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Congressional Power to Create Federal Courts: A Legal Overview

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Summary

The United States Constitution established only one federal court—the United States Supreme Court. Beyond this, Article III of the Constitution left it to the discretion of Congress to “ordain and establish” lower federal courts to conduct the judicial business of the federal government. From the very first, Congress established a host of different federal tribunals to adjudicate a variety of legal disputes. The two central types of federal “courts”—courts established under Article III and those tribunals that are not—differ in many respects, including with regard to their personnel, purposes, and powers.

Courts established pursuant to Article III are mainly defined by the three central constitutional provisions to which they are subject: resolution of cases that only present live “cases or controversies,” lifetime tenure, and salary protection. The primary purpose for these safeguards was to insulate the federal judiciary from potential pressures, from either the political branches or the public, which might improperly influence the judicial decision-making process.

Notwithstanding Article III’s seemingly literal command that the “judicial power” shall extend to *all* cases “arising under” the Constitution or federal law, Congress has assigned a host of cases arising under federal law to non-Article III bodies. Unlike Article III judges, these bodies, generally referred to as “non-Article III courts,” “legislative courts,” or “Article I courts,” enjoy neither lifetime tenure nor salary protection. There are two main categories of non-Article III courts. The first are standalone courts, created under Congress’s Article I power, which have similar authority as Article III courts, such as entering their own judgments and issuing contempt orders. Examples of legislative courts include the United States Tax Court; the Court of Federal Claims; the Court of Appeals for Veterans Claims; the Court of Appeals for the Armed Forces; and federal district courts in Guam, the Virgin Islands, and the Northern Mariana Islands. The second category of non-Article III tribunals is commonly referred to as “adjuncts” to Article III courts. This category is mainly comprised of federal administrative agencies and magistrate judges.

These non-Article III bodies have been justified on several grounds. First, the Court has held that in certain limited instances, Article III’s absolute command must give way to Congress’s exercise of its Article I powers. This theory has been used to justify the creation of territorial courts, military courts, and the adjudication of cases involving rights created by Congress (commonly referred to as “public rights” cases). The second rationale is the use of “adjuncts,” judicial officers who do not function as independent courts but instead act as a subordinate to the federal courts with direct review of their decisions. Examples of adjuncts include the thousands of administrative law judges who adjudicate cases coming before federal agencies and federal magistrate judges who assist district court judges with everything from deciding motions, hearing evidence, and trying both criminal and civil cases. Lastly, certain questions arising under federal law may be resolved by non-Article III tribunals if the parties to the proceeding consent to such an adjudication.

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Introduction

The United States Constitution established only one federal court—the United States Supreme Court.¹ In lieu of creating other adjudicative bodies through the nation’s founding document, Article I of the Constitution instead authorizes Congress to, in its discretion, “constitute Tribunals inferior to the [S]upreme Court.”² In the years following the ratification of the Constitution, Congress has regularly exercised its power to create a host of different federal tribunals that adjudicate a variety of legal disputes. For example, staffed by judges with lifetime tenures and salary protections, 13 federal circuit courts of appeals and over 90 federal district courts have been established by Congress under Article III of the Constitution.³ In addition to the judges who staff those courts, there are thousands of other judges, including administrative law judges, military judges, and federal magistrates who serve on non-Article III tribunals created by Congress.⁴

Notwithstanding the seemingly broad authority vested in Congress to establish federal courts, the Constitution does provide often sharp limits on when Congress can choose to create a federal tribunal to adjudicate a particular legal dispute. And the scope of these constitutional limits has been the focus of much debate, as evidenced by a long line of divided Supreme Court decisions on the subject.⁵ Indeed, as one legal scholar remarked, the law respecting federal courts and in particular the law distinguishing the powers of the various federal courts is “notoriously unfathomable.”⁶ This report provides an overview of this often difficult and misunderstood area of law, beginning with a discussion of the various types of federal tribunals. The report continues by noting the rationales for why Congress established the breadth of different courts that exist today and concludes with a discussion of the various factors and relevant issues that limit Congress’s discretion in establishing federal courts.

Types of Federal Courts

Article III, Section 1 of the Constitution provides that the “judicial power” of the United States shall be “vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....”⁷ Article III or “constitutional” courts are not, however, the only body that Congress can assign the task of adjudication to under federal law. Instead, the Supreme Court has long recognized that “the Constitution [gives] Congress wide discretion to assign the task of adjudication in cases arising under federal law to legislative tribunals.”⁸ The two central

¹ See U.S. CONST. art. III, §1 (“The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”).

² See *id.* art. I, §8, cl. 9.

³ See *infra* “Article III Courts Today,” at pp. 7.

⁴ See generally Richard A. Posner, *THE FEDERAL COURTS: CRISIS AND REFORM* 26 (1985).

⁵ See, e.g., *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 584-600 (1949); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 105 (1982); *Stern v. Marshall*, 131 S. Ct. 2594, 2611 (2011).

⁶ Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 959 (September 1987).

⁷ See U.S. CONST. art. III, §1.

⁸ *Freytag v. Commissioner*, 501 U.S. 868, 889 (1991); see also *American Insurance Co. v. Canter*, 1 Pet. 511, 546 (1828) (Marshall, C.J.) (“These Courts, then, are not constitutional Courts ... They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables (continued...)”).

types of federal “courts”—courts established under Article III and those tribunals that are not—differ in many respects, including with regard to their personnel, purposes, and powers. In order to understand these differences, this section describes the two types of federal courts, beginning with Article III Courts.

Article III or Constitutional Courts

Courts established pursuant to Article III are mainly defined by the three central constitutional provisions to which they are subject. First, a constitutional court can exercise the “judicial power of the United States” to resolve “cases” and “controversies” of nine designated categories.⁹ The Supreme Court has interpreted the “case-or-controversy” requirement of Article III to impose certain rules of justiciability, such as the prohibition on advisory opinions, the requirements of standing and ripeness, and the limitation on the ability of federal courts to decide “political questions.”¹⁰ Second, a judge who serves on a constitutional court holds his position during “good behavior.”¹¹ While the Constitution does not explain what “good behavior” entails or how a federal judge’s term can expire, the Supreme Court has adopted the view that the Good Behavior Clause guarantees life tenure to Article III judges, “subject only to removal by impeachment.”¹² Third, an Article III judge’s compensation cannot be “diminished during their Continuance in Office.”¹³ The Supreme Court has interpreted the Compensation Clause to prohibit both direct and indirect methods of lowering of an Article III judge’s pay, barring laws that either “order[] a lower salary” for a federal judge or laws that enact a discriminatory tax that uniquely affects federal judges.¹⁴

Constitutional Basis for Article III Courts

The three central provisions respecting Article III courts are fundamental to the basic purposes of such courts in the American constitutional scheme. The Framers of the Constitution, while proponents of democracy,¹⁵ were wary of any form of unchecked power, even when that power

(...continued)

Congress to make all needful rules and regulations, respecting the territory belonging to the United States.”).

⁹ See U.S. CONST. art. III, §1. The principal bases for federal court jurisdiction are claims that arise under federal law (such as a statute, a treaty, or the Constitution), cases involving the United States, cases where the opponents are either citizens of different states or where one party is an alien, suits between two states, or suits based on admiralty law.

¹⁰ See generally *Allen v. Wright*, 468 U.S. 737, 750 (1984). For an extended discussion of the doctrine of standing, see CRS Report R43260, *Reform of the Foreign Intelligence Surveillance Courts: Introducing a Public Advocate*, by Andrew Nolan, Richard M. Thompson II, and Vivian S. Chu, at pp. 21-44.

¹¹ See U.S. CONST. art. III, §1.

¹² See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (plurality opinion); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955) (stating that “[Article III] courts are presided over by judges appointed for life, subject only to removal by impeachment”). Scholars have at times disagreed with the Supreme Court’s conclusion. See, e.g., Note, *Bribery and Other Not So “Good Behavior”*: *Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617, 1655 (1994) (noting “The text of the Constitution, however, does not support this implication of life tenure subject only to impeachment.”).

¹³ See U.S. CONST. art. III, §1.

¹⁴ See *United States v. Hatter*, 532 U.S. 557, 569 (2001).

¹⁵ See *The Federalist*, No. 49, at 281-82 (James Madison) (Clinton Rossiter ed., 1999) (“[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter ... is derived....”).

was lodged in a democratic majority.¹⁶ As a consequence, the Framers envisioned a written Constitution, which protected specific values, principles, and rights, as a limit of what could be changed through ordinary political processes.¹⁷ Because the political branches naturally cannot be expected to fairly adhere to the near-permanent constitutional limitations placed on each body, as these branches are most directly responsive to the often temporary whims of the people, the federal judiciary established under Article III was deliberately designed by the Framers of the Constitution to be a “counter-majoritarian branch” that interpreted the written Constitution and protected its principles.¹⁸ The Constitution did this by “insulating the federal judiciary” from potential pressures, from either the political branches or the public, which could potentially “skew the decision making process or compromise the integrity or legitimacy of federal court decisions.”¹⁹ The key sources of the judiciary “insulation” from the political processes are the Good Behavior Clause and the Compensation Clause of Article III. The Good Behavior Clause, by creating a “permanent tenure of judicial offices,” ensures an “independent spirit in judges,”²⁰ and the Compensation Clause, by creating a “fixed provision for [the judiciary’s] support,” prevents the political branches from having power over a judge’s subsistence and, with that, “power over his will.”²¹

However, just as the Framers worried about the concentration of unchecked power in either of the political branches, so too did the founding generation have concerns regarding the reach of the judiciary.²² Indeed, the power that “belongs” to the judiciary, as articulated by Alexander Hamilton in Federalist No. 78, to “ascertain [the Constitution’s] meaning as well as the meaning of any particular act proceeding from the legislative body” and, when faced with a conflict, “be governed by [the Constitution] rather than [a legislative act],”²³ is an immense power. The power of judicial review, at bottom, entails the power of unelected officials to “apply and construe the Constitution, in matters of the greatest moment, against the wishes of a legislative majority, which is, in turn powerless to affect the judicial decision.”²⁴ Notwithstanding the scope of this power, the Framers of the Constitution were untroubled by the potential reach of the judiciary

¹⁶ Martin H. Redish and Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U.L. REV. 1, 15 (1987); see also THE FEDERALIST, No. 49, at 285 (James Madison) (Clinton Rossiter ed., 1999) (“But it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.”)

¹⁷ See Redish and Drizin, *supra* note 16, at 15. Alexander Hamilton, in Federalist No. 78, envisioned a “limited Constitution” that “contains certain specified exceptions” to a given branches power – such as the prohibition on the legislature’s ability to enact bills of attainder or *ex post facto* laws. See THE FEDERALIST, No. 78, at 434 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

¹⁸ See THE FEDERALIST, No. 78, at 435 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (“[C]ourts were designed to be an intermediate body between the people and the legislature in order ... to keep the latter within the limits assigned to their authority.”); see generally ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (1962).

¹⁹ Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 700-701 (1995).

