

No. 17-243

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**In the Supreme Court of the United States**

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LIBAN H. ABDIRAHMAN, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

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

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

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## **OPINIONS BELOW**

The orders of the United States Court of Appeals for the Armed Forces, the United States Air Force Court of Criminal Appeals, and the United States Army Court of Criminal Appeals are unreported.

## **JURISDICTION**

The judgments of the United States Court of Appeals for the Armed Forces were entered between May 3, 2017, and June 27, 2017. The petition for a writ of certiorari was filed on July 31, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

## **STATEMENT**

Petitioners are 165 military servicemembers who were convicted of a variety of offenses by military

courts-martial.\* Their convictions and sentences were affirmed, in some cases in part or with modifications, by the United States Air Force Court of Criminal Appeals (Air Force CCA) or the United States Army Court of Criminal Appeals (Army CCA). The United States Court of Appeals for the Armed Forces (CAAF) granted petitions for discretionary review and affirmed.

These cases present the question whether petitioners are entitled to new hearings before the Air Force CCA or the Army CCA because the panels of those courts that decided their appeals included one or more judges who had also been appointed to the United States Court of Military Commission Review (USCMCR) by the President with the advice and consent of the Senate. Petitioners contend that such simultaneous service violates 10 U.S.C. 973(b) and the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2.

The same legal issues are pending before this Court in other petitions for writs of certiorari, including *Dalmazzi v. United States*, No. 16-961 (filed Feb. 1, 2017), *Cox v. United States*, No. 16-1017 (filed Feb. 21, 2017), and *Ortiz v. United States*, No. 16-1423 (filed May 19, 2017). The relevant statutory background is set forth in the government's briefs in opposition in those cases. See, e.g., Br. in Opp. at 2-5, *Ortiz*, *supra* (No. 16-1423) (*Ortiz* Opp.). As petitioners explain (Pet. 1), they are similarly situated to the petitioner in *Ortiz* insofar as their appeals were decided by panels of the Air Force

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\* Although the petition for a writ of certiorari identifies 166 petitioners (Pet. ii-vi), one of the listed individuals, Tyran M. Alexander, has filed a separate petition seeking review of the same underlying judgment. See *Alexander v. United States*, No. 16-9536 (filed May 16, 2017). Counsel for petitioners has informed the government that Mr. Alexander was listed in the petition in this case in error.

CCA or Army CCA that included at least one judge who had also been appointed to the USCMCR.

#### ARGUMENT

Petitioners do not seek plenary review by this Court. Instead, they contend (Pet. 7) that “the petition for a writ of certiorari should be held pending the disposition of *Dalmazzi*, *Cox*, and *Ortiz*” and then disposed of as appropriate in light of the Court’s decision in those cases. As the government has explained, the petitions in *Dalmazzi*, *Cox*, and *Ortiz* should be denied because the questions presented do not warrant this Court’s review. See, *e.g.*, *Ortiz* Opp. at 7-20. Accordingly, the petition in this case should be denied as well.

If, however, this Court grants review in *Ortiz* or another case raising the same questions, the government agrees that the petition in this case should be held and then disposed of as appropriate in light of the Court’s decision. In any proceedings on remand following such a hold, the lower courts would have the opportunity to consider in the first instance any potential case-specific obstacles to relief, including whether each petitioner has adequately preserved the relevant legal arguments.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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