Note

The Seventh Amendment and Employee Safety—Conflicting Values?

A Review of Atlas Roofing Co. v. Occupational Safety and Health Review Commission

William Zisko†

_in Atlas Roofing Company, the Supreme Court denied the right of jury trial where the federal government imposes a civil penalty through a Congressionally-appointed administrative body. The author examines the constitutional justification and implications of the decision in an attempt to clarify important questions involving legislative court jurisdiction, the law/equity distinction, and the limits of administrative sanction._

I

Introduction

Confronted with alarming employee health statistics,¹ Congress enacted the Occupational Safety and Health Act of 1970,² a comprehensive program to preserve one of the nation’s most valuable resources—employees. The Act has been characterized as a “seemingly unique piece of legislation”³ and a blueprint for administrative regulation of the future.⁴ The Occupational Safety and Health Administration (OSHA) was created within the Department of Labor to enforce

† B.A. 1975, San Diego State University; J.D. 1978, University of California, Berkeley.

1. These statistics indicated there were 14,000 job related employee deaths per year, nearly 2.5 million workers disabled, and ten times as many worker days lost through employment related disabilities than through strikes. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEPT. OF LABOR, ALL ABOUT OSHA (1976). See also S. REP. No. 1282, 91st Cong., 2d. Sess. 2 (1970) reprinted in [1970] U.S. CODE CONG. & AD. NEWS 3, 5177.


this major piece of legislation. Since its inception, OSHA has been a zealous enforcer. From April 1971 to April 1975, OSHA issued 155,827 citations, assessing penalties totalling $20,173,820.5

Constitutional challenges and limitations are virtually inevitable in the enactment and enforcement of a program of such comprehensive scope.6 Perhaps this should be the case; however important the need for employee safety, the preservation of constitutional mandates should be paramount. One of the more significant constitutional challenges to the Act was laid to rest recently by the United States Supreme Court in Atlas Roofing Co. v. Occupational Safety and Health Review Commission.7 The Court held that the Act did not contravene the seventh amendment’s guarantee of a civil jury trial when it provided for the enforcement of civil penalties by an administrative body. The purpose of this note is to acquaint the reader with the Act’s enforcement scheme and to analyze the impact of the Atlas decision on the constitutional position of the Occupational Safety and Health Review Commission (hereinafter called the Commission) and the scope of the seventh amendment.

The issues raised by the Atlas decision involve the utilization of so-called administrative agencies as quasi-judicial bodies. The issues are basic to our constitutional structure, yet are some of the most difficult areas of the law today. Unfortunately, the Supreme Court has yet to directly confront the constitutional issues involved and provide a sound, definitive resolution. An exhaustive study of the implications of the Atlas decision is a difficult task in a somewhat uncharted area of the law. Hopefully, the analysis here will crystallize the issues and provide a few basic answers to the questions raised.

---

5. 5 OCC. SAFETY & HEALTH REP. (BNA) 155 (1975).
6. The Act has been the subject of numerous constitutional challenges. The seventh amendment challenge is the subject of this Note. The Act has also been attacked as a purely penal statute which fails to provide criminal procedural safeguards. The prevailing view in the federal appellate courts has been to characterize the monetary penalties as civil in nature. See, e.g., Atlas Roofing Co. v. OSHRC, 518 F.2d 990, 1000-09 (5th Cir. 1974), cert. denied on this issue, 424 U.S. 964 (1976); Clarkson Constr. Co. v. OSHRC, 531 F.2d 451, 455 (10th Cir. 1976); American Smelting & Refining Co. v. OSHRC, 501 F.2d 504, 515 (8th Cir. 1974); Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974); Brennan v. Winters Battery Mfg. Co., 531 F.2d 317, 325 (6th Cir. 1975), cert. denied, 425 U.S. 991 (1976). The commentators have taken a contrary position. See, e.g., Comment, OSHA: Employer Beware, 10 Hous. L. Rev. 426 (1973); Comment, OSHA Penalties: Some Constitutional Considerations, 10 IDAHO L. REV. 223 (1974). For a general discussion of civil and criminal fines are Charney, The Need for Constitutional Protections for Defendants in Civil Penalty Cases, 59 CORNELL L. REV. 478 (1974).

The provisions of the Act have been criticized by one commentator as being too vague. IDAHO Comment, supra. The Act’s provisions have also been challenged for their “chilling effect” on the right to appeal. See note 19 infra. Additional challenges will be set forth in this Note at more appropriate places.
II

BACKGROUND

The Act is applicable to all nongovernmental employers engaged in business affecting interstate commerce and was designed "to assure, so far as possible, every working man and woman in the Nation safe and healthful working conditions, and to preserve our human resources." To achieve this purpose, the Act does not attempt to alter traditional employer-employee relations. Congress chose instead to impose two new duties on the employer: 1) to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm" (general duty clause), and 2) "to comply with health and safety standards promulgated by the Secretary of Labor."

The Act authorizes the Secretary's appointed inspectors, upon presentation of appropriate credentials, to enter employment sites at any reasonable time and in any reasonable manner. The inspectors are authorized to examine the worksite, to compel the testimony of witnesses and the production of evidence under oath, and to demand the production of employee safety records required by the Act. An inspector who detects a possible violation is authorized to issue a citation fully describing the violation and providing a reasonable time period for abatement. The inspector may also assess a criminal or civil monetary penalty against the employer, notifying the employer by certified mail that a penalty is to be imposed.

8. 29 U.S.C. § 651(b) (1970); see also Lee Way Motor Freight v. Secretary of Labor, 511 F.2d 864, 867 (10th Cir. 1975); American Smelting & Ref. Co. v. OSHRC, 501 F.2d 504, 505 (8th Cir. 1974).
10. Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1084 (7th Cir. 1975); Cape & Vineyard Div. v. OSHRC, 512 F.2d 1150.
14. Employees believing a violation to exist may request an inspection by giving notice to the Secretary. 29 U.S.C. § 657(f) (1970).
15. 29 U.S.C. § 657(a), (b), (c) (1970).

Dollar amounts of the penalties vary and should be dependent upon the size of the business, gravity of the violation, employer's good faith, and history of prior violations. 29 U.S.C. § 666(i)
An employer desiring to contest the propriety of a citation, abatement period, or penalty must notify the Secretary within fifteen working days. Failure to contest the citation order results in the order becoming final and nonreviewable by operation of law. A contested order is stayed until proceedings before the Commission are concluded, unless the Commission determines the employer's actions to be a bad faith attempt to avoid or delay the abatement period or the payment of the penalty.

The Act provides the employer with an evidentiary hearing before the Commission pursuant to the provisions of the Administrative Procedure (1970). Willful and repeated violations carry a penalty up to $10,000 per violation. 29 U.S.C. § 666(a) (1970). In addition, for a willful violation involving the death of an employee, 29 U.S.C. § 666(e) (1970) allows a criminal penalty of six months imprisonment or a $10,000 fine or both. Undefined in the Act, “willful” has been defined by the Third Circuit as “defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission—it involves an element of obstinate refusal to comply.” Frank Irey Jr., Inc. v. OSHRC, 519 F.2d 1200, 1207 (5th Cir. 1974). See also F. X. Missina Constr. Corp. v. OSHRC, 505 F.2d 701, 702 (1st Cir. 1974).

