Louisiana Law Review

Volume 45 | Number 3
The 1984 Revision of the Louisiana Civil Code's Articles on Obligations - A Student Symposium
January 1985

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Floyd D. Shimomura

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*Floyd D. Shimomura**

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* Acting Professor of Law, University of California, Davis, School of Law.

INTRODUCTION

Americans have always agreed that an individual with a monetary claim against the United States ought to be able to petition his government for a redress of this grievance. The disagreement has been over where this petition ought to be lodged: in Congress or the federal courts. When an individual presents a monetary claim against the United States, two fundamental interests are involved: (1) the individual's interest in receiving fair consideration and prompt payment of a meritorious claim; and (2) society's interest in maintaining democratic control over the allocation of limited public revenue among competing public needs. Given these two competing interests, a basic question of institutional allocation of responsibility arises. Which branch of government, Congress or the federal courts, should have the final say in balancing the individual's interest in payment against the public's interest in possibly competing uses for such funds? Stated differently, should claims against the United States ultimately be treated as fiscal questions for Congress, or legal questions for the courts, or perhaps something in between? Moreover, how is this latter question to be decided, and who decides it? The history of claims against the United States is the story of how each generation of Americans has attempted to resolve these questions. Not surprisingly, the answers have been different over time.

This article divides American history into three periods. The first period is called the "legislative model" and extends from colonial times until the Civil War. During this early period, private claims were regarded as fiscal matters that were the proper and natural province of legislative

bodies which maintained control over the public purse-strings. Accordingly, Congress, until as late as the Civil War, received and attempted to determine private claims itself by use of its committee system or congressional bodies subject to its control. The second period is called the "hybrid model" and covers the period from the Civil War until World War II. During this transitional period, the public increasingly came to view private claims as legal rather than political matters. However, Congress was reluctant to part with its traditional authority. Therefore, Congress continued to consider claims, particularly tort and moral claims, while gradually authorizing other categories of claims (such as contract and "taking" claims) to be determined by a special Court of Claims or, in limited instances, the regular federal courts. The third period is called the "judicial model" and extends from World War II until the present. During this most recent period, Congress has become overwhelmed with more pressing national and international concerns. Thus, it has turned over to the federal judiciary the responsibility for determining virtually all legal claims and has provided a continuing appropriation for the payment of all judgments. This article, therefore, traces the evolution of private claims from the legislative hall to the courthouse.

I. THE "LEGISLATIVE MODEL": COLONIAL PERIOD TO CIVIL WAR

Congress, or bodies subject to its control, determined private claims against the United States from the adoption of the Constitution until the Civil War. In the early days of the republic, claims for money against the United States were regarded as financial questions for Congress and not legal questions for the courts. Private claimants were accustomed to pressing their claims in the legislative hall rather than in the courthouse. Legislative determination of private claims was considered a natural and appropriate legislative function, and state legislatures as well as Congress followed this practice. However, by the Civil War, this "legislative model" of claims determination had broken down. This part traces: (A) the development of the "legislative model" from an abandoned practice of the seventeenth-century English Parliament which lived on in the colonial assemblies and the Confederation Congress; (B) the triumph of the "legislative model" after the adoption of the Constitution despite the creation of an independent judiciary; and (C) the decline of the "legislative model" in the period prior to the Civil War due to the inundation of Congress by claims.

A. Development—The Colonial Legislative Tradition

1. The Seventeenth Century

The seventeenth century witnessed a great struggle in England between crown and Parliament over many issues, including control of state

finances.[1] After the rebellion broke out in 1642, the English became accustomed to having the country's finances managed by parliamentary committees[2] as the rupture with the king threw much executive business on Parliament.[3] The struggle over the power to initiate and control finances continued after the Restoration in 1660 until the "Glorious Revolution" of 1688[4] when the Bill of Rights[5]—part of the revolutionary settlement—finally and decisively confirmed Parliament's power over the purse.[6] The power over appropriation,[7] however, produced an unexpected side effect. When the money appropriated for a specific purpose was not totally spent, it produced a surplus in the Exchequer which the Exchequer officials were prohibited from turning over to the Crown.[8] Having no executive duties, members of Parliament gradually found this a ready source from which to satisfy the private claims of their constituents.[9]

There is no evidence that during this period the House of Commons ever developed a workable process for investigating the merits of private claimants' requests for money.[10] No standing committee was created to investigate such claims.[11] Apparently, such claims were treated like any other request for money and were subject to the rule, first laid down in 1667, that the House of Commons would not proceed on petitions for money except in a Committee of the Whole where "any member

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1. See C. Lovell, English Constitutional and Legal History 282-335 (1962).

2. F. Maitland, The Constitutional History of England 309-310 (1913).

3. Jameson, The Origin of the Standing-Committee System in American Legislative Bodies, 9 Pol. Sci. Q. 246, 257 (1894) ("The most important [parliamentary] committees of the years from 1642 to 1656 were the committee for the advancement of money, the army committee, the committee for taking the accounts of the kingdom, the sequestration committee, the committee of safety, the committee of both kingdoms, and the committees for plundered ministers, for removing obstructions in the sale of delinquents' lands, for the relief of those who surrendered on articles of war, for compounding with delinquents, for indemnity, and for the sale of fee-farm rents or crown lands.").

4. C. Lovell, supra note 1, at 361-414.

5. The English Bill of Rights of 1689 provides, "That levying Money for or to the Use of the Crowne by pretence of Prerogative without Grant of Parlyament for longer time or in other manner then the same is or shall be granted is Illegall." 1 The Law and Working of the Constitution: Documents 1660-1914, at 69 (W. Costin & J. Watson eds. 1961).

6. See K. Bradshaw & D. Pring, Parliament and Congress 307 (1972).

7. This was accomplished by specifying in the statute that money raised by taxation was to be used for specific purposes and by inserting another clause that prohibited the Lords of the Treasury from using the money for any other purpose. F. Maitland, supra note 2, at 310.

8. K. Bradshaw & D. Pring, supra note 6, at 310.

9. Id.

10. 3 J. Hatsell, Precedents of Proceedings in the House of Commons 241-42 (London 1818 & photo. reprint 1971).

11. R. Harlow, The History of Legislative Methods in the Period Before 1825, at 11 (1917).

could speak as often as he liked."[12] Obviously, this method did not provide a satisfactory method for the detailed review of legislation involving money.[13] By the close of the seventeenth century, this practice had become a brisk legislative business as a large number of private claims were being introduced by members and passed by the House of Commons.[14] Thus, from its very inception the practice of legislative claims determination was closely linked to the legislative appropriation power itself.

The first representative colonial assembly, the Virginia House of Burgesses, met in 1619.[15] The House of Burgesses, as would other colonial assemblies, looked to the English Parliament for models of practice and procedure.[16] Accordingly, seventeenth-century Parliamentary practices are significant because they influenced the development of the American colonial legislatures at that time.[17] The colonial assemblies' assertion of control over colonial taxation and appropriation[18] and the lodging of such control exclusively in the lower, popularly elected house[19] clearly echo the seventeenth-century developments of the English House of Commons.[20] Moreover, the parliamentary system of standing committees which developed during this time of crown conflict is said to have made its transit to the American colonies "in the days of the later

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12. 3 J. Hatsell, supra note 10, at 176-77; see also P. Thomas, The House of Commons in the Eighteenth Century 77 (1971).

13. See P. Thomas, supra note 12, at 75.

14. Id. at 71-72.

15. J. Leake, The Virginia Committee System and the American Revolution 12 (1917).

16. This was especially true of the Mid-Atlantic and Southern colonies which developed a more intimate relationship with England by virtue of their significant trade in agricultural products. Many aristocratic Southerners had their children educated in England where they became familiar with English customs. In some instances, the clerks in the assemblies were Englishmen who had experience in Parliament and who were well acquainted with its procedures. R. Harlow, supra note 11, at 6. It is said that the House of Burgesses was organized nearly identical to the pattern of the seventeenth-century House of Commons before the development of the cabinet or ministerial form of government. J. Leake, supra note 15, at 11; see R. Harlow, supra note 11, at 10.

17. R. Harlow, supra note 11, at 5.

18. See E. Greene, The Provincial Governor 116-17, 180-86 (1898). Professor Greene stated:

> In the early part of the colonial era the financial powers of the governor had . . . been very extensive. The introduction of representative assemblies, however, gradually deprived him of these abnormal powers, rendering him dependent upon the assembly for supplies. . . . [F]urthermore, the body which granted money began to claim the right of determining how that money should be spent. Hence the financial powers of the governor became very much reduced.

Id. at 117.

19. Id. at 122-23.

20. See generally C. Lovell, supra note 4.

Stuarts."[21] It is significant, therefore, that among the first three standing committees in the House of Burgesses was a committee on public claims.[22] While the other two committees—the committee on privileges and elections and the committee on propositions and grievances—show traces of correspondence to then existing parliamentary committees, the committee on public claims was "strictly a colonial development."[23] All three committees had been in active service several years before 1680.[24] In creating a standing committee to investigate claims, the House of Burgesses imported the parliamentary practice of legislative claims determination and, in an American adaptation of the standing committee system, refined the process to meet local needs.

2. The Eighteenth Century

In October 1705, the House of Burgesses further refined its claims process by establishing a general statutory process whereby public claims could be gathered from throughout Virginia and presented to the legislature.[25] At the time of the election for the House of Burgesses, the statute required each county sheriff to give notice of the time when a local court would convene in order to receive and certify public claims for the next session of the General Assembly.[26] The courts were not authorized to examine the public claims for their validity.[27] Their sole function appears to have been the purely ministerial one of properly certifying the papers in question and transmitting them to the House of Burgesses, while the task of evaluation and recommendation was lodged in the committee of public claims.[28]

Ironically, in the same year when the House of Burgesses was codifying its claims process, the private claims process in Parliament was breaking down. In the session beginning in October 1705, the House of Commons was inundated with a great number of petitions involving private claims for money.[29] John Hatsell, Clerk of the House of Commons from 1768-1820, later wrote that such claims were

> often promoted by Members who were friends to the parties, and carrying with them the appearance of justice or of charity,

21. Jameson, supra note 3, at 259.
22. R. Harlow, supra note 11, at 11.
23. Id.
24. The Committee on Public Claims evolved out of a joint committee which acted as the highest court of appeal in the colony. After its judicial function was taken away in 1680, it continued on as a House committee which investigated claims presented to the legislature. Id.
25. J. Leake, supra note 15, at 27-28.
26. Id.
27. Id.
28. Id.
29. See generally 3 J. Hatsell, supra note 10.

> induced the rest of the House to wish well to, or at most to be indifferent to their success; and by this means large sums were granted to private persons improvidently and sometimes without sufficient grounds.[30]

This abuse led to the conclusion that some restriction was necessary.[31] On December 11, 1706, the House of Commons, at the beginning of its session, passed a resolution prohibiting the receipt of a petition for a grant of money for action by the Commons unless it was first recommended by the Crown.[32] It became the practice of the Speaker, thereafter, to ask the Chancellor of the Exchequer or other person authorized by the Crown to signify his recommendation before bringing up such a petition.[33] In 1713, the resolution of December 11, 1706 was adopted as a standing order of the House of Commons[34] and has since become one of the cardinal principles of the British constitution.[35] The purpose of the rule was to transfer the responsibility for determining the merits of all grants of money, including claims, from the House of Commons to the ministers of the Crown.[36] *Pro forma* assent by the ministers merely to permit parliamentary consideration was considered destructive of the spirit and meaning of the resolution.[37] This was regarded as a failure of the ministers' duty to inspect and recommend and, in claims involving difficult equitable considerations, as a failure of the ministers' courage as well.[38]

The reasons for the House of Commons' self-restriction on its authority over money grants, which no one dreamed of contesting,[39] have various explanations. Obviously, the Commons quickly concluded it was an ill-suited forum for the investigation of claims[40] and therefore subject to abuse.[41] In the words of one commentator it was "a measure of protection against the easy extravagance of a large assembly."[42] More-

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30. Id. at 242.

31. Id. at 241-42.

32. The resolution of December 11, 1706, stated "[t]hat this House will receive no Petitions for any sum of Money, relating to publick Service, but what is recommended from the Crown." 1 W. Costin & J. Watson, supra note 5, at 197.

33. 3 J. Hatsell, supra note 10, at 242.

34. Id.

35. K. Bradshaw & D. Pring, supra note 6, at 309 ("Though it has been a standing order of the House since 1713, it has never been made statutory and could theoretically be overthrown by a simple majority of the House. Yet the principle has stood for more than 250 years, and the terms of the standing order have been reaffirmed and spelt out on several occasions.").

36. 3 J. Hatsell, supra note 10, at 243.

37. Id.

38. Id.

39. 3 J. Redlich, The Procedures of the House of Commons 122 (1908).

40. See supra text accompanying notes 34-37.

41. P. Thomas, supra note 12, at 71.

42. 3 J. Redlich, supra note 39, at 122.

over, the English courts, even during this period, could often provide an alternative forum where private claimants could press their grievance against the Crown or its officials.[43] However, the basic reason appears to have been much more fundamental. Despite the civil war and the "Glorious Revolution," the English constitution "remained monarchical in essence."[44] After a period of experimentation in the later seventeenth and early eighteenth centuries, the English returned to their traditional pattern of the Crown initiating requests for expenditures, but now with the Crown acting through ministers responsible to Parliament itself.[45] This was a part of a larger development toward cabinet government.[46]

The early eighteenth-century transfer of claims determination in England from Parliament to Crown produced no corresponding change in the practice of the American colonial assemblies. By this time, the practice appears to have been firmly entrenched. For example, in Virginia, in 1715, when certain county judges neglected to hold court to receive and certify claims for transmittal to the House of Burgesses, the House became so outraged that it ordered some of the offending judges prosecuted for neglect of duty, and had others arrested and

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43. For an excellent review of the available methods, see Jaffe, Suits Against Government and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963). "From time immemorial many claims affecting the Crown could be pursued in the regular courts if they did not take the form of a suit against the Crown. And when it was necessary to sue the Crown *eo nomine* consent apparently was given as of course. Long before 1789 it was true that sovereign immunity was not a bar to relief." Id. at 1. During the early eighteenth century, the easiest method for recovering ordinary money claims was to file a petition in chancery for a writ of liberate that would order the Exchequer to pay, or direct the barons of the Exchequer to hear, the claim. See 9 W. Holdsworth, A History of English Law 21, 33, 35 (1926). In 1700 the High Court of Parliament, in the famous *Case of the Bankers*, affirmed that in certain instances a petition could also be filed directly with the barons of the Exchequer for payment of money owed by the crown. This case and numerous related cases are collected in volume 14 of Howell's State Trials (1816). For a good discussion of this case, see 9 W. Holdsworth, supra, at 32-39, and W. Richardson, History of the Court of Augmentations, 1536-1554, at 472-74 (1961). The petition of right, due to its complicated procedural technicalities, appears to have dropped out of use during this period. 9 W. Holdsworth, supra, at 8, 9, 22-26. In fact, one writer states that there is "no trace of a petition of right from 1605 until the nineteenth century." H. Street, Governmental Liability: A Comparative Study 1, 2 (1953). Not until the nineteenth century was the petition of right revived in England with the adoption of the Petition of Right Act of 1860, 23 & 24 Vict. ch. 34, § 2 (repealed by Crown Proceedings Act of 1947, 10 & 11 Geo. 6, ch. 44, § 39), and the scope of its remedy expanded to contract actions. Feather v. The Queen, 6 B. & S. 257, 295, 122 Eng. Rep. 1191, 1205 (Q.B. 1865).

44. K. Bradshaw & D. Pring, supra note 6, at 309.

45. Id. ("[B]y leaving the power of initiating expenditure to the Crown (that is, the government) the House has ultimately confined its own function in the field of supply and appropriation to criticism of what the government does.").

46. See Jameson, supra note 3, at 259-61.

physically brought before it where the judges were ordered to make "an humble acknowledgment of their error at the bar of the House."[47] By the close of the colonial period, almost all the colonial legislatures had developed a standing committee on "claims" or "grievances;" these committees were to continue after independence.[48]

Several reasons can be offered for the continuation of legislative claims determination in the colonial legislatures. First, unlike Parliament, the colonial legislatures developed the practice of creating standing committees to investigate claims.[49] Given the undoubtedly smaller volume of claims, this procedure appears to have adequately served colonial needs.[50] Second, the colonial judiciary was subject to great control by the English governors[51] who appointed the judges[52] and participated in hearing appeals in civil cases.[53] This forum was hardly an attractive alternative for pursuing a monetary grievance against the colonial government itself.[54] Finally, the English solution was unthinkable in the American colonies. Colonial legislators who won prominence tended to be aggressive, self-confident politicians whose frontier spirit made them contemptuous of the English governors and administrators sent over from England.[55] Unlike the English Parliament, which relinquished budget initiative to ministers of the Crown responsible to it under the developing cabinet system,[56] the colonial assemblies stubbornly fought for and largely succeeded in superseding the English governor's control over all colonial finances.[57]

By the close of the colonial period, American politicians and public alike considered legislative determination of claims a natural and appropriate aspect of the legislative power over appropriations. Their colonial experience admitted no other model. After independence had been achieved, the American experience under the Articles of Confederation would simply reinforce this aspect of the colonial legislative tradition.

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47. J. Leake, supra note 15, at 28.

48. See R. Harlow, supra note 11, at 259-62.

49. R. Harlow, supra note 11, at 11, 259-61.

50. Id. at 16 ("Every case, no matter how trivial it seemed, was given a fair hearing.").

51. See E. Greene, supra note 18, at 133-44.

52. The colonial governors appointed the judges and justices of the peace with the consent of the council. However, in the latter colonial period, the provincial chief-justice was appointed by the crown. Id. at 134.

53. Id. at 140. Although appeal to the home government was possible if large sums of money were involved, this process was necessarily inconvenient, expensive, and impractical in most cases. Id. at 140-41.

54. Id. at 141. See H. Glick & K. Vines, State Court Systems 19-21 (1973).

55. R. Harlow, supra note 11, at 2.

56. See K. Bradshaw & D. Pring, supra note 6, at 309-10.

57. See E. Greene, supra note 18, at 180-86.

3. Articles of Confederation (1781-1789)

Under the Articles of Confederation, the states sought to maintain their individual sovereignty.[58] Fearing a strong central government,[59] they limited the powers granted to it. The powers that were delegated were placed in the hands of Congress, where each state had one vote.[60] No independent executive branch was created. Instead, the Confederation Congress was merely authorized to appoint a "Committee of the States" to sit during their recess and "to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States, under their direction."[61] Also, no national judiciary was created. Disputes between states were ultimately to be decided by Congress.[62] With regard to the determination of claims against the United States, the Articles of Confederation, consistent with previous colonial legislative practice, provided that they were to be defrayed only if "incurred . . . *and allowed* by the United States, in Congress assembled."[63]

After the Revolutionary War,[64] the Confederation Congress, in 1784, created a three-member Board of Treasury to supervise and manage the new nation's finances.[65] Its most important duty was that of settling the numerous accounts and claims which had arisen out of the war.[66] The Board, however, was far from independent. The Confederation Congress concerned itself with even small matters of finance and directed the Board at almost every point.[67] The numerous claims or "memorials" sent to Congress were referred to the Board for investigation.[68] The

58. Article 2 of the Articles of Confederation declared, "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled." For an excellent discussion of the struggle over sovereignty, see M. Jensen, The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution, 1774-1781, at 161-76 (1940).

59. M. Jensen, The New Nation 347 (1950).

60. Arts. Confed. art. 5, § 4 (1781, superseded 1789).

61. Arts. Confed. art. 9, § 5 (1781, superseded 1789).

62. Arts. Confed. art. 9, § 2 (1781, superseded 1789).

63. Arts. Confed. art. 8, § 1 (1781, superseded 1789) (emphasis added).

64. Due to wartime necessity, the Confederation Congress established a Department of Finance, headed by the controversial Robert Morris, to supervise the nation's finances during the first three years (1781-1784) under the Articles of Confederation. See J. Sanders, Evolution of Executive Departments of the Continental Congress, 1774-1789, at 128-45 (1971).

65. 27 Library of Congress, Journals of the Continental Congress, 1774-1789, at 469 (G. Hunt ed. 1928) [hereinafter cited as Journals Cont'l Cong.]. The three Board positions were filled by members coming from the Northern, Middle, and Southern states. J. Sanders, supra note 64, at 147.

66. J. Sanders, supra note 64, at 148-49.

67. Id. at 151.

68. M. Jensen, supra note 59, at 371.

Board normally required written documentation for claims,[69] heard evidence, and reported back to Congress[70] which had the sole power to authorize payment.[71] Most of the claims were quite small. For example, they included requests for reimbursement for cattle procured for the army,[72] compensation for special intelligence gathering against the enemy,[73] supplementation of pay affected by the depreciation of currency,[74] and payment for a home and tools destroyed to prevent them from falling into enemy hands.[75] Not all claims brought before the Board were based on what normally would be considered a legal right. Many were filed by "hopeful souls who saw a chance to make something out of the confusion."[76] Thus, claims by Revolutionary War widows, speculators, and persons lacking adequate documentation were rejected.[77]

It has been suggested that the practice of congressional claims determination after the adoption of the Constitution in 1789 can be traced to precedents established by the Confederation Congress when there was no independent executive or judicial branch of government.[78] While in a sense true, this analysis fails to give sufficient weight to the colonial legislative tradition of claims determination which can be traced, as we have seen, to at least as early as 1680 in the Virginia House of Burgesses—a full century before.[79] Moreover, it does not explain why all the newly established states—which began to create independent state judiciaries during this period[80]—also continued the practice of legislative

69. Although normally required, documentation was not always insisted on by the Treasury Board. For example, a Colonel Livingston submitted a claim for provisions and boards purchased for the army. The Board recommended payment stating that "Colonel Livingston having lost all his Papers and Vouchers on the Retreat from Quebec, the exact Balance cannot be ascertained with that accuracy which the usual Forms of the Treasury require. From the Character of Col. Livingston, the Board are of Opinion, the balance appearing due . . . should be allowed to him." 30 Journals Cont'l Cong., supra note 65, at 201 (J. Fitzpatrick ed. 1934).

70. M. Jensen, supra note 59, at 371.

71. See Arts. Confed. art. 8 (1781, superseded 1789).

72. 30 Journals Cont'l Cong., supra note 65, at 205 (J. Fitzpatrick ed. 1934).

73. Id. at 207.

74. Id. at 203-04.

75. Id. at 222-24.

76. M. Jensen, supra note 59, at 371.

77. Id. at 371-72.

78. Wiecek, The Origin of the United States Court of Claims, 20 Ad. L. Rev. 387, 389 (1968) ("The problem of claims against the central government antedated the Constitution. The Confederation Congress, in its handling of this problem, established precedents which influenced the later disposition of claims long after the reasons underlying the Confederation procedures ceased to exist . . . . Three factors determined the choice of a method for handling claims against the Confederation: The lack of administrative machinery, the lack of a separate national judiciary, and Congress' dissatisfaction with the performance of Robert Morris, the powerful superintendent of finance.").

79. See R. Harlow, supra note 11.

80. See H. Glick & K. Vines, supra note 54, at 21-22.

determination of claims.[81]

Early state courts respected the traditional legislative jurisdiction over claims.[82] For example, in *Black v. Rempublicam*,[83] the plaintiff sued the Commonwealth of Pennsylvania in a Pennsylvania state court for the value of goods confiscated in 1776 in order to keep them from the British. The state court concluded that it had no jurisdiction under Pennsylvania law to provide relief and simply stated what was at that time the obvious: "The remedy of the plaintiffs, if any of the provisions have come to the particular benefit of the state, is by application to the legislature, who have reserved these extraordinary powers to themselves."[84] In fact, one of the principal arguments raised by the Anti-Federalists against the proposed Constitution was that it would permit claims against the states to be determined judicially by the proposed federal courts, rather than legislatively by the states themselves.[85] The popular strength of the then prevailing "legislative model" is demonstrated by the fact that Hamilton and other Federalists felt the need to deny vehemently that such an unthinkable proposition was so.[86] Ac-

81. See R. Harlow, supra note 11, at 259-61.

82. See Justice Iredell's dissent in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 445-446 (1793); see also Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357 (Pa. Sup. Ct. 1788).

83. 1 Yeates 139 (Pa. 1792).

