

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

NICOLE A. DALMAZZI,)
) Petitioner,)
) v.) No. 16-961
UNITED STATES,)
) Respondent.)

LAITH G. COX,)
) Petitioner,)
) v.) No. 16-1017
UNITED STATES,)
) Respondent.)

KEANU D. W. ORTIZ,)
) Petitioner,)
) v.) No. 16-1423
UNITED STATES,)
) Respondent.)

Pages: 1 through 78
Place: Washington, D.C.
Date: January 16, 2018

HERITAGE REPORTING CORPORATION

Official Reporters
1220 L Street, N.W., Suite 206
Washington, D.C. 20005
(202) 628-4888
www.hrccourtreporters.com

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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
13 then-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
16 original language of the 2006 Act, judges could
17 be 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 it did not expressly authorize military
6 officers to hold that civil office. That's why
7 when the D.C. Circuit suggested in the Nashiri
8 case that there is a constitutional problem
9 with the assignment of military officers to the
10 CMCR and the President responded by appointing
11 five of those officers, four of whom are
12 relevant here, to that court, it triggered the
13 dual 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 are 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 what do you make -- what do you do about the
16 fact that in 1983 Congress eliminated the part
17 of 973 that said that an officer is
18 automatically terminated if the officer accepts
19 a covered civil office? And what about the
20 savings clause, which says that nothing in
21 Section 973(b) shall be construed to invalidate
22 any action undertaken by an officer in
23 furtherance of assigned official duties?

24 MR. VLADECK: So I think the -- the
25 answer to both questions, Justice Alito,

1 depends upon placing the 1983 amendments in
2 context. And if you'll indulge me, I'll --
3 I'll try to do so.

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

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

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

19 So the -- the point of the statute was
20 to basically say these assignments are not, in
21 fact, a problem under the dual office-holding
22 ban because they're not reflecting a military
23 officer holding two offices; that, in fact, the
24 pre-1983 statute had been construed by the
25 Justice Department perhaps over-broadly. And

1 so both the savings clause and the elimination
2 of the automatic termination language were with
3 an eye toward this purpose, to narrow the scope
4 of the dual office-holding ban.

5 JUSTICE GORSUCH: Got it. Still
6 waiting for the text argument.

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

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

1 official duties.

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

10 So what do you do with this -- with
11 that "except"?

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

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

23 JUSTICE SOTOMAYOR: I'm sorry. How
24 have they done that?

25 MR. VLADECK: There is a special -- a

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

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

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

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

1 provision, Justice Sotomayor, that comes
2 anywhere near suggesting that in 2009 Congress
3 was thinking about military officers when it
4 created this separate appointed office that it
5 was allowing additional judges to hold.

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

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

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

1 Department, are recognizing circumstances --

2 JUSTICE ALITO: Where is this, I'm
3 sorry?

4 MR. VLADECK: I'm sorry, it's pages
5 18a and 19a of the blue brief in the appendix.
6 The directive was the Secretary's response to
7 the provision Justice Alito cited, to Section
8 973(d), which delegated to the Secretary of
9 Defense the power to promulgate regulations to
10 enforce Section 973.

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

22 What -- I'm sorry.

23 JUSTICE BREYER: Why -- I'm just
24 curious why -- why is this a civil office?
25 This thing is -- can you hear me?

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

5 JUSTICE BREYER: Well, go ahead and
6 finish that first.

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

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

25 That is in contrast to the --

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

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

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

17 So -- so what's civil about it?

18 MR. VLADECK: So --

19 JUSTICE BREYER: I mean, except the
20 fact you mentioned, it's of course true, it is
21 of course true, that there is one civilian on
22 it or two or three. That's true.

23 Is there anything that says a military
24 officer, which would otherwise be totally
25 military, suddenly becomes civil because you

1 appoint one person who's civil?

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

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

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

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

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

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

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

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

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

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

1 intentionally mapping on to the court-martial
2 system, civilian appellate review.

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

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

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

1 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 -- and I'm mindful
19 that my federal courts class begins tomorrow.
20 So --

21 JUSTICE SOTOMAYOR: Yes.

22 MR. VLADECK: -- the -- the -- with
23 regard to the amicus's point about
24 constitutional appellate jurisdiction, I think
25 it's worth starting from this Court's decision

1 in United States versus Coe, which, frankly, I
2 did not know about before this case.

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

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

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

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

1 MR. VLADECK: So, Justice Kennedy, I
2 think there are a couple of differences.
3 First, of course, Congress has never purported
4 to describe the NLRB or the SEC as a court. It
5 is --

6 JUSTICE KENNEDY: It's just labels
7 we're talking about?

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

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

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

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

25 But, Justice Kennedy, the larger point

1 is we don't think this Court needs to reach
2 what is obviously the much harder question of
3 direct appellate jurisdiction over adjudicative
4 proceedings by an agency here because here,
5 unlike in the NLRB and SEC cases, you have
6 Congress creating a court of record, a court of
7 record, mind you, that is capable of dispensing
8 capital punishment. These are criminal cases.
9 And --

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

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

1 Palmore; I don't know about the D.C. I'll have
2 to ask about that.

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

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

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

16 JUSTICE BREYER: It's one question.

17 (Laughter.)

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

20 (Laughter.)

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

1 of Appeals because the territorial courts
2 looked like military courts. Right? That is
3 to say the analogy between the military and
4 territorial courts is actually deeply embedded
5 in this Court's non-Article III jurisprudence.

6 And so I think actually there's quite
7 decent overlap between the two.

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

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

1 committed to jail.

