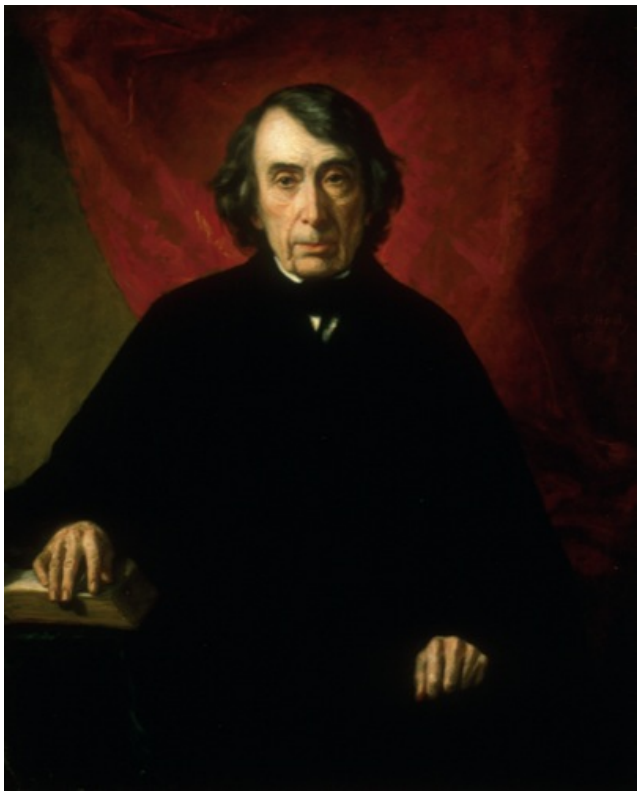
Resources for Public Speaking

Defining the Boundaries Between Article III and Non-Article III Courts



Chief Justice Roger Taney

Federal Judicial Center
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Article III of the U.S. Constitution vested the "judicial power" in the Supreme Court as well as any lower federal courts Congress might choose to establish. The article also contained provisions meant to ensure judicial independence, namely judicial tenure during good behavior and protection against any reduction in judges' compensation. Since the republic's earliest years, however, some adjudicatory tasks have been performed by officers not vested with these constitutional protections—sometimes referred to as Article I judges or officers because they carry out duties delegated to them by Congress.

This resource provides suggested talking points, in outline form, for those wishing to speak about changes in the scope of adjudication by non-Article III officers and the relationship between Article I officers and the Article III federal courts. These issues are significant because they bear on the parameters of the judicial power and help to determine which tasks must be performed by Article III judges and which can be performed by others.

In addition to the outline, the resource contains Topic at a Glance, a brief summary in PDF format; a gallery of downloadable images for use in a PowerPoint presentation; links to related resources on the FJC's History of the Federal Judiciary website; a further reading list; and excerpts of historical documents that could be handed out to audience members or incorporated into a presentation. The entire resource is available in PDF format as well.

Topic at a Glance

Introduction. Article III of the U.S. Constitution vested the "judicial power" in the Supreme Court as well as any lower federal courts Congress might choose to establish. The article also contained provisions meant to ensure judicial independence, namely judicial tenure during good behavior and protection against any reduction in judges' compensation. Since the republic's earliest years, however, some adjudicatory tasks have been performed by officers not vested with these constitutional protections. This summary provides examples of changes in the scope of non-Article III adjudication, details the history of two specialized courts with ambiguous constitutional status, and identifies the legal theories underpinning the work of non-Article III officers.

Article III is Not All-Encompassing. Congress never intended that every matter to which the judicial power extends be adjudicated by Article III judges. State courts, for example, heard many cases arising under federal law, especially before Congress granted the federal courts full federal question jurisdiction in 1875. Throughout history, Congress has assigned adjudicative tasks to non-Article III courts (sometimes called Article I courts), non-Article III officers (or adjuncts) of the U.S. district courts, and administrative agencies.

Examples of Non-Article III Adjudication. Non-Article III adjudication has been carried out by, for example, territorial judges, certain District of Columbia judges, military judges, U.S. magistrate judges, U.S. bankruptcy judges, judges of the U.S. Tax Court, and administrative law judges working in federal administrative agencies.

