No. 16-1423

IN THE

Supreme Court of the United States

KEANU D.W. ORTIZ,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In its brief in opposition, the government does not dispute that Judge Mitchell's appointment to the Court of Military Commission Review (CMCR) as an "additional judge" under 10 U.S.C. § 950f(b)(3) raises an "important question of federal law that has not been, but should be, settled by this Court," S. Ct. R. 10(c), *i.e.*, whether it triggers the dual-officeholding ban codified at 10 U.S.C. § 973(b)(2). Because § 973(b)(2) is a reflection of the "traditional and strong resistance of Americans to any military intrusion into civilian affairs," *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972), and because this question is the subject of five pending petitions for certiorari encompassing 175 court-martial appeals,[1] it would have been impossible to argue otherwise.

Instead, the government's opposition reduces to the absence of a circuit split and superficially plausible arguments for why Judge Mitchell's CMCR appointment did not disqualify him from hearing Petitioner's appeal to the Air Force Court of Criminal Appeals (CCA). Opp. 8–16. On closer inspection, however, these merits arguments do not withstand scrutiny. And like the Court of Appeals for the Armed Forces (CAAF) in its decision below, the government fails to explain what purpose § 973(b)(2) would serve on its reading, or why Congress in 1983 would have chosen to eviscerate such a major codification of civilian control of the military. Indeed, the disturbing

1. These questions are also presented in *Dalmazzi* v. *United States*, No. 16-961; *Cox* v. *United States*, No. 16-1017; *Alexander* v. *United States*, No. 16-9536; and *Abdirahman* v. *United States*, No. 17-243. Counsel for Petitioner is also counsel of record in *Dalmazzi*, *Cox*, and *Abdirahman*.

implications of the government's position not just for these cases, but beyond the military justice system, only underscore the need for this Court's intervention.

Finally, as the government concedes, *see* Brief for the United States in Opposition at 22, *Dalmazzi* v. *United States*, No. 16-961 (U.S. filed May 15, 2017); Opp. 8 n.1, this Petition is an appropriate vehicle for deciding the Questions Presented. Although CAAF has continued to grant petitions for review properly raising dual-officeholding claims (thereby protecting this Court's jurisdiction, *see* 28 U.S.C. § 1259(3)), it appears to be doing so only pending the disposition of these cases.

To be sure, the issue may also eventually reach this Court in a case arising from the Guantánamo military commissions. There, the appointment of Judge Mitchell and three other active-duty military officers to the CMCR has created further uncertainty, and the D.C. Circuit is presently considering the issue through a mandamus petition from the alleged masterminds of the September 11 attacks. *See In re Mohammad*, No. 17-1179 (D.C. Cir. filed July 21, 2017).[2] On Petitioner's view of the merits, however, there would be no statutory or constitutional infirmity in these officers' service *as civilians* as "additional judges" on the CMCR under § 950f(b)(3)—a conclusion that provides yet another reason for this Court to grant certiorari here and settle the matter.

2. The CMCR's unpublished June 21 ruling rejecting the defendants' dual-officeholding claim is reproduced in the Appendix to this brief. *See* Rep. App. 1a.

I. Judge Mitchell's CMCR Appointment Triggered the Dual-Officeholding Ban

The government's brief in opposition offers four arguments for why § 973(b)(2) did not disqualify Judge Mitchell from hearing Petitioner's CCA appeal. It claims that these arguments are "independent," Opp. 16, but they are not. Three of them reduce to the single contention that Judge Mitchell's CMCR appointment did not even trigger § 973(b)(2), because (1) "additional judges" on the Article I CMCR do not hold a "civil office"; (2) even if they did, that office does not "require[] an appointment by the President by and with the advice and consent of the Senate"; and (3) even if it does, Congress has authorized active-duty military officers to receive such an appointment. *Id*. at 8–13. As the Petition demonstrated, these merits-stage arguments are not only unavailing, but also flatly contrary to the government's longstanding interpretations of § 973(b)(2).

