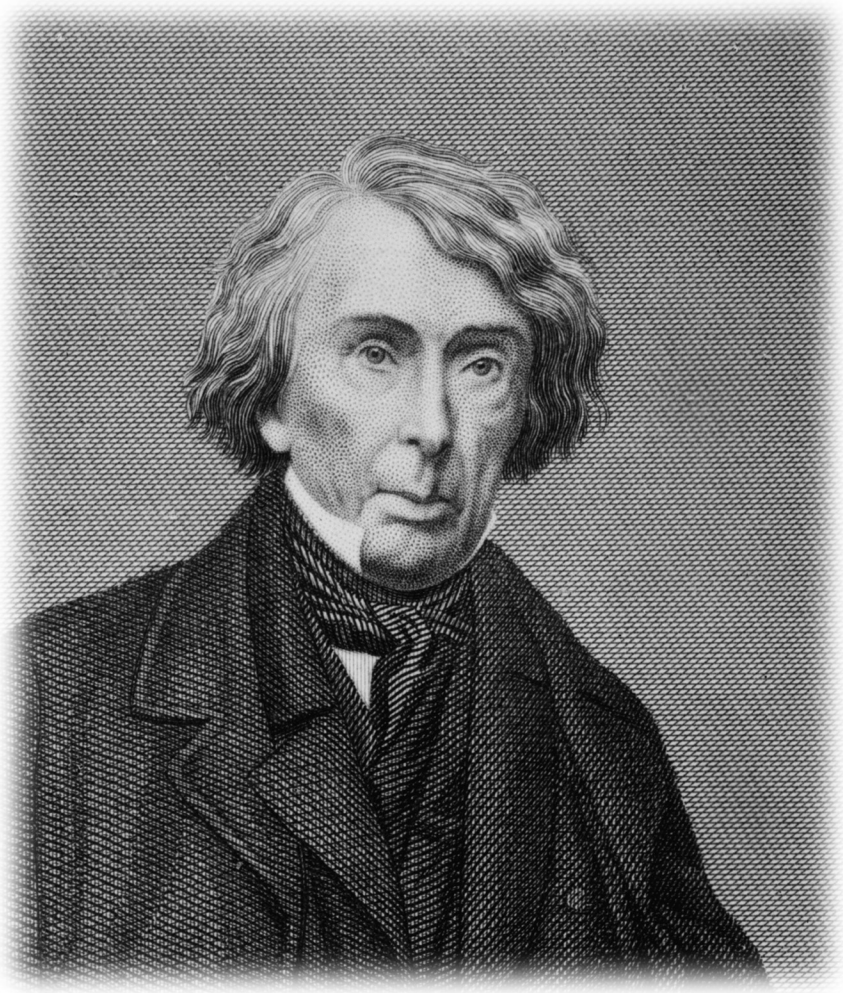
Cases that Shaped the Federal Courts

Gordon v. United States

1865



Chief Justice Roger B. Taney

Federal Judicial Center
2020

Central Question

Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?

Historical Context

In drafting the Constitution, the framers were committed to the concept of judicial independence—the notion that judges should be able to make decisions free from political pressure. One safeguard of such independence is the provision in Article III that federal judges shall hold their offices "during good behavior" and cannot have their salaries diminished, thus protecting them from removal from office or a reduction in pay as retaliation for unpopular decisions. Another structural element protecting judicial independence is the separation of powers. As Alexander Hamilton emphasized in his *Federalist* essays, the judiciary was designed as a separate branch of government so that neither the executive nor the legislature could interfere with its decisions.

Separation of powers is essential to the judiciary's role in a government of limited powers; without it, the courts would be unable to act as a check upon abuses of power by the other branches. At the same time, the constitutional structure of the judiciary has ensured that it is never entirely free from politics. Congress has the power to establish courts inferior to the Supreme Court and define their jurisdiction, and federal judges are appointed by the President with the advice and consent of the Senate. The inherent tension between judicial independence and the authority of the legislature and executive has made it necessary for the Supreme Court to police the boundaries between the judiciary and the political branches.

