No. 16-_____

IN THE

Supreme Court of the United States

NICOLE A. DALMAZZI,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

BRIAN L. MIZER
JOHNATHAN D. LEGG
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762

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

EUGENE R. FIDELL
127 Wall Street
New Haven, CT 06511

Counsel for Petitioner

February 1, 2017

QUESTIONS PRESENTED

Since shortly after the Civil War, federal law has required express authorization from Congress before active-duty military officers may hold a "civil office," including positions that require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii).

After President Obama nominated and the Senate confirmed Colonel Martin T. Mitchell as a judge of the Article I U.S. Court of Military Commission Review (CMCR), Judge Mitchell continued to serve on the U.S. Air Force Court of Criminal Appeals (AFCCA). The U.S. Court of Appeals for the Armed Forces (CAAF) rejected as moot Petitioner's challenge to Judge Mitchell's continued service on the AFCCA, because his CMCR commission had not been signed until after the AFCCA decided her case on the merits—even though she moved for reconsideration after the commission was signed.

The Questions Presented are:

1. Whether the Court of Appeals erred in holding that Petitioner's claims were moot.
2. Whether Judge Mitchell's service on the CMCR disqualified him from continuing to serve on the AFCCA under 10 U.S.C. § 973(b)(2)(A)(ii).
3. Whether Judge Mitchell's simultaneous service on both the CMCR and the AFCCA violated the Appointments Clause.

TABLE OF CONTENTS

Cases

Statutes and Constitutional Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Air Force Second Lieutenant Nicole A. Dalmazzi respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is reprinted in the Appendix at Pet. App. 1a. The opinion of the U.S. Air Force Court of Criminal Appeals is not reported. It is reprinted in the Appendix at Pet. App. 10a.

JURISDICTION

The Court of Appeals granted Petitioner's petition for review on August 18, 2016, *United States* v. *Dalmazzi*, 75 M.J. 434 (C.A.A.F. 2016) (mem.), and issued a final decision on December 15, 2016. This Court therefore has jurisdiction under 28 U.S.C. § 1259(3).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause provides that the President:

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

1. After it granted review, received plenary briefs, and heard oral argument, the Court of Appeals issued a decision at the end of which it vacated the grant and purported to deny Lieutenant Dalmazzi's petition. Pet. App. 7a. But this Court has appellate jurisdiction over all "[c]ases in which [CAAF] granted a petition for review under section 867(a)(3) of title 10." The Court of Appeals' grant of review brings this case within the plain meaning of that provision.

> 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.

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

> Except as otherwise authorized by law, an officer to whom this subsection applies [including "a regular officer of an armed force on the active-duty list"] may not hold, or exercise the functions of, a civil office in the Government of the United States . . . that requires an appointment by the President by and with the advice and consent of the Senate.

10 U.S.C. § 973(b)(2)(A)(ii).

STATEMENT OF THE CASE

A. Legal Background

Since shortly after the Civil War, Congress has generally prohibited active-duty military officers from holding a second non-military position within the Executive Branch. *See* Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319.[2] Although subsequent

2. The ban has been extended in some cases, including to require waiting periods before former officers can hold particular

measures have carved out a handful of express exceptions to this dual-officeholding ban, the general prohibition remains in force. *See* 10 U.S.C. § 973(b).

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

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

---

civilian positions, such as Secretary of Defense, 10 U.S.C. § 113(a), or to require that particular positions be held by civilians. *E.g.*, *id.* § 942(b)(1) (providing that CAAF judges "shall be appointed from civilian life by the President, by and with the advice and consent of the Senate").

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

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

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

CCA judges are inferior Executive Branch officers for purposes of the Appointments Clause, *Edmond* v. *United States*, 520 U.S. 651 (1996), and may thus be "assigned" to the CCAs if they are already inferior Executive Branch officers, rather than "appointed" thereto. *See Weiss* v. *United States*, 510 U.S. 163 (1994). But because the CMCR, unlike the CCAs, is not subject to appellate (or other) supervision within the Executive Branch, CMCR judges are almost certainly principal Executive Branch officers, for reasons the D.C. Circuit detailed (while reserving a ruling) in *In re Al-Nashiri*, 791 F.3d 71, 82–85 (D.C. Cir. 2015).

