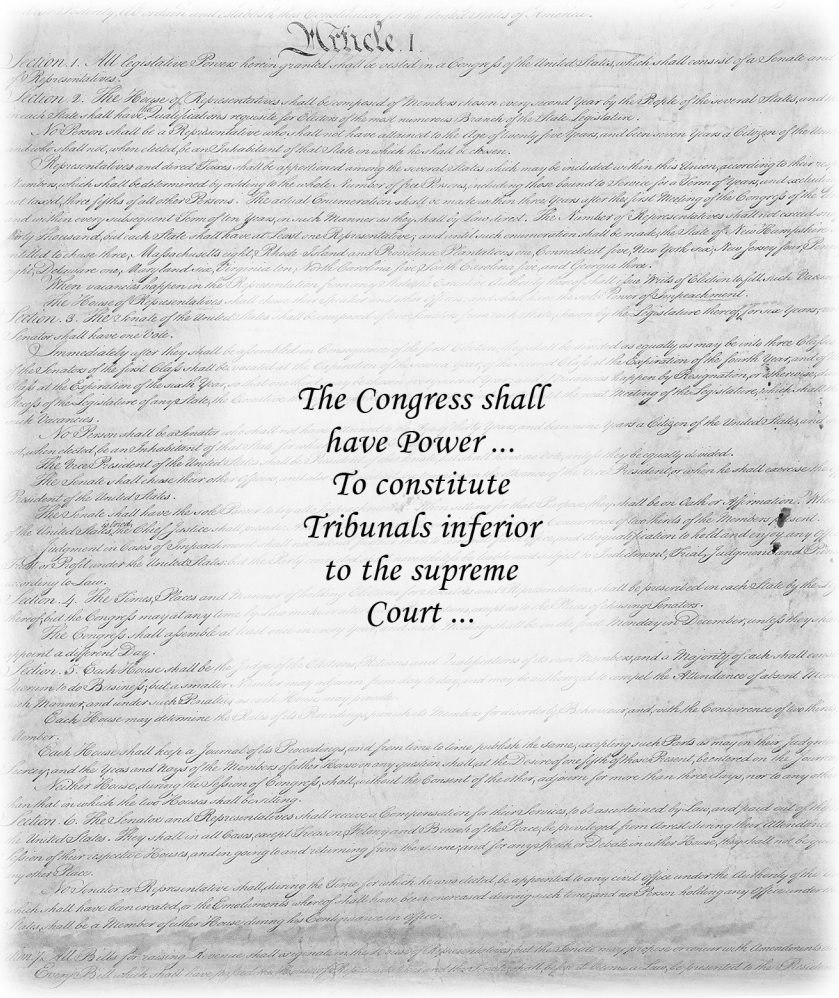
Cases that Shaped the Federal Courts

Glidden Company v. Zdanok

1962



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Central Question

Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?

Historical Context

In setting forth a plan for the federal judiciary, the framers of the Constitution provided for federal judges to serve "during good behavior" and to receive a salary that could not be diminished. These protections, found in Article III, were designed to ensure that judges would remain independent of the political branches of government. Judges who made unpopular decisions would not fear reprisals in the form of removal from office or diminution in compensation.

Early in the nation's history, however, the Supreme Court established that Congress could, under certain circumstances, create federal courts whose judges were not cloaked with the tenure and salary protections of Article III. In *Canter v. American Insurance Company*, decided in 1828, the Court held that the mandates of Article III did not apply to territorial courts. In that case, Chief Justice John Marshall drew a distinction between "constitutional courts," established under Article III to exercise the judicial power of the United States, and "legislative courts," which were created to carry out functions delegated to them by Congress. It remained to be seen, however, whether Congress would create legislative courts in other contexts, and if so, whether the Supreme Court would find those courts to be constitutionally capable of carrying out the tasks they had been assigned.

In the ensuing years, Congress established several federal courts charged with exercising specialized jurisdiction. One such specialized court was the Court of Claims, created in 1855 to hear and determine all monetary claims against the United States based on a statute, executive branch regulation, or contract. Congress created the court in order to relieve itself of the burden of handling such claims, which it had done since 1789. The statute creating the Court of Claims did not specify whether Congress was exercising its Article III power to create inferior courts, as opposed to its Article I legislative power, but the law specified that the court's judges were to hold office during good behavior.

In the Payne-Aldrich Tariff Act of 1909, Congress provided for a U.S. Court of Customs Appeals to hear all appeals from the Board of General Appraisers (later renamed the U.S. Customs Court). The purpose of the new appellate court was to remove the heavy burden of customs appeals from the U.S. circuit courts and U.S. courts of appeals, particularly in New York City, where many such cases originated. Congress provided for the court's judges to be appointed by the President with Senate confirmation but did not

specify the length of their tenure. In 1929, the court was renamed the U.S. Court of Customs and Patent Appeals and given jurisdiction over appeals from the U.S. Patent Office.