2 JUSTICE ALITO: Does the President --

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

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

18 JUSTICE BREYER: Because?

19 MR. VLADECK: Because they are
20 standard tribunals that produce records, that
21 produce transcripts, that produce proceedings
22 --

23 JUSTICE BREYER: Okay.

24 MR. VLADECK: -- independent of the
25 participants.

1 JUSTICE KENNEDY: And judgments.

2 MR. VLADECK: And judgments. And --
3 and one last point, Justice Kennedy, on
4 judgments. I do think, Justice Breyer, that
5 the judgments piece is part of this. I mean,
6 three years ago, this Court in the B&B Hardware
7 case, I think, saw the difficulties of adopting
8 a bright-line rule for when administrative
9 adjudications would or would not be preclusive.

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

17 JUSTICE KENNEDY: Do you think Marbury
18 versus Madison is right?

19 (Laughter.)

20 JUSTICE KENNEDY: Particularly as to
21 the interpretation with such exceptions as
22 Congress may make.

23 MR. VLADECK: So, I will confess,
24 Justice Kennedy, that I may perhaps belong in
25 the school of scholars who thinks that Chief

1 Justice Marshall read both the statute and the
2 Constitution to reach the constitutional
3 questions he wanted to reach.

4 I'm not sure that he nevertheless
5 didn't end up with the right -- with the wrong
6 answer. And, again, I think, for purposes of
7 the question presented in this case on this
8 Court's jurisdiction, the more relevant case is
9 not Marbury but Bollman.

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

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Bamzai.

15 ORAL ARGUMENT OF ADITYA BAMZAI,
16 AS AMICUS CURAE, IN SUPPORT OF NEITHER PARTY

17 MR. BAMZAI: Thank you, Mr. Chief
18 Justice, may it please the Court:

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

1 Marbury itself.

2 These two propositions decide this
3 case. Now, my friends on the other side have
4 made the argument by analogy to the territorial
5 and D.C. courts, and that's the principal and,
6 in fact, it's the only argument on which they
7 rely, but it's very important for this Court to
8 understand that that is a slippery slope to go
9 down because territorial and D.C. government is
10 very different in a number of respects.

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

22 CHIEF JUSTICE ROBERTS: Well --

23 JUSTICE SOTOMAYOR: I'm sorry. Except
24 that unlike those other agencies, territories,
25 this D.C. court, and military organizations are

1 explicitly -- Congress explicitly authorized to
2 -- to file rules and regulations. The three
3 provisions are almost identical.

4 And why aren't military courts
5 virtually geographic? Most military operations
6 happen in bases domestically or in foreign
7 fields. So in what ways are they different
8 geographically?

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

16 And so that is the rationale that this
17 Court has given in a number of its territorial
18 court cases.

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

25 MR. BAMZAI: Your Honor, it's true

1 that civil law doesn't apply. It's military
2 law that is applicable in these courts-martial.
3 But I don't think we're talking about
4 territorial jurisdiction in the same way that
5 we are with respect to territorial governance.

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

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

21 CHIEF JUSTICE ROBERTS: I -- I
22 understand your argument that they're different
23 because of -- but I don't understand what
24 possible pertinence the fact that they cover a
25 territory as opposed to a subject matter has to

1 do with your Article III objection.

2 MR. BAMZAI: Your Honor, it's both.
3 It's the -- the -- the reason why territorial
4 courts were created, and this is Chief Justice
5 Marshall's opinion in American Insurance versus
6 Canter points this out, that -- that Article
7 III courts, under the understanding of Article
8 III at the time, may not have been able to
9 resolve certain disputes that were necessary,
10 just in order to govern a group of people, such
11 as divorce disputes, things of that nature.

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

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

23 And that explains why certain
24 principles of the structural separation of
25 powers don't apply within the territories and

1 D.C. It also --

2 JUSTICE KAGAN: I guess I don't
3 understand why the exact same rationale
4 wouldn't apply here. In other words, you know,
5 a member of the military assaults somebody on a
6 military base and Congress decides: We don't
7 want that assault to be prosecuted in the state
8 court. We want that assault to be prosecuted
9 within a military -- a system of military
10 justice.

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

18 MR. BAMZAI: Your Honor, I think it is
19 --

20 JUSTICE KAGAN: By people, really.

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

25 And so, for example, Ex parte

1 Vallandigham or the Gordon versus United States
2 case, which we cite in our brief, are about
3 military courts and about the initial
4 incarnation of the Court of Claims.

5 And this Court denied jurisdiction and
6 said that it could not directly review either
7 of those courts.

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

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

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

25 MR. BAMZAI: Yes, Your Honor. And if

1 I may just say that I believe that this Court
2 exercises original jurisdiction in this case.
3 So I don't believe that the CAAF --

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

12 CAAF is a second level of review. It
13 is exercising appellate jurisdiction. It's not
14 hearing the case in the first instance.

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

20 JUSTICE KENNEDY: Suppose Congress
21 made the CAAF an Article III court.

22 MR. BAMZAI: That would be perfectly
23 constitutional, Your Honor. It would
24 completely alleviate the constitutional
25 problem.

1 JUSTICE KENNEDY: And that would
2 alleviate your concern here?

3 MR. BAMZAI: Absolutely, Your Honor.
4 This would fix the constitutional --
5 constitutional problem. Or, alternatively, as
6 with most of the federal --

7 JUSTICE KENNEDY: It wouldn't -- it
8 wouldn't affect the Commander-in-Chief
9 argument?

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

13 But --

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

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

23 JUSTICE BREYER: What?

24 MR. BAMZAI: The D.C. Court of Appeals
25 --

1 JUSTICE BREYER: Yeah, that's right.

2 MR. BAMZAI: -- is not an Article III
3 court. The D.C. Circuit is.

4 JUSTICE BREYER: Yeah. Yeah. So how
5 do we explain the decision that's upholding
6 that? I mean, appeals from that?

7 MR. BAMZAI: Your Honor, the -- the
8 explanation is that the D.C. courts, the local
9 courts --

10 JUSTICE BREYER: Yeah.

11 MR. BAMZAI: -- stand in the same
12 position as territorial courts --

13 JUSTICE BREYER: No, didn't -- didn't
14 -- aren't the -- weren't the territorial
15 courts, they're Article I courts, I guess, but
16 didn't Congress intend under your theory to
17 delegate to those courts part of its judicial
18 power or not?

