1983

Is the United States Claims Court Constitutional?

Joan E. Baker
Cleveland-Marshall College of Law

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JOAN E. BAKER*

I. INTRODUCTION

The creation of a new court to handle the claims against the United States that were previously decided by the United States Court of Claims was necessitated by the merger of the Court of Claims and Court of Customs and Patent Appeals into the United States Court of Appeals for the Federal Circuit. The establishment of a new United States Claims Court was less a primary goal of the Federal Courts Improvement Act of 1982[1] than it was a byproduct of the desire to create a new federal circuit court of appeals to hear appeals in defined classes of cases on a nationwide basis. Perhaps because attention was focused primarily on the Court of Appeals, Congress did not give sufficient attention to constitutional

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*Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. B.A., Reed College; J.D., George Washington University; LL.M., Yale University. The author wishes to acknowledge the research assistance of Dennis Matejka, Cleveland-Marshall College of Law, class of 1983.

[1] Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified throughout sections of titles 2, 5, 6, 10, 15, 16, 18, 19, 22, 25, 26, 28, 30, 31, 33, 35, 40, 41, 42, 44, 45, and 50 app. U.S.C. (1982)) [hereinafter cited as Federal Courts Improvement Act].

requirements in structuring the new Claims Court and providing for a transfer of duties to it. This article will deal with two major constitutional problems that have resulted from the creation of the Claims Court.

The first issue is the constitutionality of the appointment of existing Court of Claims Commissioners to be judges on the Claims Court during a four-year "transition" period. Congress was not given appointment power by the Constitution of the United States; on the contrary, that power was vested in the President by article II. By legislatively designating the persons who are to serve as judges on the new court, Congress has usurped the presidential appointment power.

The second issue relates to the constitutional status of the Claims Court. The Court of Claims which it replaces was created under article III of the Constitution, and the judges on it were therefore entitled to life tenure (during good behavior) and salaries that could not be reduced during their terms in office. The new Claims Court, on the other hand, is designated by Congress as an "article I" court; the judges are to be appointed for only fifteen year terms, and their salaries are subject to control by Congress. The new court exercises full judicial authority, however, and has jurisdiction over cases of national importance in which the government of the United States has a great financial stake. Although the analysis of this issue is far from simple, this author concludes that Congress has exceeded its constitutional authority by failing to comply with the requirements of article III of the Constitution in establishing the Claims Court.

II. The Appointment Power

The first constitutional question raised by the Federal Courts Improvement Act of 1982 relates to the initial appointment of judges to the new article I United States Claims Court. The problem centers around one of the least challenged or litigated clauses of the United States Constitution: the appointment power.[2]

A. History of the Appointment Power

The decision to vest the appointment power in the President was considered by the Founding Fathers to be an essential part of the whole

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[2] This clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by the Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

scheme of separation of powers. The constitutional division of the powers of national government among the legislative, executive and judicial branches was a protection against government corruption and the use of undue influence.[3] Those who attended the Constitutional Convention in 1787 viewed the separation of powers as a check against government tyranny.[4] Their task was to allocate the appointment power to one of the three branches, while still providing safeguards to ensure that appointees would be qualified and deserving of public office.

At the Convention, James Madison led a contingent in favor of vesting the power of appointment in the President alone, without requiring the concurrence of the Senate. Charles Pinckney and others were in favor of vesting the power of appointment in the Senate alone. Oliver Ellsworth contended that the initiative in making appointments should be with the Senate and that the President should be given only the power to negative appointments. The report of John Rutledge's committee, which was the body intended to reconcile the different views advanced in the Convention, also favored the making of appointments by the Senate. The final compromise was that the Executive should make appointments, with the advice and consent of the Senate.[5]

Madison summed up the effect of this power division as follows:

> The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature. Although it be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it.
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> We ought always to consider the Constitution with an eye to the principles upon which it was founded. In this point of view, we shall readily conclude that if the Legislature determines the powers, the honors, and the emoluments of an office, we should be insecure if they were to designate the officer also. The nature of things restrains and confines the Legislative and Executive authorities in this respect; and hence it is that the Constitution stipulates for the independence of each branch of the Government.[6]

The importance of vesting the appointment power in the President was emphasized by Alexander Hamilton, who wrote:

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[3] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 56 (M. Farrand ed. 1966) [hereinafter cited as THE RECORDS].

[4] THE FEDERALIST No. 47, at 299 (J. Madison) (C. Rossiter ed. 1961).

[5] THE RECORDS, *supra* note 3, at 50-59. The Supreme Court thoroughly considered these debates in Buckley v. Valeo, 424 U.S. 1, 120-37 (1976).

[6] 1 ANNALS OF CONG. 581-82 (J. Gales ed. 1789).

> The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care and qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretentions to them. . . .
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> A single well-directed man, by a single understanding, cannot be distracted and warped by [a] diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body.[7]

The requirement that all officers of the United States be appointed according to article II, section 2, clause 2 of the Constitution has been consistently upheld in the courts.[8] However, the size of the United States and the extent of its government made it necessary for the President to be given some flexibility and assistance in the appointment process.[9] This was permitted by article II which provided that Congress could vest some appointment power in courts of law or "Heads of Departments." Even when delegated in this manner, however, the appointment power is still indirectly controlled by the Executive. Appointments made by the courts and department heads are subject to various enumerated restrictions. First, article II, section 2 allows the appointment power to be vested in "Heads of Departments" which has been strictly interpreted to mean "Cabinet members." This provision acts as a restriction on the number of people eligible to be vested with the appointment power. In modern politics, it also creates an assurance that appointments will be made in accordance with the President's desires, if not his explicit requests, a heavily influencing factor.[10] Second, before the "Cabinet member" interpretation of "Departments Head" was applied, the Supreme Court had indicated that the power could only be vested for appointments made within the limited scope of a department head's own work. This prevented Congress from vesting the appointment power in persons other than the President to any significant extent.[11] Last, even in situations where the appointment power has been vested in others, the President has been given the authority to request a written opinion from the court of law or department head concerned, asking about the qualifications of the new ap-

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[7] THE FEDERALIST No. 76, at 492 (A. Hamilton) (C. Rossiter ed. 1961).

[8] Steele v. United States, 267 U.S. 505 (1925); Burnap v. United States, 252 U.S. 512 (1920); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Deviny v. Campbell, 194 F.2d 876 (D.C. Cir. 1952); United States v. Musgrave, 293 F. 203 (D. Neb. 1923). These cases provide support for the view that the principle of separation of powers is one of the fundamental protective principles of our government and will be strictly upheld.

[9] Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967).

[10] Brooks v. United States, 33 F. Supp. 68 (E.D.N.Y. 1939).

[11] *Ex parte* Hennen, 38 U.S. (1 Pet.) 230 (1839).

pointee. This procedure assures that the President will maintain a close check over all appointments of United States officials.[12]

B. *Transitional Provisions for the United States Claims Court*

The *permanent* appointment process that is provided for the Claims Court in the Federal Courts Improvement Act is in full compliance with article II, section 2. Section 105 of the legislation[13] states that the President shall appoint sixteen article I judges to serve on the Claims Court, with the advice and consent of the Senate.

The constitutional problem arises in the *transitional* provisions of the Act, specifically in section 167(a)[14] which states that, notwithstanding section 171(a), the Court of Claims commissioners who are serving in that capacity on October 1, 1982, will automatically become judges of the new Claims Court. These former commissioners had never been appointed by the President; they had been appointed by the judges of the former Court of Claims.[15] As such, they were subordinate officials of an article III court. In their new capacity, however, they become judges of an entirely new article I court, created by a constitutional power Congress presumed it possessed. In effect, the Congress has usurped the presidential power of appointment with respect to the initial judicial appointments of judges to the Claims Court.

There is no indication in the record of the hearings on the Federal Courts Improvement Act that Congress ever addressed the possibility that it was creating constitutional problems by making these transitional appointments.[16] The House Report attempted to rationalize the transitional appointments provision by saying that it would "merely delay the date on which the President has power to . . . appoint the judges of the

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[12] United States v. Germaine, 99 U.S. 508, 511 (1878).

[13] Federal Courts Improvement Act, § 105(a), 28 U.S.C. § 171.

[14] *Id.* § 167(a), 28 U.S.C. § 171 note.

[15] 28 U.S.C. § 792 (1976 & Supp. V 1981), *repealed by* Federal Courts Improvement Act, § 121(b), 96 Stat. 25, 34.

[16] Congress adopted the theory that no new judicial positions were being created by the Federal Courts Improvement Act. Yet the entire purpose of the legislation was to create a new court system that would be more efficient. Three factual distinctions support the theory that the Act actually did create new positions. (1) Powers of the new Claims Court judges were greater than those possessed by Court of Claims commissioners, since they could now issue final judgments and other binding orders. (2) Jurisdiction of the new Court of Appeals for the Federal Circuit was broader than any of the judges transferred to it had previously experienced, due to the merger of the business of the former Court of Claims and the Court of Customs and Patent Appeals. (3) There was an automatic raise in salary of Claims Court judges based on their new positions. *Industrial Innovation and Patent and Copyright Law Amendments: Hearings on H.R. 6033 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the Comm. on the Judiciary*, 96th Cong., 2d Sess. 722 (1980) (testimony of Judge Friedman, Chief Judge, United States Court of Claims).

Claims Court."[17] The fact remains, however, that the appointment power is vested in the President by the Constitution, as well as by the Federal Courts Improvement Act itself. There are no provisions in the Constitution which give Congress the power to appoint judicial officers of the United States.[18]

These actions by the 97th Congress are also inconsistent with the historical role of the Congress in restructuring the federal court system. Three examples will illustrate that it is possible for Congress to enact transitional provisions that conform to the appointment provisions of the Constitution.

1) In 1969 Congress enacted legislation which created the United States Tax Court.[19] The transition from the former Board of Tax Appeals to the United States Tax Court was made by elevating the former personnel to judicial seats on the new court. Since the Board of Tax Appeals had been an independent board and part of the Executive branch, all of the members elevated to Tax Court judgeships had already been appointed by the President.[20] This contrasts with the transitional provisions for the Claims Court judges, who have never been submitted to the presidential appointment process.

2) The Federal Magistrates Act of 1979[21] is an example of Congress vesting the appointment power in the courts of law. The Act provided that federal magistrates were to be appointed by the judges of the United States district courts.[22] The transitional measure provided that all current United States commissioners were eligible to serve as United States magistrates. It was not a legislative appointment. Rather, each commissioner was required to undergo a reappointment process, with a unanimous vote needed of all the district court judges in the district where the

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[17] H.R. REP. No. 312, 97th Cong., 1st Sess. 26 (1981).

[18] Actions of the Congress in formulating the new court structure demonstrated a strong intent to exercise control over the Claims Court judicial seats. The committee stated its expectation that the President would feel a sense of obligation and reappoint the sitting commissioners when their terms expired. H.R. REP. No. 312, 97th Cong., 1st Sess. 25 (1981). Another indication that Congress may have tried to diminish the role of the President in making appointments to the Claims Court occurred in connection with deciding the procedure for selecting the chief judge of the new court. The final decision, however, was to vest the power of appointment in the President. Federal Courts Improvement Act, § 105(a), 28 U.S.C. § 171(b).

[19] Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (codified as amended in scattered sections of 26 U.S.C.).

[20] Act of June 2, 1924, ch. 234, 43 Stat. 253, 336 (current version at 26 U.S.C. § 7443(b) (1976)). Although the Tax Court legislation was held to be constitutional, in Stix Friedman & Co. v. Coyle, 467 F.2d 474 (8th Cir. 1972), the issue of the appointment process was not raised.

[21] Pub. L. No. 96-82, 93 Stat. 643 (1979) (current version at 28 U.S.C. §§ 631-639 (1982)).

[22] 28 U.S.C. § 631(a) (1982).

new magistrate was to serve.[23] The same protection could have been provided for the new Claims Court. If the Act creating the Claims Court aimed to provide higher quality and more independent personnel through presidential appointments, there is no reason or logical explanation why the process could not have been instituted at the outset of the new court.

