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THE last half century has witnessed a constant, almost relentless, increase of governmental responsibilities and services in both federal and state spheres of control. Due to the changing needs of our economic and social order,[1] the desire for speedy, efficient and inexpensive settlement of controversies[2] and the imperative need of specialized administrators,[3] the task of performing these new functions has not infrequently been delegated to administrative tribunals or commissions. Neither the legislature nor the judiciary was capable of administering the myriad details or countless controversies which inevitably accompanied these new functions of government. As a consequence an administrative branch of the government made its appearance in everything except name—at first merely as an offshoot of the executive department, but finally as a series of independent estab-

* This is the first part of a discussion of the constitutionality and policy of the proposed administrative court. (See infra, p. 200.) The second installment will appear in a later issue of the Review.—*Ed.*

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[1] "Administrative tribunals . . . did not come because any one wanted them to come. They came because there seemed to be no other practical way of carrying on the affairs of government and discharging the duties and obligations which an increasing complex social organization made it necessary for the government to perform. . . ." Rosenberry, "Administrative Law and the Constitution," 23 AM. POL. SCI. REV. 32 at 35 (1929).

[2] Berle, "The Expansion of American Administrative Law," 30 HARV. L. REV. 430 (1917); Frankfurter, "The Task of Administrative Law," 75 UNIV. PA. L. REV. 614 (1927); Brown, "Administrative Commissions and the Judicial Power," 19 MINN. L. REV. 261 (1935).

[3] "These boards have been created in response to a public demand for increased efficiency of government and to meet special needs and are in the main satisfactorily accomplishing the objects for which they were created. . . . Their procedure is uniformly characterized by inexpensiveness, swifter and less complicated modes of trial, and by authority to assert an initiative in the conduct of a case. . . ." Pillsbury, "Administrative Tribunals," 36 HARV. L. REV. 405 at 407 (1923).

lishments. Consequently, some writers have expressed the view that there is a fourth power of government in addition to the orthodox tripartite division.[4] Under this expanding system of public administration, the administrative tribunal has become "a great deal more than a mere machine for the application of law."[5] It was inevitable that the function of administration pass beyond the routine enforcement of law to the more substantial responsibilities involved in the creation of law and the determination of private rights as an integral part of the administrative process.

Despite the undoubted advantages to be achieved by rapid, efficient and scientific administration of governmental functions, there has always been a certain amount of distrust and hostility toward this development in administrative activity.[6] It is noteworthy that the bar is partially responsible for this attitude of critical suspicion.[7] The

[4] WILLOUGHBY, GOVERNMENT OF MODERN STATES (1919). "The advent of the new administrative power is in the public mind associated chiefly with public utility and industrial commissions. . . ." Freund, "Substitution of Rule for Discretion in Public Law," 9 AM. POL. SCI. REV. 666 (1915). Also compare: "The Federal Trade Commission exercises administrative, not judicial, powers." Chamber of Commerce of Minneapolis v. Federal Trade Commission, (C. C. A. 8th, 1922) 280 F. 45 at 48. And "The Commission is not a court; it exercises administrative, not judicial power." Eastman Kodak Co. v. Federal Trade Commission, (C. C. A. 2nd, 1925) 7 F. (2d) 994 at 996.

[5] BLACHLY and OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION 4 (1934).

[6] "It is a matter of common knowledge that the development of administrative tribunals has been opposed at every point with varying success." Rosenberry, "Administrative Law and the Constitution," 23 AM. POL. SCI. REV. 32 at 36 (1929). "Eminent authorities in England and in the United States have joined in the criticisms of the trend toward government by commissions or administrative officers." Haines, "Public Administration and Administrative Law," 26 AM. POL. SCI. REV. 875 at 877 (1932). "Heretofore it has been customary to think of bureaucracy chiefly in terms of suspicion and instinctive resistance, but this motivated prejudice is an unwarranted and unfruitful attitude. . . ." Dimock, "Forms of Control Over Administrative Action," in HAINES and DIMOCK, ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION 287 (1935).

[7] "In the United States, there are everywhere being developed at enormous cost in the most intensive fashion a multitudinous bureaucracy with autocratic powers and arbitrary discretion . . . which reach and affect almost every individual, and most of which, only a few years ago, would have been regarded as of strictly private concern and not to be tolerated by a free people." NEW YORK JUDICIARY CONSTITUTIONAL CONVENTION OF 1921, Report to Legislature, Legislative Document No. 37, p. 10 (1922). "The dislike of lawyers to Administrative Law may to some extent be attributed to the opinion of the late Professor Dicey. . . . There are not wanting those who think that Professor Dicey, eminent jurist though he was, was under a misapprehension, both with regard to his criticism and conclusions." Rt. Hon. Lord Justice Sankey, *Foreword* in PORT, ADMINISTRATIVE LAW, viii (1929). See also BECK, OUR

espousal of such dogma as "the rule of law,"[8] "supremacy of law,"[9] and "justice according to law,"[10] as well as the perennial fear of a return to "Star Chamber" methods,[11] has done much to prevent a proper evaluation of the merits of administrative procedure. In spite of this hostility towards the growth of administrative functions, the position of administrative tribunals has become firmly entrenched in the American governmental system, and within the past few decades the efforts of both the bench and bar have been in the more fruitful direction of establishing safeguards to prevent arbitrary or capricious action by these agencies.[12] This recent tendency to advocate practical means of controlling administrative action rather than the suppression of its legitimate development is well exemplified by the Logan bill providing for the establishment of a United States Administrative Court and by the attitude of the Special Committee on Administrative Law of the American Bar Association in recommending legislation of a similar character.[13]

Under the stress of the recent economic crisis, the Federal Government was compelled to exercise an increasing degree of control over

WONDERLAND OF BUREAUCRACY (1932); Sutherland, "Private Rights and Government Control," 85 CENT. L. J. 168 (1917).

[8] DICEY, LAW OF THE CONSTITUTION, 8th ed., pp. xxxvii-xlviii, 179-409 (1915).

[9] DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927).

[10] Pound, "Justice According to Law," 13 COL. L. REV. 696 (1913), 14 COL. L. REV. 1, 103 (1914).

[11] Pound, "Executive Justice," 55 AM. LAW REG. 137 (1907).

[12] The initial battleground for those opposing the growth of administrative agencies centered around the rigid application of the doctrine of non-delegability of governmental powers. Time and again the courts sustained broad delegations of power resulting in the establishment of an almost autonomous system of administrative tribunals. Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 29 S. Ct. 671 (1909); Interstate Commerce Commission v. Brimson, 154 U. S. 447, 14 S. Ct. 1125 (1894); Sears, Roebuck & Co. v. Federal Trade Commission, (C. C. A. 7th, 1919) 258 F. 307. However, the recent decisions of the Supreme Court in Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241 (1935), and Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935), may possibly indicate a belated successful return to the original field of conflict.

[13] The frequent references to the reports of the Special Committee on Administrative Law of the American Bar Association and the writings of the various members of that Committee on the subject of the Logan bill are necessitated by the fact that the Committee and its members are largely responsible for the drafting of the bill and the publicity which followed its introduction in the Senate. See "Report of the Special Committee on Administrative Law for 1936," ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION, 209 at 245 (1936). Insofar as the writer has been able to ascertain pratically all of the published material dealing directly with the merits of the Logan bill has at this date been written by members of the Special Committee or those associated with them in this work.

the forces of economic production and distribution, with the result that there was a further tremendous growth in the federal administrative machinery during the first session of the Seventy-Third Congress. As early as May, 1933, the Executive Committee of the American Bar Association took cognizance of this "new orientation in the functions of government" and appointed its Special Committee on Administrative Law for the purpose of inquiring into the "practicality and desirability of divorcing quasi-judicial functions from quasi-legislative and executive functions" and "of concentrating the quasi-judicial functions in an independent body having the character of an administrative court."[14] The committee made no formal recommendation to the Association at the annual meeting in 1933, but restricted its report to an examination of the elements of quasi-judicial, quasi-legislative and executive functions, an analysis of the distribution of these functions among the existing administrative agencies with special emphasis on those instances of overlapping functions, and a cursory description of a bill introduced by Senator Logan[15] to establish an administrative court.[16] In its second report the special committee made a more intensive investigation of the federal administrative machinery and reached the conclusion that the "judicial functions of federal administrative tribunals should be divorced from their legislative and executive functions" and transferred to either "a federal administrative court with appropriate branches and divisions" or "an appropriate number of independent tribunals . . . analogous to the Court of Claims . . . and the Board of Tax Appeals," but "in either case the tribunal [should] be limited to judicial functions."[17] The Association, at its annual meeting in 1934, adopted a resolution which substantially approved these conclusions of the special committee.[18]

In 1935, the executive committee of the Association authorized the special committee to draft a bill, incorporating provision in accordance with its conclusions and recommendations, which was to be sub-

[14] 58 A. B. A. REP. 415 (1933).

[15] S. 1835, 73d Cong. 1st sess. (1933). This bill was a forerunner to S. 3787, the recent bill introduced by Senator Logan, but contained substantially the same provisions. It is of interest to note that in 1929 Senator Norris introduced a bill—S. 5154, 70th Cong. 2d sess.—to establish a United States Court of Administrative Justice which likewise was quite similar to the present proposal.

[16] 58 A. B. A. REP. 407-427 (1933).

[17] 59 A. B. A. REP. 539-540 (1934).

[18] 59 A. B. A. REP. 144-152 (1934). The discussion which preceded the adoption of this resolution is of more than passing interest. See particularly the remarks of Judge David, of Illinois, and Clarence N. Goodwin, Esq., of the District of Columbia. 59 A. B. A. REP. 145 et seq. (1934).

mitted to the former committee before active steps were taken to secure its enactment. The special committee proceeded with this work and a draft of a bill was finally referred to the executive committee.[19] Due to certain minor criticisms affecting the details of the draft and the uncertainty created by the decision of the Supreme Court in the *Schechter* case,[20] the draft bill was not introduced in Congress and the special committee made no formal report to the Association that year.[21] During the current year the committee tentatively completed its work on a draft bill, which in principle, if not in form or detail, is satisfactory to its members, at least as a basis for study and criticism. Although neither the executive committee nor the American Bar Association has approved the draft in form or substance, permission was granted the special committee to take active steps in having the draft bill introduced in Congress.[22] The committee transmitted its draft to Senator Logan, who introduced it in the Senate as S. 3787, 74th Congress, Second Session — hereinafter referred to as the Logan bill.[23]

THE LOGAN BILL[24]

The bill provides that the proposed court shall be composed of a chief justice and not more than forty associate justices who will be transferred from the Court of Claims, the United States Court of Customs and Patent Appeals, the United States Customs Court, and the Board of Tax Appeals.[25] The justices shall hold office during good behavior and shall be appointed by the President and with the consent of the Senate.[26] The court shall consist of a trial division and an appellate division, each divided into appropriate sections, and the number of associate justices in each division shall be fixed from time to time by the chief justice, provided that the trial division shall consist of not less than twenty justices and the appellate division not

[19] The substance of this draft appeared in 21 A. B. A. J. 133 (1935).

[20] Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935).

[21] "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION 209 at 246 (1936).

[22] Ibid., p. 247 et seq.

[23] Representative Celler introduced the same bill in the House of Representatives where it was designated H. R. 12297, 74th Cong. 2d sess. (1936).

[24] S. 3787 and H. R. 12297 were referred to the Senate and House Committees on the Judiciary respectively where they died without hearing upon the adjournment of Congress.

[25] Section 2 (a), (d). [26] Section 2 (b).

less than ten justices.[27] The bill further provides for the annual appointment by the chief justice of a chairman for each division, and no justice participating in a case in the trial division, shall participate in its determination in the appellate division.[28] Each division shall consist of appropriate sections for the hearing and determination of controversies. Pending the exercise by the chief justice of his authority to designate the number, character and personnel of each section, the trial division shall consist of a claims section, a customs section, a tax section, and an extraordinary writs and licenses section; the appellate division shall consist of a claims, customs and patent appeals section and a tax, extraordinary writs and license appeals section— each exercising a jurisdiction in accordance with its title.[29] Each section shall have a presiding justice, designated annually by the chief justice; but no section in the appellate division shall consist of less than three justices, although any section in the trial division may be composed of one justice.[30]

The proposed jurisdiction of the new court can be most conveniently treated by considering each of its divisions separately. The bill vests in the trial division the present jurisdiction of the Court of Claims, the Customs Court, and the Board of Tax Appeals.[31] It provides further for the transfer to the trial division of the jurisdiction of the several District Courts of the United States over actions against collectors of internal revenue for the recovery of taxes and over suits to enjoin the collection of taxes, and the jurisdiction of the Supreme Court of the District of Columbia over proceedings by extraordinary process against officers and employees of the United States.[32] The jurisdiction to review the action of any department, commission or other agency of the Government for refusing to admit any person to practice before it or for disbarment of practice before such agency is also conferred upon the trial division.[33] Finally the bill vests *exclusively* in the trial division the variegated jurisdiction now exercised by the several commissions, administrations, departments, and other executive agencies of the Government over the revocation or suspension of licenses, permits, registrations, or other grants for regulatory purposes, including, but not limited to, certain specified jurisdictions therein enumerated.[34] The appellate division of the pro-

[27] Section 3 (a).
[28] Section 3 (b), (c).
[29] Section 4 (d), (e).
[30] Section 4 (a), (c).
[31] Section 5.
[32] Section 5.
[33] Section 5.
[34] Section 6. Space does not permit a complete enumeration of these specified classes of jurisdiction which cover more than six pages in the bill.

posed court, in addition to the jurisdiction to review the decisions of each section of the trial division, is vested with the jurisdiction and powers of the United States Court of Customs and Patent Appeals.[35]

The procedure provided for by the bill is essentially divided into three stages. The appropriate section of the trial division shall try the facts in any proceeding and render a decision thereon in accordance with the law applicable.[36] An appeal is provided to the appropriate section of the appellate division which has jurisdiction to review all matters appearing on the record, including the determination of both questions of law and questions of fact.[37] The decision of any section of the appellate division shall be deemed the decision of the division and any section may, in its discretion, permit or direct the taking of additional evidence pertaining to the issues involved.[38] A final appeal is permitted through the medium of a petition for rehearing to the appellate division sitting *en banc*, but is limited to questions of law appearing on the record.[39] The decision of the court in such cases shall be final, subject, however, to a review by the Supreme Court of the United States upon a petition for a writ of certiorari.[40]

In addition to the usual provisions relating to the appointment or transfer of employees,[41] appointment of commissioners to take testimony,[42] appointment of a marshal and deputy marshals who shall have the same duties and powers of the marshal of the Supreme Court of the United States,[43] the power to prescribe and promulgate rules and regulations,[44] and power to compel the attendance of witnesses and the production of documents,[45] the bill provides that the court shall hold annual sessions in the District of Columbia[46] and that the customs section of the trial division shall sit regularly in the City of New York;[47] but any section of the trial division, or any justice or commissioner thereof, may hold special sessions anywhere in the United States at such times and places as the chief justice shall direct.[48] In conclusion, the bill directs the court to investigate and report to Congress within two years a complete list of the classes of cases concerning which the departments or agencies of the Government are invested with judicial or quasi-judicial functions, together with a recommendation as to which of such classes of cases should be trans-

[35] Section 5.
[36] Section 4.
[37] Section 8.
[38] Section 8.
[39] Section 8.
[40] Section 8.
[41] Section 10.
[42] Section 9 (f).
[43] Section 11.
[44] Section 13.
[45] Section 15.
[46] Section 14.
[47] Section 14
[48] Section 14.

ferred to the jurisdiction of said court and as to whether additional legislation is needed to carry out the purposes of the act.[49]

The succeeding discussion of the merits of the Logan bill divides itself naturally into two distinct parts. The first part will relate to the constitutional limitations affecting the creation and jurisdiction of the proposed court. It constitutes the present installment of this paper. The discussion in this part is to a certain extent characterized by a lack of authoritative principles. The decisions of the federal courts construing such limitations do not lend themselves to a statement of clear-cut propositions, and consequently some reliance must be placed on the dicta of the courts in cases considering the problems raised by the bill. Furthermore, the provisions of the bill concerning the status of the proposed court and the jurisdictions which it will absorb are susceptible to a variety of interpretations. Consequently, from a practical standpoint, the restrictive application and effect of these constitutional principles will depend upon which interpretation of the bill the reader accepts and, in some instances, upon the varying importance that is attached to the dicta of the cases.

The second part—to appear in a later installment—will be in the nature of a critique of the bill in terms of sound administrative policy and the improvement of procedural administration. Simple clear-cut conclusions will not find a place in this functional part of our discussion any more than in the first part. One of the unfortunate circumstances in the development of American administrative law is the scant attention that has been paid the science of public administration[50] in contrast with the over-emphasis placed on problems arising in the purely judicial field of powers and remedies. Without underestimatnig the importance and legitimate interest in the subject of judicial restraints, it is the writer's purpose to apply a few well-recognized principles of governmental administration to the procedural and substantive provisions of the Logan bill, in order to arrive at a practical evaluation of the merits of the proposed legislation.

[49] Section 17.

[50] "The new administrative law must commence with a new starting point—the nature and the needs of administrative processes. On this foundation the faults of administration can be inductively analyzed, and a resulting compromise between individual and social rights can then be worked out. Within the framework of the new administrative law, administrative justice constantly tends to replace court adjudications." Dimock, "Forms of Control Over Administrative Action," in HAINES and DIMOCK, ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION 287 at 298 (1935). See also DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927).

SOME CONSTITUTIONAL QUESTIONS

In considering the creation of new federal tribunals of a judicial nature exercising a variety of jurisdictions, we are confronted by the decisions interpreting Article III of the Constitution and the intimately associated doctrine of separation of powers.[51] By the provisions of section one of the third article "the judicial power of the United States" is vested in a Supreme Court and such inferior courts as Congress may from time to time establish. In the same section these courts are made independent of Congress by conferring tenure during good behavior upon their judges and prohibiting a diminution of compensation. Section two of the same article limits the scope of "judicial power" to certain stipulated cases and controversies.[52] The language of Article III and the theory of the separation doctrine have been mutually interpreted, on the one hand, to prohibit the exercise of "the judicial power" by the legislative or executive departments of the government[53] and, on the other hand, to prevent the exercise of legislative and executive duties by the judiciary.[54]

In *Williams v. United States*,[55] a case involving the status of the judges of the Court of Claims, the Supreme Court reaffirmed the orthodox doctrine that the judicial power of Article III could not be

[51] From an historical viewpoint, judicial recognition of the frequent interdependence of the separation doctrine and interpretations of Article III was almost immediate. See Note to Hayburn's Case, 2 Dall. (2 U. S.) 409, 1 L. Ed. 436 (1792). Similarly, but to a lesser extent, the doctrine of separation of powers has its effect on the issue as to whether a case or controversy has been presented on newly arising questions. United States v. Duell, 172 U. S. 576, 19 S. Ct. 286 (1899); Postum Cereal Co. v. California Fig Nut Co., 272 U. S. 693, 47 S. Ct. 284 (1927).

