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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

For 148 years, the dual-officeholding ban codified at 10 U.S.C. § 973(b)(2)(A) has separated the civilian and military spheres of government by barring active-duty military officers from simultaneously holding civilian positions without explicit congressional approval. To ensure that the ban fulfills its purpose:

1. It has always been read to apply to a capaciously defined class of "civil offices," including numerous offices the functions of which have historically been performed by military officers. Off. of Legal Counsel, *Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations* 18–24 (1983) ["Olson Memo"], https://perma.cc/YLM8-KTR6; *see Acting Secretary of War*, 14 Op. Att'y Gen. 200, 201 (1873).

2. The exception for cases of dual officeholding "as otherwise authorized by law" has been narrowly interpreted to require unambiguous congressional authorization. *Memorandum for the General Counsel*, 3 Op. O.L.C. 148, 150 (1979) ["Harmon Memo"].

3. Absent circumstances not presented here, a violation of the ban results in the officer's immediate forfeiture of his first (military) office. *Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. § 973(b)(2)(A)*, 40 Op. O.L.C. 1, 3 (2016) ["Thompson Memo"].

Applying these settled understandings, this should be an easy case: Judges appointed by the President to the Court of Military Commission Review (CMCR) with the advice and consent of the Senate hold a "civil office" that Congress has not specifically authorized military officers to hold. Thus, when Judges Burton,

Celtnieks, Herring, and Mitchell were appointed to the CMCR, they forfeited their commissions as military officers—disqualifying them from continuing to sit on the Courts of Criminal Appeals (CCAs).

In its brief, the government abandons these understandings. It contends that the four judges' dual officeholding was lawful because CMCR judges do not hold a "civil office," and because Congress in any event authorized such dual officeholding in the Military Commissions Act of 2009 (MCA). But even if the dual officeholding violated § 973(b)(2)(A), the government claims that, when Congress narrowed the ban in 1983, it also eliminated any consequence for its violation.

These interpretations would not only eviscerate a statute that "embodies an important policy designed to maintain civilian control of the Government," Harmon Memo at 150; they would also raise novel and serious constitutional questions. Because the relevant authorities do not compel such counterintuitive results, this Court should reject them.

I. The Four Judges' Dual Officeholding Violated § 973(b)(2)(A)

The CMCR was originally established under the Military Commissions Act of 2006, which directed the Secretary of Defense ("the Secretary") to create it within the Department of Defense (DoD). 10 U.S.C. § 950f(a) (2006). In the 2009 MCA, though, Congress reconstituted the CMCR as an Article I "court of record." *Id.* § 950f(a). Thus, regardless of whether the CMCR was *initially* "a military court modeled on the CCAs," U.S. Br. 13, the 2009 MCA intentionally scrapped that model—one of several reforms to increase the CMCR's independence vis-à-vis the Executive Branch. Pet. Br. 9–10.

The 2009 MCA also changed how CMCR judges are selected. The 2006 Act had authorized the Secretary to "assign appellate military judges" to the CMCR, who could be military officers or civilians. 10 U.S.C. § 950f(b) (2006). To avoid Appointments Clause concerns, *see Weiss* v. *United States*, 510 U.S. 163, 170 n.4 (1994), the 2009 MCA took away the Secretary's power to "assign" civilians to the CMCR, and instead authorized the President to "appoint . . . additional judges" with the advice and consent of the Senate. 10 U.S.C. § 950f(b)(3).

The government contends that the four judges' appointments did not violate § 973(b)(2)(A) because CMCR judges do not hold a "civil office," and, even if they did, military officers appointed to the CMCR hold such an office "as . . . authorized by law," *i.e.*, the MCA. Because of the changes Congress adopted in 2009, these arguments both fail.

A. "Civil office." Judges appointed to the CMCR under § 950f(b)(3) hold a "civil office" because Congress created that position by statute; because its holders exercise the sovereign authority of the United States; and because civilians may (and, indeed, do) hold it. Pet. Br. 30–34. The government does not dispute that these criteria are satisfied; it argues that such judges don't hold a "civil office" because they exercise a "military function"—reviewing military commission trials of enemy belligerents. And the sole justification offered for this characterization is the claim that military officers have previously exercised an analogous function. U.S. Br. 20–22.

