No. 16-1423

In the Supreme Court of the United States

KEANU D.W. ORTIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
DANA J. BOENTE
Acting Assistant Attorney General
JOSEPH F. PALMER
DANIELLE S. TARIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 10 U.S.C. 973(b), which provides that, except as otherwise authorized by law, a military officer may not hold a "civil office" that requires a presidential appointment with Senate confirmation, prohibits a military officer from serving simultaneously as a presidentially appointed judge on the United States Court of Military Commission Review (USCMCR) and an appellate military judge on a service court of criminal appeals.

2. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, bars a military officer from serving simultaneously as a presidentially appointed judge on the USCMCR and an appellate military judge on a service court of criminal appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes: Page

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 16-1423

KEANU D.W. ORTIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-13a) is reported at 76 M.J. 189. The opinion of the United States Air Force Court of Criminal Appeals (Pet. App. 23a-24a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on February 9, 2017, with an opinion issued on April 17, 2017. On April 26, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 9, 2017. The petition was filed on May 19, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner was convicted by a military court-martial of knowingly and wrongfully viewing, possessing, and distributing child pornography, in violation of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934. He was sentenced to a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and a reduction in grade. The convening authority approved the sentence. The United States Air Force Court of Criminal Appeals (AFCCA) affirmed. The United States Court of Appeals for the Armed Forces (CAAF) granted a petition for discretionary review and affirmed. Pet. App. 1a-22a.

1. This case presents the question whether petitioner is entitled to a new hearing before the AFCCA because the panel that decided his appeal included a military judge who had also been appointed to the United States Court of Military Commission Review (USCMCR).

a. Congress established the USCMCR in the Military Commissions Act of 2009 (MCA), Pub. L. No. 111-84, Div. A, Tit. XVIII, 123 Stat. 2574. The USCMCR is an intermediate appellate tribunal for military commissions, performing a function analogous to the one served for courts-martial by the AFCCA and the other service courts of criminal appeals. See 10 U.S.C. 950f(a). The USCMCR's decisions are reviewed by the D.C. Circuit. See *In re al-Nashiri*, 791 F.3d 71, 74-75 (D.C. Cir. 2015).

The MCA authorizes both military officers and civilians to serve as judges on the USCMCR. 10 U.S.C. 950f(b). The Secretary of Defense may "assign persons who are appellate military judges to be judges on the [USCMCR]." 10 U.S.C. 950f(b)(2). A person so assigned must be a commissioned officer in the armed forces. *Ibid.*

In addition, the President may "appoint, by and with the advice and consent of the Senate, additional judges," who are not required to be military officers. 10 U.S.C. 950f(b)(3); see *al-Nashiri*, 791 F.3d at 74-75.

The USCMCR's jurisdiction is limited to reviewing military commission proceedings. Because of that specialized docket, there are times when "the Court's judges may have very little to do." *In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). "Consistent with that reality, the military judges who serve on the [USCMCR] also continue to serve on the military appeals courts from which they are drawn." *Ibid.*

b. In November 2014, a military commission defendant, Abd Al-Rahim Hussein Muhammed al-Nashiri, petitioned the D.C. Circuit for a writ of mandamus seeking disqualification of the military USCMCR judges hearing an interlocutory appeal in his case. Among other things, al-Nashiri argued that appellate military judges assigned to the USCMCR are principal officers under the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, who must be appointed by the President and confirmed by the Senate to their positions on that court. *al-Nashiri*, 791 F.3d at 73, 75.