84. Id. at 142.

85. One Anti-Federalist, writing under the pseudonym "Brutus," made this point in an essay published February 21, 1788, with regard to the provision which would extend the jurisdiction of the proposed federal courts to controversies between a state and citizens of another state. Brutus stated, "It is improper, because it subjects a state to answer in a court of law, to the suit of an individual. . . . The states are now subject to no such actions. . . . [I]ndividuals never had in contemplation any compulsory mode of obliging the government to fulfil its engagements." 2 The Complete Anti-Federalist 429 (H. Storing ed. 1981) (footnote omitted). Other Anti-Federalists suggested that the state legislatures would be "prostrated" by such a provision. J. Main, The Anti-Federalists: Critics of the Constitution, 1781-1788, 157 (1961).

86. In *Federalist No. 81*, Alexander Hamilton notes that the issue of suits against the states in federal court has "excited some alarm upon very mistaken grounds." Hamilton then attempts to set the matter to rest by stating that:

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union . . . . [T]here is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.

The Federalist No. 81, at 548-49 (A. Hamilton) (J. Cooke ed. 1961) [hereinafter cited to this edition without reference to editor]. James Madison stated, "It is not in the power of individuals to call any state into court." 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (2d. ed. Philadelphia 1836). In the same Virginia Ratification Convention, John Marshall concurred in Madison's estimation:

> I hope that no gentlemen will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases

cordingly, at the time of the establishment of the Constitution, the "legislative model" of claims determination was a firmly established part of the American political tradition at both the state and national levels. However, the creation of the new federal judiciary was beginning to raise disturbing questions.

B. Triumph—Congress Over Court In The Early Republic

1. Early Struggle (1789-1794)

After the adoption of the Constitution on March 4, 1789, the First Congress moved quickly to maintain legislative dominance over the determination of claims. Even before it took steps to implement the new federal judiciary,[87] Congress instituted, on September 2, 1789, a transfer of the claim-reviewing function to the auditors and the Comptroller within the newly established Treasury Department.[88] This was the same general method of determining claims that had been employed under the Articles of Confederation;[89] however, Congress did not intend to relinquish ultimate control of claims by this action.[90] Claimants dissatisfied with the Comptroller's decision could still appeal to Congress.[91] Moreover, Congress could effectively overrule a Comptroller's award by simply refusing to appropriate the necessary funds.[92] With the advent of the federal judiciary, the conceptual problems which this approach

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> in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court.

Id. at 555. However, a few Federalists, such as James Wilson (who would later rule on this question as a Justice of the Supreme Court), disagreed. Wilson stated, "When a citizen has a controversy with another State, there ought to be a tribunal where both parties may stand on a just and equal footing." 1 J. McMaster & F. Stone, Pennsylvania and the Federal Constitution, 1787-1788, at 356 (1888 & photo. reprint 1970).

87. The act creating the Department of Treasury was adopted on September 2, 1789. See Act of September 2, 1789, ch. 12, 1 Stat. 65 (1845). The act implementing the federal judiciary was adopted on September 24, 1789, ch. 20, 1 Stat. 73 (1845).

88. 2 W. Cowen, P. Nichols & M. Bennett, The United States Court of Claims 4 (1978); 216 Ct. Cl. 4 (1978).

89. See Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, 66-67 (1845). Specifically, § 5 of this act provides that "it shall be the duty of the Auditor to receive all public accounts [*i.e.*, all claims], and after examination to certify the balance, and transmit the accounts with the vouchers and certificate to the Comptroller for his decision thereon: *Provided*, That if any person whose account shall be so audited, be dissatisfied therewith, he may within six months appeal to the Comptroller against such settlement."

90. See 2 W. Cowen, P. Nichols & M. Bennett, supra note 88, at 5.

91. Wiecek, supra note 78, at 389.

92. See U.S. Const. art. I, § 9 ("No money shall be drawn from the treasury, but in consequence of appropriations made by law."); see also 2 W. Cowen, P. Nichols & M. Bennett, supra note 88, at 5.

created were not lost on Representative James Madison.[93] Madison clearly saw that the powers being conferred on the Comptroller were judicial rather than executive in nature.[94] Therefore, he argued during the debates that there should be a right to review in the Supreme Court to insure impartiality.[95] Congress, however, rejected this idea, preferring to maintain control over claims without judicial interference. Three weeks later, on September 24, 1789, this sentiment again found expression when Congress enacted the Judiciary Act of 1789 and extended federal court jurisdiction over the federal government to only those situations where "the United States are plaintiffs, or petitioners"[96] and omitted reference to defendant or respondent status.[97]

Despite lodging certain authority in the Treasury Department to review claims, the First Congress, unlike Parliament,[98] had no intention of making that process exclusive. Less than a month later, on September 29, 1789, Congress enacted its first private claims bill.[99] By this time the "legislative model" of claims adjudication was too firmly entrenched in the minds of both politician and public to permit any drastic break with the past. Seven hundred and four private and public petitions were presented to the First Congress.[100] Congress responded to the petitions by referring them to the appropriate Secretary in the executive branch, or to a special legislative committee for examination and recommendation back to Congress.[101]

Congressional dominance was not to go unchallenged by the new federal judiciary. In 1792 and 1793, the Supreme Court handed down two cases: *Hayburn's Case*[102] and *Chisholm v. Georgia*.[103] In these cases

93. 1 Annals of Cong. 611-14 (J. Gales ed. 1834).

94. Id. at 611-12 ("It seems to me that they partake of a Judiciary quality as well as Executive; perhaps the latter [*sic*?] obtains in the greatest degree. The *principal* duty seems to be deciding upon the lawfulness and justice of the claims, and accounts subsisting between the United States and particular citizens; this partakes strongly of the *judicial* character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government.") (emphasis added).

95. Id. at 612.

96. See Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78 (1845).

97. This ommission has been deemed significant. See Williams v. United States, 289 U.S. 553, 573-74, 53 S. Ct. 751, 757-58 (1933).

98. See discussion supra notes 25-46; see also H.R. Rep. No. 730, 25th Cong., 2d Sess. 7 (1838), where the difference between Parliament and Congress with respect to claims is briefly discussed.

99. See Act of Sept. 29, 1789, ch. 26, 6 Stat. 1 (1846). This act allowed the Baron de Glaubeck the pay of captain for services rendered during the Revolutionary War.

100. H.R. Rep., supra note 98, at 4.

101. Id. at 2. However, very few of these claims appear to have resulted in private legislation. See the private acts of the First Congress in volume six of the United States Statutes at Large (1846).

102. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

103. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

the court sought to establish the finality of federal judicial decisions with respect to claims against the United States, and implicitly, exclusive jurisdiction to decide those claims.

In 1792 Congress passed a statute designed to settle various pension claims of widows, orphans, and others arising out of the Revolutionary War.[104] Not wishing to create a new bureaucracy,[105] Congress assigned the task of reviewing and certifying the claims to the new federal circuit courts which were to transmit their decisions to the Secretary at War.[106] Congress, however, had no intention of surrendering its control over claims since section 4 of the Act contained the following qualification: "*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."[107] Several courts refused to hear claims under this act on the grounds that the act failed to accord finality to their decisions.[108] The position of the New York Circuit Court was representative of this view: "[B]y the Constitution, neither the Secretary at War, nor any other Executive officer, *nor even the Legislature*, are authorized to sit as a court of errors on the judicial acts or opinions of this court."[109] The courts' positions caused quite a stir in Congress since these cases provided the first instances in which an act of Congress had been declared unconstitutional.[110] The Attorney General filed an action in the Supreme Court to compel the Circuit Court to hear the claim of one William Hayburn.[111] In the meantime, Congress amended the Act so that the federal court's role was limited to fact finding, *i.e.*, taking evidence and transferring it to the Secretary of War for his determination.[112] Apparently, this change satisfied the federal courts since no judicial determination of the merits was involved[113] and the matter was resolved without need for the Supreme Court to formally decide the question.[114] However, the message was clear: the

104. Act of March 23, 1792, ch. 11, 1 Stat. 243 (1845).

105. At the time, the duties of the new Federal court judges were relatively light. C. Haines, The Role of the Supreme Court in American Government and Politics, 1789-1835, at 133 (1944).

106. Act of March 23, 1792, ch. 11, 1 Stat. 243, 244 (1845).

107. Id. § 4, 1 Stat. 243, 244.

108. See the notes of the reporter accompanying Hayburn's Case, 2 U.S. (2 Dall.) at 410-14.

109. Id. at 410 (emphasis added).

110. 2 Annals of Cong. 557 (1849).

111. Hayburn's Case, 2 U.S. (2 Dall.) at 409.

112. Act of February 28, 1793, ch. 17, 1 Stat. 324 (1845).

113. The New York Circuit Court had suggested that, in deference to the intent of Congress, it might be willing to "execute this act in the capacity of commissioners." Hayburn's Case, 2 U.S. (2 Dall.) at 410.

114. Id. at 409-10. But see United States v. Yale Todd, 54 U.S. (13 How.) 52 note (1851) (footnote discussion of case inserted by Chief Justice Taney).

federal judiciary would insist that their judgments be accorded finality and not be subject to revision by either the executive or legislative branches.

In 1793, the Supreme Court, in the case of *Chisholm v. Georgia*,[115] confronted the thorny question[116] of whether or not the constitutional grant of judicial authority over "controversies . . . between a State and citizens of another State"[117] meant that a state could be sued without its consent. Although the case specifically related to a claim filed by an individual against the State of Georgia, the Court's decision would necessarily provide an important precedent for a closely related question: whether the Court could entertain a suit against the federal government without its consent under the parallel constitutional provision which extended its jurisdiction "to controversies to which the United States shall be a party."[118] The fundamental question raised was whether, under the new Constitution, claims against the states (and by analogy the federal government) were to be considered legal questions for the courts or financial questions for the appropriate legislative body. The significance of the case on both the state and Federal levels was recognized at the time by both Court and counsel. Edmund Randolph,[119] the Attorney General, argued in favor of the Court's ability to entertain the action against the State of Georgia by relying heavily on the literal language of the Constitution,[120] but he was careful to point out "that it will not follow, from these premises, that the *United States* themselves may be sued. For the head of a confederacy is not within the reach of the judicial authorities of its inferior members. It is exempted by its peculiar pre-eminencies."[121]

By a four to one vote, the Supreme Court upheld the ability of the federal courts to hear suits filed against the states without their consent.[122] The Justices rendered their opinions *seriatim*. The lone dissenter was Justice Iredell who—after tracing the history of the English petition of right—concluded that a state, as a sovereign, could only be sued with its consent and, since there were no longer any kings, such

115. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

116. Although the question was apparently not debated by the drafters, it became the subject of intense debate during the ratification process. R. Spurrier, To Preserve These Rights 39-40 (1977).

117. U.S. Const. art. III, § 2.

118. Id.

119. Interestingly, at the Philadelphia Convention Edmund Randolph was a member of the Committee of Detail which drafted Article III of the Constitution. C. Jacobs, The Eleventh Amendment and Sovereign Immunity 15-18 (1972).

120. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) at 420-25.

121. Id. at 425.

122. Id.

consent must be given by the legislative branch.[123] The opinions of the majority (Blair, Wilson, Cushing, and Jay) instead found that the Court could hear claims against the states without their consent, and left open the question of its jurisdiction over the federal government involving similar suits. However, there were some hints that the majority might decide the question the same way against the federal government although their opinions sent out mixed signals. Justice Blair's insistance on relying on the literal language of the Constitution[124] and Justice Wilson's philosophical rejection of all doctrines which placed the government in a superior position to an individual[125] strongly implied that they might decide that the federal government, like the states, could be sued without its consent. Justice Cushing, on the other hand, appeared to lean against a construction of the Constitution which would permit the federal government to be sued without its consent due to "the different wording of the different clauses, connected with other reasons."[126] Finally, Chief Justice Jay discussed the implications of their decision on the Court's jurisdiction over a federal defendant and candidly admitted the dilemma that he saw: the literal language of the Constitution suggests jurisdiction over the federal government but practically, "there is no power which the courts can call to their aid"[127] to enforce their decisions in such a situation. Chief Justice Jay closed with a philosophic lament that perhaps the nation was not ready to accept such a role by the judiciary, and therefore, "I leave it a question."[128]

123. Id. at 446 ("The only constituted authority to which such an application could with any propriety be made, must undoubtedly be the Legislature, whose express consent, upon the principle of analogy, would be necessary to any further proceeding. So that this brings us (though by a different route) to the same goal: The discretion and good faith of the Legislative body.").

124. Id. at 450 ("The Constitution of the United States is the only fountain from which I shall draw; the only authority to which I shall appeal. Whatever be the true language of that, it is obligatory upon every member of the Union.").

125. Id. at 461 ("Even in almost every nation, which has been denominated free, the State has assumed a supercilious preeminence above the people, who have formed it: Hence the haughty notions of State independence, State sovereignty and State supremacy. In despotic Governments, the Government has usurped, in a familiar manner, both upon the State and the people: Hence all arbitrary doctrines and pretensions concerning the Supreme, absolute, and incontrolable power of Government. In each, man is degraded from the prime rank, which he ought to hold in human affairs.").

126. Id. at 469 ("As to reasons for citizens suing a different State, which do not hold equally good for suing the *United States*; one may be, that as controversies between a State and Citizens of another State, might have a tendency to involve both States in contest, and perhaps in war, a common umpire to decide such controversies, may have a tendency to prevent the mischief.").

127. Id. at 478.

128. Id. ("I wish the State of society was so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question.").

The majority straddled the federal question but clearly did not foreclose the possibility that it might extend *Chisholm*—at least some time in the future. The implications of *Hayburn's Case* and *Chisholm*, which were reported virtually one after the other, would leave little doubt that: (1) the federal courts would not tolerate congressional revision of their decisions on federal claims within their jurisdiction; and (2) the Supreme Court, at a minimum, believed that the question of whether the Constitution specifically granted it jurisdiction to decide such claims against the federal government was the Court's decision through constitutional interpretation. A new concept of claims determination—based on the rule of law—was being asserted by the new federal judiciary.[129] The challenge to the colonial "legislative model" was unmistakable.

The reaction to this early assertion of judicial authority was swift and strong.[130] The Supreme Court's decision in *Chisholm v. Georgia* "created . . . a shock of surprise throughout the country"[131] and led to the immediate introduction (February 20, 1793) in Congress of a proposed constitutional amendment to nullify its effect.[132] Thereafter, the proposed Eleventh Amendment to the Constitution was adopted almost unanimously in 1794 by the Third Congress[133] and swiftly ratified by the requisite number of state legislatures.[134] This amendment provided that the federal court had no jurisdiction over suits against states brought by citizens of other states or other countries.[135]

The reasons for the widespread support for the Eleventh Amendment have traditionally been viewed in the context of federalism, *i.e.*, the struggle of the states to maintain their fiscal independence from federal intrusion and coercion at a time when state debts were matters of significant concern.[136] While this analysis explains the support of states'

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129. See C. Haines, supra note 105, at 131 ("But a new theory of the separation of powers and judicial independence was emerging, and with this came a different concept of the relation of the Judges to the other departments of government. This new concept was summed up in the doctrine that there was to be established in America 'a government of laws and not of men.'") (footnote omitted).

130. For an excellent discussion, see C. Jacobs, supra note 119, at 64-74.

131. Hans v. Louisiana, 134 U.S. 1, 11 (1889).

132. 2 Annals of Cong. 651-52 (1849). The Second Congress adjourned a few weeks later, however, without taking any action on this proposal.

133. The vote in the Senate was 23 to 2 (January 14, 1794) and in the House 81 to 9 (March 4, 1794). 3 Annals of Cong. 30, 477 (1855).

134. By February of 1795, the requisite number of states appear to have ratified the Eleventh Amendment, although the official certification of passage by President Adams did not take place until early 1798. C. Jacobs, supra note 119, at 67.

135. The Eleventh Amendment states, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of a foreign state."

136. See C. Jacobs, supra note 119, at 67-74; Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821).

rights advocates and the relatively prompt ratification by the state legislatures, it does not adequately explain the widespread Federalist party support in Congress.[137] Federalist support was probably less influenced by concerns over state rights than by concerns over the proper allocation of responsibilities among the various branches of the federal government. Hamilton, for example, saw the judiciary as the "weakest" of the three branches with "no influence over either the sword or the purse."[138] And Hamilton, as did other Federalists, clearly believed that claims against the United States involved matters of "the purse."[139] While the states saw an attack on states' rights in *Chisholm v. Georgia*, the Federalists, particularly in light of *Hayburn's Case*, also saw an attack on the traditional "legislative model" of claims adjudication. Watkins recognizes this point when he notes that "[a] wave of apprehension spread over the country at this unheard of and totally unexpected deviation from the accepted course of non-judicial adjustment or judicial non-adjustment of state debts."[140] The adoption of the Eleventh Amendment, therefore, was not only a victory for state rights but a "stinging rebuke"[141] to the Court's assault on the "legislative model" of claims adjudication. Moreover, subsequent history indicates that the Supreme Court understood it as such.[142]

2. *Congressional Adjudication (1794-1838)*

After *Hayburn's Case* in 1792 and *Chisholm v. Georgia* in 1793, Congress became reluctant to authorize claims against the United States for hearing in federal courts due to the judiciary's insistence that its decisions be final and not subject to executive or legislative revision.[143] Some believed that if a court were authorized to decide claims against the federal government, Congress might be compelled to pay in violation of Article I, Section 9 of the Constitution which provides that "no money shall be drawn from the Treasury but in consequence of appro-

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137. C. Jacobs, supra note 119, at 71 ("Support for the amendment by states' rights men was, of course, to be expected. . . . It is more dificult to account for Federalist support of the amendment.").

138. The Federalist No. 78, at 522-23 (A. Hamilton) ("The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.").

139. See discussion supra note 86.

140. R. Watkins, The State as a Party Litigant 53 (1927).

141. Id. at 54 ("It would scarcely be expected, however, that, after the stinging rebuke administered to the judges for their interpretation of the status of a State at common law, there would be necessity for similar direct action if an attempt were made to make the Federal Government a defendant.").

142. Id.

143. See 2 W. Cowen, P. Nichols & M. Bennett, supra note 88, at 5.

priations made by law."[144] Congress, however, did not want to part with its ultimate control over claims[145]—the colonial legislative tradition ran too deep to permit relinquishment of such purse-strings control. Accordingly, Congress adopted two policies which effectively established the colonial "legislative model" of claims adjudication in the new republic.

First, Congress established procedures for determining claims itself.[146] On November 14, 1794 the House established, for the first time, a Committee of Claims[147] whose duty was defined as follows: "to take into consideration all such petitions . . . claims or demands on the United States, as shall be presented, or . . . referred to them by the House, and to report their opinion thereupon, together with . . . propositions for relief . . . as . . . shall seem expedient."[148] Under this rule, the Committee of Claims had jurisdiction over all money claims against the United States including private land claims, pension claims, and public land claims.[149] During the next ten years, the Committee of Claims appears to have functioned tolerably well given the relatively low volume of petitions filed.[150] As business increased, however, the House occasionally created other committees and assigned to them special categories of claims: in 1805, a Public Lands Committee; in 1813, a Pension and Revolutionary Claims Committee; in 1816, a Private Land Claims Committee; in 1825, a Revolutionary Pensions Committee; and in 1831, an Invalid Pensions Committee.[151] Similar development occurred in the Senate.[152] By 1832, half of Congress' time was consumed with such private business—Fridays and Saturdays being fully set aside for such purposes.[153]

Second, Congress delegated claims-determination authority only to non-judicial bodies or to the Treasury or other departments where it could retain effective control over both the decision-making body and appropriations.[154] Thus, during this period two general but separate claims systems were functioning—the congressional committee system and the Treasury Department system.[155] The Treasury Department considered the bulk of routine contract claims, while Congress tended to

144. Id.

145. Wiecek, supra note 78, at 390.

146. See Binney, Origin and Development of Legal Recourse Against the Government in the United States, 57 U. Pa. L. Rev. 372, 381 (1909).

147. 4 Annals of Cong. 883 (1849).

148. H.R. Rep. No. 730, supra note 98, at 2-3.

149. Id. at 3.

150. See 2 W. Cowen, P. Nichols & M. Bennett, supra note 88, at 6.

151. H.R. Rep., supra note 98, at 3.

152. See 2 W. Cowen, P. Nichols & M. Bennett, supra note 88, at 8.

153. 8 Memoirs of John Quincy Adams 479 (C. Adams ed. 1874-1877) [hereinafter cited as J.Q. Adams Memoirs].

154. Wiecek, supra note 78, at 390.

155. Id. at 393.

handle "appeals" from Treasury determinations[156] or non-contract claims not susceptible to the narrow requirements of the Treasury auditors.[157] After the War of 1812, Congress appointed a special commissioner to hear and decide numerous claims arising out of that conflict;[158] however, the commissioner was subject to the effective control of Congress and was not truly independent.[159] Congress delegated no claims adjudication authority to the federal courts.

The role of the federal judiciary during this period was limited and characterized by a painful silence. The repudiation of the Supreme Court's decision in *Chisholm v. Georgia* by the adoption of the Eleventh Amendment did not technically resolve the question left open by the Court: whether the Constitution itself granted the federal courts jurisdiction to decide claims against the United States.[160] The Eleventh Amendment merely addressed the question of suits against the states;[161] it did not necessarily adopt Justice Iredell's dissenting view that since in England the king could not be sued without his consent, in America such authority to consent was lodged in the legislature by analogy.[162] However, the Supreme Court appears to have "learned its lesson"[163] from the 1798 amendment repudiating its decision. In 1803, in the famous case of *Marbury v. Madison*,[164] the Supreme Court tread more carefully

156. Binney, supra note 146, at 378 ("As soon as the Treasury Department was established, the accounting officers were daily occupied in paying what the government owed for contracts of all kinds; but if those officers refused or cut down a claim, further relief could only be had from Congress itself.").

157. H.R. Rep., supra note 98, at 7-8 ("When claims depend on certain principles, recognized by the accounting officers, and are sustained by such evidence and vouchers as have been required by established rules, they are settled with as much promptitude in the Departments as could be expected; but there are very many cases where the accounting officers are prevented, by the strictness of the principles on which they act, and by the rules which govern them from doing justice to a claimant.").

158. See Act of April 9, 1816, ch. 40, 3 Stat. 261; Act of March 3, 1817, ch. 110, 3 Stat. 397 (1846).

159. Although the judicial status of the Commission was debated at the time, William M. Wiecek has observed that "from our twentieth century vantage, it is plain that the Commissioner was merely an employee of Congress, having no more judicial status than a congressional committee." Wiecek, supra note 78, at 390-91.

160. Article III, § 2 of the Constitution provides, in part, that "[t]he judicial power shall extend . . . to controversies to which the United States shall be a party." See supra text accompanying notes 116-18.

161. See U.S. Const. amend. XI, quoted supra note 135.

162. R. Watkins, supra note 140, at 53-54. Nevertheless, nearly a century later, the Supreme Court was to interpret the adoption of the Eleventh Amendment as a ratification of Justice Iredell's views. See Hans v. Louisiana, 134 U.S. 1, 12 (1889).

163. Id. at 54.

164. 5 U.S. (1 Cranch) 137 (1803). This case is, of course, famous for establishing the concept of judicial review of the constitutionality of acts of Congress. See, e.g., Van Alstyne, A Critical Guide To Marbury v. Madison, 1969 Duke L.J. 1 (1969); Burton, The Cornerstone of Constitutional Law: The Extraordinary Case of Marbury v. Madison, 36 A.B.A.J. 805 (1950).

than it did in *Chisholm*. While reiterating its position that the United States was "a government of laws, and not of men" and that "[i]t will . . . cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right,"[165] the Court sought to avoid a direct confrontation with the Executive branch of government.[166] Instead, it declared unconstitutional a statute which purported to give it original jurisdiction in *mandamus* cases against the government and held that it could not order the Secretary of State to deliver a certificate of appointment to a judge. During this period, the Supreme Court appeared to accept grudgingly the "legislative model" as a political fact[167] but refused to dignify it with any theoretical or policy justification. For example, in *Cohens v. Virginia*[168] in 1821, the Supreme Court acknowledged for the first time its inability to determine claims against the United States by simply stating, as though the matter was already decided, that "[t]he universally received opinion is that no suit can be commenced or prosecuted against the United States."[169] Similarly, in *Emerson v. Hall*,[170] the Supreme Court acknowledged the power of Congress to enact, in 1831, a private statute providing for the payment of money directly to the heirs of a claimant without any attempt to explain the constitutional basis for such congressional power.[171] This judicial silence—particularly in light of its earlier statements in *Hayburn's Case* and *Chisholm*—clearly underscores the fact that the "legislative model" was more an extension of colonial history than a deduction of logic from the new Constitution. Moreover, the uniform utilization of

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165. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

166. At the time Marbury v. Madison was decided, the case was popularly viewed as a determination by the Supreme Court not to interfere with the power of the Executive. 1 C. Warren, The Supreme Court in United States History 232 (rev. ed. 1926).