19 MR. BAMZAI: That is true in the -- of
20 the territorial courts. They the --

21 JUSTICE BREYER: Were they life
22 appointments?

23 MR. BAMZAI: They were not. No, Your
24 Honor, they were not life appointments, but
25 they could exercise --

1 JUSTICE BREYER: Okay. Okay. So I
2 got your point. But now, what about the
3 government's argument that what we should do is
4 look back to history and say the tradition at
5 the time of the writing of the Constitution
6 would have been to consider military justice as
7 a functioning judicial system, and that isn't
8 true of the NLRB and it isn't true of the other
9 agencies.

10 And because they both have the
11 characteristics or many of the characteristics
12 of courts and would have been so considered
13 historically that it is appropriate to exercise
14 appellate jurisdiction from their decisions.

15 MR. BAMZAI: Your Honor, respectfully,
16 I don't know if that is entirely the
17 government's position. You might want to ask
18 my friend.

19 JUSTICE BREYER: All right. Yeah.

20 MR. BAMZAI: And that is because the
21 government appears to concede that this Court
22 in *Ex parte Vallandigham* held that it could not
23 directly -- directly review a military
24 commission in that case because the military
25 commission did not exercise the judicial power

1 in a relevant sense.

2 And as I understand the government's
3 argument, it is that this Court can review the
4 CAAF. The CAAF is different because it has
5 been codified by Congress. I see that my time
6 is up.

7 CHIEF JUSTICE ROBERTS: Why don't you
8 take another couple minutes.

9 MR. BAMZAI: Thank you, Your Honor.
10 That the CAAF is relevantly different because
11 it has been codified by Congress and exercises
12 its authority in a more formalized sense than
13 the ad hoc military commissions in the
14 Vallandigham case, and I submit --

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

19 MR. BAMZAI: Your Honor, it would not
20 be necessary. I submit that the simplest way
21 to decide this case is the one that I proposed
22 in my opening, which is that it is undisputed,
23 I believe, the government does not dispute that
24 the CAAF is within the executive branch.

25 And this Court could simply say that

1 its direct review of the executive branch is
2 necessarily --

3 JUSTICE KAGAN: Well, but how does
4 that really fit with the language of Article
5 III, Section 2? Because what Article III says
6 is "The judicial power shall extend to all
7 cases" and then talks about in those cases or
8 in various ones of them, "the Supreme Court
9 shall have appellate jurisdiction."

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

19 MR. BAMZAI: Your Honor, I think the
20 answer to that question is that Marbury
21 establishes that it's more than simply a case
22 that triggers this Court's jurisdiction, that
23 there's something to the language of original
24 and appellate, and original jurisdiction
25 because it's specified in the Constitution by

1 implication means that appellate jurisdiction
2 can only be exercised from certain types of
3 bodies.

4 And, incidentally, that is not only
5 the position that Chief Justice Marshall
6 embraced in Marbury, but it's also the position
7 that Alexander Hamilton embraced in the
8 Federalist Papers, it was proposed at a number
9 of the state conventions ratifying the
10 Constitution and embraced by a number of the
11 cases that the Court decided in its early years
12 that are cited in our brief.

13 And so I think that answers why it's
14 not simply a matter of a case, and one could
15 understand the dispute between Marbury and
16 Madison --

17 JUSTICE KAGAN: So, if I understand
18 your answer --

19 MR. BAMZAI: Yes.

20 JUSTICE KAGAN: -- you're not pointing
21 to anything in Article III, is that correct?
22 You're pointing instead to Marbury and saying
23 that the principle derives from there, but I
24 could look at Marbury and say: You know, what
25 -- what Chief Justice Marshall was talking

1 about was James Madison handing around
2 commissions, nothing to do with criminal
3 prosecutions.

4 MR. BAMZAI: Your Honor, I do believe
5 that I'm pointing to something in Article III,
6 and that's the original and appellate
7 jurisdiction provisions and the appropriate
8 structural inferences that can be made from
9 that.

10 JUSTICE KAGAN: But -- but that's all
11 with reference to the cases. "The Supreme
12 Court shall have appellate jurisdiction" over
13 these various cases. It doesn't talk about,
14 you know, which particular courts or whether
15 somebody's exercising which particular powers.
16 It just talks about cases.

17 MR. BAMZAI: That is true. That's
18 true. It does not say which particular courts.
19 It is not specified in so many words. But
20 Marbury has that principle, as does, for
21 example, Justice Story in his Commentaries on
22 the Constitution, in which he says that
23 appellate jurisdiction must be exercised from a
24 body that is exercising judicial authority and
25 cloaked with judicial power.

1 And so I think that that principle was
2 embraced by the people who wrote Article III,
3 and it's a principle that this Court ought to
4 apply in this case.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Fletcher.

8 ORAL ARGUMENT OF BRIAN H. FLETCHER
9 ON BEHALF OF THE RESPONDENT

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

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

1 decisions upholding the court-martial
2 convictions at issue here.

