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SEPARATION OF POWERS: THE PHENOMENON OF LEGISLATIVE COURTS

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Federal legislative courts are tribunals which hear, decide, and render binding judgments in "cases" and "controversies" which may be constitutionally entertained by courts established pursuant to the third article of the Constitution,[1] but whose judges do not enjoy the salary and tenure guaranties provided by article III. These tribunals sometimes act in non-judicial ways, performing legislatively assigned tasks which cannot be performed by article III courts, but when legislative courts do act in a judicial manner their judgments are directly reviewable by the Supreme Court.[2] The Supreme Court has recognized the constitutional existence of such tribunals in several cases,[3] but the opinions in those cases have not produced clarity as to how legislative courts can be permitted in a government with a constitutional separation of powers or as to whether there are any constitutional limitations on what matters Congress may entrust to legislative courts to the exclusion of any original juridiction in article III or state courts.

Confusion about legislative courts necessarily indicates confusion as to the meaning of separation of powers. It is too easily forgotten that a formalized separation of powers was a novel feature in the United

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1. The literature has often referred to courts established pursuant to article III of the Constitution as "constitutional courts." The phrase "article III courts" is used in this article as more descriptive and less confusing.

2. Thus excluded by definition from the subject matter of this article are agencies, such as the Tax Court and NLRB, which perform adjudicative tasks but whose decisions must constitutionally be subject to review by article III courts. See JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 87-94, 381-89 (1965). Separation of powers may indeed set requirements as to the extent of the original jurisdiction to be exercised by the independent judiciary [see, *e.g.*, Crowell v. Benson, 285 U.S. 22 (1932)], but this issue is not faced in this article because legislative courts divest the independent judiciary of original jurisdiction entirely.

3. See notes 85 & 104 *infra* and accompanying text.

States' constitutions and that the full implications and implementation of the separation were not immediately realized. Legislative courts were at first an inevitable result of the attempt to impose a separation of powers on continuing governmental institutions where no separation had previously existed. In the course of time, legislative court doctrine crystallized to allow a total displacement of original jurisdiction in article III and state courts only in certain narrow areas where separation of powers in fullest implementation was impossible or grossly impractical, and, conjunctively, where the strongest reasons for the separation did not exist.

Studying legislative courts as a laboratory for the development of separation of powers can give insight into three problems: (1) the relation of separation of powers to due process of law, (2) its relation to federalism, and (3) the extent of the required participation by the independent judiciary or state courts in the federal administration of law.

I. The Adoption of Separation of Powers

Prior to declaring their independence from England, the colonial governments exercised authority without a constitutional separation of powers.[4] The records of the colonial governments demonstrate that judicial business was typically conducted by the legislature or the governor or by agencies which were controlled by one or the other. Typically, after a preliminary period during which judicial authority "seems to have been exercised by the whole body of people,"[5] judicial tasks were assigned to the legislative assembly or an executive commission. Separate judicial courts generally were first created to relieve the legislatures from crowded "dockets." And even when some differentiation of departments did appear, some portion of the judicial jurisdiction, usually more appellate than original, was retained by the legislatures.[6]

The prevailing pattern of government of the period is further illustrated by the Articles of Confederation adopted in 1778, only nine years before the Constitutional Convention. Congress was to be "the

4. In doing this, the colonies were following the English pattern. In England all authority stemmed from the king, and the power to dispense justice as well as the power to administer the law was part of the royal prerogative. When new agencies were established, they were intended to relieve some of the work load and were not separate or independent. Even when Coke struggled for independence in judicial business in the early 17th century, it was not for independence from the king as an institution, but rather from the personal usurpation of the particular king. The struggle by the Commons was not for a separation of powers, but for parliamentary supremacy which was obtained in 1680 and maintained for a century and a half. See Radin, *The Doctrine of the Separation of Powers in Seventeenth Century Controversies,* 86 U. Pa. L. Rev. 842 (1938).

5. Commonwealth v. Holmes, 17 Mass. 336, 339 (1821).

6. See generally Pound, Organization of Courts chs. 2, 3 (1940). Dean Pound gives a colony-by-colony description in considerable detail.

last resort on appeal in all disputes and differences . . . between . . . states concerning boundaries, jurisdiction or any cause whatever."[7] The cases were to be tried by "Commissioners or Judges" appointed by joint consent of the states involved, but the details of the procedure provided suggest very strongly that the tribunal thus constituted would not have considered itself as independent of the legislature. In fact there was really no judicial department under the Articles. The only permanent courts were those provided "for the trial of piracies and felonies committed on the high seas" and "for recognizing and determining fully appeals in all cases of captures."[8] Salaries and tenure of judges were apparently subject to diminution, and enforcement of judgments was dependent upon special legislative action.

Prior practice in the colonies, then, was not the source of the separation of powers theory which became imbedded in the federal constitution and which had led to the complaint in the Declaration of Independence:

> He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.
> He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.[9]

The origin of the separation of powers theory upon which the colonists drew seems to have been in the 17th century.[10] This was a turbulent period in English history, in which the struggle for supremacy between the Commons and the Crown resulted in revolutions in 1640 and 1689, with the dominance of Parliament eventually being established.

Coke was one of the dramatic figures in the early struggle. When he sat on the bench he vigorously maintained the prerogatives of an independent judiciary.[11] Coke held in the famous *Dr. Bonham's Case*[12]

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7. ARTICLES OF CONFEDERATION art. 9 (1778).

8. A state feeling abused was to file a petition with Congress, and Congress was then to give the defendant-state notice. There were a number of other detailed specifications. The same procedure was to be used in determining "controversies concerning the private right of soil claimed under different grants of two or more states." *Ibid.*

9. Practical concern was most likely for judicial powers independent of review by the Privy Council in England rather than a concern with judicial independence of colonial legislatures. See POUND, *op. cit. supra* note 6, at 63-64; SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS (1950).

10. Radin, *The Doctrine of the Separation of Powers in Seventeenth Century Controversies*, 86 U. PA. L. REV. 842 (1938).

11. Even though Coke's conception of government did not involve a separation of powers, the

> result was a strong declaration of the independence of the judiciary, but it was an independence from direct interference by the king in his natural person. The king in his corporate or politic person was the source of the court's authority. No independence was desired from this sort of a king since by his nature

that he would not give any effect to a statute of Parliament that would allow a private licensing authority, the College of Surgeons, to be both the agency which prosecuted a physician for practicing without a license from the College and received one-half of the fines collected, and the tribunal which adjudicated the question of liability.[13] A statement by Coke in *Dr. Bonham's Case* was mistakenly understood by the American colonists to recognize that courts had traditional authority to declare acts of Parliament void[14] and was cited as authority in urging colonial courts to refuse to issue writs of assistance to revenue officers pursuant to an act of Parliament in 1767.

A complete separation of powers theory was set out in a pamphlet published first in 1648, and republished after the Restoration, written by one Clement Walker under the name of Theodorus Verax.[15] By method of analysis, he identified the three powers of government with which we are familiar. He said that judicial tasks begin after Parliament enacts and include deciding whether the act is binding. Even more significantly, Walker stated that the exercise of all three powers by one body (here he intended the House of Commons) results in tyranny.

> Now for any one man, or any Assembly, Court or Corporation of men (be it the two Houses of Parliament) to usurp these three powers, 1. *The Governing power,* 2. *The Legislative power,* 3. *And the Judicative power,* into themselves, is to make themselves the highest Tyrant, and the people the basest slaves in the world. . . .[16]

Walker identified the tasks appropriate to the three "powers" by assigning different phases of governmental activity to different government institutions to prevent tyranny. For example, he recognized that an executive veto is "legislative" in nature, but requires the king to participate in the task of enacting laws.

> The King is the only supreme Governour of this realm of England, to regulate and protect the people by commanding the Laws to be observed and executed; and to this end He (and He alone) beareth not the Sword in vain; yet the King by himself

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he could not do anything judicial except by speaking through his judges. . . . *Id.* at 850.

12. 2 Brownl. 255, 77 Eng. Rep. 646 (C.P. 1610).

13. See Thorne, *Dr. Bonham's Case,* 54 L.Q. Rev. 543, 548-50 (1938).

14. *Ibid.*

15. Walker, Relations and Observations, Historicall and Politick upon the Parliament Begun Anno Dom. 1640 (1648). There are several copies of this work at Harvard's Houghton and Langdell libraries.

16. *Id.* at 150-53.

> can neither make, repeal or alter any one Law, without the concurrence of both Houses of Parliament, the *Legislative power* residing in all three, and not in any one, or two of the three Estates, without the third, and therefore no one or two of them can exclude the other from having a *Negative voice* in passing, repealing, or changing of laws. . . .[17]

Walker complained that Parliament had undertaken to perform tasks which are the province of all three powers. His enumeration of tasks has a familiar ring to it, but it should be noted that Walker's allocation of tasks differs in specifics from that adopted in the United States Constitution.

> 1. For the *Governing power.* 1. they coyn, enhance, and abate money. 2. they make War and Peace, and continue an extraordinary Militia of an Army upon us. 3. they declare who are Enemies to the Realm. 4. they maintain foreign negotiations. 5. they regulate matter of Trade, and exercise other Regalities: whereas all Iura Regalia belong to the King as Supreme Governor.
>
> 2. For the *Legislative power.* They exclude the King from His Negative Voice, and the two Houses obtrude their Ordinances (things so new, that they are not pleadable in any Court of Justice) as Laws upon the people; laying an excise, assessments, and Taxes upon the People: they Vote and declare new Treasons, not known by the statute 25 Edw 3 nor by any other known Law; yea even to make or receive any addresse to, or from the King; and they account it a breach of Privilege, if men do not believe it to be Treason, being once declared. They oust men of their free-holds, and imprison their Persons, contrary to *Magna Charta,* by Ordinances of Sequestration, &c.
>
> 3. For the *Judicative power.* They erect infinite many new Judicatries under them, as their Committies of complaints, of secret Examinations, of Indempnities; their Country Committies, where businesses are examined, heard, and determined without, nay against *Magna Charta,* and the known Laws: nay even in capitial crimes they wave the Courts of Law, and all Legal proceedings by Outlawry, Indictment, or Tryall by Peers, and Bill of Attainder; (which is the only way of Tryall in Parliament: For the Parliament cannot judicially determine any thing but by Act of Parliament) and set up new-invented forms of proceedings before the Lords (even against free Commoners,

17. *Ibid.* See also *id.* at 113-15.

