

No. 17-_____

IN THE
Supreme Court of the United States

LIBAN H. ABDIRAHMAN, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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July 31, 2017

QUESTIONS PRESENTED

Since shortly after the Civil War, federal law has required specific authorization from Congress before active-duty military officers may hold a “civil office,” including positions that require “an appointment by the President by and with the advice and consent of the Senate.” 10 U.S.C. § 973(b)(2)(A)(ii).

After President Obama nominated and the Senate confirmed Lieutenant Colonel Paulette Vance Burton, Colonel Larss G. Celtnieks, Colonel James Wilson Herring, Jr., and Colonel Martin T. Mitchell as judges of the Article I U.S. Court of Military Commission Review (CMCR), all four continued to serve on either the Army or Air Force Court of Criminal Appeals (CCA), including on the panels that heard (and rejected) Petitioners’ appeals of their convictions by court-martial. After holding in an earlier case that any statutory or constitutional infirmities with such dual service implicated the judges’ service on the CMCR, not their eligibility to continue to serve on the CCAs, the U.S. Court of Appeals for the Armed Forces (CAAF) affirmed Petitioners’ convictions.

The Questions Presented are:

1. Whether these judges’ service on the CMCR disqualified them from continuing to serve on the CCAs under 10 U.S.C. § 973(b)(2)(A)(ii).
2. Whether the judges’ simultaneous service on both the CMCR and the CCAs violated the Appointments Clause.

PARTIES TO THE PROCEEDING

The Petitioners are the 166 servicemembers listed below.¹ The Respondent is the United States.

1. Abdirahman, Liban H. (No. 17-206);²
2. Alexander, Tyran M. (No. 17-188);
3. Alirad, Ali A., Jr. (No. 17-42);
4. Averett, Jeffrey I., Jr. (No. 17-303);
5. Ayers, Terry J. (No. 17-245);
6. Bailon, Dennis (No. 17-276);
7. Banks, Alvin S. (No. 17-21);
8. Bardin, Jeremy C. (No. 17-353)
9. Barksdale, Marcus A., Jr. (No. 17-305);
10. Benjamin, Wendell W. (No. 17-234);
11. Bennett, Zachary A. (No. 16-715);
12. Berg, Loren R. (No. 17-270);
13. Bickerstaff, Anthony K., II (No. 17-67);
14. Birdsong, John G. (No. 16-719);
15. Blakesley, Jacob D. (No. 16-725);
16. Bonilla, Charles (No. 17-109);
17. Boyd, Kenneth B. (No. 17-205);
18. Briggs, Michael J.D. (No. 16-711);
19. Brookshire, Corey J. (No. 17-164);
20. Brown, Mattie L. (No. 16-714);
21. Buckner, Aarron D. (No. 17-116);
22. Bullock, Jesse E., Jr. (No. 17-266);

1. The discrepancy between the number of Petitioners (166) and the number of cases consolidated in this Petition (167) arises from the fact that one of the Petitioners—Cassandra M. Riley—is the subject of two separate court-martial proceedings raising the questions presented here.

2. To help identify the 167 cases consolidated in this Petition, the docket number of each Petitioner's case in the U.S. Court of Appeals for the Armed Forces appears parenthetically after each Petitioner's name.

23. Bustamante, Marcos A. (No. 16-693);
24. Carroll, Richard S. (No. 16-749);
25. Charles, Reginald E. (No. 17-176);
26. Coker, Jodi R. (No. 17-56);
27. Coleman, Kameron M. (No. 16-732);
28. Cooper, Raymond J. (No. 17-141);
29. Cottner, Christopher K. (No. 17-16);
30. Crews, Jason R. (No. 17-112);
31. Cuellar, Jose L. (No. 17-355);
32. Curry, Andrew D. (No. 17-220);
33. Davenport, Anthony T. (No. 17-248);
34. Davis, Marcus V. (No. 17-95);
35. DeJesus, Matthew S. (No. 17-338);
36. Delvalle, Andy (No. 17-44);
37. Doherty, Nicholas (No. 17-170);
38. Donohue, James G. (No. 16-712);
39. Dorris, David J. (No. 17-48);
40. Douglas, Adrian T. (No. 17-47);
41. Dunham, Jason E. (No. 17-256);
42. Earle, Shawn E. (No. 17-241);
43. Echols, Robert S. (No. 16-720);
44. Entzminger, Marques D. (No. 17-260);
45. Erikson, Sean R. (No. 16-705);
46. Fletcher, D'Andre R. (No. 16-751);
47. Fogle, Alvin J. (No. 17-2);
48. Francisco, Lauro P. (No. 17-229);
49. Galvan, Francisco (No. 17-111);
50. Garcia, Elvis R. (No. 17-121);
51. Garman, David L. (No. 17-363);
52. George, Deandre J. (No. 17-247);
53. Girau, Austin L. (No. 17-202);
54. Gore, Lawrence E. (No. 17-372);
55. Goss, Mack R., III (No. 17-354);
56. Greene, Leroy A. (No. 17-350);
57. Greytunkl, Kevin (No 17-215);
58. Griffith, Andrew D. (No. 16-745);

