

1 APPEARANCES:

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3 of the Petitioners.

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8 Department of Justice, Washington, D.C.; on behalf
9 of the Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 16-961, Dalmazzi versus United States, and the consolidated cases.

Mr. Vladeck.

(Laughter.)

ORAL ARGUMENT OF STEPHEN I. VLADECK
ON BEHALF OF THE PETITIONERS

MR. VLADECK: Mr. Chief Justice, and may it please the Court:

At the heart of these complicated cases is the simple and well-settled distinction between federal officers who are appointed to a second office and those who have been assigned to exercise additional duties germane to their original appointment who hold one office, not two.

The dual office-holding ban incorporates this distinction, prohibiting active-duty military officers from holding a second office that requires nomination by the President and confirmation by the Senate absent express congressional authorization, while generally allowing military officers to be

1 assigned to exercise the duties of such
2 positions.

3 That's why when the four judges at
4 issue here began to serve as appointed judges
5 on the CMCR, the Court of Military Commission
6 Review, it violated the dual office-holding ban
7 and disqualified them from hearing the
8 Petitioners' appeals.

9 Congress created the Court of Military
10 Commission Review in 2006 as part of the
11 Military Commissions Act, and the initial plan
12 for the CMCR was modeled very much on the then
13 existing courts of criminal appeals in the
14 court-martial system, right down to how the
15 judges were to be selected. So in the original
16 language of the 2006 Act, judges could be
17 assigned by the Secretary of Defense to the
18 CMCR, and those judges could either be
19 civilians or military officers.

20 In 2009, when Congress turned around
21 the CMCR, when Congress decided to make it more
22 independent of the executive branch, one of the
23 measures it pursued was to bifurcate that
24 provision and to break out the assignment of
25 military officers and the appointment of

1 "additional judges" by the President with the
2 advice and consent of the Senate.

3 And it's our submission that when
4 Congress did so, it created a civil office and
5 did not expressly authorize military officers
6 to hold that civil office. That's why when the
7 D.C. Circuit suggested in the Nashiri case that
8 there is a constitutional problem with the
9 assignment of military officers to the CMCR and
10 the President responded by appointing five of
11 those officers, four of whom are relevant here,
12 to that court, it triggered the dual
13 office-holding ban and, in our view,
14 disqualified those officers from continuing to
15 serve --

16 JUSTICE GINSBURG: So are you --

17 MR. VLADECK: -- on the CCA.

18 JUSTICE GINSBURG: -- saying it was
19 the suggestion of the D.C. Circuit that the
20 constitutional problem would be cured by
21 appointing these judges to the CMCR, that gave
22 you the basis for your lawsuit? In other
23 words, when Congress said it authorized CCA
24 judges to serve on the CMCR and said the
25 Secretary of Defense may assign persons who

1 hold military positions, you had no case,
2 right?

3 MR. VLADECK: We certainly would have
4 no case under the dual office-holding ban,
5 Justice Ginsburg, for the simple reason that
6 when military officers are assigned, whether to
7 the CCAs or to the CMCR, they don't hold a
8 second office in the first place.

9 There, of course, was the Appointments
10 Clause challenge to those assignments, but,
11 yes, there would be no problem under this
12 statute in that circumstance.

13 JUSTICE GINSBURG: And you say the
14 consequence now, because they are appointed
15 rather than assigned, is that they not only can
16 no longer serve on the CMCR but they're out of
17 the service entirely. That's rather draconian
18 to these people who were just doing what they
19 were assigned to do and now told: Sorry,
20 you're out of the military, although you spent
21 19 years here. Too -- too bad.

22 MR. VLADECK: So just to clarify, they
23 can still serve on the CMCR, right, that we are
24 not challenging the appointments to the CMCR.
25 Our argument is simply that that converted

1 these officers into civilians.

2 But to Justice --

3 JUSTICE GINSBURG: And -- but you are
4 saying that how -- you -- they would have to be
5 civilians on the CMCR.

6 MR. VLADECK: That's correct.

7 JUSTICE GINSBURG: Because you say
8 they -- they lose their military -- and to be
9 civilians, they'd have to be reappointed.

10 MR. VLADECK: So we don't -- we don't
11 dispute that it is a severe consequence,
12 Justice Ginsburg, but we would just suggest
13 that it was the consequence Congress wrote into
14 the statute in 1870. The government does not
15 dispute that before 1983, at least, there would
16 have been no question that that was the
17 appropriate consequence in this case.

18 And it also reflects the common law
19 incompatibility rule.

20 JUSTICE GINSBURG: What about the --
21 the idea of fair notice to people who have
22 devoted their lives to military service and
23 then told you're out?

24 MR. VLADECK: There's no question, of
25 course, that Congress could make these officers

1 whole if there is any regard in which this
2 action led to the deprivation of benefits.

3 But, of course, this has happened
4 before. This Court and the Court of Appeals
5 for the Armed Forces has ruled at various
6 points in the past that you had military
7 officers who were wrongfully appointed, that
8 you had military officers who were acting ultra
9 vires. We don't dispute that it's an
10 unfortunate consequence for these four
11 officers. We just think it is the one that the
12 common law and the statute demands in these
13 cases.

14 JUSTICE ALITO: Well, what do you --

15 MR. VLADECK: Yes.

16 JUSTICE ALITO: -- what do you make --
17 what do you do about the fact that in 1983
18 Congress eliminated the part of 973 that said
19 that an officer is automatically terminated if
20 the officer accepts a covered civil office?
21 And what about the savings clause, which says
22 that nothing in Section 973(b) shall be
23 construed to invalidate any action undertaken
24 by an officer in furtherance of assigned
25 official duties?

1 MR. VLADECK: So I think the -- the
2 answer to both questions, Justice Alito,
3 depends upon placing the 1983 amendments in
4 context. And if you'll indulge me, I'll try to
5 do so.

6 The purpose of the 1983 amendments, we
7 and the government agree, was in direct
8 response to the OLC opinion which had called
9 into question the widespread practice of JAG
10 lawyers, military officers, serving as special
11 assistant U.S. attorneys and prosecuting
12 ordinary civilian offenses on military
13 installations.

14 JUSTICE GORSUCH: We can accept that
15 that might have been the purpose of the
16 statute, but what we do with the text, I think
17 is what Justice Alito is getting at?

18 MR. VLADECK: I'll -- and -- and if
19 you'll bear with me, I'm hoping to get there,
20 Justice Gorsuch.

21 So the -- the point of the statute was
22 to basically say these assignments are not, in
23 fact, a problem under the dual office-holding
24 ban because they're not reflecting a military
25 officer holding two offices; that, in fact, the

1 pre-1983 statute had been construed by the
2 Justice Department perhaps over-broadly. And
3 so both the savings clause and the elimination
4 of the automatic termination language were with
5 an eye toward this purpose, to narrow the scope
6 of the dual office-holding ban.

7 JUSTICE GORSUCH: Got it. Still
8 waiting for the text argument.

9 MR. VLADECK: So there's no text, of
10 course, on termination. Now, the text of the
11 savings clause refers to actions in furtherance
12 of assigned official duties. You'll find this
13 at page 10a of the blue brief. And, of course,
14 the question is what does "assigned" mean in
15 that provision?

16 Our argument is that "assigned" there
17 is in contrast to appointed or elected, that
18 because the 1983 amendments were about
19 reasserting the distinction between holding two
20 offices and simply exercising additional duties
21 as part of your original military office, it
22 makes sense, it's appropriate, it's consistent
23 with the text to read assigned in that context,
24 to mean exactly what the JAG officers had been
25 doing that triggered the statute in the first

1 place. They had been exercising the functions
2 of a civil office as part of their assigned
3 official duties.

4 JUSTICE SOTOMAYOR: So what do we make
5 of the words "except as otherwise authorized by
6 law"? It seemed to me that what was the
7 purpose of the automatic termination were
8 people who were running for public office
9 without authority by law. They were --
10 meaning, there was no federal law saying they
11 could do this.

12 So what do you do with this, with that
13 "except"?

14 MR. VLADECK: So I think -- I mean, a
15 good example, there are, of course, examples
16 where Congress has expressly authorized
17 military officers to hold a second, even civil
18 office. And perhaps the most common and
19 familiar example is the CIA director.

20 The director of the CIA -- the
21 government, I don't believe, disputes that
22 that's a civil office. Congress has expressly
23 authorized that office to be held by a military
24 officer. And so the question --

25 JUSTICE SOTOMAYOR: I'm sorry. How

1 have they done that?

2 MR. VLADECK: There is a separate
3 section, I believe it's 10 U.S.C. Section 528,
4 Justice Sotomayor, where Congress has said that
5 the CIA director may be a military officer,
6 without any consequence inuring to his military
7 service, without losing his commission, without
8 losing benefits, without losing rank or pay or
9 anything else.

10 The government argues here that the
11 Military Commissions Act itself provides
12 comparable authorization, that Congress when it
13 allowed military officers to be assigned to the
14 CMCR was showing similar approval.

15 And, frankly, again, I think that
16 misstates the distinction between being
17 assigned to exercise additional duties,
18 Congress clearly did authorize military
19 officers to be assigned additional duties as
20 CMCR judges, and being appointed to a second
21 office.

22 There's no language in the Military
23 Commissions Act, especially the provision that
24 refers to the appointment of additional judges,
25 that's Section 950f(b)(3) -- and I apologize

1 for the number of section numbers and
2 acronyms -- there's no language in that
3 provision, Justice Sotomayor, that comes
4 anywhere near suggesting that in 2009 Congress
5 was thinking about military officers when it
6 created this separate appointed office that it
7 was allowing additional judges to hold.