Questions about judicial independence have frequently arisen with respect to federal courts created for specialized purposes. In 1855, Congress established the Court of Claims, with jurisdiction to hear and determine all monetary claims against the United States government based on a statute, executive branch regulation, or contract. Formerly, all such claims had been made by petitions submitted directly to Congress. The act establishing the court provided that its judges would be appointed by the President by and with the advice and consent of the Senate, and would hold their offices during good behavior. Initially, the court reported its decisions to Congress for its approval, but in 1863, the court was empowered to issue its own decisions. The Court of Claims lacked the power to enforce those decisions, however, as the 1863 act required an estimation by the Secretary of the Treasury and an appropriation by Congress before any claim based on a judgment of the court would be paid. The court's inability to issue final, enforceable judgments led to uncertainty about its constitutional status.

Legal Debates before *Gordon*

Since the earliest years of the republic, the Supreme Court has attempted to preserve judicial independence by enforcing a prohibition against federal courts performing tasks falling outside of the "judicial power" defined by Article III of the Constitution. In 1792, the Court first confronted the question of whether a particular task Congress had assigned the courts was judicial in nature. *Hayburn's Case* arose from an act requiring the U.S. circuit courts to rule on the pension claims of Revolutionary War veterans. The statute provided for the circuit courts to certify their opinions to the Secretary of War, who would either approve the court's decision or refer the matter to Congress. Justices of the Supreme Court, sitting on circuit courts in New York, Pennsylvania, and North Carolina, agreed that the law was unconstitutional. The findings of the circuit courts in pension cases would not constitute an exercise of the judicial power because, being subject to review by the executive and legislative branches, they would not be enforceable by the judiciary. Justices James Wilson and John Blair, Jr., and district judge Richard Peters, all sitting on the circuit court in Pennsylvania, asserted in a letter to President George Washington that the dictates of the statute were "radically inconsistent" with the notion of judicial independence. The Attorney General sought a writ of mandamus from the Supreme Court requiring the circuit court in Pennsylvania to rule on the pension claim at issue, but before the Supreme Court ruled, Congress repealed the law.

The Supreme Court ruled along the same lines in the 1852 case of *United States v. Ferreira*. A federal statute provided for the Florida territorial judges (and later, a U.S. district judge) to hear and determine claims brought by Spanish residents of Florida in order to effectuate a provision of a Spanish-American treaty. Citing *Hayburn's Case* as precedent, the Court held that it had no jurisdiction over an appeal of an award made by the district judge, because the proceeding was not judicial in nature. The action involved no lawsuit, adverse parties, or witnesses; instead, the judge simply received evidence from the claimant and made a decision. Moreover, the judge's decision was subject to approval by the Secretary of the Treasury, and therefore was not a final judgment. When acting pursuant to the statute, therefore, the judge was exercising the powers of a commissioner, and not the judicial power as defined by the Constitution. For the Supreme Court to hear an appeal from such a nonjudicial proceeding would violate the principle of separation of powers.

The Case

In *Gordon*, the administrator of an estate filed a petition in Congress seeking reimbursement for damages done to property in Florida by United States troops during the War of 1812. The original petition was filed in 1832, and in 1848 Congress made an award of damages, including interest from the date of the loss. Not satisfied with the result, the

petitioner made another claim, leading to a resolution by the Secretary of War in 1860 providing for a further award of interest. In 1861, however, Congress passed a joint resolution rescinding the resolution of the Secretary of War. The petitioner filed suit in the Court of Claims to recover the amount provided for in the resolution. The court ruled against the petitioner on the grounds that the Secretary of War had been given the authority to examine the case and make a recommendation, which Congress was free to approve or reject. The petitioner then appealed to the Supreme Court of the United States.

The Supreme Court's Ruling

On March 9, 1865, the Supreme Court announced its ruling that "under the Constitution, no appellate jurisdiction over the Court of Claims could be exercised by this Court," and dismissed the case. As the December 1864 term had come to a close, the Court announced that it would provide the reasons for its decision at a later time. Sometime afterward, Chief Justice Salmon P. Chase issued a short opinion that was not published in the official U.S. Reports (it was later published in the case reporter for the Court of Claims). Chase wrote that section 14 of the Court of Claims Act, which provided the Secretary of the Treasury with the authority to revise the court's decisions, deprived the Court of Claims "of the judicial power from the exercise of which appeals can be taken to this court." He concluded by stating that the Court might announce the reasons for this conclusion later.

