



# *Marbury v. Madison* Returns! The Supreme Court Considers the Scope of “Judicial” Power

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Every first-year law student learns about *Marbury v. Madison*. In the landmark 1803 opinion by Chief Justice John Marshall, the Supreme Court established the basis for judicial review and set out the limitations of its own jurisdiction, forming the foundation for the Court’s role in U.S. government. It now appears that the scope of one of the major holdings of *Marbury* is back before the Supreme Court. In *Dalmazzi v. United States*, an appeal from the Court of Appeals for the Armed Forces (the “CAAF”), consolidated with *Ortiz v. United States* and *Cox v. United States*, the Court has taken the relatively unusual step of granting a third party amicus, University of Virginia (UVA) law professor Aditya Bamzai, [oral argument time](#) in which to argue that *Marbury*’s interpretation of the Supreme Court’s jurisdiction under Article III prevents the Court from exercising jurisdiction in any appeal from the CAAF.

This aspect of *Dalmazzi*, which is to be argued on January 16, is significant for Congress. The Supreme Court’s jurisdiction to hear CAAF appeals rests on a statute, [28 U.S.C. § 1259](#). The Court has never considered the constitutionality of this statute. If the Supreme Court agrees with Professor Bamzai that *Marbury* renders 28 U.S.C. § 1259 unconstitutional, it would be striking down a federal statute and constraining Congress’s ability to provide for direct review in the Supreme Court. On the other hand, Professor Bamzai [argues](#) that a contrary holding could conceivably enable Congress to have the Supreme Court review “any adjudicatory decision,” even those made by executive agencies. This Sidebar provides background on *Marbury* and the upcoming *Dalmazzi* case, and concludes by exploring the potential ramifications of the jurisdictional question *Dalmazzi* poses.

**A Brief History of *Marbury v. Madison*.** The [facts](#) of *Marbury* are intertwined with the first major transfer of power between political parties in American history. In March 1801, at the tail end of the John Adams Administration, weeks before Thomas Jefferson was sworn in as president, the lame-duck Federalist Congress passed the Judiciary Act of 1801, creating a number of new judgeships. On his way out of the door, President John Adams was signing commissions for these new seats down to the very last minute.

William Marbury, a Federalist Party leader from Maryland, was awarded one of these last-minute commissions. Although it was signed, the actual piece of paper evidencing the commission was not delivered in time. When Jefferson took office the next day, he ordered his Secretary of State, James

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Madison, to withhold the document. Marbury, seeking a court order forcing James Madison's hand, filed for a writ of mandamus in the Supreme Court. The Court took the case in February 1803.

Chief Justice John Marshall wrote the [opinion](#) for a unanimous four-member Court. Marshall concluded that though Marbury had a right to the commission and it was a "[plain case for a mandamus](#)," the Supreme Court had no jurisdiction to hear the case. In so doing, he held that Section 13 of the [Judiciary Act of 1789](#), which he interpreted to provide the Supreme Court with the power to issue writs of mandamus as an original matter, was unconstitutional. In holding the statute unconstitutional, Marshall established the power of "judicial review"—that is, the federal judiciary's authority to assess the constitutionality of statutes enacted by Congress and to invalidate laws that violate the U.S. Constitution.

Marshall's reasoning for holding Section 13 of the Judiciary Act of 1789 unconstitutional relied on the text of the Constitution, and in particular Article III, Section Two, which [only provides for original jurisdiction in three specific instances](#): "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction..." According to Marshall, the Supreme Court's "original" jurisdiction is limited to the three types of cases listed in Article III. Marbury's suit did not involve any of the three cases, so in order for mandamus to be proper, "[it must be shown to be an exercise of appellate jurisdiction](#)." As Marbury's application for mandamus was not an appeal of any kind, it could not fit within the Supreme Court's jurisdictional limitations under the Constitution and the case had to be dismissed.

**Background of *Dalmazzi*.** On the surface, *Dalmazzi* would seem to have little to do with *Marbury*. *Dalmazzi* and the two cases with which it is consolidated are [appeals](#) from the CAAF. Each case involves a member of the armed forces who was convicted by a military judge of a crime in a court martial. Each of the petitioners then appealed their case to their respective Court of Criminal Appeals (CCAs), which affirmed the petitioners' convictions. Now, the petitioners assert they are entitled to new hearings before the CCA because the panels that affirmed their convictions had one or more military judges that were simultaneously serving as judges of the U.S. Court of Military Commission Review, an intermediate appellate court for military commissions. Petitioners argue that for statutory and constitutional based reasons, simultaneous service is unlawful.