The D.C. Circuit denied the petition, holding that al-Nashiri had not established the "clear and indisputable" right required for mandamus relief. *al-Nashiri*, 791 F.3d at 85-86. The D.C. Circuit did not decide whether USCMCR judges are, in fact, principal officers. *Ibid.* It also did not decide whether, if they are, the Appointments Clause requires judges previously appointed as commissioned military officers by the President with the advice and consent of the Senate to be appointed a second time specifically to the USCMCR. *Ibid.* But the

D.C. Circuit observed that "the President and the Senate could decide to put to rest any Appointments Clause questions regarding the [US]CMCR's military judges" by nominating and confirming them under 10 U.S.C. 950f(b)(3). *al-Nashiri*, 791 F.3d at 86.

c. "The President chose to take that tack" as a prophylactic measure, without conceding that it was constitutionally required. *In re al-Nashiri*, 835 F.3d 110, 116 (D.C. Cir. 2016), petition for cert. pending, No. 16-8966 (filed Jan. 17, 2017). In April 2016, the Senate confirmed the two military judges on al-Nashiri's panel to the USCMCR. *Ibid.*

A few weeks later, al-Nashiri moved in the USCMCR to disqualify the military judges on his panel based on 10 U.S.C. 973(b)(2), which provides that, unless "otherwise authorized by law," a military officer may not hold a "civil office" that "requires an appointment by the President by and with the advice and consent of the Senate." He argued that Section 973(b)(2) barred military officers from being appointed as USCMCR judges. Pet. App. 28a-29a. The USCMCR denied the motion, holding that military officers' service on the USCMCR is "authorized by law" because the MCA specifically authorizes military officers to be judges on that court. *Id.* at 29a (citing 10 U.S.C. 950f(b)(2)). The USCMCR also held that a USCMCR judgeship is not a "civil office" covered by Section 973(b)(2) because "[d]isposition of violations of the law of war by military commissions is a classic military function." *Id.* at 30a-31a.

al-Nashiri sought a writ of mandamus from the D.C. Circuit based on his claim that Section 973(b)(2) bars military officers from being appointed to the USCMCR.

The D.C. Circuit denied the petition in a per curiam order. *In re al-Nashiri*, No. 16-1152 Docket entry No. 1615339 (May 27, 2016).

d. In May 2017, another military commission defendant, Khalid Shaikh Mohammad, moved to disqualify the military USCMCR judges hearing an interlocutory appeal in his case. Joined by four co-defendants, Mohammad raised, among other issues, the same statutory claims al-Nashiri had raised in his case. The USCMCR denied the motion, reaffirming its prior holdings and reiterating that a USCMCR judgeship is not a "civil office" covered by Section 973(b)(2) because "[i]t is beyond dispute that military commissions are primarily a military function with a direct connection to the law of war." Order at 6, *United States* v. *Mohammad*, No. 17-002 (June 21, 2017).

2. Petitioner, a serviceman in the Air Force, was convicted before a military court-martial of viewing, possessing, and distributing child pornography. Pet. App. 3a. Petitioner appealed his conviction to the AFCCA, and the appeal was assigned to a panel that included Colonel Martin T. Mitchell, an appellate military judge who was also serving on the USCMCR by virtue of an assignment by the Secretary of Defense, and who was later appointed to the USCMCR by the President with the advice and consent of the Senate. *Id.* at 3a-6a. The AFCCA issued a judgment affirming petitioner's conviction and sentence after Judge Mitchell had been appointed by the President. *Id.* at 6a.

3. Petitioner sought discretionary review in the CAAF. The CAAF granted review limited to two issues: (1) whether 10 U.S.C. 973(b) bars an appellate military judge from serving simultaneously on a service

court of criminal appeals and as a presidentially appointed USCMCR judge, and (2) whether such simultaneous service violates the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Pet. App. 2a; see *id.* at 2a, 13a (noting the CAAF's specification of an additional issue that it did not ultimately reach).

The CAAF first held that petitioner was not entitled to relief under 10 U.S.C. 973(b). Pet. App. 6a-9a. The court concluded that even if Judge Mitchell's position on the USCMCR were a "civil office," and even if his appointment to that office were not "otherwise authorized by law" under 10 U.S.C. 973(b)(2)(A), any violation of Section 973(b) would not affect Judge Mitchell's service on the AFCCA. Pet. App. 8a-9a. The court observed that although Section 973(b) prohibits military officers from holding certain civil offices, it "neither requires the retirement or discharge of a service member who occupies a prohibited civil office, nor operates to automatically effectuate such termination." *Id.* at 9a. The court accordingly reasoned that, even if Section 973(b) "prohibit[ed] Judge Mitchell from holding office at the USCMCR," it would not "prohibit[] [him] from carrying out his assigned military duties at the [AF]CCA." *Ibid.* The CAAF also reasoned that petitioner's challenge was foreclosed by Section 973(b)'s savings clause, 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." 10 U.S.C. 973(b)(5); see Pet. App. 9a.

