Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## ORTIZ *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

No. 16–1423. Argued January 16, 2018—Decided June 22, 2018

Congress has long provided for specialized military courts to adjudicate charges against service members**.** Today, courts-martial hear cases involving crimes unconnected with military service. They are also subject to several tiers of appellate review, and thus are part of an integrated "court-martial system" that resembles civilian structures of justice. That system begins with the court-martial itself, a tribunal that determines guilt or innocence and levies punishment, up to lifetime imprisonment or execution. The next phase occurs at one of four appellate courts: the Court of Criminal Appeals (CCA) for the Army, Navy-Marine Corps, Air Force, or Coast Guard. They review decisions where the sentence is a punitive discharge, incarceration for more than one year, or death. The Court of Appeals for the Armed Forces (CAAF) sits atop the court-martial system. The CAAF is a "court of record" composed of five civilian judges, 10 U. S. C. §941, which must review certain weighty cases and may review others. Finally, 28 U. S. C. §1259 gives this Court jurisdiction to review the CAAF's decisions by writ of certiorari.

Petitioner Keanu Ortiz, an Airman First Class, was convicted by a court-martial of possessing and distributing child pornography, and he was sentenced to two years' imprisonment and a dishonorable discharge. An Air Force CCA panel, including Colonel Martin Mitchell, affirmed that decision. The CAAF then granted Ortiz's petition for review to consider whether Judge Mitchell was disqualified from serving on the CCA because he had been appointed to the Court of Military Commission Review (CMCR). The Secretary of Defense had initially put Judge Mitchell on the CMCR under his statutory authority to "assign [officers] who are appellate military judges" to serve on that court. 10 U. S. C. §950f(b)(2). To moot a possible constitutional

Syllabus

problem with the assignment, the President (with the Senate's advice and consent) also appointed Judge Mitchell to the CMCR pursuant to §950f(b)(3). Shortly thereafter, Judge Mitchell participated in Ortiz's CCA appeal.

Ortiz claimed that Judge Mitchell's CMCR appointment barred his continued CCA service under both a statute and the Constitution. First, he argued that the appointment violated §973(b)(2)(A), which provides that unless "otherwise authorized by law," an active-duty military officer "may not hold, or exercise the functions of," certain "civil office[s]" in the federal government. Second, he argued that the Appointments Clause prohibits simultaneous service on the CMCR and the CCA. The CAAF rejected both grounds for ordering another appeal.

*Held*:

1. This Court has jurisdiction to review the CAAF's decisions. The judicial character and constitutional pedigree of the court-martial system enable this Court, in exercising appellate jurisdiction, to review the decisions of the court sitting at its apex.

An *amicus curiae*, Professor Aditya Bamzai, argues that cases decided by the CAAF do not fall within Article III's grant of appellate jurisdiction to this Court. In *Marbury* v. *Madison*, 1 Cranch 137, Chief Justice Marshall explained that "the essential criterion of appellate jurisdiction" is "that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Id.,* at 175. Here, Ortiz's petition asks the Court to "revise and correct" the latest decision in a "cause" that began in and progressed through military justice "proceedings." Unless Chief Justice Marshall's test implicitly exempts cases instituted in a military court, the case is now appellate.

There is no reason to make that distinction. The military justice system's essential character is judicial. Military courts decide cases in strict accordance with a body of federal law and afford virtually the same procedural protections to service members as those given in a civilian criminal proceeding. The judgments a military tribunal renders "rest on the same basis, and are surrounded by the same considerations[, as] give conclusiveness to the judgments of other legal tribunals." *Ex parte Reed*, 100 U. S. 13, 23. Accordingly, such judgments have res judicata and Double Jeopardy effect. The jurisdiction and structure of the court-martial system likewise resemble those of other courts whose decisions this Court reviews. Courts-martial try service members for garden-variety crimes unrelated to military service, and can impose terms of imprisonment and capital punishment. Their decisions are also subject to an appellate process similar to the one found in most States. And just as important, the

Syllabus

constitutional foundation of courts-martial is not in the least insecure. See *Dynes* v. *Hoover*, 20 How. 65, 79. The court-martial is older than the Constitution, was recognized and sanctioned by the Framers, and has been authorized here since the first Congress. Throughout that history, courts-martial have operated as instruments of military justice, not mere military command. They are bound, like any court, by the fundamental principles of law and the duty to adjudicate cases without partiality.

