LEGISLATIVE AND CONSTITUTIONAL COURTS:
WHAT LURKS AHEAD FOR BIFURCATION

I

Petitions for certiorari are strange and wondrous documents. At a time when the Federal Rules have largely eliminated the technical mysteries of pleadings, the intricacies of certiorari practice promise at least partially to maintain that condition of lay incomprehensibility which is often regarded as the true badge of a profession. Adept practitioners have, through a combination of empiricism and superstition, developed the precept that success depends upon submitting but a few well chosen questions, though many be available. It would seem, therefore, quite irregular that a recent petition filed in a case dealing with the hotly disputed issue of shop-removals devoted an entire page of argument to the proposition that since one of the judges sitting in the federal court of appeals below was a member of the Court of Claims the judgment of that court is without effect. And the Supreme Court obligingly granted certiorari, not upon the merits, but solely to explore this issue. There is no suggestion in the petition that the judge in question was not duly appointed and assigned in accordance with statute; or that he committed any error in the proceeding; or that he was prejudiced in the cause. Strange though it may seem to observers unfamiliar with this arcane branch of constitutional law, the contention of petitioner which the Court has chosen to hear is that because Judge Madden was originally appointed to the United States Court of Claims the subsequent act of Congress under the authority of which the Chief Justice temporarily assigned him to the Second Circuit unconstitutionally deprived petitioner of its rights. The argument runs as follows: Though Madden was appointed for good behavior,

1. Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).
2. [The courts] left it to the plaintiff to word his own demand; and when worded by him, and worded at his peril, he learnt by the gain or loss of his cause whether the wording of it was or was not to their taste. For themselves, they never thought anything about the matter: it was for him to declare, and at the peril of loss, and perhaps ruin, what those conceptions were, which, so far from having been declared and made known, had never been so much as formed.

BENTHAM, BOOK VIII, RATIONALE OF JUDICIAL EVIDENCE ch. XVI; 7 WORKS OF JEREMY BENTHAM 277 (1843 ed.).


5. 368 U.S. 814 (1961). For a discussion of such limited grants of certiorari by the Supreme Court see STERN & GRESSMAN, OP. CIT. supra note 3, at 154-55.

to have an undiminished salary during his continuance in office, the Congress are not required to afford him such tenure. They are not so required—though they have declared that they are 7—because the Court of Claims is not one of those courts whose judges are required by the Constitution to have such tenure. The Congress—whether they believe they can or not—may therefore alter Judge Madden's tenure or compensation at any time. The United States Courts of Appeals, however, are courts whose judges are constitutionally required to have such tenure, and litigants properly before these courts have a right guaranteed them by the Constitution to judges whose tenure is not subject to the will of the Congress.

Article I, section 8 (cl. 9) of the Constitution provides that the Congress shall have power "to constitute Tribunals inferior to the Supreme Court." And Article III, section 1 vests "[t]he judicial Power of the United States . . . in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Section 2 defines this judicial power as extending "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made . . . under their Authority," "to all Cases of admiralty and maritime Jurisdiction," and to "Cases" and "Controversies" between specified classes of litigants. The Congress may choose not to exercise their power, or, in exercising it, not to give the courts they ordain and establish the full extent of "the judicial Power of the United States."8 One might reason further that because the federal government is limited to delegated powers, and because the delegation of the power to create courts and the power of the courts so created is reasonably precise, whatever courts the Congress do establish are limited to a range of power no greater than that of "the judicial Power," and that they are subject to the other strictures contained in Article III, including the requirement in section 1 that, "[t]he Judges . . . shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office." But such a seemingly reasonable conclusion would be at variance with repeated decisions by the Supreme Court.

The first such decision was American Ins. Co. v. 356 Bales of Cotton: Canter,9 where the proceedings of a special salvage court created by the territorial legislature of Florida were collaterally attacked in the Federal District Court for South Carolina. The plaintiff argued that the salvage court could not hear cases "of admiralty and maritime Jurisdiction" since the Constitution reserved these for "one Supreme Court, and . . . such inferior


Courts as the Congress may from time to time ordain and establish; the salvage judgment could therefore legally have been rendered only by one of the two Florida Superior Courts created by the Congress. Chief Justice Marshall, observing that the act creating the territorial government gave Superior Court judges only four-year terms of office, held that neither the Superior Courts nor the salvage court were courts "in which the judicial power conferred by the constitution on the general government, can be deposited. They are incapable of receiving it." He distinguished two kinds of courts which can be created under the Constitution. The first, or "constitutional" courts, are those provided for by Article III and created thereunder; the second, or "legislative" courts are "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." These latter courts, being created under the exercise of general legislative powers, are not subject to the limitations of courts created under Article III. The Superior Courts being legislative, the Congress could, as they did, provide their judges with less than Article III tenure. And if Congress could create courts without reference to the strictures of Article III, then they could also, as they did, authorize the vesting of Article III admiralty jurisdiction in a court not created by themselves. "Although admiralty jurisdiction can be exercised in the states, in those courts only which are established in pursuance of the third article of the constitution; the same limitation does not extend to the territories."

This decision accorded with the Federalist view that the powers of the Congress should not be construed restrictively. It permitted the Congress a valuable flexibility in governing the territories, where all the judicial functions performed in the states by the local judiciary were added to the normally limited federal jurisdiction, and where the need for economy of manpower often made it expedient to have the same men perform functions pertaining to other branches of government. Moreover, the fact that territorial status

10. Emphasis supplied.
11. The salvage court consisted of a notary and five jurors. 26 U.S. at 513.
12. Id. at 546.
13. Ibid.
14. Ibid.
15. See, e.g., Hamilton's first plan of government submitted to the Constitutional Convention which provides that "[t]he legislature of the United States shall have power to pass all laws which they shall judge necessary . . . to the general welfare of the Union." Article VII, § 1; HAMILTON, THE FEDERALIST 36 (J.C. Hamilton ed. 1871).
16. See, e.g., Act of August 7, 1879; 1 Stat. 51 (Re-enactment of the Ordinance of 1787), the model upon which many territorial governments were constructed, at clause 5:

The governor and judges, or a majority of them, shall adopt and publish in the district, such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress, from time to time; which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress.
was generally a transitory phase before statehood would create difficulties if the territorial judges had life tenure. These grounds, whatever their strength in 1829, have a decidedly false ring today. The small number of remaining territories are not apt to become states in the near future and even if they did, their judges could easily be absorbed into the relatively large federal judiciary.\footnote{17} Moreover, the increase in wealth and in educated population can now support the extra expenditure in manpower required by a functionally divided government. Marshall's doctrine of legislative courts, however, not only has continued to be applied to the territories, but has also been extended to courts created by Congress with jurisdiction within the several states.

In \emph{Gordon v. United States} the Court held that the Congress under their Article I power to pay the debts of the United States could set up a Court of Claims, payments of whose "judgments" would be subject to action by the Secretary of the Treasury and the Congress, but that the Supreme Court, limited by Article III, could not constitutionally hear appeals from such a court.\footnote{18} The holding in \emph{Gordon} that the Supreme Court has no jurisdiction to review judgments whose execution is subject to the degree of approval by other government departments necessary under the statutory scheme in that case, has never been overruled.\footnote{19} The Congress, however, soon repealed the provisions calling for executive action in connection with the judgments.\footnote{20} And though this change did not transform the Court of Claims into an Article III Court,\footnote{21} the Supreme Court thereafter heard appeals from that body.\footnote{22}

In \emph{Ex parte Bakelite Corp.},\footnote{23} the Supreme Court denied a petition for a writ of prohibition which would have prohibited the Court of Customs Appeals from entertaining an appeal from the Tariff Commission. The petitioner contended that because the Tariff Commission decision was subject to final review by the

\footnote{17} Thus, there are now 301 district judgeships alone within the states and the District of Columbia. 28 U.S.C. § 133 (1961).

\footnote{18} 69 U.S. (2 Wall.) 561 (1865); 117 U.S. 697 (Appendix) (1886). Due to the death of Chief Justice Taney in 1865, the opinion was first published twenty years after judgment.

\footnote{19} The significance of this becomes more apparent when it is realized that every other criterion for distinguishing between constitutional and legislative courts is either contradicted by language in some later case, or—as in the case of tenure provisions—has become a matter solely of conceptual significance. See generally text at note 7 \emph{supra}, and at notes 124-30 \emph{infra}.

\footnote{20} Act of March 17, 1866, 14 Stat. 9 (1866), repealing § 14 of the Act of March 3, 1863, 12 Stat. 768 (1863).

\footnote{21} Williams v. United States, 289 U.S. 553 (1933); see discussion in text at notes 40-45 \emph{infra}.

\footnote{22} The first was De Groot v. United States, 72 U.S. (5 Wall.) 419 (1867). See also note 170 \emph{infra} and accompanying text.

\footnote{23} 279 U.S. 438 (1929).
President,\textsuperscript{24} it could not be reviewed by constitutional courts, of which, it was claimed, the Court of Customs Appeals was one. The Court held that the writ should not issue because the Court of Customs Appeals \textsuperscript{25} was a legislative rather than constitutional court, and could therefore consider matters other than cases and controversies. This holding was based upon a determination that the functions of the Court of Customs Appeals were not "inherently or necessarily" judicial, but that such functions had in fact been carried out at times by other branches of government.\textsuperscript{26} Developing a doctrine of strict bifurcation between constitutional and legislative courts on this basis, the Court went to elaborate lengths to characterize as legislative other courts exercising functions not "inherently" judicial; prominent among these were the Court of Claims \textsuperscript{27} and the District of Columbia courts.\textsuperscript{28}

In \textit{O'Donoghue v. United States}\textsuperscript{29} and \textit{Williams v. United States},\textsuperscript{30} decided on the same day, four years after \textit{Bakelite}, the Supreme Court had before it questions certified by the Court of Claims in actions brought by three judges to recover sums withheld from their pay under an act of Congress reducing "the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office)."\textsuperscript{31} One of the two judges in \textit{O'Donoghue} was on the Supreme (now District) Court, and the other on the Court of Appeals, of the District of Columbia.\textsuperscript{32} The judge in \textit{Williams} was on the Court of Claims.\textsuperscript{33} The Comptroller General of the United States had ruled in both cases that the courts were legislative; hence, the judges' salaries were not protected from the general reduction, and he accordingly reduced them.\textsuperscript{34} The questions certified by the Court of Claims to the Supreme Court asked whether each of these courts was subject to the provisions of Article III, and in particular whether the compensation of their judges could be lawfully diminished.