8 JUSTICE ALITO: What about 9 -- what
9 about -- I mean, there are a lot of statutory
10 hurdles you've got to get over.

11 What about 973(d), which delegated to
12 the Secretary of Defense the authority to
13 prescribe regulations to implement the ban on
14 dual office holding, and the Secretary has said
15 in regulations that, under the actions
16 undertaken by a member in carrying out assigned
17 military duties, shall be invalidated solely by
18 -- by virtue of such member having held or
19 exercised the function of a civil office in
20 violation of the prohibitions of 973(b).

21 MR. VLADECK: So I think -- thank you
22 for pointing out the directive. I think the
23 key language in the directive is actually the
24 provisions at Sections 4.6, which you will find
25 at pages 18-A and 19-A of the blue brief. And

1 what the directive does, Justice Alito, is the
2 directive says we, the Defense Department, are
3 recognizing circumstances --

4 JUSTICE ALITO: Where is this, I'm
5 sorry?

6 MR. VLADECK: I'm sorry, it's pages
7 18-A and 19-A of the blue brief in the
8 appendix. The directive was the Secretary's
9 response to the provision Justice Alito cited,
10 to Section 973(d), which delegated to the
11 Secretary of Defense the power to promulgate
12 regulations to enforce Section 973.

13 And, Justice Alito, I think it's
14 telling that the Secretary's response -- this
15 is page 18-A of the blue brief -- was to
16 delineate eight specific categories of cases
17 where termination of the officer's military
18 status was not to be the consequence, basically
19 reflecting the Vietnam era concerns that the
20 government raised in its brief, identifying
21 circumstances where the -- the remedy for a
22 violation of the statute was not going to be
23 forfeiture of military office.

24 What -- I'm sorry.

25 JUSTICE BREYER: Why -- I'm just

1 curious why -- why is this a civil office? Can
2 you hear me?

3 MR. VLADECK: I can. Thank you,
4 Justice Breyer. So on -- on civil office, and
5 I want to make sure I get back to Justice
6 Alito's question, but on --

7 JUSTICE BREYER: Well, go ahead and
8 finish that first.

9 MR. VLADECK: So, Justice Alito, as we
10 say in our reply brief, it would have made no
11 sense, there would have been no need for the
12 Secretary to identify the eight circumstances
13 in which a military officer was not going to
14 have to surrender his military office, if the
15 1983 statute did, in fact, as the government
16 argues, categorically eliminate termination as
17 a consequence.

18 If I might turn to Justice Breyer's
19 question, with regard to civil office, for us,
20 of course, the key to concluding that an
21 appointed judge on the Court of Military
22 Commission Review holds a civil office is the
23 fact that Congress has created the office by
24 statute, that it exercises the sovereign
25 authority of the United States, and that it can

1 be held and, indeed, is held by civilians.

2 That is in contrast to the --

3 JUSTICE BREYER: Why is that? I mean,
4 after all, Congress creates the military by
5 statute. And it appoints all the officers by
6 statute. And they're all confirmed by -- by
7 Congress.

8 And this is a Commission that normally
9 serves in areas where it could be under
10 civilian control, but the civilian courts are
11 not functioning and, therefore, we have a
12 military commission serving the ordinary
13 officers.

14 Now, all those things seem military,
15 special, and if you want to know whether -- if
16 you want to use did Congress intend military
17 officers to serve on it, and in the absence of
18 that it's civil, they did. All right.

19 So -- so what's civil about it? I
20 mean, except the fact you mentioned, it's of
21 course true, it is of course true, that there
22 is one civilian on it or two or three. That's
23 true.

24 Is there anything that says a military
25 officer, which would otherwise be totally

1 military, suddenly becomes civil because you
2 appoint one person who's civil?

3 MR. VLADECK: Well, I would start -- I
4 would start, Justice Breyer, with the
5 government's definition of what a military
6 office is. A military office, the government's
7 definition, the Court of Claims, we cite this
8 in our brief, has long been defined by rank,
9 title, pay, and command.

10 And, of course, judges who are
11 appointed to the Court of Military Commission
12 Review have only one of those things, pay,
13 which, of course, is itself distinct.

14 But to the point that I -- I took your
15 question to be asking about the function, the
16 government makes much of the claim that the
17 Court of Military Commission Review is
18 exercising a classic military function, and I
19 think it's worth stressing it's actually
20 neither classic nor military.

21 There had never been appellate review
22 of military commissions until 2005. And up
23 until that point, and to this day, the
24 principal judicial review of military
25 commissions on the battlefield or off, Justice

1 Breyer, has been by civilian judges, whether
2 collaterally through habeas corpus or whether
3 on direct appeal in the court-martial system to
4 the Court of Appeals for the Armed Forces, a
5 court staffed by civilians, or as Congress
6 contemplated in the Military Commissions Act
7 through the CMCR to the D.C. Circuit, a court
8 also staffed by civilians.

9 JUSTICE BREYER: In the Civil War, I
10 think you had military commissions, didn't you?

11 MR. VLADECK: There were military
12 commissions, Justice Breyer. There was no
13 mechanism for appeal. The only --

14 JUSTICE BREYER: So you want us to
15 distinguish between appeal and just carrying
16 out a trial?

17 MR. VLADECK: Well, I think -- I think
18 the distinction is structural, Justice Breyer.
19 So a military commission like a court-martial
20 is not a stand-in court. It is not a court of
21 record. It is created solely by the military.
22 It is governed by the military.

23 Congress when it created the
24 predecessors to the CCAs in 1950 and the
25 predecessor to the court of appeals, when

1 Congress created this structure, Congress was
2 intentionally mapping on to the court-martial
3 system civilian appellate review.

4 And the purpose of that was not
5 because it was viewed as classically a military
6 function but because Congress was of the view
7 that we needed civilian judges exercising
8 oversight.

9 But one last point, just back to the
10 beginning of the statute, in 1873, three years
11 after the statute was written, the Attorney
12 General concluded that the Secretary of War,
13 who holds about as military an office as I can
14 think of, nevertheless held a civil office for
15 purposes of this very statute.

16 And that I think reflects, Justice
17 Breyer, the long-standing view that civil
18 office in this context is meant to be construed
19 capaciously, back to Justice Alito's question,
20 it's part of why in 1983 Congress added the
21 three limiting criteria, that the civil office
22 has to require an election or an appointment by
23 the President and confirmation by the Senate or
24 one of the offices listed in the executive
25 schedule, because the standalone term, civil

1 office, had been read so capaciously.

2 JUSTICE GINSBURG: Is there anything
3 incompatible about serving on a CCA, which
4 deals with ordinary court martials, and service
5 on the CMCR, which deals with enemy combatants?

6 MR. VLADECK: So, I mean, certainly,
7 Justice Ginsburg, we think there's first, of
8 course, statutory incompatibility, that the
9 dual office holding ban, if read correctly,
10 creates a statutory incompatibility where any
11 functional incompatibility is actually a
12 secondary consideration.

13 JUSTICE GINSBURG: But is there any
14 functional?

15 MR. VLADECK: So we -- we suggest that
16 there is. I mean, indeed, this is why we think
17 that the government's position, even if one
18 were to accept it, raises serious separation of
19 powers concerns because you have the specter of
20 an officer who is a principal officer over here
21 on one court and an inferior officer over here
22 on another court serving with similar staffs,
23 interacting with similar officers in the
24 appellate counsel's office, for example, in
25 both the government -- the prosecution and

1 defense side.

2 And so we think that there's a reason
3 why the government has been unable to identify
4 a single example of this kind of dual office
5 holding in American history.

6 CHIEF JUSTICE ROBERTS: What is the
7 big deal, though? What is the big problem with
8 being a principal officer in one context and an
9 inferior officer in the other?

10 MR. VLADECK: There's no default --

11 CHIEF JUSTICE ROBERTS: It's not like
12 you're branded one or the other and you carry
13 it around with you wherever you go.

14 MR. VLADECK: No, of course not, Mr.
15 Chief Justice. And it's not our suggestion
16 that it's a categorical incongruity. Our point
17 is simply that if you disagree with our
18 interpretations of the relevant statutes, and
19 if you conclude that there is, in fact, no
20 problem today with this particular arrangement,
21 in this context, there might be a unique
22 concern of incongruity because, Mr. Chief
23 Justice, of the overlapping personnel, because
24 of the sensitivities of the command structure,
25 because of the very real possibility that

1 individuals with different authority on
2 different courts might not intentionally but
3 just by being there unduly influence the
4 actions of those who are subordinate to them in
5 one context but perhaps their peers in another.

6 JUSTICE SOTOMAYOR: Mr. Vladeck, you
7 didn't raise the amici's point, but what
8 position do you take with respect to that
9 point?

10 MR. VLADECK: So --

11 JUSTICE SOTOMAYOR: I know you don't
12 -- I know you don't want to be non-suited --

13 MR. VLADECK: No, no.

14 JUSTICE SOTOMAYOR: -- but -- but I
15 trust -- I trust your independent judgment that
16 you'll give us your views on that presented
17 question.

18 MR. VLADECK: And I'm mindful that my
19 federal courts class begins tomorrow. So --

20 JUSTICE SOTOMAYOR: Yes.

21 MR. VLADECK: -- the -- the -- with
22 regard to the amicus's point about
23 constitutional appellate jurisdiction, I think
24 it's worth starting from this Court's decision
25 in United States versus Coe, which, frankly, I

1 did not know about before this case.

2 Coe is an 1894 decision which we cite,
3 which the government cites in its brief, where
4 this Court expressly upheld its appellate
5 jurisdiction from the Article I Court of Public
6 Land Claims.

7 And the -- the government -- I'm
8 sorry, the -- the appellant in error in that
9 case moved to dismiss the case in the Supreme
10 Court on the ground that this Court lacked
11 constitutional appellate jurisdiction because
12 the relief that the government was seeking in
13 that case was tantamount to what it had sought
14 in Marbury.

