**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**

## JOINT APPENDIX


STEPHEN I. VLADECK
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

*Counsel of Record for Petitioners*

NOEL J. FRANCISCO
Solicitor General
U.S. Department of Justice
Washington, DC 20530-0001
(202) 514-2217
SupremeCtBriefs@usdoj.gov

*Counsel of Record for Respondent*


November 7, 2017


Petitions for Certiorari Filed: **Feb. 1, Feb. 21, & May 19, 2017**
Certiorari Granted: **September 28, 2017**

## TABLE OF CONTENTS



---

* Because no docket entries appear in the record, Counsel for the Petitioners and Counsel for the Respondent have agreed to provide "a chronological list of the important dates on which pleadings were filed, hearings held, and orders entered." Stephen M. Shapiro et al., *Supreme Court Practice* § 12.4(a), at 694 (10th ed. 2013).

**TABLE OF CONTENTS (CONTINUED)**

**TABLE OF CONTENTS (CONTINUED)**

SUPREME COURT OF THE UNITED STATES

(ORDER LIST: 582 U.S.)

THURSDAY, SEPTEMBER 28, 2017

CERTIORARI GRANTED

| | | |
|---|---|---|
| 16-961 | ) | DALMAZZI, NICOLE A. |
| | ) | V. UNITED STATES |
| 16-1017 | ) | COX, LAITH G. V. UNITED STATES |
| | ) | |
| 16-1423 | ) | ORTIZ, KEANU D. V. UNITED STATES |

The petitions for writs of certiorari are granted. The cases are consolidated, and a total of one hour is allotted for oral argument. In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: Whether this Court has jurisdiction to review the cases in Nos. 16-961 and 16-1017 under 28 U. S. C. § 1259(3).

## I. CHRONOLOGICAL LIST OF SIGNIFICANT LOWER-COURT PLEADINGS, HEARINGS, AND ORDERS

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

| | |
|---|---|
| **May 12, 2016** | Air Force CCA decision. |
| **May 27, 2016** | Motion for reconsideration filed. |
| **July 11, 2016** | CAAF petition for review filed. |
| **July 18, 2016** | Air Force CCA motion for reconsideration dismissed. |
| **Aug. 18, 2016** | CAAF grant of review. |
| **Oct. 28, 2016** | CAAF order to supplement record. |
| **Nov. 21, 2016** | CAAF order specifying additional issue. |
| **Dec. 7, 2016** | CAAF oral argument. |
| **Dec. 15, 2016** | CAAF decision. |

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

**1. *Cox***

| | |
|---|---|
| **Apr. 29, 2016** | Army CCA decision. |
| **Oct. 3, 2016** | CAAF grant of review. |
| **Jan. 17, 2017** | CAAF decision. |

2. ***Craig***

| | |
|---|---|
| **May 10, 2016** | Army CCA decision. |
| **Oct. 20, 2016** | CAAF grant of review. |
| **Jan. 17, 2017** | CAAF decision. |

3. ***Lewis***

| | |
|---|---|
| **Mar. 29, 2016** | Air Force CCA decision. |
| **May 9, 2016** | First motion for reconsideration filed. |
| **May 16, 2016** | Air Force CCA order assigning motion to "Special Panel." |
| **May 17, 2016** | Air Force CCA Special Panel order denying reconsideration. |
| **May 30, 2016** | Second motion for reconsideration filed. |
| **Dec. 19, 2016** | CAAF grant of review. |
| **Dec. 27, 2016** | CAAF decision. |

4. ***Miller***

| | |
|---|---|
| **May 6, 2016** | Army CCA decision. |
| **Nov. 30, 2016** | CAAF grant of review. |
| **Jan. 17, 2017** | CAAF decision. |

**5. *Morchinek***

| | |
|---|---|
| **May 9, 2016** | Air Force CCA decision. |
| **Oct. 18, 2016** | CAAF grant of review. |
| **Dec. 27, 2016** | CAAF decision. |

**6. *O'Shaughnessy***

| | |
|---|---|
| **May 5, 2016** | Air Force CCA decision. |
| **Nov. 29, 2016** | CAAF grant of review. |
| **Dec. 27, 2016** | CAAF decision. |

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

| | |
|---|---|
| **June 1, 2016** | Air Force CCA decision. |
| **Oct. 27, 2016** | CAAF grant of review. |
| **Dec. 16, 2016** | CAAF amends grant of review. |
| **Feb. 7, 2017** | CAAF oral argument. |
| **Feb. 9, 2017** | CAAF order and judgment. |
| **Apr. 17, 2017** | CAAF opinion issued. |

## II. *DALMAZZI* (NO. 16-961): LOWER-COURT ORDERS, OPINIONS, & RELEVANT PLEADINGS

UNITED STATES, Appellee

v.

Nicole A. DALMAZZI, Second Lieutenant

U.S. Air Force, Appellant

No. 16-0651

Crim. App. No. 38808

United States Court of Appeals for the Armed Forces

Argued December 7, 2016

Decided December 15, 2016

Military Judge: L. Martin Powell

For Appellant: *Major Johnathan D. Legg* (argued), *Brian L. Mizer,* Esq. (on brief); *Major Thomas A. Smith.*

For Appellee: *Major G. Matt Osborn* (argued); *Colonel Katherine E. Oler* and *Gerald R. Bruce,* Esq. (on brief).

Amici Curiae for Appellee: *Colonel Mark H. Sydenham, Lieutenant Colonel A. G. Courie III, Major Anne C. Hsieh, Captain Carling M. Dunham, and Captain Samuel E. Landes* (on brief)—for Army Government Appellate Division. *Colonel Valerie C. Danyluk*, USMC, *Lieutenant Commander Justin C. Henderson,* JAGC, USN, *Lieutenant James M. Belforti,* JAGC, USN, and *Brian K. Keller*, Esq. (on brief)—for Navy-Marine Corps Appellate Government Division.

Amicus Curiae in Support of Neither Party: *Brigadier General John G. Baker,* USMC, *Captain*

*Brent G. Filbert,* JAGC, USN, and *Philip Sundel,* Esq. (on brief)—for Military Commissions Defense Organization.

PER CURIAM:

The issues presented are whether a military officer is statutorily or constitutionally prohibited from simultaneously serving as an appellate military judge on a service court of criminal appeals and as a judge on the United States Court of Military Commission Review (USCMCR). As the appellate military judge who participated in deciding Appellant's case had not yet been appointed a USCMCR judge, we hold that the case is moot as to these issues.

## I. Procedural History

A military judge sitting alone convicted Appellant, in accordance with her pleas, of wrongfully using ecstasy, a Schedule I, controlled substance. The convening authority approved the adjudged sentence: a dismissal and confinement for one month. The United States Air Force Court of Criminal Appeals (CCA) affirmed the approved findings and sentence. *United States v. Dalmazzi*, ACM No. 38808, 2016 CCA LEXIS 307, at *7–8, 2016 WL 3193181, at *3 (A.F. Ct. Crim. App. May 12, 2016).

On May 27, 2016, Appellant moved the CCA to vacate its decision because of the participation of USCMCR Judge Martin T. Mitchell on the panel. On July 11, 2016, before the CCA ruled on this motion, Appellant filed a petition for grant of review at this Court. *United States v. Dalmazzi*, 75 M.J. 399 (C.A.A.F. 2016). As a result, the CCA dismissed the motion to vacate for lack of jurisdiction.

## II. BACKGROUND

In the Military Commissions Act of 2009, Pub. L. No. 111-84, div. A., tit. XVIII, § 1802, 123 Stat. 2190, 2603 (2009), Congress established the United States Court of Military Commission Review (USCMCR). 10 U.S.C. § 950f(a) (2012). As amended in 2011, Pub. L. No. 112-81, § 1034(c), 125 Stat. 1573 (2011), the USCMCR was to consist of "one or more panels, each composed of not less than three judges on the Court." 10 U.S.C. § 950f(a) (2012). The Secretary of Defense was authorized to "assign persons who are appellate military judges" to the USCMCR as "judges." § 950f(b)(2). The President was authorized to "appoint, by and with the advice and consent of the Senate, additional judges to the [USCMCR]." § 950f(b)(3).

In June 2013, the Judge Advocate General of the Air Force detailed Lieutenant Colonel Martin T. Mitchell to serve as an appellate military judge on the CCA. Judge Mitchell was promoted to the rank of colonel in June 2014. The Secretary of Defense assigned Colonel Mitchell to be a judge on the USCMCR on October 28, 2014.

In *In re Al-Nashiri*, the U.S. Court of Appeals for the District of Columbia Circuit expressed concern over whether judges on the USCMCR were principal officers, in which case the assignment of appellate military judges to that position by the Secretary of Defense would violate the Appointments Clause of the Constitution. 791 F.3d 71, 82 (D.C. Cir. 2015) (citing U.S. Const. art. II, § 2, cl. 2). The court suggested that "the President and the Senate could decide to put to rest any Appointments Clause questions regarding the [US]CMCR's military judges

by … re-nominating and reconfirming the military judges to be [*US*]*CMCR judges*." *Id.* at 86.

Apparently in response to *In re al-Nashiri*, the President nominated Colonel Mitchell for appointment as an appellate military judge on the USCMCR. The Senate received the President's nomination on March 14, 2016. 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016). The Senate gave its advice and consent to the appointment of Martin T. Mitchell as colonel on April 28, 2016. 162 Cong. Rec. S2600 (daily ed. Apr. 28, 2016). Colonel Mitchell took the oath of office of "Appellate Judge" of the USCMCR on May 2, 2016. On May 25, 2016, President Obama signed Colonel Mitchell's commission appointing him to be "an Appellate Military Judge of the United States Court of Military Commission Review."

Judge Mitchell was one of three appellate military judges to participate in the Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), review of Appellant's court-martial. The CCA's opinion was issued on May 12, 2016, ten days after Colonel Mitchell took the oath of office as a USCMCR appellate judge but two weeks before the President signed his commission.

Appellant asserts that: (1) as a USCMCR judge, Colonel Mitchell was prohibited by 10 U.S.C. § 973(b)(2)(A)(ii) from sitting on the CCA; and (2) his service on both the USCMCR and the CCA violated the Appointments Clause of the Constitution.

## III. DISCUSSION

The Appointments Clause of the Constitution provides that:

> [The President] shall nominate, and by and with the Advice and Consent of the

> Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme 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.

U.S. Const. art. II, § 2, cl. 2. Thus, three separate actions are required for the President to appoint an "additional judge" to the USCMCR under the terms of 10 U.S.C. § 950f: (1) the President nominates a person for the position and sends his name to the Senate for confirmation; (2) the Senate confirms the nominee; and (3) the President appoints the confirmed nominee to the position. Normally, the President signs a commission as evidence of the appointment. But

> if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it.

*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 156 (1803). While not necessary for the appointment, the commission is "conclusive evidence of it." *Id.* at 157. Before the issuance of the commission, the President

is free to change his mind and not make the appointment; afterwards, he is not. *See Dysart v. United States*, 369 F.3d 1303, 1311 (Fed. Cir. 2004).

Appellant argues that actions Colonel Mitchell took as a judge on the USCMCR before the President issued the commission were public acts that evidenced his appointment. We disagree. It is the President who must perform some public act that evinces the appointment, not the purported appointee. *See, e.g.*, *Dysart*, 369 F.3d at 1306, 1312. Other than the commission, issued on May 25, 2016, there is no evidence that the President appointed Colonel Mitchell to the USCMCR. Therefore, that is the date of his presidential appointment as judge to the USCMCR.

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.

## IV. DECISION

The order of August 18, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Nicole A. Dalmazzi,<br>Appellant | USCA Dkt. No. 16-0651/AF<br>Crim.App. No. 38808<br><br>ORDER |

On further consideration of the record of trial, as supplemented following the order of the Court dated October 28, 2016, it is, by the Court, this 21st day of November, 2016,

ORDERED:

That the parties brief the following specified issue:

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

The parties will brief this issue contemporaneously, and file their briefs on or before

December 1, 2016. It is further ordered that the Court will hear oral argument only on the specified issue at the hearing scheduled for December 7, 2016, and that the order allotting amicus curiae 10 minutes to present oral argument is hereby rescinded.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Nicole A. Dalmazzi,<br>Appellant | USCA Dkt. No. 16-0651/AF<br>Crim.App. No. 38808<br><br>ORDER |

On further consideration of the granted issues, it appears that the record of trial and joint appendix contain information documenting the President's nomination of Colonel Martin Mitchell to the United States Court of Military Commission Review (CMCR), as well as the Senate's confirmation of Colonel Mitchell to that position. However, it does not appear that there is adequate evidence in the record demonstrating that Colonel Mitchell was subsequently appointed to the CMCR. Accordingly, it is, by the Court, this 28th day of October, 2016,

ORDERED:

That on or before the 8th day of November, 2016, counsel for the parties shall file documentation with the Court relating to Colonel Mitchell's 2016 appointment and commission to the CMCR, and establishing the date when he took the oath of office to execute that appointment.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Nicole A. Dalmazzi,<br>Appellant | USCA Dkt. No. 16-0651/AF<br>Crim.App. No. 38808<br><br>ORDER |

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 18th day of August, 2016,

ORDERED:

That said petition is hereby granted on the following issues:

I. WHETHER UNITED STATES COURT OF MILITARY COMMISSION REVIEW JUDGE, MARTIN T. MITCHELL, IS STATUTORILY AUTHORIZED TO SIT AS ONE OF THE AIR FORCE COURT OF CRIMINAL APPEALS JUDGES ON THE PANEL THAT DECIDED APPELLANT'S CASE.

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

Briefs will be filed under Rule 25.

The Chiefs of the Appellate Defense and Appellate Government Divisions of the United States Army, the United States Coast Guard, and the United States Navy-Marine Corps are invited to file *amicus curiae* briefs on these issues. These briefs will be filed under Rule 26.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

---

UNITED STATES

v.

Second Lieutenant NICOLE A. DALMAZZI

United States Air Force

ACM 38808

ORDER

Panel No. 3

---

On 12 May 2016, this Court issued an opinion affirming the findings and sentence in Appellant's case. *United States v. Dalmazzi*, ACM 32708 (A.F. Ct. Crim. App. 12 May 2016) (unpub. op.). Appellant filed a motion to vacate this opinion on 27 May 2016. The United States filed its motion in opposition on 22 June 2016.

Appellant has since filed a petition for grant of review of her case with the United States Court of Appeals for the Armed Forces. *United States v. Dalmazzi*, __ M.J. __, No. 16-0651/AF (Daily Journal 11 July 2016). Given the petition, this Court no longer possesses jurisdiction over Appellant's case. *See United States v. Riley*, 58 M.J. 305, 310 n.3 (C.A.A.F. 2003).

Accordingly, it is by the Court on this 18th day of July, 2016,

ORDERED:

That Appellant's Motion to Vacate is DISMISSED.

[SEAL] FOR THE COURT

LAQUITTA J. SMITH

APPELLATE PARALEGAL SPECIALIST

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Second Lieutenant NICOLE A. DALMAZZI

United States Air Force

ACM 38808

12 May 2016

Sentence adjudged 21 January 2015 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: L. Martin Powell (sitting alone).

Approved Sentence: Dismissal and confinement for 1 month.

Appellate Counsel for Appellant: Major Thomas A. Smith.

Appellate Counsel for the United States: Lieutenant Colonel Roberto Ramirez and Gerald R. Bruce, Esquire.

Before

MITCHELL, DUBRISKE, and BROWN

Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

DUBRISKE, Judge:

Appellant, in accordance with her plea, was found guilty of wrongfully using ecstasy, a Schedule I controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A second charge and specification, alleging Appellant obstructed the investigation into her drug use by repeatedly dyeing her hair in an effort to avoid forensic detection, was dismissed after acceptance of her plea pursuant to a pretrial agreement.

Appellant was sentenced by a military judge sitting alone to a dismissal and one month of confinement. The general court-martial convening authority approved the sentence as adjudged.

On appeal, Appellant raises two issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). First, Appellant alleges the military judge erred in not dismissing the charges against her due to unlawful command influence. Second, Appellant argues her sentence is inappropriately severe. Finding no error, we affirm the findings and sentence.

*Background*

In January 2014, the Air Force Office of Special Investigations (AFOSI) opened drug investigations against a small number of commissioned officers, including Appellant, who were stationed at six different Air Force installations. AFOSI investigators, during the course of analyzing cell phones seized during these investigations, also discovered some of these same officers had improperly disclosed proficiency testing materials for

officers operating intercontinental ballistic missile systems.

The subsequent command-directed investigation of the test compromise allegations identified almost 100 potential suspects, including Appellant. The test compromise investigation drew significant media attention, and resulted in press conferences and statements from senior leaders within both the Department of Defense and the Department of the Air Force. These statements and press conferences were almost exclusively focused on the test compromise investigation and, eventually, the disciplinary results and corrective actions stemming from the investigation. While the original drug investigations were mentioned during some senior leader statements as the reason the test compromise allegations were discovered, only generic details about the actual investigations were ever released. One senior leader, when specifically asked about the drug allegations, declined to discuss any details as the criminal investigations were ongoing.

Disciplinary action on the test compromise allegations was eventually handled by the numbered air force commander with authority over the involved officers. There was insufficient evidence to support disciplinary action against Appellant for compromising proficiency testing materials.

Appellant was eventually charged with using ecstasy on "divers" occasions and impeding the AFOSI investigation against her. After charges against her were referred to general court-marital, the basic details regarding her trial proceedings were released to the public.

*Unlawful Command Influence*

On appeal, Appellant claims the military judge erred in denying her motion to dismiss all charges due to unlawful command influence. Appellant, adopting her arguments at trial, primarily alleges the disciplinary fallout from the much publicized test compromise investigation, which resulted in Appellant's chain of command being relieved of their leadership positions, pressured Appellant's current chain of command to bring criminal charges against her due to fear they would likewise lose their command positions if they failed to hold Appellant accountable.

Article 37(a), UCMJ, 10 U.S.C. § 837(a), states: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof, in reaching the findings or sentence in any case . . . ." The mere appearance of unlawful command influence may be "as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Ayers*, 54 M.J. 85, 94–95 (C.A.A.F. 2000) (quoting *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991)).

We review allegations of unlawful command influence de novo. *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). "On appeal, the accused bears the initial burden of raising unlawful command influence. Appellant must show: (1) facts, which if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the

unfairness." *Id.* (citing *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999)). The initial burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). Appellant must initially present "some evidence" of unlawful command influence. *Id.* (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)).

After an issue of unlawful command influence is raised by some evidence, the burden shifts to the Government to rebut an allegation by persuading the court beyond a reasonable doubt that: (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence will not affect the findings or sentence. *Biagase*, 50 M.J. at 151. "Where, as here, the issue is litigated on the record at trial, the military judge's findings of fact are reviewed under a clearly erroneous standard, but the question of command influence flowing from those facts is a question of law that this court reviews de novo." *United States v. Jeter*, 74 M.J. 772, 778 (A.F. Ct. Crim App. 2015), *pet. rev. denied*, 75 M.J. 63 (C.A.A.F. 2015).

As an initial matter, we adopt the military judge's findings of fact as they are supported by the record. Upon our independent review of the question of law, we likewise find Appellant failed to meet her initial burden of showing the pretrial publicity and disciplinary response for the test compromise investigation constituted actual or apparent unlawful command influence as it related to the charges in her case. The record clearly establishes

the senior leader and command involvement cited by Appellant was focused almost exclusively on matters unrelated to Appellant's case. As such, the argument her command's decision to move forward on drug charges was somehow influenced by a fear of being relieved of command is speculative at best. In so holding, we would note the decision to court-martial a commissioned officer accused of repeatedly using illegal narcotics, instead of imposing some form of administrative action, is not an anomaly within the military justice system.

Moreover, as noted by the military judge, Appellant's theory that her chain of command was unduly concerned about the consequences of disciplinary inaction was rebuffed by the fact that action was not taken against her for compromising testing materials. Commanders fearful they would meet the same fate as their predecessors should have driven them to hold Appellant accountable for all possible disciplinary violations. Appellant's speculative claim is therefore insufficient in our opinion to shift the burden of proof to the Government on this issue.

Assuming, arguendo, that Appellant produced some evidence that unlawful command influence had the potential to impact the trial proceedings, we find beyond a reasonable doubt that this judge alone case was not impacted by actual or apparent unlawful command influence. An objective, disinterested member of the public, fully informed of all facts and circumstances, would not harbor a significant doubt as to the fairness of Appellant's trial. *See United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).

*Sentence Appropriateness*

This court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 148 (C.A.A.F. 2010).

After giving individualized consideration to this particular Appellant, her relatively brief record of service, the nature and seriousness of the offense, and all other matters contained in the record of trial, we decline to grant Appellant the relief she requests before this court. The approved sentence for Appellant's repeated use of an illegal drug is not unduly harsh or otherwise inappropriate in our opinion.

*Conclusion*

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

Accordingly, the findings and the sentence are AFFIRMED.

[SEAL] FOR THE COURT
LAQUITTA J. SMITH
Appellate Paralegal Specialist

## III. *Cox* (No. 16-1017): Lower-Court Orders, Opinions, & Relevant Pleadings

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Laith G. Cox,<br>Appellant | USCA Dkt. No. 16-0635/AR<br>Crim.App. No. 20130923<br><br>ORDER |

On further consideration of the granted issues, 75 M.J. 457 (C.A.A.F. 2016), the facts that the United States Army Court of Criminal Appeals issued its judgment in Appellant's case on April 29, 2016, and Appellate Military Judges Paulette V. Burton and James W. Herring were appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 17th day of January 2017,

ORDERED:

That the order issued October 3, 2016, granting review is hereby vacated; and

That Appellant's petition for grant of review is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Laith G. Cox,<br>Appellant | USCA Dkt. No. 16-0635/AR<br>Crim.App. No. 20130923<br><br>ORDER |

On consideration of Appellant's petition for reconsideration of this Court's Order issued September 7, 2016, it is, by the Court, this 3rd day of October, 2016,

ORDERED:

The petition for grant of review is hereby granted on the following issues:

I. WHETHER ACCEPTANCE OF APPOINTMENT AS A CMCR JUDGE TERMINATED THE MILITARY COMMISSIONS OF JUDGE HERRING AND JUDGE BURTON.