At various times in their history, both the Court of Claims and the Court of Customs Appeals became involved in cases that required the Supreme Court to determine whether they were Article III or Article I courts; in other words, whether they were exercising power that was judicial or legislative in nature, and whether their judges possessed the independence made requisite by Article III. *Glidden v. Zdanok* provided the Court's final word on that question.

Legal Debates Before *Glidden*

In *Gordon v. United States*, decided in 1865, the Supreme Court refused to hear an appeal from the Court of Claims on the ground that the court was exercising legislative, and not judicial, power. Because the judgments of the Court of Claims were subject to revision by the Secretary of the Treasury, the court lacked the ability to enforce them. An order by the Supreme Court affirming a judgment would have been subject to the same executive branch review, intruding upon the separation of powers and impairing judicial independence. In 1866, Congress repealed the statutory provision requiring review by the Secretary of the Treasury, and the Supreme Court began hearing appeals from the Court of Claims. Later cases, however, continued to cast doubt on whether the Court of Claims was an Article III court.

In 1929, the Supreme Court was called upon to decide the constitutional status of the U.S. Court of Customs Appeals in the case of *Ex parte Bakelite Corporation*. Bakelite petitioned the Supreme Court to prevent the Court of Customs Appeals from hearing an appeal from the U.S. Tariff Commission—a body charged with making findings regarding unfair trade practices and providing recommendations to the President. Article III provided that only an actual "case or controversy" would be cognizable in federal court. Because the Tariff Commission used its findings to advise the executive branch rather than to enter enforceable judgments, Bakelite argued, a proceeding before it was not such a "case or controversy." The Court of Customs and Patent Appeals, if it were an Article III court exercising judicial power, could not issue an opinion that would be merely advisory, just as the Supreme Court could not issue such an opinion in the *Gordon* case. At stake once again were concerns over judicial independence and the separation of powers.

The Supreme Court ruled unanimously that the Court of Customs Appeals (by then renamed the Court of Customs and Patent Appeals) was not an Article III court. The court performed functions which, "although mostly quasijudicial, were all susceptible of performance by executive officers." Congress had created the court in furtherance of its power "to lay and collect duties on imports and to adopt any appropriate means of carrying that

power into execution." Because the Court of Customs Appeals was not exercising the judicial power of the United States, it was irrelevant to the case at hand whether the Tariff Commission proceeding was a "case or controversy" that could be resolved by a federal court exercising judicial power.

Four years later, *Williams v. United States* presented a similar issue with respect to the Court of Claims. In 1932, Congress passed legislation reducing the salaries of federal judges not protected by the Article III ban on diminution in compensation. The Comptroller General ruled that the Court of Claims was an Article I legislative court, and accordingly subjected its judges to the reduction in pay. Judge Thomas Williams brought suit against the government in his own court, the only forum available, and the Court of Claims certified to the Supreme Court the question of whether it possessed Article III status.

The Court ruled unanimously that the Court of Claims was an Article I legislative court, the judges of which were not protected from diminution of their salaries. In the opinion, Justice George Sutherland noted that matters coming before the Court of Claims were "equally susceptible of legislative or executive determination," and were therefore "matters in respect of which there is no constitutional right to a judicial remedy."

In 1953 and 1958 respectively, Congress passed statutes declaring the Court of Claims and the Court of Customs and Patent Appeals to have been created pursuant to Article III. In the *Glidden* case, the Supreme Court had the opportunity to rule on the effect of these declarations.

The Case

Glidden involved two separate cases that were consolidated for argument and decision by the Supreme Court. *Glidden v. Zdanok* was a suit brought in New York state court in 1958 by a group of employees alleging that their employer had breached a collective bargaining agreement. The defendant removed the case to the U.S. District Court for the Southern District of New York and won a ruling that the employees were not entitled to damages, but in 1961 the U.S. Court of Appeals for the Second Circuit reversed the decision of the trial court. The appellate court's opinion was written by Judge J. Warren Madden of the Court of Claims, who was sitting on the Court of Appeals pursuant to a federal statute authorizing the Chief Justice of the Supreme Court to make such temporary assignments.

The other case, *Lurk v. United States*, involved a conviction for armed robbery in the U.S. District Court for the District of Columbia. Presiding over the trial was Judge Joseph R. Jackson, a retired judge of the Court of Customs and Patent Appeals who, like Judge Madden in *Glidden*, was sitting by virtue of a temporary assignment by the Chief Justice. In 1961, the conviction was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit.

The defendants in both cases sought review by the Supreme Court, arguing that judges of the Court of Claims and the Court of Customs and Patent Appeals should not have been allowed to hear their cases. Because those courts were Article I legislative courts, the defendants argued, their judges lacked the tenure and salary protections of Article III. The defendants claimed that they had been denied the right to have their cases heard by judges possessing the independence of U.S. district and courts of appeals judges.

