STATE OF RHODE ISLAND		SUPREME COURT
Frank Williams, in his individual capacity Donald Carcieri, in his capacity as Governor Gerald Visconti, in his capacity as Chair Of the Judicial Nominating Commission, and Paul Tavares, in his Capacity as State Treasurer. Petitioners/Defendants v. Keven A. McKenna, P.C. Keven A. McKenna, Respondents/Plaintiffs	: : : : : : : : : : :	: M.P. 2005-05-144

AMICUS BRIEF OF SALIM AHMED HAMDAN, PROFESSOR NEAL KATYAL, AND LIEUTENANT COMMANDER CHARLES SWIFT

Salim Ahmend Hamdan, a detainee at Guantanamo Bay, Cuba, Professor Neal Katyal, and Lieutenant Commander Charles Swift, submit this *amicus* brief in the above case. A motion for leave to file as amici and a request for divided argument are being filed concurrently.

INTEREST OF AMICUS CURIAE

On November 13, 2001, the President of the United States issued a Military Order to set up military commissions to try suspected enemies of the United States. Military Order, 66 Fed. Reg. 57,833 (2001). Acting pursuant to that Order, the Secretary of Defense in March, 2002, announced the creation of a Review Panel to examine verdicts issued by military commissions.[1]

[1] "The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to reference (e). At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed conference. The Review Panel shall disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within thirty days after receipt of the record of trial, the Review Panel shall either (a) forward the case to the Secretary of Defense with a

The military commission sits at the United States Naval Base in Guantanamo Bay, Cuba.

In December, 2003, the Department of Defense stated that Chief Justice "Frank J. Williams will serve as a member of the review panel for military commissions." http://www.defenselink.mil/news/Dec2003/d20031230williams.pdf

Salim Ahmed Hamdan, a citizen of Yemen, has had charges preferred against him in a military commission. That commission has been declared partially unlawful by a federal court, *see Hamdan v. Rumsfeld*, 344 F.Supp.2d 152 (D.D.C. 2004). The *Hamdan* decision is currently on appeal in the U.S. Court of Appeals for the D.C. Circuit.[2] In rejecting Hamdan's challenge to the Review Panel, the federal district judge relied heavily on the reputation of Chief Justice Williams: "The President has appointed to that panel some of the most distinguished civilian lawyers in the country." *Id.* at 167. Hamdan has a strong interest in demonstrating why the federal court's characterization has been placed into doubt. In addition, Hamdan has an equally salient interest in resolving whether Chief Justice Williams was 'qualified' to be appointed to the tribunal, a question that, as we discuss below, turns on resolution of the questions presented here.

Professor Neal Katyal is a law professor at Georgetown University in Washington, DC. He is a specialist in separation of powers, and constitutional law more generally. He has studied and written extensively about the legality of military commissions, *e.g.*, Neal Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002). He serves, *pro bono*, as lead civilian defense counsel for Mr. Hamdan.

Lieutenant Commander Charles Swift is lead military counsel for Mr. Hamdan. Before

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recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred." Military Commission Order No. 1, available at http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf, at Sec. 6(H)(4).

[2] The briefs of the parties and amici are available at http://www.law.georgetown.edu/faculty/nkk/publications.html#Chapters.

joining the Office of Military Commissions, U.S. Department of Defense, Lieutenant Commander Swift had nine years of litigation experience and represented over 150 persons in Courts-Martial. He has extensively studied the history of commissions over the past two years.

Amici submit this brief to explain why this Court should exercise its jurisdiction to hear the immensely important questions presented in this case. In the absence of a decision by this Court, the military commission process (should it resume) will be thrown into a quagmire involving questions of Rhode Island law. A serious question will lurk as to whether one of the four selected members of the review panel has acted ultra vires. Not only would such illegality cloud the perception and reality of fairness of the military commission, it would also create an inevitable challenge to Chief Justice Williams' fitness to serve under the rules and regulations promulgated by the Defense Department, canons of judicial ethics, and 10 U.S.C. 603.

Professor Katyal and Commander Swift also have first-hand experience with the military commission at Guantanamo Bay due to their direct participation in commission hearings, and can illustrate why a position on the review panel qualifies as an "appointment" by "any other government" for purposes of Article III, Section 6 of the Rhode Island Constitution.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO HEAR THIS CASE

Amici believe that this Court's May 12, 2005 Order in this case reflects a fundamental truth: only this Court has the stature, competence, and expertise to decide the momentous question of state law presented: Is the State's highest judicial officer subject to the ban on dual officeholding? Unfortunately, the Attorney General in this case has sought to reserve to himself, and to vest in no other, the raw power to have this question even *asked*.