II. WHETHER, AS APPOINTED JUDGES OF THE CMCR, JUDGE HERRING AND JUDGE BURTON MEET THE UCMJ DEFINITION OF APPELLATE MILITARY JUDGE.

III. WHETHER THE ASSIGNMENT OF INFERIOR OFFICERS AND PRINCIPAL OFFICERS TO A SINGLE JUDICIAL TRIBUNAL ITSELF VIOLATES THE APPOINTMENTS CLAUSE.

No briefs will be filed under Rule 25.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES ARMY

COURT OF CRIMINAL APPEALS

Before

MULLIGAN, HERRING, and BURTON

Appellate Military Judges

UNITED STATES, Appellee

v.

Captain LAITH G. COX

United States Army, Appellant

ARMY 20130923

Headquarters, U.S. Army Maneuver Support Center of Excellence

Jeffrey R. Nance and Gregory A. Gross, Military Judges

Colonel Robert F. Resnick, Staff Judge Advocate

For Appellant: Captain Jennifer K. Beerman, JA; Mr. Frank J. Spinner, Esquire (on brief); Captain Jennifer K. Beerman, JA; Mr. Frank J. Spinner, Esquire (on reply brief).

For Appellee: Colonel Mark H. Sydenham, JA; Major John K. Choike, JA (on brief).

29 April 2016

---

MEMORANDUM OPINION

---

*This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.*

BURTON, Judge:

An officer panel of sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of aggravated sexual assault of a child, two specifications of indecent liberties with a child, three specifications of sodomy with a child who had attained the age of 12 years but was under age of sixteen years, one specification of conduct unbecoming an officer, three specifications of indecent language to a child, one specification of producing child pornography, one specification of viewing child pornography, and one specification of obstructing justice, in violation of Articles 120, 125, 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, 933, 934 (2006 & Supp. IV 2011) [hereinafter UCMJ]. The panel sentenced appellant to a dismissal and confinement for forty years. The convening authority approved the findings and sentence as adjudged and credited appellant with nineteen days against the sentence to confinement.

Appellant's case is before this court for review under Article 66, UCMJ. Appellate defense counsel raises four errors, one of which merits discussion and partial relief.[1] After review of the entire record, we find no evidence to support various specifications of Charge III as being prejudicial to good order and discipline in the armed forces. We will provide relief in our decretal paragraph.

---

[1] We have also reviewed those matters personally raised by appellant pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982), and they are without merit.

## FACTS

Appellant, a thirty-two year old, married man, met Miss DS, a fourteen year old girl,[2] on an adult-oriented website.[3] On that website, DS represented herself as a nineteen year old woman.[4] Appellant contacted DS through the website. They spoke several times on the phone and communicated through electronic media to include text messages and email. On 11 September 2011, appellant set up a time to meet DS in Norman, Oklahoma. On their first meeting appellant met DS in a parking lot across the street from where she lived with her mother and younger sisters. They engaged in sexual intercourse in appellant's vehicle and appellant took photos of DS in various stages of undress. Later that night, appellant met DS in the same parking lot. They drove to a motel where appellant engaged in anal, oral and vaginal intercourse with DS. Appellant took photographs and video-recorded the sexual acts with DS.

On 1 October 2011, appellant visited DS again. He picked her up in a parking lot near her home and

---

[2] DS testified she was born on 25 September 1996. Thus at the time of the incident on 11 September 2011, she was fourteen years old.

[3] The adult-oriented website is for people who would like to indulge in their sexual fantasies, and a relationship site for people who want a fling, casual dating, or sexual encounter with men, women, transsexuals, and/or couples.

[4]The website does not allow guests under the age of eighteen to register for the website. At the time of trial DS was seventeen years old.

drove to a motel. While at the motel, they again engaged in various sexual acts to include anal, oral and, vaginal intercourse. Appellant once again took photographs and video-recorded these sexual acts.

Appellant and DS discussed her age on several occasions. DS testified that before they met, she was on the telephone with appellant while she was attending a "kid's party." When appellant inquired as to why she was at a "kid's party," she told him she was fourteen years old and he replied, "[i]t doesn't really matter. I already like you anyway." According to DS she never told him any other age other than fourteen with the exception of what he saw posted on the adult-oriented website. On the video taken on 11 September 2011, prior to any sexual acts occurring, appellant asked DS to state her name and her age, and DS responded with her name and "fourteen." DS was aware that appellant was in the Army because he told her. Law enforcement located appellant by contacting a military installation.

LAW AND ANALYSIS

In accordance with Article 66(c), UCMJ, we review issues of legal and factual sufficiency de novo. *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987); *see also Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *United States v. Humphreys,* 57 M.J. 83, 94 (C.A.A.F. 2002). In resolving questions oflegal sufficiency, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner,* 56 M.J. 131, 134 (C.A.A.F. 2001). The test for factual

sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner,* 25 M.J. at 325.

Appellant claims there is no evidence that the conduct alleged in Specifications 1, 2, 4 and 5 of Charge III was prejudicial to good order and discipline.[5] We have no dispute that appellant engaged in such conduct, as photographs and videos were admitted at trial of appellant engaging in the conduct as charged. Appellant informed DS that he was in the military and civilian law enforcement officials contacted a military installation to obtain information about appellant's location. The evidence is more than sufficient to support a finding appellant's conduct was service discrediting.

However, our review of the record discloses no evidence to show that appellant's misconduct had any impact on the good order and discipline of his unit. We find the evidence to be less than minimal and insufficient to sustain a finding of guilty as to that language.

CONCLUSION

Having completed our review and in consideration of the entire record, we AFFIRM only so much of the Specifications 1, 2, 4 and 5 of Charge III as finds:

---

[5] Appellant alleges that the evidence is factually insufficient to sustain a conviction of the specifications alleged in Charges I and III and the Additional Charge. We only address the sufficiency of Charge III and its specifications as they pertain to prejudice to good order and discipline.

Specification 1: In that [appellant], did, while on board the SS OAK HILL and/or assigned to Key West Naval Air Station,[6] on or about 10 December 2011, in writing communicate to Ms. [DS], a child under the age of 16 years, certain indecent language, to wit:

> "I would wear a mask, so all she would know is that I was hella old, and then just to make my point I would pull out of you and nut on her face. Then as it dripped down cuz she couldn't wipe it cuz her hands are tied, I'd just fuck you again,"
>
> "I was getting worried I wouldn't get to pound your sexy ass again,"
>
> "I need my little sluts pussy like now,"
>
> "you still want me to rape you,"
>
> "I wish I could come over there and fuck you all over her bed,"

---

[6] In Specification 1 and 2 of Charge III, appellant was charged with "while on board the SS OAK HILL[sic]; he was found guilty except the words "SS OAK HILL" substituting therefore the words "SS OAK HILL and/or assigned to Key West Naval Air Station." We note the proper designation of this vessel is "USS Oak Hill." We hold the incorrect designation harmless in Specifications 1, 2, and 5 of Charge III.

> "I could really use some pussy right now, its been fucking months,"

or words to that effect, and that such conduct was of a nature to bring discredit upon the armed forces.

Specification 2: In that [appellant], did, while on board the SS OAK HILL and/or assigned to Key West Naval Air Station on about 24 December 2011, in writing communicate to Ms. [DS], a child under the age of 16 years, certain indecent language, to wit:

> "remember what I said that one time about fucking you in front of her and then bustin my nut all over her face,"
>
> "how about you just bring her alone and she can watch me fuck you and then we will see what she is up for,"
>
> "who is [KW]? Well I'd like to fuck around with her"
>
> "I just want her to watch me fuck you and
>
> suck on my dick a little and video me cumming on her, you think she would come and play, and I promise I won't fuck her, thats what I want for Christmas,"

or words to that effect, and that such conduct was of a nature to bring discredit upon the armed forces.

> Specification 4: In that [appellant], did at or near Norman, Oklahoma, between on and about 11 September 2011 to on or about 2 October 2011, knowingly and wrongfully produce child pornography to wit: a video of sexually explicit conduct between the said [appellant] and Ms. [DS], a child under the age of 16, and that such conduct was of a nature to bring discredit upon the armed forces.
>
> Speciation 5: In that [appellant], did while on board the SS OAK HILL, between 20 December 2011 to on or about 24 December 2011, knowingly and wrongfully view child pornography, to wit: a video of sexually explicit conduct between the said [appellant] and Ms. [DS], a child under the age of 16, and that such conduct was of a nature to bring discredit upon the armed forces.

The remaining findings of guilty are AFFIRMED. We are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of circumstances presented by appellant's case and in accordance with the principles articulated by our superior court in *United States v. Winckelmann,* 73 M.J. 11, 15-16 (C.A.A.F. 2013) and *United States* v. *Sales,* 22 M.J. 305 (C.M.A. 1986). The maximum sentence appellant could have received included confinement in excess of 100 years. We are confident that based on the entire record and appellant's course of conduct, the panel would have imposed a sentence of at least that which was adjudged, and

accordingly we AFFIRM the sentence. We find this reassessed sentence is not only purged of any error but is also appropriate. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by our decision, are ordered restored.

Senior Judge MULLIGAN and Judge HERRING concur.

FOR THE COURT:

[SIGNATURE]
MALCOLM H. SQUIRES, JR.
Clerk of Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Courtney A. Craig,<br>Appellant | USCA Dkt. No. 16-0650/AR<br>Crim.App. No. 20150272 |

ORDER

On further consideration of the granted issues, 75 M.J. 470 (C.A.A.F. 2016), the facts that the United States Army Court of Criminal Appeals issued its judgment in Appellant's case on May 10, 2016, and Appellate Military Judges Paulette V. Burton and James W. Herring were appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 17th day of January 2017,

ORDERED:

That the order issued October 20, 2016, granting review is hereby vacated; and

That Appellant's petition for grant of review is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Courtney A. Craig,<br>Appellant | USCA Dkt. No. 16-0650/AR<br>Crim.App. No. 20150272<br><br>ORDER |

On consideration of Appellant's petition for reconsideration of this Court's Order issued 12 August 2016, it is, by the Court, this 20th day of October, 2016,

ORDERED:

That said petition for reconsideration is hereby granted, that the Order of 12 August 2016, denying the petition for grant of review is hereby vacated, and that the petition for grant of review is hereby granted on the following issues:

I. WHETHER ACCEPTANCE OF APPOINTMENTS AS CMCR JUDGES TERMINATED THE MILITARY COMMISSIONS OF JUDGE HERRING AND JUDGE BURTON.

II. WHETHER, AS APPOINTED JUDGES OF THE CMCR, JUDGE HERRING AND JUDGE BURTON DO NOT MEET THE UCMJ DEFINITION OF APPELLATE MILITARY JUDGES.

III. WHETHER THE ASSIGNMENT OF INFERIOR OFFICERS AND PRINCIPAL OFFICERS TO A SINGLE JUDICIAL TRIBUNAL ITSELF VIOLATES THE APPOINTMENTS CLAUSE.

No briefs will be filed under Rule 25.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS
Before
MULLIGAN, HERRING, and BURTON
Appellate Military Judges
UNITED STATES, Appellee
v.
Specialist COURTNEY A. CRAIG
United States Army, Appellant
ARMY 20150272
Headquarters, Fort Riley
Charles L. Pritchard, Jr., Military Judge
Lieutenant Colonel Timothy A. Furin,
Staff Judge Advocate

For Appellant: Major Christopher D. Coleman, JA (argued); Lieutenant Colonel Charles D. Lozano, JA; Lieutenant Colonel Jonathan F. Potter, JA; Major Christopher D. Coleman, JA (on brief).

For Appellee: Captain Christopher A. Clausen, JA (argued); Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie, III, JA; Major Daniel D. Demer, JA; Captain Christopher A. Clausen, JA (on brief).

10 May 2016

---

DECISION

---

Per Curiam:

On consideration of the entire record, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.. [sic]

FOR THE COURT:
[SIGNATURE]
MALCOLM H. SQUIRES, JR
Clerk of Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Andrew K. Lewis,<br>Appellant | USCA Dkt. No. 16-0660/AF<br>Crim.App. No. 38671 |

ORDER

On further consideration of the granted issue (Daily Journal Dec. 19, 2016), the facts that the United States Air Force Court of Criminal Appeals issued its judgment in Appellant's case on May 17, 2016, and Colonel Martin T. Mitchell was appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 27th day of December, 2016,

ORDERED:

That the order of December 19, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Andrew K. Lewis,<br>Appellant | USCA Dkt. No. 16-0660/AF<br>Crim.App. No. 38671 |

ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 19th day of December, 2016,

ORDERED: That said petition is hereby granted on the following issue:

WHETHER JUDGE MARTIN T. MITCHELL, A JUDGE ON THE COURT OF MILITARY COMMISSION REVIEW, WAS STATUTORILY AUTHORIZED TO SIT ON THE AIR FORCE COURT OF CRIMINAL APPEALS, AND EVEN IF HE WAS STATUTORILY AUTHORIZED TO BE ASSIGNED TO THE AIR FORCE COURT OF CRIMINAL APPEALS, WHETHER HIS SERVICE ON BOTH COURTS VIOLATED THE APPOINTMENTS CLAUSE GIVEN HIS NEWLY ATTAINED STATUS AS A SUPERIOR OFFICER.

No briefs will be filed under Rule 25.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

IN THE UNITED STATES AIR FORCE

COURT OF CRIMINAL APPEALS

UNITED STATES OF AMERICA,

Appellee,

v.

ANDRE K. LEWIS

Staff Sergeant (E-5)

U.S. Air Force,

Appellant.

MOTION TO VACATE DENIAL OF RECONSIDERATION DECISION DUE TO PARTICIPATION OF UNITED STATES COURT OF MILITARY COMMISSION REVIEW JUDGE MITCHELL

Special Panel

AFCCA No. 38671

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

COMES NOW Appellant, pursuant to Rule 23 of this Court's Rules of Practice and Procedure, and moves to vacate this Honorable Court's decision to deny reconsideration, dated 17 May 2016, due to the participation of United States Court of Military Commission Review ("C.M.C.R.") Judge Martin T. Mitchell.

Statement of Facts

A) Under the 2006 Military Commissions Act ("MCA"), the C.M.C.R. was the Statutory Equivalent to the Boards of Review Established by Congress Under the UCMJ in 1950.

In response to the Supreme Court's decision in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), Congress passed and the President signed the Military Commissions Act of 2006, 120 Stat 2600 ("2006 Act"). The purpose of the 2006 Act, as President Bush explained, was to establish "a comprehensive statutory structure that would allow for the fair and effective prosecution of captured members of al Qaeda and other unlawful enemy combatants." 152 Cong. Rec. 17,189 (Sept. 6, 2006) (Message from the President).

As part of that structure, Congress agreed with the President's proposal to give the accused a right of appeal. The first level of appellate review was to be conducted by a new entity, the "Court of Military Commission Review." Congress constructed this tribunal as an agency review board within the Department of Defense, that the Secretary of Defense would establish under his control. 10 U.S.C. § 950f(a) (2006). This was also reflected in the first *Manual for Military Commissions*, which noted that the C.M.C.R. existed "[w]ithin the Office of the Secretary of Defense." R.M.C. 1201(a) (2007).

Consistent with its status as an agency review board, Congress authorized the Secretary to exercise complete control over the composition, and hence the functioning, of the C.M.C.R.. The statute made no provision for the appointment of "judges" in the

constitutional sense. Instead, the Secretary was authorized to "assign appellate military judges" to the C.M.C.R.. 10 U.S.C. § 950f(b) (2006); *see also Weiss v. United States*, 510 U.S. 163, 171-72 (1994) (distinguishing between appointing and assigning appellate military judges). These could be either a commissioned officer in the Armed Forces who was qualified to serve as a judge advocate or "a civilian with comparable qualifications." *Id*. The choice was left to the Secretary's discretion.

In either case, the statute placed no conditions on the Secretary's authority to assign or remove a C.M.C.R. judge. Indeed, while Congress prohibited unlawful attempts to coerce or influence the actions of a military commission, this protection was expressly limited to adverse personnel actions against panel members, trial and defense counsel, and military trial judges. 10 U.S.C. §949b(a) (2006). The members of the C.M.C.R. were, instead, at will employees of the Secretary.[1]

Finally, although the C.M.C.R. was intended to adjudicate the rights of an accused, it did not enjoy many of the attributes traditionally associated with a court. For example, the Secretary interpreted the statute to deprive the C.M.C.R. of any authority under the All Writs Act, which extends to "all courts

---

[1] The C.M.C.R. was modeled on the service Courts of Criminal Appeals, which are established by the Judge Advocate General for each military branch. 10 U.S.C. § 866. The Judge Advocates General "may … remove a Court of Criminal Appeals judge from his judicial assignment without cause." *Edmond v. United States*, 520 U.S. 651, 664 (1997).

established by Act of Congress." 28 U.S.C. § 1651. Whereas the statute gave the Government a limited right to file interlocutory appeals to the C.M.C.R. and to the Court of Appeals for the District of Columbia Circuit, 10 U.S.C. § 950d (2006), the Secretary promulgated a rule stating that any other "[p]etitions for extraordinary relief will be summarily denied." Rule 21(b), C.M.C.R. Rules of Practice (2008).

B) Under the 2009 MCA, Congress Reformed the C.M.C.R. and Elevated the Court to an Article I Court of Record Equivalent to C.A.A.F.

Upon taking office in 2009, President Obama exercised his authority as Commander in Chief to halt all military commission proceedings, stating that the procedures contained in the 2006 MCA had "failed to establish a legitimate legal framework." Remarks by the President on National Security (May 21, 2009). He urged Congress to reform the system in order to make "military commissions a more credible and effective means of administering justice." *Id.* In response, Congress enacted the 2009 MCA, one of the principal goals of which was to "strengthen the military commissions system during appellate review." *Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War: Before the Sen. Comm. on Armed Services*, 111th Cong. 5 (2009) (Statement of Sen. McCain).

The most significant structural reforms made by the 2009 Act was the abolition of the C.M.C.R. as an agency review board under the Secretary's supervision and the establishment of a new C.M.C.R. as the fifth independent Article I court of record in

the federal system.[2] 10 U.S.C. § 950f(a) (establishing the C.M.C.R. as a "court of record"); *see also* RMC 1201(a) (2012). The phrase "court of record" is a term of art that Congress uses when it intends to establish an adjudicatory tribunal that is functionally independent of the Political Branches. The 2009 Act followed this settled usage.

The C.M.C.R. exercises judicial powers to the exclusion of any other function. Absent a timely election by the accused to waive his appellate rights, the court is obligated to "review the record in each case … with respect to any matter properly raised by the accused." 10 U.S.C. § 950f(c). Congress endowed the court with the power to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses." *Id*. §950f(d). Finally, unlike this Court, the court's decisions are binding on the United States, without

---

[2] There are currently four other Article I courts of record: (1) the United States Court of Appeals for the Armed Forces (10 U.S.C. § 941); (2) the United States Tax Court (26 U.S.C. § 7441); (3) the United States Court of Federal Claims (28 U.S.C. § 171); and (4) the United States Court of Appeals for Veterans Claims (38 U.S.C. § 7251). This designation has also been used with respect to territorial courts established under Article IV. *See* 48 U.S.C. § 1424(a)(3) (District Court of Guam); 48 U.S.C. § 1611(a) (District Court for the Virgin Islands); 48 U.S.C. § 1821(a) (District Court for the Northern Mariana Islands). The judges on these courts have statutory tenure to ensure their judicial independence.

the review or approval of any Executive Branch official. *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997). Instead, like the judgments of a federal district court or the Court of Appeals for the Armed Forces (C.A.A.F.), the C.M.C.R.'s decisions are appealable only to the Court of Appeals for the District of Columbia Circuit and the Supreme Court. 10 U.S.C. §950g (2012).

Consistent with the C.M.C.R.'s elevated status, the 2009 Act requires the President to appoint civilian judges through the formal mechanism of the Appointments Clause. 10 U.S.C. §950f(b)(3).[3] The 2009 Act retained, however, the Secretary's authority to assign "commissioned officers of armed forces" to also serve as appellate judges. 10 U.S.C. § 950f(b)(2). But to afford these officers the same degree of judicial independence enjoyed by the civilian appointees, Congress prohibited the President or the Secretary from reassigning these officers at will. In contrast to the military courts of appeal convened by the various services under the Uniform Code of Military Justice, 10 U.S.C. § 866(a), the 2009 Act imposes a good-cause removal standard for military officers assigned to the C.M.C.R.. *Id.* §949b(b)(4)(D)

---

[3] The statute is silent with respect to the removal of appointed civilian judges. Given the adjudicative nature of the tribunal, Congress is presumed to have intended them to be removable by the President only for good cause. *Wiener v. United States*, 357 U.S. 349, 356 (1958) (President has no inherent power to remove constitutionally appointed quasi-judicial officers "and none is impliedly conferred upon him by statute simply because Congress said nothing about it.").

("No appellate military judge … may be reassigned to other duties, except … for good cause consistent with applicable procedures under [the UCMJ]."). The statute also prohibits any person from attempting to influence (by threat of removal or otherwise) "the action of a judge" in an individual proceeding before the C.M.C.R.. *Id*. §949b(b)(1)(a). Furthermore, no one may "censure, reprimand, or admonish a judge … with respect to any exercise of their functions in the conduct of proceedings." *Id*. §949b(b)(2).

