmed him on April 28, 2016. *Id.* at S2600 (daily ed. Apr. 28, 2016) (reporting confirmation). President Obama signed Judge Mitchell's commission on May 25, 2016. *See United States* v. *Dalmazzi*, 76 M.J. 1, 3 (C.A.A.F. 2016), *petition for cert. filed*, No. 16-961 (U.S. filed Feb. 1, 2017).

Although Judge Mitchell began to "exercise the functions" of his appointed CMCR judgeship no later than May 2, 2016 (when he participated in an order in a pending case), *see* Pet. App. 33a, there is no question that, at least by the time of the AFCCA's June 1, 2016 decision in Petitioner's case, he *held* the office of "additional judge" on the CMCR, since President Obama had signed his commission one week earlier, on May 25. *See Dalmazzi*, 76 M.J. at 3. As a result of this timing, Petitioner's case became the occasion for the Court of Appeals to reach the merits of the dual-officeholding claims it had sidestepped in *Dalmazzi*.

On February 9, 2017 (two days after hearing oral argument), the Court of Appeals issued a terse "order and judgment" providing 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." Pet. App. 16a. That opinion subsequently issued on April 17, 2017. *Id.* at 1a

Writing for a unanimous court, Judge Stucky first rejected Petitioner's claim that Judge Mitchell's appointment to the CMCR disqualified him from continuing to serve on the AFCCA. In particular, the court's analysis turned on two conclusions about the 1983 amendments to § 973(b), which were enacted as part of the Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, § 1002(a), 97 Stat. 614, 655 (1983).

First, the Court of Appeals noted that the 1983 amendments had deleted language from the version of § 973 then in force that had required the automatic termination from the military of anyone who violated the dual-officeholding ban. *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." Pet. App. 9a. Thus, § 973(b) "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.*

This reading was confirmed, in the Court of Appeals' view, by Congress's simultaneous addition of a "saving" clause, § 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," 10 U.S.C. § 973(b)(5) (2012), and which "applies by its terms to Judge Mitchell's assigned official duties at the CCA." Pet. App. 9a. Thus, although Judge Mitchell's appointment to the CMCR might very well have violated the dual-officeholding ban, the Court of

Appeals held this was not a basis upon which to challenge his continuing service on the AFCCA. *See* Pet. App. 13a ("The prohibition in § 973(b)(2)(A)(ii) may indeed affect Colonel Mitchell's status as a judge of the USCMCR, but that is not for us to decide.").

Turning to Petitioner's Appointments Clause objection to Judge Mitchell's simultaneous service on both the AFCCA and CMCR, the Court of Appeals held that there was no problem with such dual service—or with having someone who has principal officer status as an "additional judge" on the CMCR sitting alongside inferior officers on the AFCCA. *See* Pet. App. 11a–12a ("When Colonel Mitchell sits as a CCA judge, he is no different from any other CCA judge under Article 66 [of the UCMJ]. The Judge Advocate General's administrative supervision of the CCA is limited even as to the CCA, and has no authority or effect on the judicial or administrative functions of the USCMCR.").

REASONS FOR GRANTING THE PETITION

I. The Lower Courts Have Adopted Erroneous and Inconsistent Readings of the Dual-Officeholding Ban

The Court of Appeals' ruling in this case was the second appellate decision to consider whether Judge Mitchell's appointment to the CMCR violated § 973(b), along with the CMCR's own decision in *Al-Nashiri* (in which Judge Mitchell participated). *See* Pet. App. 25a; *see also ante* at 8 n.4. Although both courts rejected such a challenge, they did so for reasons that are independently unconvincing and mutually inconsistent.

In *Al-Nashiri*, for example, the CMCR concluded that its "additional judges" do not hold a "civil office"

because they are exercising "a classic military function." Pet. App. 31a. In *Ortiz*, by contrast, CAAF suggested that "Section 973 *might* prohibit Judge Mitchell from holding office *at the USCMCR*," Pet. App. 9a (emphases added), but held that his CMCR appointment did not disqualify him from continuing to sit on the Air Force CCA because "the current statute neither requires the retirement or discharge of a service member who occupies a prohibited civil office," thanks to the 1983 amendments thereto. *Id.* Neither of these arguments is consistent with the text, history, or purpose of § 973(b)—or with the consistent interpretations that provision has long received from both the Justice Department and the Comptroller General.