3 On the jurisdictional question, we
4 start, as I think all the parties before the
5 Court do, with Chief Justice Marshall's
6 decision for the Court in Marbury versus
7 Madison, which says that the essential
8 criterion of appellate jurisdiction is that it
9 revises and corrects the proceedings in a cause
10 already instituted and does not institute that
11 cause.

12 Under that standard, Marbury was an
13 original case because the parties came to this
14 Court in the first instance and asked for an
15 order directing the delivery of a commission.
16 If you read the report of the decision before
17 you get to the Chief Justice's opinion, you
18 find this Court taking evidence by affidavit
19 and ruling on objections, hearing testimony,
20 essentially.

21 That was an original action. This
22 case, by contrast, is an appellate action
23 because it comes to the Court on review of the
24 Court of Appeals for the Armed Forces'
25 decision, which reviewed a criminal proceeding

1 that originated in courts-martial and that
2 proceeded through the separate military justice
3 system that has existed in some form in our
4 country since the founding of it.

5 JUSTICE BREYER: There are a lot of --

6 CHIEF JUSTICE ROBERTS: What is the --
7 what -- how would you have us distinguish the
8 situation that people are concerned about,
9 which is every alphabet agency in the
10 government, that Congress says you can appeal
11 from the sanctions that the SEC imposes right
12 to the Supreme Court?

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

23 And what the Court said was if
24 Congress in those limited circumstances where
25 Congress can create courts outside the scope of

1 Article III, then it can also vest this Court
2 with jurisdiction to review their decisions.

3 CHIEF JUSTICE ROBERTS: Okay. So it
4 creates the -- the NLRB court of final review?

5 MR. FLETCHER: Well, I -- I don't
6 think it could do that, Mr. Chief Justice,
7 because, as this Court's decisions elucidate,
8 there are only very limited circumstances where
9 Congress can create courts outside of the
10 context of Article III. The two --

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

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

25 CHIEF JUSTICE ROBERTS: But when can

1 they not do it? If -- if you're doing anything
2 more than just saying everything they have done
3 so far is okay and nothing else, then -- then
4 what is the rule for telling them when they can
5 create these courts under Article I?

6 MR. FLETCHER: So what this Court has
7 said -- and, again, I -- I just want to
8 illustrate that that's -- that's a question
9 that the Court is going to have to grapple with
10 however it resolves the appellate jurisdiction
11 question here. It has other cases and will
12 presumably again in the future have to confront
13 the question when can Congress create
14 non-Article III courts.

15 All that we're saying is that what
16 follows from that is if the Court decides in
17 that context that Congress can create a
18 non-Article III court, then it can also vest
19 appellate jurisdiction in this Court to review
20 that court's decisions. And the --

21 JUSTICE BREYER: I -- the amicus says
22 --

23 JUSTICE KENNEDY: Will we have
24 jurisdiction -- appellate jurisdiction over
25 state courts? Can states do anything there --

1 can states have an NLRB type of thing and --

2 MR. FLETCHER: I don't think that they
3 could.

4 JUSTICE KENNEDY: -- with -- with no
5 appeal and -- and -- and then it has a federal
6 question and they come to us?

7 MR. FLETCHER: I -- I don't think that
8 they could, Justice Kennedy. I don't know that
9 the question has ever arisen in the context of
10 a state court. I can tell you the question has
11 arisen, or a related question has arisen, in
12 the context of federal courts. There was a
13 case called Chandler from 1970 where the Court
14 grappled with but didn't resolve the question
15 whether review of a decision by a circuit
16 judicial council was appellate jurisdiction.
17 And the question it was asking is, is what the
18 circuit judicial council is doing
19 administrative or is it instead judicial?

20 JUSTICE BREYER: What we're doing is
21 looking, I think -- at least I am, I think
22 others are too -- for a reason; that is, what
23 is it that -- that -- I can see the states.
24 You say -- the easiest is the federal courts.
25 I mean, Congress has judicial authority who

1 exercises it. Well, how can we have appellate
2 jurisdiction over state courts? That's because
3 states have sovereignty, and they can, in the
4 exercise of their sovereignty, create a
5 judicial system.

6 Well, what about territories? Well,
7 territories, that's a tougher one because it
8 looks like it's Congress's sovereignty, but it
9 isn't. That is to say, sovereign --
10 territories are the equivalent of states before
11 they are states. Human societies on
12 territories create judicial systems. And so
13 the territorial courts are analogous to the
14 state courts.

15 What about the D.C. Circuit? Hmm --
16 D.C. Court of Appeals, rather. That's a
17 tougher one but maybe rather like the
18 territorial courts, like the state court. Hmm.
19 And now what? Okay?

20 And now he says I've used this
21 territorial principle, the sovereignty arising
22 in territories physically, which aspect of the
23 sovereignty is an authority to create a
24 judicial body, giving us appellate
25 jurisdiction.

1 Now, military, you don't like that
2 territorial-based distinction because it's --
3 territorial sovereignty based distinction
4 because they don't really have -- it's not
5 territories.

6 And so now we're looking for another
7 one. That's a long question, but all I'm
8 asking for is, what is that other one? And the
9 Chief says it sounds like, which to me it did
10 sound rather like, whatever we've done in the
11 past is all right but not in the future. And
12 -- and that's a historical one. Hmm.

13 MR. FLETCHER: So let me say two
14 things about that. And the first is that the
15 way that this Court has approached territorial
16 courts and the D.C. court is not quite the way
17 Your Honor's addressed it.