²⁰ See THE FEDERALIST, No. 78, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

²¹ See THE FEDERALIST, No. 79, at 440 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

²² See generally Martin Kellner, *Congressional Grants of Standing in Administrative Law and Judicial Review: Proposing a New Standing Doctrine from a Delegation Perspective*, 30 HAMLINE L. REV. 315, 323 (Spring 2007) (noting that the opponents to the Constitution, the Anti-Federalists, “worried that federal judges would subversively abuse their power of law declaration and might substitute their own will for that of the people expressed through the states.”).

²³ THE FEDERALIST, No. 78, at 435-36 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

²⁴ See Bickel, *supra* note 12, at 20.

because Article III judges were limited to ruling in certain circumstances and could only exercise that power “when other actors—public officials and private citizens—created justiciable cases and controversies for them.”²⁵ As a consequence, as famously described by Alexander Hamilton, the Framers envisioned the judiciary as being the “least dangerous” branch of the government.²⁶

When Is a Court Designated an Article III Court?

Given the host of different types of constitutional courts, a fundamental question is when must a court be considered one that has been established under Article III and subject to Article III’s restrictions. The answer to that question has produced, in the words of Justice John Marshall Harlan II, “much confusion and controversy.”²⁷ Perhaps the best answer to the question of when a court can be deemed an Article III court comes from the 1962 Supreme Court case of *Glidden v. Zdanok*.²⁸

Glidden involved a challenge to a judgment issued in part by a judge of the Court of Claims while that judge was sitting by designation on the Second Circuit Court of Appeals.²⁹ In an earlier case, *Williams v. United States*, the Supreme Court had held that the Court of Claims was not an Article III court because the matters being brought before the court were not of the *type* that an Article III court generally adjudicates: primarily monetary claims against the government.³⁰ The *Williams* Court held as such, notwithstanding that the law creating the Court of Claims did not limit the tenure of judges on the court or provide the authority of the salaries of the judges on that court.³¹ In the intervening years since *Williams*, Congress had declared the Court of Claims was “created under Article III.”³² Notwithstanding that declaration, the petitioner in *Glidden* argued, relying on

²⁵ See Jonathan T. Molot, *Principled Minimalism: Restricting the Balance between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1761-1762 (2004).

²⁶ THE FEDERALIST, No. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

²⁷ 370 U.S. 530, 534 (1962) (Harlan, J.) (plurality opinion).

²⁸ *Id.*

²⁹ Over a dissenting opinion, the judge from the Court of Claims wrote the controlling opinion reversing order of the district court. *Id.* at 532. The case also involved a challenge to a judgment issued by a retired judge from the Court of Customs and Patent Appeals sitting by designation on the District of Columbia federal district court. *Id.* For simplicity and because the issues regarding each challenge are fairly identical, the description of the *Glidden* case in this report is limited to the challenge to the designation of the Court of Claims judge.

³⁰ 289 U.S. 553, 580-581 (1933). In a much maligned opinion, see *Freytag v. Commissioner*, 501 U.S. 868, 914 (1991) (Scalia, J., concurring) (calling *Williams* “an opinion whose understanding of the principles of separation of powers ought not inspire confidence, much less prompt emulation” and noting that *Williams* “has been declared an ‘intellectual disaster’ by commentators”), the Court in *Williams* noted that (1) monetary claims against the government are only actionable upon a waiver of sovereign immunity, (2) “there is no constitutional right to a judicial remedy” with respect to such claims, (3) that “the authority to inquire into and decide [such claims] may constitutionally be conferred on a nonjudicial officer or body.” 289 U.S. at 579-80. The Court then surmised that because of those three observations that it “follows indubitably” that the power to adjudicate a monetary claim against the government, “in whatever guise or by whatever agency exercised, is no part of the judicial power vested in the constitutional courts by the third article.” *Id.* at 580-81. The Court had made a similar holding with respect to the Court of Customs Appeals in *Ex parte Bakelite Corp.* four years before the *Williams* case. See 279 U.S. 438, 460 (1929).

³¹ See 289 U.S. at 562 (citing Act of February 24, 1855, c. 122, 10 Stat. 612). The litigation in *Williams* occurred as a result of the Legislative Appropriation Act of June 30, 1932 that set the pay “of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office)” at a rate of \$10,000 per annum, \$2,500 less than what *Williams*, a judge on the Court of Claims made the previous year. 289 U.S. at 559. The Comptroller General held that the Court of Claims was not an Article III court and reduced *Williams*’s pay accordingly. *Id.*

³² *Glidden Co.*, 370 U.S. at 541; see also Act of July 28, 1953, §1, 67 Stat. 226.

Williams, that his constitutional right to have an Article III court adjudicate the breach of contract claim was violated because a judge from a non-Article III court was designated to the case on appeal.³³

The Supreme Court issued a splintered decision in *Glidden* ultimately holding that the Court of Claims was an Article III court making the designation of the Court of Claims judge to the Second Circuit panel constitutionally valid.³⁴ Justice Harlan, writing for a plurality of three, argued that *Williams* should be overturned because the question of whether a court is an Article III court does not turn on the nature of the court’s subject matter, but instead on whether the court’s “establishing legislation complies with the limitations” of Article III.³⁵ In concluding that the Court of Claims was an Article III court, Justice Harlan noted that the establishing legislation complied with the three central constitutional provisions pertaining to constitutional courts—namely the Good Behavior Clause, the Compensation Clause, and the case-or-controversy requirement.³⁶ Specifically, Justice Harlan noted that (1) Court of Claims judges had been given life tenure to ensure their independence;³⁷ (2) Congress had not provided that the salary of a Court of Claims judge be subject to diminution;³⁸ and (3) Congress had provided the Court of Claims with the authority to rule on “cases and controversies” by, for example, respecting the finality of the rulings of the court and by providing the court jurisdiction over justiciable matters.³⁹ In other words, for Justice Harlan, what mattered in determining the status of the Court of Claims as an Article III court was not the nature of the court’s subject-matter jurisdiction, nor an after-the-fact declaration by Congress that the Court was considered an Article III Court,⁴⁰ but the nature of the enabling legislation for the court.⁴¹ Justice Clark and Chief Justice Warren concurred in the judgment of the Court, but found it unnecessary to overrule *Williams* because of the intervening declaration by Congress that the Court of Claims was an Article III court⁴² and

³³ See *Glidden Co.*, 370 U.S. at 533.

³⁴ *Id.* at 530.

³⁵ *Id.* at 552 (Harlan, J.) (plurality opinion). For Justice Harlan, the flaw in *Williams*’ logic was the assumption made in that case that because Congress had the *option* of not having the claim be brought before a constitutional court that Congress was *prohibited* from allowing the claim to be brought before an Article III court. *Id.* at 549-50 (“But because Congress may employ such tribunals assuredly does not mean that it must. This is the crucial *non sequitur* of the *Bakelite* and *Williams* opinions.”).

³⁶ For a discussion of the three central constitutional provisions with respect to Article III courts, see *supra* “Article III or Constitutional Courts,” at p. 2.

³⁷ *Glidden*, 370 U.S. at 552.

³⁸ *Id.* at 555.

³⁹ *Id.* at 554. Justice Harlan did appear concerned with the Court of Claims’ “congressional reference” cases – cases in which a panel of the court of claims serves as a reviewing body for a bill referred to by Congress. See 28 U.S.C. §2509. While these cases would not ordinarily be the subject of an Article III court because they are in essence advisory opinions and not a “case or controversy,” see *Muskrat v. United States*, 219 U.S. 346, 357 (1911), Justice Harlan concluded congressional reference cases were “so minuscule a portion of [the Court of Claims] purported functions,” that the court’s Article III status could not turn on that question. *Glidden Co.*, 370 U.S. at 583. For an extended discussion of the Court of Claims and congressional reference cases, see *infra* “Why Create Legislative Courts?,” at pp. 13-14.

⁴⁰ Justice Harlan found the 1953 congressional declaration that the Court of Claims was a constitutional court to be “persuasive evidence” of the nature of the court. See *Glidden*, 370 U.S. at 542.

⁴¹ *Id.* at 552.

⁴² *Glidden Co. v. Zdanok*, 370 U.S. 530, 585 (1962) (Clark, J., concurring).

because of changes in the jurisdiction of the Court of Claims to make the court more like an Article III court.⁴³

The specific holding of *Glidden*—that the Court of Claims is an Article III Court—is of little importance today, as the Court of Claims ceased to exist in 1982 and was replaced by the Court of Federal Claims, which is staffed by term-limited judges.⁴⁴ Nonetheless, while the *Glidden* decision was fractured, the case marks a clear shift from earlier jurisprudence that evaluated a court’s Article III status based on the nature of the subject matter of cases before the court.⁴⁵ Instead, the Court, when determining whether a court is a constitutional court, appears to look at how Congress structures a court, looking to see if the structure of the court adheres to basic requirements of Article III.⁴⁶ Moreover, a majority of justices on the *Glidden* court appear to reject the notion that Congress can by solely attaching a label to a court change the constitutional nature of that court.⁴⁷ Ultimately, the touchstone of when a court is a constitutional court appears to be whether the court was established pursuant to the power and constraints provided for under Article III of the Constitution.⁴⁸

In the wake of *Glidden*, lower courts have largely followed the plurality’s functional approach to determine whether a court is one established under Article III. For example, in *United States v. Cavanagh*, a criminal defendant challenged whether the Foreign Intelligence Surveillance Court (FISA Court) was established in violation of the Constitution.⁴⁹ In an opinion written by then-Judge Anthony Kennedy, the Ninth Circuit rejected the defendant’s argument, noting that Congress, in creating the Foreign Intelligence Surveillance Court, (1) staffed the court with judges that had lifetime tenure and salary protections⁵⁰ and (2) had the court adjudicate matters that sounded in a “case-or-controversy.”⁵¹ In other words, in line with the *Glidden* plurality, the *Cavanagh* court concluded that a court is an Article III court so long as it is established pursuant to the contours of Article III.⁵²

⁴³ *Id.* at 586 (noting that congressional reference cases formerly were a substantial part of the Court of Claims’ jurisdiction). Justices Douglas, joined by Justice Black, dissented in *Glidden*. *Id.* at 589 (Douglas, J., dissenting). Justices Frankfurter and White did not participate in the case. *Id.* at 530.

⁴⁴ See Federal Courts Improvement Act of 1982, P.L. 97-164, Section 105(a), §§171-77, 96 Stat. 25, 27-28; see also 28 U.S.C. §171(a) (2000) (“The court [of Federal Claims] is declared to be a court established under article I of the Constitution of the United States.”).

⁴⁵ See *Ex Parte Bakelite*, 279 U.S. at 460; see also *Williams*, 289 U.S. at 562. This rejection of the principle of *Williams* appears in line with the modern administrative state, where Article III courts, such as the circuit courts of appeals, regularly review the decisions of an administrative agency.

⁴⁶ See *Glidden Co.*, 370 U.S. at 552 (Harlan, J.); *id.* at 585 (Clark, J., concurring).

⁴⁷ *Id.* at 541-543 (plurality) (finding that while the congressional declaration was persuasive, the Court is the “ultimate expositor of the Constitution.”); *id.* at 585 (Clark, J., concurring) (“Not that this *ipse dixit* made the Court of Claims an Article III court....”).

⁴⁸ *Id.* at 552 (Harlan, J.) (plurality opinion).

⁴⁹ *United States v. Cavanagh*, 807 F.2d 787, 791 (9th Cir. 1987).