[52] "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

[53] GOODNOW, PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 32 (1905). Cf. Robertson v. Baldwin, 165 U. S. 275, 17 S. Ct. 326 (1897); Ex parte Randolph, (C. C. Va., 1833) 2 Brock. 447, 20 Fed. Cas. (No. 11,558) 242.

[54] Hayburn's Case, 2 Dall. (2 U. S.) 409, 1 L. Ed. 436 (1792); United States v. Ferreira, 13 How. (54 U. S.) 40, 14 L. Ed. 42 (1852); United States v. Yale Todd, 13 How. (54 U. S.) 52 (1794) as a footnote to United States v. Ferreira, supra; In re Canada No. Ry. v. International Bridge Co., (D. C. N. Y. 1880) 7 F. 653; Canada So. Ry. v. International Bridge Co., (D. C. N. Y. 1881) 8 F. 190.

[55] 289 U. S. 553, 53 S. Ct. 751 (1933).

vested in any tribunal not organized under the provisions of that article. In rejecting the contention that the judicial power as defined by Article III extended to the jurisdiction of the Court of Claims over suits against the United States, the Supreme Court said:

> "where a controversy is of such a character as to require the exercise of the judicial power *defined by Art. III*, jurisdiction thereof can be conferred only on courts established in virtue of that article, and that Congress is without power to vest *that* judicial power in any other judicial tribunal, or, of course, in an executive officer, or administrative or executive board. . . ." [56]

With respect to limitations on the jurisdiction of the judicial department, the Supreme Court, in *Keller v. Potomac Electric Power Co.*,[57] held that Congress could not require that Court or any other court organized under Article III to assume a legislative or administrative jurisdiction in the performance of its duties. Chief Justice Taft, in delivering the opinion of the Court, said:

> "the jurisdiction of this Court and of the inferior courts of the United States ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this Court without real parties or a real case, or to administrative or legislative issues or controversies. . . ." [58]

While the rule precluding the exercise of legislative and administrative duties by the judiciary has, for the most part, been strictly adhered to, the complete segregation of the judicial power of the type described in Article III from legislative and executive agencies has proven unworkable in certain definite circumstances.[59]

1. *Competency of Legislative Courts*

In establishing provisional governments for the newly acquired territories, Congress found it necessary to create judicial tribunals with

[56] 289 U. S. 553 at 578, 53 S. Ct. 751 (1933). The italics appear in the original.

[57] 261 U. S. 428, 43 S. Ct. 445 (1923).

[58] 261 U. S. 428 at 444, 43 S. Ct. 445 (1923).

[59] It will be demonstrated that this impracticability of complete segregation did not result in a "relaxation" of the separation doctrine, but rather that the doctrine was inapplicable to the particular situation.

powers similar to those exercised by the lower federal courts. Frequently the judges of these territorial courts were given appointments for only a limited term despite the restrictive provisions of Article III guaranteeing tenure during good behavior. The constitutional validity of these limited territorial appointments was presented to the Supreme Court for the first time in *American Insurance Co. v. Canter.*[60] The Court held that the judges of the territorial courts could be given a limited tenure since such courts were established solely by virtue of Congress' plenary power over the territories[61] and not of the provisions of the third article, and that such courts did not exercise any of the jurisdiction of Article III.[62] In effect it was decided that neither the restrictions of Article III nor the separation doctrine applied to these courts, although it was conceded that the jurisdiction which they exercised was similar to the type enumerated in that article.[63] It is obvious, however, that the existence of a "judicial power" of such a nature in the tribunal created by virtue of a legislative power[64] involves a relaxation pro tanto of the doctrine of separation of powers in certain respects.[65] Other judicial tribunals which have been released

[60] 1 Pet. (26 U. S.) 511, 7 L. Ed. 242 (1828). This case involved the validity of a salvage decree of a court established by the Florida territorial legislative council pursuant to congressional requirements. Congress had vested the judicial power in a superior court and in such other tribunals as the legislature should establish. It was argued that the judicial power of Article III could be vested only in courts established by Congress. Chief Justice Marshall, in delivering the opinion of the Court, merely held that in rendering the salvage decree the territorial court was not exercising the judicial power of article three.

[61] U. S. Constitution, Art. IV, § 3.

[62] This was the first opinion to employ the term "legislative court" to describe a judicial tribunal created by virtue of Congress' legislative powers, as contrasted with the constitutional courts created under the terms and provisions of Article III of the Constitution.

[63] McAllister v. United States, 141 U. S. 174, 11 S. Ct. 949 (1891), sanctioning the jurisdiction of the territorial court of Alaska which included "the civil and criminal jurisdiction of the District Courts of the United States. . . ." Cf. Evans v. Gore, 253 U. S. 245, 40 S. Ct. 550 (1920); The "City of Panama," 101 U. S. 453, 25 L. Ed. 1061 (1879).

[64] The plenary power of Congress over the territories embraces both executive and judicial authority. Smith v. Adams, 130 U. S. 167, 9 S. Ct. 566 (1889); Cooper v. Telfair, 4 Dall. (4 U. S.) 14 (1800).

[65] This abandonment of the separation doctrine of Article III was rationalized in subsequent decisions by references to the "presumably ephemeral nature of a territorial government." Downes v. Bidwell, 182 U. S. 244 at 293, 21 S. Ct. 770 (1901). The question is one of the application of the particular provision or doctrine of the Constitution to a particular geographical subdivision, rather than the application of the entire Constitution. See the opinion of the circuit court in a note to United Sates v. Benjamin More, 3 Cranch (7 U. S.) 159, 2 L. Ed. 397 (1805), and

from the restrictive effect of the separation doctrine on the theory of extraterritoriality are the consular courts[66] and provisional military courts[67] established by the executive branch of the government. Following the establishment of the "legislative court" concept, the propriety of vesting executive duties in the territorial courts was sanctioned by implication in many cases as a logical extension of the *ratio decidendi* in the *Canter* case.[68]

The status of the courts[69] of the District of Columbia has passed through a prolonged period of judicial uncertainty, culminating in the decision of the Supreme Court in the case of *O'Donoghue v. United States*.[70] The earlier decisions of the Court seemed to indicate that the provisions of Article III applied to the courts of the District,[71] but in *Keller v. Potomac Electric Power Co.*[72] a contrary view was expressed by the Supreme Court. This case involved a consideration of the validity of a statute granting to the courts of the District extensive power to supervise the rate-making function of the local power commission. The Court held that this supervisory power was a legislative or administrative duty, but approved the vesting of such jurisdiction in the courts of the District on the ground that they were legislative courts and not organized under the provisions of the third article.[73] A similar result was reached in the cases of *Postum Cereal*

the concurring opinion in Downes v. Bidwell, supra. Thus, in O'Donoghue v. United States, 289 U. S. 516 at 541, 53 S. Ct. 740 (1933), the Court said: "It is enough that the Constitution is in force, and the question here, as well as in the case of the territories, is simply whether the provisions of Art. III relied upon are applicable. Because, for the peculiar reasons already stated, they are inapplicable to the territories, it does not follow that they are likewise inapplicable to the District. . . ."

[66] In re Ross, 140 U. S. 453, 11 S. Ct. 897 (1891).

[67] Santiago v. Nogueras, 214 U. S. 260, 29 S. Ct. 608 (1909).

[68] Pacific Steam Whaling Co. v. United States, 187 U. S. 447, 23 S. Ct. 154 (1903); Luce & Co. v. Registrar of Property of Guayama, (C. C. A. 1st, 1927) 20 F. (2d) 115.

[69] This particular discussion will be limited to a consideration of the status of the District Court of the District of Columbia (formerly the Supreme Court of the District of Columbia) and the Court of Appeals for the District of Columbia.

[70] 289 U. S. 516, 53 S. Ct. 740 (1933).

[71] Kendall v. United States, 12 Pet. (37 U. S.) 524, 9 L. Ed. 1181 (1838); Callan v. Wilson, 127 U. S. 540, 8 S. Ct. 1301 (1888); McAllister v. United States, 141 U. S. 174, 11 S. Ct. 949 (1891); Capital Traction Co. v. Hof, 174 U. S. 1, 19 S. Ct. 580 (1899); In re Macfarland, 30 App. D. C. 365 (1908).

[72] 261 U. S. 428, 43 S. Ct. 445 (1923).

[73] The power of Congress to create such a court was found in Article I, Section 8, clause 17 of the Constitution where Congress is given the power "To exercise exclusive Legislation in all Cases whatsoever, over [the District of Columbia]. . . ." However, in this same opinion, the Court refused to sustain the provisions of the statute author-

Co. v. California Fig Nut Co.[74] and *Federal Radio Commission v. General Electric Co.*,[75] where the Court reiterated its conclusion that administrative duties could be imposed on the courts of the District. The decisions explaining the inapplicability of Article III did not, however, rationalize the non-applicability of the doctrine of separation of powers to a court exercising judicial jurisdiction[76] as well as administrative or legislative power.[77]

In *O'Donoghue v. United States*[78] the question of the restrictive effect of Article III on the courts of the District was again reargued in the Supreme Court. Partially abandoning its recent dicta to the effect that the courts in the District were not established under the third article, the Court resolved the dilemma created by the vesting of administrative duties and judicial power in the same tribunal, by declaring that the courts of the District exercise a dual power derived from Congress' plenary authority over the District[79] and the provisions of the third article.[80] This shift from the "legislative" court

izing an appeal to that Court, on the ground that such administrative or legislative jurisdiction could not be conferred on a constitutional court. 261 U. S. 428 at 444. See also Frasch v. Moore, 211 U. S. 1, 29 S. Ct. 6 (1908); Atkins & Co. v. Moore, 212 U. S. 285, 29 S. Ct. 390 (1909); Baldwin Co. v. R. S. Howard Co., 256 U. S. 35, 41 S. Ct. 405 (1921).

[74] 272 U. S. 693, 47 S. Ct. 284 (1927).

[75] 281 U. S. 464, 50 S. Ct. 389 (1930). See also, In re Jessie's Heirs, (D. C. Okla. 1919) 259 F. 694.

[76] Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266, 53 S. Ct. 627 (1933); Federal Trade Commission v. Klesner, 274 U. S. 145, 47 S. Ct. 557 (1927).

[77] Only by way of dictum in the Keller case did the Court attempt to explain this abandonment of the separation doctrine. "This means that as to the District Congress possesses not only the power which belongs to it in respect of territory within a State but the power of the State as well. . . ." 261 U. S. 428 at 442, 43 S. Ct. 445 (1923). This doctrine of dual power and its effect on the separation doctrine was again discussed and more clearly explained in the case of O'Donoghue v. United States, 289 U. S. 516, 53 S. Ct. 740 (1933).

[78] 289 U. S. 516, 53 S. Ct. 740 (1933). This controversy arose out of the application of the income tax laws by the Comptroller General to the salaries of the judges of the District Court of Appeals. It was contended that a tax on these judicial salaries amounted to a violation of Article III since it resulted in a diminution of the compensation of federal judges.

[79] U. S. Constitution, Art. I, § 8, cl. 17. See supra, note 73.

[80] "If, in creating and defining the jurisdiction of the courts of the District, Congress were limited to Art. III, as it is in dealing with the other federal courts, the administrative and other jurisdiction spoken of could not be conferred upon the former. But the clause giving plenary power of legislation over the District enables Congress to confer such jurisdiction in addition to the federal jurisdiction which the District courts exercise under Art. III, notwithstanding that they are recipients of the judicial power of the United States under, and are constituted in virtue of, that article." O'Donoghue v. United States, 289 U. S. 516 at 546, 53 S. Ct. 740 (1933).

to the "constitutional" court concept was necessary in order to surround the judges in the District of Columbia with the protection of Article III.[81] But the real change of conceptual approach cannot be obscured by such verbiage, since the criterion of legislative or constitutional courts depends upon the applicability of Article III.[82] By referring to a congressional power sufficient to clothe the courts of the District "with such authority as a State may confer on her courts"[83] the Court was really denying the applicability of the separation doctrine to the courts of the Districts,[84] despite its dictum to the effect that the constitutional guaranties of Article III in their entirety applied to such courts.[85]

In somewhat the same manner the earlier decisions of the Supreme Court regarding the status of the United States Court of Claims have been the subject of considerable confusion. The Court of Claims was originally organized to serve Congress in a purely advisory capacity.[86] Subsequently, however, it was given authority to render judgments against the United States, but judgments to be paid only in the discretion of the Secretary of the Treasury.[87] Although this jurisdiction was not within the scope of Article III[88] and the Supreme Court

[81] That is, the provisions guaranteeing a life tenure and prohibiting a reduction in compensation during term of office.

[82] See, for example, the rationale of the decision in Williams v. United States, 289 U. S. 553, 53 S. Ct. 751 (1933). Also note the dissenting opinion in the O'Donoghue case, where it is said, 289 U. S. 516 at 552-553: "If the limitations relating to courts established under § 1 of Article III applied to the courts of the District of Columbia, they would necessarily prevent the attaching to the latter courts of jurisdiction and powers of an administrative sort. . . ."

[83] O'Donoghue v. United States, 289 U. S. 516 at 545, 53 S. Ct. 740 (1933). See also Keller v. Potomac Elec. Power Co., 261 U. S. 428 at 444, 43 S. Ct. 445 (1923); Postum Cereal Co. v. California Fig Nut Co., 272 U. S. 693 at 700, 47 S. Ct. 284 (1927).

[84] The separation doctrine of the Constitution is inapplicable to the authority vested in state administrative and judicial tribunals by virtue of state law. Dreyer v. Illinois, 187 U. S. 71, 23 S. Ct. 28 (1902); Prentis v. Atlantic Coast Line., 211 U. S. 210, 29 S. Ct. 67 (1908). The reference to Congress' plenary power over the territories in American Insurance Co. v. Canter, 1 Pet. (26 U. S.) 511, 7 L. Ed. 242 (1828), was not for the purpose of explaining the inapplicability of the separation of powers doctrine.

[85] As has already been indicated, the orthodox approach considered the separation doctrine to be a dependent part of interpretations of the restrictive provisions of Article III. See supra, note 51.

[86] RICHARDSON, HISTORY, JURISDICTION AND PRACTICE OF THE COURT OF CLAIMS, 2d ed. (1885).

[87] Act of March 3, 1863, c. 92, § 14, 12 Stat. L. 765 at 768.

[88] Cf. Wallace v. Adams, 204 U. S. 415, 27 S. Ct. 363 (1907); United States v. Klein, 13 Wall. (80 U. S.) 128, 20 L. Ed. 519 (1871).

accordingly refused to review a decision of the Court of Claims in *Gordon v. United States*,[89] the Supreme Court did recognize the power of Congress to establish such a special tribunal with administrative jurisdiction over such claims.[90] Following the decision in the *Gordon* case, Congress made the judgments of the Court of Claims final, and since that time the Supreme Court has reviewed its decisions[91] and in one instance suggested that it was a "constitutional court."[92]

The doctrine of legislative courts was reëxamined by the Supreme Court in the *Bakelite* case,[93] where it attempted to rationalize the non-applicability of Article III to courts not located within a territory. Included in this category was the Court of Claims, which the opinion described as "a legislative court specially created to consider claims for money against the United States."[94] The most recent decision of the Supreme Court regarding the status of the Court of Claims is the case of *Williams v. United States*.[95] In that case it was held that the Court of Claims was a legislative court since it did not

[89] 2 Wall. (69 U. S.) 561, 17 L. Ed. 921 (1865).

[90] Gordon v. United States, 2 Wall. (69 U. S.) 561, 17 L. Ed. 921 (1865); In re Sanborn, 148 U. S. 222, 13 S. Ct. 577 (1893); District of Columbia v. Eslin, 183 U. S. 62, 22 S. Ct. 17 (1901); Ex parte Pocono Pines Assembly Hotels Co., 285 U. S. 526, 52 S. Ct. 392 (1932).

By virtue of this same authority Congress established the Customs Court (formerly the Board of General Appraisers) to review the determinations of appraisers and collectors in classifying imports. Act of May 28, 1926, c. 411, 44 Stat. L. 669, 19 U. S. C. A. (Supp. 1935), § 4050.

[91] De Groot v. United States, 5 Wall. (72 U. S.) 419, 18 L. Ed. 700 (1866). It is noteworthy that this is a concurrent jurisdiction with the federal district courts for claims less than $10,000. 28 U. S. C., § 41(20) (1927).

The Court of Claims still exercises an advisory jurisdiction, but there has been no attempt to authorize an appeal to the Supreme Court involving such issues. 28 U. S. C., §§ 254, 257 (1927).

[92] United States v. Union Pacific R. R., 98 U. S. 569, 25 L. Ed. 143 (1877). Also, in Miles v. Graham, 268 U. S. 501, 45 S. Ct. 601 (1925), the Supreme Court held that the salaries of the judges of the Court of Claims were non-taxable. See note, 46 HARV. L. REV. 677 at 679 (1933).

[93] Ex parte Bakelite Corporation, 279 U. S. 438, 49 S. Ct. 411 (1929). This case primarily involved a consideration of the Court of Customs Appeals, but the attention of the Court was also directed to the status of all such specialized tribunals including the Court of Claims.

[94] Ex parte Bakelite Corporation, 279 U. S. 438 at 454-455, 49 S. Ct. 411 (1929). The dicta in United States v. Union Pacific R. R., 98 U. S. 569, 25 L. Ed. 143 (1879), and Miles v. Graham, 268 U. S. 501, 45 S. Ct. 601 (1925), to the effect that the Court of Claims was organized under article three was expressly overruled in the Bakelite case.

[95] 289 U. S. 553, 53 S. Ct. 751 (1933). The issue in this case was similar to that involved in the O'Donoghue case except that here the tax was applied to the salaries of the judges of the Court of Claims.

exercise any of the judicial power of Article III[96] and that consequently none of the restrictive provisions of the article were applicable to it.[97] Fully aware of the difficulties in taking a position which permitted the vesting of the same jurisdiction in a legislative court, constitutional courts[98] and the Supreme Court,[99] the Court extricated itself from this dilemma by analogizing the Court of Claims to the legislative courts in the territories and describing its jurisdiction as an exercise of "judicial power—as distinguished from legislative, executive, or administrative power—although not conferred in virtue of the third article of the Constitution."[100] The Court failed to indicate the source of this judicial power not arising out of Article III,[101] but the opinion characterized the jurisdiction exercised by the Court of Claims as a power over "matters which are susceptible

[96] Both United States v. Union Pacific R. R., 98 U. S. 569, 25 L. Ed. 143 (1879), and Minnesota v. Hitchcock, 185 U. S. 373, 22 S. Ct. 650 (1902), indicated that the judicial power of the third article extended to the jurisdiction exercised by the Court of Claims. Cf. Kansas v. United States, 204 U. S. 331, 27 S. Ct. 388 (1907).