On 20 October 2014, Secretary of Defense Chuck Hagel assigned Colonels Martin T. Mitchell and Mark L. Allred to the U.S.C.M.R. as "appellate military judges" pursuant to 10 U.S.C. § 950f(b)(2) (2012). Colonels Mitchell and Allred were sworn in as judges of that Court on 28 and 29 October 2014, respectively.[4]

C) In 2015, the Court of Appeals for the District of Columbia Circuit Suggested that the Assignment of Military Appellate Judges Under 10 U.S.C. 950f(b)(2) Violated the Appointments Clause of the Constitution and Invited the Government to Avoid this Potential Problem by Instead Appointing Additional Judges to the C.M.C.R. Pursuant to 10 U.S.C. 950f(b)(3).

In *In re Al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015), the petitioner sought a writ of mandamus and prohibition ordering the disqualification of appellate

---

[4] http://www.mc.mil/ABOUTUS/USC.M.C.R.Judges.aspx (last visited 6 May 2015).

military judges assigned by Secretary Hagel to the C.M.C.R. because their assignment, as inferior officers, to serve with appointed civilian judges, superior officers, on an Article I court of record, violated the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2. The Court declined to issue the writ, but suggested "the President and the Senate could decide to put to rest any Appointments Clause questions regarding the C.M.C.R.'s military judges. They could do so by re-nominating and re-confirming the military judges to be *C.M.C.R. judges*. Taking these steps—whether or not they are constitutionally required—would answer any Appointments Clause challenge to the C.M.C.R." *Nashiri*, 791 F. 3d at 86.

On March 14, 2016, the President forwarded Colonel Mitchell's nomination to be a judge on the U.S.C.M.C.R to the Senate for confirmation. 162 CONG. REC. 1474 (daily ed. Mar. 14, 2016). Along with Colonel Mitchell's nomination, the President also forwarded the nominations of Captain Donald C. King, U.S. Navy, Colonel Larss G. Celtnieks, U.S. Army, Colonel James W. Herring, U.S. Army, and Lieutenant Colonel Paulette V. Burton, U.S. Army. *Id.* The identical nominations were made pursuant to 10 U.S.C. § 950f(b)(3), which permits the President, with advice and consent of the Senate, to appoint "additional judges to the United States Court of Military Commission Review." *Id.* The President had previously used §950f(b)(3) to appoint two civilians, Scott L. Silliman and William B. Pollard, to serve as "additional judges" to serve alongside the "appellate military judges" previously assigned by the Secretary of Defense under 10 U.S.C. § 950f(b)(2).

On 28 April 2016, the Senate confirmed Colonel Mitchell as an "additional judge" pursuant to §

950f(b)(3). On May 2, 2016, Judge Mitchell, as the presiding judge of the C.M.C.R., issued an order dissolving a court-ordered stay in *United States v. Al-Nashiri*, No. 14-001 (C.M.C.R. May 2, 2016) (order).

## Argument

### I

### C.M.C.R. JUDGE MITCHELL IS NOT STATUTORILY AUTHORIZED TO SIT ON THE AIR FORCE COURT OF CRIMINAL APPEALS.

#### A) Judge Mitchell Terminated His Military Commission Upon Accepting His Current Office.

Federal law prohibits active-duty officers holding civil office in the Government of the United States. 10 U.S.C. § 973 (2012). These include 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) (2012). This statute dates to 1870, and its proponents sought 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). "Congress was also interested in assuring the efficiency of the military by preventing military personnel from assuming other official duties that would substantially interfere with their performance as military officers." *Id.*

Four years after *Riddle* was decided, the Department of Justice's Office of Legal Counsel was asked to opine on whether "a commissioned military officer can retain his commission if he accepts a Presidential designation as Acting Administrator of General Services." 2 U.S. Op. Off. Legal Counsel 148 (1979). Citing *Riddle*, the Office of Legal Counsel

concluded he could not. Section 973 "embodies an important policy designed to maintain civilian control of the Government." *Id.* at 150. "We therefore conclude that a military officer who does not occupy a statutory office in a military department is not eligible for designation as Acting Administrator of General Service and that, in any event, acceptance or the exercise of its functions would result in the termination of his military commission." *Id.* While §973 was later amended, the Standards of Conduct Office opined in 2002 that §973 "as a general rule, requires retirement or discharge for members elected or appointed to a prohibited civil office." DoD SOCO, Advisory Number 02-21, What Constitutes Holding a "Civil Office" by Military Personnel (2002).

Upon accepting his current office, and by further performing the duties of that office, Judge Mitchell forfeited his commission as a matter of law. *Id.* Absent a second Presidential nomination and Senate confirmation of Mr. Mitchell to this Court, Mr. Mitchell's service on this Court—and its decision in this case—is void. *United States v. Janssen*, 73 M.J. 221 (C.A.A.F. 2014).

B) Even if Judge Mitchell Retained His Military Commission Upon Accepting His Current Office, the Uniform Code of Military Justice does not Authorize the Judge Advocate General to Appoint Judges of the Court of Military Commission Review to the Air Force Court of Criminal Appeals.

Having been confirmed as an "additional judge" pursuant to § 950f(b)(3), relating to civilian appointees, Mr. Mitchell no longer meets the statutory definition of either a "military judge" or

"appellate military judge," and the Judge Advocate General is without authority to appoint a judge from an Article I, court of record to the Air Force Court of Criminal Appeals. Article 26, UCMJ, provides:

> A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed for of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

10 U.S.C. § 826 (2012).

With respect to "appellate military judges," Article 66, UCMJ, requires the Judge Advocate General to establish a Court of Criminal Appeals, "which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges." 10 U.S.C. § 866 (2012).

Nothing in the plain language of Article 66, UCMJ, permits the Judge Advocate General to assign judges appointed to Article I Courts of Record to a Court of Criminal Appeals, and the Judge Advocate General's attempt to do so is no more valid than an attempt to assign a judge to this Court from the United States Court of Appeals for Veterans Claims.

Even in his former status as both a commissioned officer and an "appellate military judge" assigned to

the C.M.C.R. by the Secretary of Defense, Judge Mitchell did not meet the strict definition of "military judge" provided for in Article 26, UCMJ, in that he was not "assigned and directly responsible to the Judge Advocate General [of the Air Force]." 10 U.S.C. § 826 (2012). In accordance with 10 U.S.C. § 949b(4), Judge Mitchell was assigned and directly responsible to the Secretary of Defense, and he formerly could not have been assigned other duties unless under circumstances not applicable in this case.

However, he lost his *assigned* status to the C.M.C.R. when the President and Congress employed the appointments process to *appoint* him as an "additional judge" to that Court. He cannot simultaneously serve as an "appellate military judge" and an "additional judge" to the assigned "appellate military judges" on the C.M.C.R. when the statute expressly provides, "[j]udges on the Court shall be assigned *or* appointed[.]" 10 U.S.C. § 950f(b)(1) (2012); *United States v. Chilcote,* ("The disjunctive 'or' and the conjunctive 'and,' as used in a legislative enactment, are not the equivalent of each other and are not to be considered as interchangeable unless reasonably necessary in order to give effect to the intention of the enacting body. *Earle v. Zoning Board of Review of City of Warwick*, 96 R.I. 321 (R.I. 1963). When it is employed between two terms describing different subjects of power in a statue, the word 'or' usually implies a discretion when it occurs in a directory provision, and a choice between two alternatives when it occurs in a permissible provision.") (citing *Cherry Lake Farms v. Love*, 129 Fla. 469 (Fla. 1937); *Pompano Horse Club v. State*, 93 Fla. 415 (Fla. 1927)).

Judge Mitchell is one of five active-duty military judges in the history of the UCMJ to be directly

elevated by the President and the Senate to an Article I court of record, and he is to be congratulated. However, Judge Mitchell is now statutorily ineligible to serve on this Court.

WHEREFORE, Appellant respectfully requests this Court set aside its previously issued decision and complete appellate review of Appellant's case in accordance with Article 66, UCMJ.

II

EVEN IF C.M.C.R. JUDGE MITCHELL IS STATUTORILY AUTHORIZED TO BE ASSIGNED TO THE AIR FORCE COURT OF CRIMINAL APPEALS, HIS SERVICE ON BOTH COURTS VIOLATES THE APPOINTMENTS CLAUSE GIVEN HIS NEWLY ATTAINED STATUS AS A SUPERIOR OFFICER.

A) Congress Intended to Establish the C.M.C.R. as an Independent Article I Court.

In the 2009 MCA, Congress exercised its legislative prerogative to establish the C.M.C.R. as a "court of record." By using this designation, "the clear intent of Congress [was] to transform" the C.M.C.R. from an administrative agency within the Department of Defense "into an Article I legislative court." *Freytag v. C.I.R.*, 501 U.S. 868, 888 (1991).

The essential attributes of an Article I court are well-settled. *First*, the C.M.C.R. "exercises judicial, rather than executive, legislative, or administrative, power. It was established by Congress to interpret and apply the [2009 Act] in disputes between [criminal defendants] and the Government. … As an adjudicative body, it construes statutes passed by Congress and regulations promulgated by the [Secretary]." *Freytag*, 501 U.S. at 890-91. By empowering it to adjudicate

cases and controversies falling within the scope of its jurisdiction, Congress vested the C.M.C.R. with "a portion of the judicial power of the United States." *Id.* at 891; *see also Shaw v. United States*, 209 F.2d 811, 813 (D.C. Cir. 1954) (observing that the Court of Military Appeals is "a court in every significant respect, rather than an administrative agency.").

*Second*, Congress intended the C.M.C.R. to be "independent of the Executive and Legislative Branches." *Freytag*, 501 U.S. at 891. Like the judgments of its sister Article I courts, the C.M.C.R.'s "decisions are not subject to review by either Congress or the President," *id.* at 892, but rather are "subject to reversal or change only when challenged in an Article III court." *Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340 (D.C. Cir. 2012). Thus, unlike the service Courts of Criminal Appeals, the C.M.C.R. is neither "directed" nor "supervised" by any other presidentially appointed Executive Branch officials. *Edmond*, 520 U.S. at 663.

Of greatest relevance to this case, Congress also endowed the court's members with good-cause tenure to shield them from the threat of removal at will by the Executive. The civilian appointees on the C.M.C.R. cannot be removed by the President "except under the *Humphrey's Executor* standard of inefficiency, neglect of duty, or malfeasance in office," which is tantamount to "good-cause tenure." *Free Ent. Fund v. Pub. Co. Acctg. Oversight Bd.*, 130 S.Ct. 3138, 3148-52 (2010) (quotation omitted); *see also MFS Securities Corp. v. S.E.C.*, 380 F.3d 611, 619 (2d Cir. 2004) (although the organic statute is silent on removal, it is "commonly understood" that the President's power to remove an SEC commissioner is limited to "inefficiency, neglect of duty or malfeasance in office.") (quotation omitted).

The sole purpose of giving Article I judges statutory tenure is to ensure that they are able to "operate free of presidential direction and supervision." *In re Aiken County*, 645 F.3d 428, 440 (D.C. Cir. 2011) (Kavanaugh, J., concurring); *see also Morrison v. Olson*, 487 U.S. 654, 693 (1988) (noting that limits on the removal power are "essential … to establish the necessary independence of the office"); *Wiener*, 357 U.S. at 356 (describing good-cause tenure as "involving the rectitude of the member of an adjudicatory body"). The Supreme Court has long recognized that "one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935).

The provision of statutory tenure is "not an end in itself," but rather "a means of promoting judicial independence, which in turn helps to ensure judicial impartiality." *Weiss*, 510 U.S. at 179. The core meaning of "impartiality" in this context is "being free from any personal stake in the outcome of the cases to which [a judge] is assigned." *Repub. Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (O'Connor, J., concurring); *see also id.* at 776 (collecting cases). If a military judge on the C.M.C.R. knows that his professional future lies in the unfettered discretion of one of the parties to a dispute before him, it is difficult to believe that he will not have a personal stake in the outcome, especially given the politically contentious nature of military commission proceedings. *Id.* at 789.

Moreover, "the public's confidence" in the system is arguably "undermined simply by the possibility that judges would be unable" to suppress such parochial concerns. *Id.*

Accordingly, when Congress designated the C.M.C.R. as a court of record, it signaled its intent to

enhance the credibility of the system of appellate review by giving the accused a heightened level of due process. The procedural integrity associated with a court of record, coupled with its authority to exercise "broad remedial powers" within the scope of its jurisdiction, gives reviewing courts "greater confidence in the judgment's validity." *Boumediene v. Bush*, 553 U.S. 723, 782 (2008). Congress therefore subjected the findings and sentences of military commissions, which are not courts of record, to direct review by an Article I court that is intended to be "disinterested in the outcome and committed to procedures designed to ensure its own independence." *Id.* at 783.

B) Assigning a Superior Officer Appointed to an Independent Article I Court to a Court of Criminal Appeals Comprised of Inferior Officers Violates the Appointments Clause.

Generally speaking, military officers, "because of the authority and responsibilities they possess, act as 'Officers' of the United States" in the constitutional sense of the term. *Weiss*, 510 U.S. at 169. As such, military officers, including "those serving as military judges must be appointed pursuant to the Appointments Clause." *Id.* at 170. There is also no dispute that "[m]ilitary officers *performing ordinary military duties* are inferior officers," since "no analysis permits the conclusion that each of the [thousands of] active military officers … is a principal officer." *Id.* at 182 (Souter, J., concurring) (emphasis added). Ordinarily, then, an active duty military officer's commission to his current rank, which always requires a Presidential appointment, is sufficient to satisfy the strictures of the Appointments Clause. 10 U.S.C. § 531(a) (original appointments); *id.* §624(c) (promotions).

In *Weiss*, the Supreme Court concluded that military officers assigned to sit as appellate judges on the service Courts of Criminal Appeals act as inferior officers. This finding was rooted in 1) the total oversight over the military officers assigned to sit on the services respective Courts of Criminal Appeals from within the Executive Branch and 2) the fact that their judicial duties to regulate the good order and discipline of service members under the UCMJ was consistent with the general responsibilities given to all other commissioned officers. *Id*. at 170-71, 174-76; *id*. at 196 (Scalia, J., concurring). Thus, a military officer's assignment to an intermediate service court does not offend the Appointments Clause because they are performing duties within the scope of an office to which they were properly appointed, and supervised at all times by superior officers within the Executive Branch.

Three years later in *Edmond*, the Supreme Court reiterated that *none* of the judges on the services' Courts of Criminal Appeals, including civilians appointed by a Department Head, qualify as principal officers. The Court reached this conclusion for two reasons. First, these judges are subject to substantial administrative supervision and oversight by the Judge Advocates General of their respective services. In particular, a Judge Advocate General may "remove a Court of Criminal Appeals judge from his judicial assignment without cause," which "is a powerful tool for control." *Edmond*, 520 U.S. at 664. Secondly, these judges are powerless "to render a final decision" that is binding on the United States "unless permitted to do so by other Executive officers," namely the C.A.A.F., which, like the C.M.C.R., is an Article I court of record composed

Presidential appointees. *Id*. at 665; *see also Whether the Special Master for TARP Executive Compensation is a Principal Officer*, 34 Op. O.L.C. __, 2010 WL 4963118, at *7-8 (Nov. 5, 2010) (opining that the Special Master is an inferior officer because he "is removable at will by the Treasury Secretary" and nothing "preclud[es] the Treasury Secretary from reviewing and revising [his] determinations.").

The consequence in this case is clear. "If military judges were principal officers, the method of selecting them … would [have] amount[ed] to an impermissible abdication by both political branches of their Appointments Clause duties." *Id*. at 189-90 (Souter, J., concurring); *see also United States v. Libby*, 429 F.Supp.2d 27, 43 n.15 (D.D.C. 2006) (the United States Attorney is an inferior officer and thus "cannot be given duties [by the Attorney General] that would elevate him to a 'principal officer.'").

By contrast, C.M.C.R. judges are "principal" officers for Appointments Clause purposes. *Copyright Royalty Bd.*, 684 F.3d at 1338-40 (Copyright Royalty Board judges were principal officers because they were not removable at will by the Librarian of Congress and their decisions were not reversible by any Executive Branch official); *Soundexchange, Inc. v. Librarian of Congress*, 571 F.3d 1227, 1226-27 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (same); *United States v. Libby*, 498 F.Supp.2d 1, 13 (D.D.C. 2007) ("[I]f the scope of authority given to the Special Counsel by the [Attorney General] encompassed duties that no inferior officer could possess, this [would be] strong evidence that the Special Counsel is a principal officer for Appointments Clause purposes.").

Besides acting as "a bulwark against one branch aggrandizing power at the expense of another branch," the Appointments Clause is designed to "preserve[] another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Ryder v. United States*, 515 U.S. 177, 182 (1995) (quotation omitted). "In the Framers' thinking," the Clause's "strict requirements" for choosing the highest ranking positions in the Government promotes democratic accountability by forcing the President and the Senate to publicly share the responsibility "for injudicious appointments." *Weiss*, 510 U.S. at 186 (Souter, J., concurring); *Edmond*, 520 U.S. at 663 (the Clause was "designed to preserve political accountability relative to important Government assignments"). The Constitution endeavors to make the "officers of the United States … the choice, though a remote choice, of the people themselves." The Federalist No. 39 (Madison).

The assignment of inferior officers and appointment of principal officers to a single judicial tribunal itself violates the Appointments Clause. A mixed body of this sort is constitutionally suspect for two basic reasons. *Cf. Nguyen v. United States*, 539 U.S. 69 (2003) (interpreting statute to bar an Article IV federal judge from sitting on Ninth Circuit panel otherwise comprised of Article III judges in order to avoid question of whether such an assignment was constitutional).

*First*, the inferior officers are necessarily subordinate to some other superior officer in the Executive Branch. *Edmond*, 520 U.S. at 662 ("Whether one is an 'inferior' officer depends on whether he has a superior."). It is unclear, to say the

least, how an inferior officer is supposed to exercise supervisory authority over a principal officer on the same judicial tribunal. For the military officers at issue here that superior is the Judge Advocate General. They are all therefore mere agents of the Judge Advocate General. Insofar as he can pack the Court of Criminal Appeals with military officers, he is able to exercise an indirect veto over the President's Senate-confirmed appointees on all matters coming before the Court of Criminal Appeals. This kind of super-superior officer, whose will is expressed entirely *sub rosa* through a multiplicity of subordinates in tandem with Presidential appointees muddles the very lines of accountability the Appointments Clause aims to make transparent.

*Second*, it allows the Executive Branch to use rulemaking to structure government offices in a way that marginalize, if not directly subordinate, the principal officers Congress believed would be actually responsible for policy making. Indeed, unless appointed by the President and confirmed by the Senate, the judges of the Courts of Criminal Appeals operating within the Department of Defense must be military officers. *Janssen*, 73 M.J. at 225. And the Judge Advocate General selects from these "appellate military judges" and designates one of them Chief Judge. 10 U.S.C. 866(a) (2012). Thus, aside from the sheer numerical superiority of the military officers on the Court of Criminal Appeals, Article 66, UCMJ, is being implemented in a way that puts military officers, and by extension the Judge Advocate General, in the position to exercise a formal supervisory authority over the lone superior officer on the Court of Criminal Appeals.

Indeed, Justice Alito highlighted precisely this problem in *DoT v. Association of American Railroads*, 135 S.Ct. 1225, 1239 (2015). The assignment of Amtrak's President raised constitutional problems similar to those in this case, insofar as Amtrak's board operates, like this Court, as an independent multimember body. Justice Alito concluded that any member could "cast the deciding vote with respect to a particular decision. One would think that anyone who has the unilateral authority to tip a final decision one way or the other cannot be an inferior officer." *Id.*

*Finally*, the duties of Court of Criminal Appeals judge are not germane to those of the judges of C.M.C.R. *United States v. Weiss*, 36 M.J. 224, 228 (C.M.A. 1992) (holding a second appointment required if duties of appointed officer are not germane to the duties of the appointed office). While Congress has the unquestioned power to try alien, unprivileged belligerents under the UCMJ, *Hamdan*, 548 U.S. 557 (2006); Article 21, UCMJ, it has established an alternate criminal code applicable only to non-citizens. 10 U.S.C. § 948a (2012). Thus there is no overlap in jurisdiction between the jurisdiction of the Court to which Judge Mitchell has been appointed and this Court. Indeed, Congress stripped military commissions of key attributes of military justice such as Articles 10 and 31, UCMJ. 10 U.S.C. § 948b (2012).

Moreover, the "judicial construction and application" of the UCMJ by this Court and C.A.A.F., "while instructive, is therefore not of its own force binding" on Judge Mitchell and his fellow judges of the C.M.C.R. *Id.* This has led the C.M.C.R. to abandon long-standing military precedent, and created a split between the C.A.A.F. and the

C.M.C.R. *See, e.g. United States v. Al-Nashiri*, No. 14-001 (C.M.C.R. October 10, 2014) (published opinion) ("We are faced with choosing between a strict, literal application of the five-day rule in a fashion equivalent to that employed under Article 62 of the UCMJ, and the less literal computation of time rule applied by federal circuit courts of appeal when resolving timeliness appellate questions under 18 U.S.C. § 3731.") . In short, Judge Mitchell has been appointed to a Court with personal jurisdiction only over aliens, subject matter jurisdiction over statutorily defined crimes against the law of war, and that is not constrained by the decisions of its sister Court, the C.A.A.F. His duties on this Court are not constitutionally germane to his status as an appointed Article I judge.

"The Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Janssen*, 73 M.J. at 221 (citation omitted). In the wake of his appointment to an Article I Court, his participation in this case renders this Court's decision void.

WHEREFORE, Appellant respectfully requests this Court set aside its previously issued decision to deny reconsideration and allow the original panel assigned to Appellant's case to determine whether to grant or deny Appellant's motion for reconsideration.

Respectfully submitted,

[SIGNATURE]
THOMAS A. SMITH, Maj, USAF
Appellate Defense Counsel
Air Force Legal Operations Agency

United States Air Force
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Appellate Government Division on 30 May 2016.