167. The institutional strength of the judiciary relative to the other branches of government was considerably less during this early period than in later years. The adoption of the Eleventh Amendment in 1798 after *Chisolm v. Georgia,* the nearly successful impeachment conviction in 1805 of Justice Chase, see Burton, supra note 164, at 883, and the refusal of President Jackson to enforce a decision of the Supreme Court in the *Cherokee Cases* in 1831-1833, see 1 C. Warren, supra note 166, at 729-79, amply demonstrated the power of the states, Congress, and the Executive, respectively, to challenge the authority of the federal judiciary during this period.

168. 19 U.S. (6 Wheat.) 264 (1821).

169. Id. at 411-12. This comment was *dicta* in *Cohens v. Virginia*. The concept of the non-suability of the federal government was first applied in United States v. McLemore, 45 U.S. (4 How.) 286, 287-88 (1846), again without comment or explanation. It was not until after the Civil War that the elaborate doctrine of "sovereign immunity" was affirmed by the courts. See Briggs v. Light-Boats, 93 Mass. (11 Allen) 157, 166-176 (1865); United States v. Lee, 106 U.S. (16 Otto) 196, 204-08 1 S. Ct. 240, 246-250 (1882).

170. 38 U.S. (13 Pet.) 352 (1839).

171. It is not until 1895 that the Supreme Court explained the constitutional basis for this congressional power. See United States v. Realty Co., 163 U.S. 427, 440-41 (1895).

the "legislative model" by the states during this period tends to confirm this view.[172]

During the latter part of this period, however, the federal courts did assert a limited role. In *Kendall v. United States*,[173] the Supreme Court considered an 1836 private act which certain claimant mail contractors had procured from Congress. The act required the postmaster general to credit the claimants with whatever sum the solicitor of the treasury should decide was due with regard to a claim involving the carrying of mail.[174] The solicitor found for the claimants in the amount of $161,563.89.[175] Pursuant to orders from the President, the postmaster general refused to credit the total amount,[176] and the federal circuit court of the District of Columbia issued a writ of *mandamus* to the postmaster general to recognize the credits.[177] The Supreme Court miraculously found that the federal circuit court had authority to issue a writ of *mandamus*,[178] artfully aligned itself with Congress (which wanted to pay) against the Executive (which did not),[179] and gallantly recognized that once Congress had consented to payment[180] it was the responsibility

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172. See, e.g., Divine v. Harvie, 23 Ky. (7 T.B. Mon.) 439 (1828); Sewall v. Lee, 9 Mass. (9 Tyng) 363, 369 (1812); Williams v. The Register, 3 Tenn. (1 Cooke) 213 (1812); Commonwealth v. The Heirs of Andre, 20 Mass. (3 Pick.) 224, 225 (1825); Black v. Rempublicam, 1 Yeates 139, 142 (Pa. 1792); and Commonwealth v. Colquehouns, 12 Va. (2 Hen. & M) 213, 233 (1808). However, in 1833 Mississippi appears to have been the first state to adopt a fairly general policy of permitting claims against its state to be filed in its courts. See Farish v. The State, 2 Miss. (2 Howard) 826 (1838); Davie, Suing the State, 18 Am. L. Rev. 814, 827 (1884).

173. 37 U.S. (12 Pet.) 524 (1838).

174. Id. at 608-609.

175. Id. at 609.

176. Id. at 612.

177. Id. at 608.

178. Id. at 614-24. In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court, as discussed previously, held that its original jurisdiction was fixed by the Constitution and therefore Congress could not expand it by conferring upon it original jurisdiction to issue *mandamus* against the government. In McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813), and McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821), the Supreme Court held that Congress had not conferred the authority to issue *mandamus* on the federal circuit courts sitting in the several states. By a long and complicated line of reasoning, however, the Supreme Court was able to find that authority to issue *mandamus* survived in the District of Columbia.

179. 37 U.S. (12 Pet.) at 613 ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."). In *Marbury v. Madison*, the Supreme Court, after asserting its right to control executive action, avoided the issue by finding it had no power to issue *mandamus* against the government. In *Kendall*, however, it was able to align itself with the interests of Congress, and found both the authority (and the courage) to issue a writ of *mandamus* against the Executive. See Lee, The Origins of Judicial Control of Federal Executive Action, 36 Geo. L.J. 287, 292-93 (1948).

180. Id. at 611.

of the courts to see that the Executive performed its ministerial duty to do so.[181] The role of the federal judiciary, therefore, was limited to enforcing the decisions of Congress with respect to claims.[182] The period of 1794-1838 constituted the heyday of the "legislative model" of claims adjudication.[183] While there were isolated attempts at change,[184] this was a period of general acceptance of this procedure and there was no widespread agitation for reform.[185] Toward the end of this period, however, there were signs that dissatisfaction was privately brewing.[186]

C. Decline—Inundation Of Congress By Claims

1. Dissatisfaction (1838-1855)

In 1838, this dissatisfaction reached the point where the House of Representatives instructed its Committee of Claims to inquire into this matter. The Committee's report,[187] in summary, found that: (1) the congressional system of claims determination was breaking down under the flood of claims being filed;[188] (2) the volume of petitions presented had increased six times over the volume presented to the first Congresses;[189] (3) Congress was not able to consider, let alone dispose of,

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181. Id. at 614.

182. In Reeside v. Walker, 52 U.S. (11 How.) 272 (1850), the Supreme Court clarified its decision in *Kendall v. United States* by indicating that a claim could be paid only if Congress had provided a specific appropriation for it. "[W]ithout . . . an appropriation [a claim] cannot and should not be paid by the Treasury, whether the claim is by a verdict or judgment, or without either, and no mandamus or other remedy lies against any officer of the Treasury Department." Id. at 290-91.

183. See Wiecek, supra note 78, at 391-92.

184. In 1824, for example, the Senate considered and rejected a bill which would have permitted, with some limitations, claimants to bring actions against the United States in the federal district or circuit courts. 41 Annals of Cong. 472-74, 476-80, 570 (1856).

185. Wiecek, supra note 78, at 392.

186. In 1832, John Quincy Adams, then a member of the House of Representatives, wrote the following in his diary:

> There ought to be no private business before Congress. There is a great defect in our institutions by the want of a Court of Exchequer or Chamber of Accounts. It is judicial business, and legislative assemblies ought to have nothing to do with it. One-half of the time of Congress is consumed by it, and there is no common rule of justice for any two of the cases decided. A deliberative assembly is the worst of all tribunals for the administration of justice.

8 J.Q. Adams Memoirs, supra note 153, at 480.

187. See generally H.R. Rep., supra note 98.

188. Id. at 1 ("That the accumulation of private claims has been so great, within a few years past, as to burden several of the committees of Congress, and to retard final action on a great proportion of the private claims, and on many important subjects of a public character.").

189. While a total of 2,317 public and private petitions were presented to the first three Congresses (1789-1795), the number had increased to 14,602 in the three Congresses (1832-1837) immediately preceding the report. See id. at 4.

a vast percentage of these petitions;[190] (4) as a result of these problems, great injustice was done to many claimants[191] and the valuable time of Congress was being consumed in resolving private claims rather than the great public issues facing the country.[192] The Committee recommended the establishment of a board of commissioners[193] to remedy the situation. However, the perceptive warning of the Claims Committee was to go unheeded by Congress which attempted to lumber on as before.

By 1848, the dissatisfaction had turned to crisis. For the first time, the legitimacy of the "legislative model" came under widespread political attack. While in 1838 the system was criticized as "expensive as well as dilatory,"[194] by 1848 the Committee on Claims, in a new report,[195] described the system as plagued with "evils,"[196] "of unparalleled injustice, and wholly discreditable to any civilized nation."[197] The 1848 report summarized the ten year period since its previous report as follows: "[D]uring the ten years . . ., out of 16,573 petitions of private claimants to the House of Representatives, and 3,436 bills reported, only 1,796 passed the House, and but 910 passed both Houses."[198] In other words, only one out of every eighteen claimants was successful! Obviously, many meritorious claims were not being redressed under this system.[199] Moreover, the report admitted that while many just claims were not paid, many unjust claims were.[200] Thus, the report criticized the manner in which testimony was taken *ex parte* before committees with no rep-

190. Of the 8,655 private petitions presented to the three Congresses between 1832 and 1837, 5,353 were acted on and 3,302 were not. Of those acted on, 1,683 resulted in private bills being introduced of which only 603 passed both the House and Senate. See id. at 4-5.

191. Id. at 8 ("The liquidation of claims by Congress is expensive as well as dilatory. Instances are not unfrequent where thousands of dollars have been expended in discussing a claim of small amount. Claimants and agents persevere in renewing their applications, year after year, until the loss of time and expenses absorb the entire amount of a small claim; and if it is not favorably considered, the claimant is made a debtor to an amount that embarrasses him for years.") .

192. Id. at 1 ("[M]embers elected to participate in the examination and discussion of national subjects have devoted their time in the adjustment of private claims, and when called to vote on questions involving the national policy, interest, security, or honor, they have been obliged, in a great measure, to rely on the reports of committees, and on debates, to guide them in their decisions, without an opportunity being afforded to investigate for themselves.") .

193. Id. at 9.

194. Id. at 8.

195. H.R. Rep. No. 498, 30th Cong., 1st Sess. (1848).

196. Id. at 1.

197. Id. at 2.

198. Id. at 4.

199. Id.

200. Id. ("The objection is often made . . . that Congress is often imposed upon, and that unjust claims, to a large amount, are passed annually through Congress. This is doubtless true, and, from the present course of proceding, is quite unavoidable.") .

resentative from the government present to rebut or cross-examine the claimant's case.[201] It also revealed the practice of many unsuccessful claimants who received adverse recommendations simply to resubmit their claims again and again to different committees and to succeeding Congresses.[202] Finally, the report questioned whether or not Congress—as a multimember political institution—was a proper forum for the impartial adjudication of individual claims against the United States.[203] Despite this severe criticism, the Committee was not prepared to abandon the essence of the "legislative model," *i.e.*, final congressional control. Accordingly, the Committee rejected proposals to delegate the determination of claims to the federal courts[204] or to a board whose decisions would be final.[205] Instead, the Committee recommended the establishment of a permanent, three member board which would sit in Washington, D.C., examine claims, and submit its recommendations to Congress.[206] Although gaining significant support, opponents were able to prevent its passage[207] by characterizing it as "a base abandonment by the representatives of the people of the curatorship of the treasury of the United States to a few commissioners."[208] This rejection, however, did not solve the problem.

Between 1849 and 1855, nine different bills were introduced to relieve Congress of the inundation of claims.[209] By 1852, the crisis was turning to scandal as the Senate was forced to create a special committee "to inquire into abuses, bribery, or fraud, in the prosecution of claims before Congress."[210] After an attempt at major internal reform of the House claims processing system failed to gain sufficient support,[211] a

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201. Id. at 6.

202. Id. at 6.

203. Id. at 5 ("These grievances are so serious and so obvious that the committee forbear to refer to those which arise almost necessarily out of the character of the tribunal itself. The very constitution of the tribunal is entirely inconsistent with the proper discharge of such duties, even if they had ample time to devote to them. Each House is constituted as a court of justice, with a necessary appeal to and decision by the other House in all cases. The bodies making the decision are too numerous for any such duties. They are, in some sense, judges in their own cases. It being impossible that members can thoroughly examine one claim out of twenty brought before Congress, it is entirely out of their power to act upon the claims fairly or understandingly.") .

204. Id. at 8.

205. Id. at 7 ("The main objection urged against these various plans has been, that in relation to claims of a certain limited amount, the decision of the board of commissioners was declared to be final as against the government, and provision was made for the payment of the award of the commissioners, without reference to Congress.") .

206. Cong. Globe, 30th Cong., 2d Sess. 140 (1849).

207. See id. at 139-42, 163-72, 198-99, 303-09, 378-80.

208. Id. at 168.

209. Wiecek, supra note 78, at 395.

210. Cong. Globe, 32d Cong., 1st Sess. 2100 (1852).

211. See Cong. Globe, 32d Cong., 2d Sess. 96-104 (1853).

consensus appeared to form that removal of this function from the halls of Congress was the only solution.[212] The question was to where?

2. Advisory Court (1855-1860)

During December 1854, the Senate addressed this question and considered delegating this task to (1) the Treasury Department, (2) the federal courts, or (3) a board advisory to Congress.[213] Given its existing role over routine contract claims, complete transfer to the Treasury Department was quickly dismissed as a "dangerous experiment."[214] Hence, the basic debate focused on court delegation versus board delegation. The court advocates, led by Senator Pettit, argued that the government, no less than any individual citizen, ought to be accountable for its liabilities before a court of law and that nothing less than transferring the entire matter to the courts—the decisions of which would be final—would reduce the backlog of claims accumulating before Congress.[215] Advisory decisions by a board, warned Senator Pettit, would only prolong the process and "nothing will be gained."[216] The board advocates, led by Senator Brodhead, could not accept such a radical departure from the "legislative model." After cautioning that the decisions of the courts would "of course, . . . have to be final and conclusive,"[217] Senator Brodhead argued that such an approach "would be placing the public Treasury at the disposal of the courts contrary to the meaning of the Constitution and sound policy."[218] Instead, he proposed the establishment of a three member "Board of Claims" which would function as "an examining magistrate" for Congress and advise it on the appropriate disposition of claims.[219] Unlike the court advocates, the Brodhead approach sought to refine, but not reject, the "legislative model."

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212. See Cong. Globe, 33d Cong., 2d Sess. 70 (1855).

213. Id.

214. Id.

215. Id. at 72-73.

216. Id. at 73.

217. Id. at 70. In making this remark, Senator Brodhead is presumably referring to the principle established in Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

218. Cong. Globe, 33d Cong., 2d Sess. 70 (1855). Apparently, many persons shared Senator Brodhead's view that delegation of final jurisdiction over claims to the courts was inconsistent with Congress's appropriation power contained in Article I, section 9 of the Constitution. See, e.g., Cong. Globe, 32d Cong., 2d Sess. 96 (1853).

219. Conceptually, Senator Brodhead envisaged his proposed board to be more inquisitional than adjudicatory in nature. He rejected the proposal that a solicitor was necessary to represent the government on the grounds that "each member of the board represents the Government, and is in some measure an examining magistrate." Cong. Globe, 33d Cong., 2d Sess. 71 (1855). This approach was criticized by Senator Clayton who wanted the board members "to be impartial arbiters and judges between the United States and the individual claimant, feeling themselves as much bound to look to the interest of the claimant as to the interest of the Government." Id. at 72.

In the end, the Senate agreed on a compromise measure first suggested by Senator Hunter.[220] Under this compromise, a tribunal called the "Court of Claims" would be established to hear claims against the United States.[221] Three "judges" would sit on the tribunal and serve during good behavior.[222] The proceedings would be adjudicatory in nature with the government represented by a special solicitor.[223] The Court of Claims would report its decisions, accompanied by the records and suggested implementing legislation, to Congress where the decisions would pend "until the same shall be finally acted upon."[224] Whether or not such a tribunal was truly a "court" or still a "board" was hotly debated;[225] nevertheless, its superficial ability to reconcile the court and board approaches within the context of the "legislative model" made it politically irresistible. In the words of Senator Cass, "[t]his plan proposes that the board, or court, shall investigate the claims presented, leaving to Congress final action upon them, so that the Treasury will be within our control."[226] With the concurrence of the House,[227] this ambiguous compromise became law in early 1855.[228]

For its part, the new Court of Claims quickly declared it was not an advisory body but a court of law that "can only adjudge, and that whether its jurisdiction be final or not."[229] In 1856, the first decisions of the Court of Claims were reported to Congress.[230] Obviously, the success of the new tribunal depended entirely on the deference Congress paid to its decisions. Were the decisions to be treated as final judgments or advisory recommendations? The appropriate scope of congressional review was debated in the House in the context of deciding whether to refer the decisions directly to the entire House sitting as a Committee

220. See id. at 71.

221. Id. at 105-06.

222. Id.

223. Id.

224. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612, 614 (1855).

225. See Cong. Globe, 33d Cong., 2d Sess. 106-14 (1855). A dispute arose over whether or not the "judges" should serve for a fixed term or during good behavior. Advocates for a fixed term argued that since the tribunal's decisions lacked finality and were subject to final action by Congress, the decisions of the Court of Claims, despite its name, was not a court in the constitutional sense and life tenure was not required. See, e.g., id. at 107, 110-11 (remarks of Sen. Weller). Advocates for life tenure, on the other hand, argued that the test for a judicial tribunal could not be enforcibility because there "can be no judicial tribunal which could issue an execution to satisfy a judgment out of the Treasury of the United States, so that test in this instance must fail." See id. at 113 (remarks of Sen. Stuart).

226. Id. at 106.

227. Id. at 891.

228. See supra note 224.

229. Todd v. United States, 1 Cong. Ct. Cl. 1, 6 (1855); Cong. Globe, 34th Cong., 1st Sess. 972 (1856).

230. Cong. Globe, 34th Cong., 1st Sess. 607 (1856).

of the Whole (in which case the review would be necessarily *pro forma*) or whether to refer the decisions to the traditional committees which handled such claims (in which case the review would be likely *de novo*).[231] By a vote of 78 to 62, the House defeated a motion to refer the decisions directly to the Committee of the Whole House.[232] In so doing, the House effectively treated the decisions as advisory and subject to reconsideration and revision in the various committees.

This decision nullified the effectiveness of the Court of Claims and returned Congress to the same role it had tried to shed.[233] Predictably, all the old problems reappeared.[234] Between 1855 and 1860, the Court of Claims rendered judgments totaling $529,000.[235] By 1860, Congress had only paid approximately half such amount.[236] This created bitter disappointment among successful litigants[237] and many attorneys considered it no advantage to even submit a claim to such tribunal.[238] The "last ditch" attempt to save the "legislative model" through creation of an advisory court had failed. With the outbreak of the Civil War in 1860 and the avalanche of claims that followed, Congress, at long last, was prepared to do the unthinkable: seek assistance from the courts.[239]

II. THE "HYBRID MODEL"—CIVIL WAR TO WORLD WAR II

Congress and the federal judiciary shared the responsibility for determining claims against the United States from the Civil War until World War II. During this period, Congress continued to consider claims such as tort and moral claims while gradually authorizing other categories of claims (such as contract and "taking" claims) to be determined by a revised Court of Claims or, in limited instances, the regular federal courts. This transitional arrangement came to be explained by the legal doctrine of sovereign immunity, *i.e.*, the United States could only be sued as provided for by Congress. During the height of this period, an uneasy compromise was reached whereby the Supreme Court reviewed the judgments of the Court of Claims as though part of the federal judiciary and Congress paid such judgments without compulsion. The

231. Id. at 607-10, 970-72, 1241-43.
232. Id. at 1245.
233. Id. at 1247.
234. Wiecek, supra note 78, at 397-98.
235. Cong. Globe, 36th Cong., 1st Sess. 984 (1860).
236. Id.
237. See id. at 987.
238. Submitting a claim to the Court of Claims appeared to be a "no win" situation for the claimant. If the claimant was successful, Congress gave the decision little weight and reheard the matter again. However, if the claimant lost, Congress tended to treat the claim as dead. See Cong. Globe, 37th Cong., 3d Sess. 303 (1863).
239. See Wiecek, supra note 78, at 398.

"legislative model" of payment, therefore, was not immediately replaced by a "judicial model" in which all claims were finally determined and enforceable through the regular federal court structure. This "hybrid model," however, started to break down after World War I. This section of the article traces: (A) the development of the "hybrid model" during the Civil War when Congress sought the assistance of the Supreme Court in making the decisions of the Court of Claims final; (B) the triumph of the "hybrid model" in the post-Civil War era as the Supreme Court and Congress reached an uneasy compromise over the issue of enforceability and allocation of claims responsibility under the banner of sovereign immunity; and (C) the decline of the "hybrid model" commencing with the World War I period as the sovereign immunity doctrine lost credibility and the uneasy compromise over enforcibility broke down.

A. Development—Congress Seeks Court Assistance

1. Congressional Request (1860-1863)

By 1860, a congressional report recognized the need for assistance from the federal judiciary.[240] The basic choice was whether to confer claims determination authority on the existing federal courts or to reorganize the Court of Claims so as to make its decisions final, subject to review by the Supreme Court.[241] Although proposed,[242] there was little support for the idea of exposing the government to suit all over the country in the various federal courts.[243] Instead, support grew, particularly in the Senate, for making the decisions of the Court of Claims final.[244] One Senate argument in favor of retaining claims in one special court was that Congress could simply abolish it if it became dissatisfied with its performance.[245] The House, however, was not to be hurried.[246]

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240. See H.R. Rep. No. 513, 36th Cong., 1st Sess. (1860).

241. Id. at 4.

242. Id. at 7. See also Cong. Globe, 36th Cong., 1st Sess. 989-91 (1860) (remarks of Sen. Harlan).

243. This concern was colorfully expressed by Senator Crittenden who stated that "if you allow men to sue the Government of the United States everywhere, she will have to have a band of itinerant lawyers traveling all around and everywhere looking out for and watching after her interests; and they could not be protected; it would be impossible." Id. at 991.

244. See id. at 982-91, 1120-29.

245. Senator Fessenden made the argument for having the judgments of the Court of Claims be final as follows:

> I see no particular difficulty about it, because the court itself is in our power, and if we find, at any time, that it is going beyond the limits of what we think to be right, is becoming, as we may imagine, corrupt, deciding cases upon bad principles, we can strike it out of existence at any moment we please.

Id. at 987.

246. See id. at 2171.

In 1861 President Lincoln, in his annual message to Congress,[247] noted the Civil War and the resulting increase in the number of claims. He bluntly told Congress it was time for major reform. In a direct assault on the "legislative model," Lincoln said:

> It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. The investigation and adjudication of claims, in their nature belong to the judicial department; besides, it is apparent that the attention of Congress will be more than usually engaged, for some time to come, with great national questions.[248]

Lincoln urged Congress to make the judgments of the Court of Claims final, subject to the right of appeal to the Supreme Court.

During 1862 and 1863, Congress debated a bill which contained Lincoln's recommendation.[249] It was well understood that the finality provision constituted a fundamental deviation from the "legislative model." One opponent of the bill, Congressman Diven of New York, called it "a most radical change"[250] and a surrender of congressional control over the treasury to the courts.[251] Senator Doolittle of Wisconsin, another opponent, went even further, arguing that final congressional discretion over claims "is a discretion which we cannot transfer constitutionally to any other body . . . . It is a discretion which the Constitution puts upon us; and we must exercise that discretion, and determine whether or not the appropriation is just."[252] Most members of Congress, however, shared the view of Senator Trumbull of Illinois that the advisory Court of Claims "was a failure" and that Congress should either make its decisions final "or else dispense with the court."[253] Nevertheless, in an apparent effort to build a bare majority in the Senate to retain the finality provision,[254] Senator Trumbull agreed to limit the Court of Claims to its existing jurisdiction, *i.e.*, principally to contract claims.[255]

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247. Cong. Globe, 37th Cong., 2d Sess. app. 1-4 (1862). Lincoln's words are engraved on the Court of Claims Building in Washington. 2 W. Cohen, P. Nichols & M. Bennett, supra note 88, at 21.

248. Cong. Globe, 37th Cong., 2d Sess. app. 2 (1862).

249. Id. at 1671-77; Cong. Globe, 37th Cong., 3d Sess. 303-13, 394-401, 415-27, 1541 (1863).

250. Cong. Globe, 37th Cong., 2d Sess. 1671 (1862).

251. Id. at 1672.

252. Cong. Globe, 37th Cong., 3d Sess. 312 (1863).

253. Id. at 303.

254. In the Senate, a motion to delete the finality provision on January 14, 1863, failed only after the Vice-President broke a 20 to 20 tie by voting in the negative. Id. at 311.

