No. 15-1257

In the Supreme Court of the United States

HASAN K. AKBAR,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF PROFESSOR ADITYA BAMZAI AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus will address the following question:

Whether this Court has Article III jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Armed Forces.

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INTEREST OF *AMICUS CURIAE*[*]

Aditya Bamzai is an associate professor at the University of Virginia School of Law. He teaches and writes about civil procedure, federal courts, and administrative law, and he has an interest in the sound development of these fields.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 2, of the Constitution provides in relevant part: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Pertinent statutory provisions are reprinted in an appendix to this brief.

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[*] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. The University of Virginia School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amicus curiae*.) Otherwise, no person or entity other than the *amicus curiae* or his counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Article III of the Constitution limits the jurisdiction of the federal courts, *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), including the Supreme Court, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). Section 2 of Article III permits this Court to exercise "original Jurisdiction" over an enumerated list of "cases" and "controversies" and "appellate Jurisdiction" "[i]n all [ ] other Cases." U.S. Const. art. III, § 2. Interpreting this language in *Marbury*, Chief Justice Marshall held that the Court's "original jurisdiction" was limited exclusively to those categories specified in the Constitution's text, and that its "appellate jurisdiction" could not be exercised by issuing a writ directly to an executive branch officer — in that case, James Madison. 5 U.S. at 174-76. As *Marbury* put it, "the essential criterion of appellate jurisdiction" is to "revise[] and correct[] the proceedings in a cause already instituted," rather than to "create that cause." *Id.* at 175; *see Munaf* v. *Geren*, 553 U.S. 674, 688 n.3 (2008) (observing that there is "some authority" — namely, *Marbury* — "for the proposition that this Court has [limited] original subject-matter jurisdiction").

Marbury bars the Court from hearing this case. The provision that petitioner invokes (*see* Pet. 1) to establish certiorari jurisdiction, 28 U.S.C. § 1259, violates Article III, section 2, and *Marbury*'s holding by authorizing this Court to issue writs directly to executive branch officers.

First enacted in 1983, section 1259 authorizes the Court to take jurisdiction over cases from, and to issue writs directly to, the United States Court of Appeals for the Armed Forces ("CAAF"). As this Court has

recognized, although the CAAF is called a "court" by statute, it is not an Article III court, but rather an "Executive Branch entity." *Edmond* v. *United States*, 520 U.S. 651, 664 & n.2 (1997) (noting that provisions of the Uniform Code of Military Justice "make clear that [the CAAF] is within the Executive Branch"). Its members lack the structural protections that the Constitution establishes for Article III judges, such as life tenure, undiminishable salary, and removability solely by impeachment. *See* U.S. Const. art. III, § 1. For constitutional purposes, the members of the CAAF thus stand on equal footing with James Madison in *Marbury*. Madison was, and the CAAF judges are, officers within the Executive Branch, rather than courts over which this Court may exercise direct supervision. For the same reason that this Court could not issue a writ of mandamus to James Madison in 1803, it lacks jurisdiction in this case to issue a writ of certiorari to the CAAF.

Indeed, as early as the Civil War, the Court recognized the implications of *Marbury*'s holding for its supervisory relationship over the military-court system. In *Ex parte Vallandigham*, 68 U.S. 243 (1863), the Court explained that the power exercised by a military commission was not "judicial . . . in the sense in which judicial power is granted to the courts of the United States." *Id.* at 253 (quoting *United States* v. *Ferreira*, 54 U.S. 40, 48 (1851)). As a result, the Court held that "there is no original jurisdiction in the Supreme Court to issue a writ of *habeas corpus ad subjiciendum* to review or reverse [a military court's] proceedings, or the writ of certiorari to revise the proceedings of a military commission." *Vallandigham*, 68 U.S. at 253.

Modern scholars have echoed this perspective on *Marbury* and Article III, section 2. For example, the authors of the leading treatise on federal courts recognize the apparent incompatibility between section 1259 and *Marbury*'s holding. They observe that a "question about the Supreme Court's jurisdiction to review a criminal conviction before a military tribunal is raised by 28 U.S.C. § 1259," because the CAAF "is not an Article III court, and the cases it decides do not fall within Article III's definition of the original jurisdiction." Richard H. Fallon, Jr. *et al.*, *Hart and Wechsler's The Federal Courts and the Federal System* 294 (7th ed. 2015) ("*Hart & Wechsler*"). And they list a number of serious consequences that could follow if section 1259 is understood as an appropriate exercise of this Court's "appellate jurisdiction." If that were the case, as they explain, Congress could conceivably require this Court to "review *any* adjudicatory decision — even by a non-Article III federal tribunal"; could "provide for direct Supreme Court review of an NLRB decision in an unfair labor practice proceeding"; and could authorize this Court "to review a decision rendered by" a "multinational tribunal[], in which American officials participate." *Ibid.*