18 JUSTICE BREYER: I know that, but
19 looking at Coe, it doesn't seem to give much of
20 an answer.

21 MR. FLETCHER: Well, the answer that
22 it gives is appellate jurisdiction is review of
23 another court's decision --

24 JUSTICE BREYER: Yeah.

25 MR. FLETCHER: -- at the most basic

1 level. I think everyone agrees with that. And
2 so, if you're asked when review of -- of
3 tribunals' decisions -- is it original or
4 appellate, the question is, is that tribunal --

5 JUSTICE BREYER: All right. Well, at
6 that point, Justice Kennedy's question becomes
7 relevant to me. Then he says, all right,
8 Congress says the NLRB -- they used to be
9 called, you know, hearing examiners. And now
10 they're called ALJs, which is administrative
11 law judges. And now what we do is produce a
12 court of ALJs, which we call a court, dot dot
13 --

14 MR. FLETCHER: Yes.

15 JUSTICE BREYER: -- and has
16 stenographers so it's of record, da da, you
17 see? Now, that's the concern.

18 MR. FLETCHER: Yes. And the concern,
19 I think the answer -- let me say two things
20 about that. The first is I think, however you
21 might want to resolve the question between
22 legislative courts and the administrative
23 agencies like the NLRB, our view is that
24 military courts, the Court of Appeals for the
25 Armed Forces is on the territorial side of the

1 line, is on the clearer side of the line,
2 because this Court has always considered those
3 two to be together as the paradigmatic
4 examples under the circumstances --

5 JUSTICE GORSUCH: Well, have they,
6 though?

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

8 JUSTICE GORSUCH: I mean, I look at
9 the -- I'm sorry.

10 CHIEF JUSTICE ROBERTS: Justice Alito?

11 JUSTICE ALITO: Do you -- do you think
12 it's relevant that the President or the
13 Secretary of Defense can alter a decision of
14 the CAAF after it's issued?

15 MR. FLETCHER: I don't believe that
16 the President or the -- the Secretary of
17 Defense can do that. They have some limited
18 authority, and this is described in 10 U.S.C.
19 876, to mitigate sentences, to commute or
20 reduce sentences.

21 JUSTICE ALITO: Well, that's what I'm
22 referring to. The convening authority shall
23 take action in accordance with the decision of
24 the CAAF unless there is to be further action
25 by the President or the Secretary concerned.

1 MR. FLETCHER: That's correct. And
2 the further action --

3 JUSTICE ALITO: And you think that's
4 relevant to the question this, the question
5 before us?

6 MR. FLETCHER: I -- I think it might
7 be if the action of the President or the
8 Secretary extended to upsetting the conviction
9 or upsetting the judgment of the CAAF, but
10 that's not the type of action that the
11 President can take. And Congress actually
12 thought about that in --

13 JUSTICE ALITO: What kind of action
14 can the President take?

15 MR. FLETCHER: There are certain types
16 of sentences, death sentences in particular,
17 that require the President's approval before
18 they can be executed, and there are other types
19 of sentences, including the dismissal of an
20 officer, that require secretarial approval
21 before they can be executed. In those
22 circumstances, the President or the Secretary
23 can commute those sentences to something less.
24 They can't upset the conviction.

25 And so, in our view, the availability

1 of that relief from those officers is akin to
2 relief by commutation in the federal or state
3 system or to parole.

4 JUSTICE KAGAN: How does that
5 provision work?

6 JUSTICE KENNEDY: I'm not doubting
7 you, but where -- where do I look to find -- to
8 find the authority for your proposition?

9 MR. FLETCHER: You find the -- the
10 statutory provision that speaks to the finality
11 of Court of Appeals of the Armed Forces'
12 decisions and court-martial decisions in
13 general is in 876. And the -- I believe the
14 provision that speaks to authority to reduce
15 sentences is in 874, but it's at least
16 referenced there.

17 CHIEF JUSTICE ROBERTS: I -- I -- I
18 guess I am doubting you.

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: If you have
21 the -- if the executive prevails in any case,
22 he always has the discretion not to enforce it.
23 I mean, if the judgment is you can, you know,
24 suspend the pay of this service person for this
25 period, he can review it and say, well, okay,

1 you know, the -- the principle is established,
2 but I'm not going to do it. Right? Or he --
3 he wins the authority; he prevails and can say,
4 okay, you can cashier the guy out of the
5 service, but he says, well, he's the best, you
6 know, gunnery sergeant in the -- that area, so
7 I'm not going to do it. I don't understand why
8 it's -- why he -- why you think he's
9 constrained in any particular way.

10 MR. FLETCHER: Well, I think he's --
11 he's constrained. The -- the system that the
12 Uniform Code of Military Justice sets up gives
13 the President some ability to reduce or
14 mitigate sentences but not others and otherwise
15 makes the decisions of the Court of Appeals for
16 the Armed Forces final and binding.

17 And, in fact, the language in the
18 provision that I was citing to Justice Kennedy
19 earlier is the language that you, Your Honor --

20 JUSTICE GORSUCH: So --

21 MR. FLETCHER: -- quoted in your
22 opinion in Denedo --

23 JUSTICE GORSUCH: So, counsel, don't
24 we, though, have to assume the
25 constitutionality of that limitation on the

1 President's authority as Commander-in-Chief for
2 -- for this position to work and, second, what
3 if Congress were to alter that scheme and
4 provide the -- the President or the Secretary
5 further authority to alter the results of
6 military tribunals? And, in fact, I think the
7 Secretary, if I'm correct, has to approve the
8 dismissal of any commissioned officer as well
9 --

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

11 JUSTICE GORSUCH: -- under 871(b). So
12 there's another limitation on the authority of
13 the military tribunal and another grant to a
14 superior executive officer.

15 MR. FLETCHER: So let me say two
16 things about that. The first is I -- I agree
17 with you that if Congress gave greater
18 authority to executive branch officials to the
19 President or the Secretary to set aside
20 military or court-martial convictions, that
21 would change the analysis, but it would be --

22 JUSTICE GORSUCH: Well, if it changes
23 the analysis, then where -- we're back to the
24 Chief Justice's question -- where is the line,
25 and assuming the constitutionality of these

1 limitations.