Courts with Ambiguous Status. The U.S. Court of Claims (1855–1982) and the U.S. Court of Customs and Patent Appeals (1909–1982) were each created by Congress to perform specialized judicial functions. The constitutional status of both courts was long a matter of dispute. The Supreme Court initially held both to be Article I courts but ruled them to be Article III courts in 1962 (*Glidden Co. v. Zdanok*). The complicated and ambiguous history of these courts illustrates that the exact boundaries of Article III adjudication are subject to interpretation and have never been set in stone.

Legal Theories Underpinning Non-Article III Adjudication. The Supreme Court has never established a bright-line rule governing the circumstances under which non-Article III adjudication is constitutionally valid. Instead, it has made this determination on a case-by-case basis, employing different legal theories, some of which have coexisted in the law.

Outline

I. Article III
   A. Courts and Judges
      1. Article III of the U.S. Constitution provided for the Supreme Court of the United States and "such inferior Courts that the Congress may from time to time ordain and establish."
      2. Judges from both the Supreme Court and inferior courts were to be appointed by the president by and with the consent of the of the U.S. Senate and were to hold office "during good [b]ehaviour." Article III, section 1, which established this system, also protected judges from salary reductions as a mechanism for preserving their independence from the political branches of government.
   B. Article III, section 2, extended "the judicial power of the United States" to cases:
      1. arising under the Constitution, federal laws, or treaties;
      2. involving "ambassadors, other public ministers and consuls";
      3. based on admiralty or maritime jurisdiction;
      4. in which the United States was a party;
      5. between two states or between the citizens of one state and the government of another;
      6. between citizens of different states;
      7. "between citizens of the same state claiming lands under grants of different states"; and
      8. "between a state, or the citizens thereof, and foreign states, citizens or subjects."
   C. What is "the Judicial Power"?
      1. Broadly speaking, the judicial power is the ability of the federal courts to hear and decide the types of cases and controversies specified in Article III.
      2. The Constitution sets the outer limits of federal court jurisdiction, but the courts can exercise only the jurisdiction granted to them by Congress.
      3. There is a large body of case law shaping requirements for the exercise of the judicial power. A few core elements are:
         a. the existence of a true "case or controversy" between genuinely adverse parties, rather than a hypothetical dispute;
         b. the ability to issue a final, enforceable judgment not subject to interference by the other branches;
         c. a matter that is "justiciable," i.e., appropriate for resolution by a federal court. Justiciability is a broad term encompassing several elements, such as standing (meaning, among other things, that taking their allegations as true, the plaintiffs have suffered harm caused by the defendants).
      4. The Supreme Court has held that the federal courts are incapable of performing tasks that fall outside of the judicial power, such as issuing advisory opinions and engaging in non-judicial work (although individual judges can perform non-adjudicatory tasks in certain contexts, such as service on the U.S. Sentencing Commission).

II. Article III: Not All-Encompassing
   A. If Article III were read to be all-encompassing, any case or controversy to which the judicial power extends would have to be adjudicated in an Article III court.
   B. The framers did not view Article III in exclusive terms. They intended, for example, that state courts would hear many cases arising under federal law. (In fact, Congress did not grant the federal courts full federal question jurisdiction until 1875.)
   C. Congress has never interpreted Article III as the exclusive source of its power to create courts and assign adjudicative tasks.
      1. Congress has established several Article I courts (i.e., courts established pursuant to particular aspects of its legislative authority), the judges of which lack Article III protections, to adjudicate certain matters.
      2. Congress has also delegated certain judicial tasks to U.S. magistrate judges and U.S. bankruptcy judges (both of which are sometimes referred to as "adjuncts" of the U.S. district courts), which are not Article III positions.
      3. Particularly since the Progressive era, Congress has assigned administrative agencies in the executive branch the power to adjudicate a wide range of legal issues.
   D. Judges and scholars have generally rejected the tautology that Article III's vesting of the judicial power of the United States in Article III courts makes any adjudication outside of Article III courts inherently non-judicial.