59. Guice, Dayshawn M. (No. 17-151);
60. Hercules, Jasmine S. (No. 17-17);
61. Hirsch, Gavin C. (No. 17-275);
62. Ho, Tyler F. (No. 16-658);
63. Hodge, Shquon T. (No. 16-680);
64. Huertalopez, Edgar (No. 17-293);
65. Hughes, Stefan D. (No. 17-91);
66. Humburd, Thomas L., Jr. (No. 17-83);
67. Jeffers, Mario I. (No. 17-225);
68. Jewell, Brian K., II (No. 17-177);
69. Jiminez-Victoria, Salvador (No. 17-77);
70. Johnson, Terrance T. (No. 17-238);
71. Jones, Nija D. (No. 17-233);
72. Kargbo, Joseph (No. 17-244);
73. Kelley, Nathan A. (No. 17-64);
74. Kidd, Dustyn R. (No. 17-166);
75. Kissell, Scott E. (No. 17-132);
76. Knoop, Michael S. (No. 17-302);
77. Koenig, Adam G. (No. 17-370);
78. Koth, Bianca L. (No. 17-380);
79. Kundradurham, Joshua A. (No. 17-280);
80. Land, Keith D. (No. 17-40);
81. Lavasseur, Rhandall S., Jr. (No. 16-735);
82. Layton, Taylor A. (No. 16-753);
83. Leroy, Eric A. (No. 17-81);
84. Lewis, Philip S., Jr. (No. 17-124);
85. Lowrey, Olyn V. (17-249);
86. Luna, Joshua R. (No. 17-26);
87. Maestre, Jason A. (No. 17-4);
88. Maez, Joshua P. (No. 17-235);
89. Mairena, Khristian (No. 17-340);
90. Majetich, Nicholas J. (No. 17-242);
91. Markley, Ethan J. (No. 17-59);
92. Martin, Arthur, Jr. (No. 16-754);
93. Maston, Charles (No. 17-262);
94. Maydoney, Max S. (No. 16-722);

95. Mazzie, Randon P. (No. 17-210);
96. McFadden, Eric K. (No. 17-320);
97. McGowan, Jacob I. (No. 16-761);
98. Mecker, Sean A. (No. 17-211);
99. Medrano, Erick A. (No. 17-259);
100. Melvin, Christopher B. (No. 16-733);
101. Millay, William C. (No. 16-73);
102. Miner, Kyle W. (No. 17-70);
103. Montoya, David (No. 17-207);
104. Morrill, Michael C. (No. 17-145);
105. Murdorf, Jeffrey T., II (No. 17-228);
106. Murphy, Christopher R. (No. 17-175);
107. Nataren, Jose L. (No. 17-74);
108. Nealy, Samuel E., III (No. 16-713);
109. Nyangau, Collins N. (No. 16-739);
110. O'Connor, Michael B. (No. 17-93);
111. Orage, Rinard A. (No. 17-345);
112. Oscar, Gary S. (17-189);
113. Ozoskey, David M. (No. 17-373);
114. Patterson, Brandon C. (No. 17-271);
115. Perez, Anthony E. (No. 17-128);
116. Perry, Stephen B. (No. 17-240);
117. Pimentel, Jovanni (No. 16-677);
118. Piszcz, Nicholas A. (No. 16-741);
119. Podobnik, Patrick T. (No. 17-173);
120. Pretlow, Marcus L. (No. 17-239);
121. Prewitt, Jeffery E. (No. 17-197);
122. Ramirez, Eric R. (No. 17-179);
123. Reed, James R. (No. 17-294);
124. Rhodes, Seddrick M. (No. 17-130);
125. Richardson-Hoeg, Zachary S. (No. 17-172);
126. Rich, Kyle D. (No. 16-723);
127. Riley, Cassandra M. (Nos. 17-65 and 17-180);
128. Rios, Manuel (No. 17-110);
129. Robinson, David C. (No 17-375);
130. Rochford, Ryan W. (No. 16-746);