1. The most prominent example of this shift is the government's argument that CMCR judges do not hold a "civil office" because the duties of a CMCR judge are "military in nature" and CMCR judges "act pursuant to military, rather than civil, authority." Opp. 11–12. These assertions are factually incorrect and analytically irrelevant.

The CMCR is an Article I "court of record." 10 U.S.C. § 950f(a). In that regard, it is comparable to CAAF, *id*. § 941, and the U.S. Court of Appeals for Veterans' Claims, 38 U.S.C. § 7251—and materially different from the CCAs. *But see* Opp. 12.[3] Thus, the

3. The government's claim that, on Petitioner's reading, CCA judges would hold a "civil office," Opp. 12, is shallow and mistaken. It is the CCAs' structure, not their function, that

CMCR's authority stems from Congress, not the military. *See Freytag* v. *Comm'r*, 501 U.S. 868, 888 (1991) (noting implications of Congress's decision to transform an agency into an Article I court). Nor do CMCR judges exercise a "traditional military function." Pet. 15 & n.5.

The government insists that the Petition cited "no authority endorsing [this] understanding of Section 973(b)." Pet. 12. In fact, the Petition cites the unbroken line of Department of Justice opinions suggesting that an office's substantive function is irrelevant to whether it is a "civil office." Pet. 6–7.

As the Office of Legal Counsel put it in 1983, "the applicability of [§ 973(b)(2)] was not to depend on whether the duties of the civil office were undertaken in obedience to military orders." Pet. 14 (quoting Off. of Legal Counsel, Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations 16 (May 17, 1983) [hereinafter "1983 OLC Memo"]);[4] *see also*

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distinguishes them from the CMCR. Pet. 5. Unlike the CMCR, the CCAs are not Article I "courts of record," and their military judges do not hold a separate "office" in the first place. *See Weiss* v. *United States*, 510 U.S. 163, 170–72 (1994). *But see* Opp. 16 ("Judge Mitchell holds two distinct offices.").

But even if military judges on the CCAs nevertheless did hold a "civil office," it is not one that implicates the dual-officeholding ban, because it does not require nomination by the President and confirmation by the Senate. *See Edmond* v. *United States*, 520 U.S. 651, 661–66 (1997). Indeed, as the Petition explained, Congress added that narrowing requirement to § 973(b)(2) in 1983 entirely *because* "civil office" is interpreted so capaciously. Pet. 6–7.

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

Memorandum for the General Counsel, Gen. Servs. Admin., 3 OP. O.L.C. 148, 150 (1979) ("The Attorneys General . . . have ruled that . . . the policy of the statute points to a very broad interpretation of the term 'civil officer.'"); Army Officer Holding Civil Office, 18 OP. ATT'Y GEN. 11, 12 (1884) ("[T]he policy of [§ 973(b)] points to a very liberal interpretation of the phrase 'civil office.'").[5]

2. The government also maintains that "additional judges" on the CMCR do not hold an office "that requires an appointment by the President by and with the advice and consent of the Senate," § 973(b)(2)(A)(ii), because § 950f(b)(2) authorizes the *assignment* of judges to the CMCR without appointment. As the Petition explained, however, this argument requires ignoring Congress's clear intent to distinguish between "assigned" CMCR judges under § 950f(b)(2) and "additional" CMCR judges appointed under § 950f(b)(3). Pet. 9.

The government does not (and could not) contest that, at the time Judge Mitchell heard Petitioner's appeal, he was serving on the CMCR in the latter capacity—a capacity that, by statute, required presidential nomination and Senate confirmation. *See* § 950f(b)(3). In any event, insofar as CMCR judges are principal Executive Branch officers, if § 950f(b)(3) does not "require[] an appointment by the President by and with the advice and consent of the Senate," § 973(b)(2)(A)(ii), then the Appointments Clause does.

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5. Thus, shortly after § 973(b) was enacted, Attorney General Williams concluded that it would violate § 973(b) for General Sherman to serve on even a temporary basis as Secretary of War. *See* Acting Secretary of War, 14 OP. ATT'Y GEN. 200 (1873).