III. Examples of Non-Article III Adjudication
   A. Territorial Courts
      1. The Supreme Court ruled in 1828 (*American Insurance Co. v. Canter*) that Congress could create courts for U.S. territories outside the boundaries of Article III. In that opinion, Chief Justice John Marshall became the first jurist to draw a distinction between Article III "constitutional" courts and Article I "legislative" courts.
      2. Chief Justice Marshall found the power to create territorial courts with term-limited judgeships in Article IV, which gave Congress exclusive authority to make all necessary regulations for the territories.
      3. The Court's decision was most likely based on practical considerations as well. In most instances, territorial status was meant to be temporary, making a life-tenured judiciary unnecessary and impractical.
   B. District of Columbia Courts
      1. Congress possesses plenary power over the District of Columbia similar to that it exercises over U.S. territories.
      2. The District of Columbia has had Article III federal courts since 1801. Until the early 1970s, these courts exercised local jurisdiction as well.
      3. Pursuant to a 1970 statute, Congress created the D.C. Superior Court and D.C. Court of Appeals to exercise local jurisdiction. The new courts were not established under Article III and have term-limited judges.
      4. In 1973 (*Palmore v. United States*), the Supreme Court ruled the creation of non-Article III courts for D.C. to be constitutional based on Congress's legislative power over the District.
   C. Military Courts
      1. The U.S. military has always had its own justice system.

2. Congress has used its Article I power over the armed forces to create courts martial. In 1857 (*Dynes v. Hoover*), the Supreme Court ruled that these courts did not wield "the judicial power" and were not subject to Article III requirements.
3. The U.S. Court of Appeals for the Armed Forces (established in 1950 as the Court of Military Appeals) is also an Article I court. Since 1983, its decisions have been subject to Supreme Court review via a writ of certiorari.

D. U.S. Magistrate Judges
1. Congress established the U.S. magistrate judge position in 1968 to perform judicial tasks assigned by the U.S. district judges. The magistrate system was fully in place by 1971.
2. Magistrate judges are appointed by the U.S. district courts to eight-year terms (or four years if part-time).
3. Congress increased the duties of magistrate judges over time. A 1979 statute gave them the power to conduct all civil trials with the consent of all parties and misdemeanor criminal trials if the defendant waived the right to trial before a district judge.

E. U.S. Bankruptcy Courts
1. Congress established the U.S. bankruptcy courts in the Bankruptcy Reform Act of 1978. Judges were to be appointed by the president, with Senate confirmation, to fourteen-year terms.
2. The act gave bankruptcy judges greatly expanded power relative to that of the referees in bankruptcy that preceded them. These powers included jurisdiction over all cases arising under the bankruptcy laws.
3. In 1982 (*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*), the Supreme Court ruled that Congress had violated the Constitution in delegating essential elements of the judicial power to non-Article III judges.
4. Congress passed a new bankruptcy act in 1984, providing that the U.S. courts of appeals would appoint bankruptcy judges, who would have jurisdiction only over "core" bankruptcy matters but could present findings of fact and proposed conclusions of the law to the district court on "non-core" issues.

F. U.S. Tax Court
1. The U.S. Board of Tax Appeals (established in 1924) was an administrative agency that nevertheless performed largely judicial functions, adjudicating disputes over tax liability.
2. Congress changed the Board's name to the Tax Court of the United States in 1942 to reflect its judicial role, but it was still deemed an executive agency.
3. In 1969, after an unsuccessful legislative movement to convert the body to an Article III court, Congress changed its name to the U.S. Tax Court, declaring it to be a court established under Article I.
4. Decisions of the U.S. Tax Court may be reviewed in the U.S. courts of appeals (other than that for the Federal Circuit) and may be taken to the Supreme Court via writ of certiorari.

5. Although they were not granted Article III tenure and salary protections, the court's judges had their terms increased from twelve to fifteen years and became eligible for retirement with full pay under terms similar to those for Article III judges.

G. Executive Agency Courts
   1. As of 2017, nearly 2,000 administrative law judges served in adjudicative bodies within the executive branch, interpreting and enforcing federal regulations.
   2. While their specific duties vary, these judges frequently hold hearings and issue (or recommend) legal decisions in areas such as workers' compensation, Social Security, labor, occupational health and safety, and many others.
   3. Some agency courts are fully integrated into their agencies, while others, such as the Executive Office for Immigration Review (established in 1983) are themselves independent agencies.
   4. In 1946, Congress passed the Administrative Procedure Act, which codified the rules governing administrative agencies and the process for further review of their decisions in Article III courts.