> although the Lords be not their Peers) as in the case of the 4 Aldermen, &c., and the *Arch-bishop of Cantebery*. . . .[18]

Walker's pamphlet was popular enough in England to justify its republication and was familiar to at least some persons in the colonies, as a copy survived a fire in the Harvard library in 1764.[19]

John Eliot, who gained the rank of a Parliament martyr because of his imprisonment and death in the Tower, and who was one of the Parliamentary leaders whom the colonists admired, also developed a theory which finds three separate powers.[20] Although his works were not published until the 19th century, his ideas must have circulated widely.[21] Eliot cited Aristotle as his authority.[22]

The theory of separation of powers as it was most familiarly known to the colonists is contained in the writings of Montesquieu, which were carefully read by the colonial publicists.[23] Montesquieu's doctrine is much the same as Walker's, insisting that a usurpation of all three powers is tyranny, the major difference being that the tyrant in Montesquieu's France was a despotic monarch.[24]

Separation of powers theory was, on the whole, well received in the American colonies.[25] The lessons were well learned as concern was most forcefully with setting up checks and balances to prevent tyranny. Many colonists were concerned with a too powerful popular legislature and desired that the legislatures be divided into houses and be further checked by an executive and judiciary.[26] But the utility of an independent judiciary as an aid in preventing tyranny was for the most part not even debated; the question was usually only one of implementation.[27]

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18. *Id.* at 150-53.
19. Radin, *supra* note 10, at 852-57.
20. ELIOT, DE JURE MAJESTATIS 95 (Grossart ed. 1882).
21. Radin, *supra* note 10, at 857-58.
22. ARISTOTLE, POLITICS bk. IV, ch. 14 (Barker ed. 1946).
23. Radin, *supra* note 10, at 842.
24. *Id.* at 857, 866.
25. See Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 394-415 (1935).

See ADAMS, A DEFENSE OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA AGAINST THE ATTACK OF M. TURGOT (1787). Volume One was published in time to circulate widely in the federal constitutional convention. See WARREN, THE MAKING OF THE CONSTITUTION 815-18 (1928).

Madison wrote: "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 324 (Cooke ed. 1961).

26. PAINE, RIGHTS OF MAN pt. 2, ch. 4 (1792); LOCKE, ESSAY ON CIVIL GOVERNMENT ch. 12 (1690); MONTESQUIEU, THE SPIRIT OF LAWS bk. XI, ch. 6 (1748). See Sharp, *supra* note 25, at 387-88 (Locke and Montesquieu), 395 (Paine).

27. Thus, Madison, among others, advocated giving the federal judiciary the task of exercising with the executive a veto on legislation. The proposal, defeated in the federal convention on four occasions, was opposed on the ground that it prejudiced the

Because of the novelty of adopting a formalized separation of powers in a written constitution, there was very little practical experience upon which to draw, and the framers of the state and federal constitutions were necessarily influenced by the theoretical treatises and pamphlets available to them. But being practical men, they were likely to rely heavily on what experience they did have in deciding whether to establish a strong, independent judiciary and what jurisdiction should be given to it.

The experience in Virginia may have been particularly significant. There the county courts, first established in 1622, enjoyed considerable respect. These courts had a tradition of capable judges and eventually gained considerable independence by filling their own vacancies. In 1766 it was one of these courts which supported the House of Burgesses by declaring the Stamp Act unconstitutional.[28] This was in sharp contrast to the ultimate review of colonial judicial decisions in the Privy Council, where colonial interests were not sympathetically treated.[29]

After separation from England in 1776, seven of the colonies provided in their new constitutions for the separation of the executive, legislative, and judicial branches of their governments. The constitution which contained the strongest provisions and served as an example for some of the others was adopted in Virginia. The Virginia Constitution provided that the three departments should be distinct and that none should exercise the power "properly belonging to the other."[30] More particularly, in relation to the judiciary specific provision was made for four superior courts: a court of appeals, a court of chancery, an admiralty court, and a general court. Judges were to hold office during good behavior and their salaries were to be adequate and fixed.[31] Here then was a separation doctrine much more definitely expressed than that to be incorporated later in the federal constitution.

The contemporary constitutions of Massachusetts, Georgia, and Vermont all contained express provisions for the separation of powers,

judiciary's task in deciding cases which might later arise under federal statutes. See WARREN, *op. cit. supra* note 25, at 332-34.

28. Williams, *Independent Judiciary Born in Colonial Virginia,* 24 J. AM. JUD. SOC'Y 124 (1940).

29. See note 9 *supra.*

30. "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time; except that the Justices of the County Courts shall be eligible to either House of Assembly." VA. CONST. (1776). [All federal and state constitutions to the date of publication are collected in FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Thorpe ed. 1909).]

31. VA. CONST. (1776).

including specific stipulations that no department should exercise the powers of the others.[32] The Maryland and North Carolina documents simply provided that the powers should be "separate and distinct."[33] The New Hampshire Constitution of 1784 used the same language, but added the interesting proviso that the departments should be only as separate and distinct as might prove practicably workable.[34]

The new states had only short experience under these constitutions when the Constitutional Convention met in 1787, and Madison indicated in the *Federalist* that the prior allocation of governmental tasks in the colonies had not been much altered in practice.[35]

It is difficult to measure the extent to which the members of the Constitutional Convention intended to modify the traditional powers exercised by the colonial legislatures by vesting the "judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[36] Only a few things are clear. The new government was divided into three departments, one of which is judicial. There is little doubt that a majority of the framers intended to give the federal courts a rather broad jurisdiction, including much that some of the delegates considered to properly belong to the states.[37] So clear was this intention that three of the delegates refused to sign the final document because of, among

32. "[T]he legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." MASS. CONST. Declaration of Rights, art. 30 (1780). The Georgia and Vermont provisions were similar to those in Virginia. GA. CONST. art. 1 (1777); VT. CONST. ch. 2, § 6 (1786).

33. MD. CONST. Declaration of Rights, art. 6 (1776); N.C. CONST. Declaration of Rights, art. 4 (1776).

34. "In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept as separate from and independent of each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." N.H. CONST. pt. I, art. 37 (1784).

35. THE FEDERALIST No. 48 (Cooke ed. 1961) (Madison).

36. U.S. CONST. art. 3, § 1. The records of the Convention from all available sources are collected in FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1937). Madison's notes are published in 5 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Supp. 1845). The debates are summarized in MEIGS, THE GROWTH OF THE CONSTITUTION (1900) [reprinted in 1 THE CONSTITUTION AND COURTS (1924)], and in WARREN, *op. cit. supra* note 25.

37. This is evidenced clearly in the congressional debates on the Judiciary Act of 1789, where the idea of limiting the lower courts' jurisdiction to maritime and admiralty cases was recognized, but rejected. Gerry and Madison participated in the debate on opposing sides. See the debate in the House of Representatives on the bill as passed in the Senate, 1 ANNALS OF CONG. 812-14, 826-66 (1789).

other reasons, what had been done about the judicial power.[38] It is also clear that the judicial department was intended to be independent, as explicit salary and tenure guarantees were written into article III.[39] One important reason for having an independent judiciary is the need for an independent arbitrator in disputes over the jurisdiction of conflicting governmental authorities, particularly federal and state. In opposing a motion in the Convention to give power to "the Executive on application by the Senate and House of Representatives" to remove judges from office, Rutledge said,

> if the Supreme Court is to judge between the United States and particular States, this alone is an insuperable objection to the motion.[40]

But much about the establishment of the "judicial Power" is unclear, and there is little in the Constitutional Convention records which helps answer the two questions presented by the phenomena of legislative courts: what jurisdiction is *required* to be vested in the independent judiciary if not left to the state courts, and what matters, if any, which are constitutionally susceptible of treatment as "cases" or "controversies" by article III courts may be handled judicially by a dependent judiciary? The Constitution contains express limitations on Congress' power to perform judicial tasks by suspending writs of habeas corpus and passing bills of attainder or ex post facto laws.[41] Yet any other restriction on the performance of judicial acts by Congress or the executive must be inferred from the vesting provisions for the three powers. It is difficult to determine whether by "legislative power" and "executive power" the framers meant the power to make and execute laws or whether they had in mind the power to execute tasks which had traditionally been performed

38. Letters of Edmond Randolph to Speaker of the House of Delegates of Virginia, October 10, 1787; letters of Eldridge Gerry to the President of the Senate and the Speaker of the House of Representatives of Massachusetts; statement of George Mason printed in 1 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 482, 492, 494 (2d ed. 1836, reprinted 1854); 2 FARRAND, *op. cit. supra* note 36, at 637; 3 *id.* at 123, 128.

39. Some of the framers insisted on a provision that salaries could be neither increased nor diminished, in order to decrease the possibility of legislative influence. G. Morris and Franklin opposed the early draft which prohibited increases as well as diminution; Madison favored the broader position. The subject was twice debated, on July 18 and on August 27. MEIGS, *op. cit. supra* note 36, at 224, 227 (1924 ed.); WARREN, *op. cit. supra* note 25, at 532-34; 5 ELLIOT, *op. cit. supra* note 36, at 330-31, 482; 2 FARRAND, *op. cit. supra* note 36, at 38, 44-45, 429-30. The argument extended to the state conventions; *e.g.*, Grayson in the Virginia convention objected vociferously to the power of Congress to influence decisions by promise of increased salaries. Madison now supported the limitation finally decided upon. 3 ELLIOT, *op. cit. supra* note 38, at 537, 563-64.

40. MEIGS, *op. cit. supra* note 36, at 227 (1924 ed.); WARREN, *op. cit. supra* note 25, at 532; 5 ELLIOT, *op. cit. supra* note 36, at 481; 2 FARRAND, *op. cit. supra* note 36, at 428.

41. U.S. CONST. art. 1, § 9.

by colonial legislatures and executives. Their express prohibitions of previous legislative controls over the judiciary may or may not give special significance to their failure to specify other shifts in the allocation of legislative tasks. Similarly equivocal is their failure to incorporate in the federal document the provision of existing colonial constitutions specifically enjoining any commingling of powers.[42] The framers expressly permitted certain instances of commingling.[43] It is at least true that the text of the Constitution presents no clear basis for saying that the pre-1787 legislative and executive supervision of judicial tasks had been definitely rejected in all matters.

One point of possible significance in the record is that a sizeable group of the delegates thought that most adjudicative tasks should be left to the state courts and that there should be only one federal tribunal, the Supreme Court, whose appellate jurisdiction should be over cases decided by the highest state courts.[44] Had this arrangement finally prevailed, there would be considerable justification for finding that certain tasks, perhaps more "judicial" than "legislative," of peculiarly federal interest were to be performed by some other bodies under congressional administration.[45] When those who felt that jurisdiction was being unwisely taken from the states agreed to accept inferior federal courts to be created by Congress and to exercise jurisdiction at its discretion, it seems unlikely that they were focusing on the problem of legislative or executive authority to supervise the performance of tasks, susceptible of judicial treatment, that would not in any case have been of concern to the state courts.

The protests which were made in the state conventions against the

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42. See notes 30-34 *supra*.

43. *E.g.*, the Senate tries impeachment, U.S. CONST. art. 1, § 6, and the courts of law are allowed to participate in the appointment of inferior officers, U.S. CONST. art. 2, § 2.

The essays in *The Federalist* recognize the inevitability and necessity of certain interdepartmental encroachment. See *e.g.*, THE FEDERALIST No. 47, at 323-31 (Cooke ed. 1961) (Madison). "On the slightest view of the British constitution we must perceive, that the legislative, executive and judiciary departments are by no means totally separate and distinct from each other." *Id.* at 325.

"If we look into the constitution of the several states we find that notwithstanding the emphatical, and, in some instances, the unqualified terms in which the axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." *Id.* at 327.