131. Rosado DeJesus, Michael J. (No. 17-314)
132. Sadler, Michael J. (No. 17-178)
133. Sampson, Jermaine C. (No. 17-192);
134. Sands, Trevor L. (No. 16-757);
135. Santucci, Anthony V. (No. 17-105);
136. Sharpe, Carlton D. (No. 17-321);
137. Shave, Kaitlin E. (No. 17-281);
138. Slater, Michael J. (No. 17-269);
139. Smith, Christopher B. (No. 17-38);
140. Smith, George L., II (No. 17-219);
141. Smith, LaDonte A. (No. 17-267);
142. Solt, Nicholas A. (No. 17-252);
143. Soria, Jeffrey (No. 17-159);
144. Spriggs, Donnell M. (17-50);
145. Stanford, Dontae D. (No. 17-337);
146. Stanley, Tyrone E. (No. 17-118);
147. Strempler, Matthew R. (No. 17-8);
148. Sutton, Dallas R. (No. 17-194);
149. Taylor, Jesse M. (No. 16-758);
150. Thomas, Paul E. (No. 17-133);
151. Thompson, Jeffrey W., Jr. (No. 17-94);
152. Threat, Stephon D. (No. 17-288);
153. Threet, William E., IV (No. 17-230);
154. Toney, Anthony C. (No. 17-374);
155. Torres-Garza, Luis A. (No. 17-216);
156. Trejo, Marcelino (No. 17-66);
157. Tyson, Keevan D. (No. 17-258);
158. Viera, Andrew M. (No. 17-237);
159. Villar, Kristophor M. (No. 17-129);
160. Warren, Stephen C. (No. 17-14);
161. Watford, Thomas J. (No. 17-312);
162. Watkins, Matthew N. (No. 16-670);
163. White, Nicholas E. (No. 17-27);
164. Williams, Antione D. (No. 17-142);
165. Williams, Ronnie T. (No. 17-90); and
166. Wilson, Victor D. (No. 17-274).

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PETITION FOR A WRIT OF CERTIORARI

This Petition raises the same questions as those already presented in *Ortiz v. United States*, No. 16-1423 (U.S. filed May 19, 2017), and the same merits questions as those already presented in *Dalmazzi v. United States*, No. 16-961 (U.S. filed Feb. 1, 2017) and *Cox v. United States*, No. 16-1017 (U.S. filed Feb. 21, 2017).

Each of the 167 cases consolidated in this Petition presents facts that are identical in all relevant respects to those presented in *Ortiz*. That is to say, each Petitioner:

- (1) was convicted by a court-martial;
- (2) had their conviction affirmed by a panel of their service-branch Court of Criminal Appeals (CCA) that included at least one judge also serving at that time as an “additional judge” of the U.S. Court of Military Commission Review (CMCR);
- (3) petitioned for review before the Court of Appeals for the Armed Forces (CAAF); and
- (4) had CAAF grant their petition for review and affirm the decision of the CCA.

After sidestepping the questions presented in this Petition in *Dalmazzi*, see *Dalmazzi v. United States*, 76 M.J. 1 (C.A.A.F. 2016) (per curiam), CAAF reached them in *Ortiz v. United States*, 76 M.J. 189 (C.A.A.F. 2017). There, the Court of Appeals rejected a servicemember’s challenge to the continuing service of Colonel Martin T. Mitchell as a judge on the Air Force CCA after President Obama had signed his commission to serve as an “additional judge” on the CMCR. See *id.* CAAF did not decide whether

Judge Mitchell's dual officeholding violated 10 U.S.C. § 973(b)(2)(A)(ii) or Article II of the Constitution. Instead, it concluded that, at a minimum, his continuing service on the Air Force CCA was neither unlawful nor unconstitutional, without regard to whether his service on the CMCR might be. *See id.* at 192–93. After that ruling, the Court of Appeals issued summary, one-sentence orders affirming the CCAs' rulings in each of the Petitioners' cases.

Petitioners' claims rise and fall with *Ortiz*. Therefore, this Petition should be held pending the disposition of the petition in *Ortiz*. If this Court grants certiorari in *Ortiz* and reverses or vacates the decision below, it should grant this Petition as well, vacate the judgments in all of the Petitioners' cases, and remand to the Court of Appeals for further proceedings in light of this Court's ruling in *Ortiz*.

OPINIONS BELOW

The Court of Appeals' orders in Petitioners' cases are not reported. They are reprinted in the Appendix. The opinions of the U.S. Air Force and Army Courts of Criminal Appeals in Petitioners' cases are also reprinted in the Appendix.