Respectfully submitted,

[SIGNATURE]
THOMAS A. SMITH, Maj, USAF
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770

UNITED STATES AIR FORCE

COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| UNITED STATES, | ) | ACM 38671 |
| Appellee | ) | |
| | ) | |
| v. | ) | |
| | ) | ORDER |
| Staff Sergeant (E-5) | ) | |
| ANDRE K. LEWIS, | ) | |
| USAF, | ) | |
| Appellant | ) | Special Panel |

Appellant was convicted, contrary to his pleas, by a military judge sitting alone of making false official statements, aggravated sexual assault, aggravated sexual contact, abusive sexual contact, and assault consummated by a battery. On 29 March 2016, this Court issued our opinion, modifying the findings in part and reassessing the sentence. In that opinion, we incorrectly stated Appellant was convicted of adultery, but then correctly stated in footnote 2 of the opinion that Appellant was acquitted of that offense. At all times relevant to our appellate review of Appellant's case, the judges of this Court were cognizant of Appellant's acquittal on the charge of adultery.

On 9 May 2016, pursuant to Rule 19 of this Court's Rules of Practice and Procedure and *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant moved this court to reconsider our

decision.[1] In conjunction with the Motion for Reconsideration, Appellant submitted a Motion to File Appendix to Motion for Reconsideration under Seal and a Motion to Attach Appellant's declaration, dated 24 April 2016. The Government opposed the Motion for Reconsideration.

Accordingly, it is ORDERED this 17th day of May, 2016:

1) Appellant's Motion to Attach is GRANTED.

2) Appellant's Motion to File Appendix to Motion for Reconsideration under Seal is GRANTED. Appellant's declaration will be sealed and any copies in the possession of appellate government counsel may be retained solely for the purpose of fulfilling their appellate responsibilities and subsequently destroyed.

3) Appellant's Motion for Reconsideration is DENIED. Appellant fails to show that any grounds for reconsideration exist. *See United States Air Force Court of Criminal Appeals Rules of Practice and Procedure*, Rule 19.2. *See also United States v. Bethea*, 46 C.M.R. 223, 225 (C.M.A. 1973) (evidence not presented at trial cannot be used to support or reverse a conviction).

4) This Court's opinion, dated 29 March 2016, shall be corrected by striking out the first sentence of the opinion and replacing it with the following language: Appellant was convicted, contrary to his pleas, by a military judge sitting alone of making false official statements, aggravated sexual assault,

---

[1] This Court had granted an enlargement of time to Appellant for filing of his motion to reconsider.

aggravated sexual contact, abusive sexual contact, and assault consummated by a battery, in violation of Articles 107, 120, and 128, 10 U.S.C. §§ 907, 920, and 928.[2]

[SEAL] FOR THE COURT

[SIGNATURE]

LAQUITTA J. SMITH

Appellate Paralegal Specialist

[2] A corrected copy is attached to this Order.

UNITED STATES AIR FORCE

COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| UNITED STATES, | ) | ACM 38671 (RECON) |
| Appellee | ) | |
| | ) | |
| v. | ) | |
| | ) | ORDER |
| Staff Sergeant (E-5) | ) | |
| ANDRE K. LEWIS, | ) | |
| USAF, | ) | |
| Appellant | ) | Special Panel |

It is by the Court on this 16th day of May, 2016,

ORDERED:

That the Record of Trial in the above styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review, pursuant to United States Air Force Court of Criminal Appeals Rule 19.2 (d).

The Special Panel in this matter shall be constituted as follows:

ALLRED, MARK, L., Colonel,

Chief Appellate Military Judge

MITCHELL, MARTIN, T., Colonel,

Senior Appellate Military Judge

ZIMMERMAN, LE, T., Colonel,

Appellate Military Judge

[SEAL] FOR THE COURT
[SIGNATURE]
LAQUITTA J. SMITH
Appellate Paralegal Specialist

****CORRECTED COPY – DESTROY ALL OTHERS****

UNITED STATES AIR FORCE

COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ANDRE K. LEWIS

United States Air Force

ACM 38671

29 March 2016

Sentence adjudged 21 April 2014 by GCM convened at Misawa Air Base, Japan. Military Judge: Matthew Stoffel (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Thomas A. Smith.

Appellate Counsel for the United States: Captain Tyler B. Musselman and Gerald R. Bruce, Esquire.

Before

ALLRED, TELLER, and ZIMMERMAN

Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

TELLER, Senior Judge:

Appellant was convicted, contrary to his pleas, by a military judge sitting alone of making false official statements, aggravated sexual assault, aggravated sexual contact, abusive sexual contact, assault consummated by a battery, and adultery, in violation of Articles 107, 120, 128, and 134, UCMJ, 10 U.S.C. §§ 907, 920, 928, 934. Appellant was convicted, contrary to his pleas, by a military judge sitting alone of making false official statements, aggravated sexual assault, aggravated sexual contact, abusive sexual contact, and assault consummated by a battery, in violation of Articles 107, 120, and 128, 10 U.S.C. §§ 907, 920, and 928.

The court sentenced him to a dishonorable discharge, confinement for 6 years, reduction to E-1, and forfeiture of all pay and allowances. The sentence was approved, as adjudged, on 1 September 2014.

The court sentenced him to a dishonorable discharge, confinement for 6 years, reduction to E-1, and forfeiture of all pay and allowances. The sentence was approved, as adjudged, on 1 September 2014.

Appellant argues that (1) his conviction for aggravated sexual assault of one victim is factually insufficient; (2) his convictions for abusive sexual contact, aggravated sexual contact, and assault consummated by a battery of a second victim (and the related false official statement conviction) are legally and factually insufficient; (3) the remaining conviction for false official statement is legally and factually insufficient; and (4) he was prejudiced by the re-assignment of a paralegal who assisted in his

defense to the base legal office that prosecuted his case.[1] We find some merit in Appellant's factual sufficiency argument concerning the aggravated sexual contact conviction and modify the findings and reassess the sentence as described below. We affirm the remainder of the findings.

*Background*

Appellant was convicted of misconduct related to two separate incidents approximately 18 months apart. The first incident, which occurred in November 2011 as Appellant was preparing to leave Ramstein Air Base (AB), Germany, involved sexual acts with Staff Sergeant (SSgt) HP while she was substantially incapacitated. The second, which occurred on or about 13 April 2013 at Misawa AB, Japan, involved several charges related to unwanted sexual contact and battery of SSgt YM.[2]

*Germany Offenses*

There was substantial testimony about the interaction between Appellant and SSgt HP during the evening prior to the sexual misconduct in Germany. SSgt HP was part of a group of Airmen celebrating her birthday and a colleague's impending departure. Appellant had recently returned from a deployment. Appellant had originally planned to go out with a friend of his, SSgt MS, and a friend of

---

[1] The third and fourth assignments of error are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] Although Appellant was charged with sexual and other misconduct related to a third victim in 2012, he was acquitted of all of those charges.

SSgt MS, Mr. RZ. Prior to going out, Appellant parked his car at Mr. RZ's home. In an apparent coincidence, Appellant and SSgt HP ran into each other at a dance club off-base.

The evidence is compelling that SSgt HP became severely intoxicated while at the club. SSgt HP testified that she recalled dancing with Appellant for a few songs then going to sit down with a group of friends. After that, with the exception of two brief memories, she has no recollection of events until she woke up with Appellant at Mr. RZ's home. The two brief memories both involve sexual acts with Appellant which will be discussed in more detail below.

While there was no independent evidence of the circumstances surrounding Appellant's and SSgt HP's departure from the club, Appellant gave a description of the events to agents from the Air Force Office of Special Investigations (AFOSI). The written transcript of the interview and Appellant's written statement were admitted into evidence by the Government. Appellant told AFOSI that he noticed bouncers preparing to escort SSgt HP from the club because of her obvious intoxication and he decided to take her outside to get a taxi. Appellant could not find a taxi willing to take SSgt HP because of her state of drunkenness. At some point, SSgt HP also began to vomit, complicating efforts to convince a taxi to take her home. After his initial efforts to find a taxi for SSgt HP failed, Appellant went back into the club to persuade someone from SSgt HP's group of friends to take responsibility for her. According to Appellant, none of the friends he could find were amenable. Other witnesses who had accompanied SSgt HP to the club testified that they saw Appellant

during this time and he did not ask them to help SSgt HP get home. Appellant told AFOSI that he then decided to get his belongings and get a taxi himself to take SSgt HP home. When Appellant left the club, SSgt HP was no longer in the parking lot, and a bouncer suggested he check the "drunk tent," a small shelter in the parking area to keep intoxicated patrons from being injured. Appellant found SSgt HP passed out in the drunk tent, and after about 40 minutes, finally found a taxi willing to take them. Appellant described the ride as "a bit of a ways" from the club and told agents that the taxi had to stop once during the trip for SSgt HP to step out to vomit. When they arrived at SSgt HP's home, Appellant did not just drop her off, but rather paid for the taxi and got out with SSgt HP. Shortly thereafter, Appellant discovered that SSgt HP did not have her keys. Although SSgt HP easily got in the next day through a partially barred door, she was unable to do so that night and Appellant had no way of getting SSgt HP into the house. Appellant took SSgt HP to the partially open garage and set out a tarp for her to lie down on while he tried to arrange for a ride to Mr. RZ's house.

There is scant evidence of what time Appellant and SSgt HP had left the club. One witness estimated that she arrived with SSgt HP at 0115, stayed for two or three hours, and saw Appellant picking up his coat as she was leaving the club. By her estimate, that would have been approximately 0415. Appellant's cell phone showed a text from Appellant to SSgt MS at 0458, apologizing for leaving the club without him, but making no mention of needing to be picked up from SSgt HP's home. Appellant sent another text message to SSgt MS at

0502 describing SSgt HP as "almost dead." Less than 10 minutes later, Appellant sent a text to SSgt MS, asking him to send a taxi to SSgt HP's home to pick him up. His cell phone memory also indicated several phone calls and texts from 0506 to at least 0600 that are consistent with Appellant's account of the time he spent in the garage of SSgt HP's home.

Appellant was eventually successful in getting his friends to pick them up from SSgt HP's house. Around 0600, SSgt MS and Mr. RZ arrived at SSgt HP's home in a taxi to take Appellant and SSgt HP to Mr. RZ's house. While Appellant's friends testified that SSgt HP was lucid when she arrived at the house, the evidence of bias and lack of candor with law enforcement render that testimony unworthy of belief.

The primary evidence relating to the charged sexual acts comes from Appellant, although SSgt HP testified about two "flashes" of memory. According to Appellant, SSgt HP lay down on the guest room futon, and rather than joining her, he lay down on the floor. After about 30 minutes, he asserts, she verbally invited him to have sex with her, but he demurred. After 10 minutes, he decided to check on her, and she pulled him onto the futon by his belt. According to Appellant, despite her intoxication to the point of passing out when they left the club, SSgt HP had recovered enough to become the sexual aggressor. His version of events describing himself as reluctantly acceding to her sexual advances was unconvincing in light of the evidence of her state of intoxication just hours earlier. SSgt HP testified that she had only two brief recollections between sitting down at the club and waking up the next morning late for work. The first memory started with her

being "face down" on a bed with a person who she later identified as Appellant penetrating her from behind. When asked to describe her position more fully, she testified,

> [SSgt HP:] Um, I was, yeah I was face down. Um, I came from my face up, up from the bed, him, to look behind me [the witness waived her left hand up]. Um, my, um, my legs were hanging over the edge of the bed. Um, my knees, well, my knees were at the edge of the bed.
>
> [Trial Counsel:] And where were your stomach and chest with respect to the bed?
>
> [SSgt HP:] I'm not 100% sure. I pushed up and looked back.
>
> [Trial Counsel:] Did you—how long do you—how long was this piece of memory that you have?
>
> [SSgt HP:] Seconds.

SSgt HP's next recollection was being in the shower with Appellant, but she did not recall any sexual acts during that brief memory.

The next morning, Appellant took SSgt HP to work, where the allegations came to light. Appellant woke SSgt HP up at approximately 1100 because he knew she was scheduled to work. He drove her to her house, where she entered through the partially barred door and changed into her uniform. Appellant then drove her to work. After contacting some friends who were at the club with her, she spoke to her supervisor. She told him that she had become intoxicated, that she remembered Appellant penetrating her, and that she had not wanted that to

happen. The incident was investigated by AFOSI. During the investigation Appellant made specific statements of fact about interactions he had with SSgt HP's friends at the club that, according to the testimony of these individuals, did not occur. No action was taken against Appellant at that time.

*Japan Offenses*

The evidence surrounding Appellant's offenses in Japan is more complete. Unlike the offenses in Germany, this victim's intoxication did not impair her memory, and she testified fully about Appellant's conduct.

Appellant arrived at Misawa AB, Japan, in March 2013 and soon became friends with the victim, SSgt YM. SSgt YM served as Appellant's informal sponsor when he first arrived, and they worked together on the same shift in one of the base dining facilities. Although SSgt YM was in a relationship with Sergeant First Class (SFC) JJ, she and Appellant were good friends and often socialized together.

On 12 April 2013, after a night of drinks and dancing, Appellant and SSgt YM got a suite in on-base lodging. Originally, SSgt YM planned to go out with SFC JJ and perhaps some others to have some drinks. Ultimately SFC JJ was unable to go out because of his duties. Appellant agreed to go out with SSgt YM, but no one else wanted to join them. The two went to a few different bars, ending up at the on-base club, where Appellant tried to teach SSgt YM salsa dancing. While both Appellant and SSgt YM were drinking, neither was substantially intoxicated. A base curfew policy required Airmen in the rank of SSgt or below to be either on base or in their residence by midnight. It was not unusual for non-

commissioned officers subject to the curfew who lived off base to get a room at the on-base lodging facility so they could spend the night on base after going to the club. SSgt YM agreed to get a two-room suite at lodging, planning for her to spend the night in the bedroom and for Appellant to sleep on the sofa in the living room.

The evidence conflicts concerning what happened after the two arrived at lodging. SSgt YM testified as to her recollection of events, and Appellant made statements about the events which were later admitted into evidence. According to both accounts, SSgt YM was disappointed and angry that SFC JJ did not make it a priority to come out with her that night.

SSgt YM testified that as soon as they got in the elevator, Appellant unexpectedly put his arms around her from behind with a "pretty firm grip." Although she testified that she did not want him to place his arms around her and was hoping he would let go, she did not say anything to him. After they got in the room, Appellant removed his arms and SSgt YM sat down in an upholstered chair. Appellant pulled a table next to SSgt YM and began to aggressively ask her if she would have sex with him. SSgt YM testified that she told him no. SSgt YM described how Appellant would use his hand to turn her face back towards him whenever she looked away. SSgt YM testified that he then began to ask her just to kiss him; "[h]e grabbed my, he grabbed my head along my jaw and chin, and he pulled my face towards his and told me to kiss him, and he pressed my face up against his." She testified about her perception of the force used by Appellant.

[Trial Counsel:] What level of force was he using at that particular point?

[SSgt YM:] Um, he was very aggressive. If I were to try to get away, I wouldn't have been able to.

[Trial Counsel:] What makes you say that you wouldn't have been able to get away from him?

[SSgt YM:] I remember the grip on my face being very tight. And if I tried to turn my head, he would turn it back towards his.

[Trial Counsel:] Did he actually succeed in kissing you while he was doing this?

[SSgt YM:] Yes, ma'am.

[Trial Counsel:] What was your reaction when he was doing this to you?

[SSgt YM:] I was scared.

[Trial Counsel:] Can you go into more detail about why you were scared?

[SSgt YM:] Um, I was in shock that it was happening, and I didn't know what to do right at that moment. I was afraid that if I tried to get away, that something was going to happen to me.

[Trial Counsel:] When you say something was going to happen to you, what you mean by that?

[SSgt YM:] Um, with the way he was being aggressive, I didn't know what else could happen. Not necessarily that he was going to try to hit me, but I didn't know what was going to happen.

[Trial Counsel:] Did you kiss him back at any point?

[SSgt YM:] Yes, ma'am. I did.

[Trial Counsel:] And why did you kiss him back?

[SSgt YM:] I thought that if I kissed him back, he would leave me alone.

SSgt YM testified that during this time Appellant also touched her breasts. She testified that while Appellant was kissing her, and she continued to protest, Appellant placed his hands down the front of her shirt and touched her breasts, although she could not recall whether it was directly or through her clothing.

[Trial Counsel:] When he put his hands down your shirt, what exactly did he touch?

[SSgt YM:] He touched my breasts.

[Trial Counsel:] Did he touch your breasts through—did he actually touch the skin of your breasts, or was he just touching some article of clothing?

[SSgt YM:] I don't remember.

[Trial Counsel:] Could you feel his hands actually touching your breasts?

[SSgt YM:] I remember feeling them touch the top of my chest, but I don't remember if they touched my actual—the lower part of my breasts.

[Trial Counsel:] Is it fair to say he was touching the upper parts of your breasts?

[SSgt YM:]: Yes, ma'am.

She described the level of force used to touch her breasts as "maybe a three or four" on a scale of one to ten. She successfully pushed his hands away. She also testified that Appellant removed his shirt and "grabbed [her] hands and put them on his chest, and he also made [her] kiss his chest." She described the level of force he used as a seven out of ten, and stated that she was unable to pull her hands away. SSgt YM testified that after he tried unsuccessfully to get her to kiss him, Appellant asked if he should get a separate room. When she replied that he should, Appellant left.

After Appellant left the room, SSgt YM exchanged a series of calls and instant messages with SFC JJ. SSgt YM asked him to come to the room, but SFC JJ initially declined. In one message, she told SFC JJ, "I OBVIOUSLY NEED U [sic] HERE." She explained the lack of any specific reference to Appellant's conduct as an attempt to avoid making SFC JJ upset before he arrived, but said she wanted him there because she "was afraid" Appellant would come back. The military judge later clarified with her that her fear was not for her physical safety, but instead that Appellant "could have been more aggressive with trying to get [her] to have sex with him or kiss him."

Appellant did in fact return to SSgt YM's room about 20 minutes after he left. He knocked on the door, and SSgt YM, feeling "pretty sure" that it was Appellant, opened the door. SSgt YM testified that over the next three to four minutes Appellant resumed his entreaties to have a relationship with him, again using a force of about seven to bring her lips to his and bring her hands to his chest. She also recounted how he "in the same manner as before" placed his hands down her shirt. She described this

interaction as occurring with her seated on the couch and Appellant kneeling in front of her. She further testified that after getting up to leave, Appellant again tried to pull her towards him to kiss him, and as she was trying to pull away, her arm came free and she hit herself in the mouth with her phone. Specifically, she said that he placed a hand around each of her wrists and tried to pull her towards him using a force of nine out of ten. She testified:

> [Trial Counsel:] And so did he have one hand around each wrist?
>
> [SSgt YM:] Yes, ma'am.
>
> [Trial Counsel:] Were you holding anything in either of your hands?
>
> [SSgt YM:] Yes, ma'am. I had my phone in my right hand.
>
> [Trial Counsel:] And so can you describe how hard you were pulling away—trying to pull away from him?
>
> [SSgt YM:] It—I would have to put a lot of force behind it.
>
> [Trial Counsel:] How long would you say that he was holding her [sic] hands in that particular position?
>
> [SSgt YM:] Just a few seconds.
>
> [Trial Counsel:] How long did you have to pull away before you were successful?
>
> [SSgt YM:] I'd say maybe 2 to 3 seconds.

[Trial Counsel:] Was it something—were you able to pull away right away or did it take some more effort?

[SSgt YM:] It took a little bit of effort.

[Trial Counsel:] What happened when—after you were successful in pulling away?

[SSgt YM:] I hit myself in the mouth with my phone, and once I realized I was bleeding, I went into the bathroom.

The military judge later followed up to attempt to clarify the degree of force used.

[Military Judge:] There were several times where trial counsel asked you how much force it was that Sergeant Lewis applied to you and you described it on a scale of 1 to 10. Can you tell me what one means and what 10 means?

[SSgt YM:] One would be if I could easily just roughly take my hands away. Ten is there is no way I could remove myself or no way I could remove myself from his grip.

[Military Judge:] So you had described that when he had his hands on your wrists trying to pull you towards him, you described that as about a force of a nine?

[SSgt YM:] Yes, sir.

[Military Judge:] So were you able to pull your hands away or did he let your hands go?

[SSgt YM:] I think it was probably a combination of the two. I remember still—I remember having to put a lot of force behind pulling my hands away, but I think he may have let me go at the same time.

[Military Judge:] So if I understand it you had to use a lot of force to pull away, but you think that at some point when he realized you were—really did not want his hands on your wrists that he then let go?

[SSgt YM:] Yes, sir.

[Military Judge:] And is that when your hands came back toward your face?

[SSgt YM:] Yes, sir.

On cross-examination, SSgt YM agreed that she never contended that Appellant intended for the phone to hit her mouth, and agreed the contact was accidental. SSgt YM testified that after she went to the bathroom to check her injury, she and Appellant had a brief, heated conversation, and then Appellant left the room. SFC JJ arrived shortly afterwards, and after some discussion with SSgt YM, SFC JJ reported the incident to security forces.

The investigation was referred to AFOSI, who initiated a pretext phone call from SSgt YM to Appellant and then called Appellant in for an interview. In both the interview and the pretext phone call, Appellant contended that there was no contact beyond mutual kissing. He asserted that once they were in the room, the space between them "closed up" and they kissed. He told the agents that his hands were on SSgt YM's hips while they kissed. He told the agents that they first kissed near the door, then had a conversation about relationships as they sat down in the living area. He said SSgt YM got emotional talking about SFC JJ and they hugged, which led to another kiss. He stated after the kiss SSgt YM felt guilty, and he brought up again that he should get his own room. When asked if SSgt YM

displayed any physical resistance, Appellant said after the second kiss they just stopped and that "there was no tug-of-war at all." Appellant did volunteer that he returned to SSgt YM's room after getting his own, but at first stated that they just talked during his second visit to the room. As the interview progressed, Appellant's account of the second visit changed, and Appellant told AFOSI that they kissed during the second visit as well. When asked if anything else happened during that visit, he told the agents that SSgt YM slipped off the arm of the chair where he was sitting and hit her mouth on his shoulder. The photos of the injury to SSgt YM's mouth admitted into evidence clearly show an injury to SSgt YM's gums above her teeth. During the pretext phone call, Appellant asked SSgt YM repeatedly not to tell anyone about the night's events.

