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# *ORTIZ* AND THE PROBLEM OF INTRABRANCH LITIGATION

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## INTRODUCTION

In September 2017, the Supreme Court granted certiorari in *Ortiz v. United States*, a case challenging the appointment of a military judge.[1] The case, which had come to the Court on appeal from the Court of Appeals for the Armed Forces (CAAF), was quickly complicated by an amicus brief arguing that the Court lacked jurisdiction to hear the appeal.[2] In his brief, Professor Aditya Bamzai argued that, because the Court's appellate jurisdiction extends only to appeals of existing cases, the Court had no authority to hear a direct appeal from the CAAF, an Article I court located in the executive branch.[3] The Court ultimately determined that appeals from the CAAF are within its jurisdiction, but the Justices allotted time for Bamzai to present at oral argument[4] and devoted nine pages to the jurisdictional question in their majority opinion.[5] As Justice Kagan remarked when announcing the decision, Bamzai's arguments "provoked some good and hard thinking on all sides."[6]

This good, hard thinking about the Court's appellate jurisdiction raises another fundamental question, albeit not one directly at issue in *Ortiz*: Does a government appeal from the CAAF represent a justiciable case or controversy under Article III of the Constitution? This Comment analyzes the Court's jurisprudence on Article III's adverseness requirement, arguing that government appeals from the CAAF may represent a

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1. See 138 S. Ct. 54 (2017) (granting certiorari); see also Petition for a Writ of Certiorari at 1, Ortiz v. United States, 138 S. Ct. 2165 (2018) (No. 16-1423), 2017 WL 2376965.

2. Dan Maurer, Are Military Courts Really Just Like Civilian Criminal Courts?, Lawfare (July 13, 2018), https://www.lawfareblog.com/are-military-courts-really-just-civilian-criminal-courts [https://perma.cc/8PUM-CUA8].

3. See Brief of Professor Aditya Bamzai as Amicus Curiae in Support of Neither Party at 2–4, *Ortiz*, 138 S. Ct. 2165 (No. 16-1423), 2017 WL 5495453 [hereinafter Bamzai Brief].

4. See Transcript of Oral Argument at 31–45, *Ortiz*, 138 S. Ct. 2165 (No. 16-1423), 2018 WL 1368613.

5. *Ortiz*, 138 S. Ct. at 2172–80.

6. Mark Walsh, A "View" from the Courtroom: "Some Good and Hard Thinking on All Sides", SCOTUSblog (June 22, 2018), https://www.scotusblog.com/2018/06/a-view-from-the-courtroom-some-good-and-hard-thinking-on-all-sides [https://perma.cc/JR8D-V6GM].

form of non-justiciable intrabranch litigation. Part I provides background on the structure of the CAAF and introduces the problem posed by government appeals from this tribunal to the Supreme Court. Part II explores the Court's jurisprudence, as well as current scholarship, on intrabranch litigation and the requirement of adverse parties. Finally, Part III returns to *Ortiz* to examine how the Court's recent characterization of the military justice system may reconcile the doctrinal and theoretical issues presented in the preceding sections. Although the Court in *Ortiz* did not address this broader justiciability issue, the majority's focus on the judicial nature of the CAAF provides a path to finding a justiciable controversy in government appeals from the CAAF. Moreover, the decision in *Ortiz* suggests that the Court is increasingly willing to approach questions of military justice from a functionalist perspective, undermining the unitary executive theory and minimizing the importance of original understanding when it comes to this tribunal.

## I. THE CAAF AND SUPREME COURT REVIEW

### A. *Article I Status*

The Court of Appeals for the Armed Forces, formerly known as the Court of Military Appeals,[7] was established in 1950 with the passage of the Uniform Code of Military Justice (UCMJ).[8] The CAAF is the apex court of the military justice system, hearing appeals from the Courts of Criminal Appeals, which in turn review court-martial proceedings from each branch of the armed forces.[9] In 1968, Congress formally established the CAAF as an Article I court located "for administrative purposes only" within the Department of Defense,[10] remarking on the need to clearly distinguish the court from the executive branch.[11] As the Senate report on the bill explained, the change was intended to counter "contentions that the court . . . is an instrumentality of the executive branch."[12] Likewise, testimony before the House by the court's Chief Judge explained that the

7. Defense Conversion, Reinvestment, and Transition Assistance Amendments of 1994, Pub. L. No. 103-337, § 924, 108 Stat. 2663 (codified in scattered titles of the U.S.C.).

8. Uniform Code of Military Justice, Pub. L. No. 81-506, art. 67(a)(1), 64 Stat. 107, 129 (1950) (codified at 10 U.S.C. §§ 801–946 (2018)).

9. 10 U.S.C. §§ 866–867. Court-martial proceedings, as distinguished from criminal trials, are internal military disciplinary trials for violations of military law. See Joint Serv. Comm. on Military Justice, Manual for Courts-Martial, United States, at I-1 (2019 ed.), https://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2019.pdf [https://perma.cc/K6BE-V3RK]. As the Manual for Courts-Martial explains, "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." Id.

10. U.S. Court of Military Appeals Establishment Act, Pub. L. No. 90-340, 82 Stat. 178 (1968) (codified at 10 U.S.C. § 941).

