

# NOTES

## RECENT LEGISLATIVE CHANGES IN THE CONSTITUTIONAL STATUS OF THE UNITED STATES TAX COURT AND THE COURTS OF THE DISTRICT OF COLUMBIA

### I. INTRODUCTION

Since the adoption of the Constitution, numerous suits have challenged the constitutional status of various courts of the United States. These suits were important in restricting the power of Congress to limit the tenure or reduce the salary of judges, to limit the reviewability and validity of court decisions, and to provide for the assignment of judges between courts. The distinctions drawn by the Congress and the Supreme Court between those courts termed "article I" courts and those termed "article III" courts have had an effect on the doctrine of separation of powers and on the type of court system in the United States today.

This note will examine two recent federal legislative developments which affect the constitutional status of the United States Tax Court and the various courts of the District of Columbia. These legislative enactments are the Tax Reform Act of 1969 and the District of Columbia Court Reform and Criminal Procedure Act of 1970.<sup>1</sup>

### II. LEGISLATIVE VERSUS CONSTITUTIONAL COURTS

The status of a court is determined by whether its powers are granted under article III or by Congress by authority of another article of the Constitution. Article III provides that:

The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.<sup>2</sup>

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1. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487; District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (hereinafter Title I of this Act will be referred to as the Court Reorganization Act, which is codified in D.C. CODE ANN. Title 11).

2. U.S. CONST. art. III, § 1.

Courts established under article III are termed "article III" or "constitutional" courts.<sup>3</sup> These include the Supreme Court, the circuit courts of appeals, and the district courts. To implement the formation of constitutional courts, Congress is granted the power "to constitute tribunals inferior to the Supreme Court." This power, however, is limited only to inferior courts established under article III; that is, courts other than the Supreme Court.<sup>4</sup> Article III also limits the judicial power of constitutional courts to only those matters termed "cases and controversies," thereby prohibiting these courts from rendering advisory opinions or decisions on moot questions.<sup>5</sup>

Article III does not encompass the entire "court-making" power however. Article IV<sup>6</sup> gives Congress power to create courts in the territories<sup>7</sup> and article I gives Congress the power to create courts to assist Congress in carrying out its required duties.<sup>8</sup> The courts which are created under a constitutional power other than article III are termed "legislative" courts.<sup>9</sup> The first case acknowledging the existence and delineating the powers of legislative courts was *American*

3. For a history of constitutional courts, see Surrency, *A History of Federal Courts*, 28 Mo. L. REV. 214 (1963).

4. U.S. CONST. art. I, § 8. It is generally recognized that article I, § 8 refers only to the inferior courts also referred to in article III; that is, article I, § 8 does not give Congress a separate power apart from article III to create inferior courts. See, e.g., *Glidden v. Zdanok*, 370 U.S. 530, 543 (1962); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION §1579 (5th ed. 1891).

5. See generally C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS §§ 12-15 (2d ed. 1970).

6. U.S. CONST. art. IV, § 3, cl. 2:

The Congress shall have Power to dispose of and make all needful rules and regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

7. For a history of the territorial courts, see Blume & Brown, *Territorial Courts and Law*, 61 MICH. L. REV. 39, 467 (1962).

8. In *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), the Supreme Court stated that "other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution." *Id.* at 449.

9. For a discussion of legislative courts, see generally 1 J. MOORE, FEDERAL PRACTICE ¶ 0.4 (2d ed. 1972); Cassin, *Constitutional Versus Legislative Courts*, 16 FORDHAM L. REV. 87 (1947); Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894 (1930); Watson, *The Concept of the Legislative Court*, 10 GEO. WASH. L. REV. 799 (1942); Note, *The Distinction Between Legislative and Constitutional Courts and Its Effects on Judicial Assignment*, 62 COLUM. L. REV. 133 (1961); Note, *Constitutional Law: Federal Courts*, 49 CORNELL L.Q. 122 (1963).