3) The Bankruptcy Reform Act of 1978[24] was an attempt to restructure the bankruptcy procedures of the United States District Courts. Although the Act was declared unconstitutional in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[25] one of the provisions of the Bankruptcy Act which was not specifically declared unconstitutional by the Supreme Court was the transitional process whereby former bankruptcy referees were elevated to the status of bankruptcy judges. However, one cannot conclude from this that the Court expressly approved the transitional measures, since the very complex transitional process, which was to extend over a period of two years, received only passing mention by Justice Brennan, who wrote the plurality opinion. He said merely:

> The Act provides for a transition period before the new provisions take full effect in April, 1984. . . . During the transition period, previously existing Bankruptcy courts continue in existence. . . . Incumbent bankruptcy referees, who served six-year terms for compensation subject to adjustment by Congress, are to serve as bankruptcy judges until March 31, 1984, or until their successors take office. . . . During this period they are empowered to exercise essentially all of the jurisdiction and powers discussed above.[26]

The Court's apparent lack of concern for possible constitutional problems in the transitional process probably is attributable to the fact that the issue was not raised during the bankruptcy court litigation, and so it was not presented to the Court for consideration.[27] In addition, the Court had

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[23] *Id.*

[24] Pub. L. No. 95-598, 92 Stat. 2549 (1978) (current version at 11 U.S.C. § 101-151326 (Supp. V 1981)).

[25] ___ U.S. ___, 102 S.Ct. 2858 (1982).

[26] *Id.* at ___, 102 S.Ct. at 2863 (citations omitted).

[27] It is not necessary for the issue of constitutionality to be raised in the lower court proceedings in order for a challenge to be made at the Supreme Court level in this instance. In Lamar v. United States, 241 U.S. 103 (1916), a constitutional objection to the judge hearing the case was raised for the first time in the Supreme Court, on the ground that an intercircuit assignment of judges violated the President's appointment power. The Supreme Court decided the case on its merits.

Lamar was consistent with American Constr. Co. v. Jacksonville, T. & K.W. Ry., 148 U.S. 372 (1893), which held that such issues can be entertained, even though not raised in lower courts, because they are "jurisdictional." *Id.* at 386-87. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 536 (1962).

no compelling reason to decide the issue because it was prepared to hold that the bankruptcy court was unconstitutional on other grounds.

Even if Justice Brennan's brief mention of the transitional provisions was to be construed as tacit approval by the Court, those provisions can still be distinguished from the transitional measures adopted in the Claims Court legislation. Congress created the bankruptcy courts as "adjuncts" to the United States district courts. As Justice Brennan pointed out in his opinion, they were not created as article I courts. Although their designation as "adjunct" to the district courts did not save them from a charge of possessing powers that could constitutionally be conferred only on article III courts, it was clear that Congress did not mean to withdraw them entirely from the article III judicial system, as it has done with the Claims Court.

Another distinguishing factor is that the Bankruptcy Reform Act of 1978 was not intended to take full effect until March 31, 1984. The legislation emphasized that the transitional measures were temporary working procedures. In contrast, the Claims Court legislation took effect immediately, and the former commissioners were elevated to their judicial seats on the effective date of the new court, October 1, 1982.[28] Yet another difference is in the transitional provisions. During the Bankruptcy Act's transitional period, vacancies that occurred by reason of death, disability, removal or other reasons were to be filled by appointments of the district court judges, following section 34 of the former Act as though it had not been repealed.[29] In contrast, the Claims Court legislation took effect im-

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[28] Although § 171 of the Act took effect along with the rest of the Claims Court legislation on October 1, 1982, it did not really allow the President an opportunity to deny elevation to article I judge status of any of the existing Court of Claims commissioners. This is because of the provision in § 167(a) of the Act, which states:

> Notwithstanding the provisions of section 171(a) of title 28, United States Code, as amended by this Act, a commissioner of the United States Court of Claims serving immediately prior to the effective date of this Act shall become a judge of the United States Claims Court on the effective date of this Act.

Federal Courts Improvement Act, § 167(a), 28 U.S.C. § 171 note. In addition, § 167(b) may have secured to all the former commissioners who were thus elevated to Claims Court judgeships a minimum period in their new offices before they can be displaced by presidential appointees (unless they voluntarily resign, retire, or leave for other reasons). Section 167(b) states:

> Notwithstanding the provisions of section 172(a) of title 28, United States Code, as amended by this Act, the initial term of office of a person who becomes a judge of the United States Claims Court under subsection (a) of this section shall expire fifteen years after the date of his or her employment with the United States Court of Claims, or on October 1, 1986, whichever occurs earlier. Any such judge shall continue in office until a successor is sworn or until reappointed.

Id. § 167(b), 28 U.S.C. § 171 note.

[29]

> Except as otherwise provided in this subsection or in section 407 of this Act, matters relating to the office of United States bankruptcy judges shall continue to be governed during the transition period by the rules set forth in section[s] 34 . . . of

mediately, since the predecessor Court of Claims was abolished and its judges elevated to the United States Court of Appeals for the Federal Circuit. There was no real "transition period," merely a legislative promotion of existing commissioners to the status of article I judges. Nor did Congress attempt to make the Claims Court an "adjunct" to an article III court.

C. *Congressional Usurpation*

The small amount of case law concerning the limits of Congress' power to participate in the appointment process indicates that "lateral" transfers are an exception to the constitutional requirement. In lateral transfers, officials from one office or function are transferred to another, provided they have initially been appointed to office by the President.[30]

The leading case is *Shoemaker v. United States*,[31] decided in 1893. Here Congress had statutorily appointed certain designated officials to a commission it created to study the use of eminent domain in the District of Columbia. The plaintiff challenged the constitutionality of the commission because its officers had not been appointed by the President. The Court upheld the commission on the ground that though its members had not been appointed specifically to this commission by the President, they had been appointed by him to other positions with similar duties. The Court concluded that the congressional designation of the commission members was an acceptable lateral transfer from one office to another.

The appointments by Congress of the former Court of Claims commissioners to a new article I Claims Court cannot be justified under the *Shoemaker* exception, because the commissioners were never appointed to office by the President. That their duties in the new positions may be similar to those they carried out before is irrelevant because the constitutional objection is not to their qualifications, but to the usurpation by Congress of the President's power of appointment.

The Supreme Court's 1927 decision in *Springer v. Government of the*

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the Bankruptcy Act as such Act existed on September 30, 1979.

The Bankruptcy Reform Act of 1978, tit. iv, § 404(d), 28 U.S.C. prec. § 151 note (1982).

[30] The lateral transfer exception was used in creating the United States Court of Appeals for the Federal Circuit:

> The judges of the United States Court of Claims and of the United States Court of Customs and Patent Appeals in regular active service on the effective date of this Act [Oct. 1, 1982] shall continue in office as judges of the United States Court of Appeals for the Federal Circuit.

Id. § 165, 28 U.S.C. § 44 note. These transfers differ from the Claims Court appointments because the Court of Claims and Court of Customs and Patent Appeals judges were already properly appointed article III judges. Moreover, they appeared to be at the same level as appellate judges, even though they had some trial responsibilities in their former courts. Their transfers seem to fall within the *Shoemaker* exception.

[31] 147 U.S. 282 (1893).

Philippine Islands[32] provides an example of an appointment by legislation where the appointees were not originally chosen by the executive. At the time of this decision, the Phillipine Islands were governed under the law of the Phillipine Organic Act, which was modeled after the United States Constitution. The Phillipine government was divided into three branches with explicit separation of powers. Thus, even though the case did not arise under the United States Constitution, it provides a useful parallel.

The *Springer* case arose because the Phillipine legislature statutorily created a committee to exercise voting powers of government-owned stock in a coal company and a bank. The legislation provided that these committee members were to be appointed by the President of the Senate and the Speaker of the House. The Supreme Court held that the legislature's power to make laws did not include authority to appoint the officers charged with the duty of enforcing the laws. The appointment power rested with the executive alone. The Court ruled:

> Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection; though the case might be different if the additional duties were devolved upon an appointee of the executive.[33]

The issue of legislative attempts to appoint government officials arose more recently in *Buckley v. Valeo*.[34] In the Federal Election Campaign Act of 1971,[35] Congress created the Federal Election Commission. Responsibility for appointing members to the Commission was divided among the President of the Senate, the Speaker of the House, the Secretary of State, the Clerk of the House and the President. The Supreme Court held the Act unconstitutional, finding it a clear attempt on the part of Congress to usurp the presidential appointment power and to vest it in others.

Buckley can be distinguished from the problem presented by the Claims Court legislation. In *Buckley*, Congress delegated the power of appointment to persons other than the President, while in the Claims Court legislation, the legislative Act itself makes the appointments, while conferring power of future appointments on the President. But the distinction does not appear to have any constitutional significance. The Constitution does not envision even small, temporary usurpations of the President's power by the Congress.

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[32] 277 U.S. 189 (1927).

[33] *Id.* at 202.

[34] 424 U.S. 1 (1975).

[35] Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified in scattered sections of titles 2, 18, 47 U.S.C. (1976 & Supp. 1981)).

An argument might be made that the temporary appointments were within Congress' power under the necessary and proper clause of the Constitution.[36] This argument was made in *Buckley*, but the Supreme Court rejected it: "[Congress may not] vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointment Clause by clear implication prohibits it from doing so."[37] The same reasoning would apply to the Claims Court. The necessary and proper clause does not give Congress the power to violate the express terms of the Constitution.

This problem could be resolved by the President either putting the former commissioners now serving as article I judges through the presidential appointment process or having replacements appointed in their stead.[38] The President already has appointed some judges to the new court. If all the judges were properly appointed by the President with the advice and consent of the Senate, this constitutional issue would be moot, except for possible questions concerning the validity of the current judges' decisions. However, the settlement of this issue would not resolve the next constitutional problem created by the Claims Court.

III. Constitutional Status of the Claims Court

The second constitutional issue raised by the new Claims Court concerns its status as a court and the status of its judges. By the express terms of the Act, the Claims Court is an "Article I" court.[39] This signifies the intent of Congress not to be constrained by the provisions of article III of the Constitution in creating this court.

Article III states that Congress may create inferior federal courts and that their judges shall serve "during good behavior," with salary protected against reduction during their terms of office.[40] The Constitution's draftsmen considered tenure and protected salary essential to the inde-

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[36] U.S. Const. art. I, § 8, cl. 18. The Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.*

[37] 424 U.S. at 135.

[38] The suggestion that the President could proceed to make his own appointments to the Claims Court, notwithstanding the fact that Court of Claims commissioners were elevated to those positions by the Act, is based on the premise that the temporary appointments made by Congress are unconstitutional and may be disregarded by the President. *See supra* note 28. The further assumption is that the unconstitutional temporary appointment provision is severable from the permanent appointment powers granted to the President and that the Claims Court is held to be in other respects constitutional. If the argument made in Part III of this article is accepted, that the legislation creating the Claims Court violates article III of the Constitution, then the proper exercise of the President's power would not save the new court.

[39] Federal Courts Improvement Act, § 105(a), 28 U.S.C. § 171(a).

[40] U.S. Const. art. III, § 1.

pendence and integrity of the federal judiciary, which might otherwise be susceptible to the political control or influence of the executive and legislative branches. The judges of the new Claims Court, however, will not have these salary and tenure protections; they will be appointed by the President to fifteen-year terms, and their salaries will be under the direct control of Congress.[41] This section of the article will discuss whether Congress has exceeded its constitutional authority in so constituting the Claims Court.[42]

A. The Marathon *Case*

The precise constitutional question raised by the Claims Court legislation has not been addressed previously by the United States Supreme Court. A recent decision of the Court, however, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[43] involved similar issues raised by the 1978 Bankruptcy Reform Act. There the Court ruled that bankruptcy courts created by the 1978 legislation had been given judicial power which constitutionally could be exercised in the federal system only by courts conforming to the requirements of article III. The similarity of the issue in the two pieces of legislation makes it reasonable to suppose that the Court might decide to examine the constitutionality of the Claims Court when it has a case before it raising the issue. Where the constitutional question is one of jurisdiction and judicial power, the Court may raise the issue on its own motion, provided a judgment of the Claims Court is otherwise before it for review.

The discussion of this historically and theoretically complicated problem should begin with the *Marathon* case even though *Marathon* does not directly concern the Claims Court and its predecessors. Analytical approaches to questions of constitutional law tend to change over time, reflecting differing perspectives demanded by changing governmental concerns and national needs. The need to re-examine is particularly acute in the area of constitutional separation of powers, where the vast expansion of national legislative and executive power in recent decades is reflected in the startling proliferation of regulatory legislation and increased fed-

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[41] Federal Courts Improvement Act, § 105(a), 28 U.S.C. § 172.