The Supreme Court's Ruling

The Supreme Court ruled 5–2 (with two justices not participating in the case) that the Court of Claims and the Court of Customs and Patent Appeals were Article III courts. Although a majority of the Court agreed on the result, no single opinion expressing the Court's reasoning won the votes of five justices. The opinion written by Justice John Marshall Harlan and joined by two other justices was a plurality opinion, receiving the most votes while falling short of a majority. A concurring opinion written by Justice Tom Clark and joined by Chief Justice Earl Warren reached the same result while employing somewhat different reasoning.

The challenges to the constitutional status of the two courts gave the Supreme Court the opportunity to revisit its decisions in *Bakelite* and *Williams*, in which it had held that both were Article I legislative courts. The plurality noted that the congressional declarations of 1953 and 1958 that both were Article III courts, while entitled to some weight, were not conclusive. Harlan's opinion pointed out the Court's responsibility as "the ultimate expositor of the Constitution" to make its own decision regarding the status of the two courts.

At the outset of his plurality opinion in *Glidden*, Justice Harlan disagreed with an important principle underlying *Bakelite* and *Williams*. In those cases, the Court found that if certain business handled by the two courts (appeals from the Tariff Commission heard by the Court of Customs and Patent Appeals and matters referred by Congress heard by the Court of Claims) could have been handled by the legislative or executive branches, that business was inherently nonjudicial and could not be assigned to an Article III court. On the contrary, asserted Harlan, matters susceptible to resolution by other branches could, in some instances, be included within the judicial power. If they were, Congress could create an Article III tribunal to adjudicate them or could delegate them to other officials. The performance of duties that could have been delegated to other branches of government, he concluded, did not automatically deprive a tribunal of Article III status.

Whether a particular court was created under Article III, Harlan stated, "depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its

judges and judgments are allowed the independence there expressly or impliedly made requisite."

The plurality concluded that the early statutory history of the Court of Claims indicated congressional intent to establish the court under Article III. Especially significant was the 1855 act establishing the court, which provided that its judges would be appointed by the President with the advice and consent of the Senate and would have tenure during good behavior. Moreover, when the Supreme Court refused to hear an appeal from the Court of Claims in 1865 because the Secretary of the Treasury had authority to review the court's judgments, Congress promptly eliminated that authority, "once again exhibiting its purpose to liberate the Court of Claims from itself and the Executive." Further evidence of congressional intent was the Tucker Act of 1887, in which Congress gave the court jurisdiction over a range of additional cases, all of which arose "either immediately or potentially under federal law within the meaning of" Article III. Based on the establishing legislation and further statutory developments, Harlan concluded that Congress had intended to design the Court of Claims as an Article III court.

A review of the history of the Court of Customs and Patent Appeals led the plurality to the same conclusion. Although Congress had not specified the tenure of the court's judges when creating the court in 1909, it provided the judges with tenure during good behavior in 1930, immediately after the Supreme Court held in *Bakelite* that the court had not been created under Article III. Furthermore, the Court of Customs Appeals was at its inception granted jurisdiction over decisions of the Board of General Appraisers, which had formerly been the province of the U.S. circuit courts and circuit courts of appeals, which no one disputed were Article III courts. The plurality therefore found that the Court of Customs and Patent Appeals "fit[] harmoniously into the federal judicial system authorized by Article III."

Harlan next examined whether both courts were hearing "cases or controversies" as required by Article III. Harlan found that the vast majority of cases heard by the Court of Claims formed "the staple judicial fare of the regular federal courts." These cases included tax disputes, regulatory challenges, contractual issues, and liability for torts, each of which, wrote Harlan, "is contested, is concrete, and admits of a decree of a sufficiently conclusive character." "The same may undoubtedly be said," he went on, "of the customs jurisdiction vested in the Court of Customs and Patent Appeals," because "[c]ontests over classification and valuation of imported merchandise have long been maintainable in inferior federal courts." Thus, the bulk of the work conducted by both courts was well within the parameters of the judicial business as defined by Article III.

The concurring opinion reached the same result as the plurality on slightly different grounds. Justice Clark believed that the courts had attained Article III status "upon the

clear manifestation of congressional intent" to that effect in 1953 and 1958, particularly in light of the fact that the nonjudicial jurisdiction of both courts had become miniscule. He recommended that the two courts decline to exercise such jurisdiction in the future. Unlike the plurality, Clark did not believe it was necessary to overrule the *Bakelite* and *Williams* decisions, which had been issued prior to the congressional declarations, at a time when the problematic aspects of the courts' jurisdiction had been more significant.

The three justices forming the plurality and the two who concurred in the judgment agreed that both the Court of Customs and Patent Appeals and the Court of Claims were Article III courts and that their judges accordingly possessed constitutionally provided tenure during good behavior and protection against diminution of salary. These judges, therefore, had the requisite degree of independence to sit on the U.S. district court and U.S. court of appeals in the cases at hand. Its holding, the plurality opinion emphasized, did "no more than confer legal recognition upon an independence long exercised in fact."