[97] Williams v. United States, 289 U. S. 553 at 566, 53 U. S. 751 (1933). The Court conceded that the Court of Claims exercised a judicial power, but denied that this jurisdiction was a part of the "judicial power of Article III." The opinion points out that the language of section two of that article compels that conclusion. In enumerating the various classes of cases within "the judicial power" the word "all" precedes each specified class of cases, but this word is omitted when the article refers to "controversies to which the United States shall be a party." From this the Court argues that "the judicial power" does *not* extend to *all* controversies which the United States is a party and that suits against the United States as handled by the Court of Claims are a part of such controversies which are not within the scope of Article III. 289 U. S. 553 at 572.

[98] The concurrent jurisdiction exercised by the federal district courts over claims less than $10,000. 28 U. S. C., § 41(20) (1927).

[99] The appellate jurisdiction over *final* judgments rendered by the Court of Claims. See United States v. Jones, 119 U. S. 447, 7 S. Ct. 283 (1886); In re Sanborn, 148 U. S. 222, 13 S. Ct. 577 (1893).

[100] Williams v. United States, 289 U. S. 553 at 566. "If the power exercised by legislative courts is not *judicial* power, what is it? Certainly it is not legislative, or executive, or administrative power, or any imaginable combination thereof." 289 U. S. 553 at 567.

[101] Although there are no decisions in point, this power might arise from a combination of the provisions of Article I, Section 8, clause 9 of the Constitution authorizing Congress "To constitute Tribunals inferior to the supreme Court," and clause 18 of the same section and article empowering Congress to pass all laws "necessary and proper" to carry its substantive grants of legislative power into operation. But see Kansas v. Colorado, 206 U. S. 46 at 83, 27 S. Ct. 655 (1907), where it is said: "when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the Nation was capable of exercising was vested in those tribunals. . . ."

of legislative or executive determination. . . ."[102] Although the Court, on the same day had in the *O'Donoghue* case overruled the dictum of the *Bakelite* case relating to the status of the courts of the District,[103] it reaffirmed the dictum of the latter case in what was said concerning the status of the Court of Claims and the Court of Customs Appeals.[104] The Court had still to reconcile its position with respect to the doctrine of separation of powers,[105] which it did by indicating that "a power which may be devolved, at the will of Congress, upon any of the three departments plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by tripartite distribution of such powers."[106] Thus, in addition to the principle of extraterritoriality[107] and the concept of dual authority,[108] a third exception to the strict application of the separation of powers doctrine was developed by the expedient of totally withdrawing a type of controversy from the limitations of the doctrine.[109]

Reference has already been made to the decision in *Ex parte Bakelite Corporation*,[110] where the Supreme Court held that the Court of Customs Appeals was a legislative court established under the power of Congress to lay and collect duties.[111] By the provisions of the Ford-

[102] Williams v. United States, 289 U. S. 553 at 569, 53 S. Ct. 751 (1933). The Court referred to the Bakelite case where this type of jurisdiction was fully described and explained. See infra, note 116.

[103] O'Donoghue v. United States, 289 U. S. 516, 53 S. Ct. 740 (1933).

[104] Williams v. United States, 289 U. S. 553, 53 S. Ct. 751 (1933).

[105] This was necessary since the Court had referred to the jurisdiction exercised by the Court of Claims, which was conceded to be a legislative court, as a judicial power. If the Court had not characterized the jurisdiction as judicial a discussion of the separation doctrine would have been avoided. However, the reference to the "judicial power" of the Court of Claims was employed to justify the exercise of a similar jurisdiction by the federal district courts and the Supreme Court.

[106] Williams v. United States, 289 U. S. 553 at 581, 53 S. Ct. 751 (1933).

[107] American Insurance Co. v. Canter, 1 Pet. (26 U. S.) 511, 7 L. Ed. 242 (1828).

[108] O'Donoghue v. United States, 289 U. S. 516, 53 S. Ct. 740 (1933).

[109] While a similar theory was employed by the Court in Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. (59 U. S.) 272, 15 L. Ed. 372 (1856), it was assumed that if the controversy were subjected to judicial rather than administrative determination, the separation doctrine would be applicable.

[110] 279 U. S. 438, 49 S. Ct. 411 (1929).

[111] U. S. Constitution, Art. 1, § 8, cl. 1. While the Bakelite case was still pending Congress changed the name of the court to the Court of Customs and Patent Appeals and transferred to it the statutory jurisdiction to review the decisions of the commissioner of patents. Act of March 2, 1929, c. 488, 45 Stat. L. 1475, 28 U. S. C. A. (Supp. 1935), §§ 41(5), 3090.

ney-McCumber Tariff Act, [112] the Court of Customs Appeals was authorized to review the findings of the Tariff Commission on complaints of unfair importation practices. The President was authorized to impose additional duties and prohibit importation if he was satisfied as to the existence of such unfair practices. But there was no indication as to whether the findings of the Court of Customs Appeals were binding on the President. The jurisdiction of that court to entertain such appeals was challenged in the *Bakelite* case. In approving the vesting of an administrative function in a tribunal organized beyond the limits of Article III, the Court held that, "the appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers." [113] And as regards the exercise of such jurisdiction by specialized courts, the opinion observed that, "The mode of determining matters of this class is completely within the congressional control" so that "Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." [114] This explanation foreshadowed the position which was ultimately taken in the *Williams* case,[115] where the Court refused to apply the separation doctrine to this type of controversy.[116] That case involved the transfer of the jurisdiction of the District Court of Appeals to review decisions of the commissioner of patents to the new Court of

[112] Act of Sept. 21, 1922, c. 356, 42 Stat. L. 858.

[113] Ex parte Bakelite Corp., 279 U. S. 438 at 458, 49 S. Ct. 411 (1929).

[114] Ibid., 279 U. S. 438 at 451.

[115] Williams v. United States, 289 U. S. 553, 53 S. Ct. 751 (1933).

[116] Although the language used in the Bakelite and Williams cases is not as definite as might be desired, it seems clear that the Court is referring to the class of controversies which involve the granting of a governmental privilege, rather than a private right or the exercise of a sovereign function, and which either do not require a judicial review or need be subjected to only a limited scope of review to satisfy due process. This category of disputes has been described as including *inter alia*, those matters which relate to the deportation or exclusion of aliens, the enforcement of military discipline, the granting of land patents, the use of the mails, customs and patent matters, and claims against the United States. See Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285 (1932). Cf. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY, c. 15 (1928); DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW, c. 3 (1927); Pillsbury, "Administrative Tribunals," 36 HARV. L. REV. 583 (1923); Weil, "Administrative Finality," 38 HARV. L. REV. 447 (1925); Levitt, "The Judicial Review of Executive Acts," 23 MICH. L. REV. 588 at 595 (1925). The cases cited by the Court in the foot-notes appended to the Bakelite opinion bear out this conclusion. 279 U. S. 438 at 451. A more detailed description and analysis of this exceptional jurisdiction will be considered at a subsequent place in this article. See page 242 et seq.

Customs and Patent Appeals. In view of the *Bakelite* decision, this created no new problems since the Supreme Court had previously described that jurisdiction as "administrative" in character.[117]

Two other specialized tribunals should be mentioned in this connection before considering the jurisdictional provisions of the Logan bill. The Board of Tax Appeals was established to obtain an independent review of the determinations of the Commissioner of Internal Revenue.[118] The Supreme Court has described the Board as an administrative tribunal rather than a legislative court principally because the act declares it to be "an independent agency in the Executive Branch of the Government."[119] However, the Court has been compelled to recognize the peculiar nature of its jurisdiction, and on several occasions has referred to its functions as "judicial"[120] and "quasi-judicial"[121] in character. Another tribunal exercising a specialized jurisdiction was the Commerce Court. The status of this court was never the subject of judicial determination during its short existence. Due to its unusual jurisdiction to enforce or restrain the orders of the Interstate Commerce Commission,[122] the opinion has been expressed that it was a constitutional court[123] rather than a legislative agency. This conclusion finds support in the fact that it did not exercise any administrative or advisory jurisdiction, types of power frequently characteristic of legislative courts.[124]

[117] Postum Cereal Co. v. California Fig Nut Co., 272 U. S. 693, 47 S. Ct. 284 (1927).

[118] Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716 at 721, 49 S. Ct. 499 (1929). See Kahn, "The Status of the Board of Tax Appeals as a Judicial Body," 7 NAT. INCOME TAX MAG. 135 (1929).

[119] 26 U. S. C., § 600. See also Old Colony Trust Co. v. Commr. of Int. Rev., 279 U. S. 716, 49 S. Ct. 499 (1929); Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117, 46 S. Ct. 215 (1926). In Tracy v. Commissioner, (C. C. A. 6th, 1931), 53 F. (2d) 575 at 578, it was said that the Board was an administrative body because of its "organization and functions."

[120] Blair v. Oesterlein Machine Co., 275 U. S. 220, 48 S. Ct. 87 (1927).

[121] Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117, 46 S. Ct. 215 (1926).

[122] Act of June 18, 1910, 36 Stat. L. 539.

[123] When the Commerce Court was abolished, the debates in Congress seem to indicate that it was regarded as a constitutional court and for that reason its judges were not dismissed but transferred to other courts. 48 Cong. Rec. 7993-7998 (1912). See FRANKFURTER and LANDIS, THE BUSINESS OF THE SUPREME COURT, 169 (1928). Cf. Hallowell v. Commons, (C. C. A. 8th, 1914) 210 F. 793.

[124] Cf. Proctor & Gamble Co. v. United States, 225 U. S. 282, 32 S. Ct. 761 (1912).

2. *Jurisdictional Limitations of the Separation Doctrine*

From these confusing and more often conflicting decisions it is hoped that some substantial criteria may be developed by which the proposed jurisdiction of the administrative court may be tested with particular reference to the application of the separation of powers doctrine. The most outstanding feature of the proposed court is the heterogeneous jurisdiction which the Logan bill attempts to vest in it. Despite the fact that it is designated an "administrative court," it will presumably exercise jurisdiction and powers previously delegated to legislative courts,[125] constitutional courts,[126] and executive[127] or administrative authorities.[128] The question immediately arises as to whether this variety of jurisdiction can be concentrated in one tribunal in view of the limitations of the doctrine of separation of powers.

Although the Supreme Court indicated on one occasion that the status of any judicial tribunal is to be determined by "the power under which the court was created and in the jurisdiction conferred,"[129] this criterion seems wholly inadequate when the court in question is established by virtue of several different powers and exercises a variety of jurisdiction.[130] Consequently, in considering the status of the proposed administrative court, it is necessary to indulge one general assumption as to the character of the Court.[131] Any alternative assump-

[125] The jurisdiction of the Customs Court, the Court of Claims and the Court of Customs and Patent Appeals.

[126] The jurisdiction of the district courts of the United States over actions for the recovery of taxes and suits to enjoin their collection. Perhaps the jurisdiction of the Supreme Court of the District of Columbia (now the district court) over proceedings by extraordinary process against officers and employees of the United States should also be included in this category.

[127] Principally the jurisdiction of the various executive departments to suspend or revoke licenses and grants for regulatory purposes.

[128] The jurisdiction of the Board of Tax Appeals and of the various commissions and agencies to revoke or suspend licenses and grants for regulatory purposes.

[129] Ex parte Bakelite Corporation, 279 U. S. 438 at 459, 49 S. Ct. 411.

[130] See also the opinion of Justice Brandeis in Tutun v. United States, 270 U. S. 568 at 576, 46 S. Ct. 425 (1926), where it was said: "Whether a proceeding which results in a grant is a judicial one, does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. . . ."

[131] As a practical matter, it is unlikely that the Supreme Court would ever be faced with such a situation. In any particular case raising the issue of the status of the court, it would merely have to decide whether the jurisdiction questioned could be exercised by that court. In other words, it would not be necessary to reconcile its decision with the other jurisdictions vested in the court until that question was judicially presented in another proceeding. However, in the O'Donoghue case, the Court did reconcile its decision with regard to all the jurisdiction exercised by the Court of Appeals for the District.

tion seems out of the question.[132] Consequently we will assume, as did the drafters of the bill,[133] that the proposed court is legislative in origin and character.[134]

In accordance with the doctrine of the *Bakelite* and *Williams* cases, the proposed legislative court could be vested with a legislative or administrative jurisdiction "to examine and determine various matters, arising between the government and others,"[135] and also a judicial jurisdiction over matters which are susceptible of legislative or executive determination and do not inherently or necessarily require judicial determination.[136] The rationale of the *Canter*[137] and *O'Donoghue*[138] cases, sanctioning the vesting of a judicial power similar to that described in Article III in tribunals not created by virtue of that article, seems inapplicable to this court for reasons which will be subsequently more fully developed.[139] Accordingly, then, the restrictive limitations of the separation doctrine can only be avoided by confining the suggested judicial jurisdiction to those matters described in the legislative court cases.

[132] It seems doubtful that the proposed court could have an administrative status since it is called a "court," its judges are given tenure for life, it possesses many of the indicia of judicial power, and the provisions granting a direct appeal to the Supreme Court would be an unconstitutional extension of its original jurisdiction. On the other hand, if the court were considered a constitutional court much of its administrative or advisory jurisdiction would likely be invalid under the rationale of the Williams case. Furthermore, the broad authority to review all questions of fact as well as law which is vested in the court by the bill would be invalid if imposed on a constitutional court. Federal Radio Commission v. General Electric Co., 281 U. S. 464, 50 S. Ct. 389 (1930).

[133] "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION, 209 at 219, 228 (1936).

[134] On a purely quantitative basis the most important jurisdiction of the proposed court seems to be legislative in character. Consequently, an assumption that the status of the administrative court is legislative proceeds from a desire to obtain a realistic conclusion.

[135] Ex parte Bakelite Corporation, 279 U. S. 438 at 451, 49 S. Ct. 411 (1929).

[136] Williams v. United States, 289 U. S. 553, 53 S. Ct. 751 (1933).

[137] American Insurance Co. v. Canter, 1 Pet. (26 U. S.) 511, 7 L. Ed. 242 (1828), sustaining the exercise of a judicial jurisdiction by a territorial court on grounds that the separation doctrine of article three was inapplicable.

[138] O'Donoghue v. United States, 289 U. S. 516, 53 S. Ct. 740 (1933), sustaining the commingling of administrative and judicial jurisdiction on a theory of dual authority.

[139] The inapplicability of the decision in the Canter case is obvious since the proposed court will not be established in a territory. The inapplicability of the O'Donoghue case is less certain. However, at this time, it will suffice merely to point out that the administrative court will not only sit in the District but "at such times and places as the chief justice shall designate or direct." (Section 14 of the Logan bill.)

(a) Transfer of Jurisdiction of Recognized Legislative Courts and of Board of Tax Appeals

The proposal to transfer the jurisdiction of the Customs Court, the Court of Claims, and the Court of Customs and Patent Appeals to the new court does not present any serious constitutional difficulties,[140] since the separation doctrine is admittedly inapplicable to the authority and powers exercised by these tribunals.

The jurisdiction now exercised by the Board of Tax Appeals, however, is of a more doubtful nature despite the fact that its jurisdiction is primarily administrative. As to matters which are susceptible of final administrative determination,[141] there is little difficulty in the proposed transfer.[142] On the other hand, it would seem that the jurisdiction of the Board over matters which must be subjected to a judicial determination could not be vested in a legislative court if the limitations of the *Bakelite* case are to be recognized.[143] As to such matters, the vesting of this judicial power[144] in a legislative court would result in a violation of the separation doctrine of Article III. However, it must be conceded that recent decisions such as *Old Colony Trust Co. v. Commission of Internal Revenue*[145] and *Commissioner of Internal Revenue v. Liberty Bank & Trust Co.*[146] appear to hold that most, if not all, of the jurisdiction of the Board concerns matters

[140] The status of these courts is legislative, so consequently the transfer of their jurisdiction to a similar legislative court raises no new problems. In so far as their administrative or legislative jurisdiction is concerned, the separation doctrine has no application since these courts were not established under Article III. Ex parte Bakelite Corporation, 279 U. S. 438, 49 S. Ct. 411 (1929). Furthermore, the separation doctrine is also inapplicable to a judicial power over matters which are subject to final executive or administrative determination. Williams v. United States, 289 U. S. 553, 53 S. Ct. 751 (1933).

[141] The rationale of both the Williams and Bakelite cases. See supra, note 116.

[142] In the Bakelite case, the Court relied strongly on Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. (59 U. S.)272, 15 L. Ed. 372 (1855), where it was held that certain matters arising between the government and its internal revenue collectors are of this type and do not require a judicial hearing.

[143] A comparison of the jurisdiction of the Board of Tax Appeals and the Board of General Appraisers is somewhat helpful. Although the review of the acts of customs collectors and appraisers is susceptible of legislative, administrative or judicial determination, the jurisdiction over such matters was finally vested in the Customs Court.

[144] As the Supreme Court pointed out in Blair v. Oesterlein Machine Co., 275 U. S. 220 at 227, 48 S. Ct. 87 (1927): "An examination of the sections [of the Act] creating the Board . . . can leave no doubt that they were intended to confer upon it appellate powers which are judicial in character. . . ."

[145] 279 U. S. 716, 49 S. Ct. 499 (1929).

[146] (C. C. A. 6th, 1932) 59 F. (2d) 320.

which are susceptible of final administrative determination,[147] and therefore that Congress is at liberty to delegate that jurisdiction as it sees fit even to the extent of vesting the determination of such matters in a legislative or constitutional court.[148] The decision of the Supreme Court in *Phillips v. Commissioner of Internal Revenue* seems conclusive on this point. There the Court sustained "the right of the United States to collect its internal revenue by summary administrative proceedings" provided "adequate opportunity is afforded for a later judicial determination of the legal rights,"[149] by sanctioning the procedure of the act creating the Board. In effect the Court extended the rationale of *Murray's Lessee v. Hoboken Land & Improvement Co.*,[150] relating to the liability of government revenue collectors, to include the obligations of taxpayers under the revenue laws.[151] The Logan bill makes no provision for the transfer of the jurisdiction of the several Circuit Courts of Appeal, but it seems evident that this jurisdiction relates to matters similar to those vested in the Board and consequently could, if necessary, be vested in the new court.[152]

[147] The issue in both of these cases, however, was whether a review of the decisions of the Board could be vested in a constitutional court, rather than whether the jurisdiction of the Board could be transferred to a legislative court. Nevertheless, in Commissioner of Internal Revenue v. Liberty Bank & Trust Co., the court's analysis of the jurisdiction of the Board leads to the conclusion that the matters entrusted to it do not require a judicial determination. "It [the Board] is not charged with the duty of assessing or collecting taxes but with deciding controversies between the taxpayer and the authorized representative of the government, the Commissioner of Internal Revenue. The position of the Board is analogous to that of the Board of Appraisers. . . ." Commission of Internal Revenue v. Liberty Bank & Trust Co., (C. C. A. 6th, 1932) 59 F. (2d) 320 at 324.