[42] Congress is not required to create inferior federal courts; nor is it required to vest all of the judicial power of the United States in those it does create. Lockerty v. Phillips, 319 U.S. 182, 187 (1943); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 317-22 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]. However, if it does create inferior federal courts pursuant to article III, it may not give them the power to decide matters not encompassed by the limiting "case or controversy" requirement of that article, U.S. CONST. art. III, § 2, nor may it give them power to decide cases falling outside one of the specific heads of judicial power enumerated in article III. *See generally* HART & WECHSLER at 64-214.

[43] ____ U.S. ____, 102 S.Ct. 2858 (1982).

eral expenditures.[44] The national government has always been the stronger party in litigation against private citizens, but now its relative strength is overwhelming. Doctrines that seemed necessary to protect a comparatively weak national government at the beginning of the 19th century, or even after the Civil War, now may have to yield to an approach that reflects greater awareness of the critical values that were at the heart of the decision by the Founding Fathers that institutional checks and balances were as essential to the maintenance of a democratic republic as express constitutional guarantees against governmental encroachment on individual liberties. Both the majority and dissenting opinions in *Marathon* reflect these fundamental constitutional concerns.

The bankruptcy court system at issue in *Marathon* had an ambiguous constitutional status. The Act creating it referred to the bankruptcy courts as "adjuncts" to the United States district courts.[45] Yet its judges were not to be appointed by the federal courts (as had been the bankruptcy referees before them) but by the President, with the advice and consent of the Senate, for fourteen year terms.[46] The new bankruptcy judges could be removed by a vote of the judicial council of the circuit in which they sat.[47]

These "adjunct" judges, however, were given all the powers of a court of equity, law, and admiralty except the power to enjoin another court or to punish a criminal contempt not committed in the presence of the judge or warranting imprisonment. As Justice Brennan pointed out in *Marathon*:

> In addition to this broad grant of power, Congress has allowed bankruptcy judges the power to hold jury trials, § 1480; to issue declaratory judgments, § 2201; to issue writs of habeas corpus under certain circumstances, § 2256; to issue all writs necessary in aid of the bankruptcy court's expanded jurisdiction, § 451, see 28 U.S.C. § 1651 (1976 ed.); and to issue any order, process or

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[44] In a footnote in *Marathon*, Justice Brennan commented:

> Drawing the line between permissable [sic] extensions of legislative power and impermissible incursions into judicial power is a delicate undertaking, for the powers of the Judicial and Legislative Branches are often overlapping. As Justice Frankfurter noted in a similar context, "To be sure, the content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed." *Youngstown Co. v. Sawyer*, 343 U.S. 579, 610, 72 S.Ct. 863, 897, 96 L.Ed. 1153 (1952) (concurring opinion). The interaction between the Legislative and Judicial Branches is at its height where courts are adjudicating rights wholly of Congress' creation. Thus where Congress creates a substantive right, pursuant to one of its broad powers to make laws, Congress may have something to say about the proper manner of adjudicating that right.

___ U.S. at ___, 102 S.Ct. at 2878 n.35.

[45] 28 U.S.C. § 151(a) (1982).

[46] *Id.* §§ 152-153(a).

[47] *Id.* § 153(b).

> judgment that is necessary or appropriate to carry out the provisions of title 11, 11 U.S.C. § 105(A) (1976 ed., Supp. III).[48]

Judicial review of judgments of the bankruptcy courts was available in article III courts, including the court of appeals and, in some circumstances, the United States district courts.[49]

The constitutionality of the bankruptcy courts arose in the *Marathon* case after Northern Pipeline, which had filed a petition for reorganization under the Bankruptcy Act, filed a suit in the Bankruptcy Court for the District of Minnesota against Marathon Pipe Line. The plaintiffs sought damages for alleged breaches of contract and warranty, misrepresentation, coercion, and duress. Marathon moved for dismissal of the suit on the ground that the Act unconstitutionally conferred article III judicial power upon judges who lacked tenure during good behavior and protection against salary diminution. The bankruptcy judge denied the motion to dismiss, but the district court, to which an appeal was made, granted the motion on the ground that "'the delegation of authority in 28 U.S.C. § 1471 to the Bankruptcy Judges to try cases otherwise relegated under the Constitution to Article III judges' "[50] was unconstitutional. Northern Pipeline and the United States as intervenor appealed the decision to the Supreme Court.

Although a majority of the Justices of the Supreme Court agreed that the Bankruptcy Act was unconstitutional and in violation of article III, there was not a clear majority opinion on the extent of the holding or the underlying reasoning for it. Justice Brennan delivered the plurality opinion for himself and Justices Marshall, Blackmun and Stevens. Justice Rehnquist wrote a concurring opinion for himself and Justice O'Connor. Chief Justice Burger wrote a separate dissenting opinion, and Justice White wrote a dissenting opinion in which the Chief Justice and Justice Powell joined.

As the Chief Justice pointed out in his dissent, the only clear holding for which the decision in *Marathon* can be said to stand is limited to the proposition stated by Justice Rehnquist in his concurrence—that a "traditional" state common law action, not made subject to a federal rule of decision and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an "Article III court" if it is to be heard by any court or agency of the United States.[51]

The plurality opinion by Justice Brennan goes substantially beyond this narrow proposition, however, and the concurring opinion of Justice Rehnquist suggests only that he and Justice O'Connor were reluctant to

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[48] ___ U.S. at ___, 102 S.Ct. at 2863.
[49] 28 U.S.C. § 1293 (1982).
[50] ___ U.S. at ___, 102 S.Ct. at 2864 (quoting App. to Juris. Statement 1a).
[51] ___ U.S. at ___, 102 S.Ct. at 2882.

consider the broad question of congressional power to confer judicial power to non-article III courts because the only issue before the Court was a very narrow state contract claim. Justice Rehnquist stated:

> I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes, or whether instead they are but landmarks on a judicial "darkling plain" where ignorant armies have clashed by night, as Justice White apparently believes them to be. None of the cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected against its will under the provisions of the 1978 Act. To whatever extent different powers granted under that Act might be sustained under the "public rights" doctrine of Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 . . . (1855), and succeeding cases, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained.[52]

While Justice Rehnquist thus espoused a narrower basis for the holding than that of the plurality, he nonetheless concurred in the broad judgment of unconstitutionality reached by the Justices joining the plurality. He agreed that "this grant of authority is not readily severable from the remaining grant of authority to Bankruptcy Courts. . . ."[53]

There is constitutional common ground among the majority and dissenting Justices in the *Marathon* case. All of the justices are agreed that the Constitution imposes some limits on the power of Congress to confer judicial power on tribunals that do not comply with the requirements of article III. The challenge is to attempt to determine what the Justices might regard as the limits with respect to the Claims Court. A brief review of the plurality opinion written by Justice Brennan and of the dissenting opinion written by Justice White may provide some clues, however inconclusive. These clues will serve to isolate and sharpen the special issues that will demand consideration in any determination of the constitutionality of the Claims Court legislation.

B. Marathon *and the Claims Court: A Standard for Analysis of the Power of Non-article III Tribunals*

At the outset, it is important to note that the determinative issue in *Marathon*, as to which there *was* a majority decision, was the question of the power of Congress to give a non-article III tribunal jurisdiction to decide claims arising under state law. The action brought in the bankruptcy court by Northern Pipeline against Marathon Pipe Line was a common law action in which the rights asserted depended on state law for their existence. A United States district court would have had jurisdiction

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[52] *Id.* at ____, 102 S.Ct. at 2881-82.

[53] *Id.* at ____, 102 S.Ct. at 2882.

to hear such a claim incident to a bankruptcy proceeding under earlier precedents established by the Supreme Court.[54] This is the case even though as a general rule federal courts do not have power under the Constitution to take jurisdiction of cases arising under state law unless the parties to the case are of diverse citizenship, bringing the case within the diversity power of the Constitution.[55] Exceptions to the diversity requirement are made in three instances: 1) for state law claims asserted by way of counterclaim or third party claim in a case otherwise "arising under" federal law in the first instance (ancillary jurisdiction); 2) claims raised by a plaintiff that are in addition but closely related to federal claims raised in the same complaint (pendent jurisdiction);[56] 3) cases brought under the Federal Interpleader Act. The claim under state law raised in the *Marathon* case would not have fallen within any of these exceptions to the constitutional requirement. The sole question for decision by the Supreme Court was the constitutional question whether a court not endowed with the protections required by article III could hear a case arising under state law as one of the incidents of an ongoing bankruptcy proceeding.

Although claims arising under state law, as well as other issues of state law, are frequently connected with government contract disputes, they are not likely to pose a problem for Claims Court litigation, which is limited to cases brought by contractors against the government. Subcontractors, who may have state law claims against the contractor, are not permitted to bring those claims in the Claims Court, but must litigate them elsewhere.[57]

Federal law governs contracts with the United States.[58] Issues of state law may arise in the course of a proceeding, however, and state law has been successfully asserted as a defense to execution on a judgment for the government in a contracts case which was heard in the United States district court.[59] Although occasional issues of state law may arise in the course of a Claims Court proceeding, the precise issue that provided the basis for the majority decision in *Marathon* would not.

Cases asserting a right to "just compensation" for government taking of private property for public use assert a right to relief arising directly

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[54] Williams v. Austrian, 331 U.S. 642 (1947); Schumacher v. Beeler, 293 U.S. 367 (1934).

[55] Jurisdiction over such cases is extended to the United States district courts by 28 U.S.C. § 1332 (1982).

[56] United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

[57] *See, e.g.*, Severin v. United States, 99 Ct.Cl. 435 (1943), *cert. denied*, 322 U.S. 733 (1944) (subcontractor could not recover damages against the government through the contractor's suit).

[58] United States v. County of Alleghany, 322 U.S. 174 (1944); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). *See also* United States v. Seckinger, 397 U.S. 203, 209-10 (1970) (court is guided also by evolved general principles concerning contract interpretation).

[59] United States v. Yazell, 382 U.S. 341 (1966).

under the Constitution,[60] as well as under the Tucker Act,[61] on a theory of implied-in-fact contract. At least since the Supreme Court's decision in *Bivens v. Six Unknown Agents*,[62] such a case also calls for application of federal common law principles.

This examination of the opinions in *Marathon*, therefore, will be solely for the purpose of determining the standards that guided the Justices in their analysis of the limitations article III of the Constitution places on the power of Congress to confer federal judicial power on non-article III tribunals.

The status of the bankruptcy courts, unlike that of the Claims Court, was ambiguous. Congress did not declare it to be created under article I, nor did it state that it was a "legislative" court. Instead, the court was declared to be an "adjunct" of the district court, but was given full equitable and legal powers, including the power to render final judgments in bankruptcy cases.[63] Clearly it was not an administrative agency. However, since the status was ambiguous, the Supreme Court examined all possible justifications that might have been advanced, based on historical precedents, for conferring federal judicial power on a non-article III body.

1. The Brennan Plurality

Justice Brennan approached the problem by classifying the precedents according to the nature of the tribunals that the Supreme Court had excepted from the requirements of article III in the past. He made clear his view that the historical exceptions were just that—exceptions to a constitutional requirement that the judicial power of the United States be vested in courts with judges protected by tenure and salary guarantees. He stated:

> [W]hen properly understood, these precedents represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III courts. Rather they reduce to three narrow situations not subject to that command, each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers. These precedents simply acknowledge that the literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive

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[60] United States v. Great Falls Mfg., 112 U.S. 645 (1884).
[61] 28 U.S.C. § 507 (1982).
[62] 403 U.S. 388 (1971).
[63] 28 U.S.C. § 151(a) (1982).

> interference, must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole.[64]

The first group of exceptions examined by Justice Brennan consists of the "territorial" courts cases. The leading case is *American Insurance Co. v. Canter*,[65] where the Court, in an opinion by Justice John Marshall, first created the exception. Justice Marshall stated that article IV of the Constitution bestowed on Congress alone the complete power of government over the territories that were not within the states that comprised the United States. Such courts, he said, were

> created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested . . . is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States . . . In legislating for them, Congress exercises the combined powers of the general, and of a state government.[66]

The Court used similar reasoning in reviewing the creation of non-article III courts in the District of Columbia.[67] In *Palmore v. United States*,[68] the Court sustained the creation of a system of courts for the District of Columbia pursuant to the plenary authority of Congress to provide a government for the District of Columbia granted by article I, section 8, clause 17 of the Constitution.