In 1886, a copy of a draft opinion for the *Gordon* case surfaced in the papers of an executor of former Chief Justice Roger Taney's estate. Taney had prepared the opinion sometime after the case was argued in April 1864, but died before the Court reassembled in December to make its ruling. After it was found, Taney's opinion was published along with a note from the clerk explaining that the surviving members of the Court recalled considering the opinion when ruling on the case. Although the justices had apparently intended to use Taney's opinion as a basis for their own, they never did so, and the original Taney document was lost.

Taney's opinion also focused on section 14. If the Court of Claims ruled in favor of a petitioner, he pointed out, the judgment would not be paid unless and until both the Secretary of the Treasury and Congress took action. Neither the Court of Claims nor the Supreme Court, if it affirmed a ruling on appeal, could "do anything more than certify their opinion to the Secretary of the Treasury." As far as the Court of Claims was concerned, Taney saw nothing objectionable about the law governing how judgments would be handled. Deciding on the validity of monetary claims against the United States, he explained, was within the power of Congress, which was entitled to create a tribunal for that special purpose. The Court of Claims, although called a "court," was not designed to exercise the judicial power as defined in the Constitution.

The Supreme Court, on the other hand, exercised power that was "exclusively judicial." As an independent and coequal branch of government, the federal judiciary was to remain free from any legislative or executive interference with its decisions or the enforcement of its judgments. Congress could not, Taney wrote, "authorize or require this Court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties." Without the power of enforcement, a judgment of the Supreme Court would be "inoperative and nugatory … merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect." Such an outcome, Taney concluded, would violate the principle of separation of powers and would thus be unconstitutional. For these reasons, the Supreme Court could not exercise jurisdiction over an appeal from the Court of Claims.

Aftermath and Legacy

Almost immediately after Chief Justice Chase released his opinion in the *Gordon* case, Congress took remedial action. In March 1866, Congress repealed section 14 of the 1863 Court of Claims statute, which had required an estimation by the Secretary of the Treasury before any judgment could be paid. In response, the Supreme Court amended its rules to include procedures for appeals from the Court of Claims and heard the first such appeal shortly thereafter.

In keeping with its holding in cases such as *Gordon*, the Supreme Court continued to refuse to give advisory opinions on the grounds that the issuance of a nonenforceable judgment would violate the separation of powers and endanger judicial independence. In 1911, the Court ruled once again that it could not exercise jurisdiction over a proceeding originating in the Court of Claims. Congress had passed an act in 1907 allowing specific parties to bring a suit in that court, with a right of appeal to the Supreme Court, to determine the constitutionality of recent statutes regarding Indian lands. In *Muskrat v. United States*, the Supreme Court held that the proceedings instituted under the 1907 statute did not constitute a "case or controversy" over which the judicial power could be exercised. Because the suit was filed solely to determine the validity of certain statutes, and not to resolve a dispute between truly adverse parties, any ruling by the Supreme Court would constitute mere advice concerning legislative action, not an exercise of the judicial power.

The constitutional status of the Court of Claims remained in doubt for nearly a century after the *Gordon* case. In a 1933 case regarding the diminution of judges' salaries, *Williams v. United States*, the Supreme Court found the Court of Claims to be an Article I legislative court carrying out duties that traditionally belonged to Congress. In

1953, however, Congress passed a statute declaring the Court of Claims to have been created under Article III. The Supreme Court did not give conclusive effect to the congressional declaration, but in 1962 reached an identical conclusion in *Glidden Company v. Zdanok*.

The Supreme Court's plurality opinion in *Glidden* acknowledged that the Court of Claims could still not enforce its judgments without the cooperation of Congress, but found this not to be fatal to the exercise of judicial power. Congress had, as a practical matter, nearly always paid the court's judgments. Moreover, if the lack of enforceability of judgements against the United States made the work of the Court of Claims nonjudicial, it would have been impossible to vest the U.S. district courts—which were indisputably Article III courts—with jurisdiction over any monetary claims against the government. In 1982, the Court of Claims was abolished; its judges and its appellate jurisdiction were transferred to the newly created U.S. Court of Appeals for the Federal Circuit, while its original jurisdiction was vested in the new U.S. Claims Court (later renamed the U.S. Court of Federal Claims).