The CAAF next held that Judge Mitchell's simultaneous service on the AFCCA and the USCMCR did not violate the Appointments Clause. Pet. App. 9a-12a. The court assumed without deciding that the judges of the USCMCR are principal officers. *Id.* at 13a. But the

court rejected petitioner's argument that it would violate the Appointments Clause for a person who serves as a principal officer on the USCMCR to serve on the AFCCA, where he is subject to supervision by other officers. *Id.* at 11a-12a; cf. *Edmond* v. *United States*, 520 U.S. 651, 666 (1997) (holding that judges on a service court of criminal appeals "are 'inferior Officers' within the meaning of [the Appointments Clause]"). The court explained that petitioner's argument erroneously "presum[ed] that [the officer's] status as a principal officer on the USCMCR somehow carries over to the [AF]CCA, and invests him with authority or status not held by ordinary [AF]CCA judges." Pet. App. 11a. In fact, the court concluded, "[t]hat is not the case." *Ibid.* The court explained that even if an officer appointed to the USCMCR is a principal officer when acting in his capacity as a judge on that court, "[w]hen [the officer] sits as a [AF]CCA judge, he is no different from any other [AF]CCA judge." *Id.* at 11a-12a. The court thus saw "no Appointments Clause problem" with simultaneous service. *Id.* at 12a.

ARGUMENT

Petitioner renews his contention (Pet. 13-23) that he is entitled to a new hearing before the AFCCA because the panel that decided his appeal included a military judge who had also been appointed to the USCMCR. Petitioner asserts that such simultaneous service violates 10 U.S.C. 973(b) and the Appointments Clause of the Constitution. The CAAF correctly rejected those arguments, and its decision does not conflict with any

decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.[1]

1. Section 973(b) provides that, "[e]xcept as otherwise authorized by law," military officers may not "hold, or exercise the functions of, a civil office" that "requires an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. 973(b)(2)(A)(ii). Petitioner asserts (Pet. 13-18) that Section 973(b) bars a military officer from serving on the AFCCA after being appointed to the USCMCR by the President, and further contends that the asserted violation of Section 973(b) invalidates the AFCCA's decision in his case. That is incorrect for four independent reasons: (a) military officers are "authorized by law" to serve as judges on the USCMCR; (b) the position of USCMCR judge is not a "civil office" under Section 973(b); (c) an appointment by the President, with the advice and consent of the Senate, is not "require[d]" for a military officer to serve on the USCMCR; and (d) petitioner would not be entitled to relief even if he were correct that simultaneous service on the AFCCA and the USCMCR violates Section 973(b) because the statute expressly provides that it shall not "be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties," 10 U.S.C. 973(b)(5). A claim that fails on so many independent grounds does not warrant this Court's review—particularly where, as here, none of

---

[1] The questions presented in this case are also presented in several other pending petitions for writs of certiorari. See *Alexander* v. *United States*, No. 16-9536 (filed May 16, 2017); *Cox* v. *United States*, No. 16-1017 (filed Feb. 21, 2017); *Dalmazzi* v. *United States*, No. 16-961 (filed Feb. 1, 2017). Some of those petitions also present threshold procedural questions that are not presented here.

those grounds is the subject of any disagreement in the lower courts.

a. Section 973(b)(2) does not prohibit a military officer from holding a covered civil office if the officer is "authorized by law" to do so. 10 U.S.C. 973(b)(2)(A). Here, the MCA expressly authorizes the Secretary of Defense to assign "appellate military judges" to the USCMCR and requires that "[a]ny judge so assigned shall be a commissioned officer of the armed forces." 10 U.S.C. 950f(b)(2); see *In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016) ("The [MCA] authorizes both military judges and civilians to serve on the [USCMCR]."). By providing that one of the two mechanisms for USCMCR judges to be selected applies only to military officers, Congress made clear that military officers are "authorized by law" to serve on that court. Consistent with that statutory authorization, the overwhelming majority of the USCMCR's judges have been military officers. *Khadr*, 823 F.3d at 96.