The dictum of \textit{Bakelite} was not followed in \textit{O'Donoghue}. The District of Columbia courts were declared constitutional, insofar as judges' tenures and

\begin{itemize}
  \item \textsuperscript{24}The proceeding was under § 316 of the Tariff Act, 42 Stat. 943 (1922). The Court in \textit{Bakelite} held that the ambiguous language in the statute did give the President a right to review the decision.
  \item \textsuperscript{25}This court became the Court of Customs and Patent Appeals by Act of March 2, 1929, 45 Stat. 1475 (1929), passed while \textit{Bakelite} was pending. By this statute it was given the cognizance of appeals from the Board of Patent Commissioners, which had formerly been exercised by the Court of Appeals for the District of Columbia.
  \item \textsuperscript{26}279 U.S. at 458-59.
  \item \textsuperscript{27}Id. at 451-55.
  \item \textsuperscript{28}Id. at 450, 455.
  \item \textsuperscript{29}289 U.S. 516 (1933).
  \item \textsuperscript{30}289 U.S. 553 (1933).
  \item \textsuperscript{31}Legislative Appropriation Act § 107(a) (5), 47 Stat. 401 (1932).
  \item \textsuperscript{32}289 U.S. at 519-20.
  \item \textsuperscript{33}Id. at 555.
  \item \textsuperscript{34}O'Donoghue v. United States, 289 U.S. at 526-27; Williams v. United States, 289 U.S. at 559-60.
\end{itemize}
salaries are concerned, upon two policy bases: 1) constitutional status was especially necessary for those federal judges who decided the bulk of suits brought against government departments, and who were in closest geographical proximity to possible pressures from those other departments; 2) it would be unfair to the citizens of the District, who as citizens of Maryland before cession to the national government had enjoyed the Article III guarantee of federal judges with life tenure and undiminished salary, to hold that that guarantee was lost when the territory was ceded. The Court found no difficulty in reconciling its holding with *Keller v. Potomac Electric Power Co.*, in which the D.C. courts had been held capable of considering questions of an administrative character. Rather, the court followed this pre-*Bakelite* decision in interpreting Article I, section 8 (cl. 17)—granting the Congress authority to govern the District—as giving to Congress not only all of the power which they exercise over lower federal courts generally, but also all of the power which a state legislature exercises over its own state courts. And since *Keller* had held that the District of Columbia courts could be vested with non-judicial functions, the result of *O'Donoghue* was to characterize those courts as simultaneously legislative and constitutional.

The dictum in *Bakelite* was, however, respected and made the basis for decision in *Williams*. The Court there admitted that the policies expounded in *O'Donoghue* with respect to the D.C. courts were equally applicable to the Court of Claims; it felt itself incapable, however, of distinguishing the Court of Claims from the Court of Customs and Patent Appeals, which in *Bakelite* had been characterized as legislative by a unanimous court, six of whose members were still sitting. It felt itself bound, therefore, to characterize the Court of Claims as legislative, and its judges therefore subject to the salary-cutting act. In so holding Justice Sutherland, who wrote both *O'Dono-

35. [T]he judges of the [District of Columbia] courts are in closer contact with, and more immediately open to the influences of, the legislative department, and exercise a more extensive jurisdiction in cases affecting the operations of the general government and its various departments. 289 U.S. at 535.

36. *Id.* at 540-51. That part of the District granted to the national government by Virginia has been retroceded. *Phillips v. Payne*, 92 U.S. (2 Otto) 130 (1876).

37. 261 U.S. 428 (1923).

38. *Keller* was cited with approval in *Bakelite*, 279 U.S. at 450 n.5, and at 454 n.14.

39. Hughes, C.J., and Van Devanter and Cardozo, JJ., dissented on the ground that if some Article III provisions applied to the D.C. courts, all of the Article III provisions must apply; a holding which would overthrow *Keller* and other cases holding Article III strictures inapplicable in the District. 289 U.S. at 551.

40. 289 U.S. at 561-62.

41. *Id.* at 571.

42. The six were: Van Devanter, McReynolds, Brandeis, Sutherland, Butler, and Stone, JJ. Only one of these dissented in *O'Donoghue*, see note 39 supra.
ghue and Williams, was faced with the uncomfortable fact that the Tucker Act gave District Courts concurrent jurisdiction with the Court of Claims on amounts less than $10,000;43 for while the dual status of the D.C. courts discovered in O'Donoghue provided a conceptual justification for such concurrent jurisdiction in the District of Columbia, the Tucker Act was not restricted to the District. Justice Sutherland, therefore, in characterizing the jurisdiction of the Court of Claims as legislative was forced to approve the power of the Congress to assign non-Article III jurisdiction to the lower federal courts.44 Given the fact that the Supreme Court had long reviewed judgments of the Court of Claims,45 such a concession was hardly startling. It was somewhat incongruous, however, in a decision which so vigorously affirmed the strict bifurcation doctrine enunciated in Bakelite.

Article III, section 2 of the Constitution extends the federal judicial power inter alia "to Controversies to which the United States shall be a party," and to Controversies "between a State and Citizens of Another State." This latter clause was held in Chisholm v. Georgia46 to allow suit against a state by a citizen of another state in the federal courts despite the common-law doctrine of sovereign immunity. One might expect, therefore, that the former clause would be similarly construed to permit suit against the United States in Article III courts. This analogy was recognized by the Court in Williams,47 but Justice Sutherland refused to follow Chisholm,48 presumably because of the repudiation of that case by the Eleventh Amendment. But the fears which led to the passage of the Eleventh Amendment49—loss of state sovereign immunity and subjection of the states to an increased federal control—were irrelevant to the issue presented in Williams. And by refusing to follow the logic of Chisholm, the Court rejected a ready-made doctrine for declaring that the Court of Claims exercised Article III jurisdiction and was therefore a constitutional court.50 Yet in O'Donoghue the Court was willing to take

44. 289 U.S. at 564-65. Tucker Act jurisdiction is non-Article III because the function of deciding claims against the government was held in Williams to be non-Article III, the basis upon which the Court there found the Court of Claims to be a legislative court.
45. See text at note 22 supra.
46. 2 U.S. (2 Dall.) 419 (1793).
47. 289 U.S. at 573-81.
48. Ibid.
49. See generally Hans v. Louisiana, 134 U.S. 1 (1890). Justice Sutherland also relied upon Hans to discredit Chisholm, 289 U.S. at 575, although it may be regarded as a construction of the Eleventh Amendment rather than a modification of the reasoning in Chisholm.
50. The Gordon case, of course, rested upon the appellate jurisdiction of the Supreme Court (see text at note 18 supra), and so would not have been relevant.

The fact that the United States is a party in all cases before these courts is, furthermore, the ground relied upon by the Congress in declaring the Court of Claims, as well as the Customs Court and Court of Customs and Patent Appeals to be constitutional in nature. See H. R. REP. No. 695, 83d Cong., 1st Sess. (1953) (Courts of Claims) ; H. R. REP. No. 2348, 84th Cong., 2d Sess. (1956) (Customs Court) ; S. REP. No. 2309, 85th Cong., 2d Sess. (1958) (Court of Customs and Patent Appeals).
the more drastic step of establishing an entirely new doctrine of dual Congressional power—which blurred the very distinction Williams was attempting to reaffirm—in order to declare the District of Columbia courts constitutional. There were sound policy reasons for the O'Donoghue result, but Justice Sutherland admitted that the same reasons militated in favor of constitutional status for the Court of Claims.\(^1\) The conclusion seems inescapable, therefore, that the Williams result was dictated solely by the existence of Bakelite. Later cases were to make clear the price of this adherence to precedent.

Those who find the doctrinal situation somewhat confusing at this point are in distinguished company. Justice Rutledge, writing for himself and Justice Murphy in National Mutual Ins. Co. \textit{v. Tidewater Transfer Co.},\(^2\) spoke of "the contradictions, complexities and subtleties . . . in the maze woven by the 'legislative court—constitutional court' controversy,"\(^3\) and advocated continuing what he thought to be an erroneous decision rather than "ensnarl the general system of federal courts" in this web.\(^4\) In \textit{Tidewater}, the Court found constitutional an act of Congress which gave "diversity" jurisdiction in suits between citizens of the District of Columbia and citizens of the several states to all federal district courts.\(^5\) Justices Jackson, Black and Burton found the act constitutional despite the fact that they—together with four dissenting Justices—\(^6\) refused to overrule Hepburn & Dundas \textit{v. Ellzey},\(^7\) in which Chief Justice Marshall had held that the District of Columbia was \textit{not} a state for purposes of the Article III grant of diversity jurisdiction.\(^8\) The three Justices arrived at the result of constitutionality by assuming that the Congress could either provide the courts of the District—created under Article I—with nationwide service of process or could create a special system of nationwide legislative courts with jurisdiction over state created rights in suits between citizens of the District and citizens of the states.\(^9\) Given these assumptions, the question

\begin{itemize}
  \item \textit{Id.} at 604-05.
  \item \textit{Id.} at 605. The erroneous decision was Hepburn & Dundas \textit{v. Ellzey} 6 U.S. (2 Cranch) 445 (1805).
  \item See note 68 \textit{infra}.
  \item 6 U.S. (2 Cranch) 445 (1805).
  \item \textit{Hepburn} dealt with a congressional grant of diversity jurisdiction [Act of April 29, 1802, ch. 31, § 6, 2 Stat. 159 (1802)] made in substantially the same words as the Constitution. It construed the meaning of the statute, however, by first determining the meaning of the Constitution.
  \item 337 U.S. at 585. This was, startlingly enough, conceded by the defendant. \textit{Ibid}. Though Cohens \textit{v. Virginia}, 19 U.S. (6 Wheat.) 264, 421, relied upon by Jackson, \textit{(id. at 600-01)}, suggests that the Congress need not confine the effects of any local legislation in D.C. to the District in the way a state legislature must confine certain such effects to its state, Justice Jackson does not consider the effect the constitutional provision for equal protection under the laws would have upon such a system of courts. And see \textit{Hart &
presented by the act was described as one of "mere mechanics of government and administration." and it was therefore held by these justices that the Congress—rather than running process nationwide from the District or setting up a new system of legislative courts—could vest this non-Article III jurisdiction in the District Courts.