Serious violations carry penalties of up to $1,000 per violation. 29 U.S.C. § 666(b) (1970). The Act defines a serious violation as existing when a “substantial probability that death or serious physical harm could result . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the violation.” 29 U.S.C. § 666(f) (1970). See also California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986, 988 (9th Cir. 1975); Brennan v. OSHRC (Republic Creosoting Co.), 501 F.2d 1196, 1199-1200 (7th Cir. 1974).

Non-serious violations may involve a penalty of up to $1,000 per violation. 29 U.S.C. § 666(c) (1970). For de minimus violations the Secretary may issue a notice in lieu of a citation. 29 U.S.C. § 658(a) (1970).

If the employer fails to abate the condition within the allotted period, nonabatement penalties of up to $1,000 per day may be assessed. 29 U.S.C. § 666(d) (1970). Nonabatement penalties are contestable before the Commission in the same manner as any other citation or penalty. 20 U.S.C. § 659(b) (1970). See also Lake Butler Apparel Co. v. Secretary of Labor, 519 F.2d 84, 86-87 (5th Cir. 1975).

17. 29 U.S.C. § 659(a) (1970). The employer must also notify all concerned employees, 29 C.F.R. § 2200.7(g) (1976), or their authorized representative, 29 C.F.R. § 2200.7(f) (1976). Upon receipt of notice of contest, the Secretary must file a complaint with the Commission within 29 days, 29 C.F.R. § 2200.33(a) (1976). The employer must file an answer within 15 days after receipt of the complaint, 29 C.F.R. § 2200.33(b) (1976).

18. 29 U.S.C. § 659(a) (1970). Absent timely notice of contest or petition for review to the court of appeals, the Secretary has the authority to seek a summary decree entering the order by the court of appeals and institute contempt proceedings to enforce the order. 29 U.S.C. § 660(b) (1970).

19. 29 U.S.C. §§ 659(b), 666(d) (1970). The potential for a retroactive nonabatement penalty assessment has been unsuccessfully challenged as a violation of due process. The challenge contends that the “chilling effect” of the possibility of such penalty inhibits the free exercise of the right to appeal. See, e.g., Dan J. Sheehan Co. v. OSHRC, 520 F.2d 1036, 1040 (5th Cir. 1975), cert. denied, 424 U.S. 965 (1976). See also, Note, Due Process and Employee Safety: Conflict in OSHA Enforcement, 84 YALE L.J. 1380 (1975).

The Brief for the Respondents (government) in Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977), at 8 n.3, indicates that “neither the Secretary nor the Commission has ever attempted to impose such a retroactive penalty.” The absence of such an attempt frustrates review of the alleged “chilling effect” provision as a court could find an employer challenge to lack standing.

20. The Commission is established pursuant to 29 U.S.C. § 661(a) (1970) and is to be an
procedure Act. At the conclusion of the hearing, the Commission shall issue an order either affirming, modifying, or vacating the proposed penalty or abatement order. Unless review is requested by either the employer or the Secretary of Labor within sixty days, the Commission's decision becomes final by operation of law. An appeal does not operate as a stay of the Commission's decision unless so ordered by the appellate court. Review is limited to the "substantial evidence" test; the findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, are conclusive. The appellate court decision is reviewable by the United States Supreme Court by writ of certiorari.

Once an order is final, civil penalties may be recovered by the Secretary in federal district court, where neither the fact of the violation nor the propriety of the penalty may be retried. The Secretary is also authorized to seek injunctive relief in the district court to restrain conditions or practices which could reasonably be expected to cause death or serious physical harm before the enforcement procedures otherwise provided for by the Act could be concluded.

The Commission is composed of three members with six-year terms appointed by the President by reason of their training, education and experience. Initially, the hearing is conducted before an administrative law judge appointed by the Commission. The judge's decision becomes final in 30 days unless discretionary review is granted by a Commissioner. All proceedings are "of record" and, unless the Commission orders otherwise, in accordance with the Federal Rules of Civil Procedure. The Secretary has the burden of proof by the preponderance of the evidence. The Commission (administrative law judge) is given the authority to assess penalties taking into account the size of the employer, serious nature of the violation, and history of prior violations. The Commission has asserted the power to increase the penalties and has been affirmed by the courts. The Commission is authorized to increase administrative law judge's penalty; REA Express, Inc. v. Brennan, 495 F.2d 822, 825 (2d Cir. 1974); Brennan v. OSHRC (Interstate Glass Co.), 487 F.2d 438, 442 (8th Cir. 1973). Contra, Dale M. Madden Constr., Inc. v. Hodgson, 502 F.2d 278, 281 (9th Cir. 1974) (approved in dicta a Commission decision that Commission lacked the power to increase penalties).
CONFLICTING VALUES

III
ATLAS ROOFING CO. v. OSHRC

A. Facts

Frank Irey, Jr., Inc. (hereinafter Irey) and Atlas Roofing Company (hereinafter Atlas) were cited for violations of standards promulgated by the Secretary after accidents occurred which resulted in employee deaths. The OSHA inspector imposed a $7,500 fine on Irey for a willful violation, levied a $600 fine on Atlas for a serious violation, and directed both employers to abate the unsafe conditions immediately. Both petitioners timely contested the Secretary’s order and denied any violation of the Act. Irey filed a motion to dismiss the complaint alleging that the enforcement procedures of the Act are unconstitutional since they deny cited employers the right to a jury trial, involve an unlawful delegation of power to the executive branch, and provide penalties that, though denominated civil, are in fact criminal in nature.

An administrative law judge denied the motion, affirming the existence of a willful violation, but reduced the penalty to $5,000. The Commission directed discretionary review and requested briefs on whether the penalty should be increased to $10,000. The Commission subsequently affirmed the administrative law judge’s decision.

Similarly Atlas moved to dismiss the complaint against it on the grounds that “OSHA is constitutionally defective because: 1) the civil penalties in OSHA are really penal in nature and call for the constitutional protections of the Sixth Amendment and Article III; 2) even if found to be a civil penalty, OSHA violates the Seventh Amendment because of the absence of a jury trial; and 3) this is a denial of the Fifth Amendment right to a ‘prejudgment’ due process hearing, since under OSHRECOM [Occupational Safety and Health Review Commission] orders are self-executing unless the employer affirmatively seeks review.”

The administrative law judge denied the motions for lack of jurisdiction and affirmed the existence of a serious violation and the amount of the penalty. By law, the judge’s order served as the final decision of the Commission.