H. Recess Appointees
   1. Article II allows the president to make certain appointments without Senate confirmation when the Senate is in recess. These appointments last only until the end of the Senate's next session.
   2. Although a recess appointment's limited term is inconsistent with the tenure "during good behavior" provided by Article III, presidents since George Washington have made more than 300 recess appointments to courts established under Article III.
   3. While the Supreme Court has never ruled on the validity of these appointments, three U.S. courts of appeals have held them to be constitutional (*United States v. Allocco* (2nd Cir. 1962), *United States v. Woodley* (9th Cir. 1984), *Evans v. Stephens* (11th Cir. 2004)).
   4. Judicial recess appointments began to fall out of favor in the 1960s after the U.S. Senate passed a resolution disapproving of such appointments to the Supreme Court, and very few have been made since.

IV. Adjudicative Bodies with Ambiguous Status

A. Court of Claims
   1. In 1855, Congress delegated its Article I power to hear and determine monetary claims against the United States by establishing the Court of Claims for this purpose.
   2. The court's judges were appointed by the president with Senate confirmation and were granted tenure during good behavior.
   3. In 1865 (*Gordon v. United States*), the Supreme Court held that it could not hear an appeal from the Court of Claims because that court's judgments were not final and enforceable, being subject to revision by the secretary of the treasury.
   4. Any decision the Supreme Court issued would likewise not be final and would instead amount to an impermissible advisory opinion. To give an opinion subject to modification by another branch would violate the separation of powers and impinge on judicial independence.

5. Congress repealed the portion of the statute giving the secretary of the treasury authority over Court of Claims judgments and the Supreme Court began to hear appeals from the court.
6. The constitutional status of the Court of Claims remained in doubt, however. In a 1933 case (*Williams v. United States*) involving the reduction of judges' salaries, the Supreme Court held the Court of Claims to be an Article I court carrying out congressional duties.
7. In 1953, Congress passed a statute declaring the Court of Claims to be established under Article III.
8. In 1962 (*Glidden Co. v. Zdanok*), the Supreme Court made its own determination that the Court of Claims was an Article III court (stating that the 1953 statute was entitled to some weight but was not conclusive). Among the plurality opinion's observations was that the performance of duties that could have been delegated to another branch did not necessarily deprive a tribunal of Article III status.
9. The vast majority of the cases heard by the Court of Claims at the time, the plurality noted, were akin to "the staple judicial fare of the regular federal courts," such as tax, regulatory, contract, and tort cases.
10. Congress abolished the Court of Claims in 1982 and transferred its judges and some of its jurisdiction to the new U.S. Court of Appeals for the Federal Circuit.

B. U.S. Court of Customs and Patent Appeals
1. In 1909, Congress created the U.S. Court of Customs Appeals to hear appeals from the Board of General Appraisers (later renamed the U.S. Customs Court) in disputes over the valuation of imported goods and classification of tariffs (which were previously heard by Article III federal courts).
2. The court's judges were appointed by the president with Senate confirmation, but the statute did not specify their tenure or means of removal. In practice, all the judges held office until retirement, death, or appointment to another position.
3. In 1929 (*Ex parte Bakelite Corp.*), the Supreme Court held the court (then named the U.S. Court of Customs and Patent Appeals) to be an Article I body performing quasi-judicial functions that could have been performed by executive officers rather than exercising the judicial power of the United States.
4. In 1958, Congress passed a statute declaring the Court of Customs and Patent Appeals to be established under Article III.
5. In 1962 (*Glidden Co. v. Zdanok*), the Supreme Court made its own determination that the court possessed Article III status (stating that the 1958 statute was entitled to some weight but was not conclusive). As was true of the Court of Claims, the performance of duties that could have been assigned to another branch was not dispositive of Article III status.
6. The Court's plurality opinion gave weight to the fact that Congress provided the court's judges with tenure during good behavior a year after the Supreme Court's 1929 ruling.
7. The plurality also noted that the court was hearing cases that had formerly been the province of the U.S. circuit courts and U.S. circuit courts of appeals.

8. Congress abolished the Court of Customs and Patent Appeals in 1982, transferring its judges and its jurisdiction to the new U.S. Court of Appeals for the Federal Circuit.

V. Legal Theories Underpinning Non-Article III Adjudication

A. The Supreme Court has never established a bright-line rule governing the circumstances under which non-Article III adjudication is constitutionally valid. Instead, it has made this determination on a case-by-case basis, employing different legal theories, some of which have coexisted in the law.

