

No. 16-_____

IN THE
Supreme Court of the United States

LAITH G. COX, 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

BRIAN L. MIZER
JOHNATHAN D. LEGG
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762

EUGENE R. FIDELL
127 Wall Street
New Haven, CT 06511

STEPHEN I. VLADECK
Counsel of Record
727 East Dean Keeton St.
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

CHRISTOPHER D. COLEMAN
Defense Appellate Division
Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060

Counsel for Petitioners

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QUESTIONS PRESENTED

Since shortly after the Civil War, federal law has required express 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). The U.S. Court of Appeals for the Armed Forces (CAAF) rejected as moot Petitioners’ challenges to these judges’ continued service on the CCAs, because the President had not signed the judges’ CMCR commissions until after the CCAs had decided the Petitioners’ cases on the merits.

The Questions Presented are:

1. Whether the Court of Appeals erred in holding that Petitioners’ claims were moot.
2. 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).
3. Whether the judges’ simultaneous service on both the CMCR and the AFCCA violated the Appointments Clause.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES.....	iii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE.....	4
A. Legal Background.....	4
B. Procedural History	4
REASON FOR GRANTING THE PETITION.....	8
I. These Cases Raise the Same Questions as Those Presented in <i>Dalmazzi</i>	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases

<i>Chafin v. Chafin</i> , 133 S. Ct. 1017 (2013)	9
<i>Pashaian v. Eccelston Props., Ltd.</i> , 88 F.3d 77 (2d Cir. 1996)	9
<i>United States v. Buford</i> , No. 16-689 (C.A.A.F. Feb. 13, 2017) (mem.)	8
<i>United States v. Cox</i> , 75 M.J. 457 (C.A.A.F. 2016) (mem.)	2
<i>United States v. Craig</i> , 75 M.J. 470 (C.A.A.F. 2016) (mem.)	2
<i>United States v. Dalmazzi</i> , 76 M.J. 1 (C.A.A.F. 2016) (per curiam)	1, 5, 9
<i>United States v. Jones</i> , 74 M.J. 95 (C.A.A.F. 2015)	4
<i>United States v. Lewis</i> , No. 16-660 (C.A.A.F. Dec. 19, 2016) (mem.)	2
<i>United States v. Miller</i> , 75 M.J. 495 (C.A.A.F. 2016) (mem.)	2
<i>United States v. Morchinek</i> , 75 M.J. 463 (C.A.A.F. 2016) (mem.)	2
<i>United States v. O’Shaughnessy</i> , 75 M.J. 493 (C.A.A.F. 2016) (mem.)	2
<i>United States v. Ortiz</i> , No. 16-671 (C.A.A.F. Feb. 9, 2017) (mem.)	8

Statutes and Constitutional Provisions

U.S. CONST. art. II, § 2, cl. 2	3, 4
Uniform Code of Military Justice (UCMJ)	
10 U.S.C. § 867(a)(3)	3
10 U.S.C. § 880.....	5
10 U.S.C. § 899.....	7
10 U.S.C. § 920.....	8
10 U.S.C. § 920b.....	7
10 U.S.C. § 950f(b)(3).....	4, 5
10 U.S.C. § 973(b)(2)(A)(ii)	3, 10
28 U.S.C. § 1259(3)	2

Other Authorities

162 CONG. REC. S2600 (daily ed., Apr. 28, 2016).....	5
Petition for a Writ of Certiorari, <i>Dalmazzi v. United States</i> , No. 16-961 (U.S. filed Feb. 1, 2017).....	1, 4, 9, 10

PETITION FOR A WRIT OF CERTIORARI

This Petition raises the same questions as those already presented in *Dalmazzi v. United States*, No. 16-961 (U.S. filed Feb. 1, 2017). Like the Petitioner in *Dalmazzi*, each of the six Petitioners here is a servicemember who

- (1) was convicted by a court-martial;
- (2) appealed their conviction to their service-branch Court of Criminal Appeals (CCA);
- (3) had their conviction affirmed (or reconsideration denied) by a CCA panel that included at least one military judge also serving at the time as an “additional judge” of the U.S. Court of Military Commission Review (CMCR);
- (4) petitioned for review before the Court of Appeals for the Armed Forces (CAAF), challenging the legality of CMCR judges also sitting on the CCAs; and
- (5) had CAAF grant their petition for review.