Both petitioners timely petitioned for review in courts of appeals (Irey in the Third Circuit and Atlas in the Fifth Circuit). The Third Circuit, by majority vote, held the enforcement procedures constitutional against an article III and seventh amendment challenge, with the dissenting judge concluding that the Act violated the seventh amendment. The court remanded the case to the Commission, concluding that an incorrect definition of the term “willful” had been applied. The case

30. 518 F.2d 990, 992 (5th Cir. 1974).
was reargued before the Third Circuit en banc, which held, in a 6-4 decision, that in administrative adjudications such as the one presented here the seventh amendment is not applicable, and that Congress is free to use alternative enforcement schemes.31

The Fifth Circuit, however, held that OSHA fines were civil penalties, not penal sanctions, that it was within Congress’ power to commit jurisdiction over civil sanctions to an administrative agency, and that due process was satisfied by the hearing which is afforded prior to the imposition of a civil penalty.32

Petitioners sought review in the United States Supreme Court and certiorari was granted on the following question: “Assuming arguendo that such civil penalties and enforcement procedures are civil in nature and effect, whether such procedures deny the defendant employer his right to jury trial guaranteed by the Seventh Amendment to the Constitution.”33 The cases were consolidated for review.

B. Issue

A clear understanding of the jury trial issue is essential to a precise comprehension of the Atlas decision and its impact. The seventh amendment provides: “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .”34

The Atlas controversy centers on the meaning of the phrase “suits at common law” as it defines the scope of the amendment’s application.35 District Judge Fake, in United States v. Jepson,36 found that a suit by the government brought in district court to assess a civil penalty was the equivalent of an action for debt, in other words, a suit at common law within the meaning of the seventh amendment. Federal courts of appeals have also mandated a jury trial in suits by the government to assess a civil penalty when the action is commenced in a district court.37

32. Atlas Roofing Co. v. OSHRC, 518 F.2d 990 (5th Cir. 1974).
34. U.S. CONST. amend. VII.
35. Recent interpretations of the phrase “suits at common law” by the Supreme Court can be found in Perwell v. Southball Realty, 416 U.S. 363 (1973); Curtis v. Leother, 415 U.S. 189 (1973).
37. See, e.g., Judge Friendly’s discussion in United States v. J.B. Williams Co. 498 F.2d 414 (2d Cir. 1974).

There can be no doubt that in general “there is a right of jury trial when the United States sues . . . to collect a penalty even though the statute is silent on the right of jury trial,” S Moore, FEDERAL PRACTICE ¶ 38.31[1], (1971 ed.) at 232-33. The leading case supporting this proposition is Hepner v. United States, 231 U.S. 103 (1909) at 115 . . . United States v. Regan, 232 U.S. 37 at 43-44, 47 (1914). Many cases arising under a
The issue is whether Congress, by providing for fact-finding through the Commission and by limiting judicial review to the substantial evidence test, is able to remove the action from the scope of the seventh amendment. Does an employer have the right to a *de novo* jury trial on appeal from a Commission ruling before a civil penalty can be recovered by the Government? The *Atlas* Court answered this question in the negative. The more interesting question is why this is so.

**C. Holding**

A unanimous Court concluded that a jury trial was not required by the seventh amendment. Justice White summarized the holding as follows:

At least in cases in which "public rights" are being litigated—*e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.

The decision rests on two rationales: a "public rights" concept, and a theory of the inadequacy of the legal remedy. Whether the *Atlas* Court viewed these factors as distinct rationales, with each being sufficient to support the congressional action in question, or whether the decision rested upon their joint presence is not entirely clear. The Court's opinion begins by tracing the development of the "public rights" concept through a series of prior Supreme Court decisions. After quoting language from numerous decisions which establish the "public rights" concept, the Court states:

In sum, the cases discussed above stand clearly for the proposition that when Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury would...
be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law." 40

After apparently settling the issue, the Court then embarks on an analysis of the distinction between actions arising at law and those arising in equity, and states that the seventh amendment is also inapplicable because of the nature of the OSHA suit, which falls to equity since the remedy at law is inadequate. The Court states that historically whether an action was to be tried at law or in equity was dependent upon "whether courts of law supplied a cause of action and an adequate remedy to the litigant." 41 In essence, the Court's contention is that Congress has the power to transform a traditionally legal right or remedy enforceable by the government in district court 42 into an equitable right or remedy merely by finding the remedy at law inadequate to achieve some legitimate congressional objective. The Court maintained that the seventh amendment could not have destroyed Congress' power to create new public rights and remedies and to commit their enforcement, if it chose, to a non-juridical body such as an administrative agency, especially where available remedies are not protecting a legitimate congressional concern. As Congress found the common law and other existing remedies for work injuries which resulted from unsafe working conditions inadequate to protect the nation's workers, and created a structure to resolve the issues and protect the parties involved, the new remedy may be administrative. 43

Both the "public rights" and "inadequacy" factors may be present in any given situation, as was the case with OSHA, although presumably one factor could be present without the other. However, any indication that Congress could deny a jury trial outside the "public rights" context appears to be quickly laid to rest by the Court's unequivocal statement that prior Supreme Court decisions allow administrative fact-finding only in "public rights" contexts in which the government in its sovereign capacity is involved. 44 Thus, although the Court's "public rights" doctrine did not mention an inadequacy qualification, the Court's opinion could be interpreted to provide for the denial of a jury trial only when a "public right" has been enacted because the previous legal remedy was inadequate. But by the same token, the Court's opinion is sufficiently ambiguous that a lower court might interpret the decision to support the denial of a jury trial when either factor alone is

40. Id. at 455.
41. Id. at 458-59.
42. The Atlas opinion states: "[Oceanic Navigation Co.] indicated, as had Hepner v. United States . . ., that the Government could commit the enforcement of statutes and the imposition and collection of fines to the judiciary, in which event jury trial could be required . . ." Id. at 460.
43. Id. at 461.
44. Id. at 458.
present. This problem is not merely an academic one, since it is difficult to perceive any significant interrelationship between the two factors. The following discussion is an attempt to provide some insight into the "public rights" and equity doctrines, hopefully resolving some of the uncertainty generated by the Court's opinion.

IV
Analysis

The ambiguity of the Atlas holding that the seventh amendment is inapplicable to OSHA proceedings raises two basic constitutional questions.\(^\text{45}\) The first issue is whether a defendant has a constitutional right to a day in an article III court before being deprived of property. That is, does fifth amendment due process necessitate a trial before, and a decision by, an article III court employing all the substantive and procedural safeguards of the judicial process, including trial by jury where mandated, when the government attempts to impose a civil penalty.\(^\text{46}\)

A separate and distinct issue is the permissible scope of congressional control over the judicial process. Assuming arguendo that a defendant does have a right to a day in an article III court or that Congress gratuitously confers this privilege, the issue becomes whether Congress has the power to instruct article III courts on the judicial process. This question inherently involves aspects of the separation of powers and the constitutional mandates on judicial procedure.