In a similar vein, the authors of one of the primary treatises on civil procedure acknowledge "a major theoretical uncertainty as to the nature of the tribunals whose action is so far judicial that initial revisory jurisdiction [in the Supreme Court] qualifies as 'appellate.'" 16B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4005, p. 149 & n.16 (3d ed. 2012). Notwithstanding this "uncertainty," they write that "[i]t has been widely supposed that the first review of

'quasi-judicial' determinations by administrative agencies cannot be characterized as appellate," *ibid.* — in other words, that this Court lacks appellate jurisdiction to issue direct writs to executive agencies such as the CAAF.

The perspective of these two modern treatises echoes the views of one of the leading Twentieth Century authorities on administrative law, Professor Louis Jaffe, who observed over a half-century ago that the "first reviewing [Article III] court is a court of 'original' jurisdiction" for constitutional analysis, because "[i]t is the first court exercising 'judicial power' in the strict 'Article III' sense." Louis L. Jaffe, *Judicial Control of Administrative Action* 263 n.5 (1965). "[F]or that reason," Jaffe explained, "it would appear that the Supreme Court of the United States cannot be made the first reviewing court, since, following [*Marbury*], it can exercise only such original jurisdiction as the Constitution has conferred upon it." *Ibid.*

At a minimum, these treatises and the Court's opinion in *Vallandigham* highlight the significance of the threshold jurisdictional question addressed in this *amicus* brief. As *amicus* explains below, this jurisdictional question is not merely significant — in this case, it is dispositive. Under the best reading of Article III and the Court's precedents, the Court lacks jurisdiction over the petition for certiorari in this case.

Accordingly, *amicus* respectfully submits that the Court should dismiss the petition for lack of jurisdiction. In doing so, *amicus* takes no position on the substantive issue raised in the petition, nor on the merits or demerits of capital punishment in the criminal or court-martial context. *Amicus*' sole

interest is in the appropriate boundaries of this Court's jurisdiction.

Should the Court determine that the substantive issue that petitioner has identified independently satisfies the Court's standards for granting petitions for certiorari, *amicus* respectfully submits that the Court should direct the parties to address the question presented in this brief in addition to the question contained in the petition. Whether this Court has jurisdiction under Article III is a question logically antecedent to the issue presented in the petition, and must be addressed before this Court may reach the merits. *See, e.g.*, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

BACKGROUND

1. In 1983, Congress enacted a statute authorizing the filing of petitions for certiorari from the United States Court of Military Appeals (as it was then called) directly to the Supreme Court. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393; *see* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(a)(1), 108 Stat. 2663 (1994) (changing the court's name to the CAAF). At the time section 1259 was first enacted, commentators recognized that it created "a wholly novel relationship between the military justice system and the civilian rule of law" and that, until that date, "the unbroken historical pattern in the United States has been that the judgments of military tribunals are not subject to direct review by Article III courts." Bennett Boskey & Eugene Gressman, *The Supreme Court's New Certiorari Jurisdiction over Military Appeals*, 102 F.R.D. 329, 329-30 (1984). Instead, prior

to section 1259's adoption, federal-court review of military tribunals was conducted in collateral proceedings, such as by habeas corpus, rather than direct Supreme Court review. *See id.* at 330; Stephen M. Shapiro, *et al.*, *Supreme Court Practice* 130 (10th ed. 2013) ("*Supreme Court Practice*") (observing that, before 1983, "there was never any direct judicial review, by the Supreme Court or any other nonmilitary tribunal" of the court-martial system); *see also id.* at 129-35.

2. Section 1259 is one of the few statutes that Congress has enacted to govern the Supreme Court's jurisdiction. In addition to section 1259, Congress has enacted statutes to govern the scope of the Court's "original jurisdiction." 28 U.S.C. § 1251. Congress has also authorized the exercise of the Court's "appellate jurisdiction" in cases rendered by three classes of courts: inferior federal tribunals, *see* 28 U.S.C. § 1253 (three-judge district courts), 28 U.S.C. § 1254 (courts of appeal), 50 U.S.C. § 1803(b) (Foreign Intelligence Surveillance Court of Review); state courts (defined to include the Court of Appeals for the District of Columbia), *see* 28 U.S.C. § 1257; and territorial courts, *see* 28 U.S.C. § 1258 (Puerto Rico), 28 U.S.C. § 1260 (Virgin Islands).