Justice Brennan stated that courts-martial provide a similar exception to the requirements of article III:

> [These also involve] a constitutional grant of power that has been historically understood as giving the political branches of Government extraordinary control over the precise subject matter at issue. Art. I, § 8, cls. 13, 14, confer upon Congress the power "to provide and maintain a Navy," and "to make Rules for the Government and Regulation of the land and naval Forces."[69]

The third group of exceptions posed the greatest difficulty. This group

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[64] ___ U.S. at ___, 102 S.Ct. at 2867-68 (footnote omitted).

[65] 28 U.S. (1 Pet.) 511 (1828).

[66] *Id.* at 546.

[67] In Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), the Court stated that "Congress has the entire control over the District for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice." *Id.* at 619.

[68] 411 U.S. 389 (1973).

[69] ___ U.S. at ___, 102 S.Ct. at 2869.

includes all of the cases not in the first two groups that have justified non-article III status for tribunals adjudicating so-called "public rights." All federal administrative agencies and similar tribunals are included in this group. The case that gave rise to this exception, *Murray v. Hoboken Land & Improvement Co.*,[70] contained the following statement:

> 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 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.[71]

As Justice Brennan analyzes the precedents (some of them cases concerning the former Court of Claims), the "public rights" cases involve "matters that could be conclusively determined by the Executive and Legislative Branches" as distinguished from matters that are "inherently judicial." He states that the doctrine may be partly explained by "reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued."[72] But, he adds,

> the public-rights doctrine also draws upon the principle of separation of powers, and an historical understanding that certain prerogatives were reserved to the political branches of government. The doctrine extends only to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," Crowell v. Benson, 285 U.S. 22, 50, 52 S.Ct. 285, 292, 76 L.Ed. 98 (1932), and only to matters that historically could have been determined exclusively by those departments, see Ex parte Bakelite Corp., [279 U.S. 438, 458 (1928)]. The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to non-judicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency.[73]

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[70] 59 U.S. (18 How.) 272 (1855).

[71] *Id.* at 284.

[72] ____ U.S. at ____, 102 S.Ct. at 2869.

[73] *Id.*

Justice Brennan concluded that while the "public rights" doctrine had not been "conclusively explained" in the Court's precedents, it was not necessary to undertake that task in the *Marathon* litigation because:

> [A] matter of public rights must at a minimum arise "between the government and others" [citing the *Bakelite* case]. In contrast, "the liability of one individual to another under the law as defined," . . . is a matter of private rights. Our precedents clearly establish that only controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. [Citations omitted.] Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power.[74]

Since the claim objected to the *Marathon* case was a private dispute arising under state law, it clearly did not fall within the public rights doctrine in Brennan's view, making it unnecessary for him to analyze that doctrine more fully and critically. He did conclude, however, that even in the broad area theoretically encompassed within the "public rights" exception, "the presumption is in favor of Art. III courts."[75] He also stated that "when Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review."[76]

Unlike the concurring Justices, the plurality Justices did not conclude their analysis of *Marathon* with the decision that the existence of a state common law claim took the case out of an ill-defined "public rights" exception to article III requirements. Justice Brennan went on to consider two further, but related, arguments: first, that Congress' constitutional power to create uniform national bankruptcy laws[77] carried with it the power to create legislative courts to adjudicate bankruptcy-related controversies; and second, that since the bankruptcy courts created by the Act were designated as merely "adjuncts," the jurisdiction over bankruptcy matters was really conferred on the United States district courts. In response to the first argument, Justice Brennan responded by saying that such an ancillary power argument contains no limiting principle and thus "threatens to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of 'specialized' legislative courts."[78]

The appellants had relied on *Palmore v. United States*[79] to support

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[74] *Id.* at ____, 102 S.Ct. at 2870.

[75] *Id.* at ____, 102 S.Ct. at 2870-71 n.23.

[76] *Id.* (citing Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S. 442, 455 n.13 (1977)).

[77] U.S. CONST. art. I, § 8, cl. 4.

[78] ____ U.S. at ____, 102 S.Ct. at 2872.

[79] 411 U.S. 389 (1973).

their argument. In *Palmore* the Court had held that the Constitution conferred on Congress plenary authority over the government of the District of Columbia and that this gave it the power to create a system of courts for the District outside the limitations of article III. In *Palmore* the Court had stated:

> Both Congress and this Court have recognized that . . . the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accomodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.[80]

Justice Brennan reasoned that the argument based on this language in *Palmore* was "in essence, . . . that pursuant to any of its Art. I powers, Congress may create courts free of Art. III's requirements whenever it finds that course expedient. This contention has been rejected in previous cases."[81] He stated:

> In short, to accept appellants' reasoning, would require that we replace the principles delineated in our precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government.[82]

Further, Justice Brennan distinguished *Palmore* from *Marathon* on the ground that the plenary authority expressly granted to Congress over the District included all powers of government including the judicial power, and that it was limited to a defined geographical area.

The second argument, that the bankruptcy courts were merely "adjuncts" of the United States District Courts and that therefore the Act was consistent with the requirements of article III, rested on the Court's reasoning in *United States v. Raddatz*[83] and *Crowell v. Benson*.[84] The Court held that the use of magistrates in *Raddatz* or administrative agencies in *Crowell* as factfinding adjuncts to the district courts did not violate article III as long as "the essential attributes of judicial power"[85] remained in an article III tribunal. Justice Brennan appended a further limiting requirement in a footnote, stating that such practices were not unconstitutional "so long as Congress' adjustment of the traditional man-

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[80] *Id.* at 407-08.

[81] ___ U.S. at ___, 102 S.Ct. at 2872 (citing *Atlas Roofing Co.*, 430 U.S. at 450 n.7); Toth v. Quarles, 350 U.S. 11 (1955).

[82] ___ U.S. at ___, 102 S.Ct. at 2873.

[83] 447 U.S. 667 (1980).

[84] 285 U.S. 22 (1932).

[85] *Id.* at 51.

ner of adjudication can be sufficiently linked to its legislative power to define substantive rights."[86]

Justice Brennan pointed out that in *Crowell*, the administrative agency empowered to determine "questions of fact as to the circumstances, nature, extent and consequences of the injuries sustained by the employee for which compensation is to be made" did not have the power to enforce any of its compensation orders. "On the contrary, every compensation order was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be in accordance with law and supported by evidence in the record."[87]

In *Raddatz*, the Court upheld the constitutionality of the 1978 Federal Magistrates Act which permitted the referral to magistrates by district court judges of certain pretrial motions, including motions to suppress evidence based on alleged violation of constitutional rights. In *Raddatz* the Court found that determinations made by the magistrates were subject to de novo review by the district court judge, who was free to rehear the evidence or call for additional evidence. Moreover, the magistrates were empowered to hear motions only on referal by the district courts, and they were appointed and subject to removal by the district courts. "In short, the ultimate decisionmaking authority respecting all pretrial motions clearly remained with the district court."[88]

Justice Brennan summed up his analysis of these cases with the following comment:

> Together these cases establish two principles that aid us in determining the extent to which Congress may constitutionally vest traditionally judicial functions in non-Art. III officers. First, it is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges. . . . Second, the functions of the adjunct must be limited in such a

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[86] ___ U.S. at ___, 102 S. Ct. at 2874 n.29.

[87] *Id.* at ___, 102 S. Ct. at 2875.

[88] *Id.* The United States Court of Appeals for the Ninth Circuit very recently held that a section of the Magistrates Act of 1979 not at issue in *Raddatz* is unconstitutional. Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., Nos. 82-3152, 82-3182 (9th Cir. Aug. 5, 1983) (available Aug. 25, 1983, on LEXIS, Genfed library, Cir file). In this case the parties to a patent infringement suit had consented to have the case tried by a magistrate, pursuant to 28 U.S.C. § 636(c) (Supp. V 1981), which empowers the magistrate in a case tried by consent to enter a final judgment subject to review only on appeal. Unlike the provision at issue at *Raddatz*, the decision of the magistrate under § 636(c) was not subject to de novo review by the district court judge. The Ninth Circuit found this section inconsistent with the requirements of article III of the Constitution, relying in large part on the Supreme Court's plurality opinion in *Marathon* for its reasoning.

> way that "the essential attributes" of judicial power are retained in Art. III court.[89]

In an important footnote addendum to the foregoing statement, Justice Brennan added:

> Contrary to Justice White's suggestion, we do not concede that "Congress may provide for intitial adjudications by Article I courts or administrative judges of all rights and duties arising under otherwise valid federal laws." . . . Rather we simply reaffirm the holding of *Crowell*—that Congress may assign to non-Art. III bodies some adjudicatory functions. *Crowell* itself spoke of "specialized" functions. This case does not require us to specify further any limitations that may exist with respect to Congress' power to create adjuncts to assist in the adjudication of federal statutory rights.[90]

In addition, Justice Brennan reasoned, congressional power to create adjuncts to assist in the determination of federal statutory rights does not support the proposition that such power extends to the use of adjuncts to determine federal constitutional rights. He stated that such an assumption was rejected in *Crowell v. Benson*[91] and that it was implicitly rejected in *United States v. Raddatz*.[92]

> Congress' assignment of adjunct functions under the Federal Magistrates Act was substantially narrower than under the statute challenged in *Crowell*. Yet the Court's scrutiny of the adjunct scheme in *Raddatz*—which played a role in the adjudication of *constitutional* rights—was far stricter than it had been in *Crowell*. Critical to the Court's decision to uphold the Magistrates Act was the fact that the ultimate decision was made by the district court.[93]

He added:

> Moreover, such a distinction seems to us to be necessary in light of the delicate accommodations required by the principle of separation of powers reflected in Art. III. The constitutional system of checks and balances is designed to guard against "encroachment or aggrandizement" by Congress at the expense of the other branches of government. *Buckley v. Valeo*, 424 U.S., at 122. But when Congress creates a statutory right, it clearly has

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[89] *Id.* at ___, 102 S.Ct. at 2876.

[90] *Id.* at ___, 102 S.Ct. at 2876 n.32.

[91] 285 U.S. 22, 60-61 (1931).

[92] 447 U.S. 667, 683 (1980).

[93] ___ U.S. at ___, 102 S.Ct. at 2877. *See also* United States v. Raddatz, 447 U.S. 667 (1980).

> the discretion in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created. No comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.
>
> We hold that the Bankruptcy Act of 1978 carries the possibility of such an unwarranted encroachment. Many of the rights subject to adjudication by the Act's bankruptcy courts, like the rights implicated in *Raddatz*, are not of Congress' creation.[94]

The plurality Justices also found fault with the extensive power conferred on the bankruptcy judges by the Act:

> Unlike the administrative scheme that we reviewed in *Crowell*, the Act vests all "essential attributes" of the judicial power of the United States in the "adjunct" bankruptcy court. First, the agency in *Crowell* made only specialized, narrowly confined factual determinations regarding a particularized area of law. In contrast, the subject matter jurisdiction of the bankruptcy courts encompasses not only traditional matters of bankruptcy, but also "all civil proceedings arising under title 11 or arising in or related to cases arising under title 11." 28 U.S.C. sec. 1471(b) (1976 ed., Supp III) (emphasis added). Second, while the agency in *Crowell* engaged in statutorily channeled factfinding functions, the bankruptcy courts exercise "all of the jurisdiction" conferred by the Act on the district courts, sec. 1471(b) (emphasis added). Third, the agency in Crowell possessed only a limited power to issue compensation orders pursuant to specialized procedures, and its orders could be enforced only by order of the district court. By contrast, the bankruptcy courts exercise all ordinary powers of district courts, including the power to preside over jury trials, 28 U.S.C. sec. 1480 (1976 ed., Supp. III), the power to issue declaratory judgments, sec. 2201, the power to issue writs of habeas corpus, sec. 2256, and the power to issue any order, process or

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[94] ___ U.S. at ___, 102 S.Ct. at 2878.

judgment appropriate for the enforcement of the provisions of title 11, 11 U.S.C. sec. 105(a) (1976 ed. Supp. III). Fourth, while orders issued by the agency in *Crowell* were to be set aside if "not supported by the evidence," the judgments of the bankruptcy courts are apparently subject to review only under the more deferential "clearly erroneous" standard. Finally, the agency in *Crowell* was required by law to seek enforcement of its compensation orders in district court. In contrast, the bankruptcy courts issue final judgments, which are binding and enforceable even in the absence of an appeal. In short, the "adjunct" bankruptcy courts created by the Act exercise jurisdiction behind the facade of a grant to the district courts, and are exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz*.