[148] An identical situation was presented to the Court in the Williams case, where it sanctioned its own appellate jurisdiction over the decisions of the Court of Claims, which it called a legislative court.

[149] 283 U. S. 589 at 595, 51 S. Ct. 608 (1930).

[150] 18 How. (59 U. S.) 272, 15 L. Ed. 372 (1856).

[151] "It is urged that the decision in the *Murray* case was based upon the peculiar relationship of a collector of revenue and his government. The underlying principle in that case was not such a relation, but the need of the government promptly to secure its revenues." 283 U. S. 589 at 596. See supra, note 142. The fact that a subsequent judicial determination must be afforded the taxpayer does not alter the essential character of the matters over which the Board has jurisdiction. As to these matters, the Board is free from judicial restraint, except so far as Congress grants a judicial review, and consequently the separation doctrine has no application.

[152] The "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF AMERICAN BAR ASSOCIATION, 209 at 253 (1936), assumes that this jurisdiction will be vested in the proposed court. However, the bill does not so provide and such a conclusion could only be reached by inferring that the jurisdiction of the Board of Tax Appeals also includes the jurisdiction to review its decisions which is now vested in those courts. Under the most liberal interpretation of the bill this appellate jurisdiction would be merely abolished.

(b) Transfer of Other Jurisdiction Over Internal Revenue Matters

The apparent necessity of an opportunity for a judicial determination of a taxpayer's liability, at some stage in revenue controversies, is of paramount importance in considering the other jurisdiction over internal revenue matters vested in the proposed court. The bill authorizes the transfer to the newly formed court of the jurisdiction and powers of the several district courts of the United States over actions against collectors for the recovery of taxes and suits to enjoin the collection of taxes. The jurisdiction over these suits and actions is essentially an exercise of judicial power, rather than an administrative or executive power similar to that exercised by various supervisory agencies.[153] The elaborate dicta found in the taxation cases, pointing out that some judicial remedy must be afforded the taxpayer, fail to indicate at what stage this relief must be available or the exact nature and scope of the proceeding required. If the judicial determination is considered a necessary element of controversies to restrain the collection of taxes or suits to recover taxes, the vesting of a jurisdiction over such matters in a legislative court becomes highly questionable.[154]

As early as 1867, Congress, in an effort to prevent judicial encroachment upon the federal revenue-collecting system, enacted a law prohibiting suits to enjoin the assessment or collection of any tax.[155] Although various exceptions have been recognized by the courts in the application of this prohibition,[156] it is well settled that

[153] This is self-evident since constitutional courts, from which this jurisdiction is derived, can only be vested with a judicial power. The more difficult question is whether this is the judicial power of Article III or merely a judicial power similar to that exercised by the Court of Claims.

[154] It is assumed that such a judicial determination must take place in a constitutional court. Otherwise the requirement would be rendered nugatory since the judicial jurisdiction of a legislative court extends only to matters susceptible of final administrative or executive determination. To permit Congress to "substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of facts upon which the enforcement of the constitutional rights of the citizens depend . . . would be to sap the judicial power as it exists under the Federal Constitution. . . . In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. . . ." Crowell v. Benson, 285 U. S. 22 at 56, 57 and 60, 52 S. Ct. 285 (1932).

[155] Act of March 2, 1867, c. 169, § 10, 14 Stat. L. 475, Rev. Stat. (1878), § 3224.

[156] Where the tax is construed to be a penalty in the nature of a fine, injunction will lie against its collection. Lipke v. Lederer, 259 U. S, 557, 42 S. Ct. 549 (1922);

the injunctive process is not ordinarily available to the taxpayer to stop or impede the collection of taxes.[157] Accordingly, it is possible to argue that, if Congress can completely prohibit suits to enjoin the collection of taxes, it is also free to leave the determination of tax questions to administrative or executive officers, provided other fundamental safeguards are available to the taxpayer in a subsequent proceeding.[158] The existing jurisdiction of the federal district courts to enjoin the collection of taxes is not enlarged or extended by the Logan bill, but is only transferred to the administrative court.[159] Hence it is possible to argue, in accordance with the view just suggested, that the only injunctive suits which could be entertained are those arising in situations where the prohibitive statute is deemed inapplicable. Therefore it is necessary to examine the judicial exceptions to the prohibitive statute to determine whether they are based upon a mere equitable interpretation of the statutory language or upon a constitutional necessity for a judicial remedy at that stage in tax controversies.

One exception relates to a "tax" in the nature of a penalty or fine. The decisions holding the prohibitive statute inapplicable to suits for the purpose of enjoining the collection of such a tax, are based primarily on constitutional guarantees against inflicting criminal punishment without the usual judicial protection and procedure.[160]

Regal Drug Corp. v. Wardell, 260 U. S. 386, 43 S. Ct. 152 (1922). Similarly, stockholders have been permitted to enjoin their corporations from paying illegal taxes where there can be no suit to recover them. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 S. Ct. 673 (1895); Brushaber v. Union Pac. R. R., 240 U. S. 1, 36 S. Ct. 236 (1916); Stanton v. Baltic Mining Co., 240 U. S. 103, 36 S. Ct. 278 (1916). Finally, where the hardship on a particular taxpayer is exceedingly great and the circumstances of the case are extraordinary, the injunctive process may be available to the taxpayer. Hill v. Wallace, 259 U. S. 44, 42 S. Ct. 453 (1922); Miller v. Standard Nut Margarine Co., 284 U. S. 498, 52 S. Ct. 260 (1932).

[157] Graham v. Du Pont, 262 U. S. 234, 43 S. Ct. 567 (1923); Bailey v. George, 259 U. S. 16, 42 S. Ct. 419 (1922); Dodge v. Osborn, 240 U. S. 118, 36 S. Ct. 275 (1916); Snyder v. Marks, 109 U. S. 189, 3 S. Ct. 157 (1883).

[158] The implications and limitations of the decisions sustaining the prohibitive statute will be considered in detail at a subsequent point. See infra, p. 220.

Prior to Rev. Stat. (1878), § 3224, courts of equity were extremely reluctant to interfere with the collection of governmental revenues. Dows v. City of Chicago, 11 Wall. (78 U. S.) 108, 20 L. Ed. 65 (1871); State R. R. Tax Cases, 92 U. S. 575, 23 L. Ed. 663 (1876).

[159] The proposed legislation merely transfers this jurisdiction to the legislative court.

[160] This exception is confined to cases where the punitive element of the statute is unmistakable. Mere unconstitutionality is not sufficient to convert a tax into a criminal penalty. Bailey v. George, 259 U. S. 16, 42 S. Ct. 419 (1922).

In *Lipke v. Lederer*,[161] the Supreme Court sustained a decision granting an injunction against the collection of a punitive tax on the theory that a denial of such relief would infringe the complainant's right to a jury trial and violate the due process clause of the Constitution.[162] Due to the restrictive operation of the separation doctrine of Article III, it would seem that suits to enjoin the collection of a punitive exaction in the form of a "tax" must be subjected to a judicial determination to satisfy constitutional guarantees. The vesting of jurisdiction over such matters in a legislative court might, therefore, conceivably be invalid.

On the other hand, the decisions sustaining the right of a stockholder to restrain the corporation from voluntarily paying an illegal or unconstitutional tax, despite the prohibitive statute, are neither clear nor consistent in their methods of rationalization. In *Pollock v. Farmers' Loan & Trust Co.*,[163] argument on the effect of the prohibitive statute was expressly waived by the Government, and the Supreme Court assumed jurisdiction without discussing the point. When the issue was again raised in *Brushaber v. Union Pacific R. R.*[164] and *Stanton v. Baltic Mining Co.*,[165] the Court merely alluded to the *Pollock* case and rested its decision on "the absence of all means of redress which would result if the corporation paid the tax . . . without protest."[166] Although these decisions were seemingly based on the inapplicability of the prohibitive statute,[167] the total lack of other legal remedies by which the stockholder could protect his interests was a fact which the Court undoubtedly considered in reaching that result.[168] This further exception to the applicability of the prohibitive statute was based upon a threatened *voluntary* payment of taxes which could not be recovered by the corporation unless a protest had been

[161] 259 U. S. 557, 42 S. Ct. 549 (1922).
[162] Lipke v. Lederer, 259 U. S. 557, 42 S. Ct. 549 (1922).
[163] 157 U. S. 429, 15 S. Ct. 673 (1895).
[164] 240 U. S. 1, 36 S. Ct. 236 (1916).
[165] 240 U. S. 103, 36 S. Ct. 278 (1916).
[166] Brushaber v. Union Pac. R. R., 240 U. S. 1 at 10.
[167] "we are of the opinion that the contention here made that there was no jurisdiction of the cause since to entertain it would violate the provisions of the Revised Statutes [§ 3224] referred to is without merit." 240 U. S. 1 at 10, 36 S. Ct. 236 (1916).
[168] "It was further alleged that the company would if not restrained make a return for taxation conformably to the statute and would pay the tax upon the basis stated *without protest* and that to do so would result in depriving the complainant as a stockholder of rights secured by the Constitution. . . ." 240 U. S. 103 at 108, 36 S. Ct. 278 (1916). (Italics supplied.)

filed at the time of payment.[169] Now, however, suits for refund are permitted regardless of the filing of protest,[170] and it would appear that the exception can no longer be justified in the face of adequate alternative remedies.

In situations where the taxpayer is subjected to great hardship and the circumstances of the case are extraordinary, federal courts have also denied the application of the prohibitive statute and granted injunctions against the collection of a tax with the approval of the Supreme Court. This exception seems to be based on equitable principles and a judicial delimitation of the broad language of the statute. In *Miller v. Nut Margarine Co.*,[171] the Supreme Court examined a decision granting injunctive relief against the collection of an illegal tax due to extraordinarily burdensome circumstances. After discussing the equitable principle that a court of equity will not restrain the collection of a tax solely on the ground of illegality, the Court observed that "Section 3224 is declaratory of [that] principle . . . and is to be construed as near as may be in harmony with it and the reasons upon which it rests."[172] Applying the rationale of the *Nut Margarine* case in its broadest terms, it would seem that the injunctive prohibition could be expressly extended by statute to cover all such suits, regardless of the particular extraordinary circumstances, and that therefore such controversies could be subjected to other than final judicial determination at that stage of the controversy. Just how far the Supreme Court would permit Congress to go in enlarging the scope of the statute is still a debatable question. The recent case of *Rickert Rice Mills v. Fontenot*,[173] in which the Supreme Court reversed a decision of a lower federal court denying an injunction against the collection of certain agricultural processing taxes, only serves to becloud the issues. Relying on its previous decision in *United States v.*

[169] It was not until the enactment of the Revenue Act of 1924 that suits for refund could be maintained without filing protest at the time of payment. See Moore Ice Cream Co. v. Rose, 289 U. S. 373, 53 S. Ct. 620 (1933).

[170] Revenue Act of 1924, c. 234, § 1014, 43 Stat. L. 253, 26 U. S. C. (Mason 1926), § 156, amending Rev. Stat. (1878), § 3226.

[171] 284 U. S. 498, 52 S. Ct. 260 (1932).

[172] Miller v. Nut Margarine Co., 284 U. S. 498 at 509, 52 S. Ct. 260 (1932). "The general words employed are not sufficient . . . to warrant the inference that Congress intended to abrogate that salutary and well established rule. . . ." Ibid. See Hill v. Wallace, 259 U. S. 44, 42 S. Ct. 453 (1922).

[173] 297 U. S. 110, 56 S. Ct. 374 (1936). This case did not directly involve the application of Rev. Stat. § 3224, but that section was reenacted into Section 21(a) of the Agricultural Adjustment Act and the issues involved were thus identical with those arising under interpretations of the earlier statute.

Butler,[174] invalidating the taxes authorized by the Agricultural Adjustment Act, the Court merely held that, "The exaction still lacks the quality of a true tax" and that there was "no occasion to discuss or decide whether" the taxpayer was afforded "an adequate remedy at law."[175] It may be that in certain situations where the imposition of an illegal tax is unduly burdensome and the remedy at law is not necessarily adequate under the circumstances, the prohibitive statute cannot be extended without violating fundamental constitutional guarantees similar, but not identical, to those alluded to in *Lipke v. Lederer*.[176]

It has been assumed up to this point that, with certain definite exceptions, controversies involving the restraint of revenue collectors in the collection of taxes could be vested in an administrative agency for final determination,[177] inasmuch as Congress could absolutely prohibit the courts from hearing such matters. But the validity of the injunctive prohibition depends upon the availability of other judicial remedies whereby a litigant may test his liabilty for the tax assessed or collected.[178] The decisions sustaining the right of Congress to prohibit injunctive suits against the collection of taxes are expressly conditioned upon the existence of other relief of a judicial nature, particularly in the form of suits to recover taxes.[179] In *Bailey v. George*,[180] the Supreme Court upheld the validity of the prohibitive statute in the face of allegations of peculiar hardship, but observed that "the complainants did not exhaust all their legal remedies" since "they might have paid the amount assessed under protest and then brought suit against the Collector to recover the amount paid with interest."[181]

If it be true that the validity of congressional action in prohibiting injunctions against the assessment or collection of taxes depends upon the availability of a judicial remedy in suits to recover taxes, the

[174] 297 U. S. 1, 56 S. Ct. 312 (1936).

[175] United States v. Butler, 297 U. S. 110 at 113, 56 S. Ct. 312 (1936).

[176] 259 U. S. 557, 42 S. Ct. 549 (1922).

[177] The unique difficulties created by investing a legislative court with a traditional equitable remedy such as the injunctive process will be considered at another place in this discussion.

[178] Phillips v. Commissioner, 283 U. S. 589, 51 S. Ct. 608 (1930).

[179] "The system prescribed by the United States in regard to both customs and internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete. . . ." Snyder v. Marks, 109 U. S. 189 at 193-194, 3 S. Ct. 157 (1883); Shelton v. Platt, 139 U. S. 591, 11 S. Ct. 646 (1891); Dodge v. Osborn, 240 U. S. 118, 36 S. Ct. 275 (1916).

[180] 259 U. S. 16, 42 S. Ct. 419 (1922).

[181] Bailey v. George, 259 U. S. 16 at 20, 42 S. Ct. 419 (1922).

provisions of the Logan bill transferring to the administrative court the jurisdiction over such actions serves to further complicate the situation.[182] The vesting of this jurisdiction in a legislative court would amount to a denial of a judicial determination of liability, if we adhere to the assumption that the judicial remedy must be lodged in a court exercising "the judicial power of the United States."[183] In this view of the matter, the jurisdiction of the proposed court over suits to enjoin the collection of taxes assumes a different aspect. The relegation of actions for recovery or refund of taxes to a legislative court would cut off the requisite judicial determination in that stage of the tax controversy and would thereby convert suits for injunctions against collection or assessment into matters which require a judicial determination. Under these circumstances it is doubtful if the injunctive jurisdiction could be vested in a court not organized under Article III in so far as the jurisdiction over actions to recover taxes is also vested in the same court.[184]

There is, of course, the possibility that the opportunity to contest the tax liability in proceedings brought by the collector in the nature of a distraint or the enforcement of a tax lien[185] would be held to afford the necessary judicial determination, since these actions are not affected by the proposed legislation. However, this type of

[182] The interdependence of these two remedies might possibly serve to explain the result reached in Rickert Rice Mills v. Fontenot, 297 U. S. 110, 56 S. Ct. 374 (1936), despite its dictum to the contrary. Under Section 21(d) of the Agricultural Adjustment Act, the taxpayer's right to recover was limited to taxes which had not been passed on to the purchaser or consumer. It may well be that the Court considered this restriction in granting the injunction requested. But see United States v. Jefferson Electric Mfg. Co., 291 U. S. 386, 54 S. Ct. 443 (1934).

[183] See supra, note 154. Cf. Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285 (1932).

[184] This is not to say that the taxpayer would be actually without a judicial remedy in a constitutional court, since the Logan Bill expressly provides for a review by the Supreme Court. The point taken above involves the validity of vesting the jurisdiction over certain matters in a legislative court. If the jurisdiction in question is an exercise of a judicial power, it can be vested in a legislative court only if it pertains to matters which are susceptible of final executive or administrative determination. Williams v. United States, 289 U. S. 553, 53 S. Ct. 751 (1933). By transforming the jurisdiction over actions to recover or refund taxes from a constitutional court to a legislative court, it is quite possible that the injunctive jurisdiction, which under the present system need not be subjected to a judicial determination, would be converted into the class of matters which do require a judicial determination and hence could not be vested in a court organized beyond the limits of Article III without violating the separation doctrine.

[185] 26 U. S. C., § 1568 and § 1580. Cf. Blacklock v. United States, 208 U. S. 75, 28 S. Ct. 228 (1908).

remedy, although vested in a court organized under Article III, is often more illusory than real,[186] and it is doubtful if the Court would regard that relief as adequate in most cases. The possibility that the provisions of the tax laws authorizing collectors to institute suits in the district courts to collect governmental revenues,[187] with the correlative right of the taxpayer to contest his liability, would be considered as supplying the necessary judicial determination is rather unlikely, in view of the other summary remedies which the collectors have at their disposal prior to the institution of such proceedings.

The jurisdiction of the district courts over actions against collectors[188] for the recovery of taxes is, under the Tucker Act,[189] concurrent with that of the Court of Claims (a legislative court). In view of this fact, it would seem that the jurisdiction over these controversies could be vested in a legislative court.[190] Aside from the interdependence of these remedies to satisfy due process requirements, the doctrine of sovereign immunity from suit would seem to place this jurisdiction in the class of matters which are susceptible of other than final judicial determination. But the decisions of the Supreme Court, although characterized by their tendency to permit the Government wide latitude in establishing "any reasonable system for the collection of taxes and the recovery of them when illegal," are careful to point out the fundamental limitations "against the taking of property without due process of law in the method of collection and protection of the taxpayer."[191] In *Phillips v. Commissioner of Internal Revenue*,[192]

[186] For example, a lien in favor of the United States attaches to property of the taxpayer who neglects or fails to pay the tax assessed, thereby creating a cloud on his title. 26 U. S. C., § 1560 (1928). Furthermore, under certain circumstances the collectors are empowered to seize property by summary process, prior to the time when a taxpayer would be accorded his right to contest the tax liability. 26 U. S. C., § 1620.