The Attorney General's sweeping argument is particularly misplaced here, where the

Attorney General's *client* is the very subject of the power he wishes to hold for himself. Indeed, unlike a typical quo warranto action, there are strong structural reasons not to give the Attorney General a veto power here. As a repeat-player litigant before this Court, the unique delicacy of this case forces the Attorney General to stand in a very different position than a typical removal matter. After all, any state official, let alone its highest representative before the courts, would have to fear the consequences for the Court's docket and the state's litigation interests in seeking to permanently remove a member of this Court. Unlike the members of municipal boards and commissions at issue in *Fargnoli v. Mayor*, 397 A.2d 68 (R.I. 1979), where the Attorney General faced no burden on his ability to exercise a quo warranto action, in this case he most certainly does. The existence in this case of an attorney-client relationship between the Attorney General and the Chief Justice magnifies these burdens, and underlines the flawed logic of his claim that quo warranto writs are the only appropriate remedy.

Finally, in a typical dual-officeholding case, a rejection by the Attorney General ends the matter. In this case, however, such a rejection merely relegates determination of this important question of Rhode Island law to a military commission manifestly unqualified to resolve it. Hamdan's interest in this case is therefore inextricably linked to the basis for this Court exercising jurisdiction, as the need to resolve Chief Justice Williams's status is a necessary predicate to resolution of the federal-qualification question at issue in Hamdan's case. This Court, for reasons of equity and judicial efficiency, should follow precedent and exercise its jurisdiction, despite the unhappy circumstances of this specific matter.

A. Equity Demands That This Court Exercise Jurisdiction

An adjudication of whether Chief Justice Williams violated the Rhode Island dual officeholding ban is inevitable. The only question is whether that adjudication will take place in

this Court or a military commission. This Court is the supreme expositor on issues of Rhode Island law. The adjudication should take place here, not in Cuba.

The President has ordered the military commission to "sit[] as the triers of both fact and law." Military Order, *supra*. Two of the three commissioners are not lawyers.[3] As a result, a decision by this Court not to adjudicate the dual officeholding question would leave its resolution in the hands of individuals who have little familiarity with the law, let alone Rhode Island law.

A challenge to Chief Justice Williams' fitness to serve could be filed by any of the military commission defendants as a pre-trial motion.[4] The commission will then be forced to consider the Rhode Island dual-officeholding question. The military process has already resolved challenges against its members, and has stated that "[e]xamples of good cause that would normally warrant a member's removal from a military commission include situations where the member does not meet the qualifications to sit on or has not been properly appointed to a military commission."[5] Here are three of many ways in which the challenge would be made. *First*, Chief Justice Williams is being appointed under a federal statute that permits civilians to receive military rank, but only if they are "qualified." 10 U.S.C. 603; *see also* Military Commission Order No. 1, Sec. 6(H)(4) (relying on 10 U.S.C. 603 to appoint civilians). It will be impossible for the tribunal to resolve whether Chief Justice Williams is 'qualified' under federal law without resolving the Rhode Island constitutional issue.

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[3] Petitioner's Brief in *Hamdan v. Rumsfeld*, at 16-17, available at http://www.law.georgetown.edu/faculty/nkk/documents/hamdanBrief12-29-04.pdf.

[4] As such, any challenge would be made before the trial and announcement of the specific composition of the Review Panel. Four individuals have been designated to serve on the Review Panel, so there is a chance that Chief Justice Williams may not be selected in any one particular case. Four indictments have been issued, and many more are planned according to the White House and Pentagon. *See* Dep't of Defense, Presidential Military Order Applied to Nine More Combatants, available at http://www.defenselink.mil/releases/2004/nr20040707-0987.html.

[5] *See* Challenges for Cause Decision, No. 2004-001, available at http://www.defenselink.mil/news/Oct2004/d20041021panel.pdf.

Second, R.I. Canon of Judicial Ethics 4(c)(2) mirrors the dual officeholding ban:

> A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

Yet Chief Justice Williams does appear to have "accept[ed] appointment" to a "commission" and that commission is not one dedicated to "the improvement of the law" but instead one concerned with resolving "issues of fact."