Petitioner contends (Pet. 8-9) that the MCA is insufficiently "clear and unambiguous" to provide the necessary "authoriz[ation] by law" for military officers to serve on the USCMCR. But nothing in Section 973(b)(2) imposes or suggests the clear-statement rule that petitioner advocates. And even if such clarity were necessary, it would be supplied by the MCA's express requirement that all judges assigned to the USCMCR under Section 950f(b)(2) *must* be military officers, as well as by other provisions of the MCA that plainly contemplate that USCMCR judges may be military officers.[2]

---

[2] See, *e.g.*, 10 U.S.C. 949b(b)(4) (providing that the Secretary of Defense may reassign appellate military judges on the USCMCR to other duties "in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member" if

Petitioner appears to acknowledge (Pet. 9) that Section 950f(b)(2) clearly and unambiguously authorizes military officers to be assigned to be judges on the USCMCR. But he asserts (*ibid.*) that similar authorization is absent from Section 950f(b)(3), which allows the President to "appoint, by and with the advice and consent of the Senate, additional judges to the [USCMCR]." In other words, petitioner asserts that military officers are authorized to serve as "judges" assigned to the USCMCR under Section 950f(b)(2) (and thus may do so consistent with Section 973(b)), but are *not* authorized to serve as "additional judges" appointed to the USCMCR under Section 950f(b)(3).

Petitioner's attempt to distinguish between "judges" and "additional judges" lacks any statutory basis. Section 950f creates a single office—"judge[] on [the USCMCR]." 10 U.S.C. 950f(a). It then provides that "[j]udges on the Court shall be assigned or appointed" in either of two ways. 10 U.S.C. 950f(b)(1). But the availability of two modes of designation does not transform one statutory office into two. Judges designated under Section 950f(b)(3) are numerically "additional," but substantively identical, to judges designated under Section 950f(b)(2). And because Congress expressly provided that "appellate military judges" may serve as "judges on the [USCMCR]," 10 U.S.C. 950f(b)(2), their service in that office is "authorized by law" regardless of the mechanism by which they are designated to serve.

b. In any event, even if military officers were not "authorized by law" to serve as USCMCR judges, their service in that position would not violate Section 973(b)

---

the reassignment is "based on military necessity and * * * is consistent with service rotation regulations").

because the position of USCMCR judge is not a "civil office" within the meaning of Section 973(b)(2). As the USCMCR has explained, adjudication of violations of the law of war by military commissions is "a classic military function." Pet. App. 30a-31a; see William Winthrop, *Military Law and Precedents* 835 (2d ed. 1920) (noting that "military commissions * * * have invariably been composed of commissioned officers of the army").

Petitioner observes (Pet. 14-15) that USCMCR judges do not themselves preside over military commissions. But they review military commissions' dispositions, a function that is consistent with the well-recognized role of military officers in administering the law of war and that in no way threatens the "civilian preeminence in government" that Section 973(b)(2) is designed to protect. *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975); see *id.* at 884-885 (holding that the office of notary public is not a "civil office" because military judge advocates have traditionally served as notaries within the military and because service in that office does not undermine the purposes of Section 973(b)).

In arguing otherwise, petitioner appears to assume (Pet. 7) that a position qualifies as a "civil office" under Section 973(b) whenever: (1) it is established by statute, and (2) "its duties involve the exercise of 'some portion of the sovereign power.'" But petitioner ignores the additional requirement that the position must be *civil*, not military. The various opinions on which petitioner relies (Pet. 6-7) addressed positions that were not military in nature, and those opinions thus principally asked

whether the relevant position carried sufficient governmental authority to qualify as a "civil office."[3] The question here is different. There is no doubt that, like many officials who perform military duties, USCMCR judges hold a position established by statute and exercise some sovereign power. But they do not hold a "civil office" because they act pursuant to military, rather than civil, authority.