[187] 26 U. S. C., § 1644. Regarding the adequacy of remedies other than by injunction, see Shaffer v. Carter, 252 U. S. 37, 40 S. Ct. 221 (1920); cf. Air-Way Elec. Appliance Co. v. Day, 266 U. S. 71, 45 S. Ct. 12 (1924); Davis v. Wallace, 257 U. S. 478, 42 S. Ct. 164 (1922); Shelton v. Platt, 139 U. S. 591, 11 S. Ct. 646 (1891); S. C. Proctor & Gamble Distributing Co. v. Sherman, (D. C. N. Y. 1924) 2 F. (2d) 165.

[188] Although the terms of the Logan bill refer only to "actions against collectors" it will be assumed that it was intended to include actions against the United States and collectors for the recovery of taxes. This apparent omission is pointed out by the drafters in the "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF AMERICAN BAR ASSOCIATION, 209 at 235, note 2 (1936).

[189] 28 U. S. C., § 41(20); 26 U. S. C., §§ 1672-1673.

[190] The rationale of Williams v. United States, 289 U. S. 553, 53 S. Ct. 751 (1933).

[191] Wickwire v. Reinecke, 275 U. S. 101 at 106, 48 S. Ct. 43 (1927).

[192] 283 U. S. 589, 51 S. Ct. 608 (1931).

the Supreme Court sustained certain summary provisions of the Revenue Act of 1926 by referring to the "alternative methods of eventual judicial review" by which a taxpayer could protect his rights.[193] It is noteworthy that the two alternative remedies indicated by the decision are those which are to be vested in the proposed court under the terms of the Logan bill.[194]

The present system of corrective justice which surrounds tax controversies,[195] culminating in a determination by constitutional courts at various stages in the litigation, becomes somewhat disrupted by the transfer provisions of the Logan bill. The decisions of the Supreme Court have gone a long way to sustain the integrity of the revenue-collecting processes, but the substitution of a legislative court for courts organized under Article III would undoubtedly bring forward new problems of a most fundamental nature. To what extent the Court will permit this possible elimination of "the judicial power" in the determination of tax liability[196] by means of a substituted legislative court remedy depends in a large measure upon how strictly the Court will adhere to its former principles and whether its present leniency towards the summary collection of governmental revenues is to be continued.[197]

(*c*) *Transfer of Jurisdiction in Proceedings by Extraordinary Process Against Officers and Employees of the United States*

The proposal to transfer to the administrative court the jurisdiction and powers of the Supreme Court of the District of Columbia

[193] Phillips v. Commr. of Internal Revenue, 283 U. S. 589 at 597, 51 S. Ct. 608 (1931).

[194] The procedure referred to "satisfies the requirements of due process because two alternative methods of eventual judicial review are available. . . . He may contest his liability by bringing an action, either against the United States or the collector, to recover the amount paid. . . . Or the transferee may avail himself of the provisions for immediate redetermination of the liability by the Board of Tax Appeals. . . ." Phillips v. Commr. of Internal Revenue, 283 U. S. 589 at 597-598, 51 S. Ct. 608 (1931).

[195] Emaus Silk Co. v. McCaughn, (D. C. Pa. 1925) 6 F. (2d) 660.

[196] It should be noted that the provision of the Logan bill authorizing an appeal to the United States Supreme Court by petition for a writ of certiorari is merely discretionary with that Court. On the other hand, under the present system the appeal to a constitutional court lies as a matter of right.

[197] Apparently realizing the difficulties created by this unusual transfer of jurisdiction, the Special Committee on Administrative Law has carefully refrained from approving this particular aspect of the proposed bill. See "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF AMERICAN BAR ASSOCIATION 209 at 252, note 5 (1936).

"in proceedings by extraordinary process against officers and employees of the United States"[198] is perhaps the most ambiguous provision of the bill. Several writers familiar with the purposes of the legislation have expressed the view that this provision refers to proceedings by injunction and mandamus.[199] But, on the other hand, the generally accepted definitions of "extraordinary" remedies include habeas corpus, prohibition, certiorari, and quo warranto as well as mandamus.[200] And the possibility that injunction suits should technically be included in this category is highly doubtful, since injunctions are traditional rather than extraordinary, at least in equity courts. However, since the principles concerning all these remedies are substantially similar, it will be assumed for the purposes of the principal part of this discussion that the jurisdiction in question includes only mandamus and injunction proceedings against officers of the United States.

The distinguishing feature of this jurisdiction over extraordinary process against officers and employees of the United States is found in the fact that it is segregated purely on the basis of the character of the remedy rather than the nature of the controversy. To a limited extent it follows the general classification by confining itself to suits against the United States or its officers,[201] but there is here utterly no attempt to confine or restrict the jurisdiction according to the subject matter of the controversy. This jurisdictional classification according to remedial type is particularly unfortunate when used in connection with a legislative court, since its validity is dependent upon elements which are ignored in establishing the class. Judicial remedies are in a certain sense of ancillary nature; that is, they are not ordinarily the

[198] Section 5. Proceedings against officers and employees of the District of Columbia are expressly excepted from this jurisdiction by the bill.

[199] Caldwell, "A Federal Administrative Court," 84 UNIV. PA. L. REV. 966 (1936); Beelar, "United States Administrative Court," 24 GEORGETOWN L. J. 944 (1936); McGuire, "The Proposed United States Administrative Court," 22 A.B.A.J. 197 (1936).

[200] 1 CYCLOPEDIA OF FEDERAL PROCEDURE, § 52 (1928); FERRIS, EXTRAORDINARY LEGAL REMEDIES (1926).

[201] The obvious purpose of the Logan bill is to segregate suits against the United States and its officers by withdrawing these controversies from administrative agencies and constitutional courts and vesting them in the proposed administrative court for adjudication.

It should be noted that as a matter of actual practice most of the proceedings against federal officials arise in the Supreme Court of the District of Columbia, since the official residence of the vast majority of these officers is located within the District and the provisions of § 51 of the Judicial Code require such suits to be brought in the district wherein the defendant resides. 28 U. S. C., § 112. See Butterworth v. Hoe, 112 U. S. 50, 5 S. Ct. 25 (1884).

subject of independent grants of power or jurisdiction. They are the instruments by which a court hears and disposes of a controversy between parties requesting a judicial determination. Since the propriety of vesting a judicial jurisdiction in a legislatve court depends, not upon the type of remedy or a process, but upon the subject matter of the controversy, it seems evident that this basis of classification adopted by the bill is, at least in some respects, of doubtful validity.

At the outset it should be noted that the federal courts have no power to entertain an original action of mandamus[202] unless specifically authorized by a statute.[203] In this respect their power to issue the writ is auxiliary to some other suit or action within the field of federal, as distinct from state, jurisdiction.[204] The courts of the District of Columbia, however, are not thus restricted in their authority by the usual limits on federal jurisdiction. In *Kendall v. United States*[205] it was held that the act,[206] establishing the courts of the District and providing that the laws of the State of Maryland then existing should continue and be enforced in the District, was sufficient to include the common-law power of the highest courts of original jurisdiction to issue writs of mandamus against officers of the Government. Subsequently, the Supreme Court again sustained the original jurisdiction of the Supreme Court of the District to issue writs of mandamus despite the restrictive provisions of the later act[207] defining the jurisdiction of that court.[208] It is apparent, however, that the Supreme Court (now the District Court) of the District has the power to issue mandamus not only in aid of its other jurisdiction, as do the other lower federal courts,[209] but also in special cases expressly conferred by statute. Thus the District Court derives its authority to issue writs of mandamus from three distinct sources, and the Logan

[202] Cudahy Packing Co. v. United States, (C. C. A. 7th, 1926) 15 F. (2d) 133; Barber v. Hetfield, (C. C. A. 9th, 1925) 4 F. (2d) 245; Creager v. Bryan, (D. C. Tex. 1922) 287 F. 362; United States v. Nashville, C. & St. L. Ry., (D. C. Tenn. 1914) 217 F. 254.

[203] For example, see 28 U. S. C., § 520; 49 U. S. C., §§ 19, 20, 49; 15 U. S. C., § 49.

[204] 28 U. S. C., § 377, authorizes the federal courts "to issue all writs . . . which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

[205] 12 Pet. (37 U. S.) 524, 9 L. Ed. 1181 (1838).

[206] Act of February 27, 1801, 2 Stat. L. 103.

[207] Act of December 1, 1873, 18 Stat. L. 91, part 2 (Revised Statutes of the United States relating to the District of Columbia).

[208] United States v. Schurz, 102 U. S. 378, 26 L. Ed. 167 (1880).

[209] D. C. Code (1929), tit. 18, § 43.

bill does not indicate whether all of this authority, in so far as it relates to federal officers, is to be transferred to the legislative court. Since the bill expressly provides that the court "shall prescribe the form of its writs and other process . . . as may be necessary and proper to the exercise of its jurisdiction and powers,"[210] it would seem that the legislation contemplates only a transfer of the special statutory authority and the power to issue mandamus as an original process against officers of the Federal Government.[211]

As a practical matter, there seems to be no objection to the vesting of an authority to issue writs of mandamus as an original process in a court not organized under Article III. The history and fundamental nature of the remedy as applied to federal officers does not indicate that it is essentially a judicial process, and at common law it was called a prerogative writ in order to distinguish it from ordinary judicial processes.[212] Since the proposed mandamus jurisdiction is expressly limited to actions against officers of the Federal Government and, in the absence of special statutory authority, is available only to compel officers to perform a duty directly required by law,[213] it would appear that this is a matter involving the internal regulation and control of the administrative functions of government. From a remedial standpoint, it would seem that Congress would be free in its choice of means by which private citizens could require public officials to perform their lawful duties to the same extent that it is unrestrained in delegating such duties to public officers in the first instance. Since the office of the writ is restricted to situations where a specific duty is imposed by law and does not extend to discretionary duties[214] or those involving the exercise of administrative

[210] Section 13.

[211] The problem relating to the validity of vesting the power to issue mandamus as an auxiliary process is still present, whether the power is expressly conferred by statute or merely transferred from another court.

[212] For a thoughtful discussion of the origin and nature of mandamus proceedings, see the dissenting opinion by Chief Justice Taney in Kendall v. United States, 12 Pet. (37 U. S.) 524, 9 L. Ed. 1181 (1838).

[213] Decatur v. Paulding, 14 Pet. (39 U. S.) 497, 10 L. Ed. 559 (1840); Holloway v. Whiteley, 4 Wall. (71 U. S.) 522, 18 L. Ed. 335 (1867); Keim v. United States, 177 U. S. 290, 20 S. Ct. 574 (1900); Butterworth v. Hoe, 112 U. S. 50, 5 S. Ct. 25 (1884); Noble v. Union River Logging R. R., 147 U. S. 165, 13 S. Ct. 271 (1893).

[214] Reeside v. Walker, 11 How. (52 U. S.) 272, 13 L. Ed. 693 (1850); United States v. Blaine, 139 U. S. 306, 11 S. Ct. 607 (1891); United States v. Hitchcock, 190 U. S. 316, 23 S. Ct. 698 (1903).

judgment,[215] there can be no question of the possibility of an encroachment by the legislative or judicial branch upon the executive department of the government.

On the other hand, due to the fact that mandamus will lie only in the absence of other legal remedies,[216] it might be that the courts would be strongly inclined to require a judicial determination by a constitutional court where a private litigant is in imminent danger of injury by the nonperformance of official duties or where constitutional rights are imperiled. Such considerations apparently moved Justice Thompson in the *Kendall* case to observe "that the authority to issue the writ of *mandamus* to an officer of the United States, commanding him to perform a specific act required, by a law of the United States, is within the scope of the judicial powers of the United States, under the constitution."[217] Following out this view and considering the various matters which might possibly be involved in mandamus proceedings against federal officers, we come to the conclusion that certain of these proceedings relate to matters which could not be entirely subjected to final administrative or executive determination.[218]

The special statutory jurisdiction of mandamus proceedings is relatively unimportant in connection with the Logan bill. For the most part it includes the authority to issue writs of mandamus for the purpose of enforcing the orders or determinations of administrative agencies.[219] Space does not permit a complete analysis of these

[215] Keim v. United States, 177 U. S. 290, 20 S. Ct. 574 (1900); Bayard v. United States, 127 U. S. 246, 8 S. Ct. 1223 (1888); United States v. MacVeagh, 214 U. S. 124, 29 S. Ct. 556 (1909).

[216] Marbury v. Madison, 1 Cranch (5 U. S.) 137, 2 L. Ed. 60 (1803); Kendall v. United States, 12 Pet. (37 U. S.) 524, 9 L. Ed. 1181 (1838); United States v. Addison, 22 How. (63 U. S.) 174, 16 L. Ed. 305 (1860).

[217] Kendall v. United States, 12 Pet. (37 U. S.) 524 at 617, 9 L. Ed. 1181 (1838). In cases where the writ of mandamus is issued to a private litigant and questions of constitutional rights are raised, it seems clear that such jurisdiction must be vested in a constitutional court. For an indication of this view, see the decision of the Supreme Court in Interstate Commerce Commission v. Brimson, 154 U. S. 447, 14 S. Ct. 1125 (1894).

[218] Generally speaking, these controversies involve matters of governmental privilege as described in the Bakelite and Williams cases rather than matters of private rights. However, the use of mandamus as an original process is not necessarily restricted to privileges but has been extended to controversies which might require an ultimate judicial determination. See Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117, 46 S. Ct. 215 (1926); United States ex rel. v. Fisher, 222 U. S. 204, 32 S. Ct. 37 (1911); Garfield v. United States, 211 U. S. 249, 29 S. Ct. 62 (1908); Interstate Commerce Commission v. United States ex rel. Humboldt S. S. Co., 224 U. S. 474, 32 S. Ct. 556 (1912).

[219] 15 U. S. C., § 49 (Federal Trade Commission); 47 U. S. C., § 11 (Federal

special situations, but with a few exceptions, which are irrelevant to this discussion,[220] this jurisdiction does not include proceedings against officers or employees of the United States and consequently would not be transferred to the proposed court. Due to the similarity of the principles involved, the considerations governing the validity of the auxiliary authority to issue all necessary writs, including mandamus in aid of the other jurisdiction which the bill vests in the proposed court, can best be discussed in connection with the injunctive jurisdiction against federal officers.

The jurisdiction over injunction proceedings against officers of the United States is in a certain sense correlative to the mandamus jurisdiction previously considered.[221] Although injunctive suits against federal officials appear on their face to be similar to mandamus proceedings, in that both remedies more or less relate to the internal management of governmental functions, certain fundamental distinctions must be observed. In contrast with the accepted basis for mandamus proceedings, the jurisdiction to enjoin acts of federal officers is based upon some threatened action by such officials which will result in an alleged injury to property or an invasion of property rights. For the most part, the illegality of such threatened action is based upon allegations of unauthorized proceedings or the unconstitutionality of the statute empowering the officer to take such action.[222]

Communications Commission); 49 U. S. C., § 20(9) (Interstate Commerce Commission); 15 U. S. C., § 77t (under the Securities and Exchange Act); 19 U. S. C., § 1333c (the Tariff Commission).

[220] 18 Stat. L. 333, 28 U. S. C., § 520, (1875), relating to the enforcement of duties imposed upon marshals, clerks and commissioners of the federal courts.

[221] "It has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby . . . may have an injunction to prevent it. In such cases, the writs of *mandamus* and injunction are somewhat correlative to each other. . . ." Board of Liquidation v. McComb, 92 U. S. 531 at 541, 23 L. Ed. 623 (1875).

[222] There is a technical equitable distinction to be observed between an unconstitutional statute and unauthorized action by an official under a statute which is constitutional. See Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 S. Ct. 106 (1921); Harkrader v. Wadley, 172 U. S. 148, 19 S. Ct. 119 (1898). In Osborn v. Bank of the United States, 9 Wheat. (22 U. S.) 738, 6 L. Ed. 204 (1824), Chief Justice Marshall sustained the use of the federal injunction to restrain the enforcement of an unconstitutional statute by analogizing that jurisdiction to the English decisions authorizing equitable relief to enjoin officials acting beyond their lawful powers. Frewin v. Lewis, 4 Myl. & C. 249, 41 Eng. Rep. 98 (1838). Undoubtedly the analogy was not complete and this unwarranted extension of tra-

Consequently, it must be recognized that while mandamus proceedings arise out of the mere nonperformance of official duties, injunctive proceedings against federal officers are founded upon threatened affirmative action which will substantially jeopardize the rights of private litigants. Where Congress enacts a law requiring a federal officer to perform certain definite functions, it would seem that the remedies accorded private parties to compel the performance of such duties are solely within the discretion of the legislature. However, the remedies against unlawful or arbitrary positive action by public officials stand on a different footing. As to the latter remedies, it is doubtful whether Congress could either totally withdraw them, thereby subjecting private citizens to the whim and caprice of subordinate officials, or could vest them in tribunals which do not exercise a judicial power analogous to that authorized by Article III, without also providing other adequate remedies.

The power of the District Supreme Court to entertain injunction proceedings against federal officers is expressly recognized by the provisions of the local Code,[223] authorizing the issuance of all necessary writs or processes, and also by other provisions vesting in that court the jurisdiction of the federal district courts.[224] The authority and power of the lower federal courts to entertain injunction suits of this nature is founded upon their jurisdiction to entertain suits of a civil nature in equity[225] within the statutory limitations defining federal jurisdiction. In addition to this general equity jurisdiction, these courts also have a special statutory authority, relating to injunctions against the orders of the various federal agencies, similar to the mandamus jurisdiction directly conferred by statute.[226] Due to the statutory limitations upon federal jurisdiction as expressed in the Judicial Code,[227]

ditional equity jurisdiction has been generally overlooked. See Lockwood, "The Use of the Federal Injunction in Constitutional Litigation," 43 HARV. L. REV. 426 (1930).

[223] D. C. Code (1929), tit. 18, § 57.

[224] D. C. Code (1929), tit. 18, § 43.

[225] U. S. Constitution, Art. III, § 2; 28 U. S. C., § 41(1).

[226] 28 U. S. C., § 41(28) authorizing injunctions against orders of the Interstate Commerce Commission; 33 U. S. C., § 921 authorizing injunctions against compensation awards under the Longshoremen's and Harbor Workers' Act; 26 U. S. C. § 1569 authorizing injunctions against certain tax proceedings; 47 U. S. C., § 401 authorizing injunctions against the orders of the Federal Communications Commission; 7 U. S. C., § 217 authorizing injunctions against orders of the Secretary of Agriculture under the Packers and Stockyards Act.