15 And this Court expressly rejected that
16 argument. As Chief Justice Fuller wrote for a
17 unanimous court, "when Congress has exercised
18 its power to lawfully create a non-Article III
19 federal tribunal" -- the quote is -- "it
20 follows" that Congress may vest this Court with
21 direct appellate authority to do that.

22 JUSTICE KENNEDY: How -- how is that
23 different from the National Labor Relations
24 Board or the SEC?

25 MR. VLADECK: So, Justice Kennedy, I

1 think there are a couple of differences.
2 First, of course, Congress has never purported
3 to describe the NLRB or the SEC as a court.

4 JUSTICE KENNEDY: It's just labels
5 we're talking about?

6 MR. VLADECK: No. So, of course, the
7 label is not sufficient, but we think it is
8 probative. So, for example, when Congress does
9 choose to define a tribunal as a court of
10 record, what that means, of course, is that the
11 court exists independent of the officers who
12 staff it.

13 It means the court is capable of
14 receiving process on its own without the
15 officers who attend to it. And at common law,
16 of course, a writ of certiorari --

17 JUSTICE KENNEDY: You mean the NLRB
18 doesn't exist -- if there's a vacancy, there's
19 no NLRB anymore?

20 MR. VLADECK: If it's inchoate, it's
21 quite possible that the NLRB would not be able
22 to hand down decisions.

23 But, Justice Kennedy, the larger point
24 is we don't think this Court needs to reach
25 what is obviously the much harder question of

1 direct appellate jurisdiction over adjudicative
2 proceedings by an agency here because here,
3 unlike in the NLRB and SEC cases, you have
4 Congress creating a court of record, a court of
5 record, mind you, that is capable of dispensing
6 capital punishment. These are criminal cases.
7 And --

8 JUSTICE BREYER: Yeah, but that isn't
9 the issue. The issue I think is -- that's
10 being raised is what Justice Kennedy said.
11 There are many, many, many adjudicatory bodies
12 in the executive branch.

13 And what the amicus says is if you
14 don't want to have jurisdiction by cert
15 directly from all of those, rather than through
16 a court of appeals or a habeas court, if you
17 don't want that because you think that is
18 inconsistent with separation of powers, then
19 you'd better find a way or a reason or a
20 sensible difference between this case and the
21 NLRB and the SEC. And what -- what the amicus
22 says is that Coe and the other cases that have
23 upheld it -- I'm not sure how he deals with
24 *Palmore*; I don't know about the D.C. I'll have
25 to ask about that.

1 But the -- the -- the -- leaving that
2 to the side, they all not only have the
3 attributes of a -- of a court, but they also
4 have jurisdiction over a territory. Now, I
5 think that that is what he sees in the prior
6 cases. And he says that is not true here. All
7 right?

8 Now, if you do not agree with that,
9 why? If you have a different test, why? If
10 you would bring in all the NLRB, then say it.

11 MR. VLADECK: So, again, I -- first of
12 all, let me take those in order if I might,
13 Justice Breyer.

14 JUSTICE BREYER: It's one question.

15 (Laughter.)

16 MR. VLADECK: Indeed, although I hope
17 you'll indulge me in multiple sentences.

18 (Laughter.)

19 MR. VLADECK: The -- the -- with
20 regard to the territorial point, I think it's
21 worth reminding this Court of its decision in
22 Palmore, where Justice White went out of his
23 way to uphold jurisdiction over the D.C. Court
24 of Appeals because the territorial courts
25 looked like military courts. That is to say

1 the analogy between the military and
2 territorial courts is actually deeply embedded
3 in this Court's non-Article III jurisprudence.

4 And so I think actually there's a
5 quite decent overlap between the two.

6 With regard to how this Court could
7 distinguish and save for another day the
8 question of when Congress could give it direct
9 appellate jurisdiction over an administrative
10 tribunal, I do think the fact that Congress has
11 called the Court of Appeals for the Armed
12 Forces a court of record, that it acts like a
13 court of record, and that it dispenses
14 judgments in criminal cases are all reasons
15 that distinguish it from administrative
16 adjudication.

17 And if we're really focused on Chief
18 Justice Marshall in Marbury, I think it's worth
19 reiterating that just four years after Marbury
20 in Ex parte Bollman, the Chief Justice went out
21 of his way to distinguish cases in which this
22 Court was asked to review the decisions of a
23 lower court by which a citizen has been
24 committed to jail.

25 JUSTICE KENNEDY: Does the precedent

1 --

2 JUSTICE BREYER: I thought the court
3 of record was a court -- for years, I must have
4 been under a misapprehension. I thought the
5 appeals courts of the circuits are not courts
6 of record but the district courts are. And
7 that is because in the district courts, there
8 is a record. There is a -- a notary, there's a
9 person there who takes -- here -- and -- and
10 the courts of appeals, the discussion such as
11 here, though we have it recorded, it's not
12 necessarily a record. And in the courts of
13 appeals, it certainly isn't.

14 MR. VLADECK: I'm -- I'm fairly sure,
15 Justice Breyer, that the circuit courts are
16 also courts of record.

17 JUSTICE BREYER: Because?

18 MR. VLADECK: Because they are
19 standard tribunals that produce records, that
20 produce transcripts, that produce proceedings
21 independent of the participants.

22 JUSTICE KENNEDY: And judgments.

23 MR. VLADECK: And judgments. And --
24 and one last point, Justice Kennedy, on
25 judgments. I do think, Justice Breyer, that

1 the judgments piece is part of this. I mean,
2 three years ago, this Court in the B&B Hardware
3 case, I think, saw the difficulties of adopting
4 a bright-line rule for when administrative
5 adjudications would or would not be preclusive.

6 That is not true here. There is no
7 question in the -- in the court-martial system
8 that when the Court of Appeals for the Armed
9 Forces issues a judgment, it is binding, it is
10 preclusive, it is usually sending a service
11 member to prison, and perhaps it's even leading
12 to a capital sentence.

13 JUSTICE KENNEDY: Do you think Marbury
14 versus Madison is right?

15 (Laughter.)

16 JUSTICE KENNEDY: Particularly as to
17 the interpretation with such exceptions as
18 Congress may make.

19 MR. VLADECK: So, I will confess,
20 Justice Kennedy, that I may perhaps belong in
21 the school of scholars who thinks that Chief
22 Justice Marshall read both the statute and the
23 Constitution to reach the constitutional
24 questions he wanted to reach.

25 I'm not sure that he nevertheless

1 didn't end up with the right -- with the wrong
2 answer. And, again, I think, for purposes of
3 the question presented in this case on this
4 Court's jurisdiction, the more relevant case is
5 not Marbury but Bollman.

6 And if I may, Mr. Chief Justice, I'd
7 like to reserve my time.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Bamzai.

11 ORAL ARGUMENT OF ADITYA BAMZAI
12 ON BEHALF OF PROFESSOR BAMZAI
13 IN SUPPORT OF NEITHER PARTY

14 MR. BAMZAI: Thank you, Mr. Chief
15 Justice, may it please the Court:

16 This Court lacks Article III
17 jurisdiction to issue the writs in these cases.
18 The CAAF is an executive branch entity,
19 something that I believe the government does
20 not dispute. This Court's direct review of
21 executive branch officials is necessarily
22 original, not appellate, as established by
23 Marbury itself.

24 These two propositions decide this
25 case. Now, my friends on the other side have

1 made the argument by analogy to the territorial
2 and D.C. courts, and that's the principal and,
3 in fact, it's the only argument on which they
4 rely, but it's very important for this Court to
5 understand that that is a slippery slope to go
6 down because territorial and D.C. government is
7 very different in a number of respects.

8 And so, for example, I understood the
9 Court to be asking, well, if -- if the Court
10 were to apply the territorial cases such as
11 United States versus Coe permitting review from
12 the highest court in the territory to military
13 courts, then wouldn't that open up the
14 possibility that review would be permissible
15 from other adjudicatory bodies in the federal
16 agencies, many of which can be characterized as
17 courts under the definition offered by my
18 friend, such as the tax court.

19 JUSTICE SOTOMAYOR: I'm sorry. Except
20 that unlike those other agencies, territories,
21 this D.C. court, and military organizations are
22 explicitly -- Congress explicitly authorized to
23 -- to file rules and regulations. The three
24 provisions are almost identical.

25 And why aren't military courts

1 virtually geographic? Most military operations
2 happen in bases domestically or in foreign
3 fields. So in what ways are they different
4 geographically?

5 MR. BAMZAI: Your answer -- Your
6 Honor, a couple of answers to that. The first
7 is that they're not geographic in the sense in
8 which the territorial or D.C. courts are, where
9 we have courts of general jurisdiction that
10 step in for state courts where no state
11 apparatus is available.

12 And so that is the rationale that this
13 Court has given in a number of its territorial
14 court cases.

15 JUSTICE SOTOMAYOR: Well, we've also
16 said, with respect to military justice, that it
17 -- it is -- that it is the juris --
18 jurisdiction of the commander in charge of
19 either that base or that division. So, in
20 those ways, civil law doesn't apply either.

21 MR. BAMZAI: Your Honor, it's true
22 that civil law doesn't apply. It's military
23 law that is applicable in these courts-martial.
24 But I don't think we're talking about
25 territorial jurisdiction in the same way that

1 we are with respect to territorial governance.

2 And if we were, then as I pointed out
3 in my motion for oral argument time, the
4 government's position is that the appointments
5 clause does not apply to the territories where
6 currently sitting in jurisdiction in which the
7 mayor is elected. And none of those departures
8 from the ordinary separation of powers could
9 possibly be applicable within the military
10 system.