11. See, e.g., S. Rep. No. 90-806, at 2 (1967).

12. Id.

establishment of the CAAF as an Article I tribunal was necessary to "increase[] its standing and prestige in the judicial hierarchy and, by implication, give[] it the full powers of a U.S. court."[13]

Article I courts, which fall within the broader category of legislative courts established by Congress outside of the Article III judicial system, adjudicate a wide range of issues, including taxation, bankruptcy, and military discipline.[14] Military courts, despite exclusively adjudicating issues related to private rights, have traditionally been exempt from the requirements of Article III based on the constitutional separation of military and civilian justice and the unique administrative concerns of military discipline.[15] Because of the unique nature of military justice, Article III courts were considered an inappropriate forum for deciding the matters of military discipline typically before a court-martial.[16] As the Court noted in an early discussion of the constitutional foundations of military justice, the system of military discipline is rooted in Articles I[17] and II,[18] not the judicial power of Article III; "indeed, . . . the two powers are entirely independent

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13. H.R. Rep. No. 96-1480, at 3 (1968).

14. See William Baude, Adjudication Outside Article III, 133 Harv. L. Rev. 1511, 1558 (2020). Historically, the Court has permitted matters involving "public rights," which were seen as involving rights belonging "to the public as a whole," to be adjudicated outside of Article III courts, as compared to matters of private right, which involve only the interests of the individuals party to the litigation and are traditionally resolved in Article III tribunals. See Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 566 (2007). The distinction between public and private rights has evolved over time, but one consensus has been that the political branches have power to determine how issues of public right are to be resolved, whereas matters of private right require an exercise of judicial power that cannot be vested outside of an Article III court. See id. at 568–75. However, the Court has recognized a number of exceptions to this requirement, permitting non-Article III territorial courts, D.C. courts, and military courts to resolve private rights issues. See N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63–76 (1982). Unlike matters of public right, which do not require an exercise of judicial power, private rights may be dealt with in these non-Article III tribunals because they represent an exercise of judicial power that is exempt from the requirements of Article III. See Nelson, supra, at 575–76.

15. See Nelson, supra note 14, at 576 ("[T]he nineteenth-century Supreme Court understood Article III to address only the *civilian* judicial power."); see also Stephen I. Vladeck, Military Courts and Article III, 103 Geo. L.J. 933, 939–50 (2015) (describing the philosophical, legal, and remedial justifications for separating the military justice system from civilian Article III courts).

16. See James E. Pfander, Article I Tribunals, Article III Courts, and the Judicial Power of the United States, 118 Harv. L. Rev. 643, 754 (2004) ("Courts-martial were not seen as exercising the judicial power of civilian courts; they were creatures of Congress and the military . . . ."). Whereas territorial courts were historically allowed to operate outside of Article III based on the lack of federal rights to be adjudicated, see id. at 706–15, or Congress's police powers over territorial jurisdiction, see Vladeck, supra note 15, at 970–73, courts-martial were seen at the Founding as necessarily operating outside of the civilian justice system. See Pfander, supra, at 716.

17. U.S. Const. art. I, § 8 ("The Congress shall have Power . . . [t]o make Rules for the Government and Regulation of the land and naval Forces . . . .").

18. Id. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . .").

of each other."[19] The Supreme Court has long maintained this view, explaining that "[t]he need . . . for a special and exclusive system of military justice[] is too obvious to require extensive discussion."[20]

### B. *Supreme Court Review*

In 1983, Congress passed the Military Justice Act, which provides for discretionary Supreme Court review of CAAF decisions.[21] The legislative history of the Act reveals that, in providing for Supreme Court review, Congress explicitly intended to allow the government, rather than only the servicemember, to appeal adverse rulings from the CAAF to an Article III court.[22] This decision was motivated in part by concerns that servicemembers had access to judicial review through collateral habeas attack, but the government had no similar mechanism to challenge CAAF decisions.[23] Further concern that the CAAF was operating as an independent judicial body without Supreme Court supervision or Presidential oversight also drove Congress to act.[24] As the Senate report noted, the CAAF had "demonstrated a willingness to strike down provisions of the Manual for Courts-Martial and departmental regulations."[25] The President's only recourse in these instances was to seek an amendment of the relevant rule or statute, which created a problem of executive control.[26] By granting the executive branch a path to Supreme Court review, Congress took what it believed to be a "logical step in the evolution of the military justice system," furthering "the rights of servicemembers, the prerogatives of commanders, and the public perception of the fairness and effectiveness of the military justice system."[27]

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19. Dynes v. Hoover, 61 U.S. (20 How.) 65, 78–79 (1857); see also Vladeck, supra note 15, at 953 (explaining that these constitutional bases for separating military justice from Article III adjudication "only became more ingrained in the Court's jurisprudence over time," becoming "especially pronounced after World War II").

20. Chappell v. Wallace, 462 U.S. 296, 300 (1983).

21. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, 1406 (codified in scattered titles of the U.S.C.).

22. See S. Rep. No. 98-53, at 8 (1983).

23. See id. at 9 ("[T]he accused, but not the government, may initiate actions involving military justice issues which eventually might gain the Supreme Court's review. It is the committee's view that is an unsatisfactory way to manage a system of judicial review.").