This argument founders on its premise. The government's examples, *id*. at 26 n.6, are all of officers exercising administrative oversight—akin to the role

played by the Convening Authority under the MCA, 10 U.S.C. § 950b, not the CMCR. As the government concedes, "formal appellate oversight [of military commissions] is new." U.S. Br. 26; *see* Pet. Br. 9 n.10 (noting the lack of appellate review until 2005).[1]

Nor does it follow that, because military officers have in the past performed a particular function, that function is by definition "military"—let alone that an office in which it is performed must not be "civil." Military officers perform countless civil functions, just as civilian judges holding indisputably civil offices have play a central role in military justice—including on the Court of Appeals for the Armed Forces (CAAF).

But even if CMCR judges do perform functions that are in some sense "military" in nature, that would hardly prove that they do not hold "civil offices." Until this litigation, the government properly construed the term "civil office" in § 973(b) to cover even some offices that predominantly exercise military functions, such as Secretary of War. *Acting Secretary of War*, 14 Op. Att'y Gen. at 201; *see* Olson Memo at 18–24. Military offices, in contrast, are defined by "rank, title, pay, and retirement." Pet. Br. 32 n.22.

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1. In addition, judges who review military commissions "are primarily called upon to address questions about the laws of war, a body of international law hardly foreign to federal courts, and questions about the constitutional constraints on military commissions, an area in which Article III courts, *not* military courts, are especially expert." *In re Al-Nashiri*, 835 F.3d 110, 139 (D.C. Cir. 2016) (Tatel, J., dissenting) (citations omitted).

To that end, the D.C. Circuit has regularly reversed CMCR decisions on questions of military law—even for plain error. *E.g.*, *Al Bahlul* v. *United States*, 767 F.3d 1, 27–31 (D.C. Cir. 2014) (en banc).

Congress has endorsed this reading, expressly authorizing military officers to hold numerous civil offices that primarily exercise core military functions. Pet. Br. 31; Olson Memo at 16. The critical difference between these offices and second "military" offices (such as the Chairman of the Joint Chiefs of Staff) is not their function, but the fact that civilians can hold them. Thus, even if CMCR judges appointed under § 950f(b)(3) exercise a "military function," that would not settle whether they hold a "civil office" under § 973(b)(2)(A); one could similarly describe judges on CAAF or the Court of Appeals for Veterans Claims.

In contrast, Petitioners' definition of "civil office" is consistent with the history and purpose of the dual-officeholding ban and the government's own prior understanding. If the office is created by statute, if its holder exercises the sovereign authority of the United States, and—most importantly—if it can be held by civilians, it is a "civil office" under § 973(b)(2)(A).[2] Judges appointed to the CMCR under § 950f(b)(3) easily meet this test.

B. "Except as Otherwise Authorized by Law." Under § 973(b)(2)(A), a military officer may not hold, or exercise the functions of, a civil office "[e]xcept as otherwise authorized by law." As OLC has explained, "[w]here Congress wishes to permit a military officer to occupy a civilian position . . . without forfeiting his commission, it has [said] so explicitly." Harmon Memo at 150. But the MCA says nothing at all—let alone

2. The government argues that our definition of "civil office" encompasses the CCAs. U.S. Br. 25. This misses the significance of the 2009 MCA. CCAs are established by service-branch Judge Advocates General, not Congress, 10 U.S.C. § 866(a), and thus more closely resemble the original CMCR than the present one.

anything explicit—about whether military officers may hold the office of CMCR judge "*as* otherwise authorized by law," *i.e.*, by presidential appointment. Pet. Br. 39–42.

The government does not argue that § 950f(b)(3) provides the requisite clear statement. Instead, it pitches its argument on a different MCA provision—§ 950f(b)(2), which authorizes the Secretary to "assign" military officers to the CMCR. U.S. Br. 27–30. Of course, § 950f(b)(2)'s express reference to military officers only underscores Congress's silence as to whether those officers may serve on the CMCR "as" authorized by § 950f(b)(3). Pet. Br. 40–41.