B. The earliest theory, presented in *Canter*, rested on the premise that because territorial courts had limited-term judges, they were Article I rather than Article III courts, and were therefore not exercising the judicial power of the United States. Although the holding in favor of the validity of non-Article III territorial courts remains good law, critics of the opinion asserted that:

1. The reasoning employed is circular. Congress cannot evade the requirements of Article III merely by acting outside of it.
2. Article I courts often hear the kinds of cases that are also heard in Article III courts. It is problematic to classify these cases as judicial in one context and non-judicial in another.
3. Likewise, many Article I decisions are subject to review in the Supreme Court, which cannot perform non-judicial work. In its 1962 *Glidden* opinion, the Supreme Court pointed this out in disavowing Marshall's statement in *Canter* that territorial courts were "incapable of receiving" federal question jurisdiction. The Court noted that territorial courts exercise jurisdiction similar to that of Article III federal courts and "have been subjected to the appellate jurisdiction of this Court precisely because they do so."

C. In 1856, the Court laid the foundation of what came to be called the "public rights" doctrine, in *Murray's Lessee v. Hoboken Land & Improvement Co.*

1. The government seized money and property from an official who had embezzled funds, using a non-judicial procedure (a warrant of distress from the Treasury Department) to effectuate the seizure.
2. Years later, the validity of the warrant became relevant to a suit over who owned the land. The Supreme Court denied a claim that the statute providing for the warrant of distress was unconstitutional because its non-judicial nature violated the Fifth Amendment right to due process of law.
3. The Court's opinion stated that there were certain matters involving public rights that were appropriate for judicial determination, but which also fell under Congress's legislative authority so that Congress could delegate them for non-judicial resolution as it saw fit.
4. For more than a century, the public rights doctrine was applied to matters to which the federal government was a party. Congress was permitted to delegate to administrative agencies or Article I courts matters regarding immigration, customs, and monetary claims against the government, for example.
5. Beginning in the 1980s, Supreme Court case law began to apply the public rights doctrine to some cases to which the government was not a party, as long as the claim was derived from or integrally related to a federal regulatory scheme.

6. While the contours of the doctrine have changed over time, its core notion that some matters involving public rights could be resolved by the legislative or executive branches without judicial determination helped to lay the foundation of the modern administrative state.

D. Other Supreme Court cases gave rise to what has been called the "adjunct" theory of Article III, which allows Congress to vest some decision-making power in non-Article III officials as long as they do not exercise essential attributes of the judicial power.
   1. In *Crowell v. Benson* (1933), the Court upheld the role of the U.S. Employees' Compensation Commission in making factual findings regarding workers' compensation claims.
   2. The Commission had no enforcement power, and its findings were subject to review by the U.S. district courts, so the Court found no unconstitutional delegation of judicial power to have occurred.
   3. Judges and scholars have referred to the Court's decision in *Crowell* as an important part of the foundation of modern administrative adjudication.
   4. Similarly, in *United States v. Raddatz* (1980), the Court upheld the constitutionality of the Federal Magistrates Act of 1968, which allowed U.S. magistrate judges to decide certain pretrial motions.
   5. The Court found that the U.S. district courts maintained sufficient control over the magistrates to comply with Article III. The district judges appointed and could remove the magistrates, the magistrates could only review motions referred to them by the district judges, and the district judges retained ultimate decisional authority.

E. In *Northern Pipeline*, in which the Supreme Court ruled the Bankruptcy Reform Act of 1978 unconstitutional, a plurality opinion set forth a categorical standard for when non-Article III adjudication is permissible.
   1. Justice's William Brennan's plurality opinion held that a court constituted outside the boundaries of Article III would be unconstitutional if it did not come within one of three categories:
      a. territorial courts;
      b. military courts; and
      c. courts created to adjudicate public rights cases.
   2. The plurality opinion found that the U.S. bankruptcy courts created by the 1978 act did not come within any of the three categories listed.
   3. Some commentators criticized the plurality's categorical approach on the grounds that setting apart only military and territorial courts was arbitrary and that the public rights doctrine was not clearly defined in the case law.
   4. The plurality also reviewed and rejected two other theories falling outside of its categorical standard.
      a. The opinion found the "adjunct" theory to be inapplicable to the bankruptcy judges. In contrast to the cases in which adjudication by adjuncts was approved, the bankruptcy statute had delegated "essential attributes" of the judicial power to the bankruptcy judges by giving them the ordinary powers of U.S. district courts.

b. The plurality also rejected the "appellate theory" of Article III, namely that Article III is satisfied as long as some degree of review by an Article III court is available. The opinion asserted that "constitutional requirements for the exercise of judicial power must be met at all stages of adjudication, and not only on appeal."