Third, canons of judicial ethics require a judge to comply with the law, including, of course, the Rhode Island Constitution. See American Bar Assoc., Model Code of Judicial Conduct, Canon 2 ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); R.I. Code of Judicial Conduct, Canon 2.A. An accusation that Chief Justice Williams violated the Constitution is serious, and must be resolved to ensure fairness and its perception thereof.

Already, the Acting Solicitor General of the United States has placed considerable emphasis on the stature and qualifications of the Review Panel.[6] A federal district court judge has accepted these arguments:

> Petitioner's challenge to the first difference [between courts martial and military commissions] is unsuccessful. It is true that the President has made himself, or the Secretary of Defense acting at his direction, the final reviewing authority, whereas under the Uniform Code of Military Justice there would be two levels of independent review by members of the Third Branch of government--an appeal to the Court of Appeals for the Armed Forces, whose active bench consists of five civilian judges, and possible review by the Supreme Court on writ of certiorari. The President has, however, established a Review Panel that will review the trial record and make a recommendation to the Secretary of Defense, or, if the panel

[6] E.g., Reply Brief of the United States in *Hamdan v. Rumsfeld* (Jan. 10, 2005), in U.S. Court of Appeals for D.C. Circuit, at 8-9, available at http://www.law.georgetown.edu/faculty/nkk/documents/REPLY-BRIEF.pdf.

> finds an error of law, return the case for further proceedings. The President has appointed to that panel some of the most distinguished civilian lawyers in the country (who may receive temporary commissions to fulfill the requirement that they be "officers,"see Military Commission Order No.1(6)(H); 32 C.F.R. §9.6(h)).

Hamdan, 344 F.Supp.2d at 167.

In ordinary cases, certification permits a federal court to refer a question of Rhode Island law directly to this Court. Unfortunately, no certification procedure is available from a military commission. See R.I. S. Ct. Rule 6 (limiting certification to requests from the U.S. Supreme Court, U.S. Court of Appeals, and U.S. District Courts). If the sweeping logic of the Attorney General is adopted in this case, this Court will be divested of jurisdiction to decide this matter and it will fall to the military commission. The quo warranto writ, at most, limits what Rhode Island plaintiffs may do in Rhode Island courts; it does not restrict litigants in other courts from pursuing qualifications challenges under 10 U.S.C. 603 or the Canons of Ethics.

The question of whether Chief Justice Williams' continued tenure violates the Constitution, in short, is too momentous a question to be left unanswered. It should be resolved by the body with the greatest expertise and ability to answer it.

B. The Uniform Declaratory Judgment Act Confers Jurisdiction

While the Uniform Declaratory Judgment Act (UDJA) does not expand jurisdiction, *Lamb v. Perry*, 225 A.2d 521 (R.I. 1967), it confers broad discretion on the Court to terminate controversies, particularly those of extreme public importance. The Court has repeatedly stressed that the UDJA can be invoked in such cases, particularly when such a judgment will terminate a case that might be subject to repetition or might evade review.

It is axiomatic that a "declaratory-judgment action may not be used for the determination of abstract questions or the rendering of advisory opinions." *Sullivan v. Chafee*, 703 A.2d 748, 751 (R.I.1997) (citation omitted). The conflict here is far from abstract or advisory: it has

consequences regarding appropriate legal responses to terrorism and justice within this State.

Judicial power under the UDJA is to be broadly construed to "facilitate the termination of controversies." *Capital Properties, Inc. v. State*, 749 A.2d 1069, 1080 (R.I.1999) (citation omitted). Indeed, the explicit purpose of the Act is "to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." R.I. G.L. § 9-30-12. *See also Fireman's Fund Insurance Co. v. E.W. Burman*, 120 R.I. 841, 845 (1978) ("The obvious purpose of the Uniform Declaratory Judgments Act is to facilitate the termination of controversies").

Under this liberal rule, this Court has relaxed its mootness standards and adjudicated questions of public importance: "Ordinarily, this Court will not decide a moot question unless the matter addressed is of extreme public importance and is capable of repetition but … [may] evade review. Matters of extreme public importance sufficient to warrant judicial review usually relate to constitutional rights, voting rights, or a person's livelihood." *Glavin v. City of Providence*, 857 A.2d 758, 759 (R.I. 2004) (citations omitted). Indeed, the Court has extended this reasoning beyond mootness to an array of deficiencies: "Although judicial consideration of moot, abstract, academic, or hypothetical questions generally is beyond a court's judicial power, this rule is not absolute. An exception lies when the issue or question presented, while technically moot or deficient in some other respect, involves issues 'of extreme public importance, which are capable of repetition but which evade review.'" *Morris v. D'Amario*, 416 A.2d 137, 139 (R.I. 1980) (citations omitted); *In re Stephanie B.*, 826 A.2d 985, 989 (2003).