2 MR. FLETCHER: Yes.

3 JUSTICE GORSUCH: Where is the line?
4 How much authority -- how much of a court is it
5 before it is no longer a court when it's all
6 sitting in the executive branch, as this Court
7 ruled in Edmonds?

8 MR. FLETCHER: So first and foremost
9 it's a court that doles out criminal sentences,
10 up to and including death. It's a court where
11 an acquittal has double jeopardy effect. Its
12 decisions are given res judicata effect. Those
13 are not things that the President or the
14 Secretary --

15 JUSTICE GORSUCH: So it's --

16 MR. FLETCHER: -- can alter.

17 JUSTICE GORSUCH: -- criminal versus
18 civil? I mean, I can see the next case being
19 civil. There are consequences, maybe not of a
20 criminal nature, but you lose a rank or a
21 privilege or some other sort of -- well, we
22 struggle with what's the difference between
23 civil and criminal all the time in this Court.

24 MR. FLETCHER: Well, I think there's
25 no doubt that court-martial -- courts-martial

1 are criminal and the fact that they are able to
2 impose criminal punishment --

3 JUSTICE GORSUCH: Well, I accept -- I
4 accept that. I'm saying, well, what about the
5 next case, why would we draw the line there
6 when civil penalties today are very harsh and
7 severe? And you can see Congress setting up a
8 court with very extreme civil penalties and
9 very little executive oversight, let's say.

10 MR. FLETCHER: I guess I would say the
11 fact that it can distribute criminal penalties
12 is certainly an indication that if we're
13 drawing a line, is it a court, is it not, it
14 falls on the court side of the line.

15 JUSTICE BREYER: Well, what if --

16 MR. FLETCHER: That's what it shares
17 in common with territorial courts.

18 JUSTICE BREYER: What about -- you're
19 really make -- you're making me think in this.
20 I guarantee it's a hard question. But maybe we
21 find an analogy in the territorial cases.

22 Can we read the territorial cases
23 as -- as, looking at this, separately out of
24 Article III, the Constitution gives to Congress
25 the power to organize governments in the

1 territory.

2 The governments of a territory involve
3 an executive, legislative, and judicial
4 function. Therefore, in exercising its
5 sovereign constitutional power under Article I,
6 in the power to organize governments and
7 territories, it is going to have the power to
8 organize courts of a kind that act like courts
9 and, therefore, appellate review.

10 MR. FLETCHER: Yes.

11 JUSTICE BREYER: The same is true of
12 the military, which is a separate world, and it
13 is Article I giving them power over the
14 military that lets them do that.

15 MR. FLETCHER: Yes.

16 JUSTICE BREYER: The same is not true
17 of the NLRB, which is a specialized agency, and
18 because the judicial and adjudicatory functions
19 that the executive branch performs in its
20 carrying out of executive duties are
21 rule-making and decision-making authorities
22 under execution, not judicial.

23 MR. FLETCHER: Yes.

24 JUSTICE BREYER: You think that might
25 work?

1 MR. FLETCHER: I think that -- I think
2 that works exactly. I think that fits with the
3 way that this Court has looked at
4 courts-martial before. It said this is a
5 system of justice that existed before the
6 Constitution. It's a system of justice that's
7 textually recognized in the Fifth Amendment to
8 the Constitution, which exempts "cases arising
9 in the land and naval forces" from the grand
10 jury requirement, and it's a system that this
11 Court has always understood, in light of that
12 history and that textual recognition, to be a
13 court system that Congress can create outside
14 of Article III.

15 JUSTICE SOTOMAYOR: So this --

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

19 (Laughter.)

20 MR. FLETCHER: I appreciate that, Mr.
21 Chief Justice. And I think, as some of the
22 questions earlier have suggested, in order to
23 obtain the relief that they're seeking,
24 Petitioners have to clear three hurdles on the
25 merits.

1 They have to show that the CMCR
2 judgeship is a civil office within the meaning
3 of Section 973. They have to show that
4 Congress has not authorized by law military
5 officers to hold that office. And then they
6 have to show that a violation of that statute,
7 if it occurred automatically, ejected these
8 officers from the military when they accepted
9 their appointments to the CMCR of May in 2006
10 and invalidated the officers' subsequent
11 decisions in Petitioners' criminal appeals on
12 the courts of criminal appeals. And in our
13 view, they can't make any of those showings.

14 I'd like to start, if I could, with
15 the civil office question. I think it's common
16 ground between the parties that by preventing
17 or precluding military officers from holding a
18 civil office, what Congress sought to do was to
19 prevent the -- to preserve the civilian
20 preeminence over the military, to prevent
21 military encroachment into the civil
22 government.

23 And so a civil office, as we
24 understand it and as the Department of Defense
25 has long defined it, is an office in the civil

1 government that exercises the powers or
2 authorities of the civil government. It's a
3 non-military office.

4 Judged by that criterion, a judgeship
5 on the Court of Military Commission Review is a
6 military office. As its name suggests, the
7 Court of Military Commission Review is a
8 military court. It performs a function that
9 military officers have long performed, judging
10 violations of the law of war and other offenses
11 triable by military commission committed by
12 alien and enemy belligerence, and it performs a
13 function that's very, very similar to what in
14 the court-martial system is done by the courts
15 of criminal appeals, which are staffed by
16 military officers predominantly, although that
17 position can also be held by civilians, and
18 which this Court explained in Weiss performs a
19 function that is germane to military officers'
20 military office.