In a dissenting opinion joined by Justice Hugo Black, Justice William Douglas explained that he saw no reason to overturn the Court's *Bakelite* and *Williams* precedents. The congressional declarations of 1953 and 1958, he asserted, were of little significance; the status of the Court of Claims and the Court of Customs and Patent Appeals depended on the nature of their functions, and not on congressional intent. Although Congress did have the power to provide the judges of those courts with tenure during good behavior, a statutory grant of such tenure was not equivalent to that derived from the Constitution.

Aftermath and Legacy

In 1982, Congress abolished both the Court of Claims and the Court of Customs and Patent Appeals, transferring their judges to a new court, the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit, which became the only U.S. court of appeals to be defined by its subject-matter jurisdiction rather than by geographical boundaries, assumed the jurisdiction of the Court of Customs and Patent Appeals and the appellate jurisdiction of the Court of Claims. The original jurisdiction of the Court of Claims was transferred to the new U.S. Claims Court, later renamed the U.S. Court of Federal Claims, which Congress declared to have been created under Article I.

Although the courts to which the holding in *Glidden* applied no longer exist, the case underscored the importance of judicial independence by establishing that where Article III adjudication is required, litigants have an enforceable right to have their cases heard by judges possessing the independence Article III protects.

Discussion Questions

- Why was it necessary for the Supreme Court to determine whether or not the Court of Claims and the Court of Customs and Patent Appeals were Article III courts?
- Should the Supreme Court have given conclusive effect to the congressional statutes declaring both courts to have been established under Article III? Why or why not?
- What does it mean for a task to be considered nonjudicial, and why is it problematic for an Article III court to perform such a task?
- What factors did the Supreme Court consider to determine whether the courts had Article III status?

Documents

Supreme Court of the United States, Opinion in *Ex parte Bakelite Corporation*, May 20, 1929

In 1929, the Supreme Court held the Court of Customs Appeals to be an Article I court whose judges lacked the tenure and salary protections provided by Article III. The Supreme Court based its holding on the nature of the duties the special court performed—those tasks carried out the power of Congress to execute the customs laws, were not cases requiring judicial determination, and were akin to those handled by an administrative agency.

[I]t has long been settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.…

Legislative courts [] may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.

The Court of Claims is such a court. It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies.…

The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called the Board of General Appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers.…

This summary of the court's province as a special tribunal, of the matters subjected to its revisory authority, and of its relation to the executive administration of the customs laws, shows very plainly that it is a legislative and not a constitutional court.…

[I]t is said that in creating courts Congress has made it a practice to distinguish between those intended to be constitutional and those intended to be legislative by making no provision respecting the tenure of judges of the former and expressly fixing the tenure of judges of the latter. But the argument is fallacious. It mistakenly assumes that whether a court is one of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred.

Document Source: *Ex parte Bakelite Corporation*, 279 U.S. 438, 449, 451–52, 458–59 (1929).

Supreme Court of the United States, Opinion in *Williams v. United States*, May 29, 1933

In the Williams *case, the Supreme Court followed the dicta it had included in its* Bakelite *opinion four years earlier to the effect that the Court of Claims was also an Article I legislative court. The power to hear claims against the United States belonged to Congress as part of its constitutional authority to pay the nation's debts. Claimants therefore had no constitutional right to a judicial remedy, and Congress was free to delegate this function to a legislative or executive body.*

Further reflection tends only to confirm the views expressed in the *Bakelite* opinion as to the status of the Court of Customs Appeals, and we feel bound to reaffirm and apply them. And, giving these views due effect here, we see no escape from the conclusion that if the Court of Customs Appeals is a legislative court, so also is the Court of Claims. We might well rest the present case upon that determination; but must not do so without considering another view of the question, which seems to find support in some expressions of this court, namely, that when the United States consents to be sued, the judicial power of Art. III at once attaches to the court upon which jurisdiction is conferred in virtue of the clause which in comprehensive terms extends the judicial power to "controversies to which the United States shall be a party." …

This conception of the application of the judicial article of the Constitution, which at first glance seems plausible, will be found upon examination and consideration to be entirely fallacious.

We first direct attention to the carefully chosen words of § 2, cl. 1, Art. III. By that clause the judicial power is extended to *all* cases in law and equity arising under the Constitution, etc.; to *all* cases affecting ambassadors, other public ministers and consuls; and to *all* cases of admiralty and maritime jurisdiction. Then the comprehensive word "all" is dropped, and the enumeration continues in terms to apply to controversies (but not to "all") to which the United States shall be a party; to controversies between two or more states, etc. The use of the word "all" in some cases, and its omission in others, cannot be regarded as accidental ….

The doctrine of sovereign immunity is fully discussed in Hans v. Louisiana, and in the dissenting opinion of Mr. Justice Iredell in Chisholm v. Georgia. We need not repeat that discussion here. Mr. Justice Holmes, speaking for the court in *Kawananakoa v. Polybank*, 205 U.S. 349, 353, tersely said, "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." It is enough to say that in the light of the settled and unvarying rule upon that subject it is not reasonably possible to assume that it was within the contemplation of the framers of the Constitution that the words, "controversies to which the United States shall be a party," should include controversies to which the United States shall be a party *defendant*….