CMCR judges therefore hold an office "that requires an appointment by the President by and with the advice and consent of the Senate," 10 U.S.C. § 973(b)(2)(A)(ii), a conclusion the Executive Branch seems to share. Thus, in direct response to the D.C. Circuit's ruling in *Al-Nashiri* (and after initially having been "assigned" to the CMCR in 2014), Judge Mitchell was "appointed" to the court using the MCA's second staffing mechanism. *See* 10 U.S.C. § 950f(b)(3). That provision authorizes the President to "*appoint*, by and with the advice and consent of the Senate, additional judges to the [CMCR]." *Id.* (emphasis added). Every judge to join the CMCR since the D.C. Circuit's ruling in *Al-Nashiri* has similarly been "appointed" to that court.[3]

CMCR judges also hold a "civil office." The political branches have long embraced "a very liberal interpretation of the phrase 'civil office,'" *Army Officer Holding Civil Office*, 18 OP. ATT'Y GEN. 11, 12 (1884), as a generic term originally meant simply to exempt an officer's subsequent promotion (and concomitant re-appointment *as* a military officer). Thus, if a civilian can hold the position, then it is a "civil office" for purposes of § 973(b)(2)(A)(ii). *See id.* § 950f(b)(3) (authorizing appointments of civilian judges to the CMCR); *see also* U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall

3. Even if CMCR judges are inferior officers, the appointment of active-duty military officers to such positions still triggers § 973(b)(2)(A)(ii) because *appointments* to the CMCR (unlike *assignments* to it) may only be made by the President "by and with the advice and consent of the Senate." *Id.* § 950f(b)(3); *accord id.* § 973(b)(2)(A)(ii).

have been created, or the emoluments whereof shall have been increased during such time . . . .").

Indeed, the breadth of the term "civil office" is exactly *why* Congress in 1983 added three narrowing conditions to § 973(b)—including the pertinent requirement here, *i.e.*, that the second position require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii); *see also Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. § 973(b)(2)(A)*, 40 OP. O.L.C. 1, 9–10 (Aug. 2, 2016) (describing the motivation and purpose of the 1983 amendments to § 973(b)).

Any doubt that CMCR judges hold a "civil office" is conclusively settled by the 2009 amendments to the MCA, which reconstituted that body as an Article I "court of record." 10 U.S.C. § 950f(a); *see also In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). As in *Freytag* v. *C.I.R.*, 501 U.S. 868 (1991), "the clear intent of Congress [was] to transform" the CMCR from an entity wholly within the Executive Branch "into an Article I legislative court," *id.* at 888, the judges of which hold a quintessential "civil office." *See, e.g.*, *Winchell* v. *United States*, 28 Ct. Cl. 30, 35 (1892).

Nor is military officers' service as judges on the CMCR "otherwise authorized by law." Congress added that language in 1956 to reflect that "other laws enacted after the date of enactment of [5 U.S.C. § 5534a] authorize the performance of the functions of certain civil offices." 10 U.S.C. § 3544 (1958) (Historical and Revision Notes). What these other laws all have in common is clear and unambiguous indicia of Congress's intent to override the dual-

officeholding ban. *See, e.g.*, *id.* § 528 (expressly allowing appointment of certain military officers to positions within the CIA or the Office of the Director of National Intelligence). *See generally* Dwan V. Kerig, *Compatibility of Military and Other Public Employment*, 1 MIL. L. REV. 21, 85 (1958) (collecting examples).

In contrast, the MCA says nothing whatsoever about appointing military officers, as such, to serve in a "civil office" as CMCR judges. Indeed, the only language in § 950f that even appears to reference military officers is the authority provided to the Secretary of Defense to "*assign* persons who are appellate military judges to be judges on the [CMCR]." 10 U.S.C. § 950f(b)(2) (emphasis added). Neither the text nor history of this provision does not provide the clear statement required to satisfy § 973(b).

With regard to the text, the term "appellate military judges" includes civilians. *See id.* § 866(a) ("Appellate military judges who are assigned to a [CCA] may be commissioned officers or civilians"). And even if Congress nevertheless meant to refer only to military officers, given the well-settled and constitutionally significant difference between the words "assign" and "appoint" in this context, the fact that § 950f(b)(2) refers to the former "negates any permissible inference that Congress intended that military judges should receive a second *appointment*, but in a fit of absentmindedness forgot to say so." *Weiss*, 510 U.S. at 172 (emphasis added).