Two dissenting Justices—Vinson and Douglas—agreed with the assumption concerning Congressional power to create legislative courts, but held that the case and controversy doctrine prohibited constitutional courts from entrusting a jurisdiction wider than that granted in Article III, a principle which they refused to "sacrifice . . . on the altar of expediency." This heroic posture was somewhat circumscribed by their opinion, however, which sacrificed all distinctions between constitutional and legislative courts, except for the condition that the former could not be vested with non-Article III jurisdiction: a holding which involved a sub silentio overruling of the Williams dicta.

Justices Vinson and Douglas purported to agree with the other dissenters, Justices Frankfurter and Reed. The latter pair, however, gave no indication that they would find a power in the Congress to create legislative courts as the plurality and Justices Vinson and Douglas assumed. Indeed, the basis of their opinion was that Article III limitations were essential to the distribution of powers in the federal government. And since a legislative court system created without regard to Article III limitations would alter the distribution of powers, it is probable that Justices Frankfurter and Reed would have held such a system unconstitutional.

This view concerning the importance of the "case and controversy" requirements was shared by the two concurring Justices, Rutledge and Murphy, who found that the views of the plurality of three and Justices Vinson and Douglas resulted in "what is a limitation imposed on the federal courts generally [being] none when Congress decides to disregard it by purporting to act

Wechsler, The Federal Courts and the Federal System 372 (1953), who ask "Once these concessions were accepted, what was left to argue about?"

60. 337 U.S. at 585.
61. Id. at 644.
62. Id. at 645.
63. See text at note 44 supra.

In a footnote Chief Justice Vinson argues that the discussion in Williams about cases "to which the United States shall be a party" was irrelevant to that decision, apparently for the purpose of implying that district court jurisdiction over Tucker Act claims is constitutional in nature. 337 U.S. at 640 n.20.

64. 337 U.S. at 626. But Justices Frankfurter and Reed did not indicate that they agreed with Justices Vinson and Douglas.

65. See id. at 651, 652.
Justice Frankfurter did not, however, indicate how he and Justice Reed would deal with nation-wide service of process from the D.C. Courts. For some of the problems involved in this latter alternative, see note 59 supra.
under some other authorization." They held, however, that *Hepburn & Dun-das v. Elisey* should be overruled and the act held constitutional, pointing out that the result reached by Justices Jackson, Black, and Burton would in any case deny effect to that decision.

Thus, each of the two bases for constitutionality had a majority of the Justices opposed to it. The proposition that the District of Columbia was a State for purposes of Article III diversity jurisdiction lost by seven votes to two, and the proposition that the Congress could vest district courts outside the District of Columbia with the functions of a legislative court lost by six votes to three. The law was held to be constitutional, however, because both the plurality of three and the two concurring Justices had said that it was.

II

Perhaps the clearest conclusion which could be drawn from *Tidewater* was that ample room remained for future litigation. Comes now Benny Lurk, tried and convicted of robbery in the District Court for the District of Columbia. Lurk petitioned the Court of Appeals for the District of Columbia for leave to appeal in forma pauperis; when leave was denied without opinion he petitioned the Supreme Court for *certiorari.* Two grounds were presented by the petitioner. The first, an evidentiary question involving prejudice was regarded by at least three members of the Supreme Court and by the Court

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66. 337 U.S. at 605.
67. *Id.* at 626.
68. Jackson, Black, and Burton, JJ.; Vinson, C.J. and Douglas, J.; and Frankfurter and Reed, JJ. opposed. Rutledge and Murphy, JJ. in favor.
69. Rutledge and Murphy, JJ.; Vinson, C.J. and Douglas, J.; and Frankfurter and Reed, JJ. opposed. Jackson, Black, and Burton, JJ. in favor.
70. Subsequent to the decision in *Tidewater,* courts of appeals have held that Congress could constitutionally bestow diversity jurisdiction between citizens of the territories and citizens of the states upon the regular district courts. Siegmund v. General Commodities Corp., 175 F.2d 952 (9th Cir. 1949) (Hawaii); Detres v. Lions Building Corp., 234 F.2d 596 (7th Cir. 1956) (Puerto Rico). The Court of Appeals in *Siegmund,* quoted with approval in *Detres,* found that:

*The reasons assigned by the two groups of Justices who concurred in the result [in *Tidewater*] are as applicable to cases involving citizens of territories as they are to cases in which citizens of the District of Columbia are parties.* 175 F.2d at 952-53; 234 F.2d at 603. The argument that the reasons assigned by Justices Rutledge and Murphy (made in 175 F.2d at 954) were applicable to the territories is, at best, difficult to maintain:

72. *Certiorari* was granted. 365 U.S. 802 (1961).
73. Justice Frankfurter, writing for himself and Justices Harlan and Stewart in the dissent from the remand order, called it "plainly frivolous," and stated that, "It would not justify an appeal in forma pauperis." 366 U.S. 712, 713 (1961).
of Appeals on remand, as insubstantial. The second ground, however, was that the trial below was void because conducted by a judge of the Court of Customs and Patent Appeals—and a retired one at that. Certiorari was granted, and the case was remanded, per curiam, to the Court of Appeals, with directions to hear the appeal. Justices Frankfurter, Harlan, and Stewart dissented from the remand on the ground that the substantial questions presented could not be clarified by the Court of Appeals and should therefore immediately be decided by the Supreme Court itself.

Upon remand, the Court of Appeals became the first court to consider the constitutionality of Congressional attempts to overrule the strict bifurcation doctrine announced in Bakelite. Over the past decade, the Congress have enacted statutes declaring that the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals are constitutional courts and have included their judges in the comprehensive scheme for temporary assignment to any federal courts where they may be needed. The Congress have also provided that judges of these courts may retire from active service under provisions generally applicable to the federal judiciary. They may thereupon be denominated "senior judges," receive their same undiminishable salary, and perform such judicial duties in any court of the United States as they may be willing and able to undertake, and to which they are assigned from year to year by the Chief Justice. None of the acts, however, limited or altered in any way the jurisdiction or powers conferred by law upon what were, prior to these enactments, legislative courts. The Congress had granted life tenure to legislative court judges long before the acts in question, but as the holding in Williams indicated, their salaries—unlike those of constitutional judges—were subject to diminution. Given the inability of any Congress to bind their successors, the statutory grant of life tenure was regarded as provid-

74. 296 F.2d 360, 361 (D.C. Cir. 1961).
76. Nothing could be more obvious than that the Court of Appeals, no matter how it may decide the question now put in its keeping, will have it only temporarily. The inevitable final destination of the case is this Court.
83. See, e.g., Ex parte Bakelite Corp., 279 U.S. 438, 441 (1929).
84. See text at note 40 supra.
ing less of a safeguard than a constitutional one. Consequently, congressional attempts to rectify these difficulties by a simple declaration denomiating formerly legislative courts Article III bodies raise serious conceptual problems—problems which confronted the Court of Appeals in Lurk in its attempt to construe the act governing the Court of Customs and Patent Appeals.

Thus, if Bakelite is still authority for the proposition that the functions performed by the Court of Customs and Patent Appeals are legislative in nature, then the congressional enactment cannot be upheld consonantly with the express holding in that case that the classification of federal courts—congressional intent to the contrary notwithstanding—depends solely upon the functions performed by any given court. Because the enactment in question leaves the Court of Customs and Patent Appeals' functions unchanged, in other words, the fact that the Congress has now made clear its intent that the court be classified as constitutional cannot alone be sufficient to compel an Article III classification unless Bakelite's characterization of those functions is now overruled.

If, however, the "legislative" characterization propounded in Bakelite and strongly re-affirmed by dicta in Williams is overruled, and the Court of Customs and Patent Appeals is regarded as having been a constitutional court from its inception, then the effect of the congressional enactment would simply be explicitly to affirm an existing situation. Such an interpretation is suggested by the fact that the judges involved continued to sit without expressing a desire for or receiving those new found appointments which would appear to have been necessary if the act in fact had effectuated a change in status. Nor would such a characterization necessarily involve a renunciation of the Gordon decision, which held that Article III limited constitutional courts to cases and controversies in which their decisions were unreviewable by other governmental departments, for the great bulk of the customs and patent decisions of the Court of Customs and Patent Appeals cannot be reviewed either by Congress or the Executive. And even if an attempt is made

86. Ex parte Bakelite Corp., 279 U.S. at 458-59.
87. Id. at 459, 460.
88. For a suggestion to this effect, see Comment, The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment, 62 COLUM. L. REV. 133, 159 (1962).
89. 289 U.S. at 571.
90. And such an interpretation would also serve to rationalize the Supreme Court's long standing practice of reviewing the decisions of this court.
91. Gordon v. United States, 117 U.S. 697 (1865); discussed in text at notes 18-22 supra.
92. The Supreme Court has never granted certiorari to the Court of Customs and Patent Appeals in decisions of that court rendered in patent and trademark cases, though these decisions are clearly made with finality. See Comment, The Distinction between Legislative and Constitutional Courts and Its Effect on Judicial Assignment, 62 COLUM L.
to adhere to the strict bifurcation doctrine announced in *Bakelite*, the fact that a small number of tariff decisions are reviewable by the President by no means compels the conclusion that the Court of Customs and Patent Appeals is a legislative court. Thus, it is still possible for the Court—consistently with the bifurcation doctrine—to reverse the particular result reached in *Bakelite* by assuming that the Court of Customs and Patent Appeals is a constitutional court, and then concluding—consistently with *Gordon*—that such a court cannot render those decisions which are reviewable by the President.