The government nevertheless insists that the MCA satisfies § 973(b)(2)(A) because "both assigned and appointed [CMCR] judges hold the same office." U.S. Br. 28. But even if "assigned" CMCR judges hold the same "office" as "appointed" CMCR judges (and as we show below, they don't), that would not satisfy § 973(b)(2)(A). The question is not, as the government suggests, whether the military officer is otherwise authorized "to hold the office," but rather whether he or she holds that office "*as* otherwise authorized by law," *i.e.*, in the manner Congress authorized. And a military officer holding the office of CMCR judge by appointment under § 950f(b)(3), as opposed to by assignment under § 950f(b)(2), is plainly *not* holding the office "as" authorized by the MCA.

In any event, military officers who have been "assigned" to the CMCR do not hold the "same office" as those "appointed" to the court—not because Congress created two separate "offices" of CMCR judges, but because an officer "assigned" to exercise the duties of another position holds only one office for

Appointments Clause purposes, not two. *Weiss*, 510 U.S. at 172–76; *see id.* at 191 (Souter, J., concurring) (military judges hold "a single military office").

It is well settled that "Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed," *Shoemaker* v. *United States*, 147 U.S. 282, 300–01 (1893), so long as the new duties are "germane" to the offices "already held." *Id.* at 300. Otherwise, as Justice Scalia explained in *Weiss*, "taking on the nongermane duties of military judge would amount to assuming a new 'Offic[e]' within the meaning of Article II, and the appointment to that office would have to comply with the strictures of Article II." 510 U.S. at 196 (Scalia, J., concurring in part and concurring in the judgment) (alteration in original).

Thus, when Congress in 2006 provided that the Secretary could "assign" military officers to the CMCR, it did not create a new office for those officers to fill. It merely added "additional duties, germane to the offices already held by" military officers. *Shoemaker*, 147 U.S. at 301. But when Congress in 2009 provided that the President, by and with the advice and consent of the Senate, could "appoint" "additional judges" to the CMCR, it *did* create a new (civil) office. That's why judges who have been appointed to the CMCR receive commissions *as* CMCR judges, J.A. 180, 182, 184, 186, whereas judges who have been assigned to the CMCR do not.

The difference between these methods is not "merely stylistic." *Edmond* v. *United States*, 520 U.S. 651, 657 (1997). As we have explained, Pet. Br. 41, different rules govern how the two types of CMCR

judges are chosen (and by whom); what qualifications (if any) are required of them; how they are paid; and how they may be removed.

The government is therefore correct that "Section 950f establishes only one office," U.S. Br. 27, but it is wrong as to which office Congress established; the office created by the MCA is that of a judge appointed by the President under § 950f(b)(3)—which military officers do not hold "as otherwise authorized by law."[3]

II. The Four Judges' Dual Officeholding Terminated Their Military Service

Had the violation of the dual-officeholding ban occurred before 1983, there would be no dispute that the four judges would have forfeited their military commissions by operation of law. 10 U.S.C. § 973(b) (1982). The government argues, however, that when Congress amended § 973(b) in 1983, it eliminated *any* consequence for violating the ban—to either the officer or the actions they undertook while unlawfully holding two offices. In reaching this conclusion, the government ignores the structure, context, and purpose of the 1983 amendments—and argues against its own prior constructions of that statute.

It is common ground that the 1983 Act was a direct response to the Olson Memo, and its conclusion that the assignment of JAG lawyers to exercise the functions of Special Assistant U.S. Attorneys violated

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3. In opposing certiorari, the government had also argued that judges appointed to the CMCR under § 950f(b)(3) do not 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); *see Dalmazzi* Opp. Br. 17–18; *Ortiz* Opp. Br. 12–13. It no longer appears to dispute that § 950f(b)(3) itself requires such an appointment. U.S. Br. 30 n.8.

§ 973(b). The Olson Memo also implied that Congress should *allow* such assignments going forward, because the ban was meant to focus on unauthorized civil offices held by election or appointment. Olson Memo at 15 n.20. After all, under *Shoemaker*, an officer who has merely been assigned to exercise the functions of a civilian position (like the JAG lawyers) is not in fact "holding" two offices at once.