This understanding is confirmed by the history of § 950f(b)(2), which was first codified by the 2006 MCA—under which the CMCR was not a court of record. If Congress did not express any intent to

override § 973(b) when it created the CMCR in 2006, such an intent cannot be inferred simply from the reenactment of the same language as part of the 2009 overhaul of the MCA.

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

B. Procedural History

Petitioner, a Second Lieutenant in the Air Force, entered a guilty plea before a general court-martial to wrongfully using ecstasy in violation of Article 112 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912. She was sentenced to a dismissal and one month of confinement. Because her sentence included a dismissal, the Judge Advocate General referred the case to the Air Force Court of Criminal Appeals (AFCCA), *see id.* § 866(b)(1), before which Petitioner argued that the charge should have been dismissed due to unlawful command influence. She also objected to the severity of the sentence.

On May 12, 2016,[4] a three-judge panel that included Judge Mitchell rejected Petitioner's appeal. Judge Mitchell had also been serving on the CMCR since October 28, 2014, when he was "assigned" thereto under 10 U.S.C. § 950f(b)(2). But after the D.C. Circuit in *Al-Nashiri* called into question the constitutionality of such an "assignment," he was

4. For ease of reference, a chronology of the key events is provided in the Appendix. *See* Pet. App. 28a.

nominated by President Obama under 10 U.S.C. § 950f(b)(3) to an "appointment" as an "additional judge" on the CMCR. 162 CONG. REC. S1474 (daily ed. Mar. 14, 2016) (nomination of Colonel Mitchell to be CMCR judge "under 10 U.S.C. Section 950f(b)(3)"). The Senate confirmed him on April 28, 2016. *Id.* S2600 (daily ed. Apr. 28, 2016) (reporting confirmation).

Because of the dual-officeholding ban, Judge Mitchell's service on the CMCR should have immediately terminated his military status, thereby disqualifying him from hearing Lieutenant Dalmazzi's case. She pressed this argument in a motion for reconsideration filed with her AFCCA panel (including Judge Mitchell) on May 27, 2016, and again in the petition for review that the Court of Appeals for the Armed Forces granted. Pet. App. 3a.[5]

After full briefing and oral argument on the merits of Petitioner's challenge, the Court of Appeals issued an opinion holding that her objection was moot because President Obama did not formally sign Judge Mitchell's CMCR commission until May 25, 2016—13 days after the AFCCA decision in her case. *See* Pet.

5. The Court of Appeals treats the 60-day time limit within which to file a petition for review, *see* 10 U.S.C. § 867(b), as jurisdictional. *United States* v. *Rodriguez*, 67 M.J. 110, 116 (C.A.A.F. 2009); *see also id.* at 116 n.10 (explaining why CAAF's approach differs from civilian criminal appeals). After waiting over six weeks for the AFCCA to rule on her motion for reconsideration, Petitioner petitioned for review by the Court of Appeals on July 11, 2016, in order to satisfy § 867(b). The AFCCA subsequently concluded that that CAAF petition deprived it of jurisdiction over her motion for reconsideration, which it dismissed on July 18, 2016. *See* Pet. App. 8a (citing *United States* v. *Riley*, 58 M.J. 305, 310 n.3 (C.A.A.F. 2003)).

App. 7a ("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.").

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Misapplied the Wrong Doctrine in Rejecting Petitioner's Appeal

The Court of Appeals rejected Petitioner's appeal on mootness grounds, based upon a factually and legally indefensible application of the wrong doctrine. "As long as the parties have a concrete interest . . . in the outcome of the litigation, the case is not moot." *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1023 (2013) (internal quotation marks omitted). Petitioner, whose sentence includes a dismissal from the Air Force, unquestionably has such an interest in pursuing the disqualification of Judge Mitchell from the AFCCA panel that upheld that punishment. Her appeal was emphatically not moot.

In our view, the Court of Appeals' concerns more properly sound in *standing* to challenge Judge Mitchell's participation, *i.e.*, whether Petitioner could claim a concrete injury arising from his service on the CMCR. *See, e.g.*, *Pashaian* v. *Eccelston Props., Ltd.*, 88 F.3d 77, 83 (2d Cir. 1996) (discussing standing to seek a judge's disqualification). But even viewed through the proper doctrinal lens, the Court of Appeals' analysis failed to account for the dispositive facts of Petitioner's case or the plain text of the dual-officeholding ban.