3. The structure of the CAAF makes clear that its members are executive branch officers. Most pertinently, the Constitution establishes that Article III judges possess life tenure, may not have their salary diminished, and are removable by impeachment. U.S. Const. art. III, § 1. By contrast, CAAF judges are appointed to fifteen-year terms, and they may be removed by the President from office for neglect of duty, misconduct, or mental or physical

disability. 10 U.S.C. §§ 942(b) & (c); *see also* 10 U.S.C. § 941 (providing that the CAAF "is located for administrative purposes only in the Department of Defense").

4. Despite this lack of Article III status, this Court has reviewed CAAF cases on several occasions pursuant to section 1259. *See, e.g.*, *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* v. *United States*, 520 U.S. 651 (1997); *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).

This Court has never passed, however, on the constitutionality of its authority to review the CAAF directly. *See Hart & Wechsler* 294 (noting that "the Supreme Court has reviewed decisions of the [CAAF] without addressing th[e] jurisdictional issue" addressed in this brief). The jurisdictional issue, therefore, remains an open question of law. *See, e.g.*, *Arizona Christian School Tuition Org.* v. *Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."); *Hagans* v. *Lavine*, 415 U.S. 528, 535 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.").

ARGUMENT

Under Article III, Section 2, this Court lacks authority to issue writs directly to executive branch officers such as the members of the Court of Appeals for the Armed Forces.

As this Court has explained, "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." *Sprint Communications Co.* v. *APCC Services, Inc.*, 554 U.S. 269, 274 (2008); *Coleman* v. *Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring). Here, it is readily apparent that the Court lacks "original jurisdiction" over the petition for certiorari, because it does not present the kind of case enumerated in Article III, section 2. *See* U.S. Const. art. III, § 2 (specifying "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party"); The Federalist No. 81, pp. 358-59 (J. Cooke ed. 1961) (A. Hamilton) (arguing that "the original jurisdiction of the supreme court would be confined to two classes of causes" and that in "all other causes of federal cognizance, the original jurisdiction would appertain to the inferior tribunals, and the supreme court would have nothing more than an appellate jurisdiction").

Nor can the Court exercise "appellate jurisdiction" over the petition, because the Court's precedents limit the exercise of such jurisdiction to cases arising from an earlier judicial disposition by a "court" as the Constitution understands that term. *See, e.g.*, *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 407 (1821) (characterizing a "suit" as "the prosecution of some demand in a Court of justice"). Such a judicial

disposition may occur in a lower federal court; in a state court, *see Martin* v. *Hunter's Lessee*, 14 U.S. 304 (1816); or in a territorial court, *see, e.g.*, *United States* v. *Coe*, 155 U.S. 76, 86 (1894); *American Insurance Company* v. *Canter*, 26 U.S. 511 (1828). But the members of the CAAF, like James Madison, are none of these three.

A. *Marbury* v. *Madison* prohibits this Court from exercising direct "appellate jurisdiction" over executive branch officers.

In *Marbury*, the Court confronted the question whether it had jurisdiction under Article III, section 2, to issue a writ of mandamus directly to an executive branch official, without a preliminary consideration of the merits by another court. 5 U.S. at 173. The dispute arose when James Madison, the newly installed Secretary of State to incoming President Thomas Jefferson, failed to deliver a commission to William Marbury, a nominee to a five-year term as Justice of the Peace to the District of Columbia by the outgoing President, John Adams. Marbury had been confirmed by the lame-duck Federalist Senate, and his commission was signed — but not delivered — before Adams left office. Marbury asked the new Administration for his commission, and was refused. In an effort to compel the commission's delivery, Marbury turned to this Court to direct a writ of mandamus at Madison.

In an opinion authored by Chief Justice Marshall, the Court dismissed the petition for lack of jurisdiction. The Court first held that it could not exercise "original jurisdiction" over the case because it was outside of the specific class of cases enumerated

in Article III. *See* 5 U.S. at 174. The Court then held that it lacked "appellate jurisdiction" to issue the writ, because an "essential criterion" of such jurisdiction was "that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Id.* at 175. A mandamus could be "directed to courts," Chief Justice Marshall reasoned, but "to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction." *Id.* at 175-76.