*Factual Sufficiency—Aggravated Sexual Assault*

Appellant first argues that the evidence of aggravated sexual assault of SSgt HP was factually insufficient to sustain his conviction. We review issues of factual sufficiency de novo. *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to

whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Our factual sufficiency determination is limited to a review of the entire record, meaning evidence presented at trial. *Reed*, 54 M.J. at 43; *United States v. Bethea*, 46 C.M.R. 223, 225 (C.M.A. 1973).

We have reviewed the record of trial and evaluated the arguments by Appellant and the Government. We have weighed the entire record of trial and have made allowances for not having heard and observed the witnesses. Given the totality of the circumstances, and in light of all of the evidence in this case, we are convinced beyond a reasonable doubt of Appellant's guilt of aggravated sexual assault of SSgt HP.

*Factual and Legal Sufficiency—*

*Offenses Relating to SSgt YM*

Appellant next asserts that the evidence is factually and legally insufficient to support the convictions of the offenses relating to SSgt YM. Appellant was convicted of four offenses related to SSgt YM. First, he was convicted of making a false official statement to AFOSI concerning the source of SSgt YM's injury to her mouth. Second, he was convicted of abusive sexual contact3 for touching SSgt YM's breast without permission. Third, he was convicted of aggravated sexual contact for causing SSgt YM to touch his chest with her hands and lips by using unlawful force, specifically physical strength sufficient that she could not avoid or escape the sexual contact. Finally, Appellant was convicted of assault consummated by a battery for unlawfully

restraining her by her wrists. Appellant contends that the evidence was legally insufficient as to the abusive sexual contact offense because "there was no evidence elicited at trial that Appellant touched SSgt YM's breast through her clothing." He also asserts that the evidence was factually insufficient with regard to the other offenses "because SSgt YM is not credible and had a motive to fabricate the allegations against Appellant." We apply the same standard with regard to factual sufficiency as articulated above. We review the legally sufficiency of the evidence de novo. *Beatty*, 64 M.J. at 459.

"The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *Turner*, 25 M.J. at 324). The term reasonable doubt does not mean that the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R.1986). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

We find the evidence of abusive sexual contact legally sufficient. Although SSgt YM did express uncertainty about whether Appellant touched her directly or through some article of clothing, her testimony was clear that Appellant touched her breast. While her uncertainty raised an issue about

whether he touched all of her breast directly, or only some part of it, it never contradicted her initial assertion that Appellant touched her breast in some manner. Viewing this testimony in the light most favorable to the prosecution, we conclude that a reasonable finder of fact could have concluded beyond a reasonable doubt that Appellant touched some part of SSgt YM's breast through her clothing. We ourselves, after making allowances for not having seen the testimony, are also convinced beyond a reasonable doubt of Appellant's guilt of abusive sexual contact.

We are similarly convinced of Appellant's guilt beyond a reasonable doubt of the offenses of false official statement and assault consummated by a battery. The injury depicted in the photographs admitted into evidence is completely consistent with SSgt YM's account of Appellant's second visit to her room, and does not support either of the versions Appellant provided to AFOSI during his interview. SSgt YM testified that Appellant grabbed her wrists with unlawful force, and in the course of escaping from his grasp her cell phone struck her mouth and caused the injury to her gums. She also testified that she confronted Appellant, making him aware of the injury. We find that evidence factually sufficient to sustain his convictions.

We are not convinced beyond a reasonable doubt, however, of Appellant's guilt of the charged offense of aggravated sexual contact for causing SSgt YM to touch his chest with her hands and lips by using unlawful force. As alleged in Charge II, Specification 5, the Government was required to prove that Appellant used sufficient strength that SSgt YM could not avoid or escape touching Appellant's chest

with her hands and lips. Several times during her testimony, the prosecution asked SSgt YM to characterize the level of force used by Appellant. In describing the level of force used to cause her to touch his chest, SSgt YM characterized it as a seven on a scale of ten. She also testified that she could not pull her hands away, but we weigh that testimony in conjunction with her behavior that night, including her willingness to let Appellant back into her room after he had departed. When the military judge later asked her how much force Appellant used in grasping her wrists in the context of the battery offense, she characterized the level of force as nine out of ten, but testified that she was able to pull away. In light of her conflicting testimony, we are not convinced beyond a reasonable doubt that Appellant did in fact use such strength that SSgt YM could not have avoided or escaped the contact. Despite determining the evidence was factually insufficient to sustain the charged offense, we may nonetheless affirm so much of the finding that includes a lesser included offense. Article 59(b), UCMJ, 10 U.S.C. § 859(b). We are convinced beyond a reasonable doubt that Appellant caused SSgt YM to touch his chest with her hands and lips without her consent, and accordingly affirm the conviction to the lesser included offense of abusive sexual contact.

*Factual and Legal Sufficiency—*

*2011 False Official Statement*

Appellant, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), asserts that the evidence was factually and legally insufficient to sustain his conviction for the false official statement set out in

Charge I, Specification 2. Appellant specifically asserts that the evidence did not prove that he had the intent to deceive in making the statement, and that the evidence that the statement was false was unreliable. We apply the same standard for factual and legal sufficiency as set out above.

The assertion at issue is Appellant's statement that "[he] ran into a coworker [, SSgt BH,] and [he] asked [SSgt BH] to please help [him; SSgt BH] told [Appellant] [SSgt HP] was grown[,] going through a divorce[,] just take her home" or words to that effect. Appellant made this assertion both in his written statement and his verbal statement to AFOSI. The statement was made in the context of multiple assertions to AFOSI that Appellant had no preconceived intent to engage in sexual relations with SSgt HP, SSgt HP initiated the sexual contact, and he reluctantly acceded to her advances.

First, we find that a reasonable fact finder could have found beyond a reasonable doubt that no such verbal exchange took place between Appellant and the coworker, and we ourselves reach that conclusion beyond a reasonable doubt. The coworker testified at trial and unequivocally stated that no such conversation took place. The coworker, who had no apparent bias towards either party, recalled seeing Appellant as he was leaving the club. He testified that, contrary to Appellant's statement to AFOSI, Appellant affirmatively took responsibility for taking SSgt HP home. The coworker also recalled a brief exchange about the fact that SSgt HP's car was parked at the coworker's house, and that Appellant would make sure that she got it the next day. In light of the level of detail of the coworker's testimony and his lack of bias, we find his testimony both legally

and factually sufficient to conclude that the verbal exchange asserted in Appellant's statements did not occur.

Second, since we have no direct evidence of Appellant's intent to deceive, we must determine whether, in light of all the evidence, one could reasonably infer such intent from the surrounding circumstances. The charged statement was completely consistent with Appellant's other assertions that he only reluctantly took SSgt HP home in the first place. While his theme of being a reluctant partner may have been of little relevance to the offense as ultimately charged, our inquiry must focus on his intent at the time of making the statement. Appellant's verbal and written statements contain numerous assertions that SSgt HP initiated the sexual contact that night. In light of his other statements, we are convinced beyond a reasonable doubt that Appellant intended AFOSI to believe that he tried to find an alternative to leaving the club with SSgt HP to corroborate his other statements that he did not initiate the sexual contact that night. We also find the evidence sufficient to allow a reasonable finder of fact to reach that conclusion beyond a reasonable doubt.

Viewing the evidence in the light most favorable to the Government, we find a reasonable fact finder could have found all the essential elements of the offense beyond a reasonable doubt. Similarly, having weighed the evidence in the record of trial, making allowances for not having personally observed the witnesses, we ourselves are personally convinced of Appellant's guilt beyond a reasonable doubt.

*Reassignment of Defense Paralegal*

Appellant's final assignment of error, also submitted pursuant to *Grostefon*, asserts that his substantial rights were prejudiced when SSgt TG, the defense paralegal assigned to assist in his defense, was reassigned to the base legal office that was prosecuting him. In a declaration subject to penalty of perjury, Appellant makes two specific claims: first, that shortly after speaking with Appellant, SSgt TG "was removed [from] his position at the [area defense counsel's office] and began working on the government[']s behalf"; and second, he "believe[d] information stemming from [their] discussions [was] told to the Government to bring about more false and [inaccurate] charges." Appellant alleges the sharing of privileged information constituted prosecutorial misconduct and that "the appearance of transferring SSgt [TG] to the military justice section of the base legal office also raises a legitimate question regarding the fairness of Appellant's trial."

We review arguments of prosecutorial misconduct raised for the first time on appeal for plain error. *See United States v. Akbar*, 74 M.J. 364, 398 (C.A.A.F. 2015) (reviewing for plain error an allegation raised for the first time on appeal that the government's control over the defense counsels' assignments constituted prosecutorial misconduct and unlawful command influence). Appellant must show not only the underlying facts alleged to constitute misconduct, but also that it resulted in some "unfairness in the proceedings." *Id.* at 399. In this case, Appellant makes only the speculative claim that privileged

material was shared.[3] Appellant does not identify any information that came out at trial that he believes was obtained from privileged discussions. In fact, a plain reading of the record indicates that all of the evidence and the identity of witnesses related to the offenses of which he was convicted were disclosed through the course of a routine investigation. Both victims filed complaints with law enforcement independently and cooperated with the investigation. Appellant also made statements to AFOSI. While we are cognizant of the difficulty Appellant faces in proving the content of conversations that may have occurred between SSgt TG and government personnel, we also recognize that one purpose of the plain error rule is to encourage such claims to be raised at trial so that the record can be fully developed. We find that Appellant failed to meet his burden to show any unfairness in the proceeding that resulted from SSgt TG's reassignment, and therefore find no plain error.

---

[3] We find that a fact-finding hearing on this issue pursuant to *United States v. DuBay*, 37 C.M.R. 411 (1967) is not necessary or appropriate. "[I]f [an] affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis." *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Since Appellant did not specify any information he believed was derived from privileged information, we find his claim to be speculative and conclusory. Although this court granted Appellee's motion to attach affidavits from legal office personnel pertaining to SSgt TG's involvement in the case, we did not consider them in reaching this decision.

*Sentence Reassessment*

Because we have reduced Appellant's degree of guilt to one of the sexual contact offenses, we must determine whether we can reassess the sentence, or whether we must order a rehearing. This court has "broad discretion" in deciding to reassess a sentence to cure error and in arriving at the reassessed sentence. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). To reassess the sentence, we must be able to reliably conclude that, in the absence of error, the sentence "would have been at least of a certain magnitude," and the reassessed sentence must be "no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Sales*, 22 M.J. 305, 307–08 (C.M.A. 1986). We must be able to determine this to a "degree of certainty." *United States v. Eversole*, 53 M.J. 132, 134 (C.A.A.F. 2000); *see also United States v. Taylor*, 51 M.J. 390, 391 (C.A.A.F. 1999) (holding we must be able to reach this conclusion "with confidence"). "The standard for reassessment is not what would be imposed at a rehearing but what would have been imposed at the original trial absent the error." *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997); *see also United States v. Davis*, 48 M.J. 494, 495 (C.A.A.F. 1998) (holding no higher sentence than that which would have been imposed by the trial forum may be affirmed). A reassessed sentence "must be purged of prejudicial error and also must be 'appropriate' for the offense[s] involved" based on our sentence approval obligation under Article 66(c), UCMJ, 10 U.S.C. § 866(c). *Sales*, 22 M.J. at 308.

In determining whether to reassess a sentence or order a rehearing, we consider the totality of the

circumstances, including the following illustrative, but not dispositive, factors: (1) dramatic changes in the penalty landscape and exposure, (2) the forum, (3) whether the remaining offenses capture the gravamen of the criminal conduct included within the original offenses, (4) whether significant or aggravating circumstances remain admissible and relevant, and (5) whether the remaining offenses are the type with which we as appellate judges have the experience and familiarity to reliably determine what sentence would have been imposed at trial by the sentencing authority. *Winckelmann*, 73 M.J. at 15–16.

Our modification of the findings did not substantially change Appellant's culpability in this case. Appellant remains convicted of sexual assault against a fellow Airman, two instances of abusive sexual contact against a second Airman, two false statements to investigators, and a battery that resulted in injury. The sentencing landscape has not changed significantly as a result of our decision, which generally weighs in favor of our ability to reassess the sentence. *See United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003); *Winckelman*, 73 M.J. at 14. The remaining sexual misconduct captures the gravamen of the offenses, and the same conduct would have been before the military judge in sentencing. The offenses are of the type that we have experience and familiarity with as appellate judges, and the sentence was imposed by a military judge rather than a panel. Considering the totality of the circumstances of this case, including the factors enumerated in *Winckelmann*, we are confident we can reassess the sentence.

Based on Appellant's conviction for aggravated sexual contact, as well as the offenses of which Appellant remains guilty, the military judge sentenced Appellant to a dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1. In light of the factors discussed above, we conclude that we can reassess the sentence to the sentence adjudged. We are convinced that the military judge in this case imposed sentence based upon the facts and circumstances of the offenses and not the legal label associated with any one offense. We can confidently and reliably determine that, absent the error, the sentence adjudged by the military judge would have been the same.

*Conclusion*

We find the conviction for aggravated sexual contact alleged in Specification 5, Charge II, factually insufficient and approve the finding of guilt only of the lesser included offense of abusive sexual contact. We reassess the sentence to the sentence approved by the convening authority. The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ. Accordingly, the findings, as modified, and the sentence, as reassessed, are AFFIRMED.

[SEAL] FOR THE COURT

[SIGNATURE]

LEAH M. CALAHAN

Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Ian T. Miller,<br>Appellant | USCA Dkt. No. 16-0641/AR<br>Crim.App. No. 20150170<br><br>ORDER |

On further consideration of the granted issues, __ M.J. __ (Daily Journal Nov. 30, 2016), the facts that the United States Army Court of Criminal Appeals issued its judgment in Appellant's case on May 6, 2016, and Appellate Military Judge Larss G. Celtnieks was appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 17th day of January, 2017,

ORDERED:

That the order of November 30, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Ian T. Miller,<br>Appellant | USCA Dkt. No. 16-0641/AR<br>Crim.App. No. 20150170<br><br>ORDER |

On consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals and the pleadings, it is, by the Court, this 30th day of November, 2016,

ORDERED:

That said petition is hereby granted on the following issues:

I. WHETHER ACCEPTANCE OF APPOINTMENT AS A CMCR JUDGE TERMINATED THE MILITARY COMMISSION OF JUDGE CELTNIEKS.

II. WHETHER, AS AN APPOINTED JUDGE OF THE CMCR, JUDGE CELTNIEKS DID NOT MEET THE UCMJ DEFINITION OF APPELLATE MILITARY JUDGE.

III. WHETHER THE ASSIGNMENT OF INFERIOR OFFICERS AND PRINCIPAL OFFICERS TO A SINGLE JUDICIAL TRIBUNAL ITSELF VIOLATED THE APPOINTMENTS CLAUSE.

No briefs will be filed under Rule 25.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS
Before
TOZZI, CAMPANELLA, and CELTNIEKS
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist IAN T. MILLER
United States Army, Appellant

ARMY 20150170
Headquarters, United States Army
Maneuver Center of Excellence
Jeffery R. Nance and Charles A. Kuhfahl, Jr.,
Military Judges
Colonel Charles C. Poche, Staff Judge Advocate

For Appellant: Captain Heather L. Tregle, JA; Captain Michael A. Gold, JA.

For Appellee: Lieutenant Colonel A.G. Courie III, JA.

6 May 2016

---

DECISION

---

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

[SIGNATURE]

MALCOLM H. SQUIRES, JR.

Clerk of Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Joseph D. Morchinek,<br>Appellant | USCA Dkt. No. 16-0671/AF<br>Crim.App. No. S32291 |

ORDER

On further consideration of the granted issue (Daily Journal Oct. 18, 2016), the facts that the United States Air Force Court of Criminal Appeals issued its judgment in Appellant's case on May 9, 2016, and Colonel Martin T. Mitchell was appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 27th day of December, 2016,

ORDERED:

That the order of October 18, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Joseph D. Morchinek,<br>Appellant | USCA Dkt. No. 16-0671/AF<br>Crim.App. No. S32291<br><br>ORDER |

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 18th day of October, 2016,

ORDERED:

That said petition is hereby granted on the following issues:

I. WHETHER UNITED STATES COURT OF MILITARY COMMISSION REVIEW JUDGE MARTIN T. MITCHELL IS STATUTORILY AUTHORIZED TO SIT AS ONE OF THE AIR FORCE COURT OF CRIMINAL APPEALS JUDGES ON THE PANEL THAT DECIDED APPELLANT'S CASE.

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

No briefs will be filed under Rule 25.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES
v.
Senior Airman JOSEPH D. MORCHINEK
United States Air Force
ACM S32291

9 May 2016

Sentence adjudged 28 September 2014 by SPCM convened at Bagram Airfield, Afghanistan. Military Judge: Christopher F. Leavey.

Approved Sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $1,021.00 pay per month for 2 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Captain Lauren A. Shure.

Appellate Counsel for the United States: Captain Tyler B. Musselman and Gerald R. Bruce, Esquire.

Before
ALLRED, MITCHELL, and ZIMMERMAN
Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

ZIMMERMAN, Judge:

Appellant was convicted, contrary to his plea, by a panel of officer members of misbehavior before the enemy in violation of Article 99, UCMJ, 10 U.S.C. § 899. Appellant was convicted by the military judge, in accordance with his plea, of use, distribution and possession of hashish while receiving special pay in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court sentenced him to a bad-conduct discharge, confinement for two months, forfeiture of $1,021 pay per month for two months, reduction to the grade of E-1, and a reprimand.[1] The sentence was approved, as adjudged, on 2 February 2015.

Appellant argues that: (1) the evidence was factually insufficient to establish that Appellant was "before the enemy" and endangered the safety of Bagram Airfield; (2) that the Government was

[1] The court-martial order incorrectly states that the sentence was adjudged by the military judge, rather than members. We direct the promulgation of a corrected order. We also note that a reprimand was adjudged and approved, but not included on the convening authority's action, as required by Air Force Instruction 51-201, *Administration of Military Justice* (6 June 2013). Since the omission of the reprimand does not prejudice a material right of Appellant, we direct no further action in that regard. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a).

required to prove that Appellant had a duty to defend Bagram Airfield, and that it failed to do so; (3) the military judge erred in instructing the members prior to deliberation on findings; and (4) the court-martial lacked jurisdiction over the charge of misbehavior before the enemy because it alleged a capital offense yet was referred without consent of the general court-martial convening authority. Finding no error that materially prejudices a substantial right of Appellant, we affirm the findings and sentence.

*Background*

Appellant used, distributed, and possessed hashish both on and off-duty as a security forces member deployed to Bagram Airfield, Afghanistan. He pled guilty to the controlled substance offenses, but contested the charge that his use constituted misbehavior before the enemy. He argued that under the circumstances, his drug offenses did not endanger the safety of the installation. He further contended that, based upon the state of hostilities, he was not before the enemy at the time of his misconduct. Appellant stipulated that on one occasion he used hashish while posted to a perimeter response team which had immediate-action responsibilities in the event of an attack on the installation. In that capacity, he was the senior member of a three-person crew of a tactical vehicle armed with a crew-served machine gun mounted in a turret. During that time, he both used hashish and distributed it to the other members of his crew. He also stipulated that on another occasion he used hashish while responsible for the search and inspection of personnel coming onto the installation. His commander testified during the trial that both postings were part of a "defense in depth" strategy to

defend the installation. The commander also testified that the installation came under indirect fire attacks during the charged timeframe.

*Factual and Legal Sufficiency*

Appellant first argues that the evidence was factually insufficient to sustain his conviction for misbehavior before the enemy because the Government failed to prove that his misconduct was actually before the enemy and that it endangered the installation. We review issues of factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington,* 57 M.J. at 399.

The *Manual for Courts-Martial* provides an explanation for the term "before the enemy."

> Whether a person is "before the enemy" is a question of tactical relation, not distance. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat may be before the enemy

> although miles from the enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not a part of a tactical operation then going on or in immediate prospect is not "before or in the presence of the enemy" within the meaning of this article.

*Manual for Courts-Martial, United States*, pt. IV, ¶ 23.c.(1)(c) (2012 ed.). Our superior court has also examined the issue, holding that "if an organization is in position ready to participate in either an offensive or defensive battle, and, its weapons are capable of delivering fire on the enemy and in turn are so situated that they are within effective range of the enemy weapons, then that unit is before the enemy." *United States v. Sperland*, 5 C.M.R. 89, 91 (C.M.A. 1952).

Appellant contends that "[n]o evidence was presented that Appellant was tactically engaged with the enemy." Neither *Sperland* nor the definition in the *Manual* focuses on individual engagement, however. The *Manual* references, by way of illustration, those before the enemy as a "member of an antiaircraft gun crew" and "a member of a unit about to move into combat." Since one form of misbehavior before the enemy is wrongful failure to engage in combat, we find this unit-based analysis significant. *See United States v. Payne*, 40 C.M.R. 516, 519–20 (A.B.R. 1969). Appellant's commander affirmatively testified that the unit was tactically engaged in the defense of Bagram Airfield. We find Appellant's contention that Bagram Airfield was "some distance from the front or immediate area of combat" unconvincing in light of the uncontested

evidence in the record that the installation did, in fact, come under indirect-fire attack during the charged time-frame. Nor are we convinced by Appellant's argument that his misconduct did not actually endanger the base. After making allowances for not having personally observed the witnesses, and based upon our independent review of the record, we are convinced beyond a reasonable doubt that Appellant was before the enemy and that his conduct endangered Bagram Airfield.

Appellant separately argues that, although not explicitly stated in the statute, the specification as alleged incorporated as an element that Appellant had a duty to defend Bagram Airfield. More importantly, Appellant argues that the Government failed to prove such an element beyond a reasonable doubt. We construe this assignment of error as an assertion that the evidence was factually and legally insufficient to support his conviction because it did not show that Appellant had a duty to defend Bagram Airfield.