On the facts, even if § 973(b)(2)(A)(ii) was not triggered until President Obama signed Judge Mitchell's CMCR commission on May 25, 2016,

Petitioner's motion for reconsideration before the AFCCA panel—which specifically challenged Judge Mitchell's role in her case—was filed two days later on May 27, and remained pending before the AFCCA for over six weeks before it was dismissed. *See ante* at 9 & n.5. Thus, even on the Court of Appeals' view, Judge Mitchell was still participating in Petitioner's case *after* President Obama signed his commission—by which point, if not sooner, he formally held his office as a CMCR judge.

On the law, the dual-officeholding ban applies to military officers who "hold" *or* "exercise the functions" of a civil office. *See* 10 U.S.C. § 973(b)(2)(A)(ii). Whether or not Judge Mitchell formally "held" the position of CMCR judge before President Obama signed his commission, there is no question that he "exercise[d] the functions" of that position at the same time he sat on Petitioner's AFCCA panel.

For example, on May 2, 2016 (10 days before deciding Petitioner's AFCCA appeal), Judge Mitchell took the oath of office as an "Appellate Judge" of the CMCR. Later that day, he joined in an order in a pending case. *See* Pet. App. 26a. And on May 18—still one week before President Obama signed his commission—Judge Mitchell participated in the CMCR's decision in *United States* v. *Al-Nashiri*, a decision that, more than a little ironically, rejected the argument that his appointment to the CMCR violated the dual-officeholding ban. *See* Pet. App. 18a.[6] Thus,

6. In *Al-Nashiri*, the CMCR concluded, albeit summarily, that its judges do not hold a "civil office" under § 973(b) because they exercise a "classic military function." Pet. App. 24a. This *ipse dixit* failed to grapple with the liberal interpretation all three branches have long given to the term "civil office"; the presence of civilian CMCR judges (including one of the judges on

at the same time that he joined in an AFCCA decision rejecting Petitioner's appeal, Judge Mitchell was unquestionably "exercis[ing] the duties" of a CMCR judge in violation of 10 U.S.C. § 973(b)(2)(A)(ii).

II. The Court of Appeals' Error Warrants Reversal—and Its Massive (and Growing) Impact Warrants Plenary Review

The Court of Appeals' mootness analysis is much more than an isolated flaw calling for simple error correction. Already, the Court of Appeals has applied its decision in Petitioner's case to dismiss petitions for review it had granted in at least six additional appeals from CCAs raising dual-officeholding challenges. *See United States* v. *Cox*, No. 16-635 (C.A.A.F. Jan. 17, 2017) (mem.); *United States* v. *Miller*, No. 16-641 (C.A.A.F. Jan. 17, 2017) (mem.); *United States* v. *Craig*, No. 16-650 (C.A.A.F. Jan. 17, 2017) (mem.); *United States* v. *O'Shaughnessy*, No. 16-616 (C.A.A.F. Dec. 27, 2016) (mem.); *United States* v. *Morchinek*, No. 16-617 (C.A.A.F. Dec. 27, 2016) (mem.); *United States* v. *Lewis*, No. 16-660 (C.A.A.F. Dec. 27, 2016) (mem.).

As the growing list of additional cases suggests, there is no reason to believe the Court of Appeals will abandon the approach it mistakenly adopted in Petitioner's case. *See Tory* v. *Cochran*, 544 U.S. 734, 739–40 (2005) (Thomas, J., dissenting). In addition, that error has not only infected these additional cases; it has prevented the Court of Appeals from resolving

---

the *Nashiri* panel); or the CMCR's status as an Article I "court of record." 10 U.S.C. § 950f(a). *See ante* at 5–6.

It is also telling that, even though the President had not yet signed Judge Mitchell's CMCR commission, it was not argued in *Al-Nashiri* (and the CMCR did not itself suggest) that, as CAAF held in this case, the § 973(b) claim was unavailable.

the merits of the dual-officeholding question. *See, e.g.*, *Anderson* v. *Harless*, 459 U.S. 4, 12 (1982) (Stevens, J., dissenting). At the very least, then, this Court should summarily reverse and remand in order to afford the Court of Appeals an opportunity to reach and resolve the merits of Petitioner's challenge to Judge Mitchell's involvement in the AFCCA's review of her case.