44. Rutledge, Butler, Sherman, and Luther Martin were of this opinion. The two South Carolina delegates warned that the states would revolt at this encroachment on their jurisdiction. Martin warned of "jealousies and oppositions in the state tribunals," and Sherman protested the unnecessary expense. MEIGS, *op. cit. supra* note 36, at 223, 225 (1924 ed.); WARREN, *op. cit. supra* note 25 at 325-27; 1 FARRAND, *op. cit. supra* note 36, at 118, 124-25, 127, 128; 2 *id.* at 38-39, 45-46; 5 ELLIOT, *op. cit. supra* note 36, at 158-60, 331.

45. *E.g.*, adjudicating disputes in regard to federal tax collection or the regulation of imports from foreign countries.

"usurpation of state powers" in article III were in some cases quite vigorous,[46] but the concern was with judicial jurisdiction that would otherwise be vested in the state courts. Since the evidence shows that it was the consensus in the conventions that the federal inferior courts would have a comparatively narrow jurisdiction,[47] it is not improbable that the states would have agreed to Congress' performing certain "judicial" tasks concerning purely federal matters; the state legislators had been performing "judicial" tasks themselves.

The formulation of the separation of powers theory adopted in the Constitution was necessarily very rough. Because the separation was an innovation in practice, prior experience did not allow a finer articulation. Separation of powers theory developed in response to political struggles in the 17th century and was put into practice amid a struggle for political independence. Federalism, the relation of state and national governments, was a reason for the creation of an independent judiciary, because an independent arbiter is needed to resolve disputes between federal and state governments and because the federal government exercises judicial authority at the expense of state judicial powers. Of what the separation was to consist in detail was left to be worked out, and there was no clear understanding of what changes would be required in the governmental practices to which the colonists were accustomed.

II. Historical Development of Legislative Courts

Legislative Courts in Early State Development

Considering the legislatures' habit of dealing with judicial matters prior to independence from England, it would be expected that the issue of legislative control over adjudicative officers and tribunals should arise soon after the adoption of a separation of powers. It was in this context of the primitive development of separation of powers that legislative court terminology was first used. It was used, first, as a justification for legislative interference with judicial administration, and, then, as a tool to isolate those tasks that might be assigned to dependent judicial officers from those that must be assigned to constitutionally independent tribunals.

Virginia was the first to adopt a formal separation of powers provisions in its constitution,[48] and in 1779, in the *First Case of the Judges,*[49] the Virginia judiciary became the first to speak of legislative courts.

46. *E.g.,* 3 Elliot, *op. cit. supra* note 38, at 521-23 (Mason in Virginia), 4 *id.* at 136-39 (Spencer in North Carolina).
47. See Warren, *op. cit. supra* note 25, at 539-40.
48. See note 30 *supra.*
49. 8 Va. (4 Call) 1 (1779).

Although the Virginia Constitution specifically provided for four superior courts,[50] the General Assembly, after establishing the admiralty, chancery, and general courts as directed,[51] passed another act providing that the judges of the other three courts should meet together to constitute the court of appeals.[52] When these judges met at Williamsburg on August 30, 1779, they considered whether to proceed to exercise the assigned jurisdiction. The constitutionality of the statute establishing the court of appeals was questionable, partly because it gave the judges, as officers of the other courts, more extensive duties than the constitution provided, and partly because they had not been selected as judges of the court of appeals in the manner directed by the constitution.[53] The judges decided to follow the statute on the grounds that they held constitutional commissions as judges of the other courts and that "this was a legislative court only, and the judges, in construction of law, knew each other."[54] Apparently the judges considered the legislature to have some power to create courts in a manner other than that provided in the constitution, but it may be doubted whether they would have tolerated the creation of such a body to be administered by judges who did not have, in some capacity, guaranteed tenure, and it is hardly conceivable that they thought of this court as part of the legislative department.

Nine years later the General Assembly, as part of a general reorganization of the judiciary intended to improve the efficiency of the system, abolished the court of appeals as constituted by the act of 1779 and substituted for it a court composed of judges who were to sit only

50. VA. CONST. (1776).

51. 9 Laws of Va. 202 (Hening 1776); 9 Laws of Va. 389, 441 (Hening 1777). See 8 Va. (4 Call) 1-2 (1779).

52. 10 Laws of Va. 89 (Hening 1779).

53. They were not elected to the court of appeals by joint ballot of the General Assembly or commissioned as judges of that court by the Governor. VA. CONST. (1776). These doubts were articulated in the later Cases of the Judges of the Court of Appeals, 8 Va. (4 Call) 135 (1788).

54. 8 Va. (4 Call) 2 (1779). Later apology analogized this method of appeal to the adjournment of cases before all the judges of England in the Exchequer Chamber and suggested that the extra duties were consistent with the independence of the judiciary because the duties were voluntarily assumed and could not have been required and because the burdens imposed were comparatively light. 8 Va. (4 Call) 135, 144 (1788). Still later it was suggested that "had a commission been applied for as a judge of the court of appeals, it is probable, it might have been granted." Kamper v. Hawkins, 1 Va. Cas. 20, 54 (1793).

No contemporary reports of the decisions of the first court of appeals were made. Reconstructed reports are printed in 8 Virginia Reports (4 Call) where the reporter's preface states, "The work has been prepared with great labour and expense from the notes and memoranda of the judges and lawyers who attended the courts, and a diligent examination of the records: and although it is probably defective in point of style and arrangement, it is submitted to the public, with great confidence in the fidelity of the reports. May 1st, 1827."

on this court.[55] This action might be within the authority of the legislative body if the court of appeals were in fact a "legislative court." Yet at that time the incumbent judges, although they were retained as judges of the other courts, protested vigorously the unconstitutionality of the new act and found it "incompatible with their independence" because its "direct operation is the amotion from office of the whole bench of judges of appeals, and the appointment of new judges to the same court." They recognized, however, that the purpose of the legislature was sincerely to improve the system of judicial administration and resolved their dilemma by resigning their positions on the court.[56] Yet in another case, several years later, this treatment of the court of appeals, both in 1779 and 1788, was attacked by the judges as a very serious violation of the theory of separation of powers.

That case was *Kamper v. Hawkins*,[57] in which the legislative court rationale became a tool by which the judiciary was able to isolate those courts with which the legislature could interfere. In this 1793 decision the general court considered the constitutionality of a 1792 statute purporting to confer certain chancery powers upon district courts established in the reorganization of 1788 and composed of the judges of the general court riding on circuit and exercising a general common law jurisdiction.[58] The judges of the general court held the statute unconstitutional because the chancery jurisdiction had been given to them simply by vote of the General Assembly, whereas the constitution provided for the appointment of chancery judges by joint ballot of the Assembly and by executive commission.[59] It was said that the district courts could have exercised the new jurisdiction only as legislative courts and that the legislature could, therefore, later deprive the judges of this power; the experience of the court of appeals was adduced to show that this was just what might happen.[60] The judges' fear was that acceptance of this statute would create a precedent which would support the transfer "from constitutional courts to legislative courts" of "all judicial powers."[61] Legislative courts were considered by the judges to be subject to control as to tenure and jurisdiction by the legislature. The opinions do not say

55. 12 Laws of Va. 764 (Hening 1788).
56. 8 Va. (4 Call) 135, 148-50 (1788-1789).
57. 1 Va. Cas. 20 (1793).
58. 13 Laws of Va. 432 (Hening 1792). In question was the power to enjoin proceedings on judgments issued in district courts according to chancery rules.
59. VA. CONST. (1776).
60. Kamper v. Hawkins, 1 Va. Cas. 21, 53 (Henry, J.), 64-65 (Tyler, J.), 85-87, 92 (Tucker, J.).
61. *Id.* at 41 (Roane, J.). "In fine these legislative courts may absorb all the jurisdictions, powers and functions of the constitutional courts." *Id.* at 92 (Tucker, J.). Some of the judges also thought that chancery and common law jurisdiction could not be vested in the same judge.

that such courts are not to be recognized, but there is a firm holding that there is some jurisdiction which they may not exercise.

It would have been surprising had judges in the new states not assumed that some of the many matters which had been under legislative control, although handled in adjudicative proceedings, were to be continued under legislative supervision. Early examples of these legislatively supervised tribunals were established in Delaware in 1793, the same year that the judges in Virginia decided *Kamper v. Hawkins*. Levy courts and courts of appeal were established in the various counties to administer the payment of debts and the collection of taxes. These courts were given authority to adjudicate appeals as to evaluation and assessment although the tribunals did not conform to the state constitution's judiciary provisions.[62] There was also established a board of commissioners to administer the sale of vacant and uncultivated lands.[63] The members of the latter agency were appointed with limited tenure and had as part of their job the determination of certain disputes "according to the laws of the land and equity and good conscience;"[64] their decisions were appealable to the state supreme court.[65] The disposition of these lands was elsewhere identified as within the authority of the legislative department.[66]

In 1802, the General Court in Maryland was presented with the problem of drawing the line between courts which the legislature could control and those which were to be independent. *Whittington v. Polk*[67] involved the removal by the General Assembly of a justice of a county court, who was replaced with an appointee more favored by the legislators. Because the Maryland Constitution consistently referred to *judges* of the general court, whose tenure was explicitly guaranteed, in contrast to the *justices* of the county courts, the court recognized a distinction between two types of courts. Of the county courts it was said that "the principle in the Bill of Rights, that the legislative, executive and judiciary, shall for ever be kept separate and distinct, is departed from, and they are made capable of being elected members of the General Assembly, or members of the Council; which constitutes a very striking distinction between the Justices of the County Courts, and the Judges of the other

62. 2 Laws of Del. 1086 (1793). This legislation established the commission and referred to earlier statutes for an enumeration of the commission's powers, principally to the Act of 16 Geo. II, 1 Laws of Del. ch. CII.a., p. 257 (1743).

63. 2 Laws of Del. 1160 (1793).

64. 2 Laws of Del. § 3 (1793).

65. 2 Laws of Del. § 6 (1793).

66. Preamble to Act of February 7, 1794, ch. 57c, 2 Laws of Del. 1174. Other private acts of the legislature vesting title to land in certain persons are at 2 Laws of Del. 1200, 1202 (1795).

67. 1 Harr. & J. 236 (Md. 1802).

Courts. . . . The General Assembly possess competent authority to modify the County Courts in such manner as they may think will conduce to the better administration of justice. . . ."[68] Since the county court justices were not provided tenure guarantees in the constitution, the statute was held to be constitutional. The jurisdiction of the county courts, which were the successors to justice of the peace courts, was not a general one, but was provided for by special legislative acts. The county court justices were given one year appointments immediately following the adoption of the Maryland Constitution, and the general court was able to point to "legislative history" in the adoption of the constitution which supported the proposition that the Maryland framers were consciously establishing two kinds of courts.[69]

In this early state development can be seen some of the most prominent elements of legislative court doctrine. The doctrine was used both as a justification for legislative interference with judicial offices and as a tool to separate those matters that must be treated by the independent judiciary from those that may be handled under legislative supervision. That tax matters and sale of public lands should be handled by legislative tribunals apparently produced no constitutional concern in Delaware; this treatment of special subject matters was to be echoed in the federal development. But the idea which developed in Maryland that certain inferior courts have a different status from those explicitly established and protected by the constitution did not take root in early federal development though there was prompt opportunity.[70]

Early Federal Development

In the federal system, the implementation of separation of powers was bound up with the development of the independence of the judiciary. Two early cases, *Hayburn's Case* and *United States v. More*, illustrate that the judges in the early years believed that the judiciary's judgments must be final, that judges should not be given non-judicial duties, and that any tribunal that acts like a court and is created by Congress must be part of the independent judiciary.