We review legal sufficiency of the evidence de novo. *Washington*, 57 M.J. at 399. "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *Turner*, 25 M.J. at 324). The term reasonable doubt does not mean that the evidence must be free from conflict. *United States v. Lips,* 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our

assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). We review the factual sufficiency component of Appellant's assertion using the same standard of review and legal test articulated above.

Appellant first sets out a statutory and due process argument to establish, as an element, that Appellant had a duty to defend Bagram Airfield. We agree with Appellant's interpretation that the specification alleged in this case established an element that Appellant had a duty to defend Bagram Airfield.

We find, however, that the evidence was factually and legally sufficient to show that Appellant had such a duty. Appellant's commander testified both about the general duty of Airmen assigned to his unit and about the specific duties Appellant performed. He testified that all members of his unit had a duty to defend Bagram Airfield. He also testified about the layered defenses he employed, including searches of incoming and outgoing traffic as well as perimeter response teams with additional weapons. Other members of the unit also testified that Airmen assigned to the unit had a duty to defend Bagram Airfield, even during rest periods, or while "off-shift." Appellant also stipulated that he "was assigned to perform base defense duties." More specifically, Appellant stipulated that he used hashish while on-shift assigned to both search duties and perimeter response team duties. We find this evidence was sufficient when viewed in the light most favorable to the prosecution for a reasonable finder of fact to conclude that Appellant had a duty to defend Bagram Airfield at all times relevant to the charged offense. We ourselves, after making allowances for

not having personally observed the witnesses, and based upon our independent review of the record, also conclude beyond a reasonable doubt that Appellant was guilty of the offense alleged.

*Reasonable Doubt Instruction*

Appellant also argues that the military judge erred in instructing the members prior to deliberation on findings, particularly as it relates to reasonable doubt. We review de novo the military judge's instructions to ensure that they correctly address the issues raised by the evidence. *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996). When, as in this case, trial defense counsel made no challenge to the instruction now contested on appeal, the matter has been forfeited absent plain error.[2] *See* Rule for Courts-Martial (R.C.M.) 920(f). If we find error, we must then determine whether the error was harmless beyond a reasonable doubt. *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011).

The language used by the military judge in Appellant's case is—and has been for many years—an accepted reasonable doubt instruction used in Air Force courts-martial. *See, e.g.*, *United States v. Sanchez*, 50 M.J. 506, 509–10 (A.F. Ct. Crim. App. 1999); *see also United States v. Gibson*, 726 F.2d 869, 873–74 (1st Cir. 1984) (upholding similar language). It was also offered by our superior court as a suggested instruction. *See United States v. Meeks*, 41 M.J. 150, 157–58 n.2 (C.M.A. 1994) (citing Federal Judicial Center, Pattern Criminal Jury Instruction 17–18 (1987)). As such, we cannot say the military

---

[2] Although we recognize that the rule speaks of "waiver," this is in fact forfeiture. *United States. v. Sousa*, 72 M.J. 643 (A.F. Ct. Crim. App. 2013).

judge committed error, plain or otherwise, in giving the challenged instruction in Appellant's case.

*Jurisdiction over Capital Offense*

Appellant raises for the first time on appeal that the convening authority who referred his case to a special court-martial lacked the consent of the general court-martial convening authority, thereby depriving the court of jurisdiction to hear the case. *See* R.C.M. 201(f)(2)(C); *United States v. Henderson*, 59 M.J. 350, 353 (C.A.A.F. 2004). We disagree with Appellant's contention.

"The jurisdiction of a special court-martial over a non-mandatory capital offense is a legal question we review de novo." *Henderson*, 59 M.J. at 351–52.

"Misbehavior before the enemy" under Article 99, UCMJ, is a non-mandatory capital offense, punishable by "[d]eath or such other punishments as a court-martial may direct." *Manual for Courts-Martial, United States*, pt. IV, ¶ 23.e. (2012 ed.). When read together, Article 19, UCMJ, and R.C.M. 201(f)(2)(C)(ii)[3] allow a special court-martial convening authority (SPCMCA) to refer a non-mandatory capital offense to trial by special court-martial, when permitted by "[a]n officer exercising general court-martial jurisdiction over the command which includes the accused." Appellant did not raise this jurisdictional issue at trial, and the record of trial is devoid of any indication that the general court-martial convening authority (GCMCA) granted authority to the convening authority. Hence, the Government filed affidavits in support of its

[3] Although we recognize that the rule speaks of "waiver," this is in fact forfeiture. *United States. v. Sousa*, 72 M.J. 643 (A.F. Ct. Crim. App. 2013).

argument that the convening authority actually exercised proper jurisdiction under the R.C.M. 201(f)(2)(C)(ii) exception, which affidavits were not contested by Appellant.[4]

The Government supplied an affidavit from the GCMCA and one from the SPCMCA who convened this court-martial. Both affiants unequivocally attested to discussing this case with one another on multiple occasions, and to the GCMCA's granting of approval to the SPCMCA to refer the Article 99 offense to a special court-martial. We find the statements in the affidavits were relevant; the GCMCA granted permission to the convening authority to refer the offenses to trial by a special court-martial; and therefore, the special court-martial had jurisdiction to convict and sentence Appellant.[5]

---

[4] The Government filed a motion to attach documents with its response to Appellant's supplemental filings, which motion was uncontested and granted by this court. We considered the affidavits in our review of Appellant's claim of jurisdictional error. *See United States v. Ginn*, 47 M.J. 236, 242 (C.A.A.F. 1997); *United States v. Averell*, 2014 CCA LEXIS 841 (N.M. Ct .Crim. App. 6 November 2014), *pet. rev. denied*, 74 M.J. 354 (C.A.A.F. 2015) (where appellant did not raise jurisdictional issue at trial and did not dispute contents of post-trial affidavit, court relied on post-trial affidavit to find proper referral of charges to court-martial).

[5] Although neither required by law nor regulation, where the GCMCA permits a non-mandatory capital offense to be referred to a special court-martial, such

*Conclusion*

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are AFFIRMED.

[SEAL] FOR THE COURT
[SIGNATURE]
LEAH M. CALAHAN
Clerk of the Court

---

approval could be expressly stated on the charge sheet, DD Form 458, Section V.

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Kelvin L. O'Shaughnessy,<br>Appellant | USCA Dkt. No. 16-0616/AF<br>Crim.App. No. 38732<br><br>ORDER |

On further consideration of the granted issue (Daily Journal Nov. 29, 2016), the facts that the United States Air Force Court of Criminal Appeals issued its judgment in Appellant's case on May 5, 2016, and Colonel Martin T. Mitchell was appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 27th day of December, 2016,

ORDERED:

That the order of November 29, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Kelvin L. O'Shaughnessy,<br>Appellant | USCA Dkt. No. 16-0616/AF<br>Crim.App. No. 38732<br><br>ORDER |

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 29th day of November, 2016,

ORDERED:

That said petition is hereby granted on the following issues:

I. CMCR JUDGE MITCHELL WAS NOT STATUTORILY AUTHORIZED TO SIT ON THE AIR FORCE COURT OF CRIMINAL APPEALS.

II. EVEN IF CMCR JUDGE MITCHELL WAS STATUTORILY AUTHORIZED TO BE ASSIGNED TO THE AIR FORCE COURT OF CRIMINAL APPEALS, HIS SERVICE ON BOTH COURTS VIOLATED THE APPOINTMENTS CLAUSE GIVEN HIS NEWLY ATTAINED STATUS AS A SUPERIOR OFFICER.

No briefs will be filed under Rule 25.

.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES
v.
Airman First Class
KELVIN I. L. O'SHAUGHNESSY
United States Air Force
ACM 38732

5 May 2016

Sentence adjudged 21 August 2014 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Gregory O. Friedland (arraignment) and Vance H. Spath.

Approved Sentence: Bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Lauren A. Shure.

Appellate Counsel for the United States: Colonel Katherine E. Oler; Captain Tyler B. Musselman; and Gerald R. Bruce, Esquire.

Before

MITCHELL, MAYBERRY, and BROWN

Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

MAYBERRY, Judge:

At a general court-martial composed of officer and enlisted members Appellant was convicted, contrary to his pleas, of one charge and one specification each of sexual assault and abusive sexual contact, in violation of Article 120 UCMJ, 10 U.S.C. § 920. Appellant was acquitted of one specification of abusive sexual contact. The court sentenced Appellant to a bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged but deferred the adjudged forfeitures from 14 days after sentence was announced until action.

On appeal, Appellant contends that the mental health records of RS, Appellate Exhibit VII, are incomplete thereby render the record of trial incomplete. Accordingly, Appellant asserts that he was denied due process under the Fifth Amendment[1] when this court failed to examine the entire record of trial and that he was further denied due process under the Fifth Amendment due to appellate counsel's inability to review the complete mental health records, resulting in counsel's inability to

[1] U.S. CONST. amend. V.

provide effective assistance of counsel. We disagree and affirm the findings and sentence.

Prior to filing his assignment of errors, Appellant moved this court to compel the production of "the entirety of the mental health records for Ms. RS." Appellant asserted that the presence of an arrow in the margins of one page of the records contained in the mental health records "indicates there is more information contained on the back side or additional pages." Appellant's position is that facially it appears the mental health records as provided to the Government, and eventually the military judge, were incomplete. Appellant maintained that the incomplete record prohibited his counsel from determining whether there was some prejudice or harm to Appellant and this court was unable to conduct its review pursuant to Article 66, UCMJ.

This court denied the motion to compel, applying the four-prong standard for post-trial discovery set out in *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002). This court held that Appellant had failed to meet his threshold burden of demonstrating some measure of appellate inquiry was warranted in this matter. First, he had not demonstrated that the claimed "additional" records exist. Appellate Exhibit VII was reviewed in camera by the military judge at trial, and later provided to both trial and trial defense counsel. Additionally, their respective expert consultants were authorized to review the documents. RS was interviewed by trial defense counsel and testified in findings and sentencing but there was no showing that trial defense counsel inquired about the handwritten arrow or questioned the completeness of the record at trial. Finally, since Appellant had not filed an assignment of errors at

the time of his motion, he had not provided a sufficient showing of relevance to a claim of error or defense and this court was unable to determine whether there was a reasonable probability that the result of the proceeding would have been different if this information had been disclosed (assuming it exists). Additional facts necessary to resolve this issue are discussed below.

The sole error now claimed by Appellant is that the record of trial is incomplete as a result of the existence of this extraneous mark contained on one page of the sealed mental health records. Appellant's requested relief is that either the conviction be set aside or the bad-conduct discharge be disapproved.

*Record of Trial—Is it Complete?*

The issues of whether a record of trial is complete and a transcript is verbatim are questions of law that we review de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014). The lack of a verbatim transcript and an incomplete record are two separate and distinct errors. *United States v. Gaskins*, 72 M.J. 225, 230 (C.A.A.F. 2013).

We first address the issue of whether the transcript is verbatim; it is. Article 54(c)(1), UCMJ, 10 U.S.C. § 854(c)(1), requires a "complete" record of the proceedings and testimony to be prepared for any general court-martial resulting in a punitive discharge. A "complete" record must include the exhibits that were received in evidence, along with any appellate exhibits. Rule for Courts-Martial (R.C.M.) 1103(b)(2)(D)(v). The "missing" appellate exhibit page(s) solely raise the issue of whether the record is complete. The threshold question is whether the missing exhibits are substantial, either

qualitatively or quantitatively. *Davenport*, 73 M.J. at 377. Omissions may be quantitatively insubstantial when in light of the entire record the omission is "so unimportant and so uninfluential . . . that it approaches nothingness." *Id.* (quoting *United States v. Nelson*, 13 C.M.R. 38, 43 (C.M.A. 1953)).

Where a record is missing an exhibit, this court evaluates whether the omission is substantial. *United States v. Henry,* 53 M.J. 108, 111 (C.A.A.F. 2000). "Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Id.* Whether an omission is insubstantial is a "case-by-case," fact based inquiry." *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). If the omission is substantial, thereby raising a presumption of prejudice, the Government may rebut the presumption by reconstructing the missing material. *United States v. Lovely*, 73 M.J. 658, 676 (A.F. Ct. Crim. App. 2014).

Based upon the evidence in the record of trial, Appellate Exhibit VII includes every page provided to the military judge for his in camera review. We note that the record of trial is silent as to the number of pages provided to the judge.[2] We also note that the mental health records were not sealed at the time they were provided to the military judge. However,

---

[2] The only estimate as to the number of pages is offered by the trial counsel during the closed hearing on the Defense Motion to Compel Mil. R. Evid. 513 records. Trial counsel indicates that the records have been secured, and indicates the number of pages is "bordering [on] maybe 100 or so."

there was no objection or comment of any kind made by any party when this fact was announced in open court by the Special Victim's Counsel (SVC). Additionally, while the trial counsel indicated on the record that they had procured the mental health records, it was the SVC who provided them to the military judge, stating on the record that his client had them in her possession. The military judge took possession of the documents and indicated that he would "identify page numbers later." After his in camera review of the documents, the military judge held that there was nothing material or necessary to the defense and did not provide the records to either party; they remained sealed. The military judge forewarned the SVC that if there was victim impact evidence presented during the sentencing phase, assuming there was a sentencing phase, this issue would likely resurface. The SVC acknowledged that possibility and advised that he had discussed it with his client.

In the sentencing phase of the trial, the SVC requested that RS be allowed to make an unsworn statement. Again, the military judge discussed the possibility of this allowing access by counsel to the mental health records. The record of trial references that over the evening recess, the military judge decided to provide access to the mental health records and sent an email to the parties notifying them of his decision. On the record the next day the military judge states "both sides have a copy."[3] RS

[3] The record of trial does not contain the email, and the transcript contains no additional explanation as to how the sealed matters were provided to the counsel. We consider this to be analogous to a Rule

provided an unsworn statement to the court. In rebuttal, the defense offered a single page from those records as Defense Exhibit R, without objection from the SVC or the Government. This document was admitted and sealed. The page offered was neither the page containing the arrow, nor the other pages of the mental health records containing information on this same subject matter.[4] The Government did not call RS or offer any surrebuttal.

The record of trial contains no further discussion regarding the content of the mental health records in Appellate Exhibit VII. The Master Index for the record of trial does not indicate the number of pages contained in Appellate Exhibit VII, nor does the cover sheet of the envelope containing the exhibit. The only quantitative description of the records was by the trial counsel, when he opined that they bordered on 100 pages. There are in fact 12 pages. However, in so far as the mental health records were in the possession of the SVC and trial counsel had not seen them, his assessment can best be characterized as an estimate designed to guide the military judge's decision as to how long it would take him to review the material.

---

for Courts-Martial 802 session and remind military judges and counsel that such matters should be included in the record orally or in writing.

[4] To avoid unnecessarily disclosing the content of privileged mental health records, this court deliberately confines our description of the narrative on that page to be administrative in nature. Furthermore, the same subject matter is present on two other pages.

Appellate Exhibit VII contains a "Release of Confidential Information Authorization Form" signed by RS on 12 August 2014, authorizing release of the entire contents of her mental health records to her SVC. There is no evidence before us to support that the mental health records provided to the military judge differ in any way from the documents contained in Appellate Exhibit VII. Both Appellant's counsel and this court have access to the entire original record of trial. The record of trial in this case is complete.

Assuming arguendo the presence of an arrow in the margin signifies that additional pages of mental health records exist, this court must determine whether the omission is substantial. *Lovely*, 73 M.J. at 676. These records only affect the sentencing phase of the trial because they only became relevant after RS provided victim impact evidence. Appellant subsequently offered a portion of one page of the records. Having examined the contents of the page with the arrow, even if that arrow refers to additional matters found on the back of the same page or an additional page, we are convinced those matters would be insubstantial with respect to sentencing. We find that if additional records exist related to the subject matter proximate to the arrow, their omission is insubstantial. In this case the omission was insubstantial both qualitatively, because the substance of the omitted testimony presumably relates directly to the subject matter proximate to the arrow, and quantitatively, since the subject matter is addressed in other portions of the mental health records. That information is not relevant to the subject matter of RS's victim impact evidence.

Finally, we reevaluate the propriety of post-trial discovery using the Campbell factors. *Campbell*, 57 M.J. at 138. Our assessment is unchanged regarding the factors that Appellant has not made a colorable showing that the evidence exists or that the evidence, if it exists, was discoverable at the time of trial had the trial defense counsel raised the issue with the military judge, the individual who provided the copies, or RS herself. Given that Appellant has not asserted any error other than the speculation that the record of trial is incomplete, this court finds that any potential additional information is not relevant to an articulated claim or defense and there is no reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed.

The record of trial is complete. Appellant's counsel had the benefit of reviewing the entire record of trial and was able to provide effective assistance. We are able to conduct a thorough and detailed appellate review of this case and have done so.

*Conclusion*

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are AFFIRMED.

[SEAL] FOR THE COURT
[SIGNATURE]
LEAH M. CALAHAN

Clerk of the Court

## IV. *ORTIZ* (NO. 16-1423): LOWER-COURT ORDERS, OPINIONS, & RELEVANT PLEADINGS

UNITED STATES, Appellee

v.

Keanu D. W. ORTIZ, Airman First Class

U.S. Air Force, Appellant

No. 16-0671

Crim. App. No. 38839

United States Court of Appeals for the Armed Forces

Argued February 7, 2017

Decided April 17, 2017

Military Judge: L. Martin Powell

For Appellant: *Major Lauren A. Shure* (argued); *Major Johnathan D. Legg* and *Brian L. Mizer,* Esq. (on brief).

For Appellee: *Major G. Matt Osborn* (argued); *Colonel Katherine E. Oler* and *Gerald R. Bruce,* Esq. (on brief).

Amici Curiae for Appellee: Co*lonel Mark H. Sydenham, Lieutenant Colonel A. G. Courie III, and Major Anne C. Hsieh* (on brief)—*for Army Government Appellate Division. Colonel Valerie C. Danyluk,* USMC*, Lieutenant Commander Justin C. Henderson,* JAGC, USN, *Lieutenant James M. Belforti,* JAGC, USN, *and Brian K. Keller,* Esq. (on brief)—for Navy-Marine Corps Appellate Government Division.

Amicus Curiae in Support of Neither Party: *Philip Sundel,* Esq. (argued); *Brigadier General John G. Baker,* USMC, and *Captain Brent G. Filbert,*

JAGC, USN (on brief) —for Military Commissions Defense Organization.

Judge STUCKY delivered the opinion of the Court, in which Chief Judge ERDMANN, and Judges RYAN, OHLSON, and SPARKS, joined.

---

Judge STUCKY delivered the opinion of the Court.

While he was serving as a judge on the United States Court of Military Commission Review (USCMCR), under an appointment by the President with the advice and consent of the Senate, Colonel Martin T. Mitchell simultaneously served as an appellate military judge on the panel of the United States Air Force Court of Criminal Appeals (CCA) that reviewed Appellant's case. We granted review of two issues: (1) whether his simultaneous service on the two courts violated the Appointments Clause of the Constitution; and (2) whether he was statutorily barred from sitting on the CCA. We specified an additional issue, asking whether Colonel Mitchell's appointment to the USCMCR made him a principal officer in light of 10 U.S.C. § 949b(4)(C), (D) (2012), which authorize the Secretary of Defense to reassign or withdraw appellate military judges from the USCMCR.

We hold that Appellant is not entitled to relief because the applicable statute, 10 U.S.C. § 973(b) (2012), does not by its terms terminate Colonel Mitchell's position as an appel-late military judge on the CCA, and because, in any event, the statute saves Colonel Mitchell's actions in Appellant's case. We further hold that Colonel Mitchell's status as re-

gards the CCA does not violate the Constitution's Appoint-ments Clause. U.S. Const. art. II, § 2, cl. 2. In light of these holdings, we need not answer the specified issue.

## I. Procedural History

A military judge sitting alone convicted Appellant, consistent with his pleas, of knowingly and wrongfully viewing, possessing, and distributing child pornography. Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2012). The convening authority approved the adjudged sentence: a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The CCA affirmed in a summary disposition. *United States v. Ortiz*, No. 38839, 2016 CCA LEXIS 337, 2016 WL 3681307 (A.F. Ct. Crim. App. June 1, 2016).

## II. Background

> In the Military Commissions Act of 2009, Pub. L. No. 111-84, div. A., tit. XVIII, § 1802, 123 Stat. 2190, 2603 (2009), Congress established the United States Court of Military Commission Review (USCMCR). 10 U.S.C. § 950f(a) (2012). As amended in 2011, Pub. L. No. 112-81, § 1034(c), 125 Stat. 1573 (2011), the USCMCR was to consist of "one or more panels, each composed of not less than three judges on the Court." 10 U.S.C. § 950f(a) (2012). The Secretary of Defense was authorized to "assign persons who are appellate military judges" to the USCMCR as "judges." § 950f(b)(2). The President was

authorized to "appoint, by and with the advice and consent of the Senate, additional judges to the [USCMCR]." § 950f(b)(3).

In June 2013, the Judge Advocate General of the Air Force detailed Lieutenant Colonel Martin T. Mitchell to serve as an appellate military judge on the CCA. Judge Mitchell was promoted to the rank of colonel in June 2014. The Secretary of Defense assigned Colonel Mitchell to be a judge on the USCMCR on October 28, 2014.

In *In re Al-Nashiri*, the U.S. Court of Appeals for the District of Columbia Circuit expressed concern over whether judges on the USCMCR were principal officers, in which case the assignment of appellate military judges to that position by the Secretary of Defense would violate the Appointments Clause of the Constitution. 791 F.3d 71, 82 (D.C. Cir. 2015) (citing U.S. Const. art. II, § 2, cl. 2). The court suggested that "the President and the Senate could decide to put to rest any Appointments Clause questions regarding the [US]CMCR's military judges by … re-nominating and reconfirming the military judges to be [*US*]*CMCR judges*." *Id.* at 86.