255. Senator Trumbull, a proponent of the bill, stated:

> As we propose to amend the [House] bill, the jurisdiction of the court is

The willingness of Congress to accord finality to the judgments of the Court of Claims, however, did not mean that it was willing to authorize judicial enforcement of such judgments.[256] Despite the argument by Congressman Pendleton of Ohio that the bill *should* provide for the levying of government property if a judgment was not paid,[257] this suggestion fell on ears understandably deafened by the sounds of Civil War.[258]

Ironically, the lack of judicial enforceability created another argument for the opponents of the bill. Congressman Diven questioned whether the lack of enforceability prevented the Supreme Court from hearing appeals at all from the Court of Claims. In an obvious reference to *Hayburn's Case*, he asked whether the Supreme Court itself had not refused jurisdiction in previous cases involving claims when it could not execute its own decree.[259] Congressman Bingham reassured his colleagues that once a judgment was rendered, it would be paid by Congress "as a matter of course," and therefore enforceability was no problem.[260]

Under the bill, final judgments were to be paid automatically by the Secretary of the Treasury "out of any general appropriation made by law for the payment and satisfaction of private claims."[261] This was generally understood at the time to mean that Congress, in *advance* of each fiscal year, would appropriate a fixed lump sum out of which all judgments rendered subsequently during such fiscal year would be paid

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> confined to cases arising out of contract with the Government. The bill, as it passed the other House, is a little larger; it gives the court jurisdiction of all claims for which the Government would be liable in law or equity, if it were suable in a court of justice; but the bill, as the committee report it here, proposes to leave the jurisdiction as it is in the old law.

Id. at 304-05. The "old law" also contained jurisdiction over claims founded upon federal statute or regulation. See Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (1855).

256. The 1862 debates indicate that Congress was well aware of the case of Reeside v. Walker, 52 U.S. (11 How.) 272 (1850), which held that a claim, even if reduced to judgment, could only be paid if Congress had provided a specific appropriation for it. See Cong. Globe, 37th Cong., 2d Sess. 1674 (1862).

257. Cong. Globe, 37th Cong., 2d Sess. 1675-77 (1862).

258. Id. at 1676 (Rep. Wright: "Let me ask the gentleman from Ohio a question. Would he expose the military property of the Government to sale and execution? Does his amendment contemplate the seizure and sale of the artillery and other munitions of war of the Government to satisfy the claims of claimants, and thus leave the Government defenseless?").

259. Id. at 1673 ("But, sir, I doubt, and if I understand the language of the Supreme Court, they doubt, whether they have jurisdiction in any such cases. I understand the Supreme Court of the United States to have decided, in two or three cases, that they had no jurisdiction of any case where they could not execute their own decree; that a part of the province of the court is, to first determine what is right, then decree that right, and then issue their process for the execution of their decree."). Congressman Diven was no doubt referring to Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

260. Cong. Globe, 37th Cong., 2d Sess. 1676 (1862).

261. Cong. Globe, 37th Cong., 3d Sess. 398 (1863).

automatically.[262] This, argued proponents, would rid Congress of revisionary power over individual claims while retaining in Congress general budgetary control over the Treasury.[263] In the Senate, this issue was extensively debated when opponents to the bill unsuccessfully attempted to amend this provision to require payment to be made only out of specific appropriations made after the rendition of each judgment.[264] Correctly perceiving this to be another attempt to preserve revisionary control in Congress, the bill's Senate proponents defeated this amendment by a 20 to 16 vote.[265]

Thinking they had won the battle, the Senate proponents let down their guard the next day. Just before the final vote, they agreed to the following ambiguously worded amendment: "no money shall be paid . . . for any claim . . . till after an appropriation therefor shall be estimated for by the Secretary of the Treasury."[266] Assured that this did not require specific appropriations for claims, and apparently believing it merely meant that the general appropriation for anticipated claims was to be based on an estimate made by the Secretary of Treasury, the proponents did not object to the amendment.[267] This provision became section 14 of the final version of the bill which became effective on March 3, 1863.[268]

Obviously, the 1863 amendments did not completely abolish the "legislative model" of claims adjudication. Congress gave up control over contract and certain federal claims but still retained jurisdiction over tort and all other categories of claims. Moreover, Congress did not create a pure "judicial model" of payment with regard to the limited jurisdiction that it did relinquish. Rather than conferring such jurisdiction on the existing federal courts with full authority to decide and enforce their decisions, Congress conferred such authority on a special Court of Claims with authority to decide, subject to Supreme Court review, but not to enforce its decisions. Congress merely pledged that it would annually appropriate a general amount out of which all judgments would be paid. Although defenders of the "legislative model" clearly recognized

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262. In the Senate, this concept was clearly understood. Id. In the House, however, whether or not the general appropriation for all claims was to be made before or after specific judgments were rendered was less clear. E.g., Cong. Globe, 37th Cong., 2d Sess. 1676 (1862).

263. See Cong. Globe, 37th Cong., 3d Sess. 304 (1863) (Sen. Trumbull: "Still, the Treasury would not be laid open to outsiders, as the Senator suggests. It is not proposed to bring a specific bill into Congress for each claim; but still Congress will make appropriations to pay the claims or not, as it pleases. The Treasury will still be under the control of Congress.").

264. Id. at 398-400.

265. Id. at 400.

266. Id. at 426.

267. See id.

268. Act of March 3, 1863, ch. 92, 12 Stat. 765, 768 (1863).

this as the end of an era,[269] it was still not clear whether the Supreme Court was willing to accept this "hybrid model" as the beginning of another. Nevertheless, the request to the Supreme Court had been made.

2. Judicial Rejection (1864-1865)

On June 25, 1864, Congress made good on its pledge to give up revisionary control by appropriating a lump sum of $300,000 "[f]or payments of judgments *to be rendered* by [the] court of claims." (Emphasis added)[270] Despite this fact, the Supreme Court on March 10, 1865, in the case of *Gordon v. United States*,[271] dismissed the first appeal from the Court of Claims "for want of jurisdiction" without a formal opinion. The court reporter's note summarizing the decision cryptically stated that a majority of the court felt that "under the Constitution, no appellate jurisdiction over the Court of Claims could be exercised" and that since the term was at its close "the reasons . . . might be announced hereafter."[272] The Supreme Court's rejection of appellate jurisdiction came as a great surprise.[273] Obviously, the reasons that were to be "announced hereafter" would be of great importance to the future of Congress' great experiment: the "hybrid" Court of Claims. At this critical juncture, one of the more bizarre happenings in American legal history occurred. Two opinions explaining the Court's decision in *Gordon v. United States* came into existence: one by Chief Justice Taney and another by his successor, Chief Justice Chase.

Chief Justice Taney prepared a draft opinion which he gave to the clerk before his death on October 12, 1864. This opinion was subsequently lost or misplaced.[274] Taney's "lost opinion" would be recovered and published by the court in 1885—twenty-one years after his death.[275]

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269. Senator Hale of New Hampshire, a staunch defender of the "legislative model" to the very end, summarized his feelings:

> I think, sir, when some future Gibbon shall write the history of the decline and fall of the great Republic, and shall give the indications which marked its progress to decay, one of them will be that about the year of grace 1863 the Thirty-Seventh Congress took it into their head that they were wiser than everybody that went before them, and departed from all the precedents established by their fathers, and started out on new, untried, and extravagant theories and notions. Sir, from the time of the adoption of the Federal Constitution to this time, the Congress of the United States have been jealous upon this subject. They would never allow a dollar to be taken out of the Treasury on a verdict of twelve men, and a judgment of law that the verdict should stand.

Cong. Globe, 37th Cong., 3d Sess. 310 (1863).

270. Act of June 25, 1864, ch. 147, 13 Stat. 145, 148 (1864).

271. 69 U.S. (2 Wall.) 561 (1864).

272. Id.

273. Wiecek, supra note 78, at 401.

274. See United States v. Jones, 119 U.S. 477, 478, 7 S. Ct. 283, 284 (1886).

275. See Gordon v. United States, 117 U.S. 697 (1885, decided 1864). Whether the *Gordon* opinion by Taney or the Chase opinion, Gordon's Case, 7 Ct. Cl. 1 (1871),

In the meanwhile, Salmon P. Chase had become the new Chief Justice. He issued a formal version of the court's 1865 dismissal in *Gordon v. United States*.[276] The Chase opinion contained the following brief explanation:

> We think that the authority given to the head of an executive department, by necessary implication, in the fourteenth section of the amended Court of Claims act, to revise all the decisions of this court requiring payment of money, denies to it the judicial power from the exercise of which appeals can be taken to this court.[277]

There was *no* mention of Taney's "lost opinion." However, the Chase opinion closed by ambiguously stating that "[t]he reasons which necessitate this conclusion may be more fully announced hereafter."[278] Thus, when Congress met in 1866 to consider rectifying amendments, it only had the Chase opinion before it.[279]

B. Triumph—Congress and Court Reach Uneasy Accommodation

1. Accommodation on Payment and Non-Enforceability

In 1866 Congress considered amendments to cure the problem suggested in *Gordon v. United States*. Given the Chase opinion, the proposed solution was simply to repeal section 14 of the Court of Claims Act, which prohibited the payment of judgments until estimated for by the Secretary of the Treasury. Senator Trumbull of Illinois argued that this repeal would remove any concern that the executive branch retained revisionary power over court judgments and would satisfy the sole objection identified by Chief Justice Chase.[280] Nevertheless, Senator Davis of Kentucky did not feel mere repeal of section 14 went far enough to

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should be regarded as the "correct" explanation of the Supreme Court's decision in Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864), has been a matter of dispute ever since. Compare Williams v. United States, 289 U.S. 553, 563-64, 53 S. Ct. 751, 753-54 (1933) with Glidden Co. v. Zdanok, 370 U.S. 530, 568-69, 82 S. Ct. 1459, 1482-83 (1962).

276. The Chase opinion has never been published by the Supreme Court in its official reports. See *United States v. Jones*, 119 U.S. at 478, 7 S. Ct. at 283. It can be found, however, in the official reports of the Court of Claims. See Gordon's Case, 7 Ct. Cl. 1 (1871).

277. Gordon's Case, 7 Ct. Cl. at 2. In *United States v. Jones*, 119 U.S. at 478, 7 S. Ct. at 283, Chief Justice Waite questioned the precision of the court reporter's summary found in *Gordon v. United States*, 69 U.S. (2 Wall.) at 561, because it did not allude to this paragraph.

278. Id.

279. See Cong. Globe, 39th Cong., 1st Sess. 770-71 (1866).

280. Id.

cure the basic problem: the courts' inability to make the government pay its judgments like any other losing party. Advocating a "judicial model" of enforcement, he proposed a statute which would require payment out of any existing funds and, if no funds were available, authorize the claimant to execute on government property as against any other judgment debtor.[281]

Given the Chase opinion, Congress apparently concluded that the Supreme Court would not insist on enforceability so long as Congress continued to appropriate sufficient funds to assure the payment of all judgments. Therefore, Congress ignored Senator Davis's proposal,[282] repealed section 14 effective March 20, 1866,[283] and appropriated an additional $500,000 for the payment of judgments on June 23, 1866.[284] Congress guessed correctly—the Supreme Court promptly issued regulations prescribing the manner in which appeals could be taken from the Court of Claims.[285] In the December Term, 1866, the Supreme Court heard its first appeal under the new regulations in the case of *De Groot v. United States*.[286]

Between 1866 and 1870, Congress continued to appropriate annually, in advance, lump sum amounts "[f]or payment of judgments which may be rendered by the court in favor of claimants."[287] This congressional conduct must have been reassuring to the Supreme Court. In 1871, in the case of *United States v. Klein*,[288] Chief Justice Chase traced the development of the Court of Claims, noted the 1866 repeal of section 14, and stated that "[s]ince then the Court of Claims has exercised all the functions of a court, and this court has taken full jurisdiction on appeal."[289] Given the fidelity of congressional payment, the concerns raised by Senator Davis over enforceability probably seemed more theoretical than real at this point.

Nevertheless, the congressional understanding regarding payment—so intensely debated in 1863—began to fade somewhat with time. Between

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281. Id.

282. Id. at 771.

283. Id. at 1512.

284. The $500,000 appropriated in 1866, see 14 Stat. 194 (1866), was to be added to the $300,000 appropriated in 1864, see 13 Stat. 148 (1864). Apparently, no amount was appropriated in 1865 in the interim period following the Court's decision in *Gordon*, 69 U.S. (2 Wall.) at 561.

285. 70 U.S. (3 Wall.) vii-viii (1865).

286. 72 U.S. (5 Wall.) 419, 427 (1866).

287. See 14 Stat. 444 (1867) ($10,000); 15 Stat. 95 (1868) ($100,000); 15 Stat. 287 (1869) ($100,000); 16 Stat. 235 (1870) ($100,000).

288. 80 U.S. (13 Wall.) 128 (1871). In this case, the Supreme Court considered the constitutionality of certain "loyalty requirements" included in certain Civil War claims legislation which applied to claimants even though they had complied with the President's Proclamation of Amnesty.

289. Id. at 144-45.

1871 and 1875, Congress continued to make lump sum appropriations but dropped budget language which had previously implied they were for prospective judgments.[290] In 1872 Congress refused to pay a judgment in only one isolated instance.[291] Congress abandoned the prospective, lump sum approach in 1876 and appropriated $6,292.11 to pay seven specific judgments.[292] The House debated the appropriateness of this change the next year when the specific appropriation approach was used again.[293] Attacking this change, Congressman Garfield of Ohio argued that "[t]his attempt to pick them out man by man makes the House of Representatives a sort of revisory power over the judgments of our courts."[294] Denying this motivation, Congressman Clymer stated that the principal reason for the change was to prevent the reoccurrence of a single, large judgment from exhausting the fund and leaving later judgment creditors with nothing.[295] While in 1863 the gross versus specific appropriation issue was debated in terms of its implications on the broader constitutional questions of finality and enforceability,[296] by 1877 most members of Congress took the Article III status of the Court of Claims for granted. Thus, most appeared to share the view of Congressman Potter that since both sides agreed that the judgments must be paid, the form of payment was "a question . . . not worth while to dispute about."[297] Thereafter, Congress commenced appropriating retrospectively for specific judgments.[298]

The Supreme Court did not react immediately to this change.[299] However, in 1885 Taney's "lost opinion" in *Gordon v. United States* was found and published by the Supreme Court.[300] Taney's opinion linked the Article III status of the Court of Claims to its ability to enforce its judgments. Taney had returned to the 1792 precedent estab-

290. During this period, the amount appropriated was simply "[t]o pay judgments of the court of claims." See 16 Stat. 480 (1871) ($500,000); 17 Stat. 82 (1872) ($400,000); 17 Stat. 508 (1873) ($400,000); 18 Stat. 108 (1874) ($1,000,000); 18 Stat. 369 (1875) ($400,000).

291. See Act of May 8, 1872, ch. 140, 17 Stat. 82 (1872) ("[N]o part of this sum shall be paid upon any judgment rendered in favor of George Chorpenning growing out of any service rendered in carrying the mail.").

292. See Act of March 3, 1877, ch. 105, 19 Stat. 347 (1876).

293. 6 Cong. Rec. 585-88 (1877).

294. Id. at 585.

295. Id. at 587.

296. See Cong. Globe, 37th Cong., 3d Sess. 398-400 (1863).

297. 6 Cong. Rec. 588 (1877).

298. Between 1876 and 1894, Congress normally appropriated funds pursuant to a list of specifically named individuals and judgments. See, e.g., 19 Stat. 347 (1877); 21 Stat. 252 (1880); 23 Stat. 452 (1885); 26 Stat. 534-37 (1890); 28 Stat. 450-76 (1894). But see 22 Stat. 8 (1882).

299. In United States v. Union Pac. R.R., 98 U.S. 569, 603-04 (1878), the Supreme Court continued to assume the judicial status of the Court of Claims.

300. See Gordon v. United States, 117 U.S. 697 (1885).

lished in *Hayburn's Case*[301] and had argued that "[t]he award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power."[302] Specifically, Taney was concerned that congressional appropriations for a judgment "will be opened to debate" and that consequently "the real and ultimate judicial power will . . . be exercised by the Legislative Department."[303] Not being an Article III court, Taney had concluded that the Supreme Court could not review the decisions of the Court of Claims. Taney's "lost opinion," written in early 1864, had not considered the possibility that prospective, lump sum appropriations could avoid this particular problem.[304] But by 1885 Taney's opinion had acquired a new significance with the change in appropriation methods. In 1895 Congress resumed lump sum appropriations but on a retrospective basis.[305]

Throughout this period, Congress honored virtually every judgment of the Court of Claims.[306] The Supreme Court continued to assume the Article III status of the Court of Claims[307] despite lack of enforceability.[308] However, with publication of Taney's "lost opinion," the Supreme Court acquired a strange "trump card" which it could invoke in case congressional payment faltered. Congress and Court had evolved an uneasy accommodation on the question of payment and non-enforcibility.

2. *Accommodation on Advisory Jurisdiction*

In 1863, the original House bill reorganizing the advisory Court of Claims sought to make its decisions final and to give "the court jurisdiction of all claims for which the Government would be liable in law

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301. Id. at 703.

302. Id. at 702.

303. Id. at 702-03.

304. See id. With regard to when Taney's opinion was written, see United States v. Jones, 119 U.S. 477, 478, 7 S. Ct. 283, 283 (1886).

305. See, e.g., 28 Stat. 868 (1895); 29 Stat. 26 (1896); 31 Stat. 315-316 (1900); 33 Stat. 1250 (1905).

306. Note, The Court of Claims: Judicial Power and Congressional Review, 46 Harv. L. Rev. 677, 685 n.63 (1933). In Glidden Co. v. Zdanok, 370 U.S. 530, 570, 82 S. Ct. 1459, 1483 (1962), the Supreme Court refered to this note and stated, "A study concluded in 1933 found only 15 instances in 70 years when Congress had refused to pay a judgment."

307. See, e.g., United States v. Jones, 119 U.S. 477, 477-78, 7 S. Ct. 283, 283-84 (1886); United States v. Louisiana, 123 U.S. 32, 35-36, 8 S. Ct. 17, 18-19 (1887); Minnesota v. Hitchcock, 185 U.S. 373, 380, 22 S. Ct. 650, 653 (1902); Kansas v. United States, 204 U.S. 331, 342, 27 S. Ct. 288, 391 (1907).

308. Both federal and state courts abided by the rule that a judgment could only be paid from a legislative appropriation expressly made for such purpose. See, e.g., Reeside v. Walker, 52 U.S. (11 How.) 272, 290-91 (1850); Westinghouse Elec. & Mfg. Co. v. Chambers, 169 Cal. 131, 135, 145 P. 1025, 1026 (1915); Carter v. State, 42 La. Ann. 927, 932, 8 So. 836, 837 (1890); Higgionbotham's v. Commonwealth, 66 Va. (25 Gratt.) 627, 641 (1874).

or equity, if it were suable in a court of justice."[309] However, the Senate, as previously indicated, was unwilling to accept both finality and a completely "judicial model" of claims jurisdiction.[310] Accordingly, the Court of Claims' basic jurisdiction over claims remained the same after the 1863 reorganization as before; *viz.*, limited to claims based on contract law, a federal statute, or a federal regulation.[311] Its decisions, however, were no longer advisory.

Between 1863 and 1883, Congress enacted various statutes conferring (or sometimes restricting) special jurisdiction on the Court of Claims to resolve claims arising out of the Civil War.[312] Though the volume of such claims was substantial during this period,[313] the basic jurisdiction of the Court of Claims remained limited principally to contract and pension claims.[314] Congress retained jurisdiction over all other legal claims[315]—most notably tort and "taking"[316] cases. In 1868, the Supreme Court acknowledged Congress' jurisdiction over tort claims by observing that "[i]n such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination."[317] In 1879 the Court commented on "taking" cases and stated that "[i]t is to be regretted that Congress has made no provision by

309. Cong. Globe, 37th Cong., 3d Sess. 304-05 (1863).

310. See supra notes 254-55 and accompanying text.

311. Compare Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612, 612 (1855) with Act of Mar. 3, 1863, ch. 92, § 2, 12 Stat. 765, 765 (1863). However, the 1863 amendments expanded the court's jurisdiction slightly to include counterclaims and setoffs of the United States against claimants, see id. § 3, and reduced the court's jurisdiction slightly by eliminating reference cases from either House, see id. § 2.

312. E.g., Abandoned and Captured Property Act of 1863, ch. 120, 12 Stat. 820 (1863); Act of July 4, 1864, ch. 240, 13 Stat. 381 (1864); Act of May 9, 1866, ch. 75, 14 Stat. 44 (1866); Act of Feb. 21, 1867, ch. 57, 14 Stat. 397 (1867); Bowman Act of Mar. 3, 1883, ch. 116, 22 Stat. 485 (1883).

313. James G. Randall, Civil War historian, wrote that with regard to captured and abandoned property,

> the Court of Claims found its docket well crowded. The total amount paid out in judgments in such cases up to February 4, 1888, was reported as $9,864,300.75. When we remember that the sums involved in each case were usually small, and that these figures represent only the claims which were allowed, we can form an idea of the vast amount of this litigation which the court handled.

Randall, Captured and Abandoned Property During the Civil War, 19 Am. Hist. Rev. 65, 74-75 (1913); see also Richardson, History, Jurisdiction, and Practice of the Court of Claims of the United States, 7 So. L. Rev. 781, 790 (1882); 17 Ct. Cl. 3, 11 (1881-1882); 2 W. Cowen, P. Nichols & M. Bennett, supra note 88, at 28.

314. See Act of Mar. 3, 1863, ch. 92, § 2, 12 Stat. 765, 765 (1863); see also, e.g., H.R. Misc. Doc. No. 50, 40th Cong., 1st Sess. (1867).

315. Obviously, Congress also retained jurisdiction over purely "moral" claims not resting on any particular legal or equitable principal of law. United States v. Realty Co., 163 U.S. 427, 440, 16 S. Ct. 1120, 1125 (1896).

316. The Fifth Amendment provides, in part, "nor shall private property be taken for public use, without just compensation."

317. Gibbons v. United States, 75 U.S. (8 Wall.) 269, 275-76 (1868).

any general law for ascertaining and paying this just compensation."[318] By the 1880's, Congress' retention of the "legislative model" of claims adjudication for most non-contract claims again led to the introduction of various proposals designed to relieve Congress of this "private business."[319]

In 1887, the House—led by Congressman Tucker of Virginia—passed a bill designed to give the Court of Claims full jurisdiction over all legal, equitable, and admiralty claims against the United States.[320] It also provided for concurrent jurisdiction in the federal circuit courts up to the amount of $10,000.[321] Its acknowledged effect was "that the United States can be made a party defendant in any suit where an individual could be made a party defendant."[322] However, the Senate, as it had nearly a quarter century before, balked at accepting a completely "judicial model" of claims jurisdiction for the courts.[323] The Senate subtracted two significant provisions from the House bill: it excluded tort claims; and it reduced the amounts for concurrent jurisdiction to $1,000 or less for district courts and between $1,000 and $10,000 for circuit courts.[324] The Senate also made an important addition by giving the Court of Claims special jurisdiction to render advisory findings, but no judgment, on any claim specifically referred to it by either House of Congress or an Executive Department.[325] However, if the Court of Claims found that the referred claim fell within its regular claims jurisdiction, it was required to proceed to judgment.[326] On March 3, 1887, the Tucker Act, as this compromise came to be known, became law.[327]

After the adoption of the Tucker Act, the Court of Claims acquired jurisdiction over virtually all legal claims against the United States except tort claims.[328] The practical effect was to expand the court's jurisdiction beyond contract to admiralty, tax, pay, and "taking" cases.[329] Congress

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318. Langford v. United States, 101 U.S. 341, 343 (1879).

319. See 18 Cong. Rec. 622 (1887).

320. Id. at 624. The bill, however, did exclude suits based on a patent infringement by the Government and Civil War claims by inclusion of a six year statute of limitations. Id.

321. Id.

322. See remarks by Congressman Reed, id.

323. Id. at 2175-76, 2676-81.

324. See id. at 2175-76, 2676-81.

325. See Tucker Act, ch. 359, §§ 12-14, 24 Stat. 505, 507-08 (1887). With regard to Congressional "reference cases", the Tucker Act required the Court of Claims to report only its findings of facts. Id. at § 14. With regard to Executive "reference cases", the Tucker Act required the Court of Claims to submit both findings of fact and conclusions of law. Id. § 12. No judgment was to be entered in either situation. See id. §§ 12, 14.