Since all matters made cognizable by the Court of Claims are equally susceptible of legislative or executive determination … they are, of course, matters in respect of which there is no constitutional right to a judicial remedy … and the authority to inquire into and decide them may constitutionally be conferred on a nonjudicial officer or body.…

The view under discussion—that Congress having consented that the United States may be sued, the judicial power defined in Art. III at once attaches to the court authorized to hear and determine the suits—must, then, be rejected, for the further reason, or, perhaps, what comes to the same reason differently stated, that it cannot be reconciled with the limitation fundamentally implicit in the constitutional separation of powers, namely, that a power definitely assigned by the Constitution to one department can neither be surrendered nor delegated by that department, nor vested by statute in another department or agency.… That is to say, a power which may be devolved, at the will of Congress, upon any of the three departments plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tripartite distribution of such powers.

Document Source: *Williams v. United States*, 289 U.S. 553, 571, 572, 577, 579–81 (1933).

U.S. Senator Albert Gore, Remarks on Bill to Amend Court of Claims Statute, July 16, 1953

In 1953, Congress passed a statute declaring the Court of Claims to have been created pursuant to Article III. Senator Albert Gore of Tennessee opposed the act, even after it was amended to address his concern that it could have been interpreted as creating a new court. Because of prior Supreme Court decisions prohibiting Article III courts from performing functions considered outside of the judicial power, Gore worried that designating the Court of Claims an Article III court would prevent it from exercising certain parts of its jurisdiction, including providing advisory opinions in matters referred to it by Congress.

Senate bill 1349, to designate the Court of Claims a constitutional court, has been on the Senate Calendar for several months as Order No. 258. I have consistently objected to its passage on the Consent Calendar.…

I wish to state the reasons for my prior objections to the passage of Senate bill 1349. I also desire to state for the record some doubts I still entertain about the wisdom of making the Court of Claims an article III constitutional court.

My first objection to the Senate bill was the manner in which it undertook to change the status of the Claims Court from a legislative court to a constitutional court. The language of the first section of that bill is such that I believe the President could have assumed that Congress intended that he should reappoint the present judges, or appoint new judges, to what I think he could have properly regarded as a new court.

This deficiency, namely, this change in the character of the court, could produce many serious consequences. Questions could arise concerning the validity of pleadings and matters now pending before the court. More important, if the President decided to appoint a bench of new judges to the Court of Claims, we could have the uneconomic, undesirable, and unconscionable result of having 5 judges retired on full pay, and 5 new, inexperienced judges on the Court of Claims also drawing full pay.

The language of H. R. 1070, I believe, successfully avoids these unhappy possibilities. By simply declaring that the existing Court of Claims should be a court established under article III of the Constitution, this bill makes it clear that the Congress does not intend to create a new court. In any event, I think it is desirable that the legislative history show with utmost clarity that in passing this bill Congress is not establishing a new court.…

There is but one more problem that I want to mention with respect to this proposed legislation. It is a problem which … is not resolved by the House bill.

I refer to the basic question of whether Congress can, under the Constitution, designate the Court of Claims an article III court and still require it to exercise the special type of jurisdiction which it has conferred upon it.

Over the years the Supreme Court has consistently followed the principle that the Federal courts, other than those for the District of Columbia, created under article III of the Constitution, can exercise only jurisdiction falling within the judicial limits set forth in article III.

In 1933 the Supreme Court in the Williams case determined that the Court of Claims was a legislative rather than a constitutional court, partly for the reason that it believed claims against the United States, as set forth in the statute establishing the jurisdiction of the Court of Claims, were not cases to which the United States was a party in the constitutional sense in which case or controversy is used in article III. Thus, a cloud is cast upon the constitutionality of having the Court of Claims, as an article III court, exercise the principal jurisdiction which Congress has conferred upon it.…

Section 2509 of title 28 of the United States Code directs the Court of Claims to render advisory opinions on cases referred to the court by the Congress. This would seem to be a function which Congress could not require of a constitutional court. No one would seriously contend that it is a judicial power in the sense of article III.

Since the present judges of the Court of Claims have indicated that they would raise no objection to continuing to act on congressional reference cases, perhaps the problem is moot, at least temporarily. If in the future judges of the Court of Claims should refuse to act upon congressional reference cases on the grounds that they are not within the proper scope of jurisdiction of a constitutional court, I suppose the simple remedy will be for Congress to redesignate the Court of Claims as a legislative court.

Document Source: *Congressional Record*, 83rd Cong., 1st sess., 1953, 99, pt. 7:8943–8944.