In October, 1791, a group of veterans petitioned the House of Representatives for some kind of pension relief.[71] Among them was one "William Haburn." A bill enacted March 23, 1792, provided for handling of these claims by the judges of the federal circuit courts, who were to decide what pensions should be paid. The pension lists established by

68. *Id.* at 248-49.

69. Compare the development of legislative court concepts in New York described in Cassin, *Constitutional Versus Legislative Courts*, 16 FORDHAM L. REV. 87 (1947).

70. *But see* Capital Traction Co. v. Hoff, 174 U.S. 1 (1898), discussed in note 84 *infra*.

71. 1 H.R. JOUR., 2d Cong., 1st Sess. 444 (1791).

the circuit courts were to be transmitted to the Secretary of War, who was to send them to Congress, except that in cases where the Secretary suspected "imposition or mistake" he was to withhold the name from the pension list and report the case to Congress.[72]

When Haburn, or Hayburn as his name appears more frequently in the record, petitioned the circuit court for the district of Pennsylvania to be placed on the list, the judges refused to accept this jurisdiction as part of the constitutional power of their tribunal.[73] The judges of the other circuit courts took the same position. Some of them consented to exercise the statutory duty in their individual capacity as "commissioners," but all of them joined in letters to President Washington, which were transmitted by him to Congress, in which they indicated their unwillingness to accept this jurisdiction as judges of the courts.[74] In all of these letters, the refusal to act was based on the ground that the task involved was not "judicial in nature" and that the provision for legislative and executive review of the judges' decisions violated the principle of judicial independence. In the minds of some of the judges, the only real flaw was the non-finality of the judgments.[75] There is no question, however, that at least some of the judges, as indicated by the form of

72. Act of March 23, 1792, ch. 11, 1 Stat. 243. *"Provided always,* That in any case, where the said Secretary shall have cause to suspect imposition or mistake, he shall have power to withhold the name of such applicant from the pension list, and make report of the same to Congress, at their next session." 1 Stat. 244.

73. The docket of the court for April 11, 1792, includes the notation: "The petition of William Hayburn, was read and after due deliberation thereupon it is considered by the Court that the same be not proceeded upon" [as quoted in Farrand, *The First Hayburn Case, 1792,* 13 AM. HIST. REV. 281, 283 (1908)].

74. These letters have been added by the reporter in a footnote to Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792). They may also be found in AMERICAN STATE PAPERS, class X, 49 (1834).

In a letter to his wife on September 30, 1792, Justice Iredell said, "We have had a great deal of business to do here, particularly as I have reconciled myself to the propriety of doing invalid business out of court. *Judge Wilson altogether declines to."* 2 MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 361 (1858). Cited in Farrand, *supra* note 73. Justice Cushing wrote to Chief Justice Jay on October 23, 1792: "we acted as commissioners and sent our certificates accordingly (without making any entry in the book about it) to the *Supreme* [sic] Secretary of War." 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 449-50 (Johnston ed. 1891). Both letters are quoted in 14 YALE L.J. 431, 434 (1905). Justice Cushing's method of reference to the Secretary of War is suggestive of his attitude towards his assigned task.

See the presentation of claims certified by circuit judges acting as commissioners transmitted by H. Knox, Secretary of War, to the House of Representatives on April 25, 1794. AMERICAN STATE PAPERS, class IX, 107 (1834).

75. See letter of April 5, 1792, addressed by the judges of the Circuit Court for the District of New York (Jay, Cushing, and Duane) to President Washington and sent by him to Congress: "The duties assigned to the Circuit courts, by this act, are not [properly judicial] . . .; in as much as it subjects the decisions of these courts . . . first to the consideration and suspension of the Secretary at War; and then to the revision of the Legislature. . . ." Hayburn's Case, *supra* note 74, at 410; AMERICAN STATE PAPERS, class X, 49-50 (1834).

their letters, felt that there was a flaw in the jurisdiction entirely aside from the question of interdepartmental review, although whatever it may have been was not clearly articulated.[76] In any case the precedent has been broadly interpreted as authority for the proposition that independent courts cannot exercise powers which are non-judicial in nature either because of interdepartmental review of decisions or because of some other "non-judicial" element which may be involved.[77]

When the circuit courts refused to handle the claims, the 1792 statute was repealed, and for it was substituted one which was similar in nature except that the jurisdiction was given to the district courts, and they were directed only to submit evidence without opinion to the Secretary of War.[78] Apparently these courts accepted this task without objection.[79]

It is difficult to understand why the judges of the district courts accepted this duty. Award of judgment and execution are elements of finality necessary to cases or controversies within the judicial power of article III.[80] It would seem that the judges in 1793 did not feel them-

76. See letter of April 18, 1792, sent to Washington by the judges of the Circuit Court of the District of Pennsylvania (Wilson, Blair, and Peters) and forwarded to Congress. The judges refused to act, "1st. Because the business directed by the act is not of a judicial nature . . . 2nd. Because . . . its *judgments* (for its *opinions* are its judgments) might . . . have been revised and controuled by the legislature, and by an officer in the executive department." Hayburn's Case, *supra* note 75, at 411; AMERICAN STATE PAPERS, class X, 50-51 (1834). See also the letter of June 8, 1792, from the judges in the district of North Carolina (Iredell and Sitgreaves): "courts cannot be warranted . . . in exercising . . . any power not in its nature *judicial,* or, if *judicial,* not provided for upon the terms the Constitution requires." Hayburn's Case, *supra,* at 412-13; AMERICAN STATE PAPERS, class X, 52-53 (1834). Even these judges, however, placed greatest emphasis on the non-finality point.

77. It is interesting that when Hayburn's petition was rejected by the circuit court, he turned for relief not to the Supreme Court but to Congress. 3 ANNALS OF CONG. 556-57 (1792). This controversy was taken three times in various forms to the Supreme Court, but no definite decision was ever handed down there because statutory changes in 1793 made the question moot. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). A full report of the Supreme Court's treatment of Hayburn's Case is included in Miller, *Some Early Cases in the Supreme Court of the United States,* 8 VA. L. REV. 108, 110 n.3 (1921), which copies from the Federal Gazette of August 15 and 18, 1792, an account of William "Hogburne's" Case.

78. Act of February 28, 1793, ch. 17, 1 Stat. 324. The evidence was to be taken by the district judge or by three persons commissioned by the judge.

79. A list of "names of the applicants for pensions as invalids to the judges of the respective enumerated districts, together with the circumstances of each, as far as the same could be ascertained from the evidence received" is contained in a letter from Knox, the Secretary of War, to the Senate and House of Representatives, dated April 25, 1794. AMERICAN STATE PAPERS, class IX, 83 (1834). On the list are marginal remarks on the evidence transmitted by the judges of the district courts, and there is another column in which the secretary indicated the pension each applicant was to receive. Other such lists were submitted from time to time. *Id.* at 124, 128, 134, 149, 158, 165.

80. When the House Committee on Claims found names of claimants as to whom it thought the evidence was insufficiently reported, it would get an order from the House directing that the names be returned to the district judges "for the purpose of giving an opportunity to return the testimony respecting the invalids contained in the

selves in a strong enough position to assert total independence and were willing, therefore, in this first power dispute with the legislature, to accept what was little more than a moral victory. It was not likely that the circuit courts under the original statute would be considered legislative courts, since they included justices of the Supreme Court, but it might have been said that the courts and judicial offices involved were established not by the Constitution, but by Congress, and therefore could be controlled by Congress. This rationale would have been consistent with the views of the Maryland court in *Whittington v. Polk*.[81] But on this occasion the judges remained silent, and when Chief Justice Marshall later drew the line to include the district courts in the article III category,[82] the rationale was rejected for the federal courts by implication.

The first case in the federal development in which legislative courts are mentioned is *United States v. More*[83] in 1805. A District of Columbia justice of the peace was convicted for violating an 1802 statute forbidding the District justices from collecting fees from litigants as authorized by an 1801 statute. The defendant More claimed the prohibition was unconstitutional because it reduced his salary in violation of the constitutional guarantee in article III. A majority of the Circuit Court for the District of Columbia (Judge Cranch with Chief Justice Marshall concurring) reversed the conviction on this ground, reasoning that in legislating for the District, Congress is limited by the Constitution and that the justice of the peace court is an "inferior court." Judge Cranch's rationale, such as it was, seemed to be: if it looks like a court, and if it is established by Congress, it must be part of the "judicial Power."

The dissent of Judge Kiltie is of interest. He pointed out that under the original statute the justices neither held their office during good behavior nor received compensation at stated times. He reasoned that the jurisdiction of the justices of the peace was not that of article III because the "judicial Power" speaks in terms of the national role of the federal government. He felt that the jurisdiction of the justices was part of Congress' local power to govern the District of Columbia provided in article I, section 8, as Congress succeeds to powers over the District

said report, according to the requisitions of law." 4 ANNALS OF CONG. 1282 (1795); 4 ANNALS OF CONG. 766-67 (1794). There is also a record of the committee presenting a bill directing the Secretary of War to place certain names on the list. 4 ANNALS OF CONG. 470 (1795).

81. See note 67 *supra* and accompanying text.

82. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828).

83. 7 U.S. (3 Cranch) 159 (1805). Cranch, as reporter, included his opinion and the dissent below as a footnote commencing at page 160. The Supreme Court dismissed the appeal for lack of jurisdiction.

originally held by states.[84]

The position that anything created by Congress which acts judicially must be independent, the position of *United States v. More,* was not to stand long. In spite of Chief Justice Marshall's concurrence in the opinion in *More,* the existence of federal legislative courts was first recognized in an opinion he wrote in 1828 in *American Ins. Co. v. Canter.*[85] There he was faced with two questions: does the constitutional vesting of the "judicial Power of the United States" in an independent judiciary require that all federal judicial tribunals be a part of that independent branch of the government, and must the matters enumerated in article III as cases or controversies to which the judicial power extends be treated in all cases only by the independent judiciary? Marshall gave a negative answer to both questions.

In the *American Ins. Co.* case, which was an action commenced in a federal district court collaterally attacking a decree rendered by a Florida territorial court in a maritime salvage case, it was argued to the Supreme Court that because article III, section 2, of the Constitution includes admiralty jurisdiction within the "judicial Power," that jurisdiction may be exercised only by courts whose judges enjoy the constitutional protection of salary and tenure guarantees. Congress had granted to the territorial legislature in Florida authority to create inferior courts that were to exercise a jurisdiction that included admiralty and that would be manned by judges enjoying limited tenure. Chief Justice Marshall, for the Court, upheld the jurisdiction of the territorial court, saying that the Constitution empowered Congress to provide governments for the territories,[86] including the power to give the territorial legislature of Florida authority to establish courts free of tenure guarantees. This court was referred to as a "legislative court" because it could be established by the legislature without qualifying under the judicial article of the Constitution.