A careful consideration and resolution of each issue provides insight into the Atlas decision and the scope of the Commission's authority. Implicit in the resolution of these issues is the distinction between article I and article III adjudicatory power. Article I adjudicatory power is said to exist when Congress, pursuant to its article I powers, delegates the authority to resolve controversies to a non-article III governmental body. Whether the quasi-article III power is exercised by an executive officer or by a tribunal (legislative court), the constitutional considerations are essentially identical, since the power derives from

---


46. Q. . . . Has a taxpayer got a constitutional right to litigate the legality of a tax or hasn't he?

A. . . . Personally, I think he has. But I can't cite any really square decision . . . The multiplicity of remedies, and the fact that Congress has seldom if ever tried to take them all away, has prevented the issue from ever being squarely presented. For example, history and the necessities of revenue alike make it clear the government must have the constitutional power to make people pay their taxes first and litigate afterward. Summary distraint to compel payment is proper . . . But these decisions all proceeded on the express assumption that the taxpayer had other remedies, that is, the taxpayer may elect to pay the tax and then litigate afterwards. \textit{Id.} at 334.

See also \textit{id.} at 336-37.
the same article I source.\textsuperscript{47} The exercise of article I adjudicatory power is to be distinguished from the exercise of an article III court incorporating an administrative body as a fact-finding adjunct.\textsuperscript{48}

\textbf{A. Article I Adjudicatory Power}

The concept of a legislative court exercising article I adjudicatory power was first introduced in American law by Chief Justice Marshall in \textit{American Insurance Co. v. Canter}.\textsuperscript{49} In \textit{Canter}, the question was whether a court established by the territorial legislature of Florida pursuant to power delegated by Congress could exercise admiralty jurisdiction. In upholding the jurisdiction of a legislative court created under article I against an article III attack, the Chief Justice answered:

Hence, it has been argued, that Congress cannot vest admiralty jurisdiction in courts created by the territorial legislature. We have only to pursue this subject one step further, to perceive that this provision of the constitution does not apply to it. The next sentence declares, that “the judges both of the supreme and inferior courts, shall hold their offices during good behavior.” The judges of the superior courts of Florida hold their offices for four years. \textit{These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States. 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. In legislating for them, congress exercises the combined powers of the general, and of a state government.}\textsuperscript{50}

Thus the concept of the legislative court was established in a territorial context, in which the absence of article III courts resulted in a situation

\begin{footnotes}
47. In exercising article I powers, Congress may elect to repose adjudicatory power in an executive officer or create a new tribunal. Congressional acts providing for the resolution of a controversy in a body other than an article III court have been justified as “necessary and proper” to the exercise of enumerated article I powers. In either context, the source of the power is the same, article I. Leading Supreme Court decisions have utilized cases arising in either context interchangeably.

48. See text accompanying notes 74-79 infra.


50. 26 U.S. 410, 415.
\end{footnotes}
where the Supreme Court refused to deny Congress the power to oversee resolution of a vast range of disputes.

The concept of article I adjudicatory power was next addressed in Murray's Lessee v. Hoboken Land Co.51 There the Court held that the federal Treasury Department could, in order to determine the revenue owed the government by a tax collector and to collect that amount, utilize a summary adjudicatory process without resort in the first instance to federal courts. The pertinent passage of Justice Curtis' opinion has been quoted extensively by subsequent Supreme Courts52 and commentators53 regarding the legislative court concept:

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.54

While Murray's Lessee expands the use of article I adjudicatory power from Justice Marshall's territorial context to federal executive departments, the most significant aspect of Justice Curtis' opinion is his discussion of the division of subject matter jurisdiction between article I and article III bodies. Justice Curtis attempts to define the limits of permissible article I jurisdiction by suggesting that this jurisdiction includes matters involving "public rights" triable in either an article I or an article III court, but excludes matters which are by their nature suits in common law, equity, or admiralty.55 Thus, within certain as yet undefined limits, Congress in its discretion can provide for the resolution of "public rights" controversies in either an article I legislative or an article III constitutional court. Both the concepts of "public rights" and concurrent subject matter jurisdiction have proved to be important in later decisions.

The Court, in Oceanic Navigation Co. v. Stranahan56 and Lloyd Sabando Societa v. Elting,57 upheld the exercise of article I adjudica-

51. 59 U.S. 272 (1855).
52. See, e.g., Glidden Co., 370 U.S. at 550-51; Atlas 430 U.S. at 451 n.8.
53. See, e.g., JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 80-90 (1965).
54. 59 U.S. at 284.
55. See Marshall's discussion in American Ins. Co. v. Canter, 26 U.S. 511, 546 (1828), in which the Chief Justice stated that admiralty jurisdiction can be exercised in the states only in an article III court.
57. 287 U.S. 329 (1932).
tory power by, respectively, the Secretaries of Commerce and of Labor for violations of immigration acts. These cases held that the secretaries, pursuant to summary adjudicatory procedures, could impose penalties to be collected by customs officials without resort to the judicial process. In rejecting an argument that the penalty must be exacted under the article III judicial power, Justice White, in *Stranahan*, concluded that it was well settled judicial construction that Congress, with regard to matters exclusively within its control, could provide for the imposition of money penalties without resort to the judicial power.\(^5\)

Against this background, the legislative court concept received its most extensive treatment in the controversy surrounding the Court of Claims and the Court of Customs and Patent Appeals. The result was a divided court decision in *Glidden Co. v. Zdanok*.\(^5\)

The Court of Claims had been held to be a legislative court in *Williams v. United States*,\(^6\) as had the Court of Customs and Patent Appeals in *Ex parte Bakelite Corp.*\(^6\) Congress subsequently declared its intention that both courts should be regarded as constitutional courts.\(^6\) The *Glidden* Court held in a five-two decision that both the Claims Court and the Customs and Patent Appeals Court were constitutional courts. However, the majority reached this result on two different rationales. Justice Harlan's plurality opinion, in which Justices Brennan and Stewart joined, recognized congressional intent as "persuasive evidence" of the character of the courts, but went on to hold that the two courts had been constitutional courts from their inception, thus overruling *Williams* and *Bakelite*. Justice Clark's concurring opinion, in which Chief Justice Warren joined, did not go so far as to declare *Williams* and *Bakelite* erroneous, but instead relied on the congressional declarations of intent and held the courts constitutional as of the enactment of the respective congressional intent statutes.

The concept of article I adjudicatory power has received neither extensive nor consistent treatment in the Supreme Court.\(^6\) This is par-

---

5. Justice White stated:

> In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matter exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.

214 U.S. at 339.


60. 289 U.S. 533 (1933).

61. 279 U.S. 438 (1929).


63. "The distinction referred to . . . between 'constitutional' and 'legislative' courts has been
CONFLICTING VALUES

particularly apparent where the characterization of a tribunal as a legislative court has been at issue. While the concept of a legislative court has yet to be overruled, its existence has been restricted. Serious constitutional problems have arisen with Congress' attempt to create an alternative source of federal judicial power in courts outside the article III guidelines. At the outset, the legislative court concept comes into conflict with the notion of a separation of powers in the federal government. For example, if Congress attempted to delegate all federal question cases from constitutional to legislative courts, Congress would in effect be subverting article III judicial courts to article I legislative tribunals.