Discussion Questions

- What does it mean for a matter to be within "the judicial power"?
- Why was it important to the Supreme Court that it and other Article III courts not perform work outside the judicial power?
- Would it have made a difference to the outcome in *Gordon* if Congress had declared, when establishing the Court of Claims, that it was an Article III court? Why or why not?
- What do the concepts "separation of powers" and "judicial independence" mean, and how do they relate to one another?

Documents

Judges of the U.S. Circuit Court for the District of Pennsylvania, Letter to President George Washington, April 18, 1792

In Hayburn's Case*, the justices of the Supreme Court, sitting on the U.S. circuit courts, declined to rule on the pension claims of Revolutionary War veterans. In a letter to President George Washington, two justices and a U.S. district judge sitting on the circuit court in Pennsylvania explained that the separation of powers required that judicial decisions be free from interference by the other branches. Decisions on pensions, which could be revised or rejected by the Secretary of War or Congress, were therefore not an exercise of the judicial power. The letter was included as a footnote to the Supreme Court's opinion, which—there being no ruling—was merely a brief recitation of the case's procedural history.*

The Circuit court for the district of Pennsylvania (consisting of WILSON, and BLAIR, *Justices*, and PETERS, District Judge) made the following representation, in a letter jointly addressed to the President of the United States, on the 18th of April, 1792.

"To you it officially belongs to "take care that the laws" of the United States "be faithfully executed." Before you, therefore, we think it our duty to lay the sentiments, which, on a late painful occasion, governed us with regard to an act passed by the legislature of the union.

"The people of the United States have vested in Congress all *legislative* powers "granted in the constitution."

"They have vested in one Supreme court, and in such inferior courts as the Congress shall establish, "the *judicial* power of the United States."

"It is worthy of remark, that in Congress the *whole* legislative power of the United States is not vested. An important part of that power was exercised by the people themselves, when they "ordained and established the Constitution."

"This Constitution is "the Supreme Law of the Land." This supreme law "all judicial officers of the United States are bound, by oath or affirmation, to support."

"It is a principle important to freedom, that in government, the *judicial* should be distinct from, and independent of, the legislative department. To this important principle the people of the United States, in forming their Constitution, have manifested the highest regard.

"They have placed their *judicial* power not in Congress, but in "*courts*." They have ordained that the "Judges of those courts shall hold their offices during good behaviour," and that "during their continuance in office, their salaries shall not be diminished."

"Congress have lately passed an act, to regulate, among other things, "the claims to invalid pensions."

"Upon due consideration, we have been unanimously of opinion, that, under this act, the Circuit court held for the Pennsylvania district could not proceed;

"1st. Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the Circuit court must, consequently, have proceeded *without* constitutional authority.

"2d. Because, if, upon that business, the court had proceeded, its *judgments* (for its opinions are its judgments) might, under the same act, have been revised and controuled by the legislature, and by an officer in the executive department. Such revision and controul we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the Constitution of the United States.

"These, Sir, are the reasons of our conduct. Be assured that, though it became necessary, it was far from being pleasant. To be obliged to act contrary, either to the obvious directions of Congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, which we hope never to experience again."

Document Source: *Hayburn's Case*, 2 U.S. 409, 411–12 (1792).

Supreme Court of the United States, Opinion in *United States v. Ferreira*, March 2, 1852

In 1852, the Supreme Court further defined the parameters of the judicial power in U.S. v. Ferreira. *A statute provided for territorial courts (and later a U.S. district court) to hear claims from Spanish residents of Florida. The procedure entailed no lawsuit and no adverse parties. Judgments issued pursuant to the statute were not final and enforceable but were to be reported to the Secretary of the Treasury, who had discretion regarding whether or not to pay them. To accept appellate review of such judgments, the Supreme Court ruled, would constitute an exercise of nonjudicial power on its part and violate the separation of powers.*

The treaty of 1819 by which Spain ceded Florida to the United States, contains the following stipulation in the 9th article.