As a result, under *Marbury*'s holding, for jurisdiction to be proper, the Court's action must be "appellate" in the sense that the Court is supervising an earlier decision by a lower court. Without an inferior court between the reviewed executive action and the Supreme Court's consideration, in other words, it cannot be said that the Court's exercise of jurisdiction is "appellate."

B. Under this Court's precedents, the CAAF's members are executive branch officers over whom this Court cannot exercise direct "appellate jurisdiction."

In a variety of contexts, this Court has applied — and has reinforced — *Marbury*'s holding. Taken together, these precedents establish that the Court cannot issue a writ of certiorari directly to the CAAF in a case that would not otherwise fall within the scope of the Court's original jurisdiction.

1. *Courts-martial and military commissions*. In *Ex parte Vallandigham*, 68 U.S. 243 (1863), the Court dismissed for lack of jurisdiction a petition for certiorari that was "to be directed to the Judge

Advocate General of the Army of the United States, to send up to [the Supreme Court], for its review, the proceedings of a military commission." *Id.* at 243. The case arose out of Ohio Congressman Clement Vallandigham's conviction by military commission for criticizing President Lincoln during the midst of the Civil War. *See id.* at 244. Vallandigham sought a writ from the Court, but the Court responded that it had "no power to review by *certiorari* the proceedings of a military commission ordered by a general officer of the United States Army, commanding a military department." *Id.* at 248.

The Court reasoned that it lacked both original and appellate jurisdiction over the petition. With respect to original jurisdiction, the Court explained that it could not "without disregarding its frequent decisions and interpretation of the Constitution in respect to its judicial power, originate a writ of certiorari to review or pronounce any opinion upon the proceedings of a military commission." *Id.* at 251-52. That was because, as the Court explained, Article III's enumeration of cases within the Court's "original jurisdiction" "has always been considered restrictive of any other original jurisdiction." *Id.* at 252.

Nor, the Court explained, was the petition "within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court." *Id.* at 251. It was "not in law or equity within the meaning of those terms as used in" Article III, nor was the "military commission a court within the meaning of the 14th section of the Judiciary Act of 1789." *Id.*; *see Hart & Wechsler* 294 (characterizing *Vallandigham* as holding "that neither section 14 of the First Judiciary Act nor Article III permitted the Supreme Court to

entertain a petition for a writ of certiorari directly from a military commission that had convicted the prisoner of disloyalty during the Civil War"). *Compare Ex parte Milligan*, 71 U.S. 2 (1866) (reviewing legality of military commission when defendant first filed a habeas corpus petition in lower court and appealed from its judgment); *see* David P. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865-1873*, 51 U. Chi. L. Rev. 131, 134 n.16 (1984) (recognizing that *Vallandigham* held that the Court "had no jurisdiction to review directly the judgment of a military commission" and distinguishing the Court's assertion of jurisdiction in *Milligan* on this basis).

In reaching that conclusion, *Vallandigham* recognized that the officers of military courts were within the Executive Branch. *See, e.g.*, 68 U.S. at 253 (observing that, while "powers conferred by Congress" on officials could appear "judicial in their nature, for judgment and discretion must be exercised," such authority was not "judicial . . . in the sense in which judicial power is granted to the courts of the United States") (quoting *Ferreira*, 54 U.S. at 48). That recognition echoed the holdings of courts before *Vallandigham*. *See, e.g.*, *Dynes* v. *Hoover*, 61 U.S. 65, 79 (1857) (reasoning that the power to convene courts-martial "is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States" and "that the two powers are entirely independent of each other"). And it was repeated in subsequent years. *See, e.g.*, William Winthrop, *Military Law and Precedents* 49 (2d ed. 1920) (remarking that courts-martial are "not a part of the judiciary but an agency of the executive department" and that "a court-martial is not a court

in the full sense of the term") (emphasis removed and capitalization altered).

Subsequent cases have repeatedly reaffirmed *Vallandigham* on this jurisdictional point. In *In re Vidal*, 179 U.S. 126 (1900), for example, the Court rejected an application for leave to file a petition for certiorari to review the proceedings of a military tribunal established by the commanding officer of Puerto Rico. The Court held that it was not "empowered to review the proceedings of military tribunals by certiorari" and that military tribunals were not "courts with jurisdiction in law or equity, within the meaning of those terms as used in the 3d article of the Constitution." *Id.* at 127; *see Duncan* v. *Kahanamoku*, 327 U.S. 304, 309 (1946) (remarking that the court-martial sentences at stake in the case "were not subject to direct appellate court review, since it had long been established that military tribunals are not part of our judicial system"); *In re Yamashita*, 327 U.S. 1, 8 (1946) (recognizing that "the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court"); *see also* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 186-87 (1962) ("[T]he Supreme Court has adhered consistently to the 1863 holding of *Ex parte Vallandigham* that it lacks jurisdiction to review by certiorari the decisions of military courts.").

