There are two ways to get to the Supreme Court. Under Article III, a small set of cases qualify for the Court's original jurisdiction, and for "all the other Cases" the Court can hear, there's "appellate Jurisdiction."[1] But Article III never defines this term; that is, it doesn't specify *where* an appeal has to come from.[2] Even so, since *Marbury*,[3] the Court has held that an appeal can't arise from just anywhere. Instead, the "essential criterion" for appellate jurisdiction is that it "revises and corrects the proceedings in a [case] already instituted."[4] And for there to be a "case," there has to have been the exercise of "judicial power."[5]

The difficulty here is that not every entity that looks like or is called a "court" actually exercises "judicial power."[6] Put differently, the old birdwatching adage that when you "see a bird that walks, swims, and quacks like a duck, you call that bird a duck" doesn't carry over to figuring out the sorts of tribunals that can "create cases" for the Court to then directly review on appeal. To be sure, there are some easy examples. Lower federal courts can exercise "judicial power" and thus create cases.[7] The same holds for state courts.[8] But, when it comes to other non–Article III tribunals, the terrain gets murkier. For instance, the Court has ruled that it can take appeals directly from territorial courts or courts for the District of Columbia because they exercise "judicial power."[9] At the same time, the Court has held it cannot take direct appeals from tribunals like the old *Court* of Claims.[10] What exactly separates the mallards from the ducks has vexed federal courts.[11]

Last Term, in *Ortiz v. United States*,[12] the Supreme Court held that the "judicial character and constitutional pedigree"[13] of the Court of Appeals for the Armed Forces (CAAF) permitted the Court to "review

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1 U.S. CONST. art. III, § 2, cl. 2.

2 *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 338 (1816).

3 5 U.S. (1 Cranch) 137 (1803).

4 *Id.* at 175.

5 *E.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 819 (1824).

6 *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1378 (2018) ("[T]his Court has never adopted a 'looks like' test to determine if an adjudication has improperly occurred outside of an Article III court.").

7 *See* Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030–31 (1982).

8 Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 340 (1816).

9 United States v. Coe, 155 U.S. 76 (1894) (territorial courts); Palmore v. United States, 411 U.S. 389 (1973) (District of Columbia Court of Appeals).

10 Gordon v. United States, 117 U.S. 697, 702 (1864).

11 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring); William Baude, Adjudication Outside Article III, at 3–9 (June 12, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3194945 [https://perma.cc/QXB9-92K9].

12 138 S. Ct. 2165 (2018).

13 *Id.* at 2173.

decisions of the CAAF" directly on appeal "even though it is not an Article III court."[14] In so doing, the majority voiced little concern about the Executive's statutory and constitutional entanglement with the military's top court. Unlike state courts, for instance, the Executive must *approve* certain sentences affirmed by the CAAF, and the President can *remove* CAAF judges under broad circumstances.[15] On paper, this seems at odds with core separation of powers principles the Court has developed for what it means to exercise "judicial power"; namely, that judicial decisions must be final, enforceable, and independent.[16] However, these features of the CAAF, while conspicuous in theory, have been rarely if ever exercised in practice. As such, *Ortiz* may stand for the proposition that the mere *specter* of Executive revision, influence, or involvement — without more — will not render an otherwise capable tribunal incapable of exercising "judicial power" outside of Article III.

At first, though, *Ortiz* wasn't about whether the Court could exercise appellate jurisdiction over the CAAF. In fact, prior to *Ortiz*, the Court had already taken nine cases from the military's top court without pausing over its ability to do so.[17] *Ortiz* instead started as a case about Congress's "dual office-holding" ban and Article II's Appointments Clause. The ban was originally enacted in 1870,[18] and its core prohibition remains the law today: unless "otherwise authorized by law," an active-duty military officer typically "may not hold, or exercise the functions of . . . civil office[s]" in the federal government.[19] In 2017, Keanu Ortiz, an Airman First Class in the Air Force, petitioned the Supreme Court that parts of the military's justice system violated this Act.[20]

Ortiz had been convicted by a court-martial for a host of child pornography charges.[21] A panel of the Air Force Court of Criminal Appeals (CCA), the intermediate body between Air Force courts-martial and the CAAF, affirmed his conviction in June 2016.[22] Critically, one panel member — Judge Martin Mitchell — was also serving on the Court of Military Commission Review (CMCR), the appellate tribunal between the Military Commissions and D.C. Circuit.[23] According to Ortiz, the fact that Judge Mitchell, an active-duty Colonel in the Air Force,[24] wore

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[14] *Id.* at 2170.