24. See id. ("There is no other agency of government whose regulations can be ruled to be unconstitutional by a judicial body that is not subject to review by the Supreme Court.").

25. Id.

26. See id. ("[T]he Court . . . can render a decision . . . interpreting a rule or statute in a manner that the President, on an issue vital to military discipline, might consider inconsistent with the intent of Congress or the views of the Supreme Court, but he could not obtain Supreme Court review.").

27. Id. at 32–33. The House report indicates similar concerns about efficiency, command control, and legal expertise in the CAAF. H.R. Rep. No. 98-549, at 13 (1983).

### C. *The* Edmond *Decision*

A few years later, the Supreme Court characterized the CAAF in a way that contradicts the legislative history of both the Military Justice Act and the CAAF's establishment as an Article I court. In *Edmond v. United States*, a servicemember challenged the constitutionality of the appointment of members of an intermediate military court, which turned on whether the intermediate judges were principal or inferior officers.[28] Because the CAAF was required to review certain cases from the intermediate tribunal and had the power to reverse its decisions, the intermediate judges were found to be inferior officers.[29] In reaching this conclusion, the Court determined that the CAAF was an "Executive Branch entity" with the power to render final decisions on behalf of the United States.[30] Quoting the UCMJ, the Court explained that "[a]lthough the statute does not specify the court's 'location' for nonadministrative purposes, other provisions . . . make clear that it is within the Executive Branch."[31] This reading presents a sharp contrast with the legislative history of the UCMJ; in fact, the specification that the court was "established under article I . . . and located for administrative purposes only in the Department of Defense," was apparently intended to prevent the exact interpretation the Court gave to this provision.[32]

The Court's characterization of the CAAF as an executive branch entity in *Edmond* raises an interesting question about the nature of military justice and presidential control. Given that the CAAF is located squarely within the executive branch and its decisions are final, any appeal brought by the Solicitor General from the CAAF appears to present an instance of intrabranch litigation, which has historically been barred under Article III's case-or-controversy requirement.[33] In the next Part, this Comment

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28. See 520 U.S. 651, 658–66 (1999).

29. See id. at 664–66.

30. Id. at 664–65. The Court emphasized the fact that the intermediate court could not render a final decision against the wishes of the CAAF, characterizing the members of the CAAF as "Executive officers" who oversaw and implemented the decisions of the intermediate military tribunal. See id. ("What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.").

31. Id. at 664 n.2 (quoting 10 U.S.C. § 941 (1994)).

32. See U.S. Court of Military Appeals Establishment Act, Pub. L. No. 90-340, 82 Stat. 178 (1968) (codified at 10 U.S.C. § 941 (2018)); S. Rep. No. 90-806, at 2 (1967) (explaining that these changes in the statutory text were "intended to counter contentions that the court is an instrumentality of the executive branch or . . . an administrative agency within the Department of Defense").

33. See infra notes 50–70 and accompanying text. While the Court does not exercise its appellate jurisdiction over the CAAF frequently, the question is not an entirely theoretical one. Since the passage of the Military Justice Act of 1983, the Supreme Court has granted certiorari in ten appeals from the CAAF, three of which were appeals brought by the government after the CAAF found in favor of the servicemember. See Ortiz v. United States, 138 S. Ct. 2165 (2018); United States v. Denedo, 556 U.S. 904 (2009); Clinton v. Goldsmith, 526 U.S. 529 (1999); United States v. Scheffer, 523 U.S. 303 (1998); *Edmond*, 520 U.S. 651;

explores the doctrinal and theoretical underpinnings of the bar on intrabranch litigation to better understand the constitutional implications of government appeals from the CAAF.

## II. THE *MUSKRAT* PROBLEM

### A. *The Adversarial Nature of Cases and Controversies*

At the heart of the problem raised by government appeals from the CAAF is the case-or-controversy requirement of Article III, which limits the judicial power to justiciable disputes between adverse parties.[34] The Court articulated this requirement in *Muskrat v. United States*,[35] explaining that Article III "implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication."[36] The Court expounded on the Article III adverseness requirement more than fifty years later in *Flast v. Cohen*, which involved a taxpayer's constitutional challenge to the use of federal funds to finance religious schools.[37] Reading the Case or Controversy Clause as a limit on both the ability of federal courts to act on non-adversarial questions and the role of courts within the constitutional separation of powers,[38] the Court treated the adverseness requirement as an issue of constitutional standing.[39] The requirement of "concrete adverseness," it reasoned, "sharpens the presentation of issues upon which the court so largely depends."[40] Ultimately, the taxpayers were found to have standing in part because they would contest the issue "with the necessary adverseness," allowing the case to be "pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution."[41]

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Loving v. United States, 517 U.S. 748 (1996); Ryder v. United States, 515 U.S. 177 (1995); Davis v. United States, 512 U.S. 452 (1994); Weiss v. United States, 510 U.S. 163 (1994); Solorio v. United States, 483 U.S. 435 (1987). Notably, in the twenty years preceding *Ortiz*, the Court only heard appeals brought by the government.

34. See U.S. Const. art. III, § 2, cl. 1.

35. 219 U.S. 346, 348–51 (1911).