The military courts martial system has three levels. The lowest level is a court martial, which has jurisdiction over all offenses under the [Uniform Code of Military Justice](#). Appeals from courts martial go to one of four CCAs, one each for the Army, Navy-Marine Corps, the Air Force, and the Coast Guard. The top level of the military courts system is the CAAF, which is made up of [five civilian judges](#). Those judges are not "Article III" judges—though they are appointed by the President with the advice and consent of the Senate, they serve for fifteen-year terms, in contrast to the tenure during good behavior provided for members of the federal judiciary by the Constitution. In ordinary cases, the CAAF has discretion to accept review from the CCAs, which it does sparingly. [In 2016](#), the CAAF granted 66 petitions for review from the decisions of the CCAs.

Originally, there was no avenue for an appeal of the CAAF's decisions. In 1983, Congress enacted 28 U.S.C. § 1259, which grants the Supreme Court jurisdiction to hear appeals from the CAAF. The Supreme Court has reviewed only [nine](#) such cases since Congress enacted Section 1259.

**Jurisdictional Dispute.** Although there were nine previous Supreme Court appeals from the CAAF, no previous case considered the jurisdiction question. No party to *Dalmazzi* contests the validity of 28 U.S.C. § 1259 or whether the Supreme Court has jurisdiction generally to review decisions of the CAAF. However, after the petition for review was granted, Professor Bamzai, who teaches and writes about civil procedure and the federal courts at UVA, filed an [amicus](#) brief on his own behalf to argue that the Supreme Court lacked jurisdiction in this or any other case on appeal from the CAAF.

First and foremost, Professor Bamzai [argues](#) that *Marbury* prohibits the Court from hearing the cases because Article III, Section 2 only allows the Court to hear a case like this if it arises under the Supreme Court’s “appellate” jurisdiction—as *Marbury* explained, it cannot be original jurisdiction because it does not involve any of the three specified types of original jurisdiction and it involves “[revis\[ion\] and correct\[ion\] in a cause already instituted.](#)” However, the Court can only validly exercise appellate jurisdiction in cases arising from an earlier exercise of the “judicial power.” The question, then, is whether the CAAF exercises the “judicial power” when it issues its rulings. The CAAF is an executive branch entity—the judges are not Article III judges, they serve 15-year terms, and they can be terminated by the President for cause. As a result, according to Professor Bamzai, they cannot exercise the “judicial power” in the way that term is used in the Constitution; they are essentially executive officers. The CAAF judges are, in Bamzai’s view, little different from James Madison, the Secretary of State in *Marbury*. Bamzai argues that the U.S. Constitution bars the Supreme Court from reviewing CAAF decisions, just as it barred review of Madison’s decision not to deliver the commission in *Marbury*. Professor Bamzai also argues that the Court’s precedents—particular the 1863 case *Ex Parte Vallandigham*, which concluded that the Supreme Court lacked jurisdiction to review proceedings of a military commission—requires the Court to dismiss the *Dalmazzi* case as well. Lastly, Professor Bamzai argues that “fundamental separation-of-powers principles” require dismissal, particularly the principle that the Court not issue orders directly to executive branch officers.

The United States’ [brief](#) spends seven pages arguing against Professor Bamzai’s points. With respect to *Marbury*, the United States argues that despite not being an Article III court, the system of courts-martial established by Congress stands on similar footing to the territorial courts, the courts of Private Land Claims, or the courts of the District of Columbia—other courts established by Congress for which the Court has [previously held](#) that it has valid appellate jurisdiction. Similarly, the United States argues that *Vallandigham* is distinguishable because at the time of that case there was no *statutory* jurisdiction—in this case, there is a valid statute. At bottom, the United States’ argument is that Congress has the power in the case of “unique historical exceptions”—like territorial courts and courts-martial—to create non-Article III courts and may validly provide for appellate review of those decisions in the Supreme Court.

**Conclusion.** It is impossible to say what the Court will decide on the jurisdictional question, but with the oral argument time provided to Professor Bamzai, it seems almost certain that the Court is interested in whether it has jurisdiction to hear the case. Whether the Court follows or distinguishes *Marbury v. Madison* it will have future consequences beyond military courts-martial on the jurisdiction of the Supreme Court—it could permanently limit Congress’s ability to utilize the Supreme Court as a direct reviewing body in cases arising from non-Article III courts. A ruling that the Court lacks jurisdiction could necessitate Congress, if it wishes to preserve Article III review of the CAAF decisions, to amend 28 U.S.C. § 1259 to provide for intermediate review in a lower federal court. Alternatively, Congress could rely on habeas review of courts martial, as was done before 1983. The Court is scheduled to hear arguments in *Dalmazzi* on Tuesday, January 16, 2018, and a decision is expected by early summer 2018.

## Author Information

Wilson C. Freeman  
Legislative Attorney

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