F. Some cases following *Northern Pipeline* employed a "balancing" approach.
   1. In his *Northern Pipeline* dissent, Justice Byron White asserted that Article III "should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities … such a balancing approach stands behind many of the decisions upholding Art. I courts."
   2. In *Thomas v. Union Carbide Agricultural Products Co.* (1985), the Court rejected a rigid distinction between public and private rights in approving Congress' use of mandatory arbitration between private parties regarding cost-sharing under a pesticide regulatory scheme.
   3. Similarly, in *Commodity Futures Trading Commission v. Schor* (1986), the Court used a balancing test in upholding the Commission's adjudication of disputes (including state law counterclaims) between customers and brokers who allegedly violated the Commodity Exchange Act.
   4. In both *Thomas* and *Schor*, the Court looked at the practical consequences of the administrative regulation in light of the larger concerns underlying Article III and found the expediency of agency adjudication to outweigh the potential for problems regarding judicial independence and the separation of powers.
   5. Despite the move away from *Northern Pipeline* in these cases, the Court did employ a private/public rights distinction in later cases, suggesting continued viability of the *Northern Pipeline* plurality's approach.

VI. Conclusion

A. The terms of Article III have never been seen as absolute. The Supreme Court has approved of various forms of non-Article III adjudication throughout the nation's history.

B. Some judges and scholars have referred to permissible instances of Article I adjudication as exceptions to Article III's general mandate, while others have viewed them as falling outside the scope of Article III entirely.

C. The Supreme Court has never established a bright-line rule determining when non-Article III adjudication is acceptable.

D. Factors that have been considered in evaluating the validity of non-Article III adjudication include:
   1. The strength of Congress's legislative interest in regulating the subject.
   2. Whether the subject is one that was historically left to the determination of the executive or legislative branches.
   3. Whether the matter is one of public rights, which usually but not necessarily entails a claim by or against the federal government.
   4. The extent to which Article III courts retain control over the final determination of legal issues.

5. Whether permitting non-Article III officers to adjudicate an issue will encroach on the independence of the federal judiciary or the separation of powers by delegating essential elements of the judicial power to another branch.

Related FJC Resources

Cases that Shaped the Federal Courts:

American Insurance Co. v. Canter (1828)
Crowell v. Benson (1934)
Glidden Co. v. Zdanok (1962)
Gordon v. United States (1865)
Northern Pipeline Construction Co. v. Marathon Pipe Line Co. (1982)
United States v. Allocco (1961)

Kobrick, Jake and Daniel S. Holt. *Debates on the Federal Judiciary, Vol. III (1939–2005)*. Washington, D.C.: Federal Judicial Center, 2018: 7–55.

Other Federal Courts

Resources for Public Speaking: U.S. Bankruptcy Judges

Resources for Public Speaking: U.S. Magistrate Judges

U.S. Bankruptcy Judgeships

U.S. Constitution, Article III

U.S. Magistrate Judgeships

Further Reading

Coffin, Kenneth G. "Limiting Legislative Courts: Protecting Article III from Article I Evisceration." *Barry Law Review* 16, no. 1 (Spring 2011): 1–25.

Downs, J. Anthony. "The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates." *University of Chicago Law Review* 52, no. 4 (Fall 1985): 1032–1065.

Durling, James. "The District of Columbia and Article III." *Georgetown Law Journal* 107, no. 5 (May 2019): 1205–1275.

Fallon, Richard H., Jr. "Of Legislative Courts, Administrative Agencies, and Article III." *Harvard Law Review* 101, no. 5 (March 1988): 915–992.
McKenzie, Troy A. "Judicial Independence, Autonomy, and the Bankruptcy Courts." *Stanford Law Review* 62, no. 3 (March 2010): 747–807.

Pfander, James E. "Article I Tribunals, Article III Courts, and the Judicial Power of the United States." *Harvard Law Review* 118, no. 2 (December 2004): 643–776.

Resnik, Judith. "Judicial Independence and Article III: Too Little and Too Much." *Southern California Law Review* 72, no. 2-3 (January–March 1999): 657–671.