2. *Court of Claims*. In *Gordon* v. *United States*, 69 U.S. 561 (1864) (also reported at 117 U.S. 697 (1884)), immediately before his death, Chief Justice Taney prepared and circulated to the Court an opinion addressing the scope of the Court's "appellate

jurisdiction." 117 U.S. at 697 (noting that Taney "prepared an opinion" but died before the judges met); *see, e.g.*, *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 569 (1962) (plurality) (observing that Taney's opinion was "prepared before his death and circulated among, but not adopted by, his brethren"). Although the opinion itself was not adopted by the full Court in the wake of Taney's death, it was released some time later and it formed the basis for the Court's disposition of the case for want of appellate jurisdiction. 117 U.S. at 697.

The *Gordon* opinion declared that the Court lacked direct Article III "appellate jurisdiction" over the Court of Claims. In 1863, Congress had created the Court of Claims to render final judgments on monetary claims against the government, with an avenue for direct appeal to the Supreme Court. *See* Act of Mar. 3, 1863, c. 92, §§ 5, 14, 12 Stat. 765, 766, 768; *see also Glidden*, 370 U.S. at 552-54 (plurality) (summarizing development of the Court of Claims). But the new tribunal's Article III status was questionable. Because the opinion reasoned that "all that the Court [of Claims] [wa]s authorized to do is to certify its opinion to the Secretary of the Treasury," it concluded that the Court of Claims' judgments were not "final and conclusive upon the rights of the parties" and hence inconsistent with Article III's "judicial power." *Gordon*, 69 U.S. at 702; *see also Hayburn's Case*, 2 U.S. 408 (1792).

A necessary consequence of that reasoning, *Gordon* noted, was that the Court of Claims was not a "court" within the meaning of the Constitution — and that the Supreme Court could not exercise "appellate jurisdiction" from judgments that it rendered. The Court's "appellate jurisdiction," the opinion reasoned,

"is given only from such inferior courts as Congress may ordain and establish to carry into effect the judicial power specifically granted to the United States." 69 U.S. at 702. As *Gordon* explained, "Congress cannot extend the appellate power of [the Supreme] Court beyond the limits prescribed by the Constitution, and can neither confer nor impose on [the Court] the authority or duty of hearing and determining an appeal from a Commissioner or Auditor, or any other tribunal exercising only special powers under an act of Congress." *Ibid.* "The inferior court [ ] from which the appeal is taken," in other words, "must be a judicial tribunal authorized to render a judgment which will bind the rights of the parties litigating before it, unless appealed from, and upon which the appropriate process of execution may be issued by the court to carry it into effect." *Ibid.*

Notwithstanding its curious status because of Chief Justice Taney's death, the opinion in *Gordon* was understood to reflect the contemporaneous views of the Court's members and was accorded precedential status by both Congress and future courts. The Court's opinion in *United States* v. *Jones*, 119 U.S. 477 (1886), summarized the Court's "records" of Chief Justice Chase's announcement of the judgment in *Gordon* as follows: "We think that the authority given to the head of an executive department by necessary implication, in the fourteenth section of the amended court of claims act, to revise all the decisions of that court requiring payment of money, denies to it the judicial power, *from the exercise of which alone appeals can be taken to this court*." *Id.* at 478 (emphasis added). In the wake of *Gordon*, Congress repealed the provision allowing the Secretary of the Treasury to estimate the amount to be paid on claims,

see Act of Mar. 17, 1866, c. 19, § 1, 14 Stat. 9, and with that legislative fix in place, the Court exercised "appellate jurisdiction" over the Court of Claims in *De Groot* v. *United States*, 72 U.S. 419 (1866).