We conclude that sec. 241(a) of the Bankruptcy Act of 1978 has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.[95]

2. The *Marathon* Dissent: Rejecting the "Public Rights" Doctrine

Justice White, convinced that history has made it impossible to adhere to the meaning obviously attached by the draftsmen of the Constitution to article III, was critical of the plurality opinion because he believed that "[i]n its attempt to pigeonhole [the historical precedents] the plurality does violence to their meaning and creates an artificial structure that itself lacks coherence."[96]

Justice White's main argument is that "any . . . attempt to distinguish Article I from Article III courts by the character of the controversies they may adjudicate fundamentally misunderstands the historical and constitutional significance of Article I courts."[97] He attempts, through a painstaking analysis of Justice Brennan's opinion and the precedents upon which it relies, to show that there is no way to logically limit the power of Congress to create non-article III tribunals to determine cases that are within the judicial power defined by article III. He suggests that in the final analysis the only limiting factor is a matter of principle that finds expression in a balancing of constitutional powers:

To say that the Court has failed to articulate a principle by which we can test the constitutionality of a putative Article I

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[95] *Id.* at ____, 102 S.Ct. at 2878-80.
[96] *Id.* at ____, 102 S.Ct. at 2883.
[97] *Id.* at ____, 102 S.Ct. at 2885.

> court, or that there is no such abstract principle, is not to say that this Court must always defer to the legislative decision to create Article I, rather than Article III, courts. Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on how the balance is to be struck.[98]

Justice White contends that a balancing test such as the one proposed has actually been behind many decisions of the Court, including *Palmore v. United States* (District of Columbia courts)[99] and *Glidden v. Zdanok* (Court of Claims and Court of Custom and Patent Appeals).[100] He also contends that the holding in *Palmore* was not limited to geographically defined specialized courts, as Justice Brennan claimed. (The majority opinion in *Palmore* was written by Justice White.)

Justice White explained his proposed balancing test as follows:

> I do not suggest that the Court should simply look to the strength of the legislative interest and ask itself if that interest is more compelling than the values furthered by Article III. The inquiry should, rather, focus equally on those Article III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Article III values should then be measured against the values Congress hopes to serve through the use of Article I courts.[101]

He suggests that appellate review of the decisions of legislative courts would help to insure separation of powers (at the national level), and that, like appellate review of state court decisions, would provide a "firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority."[102] He concludes that a system of legislative courts that provided for judicial review by article III courts would "be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court."[103]

Justice White's final point on the balancing approach goes to the heart of the constitutional system of checks and balances:

> Similarly, as long as the proposed Article I courts are designed to deal with issues likely to be of little interest to the political

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[98] *Id.* at ____, 102 S.Ct. at 2893.
[99] 411 U.S. 389 (1973).
[100] 370 U.S. 530 (1962).
[101] ____ U.S. at ____, 102 S.Ct. at 2894.
[102] *Id.*
[103] *Id.*

> branches, there is less reason to fear that such courts represent a dangerous accumulation of power in one of the political branches of government. Chief Justice Vinson suggested as much when he stated that the Court should guard against any congressional attempt "to transfer jurisdiction for the purpose of emasculating" constitutional courts.[104]

Justice White concluded that the bankruptcy courts created by the 1978 Bankruptcy Act satisfied the balancing standard and the specific tests he had proposed.[105] First, the Act provided for appellate review of bankruptcy court decisions by article III courts. Second, the Bankruptcy Act was not "an attempt by the political branches of government to aggrandize themselves at the expense of the third branch or an attempt to undermine the authority of constitutional courts in general."[106] There was support in the legislative history for the view that Congress was prompted to create the new courts at least in part because it thought that article III courts lacked interest in bankruptcy matters and would fail to deal with them in an expeditious manner. In addition, there was little chance that Congress would bring political pressure to bear on bankruptcy court judges, since bankruptcy proceedings are usually "private adjudications of little political significance."[107] Third the purposes Congress sought to accomplish by creating non-article III bankruptcy courts were "compelling."

> The real question is not whether Congress was justified in establishing a specialized bankruptcy court, but rather whether it was justified in failing to create a specialized, Article III bankruptcy court. . . . Congress may legitimately consider the effect on the federal judiciary of the addition of several hundred specialized judges. . . . The addition of several hundred specialists may substantially change, whether for good or bad, the character of the federal bench.[108]

The need for bankruptcy judges could change; if the appointments were made pursuant to article III, there could be a surplus of highly specialized judges. Finally, "Congress may have believed" that the change from a system of bankruptcy referees to that of article I judges was "less disruptive of the existing bankruptcy and constitutional court systems, than would be a change to article III judges."[109]

The approaches of the plurality and dissenting Justices to the analysis

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[104] *Id.* (quoting National Mut. Ins. Co. v. Tidewater Co., 337 U.S. 582, 644 (1948)).
[105] ___ U.S. at ___, 102 S.Ct. at 2894.
[106] *Id* at ___, 102 S.Ct. at 2895.
[107] *Id.*
[108] *Id.*
[109] *Id.* at ___, 102 S.Ct. at 2896.

of the constitutional problem posed by the Bankruptcy Act are quite dissimilar. On the one hand, the plurality opinion stresses that there is a strong presumption in favor of article III courts deciding cases falling within the scope of the "judicial power" defined by article III of the Constitution, even when those are so-called "public rights" cases arising under federal law. Only those exceptions falling within two relatively well-defined classes of precedents and one more nebulous group of precedents (which is hedged about with various procedural limitations) will be permitted under the plurality analysis. The dissenting Justices, on the other hand, consider the precedents to be of little value to analysis except as they reveal a departure from the literal requirements of article III and the substitution of a policy-oriented balancing approach. Such an approach weighs separation-of-power values expressed by article III against the values and needs that may underlie a particular decision by Congress to create a specialized tribunal that does not conform to the tenure and salary provisions of article III.

All of the Justices evince a concern for the proper maintenance of the constitutional separation of powers between the legislative, executive and judicial branches; their differences in this area are more of degree than of quality. All of the Justices would also agree that the constitutional scheme will tolerate some deviations from the express requirements of article III, but that there are limits on the kind and extent of deviation that will be considered permissible. At the extreme edges of possibility, one could expect all of the Justices to agree that congressional creation of non-article III tribunals either violated or did not violate article III of the Constitution. Short of the extremes of possibility, however, it is difficult, if not impossible, to predict the result that might follow from application of either the plurality or dissenting approaches to a different legislative scheme.[110]

C. *The Pre-*Marathon *Litigation*

Significantly, none of the Justices in the *Marathon* case endorsed reasoning espoused in earlier Supreme Court cases which had held that the United States Court of Claims was an article I court. That, together with the fact that the Supreme Court in 1962[111] had expressly repudiated the reasoning of those earlier cases and had held that the Court of Claims was, indeed, an article III court, means at the very least that the constitutionality of the Claims Court legislation is open to serious question.

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[110] Recent commentary has suggested two alternative methods for allocating power between article III and non-article III bodies, urging that the method suggested by the Justices in *Marathon* would have adverse consequences for federal administrative agencies. *See* Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197-229.

[111] *See* Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

An examination of two earlier decisions, *Williams v. United States*[112] and *Ex parte Bakelite Corp.*,[113] in light of the changed analytical approaches taken by the present Supreme Court Justices, will help to illustrate why they are of doubtful precedential value today in resolving this constitutional question. The analysis must be prefaced, however, by a review of the history of the Court of Claims.[114]

Prior to the creation of the Court of Claims in 1855, claims against the government of the United States were dealt with solely by means of private legislation in Congress. The need for congressional participation in the payment of such claims is grounded in the Constitution: article I, section 9, clause 17 provides that: "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law;" further, the appropriation process is distinct from the process of enacting substantive legislation (although substantive "riders" are frequently attached appropriations legislation).[115] The enactment of substantive legislation must be made pursuant to the provisions of article I, section 7, clause 2,[116] which is the familiar process of passage by both the Senate and the House of Representatives, and either approval by the President or the necessary votes in Congress to override his veto.

When it was first established, the role of the Court of Claims was largely to advise the Congress in this private legislative process, that is, to help the Congress determine what claims should be paid and how much compensation was due. In carrying out this function, the Court of Claims held trials and took evidence, but its decisions lacked the force of decisions made by a court of law because they were subject to revision by Congress.[117] It was for this reason that the Supreme Court, in *Gordon v.*

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[112] 289 U.S. 553 (1933).

[113] 279 U.S. 438 (1929).

[114] *See* Glidden Co. v. Zdanok, 370 U.S. 530 (1962); W. COWEN, P. NICHOLS, JR. & M. BENNETT, THE UNITED STATES COURT OF CLAIMS, A HISTORY, PART II, ORIGIN—DEVELOPMENT—JURISDICTION 1855-1978 (*reprinted in* 216 Ct. Cl. 1); Miller, *The New United States Claims Court*, 32 CLEV. ST. L. REV. 7 (1983).

[115] The Supreme Court has ruled that Congress has the power not only to authorize expenditures of public moneys to effectuate the legislative powers it possesses, but also may appropriate funds for the benefit of the general welfare of the people. *See* United States v. Butler, 297 U.S. 1, 65 (1936); 3 WORKS OF ALEXANDER HAMILTON 372 (Lodge ed. 1885).

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> Every Bill which shall have passed the House of Representatives and the Senate shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated . . . . If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent . . . to the other House . . . and if approved by two thirds . . . it shall become a Law.

U.S. CONST. art. I, § 7, cl. 2.

[117] "Judgements within the powers vested in the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of the Government." Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113

United States,[118] held that the decisions of the Court of Claims were not reviewable in the Supreme Court. They were not "cases or controversies" within the meaning of article III of the Constitution.

As a result of the decision in *Gordon*, Congress amended the practice of the Court of Claims and conferred on that court the power to issue final judgments which would be paid for out of funds appropriated generally for the purpose of paying judgments against the United States. If the judgments exceeded a certain dollar amount, they were referred to Congress and were subject to congressional scrutiny before being approved for special appropriations legislation.[119] As a result of these legislative changes, money judgments of the Court of Claims for the most part were no longer subject to revision by Congress. This aspect of the law has not been changed by the enactment of the new Claims Court,[120] so that even though the constitutional status of the court has been changed, its power to render binding judgments against the United States has not been altered.

In *United States v. Jones*,[121] decided in 1886 after Congress had given the Court of Claims the power to render final judgments, the Supreme Court held that those judgments would be reviewable in the Supreme Court. Throughout this early period, there had never been a definitive statement from the Court or from Congress as to whether the Court of Claims was an article III or an article I court, although the presumption that appeared to prevail after the decision in *United States v. Jones* was that it was an article III court.

In *Williams v. United States*,[122] a judge of the Court of Claims brought suit in that court complaining that the Comptroller General of the United States had made a reduction in his salary in violation of article III. The government defended on the ground that the Court of Claims was not an article III court. Questions concerning the status of the judges were certi-

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(1948).

[118] 69 U.S. (2 Wall.) 561 (1864). Chief Justice Taney stated that if Congress were given the power to revise the decision of a court, "[t]he real and ultimate judicial power will, therefore, be exercised by the Legislative Department, and not by that Department to which the Constitution has confided it." 117 U.S. app. 697, 703 (1885). (Chief Justice Taney wrote this opinion just before his death, and according to the other justices it was used as the basis for the Court's decision in *Gordon*. The opinion was lost for a time, however, and when it was later discovered, the Court authorized its separate publication as an appendix to volume 117. It has since been cited often. *See*, United States v. Jones, 119 U.S. 477, 478 (1886)).

[119] The power to pay debts was granted to Congress in the Constitution. "The Congress shall have the Power To . . . pay the Debts and provide for the . . . general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. This clause has been interpreted to give Congress the power to create a judicial forum for claims against the United States. *See* Pope v. United States, 323 U.S. 1 (1944); United States v. Realty Co., 163 U.S. 427 (1896).