In *Sullivan v. Chaffee*, 703 A.2d at 752, this Court specifically adverted to its mootness doctrine and the "extreme public importance" exception in adjudicating the UDJA:

> We acknowledge, of course, that the mere fact that a court is being asked to render an advisory opinion does not automatically preclude a declaratory judgment in all situations. This court previously has held that the rule against judicial consideration of moot, abstract, academic, or hypothetical questions is not

> absolute. *Morris v. D'Amario*, 416 A.2d 137, 139 (R.I.1980). But in such cases the issuance of declaratory relief has been deemed appropriate only when the question(s) presented, although technically moot or deficient in some other respect, involved issues "of extreme public importance, which are capable of repetition but which evade review."

Although the timing element at issue in mootness cases is not present here, it is clear that the Court is confronted with "a justiciable case or controversy" "of extreme public importance" that is "capable of repetition but may evade review." It has been well said that "in certain situations we will depart from the ordinary to better deal with the extraordinary." *Mello v. Superior Court*, 370 A.2d 1262, 1263 (R.I. 1977). Certain cases "demand our attention and quite properly come before us for decision." *Id.* This is one of them.

C. This is Not a Quo Warranto Action

The defendant has put forth the extraordinary proposition that he has the power to recharacterize the plaintiff's declaratory judgment complaint as one seeking ouster under the writ of *quo warranto*. Even in an ordinary case, defendants are not permitted to recharacterize a plaintiff's claims. Such recharacterization is particularly misplaced here, since declaratory judgment may be a *remedy* for the Attorney General's *failure* to file a quo warranto action. *See Delgado v. Sunderland*, 97 N.Y. 2d 420, 425-26 (N.Y. 2002); *Antisdel v Tioga County Bd. of Elections*, 85 Misc 2d 174, 176 (1976) (permitting a declaratory judgment action by plaintiff when "the remedy of quo warranto ceases to be available to the plaintiff"); *Sheils v. Flynn* 297 N.Y.S. 705 (1937); *Shannon v. Jacobowitz*, 394 F.3d 90, 97 n.5 (2d Cir. 2005) (stating that *Delgado* left "open the possibility that 'a declaratory judgment might lie as an alternative remedy where quo warranto has ceased to be available to the aggrieved candidate because the Attorney General has declined to act'") (citation omitted)).

1. *The Plaintiff is the Master of His Pleading and the Defendant May Not*

Recharacterize a Plea for Declaratory Judgment

It is an elementary rule of civil procedure that the "plaintiffs are the masters of their own pleadings; it is their pleading and not the answers of [defendants] which determine the nature of their complaint." *Carolina Aircraft Co., v. American Mutual Liability Ins. Co.*, 517 F.2d 1076, 1076 (5th Cir. 1975); *Tilcon Gammino, Inc. v. Commercial Assoc.*, 570 A.2d 1102, 1107-08 (R.I. 1990) (rejecting the argument that a counterclaim recharacterizes equitable action). "The policy behind these liberal pleading rules is a simple one: cases in our system are not to be disposed of summarily on arcane or technical grounds." *Haley v. Lincoln*, 611 A.2d 845, 848 (R.I., 1992).

Acting as the master of his own pleadings, Plaintiff McKenna has brought forth a request for "Affirmative Declaratory Judgments" that Frank J. Williams vacated the office of Chief Justice. It goes without saying that the Court, in its wisdom, may or may not afford McKenna the relief that he requests. Nonetheless, the Court is "under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974) (citation omitted). The duty to examine the complaint, however, does not entitle the Court to treat the Plaintiff's claims as something that they are not.

The thrust of defendant's jurisdictional attack upon all of McKenna's claims, including those for declaratory judgment, is the argument that the Plaintiff is secretly bringing forth a disguised writ in the nature of quo warranto. The Court should reject this naked effort to recharacterize the Plaintiff's pleadings. "The existence of alternate methods of relief does not preclude a party from relief under the Uniform Declaratory Judgments Act." *Berberian v. Travisano*, 332 A.2d 121, 123 (R.I. 1975).