In *Dalmazzi*, CAAF held that it could not reach the merits of the dual-officeholding issue raised in these cases because the President had not signed Judge Mitchell’s commission to serve on the CMCR until after the Air Force CCA had ruled in *Dalmazzi*’s case, and so *Dalmazzi*’s claims were moot. *See United States v. Dalmazzi*, 76 M.J. 1, 3 (C.A.A.F. 2016) (per curiam). After that ruling, the Court of Appeals issued a one-sentence order in each of the Petitioners’ cases, noting that, “in light of *Dalmazzi*,” the grant of review in their case should be vacated, and the petition for review be denied. *See* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a.

Petitioners' claims rise and fall with *Dalmazzi*. Therefore, if this Court grants the petition in *Dalmazzi* and vacates or reverses the decision below, it should grant this Petition as well, vacate the decisions below, and remand to the Court of Appeals for further proceedings in light of this Court's disposition in *Dalmazzi*.

OPINIONS BELOW

The Court of Appeals' orders in Petitioners' cases are not yet reported. They are reprinted in the Appendix at Pet. App. 11a, 14a, 51a, 54a, 67a, and 78a. The opinions of the U.S. Air Force and Army Courts of Criminal Appeals in the Petitioners' cases are not reported. They are reprinted in the Appendix at Pet. App. 1a, 12a, 15a, 52a, 55a, and 68a.

JURISDICTION

In each of Petitioners' cases, the Court of Appeals granted a petition for review. See *United States v. Cox*, 75 M.J. 457 (C.A.A.F. 2016) (mem.); *United States v. Morchinek*, 75 M.J. 463 (C.A.A.F. 2016) (mem.); *United States v. Craig*, 75 M.J. 470 (C.A.A.F. 2016) (mem.); *United States v. O'Shaughnessy*, 75 M.J. 493 (C.A.A.F. 2016) (mem.); *United States v. Miller*, 75 M.J. 495 (C.A.A.F. 2016) (mem.); *United States v. Lewis*, No. 16-660 (C.A.A.F. Dec. 19, 2016) (mem.). In *Lewis*, *Morchinek*, and *O'Shaughnessy*, the Court of Appeals issued a final judgment on December 27, 2016. In *Cox*, *Craig*, and *Miller*, the Court of Appeals issued a final judgment on January 17, 2017. This Court therefore has jurisdiction over all six cases under 28 U.S.C. § 1259(3).¹

1. As in *Dalmazzi*, in each of the Petitioners' cases, the Court of Appeals' decision vacated the grant of review and purported to

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.

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

Except as otherwise authorized by law, [active-duty military officers] 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).

deny the petition. Pet. App. 11a, 14a, 51a, 54a, 67a, 78a. But this Court has appellate jurisdiction over all “[c]ases in which [CAAF] granted a petition for review under section 867(a)(3) of title 10.” The Court of Appeals’ grant of review in each of Petitioners’ cases brings them within the plain meaning of that provision.

STATEMENT OF THE CASE

A. Legal Background

As in *Dalmazzi*, 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 as “additional judges” on the U.S. Court of Military Commission Review (CMCR) under 10 U.S.C. § 950f(b)(3). As the Petition in *Dalmazzi* explains at some length, the appointment of such active-duty military officers to the CMCR violates the dual-officeholding ban Congress enacted shortly after the Civil War. See 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).²

Because the conventional remedy for a violation of § 973(b) is the termination of the appointed officers’ military commissions *nunc pro tunc*, all CCA decisions in which those officers participated subsequent to their CMCR appointments—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 Petition for a Writ of Certiorari at 16 n.10, *Dalmazzi*, No. 16-961 (citing *United States v. Jones*, 74 M.J. 95, 97 (C.A.A.F. 2015)).

B. Procedural History

Notwithstanding these concerns, the Court of Appeals for the Armed Forces (CAAF) held in

2. 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 Petition for a Writ of Certiorari at 13–16, *Dalmazzi*, No. 16-961.

Dalmazzi that, because the President had not signed Colonel Martin T. Mitchell’s CMCR commission until after the Air Force CCA (including Judge Mitchell) had ruled in *Dalmazzi*’s case, her challenge to Judge Mitchell’s continuing service on the Air Force CCA was moot. *See Dalmazzi*, 76 M.J. at 3. CAAF then applied *Dalmazzi* to each of Petitioners’ cases, vacating its prior grants of review and denying each of their petitions. *See* Pet. App. 11a, 14a, 51a, 54a, 67a, and 78a.