Even if *Bakelite*’s characterization of the functions performed by the Court of Customs and Patent Appeals as legislative is approved, the congressional enactment could still be upheld if the test of function propounded in *Bakelite* were discarded. Such an abandonment could be justified by subsequent cases that have considerably blurred the strict distinctions which *Bakelite* attempted to impose. Thus in *Williams* the Court approved the concurrent jurisdiction exercised by the Court of Claims and the federal district courts without requiring a change in the characterization of either. Similarly, five Justices in *Tidewater* thought that the Congress could vest legislative courts with Article III judicial power. Finally, the concessions made by the plurality of three in *Tidewater* appear to justify an overruling of the *Bakelite* test on the grounds that the Congress are capable of assigning legislative functions to Article III courts. The plurality of three, in other words, would have extended the *O'Donoghue* assertion that the Congress exercise dual powers over courts located in the District of Columbia to the inferior federal courts generally. Once this assertion is thus accepted, any such court may be either legislative or constitutional depending solely on whether the Congress intended to act under Article I or Article III. But six Justices in *Tidewater* vigorously opposed this last assertion. And more important—as two of the six made abundantly clear—such a holding might go far,

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94. Due to the ambiguous statutory language, such a holding would have been possible even in *Bakelite* itself. See note 24 supra.
95. 289 U.S. at 565. See text at note 44 supra.
96. Vinson, C.J. and Douglas, J., 337 U.S. at 644; Jackson, Black, and Burton, JJ., 337 U.S. at 590. The view of the trio may be adduced from the assumption they make that Congress can discharge its duties, presumably including its Article III (according to *O'Donoghue*) duties, to the citizens of the District by means of a nationwide system of legislative courts.
97. See text at notes 59-60 supra.
98. See note 69 supra.
if unqualified, towards removing Article III from the list of operative constitutional provisions.\(^9\)

The test adopted by the plurality in *Tidewater*, which is based wholly upon congressional intent, could be utilized in *Lurk* to justify the assertion that the Congress had the power to change the Court of Customs and Patent Appeals from a legislative to a constitutional body. Even under that test, however, constitutional and legislative courts would remain distinguishable in terms of the differences between constitutional and statutory tenure.\(^10\) Thus, assuming that the Congress had the power to pass the acts in question, a metaphysical explanation is required to demonstrate how legislative judges came to be appointed to the new constitutional offices which were created at the time the enactments were passed.

Although the enactments are predictably silent on this question, they could nevertheless be interpreted impliedly to have appointed the legislative judges then sitting to the new Article III offices. But Article III judges had always theretofore been appointed by the President by and with the advice and consent of the Senate. Consequently, under this interpretation, the enactments must be read not only to have created new Article III positions, but simultaneously to have enacted a novel method of appointment to those positions. Such an interpretation could be argued for, however, on the basis of Article II, section 2 (cl. 2) of the Constitution, which authorizes the Congress and the President to vest the power of appointing "inferior officers" in the President alone, or in the courts of law. Thus, assuming that judges of inferior federal courts may properly be regarded as such "inferior officers,"\(^10\) the Congress and the President must have sufficient power, whenever acting together—as they were in passing these enactments—to make such appointments directly rather than through the medium of the President alone.\(^102\) Furthermore, since the Constitution explicitly authorizes the Congress to grant such appointing power to the courts of law, judges who had retired prior to the date of the enactments—a situation presented in the *Lurk* case—could be said to have been validly appointed on the theory that the Congress has in effect authorized the Chief Justice of the United States to appoint such "in-

99. Frankfurter and Reed, JJ., 337 U.S. at 651, 652.
100. See generally note 85 supra.
102. Compare this with the treaty-making power exercised by the President and 2/3 of the Senate, and with that exercised by the President and simple majorities of each house of the Congress. See in this respect McDougal & Laps, *Treaties and Congressional-Executive or Presidential Agreements: Inter-Changeable Instruments of National Policy*, 54 Yale L.J. 181-351, 534-615 (1945), reprinted in McDougal and Associates, *Studies in World Public Order* 404-717 (1960).

ferior officers” from the ranks of retired judges of what were formerly legislative courts.103

Even if the Court of Customs and Patent Appeals is held to be a legislative court, the provisions for integrating its judges with the federal judiciary generally can still be upheld by judicious verbal juggling. Thus, the Congress could be held to have given the Chief Justice of the United States power to appoint “inferior officers” from among the judges of legislative courts; upon this appointment in accordance with the Constitution such judges must attain constitutional status regarding tenure and salary. And such “constitutional” judges would, of course, be able to sit upon legislative as well as constitutional courts—just as Article III judges have in the past been assigned to non-Article III courts104—since their “constitutional” halos would presumably survive any return to a legislative court.

However the enactments which attempt to overrule Bakelite are construed, the basic problem still remains whether the Congress and the President may themselves change a classification which the Supreme Court in Bakelite attempted to root directly in the Constitution. Certainly the received learning would regard the simple citation of Marbury v. Madison105 as the definitive answer to any such question. Constitutional judges require constitutional tenure.106 And if the Congress—because of an inability to bind future Congresses

103. If tenure means the right to continue to perform duties as well as to collect salaries, the senior judges who are appointed for limited periods by their chief judge or by the Chief Justice, but who do not have to be given any such appointments at all, even if they desire them, do not have tenure for good behavior. Certainly the nature of their tenure is different in this respect from that of ordinary district judges, for example. Neither Booth v. United States, 291 U.S. 339 (1934), which holds the salaries of such judges constitutionally protected under the statute involved in Williams and O'Donoghue, nor United States v. Moore, 101 F.2d 56 (2d Cir. 1939), cert. denied, 306 U.S. 664 (1939), which denominates such tenure as constitutional against attack by a litigant, considers the possibility that a senior judge might be refused assignment to a court. Upholding the constitutionality of senior judges' tenure helps to maintain the delicate compromise which is designed to encourage supernannuated judges who may still be capable of some service—and in any event are too proud to admit they are not—to withdraw gracefully from the strain of full time work. This benefits litigants by not giving them overworked, overage judges; at least when they are aged, under this program, they should not be overworked.

Since a judge need not retire at all, however, once he does take the step of retiring and entering his name upon the roster of senior judges willing to perform further duties as able and required, he is very unlikely to be acting in fear of not being assigned to any court in the future if his actions are disapproved; if he had had such fears, he never would have retired in the first place. His salary is guaranteed in any event, and as long as he maintains his name on the roster, the guarantee may be regarded as a constitutional as well as a legislative one.

104. E.g., the Payne-Aldrich Tariff Act ch. 6, § 29, 36, Stat. 105-08 (1909), creating the Court of Customs Appeals, provided in paragraph 12 for temporary appointment of district and circuit judges to that court. But cf. United States v. Ferreira, note 137 infra.

105. 5 U.S. (1 Cranch) 137 (1803).

—are in fact incapable of granting constitutional tenure to legislative judges, then the present enactments simply reaffirm the prior statutory tenure, which Williams held insufficient to create Article III status. If, however, as several Justices in Tidewater claimed, the entire problem is solely one of "mere mechanics of government and administration," then clearly the invocation of Marbury v. Madison would be irrelevant. It would appear, therefore, that what was called for upon the Supreme Court's remand of the Lurk case was a decision which, eschewing doctrinal subtleties, attempted to evaluate the operative consequences of what the Congress were attempting to do, and on this basis to decide whether the question presented was one of constitutional power or of administrative mechanics.

This the Court of Appeals for the District of Columbia, sitting en banc, refused to do. Rather, it construed the act in question in light of the O'Donoghue holding that District of Columbia courts could perform nonjudicial functions without losing Article III status. Consequently, by assuming that the applicability of the statute to the District of Columbia courts could be considered separately, and by ignoring the possibility that Tidewater had extended the O'Donoghue rationale to inferior federal courts generally, the Court of Appeals was enabled to hold that even if it were unconstitutional for a Court of Customs and Patent Appeals judge to be assigned to any Article III court outside the District of Columbia, the statute would nevertheless be constitutional in Lurk, which involved a court in the District of Columbia. In reaching this decision, the Court of Appeals was apparently undaunted by the fact that the statute in question does not once distinguish the District of Columbia courts from the federal district and circuit courts, and does not once mention them by name. The court relied, rather, on the fact that the act being construed had superseded an earlier enactment providing that Court of Customs and Patent Appeals judges could temporarily be assigned to any Article III court outside the District of Columbia, the statute would nevertheless be constitutional in Lurk, which involved a court in the District of Columbia. In reaching this decision, the Court of Appeals was apparently undaunted by the fact that the statute in question does not once distinguish the District of Columbia courts from the federal district and circuit courts, and does not once mention them by name. The court relied, rather, on the fact that the act being construed had superseded an earlier enactment providing that Court of Customs and Patent Appeals judges could temporarily be assigned to the District of Columbia courts. The fact that this earlier act was in effect when the judge in question was appointed seems to have been taken by the Court of Appeals as meaning that he was from that time invested with sufficient tenure to sit on the District of Columbia courts—a result which it reached by assuming, without examination, that the O'Donoghue holding rendered the earlier act constitutional. By

107. The words are those of the plurality of Jackson, Black, and Burton, JJ.; see note 60 supra. Vinson, C.J., and Douglas, J., appeared to agree; see text at notes 61-63 supra.
108. 296 F.2d 360 (D.C. Cir. 1961).
109. See text at note 37 supra.
110. 296 F.2d at 362.
111. See text at note 130 infra.
113. He was appointed in 1937.
114. 296 F.2d at 362.
115. Ibid.
dint of some fairly prodigious statutory interpretation, then, the Court of Appeals was able to avoid the substantial issues raised by the congressional attempt to revoke the *Bakelite* bifurcation doctrine. But it was able to do this only at the expense of implicitly passing on the constitutionality of a statute now defunct.

It was against this background of judicial legerdemain that Glidden Company, the defeated appellee in a recent Second Circuit case involving the issue of shop-removals, devoted an entire page in its ten-page argument for certiorari to the proposition that one of the judges sitting on the Court of Appeals was a Court of Claims—and therefore a legislative—judge. The petition in question was submitted subsequent to the *en banc* decision by the Court of Appeals in *Lurk*, and prior to the Supreme Court's grant of certiorari from that decision. The earlier remand in that case had demonstrated not only that the Supreme Court did not regard the issues presented as spurious, but also that at least three Justices—of the four required—would approve a petition for certiorari presenting such issues. Furthermore, the *en banc* decision in *Lurk* had indicated that that case might not provide an appropriate vehicle for a comprehensive decision on the legislative-constitutional controversy, because of the possibility that District of Columbia courts could be distinguished from Article III courts generally. As a result, an informed practitioner faced with the problem of obtaining a grant of certiorari in *Glidden* would have been derelict in not including in his petition a reference to the legislative-constitutional controversy, even in a case as rife with hotly disputed substantive issues as was *Glidden*. By its action in *Lurk*, in other words, the Supreme Court had to a large extent dictated the contents of the petition for certiorari in the *Glidden* case, thus exercising what may perhaps be described as one of its "Active Virtues."