Apparently in response to *In re al-Nashiri*, the President nominated Colonel Mitchell for appointment as an

> appellate military judge on the USCMCR. The Senate received the President's nomination on March 14, 2016. 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016). The Senate gave its advice and consent to the appointment of Martin T. Mitchell as colonel on April 28, 2016. 162 Cong. Rec. S2600 (daily ed. Apr. 28, 2016). Colonel Mitchell took the oath of office of "Appellate Judge" of the USCMCR on May 2, 2016. On May 25, 2016, President Obama signed Colonel Mitchell's commission appointing him to be "an Appellate Military Judge of the United States Court of Military Commission Review."

*United States v. Dalmazzi*, 76 M.J. 1, 2 (C.A.A.F. 2016).

Judge Mitchell was one of three appellate military judges to participate in the Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), review of Appellant's case. Unlike in *Dalmazzi*, how-ever, the CCA's opinion in Appellant's case was issued after the President appointed Colonel Mitchell to the USCMCR, and so the issues are not moot. *See* 76 M.J. at 3.

## III. STATUTORY ISSUE

The first assigned issue is:

> Whether United States Court of Military Commission Review Judge, Martin T. Mitchell, is statutorily authorized to sit as one of the Air Force

Court of Criminal Appeals judges on the panel that decided Appellant's case.

Appellant contends that the position of judge on the USCMCR is a civil office, that by accepting such a position Colonel Mitchell's commission as a regular Air Force officer was terminated as a matter of law, and that the UCMJ does not authorize the Judge Advocates General to assign as judges to the Courts of Criminal Appeals those who have been appointed as judges of the USCMCR.

A regular officer of an armed force on the active duty list may not, "[e]xcept as otherwise authorized by law, … hold, or exercise the functions of, a civil office in the Government of the United States … (ii) that requires an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A) (2012).

From its enactment in 1870, the statute provided that "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. 319. *See also* R.S. tit. xiv, ch. 1, § 1222 (2d ed. 1878). That statute was replaced in 1968, with one that stated the "acceptance of such a civil office or the exercise of its functions by such an officer terminated his military appointment." Pub. L. No. 90-235, § 4, 81 Stat. 753, 759 (1968). The statute was substantially amended in 1983. Pub. L. No. 98-94, tit. X, pt. A, § 1002, 97 Stat. 614, 655 (1983). The language automatically terminating the officer's military appointment was repealed and a savings clause was added: "Nothing in this

subsection shall be construed to in-validate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. § 973(b)(5). However, the fundamental prohibition on the holding of a civil office was retained. 10 U.S.C. § 973(b)(2)(A).

We decide questions of statutory construction de novo. *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015). From the earliest times, we have held to the "plain meaning" method of statutory interpretation. Under that method, if a statute is unambiguous, the plain meaning of the words will control, so long as that meaning does not lead to an absurd result. *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014); *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012); *United States v. Graham*, 16 M.J. 460, 462–66 (C.M.A. 1983); *United States v. Dickerson*, 6 C.M.A. 438, 449–50,20 C.M.R. 154, 165–66 (1955). The essential question underlying the first assigned issue is whether Judge Mitchell's appointment to the USCMCR terminated his military com-mission and thereby nullified his participation in any case at the CCA. We hold that it did not.

The 1983 amendments to the statute were occasioned by an opinion of the Justice Department's Office of Legal Counsel, which opined that the longstanding practice of appointing military judge advocates as Special Assistant U.S. Attorneys violated § 973.[1]

---

[1] The report language on the provision does not go beyond that situation. S. Rep. No. 98-174, at 232–34 (1983), *as reprinted in* 1983 U.S.C.C.A.N. 1081, 1122–24. However, in view of the unambiguous

While there is much that is unsettled about this situation, the aim of the statute is clear. The evil sought to be protected against is the unauthorized holding of civil office by officers of the armed forces on active duty, which is thought to threaten "civilian supremacy in the conduct of governmental affairs." S. Rep. No. 98-174, at 232 (1983), *as reprinted in* 1983 U.S.C.C.A.N. 1081, 1122. Thus, the prohibitions in the statute are aimed at the holding of "civil office" (here, civil office requiring presidential appointment with Senate advice and consent) rather than the performance of assigned military duty. Section 973 might prohibit Judge Mitchell from holding office at the USCMCR—a question that is not before us—but nothing in the text suggests that it prohibits Judge Mitchell from carrying out his assigned military duties at the CCA. The wording of the savings clause at subsection (b)(5), "Nothing in this subsection shall be construed to invalidate any action taken by an officer in furtherance of assigned official duties" comports with this interpretation, and applies by its terms to Judge Mitchell's assigned official duties at the CCA.

Contrary to Appellant's argument, the current statute neither requires the retirement or discharge of a service member who occupies a prohibited civil office, nor operates to automatically effectuate such termination. The language supporting Appellant's argument was expressly repealed over thirty years ago. Accordingly, Judge Mitchell's military commission, and therefore, his service on the CCA, was un-affected by his appointment to the USCMCR.

---

nature of the statutory language, resort to legislative history is unnecessary.

## IV. APPOINTMENTS CLAUSE

The second assigned issue is as follows:

> Whether Judge Martin T. Mitchell's service on both the Air Force Court of Criminal Appeals and the United States Court of Military Commission Re-view violates the Appointments Clause given his status as a principal officer of the United States Court of Military Commission Review.

The Appointments Clause of the Constitution 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.

Appellant alleges that Congress intended to establish the USCMCR as an independent Article I court and protected its judges from removal other than for cause. He then argues that assigning a principal officer appointed to the USCMCR with advice and consent to a CCA with inferior officers violates the Appointments Clause. This is because mixing principal and inferior officers on a CCA allows the Judge Advocates General to "exercise an indirect veto" over the principal officers on the CCA.

The CCA, according to this argument, can be "packed" by the assignment of military officers and the appointment of a chief judge.[2] Article 66, asserts Appellant, "is being implemented in a way that puts military officers, and by extension the Judge Advocate General, in the position to exercise a formal supervisory authority over the lone principal officer on the CCA."

The problem with this argument is that it presumes that Colonel 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. That is not the case. One is a principal or an inferior officer by virtue of appointment and exercise of the duties of the office. When Colonel Mitchell sits as a CCA judge, he is no different from any other CCA judge under Article 66. The Judge Advocate General's administrative supervision of the CCA is limited even as to the CCA, *see Edmond v. United States*, 520 U.S. 651, 664 (1997), and has no authority or

---

[2] The brief asserts that, unless appointed by the President with advice and consent, CCA judges must be military officers. It cites *United States v. Janssen*, 73 M.J. 221, 225 (C.A.A.F. 2014) for that proposition. That is not what *Janssen* held. The case held that civilians appointed to the CCAs must be appointed in one of the methods set out in the Appointments Clause *for inferior officers*. In the case of the appointment at issue in *Janssen*, there was no statutory authority for such appointment. The lack of such authority was the reason for requiring the default method of presidential appointment with advice and consent to be used.

effect on the judicial or administrative functions of the USCMCR. The scheme devised by Congress and the Executive is not illogical in a situation in which service as a USCMCR judge is perforce a part-time activity. *See In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016) (stating that the USCMCR "is an unusual court in that its caseload depends on the number of military commission proceedings appealed to it. At any given time, therefore, the Court's judges may have very little to do"). Just as military officers on active du ty hold three- and four-star ranks only while assigned to billets carrying those ranks, *see* 10 U.S.C. § 601 (2012), so Colonel Mitchell and the others similarly placed enjoy the perquisites of office only while exercising the functions of the office. We see no Appointments Clause problem from the point of view of Colonel Mitchell's exercising the functions of an appellate military judge under Article 66.

It is important to note what we need not and do not decide here. First, we decide no statutory issue beyond that set out above. We do not decide whether the USCMCR is a prohibited civil office or whether it is "authorized by law" ac-cording to § 973. On the statutory issue, we simply hold that § 973 does not operate to invalidate the actions military officers appointed to civil office take in furtherance of their military duties or to require the retirement or discharge of these officers. The prohibition in § 973(b)(2)(A)(ii) may in-deed affect Colonel Mitchell's status as a judge of the USCMCR, but that is not for us to decide.

Second, we decide no issue under the Constitution's Appointments Clause beyond that treated above. We intimate no opinion as to the jurisdiction, functions, or operation of the USCMCR,

or Colonel Mitchell's membership on it. By virtue of his presidential appointment to the USCMCR, Colonel Mitchell may well be a principal officer; certainly, the Executive's response to *al-Nashiri* would seem to indicate an executive intent to treat these appointees as principal officers, but that is a question for another day, as are any Appointments Clause questions pertaining to the USCMCR in its earlier incarnation.

Finally, we need not decide the specified issue, which again goes to Colonel Mitchell's status as a principal officer vel non on the USCMCR.

## IV. JUDGMENT

The judgment of the United States Air Force Court of Criminal Appeals is affirmed.

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Keanu D.W. Ortiz,<br>Appellant | USCA Dkt. No. 16-0671/AF<br>Crim.App. No. 38839<br><br>ORDER AND JUDGMENT |

On consideration of the briefs of the parties, the briefs of *amici curiae,* and oral argument, it is, by the Court, this 9th day of February, 2017,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed. The opinion of the Court will be issued on a future date. C.A.A.F. R. 43(b). A petition for reconsideration may be filed no later than 10 days after the date of the issuance of said opinion.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES, Appellee

v.

Keanu D. W. ORTIZ, Airman First Class

U.S. Air Force, Appellant

No. 16-0671

Crim. App. No. 38839

United States Court of Appeals for the Armed Forces

ORDER

On further consideration of the granted issues in the above-entitled case (Daily Journal, October 27, 2017), it is, by the Court, this 16th day of December, 2016,

ORDERED:

That Issue II is hereby amended as follows:

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

That the petition for grant of review is also granted on the following specified issue:

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

WITHDRAWAL OF APPELLATE MILITARY JUDGES SO APPOINTED BY THE SECRETARY OF DEFENSE OR HIS DESIGNEE.

That the parties will file contemporaneous briefs and a joint appendix on the granted issues as amended and the specified issue on or before January 24, 2017;

That reply briefs will not be filed; and

That *amicus curiae* briefs under Rule 26(a)(1) will be filed on or before January 24, 2017, and motions for leave to file *amicus curiae* briefs under Rule 26(a)(3) will be filed on or before January 17, 2017. Should said motions be granted, *amicus curiae* briefs under Rule 26(a)(3) will also be filed on or before January 24, 2017

FOR THE COURT

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

| | |
|---|---|
| United States,<br>Appellee<br>v.<br>Keanu D.W. Ortiz,<br>Appellant | USCA Dkt. No. 16-0671/AF<br>Crim.App. No. 38839<br><br>ORDER |

On consideration of the petition for grant of review of the decision of the Untied States Air Force Court of Criminal Appeals, it is, by the Court, this 27th day of October, 2016,

ORDERED:

That said petition is hereby granted on the following issues:

I. WHETHER UNITED STATES COURT OF MILITARY COMMISSION REVIEW JUDGE, MARTIN T. MITCHELL, IS STATUTORILY AUTHORIZED TO SIT AS ONE OF THE AIR FORCE COURT OF CRIMINAL APPEALS JUDGES ON THE PANEL THAT DECIDED APPELLANT'S CASE.

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

No briefs will be filed under Rule 25.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

---

UNITED STATES

v.

Airman First Class KEANU D.W. ORTIZ

United States Air Force

ACM 38839

1 June 2016

Sentence adjudged 15 April 2015 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: L. Martin Powell (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Captain Lauren A. Shure.

Appellate Counsel for the United States: Gerald R. Bruce, Esquire.

Before

ALLRED, MITCHELL, and MAYBERRY

Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

PER CURIAM:

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are AFFIRMED.

[SEAL] FOR THE COURT

LEAH M. CALAHAN

Clerk of the Court

## V. RELEVANT UNPUBLISHED OPINIONS

[DEPARTMENT OF DEFENSE SEAL]

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

---

United States,

Appellant

v.

Khalid Shaikh Mohammad

Walid Muhammad Salih Mubarek Bin 'Attash

Ramzi Bin al Shibh

Ali Abdul-Aziz Ali AKA Ammar al Baluchi, and

Mustafa Ahmed Adam al Hawsawi,

Appellee

ORDER

MOTION TO DISQUALIFY JUDGES SERVING IN VIOLATION OF 10 U.S.C. § 973(B) AND THE COMMANDER-IN-CHIEF CLAUSE OF THE U.S. CONSTITUTION AND TO ABATE UNTIL A PROPERLY CONSTITUTED COURT IS CONVENED

USCMCR CASE NO. 17-002

June 21, 2017

---

BEFORE:

BURTON, PRESIDING Judge

HERRING, SILLIMAN Judges

---

On May 8, 2017, Appellee Mohammad moved this Court to disqualify Presiding Judge Burton and Judge Herring from the panel designated to decide this appeal on the grounds that their service on the U.S. Court of Military Commission Review (USCMCR) is in violation of 10 U.S.C. § 973(b) and the Commander-in-Chief Clause of Article II Section 2 of the U.S. Constitution. Appellee Mohammad Motion 1, 14. Appellee Mohammad argued their service on the USCMCR violated the Fifth and Eighth Amendments to the U.S. Constitution. Appellee Mohammad Motion 1.[1] Appellee Mohammad moved "to abate these proceedings until a properly constituted Court is convened." *Id.* 1, 14. All co-Appellees joined Appellee Mohammad in this motion. On May 15, 2017, Appellant opposed the motion for disqualification and abatement.

Our Court has previously ruled a USCMCR appellate military judge position is not a "civil office" prohibited under 10 U.S.C. § 973(b). *See Order*

---

[1] In addition, Appellee Mohammad contended that Appellee Mohammad's panel was not properly constituted because 10 U.S.C. 950f(a) required a minimum of *three military* appellate judges on a panel. (emphasis added) Appellee Mohammad Motion 9-11. On December 31, 2011, Congress substituted "judges on the Court" for "appellate military judges" in 10 U.S.C. § 950f(a). P.L. 112-81, Div. A, Title X, Subtitle D, § 1034(c), 125 Stat. 1573 (Dec. 31, 2011). The December 31, 2011 statutory substitution resolved this issue, and this issue will not receive additional discussion in this Order.

*United States v. Al-Nashiri*, No. 14-001 (USCMCR May 18, 2016) (App. A). USCMCR military appellate judges are "authorized by law" and therefore they are not subject to the civil-office prohibition. *Id*. Our Court has also previously decided that assignment of military appellate judges to the USCMCR does not violate the Commander-in-Chief Clause of Article II Section 2 of the U.S. Constitution. *United States v. Khadr*, No. 13-005 (USCMCR Oct. 17, 2014) (App. B). We revisit those issues in this Order, and we arrive at the same holding.

Facts

The Military Commissions Act of 2009 ("2009 M.C.A."), section 950f(a) states, "*Establishment*.—There is a Court of record to be known as the [USCMCR] . . . . The Court shall consist of one or more panels, each composed of not less than three judges on the Court." 10 U.S.C. § 950f(a). The 2009 M.C.A. provided for two ways to assign or appoint judges to the USCMCR:

> (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.

10 U.S.C. § 948j(b) states:

> (b) *Eligibility*. A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under section 826 of this title [10 USCS § 826] (article 26 of the Uniform Code of Military Justice) as a military judge of general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member.

On September 10, 2015, Secretary of Defense Ashton B. Carter appointed Lieutenant Colonel Burton and Colonel Herring, who are judges on the Army Court of Criminal Appeals, to the USCMCR under his authority in 10 U.S.C. § 950f(b)(2). Appellee Mohammad App. Tab 1. On September 23, 2015, they were sworn as USCMCR military appellate judges. Appellee Mohammad Motion 2 n.1 (citing Appellee Mohammad App. Tab. 1).

The Court of Appeals for the District of Columbia Circuit considered an Appointments Clause challenge to the Secretary of Defense's assignment of military judges from their Service Courts of Criminal Appeals to sit as USCMCR judges on Al-Nashiri's panel. *In re Al-Nashiri*, 791 F.3d 71, 84 n.7 (D.C. Cir. 2015) The Court said the President could nominate,

and the Senate could confirm the military judges to be USCMCR judges to "put to rest any Appointments Clause questions regarding the CMCR's military judges." *Id*. at 86.

In response to the *Al-Nashiri* decision, President Obama nominated Lieutenant Colonel Burton and Colonel Herring to the USCMCR, and on March 14, 2016, the Senate received the President's nominations. 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016). *See also United States v. Ortiz*, 2017 CAAF LEXIS 288 (C.A.A.F. Apr. 17, 2017); *United States v. Dalmazzi*, 76 M.J. 1, 2 (C.A.A.F. 2016). On April 28, 2016, the Senate confirmed them to be judges of the USCMCR. *See id*. (citing 162 Cong. Rec. S2600 (daily ed., Apr. 28, 2016)). On May 25, 2016, President Obama signed their commissions appointing each of them to be "an Appellate Military Judge of the United States Court of Military Commission Review." *See id.*

Discussion

Title 10 U.S.C. § 973 restricts specified officers on active duty from performance of civil functions, and § 973 states:

> (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);

> ***
>
> (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 [5 USCS §§ 5312-5317].
>
> (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) Nothing 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 (emphasis added). In 1975, the Ninth Circuit considered whether a Navy officer's appointment as a California state notary caused him to lose his commission under 10 U.S.C. § 973. *Riddle v. Warner*, 522 F.2d 882 (9th Cir. 1975). In *Riddle*, the court assessed the legislative history of the statute and several opinions of the Attorney General and observed:

> The current version of [10 U.S.C. § 973] had its genesis in an 1870 enactment. *See* Act of July 15, 1870, ch. 294, § 518, 16 Stat. 319. The legislative history is sparse; there appears to be no direct illumination of the problem. A comment by the chairman of the reporting committee, however, shows that a principal concern of the bill's proponents was to assure civilian preeminence in government, i.e., to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing "paramount" to it. *See* Cong. Globe, 41st Cong. 2d Sess. App. 150 (1870). Early comment on the statute suggests that the Congress was also interested in assuring the efficiency of the military by preventing military personnel from assuming other official duties that would substantially interfere with their performance as military officers. *See, e.g.*, 13 Op. Att'y Gen. 310, 311 (1870) (position of Philadelphia Parks Commissioner determined to be a "civil office"); 15 Op. Att'y Gen. 551, 553 (1876) (position as trustees of the Cincinnati Southern Railway determined to be a "civil office"); 35 Op. Att'y Gen. 187, 190 (1927) (position as head of Louisiana State University determined to be a "civil office").

*Id*. at 884 (noting state court had determined commission of state notary public was a nullity under state law, and holding 10 U.S.C. § 973 was not

violated because Riddle was already a notary as a Navy Judge Advocate under 10 U.S.C. § 836(a)) (internal footnote omitted).

The term "civil office" in 10 U.S.C. § 973(b) is not defined in the statute; however, it was understood by way of "contrast to the term 'military office.' An 'officer of the Army,' holding, as he does, the latter, is to be inhibited from holding also the former. The two are antithetical; their duties are, if not inconsistent, at any rate, widely different, and there is to be no point where they include or overlap each other."[2] An appointment statute that includes military "[r]ank, title, pay, and retirement are the indicia of military, not civil, office." *See Smith v. United States*, 26 Ct. Cl. 143, 147 (Ct. Cl. 1891). Presiding Judge Burton and Judge Herring's appointments on the USCMCR meet the Court of Claims tests because officers meeting the military judge requirements of 10 U.S.C. § 836 are all field grade officers, sitting military judges on the Service Courts of Criminal Appeals, and eligible for military retirement upon completion of the requisite number of years of military service. *See* 10 U.S.C. §§ 836, 948j(b), and 950f(b)(2). *See also, e.g., Winchell v. United States*, 28 Ct. Cl. 30, 35 (Ct. Cl. 1892). It does not matter that the President has seen fit to appoint and the Senate confirm civilians to the USCMCR because Congress expressly provided for civilians on the USCMCR under 10 U.S.C. § 950f(b)(3). *See In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). Congress has established a requirement for military officers to be additionally appointed by the

---

[2] *Acceptance of Office in National Guard of a State by Officer on Active List of the Regular Army*, 29 U.S. Op. Att'y. Gen. 298, 299 (1912); 1912 U.S. AG LEXIS 63 at *3.

President and confirmed by the Senate, beyond that included in their promotions to their rank, to certain specified positions, including: the Chairman and Vice Chairman of the Joint Chiefs of Staff, 10 U.S.C. §§ 152, 154; the Chief and Vice Chief of Naval Operations, §§ 5033, 5035; the Commandant and Assistant Commandant of the Marine Corps, §§ 5043, 5044; the Surgeons General of the Army, Navy, and Air Force, §§ 3036, 5137, 8036; the Chief of Naval Personnel, § 5141; the Chief of Chaplains, § 5142; and the Judge Advocates General of the Army, Navy, and Air Force, §§ 3037, 5148, 8037. *See Weiss v. United States*, 510 U.S. 163, 171 (1994).