11 So there must be some narrower
12 principle to explain, and this Court will have
13 to draw a distinction between the territorial
14 schemes of governance and the military and
15 other schemes of governance in federal
16 agencies.

17 CHIEF JUSTICE ROBERTS: I mean, I
18 understand your argument that they are
19 different because of -- but I don't understand
20 what possible pertinence the fact that they
21 cover a territory as opposed to a subject
22 matter has to do with your Article III
23 objection?

24 MR. BAMZAI: Your Honor, it's both.
25 It's the -- the -- the reason why territorial

1 courts were created, and this is Chief Justice
2 Marshall's opinion in American Insurance versus
3 Canter points this out, that -- that Article
4 III courts, under the understanding of Article
5 III at the time, may not have been able to
6 resolve certain disputes that were necessary,
7 just in order to govern the group of people
8 such as divorce disputes and --

9 CHIEF JUSTICE ROBERTS: So your
10 doctrine wouldn't apply if the Article III
11 Court couldn't do it, then you'd have to say it
12 is all right for them to do it in a way that
13 seems inconsistent with your theory?

14 MR. BAMZAI: Not at all, Your Honor.
15 What I'm -- what I'm pointing out is that the
16 territorial courts were created for a certain
17 reason, and that is that they stepped into the
18 shoes of state courts where state courts were
19 not available.

20 And that explains why certain
21 principles of the structural separation of
22 powers don't apply within the territories of
23 D.C. It also --

24 JUSTICE KAGAN: I guess I don't
25 understand why the exact same rationale

1 wouldn't apply here. In other words, you know,
2 a member of the military assaults somebody on a
3 military base and Congress decides: We don't
4 want that assault to be prosecuted in the state
5 court. We want that assault to be prosecuted
6 within a military -- a system of military
7 justice.

8 So Congress is essentially doing the
9 same thing. Look, the regular state courts are
10 not suited to decide some set of cases. We're
11 going to set up a different set of courts;
12 territorial, on the one hand; on this hand,
13 partly territorial, but also defined by subject
14 matter.

15 MR. BAMZAI: Your Honor, I think it is
16 --

17 JUSTICE KAGAN: By people, really.

18 MR. BAMZAI: I think it is different
19 in relevant respects. And the Court's
20 decisions in this area have treated those --
21 these two types of courts differently.

22 And so, for example, *Ex parte*
23 *Vallandigham* or the *Gordon versus United States*
24 case, which we cite in our brief, are about
25 military courts and about the initial

1 incarnation of the court of claims.

2 And this Court denied jurisdiction and
3 said that it could not directly review either
4 of those courts.

5 That contrasts with the Court's
6 approach to United States versus Coe from a
7 territorial court. And so there -- there must
8 be a line that can be drawn between territorial
9 courts and these other types of adjudicatory
10 bodies that are within the executive branch.

11 And I submit that the line that I have
12 proposed is the easiest and best line that
13 explains all the cases, as well as allows the
14 court to say that all bodies that are within
15 the executive branch cannot be subject to this
16 Court's direct review.

17 JUSTICE GINSBURG: May I go back to
18 the beginning of your argument? You said that
19 the CAAF exercises original jurisdiction. But
20 let me ask you first, does this case, cases
21 that come to the CAAF, arise under federal law?

22 MR. BAMZAI: Yes, Your Honor. And if
23 I may just say that I believe that this Court
24 exercises original jurisdiction in this case.
25 So I don't believe that the CAAF --

1 JUSTICE GINSBURG: All right. Then --
2 then how does it get to be original
3 jurisdiction when the CAAF is an appellate body
4 that it is not making original, deciding in the
5 first instance, it is an appellate body, so it
6 goes to -- to the courts-martial and it goes to
7 the CCA and then -- so that's one level of
8 review.

9 CAAF is a second level of review. It
10 is exercising appellate jurisdiction. It's not
11 hearing the case in the first instance.

12 MR. BAMZAI: Your Honor, all of that
13 may be right, but for constitutional purposes,
14 the -- this Court is the first Article III
15 court to be reviewing an executive branch
16 decision.

17 JUSTICE KENNEDY: Suppose Congress
18 made the CAAF an Article III court?

19 MR. BAMZAI: That would be perfectly
20 constitutional, Your Honor. It would
21 completely alleviate the constitutional
22 problem.

23 JUSTICE KENNEDY: And that would
24 alleviate your concern here?

25 MR. BAMZAI: Absolutely, Your Honor.

1 This would fix the constitutional --
2 constitutional problem. Or, alternatively, as
3 with most of the federal --

4 JUSTICE KENNEDY: It wouldn't -- it
5 wouldn't affect the Commander-in-Chief
6 argument?

7 MR. BAMZAI: Your Honor, that may be
8 some separate argument that I have not fully
9 explored. And I don't have a position on that.

10 But --

11 JUSTICE BREYER: I'm also worried
12 about the -- well, two things. One, if we took
13 your -- your test, what about the D.C.? Look,
14 the D.C. Circuit is the exercise of the federal
15 judicial -- judicial power -- not the circuit,
16 but the court of appeals. But it isn't an
17 Article III court. They have limited terms.

18 MR. BAMZAI: The D.C. Court of Appeals
19 --

20 JUSTICE BREYER: What?

21 MR. BAMZAI: The D.C. Court of Appeals
22 --

23 JUSTICE BREYER: Yeah, that's right.

24 MR. BAMZAI: -- is not an Article III
25 court. The D.C. Circuit is.

1 JUSTICE BREYER: Yeah. Yeah. So how
2 do we explain the decision that's upholding
3 that? I mean, appeals from that?

4 MR. BAMZAI: Your Honor, the -- the
5 explanation is that the D.C. courts, the local
6 courts, stand in the same position as
7 territorial courts.

8 JUSTICE BREYER: No, didn't -- didn't
9 -- aren't the -- weren't the territorial
10 courts, they are Article I courts, I guess, but
11 didn't Congress intend under your theory to
12 delegate to those courts part of its judicial
13 power or not?

14 MR. BAMZAI: That is true in the -- of
15 the territorial courts that the --

16 JUSTICE BREYER: Were they life
17 appointments?

18 MR. BAMZAI: They were not. No, Your
19 Honor, they were not life appointments, but
20 they could exercise --

21 JUSTICE BREYER: Okay. Okay. So I
22 got your point. Now, what about the
23 government's argument that what we should do is
24 look back to history and say the tradition at
25 the time of the writing of the Constitution

1 would have been to consider military, just as a
2 functioning judicial system, and that isn't
3 true of the NLRB and it isn't true of the other
4 agencies.

5 And because they both have the
6 characteristics or many of the characteristics
7 of courts and would have been so considered
8 historically that it is appropriate to exercise
9 appellate jurisdiction from their decisions.

10 MR. BAMZAI: Your Honor, respectfully,
11 I don't know if that is entirely the
12 government's position. You might want to ask
13 my friend.

14 JUSTICE BREYER: All right. Yeah.

15 MR. BAMZAI: And that is because the
16 government appears to concede that this Court
17 in *Ex parte Vallandigham* held that it could not
18 directly -- directly review a military
19 commission in that case because the military
20 commission did not exercise the judicial power
21 in a relevant sense.

22 And as I understand the government's
23 argument, it is that this Court can review the
24 CAAF. The CAAF is different because it has
25 been codified by Congress. I see that my time

1 is up.

2 CHIEF JUSTICE ROBERTS: Why don't you
3 take another couple minutes.

4 MR. BAMZAI: Thank you, Your Honor.
5 That the CAAF is relatively different because
6 it has been codified by Congress and exercises
7 its authority in a more formalized sense than
8 the ad hoc military commissions in the
9 Vallandigham case, and I submit --

10 JUSTICE KENNEDY: When -- when we
11 write this opinion, whichever way we come out
12 on the issue you're arguing, will it be
13 necessary for us to define what a court is?

14 MR. BAMZAI: Your Honor, it would not
15 be necessary. I submit that the simplest way
16 to decide this case is the one that I proposed
17 in my opening, which is that it is undisputed,
18 I believe, the government does not dispute that
19 the CAAF is within the executive branch.

20 And this Court could simply say that
21 its direct review of the executive branch is
22 necessarily --

23 JUSTICE KAGAN: Well, but how does
24 that really fit with the language of Article
25 III, Section 2? Because what Article III says

1 is that judicial powers shall extend to all
2 cases and then talks about in those cases or in
3 various ones of them, the Supreme Court shall
4 have appellate jurisdiction.

5 Now there might be uncertainty as to
6 what cases means with respect to a good many
7 things, but I would have thought that when
8 we're talking about the proceeding here, which
9 is a criminal prosecution with big criminal
10 sentences, including the death penalty, I would
11 have thought that those criminal prosecutions
12 are indeed cases under the language of Article
13 III.

14 MR. BAMZAI: Your Honor, I think the
15 answer to that question is that Marbury
16 establishes that it's more than simply a case
17 that triggers this Court's jurisdiction, that
18 there's something to the language of original
19 and appellate, and original jurisdiction
20 because it's specified in the Constitution by
21 implication means that appellate jurisdiction
22 can only be exercised from certain types of
23 bodies.

24 And, incidentally, that is not only
25 the position that Chief Justice Marshall

1 embraced in Marbury, but it's also the position
2 that Alexander Hamilton embraced in the
3 Federalist Papers, it was proposed at a number
4 of the state conventions ratifying the
5 Constitution and embraced by a number of the
6 cases that the Court decided in its early years
7 that are cited in our brief.

8 And so I think that answers why it's
9 not simply a matter of a case, and one could
10 understand the dispute between Marbury and
11 Madison.