_____. "The Mythic Meaning of Article III Courts." *University of Colorado Law Review* 56, no. 4 (Summer 1985): 581–617.

Stern, Craig A. "What's a Constitution Among Friends?—Unbalancing Article III." *University of Pennsylvania Law Review* 146, no. 4 (April 1998): 1043–1076.

Young, Gordon G. "Public Rights and the Federal Judicial Power: From *Murray's Lessee* Through *Crowell* to *Schor*." *Buffalo Law Review* 35, no. 3 (Fall 1986): 765–870.

Historical Documents

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

Chief Justice Taney's draft opinion in Gordon*, lost until 1886 (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), revealed Taney's views on the nature of the "judicial power." Taney 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.*

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[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).]

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

In Glidden*, the Supreme Court addressed the classification of two courts the constitutional status of which had always been ambiguous. Overturning earlier decisions, a plurality of the Court held that the Court of Claims and the Court of Customs and Patent Appeals were Article III courts. The 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 is useful for its wide-ranging discussion of the essential components of the Article III judicial power.*

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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).]

Justice William J. Brennan, Plurality Opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, June 28, 1982

Justice William Brennan wrote a plurality opinion in Northern Pipeline*, which was joined by three other justices, while two others concurred separately. Brennan's opinion holding the Bankruptcy Reform Act of 1978 unconstitutional was notable for its categorical standard regarding permissible exceptions to Article III's mandate of tenure during good behavior for federal judges.*

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[T]his Court has identified three situations in which Art. III does not bar the creation of legislative courts. In each of these situations, the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority of Congress subject to the general prescriptions of Art. III.

We discern no such exceptional grant of power applicable in the cases before us. The courts created by the Bankruptcy Act of 1978 do not lie exclusively outside the States of the Federal Union, like those in the District of Columbia and the Territories. Nor do the bankruptcy courts bear any resemblance to courts-martial, which are founded upon the Constitution's grant of plenary authority over the Nation's military forces to the Legislative and Executive Branches. Finally, the substantive legal rights at issue in the present action cannot be deemed "public rights." … Appellant Northern's right to recover contract damages to augment its estate is "one of private right, that is, of the liability of one individual to another under the law as defined." …

Recognizing that the present cases may not fall within the scope of any of our prior cases permitting the establishment of legislative courts, appellants argue that we should recognize an additional situation beyond the command of Art. III, sufficiently broad to sustain the Act. Appellants contend that Congress' constitutional authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States," Art. I, § 8, cl. 4, carries with it an inherent power to establish legislative courts capable of adjudicating "bankruptcy-related controversies." …

Appellants' contention, in essence, is that pursuant to any of its Art. I powers, Congress may create courts free of Art. III's requirements whenever it finds that course expedient. This contention has been rejected in previous cases….

The flaw in appellants' analysis is that it provides no limiting principle. It thus threatens to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of "specialized" legislative courts….

Appellants advance a second argument for upholding the constitutionality of the Act: that "viewed within the entire judicial framework set up by Congress," the bankruptcy court is merely an "adjunct" to the district court, and that the delegation of certain adjudicative functions to the bankruptcy court is accordingly consistent with the principle that the judicial power of the United States must be vested in Art. III courts….

First, it is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges…. Second, the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Art. III court….

Many of the rights subject to adjudication by the Act's bankruptcy courts … are not of Congress' creation…. Accordingly, Congress' authority to control the manner in which that right is adjudicated, through assignment of historically judicial functions to a non-Art. III "adjunct," plainly must be deemed at a minimum. Yet is equally plain that Congress has vested the "adjunct" bankruptcy judges with powers over Northern's state-created right that far exceed the powers that it has vested in administrative agencies that adjudicate only rights of Congress' own creation….

[T]he Act vests "all essential attributes" of the judicial power of the United States in the "adjunct" bankruptcy court…. [T]he subject-matter jurisdiction of the bankruptcy courts encompasses not only traditional matters of bankruptcy, but also "all civil proceedings arising under title 11 or arising in or *related to* cases under title 11." … [T]he bankruptcy courts exercise "*all* of the jurisdiction" conferred by the Act on the district courts … exercise all ordinary powers of district courts … [and] issue final judgments, which are binding and enforceable even in the absence of an appeal. In short, the "adjunct" bankruptcy courts created by the Act exercise jurisdiction behind the façade of a grant to the district courts….

We conclude that [the Act] has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.

[Document Source: *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70–73, 76–77, 80–81, 84–87 (1982).]