36. Id. at 356–58. The plaintiffs had sued under a statute that enabled Native Americans to challenge the constitutionality of certain land allocation laws, but because the claimants asserted only a statutory right to challenge the law, rather than a right to property or compensation arising from a wrong by the government, the United States had "no interest adverse to the claimants," despite being named as a defendant. Id. at 361–62.

37. 392 U.S. 83 (1968).

38. See id. at 95.

39. See id. at 101 ("[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.").

40. Id. at 99 (internal quotation marks omitted) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

41. Id. at 106.

More recently, the Court suggested that adverseness may be a prudential justiciability requirement, rather than a constitutional one. Quoting the same language as *Flast*, the majority in *United States v. Windsor* explained that "[e]ven when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends.'"[42] Facing arguments that the government's refusal to defend the Defense of Marriage Act eliminated the adverse interests of the government and a taxpayer who was denied a refund under the Act, the Court determined that adverseness was a "judicially self-imposed limit" that could be satisfied by the willingness of an amicus curiae to defend the Act in the government's place.[43] Justice Scalia, in dissent, objected to the notion that a third party could ensure sufficiently adversarial presentation of the issues in otherwise friendly litigation, arguing that "the existence of a controversy is not a 'prudential' requirement that we have invented, but an essential element of an Article III case or controversy."[44]

With this background, government appeals to the Supreme Court from the CAAF present an interesting case study in adverseness. While adverseness certainly exists in an initial court-martial proceeding, a CAAF decision in favor of the servicemember represents a final decision on behalf of the executive branch,[45] bringing the interests of the servicemember and the executive into accord and eliminating any "case or controversy" that might exist between the two parties.[46] An argument could be made that, under *Windsor*, the adverseness requirement is prudential and was waived by Congress through the deliberate provision for government appeals from the CAAF under the Military Justice Act,[47] eliminating any Article III concern. Likewise, one could argue that although the conflict between the military justice system—as represented by the CAAF—and the servicemember has ceased to exist, the Solicitor General's intervention represents an ongoing conflict between the interests of the servicemember and the United States government.

But the adverseness issue runs much deeper than the relationship of the servicemember and the military, raising unique separation of powers concerns that override both of these counterarguments. For the Solicitor General to appeal a decision of the CAAF, the Department of Justice is

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42. 570 U.S. 744, 760 (2013) (quoting *Baker*, 369 U.S. at 204).

43. See id. at 757.

44. Id. at 786 (Scalia, J., dissenting).

45. See supra notes 28–32 and accompanying text.

46. Cf. Comm'r v. Liberty Bank & Tr. Co., 59 F.2d 320, 322 (6th Cir. 1932) (raising the question of whether a justiciable case or controversy existed in suits by the Commissioner of Internal Revenue to challenge administrative judgments of the Board of Tax Appeals).

47. See Bennett v. Spear, 520 U.S. 154, 162 (1997) ("[U]nlike their constitutional counterparts, [prudential justiciability requirements] can be modified or abrogated by Congress."); supra note 22 and accompanying text.

effectively required to bring a case in federal court challenging the final determination of another executive branch entity, adding an interesting wrinkle to the *Muskrat* problem.[48] Government appeals from the CAAF therefore present a particular adverseness problem known as intrabranch litigation, in which a court is asked to a adjudicate a dispute arising between two entities within a single branch of government. As the next section explores, allowing executive appeals from the final decision of another executive branch entity undermines the concept of the unitary executive and would seem to violate the Court's prior holdings that "no person may sue himself."[49]

### B. *The Justiciability of Intrabranch Litigation*

Government appeals from the CAAF, which require one member of the executive branch to bring a suit challenging the final determination of another executive branch official, represent an intrabranch conflict, giving rise to a particularly complicated instance of non-adversarial presentation. The Supreme Court has addressed the justiciability of executive challenges to executive action several times, beginning with *Hayburn's Case*, which arose from a statute providing pension benefits to veterans of the Revolutionary War.[50] The program was to be administered by federal circuit courts, which would make recommendations to the Secretary of War for the provision of benefits to individual veterans.[51] The procedural history of the case is complicated, but eventually resulted in Attorney General Edmund Randolph suing for a writ of mandamus against the Secretary of War on behalf of William Hayburn, a veteran whose circuit court had refused to administer his pension.[52] Ultimately, the issue was mooted before the Court decided the case, though all six of the Justices discussed their thoughts on the matter while riding circuit.[53] The reasoning in these opinions is varied, but many Justices expressed concerns with the ability of the executive branch to overrule their determination, as well as with the limits of judicial power.[54] While the precise reasoning of the Justices remains unclear today, scholars have suggested that they may have been concerned about the adversarial issue of the Attorney General suing the Secretary of

48. See supra notes 34–44 and accompanying text.

49. United States v. Interstate Commerce Comm'n, 337 U.S. 426, 430 (1948).

50. See 2 U.S. (2 Dall.) 409 (1792); Susan Low Bloch, The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism, 1989 Duke L.J. 561, 590–91.

51. See Bloch, supra note 50, at 590–91.

52. See id. at 598.

53. See *Hayburn's*, 2 U.S. (2 Dall.) at 410 n.†; see also Bloch, supra note 50, at 591–96.

54. See *Hayburn's*, 2 U.S. (2 Dall.) at 410 n.† (explaining the Justices' concerns that "if, upon that business, the court had proceeded, its judgements . . . might, under the same act, have been revised and controuled by the legislature, and by an officer in the executive department").