[15] *See id.* at 2204 (Alito, J., dissenting).

[16] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225–26 (1995); *see also* Miller v. French, 530 U.S. 327, 341–46 (2000).

[17] *Ortiz*, 138 S. Ct. at 2173 n.3 (collecting cases).

[18] Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319.

[19] 10 U.S.C. § 973(b)(2)(A) (2012).

[20] Petition for a Writ of Certiorari, *Ortiz*, 138 S. Ct. 2165 (No. 16-1423).

[21] *See Ortiz*, 138 S. Ct. at 2171.

[22] United States v. Ortiz, ACM 38839, 2016 WL 3681307 (A.F. Ct. Crim. App. June 1, 2016).

[23] *See Ortiz*, 138 S. Ct. at 2171–72; *see also* Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 947–48 (2015) (describing CMCR and its place in the military justice system).

[24] Brief for the Petitioners at 11, *Ortiz*, 138 S. Ct. 2165 (No. 16-1423).

two hats here was illegal twice over, and he was entitled to a new CCA panel because his first one was improperly constituted.[25]

Ortiz's principal argument was a statutory one: Judge Mitchell could not serve as a judge on both the CCA and CMCR under the dual office–holding ban. This claim essentially involved three parts. First, judgeships on the CMCR were "civil offices" under the law.[26] Second, Congress had not otherwise authorized military officers to hold these positions.[27] Third, the remedy for violations of the dual office–holding ban was that the military officer be dismissed from his military service.[28] As such, Judge Mitchell should have been terminated from the CCA once he started on the CMCR.[29] Ortiz also raised a related Appointments Clause argument. CMCR judges, he reasoned, were principal officers, while CCA judges were inferior officers.[30] If the former were allowed to serve with the latter, there would be an unconstitutional functional incompatibility.[31] The government rejected each turn of Ortiz's statutory interpretation,[32] as well as his constitutional argument.[33]

On appeal from the CCA, the CAAF held that the government had the better case on both fronts and denied Ortiz's appeal.[34] The Supreme Court granted certiorari.[35] But ahead of oral argument, University of Virginia Professor Aditya Bamzai sought leave as amicus curiae to argue that the Court couldn't hear the case at all because it lacked both appellate and original Article III jurisdiction to do so.[36]

For Bamzai, the CAAF was effectively a "court" in name only and thus ineligible for the Court's appellate jurisdiction. For constitutional purposes, the CAAF, as an "*Executive* Branch entity,"[37] could not permissibly exercise *judicial* power consistent with the separation of powers.[38] And without an exercise of "judicial power," it follows, there could be

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[25] *Id.* at 49.

[26] *Id.* at 30–34.

[27] *Id.* at 39–42.

[28] *Id.* at 42–49 (discussing common law doctrine of incompatibility).

[29] *Id.* at 49.

[30] *Id.* at 50.

[31] *Id.* at 50–51 (citing problems of undue influence as part of an "obvious incongruity," *id.* at 51).

[32] *See* Brief for the United States at 20, *Ortiz*, 138 S. Ct. 2165 (No. 16-1423) (explaining CMCR judges do not hold "civil offices" because they perform military functions); *id.* at 28 (noting "both assigned and appointed judges hold the same office"); *id.* at 32 (maintaining the statute's savings clause displaces the common law remedy sought by Ortiz).

[33] *Id.* at 38 ("[P]etitioners identify nothing in the text or history of the Appointments Clause, or in this Court's decisions, to support their [argument].").