12 JUSTICE KAGAN: So, if I understand
13 your answer, you're not pointing to anything in
14 Article III, is that correct? You're pointing
15 instead to Marbury and saying that the
16 principle derives from there, but I could look
17 at Marbury and say: You know, what -- what
18 Chief Justice Marshall was talking about was
19 James Madison handing around commissions,
20 nothing to do with criminal prosecutions.

21 MR. BAMZAI: Your Honor, I do believe
22 that I'm pointing to something in Article III,
23 and that's the original and appellate
24 jurisdiction provisions and the appropriate
25 structural inferences that can be made from

1 that.

2 JUSTICE KAGAN: But -- but that's all
3 with reference to the cases. The Supreme Court
4 shall have appellate jurisdiction over these
5 various cases. It doesn't talk about, you
6 know, which particular courts or whether
7 somebody's exercising which particular powers.
8 It just talks about cases.

9 MR. BAMZAI: That is true. That's
10 true. It does not say which particular courts.
11 It is not specified in so many words. But
12 Marbury has that principle, as does, for
13 example, Justice Story in his Commentaries on
14 the Constitution, in which he says that
15 appellate jurisdiction must be exercised from a
16 body that is exercising judicial authority and
17 cloaked with judicial power.

18 And so I think that that principle was
19 embraced by the people who wrote Article III,
20 and it's a principle that this Court ought to
21 apply in this case.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Fletcher.

25

1 ORAL ARGUMENT OF BRIAN H. FLETCHER

2 ON BEHALF OF THE RESPONDENT

3 MR. FLETCHER: Thank you, Mr. Chief
4 Justice, and may it please the Court:

5 Because a question has been raised
6 about this Court's jurisdiction, I'd like to
7 start by explaining why, in the government's
8 view, Section 1259 validly grants this Court
9 appellate jurisdiction to review the Court of
10 Appeals for the Armed Forces' decisions. And
11 then I'd like to turn to the merits and explain
12 why Judges Burton, Celtnieks, Herring, and
13 Mitchell did not violate Section 973(b) when
14 they accepted presidential appointments to the
15 Court of Military Commission Review and also
16 why any violation that did occur would not have
17 ejected those officers from the military or
18 provided any other basis for invalidating their
19 decisions upholding the court-martial
20 convictions at issue here.

21 On the jurisdictional question, we
22 start, as I think all the parties before the
23 Court do, with Chief Justice Marshall's
24 decision for the Court in Marbury versus
25 Madison, which says that the essential

1 criterion of appellate jurisdiction is that it
2 revises and corrects the proceedings in a cause
3 already instituted and does not institute that
4 cause.

5 Under that standard, Marbury was an
6 original case because the parties came to this
7 Court in the first instance and asked for an
8 order directing the delivery of a commission.
9 If you read the report of the decision before
10 you get to the Chief Justice's opinion, you
11 find this Court taking evidence by affidavit
12 and ruling on objections, hearing testimony,
13 essentially.

14 That was an original action. This
15 case, by contrast, is an appellate action
16 because it comes to the court on review of the
17 Court of Appeals for the Armed Forces'
18 decision, which reviewed a criminal proceeding
19 that originated in courts-martial and that
20 proceeded through the separate military justice
21 system that has existed in some form in our
22 country since the founding of it.

23 JUSTICE BREYER: There are a lot of --

24 CHIEF JUSTICE ROBERTS: What is the --
25 what -- how would you have us distinguish the

1 situation that people are concerned about,
2 which is every alphabet agency in the
3 government, that Congress says you can appeal
4 from the sanctions that the SEC imposes right
5 to the Supreme Court?

6 MR. FLETCHER: Yes. That's -- our
7 view is that that would not be a valid grant of
8 appellate jurisdiction if Congress purported to
9 do that. And the reason why the rule that we
10 think the Court should adhere to in this case
11 and the rule we think resolves this case is the
12 one from Coe, the 1894 decision that my friend
13 quoted, that dealt with a challenge to this
14 Court's appellate jurisdiction over a
15 territorial court.

16 And what the Court said was if
17 Congress in those limited circumstances where
18 Congress can create courts outside the scope of
19 Article III, then it can also vest this Court
20 with jurisdiction to review their decisions.

21 CHIEF JUSTICE ROBERTS: Okay. So it
22 grants the -- the NLRB court a final review?

23 MR. FLETCHER: Well, I -- I don't
24 think it could do that, Mr. Chief Justice,
25 because, as this Court's decisions elucidate,

1 there are only very limited circumstances where
2 Congress can create courts outside of the
3 context of Article III. The two --

4 CHIEF JUSTICE ROBERTS: So, in other
5 words, it's -- it's okay because -- we don't
6 have to worry because you can only do it in
7 cases where they've already done it?

8 MR. FLETCHER: Well, you can only do
9 it -- I think what we would do is we would link
10 the rule about when is this Court's
11 jurisdiction appellate versus original to the
12 existing jurisprudence that this Court has
13 about when can Congress create courts outside
14 of the Article III system. And the two
15 paradigmatic cases where it's uncontroversial
16 and well settled that Congress can do that are
17 the territories and the military system.

18 CHIEF JUSTICE ROBERTS: But when can
19 they not do it? If -- if you're doing anything
20 more than just saying everything they have done
21 so far is okay and nothing else, then -- then
22 what is the rule for telling them when they can
23 create these courts under Article I?

24 MR. FLETCHER: So what this Court has
25 said -- and, again, I -- I just want to

1 illustrate that that's -- that's a question
2 that the Court is going to have to grapple with
3 however it resolves the appellate jurisdiction
4 question here. It has other cases and will
5 presumably again in the future have to confront
6 the question when can Congress create
7 non-Article III courts.

8 All that we're saying is that what
9 follows from that is if the Court decides in
10 that context that Congress can create a
11 non-Article III court, then it can also vest
12 appellate jurisdiction in this Court to review
13 that court's decisions. And the --

14 JUSTICE BREYER: Well, I have the
15 amicus says --

16 JUSTICE KENNEDY: Why have
17 jurisdiction -- appellate jurisdiction over
18 state courts? Can states do anything there --
19 can states have an NLRB type of thing and --

20 MR. FLETCHER: I don't think that they
21 could.

22 JUSTICE KENNEDY: -- with -- with no
23 appeal and -- and -- and then it has a federal
24 question and they come to us?

25 MR. FLETCHER: I -- I don't think that

1 they could, Justice Kennedy. I don't know that
2 the question has ever arisen in the context of
3 a state court. I can tell you the question has
4 arisen, or a related question has arisen, in
5 the context of federal courts. There was a
6 case called Chandler from 1970 where the Court
7 grappled with but didn't resolve the question
8 whether review of a decision by a circuit
9 judicial council was appellate jurisdiction.
10 And the question it was asking is, is what the
11 circuit judicial council is doing
12 administrative or is it instead judicial?

13 JUSTICE BREYER: What we're doing is
14 looking, I think -- at least I am, I think
15 others are too -- for a reason; that is, what
16 is it that -- that -- I can see the states.
17 You say -- the easiest is the federal courts.
18 I mean, Congress has judicial authority who
19 exercises it. Well, how can we have appellate
20 jurisdiction over state courts? That's because
21 states have sovereignty, and they can, in the
22 exercise of their sovereignty, create a
23 judicial system.

24 Well, what about territories? Well,
25 territories, that's a tougher one because it

1 looks like it's Congress's sovereignty, but it
2 isn't. That is to say, sovereign --
3 territories are the equivalent of states before
4 they are states. Human societies on
5 territories create judicial systems. And so
6 the territorial courts are analogous to the
7 state courts.

8 What about the D.C. Circuit? Hmm --
9 D.C. Court of Appeals rather. That's a tougher
10 one but maybe rather like the territorial
11 courts, like the state court. Hmm. And now
12 what? Okay?

13 And now he says I've used this
14 territorial principle, the sovereignty arising
15 in territories physically, which aspect of the
16 sovereignty is an authority to create a
17 judicial body, giving us appellate
18 jurisdiction.

19 Now, military, you don't like that
20 territorial-based distinction because it's --
21 territorial sovereignty based distinction
22 because they don't really have -- it's not
23 territories.

24 And so now we're looking for another
25 one. That's a long question, but all I'm

1 asking for is, what is that other one? And the
2 chief says it sounds like, which to me it did
3 sound rather like, whatever we've done in the
4 past is all right but not in the future. And
5 -- and that's a historical one. Hmm.

6 MR. FLETCHER: So let me say two
7 things about that. And the first is that the
8 way that this Court has approached territorial
9 courts and the D.C. court is not quite the way
10 Your Honor's addressed it.

11 JUSTICE BREYER: I know that, but
12 looking at Coe, it doesn't seem to give much of
13 an answer.

14 MR. FLETCHER: Well, the answer that
15 it gives is appellate jurisdiction is review of
16 another court's decision --

17 JUSTICE BREYER: Yeah.

18 MR. FLETCHER: -- at the most basic
19 level. I think everyone agrees with that. And
20 so, if you're asked when review of -- of
21 tribunals' decisions -- is it original or
22 appellate, the question is, is that tribunal --

23 JUSTICE BREYER: Well, at that point,
24 Justice Kennedy's question becomes relevant to
25 me. Then he says, all right, Congress says the

1 NLRB -- they used to be called, you know,
2 hearing examiners. And now they're called
3 ALJs, which is administrative law judges. And
4 now what we do is produce a court of ALJs,
5 which we call a court, dot dot --

6 MR. FLETCHER: Yes.

7 JUSTICE BREYER: -- and has
8 stenographers so it's of record, da da da, you
9 see? Now, that's the concern.

10 MR. FLETCHER: Yes. And the concern,
11 I think the answer -- let me say two things
12 about that. The first is I think, however you
13 might want to resolve the question between
14 legislative courts and the administrative
15 agencies like the NLRB, our view is that
16 military courts, the Court of Appeals for the
17 Armed Forces is on the territorial side of the
18 line, is on the clearer side of the line,
19 because this Court has always considered those
20 two to be together as the paradigmatic
21 examples under the circumstances --

22 JUSTICE GORSUCH: Well, have they,
23 though?

24 JUSTICE ALITO: Do you think it's --

25 JUSTICE GORSUCH: I mean, I look at

1 the -- I'm sorry.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 JUSTICE ALITO: Do you -- do you think
4 it's relevant that the President or the
5 Secretary of Defense can alter a decision of
6 the CAAF after it's issued?