Petitioner Laith G. Cox is a Captain in the U.S. Army who was convicted, contrary to his pleas, of a number of serious offenses arising out of sexual misconduct with a 14-year-old girl. He was sentenced to dismissal from the Army and 40 years’ confinement. Cox appealed to the Army CCA, a three-judge panel of which generally affirmed his conviction and sentence (with exceptions not here relevant) in a ruling issued on April 29, 2016. *See* Pet. App. 1. The Army CCA panel included Lieutenant Colonel Paulette Vance Burton and Colonel James Wilson Herring, Jr., both of whom had been confirmed by the Senate the previous day (along with Army Colonel Larss G. Celtnieks and Air Force Colonel Mitchell) as “additional judges” of the CMCR under 10 U.S.C. § 950f(b)(3). *See* 162 CONG. REC. S2600 (daily ed., Apr. 28, 2016). As noted above, Cox subsequently petitioned CAAF for review, which was granted—and then, after and in light of *Dalmazzi*, vacated and denied. *See* Pet. App. 11a.

Petitioner Courtney A. Craig is a Specialist in the U.S. Army who was convicted, in accordance with his pleas, of attempted indecent visual recording, in violation of Article 80 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880. Craig was sentenced

to a reduction in grade, to 20 days' confinement, and to a bad-conduct discharge. On appeal, an Army CCA panel that included both Judges Herring and Burton affirmed the conviction and sentence in all respects. *See* Pet. App. 12a. That decision was dated May 10, 2016, even though Judges Herring and Burton had both been confirmed by the Senate on April 28 to serve as “additional judges” on the CMCR. As noted above, Craig subsequently petitioned CAAF for review, which was granted—and then, after and in light of *Dalmazzi*, vacated and denied. *See* Pet. App. 14a.

Petitioner Andre K. Lewis is a Staff Sergeant in the U.S. Air Force who was convicted, contrary to his pleas, based upon his culpability in two separate sexual misconduct incidents approximately 18 months apart. He was sentenced to a dishonorable discharge, confinement for six years, a reduction in grade, and forfeiture of all pay and allowances. He appealed his conviction to the Air Force CCA, a three-judge panel of which generally affirmed his conviction and sentence (with exceptions not her relevant) on March 29, 2016. *See* Pet. App. 15a. Lewis subsequently moved the Air Force CCA for reconsideration. After his motion was assigned to a “special panel” that included Judge Mitchell, the panel denied the motion for reconsideration on May 17, 2016, even though Mitchell had been confirmed by the Senate on April 28 to serve as an appointed judge of the CMCR. *See* Pet. App. 46a. On May 30, 2016, Lewis moved the special panel for reconsideration of its ruling on the ground that Mitchell’s appointment to the CMCR had disqualified him from continuing to serve on the Air Force CCA. It does not appear that the Air Force CCA ever ruled on Lewis’s second motion for reconsideration. As noted above, Lewis subsequently

petitioned CAAF for review, which was granted—and then, after and in light of *Dalmazzi*, vacated and denied. *See* Pet. App. 51a.

Petitioner Ian T. Miller is a Specialist in the U.S. Army who was convicted, contrary to his pleas, of two specifications of sexual assault of a child in violation of Article 120b of the UCMJ, 10 U.S.C. § 920b. He was sentenced to a reduction in grade, 20 months' confinement, and a bad-conduct discharge. He appealed his conviction and sentence to the Army CCA, a three-judge panel of which affirmed on May 6, 2016. *See* Pet. App. 52a. The Army CCA panel included Judge Celtnieks, who had been confirmed as an “additional judge” of the CMCR on April 28, 2016. As noted above, Miller subsequently petitioned CAAF for review, which was granted—and then, after and in light of *Dalmazzi*, vacated and denied. *See* Pet. App. 54a.

Petitioner Joseph D. Morchinek is a Senior Airman in the U.S. Air Force who was convicted, contrary to his plea, of misbehavior before the enemy in violation of Article 99 of the Uniform Code of Military Justice, 10 U.S.C. § 899, and who pled guilty to a minor drug offense. He was sentenced to a bad-conduct discharge, confinement for two months, forfeiture of \$1,021 pay per month for two months, a reduction in grade, and a reprimand. He appealed his Article 99 conviction to the Air Force CCA, a three-judge panel of which affirmed the conviction and sentence in all respects on May 9, 2016. *See* Pet. App. 55a. The Air Force CCA panel included Judge Mitchell—who had been confirmed as an additional judge of the CMCR on April 28, 2016. As noted above, Morchinek subsequently petitioned CAAF for review, which was

granted—and then, after and in light of *Dalmazzi*, vacated and denied. *See* Pet. App. 67a.