⁵⁰ *Id.* at 791 (“We need not address appellant’s suggestion that FISA applications must be passed upon by article III judges, as the judges assigned to serve on the FISA court are federal district judges, and as such they are insulated from political pressures by virtue of the protections they enjoy under article III, namely life tenure and a salary that cannot be diminished.”)

⁵¹ *Id.* (citing *United States v. Megahey*, 553 F. Supp. 1180, 1196 (E.D.N.Y. 1982)).

⁵² The *Cavanagh* court was untroubled by the contention that because a judge was only temporarily designated to the Foreign Intelligence Surveillance Court, that the court was not composed of judges having life tenure protections. 807 F.2d at 792. The Ninth Circuit, citing *Glidden*, noted the broad principle that a judge’s temporary designation to a court within the federal judicial system does not “undermine the judicial independence that Article III was intended to (continued...)”)

Article III Courts Today

Today the system of courts established under Article III consists of three layers of review.⁵³ Cases are generally brought in one of 91⁵⁴ federal district courts,⁵⁵ and litigants typically are allowed to appeal a district court's final decision to one of the 12 regional courts of appeal.⁵⁶ Federal district and circuit judges are primarily generalists, with "limited knowledge of [any] specialized field."⁵⁷ As one prominent scholar described the typical work of an Article III judge:

Judges have heavy caseloads ... Judges have to research, analyze, and address an extraordinarily wide range of issues ... Each judge must be able to resolve a major civil rights dispute on Monday, a major environmental law dispute on Tuesday, and a major commercial law dispute on Wednesday. Judges have little time or opportunity for reflection, detailed analysis of an area of law, or development of special expertise in any field of law.⁵⁸

Nonetheless, there do exist a limited number of Article III courts that have a jurisdiction limited by subject matter, as opposed to geographic area, making these courts somewhat specialized. The most prominent example of such a specialized Article III court is the Court of Appeals for the Federal Circuit. The Federal Circuit takes appeals from federal district courts and certain administrative bodies and Article I courts with respect to a host of subject areas, including international trade, government contracts, patents, trademarks, certain money claims against the U.S. government, federal personnel issues, veterans' benefits, and public safety officers' benefits claims.⁵⁹ In addition to the Federal Circuit, Congress has, throughout history, established other specialized Article III courts.⁶⁰ Today, in addition to the Federal Circuit, there are five specialized Article III courts, four of which are staffed temporarily by Article III judges from other courts. First, the FISA Court, which is responsible for issuing warrants authorizing the government to

(...continued)

secure" as the judge's on that court do not lose their life tenure or salary protections. *Id.*

⁵³ See 28 U.S.C. §41 (establishing the thirteen judicial circuits of the United States); see also 28 U.S.C. §§81-131 (establishing ninety-one district courts).

⁵⁴ See CRS Report R43426, *U.S. Circuit and District Court Judges: Profile of Select Characteristics*, by Barry J. McMillion, at p. 2. Congress has established three additional territorial courts (titled "district courts") pursuant to Article IV. See 48 U.S.C. §§1424, 1611, 1821 (establishing non-life tenured judges for courts in Guam, the Virgin Islands, and the Northern Marianas Islands).

⁵⁵ See, e.g., 28 U.S.C. §1331 (providing district courts with "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); 28 U.S.C. §1332 (providing district courts with "original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000 ... and is between" diverse parties). Some statutes allow for direct review of administrative actions in the circuit courts of appeal, bypassing the district courts. See, e.g., 33 U.S.C. §1369(b)(1) (providing that review of the Environmental Protection Agency's actions under the Clean Water Act "may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person.").

⁵⁶ See 28 U.S.C. §1291.

⁵⁷ See *Ind. Lumbermens Mut. Ins. Co. v. Reinsurance Results, Inc.*, 513 F.3d 652, 658 (7th Cir. 2008) (Posner, J.).

⁵⁸ Richard J. Pierce, Jr., *The Relationship Between the District of Columbia Circuit and Its Critics*, 67 GEO. WASH. L. REV. 797, 798 (1999).

⁵⁹ See 28 U.S.C. §1295; see generally *Court Jurisdiction*, U.S. CT. APPEALS FED. CIRCUIT, <http://www.ca9.uscourts.gov/the-court/court-jurisdiction.html> (last visited October 2, 2014).

⁶⁰ See, e.g., Emergency Court of Appeals, see Emergency Price Control Act of 1942, Pub. L. No. 77-421, §204(c), 56 Stat. 23, 32 (1942); see also Temporary Emergency Court of Appeals, see Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, §211(b), 85 Stat. 743, 749 (1971).

conduct certain espionage activities, is staffed by federal district judges who serve nonrenewable, staggered terms of up to seven years.⁶¹ The Foreign Intelligence Surveillance Act of 1978 also established an appellate court called the Foreign Intelligence Surveillance Court of Review, consisting of three judges from the federal district and courts of appeals whose role it is review certain orders issued by the FISA Court.⁶² Third, the Judicial Panel on Multidistrict Litigation, which is empowered to transfer to a single district multiple civil cases whose pretrial proceedings may benefit from consolidation and coordination, consists of a mix of district judges and circuit judges designated by the Chief Justice.⁶³ Fourth, the Alien Terrorist Removal Court, which reviews *ex parte* applications from the Department of Justice to order removal of certain aliens from the United States based on classified information, consists of five district court judges designated by the Chief Justice for staggered terms of five years.⁶⁴ Fifth, the Court of International Trade, whose jurisdiction focuses on a host of trade-related matters, is an Article III tribunal composed of nine judges appointed by the President.⁶⁵ **Table 1** lists the current Article III courts in federal judicial system.

⁶¹ See 50 U.S.C. §1803(a), (d).

⁶² See *id.* §1803(b). Judges of the Foreign Intelligence Surveillance Court of Review serve for terms seven years. *Id.* §1803(d). Notwithstanding the limited terms that a judge serves on the courts established under the Foreign Intelligence Surveillance Act, case law has viewed those courts as having been established pursuant to Article III. See *United States v. Cavanagh*, 807 F.2d 787, 791 (9th Cir. 1987) (Kennedy, J.) (“[Appellant] ... appears to suggest that the FISA court is not properly constituted under [A]rticle III because the statute does not provide for life tenure on the FISA court. This argument has been raised in a number of cases and has been rejected by the courts. We reject it as well.”). The rationale for such rulings appears to stem from historic practices of allowing Supreme Court justice to preside as circuit judges for extended periods of time without receiving a separate commission to serve as a circuit judge. See, e.g., *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

⁶³ See 28 U.S.C. §1407. Like the FISA Court the temporary assignment of a judge to the Judicial Panel on Multidistrict Litigation does not appear to deprive that court of its Article III status. See *Cavanagh*, 807 F.2d at 792 (citing the Judicial Panel on Multidistrict Litigation as example of the “substantial precedent for the temporary assignment of lower federal judges by the Chief Justice to serve on various specialized courts.”). It should be noted, however, that the Judicial Panel on Multidistrict Litigation, in contrast to other Article III courts, has a primarily administrative role: passing on petitions for the transfer of civil actions with “one or more common questions of fact ... pending in different districts” to a single district for coordinate pretrial proceedings.

⁶⁴ 8 U.S.C. §1532(a). The United States Alien Terrorist Removal Court has yet to meet as a court. See, e.g. Won Kindane, *Procedural Due Process in the Expulsion of Aliens Under International, United States, and European Law: A Comparative Analysis*, 27 EMORY INT’L L. REV. 285, 322 (2013) (noting that the Alien Terrorist Removal Procedure has “never been utilized.”). While some have referred to the Alien Terrorist Removal Court as a “Article I court” because it was created by Congress, see, e.g. Justin Florence, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 YALE L.J. 2148, 2178 (2006), given that the court is staffed entirely by Article III judges serving in adjudicative role, it appears likely that the Alien Terrorist Removal Court would be considered an Article III court. See *Cavanagh*, 807 F.2d at 792.

⁶⁵ See 28 U.S.C. §251; see generally UNITED STATES COURT OF INTERNATIONAL TRADE, About the Court, <http://www.cit.uscourts.gov/AboutTheCourt.html#jurisdiction> (last visited October 2, 2014).

Table I. Current Article III Courts

| Name of Court | Number of Jurists Provided for in Law | Staffed by . . . | Description of Court |
|--|---|---|---|
| Supreme Court of the United States | 9 total, see 28 U.S.C. §1 | Justices, appointed by the President with Senate advice and consent | Generalist, Appellate |
| Regional Federal Circuit Courts of Appeal (1 st , 2 nd , 3 rd , 4 th , 5 th , 6 th , 7 th , 8 th , 9 th , 10 th , 11 th , D.C.) | 167 total divided between the 12 regional courts of appeal, see 28 U.S.C. §44 | Circuit court judges, appointed by the President with Senate advice and consent | Generalist, Appellate |
| Regional District Courts | 655 total divided between the 91 regional district courts, see 28 U.S.C. §133 | District court judges, appointed by the President with Senate advice and consent | Generalist, primarily courts of first impression |
| Court of Appeals for the Federal Circuit | 12 total, see 28 U.S.C. §44 | Circuit court judges, appointed by the President with Senate advice and consent | Specialized, Appellate |
| Foreign Intelligence Surveillance Court of Review | 3 total, see 50 U.S.C. §1803(b) | Circuit and district court judges, designated by the Chief Justice of the Supreme Court | Specialized, Appellate |
| Foreign Intelligence Surveillance Court | 11 total, see 50 U.S.C. §1803(a) | District court judges, designated by the Chief Justice of the Supreme Court | Specialized, court of first impression |
| Judicial Panel on Multidistrict Litigation | 7 total, see 28 U.S.C. §1407(d) | Circuit and district court judges, designated by the Chief Justice of the Supreme Court | Specialized, Administrative |
| Alien Terrorist Removal Court | 5 total, see 8 U.S.C. §1532 | District court judges, designated by the Chief Justice of the Supreme Court | Specialized, court of first impression |
| Court of International Trade | 9 total, see 28 U.S.C. §251 | Judges of the United States Court of International Trade, appointed by the President with Senate advice and consent | Specialized, court of first impression and appellate review of certain administrative actions |

Source: Created by CRS.

Why Create Inferior Article III Courts?

Article III of the Constitution neither establishes nor requires the establishment of lower federal courts. Instead, the Constitution envisions Congress “from time to time” establishing federal courts that are “inferior” to the Supreme Court,⁶⁶ and it is generally accepted that Congress could have left state courts as the primary courts for matters respecting federal law.⁶⁷ Given the strict

⁶⁶ See U.S. CONST. art. III, §1.

⁶⁷ See *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (“[Congress] could have declined to create any such courts, (continued...)”).

limits that are imposed on how Congress may deploy Article III courts—lifetime appointments, inability to reduce salaries of federal judges for poor performance, and the host of restrictions that are implied by the “case-or-controversy” requirement—one might question why Congress has chosen to create the number of Article III courts that it has.