[227] Section 24 of the Code provides that the district courts shall have original jurisdiction "of all suits of a civil nature, at common law or in equity . . . where the

the authority to entertain injunctive proceedings, in the absence of statutory exception, is not the exercise of an original jurisdiction but is dependent upon the presence of at least one of the situations permitting the exercise of federal judicial power. Ordinarily, injunctions against federal officers come within the terms of the statutory description of federal jurisdiction; the controversy usually, if not always, arises under either the Constitution or the laws of the United States.[228] Furthermore, it has been assumed in many cases discussing this jurisdiction that these suits involve the exercise of the judicial power of Article III under the Constitution.[229]

Even the doctrine of the immunity of the United States from suit in the absence of express consent,[230] does not prevent injunction suits against officers in a case where an equitable cause is presented.[231] When a complainant alleges that a federal official is acting or threatens to act in such a manner as to injure his property or rights of proerty,[232] the issue becomes one of the authority of the official to take the proposed affirmative action. In the absence of such lawful authority, the officer would be placed in the position of a private individual and subjected to possible liability on a purely tort basis.[233] In situations

matter in controversy exceeds . . . the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states. . . ." 28 U. S. C., § 41(1).

[228] Where the federal officer is acting totally beyond the power of his office and does not purport to act by virtue of lawful authority, federal jurisdiction would have to rest upon diversity of citizenship. However, such a situation is exceedingly rare and no decision on this point has been discovered.

[229] These decisions consider the existence of "a case or controversy" from the viewpoint of an interpretation of Article III rather than an interpretation of "a judicial power" not arising out of the third article as explained in the Williams case. Texas v. Interstate Commerce Commission, 258 U. S. 158, 42 S. Ct. 261 (1922); New Jersey v. Sargent, 269 U. S. 328, 46 S. Ct. 122 (1926).

[230] United States v. McLemore, 4 How. (45 U. S.) 286, 11 L. Ed. 977 (1846); Case v. Terrell, 11 Wall. (78 U. S.) 199, 20 L. Ed. 134 (1871); Oregon v. Hitchcock, 202 U. S. 60, 26 S. Ct. 568 (1906); Turner v. United States, 248 U. S. 354, 39 S. Ct. 109 (1919).

[231] Waite v. Macy, 246 U. S. 606, 38 S. Ct. 395 (1918); Philadelphia Co. v. Stimson, 223 U. S. 605, 32 S. Ct. 340 (1912); Jacob Hoffman Brewing Co. v. McElligott, (C. C. A. 2nd, 1919) 259 F. 525.

[232] The complainant must also show that the injury is irreparable and that no adequate remedy at law is available. Risty v. Chicago, R. I. & P. Ry., 270 U. S. 378, 46 S. Ct. 236 (1926); Georgia v. City of Chattanooga, 264 U. S. 472, 44 S. Ct. 369 (1924); Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288, 41 S. Ct. 272 (1921).

[233] "Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority. . . . And a similar injury may be

where the officer is acting within the scope of his lawful authority but the complainant raises the question of the constitutionality of such authorization,[234] it would seem that a decision on the matter could not be left to final administrative or executive determination.[235] This is particularly true since equitable jurisdiction presupposes the complete absence of other adequate legal remedies. Consequently there is serious doubt whether the jurisdiction over such matters raising constitutional questions could be vested in a court other than that exercising the judicial power of Article III.[236] Similarly, where an officer threatens to violate or violates the constitutional rights of a private citizen by action which is clearly beyond his lawful authority, the issues would not be susceptible of final executive determination; and, if not, they could not be vested in a legislative court.[237]

inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property." Philadelphia Co. v. Stimson, 223 U. S. 605 at 621-622, 32 S. Ct. 340 (1912).

[234] Cases falling in this category are: Railroad Retirement Board v. Alton Ry., 295 U. S. 330, 55 S. Ct. 758 (1935); Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241 (1935); Hammer v. Dagenhart, 247 U. S. 251, 38 S. Ct. 529 (1918); New Jersey v. Sargent, 269 U. S. 328, 46 S. Ct. 122 (1926); Adkins v. Children's Hospital, 261 U. S. 525, 43 S. Ct. 394 (1923); Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397 (1922); Hill v. Wallace, 259 U. S. 44, 42 S. Ct. 453 (1922).

[235] Although the decisions sustaining this proposition are cases in which the confiscatory character of regulatory rates was in issue, the rationale of these decisions apply to any situation where a similar constitutional question is raised. Ex parte Young, 209 U. S. 123, 28 S. Ct. 441 (1908); Chicago, M. & St. P. Ry. v. Minnesota, 134 U. S. 418, 10 S. Ct. 462 (1890); Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 S. Ct. 527 (1920); Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 S. Ct. 192 (1909). See Wiel, "Administrative Finality," 38 HARV. L. REV. 447 (1925).

[236] Where such constitutional issues are raised by a private litigant, it seems beyond doubt that they could not be finally determined by an administrative officer. Judicial questions involving an interpretation of constitutional rights can only be decided finally by courts exercising the judicial power of the United States. Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285 (1932). A contrary doctrine would amount to a denial of the doctrine of the supremacy of judicial review. Clearly then, the jurisdiction over these controversies could not be vested in a legislative court, regardless of the provisions for a subsequent review by the Supreme Court or any other constitutional court.

[237] Cases falling in this category are: St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 56 S. Ct. 720 (1936); Santa Fé Pac. R. R. v. Lane, 244 U. S. 492, 37 S. Ct. 714 (1917); Philadelphia Co. v. Stimson, 223 U. S. 605, 32 S. Ct. 340 (1912); Colorado v. Toll, 268 U. S. 228, 45 S. Ct. 505 (1925); American School of Magnetic Healing v. McAnulty, 187 U. S. 94, 23 S. Ct. 33 (1902).

The issue in these disputes is not whether the statute itself is unconstitutional,

On the other hand, the case may be one where the officer is merely acting beyond the scope of his authority and the complaint may not directly raise constitutional issues. The validity of vesting jurisdiction over such cases in a legislative court would seem to depend upon the subject matter of the particular dispute.[238] Applying the doctrine of the *Williams* case strictly, the proposed court could only be vested with a judicial authority to determine controversies which are susceptible of final executive determination. In this view of the matter, injunctive suits against federal officers arising out of controversies which fall within the category of governmental privilege,[239] and which do not necessarily require a judicial determination, could be vested in a legislative court. However, jurisdiction over a controversy which involves a matter outside this limited category and involves the exercise of a judicial power could not be vested in a court organized beyond the limits of Article III without violating the separation doctrine.

These latter observations might also be applicable to the auxiliary authority to issue writs of mandamus in aid of other jurisdiction expressly confered by the terms of the bill, since the validity of this jurisdiction is likewise dependent upon the subject matter of the controversy. It should be noted, however, that where the controversy involves the validity of official action, whether based upon an unconstitutional statute or an unauthorized proceeding, the due process clause of the Fifth Amendment can almost invariably be invoked by the claimant. As a matter of fact, it would seem that the only occasion when it would be unavailable to a private litigant would be in those controversies where matters of privilege rather than right are involved.[240]

but whether the action of the officer, irrespective of the mandate of the statute, will result in a violation of constitutional rights. From a practical viewpoint there is actually no fundamental difference in these controversies, since in either case the injunction is directed against, and the gravamen of the offense is, the action of the official. See note 236, supra.

[238] Cases falling in this category are: Work v. Louisiana, 269 U. S. 250, 46 S. Ct. 92 (1925); Lane v. Watts, 234 U. S. 525, 34 S. Ct. 965 (1914); Waite v. Macy, 246 U. S. 606, 38 S. Ct. 395 (1918).

[239] See note 116, supra.

[240] Aside from the question of the validity of vesting the authority to entertain injunctive proceedings against federal officers in a legislative court, there is perhaps an additional problem concerning the withdrawal of certain traditional jurisdiction from courts organized under Article III. There is dictum in the Murray case, previously referred to, which might conceivably lead to the conclusion that the common-law equity jurisdiction of Article III could not be withdrawn from constitutional courts. "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance

With regard to the special statutory jurisdiction to entertain injunctive suits,[241] the provisions of the proposed bill are quite uncertain. Although these proceedings are authorized for the express purpose of testing the validity of an administrative order, the suit in effect is against the members of administrative agencies or executive officers. Whether this jurisdiction is transferred to the administrative court depends in the first instance upon whether these agencies or executive officers are "officers and employees of the United States."[242] Furthermore, the validity of such a transfer would in part be dependent upon whether the private litigant had other equitable or legal remedies whereby the determinations or orders could be subjected to a judicial review at the requisite stage of the litigation.[243]

Although it has been assumed that this jurisdiction over extraordinary proceedings includes only mandamus and injunction suits, the latent uncertainty of this position requires at least mention of the other remedies in this class. The writ of habeas corpus is commonly employed to secure the release of a person imprisoned without just cause.[244] The lower federal courts are given authority to issue the writ as an original process,[245] and it is limited to cases within the judicial power of such courts.[246] With the exception of those controversies which may be subjected to other than final judicial determination,[247] it would appear that questions of constitutional right are frequently the principal issue in habeas corpus proceedings[248]

any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty. . . ." Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. (59 U. S.) 272 at 286, 15 L. Ed. 372 (1855).

[241] See note 226, supra.

[242] The decision of the Supreme Court in Humphrey's Exr. v. United States, 295 U. S. 602, 55 S. Ct. 869 (1935), is of interest in this connection. In that case the Court attempted to draw a distinction between officers of the executive departments of the government and the members of an independent establishment exercising only quasi-judicial and quasi-legislative functions.

[243] In the absence of such remedies in a constitutional court, this statuory jurisdiction could not be vested in a court organized beyond the limits of Article III, since such controversies are not infrequently accompanied by constitutional issues of the most fundamental nature.

[244] Ex parte Bollman, 4 Cranch (8 U. S.) 75, 2 L. Ed. 554 (1807); Ex parte Watkins, 3 Pet. (28 U. S.) 193, 7 L. Ed. 650 (1830).

[245] 28 U. S. C., § 451.

[246] In re Burrus, 136 U. S. 586, 10 S. Ct. 850 (1890).

[247] In re Grimley, 137 U. S. 147, 11 S. Ct. 54 (1890); United States v. Ju Toy, 198 U. S. 253, 25 S. Ct. 644 (1905). See also 28 U. S. C., § 453.

[248] Ex parte Wilson, 114 U. S. 417, 5 S. Ct. 935 (1885); Matters v. Ryan, 249 U. S. 375, 39 S. Ct. 315 (1919); Ng Fung Ho v. White, 259 U. S. 276, 42 S. Ct. 492 (1922).

even in cases where the dispute is primarily one of authority.[249]

Proceedings by quo warranto present widely different problems from those considered in connection with habeas corpus. The jurisdiction to entertain quo warranto proceedings is also expressly conferred by statute upon the District Supreme Court[250] and is made applicable by judicial interpretation to actions against those holding office in the Federal Government.[251] However, the subject matter of these controversies — the right to hold office — is not unlike that involved in mandamus proceedings and consequently might fall within the class of disputes over which Congress has a limited discretion as to the form of final determination.[252]

The writ of prohibition, on the other hand, is generally used in connection with proceedings to restrain the exercise of a judicial function[253] by a subordinate judicial tribunal[254] acting beyond its powers or jurisdiction.[255] Since this remedy is not ordinarily available to correct or remedy errors[256] and can be used only to restrain judicial action, it seems clear that jurisdiction of this character could not be vested in a legislative court to the extent of controlling lower federal courts; this would come in direct conflict with the separation of powers doctrine.[257] There is the additional question whether the members

[249] In re Neagle, 135 U. S. 1, 10 S. Ct. 658 (1890).

[250] 28 U. S. C., § 377a.

[251] Newman v. United States ex rel. Frizzell, 238 U. S. 537, 35 S. Ct. 881 (1915).

[252] In a certain sense these proceedings relate to the internal management of governmental affairs and the courts have been very reluctant to interfere with such matters unless private rights are seriously endangered. Public policy dictates a minimum of interference with the performance of public duties, and to this end it is permissible to withhold quo warranto from private parties and permit its issuance only on petition of the government. See Wallace v. Anderson, 5 Wheat. (18 U. S.) 291, 5 L. Ed. 91 (1820).

[253] Smith v. Whitney, 116 U. S. 167, 6 S. Ct. 570 (1886). See note, 34 COL. L. REV. 899 (1934).

[254] Ex parte Phenix Ins. Co., 118 U. S. 610, 7 S. Ct. 25 (1886); The Western Maid, 257 U. S. 419, 42 S. Ct. 159 (1921).

[255] Ex parte Whitney S. S. Corp., 249 U. S. 115, 39 S. Ct. 192 (1919); In re Morrison, 147 U. S. 14, 13 S. Ct. 246 (1893).

[256] Ex parte Peterson, 253 U. S. 300, 40 S. Ct. 543 (1920); In re Chicago, R. I. & P. Ry., 255 U. S. 273, 41 S. Ct. 288 (1921).

[257] It should be noted that this same difficulty arises in connection with the proposed jurisdiction over mandamus proceedings, since that writ may also be used to control the action of judicial officers. United States v. Gomez, 3 Wall. (70 U. S.) 752, 18 L. Ed. 212 (1866); Ex parte Brown, 116 U. S. 401, 6 S. Ct. 387 (1886); In re Babcock, (C. C. A. 7th, 1928) 26 F. (2d) 153. Due to the fact that this authority is generally considered to be an exercise of appellate jurisdiction by higher courts, it did not seem necessary to discuss the proposed transfer from that viewpoint.

of these subordinate tribunals, against whom the writ would be directed, fall within the classification of "officers and employees of the United States." There are in fact no provisions in the Logan bill which indicate that the proposed court would have any authority over subordinate judicial tribunals. But in any event the only tribunals which it could validly control by the writ of prohibition would be those of a legislative or administrative character exercising judicial functions.[258]

The authority to issue the writ of certiorari is restricted in much the same manner as prohibition proceedings, being available only to control judicial functions of subordinate agencies.

(*d*) *Transfer of Authority to Revoke and Suspend Licenses, Permits or Other Grants for Regulatory Purposes—Judicial Review*

The authority of the various administrative agencies of the Federal Government to revoke and suspend licenses, permits or other grants for regulatory purposes, which the Logan bill vests in the proposed court, is essentially an administrative jurisdiction.[259] This type of regulation is extended to the fields of taxation, war, control and disposition of public lands, navigation, and commerce with the Indians, foreign nations and among the several states. In view of the constitutional restrictions relating to the judicial jurisdiction of legislative courts, the authority to revoke and suspend these grants must be examined from the standpoint both of the subject matter of the controversy and of the particular stage of the dispute at which the private litigant must be accorded a judicial review of his right to retain the license or permit.

It seems to be well settled that an administrative agency may be vested with the power to revoke or suspend licenses where such proceedings are accompanied by an adequate notice and hearing.[260] And, in some instances, where immediate action is imperative, sum-

[258] In re Cooper, 138 U. S. 404, 11 S. Ct. 289 (1891); Ex parte Joins, 191 U. S. 93, 24 S. Ct. 27 (1903).

[259] That is, in contrast to a system which requires judicial action before revocation or suspension can be effectuated. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY, § 64, p. 117 (1928). See also the procedure required in connection with the revocation of permits for the construction or operation of navigation projects as provided in 16 U. S. C., § 806.

[260] Bratton v. Chandler, 260 U. S. 110, 43 S. Ct. 43 (1922); Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064 (1886). See Goodnow, "Private Rights and Administrative Discretion," 41 A. B. A. REP. 408 at 421 (1916).

mary proceedings are justifiable.[261] But in either situation an adequate judicial review must be accorded the licensee at some stage in the controversy,[262] unless the subject matter of the dispute relates to matters of governmental privilege rather than private rights. Since most of the federal statutory provisions relating to revocation or suspension do provide for a hearing prior to the administrative determination,[263] the problem created by this transfer of jurisdiction relates primarily to the necessity and scope of judicial review in such proceedings. It should be noted that since this jurisdiction has generally been entrusted to administrative authorities free from judicial interference,[264] at least until a final determination has been reached, there is considerable doubt whether such jurisdiction would ordinarily be considered a part of the judicial power of Article III. However, the provisions of the Logan bill which purport to withdraw all other remedies relating to revocation or suspension[265] and substitute in their place a single proceeding in a legislative court have a tendency to alter the fundamental character of the former administrative process.[266] Under these circumstances, the jurisdiction over controversies involving the revocation and suspension of licenses might conceivably be converted into the

[261] North American Cold Storage Co. v. Chicago, 211 U. S. 306, 29 S. Ct. 101 (1908); Origet v. Hedden, 155 U. S. 228, 15 S. Ct. 92 (1894); Lawton v. Steele, 152 U. S. 133, 14 S. Ct. 499 (1894).

[262] Hall v. Geiger-Jones Co., 242 U. S. 539, 37 S. Ct. 217 (1917); Clement Nat. Bank v. Vermont, 231 U. S. 120, 34 S. Ct. 31 (1913); Hagar v. Reclamation Dist., 111 U. S. 701, 4 S. Ct. 663 (1884). It has been suggested that the power to license businesses and commercial transactions is founded upon the expanding concept of businesses affected with a public interest and therefore the right to engage in such activities is a "privilege" which may be refused or revoked without hearing or perhaps a subsequent judicial determination. See note, 24 COL. L. REV. 528 at 531 (1924). However, recent cases tend to show a change of attitude in this regard and the privilege concept seems to be no longer effectual. Fred Feil Brewing Co. v. Blair, (D. C. Pa. 1924) 2 F. (2d) 879; Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117, 46 S. Ct. 215 (1926); Smith v. Foster, (D. C. N. Y. 1926) 15 F. (2d) 115. See also DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW, p. 256, note 7 and p. 60, note 72 (1927). Furthermore, the decision of the Supreme Court in Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505 (1934), has had a tendency to render the public interest doctrine obsolete in certain respects.

[263] Koons, "Growth of Federal Licensing," 24 GEORGETOWN L. J. 293 (1936).

[264] FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY, p. 124, § 65 (c) and (d) (1928).

[265] "The jurisdiction and authority herein conferred upon the court shall be deemed exclusive of any other jurisdiction or remedy now authorized by law. . . ." Section 6.

[266] This point was also made in connection with the proposed jurisdiction over suits to enjoin the assessment or collection of taxes when the remedies for recovery and refund had also been vested in the same court. See supra, note 184.

class of matters which require a final judicial determination and which could not be the subject of final executive or administrative determination[267] and consequently could not be vested in a legislative court. But it must be conceded that the jurisdiction over some of these revocation proceedings relates to matters of governmental privilege[268] within the doctrine of the *Williams* case, and therefore a judicial determination of such controversies would be unnecessary. To the extent that the proposed court would be invested with a jurisdiction over controversies which were susceptible of final executive determination, there is little practical difficulty; but where the jurisdiction is extended to include controversies in which the litigant is entitled to an ultimate judicial determination, the separation doctrine would prohibit its delegation to a legislative court.