Petitioner's sweeping reading of "civil office" would mean that quintessential military offices, such as appellate military judgeships on the service courts of criminal appeals, are "civil office[s]" merely because the positions are established by statute and involve exercising government power. Petitioner cites no authority endorsing that understanding of Section 973(b).

c. An additional reason that the prohibition in Section 973(b) does not bar military officers from serving as USCMCR judges is that the office of USCMCR judge does not "require[] an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. 973(b)(2)(A)(ii). The MCA expressly provides that "[t]he Secretary of Defense may assign persons who are appellate military judges to be judges on the

---

[3] See 44 Comp. Gen. 830, 830-832 (1965) (concluding that an Army Officer could not serve as "a special policeman in the Library of Congress"); Office of Legal Counsel, *Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations* 28-29 (May 17, 1983) (holding that military officers could not serve as Special Assistant United States Attorneys prosecuting "offenses against the civil laws of the United States" under authority that "derives not from any military source but from the Attorney General"); see also *Army Officer Holding Civil Office*, 18 Op. Att'y Gen. 11, 12-13 (1884) (holding that an Army officer could not serve on a board to report to the City of Philadelphia on "the defects of the present system of paving the streets").

[USCMCR]." 10 U.S.C. 950f(b)(2). That alternative mode of designating judges makes clear that the position of USCMCR judge does not "require" a presidential appointment. And although the President responded to the D.C. Circuit's decision in *al-Nashiri* by appointing military judges to the USCMCR with the advice and consent of the Senate, no court has held that such an appointment is constitutionally required. See *In re al-Nashiri*, 791 F.3d 71, 81-86 (D.C. Cir. 2015) (declining to resolve that "question[] of first impression"). Petitioner suggests (Pet. 6) that the government has conceded this issue, but in fact the government has maintained that military officers do not require a separate appointment to serve as USCMCR judges because USCMCR judges are not principal officers. See *al-Nashiri*, 791 F.3d at 83 (noting the government's argument that the USCMCR judges are inferior officers because the Secretary of Defense supervises the court and can remove its military judges).

d. Even if all three of the foregoing arguments are wrong and Section 973(b) prohibits military officers from serving on the USCMCR, the CAAF correctly held that a violation of Section 973(b) would not entitle petitioner to relief. By its terms, Section 973(b) prohibits military officers from serving in specified civil offices, but "nothing in the text suggests that it prohibits" an officer who assumes a prohibited civil office "from carrying out his assigned military duties." Pet. App. 9a. And Section 973(b)'s savings clause expressly forecloses petitioner's attempt to use that provision to overturn the AFCCA decision in his case because it provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. 973(b)(5); see Pet.

App. 9a. Judge Mitchell participated in deciding petitioner's appeal "in furtherance of his assigned official duties," and petitioner thus cannot invoke Section 973(b) to challenge the AFCCA's decision.

Petitioner asserts (Pet. 15-16) that Section 973(b)'s savings clause applies only to actions military officers took while holding a prohibited office before the savings clause was added to the statute in 1983. Nothing in the statute supports such a limitation. Although the legislative history of the amendment indicates that the savings clause was added in response to a Justice Department memorandum concluding that military officers could not be appointed as Special Assistant United States Attorneys, Congress did not limit the clause's application to that particular context or make it purely retroactive. To the contrary, Congress broadly provided that "[n]othing in [Section 973(b)] shall be construed to invalidate *any* action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. 973(b)(5) (emphasis added).[4]

Petitioner also asserts (Pet. 16-17) that he is entitled to relief because Congress did not indicate its intent in Section 973(b) to abrogate "the common law doctrine of

---

[4] Congress's preservation of the savings clause through multiple post-1983 amendments to Section 973 further undermines petitioner's assertion that the clause should be read to include an atextual limitation to pre-1983 events. See National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Tit. V, § 545, 117 Stat. 1479; Homeland Security Act of 2002, Pub. L. No. 107-296, Tit. XVII, § 1704(b)(1), 116 Stat. 2314; National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, Div. A, Tit. V, § 506, 113 Stat. 591; National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Div. A, Tit. V, § 556, 104 Stat. 1570.