Taking the CMCR's analysis first, as explained above, an "additional judge" sitting on the CMCR unquestionably holds a "civil office" within the meaning of § 973(b), a term that has long received "a very liberal interpretation." *Ante* at 6 (quoting *Army Officer Holding Civil Office*, 18 OP. ATT'Y GEN. 11, 12 (1884)). OLC has suggested the statutory prerequisite is satisfied so long as "the position is one established by statute, and . . . its duties involve the exercise of 'some portion of the sovereign power.'" 1983 OLC Memo, *supra*, at 24. It is therefore irrelevant whether, as the CMCR held, "[d]isposition of violations of the law of war by military commissions is a classic military function." Pet. App. 30a–31a. As OLC has explained, "the applicability of the prohibition was not to depend on whether the duties of the civil office were undertaken in obedience to military orders." 1983 OLC Memo, *supra*, at 16. But even if it is relevant to the definition of "civil office" that "[d]isposition of violations of the law of war by military commissions is

a classic military function" (and it is not), this characterization is not a fair summary of the work of the CMCR itself, as opposed to the trial-level military commissions that sit at Guantánamo.[5]

Although the Court of Appeals' analysis in this case merits more attention, its interpretation of § 973 rests on a significant over-reading of the purpose and impact of the 1983 amendments to § 973(b). To begin with, the Court of Appeals misread the plain text of the saving clause, which insulates "any action undertaken by an officer in furtherance of *assigned* official duties." 10 U.S.C. § 973(b)(5) (emphasis added). After the 1983 OLC Memo concluded that the longstanding practice of assigning military lawyers to serve as Special Assistant U.S. Attorneys (SAUSAs) to prosecute offenses committed by civilians on military installations violated § 973(b), Congress both narrowed the scope of "civil office" to exclude SAUSAs and insulated the thousands of prosecutions undertaken by those "assigned" officers from legal challenge. *See* Pet. App. 8a & n.1.

In other words, the focus of § 973(b)(5) was on duties carried out by military officers in civil offices to which they had unlawfully been "assigned" under the pre-1983 version of § 973(b), such as the JAG lawyers' service as SAUSAs. Because the 1983 amendments

5. The CMCR hears *appeals* from such dispositions as an Article I court of record, which is not "classic" as military commissions have only been subject to direct appellate review since 2005. *See Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864). Nor is it "inherently military," as the CMCR includes civilian judges and has exercised jurisdiction over non-law-of-war offenses. *See Bahlul* v. *United States*, 840 F.3d 757 (D.C. Cir. 2016) (en banc) (per curiam), *petition for cert. filed*, No. 16-1307 (U.S. Mar. 28, 2017).

prospectively limited the definition of "civil office" to positions generally requiring an "election" or an "appointment," the saving clause's reach was, in practice, retroactive. *See Reserve Officer Holding Civil Office*, 4 CIV. L. OP. JAG A.F. 391, 391 (Feb. 14, 1991) (holding that clause applied to insulate service in a civil office only prior to September 24, 1983—the date on which § 973(b)(5) entered into force).

The Court of Appeals mistakenly read the 1983 amendments to have done much more—and to have effectively repealed § 973(b)'s prohibitions altogether. On its view, the saving clause would permit military officers to accept prohibited civil offices—or even elective office—and continue to serve on active duty without any consequence. In addition to its inconsistency with the text and purpose of the 1983 amendments, this reading is also internally incoherent; application of the saving clause to the *military* office would be pointless if the sole penalty for violating § 973(b) were, as the Court of Appeals concluded, disqualification from the unauthorized *civil* office.

The Court of Appeals' reasoning also assumes, despite the absence of any indicia of such legislative intent, that Congress intended to abrogate the common law doctrine of incompatibility. *See Lopez* v. *Martorell*, 59 F.2d 176, 178 (1st Cir. 1932) ("[A]n office holder was not ineligible to appointment or election to another incompatible office, but acceptance of the latter vacated the former. This rule is of great antiquity in the common law . . . ."). *But see Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952) ("Statutes 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.").

Not only do the text and legislative history of the 1983 amendments evince no such congressional purpose, they point rather squarely in the opposite direction. Thus, the same section of the statute that amended § 973(b) separately authorized the President to appoint an active-duty military officer to serve as Chairman of the Red River Compact Commission, and provided that his acceptance of such an appointment "shall not terminate or otherwise affect [his] appointment as a military officer," Department of Defense Authorization Act, 1984, § 1002(d), 97 Stat. at 656; *see also* S. REP. NO. 98-174, at 258 (1983).