Justice John Marshall Harlan, Plurality Opinion in *Glidden Company v. Zdanok*, June 25, 1962

In Glidden*, the Supreme Court voted to overturn* Bakelite *and* Williams*, holding that the Court of Claims and the Court of Customs and Patent Appeals were Article III courts. The plurality opinion, written by Justice John Marshall Harlan, based its reasoning on a combination of congressional intent as embodied in the legislative history of the two courts and the judicial nature of the vast majority of the two courts' business. The case marked the Supreme Court's last pronouncement on the issue until both courts were abolished in 1982.*

In determining the constitutional character of the Court of Claims and the Court of Customs and Patent Appeals … we may not disregard Congress' declaration that they were created under Article III. Of course, Congress may not by fiat overturn the constitutional decisions of this Court, but the legislative history of the 1953 and 1958 declarations makes plan that it was far from attempting any such thing.…

To give due weight to these congressional declarations is not of course to compromise the authority or responsibility of this Court as the ultimate expositor of the Constitution. The Bakelite and Williams decisions have long been considered of questionable soundness.…

[W]hether a tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite.…

All of the business that comes before the two courts is susceptible of disposition in a judicial manner. What remains to be determined is the extent to which it is in fact disposed of in that manner.…

"Whether a proceeding which results in a grant is a judicial one," said Mr. Justice Brandeis for a unanimous Court, "does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. The United States may create rights in individuals against itself and provide only an administrative remedy. It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted. It may give to the individual the option of either an administrative or a legal remedy. Or it may provide only a legal remedy. Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status." *Tutun v. United States*, 270 U.S. 568, 576–577. (Citations omitted.)

It is unquestioned that the Tucker Act cases assigned to the Court of Claims, 28 U.S.C. § 1491, advance to judgment "according to the regular course of legal procedure." Under this grant of jurisdiction the court hears tax cases, cases calling into question the statutory authority for a regulation, controversies over the existence or extent of a contractual obligation, and the like.… Such cases, which account for as much as 95% of the court's work, form the staple judicial fare of the regular federal courts.…

The same may undoubtedly be said of the customs jurisdiction vested in the Court of Customs and Patent Appeals by 28 U.S.C. § 1541. Contests over classification and valuation of imported merchandise have long been maintainable in inferior federal courts. . . .

We turn finally to the more difficult questions raised by the jurisdiction vested in the Court of Customs and Patent Appeals by 28 U.S.C. § 1543 to review Tariff Commission findings of unfair practices in import trade, and the congressional reference jurisdiction given the Court of Claims by 28 U.S.C. §§ 1492 and 2509. The judicial quality of the former was called into question though not resolved in Ex parte Bakelite Corp., 279 U.S. 438, 460–461, while that of the latter must be taken to have been adversely decided, so far as susceptibility to Supreme Court review is concerned, by *In re Sanborn*, 148 U.S. 222.…

It does not follow, however, from the invalidity, actual or potential, of these heads of jurisdiction, that either the Court of Claims or the Court of Customs and Patent Appeals must relinquish entitlement to recognition as an Article III court. They are not tribunals, as are for example the Interstate Commerce Commission or the Federal Trade Commission, a substantial and integral part of whose business is nonjudicial.

The overwhelming majority of the Court of Claims' business is composed of cases and controversies.… In the past year, it heard only 10 reference cases … and its recent annual average has not exceeded that figure.… The tariff jurisdiction of the Court of Customs and Patent Appeals is of even less significant dimensions.…

We think … that, if necessary, the particular offensive jurisdiction, and not the courts, would fall.…

The factors set out at length in this opinion, which were not considered in the Bakelite and Williams opinions, make plain that the differing conclusion we now reach does no more than confer legal recognition upon an independence long exercised in fact.

Document Source: *Glidden Company v. Zdanok*, 370 U.S. 530, 541–43, 552, 572–75, 579, 582–84 (1962).

Judith Resnik, *University of Colorado Law Review*, 1985

In this piece from 1985, law professor Judith Resnik of the University of Southern California (and later of Yale) reflected on the importance of the tenure and salary protections of Article III. The constitutional requirement that the judicial power of the United States be exercised by judges who could not have their pay cut or be fired was essential to the ability of the courts to make independent decisions, without interference from the other branches of government. The growing number of cases that were being delegated to non-Article III decision makers, she argued, was therefore a matter of concern.

I titled this discussion "The Mythic Meaning of Article III Courts" because I think the [Supreme] Court's interpretation of Article III is premised upon a deep-seated myth about the role of judges. The myth is captured in this society by the story of Lord Coke v. King James I, in which (in some versions) Lord Coke stands up to the King and defies the power of the executive to dictate the outcome of cases. King James orders the Judge to find on behalf of the claimant favored by the King. (Or, as the Judge reported it, "then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges.") The Judge, facing death or the Tower of London, said to the King:

> that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: and that the law was the golden met-wand and measure to try the causes of the subjects; and which protected his Majesty in safety and peace: with which the King was greatly offended and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, quod Rex non debet esse sub homine, sed sub Deo et lege.
>
> That the King is beneath no man, but is beneath God and the law.