[34] United States v. Ortiz, 76 M.J. 189, 192–93 (C.A.A.F. 2017).

[35] Ortiz v. United States, 138 S. Ct. 54 (2017) (mem.).

[36] Brief of Professor Aditya Bamzai as Amicus Curiae in Support of Neither Party at 2, *Ortiz*, 138 S. Ct. 2165 (No. 16-1423) [hereinafter Bamzai Brief].

[37] Edmond v. United States, 520 U.S. 651, 664 (1997) (emphasis added); *see also id.* n.2 (maintaining it's "clear that [the CAAF] is within the Executive Branch").

[38] Bamzai Brief, *supra* note 36, at 14–22.

no "case already instituted" and, therefore, the "essential criterion" for appellate jurisdiction would be missing.[39] On the same logic, conventional wisdom holds that the Court cannot take direct appeals from executive branch administrative agencies, even though many have "judges" that adjudicate claims.[40] Likewise, noted Bamzai, the Court has refused to take certain habeas petitions or direct appeals from some military commissions.[41] In short — just as not every bird that quacks is a duck — not every entity that *adjudicates* exercises *judicial power*.

On this view, with appellate jurisdiction unavailable, the only way to review matters from the CAAF would be through original jurisdiction. But the CAAF does not consider any matters (including Ortiz's) that qualify under Article III's limited definition of original jurisdiction.[42] And, since *Marbury*, it is black letter law that Congress cannot expand the Court's original jurisdiction by statute.[43] As such, according to Bamzai, the statute that purported to give the Court jurisdiction to review the CAAF directly was unconstitutional because it would amount to an impermissible expansion of the Court's original jurisdiction.[44] With the original and appellate roads closed, the Court therefore lacked Article III jurisdiction to hear any case directly from the CAAF.

The Supreme Court disagreed. It affirmed the CAAF and, in so doing, ruled that it had Article III appellate jurisdiction over the case.[45] Writing for the Court, Justice Kagan[46] held that "the judicial character and constitutional pedigree of the court-martial system enable this Court . . . to review the decisions of the court sitting at its apex."[47]

To get there, the Court focused on two features of the CAAF. First, the structure of the military justice system "resemble[s] those of other courts whose decisions" the Court reviews.[48] Procedural protections mirror those for civilians; judgments are given res judicata effect and counted for the Double Jeopardy Clause; and federal law governs its proceedings.[49] Second, the nature of courts-martial proceedings has been judicial since before the Founding.[50] "Throughout . . . history . . . courts-martial have operated as instruments of military justice."[51]

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[39] *Id.* at 2–3.

[40] *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 263 n.5 (1965).

[41] Bamzai Brief, *supra* note 36, at 17, 20–21.

[42] *Ortiz*, 138 S. Ct. at 2173; *see also* U.S. CONST. art. III, § 2, cl. 2.

[43] 5 U.S. (1 Cranch) 137, 174–76 (1803).

[44] Bamzai Brief, *supra* note 36, at 3.

[45] *Ortiz*, 138 S. Ct. at 2170.

[46] Justice Kagan was joined by the Chief Justice and Justices Kennedy, Thomas, Ginsburg, Breyer, and Sotomayor.

[47] *Ortiz*, 138 S. Ct. at 2173.

[48] *Id.* at 2174.

[49] *Id.*

[50] *Id.* at 2175–76 (surveying case law and commentators' assessments of military courts).

[51] *Id.* at 2175.