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116. The circuit court refused even to decide whether the Court of Customs and Patent Appeals was legislative or constitutional. 296 F.2d at 362.

117. See notes 1-7 *supra* and accompanying text. The judge in question, Judge J. Warren Madden, wrote the majority opinion in the 2-1 decision.

118. This is apparent from the citation, in the remand order, of Ellis v. United States, 356 U.S. 674 (1958), holding that non-frivolous appeals in forma pauperis to U.S. Courts of Appeals must be allowed. 366 U.S. 712 (1961).

119. Franfurter, Harlan, and Stewart, JJ.; see note 76 *supra*.


For a similar "virtue," which might properly be described as "hyperactive," see Pollak, *The Supreme Court and the States: Reflections on Boynton v. Virginia*, 49 CALIF. L. REV. 15, 21, 22 (1961), where it is shown that through an *ex parte* communication the Court took the initiative "to shift the focus of a case to an issue not embraced within the 'questions presented' by petitioner."

A second petition for certiorari was granted in the *Lurk* case, Oct. 9, 1961, and it was docketed beside *Glidden* (30 U.S.L. WEEK 3113 and 3122). Oral argument was heard in both cases on Feb. 21, 1962 (30 U.S.L. WEEK 3266, 3261-64).
III

Doctrinally—at least prior to Williams and O'Donoghue—a constitutional court was defined as a court vested with some part of "the judicial power of the United States." A legislative court, on the other hand, was a court which, though vested with powers, at least in part of a judicial nature, were not part of "the judicial power of the United States." Such a legislative court was a court created, or whose creation was authorized by the Congress in the exercise of specific or general powers constitutionally granted to the legislative department. A logical development of this bifurcation doctrine would demand a complete separation of the two classes. Thus, only legislative courts would be capable of hearing matters not within the purview of Article III, while situations under that purview could be adjudicated only by constitutional courts. Since Article III does not apply to territorial or other legislative courts, the Congress would not constitutionally be inhibited from changing the tenure of judges in such courts, even when an earlier Congress had provided for them the same tenure as that given to constitutional judges. It follows that legislative judges could not be assigned to constitutional courts, because whatever the terms of their tenure, its basis would be statutory rather than constitutional. Constitutional judges, qua judges, could not sit on legislative courts, for this would widen the carefully delineated scope of Article III.\textsuperscript{121} There could, then, be no concurrent areas of jurisdiction. And, since the same constitutional factors which deny original jurisdiction to a court serve to deny it appellate jurisdiction, review of constitutional court decisions could not be made by legislative courts, and review of legislative court decisions could not be made by constitutional courts, including the Supreme Court, except to the extent that the latter courts can review any legislative or administrative proceeding.\textsuperscript{122} Finally, in terms of such a doctrine, the nature of a court would be determined solely by the nature of the functions given to it by Congress, and it would therefore be irrelevant for classification purposes whether the Congress had labeled it legislative or constitutional.\textsuperscript{123}

Logical development, however, has not been carried to extremes, and there has recently been a tendency to do away with the legislative-constitutional distinction, as applied to existing courts, though the theoretical distinction lingers on. Thus, the Court of Claims—held in Williams to be a legislative court—has long shared a concurrent jurisdiction with the district courts.\textsuperscript{124} The Supreme Court has long accepted appeals from the legislative courts, ex-

\textsuperscript{121} The argument has been made, however, that they might opt to sit as commissioners; this suggestion, however, has met with relatively little success. See note 137 infra.

\textsuperscript{122} See generally Jaffe, The Right to Judicial Review, 71 Harv. L. Rev. 401, 769 (1958).

\textsuperscript{123} Cf. \textit{Ex parte} Bakelite Corp., 279 U.S. at 459.

\textsuperscript{124} See note 43 supra and accompanying text.
cept in instances where the matters at issue fail to present "cases and controversies." Furthermore, the Congress, at one point, attempted to declare the Customs Court a constitutional court, while leaving the Court of Customs and Patent Appeals—which reviews the decisions of that court—a legislative court. At least one judge of a territorial court has been called upon to sit in a constitutional court. The territorial courts for the District of Columbia, once regarded as unquestionably legislative, were with no appreciable intervening change in function declared by the Supreme Court to be at least in some respects constitutional. And as a result of Tidewater, the District of Columbia Courts, formerly thought of as without a doubt constitutional, now exercise by virtue of an act of Congress diversity jurisdiction of a type which falls outside the purview of Article III.

These failures in practice to implement the theoretical distinction may well result from the expansion of the functions of the federal government. Thus, in order to cope with a vast increase in legislative business, the Congress have been forced to legislate more and more generally and to delegate much of the work involved in the specific application of such general enactments to other, more specialized, bodies, originally regarded as legislative or administrative in nature. Over time the procedures developed by these agencies tend to become increasingly formal. And the more firmly fixed such rules became, the more the particular body in question comes to resemble a court of law. Thus, there exist today many quasi-independent agencies and boards whose modi operandi seem, in varying degree, judicial. At what might be called the "judicial extreme" of this group are the Tax Court, the Court of Customs and Patent Appeals, the Customs Court, and the Court of Claims. The functions performed by these last, though not "inherently" judicial in the sense that they were not exercised by courts "at common law," appear to be governed by sufficiently formal frameworks to be denominated "courts." Indeed, the

125. See note 22 supra and accompanying text. Professor Moore would justify such concurrent jurisdiction, and appeals to the Supreme Court, by finding that, though Article III is the sole source of federal judicial power, it is not the sole source of congressional power to create courts. 1 Moore, Federal Practice 71, 72 (2d ed. 1961).


127. Irish v. United States, 225 F.2d 3 (9th Cir. 1955). The territorial judge in this case, despite assertions to the contrary, see 69 Harv. L. Rev. 760 (1956), did not cast the deciding vote.


130. If Justices Rutledge and Murphy were right in Tidewater, then, of course, the jurisdiction would fall within Article III. See discussion at notes 66-67 supra.

131. This test was originated in Bakelite, 279 U.S. 438 (1929). Functions similar to those of the Customs Court and Court of Claims, however, may have been performed at an early period by the Court of the Exchequer; see, e.g., Flucknett, A Concise History of the Common Law 146, 147, 175 (1956).
process described above recapitulates the mode of development of the original common law courts in England at a time when the functions of that government were likewise expanding. The Common Pleas and King's Bench were specialized and regularized developments of the Curia Regis and the General Eyres, which exercised undifferentiated functions of government, and the Court of the Exchequer was the result of a gradual formalization of proceedings before what began as essentially an accounting and taxing agency. In the United States, furthermore, a conscious emulation of "true" courts, particularly in later stages of the development of administrative bodies, has accelerated the process.

Since the effect of such a development is to impose increasingly stringent procedural limitations and thus to render less arbitrary the exercise of the expanding powers of government, there would appear to be strong policy reasons for encouraging it. Thus Professor J.W. Moore, for example, suggests the expansion of what he terms the "hybrid" classification of the District of Columbia courts to the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals. These courts, he argues, like the District of Columbia courts, seem to be permanent in character, and exercise an important jurisdiction. Their judges should therefore be given the independence which comes from Article III tenure and should be integrated into the general federal system for the assignment of judges. Furthermore, Professor Moore sees nothing inconsistent in allowing the Congress "sufficient freedom to require . . . [such courts] . . . to perform administrative or legislative functions, or render advisory opinions." Any such "hybrid" classification, however, insofar as it authorizes the performance of non-judicial functions, must be inconsistent with the traditional view that Article III courts may be required to hear only "cases" and "controversies," as those constitutional phrases have been construed in a series of decisions beginning in 1792.

From its first judicial exposition in *Hayburn's Case*, the case and controversy doctrine has required that Article III courts review only those concrete disputes in which they can make a final decision, binding upon adversary parties, and non-reviewable by other government departments. As early

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133. 1 MOORE, FEDERAL PRACTICE ¶ 0.4[4] (2d ed. 1961).
134. Id. at 72.
135. And on this reasoning, the O'Donoghue result must also be inconsistent with the traditional view, as are the dicta in Williams regarding the non-Article III nature of the Tucker Act jurisdiction of the District Courts.
136. 2 U.S. (2 Dall.) 408 (1792).
137. *Hayburn's Case* was a motion for a mandamus to compel the Circuit Court for the District of Pennsylvania to consider a pension award to Hayburn, which the court had refused to consider because it could be reconsidered by the Secretary [Act of March 23, 1792, 1 Stat. 243 (1792)]. Other circuit courts also would not consider cases under
as 1793, the Supreme Court refused to grant the request of the President and Secretary of State for legal advice, and it has since refused to be “deceived” by congressional attempts to frame requests for such advisory opinions in the form of justiciable causes. Similarly, although the Court has retreated from more extreme statements of the doctrine in order to allow appeals from state and federal declaratory judgments, it still requires a justiciable dispute to be “definite and concrete, touching the legal relations of parties having adverse legal interests . . . [and] . . . admitting of specific relief through a decree of a conclusive character.” Antiquity, however, is not alone sufficient to make a doctrine viable. Consequently, if the

the act, but agreed to adjourn and consider the cases as commissioners, see Hayburn's Case, 2 U.S. (2 Dall.) 408, 410; United State v. Yale Todd (1794), reported in a note to United States v. Ferreira, 54 U.S. (13 How.) 39, 51-53 (1851). Yale Todd held that such a sitting as commissioners by the Circuit Court for the District of Connecticut violated the statute, but did not reach the question whether it would violate the Constitution: A question which dictum in Ferreira resolved against the validity of the practices. Hayburn's Case was taken under advisement by the Court, but the offending statute being repealed and replaced by another means of relief for Hayburn [see Act of February 28, 1793, 1 Stat. 324 (1793)], a decision was never handed down.