First, treating Plaintiff's plea for declaratory relief as a writ in the nature of quo warranto transforms a plaintiff's sword into a defendant's shield. R.I.G.L. §10-14-1 does not immunize

public officials from litigation. Rather, it provides plaintiffs with the option of filing a common law claim for injunctive relief which "may" be brought before this Court. *Id.* Defendants correctly observe that the Plaintiff does not meet the criteria for a quo warranto claim under §10-14-1. Prevailing on this argument is hardly an achievement for the Defendant, as there are hundreds of other statutes under which the Plaintiff could not obtain relief as well. The Plaintiff has not brought a quo warranto claim. Allowing defendants to recharacterize the Plaintiff's claims would do grievous damage to the rule of law, and would treat the Plaintiff as the dummy of a ventriloquist Defendant. Similarly situated plaintiffs would face insurmountable hurdles if defendants could urge courts to ignore specific claims for relief and instead to adjudicate them under statutes that happen to be more convenient for defendants.

Second, quo warranto, a claim for injunctive relief, is wholly unrelated to a request for declaratory judgment by a litigant alleging a private injury. A plea for a declaratory judgment does not seek ouster of a public official, *see Nugent v. Bristow*, 163 A.2d 41, 42 (R.I. 1960) (quo warranto "prays for the ouster of respondent"), nor is it an effort to assume public office. It is merely a request that a court determine the "rights, status, and other legal relations whether or not further relief is or could be claimed." R.I.G.L. § 9-30-1. The logical conclusion of treating a plaintiff's declaratory request as one for injunctive relief is that it will lead to courts awarding injunctive relief that plaintiffs do not even seek. Such an ambitious interpretation of recharacterization trades the passive virtues of the judiciary for the aggressive imposition of justice – whether the plaintiff requests it or not.

Third, there is no precedent for recharacterizing a plaintiff's request for declaratory judgment as a writ in the nature of quo warranto. Defendant has seized upon language used in other cases to urge the claim that this Court may alter a plaintiff's request for relief *against his*

will. The case law does not support this principle.

For example, *Fargnoli v. Mayor*, 397 A.2d 68 (R.I. 1979), does not support the defendant's effort to mutate the pleadings. Footnote 6 of the opinion reveals that "*counsel for the plaintiffs* moved that we consider their part of the complaint . . . as a petition in equity in the nature of quo warranto." *Id*. at 73 (emphasis added). Thus, the plaintiffs' claims were never recharacterized against their will.

In addition, *Fargnoli* does not even mention declaratory judgments. The plaintiffs in *Fargnoli* (1) challenged a public official's right to elected office, (2) requested their ouster, and (3) sought to replace those officials. *Id*. The Plaintiff's plea in this case, by contrast, does not seek (2), nor does it seek (3). The area of overlap on (1) with a writ of quo warranto does not justify swallowing the plea for declaratory judgment. *See State ex rel. Webb v. Cianci*, 591 A.2d 1193 (R.I. 1991) (rejecting a writ in the nature of quo warranto and still addressing common-law-writ of certiorari for discretionary review of State Board of Elections).

Likewise, in *State v. Storms,* 112 R.I. 454 (1973), a group of defendants appealed their criminal convictions, arguing that Justice Doris should have been recused from hearing the case due to prejudice and an improper election. That case has no bearing on this one. The Court had no occasion to reach the ultimate quo warranto issue because the defendants in *Storms* "*concede[d]* that generally the only person who can challenge a judge's title or right to office is the attorney general." Id. at 459 (emphasis added). All *Storms* did was to reaffirm the "general rule that a party cannot attack the title or authority of one acting under color of right as the duly elected or appointed judge of a court in *litigation pending therein*." *Id.* at 460 (emphasis added). That general rule is simply not at issue here. The plaintiff does not have ongoing litigation before Chief Judge Williams. Nor does he seek the physical removal of Chief Justice Williams.

Rather, he seeks a declaratory judgment.

Storms, once again, illustrates the depth of *amici*'s interest in this case. If this Court refuses to exercise jurisdiction to decide this matter, it may entirely preclude review in Rhode Island of the dual officeholding ban. After all, *Storms* appears to bar other litigants with cases pending before this Court from raising dual officeholding challenges. *Storms* therefore creates the specter that, absent this case, the only body to review this delicate question of Rhode Island law is a commission sitting in Cuba staffed predominantly with nonlawyers.