incompatibility," which petitioner claims requires an office holder to vacate a military office that is incompatible with an office he later assumes. But as the CAAF explained, the 1983 amendment that added the savings clause also repealed language in Section 973(b) that had automatically terminated an officer's military appointment when he assumed a prohibited civil office. Pet. App. 7a-8a. That language had provided that "[t]he acceptance of [a prohibited] civil office or the exercise of its functions by [a covered] officer terminates his military appointment." 10 U.S.C. 973(b) (1982). In repealing that language and adding the savings clause, Congress made clear that it intended to depart from the practice of automatically removing a military officer who assumes a prohibited civil office. See Pet. App. 9a ("The language supporting [petitioner's] argument was expressly repealed over thirty years ago.").

Petitioner errs in asserting (Pet. 16-17) that adhering to the plain language of Section 973(b)(5)'s savings clause would "effectively repeal[] [Section] 973(b)'s prohibitions altogether." The Executive Branch is bound to comply with Section 973(b), and does so. Cf. Pet. 17 (describing actions to ensure compliance and remedy violations). But many statutes that are binding on the Executive Branch do not create privately enforceable rights. And even when they do, Congress may limit private enforcement to particular contexts. Here, the plain terms of the savings clause unambiguously preclude petitioner from using Section 973(b) to invalidate the AFCCA's decision in his case.

e. Finally, petitioner asserts (Pet. 18) that this Court's review is warranted despite the absence of a circuit conflict because of the asserted "incongruity between the [CAAF's] analysis in this case and the

[US]CMCR's reasoning in *Al-Nashiri*." No such incongruity exists. In *al-Nashiri*, the USCMCR held that a military judge's service on that court does not violate Section 973(b) because a USCMCR judgeship is not a "civil office" and because such service is any event "specifically authorized" by the MCA. Pet. App. 29a-30a. The CAAF did not disagree with either of those holdings. To the contrary, it expressly stated that it "d[id] not decide" those issues. *Id.* at 12a. Instead, the CAAF simply held that petitioner would not be entitled to relief even if Judge Mitchell's service on the USCMCR violated Section 973(b). *Id.* at 8a-9a. The fact that two different courts have rejected petitioner's statutory argument on three alternative, independent grounds counsels against review—not in favor of it.

2. Petitioner also contends (Pet. 18-20) that Judge Mitchell's simultaneous service on the AFCCA and the USCMCR violates the Appointments Clause. The CAAF correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals.

a. The Appointments Clause provides that the President shall "nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * Officers of the United States," but that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. Judge Mitchell holds two distinct offices: He is a judge on the AFCCA, and he separately serves as a judge on the USCMCR. He was placed in each of those offices in a manner consistent with the Constitution.

Petitioner does not and could not contend that Judge Mitchell's original assignment to the AFCCA violated the Appointments Clause. Judges on the AFCCA and the other service courts of criminal appeals "are 'inferior Officers' within the meaning of [the Appointments Clause] by reason of the supervision over their work" by judge advocates general and by the CAAF. *Edmond* v. *United States*, 520 U.S. 651, 666 (1997). This Court has held that, when military judges are "already commissioned officers" and therefore have "already been appointed by the President with the advice and consent of the Senate," the Appointments Clause allows them to be assigned to the service courts of criminal appeals without a "second appointment." *Weiss* v. *United States*, 510 U.S. 163, 170 (1994); see *id.* at 176.