Subsequent opinions — including those by members of the *Gordon* Court — characterized the reasoning that led to the dismissal of the petition in *Gordon* in a manner consistent with Taney's opinion. *See United States* v. *Alire*, 73 U.S. 573, 576 (1867) (characterizing *Gordon* as denying jurisdiction "on account of the power of the executive department over its judgment," which was later "repealed"); *United States* v. *O'Grady*, 89 U.S. 641, 647 (1874) (characterizing *Gordon* as "declin[ing] to take jurisdiction of such appeals, chiefly for the reason that the act practically subjected the judgments of the Supreme Court rendered in such cases to the re-examination and revision of the Secretary of the Treasury" and noting that the offensive provision had been repealed); *Langford* v. *United States*, 101 U.S. 341, 344-45 (1879) ("An act of Congress removing this objectionable feature having passed the year after [*Gordon*], the appellate power of this court has been exercised ever since."); *see also Jones*, 119 U.S. at 478 ("It is manifest, therefore, not only that the jurisdiction was originally denied solely on the ground of the objectionable fourteenth section, but that, with this section repealed, nothing has ever been supposed until now to stand in the way of our taking cognizance of such cases.").

3. *Habeas corpus*. In a series of cases, the Court made clear that it can exercise "original habeas" jurisdiction only if a party has previously filed a case in a lower court. In *Ex parte Bollman*, 8 U.S. 75

(1807), the Court concluded that it had jurisdiction over a habeas corpus petition, which was appropriately viewed as a writ for "the revision of a decision of an inferior court." *Id.* at 100-01; *see also Ex parte Yerger*, 75 U.S. 85 (1868). By contrast, where the habeas petition did not request "review of the *judicial decision* of some inferior officer or court," the Court denied jurisdiction, reasoning that it could not "issue a writ of *habeas corpus* except under its appellate jurisdiction." *Ex parte Hung Hang*, 108 U.S. 552, 553 (1883); *see also Ex parte Barry*, 43 U.S. 65, 65 (1844) (Story, J.) (denying habeas petition, noting that "[n]o application has been made to the Circuit Court of the United States for the district of New York," and reasoning that the Court lacked appellate jurisdiction and the case "is one avowedly and nakedly for the exercise of original jurisdiction by this court").

4. *The Court of Customs and Patent Appeals and the Court of Claims (again).* In a temporary departure from some of the principles explained above, the Court in *Ex parte Bakelite Corporation*, 279 U.S. 438 (1929), and in *Williams* v. *United States*, 289 U.S. 553 (1933), held that the Court of Customs Appeals and the Court of Claims respectively were not Article III tribunals, even though the Court had exercised "appellate jurisdiction" over them, *see, e.g.*, *Five Per Cent. Discount Cases*, 243 U.S. 97 (1917). In doing so, these decisions implied that the Supreme Court could exercise "appellate jurisdiction" directly over non-Article III federal bodies, such as the two courts at issue in those cases.

Justice Harlan's plurality opinion in *Glidden Company* v. *Zdanok*, however, returned the Court's Article III jurisprudence to its historical moorings by

expressly disapproving of and overturning both *Bakelite* and *Williams*. *See* 370 U.S. at 584. The plurality opinion explained that both the Court of Customs and Patent Appeals (the successor court to the Court of Customs Appeals) and the Court of Claims were — and had always been — Article III courts.

In doing so, Justice Harlan made several statements suggesting an understanding of this Court's "appellate jurisdiction" consistent with the perspective explained in this brief. He observed that "striking evidence of [the Court's early] understanding that the Court of Claims had been vested with judicial power" could be found in the Court's "accept[ance] [of] appellate jurisdiction over what was, necessarily, an exercise of the judicial power which alone it may review." *Id.* at 554 (citing *Marbury*). Likewise, Justice Harlan argued that the Court of Claims possessed "judicial power whose exercise is amenable to appellate review" in this Court, *id.* at 566, and that this Court "took unquestioned appellate jurisdiction" from the Court of Customs and Patent Appeals "on numerous occasions, *id.* at 575. These statements were made in the context of an attempt to argue that the Court of Claims and the Court of Customs and Patent Appeals were, in fact, Article III tribunals. By claiming that this Court's exercise of appellate jurisdiction over the two courts established their Article III status, Justice Harlan logically implied that the Court cannot review actions that are *not* "an exercise of the judicial power."