138. Letter by Chief Justice Jay and Associate Justices to President Washington, dated August 8, 1793, in reply to Letter by Thomas Jefferson to Chief Justice Jay and Associate Justices, dated July 18, 1793. 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486.

139. Muskrat v. United States, 219 U.S. 346 (1911). In that case, the Congress had passed a bill granting jurisdiction to the Court of Claims and Supreme Court on appeal, to hear the named parties plaintiff, with the United States to pay their expenses from a trust fund if the acts of Congress they contested were found unconstitutional. The Court held that jurisdiction was lacking in the Supreme Court because of lack of a bona fide case or controversy, and in the Court of Claims because the act giving the two courts jurisdiction was not separable. The very inarticulateness of the Muskrat decision in attempting to explain why that situation was not cognizable by the Court is an indication of the great importance the Court attaches to safeguarding its status vis-a-vis the other branches of the federal government. Muskrat may be said to stand for the proposition that the Court will not act at the specific behest of the Congress, and thus abandon part of its freedom not to decide inopportune questions. See generally Bickel, Foreword: The Passive Virtues, 75 HARV. L. REV. 40 (1961). Professor Bickel notes two of the most important aspects of Muskrat: it was thoroughly concrete and adversary, despite the Court's contentions, and it is frequently cited with approval. Id. at 45 and n.25.

140. See Liberty Warehouse Co. v. Grammis, 273 U.S. 70, 76 (1927), where the Court said it was "beyond the constitutional limitations" upon federal courts for a district court to hear a declaratory judgment action; and Willing v. Chicago Auditorium Ass'n, 277 U.S. 274, 289-90 (1926), where the Court held a suit "in the nature of a suit to remove a cloud from title" to be "not a case or controversy within the meaning of Article III . . . [because] [r]esort to equity to remove such doubts is a proceeding which was unknown to either English or American courts at the time of the adoption of the Constitution. . . ."


143. Id. at 240-41.

144. Cf. the oral argument in Lurk in its second appearance before the Supreme Court: Mr. Gressman concluded his argument by saying that the Supreme Court has
continued existence of the constitutional-legislative distinction is to be based upon the importance of preserving the "case and controversy" limitations embodied in Article III. It becomes necessary to examine the purposes served by these limitations.

Article III creates a Supreme Court which, as a result of the doctrines announced in Marbury v. Madison, has emerged as the final authority for the construction of the federal constitution. But as that very case announced, this ultimate power is reserved for use only in "cases" and "controversies." As the member of the institutional triumvirate ruling the nation which is by far the weakest in terms of direct power and control over physical resources, yet which constitutionally is required to assert superior authority over its co-rulers to construe the Constitution and to judge their actions under it, the Court must continually guard against being brought under the control of more powerful departments. And because the Court is itself the ultimate arbiter of the content to be poured into the phrases of Article III, strict adherence to those limitations constitutes the means by which it contrives to control the timing and scope of its own participation in the processes of government. Viewed in this light, the refusal of the Supreme Court to abandon the constitutional-legislative distinction represents an unwillingness to permit congressional assumption of powers over the Court's jurisdiction greater than those which have heretofore been exercised or considered granted to the legislature under the terms of Article III. Thus, "case and controversy" serves, along with doctrines of standing, political questions, ripeness, the "substantiality" of federal questions on appeal, and certiorari discretion, as a means by which to avoid the decision of questions which are not properly presented in a particular case, or whose decision at a particular time might involve such far-reaching consequences as dangerously to deplete the reservoir of public respect and good will upon which the Court must ultimately depend for its continued independent status. These doctrines permit the Court to assert great authority over crucial questions by reserving to that body itself the decision as to the proper moment for action. And similar reasons would appear fully to justify the Court's adamant refusal in Gordon to render decisions whose execution would be subject to the approval of other government departments.

from 'time immemorial recognized the distinction between Article I and Article III courts.

Mr. Justice Frankfurter: "You know what I think about that argument. It is the same as arguing how many angels can dance on the head of a pin."

30 U.S.L. WEEK at 3263.

145. These limitations formed the basis for the never overruled case of Gordon (see note 19 supra and accompanying text); and were also basic to three of the opinions written in the Tidewater case. See text at notes 61-63 supra.

146. 5 U.S. (1 Cranch) 137, 177-78 (1803).

Given the obvious importance of permitting the Congress sufficient flexibility to make possible the most efficient utilization of the lower federal judiciary as a whole, the argument in favor of retention of the constitutional-legislative distinction would appear to be considerably weaker with regard to the lower federal courts than with regard to the Supreme Court, at least if all the lower court judges were granted life tenure and salaries not subject to diminution. In setting forth case and controversy limitations, however, section 2 of Article III speaks in general terms, making no differentiation between the definition of cases and controversies for the Supreme Court and for those inferior federal courts which the Congress might create. It might be assumed, therefore, that such limitations must be applied to all Article III courts uniformly. As Chief Justice Marshall noted, however, "[W]e must never forget that it is a constitution we are expounding." It was presumably his appreciation of this fact which enabled Marshall in American Ins. Co. v. 356 Bales of Cotton: Canter to lay the basis for the constitutional-legislative distinction by his discovery of legislative courts. And a principle which permitted that discovery must surely also be capable of authorizing differential treatment for the Supreme Court and inferior federal courts if sufficient reasons of policy so dictate. It would appear to be necessary, therefore, to examine the extent to which considerations which militate in favor of the preservation of Article III limitations in the case of the Supreme Court apply to lower federal courts as well.

The nature of the work done by the lower federal courts is, of course, different not only in degree, but in kind from that done by the Supreme Court. The lower courts are not the final arbiters of the Constitution. And such courts already exercise jurisdiction over matters such as naturalization and bankruptcy, in which the traditional elements of a case or controversy might at times not appear. Moreover, while congressional forcing of a decision from the Supreme Court at an inopportune time might well tend to reduce the independence of the Court, it is difficult to see how any congressional ex-

150. See note 15 supra and accompanying text.
151. For such differential treatment see generally Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953). For an attempt to ground at least a portion of the Supreme Court's appellate jurisdiction directly in Article III, rather than subject to control by the Congress, see id. at 1363-65.
152. For a valiant attempt to bring such proceedings within the traditional scope of "case" or "controversy," see Tutun v. United States, 270 U.S. 568 (1926).
153. The plurality in Tidewater attempted to demonstrate that bankruptcy jurisdiction was outside the Article III grant of judicial power, and that, therefore, the U.S. Courts—necessarily including the Supreme Court—had long been functioning as legislative courts. 337 U.S. at 594-600.
154. See generally text at notes 146-47 supra.
expansion of justiciable controversies in the lower courts—even requiring opinions subject to review by other departments of the government—would significantly alter the constitutional balance of power between the judiciary and a legislature which already possesses the constitutional power to abolish all such courts. Given the relatively limited present utilization of the potential jurisdiction of the lower federal courts—witness the infrequent employment of the “advisory” jurisdiction of the Court of Customs and Patent Appeals—and the ease with which inroads may be made upon historically permissible categories of cases and controversies through the doctrine of legislative courts, it appears unlikely that an explicit expansion of justiciable situations will necessarily result in any significant increase in the work assigned by the Congress to the courts. More likely, the consequences would be confined to a greater congressional flexibility in deciding what court is most convenient for adjudicating a particular class of extant disputes.

Furthermore, of all the aspects of the case and controversy requirement created by the Supreme Court, the one limiting jurisdiction to those disputes not subject to review by other branches of the government is the least definite and the one most uniquely applicable to the Supreme Court alone. The difference between cases which will or will not be heard in an Article III court on this ground is, of course, one of degree; for all judgments may require some modicum of extra-judicial “review” before they become final, even if such review involves no more than a decision whether or not to enforce a judgment running against a private party, or to comply with a judgment running against some other branch of government. The history of Supreme Court appellate jurisdiction over the Court of Claims illustrates the effect on the Court of a small change in the degree of extra-judicial control. In *Gordon v. United States*, the Supreme Court held that it was without jurisdiction...
to hear appeals from the Court of Claims, since the judgments of that court had to be satisfied by congressional appropriations on motion of the Secretary of the Treasury. Shortly after *Gordon*, however, the Court quietly accepted appellate jurisdiction over the Court of Claims although the amended statute still provided that judgments had to be paid out of congressional appropriations; the only difference was that at the time of *Gordon* the judgments had to be "estimated for" by the Secretary before they could be disbursed, while subsequent to the post-*Gordon* amendment the judgments could be paid directly out of a general appropriation for satisfaction of Court of Claims judgments. Although the theoretical possibility of legislative control remained the same under both statutes, the Supreme Court was obviously convinced that the real likelihood of control was decreased under the amended statute and therefore that the fears generally accompanying extra-judicial review were too insubstantial to counsel against the acceptance of jurisdiction in that class of cases. The factors which motivate decision on whether or not to accept cases subject to some such review include the prestige of the Supreme Court and the on-going balance of powers in our tripartite system. And the elements composing these factors are in a constant flux. A delicate determination that the acceptance of a given type of case at a given time by the Supreme Court will be deleterious to these values will in most cases be wholly inapplicable to lower federal courts. If the lower federal courts, therefore, are to be foreclosed from rendering judgments solely because such judgments may, in some degree, be subject to review by other branches of the government, an independent policy basis for this jurisdictional limitation would be required. This basis, however, is conspicuously absent in most cases.

162. It is not meant to imply that Article III limitations are wholly inapplicable to the lower federal courts; what is argued for is, simply, a more permissive interpretation of the finality requirement as applied to them. Thus, a statute requiring or permitting even the lower federal courts to render purely advisory opinions on general questions of law unconnected with a specific dispute between adversary parties should probably be held unconstitutional upon a functional analysis of the relative roles of the judiciary and the legislature in a democratic society. See generally Bickel, Foreword: *The Passive Virtues*, 75 Harv. L. Rev. at 74-79.