Two central arguments underlie why Congress has opted to create inferior Article III courts. First, Congress’s interest in creating lower federal courts aligns with the Framers’ intentions for Article III courts: Article III courts, which are insulated from political pressures through salary and tenure protections, provide a legal forum to help ensure compliance with federal legal interests, including those enshrined in the Constitution. Not only does the existence of an independent federal judiciary provide a bulwark against encroachments by *federal* political branches on civil and structural rights,⁶⁸ without an independent federal judiciary, original litigation on federal claims would arise in *state* courts. The Framers, who had just witnessed the resulting chaos of decentralization during the Articles of Confederation, considered that having such power in the exclusive province of *state* courts “presented a real threat to the enforcement of federal law against the states,”⁶⁹ and consequently, the first Congress, in the Judiciary Act of 1789, established the system of lower federal courts.⁷⁰ The quintessential example of the value of lower federal courts in protecting federal interests came in the wake of the Supreme Court’s ruling in *Brown v. Board of Education* prohibiting *de jure* school segregation where, in stark contrast to the behavior of state courts, the aggressive enforcement of *Brown’s* mandate by lower federal courts was, in the words of one prominent legal scholar, “essential in desegregating many southern school systems.”⁷¹

The second primary reason Congress has chosen to employ Article III courts as a forum for adjudication is that the constitutional protections afforded to Article III judges tend to attract high quality judges that embed any judicial process with a status unrivaled by other federal and state courts. As the Supreme Court has noted, life tenure and salary protections “helps to promote public confidence in judicial determinations” and “to attract well-qualified persons to the federal bench.”⁷² The Court’s assessment is supported by a recent study by the Congressional Research Service indicating that of the active U.S. Circuit Court judges, 54.6% of those judges had prior judicial experience and those that did not were primarily long-established private practitioners or law professors.⁷³ The status of Article III judges, in turn, allows such courts to attract high level candidates for their staff, including law clerks “who most often have strong academic credentials from top law schools, to work for one year prior to entering private practice or some other legal career.”⁷⁴ And the perceived quality of the federal judiciary established under Article III has not

(...continued)

leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe.”)

⁶⁸ See THE FEDERALIST, No. 78, at 435 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

⁶⁹ See James E. Pfänder, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 559 (May 1994).

⁷⁰ See Judiciary Act of 1789, ch. 20, 1 Stat. 73, 73.

⁷¹ See Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U.L. REV. 593, 596 (July 1991).

⁷² See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 n.10 (1982) (plurality opinion).

⁷³ See CRS Report R43538, *U.S. Circuit Court Judges: Profile of Professional Experiences Prior to Appointment*, by Barry J. McMillion.

⁷⁴ See Maxwell L. Stearns, *Survey: VII Judicial Decisionmaking: Appellate Courts Inside and Out*, 101 Mich. L. Rev. 1764, 1771 (May 2003).

been lost in congressional debates over whether to establish a new Article III court. For example, long-time efforts by the bankruptcy bar to transform the bankruptcy court into an Article III court have contended that “life-tenured judges would be more autonomous, more powerful, and enjoy more prestige, and that the bankruptcy court consequently would attract better judges.”⁷⁵

Non-Article III or Legislative Courts

As noted above, Article III of the Constitution commands that “the judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”⁷⁶ A literal interpretation of Article III would seem to require that every case that falls within the “judicial Power of the United States” must be adjudicated in forums before judges cloaked with Article III protections.⁷⁷ Again, this is to ensure that judges will not be swayed by political pressure and can hand down decisions without fear of reprisal from the democratically elected branches.⁷⁸ Notwithstanding this command, Congress has assigned to non-Article III bodies—that is, forums with judicial officers who do not enjoy Article III guarantees—the authority to adjudicate a large swath of cases that would seemingly fall within the “judicial power” traditionally allocated to Article III courts. These entities, which extend back to the earliest days of the Republic,⁷⁹ include specialized stand-alone courts, administrative agencies, and magistrate judges who serve under Article III judges. This section will survey the various types of non-Article III courts; explore the various historical, legal, and practical justifications for their uses; and provide an analytical framework for determining when non-Article III courts can be employed.

Non-Article III or Legislative Courts Today

Before exploring the justification and scope of non-Article III courts, it is necessary to establish a working definition of what a non-Article III court is and provide some examples. First, these

⁷⁵ See Eric G. Beherens, *Stern v. Marshall: The Supreme Court’s Continuing Erosion of Bankruptcy Court Jurisdiction and Article I Courts*, 85 AM. BANKR. L.J. 387, 390 (Fall 2011) (describing lobby efforts to create an Article III bankruptcy court); see generally Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts To Shape Judicial Policy?*, 74 JUDICATURE 217, 219 (1991) (“Another difference, among the courts with permanent judges, is that between Article I ‘legislative’ courts and Article III courts; the latter have greater prestige, and their judges hold lifetime terms.”). The perceived quality of Article III judges could tempt Congress to deploy Article III judges in roles that are not typically engaged in by the judiciary. However, in a footnote, the Court in *Mistretta v. United States* cautioned that separation-of-powers concerns may prevent Congress from delegating a non-adjudicatory function, such as the ability to make policy judgments, to an Article III court. See 488 U.S. 361, 394 n.20 (1989).

⁷⁶ U.S. CONST. art. III, §1.

⁷⁷ See Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 918 (1988) (“The natural implication of [Article III, Section 1] defines a position that I shall call ‘article III literalism’: although Congress need not create any ‘inferior’ courts unless it so chooses, if it does create any federal adjudicative bodies, those bodies must be the constitutional courts contemplated by article III.”); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 645 (2004) (“The literal terms of Article III appear to rule out reliance upon Article I tribunals altogether; Article III vests the judicial power of the United States in federal courts whose judges enjoy salary and tenure protections that were designed to ensure judicial independence in a scheme of separated powers.”); see also Erwin Chemerinsky, *Formalism Without a Foundation: Stern v. Marshall*, 2011 SUP. CT. REV. 183, 190-91 (2012).

⁷⁸ See Constitutional Rationale for Article III Courts, supra pp. 2-3.

⁷⁹ See, e.g., *American Insurance Co. v. 356 Bales of Cotton* (Canter), 26 U.S. (1 Pet.) 511 (1828 (upholding use of territorial courts)).

adjudicatory entities have been called by various names: “non-Article III courts,”⁸⁰ “Article I courts,”⁸¹ “Article I tribunals,”⁸² “legislative courts,”⁸³ or “administrative courts.”⁸⁴ Although there are many variations in name, structure, and duties, these bodies have a few core commonalities. First, non-Article III judges do not enjoy life tenure, but are term-limited.⁸⁵ Second, these officials do not have the luxury of constitutional salary protection.⁸⁶ Third, these judicial officials need not be appointed by the President with Senate confirmation⁸⁷ (although they sometimes are).⁸⁸

There are two main categories of non-Article III courts. The first is commonly referred to as “legislative courts” or “Article I courts.” These are standalone courts, created under Congress’s Article I power,⁸⁹ which have similar authority as Article III courts, such as entering their own judgments and issuing contempt orders. Examples of legislative courts include the United States Tax Court;⁹⁰ the Court of Federal Claims;⁹¹ the Court of Appeals for Veterans Claims;⁹² the Court of Appeals for the Armed Forces;⁹³ and federal district courts in Guam,⁹⁴ the Virgin Islands,⁹⁵ and the Northern Mariana Islands.⁹⁶ The second category of non-Article III tribunals has commonly

⁸⁰ *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 569 (1985).

⁸¹ *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 879 (1991).

⁸² Fallon, *supra* note 77, at 643.

⁸³ 26 U.S. 512.

⁸⁴ Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 *IND. L. J.* 233, 264 (1990).

⁸⁵ 28 U.S.C. §631(e) (“The appointment of any individual as a full-time magistrate judge shall be for a term of eight years, and the appointment of any individuals as a part-time magistrate judge shall be for a term of four years[.]”); 26 U.S.C. §7443 (“The term of office of any judge of the Tax Court shall expire 15 years after he takes office.”).

⁸⁶ While some statutes tie non-Article III judge’s salary to that of U.S. District court judges, *see, e.g.*, 26 U.S.C. §7443(c) (“Each [Tax Court] judge shall receive salary at the same rate and in the same installments as judges of the district courts of the United States.”), Congress could amend these statutes at any time.

⁸⁷ 28 U.S.C. §631(a) (“The judges of each United States district court and the district courts of the Virgin Islands, Guam, and the Northern Mariana Islands shall appoint United States magistrate judges in such numbers and to serve at such locations within the judicial districts as the Judicial Conference may determine under this chapter.”); 28 U.S.C. §152 (“Each bankruptcy judge to be appointed for a judicial district ... shall be appointed by the court of appeals of the United States for the circuit in which such district is located.”).

⁸⁸ 26 U.S.C. §7443(b) (“Judges of the Tax Court shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office.”); 28 U.S.C. §171 (“The President shall appoint, by and with the advice and consent of the Senate, sixteen judges who shall constitute a court of record known as the United States Court of Federal Claims.”).

⁸⁹ In many instances, Congress makes express its intent to create an Article I, versus Article III, court. *See, e.g.*, 26 U.S.C. §7441 (“There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.”).

⁹⁰ 26 U.S.C. §7441.

⁹¹ *See, e.g.*, 28 U.S.C. §171 (“The court [of Federal Claims] is declared to be a court established under article I of the Constitution of the United States.”).

⁹² 38 U.S.C. §7251 (“There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Appeals for Veterans Claims.”).

⁹³ 10 U.S.C. §941 (“There is a court of record known as the United States Court of Appeals for the Armed Forces. The court is established under article I of the Constitution. This court is located for administrative purposes only in the Department of Defense.”).

⁹⁴ 48 U.S.C. §1424, 1424b.

⁹⁵ 48 U.S.C. §1611, 1614.

⁹⁶ 48 U.S.C. §1821.

been referred to as “adjuncts” to Article III courts. This category is mainly comprised of federal administrative agencies and magistrate judges. Each of these will be described in detail below, but first it is important to understand what prompts Congress to create these judicial fora.

Why Create Legislative Courts?

Congress has opted to establish legislative courts for a number of reasons. First, some have suggested that Congress establishes Article I courts to ensure the unique status of Article III courts is preserved.⁹⁷ For example, in support of establishing Article I bankruptcy courts under the Bankruptcy Reform Act of 1978, several Members of Congress argued that establishing new specialized Article III courts would “set[] a bad precedent,” as the expansion of Article III Courts “unnecessarily” and “inevitably ... dilute[s] its prestige and influence.”⁹⁸ For others, legislative courts provide an alternative to having Article III courts “deal with the countless matters handled in administrative agencies and in specialized tribunals like bankruptcy courts.”⁹⁹

Second, given that most Article III courts are generalist in nature,¹⁰⁰ Congress has established specialized non-Article III tribunals that focus on a particular area of law, with the understanding that an expert is needed to adjudicate disputes with respect to certain complex and technical areas of law.¹⁰¹ For example, in establishing the predecessor to the Tax Court, Congress in 1924 created the Board of Tax Appeals,¹⁰² recognizing the need for an adjudicative body consisting “of ‘Members’ who possessed the specialized knowledge to handle increasingly complex tax issues.”¹⁰³ In this same vein, Congress has established legislative courts within executive branch agencies for reasons of efficiency or cost savings.¹⁰⁴ As noted by Chief Justice Hughes in *Crowell v. Benson*, a non-Article III tribunal residing in an administrative agency can “furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.”¹⁰⁵ And, indeed, one of the central reasons Congress allowed the Commodity Future Trading Commission (CFTC) to adjudicate state law counterclaims arising in a proceeding regarding a violation of the Commodity Exchange Act was because “Congress intended to create an inexpensive and expeditious alternative forum” to resolve all such disputes.¹⁰⁶

⁹⁷ See ERWIN CHERMERINSKY, FEDERAL JURISDICTION §4.1 (6th ed. 2012) (“Desiring to keep the federal judiciary small and prestigious, Congress might want to avoid establishing large numbers of additional judgeships....”).