2. *The Attorney General Has No Authority to Veto Plaintiff's Case*

The prudential arguments favoring Attorney General certification do not apply to the Plaintiff's plea for a declaratory judgment. Unlike writs in the nature of quo warranto, a plea for declaratory judgment does not require a public official's physical removal. R.I. G.L. § 9-30-1. A simple statement from the court declaring the rights and relations of the respective parties pales in comparison to the "awesome powers of injunctive relief." *New York & C. & St. L .R. Co. v.Brotherhood of Locomotive*, 358 F.2d 464 (6th Cir. 1966). Indeed, courts have traditionally been hesitant to award injunctive relief precisely because it risks imposing a material harm on a party. *See Russell v. Farley*, 105 U.S. 433, 438 (1881). A declaratory judgment simply does not pose that same risk.

Moreover, as long as Plaintiff meets the requirements for standing, this Court need not be concerned about the prospect that members of the public will bring suit any time they see "fit to cast a cloud." *See Fargnoli*, 397 A.2d at 73. Individual litigants in general are not authorized to bring public claims, and must allege a specific injury in fact. *R.I. Ophthalmological Soc. v. Cannon*, 317 A.2d 124, 131 (R.I. 1974). In this instance, Plaintiff alleges a specific injury distinct from his identity as the member of the public. His claim is limited to the small subgroup

of attorneys in Rhode Island that litigate before this Court. Thus, standing requirements eliminate the need for an additional Attorney General veto, especially over a declaratory judgment action.

Additionally, the role of the Attorney General, as Defendant's Counsel, is fundamentally at odds with his role as an attorney acting "in the public interest." *Whitehouse v. Moran*, 808 A.2d 626, 627 (R.I. 2002). The Attorney General, as a repeat litigator before this Court and this Court's highest officer, faces special difficulties when it comes to deciding whether to file a quo warranto action against this State's Chief Justice. Even if quo warranto recharacterizations might conceivably be appropriate in cases involving city council officials and lower court judges, they cannot be appropriate in this unique setting. To vest the Attorney General with the power to block the removal of a Chief Justice, no matter what the constitutional violation, would effect a massive change in Rhode Island law and destabilize the vision of the drafters of the 1843 Constitution. It would repose this vital check on government abuse in the hands of an official who, no matter how good his intentions may be, faces both a structural conflict of interest and a conflict stemming from the duty of loyalty inherent in an attorney-client relationship.

Finally, whatever the power of the Attorney General may be in quo warranto, he lacks the ability to recharacterize a declaratory judgment action as one for ouster. The UDJA requires this Court to treat the plaintiff's action in precisely the opposite way of a quo warranto writ. Whereas the strong medicine of quo warranto is to be closely scrutinized in terms of who may bring the action and the substance of the writ, the more modest declaratory judgment is governed by an entirely different set of rules:

> The purpose of declaratory judgment actions is to render disputes concerning the legal rights and duties of parties justiciable without proof of a wrong committed by one party against another, and thus facilitate the termination of controversies. In light of their highly remedial nature then, declaratory judgment statutes should be liberally construed; they should not be interpreted in a narrow or technical sense.

Millett v. Hoisting Engineers' Licensing Division of Dept. of Labor, 119 R.I. 285, 291 (1977).

D. The Suit Against the Treasurer Confers Jurisdiction

Apart from the UDJA, plaintiff's suit against the Treasurer provides an independent basis for jurisdiction and standing. Indeed, this Court has already assumed jurisdiction to resolve a suit brought by a taxpayer that challenged an allegedly dual officeholding judge. In *Davis v. Hawksley*, 379 A.2d 922 (1977), the plaintiff had alleged that Justice Needham, who was commissioned as a colonel in the United States Army Reserve and then appointed to serve as a judge in the Superior Court, was holding federal and state offices concurrently. The plaintiff also "requested that the court enjoin the defendant General Treasurer from paying Justice Needham's salary because of the constitutional violation." *Id.* at 923. The defendant challenged the plaintiff's standing and jurisdiction, but this Court assumed, "for the purpose of this appeal… that plaintiff has standing and that the Superior Court has subject matter jurisdiction" and went onto rule on the merits. *Id.* No court has subsequently challenged *Davis*' handling of standing, and good reasons exist to adopt its position here.