Moreover, even if Article III limitations were held not to apply, elements of the case and controversy doctrine are derived directly from the common law, see e.g., the discussion in *Gordon* v. United States, 117 U.S. 697, 705-06 (1886), and such limitations could presumably be applied even in the absence of constitutional prohibitions. For an analogous situation, see the status accorded declaratory judgments in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

Similarly it is unlikely that a lower federal court could be required to render such a purely advisory opinion in circumstances which amounted to an unlawful delegation of legislative powers. The line, however, may be difficult to draw. Thus, even today courts administer statutes which might well be held void on delegation grounds if directed to administrative agencies, See e.g., the *Sherman Anti-Trust Act*, 26 Stat. 209, ch. 647 (1890), as amended, 15 U.S.C. §§ 12-17 (1958).
In the case of the District of Columbia courts, moreover, a parsing of the Keller and O'Donoghue decisions suggests that the rationale of dual power would already permit the Congress to require inferior federal courts located there to render opinions subject to non-judicial review.\textsuperscript{163} Continued adhesion, therefore, to the doctrine that lower federal courts located elsewhere cannot be required to deliver such opinions appears to represent a purely formal restriction on the effective powers of the Congress.\textsuperscript{104} Moreover, it would appear to be somewhat late in the day—given the dicta in Williams\textsuperscript{105} and the result in Tidewater\textsuperscript{168}—to argue that Article III courts are incapable of receiving jurisdiction over non-Article III “cases and controversies.”\textsuperscript{107}

The gloss upon O'Donoghue provided by the plurality in Tidewater suggests that any powers the Congress may have over the jurisdiction of the District of Columbia courts extend to lower federal courts generally.\textsuperscript{108} Thus, the reasoning of the Tidewater plurality would permit the lower federal courts to render decisions subject to review by other departments on the ground that the questions presented are ones of “mere mechanics of government and administration.”\textsuperscript{109} The question as to whether or not the Supreme Court may be required to hear appeals from decisions by such courts in non-Article III cases and controversies should, however, be a separable one,\textsuperscript{170}

\textsuperscript{163} See 1 Moore, Federal Practice 72 (2d ed. 1961).
\textsuperscript{104} The extent to which such a limitation would be solely conceptual becomes even more apparent when it is realized that judges from the District are reciprocally interchangeable on a temporary basis with other members of the lower federal judiciary; this interchangeability would appear, after O'Donoghue, to be constitutionally unassailable.
\textsuperscript{165} See note 43 supra and accompanying text.
\textsuperscript{106} See text at notes 52-70 supra.
\textsuperscript{167} Although non-diversity jurisdiction over cases involving state-created rights would represent a considerably greater departure for the lower federal courts, the result, and the plurality rationale in Tidewater—upholding a grant of jurisdiction over state created rights in matters which fall \textit{without} the boundaries of Article III diversity jurisdiction—might well be read to authorize suits in federal courts on state created rights even between citizens of the same state, for if constitutional strictures regarding the scope of the federal judicial power do not apply to legislative courts, and to the Congress in creating them, such a result would be quite possible. \textit{But see} Canter, 26 U.S. (1 Pet.) at 546, stating that within the states only courts created pursuant to Article III can exercise admiralty jurisdiction (and so presumably all Article III judicial powers).

Given the radical nature of such an innovation, however, it must be recalled that there was no single majority holding in Tidewater and that the Act there at issue could also have been held constitutionally valid—as Justices Rutledge and Murphy attempted to do—by overruling an earlier case which had held the District of Columbia \textit{not} a state for purposes of Article III diversity jurisdiction. \textit{But see} the way in which the Courts of Appeals have used the result in Tidewater to allow diversity jurisdiction over territorial citizens in the federal courts (see note 70 supra), which seems to imply that they at least lean toward the permissive view expressed by the plurality of three in Tidewater.

\textsuperscript{168} See text at note 59 supra.
\textsuperscript{169} 337 U.S. at 585.
\textsuperscript{170} \textit{Cf.} De La Rama v. De La Rama, 201 U.S. 303 (1906), for a similar view on separability expressed by the Supreme Court, for the purpose of allowing it to review a
and one which might well be answered in the negative.\textsuperscript{171} But so long as that question is regarded as separable there would appear to be no need for a conceptual category of "legislative courts," and no justification for denying constitutional life tenure to judges simply because they consider matters which the Supreme Court deems it unwise to review.

The confusion apparent in cases exploring the constitutional-legislative distinction is explicable, therefore, without resort to the theory, certainly colorable from the opinions, that such decisions represent a sort of judicial Laocoon, with the Court enmeshed in the doctrinal convolutions of an archaic fiction which fails to serve any valid function. It would appear, rather, that the Supreme Court's focus on the question of construing Article III so as to maintain its own independence, itself scantily articulated for the very political reasons which impel it, has obscured the issue of the relevance of the Article III limitations to the lower federal courts which only partially share the Supreme Court's status as a governmental department with responsibilities and duties coequal with those of the Congress.\textsuperscript{172} There is no need to hamstring the lower federal courts by making them the battleground for the independence of the Supreme Court, nor to run the consequent risk of compromising the Court's independence by the admission that the Congress must be permitted a certain flexibility in organizing those inferior courts. In most instances, the Congress probably will find it expedient to continue to limit jurisdiction of the lower federal courts to matters traditionally judicial. But this should not preclude the use of the judiciary in other, related ways. Rather, once the essential difference between the Supreme Court and the inferior courts is appreciated, it should become possible for the Supreme Court to allow the Congress a good deal of freedom with respect to the latter without subjecting itself to congressional control.

IV

An important preliminary question suggested by the \textit{Glidden} and \textit{Lurk} appeals is whether, assuming the judge to be sitting unconstitutionally, it is open to a party to attack the decision upon that ground alone, without showing any specific error or prejudice. It has been maintained in a commentary\textsuperscript{173} upon the closely analogous situation of a territorial judge sitting on a court divorce action despite the fact that such actions were not allowed in lower federal courts within the states because of the lack of a dispute falling under Article III.

This would have relieved Justice Jackson of a troublesome problem; at 337 U.S. 600 n.24 he states,

> No question has been raised here as to the source of this Court's appellate jurisdiction over such cases. Nor do we see how that issue could be raised without challenging our past and present exercise of jurisdiction over cases adjudicated in the district courts and in the Court of Claims, solely under the Tucker Act. . . .

\textsuperscript{171} See text at note 146 \textit{supra}.

\textsuperscript{172} See generally text at notes 146-53 \textit{supra}.

\textsuperscript{173} 69 \textit{Harv. L. Rev.} 760 (1956).
of appeals, that the only way in which the authority of the judge could be questioned would be in a *quo warranto* proceeding initiated by the United States Attorney. The doctrinal basis for this position is that the judge is at least a *de facto* judge, and that if no injustice can be shown to have occurred, only the sovereign is injured by, and may complain of, the judge's usurpation. The policy the doctrine is designed to serve is the stability of judgments; without it the omission of a technicality in a judicial appointment would overthrow not only the judgment complained of, but all previous judgments, complained of or not, handed down by the improperly constituted court. Thus, the Supreme Court has refused to void the judgment of a lower court despite valid technical arguments regarding term time. But the *de facto* doctrine was developed at common law, where there were no constitutional safeguards regarding judicial appointments, and—whatever its validity under such circumstances—it would today seem indeed ironic if the constitutional prescriptions designed to insure an independent and impartial judiciary could not be invoked by the very litigants they were designed to protect.

Furthermore, the recent Supreme Court decision in *United States v. American-Foreign S.S. Corp.* would appear considerably to have weakened the impact of the *de facto* court doctrine. In that case, an *en banc* determination by the circuit court was reversed because of the presence, contrary to statute, of a retired judge. Since, however, as noted in Justice Harlan's dissent, the opinion carefully avoided construing the statute in question so as to afford the litigant a personal right, it leaves open—in terms of the *Lurk* and *Glidden* appeals—the question whether the defendants in those cases may claim a constitutionally protected right to a judge with life tenure and an undiminishable salary.

174. Irish v. United States, 225 F.2d 3 (9th Cir. 1955).
175. *Quo warranto* proceedings traditionally were criminal in form. *High, Extraordinary Legal Remedies* § 591 (1874). Though today they seem to be civil, at least for purposes of removal to federal courts, *Ames v. Kansas*, 111 U.S. 449 (1884), it is not to be supposed that a District Attorney would be eager to institute them against a judge.

It is perhaps worth noting that, at common law, *quo warranto* would probably have been available to a party through the fiction of suing the judge "on behalf of" the king. *Bracton's Note Book* 35 (1219), 1175 (1236-7), 1181 (1236-7); cited in *Plucknett, Legislation of Edward I* at 35-36. And in some states today similar actions may be brought by individuals.

177. See, *e.g.*, Howell v. Howell, 213 Ark. 298, 208 S.W.2d 22 (1948), noted, 46 Mich. L. Rev. 1124 (1948), which invalidated over 1,000 divorce decrees.
181. 363 U.S. at 695, 696.
In a recent district court case involving this question, *United States v. Starling*, the constitutionality of part of the Alaskan Statehood Act was challenged. The act purported to continue the District Court for the Territory of Alaska, with its bench of judges who sat for four year terms, for a period of up to three years after statehood. Litigants in two criminal and two civil cases pending before the court moved to dismiss on the ground that since Alaska had been admitted into the Union, the territorial court, despite the act, no longer had jurisdiction over civil and criminal matters arising under the laws of the United States. They alleged three grounds for the unconstitutionality of the act extending the court: that it violated the tenure for good behavior provision of Article III, section 2; that it denied them as Alaskans the privileges and immunities accorded to the citizens of the other states by Article IV, section 2; and that denial of a judge with life tenure deprived them of due process of law as guaranteed in the Fifth Amendment.

Exemplifying his dictum that “[W]hen faced with obstacles Alaskans have never been dismayed,” Judge McCarrey managed to make the law accord with the Constitution by finding the Territorial District Court operating in the state of Alaska to be a valid legislative court. The judge (who himself had a four year term) found that the right to a judge with life tenure was not sufficiently significant to rise to the status of a due process requisite. Apparently, indeed, the judge failed to recognize even the existence of such a right, for the equal protection argument urged by plaintiffs was disposed of on the ground that “a federal judge in Alaska who does not hold life tenure during Alaska’s transitional period is not ‘substantially and fundamentally different’ from his counterparts [i.e., federal judges] in the other states.”

Relying on the Supreme Court decision in *Minneapolis & St. L. R.R. v. Bombolis*, the judge reasoned that “[i]f the federal government can delegate all its judicial power to a state court, it should certainly be able to do the same to a federal legislative court, namely, to the District Court for the District of Alaska . . . such court having slight differences, if any, from an ordinary federal court.”