7 MR. FLETCHER: I don't believe that
8 the President or the -- the Secretary of
9 Defense can do that. They have some limited
10 authority, and this is described in 10 U.S.C.
11 876, to mitigate sentences, to commute or
12 reduce sentences.

13 JUSTICE ALITO: Well, that's what I'm
14 referring to. The convening authority shall
15 take action in accordance with the decision of
16 the CAAF unless there is to be further action
17 by the President or the Secretary concerned.

18 MR. FLETCHER: That's correct. And
19 the further action --

20 JUSTICE ALITO: And you think that's
21 relevant to the question this, the question
22 before us?

23 MR. FLETCHER: I -- I think it might
24 be if the action of the President or the
25 Secretary extended to upsetting the conviction

1 or upsetting the judgment of the CAAF, but
2 that's not the type of action that the
3 President can take. And Congress actually
4 thought about that in --

5 JUSTICE ALITO: What kind of action
6 can the President take?

7 MR. FLETCHER: There are certain types
8 of sentences, death sentences in particular,
9 that require the President's approval before
10 they can be executed, and there are other types
11 of sentences, including the dismissal of an
12 officer, that require secretarial approval
13 before they can be executed. In those
14 circumstances, the President or the Secretary
15 can commute those sentences to something less.
16 They can't upset the conviction.

17 And so, in our view, the availability
18 of that relief from those officers is akin to
19 relief by commutation in the federal or state
20 system or to parole.

21 JUSTICE KAGAN: How does that
22 provision work?

23 JUSTICE KENNEDY: I'm not doubting
24 you, but where -- where do I look to find -- to
25 find the authority for your proposition?

1 MR. FLETCHER: You find the -- the
2 statutory provision that speaks to the finality
3 of Court of Appeals of the Armed Forces'
4 decisions and court-martial decisions in
5 general is in 876. And the -- I believe the
6 provision that speaks to authority to reduce
7 sentences is in 874, but it's at least
8 referenced there.

9 CHIEF JUSTICE ROBERTS: I -- I -- I
10 guess I am doubting go you.

11 (Laughter.)

12 CHIEF JUSTICE ROBERTS: If you have
13 the -- if the executive prevails in any case,
14 he always has the discretion not to enforce it.
15 I mean, if the judgment is you can, you know,
16 suspend the pay of this service person for this
17 period, he can review it and say, well, okay,
18 you know, the -- the principle is established,
19 but I'm not going to do it. Right? Or he --
20 he wins the authority; he prevails and can say,
21 okay, you can cashier the guy out of the
22 service, but he says, well, he's the best, you
23 know, gunnery sergeant in the -- that area so
24 I'm not going to do it. I don't understand why
25 it's -- why he -- why you think he's

1 constrained in any particular way?

2 MR. FLETCHER: Well, I think he's --
3 he's constrained. The system that the Uniform
4 Code of Military Justice sets up, gives the
5 President some ability to reduce or mitigate
6 sentences but not others, and otherwise makes
7 the decisions of the Court of Appeals for the
8 Armed Forces final and binding.

9 And, in fact, the language in the
10 provision that I was citing to Justice Kennedy
11 earlier is the language that you, Your Honor,
12 quoted in your opinion in Denetto --

13 JUSTICE GORSUCH: But, counsel, don't
14 we, though, have to assume the
15 constitutionality of that limitation on the
16 President's authority as Commander-in-Chief for
17 -- for this position to work and, second, what
18 if Congress were to alter that scheme and
19 provide the -- the President or the Secretary
20 further authority to alter the results of
21 military tribunals? And, in fact, I think the
22 Secretary, if I'm correct, has to approve the
23 dismissal of any commissioned officer as well
24 --

25 MR. FLETCHER: That's correct, yes.

1 JUSTICE GORSUCH: -- under 871(b). So
2 there is another limitation on the authority of
3 the military tribunal and another grant to a
4 superior executive officer.

5 MR. FLETCHER: So let me say two
6 things about that. The first is I -- I agree
7 with you that if Congress gave greater
8 authority to executive branch officials to the
9 President or the Secretary to set aside
10 military or court-martial convictions, that
11 would change the analysis, but it would be --

12 JUSTICE GORSUCH: Well, if it changes
13 the analysis, then where -- we're back to the
14 Chief Justice's question -- where is the line,
15 and assuming the constitutionality of these
16 limitations.

17 MR. FLETCHER: Yes.

18 JUSTICE GORSUCH: Where is the line?
19 How much authority -- how much of a court is it
20 before it is no longer a court when it's all
21 sitting in the Executive Branch as this court
22 ruled in Edmonds?

23 MR. FLETCHER: So first and foremost
24 it's a court that doles out criminal sentences,
25 up to and including death. It's a court where

1 an acquittal has double jeopardy effect. It's
2 decisions are given res judicata effect. Those
3 are not things that the President or the
4 Secretary --

5 JUSTICE GORSUCH: So it's --

6 MR. FLETCHER: -- can alter.

7 JUSTICE GORSUCH: -- criminal versus
8 civil? I mean, I can see the next case being
9 civil. There are consequences, maybe not of a
10 criminal nature, but you lose a rank or a
11 privilege or some other sort of -- well, we
12 struggle with what's the difference between
13 civil and criminal all the time in this Court.

14 MR. FLETCHER: Well, I think that
15 there's no doubt that court-martial --
16 courts-martial are criminal and the fact that
17 they are able to --

18 JUSTICE GORSUCH: I accept -- I accept
19 that. And I'm saying, well, what about the
20 next case, why would we draw the line there
21 when civil penalties today are very harsh and
22 severe? And you can see Congress setting up a
23 court with very extreme civil penalties and
24 very little executive oversight, let's say.

25 MR. FLETCHER: I guess I would say the

1 fact that it can distribute criminal penalties
2 is certainly an indication that if we're
3 drawing a line, is it a court, is it not, it
4 falls on the court side of the line.

5 JUSTICE BREYER: Well, what if --

6 MR. FLETCHER: That's what it shares
7 in common with territorial courts.

8 JUSTICE BREYER: Well, what about, you
9 are really -- you're making me think in this.
10 I guarantee it's a hard question. But maybe we
11 find an analogy in the territorial cases.

12 Can we read the territorial cases
13 as -- as, looking at this, separately out of
14 Article III, the Constitution gives to Congress
15 the power to organize governments in the
16 territory.

17 The governments of a territory involve
18 an executive, legislative, and judicial
19 function. Therefore, in exercising its
20 sovereign Constitutional power under Article I,
21 in the power to organize governments and
22 territories, it is going to have the power to
23 organize courts of a kind that act like courts
24 and, therefore, appellate review.

25 The same is true of the military,

1 which is a separate world, and it is Article I
2 giving them power over the military that let's
3 them do that.

4 MR. FLETCHER: Yes.

5 JUSTICE BREYER: The same is not true
6 of the NLRB, which is a specialized agency, and
7 because the judicial and adjudicatory functions
8 that the executive branch performs in its
9 carrying out of executive duties are
10 rule-making and decision-making authorities
11 under execution, not judicial.

12 MR. FLETCHER: Yes.

13 JUSTICE BREYER: You think that might
14 work?

15 MR. FLETCHER: I think that -- I think
16 that works exactly. I think that fits with the
17 way that this Court has looked at
18 courts-marshal before. It said this is a
19 system of justice that existed before the
20 Constitution. It's a system of justice that is
21 textually recognized in the Fifth Amendment to
22 the Constitution, which exempts "cases arising
23 in the land and naval forces from the grand
24 jury requirement," and it's a system that this
25 Court has always understood, in light of that

1 history and that textual recognition, to be a
2 court system that Congress can create outside
3 of Article III.

4 JUSTICE KAGAN: So this --

5 CHIEF JUSTICE ROBERTS: Mr. Fletcher,
6 maybe it's a good time for us to let you get to
7 the merits of the case.

8 (Laughter.)

9 MR. FLETCHER: I appreciate that, Mr.
10 Chief Justice. And I think, as some of the
11 questions earlier have suggested, that in order
12 to obtain the relief that they're seeking,
13 petitioners had to clear three hurdles on the
14 merits.

15 They have to show that the CMCR
16 judgeship is a civil office within the meaning
17 of Section 973. They have to show that
18 Congress has not authorized, by law, military
19 officers to hold that office. And then they
20 have to show that a violation of that statute
21 if it occurred automatically ejected these
22 officers from the military when they accepted
23 their appointments to the CMCR of May in 2006
24 and invalidated the officer's subsequent
25 decisions in petitioner's criminal appeals on

1 the courts of criminal appeals. And in our
2 view they can't make any of those showings.

3 I would like to start, if I could,
4 with the civil office question. I think it's
5 common ground between the parties that by
6 preventing or precluding military officers from
7 holding a civil office, what Congress sought to
8 do was to prevent the -- to preserve the
9 civilian preeminence over the military, to
10 prevent military encroachment into the civil
11 government.