On the other hand, there is a substantial possibility that this jurisdiction would continue to be considered administrative rather than judicial, despite the exclusion of other judicial remedies.[269] This interpretation finds support in the fact that revocation and suspension proceedings are in many instances broad enough to include considerations of policy and the exercise of an administrative discretion.[270] Under this theory the proposed jurisdiction, so far as it included the exercise of administrative discretion based upon consideration of policy,

[267] By excluding other remedies in this manner the entire controversy relating to revocation and suspension as an original proceeding would take place in the one tribunal. Consequently, if it be assumed that a judicial review is necessary, it would have to be available in that proceeding. Obviously, then, these matters could not be left to a final administrative determination, although it seems quite possible that this could be done if the other judicial remedies had not been excluded.

[268] Space does not permit a complete enumeration of these special controversies. However, it will suffice to point out that the following proceedings are probably within that category: The jurisdiction of the Secretary of the Treasury to revoke licenses of customhouse brokers (19 U. S. C., § 1641b); of the President to revoke licenses to trade with the Indians (25 U. S. C., § 263); of the Postmaster General to revoke certificates of second-class mail privileges (39 U. S. C., § 232); of the Foreign Trade Zones Board to revoke licenses of foreign trade zones (19 U. S. C., § 81r) and of the Secretary of Agriculture to revoke designations of bonded warehouses (7 U. S. C., § 250).

[269] This conclusion would be accompanied by further problems relating to the adequacy of judicial review under this section of the bill, which will be discussed in another connection. See pages 249-250, infra.

[270] Authorizations to revoke or suspend licenses are not infrequently characterized by the standards of discretion which are available to the administrative agency. This is particularly true where the license or grant is founded upon a safety law, relates to matters of public health or involves the professional qualifications of the grantee. See FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY, § 66, p. 127 (1928).

would not be considered a judicial jurisdiction[271] and could be vested in a legislative court, regardless of the limitations preventing an adequate judicial review. In a large measure, the actual status of this jurisdiction over revocation proceedings will be dependent upon the procedure which the proposed court adopts in making its determinations under this section of the bill.[272]

(e) *Transfer of Jurisdiction to Review Refusal to Admit to Practice or Disbarment from Practice*

The authority and power to review the action of any department or other establishment of the goverment for refusing to admit any person to practice before it or for disbarring such person is not unlike the jurisdiction over revocation and suspension proceedings.[273] However, one important distinction must be noted. While the general revocation jurisdiction is original jurisdiction, this is obviously appellate in form and nature. In *Goldsmith v. United States Board of Tax Appeals*,[274] the Supreme Court held that due process of law required "a notice, hearing and opportunity to answer" before an attorney could be barred from practice before the Board of Tax Appeals.[275] This decision was in accord with other cases involving disbarment proceedings[276] and within the rule of *Randall v. Brigham*[277] that, "The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."[278] Similarly, controversies involving the statutory power of an administra-

[271] Federal Radio Commission v. General Elec. Co., 281 U. S. 464, 50 S. Ct. 389 (1930); Keller v. Potomac Elec. Power Co., 261 U. S. 428, 43 S. Ct. 445 (1923). See also note, 29 MICH. L. REV. 766 (1931).

[272] In Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249, 53 S. Ct. 345 (1933), the Supreme Court held that the status of a particular jurisdiction is to be determined by what the lower court does rather than by what the statute authorizes it to do in connection with non-judicial functions. Cf. Avery v. Commissioner, (C. C. A. 5th, 1927) 22 F. (2d) 6; Kekaha Sugar Co. v. Burnet, (App. D. C. 1931) 50 F. (2d) 322.

[273] See note, 24 MICH. L. REV. 846 (1926), where the opinion is expressed that a revocation of the right to practice before any governmental department is of the same nature as the ordinary license and grant proceedings.

[274] 270 U. S. 117, 46 S. Ct. 215 (1926).

[275] Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117 at 123, 46 S. Ct. 215 (1926).

[276] Phillips v. Ballinger, 37 App. D. C. 46 (1911); Garfield v. United States ex rel. Spalding, 32 App. D. C. 153 (1908); Wedderburn v. Bliss, 12 App. D. C. 485 (1898).

[277] 7 Wall. (74 U. S.) 523, 19 L. Ed. 285 (1869).

[278] Randall v. Brigham, 7 Wall. (74 U. S.) 523 at 540, 19 L. Ed. 285 (1869).

tive agency "to adopt rules of practice before it by which it may limit those who appear" on behalf of clients affected by its orders are cases "in which the construction of a law of the United States is drawn in question" under § 250 of the Judicial Code.[279] Therefore, in so far as the review of disbarment or suspension proceedings relates to the fundamental authority of the agency or to the procedural requirements of due process, the jurisdiction could not be vested in a legislative court. However, the jurisdiction to review the decision directly, as distinguished from the administrative authority to render a decision, of the administrative agency or officer relating to the disbarment is "not a matter for the consideration of the courts"[280] since "the right to appear before" any governmental department "is not an inherent right, but a privilege granted by law and subject to such limitations as are necessary for the protection both of the . . . public" and the agency in question.[281] Furthermore, a jurisdiction over such controversies which includes a full review of all the facts upon which the original determination was founded is a broader jurisdiction than can be constitutionally delegated to courts organized under Article III.[282]

In the light of these considerations, it would appear that while the jurisdiction now exercised by constitutional courts relating to statutory authority and procedural requirements could not be vested in a tribunal not organized within the terms of the third article, the proposed court could receive the authority to review the action of any department disbarring or suspending any person from practice before it. This interpretation seems to be the more acceptable for the reason that this is not a transferred authority, but a newly created jurisdiction which is not made exclusive of other remedies as in the case of the general revocation and suspension jurisdiction. Although the decision in the *Goldsmith* case seemed to convert an administrative jurisdiction into the category of judicial power, the opinion is restricted to matters which have been traditionally handled by the courts, and there is small reason to suppose that it will be subsequently extended to prevent the vesting of this appellate jurisdiction in the proposed court.

[279] Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117 at 120, 46 S. Ct. 215 (1926).

[280] Wedderburn v. Bliss, 12 App. D. C. 485 at 492 (1898).

[281] Phillips v. Ballinger, 37 App. D. C. 46 at 50 (1911).

[282] Federal Radio Commission v. General Elec. Co., 281 U. S. 464, 50 S. Ct. 389 (1930). See also supra, note 271.

(f) *General Observations—Conclusions*

Before concluding this discussion of the jurisdictional aspects of the proposed court it seems necessary to analyze in more detail the doctrine of the *Bakelite* and *Williams* cases and also to allude further to the position of the drafters and sponsors of the bill. With regard to the latter point, it seems rather paradoxical that the purposeful attempt to invest a legislative court with quasi-judicial functions in order to comply fully with the strict requirements of the separation of powers doctrine should be rendered unconstitutional by reference to the same doctrine. This seeming paradox results (1) from a failure to distinguish between "judicial functions" and "judicial power," and (2) from a failure to restrict the jurisdictional provisions of the bill to the functions performed by administrative agencies or executive officers.

On a quantitative basis, the Logan bill vests the proposed court with more authority derived from legislative or constitutional courts than from administrative agencies.[283] If the transfer of jurisdiction of the court had been limited to the functions performed by administrative agencies, and if the existing judicial remedies were left as they are, there would have been little question as to the validity of the transfer.[284] Instead, however, the drafters of the bill ignored much of the quasi-judicial jurisdiction of these administrative agencies,[285] and attempted to establish a tribunal with judicial powers for the handling of controversies arising between the government, or its representatives, and private parties.[286] A jurisdiction based primarily on this classi-

[283] The only proposed jurisdiction derived from administrative agencies is that now exercised by the Board of Tax Appeals and the general administrative authority to revoke or suspend permits, licenses or other grants for regulatory purposes.

[284] Unquestionably, legislative courts may be invested with either an administrative or legislative jurisdiction. Keller v. Potomac Electric Power Company, 261 U. S. 428, 43 S. Ct. 445 (1923); Postum Cereal Co. v. California Fig Nut Co., 272 U. S. 693, 47 S. Ct. 284 (1927); Ex parte Bakelite Corporation, 279 U. S. 438, 49 S. Ct. 411 (1929).

[285] It would be impracticable to attempt to list the many instances in which the drafters failed to include quasi-judicial functions of an administrative agency. However, the Report of the Special Committee on Administrative Law gives a comprehensive list of these functions with an explanation regarding each type. See ADVANCE PROGRAM OF AMERICAN BAR ASSOCIATION, 209 at 234 et seq. (1936).

[286] Legislative courts have never been denied the indicia of judicial powers in aid of their appropriate jurisdiction. For example, they may punish for contempt in certain instances. Francis v. People of the Virgin Islands, (C. C. A. 3d, 1926) 11 F. (2d) 860; Fleming v. United States, (C. C. A. 9th, 1922) 279 F. 613. The decisions of territorial courts are reviewable by prohibition from the Supreme Court. In re Cooper, 138 U. S. 404, 11 S. Ct. 289 (1891). Furthermore, their decisions are res judicata. Cherokee Nation v. United States, 270 U. S. 476, 46 S. Ct. 428 (1926).

fication inevitably included, in addition to executive and administrative functions, much of the authority now exercised by the judicial branch of the government. But this approach ignores the inherent distinction which exists between the quasi-judicial functions of an administrative agency and the judicial power exercised by constitutional courts.

Although the courts have not expressly recognized the fundamental difference between the nature of these jurisdictions in any particular decision,[287] the decisions of the Supreme Court divide themselves naturally into two clases which support this differentiation. Almost simultaneously the Court has sanctioned the vesting of quasi-judicial functions in the executive department of the government,[288] and has prohibited the vesting of the judicial power of the United States in courts other than those organized under Article III of the Constitution.[289] Under any circumstances, it seems beyond serious doubt that the sponsors of the Logan bill are mistaken in assuming that "in actual practice, the judicial power of the United States is dispersed among" administrative tribunals as well as constitutional and

Recently, an attorney in the United States Customs Court was held to be entitled to an attorney's lien. Brooks v. Mandel-Witte Co., Inc., (C. C. A. 2d, 1932) 54 F. (2d) 992.

[287] The nearest approach to a recognition of this distinction occurred in Crowell v. Benson, 285 U. S. 22 at 58, 52 S. Ct. 285 (1933). In considering the rationale of the Bakelite case, the Court said: "where administrative bodies have been appropriately created to meet the exigencies of certain classes of cases and their action is of a judicial character, the question of the conclusiveness of their administrative findings of fact generally arises where the facts are clearly not jurisdictional and the scope of review as to such facts has been determined by the applicable legislation. None of the decisions of this sort touch the question which is presented where the facts involved are jurisdictional or where the question concerns the proper exercise of the judicial power of the United States. . . ." See also the opinion in Sears, Roebuck & Co. v. Federal Trade Commission, (C. C. A. 7th, 1919) 258 F. 307 at 312, where it is observed that "though the action of the commission in ordering desistance may be counted quasi judicial on account of its form, with respect to power it is not judicial because a judicial determination is only that which is embodied in a judgment or decree of a court and enforceable by execution or other writ of the court."

[288] Federal Trade Commission v. Eastman Kodak Co., 274 U. S. 619, 47 S. Ct. 688 (1927); Baer Bros. Mercantile Co. v. Denver & R. G. R. R., 233 U. S. 479, 34 S. Ct. 641 (1914); Interstate Commerce Commission v. Louisville & Nashville R.R., 227 U. S. 88, 33 S. Ct. 185 (1913); Interstate Commerce Commission v. Brimson, 154 U. S. 447, 14 S. Ct. 1125 (1894). See Needham, "Judicial Determinations by Administrative Commissions," 10 AM. POL. SCI. REV. 235 (1916).

[289] Ex parte Bakelite Corporation, 279 U. S. 438, 49 S. Ct. 411 (1929); Williams v. United States, 289 U. S. 553, 53 S. Ct. 751 (1932); O'Donoghue v. United States, 289 U. S. 516, 53 S. Ct. 740 (1933); Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285 (1932).

legislative courts.[290] Rather it seems probable that if any of the jurisdiction of the proposed court is within the judicial power of Article III it cannot be transferred to or vested in that tribunal without violating the separation doctrine.

It is unlikely that the jurisdictional provisions of this court would come within any of the exceptions to the application of the separation doctrine. The rationale of the *Canter* case,[291] sustaining the exercise by a territorial court of a judicial power similar to that described in Article III, seems inapplicable to the provisions of the Logan bill. The Supreme Court, in *O'Donoghue v. United States*,[292] ignored the possibilities of an analogy between courts situated in the District and the territorial courts. It held that the courts of the District were distinguishable from courts in the territories in that the latter were merely temporary tribunals created by Congress to hear disputes until a permanent government could be established.[293] Moreover, if the proposed court could not claim a localized situs within the District, due to its ambulatory features,[294] the possibility of applying a doctrine of complete federal sovereignty (applicable in the District) must be definitely cast aside. Furthermore, this doctrine utilized by the Court in the *O'Donoghue* case would appear to be inapplicable here for two reasons. First, and most obvious, the Logan bill provides that the trial division shall be ambulatory, and there is every reason to believe that such a provision is vital to the proper functioning of the court.[295] The reasoning of the Court in the *O'Donoghue* case would not cover the situation created by a court which merely had headquarters in the District and was established to handle a general type of controversy anywhere.[296] Secondly, the cases explaining and rationalizing the complete federal sovereignty concept[297] seem to indicate that once this power has been utilized in establishing an autonomous system of

[290] "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION 209 at 212 (1936).

[291] American Ins. Co. v. Canter, 1 Pet. (26 U. S.) 511, 7 L. Ed. 242 (1828).

[292] 289 U. S. 516, 53 S. Ct. 740 (1933).

[293] O'Donoghue v. United States, 289 U. S. 516 at 538, 53 S. Ct. 740 (1933).

[294] Section 14 of the Logan bill. See supra, note 139.

[295] The ambulatory features were inserted in the bill to satisfy objections concerning the over-concentration of administrative machinery in the District which would require private litigants to travel hundreds of miles to prosecute their claims.

[296] Although the Williams and O'Donoghue cases were decided on the same day, the Court made no attempt to apply the complete power doctrine of the O'Donoghue case to the jurisdiction of the Court of Claims considered in the former case.

[297] Keller v. Potomac Elec. Power Co., 261 U. S. 428, 43 S. Ct. 445 (1923); O'Donoghue v. United States, 289 U. S. 516, 53 S. Ct. 740 (1933).

courts, it is exhausted and can no longer be used as a means of avoiding the restrictive effect of the judicial article. This interpretation of the decisions is borne out by the fact that the concept has not been applied to any of the specialized courts located in the District unless they were a part of the local judicial system.

Although the cases examining the judicial competency of legislative courts are unequivocal in their decisions as to the particular jurisdiction under consideration, the precise extent to which these principles nullify the restrictive effect of the separation doctrine is the subject of no little confusion. The rationale of the *Bakelite* and *Williams* cases, sanctioning the vesting of a judicial jurisdiction in a legislative court, establishes a criterion which assumes the existence of a well-defined class of controversies permitted by the Constitution to be finally determined by administrative agencies or executive officers.[298] In neither case, however, did the Court attempt to set the outer limits of this category of disputes. In the *Bakelite* opinion the Court merely supported its conclusion by the citation of cases in which it has been held that the determinations of administrative officers need not be subjected to a court review. With respect to the subject matter of these controversies "the function of the courts is not one of review but essentially of control."[299] Within this classification of cases are included matters relating to the control of aliens,[300] claims against the United States[301] or foreign governments,[302] disputes between the government and its revenue collectors,[303] and nationalization proceedings,[304] the use of the mails,[305] the enforcement of military discipline,[306] customs matters,[307] the granting of land patents,[308] of pen-

[298] As distinguished from those controversies in which the parties are entitled to a final judicial determination in order to satisfy due process requirements of the Fifth Amendment. Regarding the limitations arising out of the judicial article, see Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285 (1932).

[299] Dissenting opinion of Justice Brandeis in Crowell v. Benson, 285 U. S. 22 at 89, 52 S. Ct. 285 (1932).

[300] Nishimura Ekiu v. United States, 142 U. S. 651, 12 S. Ct. 336 (1892).

[301] Williams v. United States, 289 U. S. 553, 53 S. Ct. 751 (1932).

[302] La Abra Silver Min. Co. v. United States, 175 U. S. 423, 20 S. Ct. 168 (1899).

[303] Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. (59 U. S.) 272, 15 L. Ed. 372 (1855).

[304] Tutun v. United States, 270 U. S. 568, 46 S. Ct. 425 (1926).

[305] Public Clearing House v. Coyne, 194 U. S. 497, 24 S. Ct. 789 (1904).

[306] Carter v. Roberts, 177 U. S. 496, 20 S. Ct. 713 (1900).

[307] Passavant v. United States, 148 U. S. 214, 13 S. Ct. 572 (1893).

[308] Riverside Oil Company v. United States ex rel. Hitchcock, 190 U. S. 316, 23 S. Ct. 698 (1903).

sions[309] and patent rights,[310] and purely political affairs or acts of state.[311]

This partial withdrawal of certain controversies from the realm of judicial cognizance is rationalized by reference to either of two theories frequently found in the decisions of the courts. The first theory recognizes the impropriety of permitting private litigants to question the determinations of administrative officers in situations where the government is extending a privilege or gratuity to the members of the public.[312] The other theory recognizes the importance of the efficient performance of indispensable governmental services and functions by administrative officials with a minimum of interference from private parties, whose interest in their determinations is at the most indirect.[313] A third theory might also be mentioned in this connection, although it would seem to be included within the implications of the second. Where governmental functions are being performed in the exercise of sovereign powers and involve grave questions of policy or of a political nature, the adjudications of executive officers should not be disturbed by judicial re-determination at the instance of private citizens whose private interests play but a small part in formulating the national policy.[314]

This brief analysis of the judicial competency of legislative courts will serve to bring into sharp relief the theoretical limitations on the proposed jurisdiction of the administrative court suggested by the Logan bill. As a practical matter, it seems quite apparent that much of the ordinary jurisdiction now exercised by the lower federal courts could not be placed in any of these established categories and consequently any attempt to vest them in a legislative court would be futile. On the other hand, it is interesting to note that many of the controversies referred to above have already been vested in legislative courts of considerable repute.[315]

[309] Decatur v. Paulding, 14 Pet. (39 U. S.) 497, 10 L. Ed. 559 (1840). Cf. United States ex rel. Dunlap v. Black, 128 U. S. 40, 9 S. Ct. 12 (1888).