"The United States shall cause satisfaction to be made for the injuries if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

In 1823 Congress passed an act to carry into execution this article of the treaty. The 1st section of this law authorizes the judges of the superior courts established at St. Augustine and Pensacola respectively, to receive and adjust all claims arising within their respective jurisdictions, agreeably to the provisions of the article of the treaty above mentioned; and the 2d section provides "that in all cases where the judges shall decide in favor of the claimants the decisions, with the evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who on being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged." …

The law of 1823, therefore, and not the stipulations of the treaty, furnishes the rule for the proceeding of the territorial judges, and determines their character. And it is manifest that this power to decide upon the validity of these claims, is not conferred on them as a judicial function, to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptance of the term, are to be made—no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*; and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence, nor his award, are to be filed in the court in which he presides, nor recorded there; but he is required to transmit, both the decision and the evidence upon which he decided, to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.

It is too evident for argument on the subject, that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner.… And an appeal to this court from such a decision, by such an authority from the judgment of a court of record, would be an anomaly in the history of jurisprudence.…

The appeal must be dismissed for want of jurisdiction.

Document Source: *United States v. Ferreira*, 54 U.S. 40, 45–47, 52 (1852).

Chief Justice Roger Taney, Draft Opinion in *Gordon v. United States*, 1864

Chief Justice Taney's draft opinion in Gordon*, lost until 1886, explained that the Court of Claims was not exercising judicial power because it lacked the authority to enforce its judgments. As a result, the Supreme Court, which exercised power that was exclusively judicial, could not hear appeals from the Court of Claims.*

[T]he claimant whose claim has been allowed by the Court of Claims, or upon appeal by the Supreme Court, is to be paid out of any general appropriation made by law for the payment and satisfaction of private claims but no payment of any such claim is to be made until the claim allowed has been estimated for by the Secretary of the Treasury, and Congress, upon such estimate, shall make an appropriation for its payment. Neither the Court of Claims nor the Supreme Court can do anything more than certify their opinion to the Secretary of the Treasury, and it depends upon him, in the first place, to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant, it will then rest with Congress to determine whether they will or will not make an appropriation for its payment. Neither court can by any process enforce its judgment, and whether it is paid or not, does not depend on the decision of either court, but upon the future action of the Secretary of the Treasury, and of Congress.

So far as the Court of Claims is concerned we see no objection to the provisions of this law. Congress may undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress, or a head of any of the Executive Departments.…

But whether this court can be required or authorized to hear an appeal from such a tribunal, and give an opinion upon it without the power of pronouncing a judgment, and issuing the appropriate judicial process to carry it into effect, is a very different question, and rests on principles altogether different. The Supreme Court does not owe its existence or its powers to the Legislative Department of the government. It is created by the Constitution, and represents one of the three great divisions of power in the Government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate functions. The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other.…

The appellate power and jurisdiction are subject to any such exceptions and regulations as the Congress shall make. But the appeal 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. The inferior court, therefore, from which the appeal is taken, 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.…

The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this Court, in the exercise of its appellate jurisdiction: yet it is the whole power that the Court is allowed to exercise under this act of Congress.…

[T]his Court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term, and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress.

Document Source: *Gordon v. United States*, 117 U.S. 697, 698–700, 702, 704 (1864).

U.S. Senators Lyman Trumbull, James Grimes, and William Fessenden, Debate on Bill to Amend Court of Claims Statute, February 9, 1866

In response to Chief Justice Salmon Chase's brief opinion in Gordon*, Congress quickly repealed section 14 of the Court of Claims Act, which had given the Secretary of the Treasury discretionary power over the court's judgments. In this excerpt from the debate in the U.S. Senate, Democrat Lyman Trumbull of Illinois explained to Republican William Fessenden of Maine why the amendment was needed.*

Mr. Trumbull. I move that the Senate proceed to consider Senate bill No. 33.… It proposes to repeal the fourteenth section of an act approved March 3, 1863, entitled "An act to amend an act to establish a court for the investigation of claims against the United States" …