The temporary nature of the territorial government has been considered in subsequent cases as a significant factor in this decision.[87] The treaty in which the territory had been ceded to the United States by

84. The status of these justice of the peace courts was not decided by the Supreme Court until 1898 in Capital Traction Co. v. Hoff, 174 U.S. 1, where it was held that the seventh amendment right to a jury trial was not satisfied by a jury trial before a justice of the peace and that a statute providing for retrial before a jury in the Circuit Court for the District of Columbia was constitutional. It was said that the justice of the peace was not a judge, his court was not really a court, and the jury trial in the justice of the peace court was not a constitutional jury trial. *Id.* at 38-39.

85. 26 U.S. (1 Pet.) 511 (1828).

86. U.S. CONST. art. 4, § 3.

87. See O'Donoghue v. United States, 289 U.S. 516, 536-37 (1932); McAllister v. United States, 141 U.S. 174, 186-87 (1891).

Spain, anticipated that Florida would become a state. But, while Chief Justice Marshall recognized the reasonableness of the tenure limitation in the territory, he clearly indicated where he would draw the line; the legislative court could exercise admiralty jurisdiction in the territory,

> although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the third article of the constitution. . . .[88]

This case may come as something of a shock to one reading it today, because we have become accustomed to a separation of powers which in practice has made inviolable the position of federal judges and which in our minds has made sacrosanct an extensive jurisdiction in the federal courts. But Marshall did not have the benefit of our hindsight; while the independence of the judiciary was written into the Constitution, its jurisdiction was left to the discretion of Congress within limitation, and there were many who hoped to see this jurisdiction be quite narrow.[89] Not only was an independent judiciary not meaningful in a territorial government which would be only temporary, but, further, there could be no conflict with the jurisdiction of state courts, which had been of major concern to the Constitutional Convention delegates. Within the states, Congress always would have the constitutional alternative of allowing federal matters to be treated in state courts, where the relation of judicial to legislative and executive departments would be governed by state law and might be of a different nature than in the federal government. It would have seemed natural, then, that Congress should have greater flexibility in establishing courts in the territories, where it did not have the alternative of state court jurisdiction, than it has in establishing federal courts in the states.

American Ins. Co. v. Canter has proved a remarkably strong precedent for the treatment of territorial courts. As late as 1959, a territorial court in Alaska followed the *American Ins. Co.* rationale in upholding a provision of the Statehood Bill extending the jurisdiction of the territorial courts through the period of transition, not to exceed three years.[90] On the other hand, the limitation implied in *American Ins. Co.* has proved equally strong. For example, the Supreme Court held in 1850 in *Benner v. Porter*[91] that after Florida became a state the territorial courts which became a part of the state court system could no longer exercise admiralty jurisdiction. Mr. Justice Nelson restated the rationale of the terri-

88. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828).
89. See note 44 *supra*.
90. United States v. Sterling, 171 F. Supp. 47 (D. Alaska 1959).
91. 50 U.S. (9 How.) 235 (1850). *Cf.* United States v. Ferreira, 54 U.S. (13 How.) 40, 48-49 (1851).

torial courts' jurisdiction and significantly showed the relation of the principle of separation of powers to the principle of federalism.

> The distinction between the Federal and State jurisdictions, under the Constitution of the United States, has no foundation in these Territorial governments; and consequently, no such distinction exists, either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the Federal and State authorities. There is but one system of government, or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction.
>
> They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control. Whether, or not, there are provisions in that instrument which extend to and act upon these Territorial governments, it is not now material to examine. We are speaking here of those provisions that refer particularly to the distinction between Federal and State jurisdiction.[92]

Returning to the *American Ins. Co.* case, some of Chief Justice Marshall's reasoning reflected the confusion which was typical of the contemporary understanding of separation of powers. Referring to the limited tenure of the territorial judges, Marshall said: "the Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it."[93] The ambiguity of the phrase "judicial power" makes this statement less than precise. In what sense does "judicial" power refer to authority which the Constitution and Congress have assigned to article III courts? What has evolved are two conflicting trains of thought either of which can find support in the phrase "judicial power." One says that any jurisdiction which may be described as judicial must be independent, while the other reasons that any tribunal over which Congress has retained control is incapable of exercising judicial power in the constitutional sense even though such

92. Benner v. Porter, *supra* note 91, at 242.
93. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828).

tribunals do exercise a judicial jurisdiction of some kind.[94] Chief Justice Marshall was clearly using the latter reasoning. The territorial courts, which do not exercise the "judicial Power," exercise a jurisdiction that includes many matters that may be treated, according to this line of cases, by federal courts in the states only if they qualify under article III. Whether legislative courts are legitimate outside the territories and, if so, what jurisdiction they may properly exercise were matters left for later development.

Constitutionality of Supreme Court Review

The Supreme Court's jurisdiction to review judgments of a territorial court was not challenged in the early cases, but a problem was presented. In *Marbury v. Madison*[95] the Supreme Court's original jurisdiction was held to be constitutionally limited to "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party."[96] In the direct review of judgments of territorial courts, the Supreme Court is the first article III court to hear the case, and it could be argued with some plausibility that the hearing in the Supreme Court is an unconstitutional exercise of original jurisdiction.

It appears that the Supreme Court did not explicitly face the ques-

94. This dichotomy is reflected in a congressional debate in the middle of the 19th century. The United States Court of Claims, as originally established in 1855, heard claims against the United States within its specified jurisdiction and reported its findings of fact and conclusions of law to Congress. Act of February 25, 1855, ch. 22, 10 Stat. 612. When the court made its first report, the House of Representatives debated whether it should be considered by the Committee of the Whole House or referred to the Committee on Claims. Those who advocated the former course argued that Congress had no authority to interfere with the results reached by the Court of Claims which is

> to all intents and purposes, a *court*, having the attributes and characteristics of *judicial* power, its creation authorized by the Constitution . . . and . . . it must now be regarded as part of our Federal judiciary. . . . The title [of the organic act] is "to establish a court for the investigation of claims against the United States,"—not an *outside* committee or board, with no judicial power—not a creature auxiliary to Congress—but a *court*, a *constitutional* court, and, therefore, by virtue of its organization, independent of Congress.

CONG. GLOBE, 34th Cong., 1st Sess. 971 (pt. 2 1856). In favor of referring the report to the Committee on Claims, which was the procedure actually adopted, *id.* at 1245-46, it was contended that suits against the United States were not within the enumeration of article III, and, therefore, a court given such jurisdiction was not exercising "judicial power."

> Any tribunal which Congress may create with other powers than those named in the Constitution, extending to cases not included in the terms of the Constitution, proceeds from the sovereign will and pleasure of Congress alone, and derives and can derive no authority whatever from any other source than Congress.

Id. at 1241-42. *Hayburn's Case* and *American Ins. Co. v. Canter* were appropriately cited by the participants in this debate. For a discussion of the status of the Court of Claims, see notes 133 & 136 *infra* and accompanying text.

95. 5 U.S. (1 Cranch) 137 (1803).

96. U.S. CONST. art. 3, § 2.

tion of the legitimacy of its jurisdiction to hear direct appeals from legislative courts until 1894 in *United States v. Coe*.[97] Congress had authorized the Court of Private Land Claims to hear land claims against the United States arising under treaties with Mexico ceding territory to the United States; its decisions were appealable to the Supreme Court. On a motion to dismiss such an appeal for lack of jurisdiction, Chief Justice Fuller, recognizing that Congress could decide such cases without reference to any court[98] and noting that land claims judges were given only limited tenure, admitted that the Court of Private Land Claims did not qualify as an article III court. He thought, nevertheless, that the tribunal could be placed under the immediate supervision of the Supreme Court.

The precedents, such as they were, seem to support the decision. The Supreme Court had reviewed a number of decisions from territorial courts, and Chief Justice Fuller could rely heavily on these cases, as the particular claim before the Court arose within the Territory of Arizona. At the same time, the cases cited by counsel for the appellee in favor of the motion to dismiss did not support his contentions. The cases cited in which the Supreme Court had refused jurisdiction rested on the fact that the tribunals hearing claims against the Government were not exercising a final judicial jurisdiction, but were rendering opinions that were reviewable by executive officers and Congress.[99] Other decisions cited did not involve direct review by the Supreme Court, but justified review of non-article III tribunals by the district and circuit courts as being within the "judicial Power."[100] And the decision in *Marbury v. Madison* had not faced the question. The most relevant passage from that opinion, cited by counsel, seems quite neutral.

> It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.[101]

Chief Justice Fuller's reasoning in the *Coe* case seems to have been that if a tribunal is a court and if it is federal, it can be inferior to the Supreme Court.

> And as wherever the United States exercise the power of

97. 155 U.S. 76 (1894).
98. Astiazaran v. Santa Rita Mining Co., 148 U.S. 80 (1893).
99. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); United States v. Ferreira, 54 U.S. (13 How.) 40 (1851); Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865) (opinion of C. J. Taney at 117 U.S. 697); *In re* Sanborn, 148 U.S. 222 (1893).
100. United States v. Ritchie, 58 U.S. (17 How.) 525 (1854); Grisar v. McDowell, 58 U.S. (6 Wall.) 363 (1867); ICC v. Brimson, 154 U.S. 447 (1894).
101. 5 U.S. (1 Cranch) 137, 175 (1803).

> government, whether under specific grant, or through the dominion and sovereignty of plenary authority as over the Territories, *Shively v. Bowlby,* 152 U.S. 1, 48, that power includes the ultimate executive, legislative, and judicial power, it follows that the judicial action of all inferior courts established by Congress may, in accordance with the Constitution, be subjected to the appellate jurisdiction of the supreme judicial tribunal of the government. There has never been any question in regard to this as applied to territorial courts, and no reason can be perceived for applying a different rule to the adjudications of the Court of Private Land Claims over property in the Territories.[102]

Although a somewhat less casual articulation may have been desirable, the decision is probably sound. Clearly there is no constitutional policy that the Supreme Court should only review the decisions of article III courts, since the Court may review decisions of the state courts. It may be recalled that there was considerable sentiment in the Constitutional Convention that inferior courts were not needed.[103] In reviewing the decision of the Court of Private Land Caims, the Supreme Court was faced with a "case" or "controversy;" review was of an adjudicative proceeding in which a final judgment had been issued; the Supreme Court was not the first court in which the issues were formulated in a judicial proceeding. Once granting that the Court of Private Land Claims and other legislative courts were competent to exercise the jurisdictions assigned to them, it seemed difficult to find any constitutional policy which would forbid Supreme Court review. The proceedings were "appellate" in character, and the "original" proceedings were before a competent judicial tribunal.

Legislative Court Jurisdiction Outside the Territories

Was the significant factor making the Court of Private Land Claims a competent inferior court, allowing Supreme Court review in *United States v. Coe,* that the particular case involved a claim arising in a territory, in the government of which Congress is not restricted by the separation of powers? Justice Fuller seemed to imply that the result would be no different if the claim had arisen and the proceedings had been within the territorial limits of a state. It had been said in the territorial court cases that Congress is not bound by separation of powers in that area of national government where there are no state interests to be

102. United States v. Coe, 155 U.S. 76, 86 (1894).
103. See note 44 *supra* and accompanying text.

protected by the elaborate checks and balances which are a part of that federal-state compact, the Constitution. Justice Fuller, in the passage quoted, spoke of "the dominion and sovereignty of plenary authority as in the Territories," not ruling out that there might be other matters wherein Congress may govern in any form it wishes. One such area would seem to be the administration of treaties with foreign governments as was involved in the pending case.