[120] 31 U.S.C. § 724(a) (Supp. V 1981).

[121] 119 U.S. 477 (1886).

[122] 289 U.S. 553 (1933).

fied to the Supreme Court, which held that the Court of Claims was not an article III court and that the judges were not entitled to tenure and salary protections. In reaching its decision, the Court was obviously impressed with the importance of the business of the Court of Claims,[123] and the dangers of having cases against the United States decided by judges who were dependent "upon the legislative pleasure for the tenure of their offices and for a continuance of adequate compensation during their service in office."[124] But, the Court concluded, these considerations of the need for independent judges "though obvious enough" were not alone sufficient to warrant a conclusion that the court was within the reach of article III. "The integrity of such a conclusion must rest not upon its desirability, but upon its conformity with the provisions of the Constitution."[125]

After reviewing the history of the Court of Claims, the *Williams* Court concluded that while it originally started out as "nothing more than an administrative or advisory body," it had been converted into a true court "and given jurisdiction over controversies which were susceptible of judicial cognizance."[126] However, "the question still remains—and is the vital question— whether it is the judicial power defined by Art. III of the Constitution."[127]

The Court then referred to Chief Justice Marshall's opinion in *American Insurance Co. v. Canter*,[128] dealing with territorial courts, for the proposition that while territorial courts (and, of course, other legislative courts) are invested with judicial power, it "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."[129] The Court was supportive of the view that legislative courts exercise judicial power.

> The fact that the appellate jurisdiction of this court over judgments and decrees of the legislative courts has been upheld and freely exercised under acts of Congress from a very early period, [is] a practice which can be sustained, . . . only upon the theory that the legislative courts possess and exercise judicial power—as distinguished from legislative, executive, or administrative power— although not conferred in virtue of the third article of the Constitution.[130]

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[123] *Id.* at 561.
[124] *Id.* at 562.
[125] *Id.*
[126] *Id.* at 565.
[127] *Id.*
[128] 26 U.S. (1 Pet.) 511 (1828).
[129] *Id.* at 546.
[130] 289 U.S. at 566.

The idea that there is more than one source of the "judicial power" of the United States in the Constitution has been disclaimed by the Court in more recent decisions and it seems unlikely that the Court today would revert to this line of reasoning to sustain the validity of the United States Claims Court as a non-article III court. This illustrates, however, the conceptual difficulties the Supreme Court has been forced to contend with over the years in order to justify congressional departures from the tenure and salary requirements of article III of the Constitution. The difficulty is most poignantly emphasized by the question posed in the Court's opinion in *Williams*: "If the power exercised by legislative courts is not judicial power, what is it? Certainly it is not legislative, or executive, or administrative power, or any imaginable combination thereof."[131]

In answering this question, the Court decided to adopt the view it had expressed five years earlier in dictum, in *Ex parte Bakelite Corp.*,[132] that the Court of Claims, like the Court of Customs and Patent Appeals, was a legislative court and not an article III court. In *Bakelite* the Court had said of the Court of Claims:

> It was created, and has been maintained as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies.[133]

The Court in *Bakelite* had added that none of the matters determined by the Court of Claims necessarily required judicial determination, but were "susceptible of legislative or executive determination and can have no other save under and in conformity with permissible legislation by Congress."[134]

The Court in *Williams* did not rely exclusively on the dictum of *Bakelite* for its holding. It proceeded to consider a further argument: "namely, that when the United States consents to be sued, the judicial power of Art. III at once attaches to the court upon which jurisdiction is conferred in virtue of the clause which in comprehensive terms extends the judicial power to 'controversies to which the United States shall be a party.' "[135] The Court here referred to the express language in article III extending the judicial power of the United States to such controversies, which would appear to encompass all suits brought against the United States as well as those in which the United States was plaintiff. The Court concluded, after analyzing the language, that the omission of the word "all"

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[131] *Id.* at 567.
[132] 279 U.S. 438 (1929).
[133] *Id.* at 452.
[134] *Id.* at 453.
[135] 289 U.S. at 571.

in the passage meant that the judicial power of article III did not extend to those suits in which the United States was a party defendant, but only to those in which it was plaintiff.[136]

The Court bolstered this reading of article III by a reference to the opinion of Chief Justice John Marshall in *Cohen v. Virginia*,[137] in which he had said: "The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits."[138] The fact that Justice Marshall was here referring to the Judiciary Act of 1789 and not to article III of the Constitution did not appear to trouble the *Williams* Court, which had earlier commented: "The Judiciary Act of 1789 has always been regarded as practically contemporaneous with the Constitution, and as such, of great value in expounding the meaning of the judicial article of that instrument."[139]

The *Williams* analysis failed to consider that the 1789 Judiciary Act conferred only a small part of the potential judicial power of article III on the inferior federal courts. Among the notable omissions was general federal question jurisdiction, for example, which was not created until 1875.[140] Moreover, as Justice Marshall's famous opinion in *Osborn v. Bank of the United States*[141] revealed, the Chief Justice was not inclined to construe the judicial power conferred by article III any more narrowly than necessary. In any event, the matter before the Court in *Cohen v. Virginia* was an appeal from a state court judgment, and the comment about immunity was dictum, as well as limited to the Judiciary Act.

The Court in *Williams* attempted to strengthen its argument on the immunity issue by referring to the immunity of the states from suit in federal court under the eleventh amendment to the Constitution and to the Court's decision in *Hans v. Louisiana*,[142] which held that a state could not be sued by its own citizens in the federal courts. The Court concluded that the reasoning of that case "applies with equal force to suits against a state and those brought against the United States."[143] The Court thus rejected the possibility that article III judicial power extends to suits against as well as by the United States, saying:

> It cannot be reconciled with the settled principle that where a controversy is of such a character as to require the exercise of the judicial power *defined by Art. III*, jurisdiction thereof can be

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[136] *Id.* at 573.

[137] 19 U.S. (6 Wheat.) 264 (1821).

[138] 289 U.S. at 574.

[139] *Id.* at 573-74.

[140] Act of March 3, 1875, ch. 137, 18 Stat. 470 (current version at 28 U.S.C. § 1331 (1982)).

[141] 22 U.S. (9 Wheat.) 738 (1824).

[142] 134 U.S. 1 (1889).

[143] 289 U.S. at 577.

> conferred only on courts established in virtue of that article, and that Congress is without power to vest *that* judicial power in any other judicial tribunal, or, of course, in an executive officer, or administrative or executive board, since, to repeat the language of Chief Justice Marshall in *American Insurance Co. v. Canter*, . . . "they are incapable of receiving it."[144]

This idea, including the specific statement of it in *Canter*, has been rejected by the Court since the decision in *Williams*.[145] Indeed, the *Williams* decision itself did not appear to rely upon it too heavily, for it proceeded to another analytical approach, which rested on the famous "public rights" doctrine of *Murray's Lessee v. Hoboken Land & Improvement Co.*,[146] in which the Court stated that it was beyond the power of Congress to

> withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at 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.[147]

The Court in *Williams* was thus able to conclude:

> Since all matters made cognizable by the Court of Claims are equally susceptible of legislative or executive determination, . . . they are, of course, matters in respect of which there is no constitutional right to a judicial remedy, . . . and the authority to inquiry into and decide them may constitutionally be conferred on a nonjudicial officer or body.[148]

As if it was still not satisfied with the analysis, the *Williams* Court presented the further argument that finding judicial power in article III for suits against the United States must be rejected because:

> it cannot be reconciled with the limitation fundamentally implicit

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[144] *Id.* at 578.

[145] In a footnote to *Marathon*, Justice Brennan stated that this dichotomy has not withstood analysis since the decision in *Williams*. "Our more recent cases clearly recognize that legislative courts may be granted jurisdiction over some cases and controversies to which the Art. III judicial power might also be extended." ___ U.S. at ___, 102 S.Ct. at 2867 n.14.

[146] 59 U.S. (18 How.) 272 (1855).

[147] *Id.* at 284.

[148] 289 U.S. at 579-80.

> in the constitutional separation of powers, namely, that a power definitely assigned by the *Constitution* to one department can neither be surrendered nor delegated by that department, nor vested by *statute* in another department or agency. . . . And since Congress, whenever it thinks proper, undoubtedly may, without infringing the Constitution, confer upon an executive officer or administrative board, or an existing or specially constituted court, or retain for itself, the power to hear and determine controversies respecting claims against the United States, it follows indubitably that such power, in whatever guise or by whatever agency exercised, is no part of the judicial power vested in the constitutional courts by the third article. That is to say, a power which may be devolved, at the will of Congress, upon any of the three departments plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tripartite distribution of such powers.[149]

Much of the foregoing argument was implicitly and/or explicitly rejected by the Court in its later decision in *Glidden Co. v. Zdanok*[150] in which it held that the Court of Claims was an article III court. Since article III courts cannot take jurisdiction of cases or controversies that do not fall within the scope of the judicial power defined by article III,[151] the Court necessarily concluded that suits against the United States are within the judicial power as defined by article III.[152]

However, there are two aspects of the *Williams* decision that should be pursued in any new consideration of the scope of Congress' power to confer the judicial power of the United States on non-article III courts. The first, and perhaps most difficult, is the problem of sovereign governmental immunity from suit and whether the existence of such immunity confers extraordinary powers on Congress to allocate their disposition to non-article III courts. The second is the question whether, as the Court suggested in *Williams*, the Constitution consigns suits against the government to the exclusive province and plenary authority of Congress.

Although federal government immunity from suit is not a doctrine expressed in the Constitution, it is nonetheless firmly entrenched in our jurisprudence.[153] To define its exact meaning and scope is difficult, per-

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[149] *Id.* at 580-81.

[150] 370 U.S. 530 (1962).

[151] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[152] 370 U.S. at 571.

[153] The Draftsmen of the Constitution were evidently more concerned with providing the states with immunity from certain types of suits in the federal courts. *See* THE FEDERALIST No. 81, at 487-88 (A. Hamilton) (C. Rossiter ed. 1961); Principality of Monaco v. Mississippi, 292 U.S. 313 (1934); Hans v. Louisiana, 134 U.S. 1 (1889).

The immunity doctrine has not prevented the United States from bringing suits against states under the original jurisdiction of the Supreme Court. *See* United States v. Texas, 143

haps impossible. At the very least, immunity appears to mean that the federal government cannot be sued, either in federal or state courts, without its consent, and that statutes giving such consent are to be strictly construed.[154] It does *not* mean that agents of the federal government may not be sued, although it is frequently difficult to distinguish when a suit is really against the government even though nominally against an agent of the government.[155] Numerous consent statutes exist; some of them, like the Federal Torts Claims Act,[156] are limited in scope, while others, like the Tucker Act[157] which confers jurisdiction on the Court of Claims over a variety of claims, are quite general.

The issue presented by the *Williams* decision is whether the doctrine of federal government immunity from suit carries with it the implication that Congress possesses greater powers with respect to claims against the United States than it possesses with respect to other substantive legislation, and greater powers with respect to control over the creation and jurisdiction of the inferior federal courts than it already otherwise possesses. Indeed, Justice Brennan acknowledged such an implication of the sovereign immunity doctrine in his review of the so-called "public rights" cases in the course of his opinion in the *Marathon* case.[158]

Congress and the President have exclusive control over the enactment of legislation, and only Congress can initiate legislation.[159] The Constitution gives it the power to legislate, but does not require that it do so. If Congress chose not to act, then there would be no national law except for the Constitution of the United States and federal common law derived

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U.S. 621 (1892). In addition, the Supreme Court has held that state immunity to suits in the lower federal courts may be waived. *See* Parden v. Terminal Ry., 377 U.S. 184 (1964).

The opposite is not true. A state may not sue the United States in the Supreme Court unless there has been consent to the suit by the government. Kansas v. United States, 204 U.S. 331 (1907). As is true in the case of individual actions against the national government, the states may get around the immunity barrier in some cases by bringing the suit against a federal government official. *See* Oregon v. Mitchell, 400 U.S. 112 (1970); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[154] *See* Basso v. United States, 239 U.S. 602 (1915); Dooley v. United States, 182 U.S. 222 (1901). *See also* HART & WECHSLER, *supra* note 42, at 1351.

