



U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

June 4, 2018

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Dalmazzi v. United States, No. 16-961; Cox v. United States, No. 16-1017;
and Ortiz v. United States, No. 16-1423

Dear Mr. Harris:

These consolidated cases were argued on January 16, 2018. On May 23, 2018, petitioners wrote to advise the Court of a memorandum issued by the United States Court of Military Commission Review (CMCR) suggesting that Judge James Herring continues to serve on the court despite his retirement from the military.

The Department of Defense has confirmed to this Office that Judge Herring retired on August 1, 2017. Judge Herring was placed on the CMCR as an "appellate military judge" within the meaning of 10 U.S.C. 949b(b)(4). That provision states that an appellate military judge may be reassigned from the CMCR if, *inter alia*, he "retires or otherwise separates from the armed forces." 10 U.S.C. 949b(b)(4)(B); see also Regulation for Trial By Military Commission 25-2(c) ("Each appellate military judge assigned to the USCMCR shall remain assigned to the Court unless reassigned, retired, or separated from active duty pursuant to 10 U.S.C. § 949b(b)(4)."). As demonstrated by the briefing in this case, however, there is disagreement about whether Section 949b(b)(4) applies to the appellate military judges who were appointed to the CMCR by the President with the advice and consent of the Senate. See U.S. Br. 29-30; Pet. Reply Br. 15-16. There is thus some dispute about Judge Herring's post-retirement status.

I would appreciate it if you would distribute this letter to the Members of the Court. Thank you for your assistance.

Sincerely,

Noel J. Francisco
Solicitor General

cc: See Attached Service List

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