C. Fundamental separation-of-powers principles preclude this Court from issuing writs to executive branch officers.

1. Fundamental separation-of-powers principles reinforce the precedents of this Court and compel the conclusion that this Court may not issue writs directly to executive branch officers such as the members of the CAAF. The Constitution vests the "executive power" in a single President, U.S. Const. art. II, and the "judicial power" in this Court and in inferior Article III tribunals. Allowing this Court to direct executive branch officers undermines the constitutional scheme by heightening the risk, on the one hand, that a multimember body might directly oversee the Executive Branch instead of the Constitution's single Chief Magistrate and, on the other hand, that Congress may assign to, and thereby inundate this Court with, the routine, direct review of agency decisionmaking. *See Hart & Wechsler* 294 (speculating whether Congress could require this Court to "review *any* adjudicatory decision — even by a non-Article III federal tribunal" or a "multinational tribunal[], in which American officials participate").

That does not mean that this Court can exercise no control over the court-martial system. Quite the contrary, review would be available by way of collateral attack, such as habeas corpus proceedings initiated in federal district court, in the same manner that Article III review of courts-martial had been accomplished for much of the Nation's history. Moreover, to the extent that Congress desired a system of direct Article III review, it could channel cases through the federal courts of appeal before they

reached this Court, in the same manner as a wide variety of schemes authorizing judicial review of agency action in federal appellate court. Or alternatively, Congress could bestow full Article III status on the judges of the CAAF. *See Supreme Court Practice* 131 n.126 (observing that such suggestions have been made in the past).

2. No less importantly, a holding that this Court can exercise "appellate jurisdiction" over the CAAF would necessitate a distinction between some executive branch officers (such as James Madison in *Marbury*) from whose decisions this Court may not exercise "appellate jurisdiction" and other executive branch officers (such as the CAAF's members) from whose decisions this Court may exercise such "appellate jurisdiction." That distinction, presumably, would hinge on the "court-like" functions of the latter officers: whether they exercise judgment, develop a record, and seek to rule on a concrete dispute in an impartial fashion.

Leaving to one side the sheer unpredictability of such a distinction, the Constitution nowhere authorizes a set of "court-like" bodies that partake in some, but not all, of Article III's protections. Nor does it suggest that "appellate jurisdiction" would lie from any such tribunals in this Court. To the contrary, Article III vests the "judicial power" in this Supreme Court, and in inferior Article III tribunals.

The muddying of the waters between Article III courts and such court-like bodies can only have deleterious effects on the Constitution's separation of powers. Indeed, the history of this Court's review of the CAAF illustrates the complications that this approach might create with the utmost clarity. In

both *United States* v. *Denedo*, 556 U.S. 904 (2009), and *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999), this Court entertained a petition for a writ of certiorari from the CAAF by the United States, thereby addressing a peculiar scenario in which one part of the Executive Branch (the Department of Justice) sought this Court's intervention to overturn a supposedly erroneous decision rendered by another part of the Executive Branch (the CAAF). It is questionable whether the Court possesses the constitutional authority to adjudicate an intrabranch dispute of this nature. *See, e.g.*, *Hart & Wechsler* 86-87 (noting "potential pathologies of intragovernmental litigation"). It is likewise questionable whether the President possesses the authority to ask this Court to adjudicate a dispute between two subordinate executive branch officers. By adhering to its precedents construing its own "appellate jurisdiction," the Court could avoid the risk that it may face a thorny intrabranch dispute under the guise of a petition pursuant to section 1259.

CONCLUSION

The petition for a writ of certiorari should be dismissed for lack of Article III jurisdiction.

Respectfully submitted.

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August 2016

APPENDIX

STATUTORY APPENDIX

28 U.S.C. § 1259

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

> (1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.
>
> (2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.
>
> (3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.
>
> (4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

10 U.S.C. § 941

There is a court of record known as the United States Court of Appeals for the Armed Forces. The court is established under article I of the Constitution. The court is located for administrative purposes only in the Department of Defense.

10 U.S.C. § 942

(a) Number.--The United States Court of Appeals for the Armed Forces consists of five judges.

(b) Appointment; qualification.--(1) Each judge of the court shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, for a specified term determined under paragraph (2). A judge may serve as a senior judge as provided in subsection (e).
(2) The term of a judge shall expire as follows:
(A) In the case of a judge who is appointed after January 31 and before July 31 of any year, the term shall expire on July 31 of the year in which the fifteenth anniversary of the appointment occurs.
(B) In the case of a judge who is appointed after July 31 of any year and before February 1 of the following year, the term shall expire fifteen years after such July 31.
(3) Not more than three of the judges of the court may be appointed from the same political party, and no person may be appointed to be a judge of the court unless the person is a member of the bar of a Federal court or the highest court of a State.
(4) A person may not be appointed as a judge of the court within seven years after retirement from active duty as a commissioned officer of a regular component of an armed force.