Such action would go far beyond the recognized bounds of the legislative court concept, which has been thus far limited to contexts involving the government as a sovereign plaintiff or defendant or involving tribunals in United States territories. But the fact that Congress has not attempted such a blatant transfer of power does not preclude the possibility. Under the notion of article I adjudicatory power the proposal is theoretically possible: "‘Public right’ is an alchemical concept which with a little legerdemain can be used to transmute nearly every controversy into ‘one involving public rights’." "Murray's Lessee" suggests that Congress could not constitutionally deprive a private plaintiff of access to a constitutional court, but the decision affords little protection to defendants. Any delegation of adjudicatory power to legislative courts erodes the independence of the federal court system which was considered essential by the framers of the Constitution, since the article III protections afforded to the judiciary and its judges are, by definition, inapplicable to article I courts. The language of the Constitution itself brings into question the legitimacy of article I courts, for the Constitution read as a whole seems to indicate that article III is the sole source of federal judicial power. Article I,
section VIII, clause 9, establishing congressional power "to constitute tribunals inferior to the Supreme Court," refers only to the creation of constitutional courts under article III and has been so interpreted.70

The constitutional support for article I courts has thus far been found only in congressional power to do what is "necessary and proper" in carrying out other enumerated powers, except for the territorial courts which derive their power from a "necessary and proper" interpretation of article IV, section III, clause 2. Although Congress has plenary power over the jurisdiction of article III courts and can abolish such courts by withdrawing all of their jurisdiction, this does not legitimate article I courts, but rather addresses the "balance of power" between state and federal governments. As noted by Professor Crowin, the concept of judicial power, or the power to decide a case, is distinct from jurisdiction, or the authority of a court to exercise judicial power in a given case.71 Thus Congress' power over the jurisdiction of article III courts does not carry with it a concomitant power to invest other tribunals with judicial power.

The constitutionality of legislative courts is further drawn into question, both by the provisions in article III, section II that the jurisdiction of constitutional courts extends to all cases arising under the laws of the United States or controversies to which the United States is a party72 and by Chief Justice Marshall's declaration in *Canter* that legislative courts are incapable of receiving judicial power.73 Chief Justice Marshall also stated in *Hodgson v. Bowerbank*74 that article III constitutional courts could not exercise power beyond that defined in article III, the constitutional dilemma is clearer still when Congress attempts to provide for judicial review of a legislative court decision. This quandary was addressed by Justice Curtis, who determined in *Murray's Lessee*, that legislative and constitutional courts exercise concurrent subject matter jurisdiction. Thus, some actions may be capable of either constitutional or legislative court resolution, and a constitutional court is not barred from entertaining an appeal from a legislative court decision.

---


71. "Judicial" is the power to decide "cases" and "controversies" in conformity with law and by the methods established by the usages and principles of law. It should not be confused with "jurisdiction," which is the authority of a court to exercise "judicial power" in a particular case. The Constitution vests the "judicial power" in the Courts; Congress cannot, of course, change that. But as shown below, Congress has considerable power under the Constitution to define the "jurisdiction" of the courts.


74. 9 U.S. 169 (1809).
The concept of a legislative court has not been free from attack by the commentators, and the Supreme Court would be on safer constitutional ground in restricting, rather than expanding, the concept. The problem would be better resolved if Congress created article III courts with limited jurisdiction (e.g., the Court of Claims) to provide for controversies arising in circumstances where Congress feels that the federal district courts are inadequate.

B. Constitutional Courts and Administrative Adjuncts

Unlike article I tribunals which are of questionable constitutional validity, article III courts are expressly provided for in the Constitution. One method of assisting article III courts in the performance of their duties was the development of specialized administrative adjuncts. The utilization of an administrative body as a fact-finding adjunct to an article III constitutional court was introduced by Chief Justice Hughes in *Crowell v. Benson*. That case presented the Court with procedural adjudicatory provisions under the Longshoremen's and Harbor Workers' Compensation Act which are similar to the instant Act's provisions. The Longshoremen's Act provided for resolution of private disputes in admiralty by a deputy commissioner whose decisions were enforceable in federal district court by the deputy commissioner or by the beneficiary of the award, provided that the award was made in accordance with the law. After discussing *Murray's Lessee* and the "public rights" concept, Chief Justice Hughes concluded:

The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined. But in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact [even] in constitutional courts shall be made by judges.

---

75. See sources cited notes 65 & 70 supra.
76. The argument for the existence of a legislative court is stronger in the territorial context. State courts are nonexistent in the territories, and Congress must provide a forum for the resolution of disputes normally falling under state court jurisdiction. Also, the temporary nature of territorial courts necessitates judges without life tenure.
78. This limited solution would at least avoid constitutional problems like the following: "Perhaps the right to a jury trial does not require that the court to which the jury is an adjunct be an 'Article III' court. But it is questionable that a jury attached to an administrative agency... would satisfy the Constitution..." JAFFE, supra note 53, at 90.
81. 285 U.S. at 50-51. Chief Justice Hughes' discussion is also quoted in the *Atlas* opinion, 430 U.S. at 452.
82. 285 U.S. at 51.
Justice Hughes' genius was evidenced by the way in which he justified the constitutionality of the administrative fact-finding provisions of the Longshoremen's Act. He concluded that jurisdiction remained with the federal district court sitting in admiralty. The role of the deputy commissioner was that of a fact-finding adjunct, analogous to juries and to special masters already utilized by federal district courts. In providing for administrative fact-finding by the admiralty adjunct, Justice Hughes was careful to set forth guidelines for the exercise of this device. Administrative findings of constitutional or jurisdictional facts must be tried de novo in district court, and questions of law (sufficiency of evidence being a question of law) cannot be withdrawn from consideration by the district court. After construing the provisions of the Longshoremen's Act to fall within these guidelines, Justice Hughes upheld the procedure exercised under article III jurisdiction. In so resolving the issue, he emphasized that article III judicial safeguards, including the right to jury trial, were not being undermined.83 The use of a fact-finding adjunct was also upheld against a seventh amendment challenge in Crowell, solely on the basis that the amendment by its terms is inapplicable to cases arising in admiralty. In sum, Crowell, although it did not involve article I adjudicatory power, is a landmark decision on the use of administrative fact-finders by an article III constitutional court.84

The confusion which has resulted from a lack of precision by the Supreme Court and the Congress in this area of the law is exemplified by two additional decisions discussed by the Atlas Court: NLRB v. Jones & Laughlin Steel Corp.85 and Block v. Hirsh.86

In Atlas, Justice White, relying on dictum in Curtis v. Loether87 and Pernell v. Southall Realty,88 concluded that the Jones & Laughlin Steel decision stands for the proposition that the seventh amendment is inapplicable when Congress delegates "the factfinding function under a

---

83. 285 U.S. at 48-54.
84. See JAFFE, supra note 53, at 88-89. Professor Jaffe comments:

The surprising conclusion, achieved by something of a tour de force, was that the jurisdiction had not been "withdrawn" from the courts. . . .