Bamzai argues that the Court lacks jurisdiction because the CAAF is not an Article III court, but is instead in the Executive Branch. This Court's appellate jurisdiction, however, covers more than the decisions of Article III courts. This Court can review proceedings of state courts. See *Martin* v. *Hunter's Lessee*, 1 Wheat. 304. It can also review certain non-Article III judicial systems created by Congress. In particular, the Court has upheld its exercise of appellate jurisdiction over decisions of non-Article III territorial courts, see *United States* v. *Coe*, 155 U. S. 76, and it has uncontroversially exercised appellate jurisdiction over non-Article III District of Columbia courts, see *Palmore* v. *United States*, 411 U. S. 389. The non-Article III court-martial system stands on much the same footing as territorial and D. C. courts. All three rest on an expansive constitutional delegation, have deep historical roots, and perform an inherently judicial role. Thus, in *Palmore*, this Court viewed the military, territories, and District as "specialized areas having particularized needs" in which Article III "give[s] way to accommodate plenary grants of power to Congress." *Id.*, at 408.

Bamzai does not provide a sufficient reason to divorce military courts from territorial and D. C. courts when it comes to defining this Court's appellate jurisdiction. He first relies on the fact that territorial and D. C. courts exercise power over discrete geographic areas, while military courts do not. But this distinction does not matter to the jurisdictional inquiry. His second argument focuses on the fact that the CAAF is in the Executive Branch. In his view, two of the Court's precedents—*Ex parte Vallandigham*, 1 Wall. 243, and *Marbury*, 1 Cranch 137—show that the Court may never accept appellate jurisdiction from any person or body within that branch. As to *Vallandigham*, that case goes to show only that not every military tribunal is alike. Unlike the military commission in *Vallandigham*, which lacked "judicial character," 1 Wall., at 253, the CAAF is a permanent court of record established by Congress, and its decisions are final unless the Court reviews and reverses them. As to *Marbury*, James Madison's failure to transmit William Marbury's commission was not a judicial decision by a court. Here, by contrast, three constitutionally rooted courts rendered inherently judicial decisions. Pp. 5–19.

Syllabus

2. Judge Mitchell's simultaneous service on the CCA and the CMCR violated neither §973(b)(2)(A) nor the Appointments Clause. Pp. 19–25.

(a) The statutory issue turns on two interlocking provisions. Section 973(b)(2)(A) is the statute that Ortiz claims was violated here. It prohibits military officers from "hold[ing], or exercis[ing] the functions of," certain "civil office[s]" in the federal government, "[e]xcept as otherwise authorized by law." Section 950f(b) is the statute that the Government claims "otherwise authorize[s]" Judge Mitchell's CMCR service, even if a seat on that court is a covered "civil office." It provides two ways to become a CMCR judge. Under §950f(b)(2), the Secretary of Defense "may assign" qualified officers serving on a CCA to be judges on the CMCR. Under §950f(b)(3), the President (with the Senate's advice and consent) "may appoint" persons—whether officers or civilians is unspecified—to CMCR judgeships.

Ortiz argues that Judge Mitchell was not "authorized by law" to serve on the CMCR after his appointment because §950f(b)(3) makes no express reference to military officers. In the circumstances here, however, the express authorization to assign military officers to the CMCR under §950f(b)(2) was the only thing necessary to exempt Judge Mitchell from §973(b)(2)(A). Once the Secretary of Defense placed Judge Mitchell on the CMCR pursuant to §950f(b)(2), the President's later appointment made no difference. It did not negate the Secretary's earlier action, but rather ratified what the Secretary had already done. Thus, after the appointment, Judge Mitchell served on the CMCR by virtue of both the Secretary's assignment and the President's appointment. And because §950f(b)(2) expressly authorized the Secretary's assignment, Judge Mitchell's CMCR service could not run afoul of §973(b)(2)(A)'s general rule. Pp. 20–23.

(b) Ortiz also raises an Appointments Clause challenge to Judge Mitchell's simultaneous service on the CCA and the CMCR. That Clause distinguishes between principal officers and inferior officers. CCA judges are inferior officers. Ortiz views CMCR judges as principal officers. And Ortiz argues that, under the Appointments Clause, a single judge cannot serve as an inferior officer on one court and a principal officer on another. But the Court has never read the Appointments Clause to impose rules about dual service, separate and distinct from methods of appointment. And if the Court were ever to apply the Clause to dual-officeholding, it would not start here. Ortiz does not show how Judge Mitchell's CMCR service would result in "undue influence" on his CCA colleagues. Pp. 23–25.

76 M. J. 125 and 189, affirmed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS,

Syllabus

C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. THOMAS, J., filed a concurring opinion. ALITO, J., filed a dissenting opinion, in which GORSUCH, J., joined.

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