⁹⁸ See H.R. Rep. No. 595, 95th Cong., 1st sess. 539 (separate views of Congressmen Railsback, Danielson, Mann, and Hyde).

⁹⁹ See Chemerinsky, *supra* note 97.

¹⁰⁰ See “When is a Court Designated an Article III Court,” *supra* pp. 4-6.
” at 7-9.

¹⁰¹ See Chemerinsky, *supra* note 97. The logic of establishing specialized courts, as noted by one legal scholar is that “expert judges will produce higher-quality decisions than nonexperts.” See LAWRENCE BAUM, SPECIALIZING THE COURTS 35 (2011).

¹⁰² See Revenue Act of 1924, ch. 234, §900(a), 43 Stat. 253, 336.

¹⁰³ See Adam J. Smith, *Unauthorized Practice of Law and CPAs: A Law of the Lawyers, by the Lawyers, for the Lawyers*, 23 U. FLA. J.L. & PUB. POL’Y 373, 391 (December 2012).

¹⁰⁴ See Chemerinsky, *supra* note 97.

¹⁰⁵ 285 U.S. 22, 46 (1932).

¹⁰⁶ *Commodity Futures Trading Com v. Schor*, 478 U.S. 833, 855 (1986).

Finally, Congress has established non-Article III tribunals to avoid the constitutional restrictions imposed upon Article III courts. For example, in 1982, Congress reconstituted the Court of Claims as an Article I tribunal in part so that the court could hear “congressional reference” cases.¹⁰⁷ A “congressional reference” case is one in which a bill for monetary relief is referred by a resolution of either house of Congress to the Court of Claims. After conducting proceedings to determine the factual merits, the Court of Claims, in turn, issues a report to Congress, which is free to ignore the court’s recommendations.¹⁰⁸ Because the Court of Claims’ report in a congressional reference case cannot bind the parties presenting the case, the report is advisory in nature and could not be issued by a constitutional court, which lacks the authority under Article III to “give opinions upon ... abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.”¹⁰⁹ As a consequence, the only means by which Congress could have the Court of Claims adjudicate congressional reference cases was to reconstitute the court as a legislative tribunal.¹¹⁰ Likewise, Congress may wish to exert control over or influence the work of a court, and by establishing an Article I tribunal, Congress can establish a court housed with judges that lack life tenure and salary protections.¹¹¹

Constitutional Basis for Legislative Courts

Again, while Article III would seem to require that every “case” or “controversy” must be litigated in an Article III court, there appears to be historical, legal, and practical support for Congress’s authority to create non-Article III tribunals and vest in them the authority to hear matters that would otherwise fall within one of the heads of Article III jurisdiction (for instance, cases “arising under” federal law).¹¹²

Non-Article III tribunals have been entrenched in federal adjudications for over 200 years and are likely to remain. From very early on, Congress placed adjudicating authority in various non-Article III forums that might have instead been vested in Article III courts.¹¹³ For instance, the first Congress left it to the executive branch to resolve disputes concerning military pensions¹¹⁴ and federal customs laws,¹¹⁵ disputes that clearly arose under federal law and could have been placed in constitutional courts. Likewise, in the early 18th century, the Supreme Court, led by Chief Justice John Marshall, approved of the use of legislative courts in the territories notwithstanding that the subject matter of the case—admiralty law—fell within Article III’s “judicial power.”¹¹⁶

¹⁰⁷ See Harold C. Pretowitz, *Federal Court Reform: The Federal Courts Improvement Act of 1982*, 32 AM. U.L. REV. 543, 558 (Winter 1983) (“The major reason for this change was to enable the Claims Court to continue to handle congressional reference cases.”).

¹⁰⁸ *Id.*; see generally 28 U.S.C. §2509.

¹⁰⁹ *Mills v. Green*, 159 U.S. 651, 653 (1895).

¹¹⁰ See Pretowitz, *supra* note 107, at 558.

¹¹¹ See Chemerinsky, *supra* note 97.

¹¹² U.S. CONST. art. III, §2.

¹¹³ Fallon, *supra* note 77, at 919.

¹¹⁴ See Act of September 29, 1789, ch. 24, 1 Stat. 95.

¹¹⁵ See Act of September 1, 1789, ch. 11, 1 Stat. 55.

¹¹⁶ *American Insurance Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511 (1828).

The leading legal rationale for the legitimacy of legislative courts is to treat them as an “exception” to Article III’s requirement of tenure and salary protection. That is to say, in certain instances when Congress is exercising its Article I authority, the need for life-tenured judges with salary protection “must give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warrant distinctive treatment.”¹¹⁷ This theory finds strong support in Justice Brennan’s plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*¹¹⁸ In assessing whether creation of the bankruptcy courts as legislative courts was consistent with Article III strictures, Justice Brennan noted that there were three instances in which Congress has created legislative courts: territorial courts, military courts, and courts that adjudicate public rights.¹¹⁹ Each of these recognized “a circumstance in which the grant of power to the Legislative or Executive Branch was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers.”¹²⁰ Adjuncts to federal courts, such as administrative agencies and magistrate judges, do not necessarily rely on this “exceptions” rationale (although administrative agencies do adjudicate many public rights cases). Rather, adjuncts are primarily justified by the direct oversight by Article III courts.¹²¹

In addition to the historical and legal foundations for non-Article III courts, there are practical reasons why all federal adjudications need not take place in Article III courts. One commentator has noted, “Every time an official of the executive branch, in determining how faithfully to execute the laws, goes through the process of finding facts and determining the meaning and application of the relevant law, he is doing something which functionally is akin to the exercise of judicial power.”¹²² In other words, in a certain light, every application of law to facts by a federal executive branch official could be deemed a “judicial” act that should be litigated in an Article III court. However, if every application of law to facts by an executive branch official—for instance, each application of the tax code—required an Article III determination, the federal court system would be rendered completely unworkable.

Constitutional Limitations on Non-Article III Courts

Distilling the somewhat Byzantine case law in this area, there appear to be four instances in which non-Article III courts may be employed: (1) territorial courts, (2) military courts, (3) cases involving “public rights,” and (4) adjuncts to federal courts. Additionally, in some instances, litigant consent will permit a non-Article III court to hear certain matters.

Territorial Courts

Article IV, §3, cl. 2 provides Congress the power to “make all needful Rules and Regulations respecting the territory or other Property belonging to the United States.”¹²³ Under this authority,

¹¹⁷ *Palmore v. United States*, 411 U.S. 389, 408 (1973).

¹¹⁸ *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

¹¹⁹ *Northern Pipeline*, 458 U.S. at 64-67.

¹²⁰ *Northern Pipeline*, 458 U.S. at 64.

¹²¹ See “Adjunct Theory,” *infra* p. 20.

¹²² Bator, *supra* note 77, at 264.

¹²³ U.S. CONST. art. IV, §3, cl. 2.

Congress has set up a host of different courts in the territories. The Supreme Court's first opportunity to address the use of territorial courts came in the 1828 case *Florida in American Insurance Co. v. Canter*.¹²⁴ In *Canter*, the Court assessed the constitutionality of a court established in the territory of Florida. Judges of these courts did not enjoy life tenure, but instead sat for four-year terms.¹²⁵ Challengers to the court's jurisdiction argued that it could not properly hear cases arising under admiralty law, which instead must be heard in Article III courts overseen by life-tenured judges. Chief Justice John Marshall, writing for the Court, disagreed and explained that such courts were "created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction which they are invested ... is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States."¹²⁶ In other words, when Congress exercised its plenary authority over the territories under Article IV, it could place matters normally left to Article III courts in an alternative judicial forum.¹²⁷ Looking to more modern examples, the district courts in the federal territories, including Guam,¹²⁸ the Virgin Islands,¹²⁹ and the Northern Mariana Islands,¹³⁰ are all considered legislative courts.

A similar rationale of congressional authority has also applied in the context of courts in the District of Columbia. Under Article I, §8, cl. 17 of the Constitution, Congress has the authority to "exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia.¹³¹ In an early twentieth century ruling, the Supreme Court concluded that a federal law seeking to reduce judicial salaries could not apply to the judges sitting on the Supreme Court of the District of Columbia and the District of Columbia Court of Appeals as they were considered Article III courts.¹³² At the time, these courts not only had jurisdiction over local matters in the District, but also had jurisdiction over federal questions equivalent to that of other inferior federal courts. In 1970, Congress created a new Superior Court and Court of Appeals for the District "pursuant to Article I of the Constitution."¹³³ These courts were limited to hearing purely local matters. In *Palmore v. United States*, the defendant challenged the constitutionality of these courts, arguing that he was entitled to a life-tenured judge since he was being prosecuted under federal law (the District of Columbia criminal code).¹³⁴ The Court rejected this argument, and observed that "requirements of Art. III, which are applicable where law of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary

¹²⁴ *American Insurance Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511 (1828).

¹²⁵ *Canter*, 26 U.S. at 546.

¹²⁶ *Id.* at 546.

¹²⁷ Chemerinsky, *supra* note 97, at §4.2. One rationale for the use of these non-Article III courts was the expediency of not wanting to create an excess of life-tenured Article III judges that could not be put to use once the territory became a state. See *Glidden v. Zdanok*, 370 U.S. 530, 546-47 (1962) ("It would have been doctrinaire in the extreme to deny the right of Congress to invest judges of its creation with authority to dispose of the judicial business of the territories. It would have been at least as dogmatic, having recognized the right, to fasten on those judges a guarantee of tenure that Congress could not put to use and that the exigencies of the territories did not require.").

¹²⁸ 48 U.S.C. §1424, 1424b.

¹²⁹ 48 U.S.C. §1611, 1614.

¹³⁰ 48 U.S.C. §1821.

¹³¹ U.S. CONST. art I., §8, cl. 17.

¹³² *O'Donoghue v. United States*, 289 U.S. 516, 551 (1933).

¹³³ District of Columbia Court Reorganization Act of 1970, P.L. 91-358, 84 Stat. 473.