21 The Court in Weiss went through the
22 history of the military justice system in the
23 court-martial side of the house and explained
24 the role that military officers had long played
25 in that system, and it concluded that, as a

1 result of that role, serving as a judge on the
2 court of criminal appeals is germane to holding
3 military office.

4 Obviously, the Court in Weiss did not
5 have in front of it Section 973, but we think
6 its conclusion on germaneness is very
7 instructive on this question because the Court
8 of Military Commission Review performs a
9 function that is very similar to the function
10 performed by the courts of criminal appeals.

11 It was expressly patterned on the
12 courts of criminal appeals and the statute
13 defining the circumstances under which it can
14 review a case, 950f. It is drawn almost
15 verbatim from the statute for the courts of
16 criminal appeals, 866.

17 And just as military officers serving
18 on the court of criminal appeals are performing
19 a military function and are doing something
20 that is germane to their military duties,
21 that's also true when those same officers
22 perform essentially the same function in
23 another military court system.

24 And I think what that illustrates,
25 and, by the way, I don't understand my friend

1 to dispute that a judgeship on the court of
2 criminal appeals is a military office, not a
3 civil office of the sort that would be
4 contemplated in Section 973.

5 And what that shows is that even if an
6 office can be held by civilians, as the court
7 of criminal appeals judgeship can be, it is
8 still a military office if it's performing a
9 military function.

10 So judged by that standard, we think
11 Petitioners' claim fails on that first instance
12 because the Court of Military Commission Review
13 is not a civil office.

14 But even if you disagree with us on
15 that question, we also think that Congress has
16 authorized by law military officers to hold a
17 position on the Court of Military Commission
18 Review.

19 And the way that my friend approaches
20 Section 973 is through the lens of assigning
21 and appointing, and he wants to draw a sharp
22 distinction between assigning and appointment
23 and read that distinction into the prohibition
24 in Section 973.

25 But that's not a prohibition that's

1 found in the language or the history of
2 Section 973. Instead, what the statute says is
3 that, "except as otherwise authorized by law,"
4 an officer "may not hold or exercise" the
5 functions of a civil office.

6 So the concern is not with the manner
7 in which the officer ends up in the civil
8 office. The question is: Has Congress
9 authorized military officers to hold or
10 exercise the function of the civil office?

11 And in our view, Congress created a
12 single office when it created the Court of
13 Military Commission Review. That office is
14 judged on the Court of Military Commission
15 Review. That's the statutory term in Section
16 950f.

17 And Congress then authorized military
18 officers to serve on that court, to hold that
19 office in unambiguous terms, in Section
20 950f(b)(2), where it said that the Secretary of
21 Defense may assign persons who upheld military
22 judges to be judges on the Court of Military
23 Commission Review.

24 That's how all four of the judges who
25 are at issue here were first placed on the

1 Court of Military Commission Review.

2 Now, it's true the D.C. Circuit in
3 Al-Nashiri raised questions about whether that
4 assignment, which was valid for all statutory
5 purposes, also complied with the appointments
6 clause. And in response to the questions that
7 the D.C. Circuit raised, the Senate and the
8 President heeded the D.C. Circuit's suggestion
9 that they avoid the need to resolve
10 appointments clause questions and also appoint
11 those four officers to the Court of Military
12 Commission Review under Section 950b(3). And
13 those appointments essentially ratify the
14 preexisting assignments and mean that now the
15 four judges serve on the Court of Military
16 Commission Review by virtue of both the
17 assignment of the Secretary of Defense and the
18 appointment of the President.

19 But in doing that, the President did
20 not create a problem, did not put those
21 officers in an office that they're not
22 authorized to hold by Congress. He just
23 ratified their placement in that office through
24 the means that Congress specified.

25 And finally, just very briefly, we do

1 hope that the Court will answer the question,
2 the merits question, about whether or not a
3 CMCR judgeship is a civil office because it's
4 important to the government. The government is
5 obligated to comply with the statute.

6 We believe that judges can validly
7 serve on the military -- excuse me, military
8 officers can validly serve on the Court of
9 Military Commission Review, but if this Court
10 disagrees, obviously, the government is going
11 to have to fix that problem.

12 So we hope that the Court answers the
13 question presented on the merits and holds that
14 973(b) does not prevent military officers from
15 serving on the CMCR, but in the event that you
16 disagree with us on that or you don't reach
17 that question, we think also that, as the Court
18 of Appeals for the Armed Forces held, any
19 violation of Section 973(b) that occurred would
20 not be a basis for invalidating the judges'
21 decisions on the court of criminal appeals.
22 And that's true for at least two reasons.

23 The first is that the Petitioners'
24 argument that it does invalidate their
25 decisions hinges on the premise that

1 automatically upon the acceptance of a
2 prohibited civil office, the relevant officers
3 are ejected from the military.

4 That used to be the way the statute
5 worked, but for good reason Congress changed
6 that. It deleted that automatic termination
7 consequence.

8 Now, when a violation of Section 973
9 occurs, the government and the officer have to
10 fix it by either giving up the military office
11 or giving up the civil office, but those things
12 happen as a result of administrative action
13 once the violation comes to light, not
14 retroactively and automatically by virtue of
15 the acceptance of the civil office.

16 And, second, and even more clearly --
17 and I'll close -- close on this -- Congress
18 enacted a savings clause that says that nothing
19 in Section 973 can be used to invalidate the
20 actions of officers in furtherance of assigned
21 official duties. And that perfectly describes
22 what happens here -- what happened here.

23 My friend is correct that it may also
24 describe what military officers do in civil
25 offices, for example, the special assistant

1 U.S. attorneys, JAG lawyers who are assigned to
2 be special assistant U.S. attorneys perform
3 civil functions in furtherance of their
4 assigned official duties. But --

5 CHIEF JUSTICE ROBERTS: If your
6 reading of the authorization or the savings
7 clause is correct, then you really have no
8 reason to fix any problem that's been
9 identified, right?