326. Id. § 13.

327. Tucker Act, ch. 359, 24 Stat. 505 (1887).

328. See id. § 1. Pension and certain Civil War claims were also excluded.

329. 2 W. Cowen, P. Nichols & M. Bennett, supra note 88, at 43-51.

retained jurisdiction over tort and moral claims.[330] By allowing factual disputes arising from tort or moral claims to be determined by the Court of Claims, Congress hoped to relieve itself "from much of the private business that is imposed upon it."[331] In this context, the Court of Claims analogized its relationship to Congress in congressional "reference cases" as being much like that which existed between courts of equity and courts of law. It noted that Congress, like a court of equity, could refer factual disputes to the Court of Claims which, like a court of law, could render the requested findings, but only if there was no adequate remedy at law under its regular claims jurisdiction.[332]

It will be recalled that the historic confrontation between Congress and the federal judiciary in *Hayburn's Case* over the finality of the courts' judgments on claims was resolved by an amendment which limited the courts' role to an essentially fact-gathering one.[333] Accordingly, there was some precedent for advisory fact-finding jurisdiction. However, the Supreme Court had long maintained that a federal court could not render advisory opinions on questions of law.[334] In 1893, the Supreme Court, in *In re Sanborn*,[335] considered an appeal from an Executive "reference case" which contained both findings of fact and, unlike congressional "reference cases," conclusions of law.[336] The Supreme Court held that there was no statutory right to appeal because the findings and conclusions did not result in a "judgment" which was appealable under the Tucker Act.[337] Nevertheless, in an attempt to reconcile the authority to issue advisory legal opinions to executive agencies with the Article III status of the Court of Claims, the Supreme Court

330. See Tucker Act, 1887, ch. 359, § 1, 24 Stat. 505 (1887). In *United States v. Realty Co.*, 163 U.S. at 440, 16 S. Ct. at 1125, Congress's power to pay "debts" was defined broadly to include a claim which "grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law."

331. See 18 Cong. Rec. 622 (1887) (remarks of Rep. Springer).

332. See Pocono Pines Assembly Hotels Co. v. United States, 73 Ct. Cl. 447, 488-89 (1932), which approvingly quoted its prior opinion of Stovall v. United States, 26 Ct. Cl. 226, 233 (1891), where an identical relationship existed under the Bowman Act, see Act of Mar. 3, 1883, ch. 116, § 1, 22 Stat. 485, 485 (1883).

333. See supra notes 104-14 and accompanying text.

334. 3 The Correspondence and Public Papers of John Jay 488-89 (H. Johnston ed. 1890) (correspondence between Chief Justice Jay and Secretary of State Jefferson in which the Supreme Court refused to render an advisory opinion). But see 1 C. Warren, The Supreme Court in United States History 596-97 (1926) (detailing correspondence from Justice Johnson to President Monroe in which an advisory opinion, in fact, was given).

335. 148 U.S. 222, 13 S. Ct. 577 (1893).

336. See supra note 325. The reason why Congress may have permitted conclusions of law in Executive "reference cases" was because many departments lacked adequate legal staffs at that time. See *Pocono Pines Hotels*, 73 Ct. Cl. at 487.

337. 148 U.S. at 226, 13 S. Ct. at 579. Cf. Ex Parte Atocha, 84 U.S. (17 Wall.) 439 (1873) (involving statute that provided for final judgment but failed to provide for appeal).

stated that "[w]e regard the function of the Court of Claims, in such a case, as ancillary and advisory only."[338] With this decision, another uneasy accommodation was reached between Congress and the Court, this time on the issue of advisory jurisdiction.[339]

3. Accommodation on Theory

In *Chisholm v. Georgia*, the Supreme Court held that no consent by a state was necessary for exercise of its Article III jurisdiction over a claim "between a state and citizens of another state." It also noted, without deciding the question, that an analogous issue existed with regard to claims involving "controversies to which the United States shall be a party."[340] As we have seen, this suggestion that Article III of the Constitution contained a "judicial model" of claims determination was effectively repudiated by adoption of the Eleventh Amendment.[341] And with the triumph of the "legislative model," many members of Congress came to explain their ability to determine claims as arising under their power over appropriations under Article I, Section 9 of the Constitution.[342] For its part, the Supreme Court acknowledged its inability to determine claims during the pre-Civil War period by simply reciting, without explanation, the rule against suability without consent.[343]

After the Civil War, the evolution of the "hybrid model" forced the Supreme Court to develop a comprehensive theory which would justify Congress' ability to both (1) continue to consider some categories of claims, such as tort and strictly moral claims, and (2) authorize other categories to be determined by a special Court of Claims which was subject to Supreme Court review. In response to this need, the simple rule of non-suability without consent was transformed into an elaborate

338. 148 U.S. at 226, 13 S. Ct. at 579.

339. In later periods, the Court of Claims's advisory jurisdiction played a significant role in the debate over its Article III status. See Ex Parte Bakelite Corp., 279 U.S. 438, 454, 49 S. Ct. 411, 414 (1929); Williams v. United States, 289 U.S. 553, 569, 53 S. Ct. 751, 756 (1933); Glidden Co. v. Zdanok, 370 U.S. 530, 579-83, 82 S. Ct. 1459, 1487-90 (1962).

340. See 2 U.S. (2 Dall.) 419 (1793). See also supra notes 115-29 and accompanying text.

341. See supra notes 130-35.

342. See, e.g., Cong. Globe, 32d Cong., 2d Sess. 96 (1852) (remarks of Rep. Brown); Cong. Globe, 33d Cong., 2d Sess. 70 (1854) (remarks of Sen. Brodhead); Cong. Globe, 37th Cong., 3d Sess. 312 (1863) (remarks of Sen. Doolittle).

343. See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821); United States v. McLemore, 45 U.S. (4 How.) 286, 287-88 (1846); Hill v. United States, 50 U.S. (9 How.) 385, 389 (1850). In United States v. Lee, 106 U.S. 196, 1 S. Ct. 240 (1882), the Supreme Court noted that although the non-suability of government has "been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine." Id. at 207.

doctrine called "sovereign immunity" which was justified on the basis of public policy and English legal precedent.[344]

In the aftermath of the Civil War, the public policy justification quickly gained prominence. In 1865, Justice Gray of the Supreme Judicial Court of Massachusetts articulated this view in *Briggs v. Light-Boats*[345] when he stated that permitting suit without consent would "endanger the performance of the public duties of the sovereign" since it would force the executive "to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace, and the money in his treasury." In 1868, the Supreme Court in *The Siren* echoed this justification and stated that "[t]he doctrine rests upon reasons of public policy . . . ."[346] In 1882 the Supreme Court examined the basis for the doctrine in some detail in *United States v. Lee*.[347] While differing on the application of the doctrine, both the majority[348] and minority[349] opinions continued to rely primarily on the public policy justification for the rule although extensive reference to English historical precedent was also employed.[350]

English legal precedent was also adopted in 1889 as a major justification in order to reconcile the rule of non-suability with the federal courts' apparent jurisdiction under Article III.[351] This explanation of the Constitution was not a new one. During the ratification debates, Alexander Hamilton had argued with regard to states that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*" and that there was no "surrender of this immunity in the plan of the convention."[352] Justice Iredell, the lone dissenter in *Chisholm v. Georgia*, also relied heavily on English precedent

344. It is said that whether a glass is viewed as half-full or half-empty depends entirely on the frame of reference of the observer. The same can be said of the sovereign immunity doctrine. In later periods, it would be condemned as a conservative doctrine which justified why some suits could not be filed. However, in the post-Civil War period, most courts embraced the doctrine as a progressive one precisely because it justified why some suits could be filed for the first time.

345. 93 Mass. (11 Allen) 157, 162-63 (1865).

346. 74 U.S. (7 Wall.) 152, 154 (1868).

347. 106 U.S. 196, 1 S. Ct. 240 (1882).

348. Id. at 206, 1 S. Ct. at 248-49.

349. See id. at 226, 1 S. Ct. at 265-66. ("[I]t is essential to the common defense and general welfare that the sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war, necessary to guard the national existence against insurrection and invasion; of custom-houses and revenue cutters, employed in the collection of the revenue; or of light-houses and light-ships, established for the security of commerce with foreign nations and among the different parts of the country.").

350. See id. at 205-06, 227-34, 1 S. Ct. at 248-49, 266-70.

351. See Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504 (1889).

352. Supra note 86.

for his conclusion that a state, as a sovereign, possessed an immunity from suits not consented to and since there were no longer any kings such consent must be given by the legislative branch.[353] Moreover, even Justice Gray, who announced the "broader" public policy justification in *Briggs v. Light-Boats*, had first noted that "[i]n the older books, this is often put upon the technical ground that, all judicial writs being in the name of the king as the fountain of justice, the king cannot by his own writ command himself."[354] Nevertheless, the 1793 rejection of the "sovereignty" theory by the majority in *Chisholm v. Georgia* had forever discredited this justification.[355] In 1889 the Supreme Court in *Hans v. Louisiana*[356] re-examined the majority decision in *Chisholm v. Georgia*. It concluded that the nation's adverse reaction to that decision had vindicated the view of Justice Iredell[357] and Hamilton[358] that the exercise of the federal court jurisdiction under Article III was conditioned on a state (and by inference the federal government) waiving its sovereign immunity by enacting a statute consenting to suit.[359]

The sovereign immunity doctrine—as justified by policy and precedent—provided a flexible theoretical explanation for much of the "hybrid model" through its elastic concept of consent;[360] consent to suit in contract did not mean consent to suit in tort;[361] consent could be conditioned on requiring a claim to be filed in a special court[362] pursuant to special rules; [363] and consent

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353. Supra note 123.

354. 93 Mass. (11 Allen) 157, 162 (1865).

355. See, e.g., United States v. Lee, 106 U.S. 196, 205-08, 1 S. Ct. 240, 247-50 (1882); Langford v. United States, 101 U.S. 341, 342-43 (1879).

356. 134 U.S. 1, 10 S. Ct. 504 (1890).

357. Id. at 18-19, 10 S. Ct. at 508-09 ("In view of the manner in which that decision [*Chisholm v. Georgia*] was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice Iredell's views in this regard.").

358. See id. at 12-15, 10 S. Ct. at 502-05. The Supreme Court stated that "[i]t seems to us that these views [regarding sovereign immunity] of those great advocates [including Hamilton] and defenders of the Constitution were most sensible and just; and they apply equally to the present case . . . ." Id. at 14-15, 10 S. Ct. at 504-05.

359. See id. at 13, 10 S. Ct. at 504.

360. During this period, there was a tendancy to construe Congressional consent to suit narrowly. E.g., Nichols v. United States, 74 U.S. (7 Wall.) 122 (1868); Gibbons v. United States, 75 U.S. (8 Wall.) 269 (1868); Langford v. United States, 101 U.S. 341 (1879). This was consistent with the general practice of interpreting all statutes relating to the federal government narrowly so as not to limit or abridge the government's sovereign powers unless specifically expressed. Cf. The dollar Savings Bank v. United States 86 U.S. (19 Wall.) 227, 239 (1873) (statutory remedies not construed to limit government's common law remedy of debt); United States v. Herron, 87 U.S. (20 Wall.) 251 (1873) (government debt not barred by bankruptcy statute).

361. See Gibbons v. United States, 75 U.S. (8 Wall.) 269, 274 (1868).

362. See *United States v. Union Pac. R.R.*, 98 U.S. at 602-05.

363. Congress did not necessarily subject the government and claimant to the same procedural rules with regard to the claims jurisdiction it relinquished to the Court of

to suit could later be revoked.[364] During this period, the foregoing explanation of the sovereign immunity doctrine also became popular in the states.[365] Nevertheless, this doctrine failed to explain one fundamental aspect of the "hybrid model": Congress's power to determine claims through private legislation.[366]

In 1895, the Supreme Court clarified for the first time the constitutional basis of Congress's power to determine claims in *United States v. Realty Company*.[367] In that opinion the Supreme Court ignored the "appropriations" theory which suggested that claims were fiscal questions exclusively for Congress[368] and held, instead, that such power came from Congress's authority "to pay the debts" of the United States.[369] The

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Claims. See Freund, Private Claims Against the State, 8 Pol. Sci. Q. 625, 630-31 (1893). For example, for a time neither the claimant nor any person interested in the claim was permitted to testify in support of a claim although the government was permitted to call them for examination if it deemed it appropriate. See Act of June 25, 1868, ch. 71, § 4, 15 Stat. 75 (1868); Act of Mar. 3, 1887, ch. 359, § 8, 24 Stat. 505, 506 (1887) (repealing the testimony prohibition). At one time, the government was given the right to depose the claimant, but no reciprocal right was given the claimant. See Act of Mar. 3, 1863, ch. 92, § 8, 12 Stat. 765, 766-67 (1863). The government was permitted to appeal any final judgment while a claimant could do so only if certain monetary amounts were exceeded. See id. § 5; Act of June 25, 1868, ch. 71, § 1, 15 Stat. 75 (1868). The government had a special right to move for a new trial on the basis of fraud for up to two years after final disposition of the case. Act of June 25, 1868, ch. 71, § 2, 15 Stat. 75 (1868). Finally, any claimant who practiced fraud in prosecuting a claim automatically forfeited the claim to the government. Act of Mar. 3, 1863, ch. 92, § 11, 12 Stat. 765 (1863).

364. See Railroad Co. v. Tennessee, 101 U.S. 337 (1879); Railroad Co. v. Alabama, 101 U.S. 832 (1879); Baltzer v. North Carolina, 161 U.S. 240, 16 S. Ct. 500 (1896).

365. See Davie, Suing the State, 18 Am. L. Rev. 814 (1884). However, a few states such as Alabama, Arkansas, and Mississippi appear to have waived much of their immunity by statute. Id. at 827; Martindale, The State and Its Creditors, 7 So. L. Rev. 544, 545-46 (1881).

366. This power is not as self-evident as one might suppose. Many states have significant limitations on their legislature's power to enact private legislation involving private claims. See Paramino Lumber Co. v. Marshall, 309 U.S. 370, 380, 60 S. Ct. 600, 603-04 (1939). For example, in Bourn v. Hart, 93 Cal. 321, 28 P. 951 (1892), the California Supreme Court held that its state legislature violated its state constitutional prohibition against gifts of public funds when it enacted private legislation awarding a state prison guard $10,000 for tort injuries suffered while on the job.

367. 163 U.S. 427, 16 S. Ct. 1120 (1896). Before this case, the Supreme Court had recognized the existence of Congress's power over claims without specifying its constitutional basis. See, e.g., Heirs of Emerson v. Hall, 38 U.S. (13 Pet.) 409 (1839); United States v. Price, 116 U.S. 43, 6 S. Ct. 235 (1885).

368. The "appropriations" theory was popular in Congress before the Civil War. See supra note 342. To some members of Congress, this meant Congress could not delegate this power. See Cong. Globe, 37th Cong., 3d Sess. 312 (1863) (remarks of Sen. Doolittle).

369. United States v. Realty Co., 163 U.S. 427, 440, 16 S. Ct. 1120, 1125 (1896) ("Under the provisions of the Constitution [Article I, § 8], Congress has power to lay and collect taxes, etc., 'to pay the debts' of the United States. Having the power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object.").

term "debts" was construed broadly to include not only legal obligations, but also "those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual."[370] The Court further noted that this had been the congressional practice since the adoption of the Constitution.[371] By this construction of the Constitution, the Supreme Court was able to uphold Congress's traditional practice of determining both moral and legal claims while implying that the federal judiciary possessed an overlapping, but not necessarily superior, role for the legal claims.[372]

Thus, after the Civil War, Congress and the federal judiciary began sharing the responsibility for determining claims against the United States. The triumph of this "hybrid model" of claims determination was dependent on a series of uneasy accommodations on the issue of congressional payment and judicial non-enforceability, the question of advisory jurisdiction, and the persuasiveness of the sovereign immunity doctrine as a theoretical justification for the "hybrid model" itself. By the close of the nineteenth century, these accommodations had been worked out. However, during the first third of the twentieth century the accommodations supporting the "hybrid model" began to break down.

C. Decline—The Accommodations Break Down

1. Breakdown—Advisory Jurisdiction

In 1910, the accommodation on advisory jurisdiction began to break down when Congress amended the Tucker Act to expand the fact-finding jurisdiction of the Court of Claims in congressional "reference cases" to include advisory conclusions of law.[373] As noted, in *In re Sanborn*, the Supreme Court was able to reconcile the Court of Claims's Article III status with its advisory duties by characterizing the latter as "ancillary" when such advisory role was confined to a few fact-finding chores for Congress or an occasional opinion to an executive department.[374] By 1910, both the justices of the Court of Claims and members of the referring congressional committees had become dissatisfied with reports which were necessarily limited to the facts.[375] It was noted that "very little, if any, help was obtained by the committee in many cases

370. Id.

371. Id. at 441, 16 S. Ct. at 1126.

372. Once Congress appropriated funds to pay a claim, neither the treasurer nor the courts had authority to inquire into the merits of such payment. United States v. Jordan, 113 U.S. 418, 5 S. Ct. 585 (1885); United States v. Price, 116 U.S. 43, 6 S. Ct. 235 (1885).

373. See Act of June 25, 1910, ch. 409, 36 Stat. 837 (1910).

374. See supra notes 335-38 and accompanying text.

375. See 45 Cong. Rec. 3491-92 (1910).

. . . ."[376] Accordingly, Congress amended the Tucker Act to require not only a report on the facts but also a report on "the nature . . . of the demand, either as a claim, legal or equitable, or as a gratuity, against the United States and the amount, if any, legally or equitably due."[377] This amendment greatly expanded the scope of the Court of Claims's advisory role.

In 1911, in *Muskrat v. United States*, the Supreme Court considered the constitutionality of a statute which conferred special advisory jurisdiction on the Court of Claims to determine the validity of previous acts of Congress which affected the distribution of certain Cherokee property.[378] Unlike "reference cases," this statute specifically authorized appeal to the Supreme Court.[379] The Court of Claims had determined that the acts in question were valid. On appeal, the Supreme Court relied on cases such as *Hayburn's Case* for the proposition that Congress could not constitutionally confer jurisdiction on an Article III court to determine the validity of an act of Congress in proceedings which were essentially advisory in nature (*i.e.*, lacked a genuine case or controversy).[380] After concluding that it could not entertain the appeal, the Supreme Court closed by observing that "[a]s Congress . . . evidently intended to provide a review of the judgment of the Court of Claims in this court . . . we think the act cannot be held to intend to confer jurisdiction on that court separately considered."[381] In light of the Supreme Court's acquiescence in the Court of Claims' "ancillary" advisory jurisdiction in *In re Sanborn*,[382] this final sentence implied that the Court of Claims might not necessarily be subject to the same constitutional limitations that regular Article III courts were subject to. This ambiguity over the Court of Claims' status, however, did not stop Congress from referring cases to it.

During 1912 over 3,600 congressional "reference cases" were dock-

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376. Id. at 3491 (remarks of Rep. Diekema).

377. Act of June 25, 1910, ch. 409, 36 Stat. 837 (1910). The requirement that the Court of Claims determine "the amount, if any, legally or equitably due" was added as a floor amendment over the objection of the bill's original sponsor who feared it might erode Congress's discretion over moral claims. 45 Cong. Rec. 3491-92 (1910). The Court of Claims, however, construed its authority narrowly to only apply to situations where amounts could "be based upon legal or equitable principles as recognized by or enforced in the courts." Montgomery v. United States, 49 Ct. Cl. 574, 626 (1914).

378. 219 U.S. 346, 31 S. Ct. 250 (1911).

379. Compare In re Sanborn, 148 U.S. 222, 13 S. Ct. 577 (1893) with Muskrat v. United States, 219 U.S. 346, 350, 31 S. Ct. 250, 251 (1911).

380. Although the statute required the federal government to defend the constitutionality of the acts in question, the Supreme Court concluded that the federal government had no direct interest in the outcome of the contest since it did not share in the distribution of the Cherokee property. *Muskrat*, 219 U.S. at 360-63, 31 S. Ct. at 255-56.

381. Id. at 363, 31 S. Ct. at 256.

382. See supra notes 335-38 and accompanying text.

eted with the Court of Claims.[383] In 1914 the number was over 3,100.[384] The Court of Claims acknowledged the tremendous increase in such claims following the 1910 amendment as follows: "The docket of this court shows that while the number of references which came from Congress during the five years commencing with 1891, four years after the enactment of the Tucker Act, was about 2,700; the number during the five years prior to 1915 was about 8,200 . . . ."[385] During this period, most of the "reference cases" related to old Civil War claims.[386]

In 1914 the Court of Claims, in *Montgomery v. United States*,[387] defended its expanded advisory jurisdiction by developing the concept implied in *Muskrat*. In effect, the Court of Claims asserted that due to its non-Article III origins and its special jurisdiction over government claims, it possessed a unique constitutional status which permitted it to exercise a "duality of jurisdictions."[388] The Court of Claims described its dual jurisdictions as "cases where the statute authorizes the court to proceed to final judgment, from which appeals lie direct to the Supreme Court, and . . . those classes of reference, congressional and departmental, in which its action does not result in final judgment, and . . . [from which] no appeal lies."[389] It justified its advisory jurisdiction in "reference cases" by noting its Article I origins as an advisory court to Congress[390] and the persistence of this unique status since the Tucker Act did not confer concurrent jurisdiction for "reference cases" on the federal district courts.[391] It justified its ability to exercise Article III powers by noting that when Congress made its decision final, "it became vested necessarily with judicial power, because the cases of which it has cognizance are suits to which the United States must be a party, and its judgments, subject to appeal, are final judgments."[392] Finally, the Court of Claims referred to *In re Sanborn* to show that its possession of a "duality of jurisdictions" was not necessarily an incompatible mixture.[393]

383. Chase v. United States, 50 Ct. Cl. 293, 315-16 (1915).

384. Id. at 316.

385. Id. at 315.

386. Id. Following Court of Claims review, Congress appropriated funds to pay many of these Civil War claims in 1915 in the Omnibus Claims Act, see Act of Mar. 4, 1915, ch. 140, 38 Stat. 962 (1915).

387. 49 Ct. Cl. 575 (1914).

388. Id. at 608-10.

389. Id. at 608. The Court of Claims reiterated this view in subsequent cases. Chase v. United States, 50 Ct. Cl. 293, 298 (1915); *Pocono Pines Assembly Hotels Co.*, 73 Ct. Cl. at 488.

390. *Montgomery v. United States*, 49 Ct. Cl. at 608-09. The Court of Claims relied on Justice Tanney's "lost opinion" in Gordon v. United States, 117 U.S. 697 (1885), for the proposition that Congress may "undoubtedly establish" advisory tribunals to review claims against the United States. *Montgomery*, 49 Ct. Cl. at 602-03.

391. 49 Ct. Cl. at 608.

392. Id. at 609.

393. Id. See also In re Sanborn, 148 U.S. 222, 13 S. Ct. 577 (1893).

Thus, by 1914 the expansion of the court's advisory jurisdiction had profoundly altered the Court of Claims's own self-image. Rather than viewing itself as an Article III court which exercised "ancillary" advisory powers,[394] the Court of claims began to view itself as a special congressional court which also exercised judicial powers.[395] In the following years, the Court of Claims appears to have basked in the glory of its "duality of jurisdictions," finding that it attracted interesting cases, public attention, and capable candidates for judgeships.[396] Although it ran the risk of not being considered an Article III court, the Court of Claims probably concluded that this did not create a significant disadvantage so long as the Supreme Court continued to review its decisions, and Congress continued to pay the judgments rendered under its non-advisory jurisdiction.[397]

The Supreme Court's position on the constitutional status of the Court of Claims did not change as quickly as the Court of Claims itself. In 1924, in *Miles v. Graham*,[398] the Supreme Court continued to treat the judges of the Court of Claims as Article III judges for the purpose of determining the effect of changes in the tax laws on their judicial salaries. However, the growth in the Court of Claims's advisory jurisdiction could no longer be dismissed as "ancillary." In 1928, the Supreme Court, in *Ex Parte Bakelite Corp.*[399] expressly backed off from its position in *Miles v. Graham*.[400] Although *Bakelite* involved the constitutional status of the Court of Customs Appeals and not the Court of Claims, it nevertheless announced, by way of *dictum*, that under its prior decisions "the Court of Claims is a legislative court specially created to consider claims for money against the United States, and . . . Congress may require it to give advisory decisions."[401] Since the

394. See In re Sanborn, 148 U.S. 222, 13 S. Ct. 577 (1893).

395. See *Montgomery*, 49 Ct. Cl. at 608-09.

396. See 2 W. Cowen, P. Nichols & M. Bennett, supra note 88, at 64 ("But the Court of Claims would appear in the period under review to have derived from its advisory jurisdiction a far more important, varied, and interesting diet of cases, and consequently, greater appeal to the more able candidates for judgeships, and a more conspicuous place in the public and congressional eyes.").