In response, Congress narrowed the offices covered by the ban to those that satisfy the additional criteria set out in § 973(b)(2)(A), which generally require election or presidential appointment and Senate confirmation. And in line with *Shoemaker*, Congress authorized military officers to exercise the functions of all other "civil offices" if they were "assigned or detailed" thereto. 10 U.S.C. § 973(b)(2)(B).

Because Congress narrowed the scope of the ban (in section 1002(a) of the 1983 Act), it also sought, at OLC's urging, to eliminate any consequence for actions officers had undertaken in "assigned" (but *not* elected or appointed) civil roles before 1983. To that end, the next subsection (section 1002(b)) provided:

> Nothing in [§ 973(b)] as in effect before the date of enactment . . . shall be construed—(1) to invalidate any action undertaken by an officer of an Armed Force *in furtherance of assigned official duties*; or (2) to have terminated the military appointment of an officer of an Armed Force by reason of the acceptance of a civil office, or the exercise of its functions, by that officer *in furtherance of assigned official duties*.

DoD Authorization Act, 1984, Pub. L. No. 98-94, § 1002(b), 97 Stat. 614, 655 (1983) (codified at 10 U.S.C. § 973 note) (emphases added).

As the emphasized text makes clear, Congress's focus was exclusively on previously unauthorized *assignments*. To that end, section 1002(b) immunized officers from termination if they had been unlawfully assigned to a civil office (*e.g.*, JAG lawyers), and insulated from collateral attack those actions the officers undertook "in furtherance of [such] assigned official duties" (*e.g.*, civilian convictions obtained by JAG lawyers)—and nothing more. If a military officer had been elected or appointed to an unauthorized civil office before 1983, section 1002(b) had no effect.

Whereas section 1002(b) applied only to pre-1983 violations of the ban, Congress also provided two prospective remedial reforms. *First*, it enacted, as § 973(b)(5), a verbatim copy of section 1002(b)(1)'s immunity provision: "Nothing in this subsection shall be construed to invalidate any action undertaken by an officer *in furtherance of assigned official duties*."

Second, apparently in response to abuse of § 973(b) by Vietnam-era officers (some of whom accepted minor local offices to terminate their military service), U.S. Br. 32 n.9, Congress deleted language automatically vacating the military commission of any officer "accepting or exercising the functions of a civil office." 10 U.S.C. § 973(b) (1982). And it delegated to the Secretary the power to "prescribe regulations to implement [§ 973]," currently reflected in *Political Activities by Members of the Armed Forces*, DoD Directive 1344.10 (2008) ["Directive 1344.10"].

The Directive identifies eight circumstances in which an officer does not have to be terminated for violating § 973(b)(2)(A). *Id.* ¶¶ 4.6.1.1–4.6.1.9.[4] In

4. Perhaps because of the Vietnam-era issue, the first two exceptions are for officers "[o]bligated to fulfill an active duty

such cases, however, the Directive does not *permit* the officer to simultaneously hold both offices, *id.* ¶ 4.4.2 (prohibiting dual officeholding on the same terms as § 973(b)(2)(A)); instead, it presumably precludes the officer's acceptance of the *civil* office.

Notwithstanding this backdrop, the government's principal argument is that these reforms (1) generally exempt military officers from termination of their military office for violations of even the post-1983 dual-officeholding ban; and (2) preclude collateral attacks on all actions dual officeholders take in either position after assuming an unauthorized civil office. The necessary implication of this argument is that Congress in 1983 neutered the dual-officeholding ban. But as the government's own understanding (until this litigation) underscores, nothing in the 1983 Act supports—let alone compels—such a jarring result.

A. Mandatory Termination. The government now insists that when Congress deleted the statutory termination requirement in 1983, it also abrogated the common law rule that unlawful dual officeholding triggers disqualification from the first office—and instead left to the Secretary's sole discretion whether a military officer should forfeit his military office upon violating § 973(b)(2)(A). U.S. Br. 34–37.