10 MR. FLETCHER: Except --

11 CHIEF JUSTICE ROBERTS: If you see,
12 you know, the person shouldn't be serving
13 there, but everything he does is okay, so we
14 don't have to remove him.

15 MR. FLETCHER: Well, no, I think the
16 -- we think we are obligated to comply with the
17 law. And the executive branch does and takes
18 that seriously. And that's the history of
19 enforcement of the civil office holding
20 prohibition, is that, as the Olson memo, for
21 example, that brought to light the violation
22 that had been happening before 1983, the
23 government raised the issue and then took
24 action to correct the issue.

25 CHIEF JUSTICE ROBERTS: Well, how

1 would a problem -- how would a problem arise,
2 given the savings clause?

3 MR. FLETCHER: Given the savings
4 clause, I think a problem would arise in the
5 way that problems arise. There are lots of
6 statutes that apply to federal personnel
7 matters or that prohibit certain actions by
8 federal employees but don't invalidate their
9 actions as a result of the violation.

10 And the way that those things are
11 policed are by Inspector General, by
12 congressional oversight, and the Government
13 Accountability Office, by the Office of Legal
14 Counsel, and the lawyers within the agencies.
15 All of those things are still available.

16 And, indeed, the sources cited in the
17 briefs show that the government is taking
18 seriously its obligation to enforce the
19 statute. That will continue.

20 And, in fact, the directive also that
21 we cite makes the acceptance of a civil office,
22 if an officer just goes out and does it, you
23 know, their own, without authorization, it
24 makes taking that action a violation of a
25 lawful order that is potentially subject to

1 disciplinary action.

2 So there would -- there would
3 certainly be remedies, just not the drastic
4 remedy of ejection from the military or
5 invalidation of official actions. We think
6 there's a good reason Congress why chose that
7 scheme, and we'd ask the Court to adhere to it.

8 If the Court has no further questions.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Vladeck, you have five minutes
12 left.

13 REBUTTAL ARGUMENT OF STEPHEN I. VLADECK
14 ON BEHALF OF PETITIONERS

15 MR. VLADECK: Thank you, Mr. Chief
16 Justice.

17 Just to briefly address one point on
18 jurisdiction before turning back to the merits,
19 the amicus relies on this Court's decision in
20 Vallandigham. I actually think Vallandigham
21 proves the point that both I and Mr. Fletcher
22 were trying to make.

23 The Court in Vallandigham went out of
24 its way to explain why the military commission
25 itself was not "judicial" in the sense of

1 Article III.

2 The analogy, of course, to this case
3 would be to the underlying court-martial
4 proceeding and not to the decisions by the
5 courts of criminal appeals or by the Court of
6 Appeals for the Armed Forces.

7 Turning to the merits, I think it's
8 important to stress the emptiness of the
9 government's suggestion that it has been
10 engaged in rigorous administrative enforcement
11 of the statute.

12 On its read-in of both Section
13 973(b)(5) and of the deletion of the automatic
14 termination provision, there is, in fact, no
15 consequence for violating a statute Congress
16 enacted to ensure civilian control of the
17 military, for protecting the civilians' fear of
18 government from having military officers
19 serving in all kinds of positions, and there
20 would be no remedy, especially in a case like
21 this one, where the problem at issue is not a
22 general objection to military officers serving
23 in administrative positions, but a very
24 specific objection to military officers serving
25 as judges.

1 This Court has, for decades, suggested
2 that there are unique separation of powers
3 considerations and there are unique doctrinal
4 and common law reasons to take especially
5 seriously concerns that judges are acting
6 without authority.

7 It's why this Court in both the Ryder
8 case and Nguyen held that the de facto officer
9 doctrine does not apply to immunize at least
10 non-technical violations of judicial assignment
11 rules, and it's why the separation of powers
12 problem we have identified is especially
13 serious in this context.

14 One last point, though, the -- neither
15 -- the government doesn't talk about the -- did
16 not talk about the Commander-in-Chief clause in
17 its merits argument, but I think it's worth
18 stressing just how serious a Commander-in-Chief
19 clause problem a ruling in its favor could
20 create.

21 Under judges who are appointed to the
22 Court of Military Commission Review, under
23 Section 950f(b)(3), serve with good cause
24 removal protection. What that means is if
25 they're military officers, they are insulated

1 from removal by good cause, which, of course,
2 takes them out of the chain of command.

3 Now, rather than suggest that that is
4 a constitutional constraint on the President as
5 Commander-in-Chief, the government argues that,
6 in fact, a judge who is appointed to the CMCR
7 by the President and confirmed by the Senate
8 can be reassigned by the General Counsel of the
9 Department of Defense.

10 There is no suggestion in the Military
11 Commissions Act that Congress intended such a,
12 frankly bizarre, reassignment scheme, and
13 there's no explanation for how that would solve
14 the Commander-in-Chief clause problem.

15 We agree that that question is not
16 squarely presented here because it would only
17 invalidate the ability of these judges to serve
18 on the Court of Military Commission Review.
19 But given that there is a petition for writ of
20 mandamus pending in the D.C. Circuit by two of
21 the defendants in the 9/11 trial, we think it
22 incumbent upon on this Court to reach the
23 merits question and not just rely on the
24 remedies consideration, even if it is inclined
25 to affirm the decisions below.

1 If there are no further questions.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. Thank you, Mr. Bamzai, for your
4 participation. The case is submitted.

5 (Whereupon, at 12:10 p.m., the case
6 was submitted.)

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