In United States v. Mitchell, ___ U.S. ___, 103 S.Ct. 2961, 2965 (1983), the Supreme Court stated: "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." The Court went on to hold that the Tucker Act constitutes a waiver of sovereign immunity with respect to all claims encompassed within the scope of that Act.

[155] *See* Hawaii v. Gordon, 373 U.S. 57 (1963).

[156] *See* 28 U.S.C. § 2674 (1982).

[157] *See* 28 U.S.C. § 1346 (1976), *amended by* Federal Courts Improvement Act, § 129, 28 U.S.C. § 1346.

[158] ___ U.S. at ___, 102 S.Ct. at 2869.

[159] "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.

from it.[160] If it chose not to create inferior federal courts, then there would be no courts except for the Supreme Court of the United States and the state courts.[161] It is difficult to imagine that Congress could possibly possess power broader than that, especially since it also has the power to repeal any law it may choose to enact, so that the passage of a particular piece of legislation does not bind its hands in the future. The very act of creation of the new Claims Court and the abolition of the old Court of Claims bears witness to the fact that the Congress is not bound to perpetuate the national institutions it creates if it chooses not to do so.

One possible significance of the doctrine of sovereign immunity to federal jurisdiction can be imagined based on the following scenario: Assume that Congress abolished all inferior federal courts, leaving only the state courts and the Supreme Court of the United States, and that it likewise repealed all statutes consenting to suits against the United States. If the doctrine of sovereign immunity were strictly adhered to, neither the state courts nor the Supreme Court of the United States would be able to entertain a suit against the United States seeking redress for a violation by the government of rights guaranteed by the Constitution. For instance, it would appear that a claim for just compensation for the taking of private property for public use in violation of the fifth amendment would be blocked if the government did not expressly consent to its maintenance, unless the litigant were able to cast the suit as one against an official of the government and not as a suit against the government itself. Without the doctrine of sovereign immunity, on the other hand, it would appear that the state courts would have to entertain such a case because of the supremacy clause of the Constitution;[162] further, if the evidence established such a taking, the plaintiff would be entitled to appropriate compensation as a matter of federal (not state) common law.[163] The United States Supreme Court would have jurisdiction to review the case, unless Congress by statute removed its appellate power over cases "arising under" the United States Constitution, which would itself probably raise a constitutional issue of considerable importance.[164]

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[160] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

[161] "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

[162] U.S. CONST. art. VI, cl. 2.

[163] *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). *See also* Bell v. Hood, 327 U.S. 678 (1946) (permitting damages for injuries resulting from violations of the fourth and fifth amendments). An analysis of the right to compensation in these cases as a matter of federal common law is found in Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1 (1968).

[164] The appellate jurisdiction of the Supreme Court has been held to be entirely within congressional control. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869). For a full discussion of the constitutional issues surrounding this power, see Hart, *The Power of Congress to*

Having imagined this extreme scenario, is it grounds for concluding that the doctrine of sovereign immunity gives Congress such extraordinary power over suits against the United States that it would be entitled to entirely disregard the requirements of article III of the Constitution in creating inferior courts to take jurisdiction over such suits? Since Congress must pass laws in order to permit the government to be held accountable in a judicial proceeding, may it, in so doing, ignore the provisions of the Constitution that were designed to assure that federal judicial proceedings would be free from political control? To grant that Congress is free not to pass a law giving consent to suit really does not say much more than that Congress is free not to pass any laws at all or that Congress is free not to create any inferior federal courts at all. The reason or logic of attaching tremendous additional congressional power over the federal judicial system as an incident of a doctrine that can so easily be waived if Congress feels that a legislative scheme would benefit from the inclusion of judicially determinable remedies,[165] seems totally elusive. *Williams v. United States* does not satisfactorily explain the connection.

If sovereign immunity from suit is a power regarded as residing in the political branches of the national government, and not the judicial branch, then it seems reasonable to conclude that it is another expression of the constitutional separation of powers. It provides one more check on the judicial power and serves to give the Congress and President yet another means of limiting the jurisdiction of the inferior federal courts, a means that merges into and becomes indistinguishable from the power to legislate substantively, and the plenary power to control the lower federal courts. It does not require the further destruction of the independence of the federal judiciary assigned to try those cases against the government which Congress and the president *do* see fit to allow, to protect the government against unwanted litigation. Indeed, it seems too high a price to pay for this doctrine, which after all is not written into the Constitution, to say that it gives Congress the power to override the express requirements of article III which give the judges of the Supreme and inferior courts the protections designed to make them independent of the political branches. The immunity doctrine should not be used as a pretext for rendering express constitutional protections inoperative. It is not only the

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Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362 (1953); *see also* HART & WECHSLER, supra note 42, at ch. IV and 1981 supp.

[165] In Mitchell v. United States, ___ U.S. ___, 103 S. Ct. 2961 (1983), the Supreme Court held unequivocally that the government has waived sovereign immunity to all suits brought against it under the Tucker Act, 28 U.S.C. § 1491 (1982) (originally enacted as Act of March 3, 1887, ch. 359, 24 Stat. 505), or the Indian Tucker Act, 28 U.S.C. § 1505 (1982) (originally enacted as Act of May 24, 1949, ch. 139, § 89(a), 63 Stat. 89, 102). The *Mitchell* case was an action for damages in the Court of Claims brought by an Indian tribe and individual tribe members seeking compensation for alleged government mismanagement of forest lands belonging to the Indians.

judges concerned who benefit from article III protections: it is the integrity and impartiality of the federal judicial process. Nowhere is that integrity and impartiality more needed than when the federal government itself is a litigant. The government passes the laws and makes the rules to guide judicial decisions; in many areas of government litigation, the rules are already heavily weighted in the government's interest. It seems clear that the Founding Fathers thought that at least the final judgment should not be politically ordained.

In its rejection of the "public rights" doctrine as a viable basis for congressional creation of non-article III courts, the dissenting opinion in *Marathon* appears to have implicitly rejected the *Williams v. United States* use of the doctrine of sovereign immunity from suit.[166] The "public rights" doctrine is an offshoot of the sovereign immunity doctrine and would seem to have no constitutional force without the foundation of sovereign immunity.

The process of rejecting the analysis of the *Williams* case, as Justice White's dissent points out, was begun by the Chief Justice Vinson in his dissenting opinion in *National Insurance Co. v. Tidewater Transfer Co.*[167] and was continued by Justice Harlan in his plurality opinion in *Glidden Co. v. Zdanok.*[168] Whether these differences with the decision in *Williams v. United States* will lead the Court to reject the *Williams* application of the sovereign immunity doctrine to enhance congressional power over courts in the federal system remains to be seen. One can only hope that the Supreme Court will not perpetuate a doctrine that has created such analytical difficulties and that has contributed nothing to the values served by the constitutional separation of powers.

The suggestion in *Williams v. United States* that the holding rested at least in part on the belief that Congress possesses plenary authority over all aspects of suits against the United States may be viewed independently of the sovereign immunity doctrine with which it was linked in the opinion. The underlying principle is that when the Constitution has expressly or by implication committed a matter to the sole discretion of one of the political branches, the usual constitutional checks and balances are not operative. This appears to be the justification for the "political question" doctrine,[169] for one example, and for the holding that the guarantee of a republican form of government in article IV, section 4 of the Consti-

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[166] ____ U.S. at ____, 102 S.Ct. at 2883 (White, J., dissenting).

[167] 337 U.S. 582, 626 (1949) (Vinson, C.J., dissenting).

[168] 370 U.S. 530 (1962). Justice Harlan openly rejected the *Williams* Court's application of the sovereign immunity doctrine and contended that the Supreme Court had also rejected it on other occasions. His position was that the doctrine means only that the United States must give its consent before it can be sued in the federal courts, but once this consent is given, the judicial power of the United States as embodied in article III extends to the controversy. *Id.* at 564.

[169] *See* Baker v. Carr, 369 U.S. 186 (1962).

tution does not give rise to judicial questions, but only political ones.[170]

In his plurality opinion in the *Marathon* case, Justice Brennan expressed the view that the Constitution similarly granted plenary governmental authority to Congress over the military and hence the military courts martial; over the territories, and hence over the territorial courts; and over the District of Columbia, and hence over the court system of the District of Columbia.[171] Although the dissenting Justices implicitly reject this view, the fact that four Justices have adopted it as a justification for permitting Congress to give the judicial power of the United States to non-article III courts means that the adoption of a similar rationale by the Supreme Court in the *Williams* case deserves careful consideration. If a similar constitutional grant of exclusive congressional control can be found respecting suits against the United States, the new Claims Court could conceivably be justified on that ground, and it might succeed in joining the ranks of the other courts above mentioned as a fourth major exception to the presumptive applicability of article III requirements to federal courts.

The constitutional basis for supposed plenary congressional authority over suits against the United States is the power granted to Congress by article I, section 8, clause 1 to pay the debts of the United States,[172] a power that is linked to the taxing power and the power to spend "for the general welfare." The generality of the language of this clause, together with the fact that it appears in section 8 of article I which enumerates all of Congress' legislative power, makes it difficult to accept the argument that the clause embodies some extraordinary additional grant of authority to Congress beyond the authority to legislate.

In his dissenting opinion in *Marathon*, Justice White criticizes the plurality's view that the validity of the legislation creating the courts of the District of Columbia is grounded on the constitutional commitment of all the governmental affairs of the District of Columbia, precisely because the clause referring to the government of the District is contained in section 8, along with the enumeration of all of the other legislative powers of Congress.[173] Carried to its logical conclusion, Justice White suggests, the idea that a clause in section 8 grants such extraordinary authority to Congress would provide a basis for Congress to ignore the limitations of article III altogether whenever it wished to create a court to deal with matters within the scope of its legislative power.[174] Justice Brennan and the other members of the plurality would probably defend against such a result by pointing to the language of the District of Columbia clause, arti-

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[170] *See* Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

[171] ___ U.S. at ___, 102 S.Ct. at 2868.

[172] "The Congress shall have the Power to . . . pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

[173] ___ U.S. at ___, 102 S.Ct. at 2892 (White, J., dissenting).

[174] *Id.*

cle I, section 8, clause 17, which in express terms gives Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever" over the seat of the national government—language that is far more specific than the legislative power conferred by the other clauses.

In any event, it serves no useful purpose to suggest that the power to pay the debts of the United States goes beyond the necessary power of raising (through taxation legislation) and appropriating the money needed for that purpose, and that it confers exceptional power on Congress to ignore the requirements of article III in creating federal courts to judicially determine controversies respecting those debts. Neither the Court in *Williams* nor the Congress in enactment of the Claims Court legislation suggested any such purpose. Since Congress has the power to decide whether the federal government shall consent to suit, it seems unnecessary to resort to the plenary authority doctrine and to give Congress the additional power to decide that although such suits should be resolved by federal courts, those courts should not meet the standards of independent judgment and impartiality specified in article III of the Constitution.

IV. Conclusion

Apart from the issue of federal sovereign immunity, there is nothing in the work of the United States Claims Court that would appear to justify its status as an article I court. The work of the court is national in scope and importance. The outcome of cases it hears is of obvious and direct interest to both the executive and legislative branches of government. Indeed, as defendant, the government has a special stake in the court's judgments. Further, the court has jurisdiction over a variety of cases, including claims for money judgments under the Constitution, contracts, Indian claims, and tax and patent cases. If specialization is a feature that warrants departure from the requirements of article III,[175] the Claims Court does not appear to qualify.[176]

The issue of the constitutionality of the Claims Court under article III was not debated in hearings on the Federal Courts Improvement Act; while the House Report states that the constitutionality of the court was considered,[177] if such consideration took place it was not regarded as im-

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[175] Justice Brennan noted in *Marathon* that there had been rare circumstances where Congress had found a particularized need in a specialized area that warranted distinctive treatment. Id. at ____, 102 S.Ct. at 2872.

[176] The House Report stated its view that the Claims Court was as specialized as the Tax Court, and for that reason could be justified as a article I court. H.R. Rep. No. 312, 97th Cong., 1st Sess. 25 (1981). The Supreme Court has never ruled on the constitutionality of the Tax Court. The court was held constitutional in Stix Friedman & Co. v. Coyle, 467 F.2d 474 (8th Cir. 1972).