397. See id.

398. 268 U.S. 501, 45 S. Ct. 601 (1925).

399. 279 U.S. 438, 49 S. Ct. 411 (1928).

400. Id. at 455, 49 S. Ct. at 415.

401. Id. at 454-55, 49 S. Ct. at 415. In *Bakelite*, the Supreme Court held that the Court of Customs Appeal was a "legislative court" and therefore Congress could authorize it to consider appeals from certian advisory recommendations of the Tariff Commission. By way of analogy, the Supreme Court referred to the Court of Claims and stated:

> From the outset Congress has required it [the Court of Claims] to give merely advisory decisions on many matters. Under the act creating it all of its decisions were to have effect as binding judgments, but others were still to be merely advisory. This is true at the present time. A duty to give decisions which are advisory only, and so without force as judicial judgments, may be laid on a

Supreme Court historically had accepted appellate review of final judgments from other "legislative courts" such as federal territorial courts, this change in position did not necessarily imply a rupture of that critical relationship between the two courts.[402] Ironically, the most significant consequence of the *Bakelite* decision would be a change in the behavior of Congress, rather than the Supreme Court, toward the Court of Claims.

2. Breakdown—Payment and Non-Enforceability

By the late 1920's, the accommodation regarding congressional payment and judicial non-enforceability of judgments began to break down. As noted, in the post-Civil War era Congress routinely paid such judgments without compulsion and the Supreme Court reviewed such judgments without insisting on enforceability.[403] However, after the 1910 expansion of the Court of Claims' advisory jurisdiction, Congress became accustomed to revising the decisions of the Court of Claims in "reference cases," and payment was far from automatic in such cases.[404] In time, the "duality of jurisdictions" led to significant confusion in Congress and some members came to erroneously believe that all of the decisions of the Court of Claims were advisory and subject to its revision.[405] The 1928 *Bakelite obiter* statement that the Court of Claims was merely a "legislative court" served only to undermine further an already shaky congressional commitment to routine payment of judgments.

In the early 1930's, the "duality of jurisdictions," the congressional

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legislative court, but not on a constitutional court established under article 3. Id. at 454, 49 S. Ct. at 414 (footnotes omitted). The foregoing clearly reveals that the expansion of advisory jurisdiction was the major factor in changing the Supreme Court's view on the constitutional status of the Court of Claims.

402. In American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828), the Supreme Court held that courts created by Congress in the territories were "legislative courts." The Supreme Court had consistently exercised appellate review over territorial courts although it had never satisfactorily explained why it could do so. See, e.g., Freeborn v. Smith, 69 U.S. (2 Wall.) 160, 173 (1864). See also Note, The Court of Claims: Judicial Power and Congressional Review, 46 Harv. L. Rev. 677, 682 n.39 (1932). But see Gordon v. United States, 117 U.S. 697 (1885, decided 1864) (Justice Taney's "lost opinion").

403. See supra notes 280-308 and accompanying text.

404. For example, after the 1910 expansion of the Court of Claims' advisory jurisdiction, the Court of Claims submitted a vast number of recommendations (mostly relating to Civil War claims) which Congress refused to pay. It was not until 1915 that Congress enacted the Omnibus Claims Act to clear most of this backlog. Act of March 4, 1915, ch. 140, 38 Stat. 962 (1915); see also 52 Cong. Rec. 5287-89, 5320, 5471-72 (1915); Chase v. United States, 50 Ct. Cl. 293, 295 (1915); *Pocono Pines Assembly Hotels Co.*, 73 Ct. Cl. at 490. In another case, Congress apparently twice refused to follow an advisory recommendation of the Court of Claims relating to the "Sibley heirs." 74 Cong. Rec. 6073 (1931) (remarks of Sen. Robinson).

405. In *Pocono Pines Assembly Hotels Co.*, the Court of Claims observed that "it was . . . the vast number of [Congressional] references . . . that enabled an erroneous opinion to exist that this character of jurisdiction represented the . . . authority of this court and limited its activities to advisory findings of fact and opinions, without power to conclude the . . . rights of the parties . . . ." 73 Ct. Cl. at 490; see also id. at 491.

confusion over payment, and the *Bakelite* dictum collided in the three decisions rendered by the Court of Claims in *Pocono Pines Hotel Co. v. United States*.[406] In *Pocono Pines I* (1930), the Court of Claims considered a claim that was filed under its regular jurisdiction by a hotel company which had leased property to the federal government for use as a hospital facility.[407] The property was damaged by fire. At trial, the government lawyers introduced no evidence on the origins of the fire and rested their defense solely on the legal argument that under the lease the hotel company had the burden to prove that the fire was the government's fault.[408] The Court of Claims rejected this argument and rendered a final judgment against the government for $227,239.53 on the ground that the government failed to prove it was not at fault.[409]

In 1931, the *Pocono Pines I* judgment came before Congress for payment.[410] The Comptroller General reported that due to the nature of the government's defense, the government had failed to introduce testimony which showed that the fire may have been caused by the hotel company's own defective wiring.[411] Relying on the *Bakelite* dictum,[412] the Comptroller General recommended that Congress should direct its "legislative court" (the Court of Claims) to grant the government a new trial.[413] In the Senate, this recommendation[414] was opposed by

406. The Court of Claims rendered three decisions under this title, at 69 Ct. Cl. 91 (1930) [hereinafter cited as *Pocono Pines I*], at 73 C. Cl. 447 (1932) [hereinafter cited as *Pocono Pines II*], and at 76 Ct. Cl. 334 (1932) [hereinafter cited as *Pocono Pines III*].

407. 69 Ct. Cl. 91 (1930).

408. Id. at 106.

409. Id. at 110.

410. See 74 Cong. Rec. 5939-56, 6070-84 (1931).

411. Id. at 6077-79 (letter dated February 5, 1931, from Comptroller General McCarl to the Senate Committee on Appropriations).

412. The legal position of the Comptroller General was submitted to Congress in a document entitled "Memorandum By The Attorney From The Comptroller General's Office." Id. at 6083-84. The memorandum quoted extensively from the *Bakelite* case. See id. at 6084. The memorandum stated that:

> The Court of Claims is an agency of the Congress created with a view to assisting the Congress in reaching a correct and just conclusion respecting certain types of claims against the United States the payment of which is a duty fixed by the Constitution upon the Congress. It is not a constitutional court and has no authority to render a binding judgment against the United States. Its judgments must be submitted to the Congress and may not be paid unless the Congress makes specific appropriation for such payment.

Id. at 6083. The memorandum concluded that Congress possessed the power to direct the Court of Claims to reconsider a judgment just as Congress could ask one of its committees or its General Accounting Office to reconsider a matter. Id. at 6084.

413. See id. at 6079.

414. On February 25, 1931, the Senate considered the following amendment: "The United States Court of Claims be, and it is hereby, authorized and directed . . . to grant the United States a new trial in the case of Pocono Pines Assembly Hotels Co. v. United States of America, No. J-543 . . . ." Id. at 5939.

Senator Robinson of Arkansas and Senator Reed of Pennsylvania who argued that ordering a new trial would be unfair and would constitute an improper attempt by Congress to revise a final judgment of the Court of Claims.[415] After the defeat of this recommendation on procedural grounds,[416] Senator Reed introduced a new amendment providing for full payment of the judgment.[417] The Senate, however, was reluctant to appropriate $227,239.53 for a judgment it questioned.[418] This amendment was also defeated,[419] leaving the issue unresolved. This dilemma was resolved by Senator Glass of Virginia who proposed that the Senate not disturb the judgment but simply refer the matter to the Court of Claims "without any implications whatsoever, but merely with instructions to find the facts and report them to the Senate, so that the Senate might conclude whether or not it would make an appropriation in this case."[420] The Glass compromise was adopted.[421]

In *Pocono Pines II* (1932), the Court of Claims considered the validity of the Glass compromise in the context of a motion to set aside the referral.[422] In a lengthy opinion, the Court of Claims traced its history[423] and the development of its two categories of jurisdiction: regular and advisory.[424] While recognizing that this mixture may have caused some congressional confusion,[425] the Court concluded that nothing in *Bakelite* suggested that being a legislative court "deprives them . . . from rendering final judgments in cases where jurisdictional acts confer such power."[426] Thus, the court unanimously agreed that Congress had no power to revise its *Pocono Pines I* judgment of $227,239.53 which

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415. See id. at 5940-42.

416. See id. at 5941-42 (improper attempt to enact legislation in a general appropriations bill by conferring new powers on the Court of Claims).

417. Id. at 5945.

418. The feelings of most of the Senate were probably summarized by Senator Glass of Virginia when he said:

> If we deny this appropriation, we have a record which impugns the honor of the Court of Claims; and if we grant the appropriation, apparently we have a record here of paying a company $277,000 which is not entitled to a cent of it. It is a very embarrassing situation.

Id. at 5952.

419. Id. at 6077 (13 yeas, 68 nays, 15 not voting).

420. Id. at 6076.

421. Id. at 6077. The Glass compromise stated:

> The case of the Pocono Pines Assembly Hotels Co. v. United States of America, No. J-543, be, and hereby is, remanded to the United States Court of Claims with complete authority . . . to hear testimony as to the actual facts involved in the litigation and with instructions to report its findings of facts to Congress . . . .

422. 73 Ct. Cl. 447 (1932).

423. Id. at 466-88.

424. Id. at 488-92.

425. Id. at 491.

426. Id. at 493.

had been rendered under its regular jurisdiction.[427] Nevertheless, a majority held that the Glass compromise, unlike the original Senate recommendation, "does not seek to set aside a judgment of this court."[428] Concluding that the referral did not seek a re-evaluation of the past judgment but only facts with respect to the future payment of that judgment,[429] the majority treated the matter as falling within its advisory jurisdiction,[430] docketed the matter as "Congressional Reference No. A,"[431] and refused to vacate the hearing on the matter.[432] Thus, while the Court of Claims was unwilling to rehear the matter under its regular jurisdiction, a majority was willing to do so under its advisory jurisdiction.

As noted, routine congressional payment of judgments had obviated the need for judicial insistence on enforceability. This accommodation, already shaky, was toppled in *Pocono Pines II* (1932). While maintaining that Congress could not technically revise its judgments, the Court of Claims in fact held that Congress could constitutionally refuse to pay its judgments[433] and could require it to retry the facts under the Court's advisory jurisdiction.[434] During this time, Congress was beginning to assert its power to refuse payment in other cases.[435] When the Supreme

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427. See id. at 499 ("[T]here is but one tribunal of the United States which may direct this court to grant a new trial in a case adjudicated by this court . . ., and that tribunal is the Supreme Court of the United States.").

428. Id. at 500. Judge Green dissented from this portion of the opinion with Judge Whaley concurring in such dissent. See id. at 502-07. Judge Green's dissent reasoned:

> If other findings are made we will then have the case with two findings of fact. As the former findings were part of the judgment, it seems clear to me that the requirement to make new findings in the case not only conflicts with the judgment heretofore rendered, but overrules it and sets it aside. I think it clear that an act which has such an effect is unconstitutuonal.

Id. at 506.

429. Id. at 499-501.

430. Id. at 500.

431. Id. at 449.

432. Id. at 502.

433. Id. at 500 ("The act [*i.e.*, Glass Compromise] is in its essence legislation respecting an appropriation for the payment of a valid existing final judgment of this court, an ancillary proceeding of a legislative body indispensable under the Constitution, apart from judicial proceedings, to liquidate final judgments against the United States . . . .").

434. Id. at 501 ("[W]e do not believe Congress intended to remand a case, but, on the contrary, was seeking to ascertain certain facts with respect to appropriating public funds of the United States, and no other purpose, a separate and distinct law concerned only with legislation and not with judicial action.").

435. In 1931, the Court of Claims rendered judgment in favor of the claimant in the case of Dalton v. United States, 71 Ct. Cl. 421 (1931). Congressman Wood of Indiana argued that neither the *Pocono Pines I* judgment nor the *Dalton* judgment ought to be paid so long as Congress questioned the appropriateness of the Court of Claims's disposition. He said, "[I]t is time we called a halt on this court by reversing some of its decisions." 75 Cong. Rec. 1306-07 (1932). This position was strongly protested by Dalton's attorneys who argued that Congress had no legal or moral right to repudiate a final judgment of the Court of Claims. Id. at 3358-61.

Court failed to halt the Court of Claims from proceeding to retry the facts in *Pocono Pines III* (1932),[436] the breakdown in the accommodation between congressional payment and judicial non-enforceability became complete. This breakdown, however, was to help force a further revision in theory.

3. Breakdown—Theory

During the first third of the twentieth century, the theory supporting the "hybrid model" also began to break down. As noted, the Supreme Court used the sovereign immunity doctrine in the post-Civil War period in order to reconcile the partial transfer of claims jurisdiction from Congress to the courts with the judiciary's seemingly complete Article III jurisdiction over "controversies to which the United States shall be a party."[437] As late as 1902, the Supreme Court, in *Minnesota v. Hitchcock*, stated that under this clause it is "a matter of indifference whether the United States is a party plaintiff or defendant."[438] The Supreme Court explained the relationship between the sovereign immunity doctrine and the federal court's Article III jurisdiction by stating that "the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition."[439] Thus, at the turn of the century, the Supreme Court could still characterize the Court of Claims as simply an Article III court exercising Article III powers to the extent sovereign immunity had been waived.[440] However, by 1933, both the sovereign immunity doctrine and the Article III basis for the "hybrid model" were under heavy attack.

The concept of sovereign immunity had its critics both at the beginning of the republic[441] and after the Civil War.[442] Following World

436. On March 14, 1932, the Supreme Court denied a request to permit a writ of *mandamus* or prohibition to be filed to halt further proceedings in the Court of Claims. See Ex parte Pocono Pines Assembly Hotels Co., 285 U.S. 526, 52 S. Ct. 392 (1932). Thus, in *Pocono Pines III* the Court of Claims retried the matter as a Congressional "reference case," found that the fire did not originate from the faulty wiring of the hotel company as argued by the government, and reaffirmed, in effect, its prior judgment against the government. See 76 Ct. Cl. 334 (1932). These conclusions were reported back to Congress. See 76 Cong. Rec. 40, 60 (1932).

437. See supra notes 340-65 and accompanying text.

438. 185 U.S. 373, 384 (1902).

439. Id. at 386. See also Kansas v. United States, 204 U.S. 331, 342 (1907).

440. The Supreme Court continued to characterize the Court of Claims as an Article III court as late as 1924. See supra note 398 and accompanying text.

441. For example, James Wilson of Pennsylvania not only opposed the sovereign immunity concept in 1793 at the time of *Chisholm v. Georgia*, see 2 U.S. (2 Dall.) at 461, but also before the adoption of the Constitution as well, see 1 J. McMaster & F. Stone, supra note 86, at 356.

442. See Martindale, The State and Its Creditors, 7 So. L. Rev. 544 (1881); Davie, supra note 365; Freund, supra note 363.

War I and throughout the 1920's, however, scholarly criticism greatly intensified, often in conjunction with calls for the abolition of tort immunity.[443] In 1921 Dr. Ludwik Ehrlich concluded that the thirteenth-century statement by Bracton that "the king can do no wrong" simply meant "the the king must not, was not allowed, not entitled, to do wrong; his acts, if against the law, were not legal acts, but *iniuriae*, wrongs."[444] Moreover, "it was the king's duty to redress wrongs done by himself or on his behalf."[445] The view that early kings—at least in theory—were subject to the law was also expressed by Professor Holdsworth of Oxford University in 1926.[446] This understanding was directly contrary to the eighteenth century beliefs of Blackstone—whose *Commentaries* were particularly influential in the early American republic[447]—who had argued that neither the king nor his ministers could do wrong "because [English law] feels itself incapable of furnishing any adequate remedy."[448] This led Professor Borchard of Yale to charge that the sovereign immunity doctrine "rests upon a historical error"[449] and that it was inconsistent with the rule of law.[450] During the 1920's, Congress itself found it necessary to respond to the growing popular and scholarly criticism by enacting limited administrative relief for tort claims.[451] By

443. See, e.g., R. Watkins, supra note 140; Borchard, Government Liability in Tort (pts. 1-6), 34 Yale L.J. 1, 129, 229 (1924-1925), 36 Yale L.J. 1, 757, 1039 (1926-1927); Laski, The Responsibility of the State in England, 32 Harv. L. Rev. 447 (1918); Maguire, State Liability for Tort, 30 Harv. L. Rev. 20 (1916).

444. See L. Ehrlich, Proceedings Against the Crown 42 (1921).

445. Id. at 43.

446. 9 W. Holdsworth, supra note 43, at 10 ("But we have seen that it was well recognized in the thirteenth century and later that the king was subject to the law; and that, though ordinary writs did not lie against him in his court, he was morally bound to do the same justice to his subjects as they could be compelled to do to one another. Indeed, as we have seen, there were many, including perhaps Bracton, who thought that the highest court of the realm—the assembly of the baronage—ought to have jurisdiction over him.") (footnotes omitted).

447. See Nolan, Sir William Blackstone and the New American Republic: A Study of Intellectual Impact, 51 N.Y.U. L. Rev. 731 (1976). Justice Iredell's dissent in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 429-50 (1793), was heavily influenced by Blackstone's views on sovereignty. Nolan, supra, at 756-57. Blackstone's views were echoed by other early commentators. See, e.g., J. Chitty, Prerogatives of the Crown 5 (1820).

448. 4 Blackstone's Commentaries 254-55 (S. Tucker ed. 1803). See also Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 3-4 (1963).

449. Borchard, Governmental Responsibility in Tort—A Proposed Statutory Reform, 11 A.B.A.J. 495, 496 (1925).

450. Professor Edward M. Borchard of Yale, probably the leading critic of the sovereign immunity doctrine during this period, stated that

> [i]f self-government has any meaning, it signifies community submission to legal processes, as evidenced by the Constitution. Community agreement to be bound by rules of law or to submit legal issues to judicial determination, is an adequate assurance of the reign of law, without insisting on the "command" of a Superior Being.

Borchard, Government Liability in Tort (pt. 5), 36 Yale L.J. 757, 800 (1927).

451. In 1922, Congress enacted legislation allowing department heads to determine negligence claims not exceeding $1,000. Act of Dec. 28, 1922, ch. 17, 42 Stat. 1066 (1922).

the early 1930's, the policy of governmental immunity was under "a continuous fire of adverse criticism from commentators."[452]

Thus, the theoretical foundation of the "hybrid model" was being pulled apart from two sides. The resurgence of "legislative model" attitudes in Congress had already undermined the Article III status of the Court of Claims by the 1910 increase in its advisory jurisdiction.[453] Moreover, Congress's 1931 "remand" of the *Pocono Pines I* judgment[454] raised even more difficult questions about the nature of the Court of Claims's "judicial" (*i.e.*, non-advisory) powers. Was Congress truly bound to follow them?[455] Meanwhile, proponents of the "judicial model" had seriously eroded the persuasiveness of the sovereign immunity doctrine as a credible explanation for the gradual transfer of claims jurisdiction from Congress to the courts.[456]

In 1933, the Supreme Court confronted these problems in *Williams v. United States*.[457] The question presented was whether the Article III prohibition against diminution of judicial salaries while in office prevented the salaries of judges of the Court of Claims from being reduced from $12,500 to $10,000 per year. The Supreme Court, relying heavily on its *dictum* in *Bakelite*, held that since the Court of Claims was an Article I court it was not protected by the Article III prohibition against reduction of salaries. Thus, the salary cut was permissible.

The Supreme Court, however, used *Williams* to announce a substantially new constitutional theory regarding claims. In essence, the Court stated that the power to determine money claims was basically a legislative "function which belongs primarily to Congress as an incident of its power to pay the debts of the United States."[458] Congress could exercise this power itself or delegate this power to either the executive[459] or judicial branches.[460] The Court then repudiated its previous position

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In 1925, Congress debated, without resolution, proposals to further extend government liability for tort. 67 Cong. Rec. 1086-1110 (1926). In 1929, Congress passed significant legislation authorizing tort claims against the United States for up to $50,000 for property and for up to $7,500 for personal injuries. 70 Cong. Rec. 4858, 5272 (1929). This proposal was given a pocket veto by President Coolidge apparently because the bill designated the Comptroller General, rather than the Attorney General, to defend the government's position. See McGuire, Tort Claims Against the United States, 19 Geo. L.J. 133, 134-35 (1931); see also H.R. Rep. No. 2245, 77th Cong., 2d Sess. 5 (1942).

452. Note, Administrative Phases of State Responsibility, 44 Harv. L. Rev. 432, 432-33 (1930).

453. See supra notes 373-402 and accompanying text.

454. See supra notes 403-36 and accompanying text.

455. Note, The Court of Claims: Judicial Power and Congressional Review, 46 Harv. L. Rev. 677, 677 (1932-1933).

456. See supra notes 411-52 and accompanying text.

457. 289 U.S. 553, 53 S. Ct. 751 (1933).

458. Id. at 569, 53 S. Ct. at 756.

459. Id.

460. Id. at 565, 53 S. Ct. at 754.

in *Minnesota v. Hitchcock* and held that the federal judiciary had no independent constitutional basis for jurisdiction under the Article III clause referring to "controversies to which the United States shall be a party."[461] Relying on the presumed intentions of the Framers, the Court stated that this phrase must be read to refer only to cases in which the United States is a party plaintiff or petitioner.[462] Accordingly, the "judicial" power delegated to the Court of Claims was really an Article I judicial power and not an Article III judicial power at all!

By this reformulation, the Supreme Court was clearly laying the basis for a theory which could explain both the ability of Congress to refuse to appropriate funds to pay a judgment and the inability of the judiciary to enforce it. Conceptually, it also tended to transform the non-suability of the government from an ancient question of immunity of the sovereign into a modern question of delegation of Article I authority. With this change, the Court appeared to be both anticipating and acquiescing in a resurgence of congressional activism in revising judgments involving claims. In a theoretical sense, the Supreme Court in *Williams* appeared to be willing to give Congress what it had refused to do in 1792 in *Hayburn's Case*[463] and in 1865 in *Gordon v. United States*[464]—that is, to give Congress an advisory court.

Thus, in *Williams* the theoretical basis for the "hybrid model" was dismantled. The Supreme Court eliminated the Article III basis for an evolving "judicial model" as it cleared the way for Congress to build a new system of claims determination—presumably within the context of the "legislative model." However, by this time the attention of Congress had shifted to broader issues as the country slipped deeper into economic depression at home and global war abroad. During the remainder of the 1930's, efforts in Congress either to assert greater control over judgments[465] or, conversely, to eliminate tort immunity[466] went nowhere as Congress wrestled with more urgent domestic and international problems. By 1939, the Supreme Court itself began to sense that its prior doctrines might be out of step with "the expanding conceptions of public morality regarding governmental responsibility."[467]

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461. Id. at 571-77, 53 S. Ct. at 756-59.

462. Id. at 577, 53 S. Ct. at 759.

463. See supra notes 102-14 and accompanying text.

464. See supra notes 271-79 and accompanying text.

465. In 1932, some members of Congress advocated greater congressional control over judgments. See supra note 435. A bill introduced in the Senate to deprive the Court of Claims of its power to render binding judgments never got out of committee, however. S. 3625, 72d Cong., 1st Sess., 75 Cong. Rec. 3808 (1932).

466. For a complete listing of all tort claims bills introduced in Congress during this period, see Gottlieb, The Federal Tort Claims Act—A Statutory Interpretation, 35 Geo. L.J. 1, 2-3 nn.4-5 (1946).

467. See Keifer & Keifer v. RFC, 306 U.S. 381, 396, 59 S. Ct. 516, 521 (1939).

It had taken the Civil War to jolt Congress into abandoning the "legislative model;" it would take World War II to play a similar role in the demise of the "hybrid model." The Supreme Court in *Williams*, however, poorly anticipated the approach Congress would take in building a new system of claims determination after the war.

III. The "Judicial Model"—World War II to Present

Since World War II, Congress has turned over to the federal judiciary the responsibility for determining virtually all legal claims against the United States. Congress's relinquishment of its historic practice was necessitated by the press of more significant matters for its limited time and attention. Nevertheless, Congress has retained its practice of considering moral claims. This section of the analysis traces: (A) the development of the "judicial model" during the post-World War II era when Congress adopted the Federal Tort Claims Act in 1946,[468] statutorily declared the Court of Claims to be an Article III court in 1953,[469] and enacted the Automatic Payment of Judgments Act in 1956;[470] and (B) the triumph of the "judicial model" when the Supreme Court re-established an Article III basis for claims in *Glidden Co. v. Zdanok* in 1962,[471] and when Congress continued to permit virtually all legal claims to be determined by the federal courts and repealed the $100,000 limitation on the Automatic Payment of Judgments Act in 1977.