Mr. Grimes. I will inquire of the Senator from Illinois what is this fourteenth section of the former act that is proposed to be repealed? …

Mr. Trumbull.… The fourteenth section declares that no money shall be paid out of the Treasury for any claims passed upon by the Court of Claims until after an appropriation therefor shall be estimated for by the Secretary of the Treasury. I did not think when the fourteenth section was adopted that it altered the law as prescribed in the seventh section [providing for appeals to the

> Supreme Court], but when a case went up to the Supreme Court of the United States they refused to entertain jurisdiction of the appeal on the grounds that under the fourteenth section there was a discretionary power in the head of the Treasury Department to pay the judgment or not.…
>
> The law specially provided for appeals. They have refused to entertain appeals; but I understand if that fourteenth section were out of the way, they would entertain appeals. I do not think, and I did not think at the time, that the fourteenth section altered the previous provisions of the act; but the court have come to a different conclusion, and regard it as vesting a sort of discretionary power in the Secretary of the Treasury. The sole object of this bill is to remove this obstacle to taking appeals to the Supreme Court.…

Mr. Fessenden. What does [the fourteenth section] have to do with the question of appeals?

Mr. Trumbull. The Supreme Court have decided that it gives the Secretary of the Treasury a supervisory power to pay the judgment or not.

Mr. Fessenden. Even if it does, that does not affect the question of appeal.

Mr. Trumbull. They say that it affects it in this way: that the judgment of the Court of Claims is not a final judgment; that under the fourteenth section of this law, the Court of Claims is a mere commission to examine, a sort of board of auditors, and their judgment not being final, they are not a court that can enter judgments because they are subject to departmental supervision under the fourteenth section. Now, there is no such supervision exercised; it is not in point of fact done; but the judgments are paid out of the appropriation which we make; and the sole object of this bill is to repeal that fourteenth section.

Document Source: *Congressional Globe*, 39th Cong., 1st sess., 1866, 36, pt. 1: 770–71.

Supreme Court of the United States, Opinion in *Muskrat v. United States*, January 23, 1911

Although the Supreme Court began accepting appeals from the Court of Claims in 1866, there were nevertheless particular matters originating in that court which the Supreme Court found to be outside the judicial power and therefore beyond its ability to hear. In Muskrat*, Congress provided for the Court of Claims to determine the validity of a federal statute. Finding that the matter did not constitute a "case or controversy" as the Constitution required for the exercise of judicial power, the Supreme Court declined to rule, pointing out that the separation of powers precluded it from giving legislative advice unconnected to an actual case.*

These cases arise under an act of Congress undertaking to confer jurisdiction upon the Court of Claims, and upon this court on appeal, to determine the validity of certain acts of Congress hereinafter referred to.…

As we have already seen by the express terms of the Constitution, the exercise of the judicial power is limited to "cases" and "controversies." Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.…

The power being thus limited to require an application of the judicial power to cases and controversies, is the act which undertook to authorize the present suits to determine the constitutional validity of certain legislation within the constitutional authority of the court? This inquiry in the case before us includes the broader question, When may this court, in the exercise of the judicial power, pass upon the constitutional validity of an act of Congress? That question has been settled from the early history of the court, the leading case on the subject being *Marbury v. Madison, supra*.

In that case Chief Justice Marshall, who spoke for the court, was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the court upon the legislation of Congress; and that the authority to declare an act unconstitutional sprung from the requirement that the court, in administering the law and pronouncing judgment between the parties to a case, and choosing between the requirements of the fundamental law established by the people and embodied in the Constitution and an act of the agents of the people, acting under authority of the Constitution, should enforce the Constitution as the supreme law of the land.…

It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not.… The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government.

Document Source: *Muskrat v. United States*, 219 U.S. 346, 348, 356–58, 361 (1911).