(c) Removal.--Judges of the court may be removed from office by the President, upon notice and hearing, for—

(1) neglect of duty;
(2) misconduct; or
(3) mental or physical disability.
A judge may not be removed by the President for any other cause.

(d) Pay and allowances.--Each judge of the court is entitled to the same salary and travel allowances as are, and from time to time may be, provided for judges of the United States Courts of Appeals.

(e) Senior judges.--(1)(A) A former judge of the court who is receiving retired pay or an annuity under section 945 of this title (article 145) or under subchapter III of chapter 83 or chapter 84 of title 5 shall be a senior judge. The chief judge of the court may call upon an individual who is a senior judge of the court under this subparagraph, with the consent of the senior judge, to perform judicial duties with the court--
(i) during a period a judge of the court is unable to perform his duties because of illness or other disability;
(ii) during a period in which a position of judge of the court is vacant; or
(iii) in any case in which a judge of the court recuses himself.
(B) If, at the time the term of a judge expires, no successor to that judge has been appointed, the chief judge of the court may call upon that judge (with that judge's consent) to continue to perform judicial duties with the court until the vacancy is filled. A judge who,

upon the expiration of the judge's term, continues to perform judicial duties with the court without a break in service under this subparagraph shall be a senior judge while such service continues.

(2) A senior judge shall be paid for each day on which he performs judicial duties with the court an amount equal to the daily equivalent of the annual rate of pay provided for a judge of the court. Such pay shall be in lieu of retired pay and in lieu of an annuity under section 945 of this title (article 145), subchapter III of chapter 83 or subchapter II of chapter 84 of title 5, or any other retirement system for employees of the Federal Government.

(3) A senior judge, while performing duties referred to in paragraph (1), shall be provided with such office space and staff assistance as the chief judge considers appropriate and shall be entitled to the per diem, travel allowances, and other allowances provided for judges of the court.

(4) A senior judge shall be considered to be an officer or employee of the United States with respect to his status as a senior judge, but only during periods the senior judge is performing duties referred to in paragraph (1). For the purposes of section 205 of title 18, a senior judge shall be considered to be a special government employee during such periods. Any provision of law that prohibits or limits the political or business activities of an employee of the United States shall apply to a senior judge only during such periods.

(5) The court shall prescribe rules for the use and conduct of senior judges of the court. The chief judge of the court shall transmit such rules, and any

amendments to such rules, to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives not later than 15 days after the issuance of such rules or amendments, as the case may be.

(6) For purposes of subchapter III of chapter 83 of title 5 (relating to the Civil Service Retirement and Disability System) and chapter 84 of such title (relating to the Federal Employees' Retirement System) and for purposes of any other Federal Government retirement system for employees of the Federal Government--

(A) a period during which a senior judge performs duties referred to in paragraph (1) shall not be considered creditable service;

(B) no amount shall be withheld from the pay of a senior judge as a retirement contribution under section 8334, 8343, 8422, or 8432 of title 5 or under any other such retirement system for any period during which the senior judge performs duties referred to in paragraph (1);

(C) no contribution shall be made by the Federal Government to any retirement system with respect to a senior judge for any period during which the senior judge performs duties referred to in paragraph (1); and

(D) a senior judge shall not be considered to be a reemployed annuitant for any period during which the senior judge performs duties referred to in paragraph (1).

(f) Service of article III judges.--(1) The Chief Justice of the United States, upon the request of the chief judge of the court, may designate a judge of a United States court of appeals or of a United States district court to perform the duties of judge of the United States Court of Appeals for the Armed Forces--

(A) during a period a judge of the court is unable to perform his duties because of illness or other disability;

(B) in any case in which a judge of the court recuses himself; or

(C) during a period when there is a vacancy on the court and in the opinion of the chief judge of the court such a designation is necessary for the proper dispatch of the business of the court.

(2) The chief judge of the court may not request that a designation be made under paragraph (1) unless the chief judge has determined that no person is available to perform judicial duties with the court as a senior judge under subsection (e).

(3) A designation under paragraph (1) may be made only with the consent of the designated judge and the concurrence of the chief judge of the court of appeals or district court concerned.

(4) Per diem, travel allowances, and other allowances paid to the designated judge in connection with the performance of duties for the court shall be paid from funds available for the payment of per diem and such allowances for judges of the court.

(g) Effect of vacancy on court.--A vacancy on the court does not impair the right of the remaining judges to exercise the powers of the court.