I think this image—of Judge v. King—animates the Court's work in Article III. The "essential attributes of judicial power" to which Chief Justice Hughes [in *Crowell v. Benson*] and Justice Brennan [in *Northern Pipeline*] both referred but neither precisely defined are found in this paragraph from Lord Coke. Here are the quintessentially judicial "private rights" cases. Here are the broad jurisdiction grants—over "life, or inheritance, or goods, or fortunes." And here is the need for the powers of finality and contempt—to equip judges to do battle with the executive (and in this country, with the legislature). By insisting on the powers of finality, generality, and contempt, the Court provides Article III judges with

the capacity to review executive and congressional action in a diverse set of arenas and to enforce decisions at odds with the "King." Article III judges stand ready, as "gladiators" of sorts, should the need arise ….

Of course, our Article III judges may identify with Lord Coke but they enjoy luxuries which he did not. Our judges have protection from being fired (symbolically killed) because of the constitutional text. Given that our "gladiators" have such thick shields, bravery is not so necessary; the battle is far safer than that which Lord Coke faced. In that sense, Article III judges may be required less often to display moral courage. But moral courage may be a quality upon which we would rather not have to depend. The myth of Lord Coke is made complex by other versions of the story—that after Lord Coke has stood up to the King, James ordered him taken to the tower. The Judge then fell upon his knees and begged for forgiveness. James was at first loath to renege, but Lord Coke's aunt's husband intervened and pleaded on the Judge's behalf, and the King permitted the Judge to live. Our Article III judges are not as vulnerable as was Lord Coke; their mythic battles are made safe by Article III.…

The question is whether the "gladiators" will know when the battle starts. Under the pressures of crowded dockets, the courts have permitted a substantial amount of delegation of decisionmaking to non-Article III judges. Administrative law judges and magistrates now rule on a great number of matters. In some districts, prisoners' cases have been turned over to magistrates; empirical studies suggest that magistrates find fault with prior decisions of trial judges at somewhat lower rates than did Article III judges.…

In short, we are left with a view of Article III that there is something essential there, and that it matters that final decisions are made by specially empowered actors. On the other hand, Article III judges have conceded (perhaps out of workload pressures, perhaps from conviction) that it does not matter that the underlying bases of those decisions are formed by actors who are not as independent—either from Congress or (in the case of magistrates) from Article III judges themselves. The ranks of the first tier of the federal judiciary are now filled with individuals who can be fired. These individuals will need the bravery of a Lord Coke (as described in his own version of the events), for they are not as protected as are the Article III judges who review the decisions made. As exemplified by the story of Lord Coke, and our own history, such moral courage is unusual.

I do not know if this compromise will work, but there are reasons to be concerned. First tier decisionmakers have enormous powers to shape records and to protect their own decisions. Unless Article III judges have and exercise the authority to undertake "de novo" consideration with gusto, then the real decisionmakers are those without Article III attributes. Appellate review of records made and facts found by non-Article III judges is a weak substitute for Article III judging. If the Court is correct that Article III attributes are

important, that safety is essential to brave judgment, then the compromises made do not provide the protections intended. In order for Lord Coke to come face to face with the King, in order for Lord Coke to assert his independence from the King and to challenge the King, the Judge had to rule in a manner that displeased.

Document Source: Judith Resnik, "The Mythic Meaning of Article III Courts," *University of Colorado Law Review* 56, no. 4 (Summer 1985): 611–13, 615–17 (footnotes omitted).

James E. Pfander, *Harvard Law Review*, 2004

Law professor James Pfander, then of the University of Illinois, grappled with the relationship between Article III and Article I courts in a 2004 Harvard Law Review *article. Article III literalism—the argument that any courts Congress creates must be staffed with judges vested with Article III tenure and salary protections—would, if put into practice, destroy the administrative state. Professor Pfander suggested, however, that the Inferior Tribunals Clause of Article I, by giving Congress the power to constitute tribunals inferior to the Supreme Court, provided a textual solution to the problem. While most have read "tribunals" as synonymous with the "courts" described in Article III, Pfander argued for a different interpretation. The clause could be read, he asserted, as a separate grant of authority for Congress to create tribunals designed to exercise nonjudicial power and staffed with non-Article III judges, as long as those tribunals were made inferior to the Supreme Court.*

Scholars have searched, with mixed success, for an organizing and limiting principle in the somewhat muddled jurisprudence that governs the relationship between Article III courts and Article I tribunals. While some scholars have reacted to the confusion by supporting a return to principled Article III literalism, others have been unwilling to accept the wholesale uprooting of the administrative state that such an approach would apparently entail.…

History, custom, and expediency have no doubt contributed to the complex mix of institutional arrangements that now govern the interplay among adjudicatory bodies. But the new account offered in this Article suggests that text, structure and principle may still have important roles in defining the relationship between Article I tribunals and Article III courts. The key to this account lies in the constitutional requirement that any courts and tribunals Congress creates must remain "inferior" to a single Supreme Court.…

Just as Article III mandates a hierarchical judicial department with a single superior court, the constitutional requirements of supremacy and inferiority establish an important limit on the power of Congress to establish Article I tribunals. The Inferior Tribunals

Clause of Article I expressly empowers Congress to "constitute" such tribunals, but it qualifies the grant of power by mandating that any such tribunals be "inferior to the supreme Court." The Clause requires more than inferiority in the abstract; it requires concrete inferiority in relationship to the Supreme Court. This subjects inferior tribunals to the oversight of the Supreme Court and requires them to give effect to supreme federal law. The complementary texts of Article III and Article I, in short, establish a firm rule: all tribunals that Congress constitutes, including both Article III courts and Article I tribunals, must remain inferior to the Supreme Court.