Legislative court jurisdiction outside the territories was unequivocally approved for the first time in 1929 in *Ex parte Bakelite Corp.*[104] Bakelite Corporation had petitioned the Supreme Court for a writ of prohibition to be issued against the Court of Customs Appeals, hearing an appeal from the Tariff Commission, on the ground that there was no case or controversy.[105] In denying the writ, the Court said that because the jurisdiction of the Court of Customs Appeals was only over matters that Congress was not required to submit to any court, the court was a legislative court and, therefore, could be required by Congress to hear matters which are not within the jurisdiction of article III courts as allowed by the Constitution. By this route the Court avoided deciding whether the particular matter before the Court of Customs Appeals was in fact a case or controversy.

Mr. Justice Van Devanter, writing for a unanimous Court, attempted to make a coherent structure out of some scattered materials. The cornerstone of the opinion was a passage cited from a Supreme Court opinion in 1855[106] where the Court had allowed summary, non-judicial

104. 279 U.S. 438 (1929). *But see* note 122 *infra.*

105. The Tariff Act of 1922 (Fordney-McCumber Act), ch. 356, § 316, 42 Stat. 943, permitted the President to control tariff rates or exclude certain articles from import if necessary to protect domestic industry from unfair practices, provided for tariff commission investigations "to assist the President" with hearings, findings, and recommendations, gave the importer a right of appeal to the Court of Customs Appeals on questions of law and further review by the Supreme Court on certiorari, and provided that final action on any tariff law rested with the President.

On a complaint of unfair practices by the Bakelite Corporation, the Tariff Commission found in favor of Bakelite and recommended exclusion of certain items. On appeal by the importers, Bakelite challenged the jurisdiction of the Court of Customs Appeals on the ground that there was no case or controversy. All counsel assumed and the court held that the Court of Customs Appeals was an article III court, but it was held that there was a case or controversy. Bakelite then sought a writ of prohibition from the Supreme Court to stay further proceedings. Counsel (now including the Solicitor General) again assumed that the court was under article III, but the Solicitor General asked that the status of the lower court be determined because Congress had pending before it a bill to transfer to that court from the Court of Appeals of the District of Columbia jurisdiction to review decisions of the Commissioner of Patents, which jurisdiction had been held to be "administrative" in Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927). See Katz, *Federal Legislative Courts,* 43 HARV. L. REV. 894, 908-11 (1930).

106. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855).

proceedings against a customs collector whose accounts, upon audit, had shown a deficiency. There Mr. Justice Curtis had said:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[107]

On this authority and that of cases which followed, Justice Van Devanter pointed out that there are some matters of government which Congress can administer, or assign to the executive department to administer, in any form Congress wishes, and that the fact that these matters are susceptible of judicial treatment and capable of being cases or controversies if included in the jurisdiction of courts does not make such treatment mandatory. Congress' authority in these matters is conferred by the Constitution, and, therefore, it seems reasonable that Congress cannot permanently divest itself of the authority by including the matters for a time in the jurisdiction of article III courts; nor can Congress reasonably be presumed to have intended to create an article III court when it creates a tribunal to deal exclusively with matters that Congress may treat non-judicially if it wishes, especially if the tribunal is also assigned non-judicial matters which an article III court may not constitutionally handle.[108]

In addition to referring to a number of matters that are susceptible of judicial treatment but are within the plenary authority of Congress, Justice Van Devanter discussed in elaborate dicta tribunals that he con-

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107. *Id.* at 284. For criticism of the use of this precedent, see notes 145-49 *infra* and accompanying text.

108. This may distort what Justice Van Devanter said in that he stated that Congress' intent was not relevant: "But the argument is fallacious. It mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred." *Ex parte* Bakelite Corp., 279 U.S. 438, 459 (1929). Justice Van Devanter's statement should be read, however, in light of the severability problem which would arise if Congress were at the same time to create a tribunal intending it to be an article III court and at the same time attempt to vest in it a jurisdiction which an article III court could not constitutionally entertain. See notes 145-49 *infra* and accompanying text.

sidered to be legislative courts.[109] *American Ins. Co. v. Canter* was, of course, cited as a leading case,[110] but the most comprehensive discussion in the entire opinion was of claims against the United States heard in the Court of Claims. The status of the Court of Claims was adjudicated three years later in *Williams v. United States*[111] when the Court was faced with deciding whether the salary of the Court of Claims' judges could be diminished by Congress. The Court there approved Justice Van Devanter's dictum, and, relying heavily on his reasoning, held the Court of Claims to be a legislative court.

After 1887 the Court of Claims had exercised both an advisory jurisdiction by which it made findings of fact and rendered opinions of law, without entering judgment, on claims referred to the court by Congress or the executive department, and a final jurisdiction in certain classes of claims authorized in its organic act.[112] This latter jurisdiction, within a maximum jurisdictional amount, was exercised concurrently with the United States district courts. In its advisory jurisdiction the court acted non-judicially, and its opinions could not be reviewed by the Supreme Court.[113] But the status of the Court of Claims in exercising its final jurisdiction, in which Supreme Court review was permitted, was unclear.

> By these provisions it is made plain that the Court of Claims, originally nothing more than an administrative or advisory body, was converted into a court, in fact as well as in name, and given jurisdiction over controversies which were susceptible of judicial cognizance. It is only in that view that the appellate jurisdiction of this court in respect of the judgments of that court could be sustained, or *concurrent* jurisdiction appropriately be conferred upon the federal district courts. The Court of Claims, therefore, undoubtedly, in entertaining and deciding these controversies, exercises judicial power, but the question still remains—and is the vital question—whether it is the judicial power defined by Art. III of the Constitution.[114]

Justice Van Devanter had reasoned in *Bakelite* that Congress could

109. *Id.* at 449 (territorial courts), 456 (Court of Private Land Claims), 451 (Court of Claims, United States Court for China), 457 (Choctaw and Chickasaw Citizenship Court), 450 (District of Columbia courts).

110. See note 85 *supra.*

111. 289 U.S. 553 (1932).

112. Act of March 3, 1883 (Bowman Act), ch. 116, §§ 1, 2, 22 Stat. 485; Act of March 3, 1887 (Tucker Act), ch. 359, §§ 12, 13, 14, 24 Stat. 507.

113. Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865). An opinion by Chief Justice Taney, who died before the case was decided, is reported at 117 U.S. 697. *In re* Sanborn, 148 U.S. 222 (1893).

114. Williams v. United States, 289 U.S. 553, 565 (1932).

establish the Court of Claims as an incident of Congress' power to pay the debts of the United States; the claims are not matters "which inherently or necessarily require judicial determination."[115] Some of the Court of Claims' decisions are to have effect as binding judgments, others are merely advisory. The advisory function cannot be given to an article III court. Both the *Bakelite* and *Williams* opinions recognized that the Court of Claims had often been assumed to be an article III court "irrelevantly,"[116] but both agreed that the test should be "the power under which the court was created and the jurisdiction conferred;"[117] *i.e.*, is "the power" one which gives Congress plenary authority, and is "the jurisdiction conferred" within that power and not extended to matters that must be vested in the independent judiciary? By this test the Court of Claims was a legislative court.[118]

The *Coe, Bakelite,* and *Williams* cases extended legislative court doctrine beyond what in the territorial court cases had seemed a narrow doctrine of necessity (because of the temporary nature of the territorial governments). When dealing with foreign imports or claims against the federal government, it cannot be said that Congress is only exercising local powers of government such as the states exercise in their own territories. After this bridge was crossed the question naturally arose whether the Supreme Court would at any point block congressional attempts to remove jurisdiction from article III courts and give it to legislative courts. But in a companion case to *Williams* in which the status of the District of Columbia courts was questioned, the Court demonstrated its intention to keep legislative court jurisdiction within bounds.

Legislative court doctrine readily lends itself to confusion, but nothing was more confusing than the history of the District of Columbia judiciary when *O'Donoghue v. United States*[119] was decided. When the

115. 279 U.S. at 452-53. See Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865) (opinion of Chief Justice Taney, 117 U.S. at 699):

> So far as the Court of Claims is concerned we see no objection to the provisions of this law. Congress may undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress, or a head of any of the Executive Departments. In this respect the authority of the Court of Claims is like to that of an Auditor or Comptroller. . . . The circumstance that one is called a court and its decisions called judgments cannot alter its character nor enlarge its power.

116. 279 U.S. at 455; 289 U.S. at 568. See the congressional debates described in note 94 *supra.*

117. *Ex parte* Bakelite Corp., 279 U.S. 438, 459 (1929).

118. *Cf.* Pope v. United States, 323 U.S. 1 (1944). For later statutory and case development affecting the status of the Court of Claims, see notes 133-49 *infra* and accompanying text.

119. 289 U.S. 516 (1932). We are not here speaking of the minor courts such as justice of the peace courts. See note 84 *supra.*

Theban Sphinx asked, what creature it is that walks in the morning upon four feet, at noon upon two, and at evening upon three, Oedipus' answer was direct and unequivocal.[120] But when the Supreme Court was asked what "creature" was the District of Columbia judiciary (which was born with night-cap judges, whose judges were removed from office in a "reorganization" in 1863[121]) which exercises jurisdiction coextensive with the federal district courts and courts of appeals as well as jurisdiction over matters that cannot be treated judicially, and whose judges by statute enjoy tenure during good behavior, Justice Sutherland answered, the courts exercise both legislative and article III powers. From this seeming contradiction in terms, it was concluded that the salary of the judges of the District cannot be reduced. During the 132 years of the existence of the District of Columbia courts, the Supreme Court had successfully avoided answering the riddle of their status,[122] and as a consequence such a confusing residue of jurisdiction had been accumulated by these courts that they were easily the strangest hybrids in the

120. The answer: A man, who crawls as an infant, walks upright in mature years, and uses a cane in old age.

121. Act of March 3, 1863, ch. 91, 12 Stat. 762. The old circuit court was repealed and a supreme court created in its place, but the change in name was the only real change effected. The jurisdiction of the new court was defined in terms of that of the old; it was to meet at the same time and place; and the provisions for holding special terms were practically identical with those of the former system of District courts. Sponsors of the reorganization act defended it as intended to improve the administration of justice in the District. Its only real purpose, however, was to remove certain incumbent judges on the District circuit court whose views were incompatible with members of the prevailing Republican party in Congress. Opponents pointed to the similarity of the District of Columbia courts and other federal courts and used the separation of powers as their battle cry. Sponsors were driven to rely heavily on the *American Ins. Co.* case, and *United States v. Moore* was again debated to determine the extent of Congress' power over the District's judiciary. CONG. GLOBE, 37th Cong., 3rd Sess. 1128-30, 1135-39 (pt. 2 1863). The constitutionality of this statute apparently has never been challenged in the courts.