As the government concedes, no legislative history supports this claim. *Id.* at 36. And the government's own Directive contradicts it, identifying eight specific circumstances in which termination is not required. There would have been no reason for the Secretary to delineate those exceptions if the common law rule no

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service commitment" or "[s]erving . . . in an area that is overseas, remote, a combat zone, or a hostile pay fire area." Directive 1344.10 §§ 4.6.1.1–4.6.1.2.

longer applied. Instead, the better reading is that Congress gave the Secretary discretion to depart from that rule in appropriate cases—to insist upon forfeiture of the civil, rather than military, office—but that it otherwise remains in force. Pet. Br. 42–43.

This reading is reinforced by the 2016 Thompson Memo, in which both OLC and DoD continued to read § 973(b)(2)(A) (and not just the Directive) to "prohibit continuation of military status upon appointment to a covered position." Thompson Memo at 3;[5] *see also Reserve Officer Holding Civil Office*, 4 Civ. L. Op. JAG A.F. 391, 391 (1991) ("[A] member elected or appointed to a prohibited civil office may request retirement and shall be retired if eligible. If such member does not request or is not eligible for retirement, the member shall be discharged or released from active duty."); Dep't of Def., Standards of Conduct Off., Advisory No. 02-21, *What Constitutes Holding a "Civil Office" by Military Personnel* (2002) ("The directive, as a general rule, requires retirement or discharge for members elected or appointed to a prohibited civil office.").

The government's only rejoinder is language in the Directive providing that an officer "may request retirement (if eligible), discharge, or release from active duty." Directive § 1344.10 ¶ 4.6.1. In its view, this language establishes that "[t]ermination . . . is not automatic upon the acceptance of the prohibited office; it is expressly made discretionary." U.S. Br. 37.

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5. The government claims that the Thompson Memo was addressed to "the substantive reach of Section 973(b), not the remedy for a violation." U.S. Br. 37 n.10. But the quoted language reflected DoD's assumption (that OLC did not dispute) that *if* DoD was correct about "the substantive reach of Section 973(b)," *then* the ban would "prohibit continuation of military status."

But the Directive's permissive language is with respect to *how* offending officers are to be terminated from the military (voluntarily or involuntarily), not *whether* they must be terminated. Directive 1344.10 ¶ 4.6.2 ("Subparagraph 4.6.1. does not preclude a member's involuntary discharge or release from active duty."). Thus, the Directive does not override the dual-officeholding ban itself; it merely overrides the common law incompatibility rule in cases in which the penalty inures to the civil—not military—office.

Because none of those circumstances are present here, the common law rule applies. Pet. Br. 42–45. When the four judges began to exercise the functions of judges appointed to the CMCR under § 950f(b)(3), they forfeited their military commissions and thereby became ineligible to participate in Petitioners' CCA appeals—rendering those decisions not just voidable, but void. *Ryder* v. *United States*, 515 U.S. 177, 182–83 (1995); *see Nguyen* v. *United States*, 539 U.S. 69, 77 (2003) (declining to apply the *de facto* officer doctrine to "irregularities in the assignment of judges").

B. § 973(b)(5). The government falls back on § 973(b)(5): "Nothing in [§ 973(b)] shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." In its view, this text immunizes all actions an unlawful dual officeholder takes going forward in *both* offices.

The government claims that Petitioners "do not appear to dispute that a natural reading of Section 973(b)(5) forecloses [our] claim." U.S. Br. 33. On the contrary, our opening brief demonstrated how the limiting phrase "in furtherance of assigned official duties" in § 973(b)(5), when read alongside the same language in section 1002(b) of the 1983 Act, clearly

refers only to those duties the officer undertook in a position to which he or she was unlawfully *assigned*. Pet. Br. 46–47. Indeed, the fact that § 973(b)(5) is a word-for-word copy of section 1002(b)(1) of the 1983 Act only reinforces that it has this meaning. *Id*. at 48.

Tellingly, the government has no explanation for how the same language in adjacent provisions of the same statute could have the radically different meanings its brief implies. Instead, it asserts that our reading renders § 973(b)(5) superfluous, because section 1002(b)(1) of the 1983 Act retroactively insulated officers' actions in civil offices to which they had unlawfully been assigned (and such assignments are no longer possible after the 1983 Act). U.S. Br. 34.