¹³⁴ *Palmore v. United States*, 411 U.S. 389 (1973).

grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.”¹³⁵

Military Courts

The second major category of Article I courts are those employed in the military context. Under Article I, §8, cl. 14, Congress has the authority “[t]o make Rules for the Government and Regulation of the land and naval forces.” In the 1858 case *Dynes v. Hoover*, the Supreme Court upheld the use of this authority to create military courts.¹³⁶ In that case, the Court observed that “Congress has the power to provide for the trial and punishment of the military and naval offences ... and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.”¹³⁷ Although Congress has broad authority to create and implement military courts, the Supreme Court has set some substantive limits on their jurisdiction. For instance, military courts cannot be used to try civilians¹³⁸ nor the spouses of military members.¹³⁹ Additionally, military courts have jurisdiction over members of the military only when they are still in service.¹⁴⁰ However, military courts are able to hear non-service related crimes while the defendant is still in the service.¹⁴¹ Currently, the U.S. Court of Appeals for the Armed Forces (CAAF), an Article I court, sits at the apex of the military justice system.¹⁴² Judges of the CAAF sit for 15-year terms and can be removed by the President for neglect of duty, misconduct, or mental or physical disability.¹⁴³

Public Rights

The third category of cases that can be resolved in an Article I court are “public rights” cases—those that arise between a private actor and the government. This public rights theory can be traced back to the Court’s ruling in *Murray’s Lessee v. Hoboken Land & Improvement Co.* in which Justice Story explained that although Congress cannot withdraw from federal courts the jurisdiction to hear suits at common law, equity, or admiralty, “there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.”¹⁴⁴ At the core of

¹³⁵ *Id.* at 408.

¹³⁶ *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857).

¹³⁷ *Id.*

¹³⁸ *Ex parte Milligan*, 71 U.S. 2, 121-22 (1867).

¹³⁹ *Reid v. Covert*, 354 U.S. 1, 30 (1957) (“In light of this history, it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were ‘necessary and proper’ for the regulation of the ‘land and naval Forces.’”); *see also* *Kinsella v. United States ex re. Singleton*, 361 U.S. 234, 249 (1960).

¹⁴⁰ *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14-15 (1955).

¹⁴¹ *Solorio v. United States*, 483 U.S. 435, 450-51 (1987).

¹⁴² 10 U.S.C. §941.

¹⁴³ *Id.* at 942(b)-(c). Another example of military courts are the military tribunals established by President Bush by executive order shortly after the September 11, 2001 attacks. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 *Federal Register* 57,833 (November 13, 2001).

¹⁴⁴ *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

the public rights doctrine are cases involving claims or benefits against the government.¹⁴⁵ The United States Tax Court, for example, is an Article I court that resolves disputes between taxpayers and the government.¹⁴⁶ Although judges of the Tax Court exercise the “judicial power” of the United States,¹⁴⁷ its judges do not enjoy life tenure, but rather sit for 15-year terms.¹⁴⁸ And unlike Article III judges who are subject to removal only through impeachment, Tax Court judges can be removed by the President for “inefficiency, neglect of duty, or malfeasance in office[.]”¹⁴⁹

The Court has offered several rationales for why public rights cases can be handled in Article I courts. The first is based on the doctrine of sovereign immunity and the right of Congress to attach conditions to the federal government being sued, including what type of forum the claim can be brought in.¹⁵⁰ The second major rationale is that historically these cases were conclusively determined by the executive and legislative branches, “and that as a result there can be no constitutional objection to Congress’ employing the less drastic expedient of committing their determination to a legislative court or an administrative agency.”¹⁵¹

As a general matter, the Court has broadly defined public rights cases as those that arise “between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.”¹⁵² Private rights cases, on the other hand, pertain to the “liability of one individual to another under the law as defined.”¹⁵³ Beyond these general definitions, the Supreme Court has struggled to articulate the exact parameters of the public rights doctrine. As Chief Justice Roberts has noted, “our discussion of the public rights exception ... has not been entirely consistent, and the exception has been the subject of some debate.”¹⁵⁴ In a series of cases, the Court has endeavored to draw this line.

In the 1982 case *Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, the Court addressed whether Article I bankruptcy courts could adjudicate common law contract and tort claims.¹⁵⁵ Under Bankruptcy Act of 1978, bankruptcy judges were appointed to office for 14-year terms by the President, with the advice and consent of the Senate, and subject to removal by the judicial council in the circuit in which they presided.¹⁵⁶ Acknowledging that the “distinction between public and private rights has not been definitely explained” in the Court’s precedents, Justice Brennan, writing for a plurality of the Court, traced the three historical exceptions to the literal

¹⁴⁵ Fallon, *supra* note 77, at 952.

¹⁴⁶ 26 U.S.C. §7441 (“There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.”).

¹⁴⁷ See *Freytag v. Commissioner*, 501 U.S. 868, 890-91 (1991).

¹⁴⁸ 26 U.S.C. §7443(e).

¹⁴⁹ 26 U.S.C. §7443(f).

¹⁵⁰ *Northern Pipeline*, 458 U.S. at 67.

¹⁵¹ *Ex Parte Bakelite*, 279 U.S. 438, 451 (1929) (“The mode of determining [public rights cases] ... is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.”). Although Congress has generally employed some level of judicial review for public rights cases, it is generally accepted that this is not constitutionally required. See *Ex Parte Bakelite*, 279 U.S. at 451; *Northern Pipeline*, 458 U.S. at 68 n.20; *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932).

¹⁵² *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

¹⁵³ *Id.* at 51.

¹⁵⁴ *Stern v. Marshall*, 131 S. Ct. 2594, 2611 (2011).

¹⁵⁵ *Northern Pipeline Constr. Co v. Marathon Pipe Line Co.*, 458 U.S. 50 (1981).

¹⁵⁶ 28 U.S.C. §152, 153(a) (1976 ed., Supp. IV).

command of Article III: territorial courts, military courts, and courts and agencies that adjudicate public rights. Disposing of the first two categories as clearly inapplicable, the plurality also rejected the public rights argument as the underlying case did not arise between government and a private party, but involved a state-created claim between two private parties.¹⁵⁷

Several years later in *Thomas v. Union Carbide Agricultural Products Co.* the Court shifted from the formalist approach of *Northern Pipeline* to a more functional approach for determining when Congress may utilize non-Article III forums.¹⁵⁸ The statute in question created a system of binding arbitration for determining the amount of compensation due to pesticide manufacturers whose data had been used by other manufacturers to register their products.¹⁵⁹ The arbitrator's decision was subject to judicial review for "fraud, misrepresentation, or other misconduct."¹⁶⁰ Justice O'Connor, writing for the majority, rejected the strict public/private rights dichotomy established in Justice Brennan's *Northern Pipeline* opinion, instead asserting that "substance rather than doctrinaire reliance on formal categories should inform application of Article III."¹⁶¹ Instead of formal reliance on these strict categories, the Court instructed that the nature of the right at issue and the concerns that drove Congress to create this alternative judicial forum should guide the inquiry. Because the arbitration scheme was created by federal statute, was a "pragmatic solution to the difficult problem of spreading [] costs," and did not "preclude review of the arbitration proceeding by an Article III court," the Court found that it "did not threaten the independent role the Judiciary in our constitutional scheme." This decision is notable as it broke away from the strict public rights category from *Northern Pipeline* and permitted a private right to be adjudicated in a non-Article III forum so long as the private right is "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by Article III judiciary."¹⁶² Two years later in *Commodity Futures Trading Commission v. Schor*, the Court reaffirmed *Thomas*' functional approach and held that the Commodity Futures Trading Commission (CFTC) was empowered to hear common law counterclaims related to a violation of the Commodities Exchange Act (CEA) or CFTC regulations.¹⁶³

In the most recent foray into Article I courts, *Stern v. Marshall*, the Court shifted away from the functionalism of *Thomas* and *Schor* and back towards the formalism of *Northern Pipeline*.¹⁶⁴ In

¹⁵⁷ Alternatively, Justice Brennan addressed whether the bankruptcy courts could be treated as adjuncts to the federal district courts. *Northern Pipeline*, 458 U.S. at 76-77. He rejected the petitioner's argument, however, that appellate review by a federal court was sufficient to satisfy Article III, instead positing that "the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level." *Id.* at 86 n.39.

¹⁵⁸ *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1984).

¹⁵⁹ *Id.* at 568.

¹⁶⁰ *Id.* at 573-74.

¹⁶¹ *Id.* at 587.

¹⁶² *Id.* at 593-94.

¹⁶³ *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 857 (1986). In *Schor*, the Court described several non-determinative factors for assessing whether the adjudication of traditional Article III cases in a non-Article III forum threatens the institutional integrity of the judicial branch: (1) "extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts," (2) "the origins and importance of the right to be adjudicated"; and (3) "the concerns that drove Congress to depart from the requirements of Article III." *Id.* at 851.

¹⁶⁴ *Stern v. Marshall*, 131 S. Ct. 2594 (2010).

Stern, the issue was whether a bankruptcy court could adjudicate a common law claim for fraudulent interference with a gift. In a 5-4 decision authored by Chief Justice Roberts, the Court held that Article III prohibited the bankruptcy court's exercise of jurisdiction because it did not fall under the public rights exception.¹⁶⁵ The Court acknowledged that *Thomas* and *Schor* had rejected the limitation of the public rights exception to actions involving the government as a party, but that the Court has continued to limit the exception to claims deriving from a "federal regulatory scheme" or in which "an expert government agency is deemed essential to a limited regulatory objective."¹⁶⁶ In rejecting the application of the public rights exception to the fraudulent interference counterclaim, the Court observed that her claim was not one that could be "pursued only by grace of the other branches" or could have been "determined exclusively" by the executive or legislative branches.¹⁶⁷ Additionally, the underlying claim did not "flow from a federal regulatory scheme" and was not limited to a "particularized area of law."¹⁶⁸ Because the counterclaim involved the "most prototypical exercise of judicial power," adjudication of a common law cause of action not created by federal law, the Court rejected the bankruptcy courts' exercise of jurisdiction over the counterclaim as a breach of Article III.¹⁶⁹

Adjunct Theory

In addition to the three categories of legislative courts—territorial, military, and public rights—the use of "adjuncts" is another prominent theory that supports the use of non-Article III courts to adjudicate federal questions. An "adjunct" is an adjudicator—most often an administrative agency or a magistrate judge—that does not function as an independent court, but instead acts as a subordinate to the federal courts. Adjuncts have become highly important in the modern era, as they not only handle many cases involving public benefits, but also assist Article III judges with their heavy caseload.

Support for the adjunct theory can be traced back to the 1932 case *Crowell v. Benson*.¹⁷⁰ In *Crowell*, the plaintiff brought a claim against his employer under the Longshoreman's and Harbor Workers' Compensation Act for injuries allegedly sustained while working on the navigable waters of the United States.¹⁷¹ The act required that all such claims be filed with the United States Employees' Compensation Commission. The agency was to determine "questions of fact as to the circumstances, nature, extent, and consequences of the injuries sustained by the employee."¹⁷² After the commission awarded the plaintiff damages, the employer appealed this decision, claiming that grant of jurisdiction to the commission violated Article III. In upholding the act, the Supreme Court delineated the proper role of the use of adjuncts in relation to Article III courts. The Court observed that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges."¹⁷³ Instead, an adjunct may make findings of fact and initial legal determinations, but

¹⁶⁵ *Id.* at 2611.

¹⁶⁶ *Id.* at 2612.

¹⁶⁷ *Id.* at 2613-14.

¹⁶⁸ *Id.* at 2614.

¹⁶⁹ *Id.*

¹⁷⁰ *Crowell v. Benson*, 285 U.S. 22 (1932).

¹⁷¹ *Id.* at 36-37.

¹⁷² *Id.* at 54.