On the Court of Appeals' reading, this proviso was wholly unnecessary. But Congress clearly disagreed, and the Department of Defense has disagreed as well; it continues to view administrative separation as the proper sanction for a violation of § 973(b) absent special circumstances not present here. *See* Political Activities by Members of the Armed Forces, Dep't of Def. Directive 1344.10, § 4.6, at 9 (Feb. 19, 2008). Indeed, there would have been no need for the 2016 OLC Memo considering "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)," 2016 OLC Memo, *supra*, at 1, if that officer was otherwise not subject to military separation. Thus, the appropriate remedy for the violation of § 973(b) in petitioner's case is the nunc pro tunc disqualification of Judge Mitchell from service on the AFCCA. *See Ryder* v. *United States*, 515 U.S. 177, 184–85 (1995).

Given the gravity of the dual-officeholding issue, and the depth of its impact on pending cases within both the court-martial and military commissions systems, such a flawed interpretation of § 973(b)'s ban is worthy of this Court's review on its own terms. But certiorari is especially warranted because of the incongruity between the Court of Appeals' analysis in this case and the CMCR's reasoning in *Al-Nashiri*: The CMCR is of the view that its "additional judges" do not hold a "civil office" at all; the Court of Appeals is of the view that "additional judges" of the CMCR very well *may* hold such an office, but "that is not for us to decide," Pet. App. 13a, because any remedy for a violation of the dual-officeholding ban rests with the CMCR. *See id.* Such buck-passing by these two appellate courts does not settle the statutory questions raised in these cases. If anything, it simply adds to the continuing uncertainty over the status of the CMCR's military-officer judges, and underscores the urgency of having the matter resolved by this Court.

II. The Lower Courts' Interpretations Have Raised, Rather than Resolved, Serious Constitutional Questions

Beyond rendering inconsistent verdicts on the statutory objection to Judge Mitchell's dual officeholding, both appeals courts have also given short shrift to the significant constitutional problems that their statutory readings would necessarily provoke under both the Appointments Clause and the Commander-in-Chief Clause of Article II. Indeed, the constitutional questions raised by Judge Mitchell's dual officeholding not only provide a reason to conclude that his appointment to the CMCR

terminated his military service, but they also provide an independent justification for this Court's review.

The Court of Appeals rejected Petitioner's Appointments Clause objection, contending 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." Pet. App. 11a. In the Court of Appeals' view, there is no Appointments Clause problem anytime an Executive Branch principal officer also holds a separate position as an Executive Branch inferior officer.

The difficulty with this reasoning is that, in the process, the Court of Appeals ignored the possibility that the two positions, while not formally incompatible, might be functionally incompatible. After all, if an additional judge of the CMCR (as a principal officer) could serve alongside a judge of the AFCCA (as an inferior officer), the same logic would allow the President to nominate (and the Senate to confirm) the sitting Secretary of Defense to serve on the AFCCA. But in that scenario, there is an obvious "incongruity" in having an individual with such authority (1) serving in 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 his principal office. *Cf. Morrison* v. *Olson*, 487 U.S. 654, 675–76 (1988) (discussing the prospect of functional incompatibility through the "incongruity" of the overlapping functions (quoting *Ex parte Siebold*, 100 U.S. 371, 398 (1880))). This concern is especially acute where, as here, the distinct offices involve overlapping personnel—in contrast to circumstances in which an individual

holds offices in two completely unrelated Executive Branch entities.

Whether such an arrangement rises to the level of functional incompatibility that is prohibited by the Appointments Clause (if not the separation of powers more generally) is a difficult question of first impression. *Cf. Nguyen* v. *United States*, 539 U.S. 69 (2003) (interpreting statutes to prohibit Article III and Article IV federal judges from serving on same court of appeals panel); *id.* at 83 n.17 (suggesting that allowing such mixed panels would "call into serious question the integrity as well as the public reputation of judicial proceedings"). It is also one that can easily be avoided here, by interpreting Judge Mitchell's appointment to the CMCR as terminating his military commission and therefore disqualifying him from continuing to serve on the AFCCA. *See Ryder*, 515 U.S. at 184–85. Either way, it is a question that deserves far more careful consideration and scrutiny than that provided by the Court of Appeals (to say nothing of the CMCR).