None of the statutory provisions requiring Presidential appointment and Senate confirmation of commissioned officers to these positions specify the inapplicability of 10 U.S.C. § 973. *See* 10 U.S.C. §§ 152, 154, 3036, 3037, 5033, 5035, 5043, 5044, 5137, 5141, 5142, 5148, 8036, 8037. There have not been any challenges of their appointments under 10 U.S.C. § 973 in the courts. Military commissions are a traditional military function. U.S. military commissions or similar military tribunals have been used to prosecute offenses against the law of war since the Revolutionary War.[3] There were 4,271

[3] *See Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006); *Ex parte Quirin*, 317 U.S. 1, 31 n. 9 (1942) (indicating in 1780 British Major Andre was tried by a "Board of General Officers" for spying), *see also* George Davis, *A Treatise on the Military Law of the United States* 308 n.1 (rev. 3d ed. 1915) (indicating British Major Andre's tribunal was "in fact a military commission."). *See also United States v. Hamdan*, 801 F. Supp. 2d 1247, 1294-1310 (USCMCR 2011), *rev'd on other grounds*, *Hamdan v. United States*,

documented military commission trials during the Civil War and another 1,435 during Reconstruction.[4] In the wake of World War II, the U.S. military acted as a leading proponent of and participant in thousands of war crimes trials in Germany and the Far East for violations of the law of war.[5]

In *Quirin*, the Supreme Court addressed the authority of the President to try by military commission cases of the Nazi saboteurs captured on U.S. soil and accused of violations of the law of war as follows:

> Congress has explicitly provided, so far as it may constitutionally do so, that

---

696 F.3d 1238 (D.C. Cir. 2012) (describing military commissions from the Revolutionary War through the post-World War II trials).

[4] David Glazier, *The Laws of War: Past, Present, and Future: Precedents Lost: The Neglected History of the Military Commission*, 46 Va. J. Int'l L. 5, 40 n. 223 (2005) (citing Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* 168-73, 176-77 (1991)).

[5] *See* Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trial Under Control Council Law No. 10*, at 1, 234-35 (1949), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf. *See also* International Criminal Court website, Link-Allied Tribunals of the Far East, Link-United States of America, Link-Yokohama Trials, is the Internet location for numerous trials of Japanese war criminals by the Eighth U.S. Army, https://www.legal-tools.org/en/browse/; *In re Yamashita*, 327 U.S. at 1 (1946).

> military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. . . . By his Order creating the present Commission [the President] has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war. . . *An important incident to the conduct of war is the adoption of measures by the military command* not only to repel and defeat the enemy, but to seize and *subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war*.

*Ex parte Quirin*, 317 U.S. 1, 28-29 (1942) (emphasis added; internal footnote omitted). The word "military" is used in the 2009 M.C.A. more than 450 times. It is beyond dispute that military commissions are primarily a military function with a direct connection to the law of war. There is no evidence that Congress intended to limit service on the USCMCR to civilians, especially in light of the specific declaration in 10 U.S.C. § 950f(b)(2) that military appellate judges could be appointed to the USCMCR.

The Department of Justice, Office of Legal Counsel observed that the phrase "otherwise authorized by law" in 10 U.S.C. § 973(b) need not be mentioned in the appointment statute to be

effective.[6] The appointment statute does not, for example, need to indicate that the position to which a military officer is appointed in the appointment statute is an exception to the prohibition in 10 U.S.C. § 973.[7] Moreover, § 973's "'otherwise authorized by law' clause also does not list specific statutes authorizing active duty officers to hold particular civilian offices."[8]

In addition, 10 U.S.C. § 950f(b)(2), currently applying to only three military appellate judges assigned to the USCMCR, is more specific than 10 U.S.C. § 973(b)(2)(A)(ii) (currently over 1,000 Presidential appointments with Senate confirmation (PAS)),[9] and 10 U.S.C. § 950f was more recently amended than 10 U.S.C. § 973.[10]

---

[6] *See 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, 2016 OLC LEXIS 3, *6-*7, *10-*11 (Mar. 24, 2016) (2016 OLC Opinion) (holding military commissioned officers are "authorized by law" to hold civilian offices while on terminal leave even though that "position was covered by [10 U.S.C.] section 973(b)(2)(A).").

[7] *See id.*

[8] *Id.* at *10 (citations omitted).

[9] There are about 1,212 Presidential appointments with Senate confirmation (PAS) and the PAS includes "[c]abinet secretaries and their deputies, the heads of most independent agencies, and ambassadors." Zach Piaker, Center for Presidential Transition, Partnership for Public Service website (Mar. 16, 2016),

Appellee Mohammad explained his argument challenging the appointments of Presiding Judge Burton and Judge Herring as follows:

---

http://presidentialtransition.org/blog/posts/160316_help-wanted-4000-appointees.php. *See* Christopher M. Davis and Michael Greene, *Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations*, Congressional Research Service RL30959 (May 3, 2017); Henry B. Hogue and Maeve P. Carey, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, Congressional Research Service R44083 (June 22, 2015) (noting the PAS process involved more than 1,000 in Executive Branch alone). *See also, e.g., United States v. Burns*, 79 U.S. 246, 252 (1871) (concluding the Secretary of War held a "civil office," because the Secretary "is a civil officer with civil duties to perform, as much so as the head of any other of the executive departments."). *See also* 2016 OLC Opinion, *supra* n. 6, at *11-*13 (discussing "rule of relative specificity").

[10] *See* P.L. 112-81, Div A, Title X, Subtitle D, § 1034(c), 125 Stat. 1573 (Dec. 31, 2011) (most recent amendment of 10 U.S.C. § 950f); P.L. 108-136, Div A, Title V, Subtitle D[E], § 545, 117 Stat. 1479 (Nov. 24, 2003) (most recent amendment of 10 U.S.C. § 973). *See also United States v. Estate of Romani*, 523 U.S. 517, 532-33 (1998) (later, more specific statute governs); *Tenn. Gas Pipeline Co. v. FERC*, 626 F.2d 1020, 1022 (D.C. Cir. 1980) (citations omitted).

Accepting an appointment as a federal appellate judge on an independent Article I court of record is constitutionally incompatible with the status of a serving commissioned officer. Judges appointed to the USCMCR under § 950f(b)(3) cannot be reassigned or otherwise removed from the USCMCR for any reason other than good cause. This level of tenure protection, only slightly below the "good behavior" tenure of an Article III judge, is irreconcilable with the President's constitutional authority as Commander-in-Chief and therefore cannot stand.

* * *

Even if Congress had contemplated the "appointment" of military officers to the principal office of USCMCR judge – which is inconsistent with the scheme of 10 U.S.C. § 950f – the good cause tenure that accompanies such an appointment would be an unconstitutional encroachment on the President's ability to direct and supervise the duties of those in the chain of-command. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015)) ("[W]hen a Presidential power is 'exclusive,' it 'disabl[es] the Congress from acting upon the subject.") (citation omitted); *Relation of the President to the Executive Departments*, 7 U.S. Op. Att'y. Gen. 453, 464 (1955); 1855 U.S. AG LEXIS 35 ("No act of Congress . . . can . . . authorize or create any military

> officer not subordinate to the President."). Unsurprisingly, there is no precedent for military officers simultaneously serving as principal officers with the attendant tenure protections for the chain-of command. *Orloff v. Willoughby*, 345 U.S. 83,
>
> 94 (1953) (failing to find a single "case where this Court has assumed to revise duty orders as to one lawfully in the service."). It is probably no coincidence that 10 U.S.C. § 973(b), discussed above, has long been a bar to military members' simultaneous holding of civil offices that could prevent the reassignment by their military chain of command.

Appellee Mohammad Motion 11-14.

The 2009 M.C.A. § 949b(b)(4) provides the reassignment limitations for USCMCR military appellate judges:

> (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).

10 U.S.C. § 949b(b)(4).

The reassignment limitations in 10 U.S.C. § 949b(b)(4) along with other provisions in the 2009 M.C.A. are designed to ensure that the USCMCR is free from improper influence. Congress has an important role in ensuring Appellees' military commission is protected from improper influence, and one way of doing that is to limit reassignment of appellate military judges. Congress's important role is specifically defined in the U.S. Constitution. The

preamble of the Constitution "provides for the common defence." To implement that goal, the Constitution sets forth the powers of Congress as follows:

> [T]he Constitution gives to Congress the power to "provide for the common Defence," Art. I, § 8, cl. 1; "To raise and support Armies," "To provide and maintain a Navy," Art. I, § 8, cl. 12, 13; and "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14. . . . And finally, the Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18.

*Quirin*, 317 U.S. at 26. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643 (1952) (Jackson, J., concurring). The USCMCR appellate judges are not the only entity where Congress has addressed assignments and reassignments. Congress has enacted several statutes limiting assignments of military officers. *See, e.g.*, 10 U.S.C. § 154(a)(3) (defining tour length of Vice Chairman of Joint Chiefs of Staff); *id.* at §§ 661, 664, 668 (defining the qualifications, duration, and standards for tours of officers in joint duty assignments); *id.* at § 671 (prohibiting assignment overseas on land before completing entry-level training); *id.* at § 1161 (limiting the President's authority to drop an officer from the rolls for misconduct); *id.* at § 3033 (limiting the time an officer may serve as Chief of Staff of the

Army). *See also*, *e.g.*, *Clinton v. Goldsmith*, 526 U.S. 529, 532, 540 (1999) (reversing CAAF decision under the All Writs Act to enjoin the President and other officials from dropping Goldsmith from the Air Force rolls under 10 U.S.C. § 1161).

Conclusion

We affirm our previous decision that USCMCR military appellate judicial positions occupied by commissioned officers qualified under 10 U.S.C. §§ 826, 948j(b), and 950f(b)(2) initially assigned by the Secretary of Defense under 10 U.S.C. § 950f(b)(2), nominated by the President, confirmed by the Senate, and appointed by the President as "an Appellate Military Judge" under 10 U.S.C. § 950f(b)(3) to the USCMCR does not violate the civil office provision in 10 U.S.C. § 973(b). Military commissions are a traditional military function, and Presiding Judge Burton's and Judge Herring's service as military appellate judges is "authorized by law." The limitation on the President's removal or reassignment authority in the 2009 M.C.A. § 949b(b)(4) does not violate the Constitution's Commander-in- Chief Clause. Appellee Mohammad's Motion does not establish disqualification of Presiding Judge Burton and Judge Herring. Accordingly, there is no basis to abate these proceedings.

ORDER

Therefore, it is hereby

ORDERED that Appellee Mohammad's motion does not establish a basis to disqualify Presiding Judge Burton and Judge Herring, and his motion to disqualify them is DENIED. It is further

ORDERED that Appellee Mohammad's motion does not establish a basis to require three military appellate judges to be assigned to Appellee's panel, and his motion to require three military appellate judges to be assigned to his panel is DENIED. It is further

ORDERED that Appellee Mohammad's motion that this Court declare the limitation in the 2009 M.C.A. § 949b(b)(4) on the President's authority to reassign appellate military judges to be a violation of the Constitution's Commander-in-Chief clause is DENIED. It is further

ORDERED that Appellee Mohammad's motion to abate his appeal is DENIED.

FOR THE COURT:

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

[APPENDICES OMITTED]

[DEPARTMENT OF DEFENSE SEAL]

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

---

UNITED STATES,

Appellant

v.

ABD AL RAHIM HUSSAYN MUHAMMAD AL-NASHIRI,

Appellee

ORDER

LIFTING STAY

AFFIRMING PRIOR ORDERS

DENYING DISQUALIFICATION AND RECUSAL MOTIONS

SETTING ORAL ARGUMENT

CMCR CASE NO. 14-001

May 18, 2016

---

BEFORE:

MITCHELL, PRESIDING Judge

KING, SILLIMAN Judges

---

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

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

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

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

On June 26, 2015, we granted the requests to hold this case in abeyance pending possible presidential nomination and Senate confirmation of the military appellate judges. *See In re Al-Nashiri,* 791 F.3d at 86 (suggesting such nomination and confirmation would "put to rest any Appointments Clause questions"). On March 14, 2016, the Senate received the nominations of Judges Mitchell and King to our

court.[1] The Senate confirmed Judges Mitchell and King on April 28, 2016, 2 and they were sworn as USCMCR judges on May 2, 2016.[2]

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

---

[1] *See* 162 Cong. Rec. Sl474 (daily ed. Mar. 14, 2016) (indicating receipt of President's nominations of Colonel Martin T. Mitchell, U.S. Air Force, and Captain Donald C. King, U.S. Navy, as appellate military judges on the United States Court of Military Commission Review).

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

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

On May 16, 2016, we received appellee's response. Appellee moved to continue the stay; to disqualify the military judges, Judges Mitchell and King; and to recuse Judges Mitchell and King from deciding the disqualification motion. As one of several alternatives to disqualification, Appellee seeks an order "confirming Col Mitchell and CAPT King's newfound civilian status[.]" Appellee cites 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016)[3] and 10 U.S.C. 973(b) as the basis for disqualification. Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of the nomination and confirmation process. Moreover, the Senate previously confirmed Judge Mitchell to Colonel, and Judge King to Captain more than two years ago. On April 28, 2016, the Senate confirmed Judges Mitchell and King as appellate military judges in accordance with the Secretary of Defense's recommendation and the President's nomination. *See* note 2, *supra*.

---

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

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

Title 10 U.S.C. § 973(b)(2)(A) provides, "Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States-- ... ( ii) that requires an appointment by the President by and with the advice and consent of the Senate." Appellate military judges are specifically authorized by law under 10 U.S.C. § 950f(b)(2), and 10 U.S.C. § 973(b)(2) does not prohibit Judges Mitchell and King from acting as appellate military judges.[4] Title 10 U.S.C. §§ 950f(b)(2) and 973(b)(2) do not define the term "civil office", and there is no evidence that Congress intended commissioned officers appointed as appellate military judges to the Court of Military Commission Review to occupy a civil office.[5] The 2009 Military

---

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

[5] *See* Department of Defense Directive Number 1344.10, Political Activities by Members of the Armed Forces (Feb. 19, 2008) Section E2.3. (defining "civil office" as "A non–military office involving the exercise of the powers or authority of civil government, to include elective and appointed office in the U.S. Government, a U.S. territory or

Commissions Act states, "The Court shall consist of one or more panels, each composed of not less than three appellate military judges." 10 U.S.C. § 950f(a). Military commissions are used "to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. § 948b(a). Disposition of violations of the law of war by military commissions is a classic military function and Judges Mitchell and King do not occupy a "civil office" when serving as appellate military judges on the Court of Military Commission Review.

Therefore, it is hereby

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

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

ORDERED that orders our Court previous1y decided are AFFIRMED.

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

---

possession, State, county, municipality, or official subdivision thereof. This term does not include a non elective position as a regular or reserve member of civilian law enforcement, fire, or rescue squad.").

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

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

FOR THE COURT:

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

[DEPARTMENT OF DEFENSE SEAL]

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

---

UNITED STATES,

Appellant

v.

ABD AL RAHIM HUSSAYN MUHAMMAD AL-NASHIRI,

Appellee

ORDER

CMCR CASE NO. 14-001

May 2, 2016

---

BEFORE:

MITCHELL, PRESIDING Judge

KING, SILLIMAN Judges

---

On June 26, 2015, appellant filed an unopposed motion moving "the Court to stay the proceedings while it explores options for re-nomination and reconfirmation of the military judges as U.S.C.M.C.R. judges." Appellant explained that the stay sought is for all litigation on the two government appeals filed with our Court. Appellee did not object to the suspension of proceedings.

By a series of orders, our Court ordered the continued suspension of the hearing schedule and oral argument. The President nominated, and on

March 14, 2016, the Senate confirmed Judges Mitchell and King. On April 29, 2016, appellant requested that we lift the stay and reaffirm our previous orders and decisions. On April 30, 2016, appellee filed an unopposed request for an extension until May 16, 2016, to respond to appellant's motion.

Therefore, it is hereby

ORDERED that the suspension of the briefing schedule and oral argument is continued in this case. Appellee's motion to delay responding to appellant's April 29, 2016 motion until May 16, 2016 is GRANTED.

FOR THE COURT:

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

Copy to:

Convening Authority, OMC

Judges Listed

Appellate Counsels

## VI. JUDICIAL OATHS AND COMMISSIONS

JUDICIAL OATH OF OFFICE
APPELLATE JUDGE

I, Paulette V. Burton, having been duly appointed as Appellate Judge of the United States Court of Military Commission Review, do solemnly swear that I will support the Constitution of the United States, and that I will faithfully and impartially perform, according to my conscience and the laws and regulations applicable to trials by Military Commission, all the duties incumbent upon me as Appellate Judge, so help me God.

| | |
|---|---|
| 2 May 2016 | [SIGNATURE] |
| Date | (Name of Judge) |

[SIGNATURE]
Signature of Official Administering Oath

10 USC 936 [sic]
Authority to Administer Oath

Barack Obama

President of the United States of America

To all who shall see these presents, Greeting:

Know ye, that reposing special trust and confidence in the Integrity and Ability of Lieutenant Colonel Paulette V. Burton, United States Army, I have nominated, and, by and with the advice and consent of the Senate, do appoint her to by an Appellate Military Judge of the United States Court of Military Commission Review, and do authorize and empower her to execute and fulfill the duties of that Office according to law, and to have and to hold the said Office, with all the powers, privileges, and emoluments thereunto of right appertaining, unto him the said Lieutenant Colonel Paulette V. Burton, during the pleasure of the President of the United States for the time being.

In testimony whereof, I have caused these Letters to be made Patent, and the Seal of the Department of Defense to be hereunto affixed.

Done at the City of Washington this twenty-fifth day of May in the year of our Lord two thousand sixteen and of the Independence of the United States of America the two hundred and fortieth.

[DEPARTMENT OF DEFENSE SEAL]

By the President: *Barack Obama* [signature]

Secretary of Defense: *Ash Carter* [signature]

JUDICIAL OATH OF OFFICE
APPELLATE JUDGE

I, Larss Gunars Celtnieks, having been duly appointed as Appellate Judge of the United States Court of Military Commission Review, do solemnly swear that I will support the Constitution of the United States, and that I will faithfully and impartially perform, according to my conscience and the laws and regulations applicable to trials by Military Commission, all the duties incumbent upon me as Appellate Judge, so help me God.

| | |
|---|---|
| 2 May 2016 | [SIGNATURE] |
| Date | LARSS G. CELTNIEKS |

[SIGNATURE]
Signature of Official Administering Oath

10 U.S.C. § 936
Authority to Administer Oath

Barack Obama

President of the United States of America

To all who shall see these presents, Greeting:

Know ye, that reposing special trust and confidence in the Integrity and Ability of Colonel Larss Gunars Celtnieks, United States Army, I have nominated, and, by and with the advice and consent of the Senate, do appoint him to by an Appellate Military Judge of the United States Court of Military Commission Review, and do authorize and empower him to execute and fulfill the duties of that Office according to law, and to have and to hold the said Office, with all the powers, privileges, and emoluments thereunto of right appertaining, unto him the said Colonel Larss Gunars Celtnieks, during the pleasure of the President of the United States for the time being.

In testimony whereof, I have caused these Letters to be made Patent, and the Seal of the Department of Defense to be hereunto affixed.

Done at the City of Washington this twenty-fifth day of May in the year of our Lord two thousand sixteen and of the Independence of the United States of America the two hundred and fortieth.

[DEPARTMENT OF DEFENSE SEAL]

By the President: *Barack Obama* [signature]

Secretary of Defense: *Ash Carter* [signature]

JUDICIAL OATH OF OFFICE
APPELLATE JUDGE

I, James W. Herring, Jr., having been duly appointed as Appellate Judge of the United States Court of Military Commission Review, do solemnly swear that I will support the Constitution of the United States, and that I will faithfully and impartially perform, according to my conscience and the laws and regulations applicable to trials by Military Commission, all the duties incumbent upon me as Appellate Judge, so help me God.

| | |
|---|---|
| 2 May 2016 | [SIGNATURE] |
| Date | (Name of Judge) |

[SIGNATURE]
Signature of Official Administering Oath

10 USC 936 [sic]
Authority to Administer Oath

Barack Obama

President of the United States of America

To all who shall see these presents, Greeting:

Know ye, that reposing special trust and confidence in the Integrity and Ability of Colonel James W. Herring, United States Army, I have nominated, and, by and with the advice and consent of the Senate, do appoint him to by an Appellate Military Judge of the United States Court of Military Commission Review, and do authorize and empower him to execute and fulfill the duties of that Office according to law, and to have and to hold the said Office, with all the powers, privileges, and emoluments thereunto of right appertaining, unto him the said Colonel James W. Herring, during the pleasure of the President of the United States for the time being.

In testimony whereof, I have caused these Letters to be made Patent, and the Seal of the Department of Defense to be hereunto affixed.

Done at the City of Washington this twenty-fifth day of May in the year of our Lord two thousand sixteen and of the Independence of the United States of America the two hundred and fortieth.

[DEPARTMENT OF DEFENSE SEAL]

By the President: *Barack Obama* [signature]

Secretary of Defense: *Ash Carter* [signature]

JUDICIAL OATH OF OFFICE
APPELLATE JUDGE

I, Martin T. Mitchell, having been duly appointed as Appellate Judge of the United States Court of Military Commission Review, do solemnly swear that I will support the Constitution of the United States, and that I will faithfully and impartially perform, according to my conscience and the laws and regulations applicable to trials by Military Commission, all the duties incumbent upon me as Appellate Judge, so help me God.

| | |
|---|---|
| 2 May 2016 | [SIGNATURE] |
| Date | (Signature of Judge) |

[SIGNATURE]
Signature of Official Administering Oath

TSgt Leah Calahan, USAF
Clerk of Court

Authority to Administer Oath
[SEAL]

Barack Obama

President of the United States of America

To all who shall see these presents, Greeting:

Know ye, that reposing special trust and confidence in the Integrity and Ability of Colonel Martin T. Mitchell, United States Air Force, I have nominated, and, by and with the advice and consent of the Senate, do appoint him to by an Appellate Military Judge of the United States Court of Military Commission Review, and do authorize and empower him to execute and fulfill the duties of that Office according to law, and to have and to hold the said Office, with all the powers, privileges, and emoluments thereunto of right appertaining, unto him the said Colonel Martin T. Mitchell, during the pleasure of the President of the United States for the time being.

In testimony whereof, I have caused these Letters to be made Patent, and the Seal of the Department of Defense to be hereunto affixed.

Done at the City of Washington this twenty-fifth day of May in the year of our Lord two thousand sixteen and of the Independence of the United States of America the two hundred and fortieth.

[DEPARTMENT OF DEFENSE SEAL]

By the President: *Barack Obama* [signature]

Secretary of Defense: *Ash Carter* [signature]