*Insurance Company v. Canter*.<sup>10</sup> This case involved a collateral attack on a salvage decree of a federal court created in the Florida Territory with the judges appointed for only four year terms. Chief Justice Marshall rejected the argument that Congress could not create courts with judges of limited tenure and stated:

These Courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States: The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.<sup>11</sup>

Although several other cases have upheld the validity of legislative courts,<sup>12</sup> the major decision expanding the concept of the legislative court is *Ex parte Bakelite Corporation*.<sup>13</sup> This case came before the Supreme Court on a petition for a writ of prohibition which necessitated a determination whether the Court of Customs Appeals could hear an appeal from the findings of a Tariff Commission proceeding. The Court of Customs Appeals was not deciding a "case or controversy" within the meaning of article III because the Tariff Act of 1922 allowed the President to overrule the Tariff Commission, thereby disabling the Court of Customs Appeals from rendering a final and en-

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10. 26 U.S. (1 Pet.) 511 (1828).

11. *Id.* at 546. This statement forms the basis for the concept of the legislative courts. With regard to territorial courts, their designation as legislative courts would seem to be required by the practical consideration of having inferior courts in these localities with judges holding only limited tenure, since statehood and a state court system would soon be developed in the territories. See Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894, 902 (1930).

12. *Wallace v. Adams*, 204 U.S. 415 (1907) (upholding the validity of the Choctaw and Chickasaw citizenship court, created to determine membership in the two Indian tribes so as to distribute lands and funds held in trust by the federal government); *United States v. Coe*, 155 U.S. 76 (1894) (upholding the validity of the Court of Private Land Claims, which was created by Congress by virtue of its power over the fulfillment of treaty obligations to hear and determine claims founded on Spanish or Mexican grants). See *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929) (discussing the United States Court for China and consular courts, created by Congress to exercise jurisdiction over American citizens in foreign lands).

13. 279 U.S. 438 (1929).

forceable decree.<sup>14</sup> Accordingly, even though the judges of the Court of Customs Appeals held tenure for life,<sup>15</sup> the Supreme Court held that the court was a legislative court "created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution."<sup>16</sup> According to the decision, Congress had the power to establish, for non-territorial purposes, legislative courts capable of deciding suits that were not cases or controversies. The Court stated:

Legislative courts also may be created as special tribunals to examine and determine various matters, between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.<sup>17</sup>

The Court in *Bakelite* rejected the use of congressional intent as the only test to determine status. Instead, the Court declared that "the true test lies in the power under which the court was created and in the jurisdiction conferred."<sup>18</sup> Following this test the Court held four years later in *Williams v. United States*<sup>19</sup> that the Court of Claims was not an article III court, since the "power under which the court was created" originated within article I, section 8 of the Constitution.

The trend towards a broad view of legislative, non-territorial courts

14. Tariff Act of 1922, ch. 356, § 316, 42 Stat. 858, 943.

15. 279 U.S. at 459.

16. *Id.* at 458.

17. *Id.* at 451. This statement formed one of the tests used by Judge Drennan in *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392 (1971), in holding that the Tax Court is a legislative court.

18. 279 U.S. at 459. Congress could not therefore merely state that a court is established under article III in order to make it a constitutional court—Congress would also have to vest the court with the powers and jurisdiction of a constitutional court, whatever those powers or jurisdiction may be.

The Court in *Bakelite* also stated that special provisions for lifetime tenure and undiminished salary are not necessary to establish a constitutional court. If the court is a constitutional court, then the absence or presence of any tenure or salary provision will not have any effect. *Id.* at 459.

19. 289 U.S. 553 (1933). The decision in *Williams* was significant because the Court found that the Court of Claims had not limited its jurisdiction to cases and controversies. The Supreme Court interpreted the language of article III, section 2 of the Constitution, "controversies to which the United States shall be a party," to mean a party plaintiff alone, and that a suit is not a controversy where the United States is a party defendant. *Id.* at 571-78.

was curtailed in the cases following *Bakelite* and *Williams*.<sup>20</sup> In *Glidden v. Zdanok*<sup>21</sup> the petitioner brought suit attacking the validity of a Second Circuit Court of Appeals judgment in which Judge Madden of the Court of Claims, sitting by designation,<sup>22</sup> participated. The petitioner alleged that the assignment of a legislative court judge to sit on a constitutional court was impermissible and rendered the judgment invalid. Although the Supreme Court in *Williams* had held that the Court of Claims was an article I court, the Supreme Court here held that the participation of Judge Madden did not vitiate the judgment.<sup>23</sup> The Court did not, however, reach the question of the effect of the participation of article I judges on article III courts. Instead, they held the Court of Claims to be an article III court. Mr. Justice Harlan, joined by two other justices, stated that the Court of Claims had always been an article III court, thus rejecting *Bakelite* and *Williams*.<sup>24</sup> Mr. Justice Clark, joined by Chief Justice Warren, concurred in the finding that the Court of Claims was now an article III court, but would not overrule *Bakelite* or *Williams*.<sup>25</sup> Mr. Justice Clark took the position that the *Bakelite* and *Williams* decisions were correct when rendered, but no longer controlling because of the 1958 legislation<sup>26</sup> declaring the Court of Claims to be an article III court. Mr. Justice Douglas, joined by Justice Black in dissent, also would not overrule