3. In addition, the government correctly notes that Congress, in § 950f(b)(2), clearly intended that active-duty military officers would be *assigned* to the CMCR. As the Petition demonstrated, however, § 950f(b)(2)'s clear statement to this effect only proves the absence of similar authorization for military officers to be *appointed* as "additional judges" under § 950f(b)(3). Pet. 9–10; *see Weiss*, 510 U.S. at 172 ("This difference negates any permissible inference that Congress intended that military judges should receive a second appointment, but in a fit of absentmindedness forgot to say so."). Tellingly, the government does not argue that Congress has authorized the *appointment* of active-duty military officers to the CMCR as "additional judges" under § 950f(b)(3). Judge Mitchell's appointment to the CMCR as a military officer is therefore not "otherwise authorized by law." § 973(b)(2)(A).

II. 10 U.S.C. § 973(b)(5) Does Not Preclude Judge Mitchell's Disqualification

The government falls back on what CAAF actually held below—that "a violation of Section 973(b) [does] not entitle petitioner to relief." Opp. 13. As the Petition explained, this novel interpretation is based upon a misreading of the text of § 973(b)(5), which provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." Pet. 15–17. CAAF's (and the government's) view appears to be that this text thereby immunizes military officers from suffering any sanction for violating the dual-officeholding ban.[6]

6. To that end, the government has now argued that § 973(b)(5) also precludes challenges to actions undertaken by

As the Petition noted, this argument fails under settled principles of statutory interpretation. Pet. 15–18. But more importantly for present purposes, a contrary conclusion would only bolster, not weaken, the case for granting certiorari.

1. Whereas these cases present the specific issue of active-duty military officers serving as Article I judges, § 973(b) has historically swept far more broadly, limiting the ability of men and women in uniform to simultaneous hold almost all Cabinet positions, thousands of other civil offices within the federal government, and elective office at the state or federal levels. Indeed, the dual-officeholding ban was designed and intended "to assure civilian preeminence in government, *i.e.*, to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975); *see also* 1983 OLC Memo, *supra*, at 16 ("What was intended was a strict separation of the military and civilian establishment.").

On the government's (and CAAF's) reading of § 973(b)(5), the dual-officeholding ban would no longer be able to serve that vital purpose in any context, let alone with respect to the CMCR.[7] Given the profound implications such an interpretation would portend for

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military officers in unauthorized civil offices, as well. *See* Brief for the United States in Opposition at 20–21, *In re Mohammad*, No. 17-1179 (D.C. Cir. filed Aug. 25, 2017), *available at* https://perma.cc/QS4J-XUYC.

7. In its brief in opposition, the government responds that "[t]he Executive Branch is bound to comply with Section 973(b), and does so." Opp. 15. Regardless of how it is enforced (or by whom), the dual-officeholding ban serves no purpose if, as the government claims, there are no consequences for its violation.

civil-military relations in general, it is self-evident that it should be for this Court to say so. *See Clinton* v. *Goldsmith*, 526 U.S. 529, 536 (1999) (emphasizing CAAF's narrowly circumscribed role, even within the military justice system).

2. In any event, "Congress . . . does not . . . hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). And the text of the statute that created § 973(b)(5) proves that Congress did not intend (or effect) such a sea change in civil-military relations. Taking § 973(b)(5) first, the government makes much out of that provision's reference to "*any* action," Opp. 14, and ignores the qualifier—"in furtherance of assigned official duties."

The government agrees that § 973(b)(5) was prompted by a desire to preclude challenges to criminal convictions obtained by military officers who, prior to the 1983 amendments to § 973(b), had been *assigned* to hold a "civil office" as Special Assistant U.S. Attorneys. *See* Pet. 15–16; Opp. 14. Thus, Congress's focus was on immunizing military officers' actions in the civil office to which they had (unlawfully, as OLC concluded) been assigned, not on actions taken in their military capacity subsequent to their assumption of an unauthorized civil office.[8]

8. Congress's focus on "assigned" duties also explains why § 973(b)(5) has had only retroactive effect, since it is no longer a violation of § 973(b)(2) for a servicemember to assume a civil office "in furtherance of assigned official duties." Pet. 15–16. The government's only counterargument is that Congress has since amended § 973 without eliminating § 973(b)(5). Opp. 14 n.4, The brief in opposition does not explain how those amendments bear on what Congress intended when it enacted § 973(b)(5).