122. In 1923, the Supreme Court ruled that the District of Columbia judiciary could hear a matter not sufficiently a "case or controversy" to be brought constitutionally within the appellate jurisdiction of the Supreme Court. Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923). This holding was cited in later cases for the proposition that the District of Columbia courts were legislative courts. *E.g., Ex parte* Bakelite Corp., 279 U.S. 438, 450 (1929). But the matter was treated in *Keller* in one short paragraph without recognizing the complexities of the constitutional question and, furthermore, the four cases cited as authority do not support the holding. To the contrary, two of the patent cases cited determined, as a necessary part of their reasoning, that the actions of the District of Columbia judiciary in review of the Commissioner of Patents therein considered were conclusive judicial determinations, binding on the Patent Office. Butterworth v. Hoe, 112 U.S. 50 (1884); United States v. Duell, 172 U.S. 576 (1899). A third patent case cited in *Keller* focused on the jurisdiction of the Supreme Court to review determinations by the District's judiciary, and held the appellate jurisdiction unauthorized. Baldwin Co. v. R. S. Howard Co., 256 U.S. 35 (1921). The other case cited in *Keller* construed jurisdictional statutes, in light of Congress' extensive legislative powers over the District of Columbia, to authorize the District's courts to issue writs of mandamus in circumstances which might not justify the writ in other federal courts. Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838).

federal judiciary. They had been given substantially all the jurisdiction of the federal courts within the states, but they also exercised jurisdiction over matters which clearly were not cases or controversies, such as prescribing rates for use by railroads of terminal facilities.[123]

In the *Bakelite* case Justice Van Devanter had, in his elaborate survey of legislative courts, reviewed the various non-judicial activities of the District of Columbia courts and concluded that because article III courts cannot exercise non-article III powers, the courts of the District must be legislative, pointing out their similarity to the territorial courts. *O'Donoghue* was decided the same day as the *Williams* case, both opinions being written by Justice Sutherland. But while Justice Sutherland approved the *Bakelite* dictum in regard to the Court of Claims and adopted Justice Van Devanter's criteria, he took a new look at the District of Columbia judiciary and decided that the jurisdiction which it exercised required that the judges enjoy tenure and salary guarantees.[124] Justice Sutherland recognized that Congress has greater powers in the District of Columbia than it has in the states and attempted to rationalize the imposition of non-judicial duties on the District of Columbia courts.

> The fact that Congress, under another and plenary grant of power, has conferred upon these courts jurisdiction over non-federal causes of action, or over quasi-judicial or administrative matters, does not affect the question. . . .
>
> If, in creating and defining the jurisdiction of the courts of the District, Congress were limited to Art. III, as it is in dealing with the other federal courts, the administrative and other jurisdiction spoken of could not be conferred upon the former.[125]

But Justice Sutherland declared that the District of Columbia has

123. 32 Stat. 918 (1903), D.C. CODE § 7-1213 (1961). Of more doubtful significance is a statutory provision authorizing the District of Columbia district court judges to appoint the members of the District's Board of Education. 34 Stat. 316 (1906), D.C. CODE § 31-101(a) (1961). Article II, § 2 of the Constitution explicitly permits the courts to participate in the appointment of inferior officials. Nevertheless, a pending suit challenges the constitutionality of the statute on the theory that article II had in mind only the appointment of inferior court personnel. Hobson v. Hansen, 252 F. Supp. 4 (D.D.C. 1966) (empanelling a three-judge district court). If fully litigated, this case might face the question of the validity of the dictum in O'Donoghue v. United States, 289 U.S. 516 (1932), that the District of Columbia judiciary may perform non-judicial tasks as article III courts. (See text which follows.) Also of interest, but not challenged in *Hobson,* is 71 Stat. 340, added in 1957, D.C. CODE § 31-101(b) (1961), which gave the District of Columbia's district judges authority to remove members of the Board of Education, upon petition and hearing, for cause shown in regard to the members' character and efficiency as members of the board.

124. O'Donoghue v. United States, 289 U.S. 516, 551-53 (1932). Chief Justice Hughes, with Justices Van Devanter and Cardozo concurring, dissented.

125. *Id.* at 545-46.

a different status than the territories, because of the "transitory character of the territorial government,"[126] and because the District of Columbia is territory which had originally been a part of two states. It was also important that the District's courts exercise jurisdiction over cases that transcend matters of local concern to the District of Columbia, not only cases similar to those handled by federal courts sitting in state territories, but also claims in which venue statutes might require suitors to come to the District of Columbia courts.[127] Under these circumstances, the District of Columbia courts exercise jurisdiction that must be vested in the independent judiciary and, therefore, could be created only under the authority of article III.

It is admittedly anomalous that these courts should perform tasks forbidden to article III courts by the venerable principle of *Hayburn's Case*,[128] and it is unfortunate that these courts were said to legitimately exercise legislative court powers while the Court held that

> the Supreme Court and the Court of Appeals of the District of Columbia are constitutional courts of the United States, ordained and established under Art. III of the Constitution; that the judges of these courts hold their offices during good behavior, and that their compensation cannot, under the Constitution, be diminished during their continuance in office.[129]

Perhaps had the Supreme Court faced this question earlier in the history of the District of Columbia judiciary, the non-judicial jurisdiction might have been held unconstitutional. On the other hand, awareness of separation of powers problems has only gradually increased in both Congress and the Court, and a clear separation in the District of Columbia at an earlier time may have been unlikely.

The constitutionality of the non-judicial jurisdiction of the District of Columbia courts was not the issue presented in the *O'Donoghue* case, and Justice Sutherland's justification of its validity was not necessary to the decision. However, as the problem was presented, it seemed undesirable to eliminate a jurisdiction which had been unchallenged for so

126. *Id.* at 536-37.

127. *E.g.*, §§ 4, 5, 13, and 14(b) of the Voting Rights Act of 1965 grant the District of Columbia exclusive jurisdiction over actions by a state for a declaration that provisions of the act are not applicable to the state. 79 Stat. 438 (1965), 42 U.S.C. §§ 1973b(a), 1973c, 1973k, 1973*l*(b) (Supp. I, 1965) (constitutionality upheld in South Carolina v. Katzenbach, 383 U.S. 301 (1966)). Currently, the general venue provisions of the Judicial Code allow suits against the United States and against government officials to be brought in districts outside the District of Columbia. 28 U.S.C. §§ 1391(e), 1394, 1398-99, 1402 (1964).

128. See note 71 *supra* and accompanying text.

129. O'Donoghue v. United States, 289 U.S. 516, 551 (1932).

long when the practice could be so readily limited by the peculiar character of the District.

Legislative Courts Today

The legislative impulse to control the conduct of the federal government's business that is susceptible of adjudicative treatment is not always illegitimate, for there are some matters which the Constitution allows the federal government to treat without any judicial review by article III or state courts including, *e.g.*, payment of government debts, implementation of aspects of treaties with foreign governments, and the governing of territories. In such matters, Congress has the responsibility for adopting the most suitable scheme of administration to effectuate its policies consistent with the requirements of due process.

Legislative court doctrine has been instrumental in clarifying and strengthening the separation of powers rather than in violating that principle. The *O'Donoghue* case, after all, found a separation where none had seemed to exist before, and in a more recent case, *National Mutual Ins. Co. v. Tidewater Transfer Co.*,[130] a majority of the court agreed that *O'Donoghue* could not be used as a precedent to give legislative court duties to article III courts outside the District of Columbia.[131] Recognizing that legislative courts have a special character makes it possible to segregate those matters that Congress can control from those in which there must be review by an independent judiciary. Legislative court doctrine enables Congress to do what the Constitution allows it to do without straining the separation of powers. Thus, Congress has a choice of administrative schemes in certain narrow areas, a choice between judicial proceedings and executive or legislative proceedings, and, if judicial proceedings are selected, a choice between article III or legislative courts. Congress in the 1950's amended the Judiciary Code to state that the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals are established under article III,[132] and the question has arisen as to the effect of this legislation.[133]

Non-judicial tasks cannot be performed by article III courts, except for the District of Columbia judiciary. Six justices agreed in the *Tide-*

130. 337 U.S. 582 (1949).

131. The issue of the case was the constitutionality of 28 U.S.C. § 1332(d) (1964), which designates the District of Columbia as a "state" for purposes of diversity of citizenship. The actual disposition of the case was paradoxical. Three justices who thought *O'Donoghue* held that article III courts could be given legislative court duties combined with two justices who thought that "states" in article III, § 2 of the Constitution should include the District of Columbia to uphold the statute giving the district courts this diversity jurisdiction.

132. 28 U.S.C. §§ 171, 211, 251 (1964).

133. Glidden Co. v. Zdanok, Lurk v. United States, 370 U.S. 530 (1962).

water case that article III courts sitting in the states are strictly limited to performing tasks that qualify under article III as within the "judicial Power." While the Court of Claims sits in the District of Columbia, its jurisdiction is not concerned with responsibilities in the local government of the District. Therefore, were the claims court an article III tribunal, Congress could not justify giving the court non-judicial tasks on the basis of its special powers for governing the District. And the court's past history has not been so confused that the Supreme Court would allow it at this point to perform non-judicial tasks as an article III court. Consequently, either the Court of Claims' advisory jurisdiction[134] or the article III court label should be unconstitutional. In a similar constitutional inconsistency, the Court of Customs and Patent Appeals retains, along with its judicial jurisdictions, the task sought to be attacked in *Bakelite* of advising the President in his control of tariffs.[135]

Arguably, it should have been held that in spite of the new statutory appellation these courts are still legislative courts, because it would not be reasonable to suppose that Congress intended to repeal in this backwards fashion advisory jurisdictions that have existed for such a long time. However, in recent companion cases, *Glidden Co. v. Zdanok* and *Lurk v. United States*,[136] the Supreme Court held the Court of Claims and the Court of Customs and Patent Appeals to be article III courts. In both cases litigants attacked the constitutionality of an assignment of a judge from one of these courts, pursuant to a statute,[137] to hear a case in an article III court. In upholding the statute, there was not a majority of the Court which could agree on a single rationale. Two justices said[138] that Congress successfully converted the tribunals into article III courts by its legislation labelling the courts as such. A group of three justices,[139] reading the recent legislation as a declaration by the Congress that the courts in question had been intended to be article III courts from the beginning, took the opportunity to disapprove the unanimous decisions in *Bakelite* and *Williams*, but did not satisfactorily explain the status over the years of the courts' advisory jurisdiction. The current constitutionality of the advisory jurisdiction was unfortunately, though

134. 28 U.S.C. § 1492 (1964).
135. 28 U.S.C. § 1543 (1964).
136. 370 U.S. 530 (1962).
137. 28 U.S.C. § 293 (1964).
138. Glidden Co. v. Zdanok, Lurk v. United States, 370 U.S. 530, 585 (1962) (opinion of Justice Clark, with whom Chief Justice Warren concurred).
139. *Id.* at 531 (opinion of Justice Harlan, with whom Justices Brennan and Stewart concurred).

necessarily, left to future adjudication.[140] It was noted, however, that these courts' advisory functions had largely fallen into disuse. The two dissenting justices[141] were dissatisfied with both approaches, being seriously disturbed that the challenged judges had been nominated by the President and consented to by the Senate as judges of specialized legislative courts prior to the recent legislation. The dissenters would not allow judges to sit in article III courts unless they were confident that the President and Senate realized that they were making and confirming appointments of article III judges.[142]

Perhaps two additional factors should have been influential in supporting the *Glidden* and *Lurk* results, although they received only passing mention in the opinions. The Federal Tort Claims Act, enacted in 1946, gave the Court of Claims jurisdiction to review the judgments of the federal district courts in tort claims suits against the United States, although only with consent of appellees.[143] Jurisdiction to review judgments of article III courts cannot be vested in other than other article III courts and is constitutionally inconsistent with an advisory jurisdiction. And it is at least questionable whether the provision requiring the consent of the parties to the review would cure the constitutional inconsistency were the Court of Claims still a legislative court.[144]

In regard to the Court of Customs and Patent Appeals, there is serious doubt that the *Bakelite* holding,[145] that taxes may be collected without review by original proceedings in article III or state courts, is correct.[146] The *Hoboken Land* case,[147] much relied on in *Bakelite*, did not necessarily so hold,[148] and statements in other cases seem inconsistent

140. *Id.* at 581-83. "As evidence that adjudication without constitutional judicial review may be difficult to kill permanently, see the recent statute by which Congress established a new congressional reference procedure in which Court of Claims commissioners (not the judges) adjudicate referred claims and make recommendations to Congress." 80 Stat. 957 (1966), 28 U.S.C.A. §§ 1492, 2509 (Supp. 1966).