A. Development—Congress Relinquishes Control

1. Relinquishment—Tort Claims

On January 14, 1942, in a message to Congress, President Roosevelt alluded to America's involvement in World War II, noted the fact that over 2,000 claims bills were introduced in each Congress, and declared that consideration of such claims was time consuming and expensive for both Congress and the President.[472] In a direct attack on Congress's inability to resolve the problem, Roosevelt said:

> As Congress knows, this question has been considered many times before. During the past 20 years, Members of the Congress

468. Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (1947) (codified as amended at 28 U.S.C. § 1346 (1983)).

469. Act of July 28, 1953, ch. 253, 67 Stat. 226 (1953).

470. Automatic Payment of Judgments Act, ch. 748, 70 Stat. 694 (1956).

471. 370 U.S. 530, 82 S. Ct. 1459 (1962).

472. H.R. Rep. No. 2245, 77th Cong., 2d Sess. 6 (1942). President Roosevelt stated that "[d]uring the last 3 Congresses, fully 6,300 private claim bills were introduced . . . of which less than 20 percent became law. And of all the bills which I vetoed during these Congresses, fully one-third was made up of private claim bills." Id.

> have frequently pointed out that the procedure for relief of tort claims by special act is slow, expensive, and unfair both to the Congress and to the claimant, and several attempts have been made to enact legislation submitting all negligence claims to administrative or judicial determination.
>
> The question arises why the Congress and the President should continue to devote so much time to the consideration and approval of these numerous individual cases.[473]

Roosevelt urged Congress to grant jurisdiction to the federal district courts to consider tort claims up to $7,500, with a right of appeal to the Court of Claims.[474] Despite Roosevelt's support, many members of Congress remained satisfied with congressional determination of tort claims and deemed the proposal "highly dangerous to our Government."[475] Such members apparently retained enough influence to prevent passage until the end of the war.

By the end of World War II, a consensus arose that Congress—which last reorganized in 1921—was badly in need of another reorganization. Studies concluded that the traditional legislative machinery was no longer competent to deal with the problems of the post-war world.[476] A majority of Congress came to share the view of Congressman Monroney of Oklahoma, a principal advocate of reorganization, who argued that Congress was struggling under a work load which had increased by "geometric proportions" while "trying to do the job with tools so absolutely obsolete and antiquated that 435 saints could not possibly do with our present equipment and organization."[477] Senator LaFollette of Wisconsin described the situation as "a grave constitutional crisis . . . in which the fate of representative government itself is at stake."[478] In response to this crisis, Congress adopted the Legislative Reorganization Act of 1946[479]—a wide ranging package of reforms which regulated lobbyists, consolidated Congress's committee structure, improved procedures for the appropriation of funds, strengthened Congress' oversight ability over the Executive, and conserved Congress's time for the most important policy-making matters.[480] One little-debated part of the reform package, designed to save congressional time, was the transfer of most tort claims from Congress to the federal district courts.[481]

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473. Id.
474. Id.
475. Id. at 18.
476. S. Rep. No. 1400, 79th Cong., 2d Sess. 1-2 (1946).
477. 92 Cong. Rec. 10039 (1946).
478. Id. at 6344.
479. Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (1946).
480. Id. See also S. Rep. No. 1400, 79th Cong., 2d Sess. 1-9 (1946).
481. See Legislative Reorganization Act of 1946, ch. 753, tit. IV (Federal Tort Claims Act), 60 Stat. 812, 842-47 (1946). By 1946, approximately one-third of all bills introduced

In this way, the Federal Tort Claims Act of 1946 was adopted as a part of the larger reform measure.[482] The act conferred jurisdiction on the federal district court to determine claims against the United States on account of damages to property or personal injury caused by the negligence or wrongful act of any employee of the government.[483] Although excluding intentional torts and discretionary acts,[484] the Act imposed no monetary limit.[485] Moreover, Congress banned the introduction of private bills concerning claims which could be instituted under the Federal Tort Claims Act.[486] Although this change was arguably long overdue, a 1942 congressional study indicated that only a handful of state legislatures had gone as far.[487] Thus, after over a century of acrimonious debate, Congress finally relinquished jurisdiction over most tort claims in 1946, with little fanfare, as a part of a larger reform package.

2. Relinquishment—Article III Status of Court of Claims

Before the adoption of the Federal Tort Claims Act of 1946, the Supreme Court had consistently adhered to its position in *Williams* that the determination of claims against the United States was solely an Article I power which Congress could exercise itself or delegate to other judicial or non-judicial agencies.[488] Under the *Williams* theory, the Court

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and one-half of all laws adopted were private legislation. 95 Cong. Rec. A2901 (1949). The purpose of transfering the determination of tort claims to the courts was to reduce the volume of private legislation and to thereby save congressional time. S. Rep. No. 1400, 79th Cong., 2d Sess. 7 (1946). Given the magnitude of the other changes, congressional opponents of the Legislative Reorganization Act of 1946 appeared to focus their attention on other aspects of the legislation and dismissed title IV of the Act—relating to tort claims—as "purely a legal matter." 92 Cong. Rec. 6464 (1946) (remarks of Sen. Thomas).

482. Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (1947) (codified as amended at 28 U.S.C. § 1346 (1983)).

483. Id. at 843-45.

484. The Federal Tort Claims Act expressly excluded "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." Id. at 846. The act also excluded "[a]ny claim . . . based upon the exercise . . . or the failure to exercise . . . a discretionary function . . . whether or not the discretion involved be abused." Id. at 845.

485. For an excellent summary of the provisions of the Federal Tort Claims Act, see Gottlieb, The Federal Tort Claims Act—A Statutory Interpretation, 35 Geo. L.J. 1 (1946).

486. Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812, 831 (1946).

487. H.R. Rep. No. 2245, 77th Cong., 2d Sess. 8 (1942) (The states mentioned were New York, California, Illinois, and Arizona.). See also Nutting, Legislative Practice Regarding Tort Claims Against the State, 4 Mo. L. Rev. 1 (1939); Shumate, Tort Claims Against State Governments, 9 Law & Contemp. Probs. 242 (1942).

488. For example, in United States v. Sherwood, 312 U.S. 584, 61 S. Ct. 767 (1941), the Supreme Court continued to state that the "Court of Claims is a legislative, not a constitutional court. Its judicial power is derived not from the Judiciary Article of the

of Claims was a legislative court and the Federal Tort Claims Act, which conferred primary jurisdiction on the district courts, could be explained as a delegation of Article I judicial power to the district courts similar to the concurrent claims jurisdiction conferred on such courts under the Tucker Act.[489] Nevertheless, in 1949 in *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[490] only three justices of the Supreme Court continued to adhere to the strict *Williams* view that claims against the United States were solely an Article I power.[491] The other justices—perhaps sensing a fundamental shift away from the "legislative model" implied in the conferral of tort claims jurisdiction on the district courts—suggested that such claims were also within Article III either as "controversies to which the United States shall be a party"[492] or as cases "arising under . . . the laws of the United States."[493] This theoretical retreat from *Williams* was not to go unnoticed by Congress.

In 1953 Congress considered bills which sought to declare the Court of Claims an Article III court.[494] The purposes of the bills were to help protect the independence of the Court of Claims and to permit the assignment of district and circuit judges to assist the judges of the Court of Claims when necessary.[495] An examination of the congressional debates clearly reveals that Congress understood that the Supreme Court's divided

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Constitution, but from the Congressional power 'to pay the debts . . . of the United States,' which it is free to exercise through judicial as well as non-judicial agencies." Id. at 587, 61 S. Ct. at 770 (citing U.S. Const. art. I, § 8, cl. 1). See also Monaco v. Mississippi, 292 U.S. 313, 321, 54 S. Ct. 745, 747 (1934); Pope v. United States, 323 U.S. 1, 9, 65 S. Ct. 16, 21 (1944).

489. See supra notes 457-62 and accompanying text.

490. 337 U.S. 582, 69 S. Ct. 1173 (1944). This case involved whether or not Congress could confer jurisdiction on federal courts to determine actions brought by citizens of the District of Columbia against citizens of one of the States. A divided Court held the statute constitutional for different reasons.

491. Justices Jackson, Black, and Burton adhered to the view that jurisdiction to determine claims was solely an Article I power with no Article III basis. Id. at 592-94, 69 S. Ct. at 1177-79 (plurality opinion).

492. Chief Justice Vinson and Justices Rutledge, Douglas, and Murphy appeared to endorse this view in their concurring opinion. Id. at 609-10, 69 S. Ct. at 1186-87 (Vinson, C.J., Rutledge, Douglas, Murphy, JJ., concurring). Likewise, Justices Frankfurter and Reed said in dissent that the Court's discussion in *Williams* regarding "controversies to which the United States shall be a party" was "dictum." Id. at 640 n.20, 641-42 n.21, 69 S. Ct. at 1207-08 nn.20-21 (dissenting opinion).

493. Justices Frankfurter and Reed, who dissented from the decision's conclusion, took the position that suits involving claims against the government were within the federal question jurisdiction of Article III. Id. at 648-49, 69 S. Ct. at 1196-97 (Frankfurter, Reed, JJ., dissenting). Chief Justice Vinson, and Justices Rutledge, Douglas, and Murphy expressly agreed with this portion of Frankfurter and Reed's dissenting opinion. Id. at 610, 69 S. Ct. at 1187 (Vinson, C.J., Rutledge, Douglas, Murphy, JJ., concurring).

494. S. 1349, 83 Cong., 1st Sess. (1953); H.R. 1070, 83d Cong., 1st Sess. (1953).

495. H.R. Rep. No. 695, 83d Cong., 1st Sess. 2 (1953); S. Rep. No. 261, 83d Cong., 1st Sess. 2-3 (1953).

Tidewater opinion of 1949—which suggested an Article III basis for claims—had opened the door for a possible congressional reversal of *Williams*.[496] Most members of Congress came to agree with Senator Laner of North Dakota that *Williams* was wrongly decided and that "[t]his measure would bring about what is believed to be the original intent of Congress when the Court of Claims was created."[497] Critics of the bill, such as Senator Gore of Tennessee, asked how Congress could declare the Court of Claims to be an Article III court and at the same time continue to require it to render advisory opinions.[498] Notwithstanding this concern, the bill was adopted.[499] Thus, by 1953 Congress was willing to relinquish voluntarily, at least in word if not totally in deed, constitutional hegemony over the Court of Claims.

3. Relinquishment—Automatic Payment of Most Judgments

Despite the 1953 congressional declaration, two factors which historically had confused the constitutional status of the Court of Claims remained unchanged: (1) its advisory jurisdiction,[500] and (2) its inability to enforce its judgments if Congress refused to appropriate the necessary funds.[501] Although Congress continued to request advisory opinions even after its 1953 declaration,[502] it took action three years later which substantially alleviated the second concern.

In 1956, Congress adopted the Automatic Payment of Judgments Act which provided a continuing appropriation for all judgments certified by the Comptroller General not in excess of $100,000.[503] The purpose of the legislation was to eliminate delays in the payment of judgments and the additional interest costs incurred as a result of such delays.[504] Although subject to the $100,000 limit, it was estimated at the time that it would cover 98 percent of all judgments.[505] This represented an historic shift in congressional attitudes. As noted, after the Civil War Congress refused to provide for either a continuing appropriation for the payment of judgments or the enforcement of judgments through

496. See 99 Cong. Rec. 8943-44 (1953).
497. Id. at 5296.
498. Id. at 8944.
499. Act of July 28, 1953, ch. 253, 67 Stat. 226 (1953).
500. Although the 1953 statute repealed the provision relating to executive reference jurisdiction, see Act of July 28, 1953, § 8, 67 Stat. 226, 226 (1953), it left intact jurisdiction over congressional reference cases. Note, The Constitutional Status of the Court of Claims, 68 Harv. L. Rev. 527, 531-34 (1955).
501. See Note, supra note 500, at 530-31.
502. See, e.g., Waring v. United States, 127 Ct. Cl. 336 (1954); Gorham v. United States, 127 Ct. Cl. 750 (1954); Braund v. United States, 130 Ct. Cl. 691 (1955).
503. Automatic Payment of Judgments Act, ch. 748, 70 Stat. 694 (1956).
504. H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1956).
505. Id.

execution.[506] Instead, Congress chose to appropriate funds annually on a lump sum basis—at first prospectively and then ultimately retrospectively after 1895.[507] Although Congress almost always paid,[508] significant questions were raised over the constitutional status of such judgments if, as in the *Pocono Pines* litigation, Congress chose not to pay a certain judgment.[509] The 1956 legislation did much to minimize this concern.

Thus, following World War II, Congress enacted three significant pieces of legislation: the Federal Tort Claims Act in 1946, the statutory declaration that the Court of Claims was an Article III court in 1953, and the Automatic Payment of Judgments Act in 1956. There was little doubt that Congress, which now had weightier matters on its agenda, was moving toward a "judicial model" of claims determination in which private claims would be finally determined by the federal judiciary pursuant to the rule of law, rather than by Congress pursuant to the political process. During this period, the states were also gradually moving away from the "legislative model."[510] Despite favorable indications,[511] the question became how the Supreme Court would react to this congressional change in direction given its 1933 opinion in *Williams* and its divided 1949 opinion in *National Insurance Co.*

B. Triumph—Toward A "Judicial Model"

1. A "Judicial Model" of Article III

In 1962, the Supreme Court reexamined the constitutional status of the Court of Claims in *Glidden Co. v. Zdanok*.[512] This case involved the validity of a federal district court judgment rendered by a judge of the Court of Claims who was sitting pursuant to a temporary assignment

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506. See supra notes 256-58, 281-84 and accompanying text.

507. See supra notes 290-305 and accompanying text.

508. See supra note 306.

509. See supra note 455 and accompanying text.

510. The state reforms were gradual and appeared to favor administrative, rather than judicial, methods of determining claims. See generally Note, Administration of Claims Against the Sovereign—A Survey of State Techniques, 68 Harv. L. Rev. 506 (1955). Nevertheless, there were isolated signs that the sovereign immunity doctrine was no longer beyond judicial criticism. For example, in 1953 Justice Carter of the California Supreme Court, in a dissenting opinion, stated that "[t]he entire doctrine of governmental immunity rests upon a rotten foundation, and professors, writers and liberal-minded judges are of the view that it should be placed in the judicial garbage can where it belongs." Talley v. Northern San Diego Hosp. Dist., 41 Cal. 2d 33, 43, 257 P.2d 22, 28 (1953). See also Boxberger v. State Highway Dep't, 126 Colo. 438, 250 P.2d 1007 (1952); Note, The Sovereign Immunity of the States: The Doctrine and Some of Its Recent Developments, 40 Minn. L. Rev. 234 (1956).

511. On February 23, 1954, Chief Justice Earl Warren assigned a federal circuit judge to temporarily serve as a judge of the Court of Claims pursuant to the act which had declared the Court of Claims an Article III court. 127 Ct. Cl. xxi (1954).

512. 370 U.S. 530, 82 S. Ct. 1459 (1962).

from the Chief Justice. The issue was whether a Court of Claims judge was an Article III judge capable of accepting such an assignment. The case, therefore, turned on the effect of Congress's 1953 statutory declaration on the Supreme Court's 1933 decision in *Williams*. On a five to two vote,[513] the Supreme Court sustained both the judgment and the Article III status of the Court of Claims. However, the five justices voting to sustain split into two groups.

The plurality opinion was written by Justice Harlan and joined by Justices Brennan and Stewart.[514] After tracing the history of the Court of Claims, Justice Harlan concluded that the Supreme Court had consistently assumed the Article III status of the Court of Claims during the post-Civil War period[515] and that its opinions in *Bakelite* and *Williams* were wrongly decided.[516] In particular, Harlan disagreed with the concept in *Williams* that "controversies to which the United States shall be a party" only applied to situations where the United States was a party plaintiff.[517] Relying on cases such as its 1902 opinion in *Minnesota v. Hitchcock*, Harlan noted that the *Williams* analysis was directly contrary to earlier precedent.[518] In a return to the "hybrid model" theory, Harlan stated that this Article III provision applied to both party plaintiff and party defendant status and "once . . . consent is given, . . . there remains no barrier to justiciability."[519] Next, Harlan addressed the issue raised by Justice Taney in his "lost opinion"[520]—*i.e.*, whether enforceability was essential to Article III jurisdiction.[521] After noting Congress's 1956 adoption of the Automatic Payment of Judgment Acts for awards up to $100,000[522] and Congress's near perfect payment history even before this enactment,[523] Harlan observed that this created a situation "surely more favorable to prevailing parties than that obtaining in private litigation."[524] Under these circumstances, Harlan concluded that this "may well make us doubt whether the capacity to enforce a judgment

513. A dissenting opinion was written by Justice Douglas and joined by Justice Black who continued to adhere to the Court's prior position in *Bakelite* and *Williams* that the Court of Claims was an Article I court. Id. at 589-606, 82 S. Ct. at 1493-1502. Justices Frankfurter and White did not participate in the Court's decision. Id. at 585, 82 S. Ct. at 1491.

514. Id. at 531-85, 82 S. Ct. at 1463-91.

515. See id. at 552-58, 82 S. Ct. at 1474-77.

516. See id. at 562-68, 82 S. Ct. at 1479-82.

517. Id. at 562, 82 S. Ct. at 1479.

518. Id. at 564, 82 S. Ct. at 1480.

519. Id.

520. See supra note 302.

521. *Zdanok*, 370 U.S. at 568-71, 82 S. Ct. at 1482-84.

522. Id. at 569, 82 S. Ct. at 1482.

523. Id. at 570, 82 S. Ct. at 1483 ("A study concluded in 1933 found only 15 instances in 70 years when Congress had refused to pay a judgment.").

524. Id.

is always indispensable for the exercise of judicial power."[525] Having concluded that the Court of Claims was an Article III court, Harlan assumed that advisory jurisdiction inconsistent with this status would no longer be entertained.[526] Thus, the plurality's position was that the 1953 statutory declaration merely confirmed the existing Article III status of the Court of Claims.

A concurring opinion was written by Justice Clark and joined by Chief Justice Warren.[527] Justice Clark objected to the "unnecessary overruling" of *Bakelite* and *Williams* by the plurality.[528] Clark argued that the two prior cases were compelled by the substantial advisory jurisdiction which the Court of Claims exercised during that period of its history.[529] Since that time, however, Congress had reduced the number of congressional reference cases to approximately ten a year, and practically all the court's jurisdiction was now comprised of Article III cases.[530] Given this significant change in circumstances, Justice Clark believed that the Supreme Court could give effect to the 1953 statutory declaration without overruling its previous opinions.[531] Given its Article III status, Clark also believed the Court of Claims should henceforth decline to render advisory opinions.[532]

Thus, after the Supreme Court's 1962 decision in *Glidden Co. v. Zdanok*, the Article III basis for claims was once again firmly established. The Article III judges of the Court of Claims stopped responding to congressional reference cases, and in 1966 Congress was forced to confer this responsibility on the non-Article III trial commissioners of the Court of Claims.[533] The Supreme Court made a major readjustment and took

525. Id. Most legal scholars would agree with Harlan that an official sanction is not always an essential criterion for the existence of a body of legal rules so long as there is a reasonably high degree of compliance. See generally E. Bodenheimer, Jurisprudence 269-76 (rev. ed. 1974).

526. *Zdanok*, 370 U.S. at 582-83, 82 S. Ct. at 1489-90.

527. Id. at 585-89, 82 S. Ct. at 1491-93.

528. Id. at 585, 82 S. Ct. at 1491. It appears, however, that Harlan and the plurality were concerned that a theory that admitted that a change in the constitutional status of the Court of Claims occurred in 1953 would also require new presidential appointments for all the positions on the Court of Claims. Id. at 589, 82 S. Ct. at 1493.

529. Id. at 586, 82 S. Ct. at 1491.

530. Id. at 586-87, 82 S. Ct. at 1491-92.

531. Id. 585-87, 82 S. Ct. at 1491-92.

532. Id. at 587, 82 S. Ct. at 1492 ("In my view the Court of Claims, if and when such a reference occurs, should with due deference advise the Congress, as this Court advised the President 169 years ago, that it cannot render advisory opinions.").

533. In 1966, Congress conferred the responsibility for determining congressional reference cases upon the chief commissioner of the trial division of the Court of Claims. Act of October 15, 1966, Pub. L. No. 89-681, 80 Stat. 958 (1966); Glosser, Congressional Reference Cases in the United States Court of Claims: A Historical and Current Perspective, 25 Am. U.L. Rev. 595 (1976). This was constitutionally permissible because the commissioners (trial judges) of the Court of Claims were not Article III judges. See 2 W. Cowen, P. Nichols & M. Bennett, supra note 88, at 63.

a big step toward establishing an Article III basis for a "judicial model" of claims determination.

2. A "Judicial Model" of Claims Jurisdiction

In 1962 in *Glidden Co. v. Zdanok*, the Supreme Court was careful to state that the exercise of Article III jurisdiction was conditioned upon a waiver of sovereign immunity.[534] Moreover, in 1963 the Supreme Court reaffirmed the validity of this doctrine in two cases involving land.[535] The Supreme Court's position was contrary to the views of many of the doctrine's critics[536] and in sharp contrast to the decisions of many state courts which judicially abolished or abridged the sovereign immunity doctrine during the late 1950's and early 1960's.[537]

By this time, however, the transfer of claims from Congress to the courts had been so extensive that it had alleviated much of the pressure at the federal level for judicial abolition of the doctrine. As previously indicated, aggrieved individuals could bring damage actions against the federal government for contract claims since the reorganization of the Court of Claims in 1863,[538] and for most other common legal claims (e.g., admiralty, tax, pay, and "taking" cases) since the adoption of the Tucker Act in 1887[539]—the significant exception, of course, being for those claims "sounding in tort."[540] However, Congress had subsequently waived much of its tort immunity over the years as follows: patent claims in 1910,[541] negligence claims in 1946,[542] and copyright claims in 1960.[543] Such extensive legislative waiver of immunity was not the

534. 370 U.S. at 564, 82 S. Ct. at 1480.

535. See Dugan v. Rank, 372 U.S. 609, 83 S. Ct. 999 (1963); Hawaii v. Gordon, 373 U.S. 57, 83 S. Ct. 1052 (1963).

536. Criticism of the sovereign immunity doctrine continued even after the adoption of the Federal Tort Claims Act of 1946. See, e.g., Block, Suits Against Government Officers and the Sovereign Immunity Doctrine, 59 Harv. L. Rev. 1060 (1946); Carrow, Sovereign Immunity in Administrative Law: A New Diagnosis, 9 J. Pub. L. 1 (1960); Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963); Pugh, Historical Approach to the Doctrine of Sovereign Immunity, 13 La. L. Rev. 476 (1953); Walkup, Immunity of the State From Suit By Its Citizens—Toward A More Enlightened Concept, 36 Geo. L.J. 310 (1948).

537. For a list of the state court decisions from this period, see Note, The Role of the Courts in Abolishing Governmental Immunity, 1964 Duke L.J. 888, 890 n.12.

538. Act of March 3, 1863, ch. 92, 12 Stat. 765 (1863).

539. Act of March 3, 1887, ch. 359, 24 Stat. 505 (1887).

540. Id.

541. Act of June 25, 1910, ch. 423, 36 Stat. 851 (1911).

542. Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (1947) (codified as amended at 28 U.S.C. §§ 1346, 2671 et seq. (1983)). The waiver of immunity for negligence, however, is significantly qualified by the "discretionary function" exemption, see 28 U.S.C. § 2680(a) (1983). Compare Dalehite v. United States, 346 U.S. 15, 73 S. Ct. 956 (1953) (negligence at "planning" level still immune) with Indian Towing Co. v. United States, 350 U.S. 61, 76 S. Ct. 122 (1955) (negligence at "operational" level not immune).

543. Act of Sept. 8, 1960, Pub. L. No. 86-726, 74 Stat. 855 (1960).

case in many states where reform was prompted only after the judicial abolition or abridgment of the sovereign immunity doctrine.[544] Thus, the sovereign immunity doctrine remained the federal rule in theory largely because immunity had become the decided exception in practice. Moreover, the Supreme Court was to devise other means to address the last, significant pocket of federal immunity[545]—the area of intentional torts.