In light of this, Justice Kagan concluded that the court-martial system "stands on much the same footing" as territorial courts or D.C. courts.[52] All three were established under an "expansive constitutional delegation" to Congress, share longstanding historical roots, and occupy fundamentally judicial roles.[53] Surveying Bamzai's argument, the Court failed to identify "a powerful reason to divorce military courts from [those] courts when it comes to defining our appellate jurisdiction."[54] Instead, the Court held that here "three constitutionally rooted courts, ending with the CAAF, rendered inherently judicial decisions," so to review the final one would fall within its appellate jurisdiction.[55]

The Court then briefly turned to the merits, where it dispensed with Ortiz's statutory and constitutional arguments. The majority held that Congress had authorized Judge Mitchell to hold two offices and that Ortiz's Appointments Clause functionalist argument was fatally novel.[56]

Justice Thomas concurred and wrote separately to explain how the Court adhered to the "Founders' understanding of judicial power — specifically, the distinction they drew between public and private rights."[57] In particular, "[m]ilitary courts 'have long been understood to exercise "judicial" power' because they 'act upon core private rights to person and property'" and have done so since the Founding.[58] Because the CAAF fits this historical mold, "the statute giving this Court appellate jurisdiction over its decisions does not violate Article III."[59]

Justice Alito dissented.[60] He argued that the Court lacked jurisdiction to hear *Ortiz* and did so over three main points. First, executive adjudications, like those in the CAAF, "do not give rise to 'cases' . . . because officers of the Executive Branch cannot lawfully be vested with judicial power."[61] Second, the CAAF is meaningfully different from non–Article III tribunals like territorial or D.C. courts.[62] While those tribunals all exercise judicial power on behalf of another sovereign, military courts lack a similar source of authority because the *federal* judicial power is vested exclusively in the federal judiciary.[63] Third, even under what Justice Alito labeled the Court's "looks like test,"[64] the CAAF failed

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[52] *Id.* at 2178; *see also id.* at 2176–80.
[53] *Id.* at 2178.
[54] *Id.*
[55] *Id.* at 2180.
[56] *Id.* at 2181–84.
[57] *Id.* at 2184 (Thomas, J., concurring).
[58] *Id.* at 2186 (quoting Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 576 (2007)). For a discussion of public and private rights, see Nelson, *supra*, at 565–93.
[59] *Ortiz*, 138 S. Ct. at 2189 (Thomas, J., concurring); *see also id.* at 2186.
[60] Justice Alito was joined by Justice Gorsuch.
[61] *Ortiz*, 138 S. Ct. at 2192 (Alito, J., dissenting); *see id.* at 2193–95.
[62] *Id.* at 2196; *see also id.* at 2196–98.
[63] *Id.* at 2196; *see also* U.S. CONST. art. III, § 1.
[64] *Ortiz*, 138 S. Ct. at 2203 (Alito, J., dissenting).

on the majority's own terms: unlike other "courts," the President can remove judges for cause; the Judge Advocate General can order review of cases; and the Executive needs to approve sentences involving death or dismissal.[65] In short, "[t]he CAAF is what we have always thought it to be: an agent of executive power to aid the Commander in Chief."[66]

Following *Ortiz*, what's clear is that the Court can take direct appeals from the CAAF. Beyond that, though, the case's broader implications may stem from where the Court stayed relatively *silent*. As the below spells out, there are at least two structural features of the CAAF that seem suspect. First, the Executive likely has both statutory *and* constitutional authority to alter CAAF judgments. Second, the President may be able to influence the CAAF through his broad ability to remove its judges. These would seem to be red flags because the Court has long held that for a tribunal to be able to exercise "judicial power," it *must* possess certain attributes; namely, the ability to render final, enforceable, and independent decisions. But these issues were given little airtime by the Court, let alone treated as "powerful reasons" to treat the CAAF differently. Making sense of this silence may support a broader proposition: following *Ortiz*, the mere *specter* of executive revision, influence, or involvement — without more — will not bar an otherwise capable tribunal from exercising judicial power outside of Article III.

Through *Hayburn's Case*[67] and its progeny, the Court has underscored that separation of powers principles require there to be certain prerequisites for the exercise of "judicial power."[68] A tribunal must possess these attributes in order to be vested with judicial power.[69] And if any of the following are absent, then that tribunal can neither create a "case" nor be reviewed directly on appeal by the Supreme Court.