Building on the requirements of unity, supremacy, and inferiority, this Article emphasizes a typically overlooked distinction between "courts" and "tribunals." Although the Constitution speaks of "courts" both in Article III and elsewhere, it contains but a single reference to "tribunals," one appearing in the Inferior Tribunals Clause of Article I. Most observers have treated the words as synonyms, assuming that when Congress exercises the power to create inferior tribunals under Article I, the tribunals in question must meet the requirements of Article III and employ judges with salary and tenure protections. Distinguishing Article III courts from Article I tribunals, however, creates new possibilities. In particular, Article III can then be read to vest the judicial power in inferior federal "courts" but not in some inferior "tribunals" created under Article I. This interpretation suggests that Congress enjoys a degree of flexibility in creating Article I tribunals. On such a reading, the Inferior Tribunals Clause may empower Congress to create inferior "tribunals" with judges who lack Article III protections. While these tribunals must remain inferior to the Supreme Court and the judicial department, Article I does not require that they employ life-tenured judges and Article III does not formally invest these tribunals with the judicial power of the United States.

Such an "inferior tribunals" approach has a number of virtues. First, it suggests a textual solution to the nettlesome problem of incorporating Article I tribunals into the framework of Article III courts. This approach explains how the Court can insist on a strict adherence to the Article III requirement of life-tenured judges for lower federal courts, all of which exercise the judicial power of the United States, yet still recognize that the strict requirements of Article III do not apply to certain tribunals that Congress creates pursuant to Article I. Complementing this textual predicate for Congress's power to create tribunals, the Article I requirement of "inferiority" offers an important justification for the widely accepted notion that the legality of such tribunals depends in part on the availability of judicial review in Article III courts.

Apart from providing a textual foundation for congressional power, the inferior tribunals account nicely accords with the institutional history of Article I tribunals. Congress has, by and large, respected the requirement of inferiority when constituting Article I

tribunals, and Article III courts have lent a supporting hand. Congress often provides for direct appellate review to ensure the inferiority of Article I tribunals; or, as in the case of administrative agencies, it makes the Article I tribunal's determination provisional and subject to completion through Article III adjudication. In addition, the federal courts have often worked to supply an otherwise missing source of inferiority, either through the creative interpretation of federal statutes or through the exercise of jurisdiction to entertain collateral attacks.

Finally, the inferior tribunals thesis provides an account of the scope and limits of congressional power to create tribunals outside of Article III. In contrast to the consensus in the literature, which portrays their creation as an act of simple expediency, institutional history reveals that Congress often created Article I tribunals as forums to hear disputes that, for one reason or another, were thought to lie beyond the judicial power of the United States. Article III permits federal courts to exercise power only in circumstances in which the judicial department is to have the last word, free from revision at the hands of the political departments. Such a requirement of judicial finality was thought to preclude Article III courts from hearing "public rights" claims for money against the federal government, at least when Congress retained legislative discretion over payment, and proceedings in the nature of courts-martial, which were subject to review that occurred inside the executive branch. Similarly, Article III courts exercising the limited judicial power of the United States were not thought appropriate to hear disputes over the local common law of contract, property, and probate that filled the dockets of the territorial courts.

The perceived inability of the Article III judiciary to hear disputes in the first instance did not mean that Congress could place the work of Article I tribunals entirely beyond the reach of the constitutional courts. To the contrary, Article III courts frequently oversaw the work of Article I tribunals. Article III courts policed the jurisdictional boundaries of courts-martial, either by considering petitions for writs of habeas corpus by those claiming to have been wrongly detained for trial before such tribunals, or by hearing common law suits for trespass against those who convened such tribunals unlawfully. Article III courts also reviewed the work of territorial tribunals on appeal, particularly when such tribunals handled matters arising under the Constitution, laws, and treaties of the United States. No hard and fast line separated the work of the two institutions; early Article I tribunals often filled a gap in the judicial competence of the federal courts.

Document Source: James E. Pfander, "Article I Tribunals, Article III Courts, and the Judicial Power of the United States," *Harvard Law Review* 118, no. 2 (December 2004): 647–48, 650–52 (footnotes omitted).

Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of "the judicial power," remedies, judicial review, the relationship between federal judicial power and states' rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn's Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter's Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court's jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?