¹⁷³ *Id.* at 51.

questions of law must be subject to *de novo* review in an Article III court.¹⁷⁴ Questions of jurisdictional fact—that is, facts that pertain to the jurisdiction of the agency itself—and constitutional fact are also subject to a more searching review by a constitutional court.¹⁷⁵ In sum, assuming one of the three historical exceptions is not applicable, *Crowell* instructs that for Article III courts to retain the “essential attributes of the judicial power,” adjuncts must act as subordinates to the Article III courts and not as independent adjudicators.

Administrative Agencies

The framework established in *Crowell* provided the blueprint for the modern administrative state, starting with the New Deal and expanding throughout the 20th and 21st centuries.¹⁷⁶ These agencies perform a host of various functions including making policy, promulgating rules, and adjudicating questions arising under federal law.¹⁷⁷ Many of the disputes coming before federal agencies concern public rights cases, with a large share of cases concerning the right to various government entitlements. For instance, the Social Security Administration, a federal agency who administers various government benefits including old-age and disability benefits, has a complex adjudication process for determining who is entitled to these benefits, including several tiers of administrative review and review by both a federal district court and a circuit court of appeal.¹⁷⁸ The form of judicial review of SSA decisions closely follows the *Crowell* model. For example, while factual findings made by an administrative law judge are subject to the highly deferential “substantial evidence” standard,¹⁷⁹ legal determinations “receive no deference” from either the district court or court of appeals.¹⁸⁰ And while administrative law judges do not receive constitutionally protected life tenure or salary protection, there are statutory protections regarding their appointment, tenure, and compensation.¹

Magistrate Judges

The second major subcategory of adjuncts is the federal magistrate judge. In 1968, Congress abolished the U.S. commissioner system as part of the Federal Magistrates Act,¹⁸¹ and sought to

¹⁷⁴ *Id.* at 51.

¹⁷⁵ *Id.* at 54-57.

¹⁷⁶ Fallon, *supra* note 77, at 925.

¹⁷⁷ Bator, *supra* note 84, at 238.

¹⁷⁸ 42 U.S.C. §405(g) (“Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party ... may obtain a review of such decision by a civil action ... brought in [a] district court of the United States. ... The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.”); 28 U.S.C. §1291 (“The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States....”).

¹⁷⁹ 42 U.S.C. §405(g) (“The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive....”); *Jesurum v. Secretary of U.S. Dept. of Health and Human Services*, 48 F.3d 114, 117 (3d Cir. 1995) (“When reviewing the Secretary’s denial of disability benefits, we are limited to determining whether the Secretary’s denial is supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is less than a preponderance of the evidence but more than a mere scintilla.”) (internal quotation marks and citations omitted).

¹⁸⁰ *Hickman v. Bowman*, 803 F.2d 1377, 1380 (5th Cir. 1986); *Foster v. Astrue*, 548 F. Supp. 2d 667, 668 (E.D. Wis. 2008) (“Conclusions of law are entitled to no deference, so if the ALJ commits legal error reversal is required without regard to the volume of evidence in support of the factual findings.”).

¹⁸¹ Federal Magistrates Act, P.L. 90-578, 82 Stat. 1107.

“reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice by establishing a system of U.S. magistrates.”¹⁸² Initially the magistrate judges were assigned a somewhat circumscribed role, but over the last several decades, Congress has expanded the role of magistrate judges to include the power to decide various motions, hear evidence, and try both criminal and civil cases. With the ever burgeoning federal docket, magistrate judges have been deemed “nothing less than indispensable” in the federal judicial process.¹⁸³ However useful they may be, there appears to be some conflict in vesting authority to resolve federal questions in judicial officials not cloaked with life tenure and salary protections. Instead, magistrate judges are selected by district court judges and can be removed for good cause or if the Judicial Conference “determines that the services performed by his office are no longer needed.”¹⁸⁴

The Supreme Court’s first encounter with the first Magistrates Act came about in *Wingo v. Wedding*.¹⁸⁵ In that case, the Court addressed whether the act permitted magistrate judges to hold evidentiary hearings in habeas corpus proceedings without the defendant’s consent or whether district court judges were required to do so personally. The Court, speaking through Justice Brennan, parsed the statute in a way to avoid potential Article III problems. The High Court did this by construing the term “additional duties” in the act to not include the authority of a magistrate to hold evidentiary hearings, but instead allowing the magistrate simply to *propose* to the district court judge whether such a hearing should be held.¹⁸⁶ Two years later in *Mathews v. Weber*, the Court was tasked with interpreting whether “additional duties” could be read to permit referral of Social Security benefit cases to a magistrate judges for preliminary review of the administrative record and preparation of a recommended ruling.¹⁸⁷ While the Court again avoided the potential Article III issues,¹⁸⁸ it echoed the adjunct theory by observing that a district judge is free to follow or wholly reject a magistrate’s recommendation and that the “authority—and the responsibility—to make informed, final determination ... remains with the judge.”¹⁸⁹ As a statutory matter, because the district judge was still free to follow or wholly ignore the magistrate’s recommendation, the Court upheld the magistrate’s “preliminary-review function” as one of the “additional duties” permitted under the act.¹⁹⁰

In the 1980 case *United States v. Raddatz*, the Court finally addressed head-on the constitutional issues surrounding that Magistrates Act that were left unresolved in previous cases. In *Raddatz*, the defendant challenged both the magistrates’ statutory and constitutional authority to hear motions to suppress evidence in a criminal proceeding.¹⁹¹ Under the act, magistrate judges could “hear and determine” any pretrial matter before it, except for any certain dispositive motions, including motions to suppress evidence in criminal cases.¹⁹² For these dispositive motions, the

¹⁸² See *Mathews v. Weber*, 423 U.S. 261, 266 (quoting S. Rpt. 371, 90th Cong., 1st Sess., 8 (1967)).

¹⁸³ *Government of Virgin Islands v. Williams*, 892 F.2d 305, 308 (3d Cir. 1989).

¹⁸⁴ 28 U.S.C. §631.

¹⁸⁵ *Wingo v. Wedding*, 418 U.S. at 469

¹⁸⁶ *Id.* at 472.

¹⁸⁷ *Mathews v. Weber*, 423 U.S. 261, 271 (1975).

¹⁸⁸ The Court noted that the defendant “decline[d] to rely on any constitutional argument.” *Id.* at 269 n.5.

¹⁸⁹ *Id.* at 271.

¹⁹⁰ *Id.* at 271-72.

¹⁹¹ *United States v. Raddatz*, 447 U.S. 667 (1980).

¹⁹² See 28 U.S.C. §636(b)(1)(A) (1982 ed).

district court judge could “designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition....”¹⁹³ If the proposed findings or recommendations were objected to by either party, the district court judge was then required to make a “de novo determination” of the raised issues and could “accept, reject, or modify, in whole or in part, the findings or recommendations of the magistrate.”¹⁹⁴ The defendant in *Raddatz* contended that these provisions required the district court judge to rehear the testimony on which the magistrate based his findings. In an opinion by Chief Justice Burger, the Court rejected this argument, holding that the district court need only make a de novo *determination* of the disputed findings and recommendations and not hold a de novo *hearing* on the issues raised.¹⁹⁵ In the face of the Article III challenge, the Court upheld the act observing that the “ultimate decision” is reserved for the district court judge and that magistrates “are constantly subject to the court’s control.”¹⁹⁶

Congress amended the act in 1979, further enlarging and clarifying the magistrates’ authority.¹⁹⁷ Under the new statute, upon designation by the district court judge and with consent of the parties, magistrate judges were authorized to preside over and enter final judgments in civil trials, including jury trials¹⁹⁸ and misdemeanor criminal prosecutions.¹⁹⁹

In *Gomez v. United States*, the Court addressed whether overseeing the selection of jurors in a felony criminal prosecution was among the “additional duties” envisioned in the act.²⁰⁰ The defendant in that case objected to the assignment both the before and after the magistrate judge selected the jury.²⁰¹ In a unanimous decision, the Court agreed, and held that the Magistrates Act did not permit such an assignment. Adhering to the rule of avoiding “an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question,” the Court focused on the statutory question of whether Congress would have intended magistrates to oversee this “critical stage of the criminal proceeding.”²⁰² By focusing on the importance of the selection of a jury, “the primary means by which a court may enforce a defendant’s right to be tried by a jury free from ethnic, racial, and political prejudice,” the Court was able to avoid the lingering Article III question whether judicial officials without life tenure and salary protection can preside over an essential part of a federal criminal prosecution.²⁰³ Speaking for a unanimous Court, Justice Stevens noted that while a literal reading of the additional duties provision would allow magistrates to oversee felony trials, the “carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial.”²⁰⁴ Ultimately, the Court held that the “absence of a specific reference to jury selection in the statute, or, indeed,

¹⁹³ §636(b)(1)(B).

¹⁹⁴ *Id.*

¹⁹⁵ *Raddatz*, 447 U.S. at 676.

¹⁹⁶ *Id.* at 682-83.

¹⁹⁷ Federal Magistrate Act of 1979, P.L. 96-82, 93 Stat. 643.

¹⁹⁸ 93 Stat. 643-44.

¹⁹⁹ 93 Stat. 645-46.

²⁰⁰ *Gomez v. United States*, 490 U.S. 858 (1989).

²⁰¹ *Id.* at 860-61.

²⁰² *Id.* at 873.

²⁰³ *Id.*

²⁰⁴ *Id.* at 872.

in the legislative history, persuades us that Congress did not intend the additional duties clause to embrace this function.”²⁰⁵ Importantly, in *Gomez*, the defendant had not given consent to the magistrate to select the jury, illustrating the limits of the adjunct theory when consent is withheld.

Role of Consent

Even if a particular proceeding before a legislative court involves a claim traditionally tried by an Article III court,²⁰⁶ such a proceeding may be able to occur within the bounds of the Constitution if the parties to the proceeding *consent* to such an adjudication. Before discussing the role of consent and the constitutionality of non-Article III tribunals, it is important to note, as a statutory matter, Congress has from time to time allowed non-Article III courts to adjudicate based on consent. For example, under the Federal Magistrates Act, upon the consent of the parties, a magistrate judge “may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case....”²⁰⁷ Moreover, pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984, a district court, with the “consent of all parties to the proceeding,” is permitted to refer a “proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments....”²⁰⁸ Other federal laws may provide for arbitration over discrete legal issues to occur based on the consent of the parties involved.²⁰⁹ In short, some federal statutes have allowed parties to consent to have discrete matters adjudicated before a non-Article III tribunal.

While a non-Article III tribunal may be *statutorily* authorized to adjudicate a matter based on the consent of the parties, a question still remains as to whether the *Constitution* provides for such an arrangement. To understand the constitutional limits with respect to consent and non-Article III tribunals, it is important to understand the nature of the interests protected by Article III, §1, the constitutional provision that restricts Congress’s ability to constitute legislative courts.²¹⁰ The Supreme Court has identified two separate rationales for the constitutional limitations on the creation of non-Article III tribunals. First, the Court has noted that Article III, §1, provides a right that is *personal* in nature to individual litigants, preserving “their interest in an impartial and independent federal adjudication of claims with the judicial power of the United States.”²¹¹ Second, in addition to the “individual rights” component of Article III, §1, the Court has held that that provision also safeguards certain *structural* principles, as well. Specifically, Article III preserves the “role of the Judicial Branch” in our system of government by preventing Congress from transferring jurisdiction to non-Article III tribunals en-masse, which could risk “‘emasculating’ constitutional courts.”²¹² Put another way, Article III, §1 prohibits Congress from undermining Article III courts by enacting legislation that reassigns traditional federal judicial

²⁰⁵ *Id.* at 875-76.