And yet, although such a disposition would ordinarily be sufficient, this Petition is not ordinary; plenary briefing and argument are instead warranted on all three of the Questions Presented:

1. Well over 100 cases are already pending in the lower military courts raising the dual-officeholding questions presented here.[7] Moreover, because of the continuing service of three CMCR judges on the Army CCA, that number is growing by the day. The sooner Petitioner's dual-officeholding claim can be conclusively resolved, the easier it will be to sort out the consequences of such a ruling on cases currently pending in the Army CCA, the Court of Appeals, and the CMCR.

2. Even if the statutory dual-officeholding claim is resolved *against* the Petitioner, such a result would only provoke a host of difficult constitutional

7. The Court of Appeals' current docket itself reflects over 80 pending cases raising the dual-officeholding question. *See* U.S. Court of Appeals for the Armed Forces, New Grants and Summary Dispositions (last updated Jan. 26, 2017), http://www.armfor.uscourts.gov/newcaaf/grants_disp.htm. As of the date of this filing, Counsel for the Petitioner are also aware of 21 additional petitions for review pending in the Court of Appeals that present dual-officeholding objections to decisions by the Army CCA. That number is growing by the day.

questions arising from the simultaneous service of an active-duty military officer on a CCA and the CMCR.

One problem with such simultaneous service arises from the Appointments Clause of Article II, since a CMCR judge who is also serving on one of the CCAs would be a principal officer (and Article I judge) serving alongside inferior (Article II) officers of equal authority. *Cf. Nguyen* v. *United States*, 539 U.S. 69 (2003) (interpreting statutes to prohibit Article III and Article IV federal judges from serving on same court of appeals panel); *id*. at 83 n.17 (suggesting that allowing such mixed panels would "call into serious question the integrity as well as the public reputation of judicial proceedings").

Moreover, in his capacity as a CCA judge, such a principal officer would be subject, contrary to the Appointments Clause, to the direct supervisory authority of another principal officer, *i.e.*, the Judge Advocate General of the relevant service branch. *See Edmond*, 520 U.S. at 664 (discussing the JAG's authority over CCA judges). *But see Myers*, 272 U.S. at 126–28 (holding that principal officers must be subject to the direct and plenary control of the President).

A second problem arises from the Commander-in-Chief Clause of Article II—since CMCR judges appointed under 10 U.S.C. § 950f(b)(3) "may be removed by the President only for cause and not at will." *Khadr*, 823 F.3d at 98. As such, CMCR judges "cannot . . . be removed by the President except [for] . . . inefficiency, neglect of duty, or malfeasance in office," *i.e.*, they have "good-cause tenure." *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 487, 493 (2010).

Such a constraint on the President's power over active-duty military officers raises constitutional concerns of the first order. *E.g.*, *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander in chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual[.]"). Indeed, it is well settled that it would be unconstitutional for Congress to "insulate [a military] officer from presidential direction or removal." David Barron & Martin Lederman, *The Commander-in-Chief at Its Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 1103–04 (2008). Yet if the dual-officeholding ban does *not* prohibit active-duty military officers from serving as CMCR judges, then the good-cause removal protection provided by 10 U.S.C. § 950f(b)(3) would have exactly that unconstitutional effect.[8]

These constitutional considerations matter in two different but equally important respects: First, they provide yet further support for Petitioner's statutory claim—that the dual-officeholding ban forbids active-duty military officers from serving as CMCR judges. Indeed, the strength of the Appointments Clause and Commander-in-Chief Clause objections should necessarily resolve any ambiguity in § 973(b)(2)(A)(ii) in favor of *prohibiting* active-duty military officers

8. The Questions Presented do not include the Commander-in-Chief Clause claim because Petitioner has no standing to object to Judge Mitchell's service on the CMCR, as such. But the very real possibility that such service might violate the Commander-in-Chief Clause both bolsters her statutory argument and underscores the need for this Court, rather than the Court of Appeals (which has no authority over the CMCR), to settle the matter.

from serving as CMCR judges. Put another way, if Petitioner is correct that Judge Mitchell's service on the CMCR triggered the dual-officeholding ban (thereby terminating him from the military and disqualifying him from the Petitioner's AFCCA panel *nunc pro tunc*),[9] Petitioner's constitutional objections disappear.