The phrase "the reservation of legal questions is to the same court, etc." is a neat way of insinuating that the reviewing court (a district court in this case) is a trial court in admiralty sitting with a fact-finding adjunct . . . . The essence rather of the judicial power is the control exercised by the court in testing the "reasonableness" of the findings of fact and in determining the law. . . .

Chief Justice Hughes' opinion in Crowell v. Benson, his rationalization of the jurisdiction of administrative agencies, was a major achievement.

Id. at 88-89 (emphasis in original).
85. 301 U.S. 1 (1937).
86. 256 U.S. 135 (1921).
new statute to an administrative tribunal.\textsuperscript{89} The Supreme Court in \textit{Jones & Laughlin Steel} was faced with a statute enacted under the interstate commerce clause providing for the resolution of unfair labor practice disputes by the National Labor Relations Board and empowering that body to order reinstatement and to award back pay if warranted. After an extensive discussion of the interstate commerce power issue, the Court disposed of the seventh amendment issue in only two paragraphs. The entire disposition reads:

Respondent complains that the Board not only ordered reinstatement but directed the payment of wages for the time lost by the discharge, less amounts earned by the employee during that period. This part of the order was also authorized by the Act, §10 (c). It is argued that the requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The Amendment thus preserves the right which existed under common law when the Amendment was adopted. \textit{Shields v. Thomas}, 18 How. 253, 262; \textit{In re Wood}, 210 U.S. 246, 258; \textit{Dimick v. Schiedt}, 293 U.S. 474, 476; \textit{Baltimore & Carolina Line v. Redman}, 295 U.S. 654, 657. Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. \textit{Clark v. Wooster}, 119 U.S. 322, 325; \textit{Pease v. Rathbun-Jones Engineering Co.}, 243 U.S. 273, 279. \textit{It does not apply where the proceeding is not in the nature of a suit at common law. Guthrie National Bank v. Guthrie}, 173 U.S. 528, 537.

The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit.\textsuperscript{90}

The \textit{Atlas} Court refers to only a portion of this analysis in the \textit{Jones & Laughlin Steel} decision. The Court’s attempt to distinguish away the entire first paragraph in note ten of the \textit{Atlas} opinion seems entirely inadequate, considering that paragraph’s consistency with prior opinions in this area of the law. This is notable because the author of the \textit{Cowell} opinion, Chief Justice Hughes, also wrote the \textit{Jones & Laughlin Steel} opinion, and there is no indication that the Chief Justice departed from his prior reasoning while writing \textit{Cowell}. Arguably the \textit{Jones & Laughlin Steel} decision stands for nothing more than the proposition that an article III court can utilize an administrative fact-

\textsuperscript{89} 430 U.S. at 453.
\textsuperscript{90} 301 U.S. at 48-49 (emphasis added).
finding adjunct when the seventh amendment is inapplicable, *i.e.*, "in a case where recovery of money damages is incident to equitable relief."91

The *Atlas* Court also cited *Block* in support of its assertion that when Congress creates new statutory public rights it may assign their adjudication to an administrative agency proceeding, with which a jury trial would be incompatible.92 In *Block*, Justice Holmes sustained a temporary federal statute passed under the war power in an attempt by Congress to deal with an emergency housing shortage in the District of Columbia during World War I. The statute ordered landlords to allow tenants to hold over upon expiration of their leases at rates to be set by a fact-finding commission. After holding the statute a valid exercise of congressional power, Justice Holmes summarily dismissed the seventh amendment issue as follows:

The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land. If the power of the Commission established by the statute to regulate the relation is established, as we think it is, by what we have said, this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable. *While the act is in force there is little to decide except whether the rent allowed [by the Commission] is reasonable, and upon that question the courts are given the last word.* A part of the exigency is to secure a speedy and summary administration of the law and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision. . . .93

While the uncertainty in *Block* cannot be resolved in the same manner as in *Jones & Laughlin* (finding the money damages incident to equitable relief), the most likely interpretation is that article III courts retained jurisdiction, and that the suspension of the legal remedy therein, placing the matter outside the purview of the seventh amendment, was a proper exercise of Congressional plenary power over the District of Columbia during an emergency situation.

Since Justice Holmes' decision in *Block* predates Justice Hughes'
rationale in *Crowell*, great difficulty is encountered in attempting to determine whether Holmes viewed the Commission as a legislative court or as something similar to Hughes' fact-finding adjunct. The most likely interpretation is that if Holmes considered the issue at all, he thought that the case fell within article III jurisdiction and that the temporary deprivation of a constitutional right was justified by the emergency housing shortage. As he states in the opinion, "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." Any real expansion of the "public rights" doctrine into the private landlord-tenant rights sphere would have merited greater enunciation and presumably some reference to decisions such as *Canter* and *Murray's Lessee*.

Certainly, a careful analysis of the precedent reveals the existence of two distinct repositories of federal adjudicatory power—article I and article III bodies. Notwithstanding the troublesome constitutional issues, article I adjudicatory power exercised through executive departments and legislative courts has yet to be overruled. In light of the *Atlas* Court's approving reference to landmark article I decisions, the concept must still be considered viable. However, under the legal thinking prior to *Atlas*, the classification of the Commission as a legislative court would not have settled the jury trial issue. The seventh amendment had been held applicable in the legislative court context. The

---


95. An argument to the contrary could be made premised on the following quote from Holmes:

> The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. 256 U.S. at 155.

> The argument being advanced in that great public concern elevates private matters to public rights and hence justifies the existence of a legislative court. However, this public rights language does not appear in reference to the seventh amendment and is directed primarily at an attack against the constitutionality of the congressional interference with private property by depriving landlords of property without due process of law in the private sphere.

96. The seventh amendment is applicable to legislative courts in the territorial context. *Rasmussen v. United States*, 197 U.S. 516, 521 (1905); *Black v. Jackson*, 177 U.S. 349, 363 (1899). Justice Harlan commented on the applicability of the seventh amendment to legislative courts in *Glidden Co.*, 370 U.S. at 572:

> A preliminary consideration that need not detain us long is the absence of provision for jury trial of counterclaims by the Government in actions before the Court of Claims. ... The legitimacy of that nonjury mode of trial does not depend upon the supposed "legislative" character of the court. It derives instead . . . from the fact that suits against the Government, requiring as they do a legislative waiver of immunity, are not "suits at common law" within the meaning of the Seventh Amendment.