141. *Id.* at 589 (dissenting opinion of Justice Douglas, with whom Justice Black concurred). Two justices did not participate.

142. Compare the dissenters' viewpoint with the Virginia judges' concern with appointments in Kamper v. Hawkins, 1 Va. Cas. 21 (1793), note 59 *supra* and accompanying text.

143. 28 U.S.C. § 1504 (1964).

144. *Cf.* cases holding that parties may not confer subject matter jurisdiction on the federal courts by consent or waiver. *E.g.*, Mansfield, C. & L. Mich. Ry. v. Swan, 111 U.S. 379 (1884).

145. See note 104 *supra* and accompanying text.

146. See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 314-16 (1953).

147. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1865).

148. While the opinion purported to approve summary collection of a debt due the Government without judicial review, the statute in question did in fact authorize a suit by the debtor challenging the validity of the debt subsequent to creation of a lien by a

with such a proposition.[149] If the holding is incorrect, then either the Court of Customs and Patent Appeals is an article III court, or its proceedings are non-judicial and subject to collateral attack making direct review by the Supreme Court unconstitutional.

Congress could conceivably create a court, vest in it only a judicial jurisdiction of a kind that could be vested in either article III or legislative courts and express an intention that the court should be an article III court. *Glidden* and *Lurk* notwithstanding, unless the intention is clear, Congress should not easily be presumed to have divested itself of a control it could legitimately retain. But, assuming *Bakelite* is not incorrect, Congress seems to have met these criteria in regard to the Customs Court, since its task of reviewing the actions of customs appraisers and collectors seems to be judicial in nature and the Court of Customs and Patent Appeals, which reviews its judgments, was held in *Glidden* to be an article III court, eliminating the problem of non-judicial review which would otherwise be present.

An interesting question of severability would arise if Congress in one act were to create a court, vest in it a non-judicial jurisdiction as well as a judicial jurisdiction that could be vested in a legislative court, and label it an article III court. Such a statute would be unconstitutional, but it would be necessary to determine whether the courts should strike down the entire statute, creating no court; strike down the non-judicial jurisdiction, creating an article III court; or allow the court to stand as a legislative court with the entire jurisdiction.

III. Conclusion

It could not have been clear in the minds of the framers of the Constitution in 1787 to what extent judicial tasks previously supervised by legislators were to be vested in the independent judiciary. Madison wrote in the *Federalist* that separation of powers requires only that the "*whole* power of one department" not be vested in another.[150] The delineation of the "judicial Power" in practice, however, has made a rather large judicial jurisdiction sacrosanct.

As it was established by the framers of the Constitution, the separation of powers had various aspects: its purpose was to prevent abuses of authority; it was a means of achieving that purpose by creating checks and balances; and as an institution, it had to be integrated with many

distress warrant. *Id.* at 237-38. Further, the Government's actions in the case were not directed against a taxpayer, but against a tax collector.

149. See *In re* Fasset, 142 U.S. 479, 488 (1892); Phillips v. Commissioner, 283 U.S. 589, 595, 596-601 (1931).

150. The Federalist No. 44, at 325-26 (Cooke ed. 1961) (Madison).

other elements which, together, made up the federal government. Furthermore, observance of the separation of powers in practice would be behavior to which people would look for confirmation that governmental authority was being exercised without abuse, giving separation of powers major symbolic significance. The nature of these aspects was not clearly or consistently conceived by the framers, and clarification and delineation was one of the necessary elements of the growth of the institution: the purpose of separation of powers would be modified by finding what the means were actually capable of achieving; the means might be modified to more nearly achieve the originally conceived purpose; and the relationship to other elements of the government would be more clearly seen in practical operation. Legislative court doctrine has been a part of the delination and adjustment of the separation of powers.

Three points may be made as a conclusion to this study. First, in a constitution designed to preserve individual liberties, a separation of powers serves special purposes. There are individual interests to be protected through the existence of state governments and "checks and balances" in the federal government, and stability in governmental structure is necessary for personal security. Thus separation of powers has content that is distinct from due process and other guarantees of individual liberties written into the Constitution. The separation and due process concepts do touch at two points however: it is offensive to have a party to a controversy be his own judge; and the Constitution through prohibitions of *ex post facto* laws, bills of attainder, and suspension of habeas corpus, and through its guaranty of due process of law gives the independent judiciary (or the state courts, if a federal court of first instance were not available) a role in protecting individuals from "tyrannical" exercises of power in particular cases.[151] The principle that a man should not be a judge of his own case is venerable in Anglo-American law. Lord Coke felt such a circumstance was so offensive that in *Dr. Bonham's Case* he held a statute creating the situation repugnant.[152] Thus either separation of powers or due process may in appropriate circumstances require the existence of an independent arbiter. Nevertheless, the two concepts have distinct contents. Due process requires that matters be treated with degrees of judicial formality; but due process being satisfied, there remains yet the separation of powers question, whether an adjudicable question must be determined by the independent

151. See HART & WECHSLER, *op. cit. supra* note 146, at 312-40.

152. See Thorne, *Dr. Bonham's Case,* 54 L.Q. REV. 543 (1938). See note 12 *supra* and accompanying text.

judiciary or may be treated by an agency dependent on a legislature or executive.[153]

The second point relates to the relation of separation of powers to federalism. Although each Supreme Court decision upholding the jurisdiction of a legislative court has found a unique constitutional justification for the departure from the requirement of independent judicial review, the various legislative courts have shared a common limitation. All legislative courts have developed in areas where federal jurisdiction is most undisputed, least at the expense of state jurisdictions. To quote again from *Benner v. Porter*:

> The distinction between the Federal and State jurisdictions, under the Constitution of the United States, has no foundation in these Territorial governments. . . . They are legislative governments, and their courts legislative courts, Congress . . . combining the powers of both the Federal and State authorities. . . .
>
> They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control.[154]

Significantly, in this connection, the matters in which it was said in *Bakelite* that Congress has a choice of giving judicial or non-judicial treatment were in areas where the federal government has undisputed authority: customs collection, deportation and exclusion of non-resident aliens, rights under treaties with foreign governments, determination of citizenship in Indian tribes, and claims against the federal government.[155] In none of these matters is there an issue of federal-state relations, no state jurisdiction which is contiguous to the federal jurisdiction; in these matters it was said that Congress is not impelled by separation of powers to vest jurisdiction in the independent judiciary.

That, as an empirical matter, the separation of powers is observed to have its greatest vitality in areas where there are potential conflicts of government authority is reasonable. Separation of powers theory was a result of political struggles. The concern of Walker, Eliot, and Montesquieu was usurpation of political power which they called tyran-

153. *Compare* Rose v. McNamara, 252 F. Supp. 111 (D.D.C. 1966), *with In re* Nicholson, described *id.* at 113. *Rose v. McNamara* relies on a comparison of Madsen v. Kinsella, 343 U.S. 341 (1952), with Reid v. Covert, 354 U.S. 1 (1957).

154. 50 U.S. (9 How.) 235, 242 (1850).

155. See cases cited by Justice Van Devanter in *Ex parte* Bakelite Corp., 279 U.S. 438, 451 n.8 (1929).

ny.[156] The framers of the Constitution must have felt that individual liberty is endangered whenever there are political struggles, and they undoubtedly wished to establish a stable government which would be capable of resolving institutional conflicts without disruption of government. Adjudication had developed in English tradition as the most effective means of avoiding self-help in justiciable disputes, and if adjudication is to be effective in those matters where judgments can be enforced without great conflict only by voluntary compliance, it is necessary that the adjudicator be totally free from control by interested parties. In the new system of government, there were potential conflicts between the legislative and executive departments within the federal government,[157] and between the federal and state governments. A judiciary, the judges of which were independent of control by any government and whose judges were trained in state as well as federal practices, might have been the only means of effectively arbitrating these potential institutional conflicts.[158]

In those limited areas, then, where the federal government has undisputed plenary powers, the existence of an independent judiciary has less utility because there is not the danger of disruption of government that there is where the authority of more than one jurisdiction is in question. It is not surprising that, in the few areas where there is no danger that federal authority may be usurping powers not legitimately its own, the judges with a jurisdiction to prevent abuses of due process should have been allowed a dependent judicial jurisdiction. The separation of powers was an innovation in our government, and where the strongest reasons for the separation do not exist, the government has tended to lapse back into what may have been a more convenient organization.

The final point to note is how limited are the areas in which legislative courts may divest the independent courts of original jurisdiction. First, the Supreme Court has sanctioned legislative courts only where justifiable by special constitutional considerations: the Court of Claims was justified by sovereign immunity; territorial courts were based on the necessities of a temporary government; the Court of Private Land Claims involved the administration of treaties with a foreign government; and the Court of Customs Appeals was justified by historical reference to tax collection procedures antedating the federal constitu-

156. See notes 15, 20, & 23 *supra.*
157. See, *e.g.,* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).
158. See note 40 *supra;* see also note 39 *supra* and accompanying text.

tion.[159] Conjointly, legislative courts have been permitted only in areas where there is no danger that the federal government will violate state authority. Even in those areas where Congress has considerable authority to draw the boundaries between national and state government powers, such as under the commerce clause and in the area of civil rights, the federal courts have been in the past, and undoubtedly will continue to be, diligent to ensure that there be an independent judicial jurisdiction, original as well as appellate,[160] available to see that governmental agencies do not transgress the lines as drawn.[161] This traditional attitude is well based on the consideration that the states reluctantly ceded a portion of their judicial jurisdiction to the federal government under a charter which promised that the jurisdiction would be exercised by an independent judiciary and, therefore, that the separation of powers should be departed from only where warranted by compelling constitutional circumstances.

159. The historical justification was not contained in *Bakelite* itself, but in *Murray's Lessee v. Hoboken Land & Improvement Co.*, on which the *Bakelite* case relied heavily. *Bakelite* remains suspect as the only case to hold unequivocally that opportunity for judicial review by article III courts or state courts is not constitutionally required in tax collections. See note 145 *supra* and accompanying text.

160. While the Supreme Court may participate in reviewing legislative courts' decisions, this, as an appellate rather than an original jurisdiction and as part of the Supreme Court's discretionary *certiorari* jurisdiction, is neither a practical nor theoretical equivalent to review by inferior article III courts or in state courts.

161. See, *e.g.*, Crowell v. Benson, 285 U.S. 22 (1932).