In *Bombolis*, the trial of a federally created right under FELA in a state court was held not to be subject to the jury trial requirement of the Seventh Amendment. And such a holding would seem equally applicable in *Glidden*,

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183. Id. at 56.
184. Id. at 65.
185. Id. at 63.
186. Id. at 65.
188. 171 F. Supp. at 66.
in which federal jurisdiction was founded upon diversity of citizenship.\textsuperscript{190} Furthermore, whereas the Seventh Amendment right to jury trial is expressly conferred upon litigants, the tenure provisions in Article III can be read to relate solely to the distribution of powers within the federal government, thus creating personal rights only in judges rather than litigants. And such a reading of Article III would be bolstered by the fact that trials in federal courts may be presided over by interim judges, who would not only lack life tenure, but might not receive any salary at all if not confirmed.\textsuperscript{191}

But whether or not the right to be tried before a judge with constitutional tenure is considered inconsequential when viewed in the abstract—as it apparently was in \textit{Starling}\textsuperscript{192}—this right, like the twenty dollar lower limit on civil jury trials,\textsuperscript{193} the right to grand jury indictment,\textsuperscript{194} and the right to be tried in the state and previously ascertained district wherein an alleged crime shall have been committed,\textsuperscript{195} is embodied in the basic law of the land. And since the holding in \textit{Bombolis} has not eliminated the Seventh Amendment requirement in federal courts,\textsuperscript{196} there is no reason to assume that lack of a right to judges with Article III tenure in state courts should alter any rights which a litigant such as Glidden might have in federal courts. Furthermore, the possibility of an interim judge need not militate against such a right, since Article III could also be construed to give a right to a judge with constitutional tenure in all cases except for interim appointments which are specifically provided for in the Constitution.\textsuperscript{197}

Even if Article III is held not to give civil litigants rights to a judge with tenure, however, the result might differ in a criminal case. Assuming the proposition that the Congress could vest jurisdiction of federal crimes in state courts,\textsuperscript{198} there are grounds for believing that the reasoning of the

\textsuperscript{190} \textit{Glidden} was removed to the federal District Court from the New York Supreme Court. Zdanok v. Glidden Co., 288 F.2d 99 (1961).


\textsuperscript{192} See notes 185-86 supra and accompanying text.

\textsuperscript{193} U.S. Const., amend. VII.

\textsuperscript{194} U.S. Const., amend. V.

\textsuperscript{195} U.S. Const., art. III, § 2 (cl. 3) ; amend. VI.

\textsuperscript{196} Indeed, federal procedure will apply even as to a state-created right tried in a federal court, and even in the absence of a federal statute overriding the state procedure, and even, despite \textit{Erie R.R. v. Tompkins}, 304 U.S. 64 (1938), where the state procedural practice is of some importance to the determination of the case. Byrd v. Blue Ridge Rural Elec. Co-op, 356 U.S. 525 (1958) ; Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960).

\textsuperscript{197} “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” U.S. Const., art. II, § 2 (cl. 3). See United States v. Allocco, (S.D.N.Y., filed Dec. 1, 1961, No. 27324). To be sure, the words of the Constitution do not provide in explicit terms that recess appointees shall sit before they are confirmed. But what else could the words mean?

Bifurcation case would not be extended, and that in the exercise of such jurisdiction the state courts would have to accord the accused constitutionally guaranteed procedural rights, such as the Article III, section 2 and Sixth Amendment right to a jury trial.\textsuperscript{199} Given the present-day priority of personal over property rights,\textsuperscript{200} furthermore, the Court might well distinguish between civil and criminal cases even in connection with the right to a judge with tenure.\textsuperscript{201} The practical reasons for such a distinction are clear. In most civil cases—and especially in those between private parties—lack of life tenure is less apt to affect the impartiality of the judge than in criminal cases, where the government is always a party,\textsuperscript{202} and where popular emotions are more apt to assume significant proportions.

Because Benny Lurk committed his robbery in the District of Columbia, his trial could not be held in a state court, and his rights under the federal constitution were therefore vouchsafed him. But it seems absurd to give those accused of federal crimes in the District of Columbia superior rights to those accused of federal crimes in the several states, in whose interest, if in any litigant’s interests, the constitutional safeguards were established.\textsuperscript{203} Finally, the result of finding a right for criminal but not for civil litigants, in constitutional words which seem to apply generally,\textsuperscript{204} seems no more anomalous than the result achieved by Bombolis of finding rights for litigants in federal courts in both state and federal causes of action, but not for litigants in state courts even in federal causes of action, in words which seem to be equally general.\textsuperscript{205}

Even in connection with civil litigants, however, the question of a constitutional right to a judge with Article III tenure is certainly not foreclosed. All lower federal courts are created by the Congress. And it seems difficult to argue that even the Keller case—which established the doctrine of Article I congressional power over District of Columbia courts\textsuperscript{206}—should be read to have freed the Congress from constitutional strictures; just as the plenary

\textsuperscript{199} See text at notes 210-17 infra.
\textsuperscript{202} The government is likewise always a party in the Customs Court, Court of Customs and Patent Appeals, Court of Claims, and the Tax Court providing a similar justification for requiring judges in those courts to have life tenure.
\textsuperscript{203} But cf. the plurality view in Tidewater, note 59 supra and accompanying text; and the O’Donoghue argument, note 35 supra and accompanying text. If the due process clause of the Fifth Amendment incorporates equal protection prohibitions, however, see Bolling v. Sharpe, 347 U.S. 497 (1954), then acceptance of the Tidewater and O’Donoghue rationales might be held to deny equal protection under the laws to citizens of the several states. See note 59 supra and the discussion of United States v. Starling at notes 182-88 supra.
\textsuperscript{204} U.S. Const., art. III, § 1.
\textsuperscript{205} U.S. Const., amend. VII.
\textsuperscript{206} See note 37 supra and accompanying text.
power of a state legislature over its judicial system is bounded by the limits of the state constitution, so the Congress—when they create federal *nisi prius* bodies—should be held to the limitations of the national constitution. *Cohens v. Virginia* and at least five Justices in *Tidewater* would apply this test even where the Congress legislates for the District. *A fortiori* such limitations should be held to apply whenever the Congress creates courts which are national in scope.

It seems important to note, in this connection, that Justice Jackson, writing for the plurality of three in *Tidewater*, carefully pointed out that fundamental rights of litigants were not involved in that case. Rather, what was involved both in *Tidewater* and in *Keller* was the permissible scope of congressional power over the lower federal courts. And in *O'Donoghue*—in which litigants' rights formed an explicit ground for decision—a widened scope in terms of functions was accompanied by a continuation of constitutionally guaranteed rights. Support for a constitutional right to be tried by a judge with tenure may also be gleaned from the continued expansion of procedural rights in analogous areas. Thus, on the basis that the proceedings objected to would deny petitioners such constitutional rights as grand jury indictment, jury trial, and a judge with life tenure, the Supreme Court, in *Toth v. Quarles* and *Reid v. Covert* refused to permit the extension of court-martial jurisdiction over discharged military personnel and over civilians accompanying military forces overseas. Similarly, the landmark case of *Wong Yang Sung v. McGrath* embodies a quasi-constitutional interpretation of the Administrative Procedure Act which may well result in the application of continually expanding procedural safeguards to the administrative process.

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207. This is the distinction upon which the difference between constitutional tenure and lesser tenures should rest. When the whole case can be brought *de novo* in a higher court, there is no reason for finding that Article III judicial power is vested in Justice-of-the-Peace courts, police courts, small claims courts, etc. See Comment, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 Colum. L. Rev. 133, 152-53 (1962).


209. The argument made against the assumption that the Congress could provide nationwide service of process in the *Tidewater* situation was that the Congress—in legislating for the District of Columbia—was dealing with essentially local matters. This both the plurality of three and Chief Justice Vinson and Justice Douglas vigorously denied. 337 U.S. at 600-01, 623.

210. 337 U.S. at 585.

211. See text at notes 35-39 supra.


214. 354 U.S. 1, 21, 36 (1957).


The Constitution contains a complex of rights accorded those who appear before "courts." While these rights are not readily applicable to bodies exercising legislative or executive discretion, they become increasingly possible of effective application as the body's rules of procedure become increasingly formalized. The argument presented here is that as each of these constitutional rights accorded litigants becomes possible of ready application,²¹⁸ the body involved should in that respect be regarded as an Article III court. This is not meant to imply that under such a view the Congress could create administrative review bodies—such as the Interstate Commerce Commission—only under the aegis of Article III. Rather, what is suggested is simply that such bodies will—either through legislative mandate or through internal development—come to apply an increasingly definite complex of general rules to the succession of specific controversies coming before them.²¹⁹ And as they do, increasing weight will be accorded to their findings in specific cases by other governmental bodies, including the courts, and so their decisions will become increasingly less open to review.²²⁰

The process described above—paralleling the English experience in the common law courts²²¹—is, of course, the growth of the rule of law. And just as the line between constitutional and legislative should not be used hamstring congressional control over the lower federal courts,²²² so that boundary should not be regarded as a barrier to the assertion of a litigant's constitutional rights. If Article III cases and controversies constitute too narrow a specification to encompass all the manifold judicial duties of a modern government, those categories must be thus far inadequate as a measure of the scope of constitu-

²¹⁸. See e.g., discussion in text concerning the present ease of application of Article III tenure to judges of territorial courts, at notes 15-17 supra.

²¹⁹. Thus, in the oral argument of the *Lurk* case in its second appearance before the Supreme Court, Justice Black enquired, "How are proceedings before the I.C.C. any less judicial than before this Court? Is a reparation suit judicial in nature? What is left out?" 30 U.S.L. Week at 3262, 3263.


²²¹. See text at note 132 supra.

²²². See text notes 152-58 supra.
tional rights. Whether Congress declare a court constitutional or legislative, in short, it is an inferior federal court. And as it develops increasingly judicialized procedures for application to specific controversies, the procedural rights vouchsafed to the litigant by the federal constitution must begin to apply. To hold otherwise would be to deprive citizens of a safeguard made increasingly necessary by an equally increasingly necessary expansion of government services.