War.[55] At the very least, the Court avoided setting a precedent permitting this type of intrabranch litigation.[56]

Concerns with intrabranch litigation remain salient today, largely as a result of the unitary executive theory, which posits that the President must have broad power to control each component of the executive branch.[57] The unitary executive theory draws on the text of Article II, along with statements from the Framers, to argue that the Constitution vests broad power in the President to oversee the execution of the law.[58] These readings have increased in popularity over time, to the point that one scholar has noted that "[t]he theory of the unitary executive is a theory no longer. . . . Each President exceeds his predecessor's control of the Fourth Branch."[59] The development of this vision of executive power is especially striking in the context of the Court's recent removal jurisprudence.[60]

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55. See Bloch, supra note 50, at 611 ("In today's parlance, the justices might have questioned first, whether there exists a justiciable controversy when the Attorney General sues the Secretary of War pursuant to an agreement reached under orders from Congress . . . .").

56. Joseph W. Mead, Interagency Litigation and Article III, 47 Ga. L. Rev. 1217, 1233 (2013). In another early case, the Court determined that "where the United States is a party, and is represented by the Attorney-General . . . , no counsel can be heard in opposition on behalf of any other of the departments of the government." The Gray Jacket II, 72 U.S. (5 Wall.) 370, 371 (1866).

57. See Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1242 (1994) ("[The] power to execute the laws is vested, not in the executive department . . . , but in 'a President of the United States of America.' . . . Any plausible theory of the federal executive power must acknowledge and account for this vesting of the executive power in the person of the President."); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 8 (1994) (explaining that under the "strong" version of the unitary executive theory, all officers "must either be removable at the President's discretion or be subject to presidential countermand in the context of policy disagreements").

58. See Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 570–84 (1994) (providing a textual argument for broad executive power based on the Vesting Clause and Take Care Clause); see also 1 Annals of Cong. 463 (1789) (Joseph Gales ed., 1834) (statement of James Madison) ("If the Constitution has invested all Executive power in the President, . . . the Legislature has no right to diminish or modify his Executive authority . . . . I conceive that if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."); The Federalist No. 70, at 1052 (Alexander Hamilton) (Project Gutenberg ed., 2009) ("[O]ne of the weightiest objections to a plurality in the Executive, and which lies as much against the last as the first plan, is, that it tends to conceal faults and destroy responsibility."); Lawson, supra note 57, at 1243 n.69 (summarizing arguments that the unitary executive theory can only be textually based in the Article II Vesting Clause because the Take Care Clause imposes a duty on the executive branch rather than conferring power).

59. Kathryn E. Kovacs, Rules About Rulemaking and the Rise of the Unitary Executive, 70 Admin. L. Rev. 515, 516 (2018).

60. Compare Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (striking down the Sarbanes–Oxley Act's double for-cause removal protections), with Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (providing the sole vote against the 1978 Ethics in Government Act's removal restrictions on the grounds that Article II does not vest "*some* of the executive power, but *all* of the executive power"). The Court's most recent removal case, involving the constitutionality of the Consumer Financial

Under the unitary executive theory, one facet of the problem presented by intrabranch litigation is the possibility that these suits negate adverseness.[61] If executive branch officers are "alter ego[s]" of the President,[62] a suit by the Solicitor General challenging the final decision of the CAAF would effectively represent a suit by the President against himself.[63] Intrabranch suits, therefore, "undercut the conception of a unitary executive under which each official's decision represents that of the president."[64] Viewing the executive branch as a hierarchy overseen by the President, intrabranch litigation does not provide the court with a pair of litigants with adverse interests.[65]

Setting aside this formalist presentation of the unitary executive theory, a distinct separation of powers problem arises from the implication that courts, rather than the President, are best equipped to settle disputes within the executive branch.[66] If the Constitution is read as establishing a unitary executive responsible for overseeing the work of the administrative state, permitting the courts to resolve executive intrabranch conflicts appears to encroach on the power of the President to control his subordinates.[67] An alternate way of viewing this problem is the concern raised in *Hayburn's Case*: Even if a court issues a ruling in an intrabranch dispute, it may be treated as an advisory opinion subject to revision by the President.[68] These concerns about the proper judicial role and the separation of powers are particularly salient in light of the other avenues available for

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Protection Bureau's status as an independent agency headed by a single director, has yet to be decided. At oral argument, a majority of the Court seemed inclined to determine that the agency's structure represented an unconstitutional limitation on presidential control. See, e.g., Transcript of Oral Argument at 64, Seila Law LLC v. CFPB, No. 19-7 (U.S. Mar 3, 2020) (Roberts, C.J.) ("[T]he buck stops here quote was quoted in our recent decision in Free Enterprise. Do you think . . . that recent precedent should have a binding . . . effect on how the Court addresses this case?").

61. See Michael Herz, *United States v. United States*: When Can the Federal Government Sue Itself?, 32 Wm. & Mary L. Rev. 893, 914 (1991).