Moreover, neither the Court of Appeals nor the CMCR even *noted*, let alone resolved, the serious Commander-in-Chief Clause problem that arises from Judge Mitchell's service on the CMCR—since CMCR judges appointed under 10 U.S.C. § 950f(b)(3) "may be removed by the President only for cause and not at will." *Khadr*, 823 F.3d at 98. They thus "cannot . . . be removed by the President except [for] . . . inefficiency, neglect of duty, or malfeasance in office," *i.e.*, they have "good-cause tenure." *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 487, 493 (2010).

If a CMCR judge is a civilian, this good-cause tenure protection raises no constitutional problem. But where, as here, the judge at issue is an active-duty military officer, such a constraint on the President's power raises constitutional concerns of the first order. *E.g.*, *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850) ("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[.]"). Indeed, it is well settled that it would be unconstitutional for Congress to "insulate [a military] officer from presidential direction or removal." David Barron & Martin Lederman, *The Commander-in-Chief at Its Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 1103–04 (2008). Yet if the dual-officeholding ban does *not* prohibit active-duty military officers from serving as CMCR judges, then the good-cause removal protection provided by 10 U.S.C. § 950f(b)(3) would have exactly that unconstitutional effect.

III. Only this Court Can Conclusively Settle the Questions Presented

Finally, there is no reason to believe that further litigation in the lower courts is likely to remedy the statutory errors—or to provide answers to the serious constitutional questions—outlined above. The Court of Appeals considers the matter settled, as it has cleared its docket of the 100-plus cases that raise dual-officeholding questions. *See* C.A.A.F., Daily Journal (May 2017), http://www.armfor.uscourts.gov/newcaaf/journal/2017Jrnl/2017May.htm (last visited May 17, 2017). There is also no obvious mechanism for military commission defendants to challenge the CMCR's ruling in *Al-Nashiri* until after a conviction is

affirmed by a CMCR panel that includes an active-duty military officer, which could be years away.[6] And the government has also now argued to the CMCR that "[i]t is unclear whether a criminal defendant would [even] have standing to obtain disqualification of a judge on [Commander-in-Chief Clause] grounds." Appellant's Response to Appellee Mohammad's Motion to Disqualify at 4, *United States* v. *Mohammad*, No. 17-002 (Ct. Mil. Comm'n Rev. filed May 15, 2017). Simply put, absent this Court's intervention, the problematic impasse summarized above is likely to persist, all while more and more cases implicating these defects arise.

Finally, if Petitioner is correct that the appropriate remedy for Judge Mitchell's violation of the dual-officeholding ban is his termination from the military nunc pro tunc, that remedy is beyond the Court of Appeals' power to direct. *See Clinton* v. *Goldsmith*, 526 U.S. 529, 535 & n.7 (1999). Of course, that fact poses no obstacle to Petitioner's ability to obtain the specific relief he seeks—Judge Mitchell's disqualification from his AFCCA panel. But it does underscore, more broadly, the extent to which only

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6. Although the D.C. Circuit has appellate jurisdiction over the CMCR, that jurisdiction only extends to appeals from "a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the [CMCR])." 10 U.S.C. § 950g(a); *see Khadr* v. *United States*, 528 F.3d 1112 (D.C. Cir. 2008).

Thus, the CMCR's rejection of the dual-officeholding challenge in *Al-Nashiri*, *see ante* at 8 n.4, is effectively unreviewable by the D.C. Circuit until after the CMCR has ruled on Nashiri's (or another affected defendant's) post-conviction appeal—which may not be for many years. *See In re Al-Nashiri*, 835 F.3d 110, 134 (D.C. Cir. 2016), *petition for cert. filed*, No. 16-8966 (U.S. filed Jan. 17, 2017).

this Court can conclusively resolve the recurring and thorny questions raised by the appointment of active-duty military officers as CMCR judges.

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The merits of the questions presented deserve plenary briefing and argument. Because the government has opposed certiorari in *Dalmazzi* and *Cox* on threshold procedural issues as well as the merits, *see* U.S. *Dalmazzi* Brief, at 22, the Court should grant all three Petitions. If it agrees with the petitioners in *Dalmazzi* and *Cox* that the threshold issues pose no obstacle to reaching the merits, this petition can be consolidated with those for purposes of briefing and argument. If, instead, it agrees with the government on either of the threshold questions, then, as the government itself all-but concedes, this case becomes the best vehicle for reaching and resolving the merits. *See id.* at 22. Either way, certiorari is clearly warranted here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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