*See also* *Thompson v. Utah*, 170 U.S. 343, 346 (1898).
Atlas Court’s reliance on article I decisions, in which the seventh amendment was not put in issue, is misplaced.\textsuperscript{97}

C. Inadequate Legal Remedy and Jury Trials

In the concluding paragraphs of the opinion, the Atlas Court provides a wholly independent alternative rationale supporting the inapplicability of the seventh amendment. The seventh amendment by its terms is inapplicable to actions arising in equity or admiralty. The distinction between actions arising in law versus equity has been the subject of landmark Supreme Court decisions in the seventh amendment area.\textsuperscript{98} Prior to Atlas, the prevailing view was that the application of the seventh amendment was dependent on the nature of the relief sought rather than on the form of the action\textsuperscript{99} or on the forum in which it was presented.\textsuperscript{100} The seventh amendment did not simply freeze the right to jury trial as it existed in 1791; it allowed extension of that right “beyond the common-law forms of action recognized at that time,” including newly created statutory causes of action.\textsuperscript{101}

Even as recently as 1974, the Supreme Court stated:

Whether or not a close equivalent . . . existed in England in 1791 is irrelevant for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty.\textsuperscript{102}

The Supreme Court had even declared that the seventh amendment required that, in actions involving elements of both law and equity, the trial of the legal issues incorporating a jury take precedence over the trial of the equitable issues by a judge.\textsuperscript{103}

\textsuperscript{97} The Atlas Court attempted to resolve this complication in the following manner:

It is suggested that in some of the cases, Elting, Oceanic, Murray’s Lessee, Phillips, and Helvering, the Seventh Amendment was not expressly put in issue. But these cases are clear enough that in the context involved, there was no requirement that the courts be involved at all in the fact-finding process in the first instance. It is difficult to believe that these holdings or dicta did not subsume the proposition that a jury trial was not required. 430 U.S. at 456.

For a contrary view to White’s analysis, see Seton Hall Note, supra note 31, at 476-79; B.Y.U. Note, supra note 31, at 548-50.


\textsuperscript{102} Pernell v. Southall Realty, 416 U.S. at 375.

The *Atlas* decision quite subtly marks the end of the expansive reading of the seventh amendment with its modification of the definition of equity. After *Atlas*, the right to jury trial will be determined "not solely on the nature of the issue to be resolved, but also on the forum in which it is to be resolved." Incorporating the Court's modification is a somewhat novel interpretation of the doctrine that a case may arise in equity when the remedy at law is inadequate. If the remedy at law is inadequate, the whole action may now be tried without a jury. The disturbing aspect of the Court's analysis is that it fails to establish just what makes the remedy at law inadequate, or even who shall decide the adequacy question, Congress or the courts. The government already has a legal remedy by which to collect civil penalties through a suit in federal district court. The *Goldschmid* report indicates that the government makes extensive use of this legal remedy. If such factors as non-uniform jury results, increased length of jury trials, or substantial delays due to extensive case backlogs render the legal remedy inadequate, no area of civil litigation can be called adequate.

Perhaps the decisive element is that employee injuries were not sufficiently curtailed prior to the Act. However, it is obvious that a wide range of factors beyond inadequacy of legal remedies contributed to this situation. The difficulty with the *Atlas* opinion is the lack of a precise standard for determining when the remedy at law is inadequate. But apparently this should not hamper lower courts, for it is Congress who will determine whether the remedy at law is adequate and whether the seventh amendment is applicable. Congress will indicate its intention by providing for adjudication in an administrative body rather than in a district court. By classifying the action as one in equity, Congress will also avoid the troublesome constitutional issues inherent in the legislative court concept. In an equity action, the utilization of a fact-finding adjunct is perfectly permissible under the *Crowell* doctrine, provided that certain safeguards are employed.

Conspicuously absent from Justice White's opinion in *Atlas* is a method of analysis present in numerous cases involving constitutional issues—intent of the framers. As it has been noted: “One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision preserving the right of trial

---

105. See notes 36 and 37 *supra*.
106. *GOLDSCHMID*, *supra* note 4, at 950-64. Professor Goldschmid's study indicated the vast majority of civil penalty enforcement schemes involved the federal district court trial procedure where defendants were afforded a jury trial.
107. *Atlas* v. OSHRC, 430 U.S. at 460. See also note 102 *supra*.
108. Congress did not set forth its intention that the remedy at law was inadequate in the Act. One must presume that Congress' intention is to be derived from its election to provide for an administrative fact-finder.
by jury in civil cases."109 In presenting the case to the Atlas Court, one of the petitioners' major arguments was that the seventh amendment was designed specifically to apply to civil penalty cases.110 Indeed, the argument seems persuasive that the seventh amendment was included in the Bill of Rights in response to English practices of exacting monetary penalties from the colonists without a jury trial.111 A major thrust of the Bill of Rights was to afford United States citizens protection from an abusive exercise of federal government powers, and there is no reason to conclude that the framers thought of trial by jury as any less important than freedom of speech or protection against self-incrimination.

V

CONSTITUTIONAL IMPACT OF ATLAS

In employing the "public rights" and equity analyses, the Court is not reaffirming established legal principles but creating new law. A determination of whether the Atlas Court views the Commission as a legislative court or a fact-finding adjunct will provide insight into the precise limits of the Atlas holding. As Justice Harlan noted in Glidden, the Supreme Court has not established a clear standard for determining whether a court is legislative or constitutional. The matter is complicated further when the issue involves the distinction between an administrative adjunct and a legislative court, as the characteristics of the two are even more similar. The lack of clear congressional language setting forth Congress' intention is especially unfortunate in light of the deference the Glidden and Atlas Courts pay to Congress in this area.

The Atlas Court's characterization of the issue as one involving "public rights," a term of art historically found in article I adjudicatory power decisions, indicates that the Court regards the Commission as a legislative court.112 The Court sets forth the legislative court/administrative adjunct distinction and implies that the Commission is not an administrative adjunct.113 The Court also states that this case does not present the question of whether judicial review of a Commission decision is required.114 This question would arise only in the legislative court context, since Crowell established that judicial review

111. 2 LEGAL PAPERS OF JOHN ADAMS 184-200 (L.K. Wroth and H.B. Zobel, eds., 1965).
112. The Commission is an independent tribunal and is not organized under the Department of Labor. See notes 20 & 23 supra. See also 29 U.S.C. § 661 (1970), where the Commission is created as an independent body.
113. 430 U.S. at 450 n.7.
114. 430 U.S. at 455 n.13.
of an adjunct decision would follow as a matter of course. The *Atlas* Court's acknowledgment of the presence of the government as a sovereign party in its statement of the holding further indicates that the Commission is to be regarded as a legislative court, although it is not labeled as such anywhere in the opinion.