62. Myers v. United States, 272 U.S. 52, 133 (1926) (emphasis omitted).

63. See Herz, supra note 61, at 914 ("[A] unified executive might be the sort of single 'person' incapable of having a case or controversy with itself. More precisely, the President's control over the potential litigants and their shared assignment to execute the laws would negate adversity.").

64. Harold J. Krent, The Sometimes Unitary Executive: Presidential Practice Throughout History, 25 Const. Comment. 489, 510 (2009) (book review); see also Herz, supra note 61, at 897.

65. See Herz, supra note 61, at 923 ("Interagency litigation does seem inconsistent with a model of centralized, hierarchical, and self-contained decisionmaking.").

66. See id. at 914.

67. See Krent, supra note 64, at 512–13; see also Herz, supra note 61, at 897 ("This separation of powers concern is underlined by the Framers' adoption of a unitary executive, with a single, accountable head—a structure that seems inconsistent with allowing agencies to turn to courts to settle their disputes.").

68. See supra note 54 and accompanying text.

resolving intrabranch disputes.[69] In spite of these theoretical tensions, however, "presidents have acquiesced in congressional schemes that pit one agency against the other."[70] It is therefore worthwhile to explore the instances in which these suits have been permitted.

1. *Looking Behind the Named Parties.* — In some instances, the Court has allowed intrabranch litigation when one party in the dispute does not represent the United States in a regulatory capacity. In *United States v. Interstate Commerce Commission (ICC)*, for example, the Court allowed the Department of Justice to challenge a decision of the Interstate Commerce Commission after scrutinizing the underlying interests being litigated.[71] Acknowledging "the long-recognized general principle that no person may sue himself," the Court held that "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented."[72] In the case before the Court, the United States had filed a complaint with the Commission alleging that a railroad had illegally charged it for wharfage services that the government had provided itself.[73] When the Commission ordered the United States to pay the charge, the government brought an action in federal court to set the Commission's order aside.[74] Because all actions against the Commission were statutorily required to be brought against the United States, the government was made a defendant in the action.[75] Although the Court noted that "the formal appearance of the Attorney General for the Government as statutory defendant does create a surface anomaly,"[76] the suit was allowed to proceed because the United States' underlying interest as a plaintiff was that of a shipper using the railroads, rather than a regulator.[77] The Court developed this line of reasoning further in *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, when it held that an officer in the Department of Labor did not have standing to challenge a determination of the Department's Benefits Review Board.[78] The case arose from a claim for disability benefits, which was partially denied by the Benefits Review Board and then appealed to the Fourth Circuit by the Department's Director of the Office of Workers' Compensation

69. For example, intrabranch dispute resolution has historically been provided by Executive Order through the Federal Legal Council. Exec. Order No. 12,146, 3 C.F.R. § 409 (1979).

70. Krent, supra note 64, at 511.

71. 337 U.S. 426, 430 (1948).

72. Id. at 430.

73. See id. at 428.

74. Id. at 429.

75. Id.

76. Id. at 432.

77. See id. at 430 ("[T]he Government is not less entitled than any other shipper to invoke administrative and judicial protection.").

78. 514 U.S. 122, 125–30 (1995).

Programs.[79] The case was distinguished from *ICC* on the ground that the government's standing in that case was based on its role as a market participant, whereas in this instance the Director was bringing suit as an administrator to contest the Board's determination when the benefits claimant declined to do so.[80] Because there was no precedent recognizing standing for an intrabranch suit in which the government plaintiff could only claim an interest "in its regulatory or policymaking capacity,"[81] the Court concluded that allowing the suit to proceed "would put the federal courts into the regular business of deciding intrabranch and intra-agency policy disputes—a role that would be most inappropriate."[82]

2. *Applying the* ICC *Carve-Out to the CAAF.* — In a way, government appeals from the CAAF present the inverse of the scenario discussed in *ICC*.[83] On appeal from the CAAF, the named parties are the United States and the servicemember—a facially adverse conflict. However, upon closer examination, the servicemember has received a favorable ruling from the CAAF, bringing their interest into accord with the executive entity permitted to speak with finality on the matter.[84] A government appeal from this determination therefore represents an executive challenge to the determination of the CAAF, another executive branch entity, triggering the prohibition on one party suing himself.[85]

Applying *ICC*'s test only strengthens the case against this particular form of intrabranch litigation, rather than providing for a clear exception. Under *ICC*, the Court examines the nature of the underlying interests to determine whether the case is truly reflective of a conflict between portions of the executive branch.[86] In the case of government appeals from the CAAF, both the Solicitor General and the CAAF are performing their executive branch roles, suggesting that the *ICC* carve-out does not apply.

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79. Id. at 123–25.

80. See id. at 124–25, 128.

81. Id. at 127.

82. Id. at 129.

83. Another interesting application of *ICC*'s "look behind names" test arose in *United States v. Nixon*, when a special prosecutor in the Department of Justice subpoenaed evidence from President Richard Nixon. 418 U.S. 683, 687–88 (1974). While Nixon argued that the dispute represented a non-justiciable intrabranch conflict, the Court quickly dismissed this claim, citing *ICC* for the proposition that "justiciability does not depend on such a surface inquiry" and cannot be defeated by the "mere assertion of a claim of an 'intra-branch dispute.'" Id. at 692–93. Looking beyond the named parties, the Court determined that, in light of the unique circumstances—namely, a criminal prosecution involving the President—"the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability." Id. at 697. Rather, adverseness was assured despite the appearance of intrabranch conflict because of the independent nature of the Special Prosecutor and the President's "steadfast assertion of privilege against disclosure of the material." Id.