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20. Although the trend was curtailed, the distinction between legislative and constitutional courts survived. See, e.g., *Nash Miami Motors, Inc. v. Commissioner*, 358 F.2d 636 (5th Cir. 1966), where the court rejected the taxpayer's contention that the distinction between legislative and constitutional courts had been overruled by *Glidden*.

21. 370 U.S. 530 (1962). *Lurk v. United States* was a companion case decided in the same opinion. In *Lurk*, a retired judge of the Court of Customs and Patent Appeals, sitting by similar designation, presided over a robbery trial in a federal district court. The court held, as in *Glidden*, that the Court of Customs and Patent Appeals was an article III court.

22. The Chief Justice was given authority under 28 U.S.C. § 293(a) (1970) to "assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals . . . to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises."

23. 370 U.S. 530, 584 (1962).

24. *Id.* at 552. The test employed by Harlan to determine whether the court was created under article III was whether the "establishing legislation complies with the limitation of that article: whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite."

25. *Id.* at 585.

26. 28 U.S.C. § 211 (1970) (originally enacted as Act of August 25, 1958, § 1, 72 Stat. 848).

*Bakelite* or *Williams*, but he also would not allow Congress to change the status of the Court of Claims since he felt that judges of article I and article III courts were not "fungible" and that a judge chosen for an article I court might not have the qualifications required of a judge sitting on an article III court.<sup>27</sup>

The Court in *Glidden* was, nevertheless, consistent with *Bakelite* in rejecting a test based solely on congressional intent.<sup>28</sup> From an analysis of the opinions in *Glidden* it becomes apparent that for a court to be held a constitutional court the following criteria must be met: (1) that Congress intends the court to have article III status;<sup>29</sup> (2) that the court be primarily concerned with "cases and controversies";<sup>30</sup> (3) that the court function in the traditional manner of a court;<sup>31</sup> and (4) that the term of office of judges be for life and that their salaries be free from diminution.<sup>32</sup>

Other commenators have condensed the four criteria emanating from *Glidden* into two basic functional differences between legislative and constitutional courts.<sup>33</sup> First, pursuant to the explicit mandate of arti-

27. 370 U.S. at 599.

28. *Id.* at 541:

In determining the constitutional character of the Court of Claims and the Court of Customs and Patent Appeals, as we are thus led to do, we may not disregard Congress's declaration that they were created under article III. Of course, Congress may not by fiat overturn the constitutional decision of this court . . . .

29. See note 28 *supra*.

30. 370 U.S. at 579. Some insignificant amount of judicial business not considered to be cases or controversies may be allowed. The Court of Claims was granted congressional reference jurisdiction by 28 U.S.C. §§ 1492 and 2509 (1970). At that time Congress made an average of ten legislative references to the Court of Claims each year. *Id.* at 587.

The Court of Customs and Patent Appeals held authority under 28 U.S.C. § 1543 (1970) to review Tariff Commission findings of unfair practices in import trade. Since the *Bakelite* decision, however, this court has handled only four congressional references of an advisory nature and only one in the last twenty-seven years. *Id.* at 588.

31. *Id.* at 572. By "functioning in the traditional means of a court," Harlan may have intended that the court function under rules of evidence and procedure and operate in an adversary proceeding.

32. *Id.* at 534.

33. See, e.g., Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894, 895 (1930). To determine whether the court is a legislative or constitutional court in the first place, commentators look at various other differences that have been important at one time or another. For example, location of the courts, in the territories or outside any state, has been cited as another difference between legislative and constitutional courts. See Watson, *The Concept of the Legislative Court*, 10 GEO. WASH. L. REV. 799 (1942);

cle III, judges of constitutional courts must have lifelong tenure and their salaries may not be diminished. In comparison, the judges of legislative courts are not afforded such constitutional protection. The policy usually articulated for this provision is to assure an independent judiciary.<sup>34</sup> Secondly, legislative courts are not bounded with the limitations pertaining to constitutional courts, such as the case or controversy limitation, and may therefore render advisory opinions.