Regarding the Commission as a legislative court, the *Atlas* holding could be limited by viewing the seventh amendment as inapplicable to cases involving the government as a sovereign party which arise in a legislative court. The effect of the equity discussion on the holding is a difficult question. If the equity theory is viewed as a distinct rationale underlying the *Atlas* holding, the Court must be reading into congressional enactment of an OSHA-type enforcement scheme an implicit statement that Congress has deemed the remedy at law inadequate. Even so, neither the terms of the inadequacy theory nor the Court's statement of the doctrine is inherently limited to public rights contexts. The Court's discussion of the equity theory as a distinct justification for the *Atlas* holding suggests that equity jurisdiction might henceforth encompass cases where Congress has determined the remedy at law to be inadequate, whether or not the government as sovereign is a party to the action. This formulation marks a unique turn in the development of equity jurisdiction and the consequent scope of the seventh amendment. If the Supreme Court follows this approach in future decisions, Congress will have wide latitude in deciding when the seventh amendment should or should not apply.

VI
THE COMMISSION AS LEGISLATIVE COURT

The distinction between a legislative and a constitutional court should be carefully drawn, since significant consequences flow from the nature of the adjudicatory power source.¹¹⁵ For example, article I legislative courts are free from article III strictures, such as the case and controversy requirements.¹¹⁶ Also, legislative court judges need not be given life tenure as must article III federal judges.¹¹⁷ Conversely, article I judges would not be entitled to the same degree of independence as that enjoyed by article III judges.¹¹⁸

---

¹¹⁵. *See, e.g.*, *Glidden Co.*, 370 U.S. at 593-606 (Douglas, J., dissenting), setting forth the significant differences between article I and III courts.


¹¹⁸. The salary of a legislative court judge may be reduced. *United States v. Fisher*, 109 U.S. 143, 145 (1883). Also, an article I judge may be removed from office before the end of his statutory term without regard to his good behavior. *McAllister v. United States*, 141 U.S. 174, 186 (1891).
While the distinction between legislative and constitutional courts has been the subject of controversy in the Supreme Court, the distinction pertinent to the present inquiry, that between legislative courts and administrative fact-finding adjuncts, has received less coverage in the Court.

As the *Atlas* decision is not likely to be overturned in the near future, the consequences flowing from the legislative court/administrative adjunct distinction are important but as yet unclear. Certainly the revitalization of the legislative court concept requires a close look at the practical differences between them. The most important factor to be kept in mind is that the legislative court derives its power directly from Congress while the administrative adjunct must exercise its quasi-judicial power through a constitutional court. Thus Congress has the power to overrule legislative court decisions, while adjunct decisions are insulated from congressional review by the lack of article III jurisdiction. Similarly, by creating a legislative court, Congress is able to control the powers exercised and procedures followed by the quasi-judicial body while these features of administrative adjuncts are largely dictated by the requirements of article III judicial process. A legislative court possesses the power to compel witnesses and to issue contempt citations, powers an adjunct must exercise through the constitutional court. An issue still unresolved is whether a legislative court can order other governmental officials to enforce its decisions without resorting to article III courts.

A related and important issue raised, but not resolved, by the *Atlas* court in note thirteen is "whether Congress may commit the adjudication of public rights . . . to an administrative agency without any sort of intervention by a [constitutional] court at any stage of the proceedings." A legislative court has the power to resolve questions of law in deciding a controversy, but if an adjunct is given such power at all, its exercise will be closely regulated by an article III court. Review of a decision of an administrative adjunct by a constitutional court would of course follow under article III judicial process and *Crowell*. Although Congress has the power to overrule legislative court decisions, review by an article III court seems to be an anomaly to the concept that a legislative court is the exercise of adjudicatory power.

120. *See Gordon v. United States*, 69 U.S. 561 (1864). *See also Wright*, *supra* note 63, at 31-32.
121. *See Katz*, *supra* note 65, at 920, and authorities cited therein.
123. 430 U.S. at 455 n.13.
outside the sphere of article III. The Supreme Court's language in prior decisions seems to indicate that where article III review existed it was a matter of congressional grace rather than constitutional requirement, and that article I adjudicatory power is complete within itself.\textsuperscript{125} However, the concept of concurrent subject matter jurisdiction would allow an article III court the power to review an article I court decision. If such a practice is permitted, the article I courts should abide by the same rules of evidence that article III courts follow: to allow an article III court to consider evidence not normally admissible under its jurisdiction would subvert judicial safeguards.

VII

CONCLUSION

In light of the \textit{Atlas} Court's reintroduction of the legislative court concept and its indication that the Commission is such a body,\textsuperscript{126} the powers of the Commission must be re-examined. At the least, \textit{Atlas} has insulated the Commission from the type of constitutional scrutiny to which it was previously subject. But how far that insulation extends to other legislative constructs is unclear.

The permissible subject matter scope of the "public rights" doctrine is untouched by the \textit{Atlas} opinion. As the "public rights" doctrine seems to encompass all controversies to which the government is a sovereign party, it is unsettled why Congress could not transform virtually

\begin{itemize}
\item \textsuperscript{125} \textit{Murray's Lessee}, 59 U.S. at 282-86; Lloyd v. Elting, 287 U.S. 329, 335 (1932). For a contrary view see \textit{Jaffe}, supra note 53, at 92. Professor Jaffe suggests that judicial review may be required under the fifth amendment due process provisions. At a minimum, due process may require review of jurisdictional facts by an article III court.
\item \textsuperscript{126} The \textit{Atlas} decision has posed difficult legal issues through its reintroduction of the "public rights" concept and its strained interpretation of equity jurisdiction. Three possible alternatives are apparent, any of which could, if utilized, provide a sounder solution to problems such as employee safety.
\end{itemize}
any controversy into one involving "public rights" by the mere insertion of the government as a party. Considering *Glidden* and *Atlas* together, no definitive statement appears concerning the extent of subject matter jurisdiction in legislative courts. Arguably, the difficulty encountered in drawing a subject matter jurisdiction line reflects the legitimacy of the "public rights" concept in the first place. "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

In 1974, the Supreme Court rejected the notion that jury trials and speedy justice were inconsistent values. The *Atlas* decision, though, evidences a trend of current dissatisfaction with the use of juries; factors such as inconsistent results and prolonged time consumption are increasingly cited as drawbacks to the jury system. Professor Goldschmid's report is indicative of the feeling that juries are incapable of fulfilling either society's or the legal system's needs. The *Atlas* decision revives both the practical abilities and limitations test first introduced by *Ross v. Bernhard* and the view that a critical analysis of the jury's usefulness must precede future utilization of the jury system.

The *Atlas* decision also reveals judicial acknowledgment that the widespread delay which plagues federal district court litigation may have rendered those courts impotent to deal with problems requiring prompt action. Though the means employed are questionable, *Atlas* is a clear signal that the search has begun for effective alternatives to the overworked district court litigation process in such areas.

127. "Nor need we now explore the extent to which Congress may commit the execution of even 'inherently' judicial business to tribunals other than Article 3 courts." *Glidden Co.* 370 U.S. at 549.
129. "More importantly, however, we reject the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial." *Pernell v. Southall Realty*, 416 U.S. 363, 384 (1974).
130. GOLDSCHMID, supra note 4. Professor Goldschmid advises an increased utilization of fact-finding bodies similar to the Commission in federal government regulation of the private sector.