Second, these constitutional questions also suggest that, until the statutory challenge is conclusively resolved, there will continue to be panels of both the CCAs and the CMCR that are exercising authority not just in potential violation of 10 U.S.C. § 973(b)(2)(A)(ii), but in violation of two different provisions of Article II as well.[10] Even if the Court of Appeals in this (or another) case is able to resolve the merits of Petitioner's dual-officeholding challenge, such a holding would not affect the CMCR's prior rejection of such a claim in *Al-Nashiri*—which may not be subject to further appellate review anytime soon.[11]

---

9. Civilians may serve on the CCAs, 10 U.S.C. § 866(a), but they must be appointed by the President and confirmed by the Senate. *See United States* v. *Janssen*, 73 M.J. 221, 225 (C.A.A.F. 2014). Judge Mitchell was not so appointed.

10. Nor can decisions by such unlawfully constituted panels be salvaged by application of the *de facto* officer doctrine. This Court specifically rejected application of that doctrine to a claim that civilians were unconstitutionally serving on predecessors to the CCAs in *Ryder* v. *United States*, 515 U.S. 177 (1995). And CAAF has held that the *de facto* officer doctrine is inapplicable where, as here, a defendant timely challenges a judge's legal authority to sit on a CCA panel. *United States* v. *Jones*, 74 M.J. 95, 97 (C.A.A.F. 2015).

11. Although the D.C. Circuit has appellate jurisdiction over the CMCR, that jurisdiction only allows it to entertain appeals from "a final judgment rendered by a military commission (as

3. Finally, the ultimate remedy for a violation of the dual-officeholding ban—the officer's immediate termination from the military—is beyond the Court of Appeals' power to direct. *See Clinton* v. *Goldsmith*, 526 U.S. 529, 535 & n.7 (1999). Of course, that fact poses no obstacle to Petitioner's ability to obtain from the Court of Appeals the specific relief she seeks—Judge Mitchell's disqualification from her AFCCA panel. But it does underscore, more broadly, the extent to which only this Court can conclusively resolve the plethora of thorny but persistent questions raised by the appointment of active-duty military officers as CMCR judges.[12]

* * *

As the Chief Justice explained for a unanimous Court in *Munaf* v. *Geren*, even when straightforward resolution of a threshold procedural issue may settle the lower courts' error, "There are occasions . . . when

---

approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the [CMCR])." 10 U.S.C. § 950g(a); *see Khadr* v. *United States*, 528 F.3d 1112 (D.C. Cir. 2008). Thus, the CMCR's rejection of the dual-officeholding challenge in *Al-Nashiri*, *see ante* at 11 & n.5, is effectively unreviewable by the D.C. Circuit until after the CMCR has ruled on Nashiri's (or another affected defendant's) post-conviction appeal—which may not be for many years. *See In re Al-Nashiri*, 835 F.3d 110, 134 (D.C. Cir. 2016), *petition for cert. filed*, No. 16-___ (U.S. Jan. __, 2017).

12. In addition to the questions raised by the service of active-duty military officers as CMCR judges, the D.C. Circuit has also flagged "a serious issue" involving *civilian* CMCR judges, at least some of whom have continued to engage in the private practice of law without express statutory authorization to do so, despite the clear ban on such conduct in 18 U.S.C. § 203(a). *See Khadr*, 823 F.3d at 99–100.

it is appropriate to proceed further and address the merits. This is one of them." 553 U.S. 674, 691 (2008).

The same is true here.

Because of the posture in which this case reaches the Court, the more-than-100 pending cases that now turn on the resolution of Petitioner's dual-officeholding challenge, the significance of the constitutional questions that challenge implicates, and the difficulties the lower courts will have in conclusively settling the matter without this Court's intervention, certiorari is imperative.

CONCLUSION

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

Respectfully submitted,

STEPHEN I. VLADECK
Counsel of Record

727 East Dean Keeton St.
Austin TX 78705
(512) 475-9198
svladeck@law.utexas.edu

BRIAN L. MIZER
JOHNATHAN D. LEGG
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762

EUGENE R. FIDELL
127 Wall Street
New Haven, CT 06511

Counsel for Petitioner

February 1, 2017