The distinctions between legislative and constitutional courts are not purely academic. There are some practical considerations that make this distinction important. One such consideration is whether judges of legislative courts may be assigned to constitutional courts,<sup>35</sup> thus limiting the efficient utilization of federal judges.<sup>36</sup> If this limitation is ignored, the result might be the vitiation of a constitutional court's decision. A second important consideration lies in the power of legislative courts to render advisory opinions. Congress on a number of occasions has relied upon the assistance rendered by legislative courts in giving advisory opinions or performing legislative tasks.<sup>37</sup> Without legislative courts Congress would be forced to find a substitute forum in the legislative or executive branches. Another consideration lies in the concept of separation of power.<sup>38</sup> To maintain closer control over certain courts, such as the Tax Court and the Court of Military Appeals, Congress has limited the tenure of its judges. Depending on one's concept of the ideal relationship between the judiciary and the other

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Note, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 COLUM. L. REV. 133, 138 (1962).

34. *Sec O'Donoghue v. United States*, 289 U.S. 516, 535 (1933); *THE FEDERALIST* Nos. 80, 81, 82 (A. Hamilton); Note, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 COLUM. L. REV. 133, 149 (1961).

35. *Sec Glidden v. Zdanok*, 370 U.S. 530 (1962).

36. The Chief Justice of the Supreme Court was given authority under 28 U.S.C. § 293(a) (1970) to make efficient use of judges of the Court of Claims and Court of Customs and Patent Appeals. *See note 22 supra*.

37. Congress, acting under article I, has from time to time vested administrative and even legislative powers in the courts of the District. *See, e.g.*, *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 467-68 (1930) (review of radio station licensing); *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 698-701 (1926) (patent and trademark appeals); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 440-43 (1923) (review of ratemaking). In addition, Congress had given authority to District Court judges to appoint members of the Board of Education. Act of June 20, 1906, ch. 3446, § 2, 34 Stat. 316.

38. For a general discussion of the concept of separation of powers, *see Note, Constitutional Law: Federal Courts*, 49 CORNELL L.Q. 122, 132 (1963).

branches of government, this may result in a lack of judicial independence or in a greater accountability of judges to Congress.

Recently Congress has passed the Tax Reform Act of 1969 and the District of Columbia Court Reform and Criminal Procedure Act of 1970. Both pieces of legislation deal extensively with the constitutional status of federal courts. This note will examine the effect of this legislation on the status of the Tax Court and the Courts of the District of Columbia and will further examine any shortcomings of the legislation in providing for the independence of these courts.

### III. THE UNITED STATES TAX COURT

#### A. *History of the Tax Court*

In the Revenue Act of 1918,<sup>39</sup> Congress established an Advisory Tax Board to review questions of interpretation and administration of the tax laws. In the Revenue Act of 1924,<sup>40</sup> Congress expanded the function of the board and replaced it with the Board of Tax Appeals.<sup>41</sup> Under the 1924 Act there was no appeal from a decision of the Board of Tax Appeals. The only remedy to the taxpayer upon losing his case was to pay the tax and bring suit for a refund in a District Court or the Court of Claims, where the trial would be held *de novo*.<sup>42</sup> To eliminate unnecessary and expensive duplication of procedure, Congress, in the Revenue Act of 1926,<sup>43</sup> made the decision of the board final and reviewable by the various circuit courts of appeals.<sup>44</sup>

39. Revenue Act of 1918, ch. 18, § 1301, 40 Stat. 1140-41.

40. Revenue Act of 1924, ch. 234, § 900(a), 43 Stat. 336.

41. For an analysis of the reasons underlying the creation of the Board of Tax Appeals, see *Flora v. United States*, 362 U.S. 145 (1960); Henke, *The Tax Court, The Proposed Administrative Court, and Judicialization*, 18 BAYLOR L. REV. 449, 450-52 (1966).