This reading of § 973(b)(5)'s text is confirmed by two additional provisions of the same statute—neither of which the government acknowledges. First, after amending § 973(b) in section 1002(a) of the Department of Defense Authorization Act for FY1984, Congress separately provided that

> Nothing in [§ 973(b)], as in effect before the date of the enactment of this Act, shall be construed . . . 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*.

Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, § 1002(b)(2), 97 Stat. 614, 655 (1983) [hereinafter "1983 Act"] (emphasis added). Thus, in the very next subsection of the same statute, Congress used the same phrase ("in furtherance of assigned official duties") to unambiguously refer to actions undertaken by military officers in the civil office to which they were assigned without authorization. *See Atl. Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.").

Second, as the Petition noted, the same section of the 1983 Act also authorized the appointment of an active-duty military officer to the Red River Compact Commission, and specified that acceptance of that appointment "shall not terminate or otherwise affect such officer's appointment as a military officer." § 1002(d), 97 Stat. at 656; *see* Pet. 17. This proviso would have been wholly unnecessary if § 973(b)(5) has

the meaning claimed by CAAF and the government. Instead, it provides further evidence that § 973(b)(5) has no bearing here—and further reason why CAAF's decision to the contrary merits this Court's review.

III. The Decision Below Raises Serious Constitutional Questions

Finally, the government continues to give short shrift to the constitutional problems with Judge Mitchell's dual-officeholding. It is true, as the government argues, that the Petition "cites no authority holding that the Appointments Clause prohibits this sort of simultaneous service." Opp. 18. But that hardly proves the point, since Petitioner is unaware of any prior instance in which the same individual served simultaneously as both an inferior and a principal officer on two different federal courts. *Cf. Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) ("Perhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent." (citation and internal quotation marks omitted)). Whether the Constitution allows such an arrangement is, as the Petition admits, a novel question. *See* Pet. 20. It is not at all clear, however, that the answer is yes.

The government also continues to mischaracterize the Commander-in-Chief Clause concerns raised by the decision below—under which military officers *qua* CMCR judges are at once in the chain of command but also the beneficiaries of statutory tenure protection. Pet. 20–21 (citing *In re Khadr*, 823 F.3d 92, 98 (D.C. Cir. 2016)). The government's only responses are that Petitioner lacks standing to press this argument and that the D.C. Circuit has summarily refused to issue

a writ of mandamus in a case in which it was raised. Opp. 19 & n.5. The former contention misses the point and the latter contention is specious.

Petitioner is not claiming that the Commander-in-Chief Clause, if violated, would invalidate Judge Mitchell's participation in his CCA appeal. Pet. 21. The claim, instead, is that each of the interpretations of § 973(b) advanced by CAAF below and the government here raises serious constitutional questions, and that § 973(b) can—and therefore should—be construed by this Court to avoid them. But even if these difficult constitutional questions cannot be avoided, it is this Court that should answer them.

* *

The government does not argue against certiorari because the Questions Presented are unimportant in their substance or limited in their scope. Instead, the case against this Court's intervention rests on a series of novel and narrow interpretations of a 147-year-old statute intended to protect against undue military influence over civilian affairs—a statute the Executive Branch has, until now, always construed broadly in furtherance of that goal.

The government's new position does not just fail to persuade. It has also created avoidable uncertainty in hundreds of pending criminal cases, including the military commission trial of the alleged masterminds of the September 11 attacks. It raises constitutional questions of the first order. And, if the decision below is left intact, it could lead to a fundamental reorientation of civil-military relations, with ramifications far beyond the military justice system. This Court's intervention is therefore not only warranted, but imperative.

CONCLUSION

For the foregoing reasons and those previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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