In fact, there is no such superfluidity: military officers *can* still be unlawfully assigned to civil offices today—offices listed "in the Executive Schedule under [5 U.S.C. §§ 5312–17]." 10 U.S.C. § 973(b)(2)(A)(iii).[6] Properly understood, § 973(b)(5) is the prospective counterpart to the immunity retroactively conferred by section 1002(b)(1). Nothing in the text, context, or purpose of the 1983 amendments supports the conclusion that Congress intended anything more. Section 973(b)(5) therefore has no bearing in cases—like these—in which the dual officeholding results from unauthorized appointments.

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6. Like the government, our opening brief neglected this provision in suggesting that "a prohibited civil office requires an election or an appointment." Pet. Br. 47. Although many offices listed in the Executive Schedule also require an appointment by the President with the advice and consent of the Senate, roughly one-third of them do not. *E.g.*, 38 U.S.C. § 308(a)(3) (four of seven Assistant Secretaries of Veterans Affairs may be appointed "without the advice and consent of the Senate").

III. The Government's Position Raises Serious Constitutional Questions

If the government is correct that no consequence stems from the four judges' dual-officeholding violation, or that there was no violation in the first place, that conclusion would raise two novel and substantial constitutional questions.

A. The Commander-in-Chief Clause. The Constitution "vest[s] in the President the supreme command over all the military forces." *United States* v. *Sweeny*, 157 U.S. 281, 284 (1895). That includes his "right to decide according to [his] own judgment what officer shall perform any particular duty." *Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 468 (1860).

As the government has argued elsewhere, judges appointed under § 950f(b)(3) do not serve at the pleasure of the President; they can be removed only for "good cause." *In re Khadr*, 823 F.3d 92, 98 (D.C. Cir. 2016); *see Wiener* v. *United States*, 357 U.S. 349, 356 (1958). Thus, if the four judges did not forfeit their military commissions when they began to exercise the functions of appointed CMCR judges, they would have been insulated from the President's command and control—thereby raising a serious Commander-in-Chief Clause question.[7]

Instead of defending the constitutionality of "good cause" removal for military officers appointed to the CMCR under § 950f(b)(3), the government claims that

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7. Although a CMCR appointment would not prevent the President from terminating an officer's military commission, the CMCR's "good cause" removal restriction could certainly hamper the President's ability to reassign that officer to conflicting military duties that the President determines to be more pressing or appropriate.

these presidential appointees can nevertheless be "reassigned" from the CMCR by the Secretary under 10 U.S.C. § 949b(b)(4). U.S. Br. 41. This square-peg-into-a-round-hole reasoning is not only unfounded; it would not actually solve the constitutional problem.

The government offers no evidence that Congress intended to give the Secretary (to say nothing of the DoD General Counsel)[8] the power, by "reassignment," to remove a CMCR judge appointed by the President with the advice and consent of the Senate. "Under the traditional default rule, removal is incident to the power of appointment." *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477, 509 (2010); *see Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259–60 (1839). Even if Congress *could* constitutionally depart from that rule, there is no evidence that it did so in the MCA.[9]

In any event, § 949b(b)(4) still constrains the President's power to direct the actions of military officers by limiting the reassignment of CMCR judges to four specific circumstances.[10] Thus, whether their

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8. The Secretary has delegated his reassignment authority to the DoD General Counsel. Regulation for Trial by Military Commission ¶ 25-2(g).

9. The government's only support for its newfangled construction of § 949b(b)(4) comes from the text of the judges' nominations and commissions—in which Congress played no part. U.S. Br. 30. It is Congress, though, that defines the removal conditions of an office it creates. And even if those terms *could* be altered by presidential fiat, the nominations and commissions here refer only to the "unlawful influence prohibitions . . . under [§ 949b(b)]," 162 Cong. Rec. S1474 (daily ed., Mar. 14, 2016).

10. In telling contrast to the reassignment of CMCR judges under § 949b(b)(4), Congress has left the rules for reassigning CCA judges entirely to the President. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5330(a), 130 Stat. 2000, 2932 (2016) ("In accordance with

removal is governed by "good cause" or by § 949b(b)(4), it would raise a novel and serious question under the Commander-in-Chief Clause if military officers were simultaneously allowed to hold office as judges appointed to the CMCR under § 950f(b)(3).