First, judicial decisions must be final.[70] Judicial power is "the power, not merely to rule on cases, but to *decide* them"[71] and thus promulgate judgments that are "*final* and *conclusive* upon the rights of the parties."[72] As a result, neither political branch may revise, or compel the revision of, a final judicial decision.[73] This is the reason the Court could not take direct appeals from the old Court of Claims; there, the Secretary of the Treasury could revise its judgments and, with an essential trait (finality) lacking, the Court of Claims could not be vested with judicial

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[65] *Id.* at 2204–05.
[66] *Id.* at 2205.
[67] 2 U.S. (2 Dall.) 409 (1792).
[68] *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225–26 (1995).
[69] *See generally* William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1814–36 (2008).
[70] *See* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990).
[71] *Plaut*, 514 U.S. at 218–19.
[72] Gordon v. United States, 117 U.S. 697, 702 (1885) (opinion of Taney, C.J.) (emphases added).
[73] *See Plaut*, 514 U.S. at 225–26 (collecting cases descending from *Hayburn's Case*).

power.[74] Second, judicial decisions must be enforceable.[75] "Judgments within the powers vested in courts . . . may not lawfully be . . . refused faith and credit by another Department of Government."[76] This because without "faith and credit" by the political branches, judicial decisions risk becoming recommendations, in violation of the general prohibition against advisory opinions.[77] Third, judicial decisions must be made independently.[78] No branch may "possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers."[79] This is especially so for the judicial power, which is designed to be wholly insulated from political influences or actors.[80]

The CAAF does not obviously meet these criteria. As a product of its design as well as its place within the military, the CAAF's relationship with the Executive appears at tension with these principles on at least two fronts. For one, the Executive likely has the statutory and constitutional power to affect the *finality* and *enforceability* of CAAF judgments. What's more, the President can impact the *independence* of CAAF judgments through his broad removal authority over its judges. The upshot here is that these features together raise notable questions about the CAAF — questions largely not addressed by the Court.

The Uniform Code of Military Justice (UCMJ) gives the Executive statutory authority to affect CAAF judgments. Article 76 of the UCMJ provides that the President, the Secretary of Defense, or a relevant subordinate must *approve* any death sentence or dismissal before it can go into effect.[81] On its face, this arrangement would seem at odds with the principles of finality and enforceability that make clear "Congress cannot vest review of the decisions of Article III courts," or any tribunal exercising judicial power, "in officials of the Executive Branch."[82] For Justice Kagan, this was not so because Article 76 mirrors the pardon power: much as the President can commute a punishment after a judgment has been rendered, without throwing into question the underlying tribunal's ability to exercise "judicial power," he can do so here by way of statute without altering the nature of the CAAF's proceedings.[83]

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[74] *Gordon*, 117 U.S. at 702–03.

[75] Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1034–35 (2004).

[76] Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

[77] *Cf.* Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1002–03 (1923).

[78] *See* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

[79] Mistretta v. United States, 488 U.S. 361, 409 (1989) (quoting THE FEDERALIST NO. 48, *supra* note 78, at 305 (James Madison)).

[80] *See* Thomas G. Krattenmaker, Commentary, *Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional*, 70 GEO. L.J. 297, 302–03 (1981).

[81] 10 U.S.C. §§ 871(a)–(b) (2012); *see* Denedo v. United States, 66 M.J. 114, 120 (C.A.A.F. 2008).

[82] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995) (describing *Hayburn's Case*); *see also* Hayburn's Case, 2 U.S. (2 Dall.) 409, 413 (1792) (opinion of Iredell, J. and Sitgreaves, D.J.).

[83] *Ortiz*, 138 S. Ct. at 2180 n.9; *see also* Schick v. Reed, 483 F.2d 1266, 1269 (D.C. Cir. 1973).