²⁰⁶ *Cf.* *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (holding that “[w]hen a suit is made of ‘the stuff of the traditional actions at common law tried by the courts at Westminster in 1789’ ... the responsibility for deciding that suit rests with Article III judges in Article III courts. The Constitution assigns that job ... to the Judiciary.”) (internal citations omitted).

²⁰⁷ *See* 28 U.S.C. §636(c)(1).

²⁰⁸ *See* 28 U.S.C. §157(c)(2).

²⁰⁹ *See, e.g.*, 42 U.S.C. §4083(a) (allowing for arbitration of claims or disputes arising as a result of the National Flood Insurance Program based on the “consent of the parties concerned.”).

²¹⁰ *See supra* “Constitutional Limitations on Non-Article III Courts.”

²¹¹ *See* *Commodities Future Trading Comm’n v. Schor*, 478 U.S. 833, 850 (1986).

²¹² *Id.* (quoting *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)).

business to legislative judges that do not have life tenure and guaranteed compensation and, therefore, are presumably less independent.²¹³

Having individuals consent to the jurisdiction of a non-Article III tribunal effectively undermines only one of the two rationales for why Article III can bar litigation of certain claims before legislative courts—the individual rights rationale. Generally, individual rights that are protected by the Constitution can be waived²¹⁴ through a voluntary, knowing, and intelligent act “done with sufficient awareness of the relevant circumstances and likely consequences.”²¹⁵ For example, while the Fifth Amendment protects a criminal defendant’s right against self-incrimination during custodial interrogation,²¹⁶ the defendant can waive that right by voluntarily answering questions without claiming a right to keep silent or by executing a written waiver of his rights.²¹⁷ Likewise, with respect to individual rights protected under Article III, §1, a party can agree to adjudication before a legislative court and effectively waive his individual interest in having an Article III court adjudicate his claim.²¹⁸

Nonetheless, while individual rights can be waived, “notions of consent and waiver cannot be dispositive” with respect to the structural protections provided by Article III, §1 “because [those] limitations serve institutional interests that the parties cannot be expected to protect”²¹⁹—namely, separation of powers principles protecting the judicial branch from encroachment by the political branches.²²⁰ Indeed, the Supreme Court has likened the structural protections provided by Article III, §1 to the limits on the subject-matter jurisdiction of a federal court imposed by Section 2 of Article III, which cannot be waived through consent.²²¹ Instead, the Supreme Court, when examining the structural component of Article III protections in consent cases, has assessed the constitutionality of a given judicial scheme using *ad hoc* balancing tests that rely on seemingly disparate principles, leaving an open question as to when Congress can provide an alternative forum to an Article III court in which consenting parties can assert their grievances.²²²

For example, in *Commodities Futures Trading Commission v. Schor*, the Supreme Court, in assessing the structural component of the constitutional protections provided by Article III, §1, rested its decision primarily based on the breadth of matters adjudicated by the non-Article III tribunal at issue in that case. Specifically, the Court upheld a law that allowed the Commodities Futures Trading Commission to adjudicate common law claims that were (1) “incidental to” and

²¹³ See *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 458 U.S. 50, 58-60 (1982) (plurality opinion). The fact that the structural component of Article III is primarily focused on preserving the role of federal courts as an independent branch does not mean, however, that such structural interests fail to implicate individual rights. See *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) (“Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution’s concern. The structural principles secured by the separation of powers protect the individual as well.”).

²¹⁴ See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (defining waiver as an “intentional relinquishment or abandonment of a known right or privilege.”)

²¹⁵ *Brady v. United States*, 397 U.S. 742, 748 (1970).

²¹⁶ See *Miranda v. Arizona*, 384 U.S. 436, 471 (1966).

²¹⁷ See *Paterson v. Illinois*, 487 U.S. 285, 292 (1988).

²¹⁸ See *Schor*, 478 U.S. at 849-50; see also *Peretz v. United States*, 501 U.S. 923, 936 (1991).

²¹⁹ See *Schor*, 478 U.S. at 851.

²²⁰ See *Stern*, 131 S. Ct. at 2608-09.

²²¹ See *Schor*, 478 U.S. at 850-51.

²²² See *id.* at 848-49; see also *Peretz v. United States*, 501 U.S. at 930.

“completely dependent upon adjudication by the Commission of [public rights] claims created by federal law” and (2) arose “out of the same transaction or occurrence” as the federal law claim.²²³ For the Court, allowing an administrative agency to adjudicate such a “narrow class of common law claims,”²²⁴ amounted to an intrusion on the judicial branch that could “only be termed *de minimis*.”²²⁵ Nonetheless, the *Schor* Court, in noting the narrow nature of its holding, emphasized that Congress could not “create[] a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities,” even if parties consented to adjudicate before such a forum.²²⁶

Five years later, the Court approached the issue regarding Article III’s structural protections in a slightly different manner in another consent case, *Peretz v. United States*.²²⁷ In *Peretz*, a criminal defendant who had failed to demand the presence of an Article III judge during the selection of his jury challenged, relying on the constitutional underpinnings of *Gomez*,²²⁸ argued that having a magistrate judge oversee *voir dire* proceedings implicated the *structural* protections provided by Article III.²²⁹ As in *Schor*, the Court in *Peretz* rejected that a judicial scheme affording to a legislative court certain responsibilities traditionally exercised by a constitutional court ran counter to the institutional interests preserved by Article III.²³⁰ Nonetheless, unlike in *Schor*, where the Court focused on the narrow nature of the claims adjudicated by administrative agency in that case, the Court’s reasoning in *Peretz* centered on the degree of control exercised by a constitutional court over the non-Article III court’s work. In *Peretz*, the Court observed that (1) magistrate judges are “appointed and subject to removal” by Article III judges; and (2) the “‘ultimate decision’ whether to invoke the magistrate’s assistance,” including assistance with *voir dire*, is made by the district court.²³¹ Based on these observations, the Court concluded that “[b]ecause ‘the entire process takes place under the district court’s total control and jurisdiction,’ there is no danger that use of the magistrate involves a ‘congressional attempt’” to undermine the power of constitutional courts.²³²

Given the different approaches of *Schor* and *Peretz* with respect to how to evaluate the threat posed by consent cases to the structural protections afforded by Article III, lower court judges have—perhaps predictably—struggled to ascertain the constitutional limits of allowing consenting parties to seek traditional judicial relief from non-Article III tribunals. For example, in 1984 a divided panel of the Seventh Circuit Court of Appeals upheld the constitutionality of a provision of the Federal Magistrates Act of 1979 that allowed magistrates with the consent of the parties to try any civil case and to enter judgment with respect to them.²³³ In so holding, the

²²³ See *Schor*, 478 U.S. at 856.

²²⁴ *Id.* at 854.

²²⁵ *Id.* at 856.

²²⁶ *Id.* at 855.

²²⁷ 501 U.S. 923.

²²⁸ See *supra* “Magistrate Judges,” at 23 (discussing *Gomez v. United States*, 490 U.S. 858 (1989)).

²²⁹ 501 U.S. at 937. In contrast to *Gomez*, in *Peretz*, the criminal defendant’s failure to demand an Article III judge during *voir dire* effectively waived the ability of the defendant to argue that the individual rights component of Article III’s protections were implicated. See *Peretz*, 501 U.S. at 930.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1045 (7th Cir. 1984).

appellate court reasoned that the “magistrates continue to function as adjuncts of the district courts” in such cases because magistrates are appointed and removed by district judges and the magistrate’s conclusions of law are subject to *de novo* review by an Article III Court.²³⁴ Judge Richard Posner dissented from the decision, arguing that the power to enter final judgments is vested in Article III courts and cannot be delegated to judges who lack the protections afforded by Article III.²³⁵ The remaining circuit courts have agreed with the Seventh Circuit’s assessment on the constitutionality of allowing consenting parties to proceed before a magistrate,²³⁶ including the Ninth Circuit in a decision written by then-Judge Anthony Kennedy.²³⁷ In the wake of *Stern* and the Court’s condemnation of the “broad substantive jurisdiction” afforded to the bankruptcy court to enter final and binding judgments, questions about the constitutionality of allowing consenting parties to proceed before a non-Article III court have been renewed.²³⁸ Specifically, the federal appellate courts divided on the question of whether consenting parties could have claims similar to those adjudicated in *Stern* proceed before a bankruptcy court.²³⁹ During the October 2013 term, the Court declined to resolve split amongst the circuits on the constitutional issue in *EBIA v. Arikson*.²⁴⁰ The High Court, however, recently granted *certiorari* to a similar case to *Arikson* and may soon ultimately clarify the extent to which Congress can allow consenting parties to have traditional claims adjudicated before a non-Article III tribunal.²⁴¹ Without further guidance from the Court, it would appear at the very least legislation that affords a narrow class of claims to be adjudicated before a non-Article III tribunal and provides Article III courts with substantial oversight of the legislative court’s activities would arguably pass constitutional muster under the logic of *Schor* and *Peretz*.

²³⁴ *Id.*

²³⁵ *Id.* at 1048 (Posner, J., dissenting).

²³⁶ See *Goldstein v. Kelleher*, 728 F.2d 32, 36 (1st Cir. 1984); *Collins v. Foreman*, 729 F.2d 108, 115-16 (2d Cir. 1984); *Wharton-Thomas v. United States*, 721 F.2d 922, 929-30 (3rd Cir. 1983); *Gairola v. Virginia Dep’t of Gen. Servs.*, 753 F.2d 1281, 1285 (4th Cir. 1985); *Puryear v. Ede’s Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984); *Bell & Beckwith v. United States*, 766 F.2d 910, 912 (6th Cir. 1985); *Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp.*, 739 F.2d 1313, 1316 (8th Cir. 1984); *United States v. Dobey*, 751 F.2d 1140, 1143 (10th Cir. 1985); *Sinclair v. Wainwright*, 814 F.2d 1516, 1519 (11th Cir. 1987); *Fields v. Washington Metro. Area Transit Auth.*, 743 F.2d 890, 893 (D.C. Cir. 1984); *D.L. Auld Co. v. Groma Graphics Co.*, 753 F.2d 1029, 1032 (Fed. Cir. 1985).

²³⁷ *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 540 (9th Cir. 1984) (*en banc*) (Kennedy, J.).

²³⁸ 131 S. Ct. at 2615

²³⁹ Compare *In re Bellingham Insurance Agency, Inc.*, 702 F.3d 553, 566-70 (9th Cir. 2012), with *Wellness Int’l Network, Ltd v. Sharif*, 727 F.3d 751, 771 (7th Cir. 2013).

²⁴⁰ See 134 S. Ct. 2165, 2173 (2014) (interpreting the bankruptcy code such that when a *Stern* claim is presented to a bankruptcy court, that the court is authorized to and should issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court, obviating the underlying constitutional issue).

²⁴¹ See *Wellness Int’l Network, Ltd. v. Sharif*, No. 13-935, 83 U.S.L.W. 3011 (July 1, 2014).

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