84. See supra section I.C.

85. See supra notes 72–77 and accompanying text.

86. See supra section II.B.1.

Unlike *ICC*, in which the government challenged the Commission's decision as a regulatory beneficiary, the Solicitor General's appeal from the CAAF seeks to vindicate the same interest in military discipline that the CAAF works to achieve.[87] A government appeal, therefore, appears closer to the type of intrabranch dispute in which the government claims an interest in its "regulatory or policymaking capacity."[88] As one scholar has explained, "An agency that wants to impose its interpretation of law . . . relies on its piece of the sovereign interest . . . . Intuitively, when both plaintiff and defendant rely on this same sovereign interest to establish an injury, there is no justiciable controversy."[89]

Arguably, government appeals from the CAAF are distinguishable from the situation in *Newport News* based on the extremity of the government interest, a possibility that the *Newport News* Court noted.[90] Compared to the government interest in labor regulation, the President's constitutional role as Commander in Chief gives rise to a more compelling government interest in overseeing military discipline.[91] However, invoking the Commander in Chief Clause as the basis for recognizing an appeal from the CAAF quickly raises separation of powers concerns. Government appeals from the CAAF are still subject to an adverse determination in the Supreme Court, undercutting any claim that the appeal vindicates the President's constitutional prerogative of overseeing the armed forces. Presumably, the President has other mechanisms for maintaining discipline in the military and does not need to rely on the courts to do so.[92] Regardless, as Part III explains, the Court's recent characterization of the military justice system in *Ortiz* may allow these seemingly conflicting doctrines to be squared.

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87. See Mead, supra note 56, at 1263–64 ("[N]o agency—as one of many duly empowered agents articulating and advocating for the United States' sovereign interests—can have an interest in adjudicating a claim that amounts to simply rejecting another duly empowered agent's view of those same interests.").

88. See supra notes 78–82 and accompanying text.

89. Mead, supra note 56, at 1264.

90. See Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 130 (1995) ("If [impairment of government interest] alone could ever suffice to contradict the normal meaning of the phrase (which is doubtful), it would have to be an interest of an extraordinary nature, extraordinarily impaired.").

91. U.S. Const. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . .").

92. While some scholars have suggested intrabranch litigation may be constitutionally permissible when the agency being challenged is independent and therefore subject to limited control by the President outside of litigation, see, e.g., Krent, supra note 64, at 512; Mead, supra note 56, at 1250–51, it is difficult to square this argument with the unitary executive theory in the military justice context. CAAF judges have some independence under 10 U.S.C. § 942, which provides for-cause removal protections and pay that tracks that of Article III judges. 10 U.S.C. § 942(c)–(d) (2018). However, the same justifications for insulating agencies like the Federal Election Commission or Securities and Exchange Commission from political control do not extend to the military, where the President retains authority as Commander in Chief.

## III. *ORTIZ* AND THE CHANGING CONCEPTION OF MILITARY JUSTICE

While the recent decision in *Ortiz* did not directly address the constitutional propriety of government appeals from the CAAF, the Court's characterization of the military justice system may provide a way to reconcile the existence of these appeals with the doctrines discussed above. In his amicus brief, Professor Bamzai argued that, under *Marbury v. Madison*, the Court's appellate jurisdiction does not extend to review of CAAF decisions.[93] Because the CAAF is located within the executive branch, Bamzai argued, it does not exercise judicial power and cannot be considered a "court" from which the Supreme Court could hear an appeal under Article III.[94] In upholding the Court's appellate jurisdiction over decisions of the CAAF, Justice Kagan's majority opinion emphasized the "constitutional foundation of courts-martial—as judicial bodies" and minimized the issue of executive control.[95] This holding may not accord with the historical view of the military justice system,[96] but instead represents another step in the process of closing the gap between military and civilian justice.[97]

In recognizing its appellate jurisdiction, the Court underscored the judicial nature of the CAAF's work.[98] Although the CAAF is not an Article III court, "it stands at the acme of a firmly entrenched judicial system that exercises broad jurisdiction in accordance with established rules and procedures."[99] The Court distinguished between acts of "military justice" and extrajudicial "military command,"[100] emphasizing the legal rules and principles that guide the actions of military judges.[101] These legal formalities, along with the appellate structure of the military justice system, bring the CAAF in line with the judicial power wielded by civilian courts over which the Supreme Court exercises appellate jurisdiction.[102]

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93. See Bamzai Brief, supra note 3, at 12–14.

94. See id. at 26–29.

95. Ortiz v. United States, 138 S. Ct. 2165, 2175 (2018).

96. See supra section I.A.

97. See Vladeck, supra note 15, at 941, 966–69 ("[M]ilitary courts today look far less 'separate' from civilian courts than they used to, separation that is only further mitigated by the ability of the civilian courts to entertain historically 'military' cases.").