Petitioner also does not appear to contend that there is any Appointments Clause problem with the manner in which Judge Mitchell was appointed to the USCMCR. He asserts (Pet. 5-6) that judges on the USCMCR are principal officers. The government disagrees with that premise. See p. 13, *supra*. But even if petitioner's assertion were correct, Judge Mitchell and the other military judges on the USCMCR have now been appointed to that court in the manner required by the Appointments Clause for principal officers: by the President with the advice and consent of the Senate. See Pet. App. 5a; *In re al-Nashiri*, 835 F.3d 110, 116 (D.C. Cir. 2016), petition for cert. pending, No. 16-8966 (filed Jan. 17, 2017). Those appointments "put to rest any Appointments Clause questions regarding the [US]CMCR's military judges." *al-Nashiri*, 791 F.3d at 86.

b. Unlike a typical Appointments Clause challenge, therefore, petitioner's claim does not rest on an assertion that an individual has been appointed to a federal

office in a manner inconsistent with the Appointments Clause's procedures. His contention is, instead, that it violates the Appointments Clause for a single individual to serve simultaneously as a judge on a service court of criminal appeals (an inferior officer) and as a judge on the USCMCR (according to petitioner, a principal officer). But nothing in the text of the Appointments Clause supports that assertion, and petitioner cites no authority holding that the Appointments Clause prohibits this sort of simultaneous service.

As the CAAF explained, petitioner's arguments appear to "presume[] that [an officer's] status as a principal officer on the USCMCR somehow carries over to the [court of criminal appeals], and invests him with authority or status not held by ordinary [court of criminal appeals] judges." Pet. App. 11a. "That is not the case." *Ibid.* Even if a USCMCR judge were a principal officer when he acted in his capacity as such, "[w]hen [the same individual] sits as an [AF]CCA judge, he is no different from any other [AF]CCA judge." *Id.* at 11a-12a. The officer's status as a USCMCR judge grants him no additional authority on the AFCCA. *Id.* at 12a. Accordingly, to the extent he is supervised by, or otherwise constrained by the actions of, nonprincipal officers when he acts in his capacity as an AFCCA judge, such limitations do not contravene the Appointments Clause. See *ibid.* And, conversely, the officer's status as an AFCCA judge subjects him to no greater supervision when he acts on the USCMCR. *Ibid.*

Petitioner asserts (Pet. 19-20) that simultaneous service on the USCMCR and the AFFCA violates the Appointments Clause because the two positions "might be

functionally incompatible" or because simultaneous service is "incongru[ous]." Neither of the decisions on which petitioner relies support that assertion.

In *Morrison* v. *Olson*, 487 U.S. 654, 675-676 (1988), this Court stated that Congress's decision to vest Article III courts with authority to appoint individuals to a particular office could exceed Congress's authority under the Appointments Clause "if there was some 'incongruity' between the functions normally performed by the courts and their performance of th[at] duty to appoint." *Id.* at 676 (quoting *Ex parte Siebold*, 100 U.S. 371, 398 (1879)). That principle concerns the propriety of a method for appointing individuals to serve in a single office—not any purported "incongruity" in the same individual holding two different offices, or any other issue involving simultaneous service of the sort at issue here.

In *Nguyen* v. *United States*, 539 U.S. 69 (2003), this Court held that an Article IV judge on a territorial court could not sit by designation on a panel of the Ninth Circuit. *Id.* at 71. But the Court's decision rested on a statute requiring that judges sitting by designation be Article III judges—not on the Appointments Clause. *Id.* at 74-77 (citing 28 U.S.C. 292(a)).[5]

---

[5] Petitioner also asserts (Pet. 20-21) that the appointment of military officers to the USCMCR raises questions under the Commander-in-Chief Clause, U.S. Const. Art. II, § 2, Cl. 1. But the questions he presents to this Court do not include the Commander-in-Chief claim, which was not passed upon by the court below. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). In addition, petitioner lacks standing to raise that claim because it relates only to the USCMCR and not the AFCCA. And in any event, petitioner's Commander-in-Chief Clause argument lacks merit. Cf. *al-Nashiri*, 791 F.3d at 75, 82 (denying a

In sum, petitioner does not identify any decision, by any court, holding that simultaneous service on the USCMCR and the AFCCA violates the Appointments Clause—or even applying the Appointments Clause to an arguably analogous situation. And petitioner provides no sound reason for this Court to depart from its usual practices by taking up such a novel issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
DANA J. BOENTE
Acting Assistant Attorney General
JOSEPH F. PALMER
DANIELLE S. TARIN
Attorneys

AUGUST 2017

---

petition for mandamus raising a similar Commander-in-Chief Clause claim).