A taxpayer may have standing, if the individual has a "personal stake beyond that shared by all other members of the public at large or the taxpayers of the town." *West Warwick School Comm. v. Souliere*, 626 A.2d 1280, 1284 (R.I. 1993). An exception to this rule exists, however, for cases in which a "substantial public interest is at stake." *Cummings v. Shorey*, 761 A.2d 680, 684 (R.I. 2000). *See also Retirement Bd. v. Providence*, 660 A.2d 721, 726 (R.I. 1995) (holding that because cases present issues of substantial importance to retirement systems members and to city taxpayers, the court would overlook concerns about the plaintiffs' lack of standing.).

This Court has conferred standing "liberally in matters involving substantial public interest." *Burns v. Sundlun*, 617 A.2d 114, 116 (R.I. 1992) (citing *Gelch v. State Board of Elections*, 482 A.2d 1204, 1207 (R.I. 1984); *see also Sennott v. Hawksley*, 241 A.2d 286, 287

(R.I. 1968) (allowing taxpayer standing in a suit to enjoin treasurer from using public funds for publication of certain materials because of substantial public interest raised by the case.).

Here, the public interest is at its apogee. Substantial arguments exist to show that the Chief Justice of the highest court in the state has violated the State Constitution. This is not a challenge to a minor actor in government, but rather a weighty allegation against the supreme judicial officer of the State. The fact that the Attorney General has a quo warranto power does not defeat this public interest, just as the Attorney General's ability to bring suit to vindicate the plaintiffs' interests in cases such as *Retirement Board* and *Sennott* did not defeat taxpayer standing. If taken literally, the Attorney General's quo warranto argument would leave the citizens of Rhode Island largely unprotected against collusive arrangements by public officials not to bring such actions – which was a fear that motivated the prohibition against dual officeholding in the first place, see pages 18-20, *infra*.

In this case, of course, an additional public interest concern is raised by the consequences likely to follow from the Court's refusal to decide this case on the merits. Should the issue of Chief Justice Williams' eligibility not be decided by this Court, it will be raised again in Cuba, leaving a core issue of Rhode Island law to be decided by a Military Tribunal. Contrary to the assertion that Plaintiff "seeks to create conflict between the Rhode Island and United States Constitutions where none exists" (Defs. Mem. Support Pet. Cert., at 4), allowing the case to proceed would permit the issue of Rhode Island law to be addressed by the court most qualified to decide it, and would facilitate the work of the Military Commission.

II. THIS COURT SHOULD DECLARE THAT CHIEF JUSTICE WILLIAMS HAS VIOLATED THE STATE CONSTITUTION

The second clause of Article III, Section 6 of the Rhode Island Constitution states, "if any general officer, senator, or judge shall, after election and engagement, accept any appointment under any other government, the office under this shall be immediately vacated." The text of the

Constitution enumerates only two categories of officials to whom the Clause does not apply: those appointed to take "depositions" and "acknowledgements" of instruments such as deeds.

Article III, Section 6 is therefore applicable to Chief Justice Williams, who was selected for service on the Rhode Island Supreme Court, as (1) this Court has previously recognized that Section 6 applies to appointed judges, and (2) the framers of the Constitution intended that R.I. Supreme Court justices be subject to the provisions of the section.

A. This Court Has Held that Judges Are Subject to Article III, Section 6

In *Davis v. Hawksley*, 379 A.2d 922 (R.I. 1977), this Court recognized that Rhode Island state judges selected under Article X, Section 4 are subject to the provisions of Article III, Section 6. In *Davis*, the Court considered whether Judge Needham's commission in the United States Army Reserve prior to his appointment to the Rhode Island Superior Court violated the dual officeholding prohibition. The Court recognized in that case that Judge Needham was "appointed" under Article X, Section 4, rather than elected. *Id.* at 922. *See also* R.I.G.L. §8-2-2 (1977) (providing for appointment of judges to Superior Court).

Despite Judge Needham's judicial appointment, the Court held that the second clause of Section 6, "adds judges to the list of state officials addressed, and prohibits the acceptance of federal appointments by those already engaged as state officials." *Id.* at 923. Using the "usually accepted meaning" of the text, this Court went on to state that the section is "clearly applicable to judges." While Judge Needham was subject to the clause, he kept his seat because his military position predated his state judicial appointment. Therefore this Court has held that an appointed judge not subject to "election" is subject to Article III, Section 6.

B. The Framers of the Rhode Island Constitution Intended that Supreme Court Justices Be Subject to Article III, Section 6 and That Intent Has Not Been Altered by the Slight Change in the Process for the Selection of Justices.