12 And so a civil office, as we
13 understand it and as the Department of Defense
14 has long defined it, is an office in the civil
15 government that exercises the powers or
16 authorities of the civil government. It's a
17 non-military office.

18 Judged by that criterion, a judgeship
19 on the Court of Military Commission Review is a
20 military office. As its name suggests, the
21 Court of Military Commission Review is a
22 military court. It performs a function that
23 military officers have long performed, judging
24 violations of the law of war and other offenses
25 triable by military commission committed by

1 alien and enemy belligerence, and it performs a
2 function that is very, very similar to what in
3 the court-martial system is done by the courts
4 of criminal appeals, which are staffed by
5 military officers predominantly; although that
6 position can also be held by civilians, and
7 which this court explained in Weiss performs a
8 function that is germane to military officers'
9 military office.

10 The court in Weiss went through the
11 history of the military justice system in the
12 court-martial side of the house, and explained
13 the role that military officers had long played
14 in that system, and it concluded that, as a
15 result of that role, serving as a judge on the
16 court of criminal appeals is germane to holding
17 military office.

18 Obviously the court in Weiss did not
19 have in front of it Section 973, but we think
20 its conclusion on germaneness is very
21 instructive on this question because the Court
22 of Military Commission Review performs a
23 function that is very similar to the function
24 performed by the courts of criminal appeals.

25 It was expressly patterned on the

1 courts of criminal appeals and the statute
2 defining the circumstances under which it can
3 review a case, 950f. It is drawn almost
4 verbatim from the statute for the courts of
5 criminal appeals, 866.

6 And just as military officers serving
7 on the court of criminal appeals are performing
8 a military function and are doing something
9 that is germane to their military duties,
10 that's also true when those same officers
11 perform essentially the same function in
12 another military court system.

13 And I think what that illustrates,
14 and, by the way, I don't understand my friend
15 to dispute that a judgeship on the court of
16 criminal appeals is a military office, not a
17 civil office of the sort that would be
18 contemplated in Section 973.

19 And what that shows is that even if an
20 office can be held by civilians, as the court
21 of criminal appeals judgeship can be, it is
22 still a military office if it's performing a
23 military function.

24 So judged by that standard, we think
25 Petitioner's claim fails on that first instance

1 because the Court of Military Commission Review
2 is not a civil office.

3 But even if you disagree with us on
4 that question, we also think that Congress has
5 authorized by law military officers to hold a
6 position on the Court of Military Commission
7 Review.

8 And the way that my friend approaches
9 Section 973 is through the lens of assigning
10 and appointing, and he wants to draw a sharp
11 distinction between assigning an appointment
12 and read that distinction into the prohibition
13 in Section 973.

14 But that's not a prohibition that is
15 found in the language or the history of
16 Section 973. Instead, what the statute says is
17 that, except as otherwise authorized by law, an
18 officer may not hold or exercise the functions
19 of a civil office.

20 So the concern is not with the manner
21 in which the officer ends up in the civil
22 office. The question is: Has Congress
23 authorized military officers to hold or
24 exercise the function of the civil office?

25 And in our view Congress created a

1 single office when it created the Court of
2 Military Commission Review. That office is
3 judged on the Court of Military Commission
4 Review. That's the statutory term in Section
5 950f.

6 And Congress then authorized military
7 officers to serve on that court, to hold that
8 office in unambiguous terms, in Section
9 950f(b)(2), where it said that the Secretary of
10 Defense may assign persons who upheld military
11 judges to be judges on the Court of Military
12 Commission Review.

13 That's how all four of the judges who
14 are at issue here were first placed on the
15 Court of Military Commission Review.

16 Now, it's true the D.C. Circuit in
17 Al-Nashiri raised questions about whether that
18 assignment, which was valid for all statutory
19 purposes, also complied with the appointments
20 clause. And in response to the questions the
21 D.C. Circuit raised, the Senate and the
22 President heeded the D.C. Circuit's suggestion
23 that they avoid the need to resolve appointment
24 clause questions, and also appoint those four
25 officers to the Court of Military Commission

1 Review under Section 950b(3). And those
2 appointments essentially ratify the preexisting
3 assignments and mean that now the four judges
4 serve on the Court of Military Commission
5 Review by virtue of both the assignment of the
6 Secretary of Defense and the appointment of the
7 President.

8 But in doing that, the President did
9 not create a problem, did not put those
10 officers in an office that they are not
11 authorized to hold by Congress. He just
12 ratified their placement in that office through
13 the means that Congress specified.

14 And finally, just very briefly, we do
15 hope that the Court will answer the question,
16 the merits question, about whether or not a
17 CMCR judgeship is a civil office because it's
18 important to the government. The government is
19 obligated to comply with the statute.

20 We believe that judges can validly
21 serve on a military -- excuse me, military
22 officers can validly serve on the Court of
23 Military Commission Review, but if this Court
24 disagrees, obviously the government is going to
25 have to fix that problem.

1 So we hope that the Court answers the
2 question presented on the merits and holds that
3 973(b) does not prevent military officers from
4 serving on the CMCR, but in the event that you
5 disagree with us on that or you don't reach
6 that question, we think also that as the Court
7 of Appeals for the Armed Forces held, any
8 violation of Section 973(b) that occurred would
9 not be a basis for invalidating the judges'
10 decisions on the Court of Criminal Appeals.
11 And that's true for at least two reasons.

12 The first is that the Petitioner's
13 argument that it does invalidate their
14 decisions hinges on the premise that
15 automatically upon the acceptance of a
16 prohibited civil office, the relevant officers
17 are ejected from the military.

18 That used to be the way the statute
19 worked, but for good reason Congress changed
20 that. It deleted that automatic termination
21 consequence.

22 Now, when a violation of Section 973
23 occurs, the government and the officer have to
24 fix it by either giving up the military office
25 or giving up the civil office, but those things

1 happen as a result of administrative action
2 once the violation comes to light, not
3 retroactively and automatically by virtue of
4 the acceptance of the civil office.

5 And, second, and even more clearly --
6 and I will close on this -- Congress enacted a
7 savings clause that says that nothing in
8 Section 973 can be used to invalidate the
9 actions of officers in furtherance of assigned
10 official duties. And that perfectly describes
11 what happens here -- what happened here.

12 My friend is correct that it may also
13 describe what military officers do in civil
14 offices, for example, the special assistant
15 U.S. attorneys, JAG lawyers who are assigned to
16 be special assistant U.S. attorneys perform
17 civil functions in furtherance of their
18 assigned official duties. But --

19 CHIEF JUSTICE ROBERTS: If your
20 reading of the authorization or the savings
21 clause is correct, then you really have no
22 reason to fix any problem that's been
23 identified, right?

24 MR. FLETCHER: Except --

25 CHIEF JUSTICE ROBERTS: If you see,

1 you know, the person shouldn't be serving there
2 but everything he does is okay, so we don't
3 have to remove him.

4 MR. FLETCHER: Well, no, we think we
5 are obligated to comply with the law. And the
6 executive branch does and takes that seriously.
7 And that's the history of enforcement of the
8 civil office holding prohibition, is that as
9 the Olson memo, for example, that brought to
10 light the violation that had been happening
11 before 1983, the government raised the issue
12 and then took action to correct the issue.

13 CHIEF JUSTICE ROBERTS: Well, how
14 would a problem -- how would a problem arise
15 given the savings clause?

16 MR. FLETCHER: Given the savings
17 clause, I think a problem would arise in the
18 way that problems arise. There are lots of
19 statutes that apply to federal personnel
20 matters or that prohibit certain actions by
21 federal employees, but don't invalidate their
22 actions as a result of the violation.

23 And the way that those things are
24 policed by inspector general, by congressional
25 oversight, and the Government Accountability

1 Office, by the office of legal counsel and the
2 lawyers within the agencies. All of those
3 things are still available.

4 And, indeed, the sources cited in the
5 briefs show that the government is taking
6 seriously its obligation to enforce the
7 statute. That will continue.

8 And, in fact, the directive also that
9 we cite makes the acceptance of a civil office,
10 if an officer just goes out and does it on, you
11 know, their own, without authorization, it
12 makes taking that action a violation of a
13 lawful order that is potentially subject to
14 disciplinary action.

15 So there would -- there would
16 certainly be remedies, just not the drastic
17 remedy of ejection from the military or
18 invalidation of official actions. We think
19 there is a good reason Congress why chose that
20 scheme, and we'd ask the Court adhere to it.

21 If the Court has no further questions.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Vladeck, you have five minutes
25 left.

1 REBUTTAL ARGUMENT OF STEPHEN I.

2 VLADECK, ON BEHALF OF PETITIONERS

3 MR. VLADECK: Thank you, Mr. Chief
4 Justice.

5 Just to briefly address one point on
6 jurisdiction before turning back to the merits,
7 the amicus relies on this Court's decision in
8 Vallandigham. I actually think Vallandigham
9 proves the point that both I and Mr. Fletcher
10 were trying to make.

11 The Court in Vallandigham went out of
12 its way to explain why the military commission
13 itself was not "judicial" in the sense of
14 Article III.

15 The analogy, of course, to this case
16 would be to the underlying court-martial
17 proceeding and not to the decisions by the
18 courts of criminal appeals or by the Court of
19 Appeals for the Armed Forces.

20 Turning to the merits, I think it is
21 important to stress the emptiness of the
22 government's suggestion that it has been
23 engaged in rigorous administrative enforcement
24 of the statute.

25 On its read-in of both Section

1 973(b)(5) and of the deletion of the automatic
2 termination provision, there is, in fact, no
3 consequence for violating a statute Congress
4 enacted to ensure civilian control of the
5 military, for protecting the civilian's fear of
6 government from having military officers
7 serving in all kinds of positions, and there
8 would be no remedy, especially in a case like
9 this one, where the problem at issue is not a
10 general objection to military officers serving
11 in administrative positions, but a very
12 specific objection to military officers serving
13 as judges.