Floyd D. Shimomura, *Louisiana Law Review*, 1985

Law professor Floyd Shimomura of the University of California, Davis, examined an issue that was largely ignored at the time of the Gordon *case. Even after the Treasury Secretary's authority over judgments of the Court of Claims was repealed, the court still could not enforce its judgments in the event Congress refused to pay. Nevertheless, as Professor Shimomura described in this 1985 article, the Supreme Court continued to assume that the Court of Claims possessed Article III status as long as Congress continued to pay its judgments. The arrangement endured, possibly bolstered by Taney's draft opinion in* Gordon*, which hinted at the consequences should Congress waver.*

In 1866 Congress considered amendments to cure the problem suggested in *Gordon v. United States*.... [T]he proposed solution was simply to repeal section 14 of the Court of Claims Act, which prohibited the payment of judgments until estimated for by the Secretary of the Treasury. Senator Trumbull of Illinois argued that this repeal would remove any concern that the executive branch retained revisionary power over court judgments and would satisfy the sole objection identified by Chief Justice Chase. Nevertheless, Senator Davis of Kentucky did not feel mere repeal of section 14 went far enough to cure the basic problem: the courts' inability to make the government pay its judgments like any other losing party. Advocating a "judicial model" of enforcement, he proposed a statute which would require payment out of any existing funds and, if no funds were available, authorize the claimant to execute on government property as against any other judgment debtor.

Given the Chase opinion, Congress apparently concluded that the Supreme Court would not insist on enforceability so long as Congress continued to appropriate sufficient funds to assure the payment of all judgments. Therefore, Congress ignored Senator Davis' proposal, repealed section 14 effective March 20, 1866, and appropriated an additional $500,000 for the payment of judgments on June 23, 1866. Congress guessed correctly—the Supreme Court promptly issued regulations prescribing the manner in which appeals could be taken from the Court of Claims. In the December Term, 1866, the Supreme Court heard its first appeal under the new regulations in the case of *De Groot v. United States*.

Between 1866 and 1870, Congress continued to appropriate annually, in advance, lump sum amounts "[f]or payment of judgments which may be rendered by the court in favor of claimants." This congressional conduct must have been reassuring to the Supreme Court.... Given the fidelity of congressional payment, the concerns raised by Senator Davis over enforceability probably seemed more theoretical than real at this point.

Nevertheless, the congressional understanding regarding payment ... began to fade somewhat with time. Between 1871 and 1875, Congress continued to make lump sum

appropriations but dropped budget language which had previously implied they were for prospective judgments. In 1872 Congress refused to pay a judgment in only one isolated instance. Congress abandoned the prospective, lump sum approach in 1876 and appropriated $6,292.11 to pay seven specific judgments.… While in 1863 the gross versus specific appropriation issue was debated in terms of its implications on the broader constitutional questions of finality and enforceability, by 1877 most members of Congress took the Article III status of the Court of Claims for granted. Thus, most appeared to share the view … that since both sides agreed that judgments must be paid, the form of payment was "a question … not worth while to dispute about." Thereafter, Congress commenced appropriating retrospectively for specific judgments.

The Supreme Court did not react immediately to this change. However, in 1885 Taney's "lost opinion" in *Gordon v. United States* was found and published by the Supreme Court.… Taney's "lost opinion," written in early 1864, had not considered the possibility that prospective, lump sum appropriations could avoid this particular problem [of ensuring payment]. But by 1885 Taney's opinion had acquired a new significance with the change in appropriation methods. In 1895 Congress resumed lump sum appropriations but on a retrospective basis.

Throughout this period, Congress honored virtually every judgment of the Court of Claims. The Supreme Court continued to assume the Article III status of the Court of Claims despite lack of enforceability. However, with publication of Taney's "lost opinion," the Supreme Court acquired a strange "trump card" which it could invoke in case congressional payment faltered. Congress and the Court had evolved an uneasy accommodation on the question of payment and non-enforceability.

Document Source: Floyd D. Shimomura, "The History of Claims against the United States: The Evolution from a Legislative toward a Judicial Model of Payment," *Louisiana Law Review* 45, no. 3 (January 1985): 659–62 (footnotes omitted).

Vicki C. Jackson, *George Washington International Law Review*, 2003

Law professor Vicki Jackson, then of Georgetown University, wrote in 2003 about the problem of judicial enforcement of judgments against the United States. The doctrine of sovereign immunity suggests that a court cannot force Congress to withdraw money from the treasury without an appropriation. The Supreme Court in 1962 determined the Court of Claims to be an Article III court, however, because Congress had always paid its judgments, apart from a very few isolated instances. This reality, according to Jackson, called into question whether the enforceability of judgments was in fact an essential component of the judicial power.