But the analogy to the pardon power is not one-to-one. Most obviously, the default rule is different: while the civilian justice system can operate without presidential involvement, and the President may *intervene* with a pardon or commutation, aspects of the military's system cannot come into effect *without* Executive action. The Court has taken issue with this order of operations before. "[I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render."[84] Put differently, when court judgments *depend* on Executive approval in order to *become* final and enforceable, they resemble recommendations or advisory opinions rather than binding judgments.[85] And for the most important sentences issued by military courts, the President seems to have the final word on the outcomes as well as the substantive judgments themselves.[86]

Article II also gives the President inherent, and perhaps even exclusive, authority to affect judgments rendered by the CAAF. The President has inherent powers over military justice,[87] which he shares with Congress.[88] For much of the nation's history, the President designed the courts-martial system on his Article II authority alone and exercised wide-ranging discretion over the finality of judgments.[89] The President also possesses core Commander-in-Chief powers that are *exclusive* under Article II and cannot be burdened by other branches.[90] These powers naturally can extend to issues of military justice and discipline.[91]

Returning to the CAAF, Article 76 takes on an added dimension — one not explored by the Court. The provision also stipulates that the finality of CAAF judgments *in general* is "subject . . . to action upon . . . the authority of the President."[92] Legislative history reveals that this phrase was *added* to account for the President's residual constitutional authority here.[93] Should the President, on Article II grounds, eventually

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[84] Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

[85] *See* Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth., 30 F.3d 1510, 1513 (D.C. Cir. 1994) (collecting Court precedent for this proposition).

[86] *See* Runkle v. United States, 122 U.S. 543, 557 (1887) ("[T]he action required of the President [in reviewing sentences] is judicial in its character, not administrative.").

[87] William F. Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U. L. REV. 861, 862–63 (1959).

[88] Loving v. United States, 517 U.S. 748, 767–68 (1996).

[89] *See, e.g.*, Swaim v. United States, 165 U.S. 553, 564–66 (1897); Kurtz v. Moffitt, 115 U.S. 487, 503–04 (1885); United States v. Eliason, 41 U.S. (16 Pet.) 291, 301 (1842).

[90] *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (opinion of Chase, C.J.).

[91] *E.g.*, Swaim v. United States, 28 Ct. Cl. 173, 221 (1893) ("Congress can not take away from the President the supreme command. . . . The power to command depends upon discipline, and discipline depends upon the power to punish . . . ."), *aff'd*, 165 U.S. 553.

[92] 10 U.S.C. § 876 (2012).

[93] *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong. 1222–23 (1949).

act upon a judgment rendered by the CAAF, he would thus be doing so in Jackson Category One; that is, with "his authority . . . at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[94] To understand the importance of this for the CAAF, consider a variation of a hypothetical raised by Chief Justice Roberts at oral argument: During a war, the Army's best sharpshooter is sentenced to six months in the brig for bad conduct and the CAAF affirms the judgment.[95] There is a tenable argument that the President, operating at the zenith of his Article II authority, can revise or set aside this sentence as Commander in Chief. And if so, it's hard to see how the CAAF could ever be capable of exercising judicial power because the President, by *constitutional design*, would have the innate authority to curb its ability to deliver final and enforceable judgments.

The President can also affect the judgment of the CAAF from a different angle: he has the power to remove judges for "neglect of duty; misconduct; or mental or physical disability."[96] The Court has characterized these specific grounds as "very broad," sustaining removals for "any number of actual or perceived transgressions"[97] — a reading that would receive its broadest gloss here because it concerns the armed forces.[98] This dynamic, at minimum, is a stark contrast to Article III's salary and tenure protections.[99] What's more, it raises constitutional issues because the desire of members operating under one branch to avoid being removed by those of another "creates the here-and-now subservience to [the other] that raises separation-of-powers problems."[100]

For judges, this sort of structural pressure to please the Executive in an effort to stay employed directly conflicts with the *independence* necessary to exercise judicial power. Indeed, the fact that members of a tribunal can be removed by the Executive may be powerful evidence that the tribunal never exercised judicial power in the first place. As Justice Scalia noted in his concurring opinion in *Freytag*[101]: "How anyone with these characteristics," such as being removable by the President, "can exercise *judicial* power independent of the Executive Branch is a complete

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94 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

95 *See* Transcript of Oral Argument at 57–58, *Ortiz*, 138 S. Ct. 2165 (No. 16-1423), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-961_768b.pdf [https://perma.cc/B5MJ-WJK4].