Petitioner Kelvin I.L. O’Shaughnessy is an Airman First Class in the U.S. Air Force who was convicted, contrary to his pleas, of one charge and one specification each of sexual assault and abusive sexual contact, in violation of Article 120 of the UCMJ, 10 U.S.C. § 920. He was sentenced to a bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and a reduction in grade. He appealed to the Air Force CCA, a three-judge panel of which affirmed the convictions and sentence in all respects on May 5, 2016. *See* Pet. App. 68a. The Air Force CCA panel included Judge Mitchell—who had been confirmed as an additional judge of the CMCR on April 28. As noted above, O’Shaughnessy subsequently petitioned CAAF for review, which was granted—and then, after and in light of *Dalmazzi*, vacated and denied. *See* Pet. App. 78a.

REASONS FOR GRANTING THE PETITION

I. These Cases Raise the Same Questions as Those Presented in *Dalmazzi*

In addition to the substantive dual-officeholding questions presented in *Dalmazzi* and here (and over 100 additional cases now pending in the Court of Appeals),³ the Petitioners’ cases raise the same

3. In a terse order issued on February 9, 2017, the Court of Appeals affirmed an Air Force CCA decision in a case raising the same dual-officeholding questions, noting that “[t]he opinion of the Court will be issued on a future date.” *United States v. Ortiz*, No. 16-671, at 1 (C.A.A.F. Feb. 9, 2017) (mem.), *reprinted at* Pet. App. 79a; *see also* *United States v. Buford*, No. 16-689, at 1 (C.A.A.F. Feb. 13, 2017) (mem.) (“[T]he granted assigned issues are without merit in view of our holding in *United States v. Ortiz . . .*”), *reprinted at* Pet. App. 80a. If CAAF has indeed

“mootness” question as that raised by the Petition in *Dalmazzi*. See Petition for a Writ of Certiorari at 10–12, *Dalmazzi*, No. 16-961.

In *Dalmazzi*, the Court of Appeals held that a dual-officeholding challenge to the continuing CCA service by an “appointed judge” of the CMCR was “moot” because the President had not yet signed the challenged judge’s CMCR commission at the time the relevant CCA decision was handed down. See *Dalmazzi*, 76 M.J. at 3. As the Petition in *Dalmazzi* explained, though, this analysis was “based upon a factually and legally indefensible application of the wrong doctrine.” Petition for a Writ of Certiorari at 10, *Dalmazzi*, No. 16-961.

“As long as the parties have a concrete interest . . . in the outcome of the litigation, the case is not moot.” *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (internal quotation marks omitted). Petitioners, whose sentences include substantial punishment, unquestionably have such an interest in pursuing the disqualification of judges from the CCA panels that upheld their convictions and sentences. Their appeals are emphatically not moot.

In our view, the Court of Appeals’ concerns more properly sound in *standing* to challenge these judges’ dual participation, *i.e.*, whether the Petitioners could claim a concrete injury arising from their service on the CMCR. See, *e.g.*, *Pashaian v. Eccelston Props., Ltd.*, 88 F.3d 77, 83 (2d Cir. 1996) (discussing standing to seek a judge’s disqualification). But even viewed through the proper doctrinal lens, the Court of

rejected these claims on the merits, that only bolsters the case for this Court’s intervention both in *Dalmazzi* and here. See Petition for a Writ of Certiorari at 13–17, *Dalmazzi*, No. 16-961.

Appeals’ analysis in *Dalmazzi* failed to account for the plain text of the dual-officeholding ban, which applies to military officers who “hold” or “exercise the functions” of a civil office. See 10 U.S.C. § 973(b)(2)(A)(ii).

Whether or not Judges Burton, Celtnieks, Herring, or Mitchell formally “held” the position of “additional judge” of the CMCR before President Obama signed their commissions, there is no question that they “exercise[d] the functions” of that position at the same time that they sat on Petitioners’ CCA panels—by taking the oath of office as CMCR judges; by participating in orders in pending CMCR cases; and by handing down decisions in pending CMCR cases. See Petition for a Writ of Certiorari at 11–12, *Dalmazzi*, No. 16-961.

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Thus, if this Court grants the petition in *Dalmazzi* and reverses or vacates the Court of Appeals’ “mootness” analysis, it should also vacate CAAF’s orders in the Petitioners’ cases—and return these cases to CAAF for further proceedings in light of *Dalmazzi*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN I. VLADECK
Counsel of Record
727 East Dean Keeton St.
Austin TX 78705
(512) 475-9198
svladeck@law.utexas.edu

BRIAN L. MIZER
JOHNATHAN D. LEGG
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762

CHRISTOPHER D. COLEMAN
Defense Appellate Division
Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060

EUGENE R. FIDELL
127 Wall Street
New Haven, CT 06511

Counsel for Petitioners

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