2. The Appointments Clause. The government has not identified a single instance in which the same individual has simultaneously held different offices through which they served on different federal courts—or has simultaneously held office as both an inferior and a principal officer within the Executive Branch. Instead, as proof that such dual officeholding poses no unconstitutional "incongruity," it points to judges who serve on the Foreign Intelligence Surveillance Court and Court of Review, and those who sit by designation on other courts. U.S. Br. 39.

Here, again, Congress has not created a second, inferior "office" that the judges hold simultaneously with their principal Article III office; such judges are all "designated" temporarily to serve on those second tribunals in their capacity as holders of their underlying judgeships. 28 U.S.C. §§ 291–97; 50 U.S.C. § 1803(a)(1), (b). As for the incongruity of a principal officer (on the CMCR) serving alongside inferior officers (on the CCAs), the government's purported counterexamples are likewise inapposite. Justices, circuit judges, and district judges may hold offices on different courts, but they are all *principal* officers. *Freytag* v. *C.I.R.*, 501 U.S. 868, 884 (1991); *see Weiss*, 510 U.S. at 191–92 & n.7 (Souter, J., concurring).

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regulations prescribed by the President, assignments of [judges to the CCAs] shall be for appropriate minimum periods, subject to such exceptions as may be authorized in the regulations.").

The government says we have "all but abandon[ed] the Appointments Clause as a freestanding claim." U.S. Br. 37. Far from it. Pet. Br. 52 ("[S]uch simultaneous service is unconstitutional."); *see Free Enterprise Fund*, 561 U.S. at 505 ("Perhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent." (citation and internal quotation marks omitted)). But the Court can and should avoid resolving that question—by construing any ambiguity in § 973(b) to prohibit a military officer from also serving as a presidentially appointed judge on the CMCR.

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"In general, courts should think hard, and then think hard again, before turning small cases into large ones." *Camreta* v. *Greene*, 563 U.S. 692, 707 (2011). We obviously do not believe that this is a small case, but the government would make it far bigger than it needs to be—asking this Court not only to hold that Congress eviscerated the dual-officeholding ban in 1983, but to resolve the novel constitutional questions such a holding would provoke. There are good reasons to assume that Congress "does not . . . hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). Even better reasons militate against the unnecessary resolution of difficult constitutional questions.

IV. This Court Can—and Should—Reverse All Eight Judgments Below

Finally, if this Court reverses CAAF's judgment in *Ortiz*, it should do so in *Dalmazzi* and the six cases consolidated in *Cox*, as well.

A. Jurisdiction. In arguing against this Court's jurisdiction in *Dalmazzi* and *Cox*, the government

pays scant attention to the text of 28 U.S.C. § 1259(3), which conditions this Court's review solely on whether CAAF (1) granted a petition for review; and (2) issued a decision. Pet. Br. 23–27. CAAF did both of those things in all eight cases before the Court.

The government's argument rises and falls on 10 U.S.C. § 867a(a), which provides that "[t]he Supreme Court may not review by a writ of certiorari under this section any action of [CAAF] in refusing to grant a petition for review." U.S. Br. 42–43. But CAAF did far more than "refus[e] to grant a petition for review" in *Dalmazzi*: it granted the petition, specified additional issues, received full merits briefing, heard oral argument, and issued a published, precedential opinion (resolving one of the issues on which review was granted), before *purporting* to vacate the grant of review and deny the petition at the end of its ruling.

Nor is the attempt to analogize these cases to those in which a district court withdraws a prior grant of certification under 28 U.S.C. § 1292(b) convincing. That provision conditions jurisdiction not on whether a specific procedural step *happened*, but on the judge's "opinion." Opinions can change; facts cannot. The government is correct that CAAF "hold[s] the key allowing access to the Supreme Court," U.S. Br. 43. But once that key has been turned, § 1259(3) precludes *un*-turning it and thereby evading review.