14 This Court has for decades suggested
15 that there are unique separation of powers
16 considerations and there are unique doctrinal
17 and common law reasons to take especially
18 seriously concerns that judges are acting
19 without authority.

20 It's why this Court in both the Ryder
21 case and Nguyen held that the de facto officer
22 doctrine does not apply to immunize at least
23 non-technical violations of judicial assignment
24 rules, and it's why the separation of powers
25 problem we have identified is especially

1 serious in this context.

2 One last point, though, the -- neither
3 -- the government doesn't talk about the -- did
4 not talk about the Commander-in-Chief clause in
5 its merits argument, but I think it's worth
6 stressing just how serious a Commander-in-Chief
7 clause problem a ruling in this favor could
8 create.

9 Under judges who are appointed to the
10 Court of Military Commission Review, under
11 Section 950f(b)(3), serve with good cause
12 removal protection. What that means is if
13 they're military officers, they are insulated
14 from removal by good cause, which of course
15 takes them out of the chain of command.

16 Now rather than suggest that that is a
17 constitutional constraint on the President as
18 Commander-in-Chief, the government argues that,
19 in fact, a judge who is appointed to the CMCR
20 by the President and confirmed by the Senate
21 can be reassigned by the general counsel of the
22 Department of Defense.

23 There is no suggestion in the Military
24 Commissions Act that Congress intended such a
25 frankly bizarre reassignment scheme, and there

1 is no explanation for how that would solve the
2 Commander-in-Chief clause problem.

3 We agree that that question is not
4 squarely presented here, because it would only
5 invalidate the ability of these judges to serve
6 on the Court of Military Commission Review.
7 But given that there is a petition for writ of
8 mandamus pending in the D.C. Circuit by two of
9 the defendants in the 9/11 trial, we think it
10 incumbent upon on this Court to reach the
11 merits question and not just rely on the
12 remedies consideration, even if it is inclined
13 to affirm the decisions below.

14 If there are no further questions.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. Thank you Mr. Bamzai for your
17 participation. The case is submitted.

18 (Whereupon, at 12:10 p.m., the case
19 was submitted.)

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Official - Subject to Final Review

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| 1 | Absolutely ^[1] 38:25 accept ^[4] 10:14 21:18 60:18,18 acceptance ^[3] 70:15 71:4 73:9 accepted ^[2] 46:14 63:22 accepts ^[1] 9:20 accordance ^[1] 55:15 Accountability ^[1] 72:25 acquittal ^[1] 60:1 acronyms ^[1] 14:2 Act ^[7] 5:11,16 13:11,23 19:6 61:23 76:24 acting ^[2] 9:8 75:18 action ^[14] 9:2,23 47:14,15 55:15,16,19,24 56:2,5 71:1 72:12 73:12,14 actions ^[7] 11:11 14:15 23:4 71:9 72:20,22 73:18 active-duty ^[1] 4:21 acts ^[1] 28:12 actually ^[7] 14:23 18:19 21:11 28:2,4 56:3 74:8 ad ^[1] 42:8 added ^[1] 20:20 additional ^[7] 4:16 6:1 11:20 13:17,19,24 14:7 address ^[1] 74:5 addressed ^[1] 53:10 adhere ^[2] 48:10 73:20 ADITYA ^[4] 2:4,5 3:6 31:11 adjudication ^[1] 28:16 adjudications ^[1] 30:5 adjudicative ^[1] 26:1 adjudicatory ^[4] 26:11 32:15 37:9 62:7 administrative ^[9] 28:9,15 30:4 51:12 54:3,14 71:1 74:23 75:11 adopting ^[1] 30:3 advice ^[1] 6:2 affect ^[1] 39:5 affidavit ^[1] 47:11 affirm ^[1] 77:13 agencies ^[6] 32:16,20 34:16 41:4 54:15 73:2 agency ^[3] 26:2 48:2 62:6 ago ^[1] 30:2 agree ^[4] 10:7 27:8 59:6 77:3 agrees ^[1] 53:19 ahead ^[1] 16:7 akin ^[1] 56:18 Al-Nashiri ^[1] 68:17 Alexander ^[1] 44:2 alien ^[1] 65:1 ALITO ^[16] 9:14,16 10:2,17 14:8 15:1,4,9,13 16:9 54:24 55:2,3,13,20 56:5 Alito's ^[2] 16:6 20:19 ALJs ^[2] 54:3,4 alleviate ^[2] 38:21,24 allowed ^[1] 13:13 allowing ^[2] 4:25 14:7 allows ^[1] 37:13 almost ^[2] 32:24 66:3 alphabet ^[1] 48:2 already ^[2] 47:3 49:7 | alter ^[4] 55:5 58:18,20 60:6 alternatively ^[1] 39:2 although ^[3] 7:20 27:16 65:5 Amendment ^[1] 62:21 amendments ^[3] 10:3,6 11:18 American ^[2] 22:5 35:2 amici's ^[1] 23:7 amicus ^[5] 2:5 26:13,21 50:15 74:7 amicus's ^[1] 23:22 analogous ^[1] 52:6 analogy ^[4] 28:1 32:1 61:11 74:15 analysis ^[2] 59:11,13 another ^[9] 21:22 23:5 28:7 42:3 52:24 53:16 59:2,3 66:12 answer ^[9] 10:2 31:2 33:5 43:15 44:13 53:13,14 54:11 69:15 answers ^[3] 33:6 44:8 70:1 apologize ^[1] 13:25 apparatus ^[1] 33:11 appeal ^[5] 19:3,13,15 48:3 50:23 appeals ^[36] 5:8,13 9:4 19:4,25 26:16 27:24 28:11 29:5,10,13 30:8 39:16,18,21 40:3 46:10 47:17 52:9 54:16 57:3 58:7 63:25 64:1 65:4,16,24 66:1,5,7,16,21 70:7,10 74:18,19 APPEARANCES ^[1] 2:1 appears ^[1] 41:16 appellant ^[1] 24:8 appellate ^[35] 18:21 20:3 21:24 23:23 24:4,11,21 26:1 28:9 31:22 38:3,5,10 41:9 43:4,19,21 44:23 45:4,15 46:9 47:1,15 48:8,14 49:11 50:3,12,17 51:9,19 52:17 53:15,22 61:24 appendix ^[1] 15:8 applicable ^[2] 33:23 34:9 apply ^[10] 32:10 33:20,22 34:5 35:10,22 36:1 45:21 72:19 75:22 applicant ^[2] 18:2 68:24 appointed ^[11] 4:15 5:4 7:14 9:7 11:17 13:20 14:6 16:21 18:11 76:9,19 appointing ^[3] 6:10,21 67:10 appointment ^[7] 4:17 5:25 13:24 20:22 67:11 68:23 69:6 Appointments ^[9] 7:9,24 34:4 40:17,19 46:14 63:23 68:19 69:2 appoints ^[1] 17:5 appreciate ^[1] 63:9 approach ^[1] 37:6 approached ^[1] 53:8 approaches ^[1] 67:8 appropriate ^[4] 8:17 11:22 41:8 44:24 approval ^[3] 13:14 56:9,12 approve ^[1] 58:22 area ^[2] 36:20 57:23 areas ^[1] 17:9 aren't ^[2] 32:25 40:9 argues ^[3] 13:10 16:16 76:18 arguing ^[1] 42:12 argument ^[25] 1:24 3:2,5,9,12 4:4, | 8 7:25 11:8,16 24:16 31:11 32:1,3 34:3,18 37:18 39:6,8 40:23 41:23 46:1 70:13 74:1 76:5 arise ^[4] 37:21 72:14,17,18 arisen ^[3] 51:2,4,4 arising ^[2] 52:14 62:22 Armed ^[11] 9:5 19:4 28:11 30:8 46:10 47:17 54:17 57:3 58:8 70:7 74:19 around ^[3] 5:20 22:13 44:19 arrangement ^[1] 22:20 Article ^[26] 24:5 31:16 34:22 35:3,4,10 38:14,18 39:17,24 40:10 42:24,25 43:12 44:14,22 45:19 48:19 49:3,14,23 61:14,20 62:1 63:3 74:14 aside ^[1] 59:9 aspect ^[1] 52:15 assault ^[2] 36:4,5 assaults ^[1] 36:2 assign ^[2] 6:25 68:10 assigned ^[19] 4:16 5:1,17 7:6,15,19 9:24 11:12,14,16,23 12:2 13:13,17,19 14:16 71:9,15,18 assigning ^[2] 67:9,11 assignment ^[5] 5:24 6:9 68:18 69:5 75:23 assignments ^[3] 7:10 10:22 69:3 Assistant ^[4] 2:7 10:11 71:14,16 assume ^[1] 58:14 assuming ^[1] 59:15 attend ^[1] 25:15 Attorney ^[1] 20:11 attorneys ^[3] 10:11 71:15,16 attributes ^[1] 27:3 Austin ^[1] 2:2 authorities ^[2] 62:10 64:16 authority ^[20] 12:9 14:12 16:25 23:1 24:21 42:7 45:16 51:18 52:16 55:10,14 56:25 57:6,20 58:16,20 59:2,8,19 75:19 authorization ^[4] 4:24 13:12 71:20 73:11 authorize ^[2] 6:5 13:18 authorized ^[11] 6:23 12:5,16,23 32:22 63:18 67:5,17,23 68:6 69:11 automatic ^[4] 11:4 12:7 70:20 75:1 automatically ^[4] 9:19 63:21 70:15 71:3 availability ^[1] 56:17 available ^[3] 33:11 35:19 73:3 avoid ^[1] 68:23 |
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