JURISDICTION

In each of Petitioners' cases, the Court of Appeals granted a petition for review and issued a final judgment affirming the decision of the Court of Criminal Appeals. The earliest such judgments were issued on May 3, 2017, and the latest such judgment was issued on June 27, 2017. This Court therefore has jurisdiction over all 167 cases under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause provides that the President:

shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

U.S. CONST. art. II, § 2, cl. 2. The Commander-in-Chief Clause provides that “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” *Id.* art. II, § 2, cl. 1.

As relevant here, the military dual-officeholding statute provides that:

Except as otherwise authorized by law, an officer to whom this subsection applies [including “a regular officer of an armed force on the active-duty list”] may not hold, or exercise the functions of, a civil office in the Government of the United States . . . that requires an appointment by the President by and with the advice and consent of the Senate.

10 U.S.C. § 973(b)(2)(A)(ii). A 1983 amendment to the statute further provides that “[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.” *Id.* § 973(b)(5).

REASONS FOR GRANTING THE PETITION

As in *Dalmazzi*, *Cox*, and *Ortiz*, this Petition arises from the continuing service of active-duty military officers as judges on the Air Force and Army Courts of Criminal Appeals (CCAs) after their confirmation to the U.S. Court of Military Commission Review (CMCR) as “additional judges” under 10 U.S.C. § 950f(b)(3). As the Petitions in *Dalmazzi* and *Ortiz* explain in detail, the appointment of such active-duty military officers to such a civil office necessarily triggers the Civil War-era ban on the holding of such offices by active-duty servicemembers. *See* Petition for a Writ of Certiorari at 3–10, *Ortiz v. United States*, No. 16-1423 (U.S. filed May 19, 2017); Petition for a Writ of Certiorari at 2–8, *Dalmazzi v. United States*, No. 16-961 (U.S. filed Feb. 1, 2017); *see also* 10 U.S.C. § 973(b)(2)(A)(ii).³

Absent special circumstances not present here, *see* Political Activities by Members of the Armed Forces, Dep’t of Def. Directive 1344.10, § 4.6, at 9 (Feb. 19, 2008), the typical remedy for a violation of § 973(b) is the termination of the appointed officers’ military commissions *nunc pro tunc*. *See, e.g.,*

3. Moreover, insofar as such dual appointments do not violate § 973(b)(2)(A)(ii), they raise substantial—and potentially insurmountable—problems under the Appointments Clause and Commander-in-Chief Clause of Article II. *See Ortiz* Pet. at 18–21; *Dalmazzi* Pet. at 13–16.

Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. § 973(b)(2)(A), 40 OP. O.L.C. 1 (Aug. 2, 2016). As a result, if the appointment of Judges Burton, Celtnieks, Herring, and Mitchell to the CMCR as “additional judges” did indeed trigger the dual-officeholding ban, then they necessarily forfeited their military commissions (and, thus, their authority to continue serve as appellate military judges) at the moment they began exercising the functions of their CMCR judgeships.

Finally, any CCA decisions in which these judges participated after forfeiting their commissions as military officers—including the CCA rulings in each of the Petitioners’ cases—are not just voidable, but void, and cannot be salvaged by the *de facto* officer doctrine. See *Ortiz* Pet. at 17 (citing *Ryder v. United States*, 515 U.S. 177, 184–85 (1995)); *Dalmazzi* Pet. at 16 n.10 (citing *United States v. Jones*, 74 M.J. 95, 97 (C.A.A.F. 2015)).

Thus, if this Court holds in *Dalmazzi*, *Cox*, or *Ortiz* that the Petitioners here are correct—and that the appointment of Judges Burton, Celtnieks, Herring, and Mitchell to the CMCR as “additional judges” triggered the dual-officeholding ban—then the Petitioners are entitled (1) to vacatur of the CCA decisions in their cases; and (2) to have their court-martial appeals reheard by properly constituted CCA panels. See *Nguyen v. United States*, 539 U.S. 69, 82–83 (2003).

*

*

Petitioners recognize the burden it would place on the CCAs to have to rehear the appeals of 167 court-martial convictions. If anything, though, that burden

only further militates in favor of conclusive resolution of the questions presented now—before dozens (if not hundreds) of new cases presenting the same issues arise in both the court-martial and military commissions systems.

Between them, the Petitions in *Dalmazzi*, *Cox*, and *Ortiz* present this Court with an opportunity to reach the merits of the questions presented here. If this Court answers those questions differently than the Court of Appeals did in *Ortiz*, then the appropriate disposition would be to grant this Petition, vacate the decisions below, and return these cases to the lower courts for further proceedings not inconsistent with such a ruling.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held pending the disposition of *Dalmazzi*, *Cox*, and *Ortiz*—and, if appropriate, granted thereafter.

Respectfully submitted,

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July 31, 2017