Otherwise, CAAF could conclude its precedential opinions with the disposition it tacked onto *Dalmazzi*,[11] and thereby render this Court (and a

11. CAAF has even relied upon its substantive analysis in *Dalmazzi* in subsequent opinions. *E.g.*, *United States* v. *Richards*, 76 M.J. 365, 367 n.1 (C.A.A.F. 2017) (noting "our

habeas court, Pet. Br. 27 n.18) powerless to review them. That is not what Congress intended when it enacted § 1259(3), and it is not compelled by the text of either that provision or § 867a(a). This Court therefore has jurisdiction in all eight cases.[12]

B. "Abuse of Discretion." The government also suggests that, because CAAF had discretion to deny the petitions for review in *Dalmazzi* and the six cases consolidated in *Cox*, its decisions should only be reviewed for an "abuse of discretion." U.S. Br. 52–53. The government waived this argument by failing to raise it in opposing certiorari. S. Ct. R. 15.2; *see Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010).

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holding in . . . *Dalmazzi*"); *United States* v. *Commisso*, 76 M.J. 315, 318 n.2 (C.A.A.F. 2017) (citing *Dalmazzi*).

12. Petitioners agree with the government that this Court can constitutionally hear appeals from CAAF. U.S. Br. 45–51; *see Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("[T]he essential criterion of appellate jurisdiction [is] that it revises and corrects the proceedings in a cause already instituted . . . .").

As the government correctly argues, this Court's appellate jurisdiction does not turn—and never has turned—on whether the "proceedings in a cause already instituted" took place before an Article III court. *E.g.*, *United States* v. *Coe*, 155 U.S. 76, 85 (1894) (upholding direct review from an Article I tribunal); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 337–39 (1816) (upholding direct review from state courts). The touchstone is whether the underlying proceeding was "judicial." *E.g.*, *Tutun* v. *United States*, 270 U.S. 568, 576 (1926). The *amicus* could hardly claim that CAAF's proceedings are not "judicial," in contrast to Secretary of State Madison's refusal to deliver William Marbury's commission. CAAF's administrative location and Article I status are therefore immaterial to whether this Court may constitutionally exercise appellate jurisdiction over it.

Waiver aside, this contention also lacks merit. The Petitioners in *Dalmazzi* and *Cox* are not challenging *whether* CAAF should have exercised its discretion to grant review, but rather its substantive analysis in support of the judgments. As with this Court's review of a state court with discretionary jurisdiction, how CAAF answers a federal question is subject to *de novo* review, even if CAAF could have declined to answer the question in the first place. *E.g.*, *Grady* v. *North Carolina*, 135 S. Ct. 1368, 1370 & n.* (2015).

Implicitly conceding that CAAF resolved *Dalmazzi* on the merits, the government closes by defending CAAF's analysis—asserting that the four judges were continuing to act in their capacity as *assigned* CMCR judges when they decided the *Dalmazzi* and *Cox* Petitioners' CCA appeals. U.S. Br. 53 n.17. This argument is substantively unavailing, Pet. Br. 27–29; it is also belied by the government's own conduct.

After *In re Al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015), the government obtained a stay from the CMCR while it sought to resolve the Appointments Clause problem identified therein. J.A. 171. On April 29, 2016 (the day after the Senate confirmed the four judges), the government asked the CMCR to lift the stay, *id.* at 172, conveying its (correct) understanding that the confirmations settled that constitutional problem—because they transformed the judges from "assigned" to "appointed" CMCR judges.

Even on the government's view, then, by the time the four judges took the oath of office as § 950f(b)(3) appointees on May 2, 2016 (if not sooner), they were "exercising the functions" of a "civil office."[13] All eight

13. Even if CAAF was correct that no impermissible dual officeholding occurred until President Obama signed Judge

Petitioners are therefore entitled to have the appeals of their court-martial convictions re-heard by lawfully constituted CCA panels.

Mitchell's commission on May 25, the Petitioner in *Dalmazzi* and one of the *Cox* Petitioners are still entitled to relief. In *Dalmazzi*, the Petitioner sought rehearing before her Air Force CCA panel including Judge Mitchell on May 27. J.A. 6. In *Cox*, Petitioner Lewis moved for reconsideration before an Air Force CCA panel including Judge Mitchell on May 28. *Id*. at 45.

CONCLUSION

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

Respectfully submitted,

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