98. See *Ortiz*, 138 S. Ct. at 2176 n.5 ("By adjudicating criminal charges against service members, courts-martial of course help to keep troops in line. But the way they do so—in comparison to, say, a commander in the field—is fundamentally judicial.").

99. Id. at 2180.

100. Id. at 2175.

101. Id. at 2176 n.5 ("When a military judge convicts a service member . . . [h]e is acting *as a judge*, in strict compliance with legal rules and principles—rather than as an 'arm of military command.'" (quoting id. at 2199 (Alito, J., dissenting))).

102. See id. at 2170 ("[C]ourts-martial are now subject to several tiers of appellate review, thus forming part of an integrated 'court-martial system' that closely resembles civilian structures of justice."). Although the Court has expressed doubts about the constitutional validity of novel structural devices, the majority did not display the same level of skepticism when evaluating the relatively recent grant of authority to review decisions of the CAAF. See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 505 (2010) ("Perhaps

While emphasizing the judicial character of CAAF proceedings, the Court also relied on the "constitutional pedigree" of the CAAF to minimize the structural concerns raised in Bamzai's brief.[103] The Court reiterated its holding from *Edmond* that the CAAF is located within the executive branch and acknowledged that Congress had established the CAAF under Article I rather than Article III, but did not treat these facts as dispositive.[104] Instead, Justice Kagan explained that the Court's appellate jurisdiction extends beyond overseeing Article III courts.[105] In his concurrence, Justice Thomas countered Bamzai's contention that appellate review by the Supreme Court would undermine the unitary executive by emphasizing the existing statutory limits on executive control of the CAAF.[106] Justice Alito, joined by Justice Gorsuch, dissented on the grounds that, no matter how judicial its work might look, the CAAF essentially exercises executive power that cannot be reviewed under the Court's appellate jurisdiction.[107] In short, although two Justices were persuaded by Bamzai's strict formalist argument, a sizeable majority of the *Ortiz* Court was unfazed by the separation of powers concerns arising from its review of CAAF decisions, treating the issue instead as one of necessary judicial oversight of what are essentially judicial determinations.

The Court did not address the question of intrabranch litigation in *Ortiz*, but its analysis nevertheless provides a framework for reconciling the appearance of intrabranch litigation in government appeals from the CAAF with the notion that "no person may sue himself."[108] Under the majority's functionalist reasoning, the CAAF is closer to a court exercising judicial power than an agency head exercising executive power.[109] Applying the test from *ICC* and looking beyond the face of the dispute, the appearance of intrabranch conflict between the Solicitor General and the CAAF disappears when viewing the CAAF as a functionally judicial, rather than executive, entity. This conception aligns more closely with Congress's

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the most telling indication of [a] severe constitutional problem" in the structure of a governmental entity is its "lack of historical precedent."). To the extent that the Court took these arguments into account, it did so indirectly, downplaying the modern restructuring of the military justice system and emphasizing its historical and "constitutional pedigree." See *Ortiz*, 138. S. Ct. at 2173–76.

103. Id. at 2173.

104. See id. at 2176.

105. See id. at 2177–78 (analogizing to the Court's ability to review determinations of state and territorial courts).

106. See id. at 2187 (Thomas, J., concurring) ("The Executive Branch has no statutory authority to review or modify the CAAF's decisions.").

107. See id. at 2190 (Alito, J., dissenting) ("Courts-martial are older than the Republic and have always been understood to be Executive Branch entities that help the President, as Commander in Chief, to discipline the Armed Forces. . . . [They] do not comply with Article III, and thus they cannot exercise the Federal Government's judicial power.").

108. United States v. Interstate Commerce Comm'n, 337 U.S. 426, 430 (1948).

109. See *Ortiz*, 138 S. Ct. at 2174 (describing the CAAF's "essential character" as judicial).

intentions for the CAAF, as demonstrated in the legislative history of the statutes establishing the court under Article I and providing Supreme Court review.[110] In minimizing the historical motives for separating the civilian and military justice systems, the *Ortiz* majority downplayed the role of the executive in overseeing military discipline, while Justice Thomas's concurrence relied on the statutes that currently serve to minimize executive control of court-martial proceedings. Despite the formal and historical arguments for broad executive power in the context of military justice, the Court adopted a modern, pragmatic view of the military justice system, creating a place for government appeals from CAAF decisions within the Court's prior limitations on intrabranch litigation.

## CONCLUSION

Although government appeals from the Court of Appeals for the Armed Forces appear to present a conflict between a servicemember and the executive branch, the Court's characterization of the military justice system in *Edmond* raised the possibility that these appeals in fact represent an executive challenge to executive action, in violation of the separation of powers and Article III. This Comment uses the evolving nature of the military justice system as a lens for examining the Court's jurisprudence on the adverseness requirement of Article III and the bar on intrabranch litigation. The recent decision in *Ortiz v. United States*, while not directly addressing this issue, serves to reconcile these doctrines by framing the work of the CAAF as closer to that of a civilian court than an executive branch entity. Furthermore, the analysis in *Ortiz* indicates a broader willingness in the Court's military justice jurisprudence to take a functionalist approach to separation of powers concerns, minimizing the significance of original understanding and the unitary executive theory in favor of a more pragmatic, modern view of military discipline.

110. See supra sections I.A–.B.