The framers of Article III, Section 6 intended its provisions to cover Supreme Court Justices. "[F]rom the very beginning, Rhode Island has been exceptionally jealous of its independence and sovereignty as a state." *Opinion to the Governor*, 116 A.2d 474 (R.I. 1955). As a result, the framers of the Rhode Island Constitution designed Article III, Section 6, "to secure the undivided loyalty and service of such officers to this state." *Id* at 475.

The Defendants themselves admit that the framers intended that Article III, Section 6 apply to Supreme Court justices. (Defs. Mem. Support Pet. Cert., at 9 n.4). Defendants acknowledge that state judges selected under Article X, Section 4 were originally intended to be subject to the provisions of Article III, Section 6. This intent has not been altered by slight changes in the language of Article X, Section 4 affecting the method by which state judges are selected for appointment to judicial office. The original language of Article X did not call for a direct election by the people, but merely a vote by the members of both houses of the General Assembly, as still occurs today.

The process for the selection of Supreme Court justices under Article X has been slightly altered over time to allow the governor to choose judicial candidates from a list of potential nominees submitted by a non-partisan judicial nominating committee. *See* R.I. Const. art., X, Section 4. Despite this minor change in the process by which judicial candidates are *nominated*, potential judges must still be approved by the two houses of the Rhode Island General Assembly in substantially the same process set forth in the original language of Article X, Section 4. Therefore, while the language of Article X, Section 4 has changed superficially, the process for approval of Supreme Court judges remains an election by the General Assembly. As such, the change in the language of Article X, Section 4 does not undermine the Framer's original intent that judges be subject to the provisions of Article III, Section 6.

Defendant nevertheless embraces the extraordinary position that the mere legislative change in 1994 somehow removed judges from the reach of the constitutional prohibition on dual officeholding. There is absolutely no support for the idea that legislation of any sort can trump a constitutional guarantee, and nothing in the 1994 legislation suggests any intent to alter this Court's holding in *Davis*. To read the Constitution the way Defendant suggests would read the word "judges" in Article III, Section 6 out of the state Constitution altogether. As this Court has pointed out, subsequent constitutional conventions have made only one change to the dual-officeholding prohibition: to make it gender-neutral. See *Governor Sundlun*, 585 A.2d at 1187.

Common-sense suggests reading the clause just as *Davis* did. The ban on dual officeholding extends to "any general officer, senator, or judge." The writers of the Constitution used the words "election and engagement" merely to make clear that if the position of the other government *predated* the state position, no conflict ensued. And so, if a federal officer later took a state job, such as a state Senator, no violation ensued. *Davis* therefore found no constitutional violation, since the federal military service predated the state position. At no point did an election somehow become a requirement for the Article III, Section 6 prohibition, and that is why this Court emphasized that Judge Needham was "appointed." *Davis*, 379 A.2d at 922-23.

Under the predecessor to the federal Constitution, the Articles of Confederation, "all federal adjudications were rendered by special federal courts appointed from the state bench." Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L.Rev. 1045, 1146 (1994). The military commissions return to the world of the Articles of Confederation by appointing state judges to a federal role. Yet most states, including Rhode Island, rejected precisely that arrangement:

> [A] rule of one person, one office federal-state incompatibility is virtually mandated in most instances by state constitutional law. Thus, forty-seven out of

> fifty states have clauses in their state constitutions rendering individuals holding federal office ineligible to serve in their state legislatures…. And, forty-one states [including Rhode Island] forbid members of their state judiciaries from holding office in the federal government.[7]

Finally, it should be noted that Rhode Island's prohibition serves vital interests to the State, such as "to secure the full-time service and attention of their office holders from excessive national loyalties," to avoid "conflicts of interest," and to minimize "the threat of preferment that is created just by the possibility of simultaneous dual federal-state office holding" in which a state official "might be tempted collectively to sell-out vital state interests with each official thus hoping to win federal favor and office." *Id.* at 1152-3. Of course, all citizens hope that none of these interests will materialize in this specific case. The Rhode Island Constitution nonetheless enacts a prophylactic ban to guard against its mere possibility. To leave this delicate *state law* question in the hands of a federal tribunal, particularly an *ad hoc* one lacking the necessary institutional competence or even federal Article III protections, is to eviscerate the scheme set in place by the Founders of the Constitution.

Respectfully submitted,

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[7] *Id.* at 1151-52 (footnotes omitted). The authors cite, as one of the 41 states, Rhode Island's Article III, Sec. 6 provision as establishing that state judges cannot serve in federal roles.