During the 1970's, the Supreme Court responded to the government's intentional tort immunity by making federal officials, rather than the government itself, increasingly liable for their own tortious acts.[546] This was accomplished in two ways. First, in 1971 the Supreme Court held in *Bivens v. Six Unknown Federal Narcotics Agents*[547] that federal narcotics agents who violated the Fourth Amendment prohibition against unreasonable searches and seizures could be held personally liable for damages in a suit brought directly under the Fourth Amendment itself—no further statutory authorization by Congress was necessary.[548] Following *Bivens*, the federal courts expanded the case's rationale to include

544. See Note, supra note 537, at 890-92.

545. After the adoption of the Federal Tort Claims Act of 1946, it was suggested that Congress should reassess its preservation of immunity for intentional torts. See Developments in the Law—Remedies Against the United States and its Officials, 70 Harv. L. Rev. 827, 891 (1957). Congress, however, preferred to determine such claims itself pursuant to its own internal procedures. See generally Gellhorn & Lauer, Congressional Settlement of Tort Claims Against the United States, 55 Colum. L. Rev. 1 (1955). Nevertheless, during the 1970's Congress waived significant immunity in the non-claims area. In 1972 Congress enacted legislation to permit quiet title actions to be brought against the United States. Act of Oct. 25, 1972, Pub. L. No. 92-562, 86 Stat. 1176 (codified at 28 U.S.C. § 1346(f), 1402(d), 2409(a) (1983)). And in 1976 Congress amended the Administrative Procedure Act to permit review of administrative action in suits for relief other than monetary relief. Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (codified at 5 U.S.C. §§ 702-703 (1983)).

546. In theory, federal personnel were personally answerable under state law for torts committed while engaging in official duties. Wheeldin v. Wheeler, 373 U.S. 647, 652, 83 S. Ct. 1441, 1445 (1962). In reality, however, certain privileges and immunities had effectively shielded them from most tort liability. See Davis, Administrative Officers' Tort Liability, 55 Mich. L. Rev. 201 (1956). In particular, federal personnel exercising discretionary authority could invoke an absolute federal immunity. Barr v. Mateo, 360 U.S. 564, 574, 79 S. Ct. 1335, 1341 (1959); Spalding v. Vilas, 161 U.S. 483, 498-99, 16 S. Ct. 631, 637 (1895). For a concise summary of the law of public officer liability as it existed during the early 1970's, see W. Prosser, Handbook of the Law of Torts § 132, at 987-92 (4th ed. 1971).

547. 403 U.S. 388, 91 S. Ct. 1999 (1971).

548. In a concurring opinion, Justice Harlan addressed the lack of a statute authorizing a damage remedy as follows:

> [I]t would be at least anomalous to conclude that the federal judiciary—while competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies . . . is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will.

Id. at 403-04, 91 S. Ct. at 2008.

a wide range of constitutional infringements including violations of due process, freedoms of speech and assembly, and equal protection.[549] Thus, after *Bivens*, federal officials could be held personally liable for committing a wide variety of constitutional wrongs directly under the Constitution itself.[550] Second, in 1974 the Supreme Court held in *Scheuer v. Rhodes*[551] that Ohio officials who made critical decisions that culminated in the fatal shooting of three students at Kent State University in 1970 could assert only a conditional, rather than an absolute, immunity in civil rights damage suits filed against them in their personal capacity. Thus, an executive official could no longer claim a broad, absolute immunity for all his discretionary acts.[552] The official could claim official immunity only if he acted in good faith and upon a reasonable belief in the validity of his acts.[553] In subsequent cases, the Supreme Court applied the conditional immunity doctrine to constitutional violations by federal officials as well.[554] The effect of the *Bivens* and *Scheuer* line of case law was to expand substantially the personal responsibility of federal officials for their own tortious acts by increasing their liability for constitutioual wrongs and by decreasing the scope of their personal

549. See Davis v. Passman, 442 U. S. 228, 99 S. Ct. 2264 (1979); Lehmann, Bivens and Its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials, 4 Hastings Const. L.Q. 531, 566-572 (1977). For an excellent article regarding the scope of recoverable damages, see Love, Damages: A Remedy for the Violation of Constitutional Rights, 67 Calif. L. Rev. 1242 (1979).

550. Ironically, Congress had in 1871 imposed personal liability on state and local governmental personnel for constitutional violations. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1873) (codified as amended at 42 U.S.C. § 1983 (1983)).

551. 416 U.S. 232, 94 S. Ct. 1683 (1974).

552. Barr v. Mateo, 360 U.S. 564, 574, 79 S. Ct. 1335, 1341 (1959); Spalding v. Vilco, 161 U.S. 483, 498-99, 16 S. Ct. 631, 637 (1895). In *Scheuer*, Chief Justice Burger described the relationship between the sovereign immunity of the government and the personal immunity of the official as follows:

> The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine - that the 'King can do no wrong' - did not protect all government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability.

416 U.S. at 239, 94 S. Ct. at 1688.

553. See *Scheuer*, 416 U.S. at 247-48, 94 S. Ct. at 1692 ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in course of official conduct."). Subsequent Supreme Court cases defining the qualified immunity defense include: Wood v. Strickland, 420 U.S. 308, 95 S. Ct. 992 (1975); Butz v. Economou, 438 U.S. 478, 98 S. Ct. 2894 (1978); Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982); Davis v. Scherer, 104 S. Ct. 3012 (1984).

554. Butz v. Economou, 438 U.S. 478, 98 S. Ct. 2894 (1978); Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982).

immunity.[555] The Supreme Court itself stated that this expansion was prompted by the need to deter official wrongdoing and to provide victims with relief given the federal government's retained tort immunity.[556]

The Supreme Court's actions, however, resulted in pressure on Congress to waive the government's remaining tort immunity.[557] After *Bivens*, many felt it was unfair and inhibiting to make federal employees bear the brunt of *Bivens* liability entirely themselves.[558] A Senate report described another disparity as follows: "under the Federal Tort Claims Act a Federal mail *truck* driver creates direct federal liability if he negligently runs down a citizen . . . but the Federal Government is held harmless if a federal narcotics agent intentionally assaults that same citizen in the course of an illegal 'no-knock' raid."[559] In response to this specific inequity, Congress amended the Federal Tort Claims Act in 1974 and waived the government's immunity with regard to the following torts committed by its investigative and law enforcement personnel: assault, battery, false imprisonment, abuse of process, and malicious prosecution.[560] However, Congress rejected proposals for a general waiver of its tort immunity for all federal personnel,[561] preferring to continue to consider such claims itself pursuant to its own procedures.[562] Nevertheless, bills proposing a more extensive waiver have continued to be introduced in subsequent Congresses.[563]

Thus, during the 1970's the Supreme Court continued to adhere to the sovereign immunity doctrine despite its widespread abridgment by state courts.[564] However, by significantly increasing the personal liability

555. For an excellent discussion of the blessings and problems created by this expansion, see Bermann, Integrating Governmental and Officer Tort Liability, 77 Colum. L. Rev. 1175 (1977).

556. *Butz v. Economou*, 438 U.S. at 504-06, 98 S. Ct. at 2909-10.

557. Boger, Gitenstein & Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis, 54 N.C.L. Rev. 497 (1976).

558. Id. at 512.

559. S. Rep. No. 588, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 2789, 2791.

560. 28 U.S.C. § 2680(h) (1982) (effective March 16, 1974).

561. See Burger, Gitenstein & Verkuil, supra note 557, at 510-17.

562. For a good article describing congressional procedures for determining claims and the use after 1966 of Commissioners of the Court of Claims to determine factual questions, see Bennett, Private Claims Acts and Congressional References, 9 U.S.A.F. JAG L. Rev. 9 (Nov.-Dec. 1967).

563. See, e.g., S. 2117, 95th Cong., 1st Sess. (1977); H.R. 9219, 95th Cong., 1st Sess. (1977); H.R. 2659, 96th Cong., 1st Sess. (1979); H.R. 24, 97th Cong., 1st Sess. (1981); S. 633, 98th Cong., 1st Sess. (1983). See also Bell, Proposed Amendments to the Federal Tort Claims Act, 16 Harv. J. Legis. 1 (1979); Castro, Government Liability for Constitutional Torts: Proposals to Amend the Federal Tort Claims Act, 49 Tenn. L. Rev. 201 (1982); Dolan, Constitutional Torts and the Federal Tort Claims Act, 14 U. Rich. L. Rev. 281 (1979).

564. See, e.g., United States v. Testan, 424 U.S. 392, 399, 96 S. Ct. 948, 953-54

of federal officials for their own intentional torts, the Supreme Court had chosen to prod, rather than to coerce, Congress toward completing a "judicial model" of claims jurisdiction.

3. A "Judicial Model" of Enforcement

During the late 1970's and early 1980's, the focus of development shifted from immunity to the payment of judgments. Ever since Lord Sommers's classic argument in 1700 in the *Case of the Bankers*,[565] it had been regarded as axiomatic that a judicial power to dispurse funds directly from the public treasury was incompatible with a legislative power to allocate scarce resources to the most pressing public and private needs.[566] By the time of American independence, it was already a well-established English practice to submit money judgments against the crown to Parliament for payment.[567] This received wisdom was never seriously questioned by either Congress or the federal courts. Thus, Congress had historically refused to enact a continuing appropriation for the payment of all judgments,[568] and the federal courts had refused to enforce payment without a specific appropriation.[569] As late as 1974, the Supreme Court continued to state that a judgment creditor must "'rely on the good faith of the United States'" for payment.[570] State courts had long adopted a similar position for judgments against a state.[571]

(1976). By 1977, 31 state courts had abolished or abridged sovereign immunity by judicial action. K. Davis, Administrative Law of the Seventies § 25.00 (1976 & Supp. 1977).

565. 14 How. St. Trials 1 (1816).

566. In 1700 Lord Sommers maintained in the *Case of the Bankers* that a judicial power to disperse funds from the treasury was incompatible with Parliament's newly acquired power of the purse. His classic argument was stated as follows:

> The barons of the Exchequer [when sitting as a court of justice] cannot, as such, be conusant of the necessities of the state; and if they were, and knew them to be ever so pressing, they must act according to one rule; and must order a pension . . . to be paid with the very money, which ought to be employed, and possibly was provided by parliament, for suppressing a rebellion, or resisting an invasion, or setting out a fleet.
>
> For they, as a court of justice, have no judgment of discretion allowed them: whenever the party comes to pray it, the grant must be inrolled and allowed, and the judgment given, and the writ go.

Id. at 103.

567. See Macbeath v. Haldiman, 1 Term R. 172 (K.B., Durnford & East's Reps. 1785-1787).

568. See supra notes 256-68, 281-84, 503-05 and accompanying text.

569. See Reeside v. Walker, 52 U.S. (11 How.) 272, 290-91 (1850).

570. Regional Rail Reorganization Act Cases, 419 U.S. 102, 149 n.35, 95 S. Ct. 335, 361 n.35 (1974).

571. E.g., Carter v. State, 42 La. Ann. 927, 8 So. 836 (1890); Carr v. State, 127 Ind. 204, 26 N.E. 778 (1891); Westinghouse Elec. Mfg. Co. v. Chambers, 169 Cal. 131, 145 P. 1025 (1915). But see State v. Yalle, 199 Wash. 70, 90 P.2d 263 (1939).

In 1977 Congress challenged the wisdom of Lord Somers's axiom by amending the Automatic Payment of Judgment Act to remove the $100,000 payment limitation.[572] After twenty-one years, Congress apparently concluded that the problems created by the $100,000 limit (*i.e.*, delays,[573] added interest costs,[574] apportionment questions[575]) outweighed the risk that any isolated judgment would seriously jeopardize its 400 billion dollar budget.[576] In the words of a Senate report, the amendment would result in a "permanent appropriation to pay future claims and judgments."[577] The historical significance of this practical judgment which Congress reached in adopting a routine supplemental appropriations bill—was not lost on the Court of Claims.[578] That court described the 1977 amendment in its official history as follows:

> In 1855 Congress would not even permit a final judgment, reserving to itself the right to second-guess the court. By 1866 the court [of claims] could enter a final judgment but Congress still reserved the right, though [largely] unused . . ., to challenge a court judgment by refusing to pay it. One hundred and eleven years later it cut the court from this financial apron string. The court had served its probationary period, if you can call it that, and after 122 years Congress formally announced that it would not be necessary to maintain any oversight of the judgments . . . . In a sense, it is the ultimate compliment that a sovereign would leave its purse standing open "permanently and . . . indefinitely" in this way.[579]

Theoretically, the 1977 amendment also rendered moot the question of the essentialness of enforceability to the exercise of Article III jurisdiction[580] by providing a funding source out of which judgments could be judicially enforced.[581] Thus, movement toward a "judicial model" of enforcement has, in a sense, been achieved at the federal

572. Supplemental Appropriations Act of 1977, Pub. L. No. 95-26, 91 Stat. 61, 96-97 (1980) (codified and reorganized at 31 U.S.C. § 1304 (1983)).

573. 2 W. Cowen, P. Nichols & M. Bennett, supra note 88, at 161.

574. Id.

575. United States v. Maryland, 349 F.2d 693 (D.C. Cir. 1965); United States v. Varner, 400 F.2d 369 (5th Cir. 1968).

576. The federal government spent $400,506,000,000 in the 1977 fiscal year. Executive Office of the President, Office of Management and Budget, Budget of the United States Government, Fiscal Year 1984 9-55 (1984) (Table 24 compiling budget outlays from 1789-1984).

577. S. Rep. No. 64, 95th Cong., 1st Sess. 173 (1977).

578. 2 W. Cowen, P. Nichols & M. Bennett, supra note 88, at 161-62.

579. Id.

580. See *Glidden Co. v. Zdanok*, 370 U.S. at 568-71, 82 S. Ct. at 1482-84.

581. See Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838).

level through legislative acquiescence rather than through judicial assertion[582] of an inherent enforcement power.[583]

4. A "Judicial Model" of Organization

In 1982 Congress took a major step toward integrating the adjudication of government claims into the normal federal court structure.[584] In theory, the Court of Claims was a trial court.[585] However, over time the growth of its caseload forced it to evolve a two-tier structure that consisted of an appellate division composed of its Article III judges and a trial division composed of commissioners appointed by the court itself.[586] The commissioners, who were not Article III judges, had no power to enter final judgments, and therefore all their findings and recommendations were subject to "appeal" to the Article III judges for final disposition.[587]

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582. It has been subsequently argued, however, that the federal judiciary may well possess the authority to enforce money judgments against the United States even without a specific appropriation. See Stewart, The Enforcement of Judgments Against the United States, 12 Creighton L. Rev. 815 (1979).

583. During the 1980's a few state courts, most notably in California, asserted broad powers of enforcement if the legislature had unreasonably refused to pay a valid judgment. In Mandel v. Myers, 29 Cal. 3d 531, 629 P.2d 935, 174 Cal. Rptr. 841 (1981), the California Supreme Court upheld an order which compelled the state controller to pay a $25,000 judgment from a department's general operating budget despite the fact that the California Legislature, on two occasions, refused to appropriate the necessary funds. Rather than assuming the "good faith" of the legislature, the California Supreme Court found that the legislature's refusal stemmed not from a lack of funds or more pressing budget priorities but from a legislative redetermination of the merits of the case. Id. at 538, 629 P.2d at 938, 174 Cal. Rptr. at 844. The court concluded that this violated the separation of powers. Id. at 549, 629 P.2d at 946, 174 Cal. Rptr. at 852. While it recognized that it could not compel the legislature to appropriate funds, id. at 539, 629 P.2d at 939, 174 Cal. Rptr. at 845, the California Supreme Court held that it could invalidate any restriction against payment placed on funds appropriated to the judgment debtor agency which would otherwise be available for the payment of such judgment. Id. at 539-42, 545-51, 629 P.2d at 939-41, 943-47, 174 Cal. Rptr. at 845-47, 849-53. A subsequent California case indicated that the size of the judgment and its disruptive impact on the agency's programs were important factors in determining whether funds were otherwise available. See California State Employees' Assn. v. Cory, 123 Cal. App. 3d 888, 176 Cal. Rptr. 904 (1981) (refusal to order payment of $18,000,000). Another case ordered payment out of an agency's unexpended, unencumbered funds. Serrano v. Priest, 131 Cal. App. 3d 188, 182 Cal. Rptr. 387 (1982). For a critique, see Note, Mandel v. Myers: Judicial Encroachment on Legislative Spending Powers, 70 Calif. L. Rev. 932 (1982).

584. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 18 U.S.C. (1983)).

585. Although they seldom did so, the Article III judges of the Court of Claims were authorized to sit as trial judges. See 2 W. Cowen, P. Nichols & M. Bennett, supra note 88, at 91.

586. See id. at 90-95. After 1973, the commissioners' title was redesignated to that of "trial judges." Id. at 90 n.14.

587. Id. at 90-91; H.R. Rep. No. 97-312, 97th Cong., 1st Sess. 25 (1981).

The only exception was for congressional reference cases.[588] The Federal Courts Improvement Act of 1982 abolished the Court of Claims and reorganized its two-tier structure into two new courts.[589]

The act created the United States Court of Appeals for the Federal Circuit by merging the appellate division of the Court of Claims with the Court of Customs and Patent Appeals.[590] The new appellate court functions as one of the Article III circuit courts of appeal except that its jurisdiction, like that of its predecessor courts, is defined by subject matter rather than geography.[591] One of the Federal Courts Improvement Act's major purposes was to integrate the specialized appellate jurisdiction of the merged courts into the general federal court structure. The House report stated that the bill "provides the judges of the new court with a breadth of jurisdiction that rivals in its variety that of the regional court of appeals. The proposed . . . court is not a 'specialized court.' . . . Rather, it has a varied docket spanning a broad range of legal issues and types of cases."[592]

The Act also reconstituted the trial division of the Court of Claims into an Article I trial court called the United States Claims Court.[593] The major purpose of the reorganization was to confer the trial jurisdiction of the Court of Claims on "trial judges whose status is upgraded and who are truly independent."[594] To this end, the new Claims Court is authorized to render final judgments and to grant equitable relief.[595] It also elevates the former commissioners to the status of "judges" who, after a transitional period, are eligible for presidential reappointment for lengthy fifteen-year terms.[596] Finally, the new court assumes

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588. See supra note 533.

589. See supra note 584.

590. Id.

591. H.R. Rep. No. 97-312, 97th Cong., 1st Sess. 18 (1981). The House Report summarized the jurisdiction of the new Court of Appeals for the Federal Circuit as follows:

> It will handle all patent appeals and some agency appeals, as well as all other matters that are now considered by the CCPA or the Court of Claims. The Court of Claims decides cases involving federal contracts, civil tax issues if the government is the defendant, Indian claims, military and civilian pay disputes, patents, inverse condemnation, and various other matters. The CCPA decides patent and customs cases from several sources, and those cases often include allegations of [the] defenses of "misues, fraud, inequitable conduct, violation of the antitrust laws, breach of trade secret agreements, unfair competition, and such common law claims as unjust enrichment."

Id. at 19.

592. Id.

593. 28 U.S.C. § 171 (1983).

594. H.R. Rep., supra note 591, at 25.

595. See 28 U.S.C. §§ 1491(a), 2505 (1983).

596. See 28 U.S.C. § 172(a) (1983); Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, title I, § 167, 96 Stat. 50, 51 (1982).

the jurisdiction of the trial division of the Court of Claims, including its responsibility to determine congressional reference cases.[597] According to a House report, the Article I designation was required "[b]ecause . . . existing law gives the trial judges [*i.e.*, commissioners] of the Court of Claims jurisdiction to hear Congressional reference cases, which are not 'cases and controversies' in the constitutional sense . . . ."[598] Thus, the need to preserve congressional reference jurisdiction, rather than a desire to reassert congressional hegemony over claims, appears to have been the reason for retaining the non-Article III status of the Claims Court.

Was the 1982 reorganization consistent with the 1962 decision in *Glidden Co. v. Zdanok*, which reasserted an Article III basis for claims?[599] A case decided shortly after the adoption of the 1982 Act suggests that it was. In *Northern Pipeline Co. v. Marathon Pipe Line Co.*, the Supreme Court considered the constitutionality of bankruptcy courts created by Congress in 1978.[600] In a footnote, the Supreme Court suggested that with regard to "public rights" such as government claims, while "the presumption is in favor of Art. III courts" under *Glidden*, "when Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review."[601] This footnote appears to ratify the present arrangement created by the Federal Courts Improvement Act of 1982 whereby most jurisdiction over government claims is exercised by the Article I Claims Court whose decisions are reviewable by the Court of Appeals for the Federal Circuit.

CONCLUSION

Over the past three centuries, American attitudes toward claims have evolved slowly but no less dramatically as the focus has shifted from the legislative hall to the courthouse. As indicated, in 1680 the Virginia House of Burgesses already possessed a standing committee on public claims,[602] and by 1715 it had become so protective of this responsibility that it ordered the prosecution of judges who neglected to receive and transmit claims to it.[603] Nowadays, by contrast, Congress has waived most immunity, and the United States may be sued in the federal courts for almost all legal claims.[604] A continuing appropriation ensures the prompt payment of judgments.[605]

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597. See 28 U.S.C. §§ 1491-1492 (1983).
598. H.R. Rep., supra note 591, at 32.
599. See supra notes 512-32 and accompanying text.
600. See 458 U.S. 50, 102 S. Ct. 2858 (1982).
601. Id. at 69 n.23, 102 S. Ct. at 2870 n.23.
602. See supra notes 22-24.
603. See supra note 47.
604. See supra notes 538-48 and accompanying text.
605. See supra notes 572-77 and accompanying text.

The apparent triumph of the "judicial model" however, does not mean that the colonial "legislative model" has been vanquished. Certain remnants remain. For instance, Congress continues to determine moral and intentional tort claims itself, pursuant to its own procedure.[606] Moreover, its desire to retain its congressional reference power has affected the constitutional status of the new Claims Court.[607] The most significant vestiges, however, lie just below the surface. Although Congress has waived most immunity, the Supreme Court's continued adherence to the sovereign immunity doctrine, if taken at face value, suggests that a congressional return to the "legislative model" is still a judicially acceptable course of conduct. Moreover, if Congress repealed the continuing appropriation for the payment of judgments, there would again be no means of judicial enforcement. This does not mean that the present "judicial model" is any less "real." It does mean, however, that today's triumph may be a fleeting one. What Congress gives today, it may theoretically withdraw tomorrow. In this sense, the "legislative model" still persists in present judicial theory if not in current everyday practice.

There is an historic irony in the present situation. The "legislative model" lost popular support well before the Civil War and its last significant congressional support shortly after World War II. Accordingly, the Supreme Court—the very institution which once challenged the validity of the colonial "legislative model" under the new Constitution in 1792 in *Hayburn's Case* and in 1793 in *Chisholm*[608]—has become its last bastion of modern support. We have come full circle. It is time that the Court reviewed its continued adherence to old doctrines, such as sovereign immunity, that have clearly outlived their historical usefulness.[609] Over half of the state courts have already abolished or abridged

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606. See generally Gellhorn & Lauer, Congressional Settlement of Tort Claims Against the United States, 55 Colum. L. Rev. 1 (1955); Glosser, Congressional Reference Cases in the United States Court of Claims: A Historical and Current Perspective, 25 Am. U.L. Rev. 595 (1976); Note, Private Bills in Congress, 79 Harv. L. Rev. 1684 (1966). There is nothing inappropriate with Congress's power to determine moral claims through private legislation. Gellhorn and Lauer recognize this when they state:

> Civilized communities, valuing equality of treatment for those similarly situated and therefore preferring rules of general application, nevertheless realize that not all persons are in similar circumstances. Attentive to the limitations of general rules, they thus recognize the appropriateness of treating exceptional cases differently. . . . [W]hile maintaining a preference for general legislation, we affirm the continued value of private legislation.

Gellhorn & Lauer, supra, at 36.

607. See supra notes 593-98 and accompanying text.

608. See supra notes 100-40 and accompanying text.

609. In Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900, 907 (1984), the Court reaffirmed the proposition that "the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III . . . ." Moreover, the Court continues to construe broadly congressional exemptions from liability.

this doctrine.[610] For a "new" constitutional theory to explain the present "judicial model," the Supreme Court need only consult a couple of its old cases from 1792 and 1793. It needn't worry. The Constitution has not much changed.

See, e.g., Kosak v. United States, 104 S. Ct. 1519 (1984) (exemption for claims "arising in respect of" detention of goods by customs officials).

610. See K. Davis, supra note 564, § 25.00.