[177] The report asserted that in keeping with the independent and affirmative obligation of Congress to determine the constitutionality of all legislation, the committee had concluded

portant enough to warrant inclusion in published hearings or reports on the legislation. Neither in the House nor in the Senate was the government's practical need for a change in the court's status from article III to article I considered. Indeed, the Bar Association of the District of Columbia presented testimony urging that the court be made an article III court for the practical reason that the security and prestige of article III status was needed to secure qualified applicants willing to serve as judges.[178] The Association claimed that there was a serious problem in finding qualified applicants to serve on article I tribunals. The change in the court's status appears to have been made as a matter of legislative convenience only: the major purpose behind the Federal Courts Improvement Act was the creation of a new Court of Appeals for the Federal Circuit, and the major reason for the creation of that new court was to bring some uniformity to patent appeals. An examination of the legislative history reveals that this issue preoccupied the Congress.[179] Once the decision was made to transform the Court of Claims and the Court of Customs and Patent Appeals into the Court of Appeals for the Federal Circuit, Congress was forced to do something to fill the void created with respect to trial of suits against the government. Much of the existing institutional structure was left intact by transforming the hearing officers of the Court of Claims into judges equipped with all the powers they held previously along with all the powers the Court of Claims judges had possessed and a few additional powers conferred by the new legislation. By legislatively elevating these former court appointees to the status of article I judges, the Congress accomplished the most sweeping changes with great efficiency, but with almost no expressed concern for the important constitutional values that were affected by the changes.[180] It would be difficult to find in the legislative history of this Act any genuine support for the idea that Congress acted as it did because of the nature of the

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that "there is no constitutional objection to those reallocations." H.R. REP. No. 312, 97th Cong., 1st Sess. 26 (1981).

[178] *Federal Courts Improvement Act of 1981—S.21 and State Justice Institute Act of 1981—S.537: Hearing Before the Subcomm. on Courts of the Comm. on the Judiciary United States Senate*, 97th Cong., 1st Sess. 242 (1981) (statement of Clarence T. Kipps, Bar Association of D.C.) [hereinafter cited as *Federal Courts Hearings*].

[179] *See, e.g.*, H.R. REP. No. 312, 97th Cong., 1st Sess. 16-24, 28-30 (1981). Page references to the United States Claims Court in the legislative history of the Act (and its predecessor bills) are printed in the appendix to this article. The hearings before Senate and House subcommittees contain no discussion of constitutional problems posed by the legislation. It is possible that committee members and witnesses considered the issues settled as a result of the passage of Tax Court, Bankruptcy Court, and U.S. Magistrates' legislation. There are indications that some Congressmen and witnesses saw a degree of similarity between the new Claims Court and the Tax Court. However, the House Report did reveal an awareness of the existence of an issue relating to the constitutionality of the Claims Court temporary appointments provisions. Unfortunately, a memorandum prepared for the Committee chairman on this issue, which is mentioned in the report, is not included in the printed hearings.

[180] *See* H.R. REP. No. 312, 97th Cong., 1st Sess. 24-27 (1981).

cases involved or because of some special legislative needs connected with the work of the Claims Court.

One exception to the above critique, however, involves the matters that Congress had referred to the Court of Claims in the past. In recent years these reference matters have been given, not to the judges of the Court of Claims, but to a special commissioner.[181] Now, presumably, the judges of the Claims Court will be able to handle these matters themselves, because as article I judges they will no longer be bound by the justiciability limitations of article III. This work of the court is a very small fraction of the whole,[182] however, and is insufficient justification for another major exception to the requirements of article III.

There were undoubtedly many other constitutionally valid ways in which Congress could have dealt with the matters involved in Claims Court litigation. Congress might, for example, have distributed such matters to existing district court judges. For instance, the district courts already have jurisdiction over Tucker Act claims if the amount in controversy does not exceed $10,000,[183] yet it has always been unclear why their jurisdiction was so limited. Moreover, the district courts already have jurisdiction over cases under the Federal Torts Claims Act and other cases in which the United States is a defendant.[184] The district courts do not lack experience and competence to deal with the kinds of cases that fall within the Claims Court's jurisdiction. The only good argument against such a delegation is that it would add additional burdens to an already overtaxed district court system.

A second solution might have been to make the Claims Court itself an article III court, equal in rank to the district courts. The Court of Claims was a strange hybrid court, apparently equal in rank to a circuit court of appeals,[185] but possessing the responsibility of a trial court in many circumstances.[186] Congress might have streamlined its operations by making it strictly a trial court without the necessity of transforming it into an article I court.

A third possibility might have been to split off some of the court's functions, making them resolvable by non-judicial means, although this approach probably would have created more complications instead of eliminating existing ones. Some matters, for example, might have been delegated to administrative agencies, subject to judicial review at the appellate court level under the Administrative Procedure Act.[187] Whether

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[181] 28 U.S.C. § 1492 (1982).

[182] *See Federal Courts Hearings, supra* note 178, at 242. Justice Harlan made the same point in his opinion in Glidden Co. v. Zdanok, 370 U.S. 530, 583 (1962).

[183] 28 U.S.C. § 1346(b) (1982).

[184] *Id.* at 2674.

[185] *See generally id.* ch. 7.

[186] *Id.*

[187] 5 U.S.C. §§ 701-706 (1976). The sections allow for judicial review of administrative

suits under the provisions of the fifth amendment could be converted into a form suitable for administrative determination is debatable, but a positive outcome is not inconceivable since administrative agencies have been known to make rulings on important constitutional issues.[188] Contract cases might be difficult to manage in an administrative setting, but certainly would be amenable to arbitration by arbitrators acceptable to both parties, subject again to the minimal judicial review that is customary in federal contract cases.[189]

It might be suggested that the admission that certain matters within the jurisdiction of the Claims Court could be transferred to administrative agencies (which are neither article I nor article III courts) or arbitrators (who are neither article I nor article III judges) undermines the argument that Congress exceeded its authority in creating the Claims Court as an article I court. Justice White's dissent might be interpreted as containing such a suggestion,[190] but that would be to overlook the fact that he, too, recognized constitutional limits to the power of Congress to bypass the requirements of article III and the values of separation of powers and judicial independence which article III embodies. He stated clearly that the final judgement on the constitutionality of such legislation will be for the Court to make,[191] and it is clear that in such a review, the mere legislative convenience of Congress, without more, will not be sufficient to outweigh the values served by an independent judiciary.[192] To say that Congress is free to find alternatives to the judicial resolution of disputes is not the same as saying that if it chooses to utilize the federal judicial process, it is free to ignore the protections the Constitution provides against political influences or control over that process.

The net result of the passage of the Claims Court legislation is that Congress has removed a broad range of cases of great importance to the nation from the independent federal judicial system. Congress conferred a significant portion of the judicial power of the United States on a federal court subject to political control, including the power to render final judgments and to enforce them with judicial process, as well as the ability to use all of the powers of equity in deciding cases.

There is no evidence to suggest that this change resulted from open

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agency actions. Congress did not give adequate consideration to this alternative. The Act already provides review for administrative decisions in cases in which the United States is a defendant. *See* Mulry v. Driver, 366 F.2d 544 (9th Cir. 1966); Carman v. Richardson, 357 F. Supp. 1148 (D. Vt. 1973).

[188] *See* St. Eliz. Com. Hosp. v. NLRB, 259 NLRB 1135 (1982).

[189] *See* Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C. Cir. 1961); *see also* Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) (appellant entitled to judicial review for arbitrary and capricious contract bid decision).

[190] ___ U.S. at ___, 102 S. Ct. at 2858.

[191] *Id.*

[192] *Id.*

hostility to the judiciary or to the doctrine of separation of powers, but there *is* evidence that the change was made on the basis of a misconception of the meaning of judicial independence. In the House Report on the legislation, the comment was made that the elevation of Court of Claims hearing officers to judgeships on the new Claims Court would be efficacious because it would free them from dependence on the judges who had appointed them.[193] Obviously the Representatives did not stop to reflect that the independence guaranteed by article III of the Constitution is independence of the judges from the influence or control of the political branches of government, not from the judicial branch.

It would be salutary if Congress itself would re-evaluate its creation, putting the Claims Court legislation back on the drafting table for a more thoughtful examination of the problems it poses for the constitutional separation of powers, as well as the practical desirability of having a truly independent judiciary decide cases brought against the government of the United States. Congress could at the same time examine alternative means for handling the business of the court. Admittedly it has not been an easy matter for Congress to understand precisely what powers it does and does not possess vis-a-vis the federal court system, but the *Marathon* case has once again made clear that there are constitutional limitations on Congress' powers and that these limitations will be enforced even years after the fact, creating a situation of great uncertainty and confusion for those who must resort to the courts.

[193] H.R. REP. No. 312, 97th Cong., 1st Sess. 25 (1981).

APPENDIX

REFERENCES TO UNITED STATES CLAIMS COURT IN LEGISLATIVE HISTORY

Chronologically listed, 1977 to 1982

SOURCE	LOCATION
State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (June 20, 1977).	Not specifically directed to United States Claims Court, but see pages 235-39.
SENATE COMM. ON THE JUDICIARY, FEDERAL COURTS IMPROVEMENT ACT OF 1979, S. 1477, 96th Cong., 1st Sess.	Pages 8, 29-39.
Federal Courts Improvement Act of 1979: Hearings on S. 677, S. 678 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess.	Pages 5, 32, 39, 61, 79-84, 91-92, 98-100, 104-06, 111, 117, 124, 309-442 (S. 677), 461, 506, 509-14, 519-23, 560-62, 633, 642-43, 669.
HOUSE COMM. ON THE JUDICIARY, COURT OF APPEALS FOR THE FEDERAL CIRCUIT ACT OF 1980, H.R. 3806, 96th Cong., 2d Sess. (1980).	Pages 1-15 (H.R. 3806), 22-24, 26-28, 30, 32-33, 36-43, 45-46, 50-51, 59-62, 68-75, 78-84, 86, 88, 91-98, 100, 102-04, 106-07, 110, 113-16, 118-29, 131.
Federal Courts Improvement Act of 1979: Addendum to Hearings on S. 677, S. 678 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess.	Pages 17, 28, 45, 82-87.
Industrial Innovation and Patent and Copyright Law Amendments: Hearings on H.R. 6033, 6934, 3806, 2414 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess.	Pages 368, 371, 389, 396, 708, 721-24, 726, 761-62.

HOUSE COMM. ON THE JUDICIARY, COURT OF APPEALS FOR THE FEDERAL CIRCUIT ACT OF 1981, H.R. 4482, 97th Cong., 1st Sess. (1981).	Pages 1-16 (H.R. 4482), 17, 24-27, 32-40, 42-53, 57-58, 67-71, 77-85, 87, 89-95, 97, 99-101, 104-10, 112-13, 115-17, 119-24, 127-30, 132-43, 145.
Additional Judicial Positions: Hearings Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981).	Pages 123-26.
Court of Appeals for the Federal Circuit and United States Claims Court: Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. (1981).	Pages 18, 20, 25, 27-35, 37-40, 16-67, 211-13, 214, 229, 424, 427, 536, 538-41, 544-53, 555, 558-69, 571-73, 575-78, 580-82, 741.
Federal Courts Improvement Act of 1981 and Senate Justice Institute Act of 1981: Hearings on S. 21, S. 537 Before the Subcomm. on the Judiciary, 97th Cong., 1st Sess. (May 18, 1981).	Pages 1, 2-71 (S. 21), 139-40, 154, 235, 239-42, 273, 276-79, 281-88.
SENATE COMM. ON THE JUDICIARY, FEDERAL COURTS IMPROVEMENT ACT OF 1981, S. 1700, 97th Cong., 1st Sess.	Pages 2, 7, 13, 15-18, 22-25, 32-33.
127 CONG. REC. 168, H8383-92 (daily ed. Nov. 17, 1981).	Page H8390. Discussion of bill.
127 CONG. REC. 169, H8442-43 (daily ed. Nov. 18, 1981).	No discussion of Claims Court. Passage by the House of amended bill (321-76).
127 CONG. REC. 182, S14683-723 (daily ed. Dec. 8, 1981).	Pages S14692-94, 14709, 14721. Discussion of bill.
128 CONG. REC. 22, H737-47 (daily ed. Mar. 9, 1982).	Introduction of bill into record.
128 CONG. REC. 29, S2567 (daily ed. Mar. 22, 1982).	Presentation to the Senate of amendment to the Act.