96 10 U.S.C. § 942(c).

97 Bowsher v. Synar, 478 U.S. 714, 729 (1986).

98 *See* Loving v. United States, 517 U.S. 748, 768 (1996).

99 *E.g.*, James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1228–30 (2007). Such power is not unprecedented, though, for non–Article III tribunals. *See* Shurtleff v. United States, 189 U.S. 311, 317 (1903) (upholding presidential removal power over territorial judges).

100 *Bowsher*, 478 U.S. at 727 n.5 (quoting Synar v. United States, 626 F. Supp. 1374, 1392 (D.D.C. 1986)); *see also* Buckley v. Valeo, 424 U.S. 1, 120 (1976) (per curiam).

101 Freytag v. Comm'r, 501 U.S. 868 (1991).

mystery."[102] Nevertheless, following *Ortiz*, the President, as Chief Executive, retains "very broad" latitude to remove judges now capable of exercising federal *judicial* power, thereby implicating the CAAF's ability to render fully independent judgments.[103]

The Court, though, never discussed the removal issue. Nor did it address the Article II argument. And it quickly approved of the President's statutory role in CAAF judgments. But if the above holds any water, there are nonetheless real red flags here. What to make of the Court's relative silence about them will shape *Ortiz*'s future impact.

On the one hand, it's possible the Court did not address these issues and *Ortiz* is best read as leaving them for another day. Justice Thomas did so expressly.[104] But this would put the Court in a somewhat awkward position: for instance, should the President invoke his Article II powers to impact a CAAF judgment, and should a future majority agree he can do so, the Court would have to decide whether the CAAF *then* stopped being able to exercise "judicial power," or if in fact it never could do so to begin with. On the other hand, reaching these questions might be logically necessary to get to *Ortiz*'s holding. As a strictly formal matter, it would seem necessary for each Justice to at least implicitly maintain that neither legislation nor constitutional provision prevented the CAAF from possessing each prerequisite for the exercise of judicial power explained above. But that's a lot to infer from very little text.

One proposition seems to thread the needle. Recall that the President has never removed a CAAF judge for cause nor revised, on Article II grounds, a decision delivered by the CAAF. As such, *Ortiz* may stand for the view that the mere *specter* of Executive revision, influence, or involvement — without more — will not render an otherwise capable tribunal incapable of exercising judicial power. What constitutes "something more" will likely develop over future applications.[105] In the meantime, the CAAF is a duck under Article III, eligible for direct appellate review; *Ortiz* nonetheless offers limited aid for those figuring out what it really means to walk, swim, and quack in the constitutional sense.

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[102] *Id.* at 912 (Scalia, J., concurring in part and concurring in the judgment) (alterations and internal quotation marks omitted); *cf.* Kuretski v. Comm'r, 755 F.3d 929, 932, 944 (D.C. Cir. 2014).

[103] The design of the CAAF may mitigate some of this concern. First, Congress made CAAF judges civilians to create some separation between them and the Commander in Chief. *See* Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 UCLA L. REV. 1, 4 n.1 (1970). Second, doctrines of unlawful command influence would prohibit any attempt to improperly affect a court-martial proceeding. *See* Stephen I. Vladeck, Response, *Unlawful Command Influence and the President's Quasi-Personal Capacity*, 96 TEX. L. REV. ONLINE 35, 36–37 (2018).

[104] *Ortiz*, 138 S. Ct. at 2184 n.1 (Thomas, J., concurring).

[105] For instance, we now know that Executive *approval* of judgments is permissible while *revision* of those judgments is not. *Compare id.* at 2180 n.9 (majority opinion), *with* Gordon v. United States, 117 U.S. 697, 703 (1885). Likewise, it seems that the Court is willing to tolerate a degree of for-cause removal for a tribunal's judges. But what about tribunals like the CMCR, whose judges can be freely reassigned by the Secretary of Defense? *See* 10 U.S.C. § 949b(b)(4) (2012); Brief for the United States, *supra* note 32, at 41.