[310] See Morgan v. Daniels, 153 U. S. 120, 14 S. Ct. 772 (1894), where the Court refers to the various types of patent determinations which will not be interfered with by the judiciary.

[311] In re Baiz, 135 U. S. 403, 10 S. Ct. 854 (1890); Tiaco v. Forbes, 228 U. S. 549, 33 S. Ct. 585 (1913).

[312] See FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY, c. 15 (1928).

[313] DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 59 et seq. (1927).

[314] Ibid at 305 et seq.

[315] The Customs Court, the Court of Claims, and the Court of Customs and Patent Appeals.

The recent case of *Crowell v. Benson*[316] has served to clarify one point which might have been considered doubtful prior to that decision. In the course of its opinion the Court pointed out that as to those controversies which are not included in the rationale of the *Bakelite* case, Article III, as well as the due process clause, requires an opportunity for a judicial determination in a court organized under and within the terms of the judicial article.[317] In this respect, the Fifth Amendment and the third article are to be interpreted together, to require a judicial determination by a constitutional court in an effort to achieve a more complete separation of governmental powers. To ignore the inherent limitations of the *Bakelite* decision by vesting in the proposed court a variegated class of disputes, the distinguishing feature of which appears to be that the United States or its officers are made defendants in the controversy, would result in an unprecedented emasculation of the separation doctrine as it relates to Article III.[318] As a matter of judicial interpretation, many of the disputes between private litigants and governmental representatives are not susceptible of administrative finality and consequently would be totally beyond the competency of the proposed court.[319]

[316] 285 U. S. 22, 52 S. Ct. 285 (1932). This decision was primarily concerned with the scope of judicial review and relates solely to determinations by federal agencies and officers.

[317] Crowell v. Benson, 285 U. S. 22 at 56, 52 S. Ct. 285 (1932).

[318] As Justice Brandeis pointed out in his dissent in the Crowell case: "The suggestion that due process does not require judicial process in any controversy to which the government is a party would involve a revision of historic conceptions of the nature of the federal judicial system." 285 U. S. 22 at 87, note 33.

[319] Matters arising under the Interstate Commerce Act are subjected to a stringent judicial review: Interstate Commerce Commission v. Ill. Cent. R. R., 215 U. S. 452, 30 S. Ct. 155 (1910); Interstate Commerce Commission v. Union Pac. R. R., 222 U. S. 541, 32 S. Ct. 108 (1912); St. Louis & O. Ry. v. United States, 279 U. S. 461, 49 S. Ct. 384 (1929). Likewise with regard to the Federal Trade Commission Act: Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568, 43 S. Ct. 210 (1923); Federal Trade Commission v. Gratz, 253 U. S. 421, 40 S. Ct. 572 (1920). In the other fields of federal control the rule of review is similarly broad. See Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 50 S. Ct. 220 (1930); St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 56 S. Ct. 720 (1936); Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935).

There was some suggestion in the majority opinion of the Crowell case that the doctrine of the Bakelite case extended to controversies arising under the laws of federal taxation and interstate commerce as well as the other matters already noted. However, this statement cannot be taken broadly since it would practically nullify the effect of Article III. Although the Commerce Court was created to hear disputes arising under the Interstate Commerce Act, it is generally believed to have been a constitutional court exercising the judicial power of Article III. See supra, note 123. Regarding the limits of the doctrine of the Bakelite case, see Katz, "Federal Legislative Courts," 43 HARV. L. REV. 894 (1930).

Regardless of the supposed necessity for administrative uniformity, the legislative court doctrine must be strictly interpreted to prevent inroads on the jurisdiction of the constitutional courts. Undoubtedly some of the jurisdiction now vested in these courts could be transferred to a legislative tribunal, since not all of their judicial power arises out of the third article.[320] In neither the *Bakelite* nor *Williams* case is there any suggestion that legislative courts could be created to exercise a jurisdiction over the ordinary matters which are now vested in constitutional courts. To accept the broad proposition that the "judicial power" is not vested exclusively in courts created under the third article and consequently that that power may be vested in legislative courts, would serve to break through the restrictive provisions of the judicial article and completely nullify its tenure and salary limitations. To give these restrictive provisions any effect, it must be assumed that some of the jurisdiction of the courts organized under Article III could not be constitutionally vested in legislative courts. The line of demarcation between the judicial jurisdiction which can be vested in a legislative court and that which must be exercised exclusively by constitutional courts divides the cases into categories in which the Constitution either does or does not require a final judicial determination. Only in those situations where the controversy may be subjected to administrative finality may that jurisdiction be vested in a legislative court without violating the separation doctrine. To extend the legislative court theory further than this "would be to sap the judicial power as it exists under the Federal Constitution."[321]

Many of the constitutional doubts raised by the Logan bill are the result of misguided attempts to cut off entirely judicial remedies now vested in constitutional courts or to transfer such remedies to the proposed court. This process of remedial exclusion, as applied to situations where the remedy is utilized to control administrative action, has a tendency to convert an ordinary administrative proceeding into a controversy in which the litigant is entitled to a judicial determination. This is due to the fact that it is the only proceeding authorized by the bill. In the performance of governmental functions there are generally many stages in the proceedings at which a litigant could be accorded a judicial remedy. Public policy dictates the stage in the dispute at which such a remedy must be accorded a pri-

[320] Williams v. United States, 289 U. S. 553 at 567, 53 S. Ct. 75 (1932).

[321] Crowell v. Benson, 285 U. S. 22 at 57, 52 S. Ct. 285 (1932).

vate litigant in order that he may be protected from unauthorized or arbitrary administrative action. These considerations are most evident in tax proceedings, where questions of efficient governmental action are weighed against the possibility of unwarranted imposition of liability. Many of the jurisdictional provisions of the Logan bill disrupt this balance of administrative procedure and judicial restraint by reducing controversies to a single stage and either excluding all alternative remedies or vesting them all in the same tribunal.

3. OTHER CONSTITUTIONAL RESTRICTIONS

The other constitutional questions pertaining to the Logan bill arise chiefly in connection with the provisions which utilize the Supreme Court as an appellate agency. The bill authorizes an appeal from the final judgments of the proposed tribunal to the Supreme Court upon a petition for a writ of certiorari.[322] Two difficulties are created by this provision. One problem is concerned with the limits of the original jurisdiction of the Supreme Court and its authority to entertain appeals from tribunals exercising an administrative as well as a judicial jurisdiction. The other problem arises out of the requirements of the doctrine of judicial review.

It is now well settled that the original jurisdiction of the Supreme Court cannot be enlarged or extended beyond the enumeration of cases in section two of the third article.[323] This principle has never been interpreted to prevent a direct review of the decisions of a legislative court exercising a judicial function,[324] but a provision for a similar review of the decisions of an administrative tribunal would undoubtedly be invalid.[325] In this respect *Marbury v. Madison*,[326] has been construed to hold that a review of the determination of an administrative agency is an exercise of original jurisdiction, while a review of the decisions of either a constitutional or legislative court is considered appellate jurisdiction.[327] Under these circumstances it

[322] Section 8.

[323] Marbury v. Madison, 1 Cranch (5 U. S.) 137, 2 L. Ed. 60 (1803); Ex parte Vallandingham, 1 Wall. (68 U. S.) 243, 17 L. Ed. 589 (1864); Ex parte Hung Hang, 108 U. S. 552, 2 S. Ct. 863 (1883).

[324] See Williams v. United States, 289 U. S. 553 at 565, 53 S. Ct. 751 (1933).

[325] See Old Colony Trust Co. v. Commr. of Internal Revenue, 279 U. S. 716 at 728, 49 S. Ct. 499 (1929); United States v. Ritchie, 17 How. (58 U. S.) 525 at 533, 15 L. Ed. 236 (1855).

[326] Marbury v. Madison, 1 Cranch (5 U. S.) 137, 2 L. Ed. 60 (1803).

[327] Federal Radio Commission v. General Electric Co., 281 U. S. 464, 50 S. Ct. 389 (1930); see note, 29 MICH. L. REV. 766 (1931).

would seem evident that the proposed right of appeal to the Supreme Court from the final judicial decisions of the administrative court would not be invalidated as an unauthorized extension of the former Court's original jurisdiction.[328]

On the other hand, the Supreme Court has held that it is without power to review decisions of a legislative court acting in an administrative capacity.[329] This result is based upon the provisions of Article III and the restrictive effect of the separation doctrine, which have been read together to prevent the Supreme Court from reviewing the exercise of an administrative function or legislative power.[330] In this regard the limitations on the jurisdiction of the Supreme Court are the same as those discussed in connection with other constitutional courts.[331] In *Federal Radio Commission v. General Electric Co.*,[332] the Supreme Court refused to review the decisions of the District Court of Appeals under the Federal Radio Act before it was amended.[333] Under that act the Radio Commission was vested with certain administrative functions, in the exercise of which it was given wide discretion, and the Court of Appeals was authorized to review the determinations of the Commission in those respects. The Court held that the Court of Appeals had been made a superior revising agency in the same field as a part of the machinery of the Commission and that to require the Supreme Court to review its determinations would amount to a participation in an administrative function.[334] Subsequently the Radio Act was amended[335] by confining the review of the Court of Appeals to questions of law, and the Supreme Court

[328] Katz, "Federal Legislative Courts," 43 HARV. L. REV. 894 at 920 (1930).

[329] Federal Radio Commission v. General Electric Co., 281 U. S. 464, 50 S. Ct. 389 (1930); Keller v. Potomac Electric Power Co., 261 U. S. 428, 43 S. Ct. 445 (1923); Postum Cereal Co. v. California Fig Nut Co., 272 U. S. 693, 47 S. Ct. 284 (1927).

[330] See cases cited in note 328, supra.

[331] See supra, notes 270 and 271. It has previously been pointed out that the proposed court has authority to exercise a complete jurisdiction as to issues of fact as well as law in both original and appellate proceedings. Logan Bill, sec. 8. However, this particular discussion is limited to the suggested appellate jurisdiction over administrative agencies.

[332] 281 U. S. 464, 50 S. Ct. 389 (1930).

[333] Radio Act of 1927, 44 Stat. L. 1162.

[334] Federal Radio Commission v. General Electric Co., 281 U. S. 464, 50 S. Ct. 389 (1930). This same rationale was employed by the Court in Keller v. Potomac Electric Power Co., 261 U. S. 428, 43 S. Ct. 445 (1923).

[335] 46 Stat. L. 844 (1930), repealed by 48 Stat. L. 1102 (1934).

consented to review its decisions in *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.*[336]

The Logan bill attempts to avoid the implications of the *General Electric* case and others mentioned, by confining the jurisdiction of the appellate division sitting *en banc* upon a petition for rehearing to "questions of law appearing on the record."[337] Whether this anomalous proceeding will accomplish the end desired is open to some doubt. If the above mentioned decisions are interpreted to mean that the Supreme Court will not directly review any decision of a tribunal whose authority and original jurisdiction in connection with that determination was broad enough to include a consideration of all questions of fact or discretion, the provisions of the bill authorizing such an appeal would be invalid despite the fact that the actual review was limited to questions of law.[338] This conclusion is somewhat strengthened by the provisions of the bill empowering the court, in the final appellate stage from which the appeal to the Supreme Court is authorized, to affirm, modify, or reverse any decision on rehearing. Such a jurisdiction, whether completely exercised or not, is generally considered to be administrative in character.[339] On the other hand, if the rationale of these cases be interpreted restrictively and if the appellate jurisdiction of the Supreme Court be confined to questions of law only, the suggested provisions for final review would appear to be a valid extension of that Court's appellate jurisdiction. But under any interpretation of these decisions, the propriety of permitting direct appeals to the Supreme Court from a legislative tribunal exercising an administrative jurisdiction, should be seriously questioned, if not condemned in principle.

A few minor aspects of the doctrine of judicial review have already been mentioned in connection with the analysis of the rationale of the

[336] 289 U. S. 266, 53 S. Ct. 627 (1933).

[337] Section 8. However, it should be noted that the appellate division sitting en banc has "the power to enter a judgment affirming, modifying or reversing the decision of" the appropriate section of the appellate division. Ibid.

[338] The situation created by the provisions of the Logan bill is not the usual one in which the same tribunal merely exercises judicial as well as administrative functions. In those situations it is clear that the Supreme Court may review the judicial part of that jurisdiction. Under the terms of this bill, however, the proposed court has complete authority to exercise an administrative or legislative jurisdiction over any of the controversies brought before it. Whether the court actually confines itself to the exercise of a judicial jurisdiction in any particular case seems to be immaterial in this connection.

[339] See Keller v. Potomac Electric Co., 261 U. S. 428, 43 S. Ct. 445 (1923); Prentis v. Atlantic Coast Line Ry., 211 U. S. 210, 29 S. Ct. 67 (1908).

legislative court cases. Although it has been assumed that the jurisdiction of the proposed court could be extended only to those matters which are susceptible of administrative finality, the problem of the sufficiency of the right to a judicial review in a constitutional court is nevertheless a consideration which cannot be entirely ignored. Even in the case of those exceptional controversies described in the *Bakelite* case and referred to in the *Williams* decision, the immunity from judicial control in certain respects is not absolute.[340] Consequently, it becomes important to analyze the provisions of the Logan bill to ascertain whether they authorize an adequate or proper type of review essential to the satisfaction of the requirements of due process of law.

Aside from the judicial remedies which might still be available to private litigants apart from the express provisions of the bill,[341] the proposed legislation merely provides for an appeal to the Supreme Court upon a petition for a writ of certiorari. This is the only remedy in a constitutional court which the bill directly recognizes. Ordinarily, the requirements of judicial review are satisfied by authorizing a statutory appeal, either to a federal district court or to a circuit court of appeals, in which the private litigant may obtain as a matter of right a review of administrative determinations adversely affecting his interests.[342] The remedy provided by the Logan bill in the nature of a petition for certiorari is substantially different from the usual type of review in a constitutional court. While it may be said that the right to request such an appeal arises as a matter of right, the assurance

[340] Notably where issues are raised involving the impairment of constitutional rights or the fundamental authority of the administrative agency. In these situations, a right of judicial review must be accorded private parties. See In re Grimley, 137 U. S. 147, 11 S. Ct. 54 (1890); Noble v. Union River Logging Co., 147 U. S. 165, 13 S. Ct. 271 (1893); Smith v. Hitchcock, 226 U. S. 53, 33 S. Ct. 6 (1912); Ng Fung Ho v. White, 259 U. S. 276, 42 S. Ct. 492 (1922).

[341] As previously pointed out, it is practically impossible to indicate with certainty the extent to which the Logan bill would interfere with existing remedies for the correction of administrative errors. In some instances the bill merely provides for the transfer of certain jurisdiction now vested in constitutional or legislative courts. In others it completely abolishes the jurisdiction in question. It is particularly noteworthy that the jurisdiction over proceedings by extraordinary process, including injunction, is withdrawn from the courts of the District. Where the regulatory statute does not provide for any particular type of review to correct administrative errors, the injunctive process is generally available to private litigants. See the cases cited in note 340, supra.

[342] For example, see the provisions of the Interstate Commerce Act (28 U. S. C., § 41[28]; the Federal Communications Acts (47 U. S. C., § 401); the Packers and Stockyards Act (7 U. S. C., § 217); and the Federal Trade Commission Act (15 U. S. C., § 45).

that such a review will be granted is never absolute.[343] The granting or refusal to issue certiorari in the Supreme Court is a highly discretionary matter based upon a variety of considerations which are not binding on the Court.[344] In this respect the limitations on the use of the injunctive process are somewhat the same, except that the elements of discretion in the case of certiorari are not reflected in a settled body of law as in the case of equitable jurisdiction.[345] However, one point stands out above all others in this connection. The purpose of the writ of certiorari is not primarily to correct erroneous determinations, but rather to secure a uniformity of decisions within the federal judiciary on questions of great public importance.[346] The writ is granted only in cases of peculiar gravity or general importance and the power to issue the writ has always been sparingly exercised.[347] Under these circumstances it may well be concluded that the mere right to petition for an appeal by way of certiorari is not sufficient to satisfy the requirements of due process, unless the private litigant has access to other remedies in a court organized under Article III. As a practical matter it seems evident that a party against whom an adverse determination has been rendered is less certain to obtain an actual review by certiorari in the Supreme Court than in the case of any other remedy which is ordinarily available in a constitutional court.[348] Before permitting the substitution of a discretionary right of

[343] See Supreme Court Rule 38, Section 5 [286 U. S. 593 at 624 (1932)], where the reasons for granting the writ of certiorari are listed. However, these considerations neither control nor fully measure the discretion of the Court.

[344] See Magnum Import Co. v. Coty, 262 U. S. 159, 43 S. Ct. 531 (1923); Houston Oil Co. v. Goodrich, 245 U. S. 440, 38 S. Ct. 140 (1918); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 36 S. Ct. 269 (1916). Cf. ROBERTSON, PRACTICE AND PROCEDURE IN THE SUPREME COURT OF THE UNITED STATES, c. 1 (1929).

[345] Except in most unusual cases the denial of a petition for a writ of certiorari is unaccompanied by an opinion. Consequently, the reasons for the refusal of the Court to review are a matter of speculation.

[346] "The jurisdiction to bring up cases by certiorari . . . was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. . . ." Magnum Import Co. v. Coty, 262 U. S. 159 at 163, 43 S. Ct. 531 (1923). See also Fields v. United States, 205 U. S. 292, 27 S. Ct. 543 (1907).

[347] Forsyth v. City of Hammond, 166 U. S. 506, 17 S. Ct. 665 (1897); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 36 S. Ct. 269 (1916).

[348] During the year 1930, out of 726 petitions for a writ of certiorari, the

appeal for the ordinary types of review now exercised by the lower federal courts, questions as to the degree of protection afforded private parties by this new remedy should be given thoughtful consideration. A strict interpretation of the requirements of due process would seem to indicate that the remedy for appeal by way of certiorari presents the least possible protection against unwarranted administrative action and clearly violates the spirit of the doctrine of review.[349]

Court denied all but 159; in 1931 out of 738 petitions, it denied all but 137; in 1932 out of 797, it denied all but 148; in 1933 out of 880, it denied all but 148; and in 1934 out of 835 petitions, it denied all but 165. See Frankfurter and Hart, "The Business of the Supreme Court at October Term, 1934," 49 HARV. L. REV. 68 at 78 (1935).

[349] See the opinions in those cases which describe the scope of judicial review necessary to satisfy the requirements of due process of law. Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 S. Ct. 527 (1920); Napa Valley Elec. Co. v. Railroad Comm., 251 U. S. 366, 40 S. Ct. 174 (1919); New York & Queens Gas Co. v. McCall, 245 U. S. 345, 38 S. Ct. 122 (1917); Chicago, M. & St. P. Ry. v. Minnesota, 134 U. S. 418, 10 S. Ct. 462 (1889).