The independence of a court can be understood across many axes. Why, though, would sovereign immunity—a doctrine that limits judicial power against the government—have anything to do with judicial independence, which consists, in part, of courts' willingness to reach decisions on the law even if the political branches disagree? A partial answer may lie in the caselaw prohibiting executive or legislative revision of judgments, the development of which has featured cases from the United States Court of Federal Claims and its predecessors.

A court whose judgments are revised by other branches may not be seen as independent, and may not understand itself as independent. It may take less care in reaching conclusions, or may seek to curry favor with the political revisory authority to avoid being reversed or ignored. A court that cannot enforce its own judgments may need to be mindful of the avenues for enforcement outside the judiciary and the wishes of other branches of the government in deciding what relief to afford. A court that cannot grant effective relief may be perceived by citizens as impotent, and, without some degree of popular support for the judiciary, courts may have difficulty functioning independently of other branches of government.…

A formal revisory power in another branch has many potential costs, including that of disrespect for the judgments of courts, but it has at least the benefit of institutional accountability and transparency, in the sense that the court enters the judgment it believes is appropriate, and then another branch outside the court acts to agree or disagree.…

The temptations for Congress to exercise or retain control over judicial decisions are likely to be particularly acute in cases that come before a court, like the federal Claims Court, that only hears cases against the government. Congress has exercised careful attention and control over the jurisdiction, makeup, and business of the Claims Court. Formal revisory powers in legislative representatives or executive officials, like designation of matters as "advisory" references, clearly signal that courts are not being treated as final decisionmakers of the rights of the parties. However, even where as a formal matter the courts' judgments are final and appeals are exhausted, Congress may be able to avoid payment of judgments once final by failing to appropriate funds to satisfy the judgment, or prohibiting the use of previously appropriated funds for such a purpose …. Congress has in the past (on rare occasions) reportedly singled out particular judgments of what was then the Court of Claims for nonpayment.

Even when the Claims Court's judgments are treated as final—in the sense of finally resolving the parties' legal entitlements—appropriations may not be available for their immediate satisfaction. As noted above, an important element of the judicial power is the power to issue effective judgments; an effective judgment is generally, though not invariably, one that the court itself can issue process to enforce. Sovereign immunity is perhaps

most intimately bound up with this Article III concern over the effectiveness and enforcement of judgments. To the extent that the original Constitution supports any part of the federal sovereign immunity doctrine, it most supports the idea that a court cannot order money to be withdrawn from the Treasury without an appropriation. If the Constitution's commitment of appropriations to Congress implies that federal courts cannot issue process against treasury funds, judgments that can be satisfied only through such payments bear the risk of being ineffective, absent legislative commitments to pay. Prudential concerns might thus support a remedial hesitation.…

Whether process could issue to compel payment of a judgment against the United States was at the crux of Chief Justice Taney's draft opinion in the Gordon case.…

In *Glidden v. Zdanok*, the Court again faced arguments that the Court of Claims was not an Article III court because judicial process could not issue to compel payment of its judgments. Justice Harlan announced the Court's judgment, affirming the Court of Claims' character as an Article III court ….

His response to this "problem" is essentially empirical—to note how rare it had been for Congress not to provide for payment of Court of Claims judgments. He thus questioned whether "the capacity to enforce a judgment is always indispensable to the exercise of judicial power," in light of this "historical record, surely more favorable to prevailing parties than that obtaining in private litigation." If the ability to issue process were truly indispensable, moreover, it would render problematic Congress' decision to vest the district courts with jurisdiction over money claims against the United States. Finally, he suggested that the Court has in essence relied on the good faith of the state governments to comply with decrees issued in original jurisdiction cases, and could likewise rely on the good faith of the federal government itself. This argument was later endorsed by the full Court in the Railroad Reorganization Act Cases.

Document Source: Vicki C. Jackson, "Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence," *George Washington International Law Review* 35, no. 3 (2003): 573–74, 580–81, 589–90, 593–97 (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?