For an early account of the origins of the Board of Tax Appeals, see C. HAMEL, *PRACTICE AND EVIDENCE BEFORE THE UNITED STATES BOARD OF TAX APPEALS* (1938). For later histories of the Board and the Tax Court, see 9 J. MERTENS, *LAW OF FEDERAL INCOME TAXATION* § 50.02 (J. Malone ed. 1972); Ferguson, *Jurisdictional Problems in Federal Tax Controversies*, 48 IOWA L. REV. 312, 350-56 (1963); Henke, *The Tax Court, The Proposed Administrative Court, and Judicialization*, 18 BAYLOR L. REV. 449 (1966); Note, *Procedural and Administrative Changes in the Tax Court Created by the Tax Reform Act of 1969*, 8 HOUSTON L. REV. 395, 396-98 (1970).

42. *Garden City Feeder Co. v. Commissioner*, 27 B.T.A. 1132, 1140 (1933), *rev'd on other grounds*, 75 F.2d 804 (8th Cir. 1935), *rehearing*, 35 B.T.A. 770 (1937).

43. Revenue Act of 1926, ch. 27, § 1001, 44 Stat. 109.

44. The 1926 Act made a number of changes in the Board that indicated the Board's judicial nature. The 1926 Act ordered the Board to follow judicial procedures.



The taxpayer was not restricted to this forum, for he could always pay the disputed tax and then sue for a refund in a federal district court.<sup>45</sup> The advantage of using the Board of Tax Appeals as a forum for tax litigation was that prepayment of the taxes was not required.<sup>46</sup> Once the taxpayer elected to bring suit before the Board, however, he was precluded from bringing suit in any other court. In other words, the Board of Tax Appeals had exclusive control once its jurisdiction was invoked.<sup>47</sup>

The 1939 Code<sup>48</sup> designated the Board of Tax Appeals an independent agency within the executive branch even though its functions were entirely judicial.<sup>49</sup> In the Revenue Act of 1942<sup>50</sup> Congress changed the title of the Board to the Tax Court of the United States and designated that the members of the court were to be known as "judges."<sup>51</sup> Nevertheless, the 1939 Code<sup>52</sup> and the 1954 Code<sup>53</sup> continued to refer to the Tax Court as an agency within the executive branch, though numerous court decisions<sup>54</sup> and congressional reports<sup>55</sup>

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*See generally* Revenue Act of 1926, ch. 27, §§ 900, 901, 44 Stat. 105-06. Even though the Committee Report referred to the Board's jurisdiction as judicial, *see* 9 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 50.03 n.27 (J. Malone ed. 1972), the Board was termed "an independent agency in the Executive Branch of the Government." Revenue Act of 1924, ch. 234, § 900(k), 43 Stat. 338.

45. *See, e.g.*, Fox v. Rothensies, 115 F.2d 42 (3d Cir. 1940).

46. This distinction continues to the present day. The district court and Court of Claims require prepayment of taxes before a suit for refund is allowed, whereas the Tax Court does not allow such prepayment. This distinction is often the deciding factor in the taxpayer's choice of forum, and has resulted in the Tax Court being called the "poor man's" tax court. *See generally* L. KEIR & D. ARGUE, TAX COURT PRACTICE 10-35 (4th ed. 1970).

47. INT. REV. CODE OF 1939, ch. 1, § 322(c), 53 Stat. 92. Section 6512(a) of the Internal Revenue Code of 1954 also provides that the Tax Court obtains exclusive jurisdiction the very moment a petition for review of a tax deficiency is filed with it, and the forum thereafter cannot be changed. *See* Thompson v. United States, 308 F.2d 628, 634 (1962).

48. INT. REV. CODE OF 1939, ch. 5, § 1100, 53 Stat. 158.

49. *See* note 54 *infra*.

50. Revenue Act of 1942, ch. 619, § 504(a), 56 Stat. 957.

51. For a discussion of the Revenue Act of 1942 and the controversy surrounding the Tax Court's continued designation as an independent agency within the executive branch while being termed a court, *see* Gribbon, *Should the Judicial Character of the Tax Court be Recognized*, 24 GEO. WASH. L. REV. 619 (1956).

52. *See* note 48 *supra*.

53. Act of Aug. 16, 1954, ch. 76, § 7441, 68A Stat. 879.

54. The one Supreme Court decision continually cited to show that the Board of Tax Appeals and hence the Tax Court is but an agency of the executive department is *Old Colony Trust Company v. United States*, 279 U.S. 716 (1929). But this case was

termed the Tax Court a judicial court and not an executive agency.

Congress in the Tax Reform Act of 1969 attempted to resolve any dispute as to the status of the Tax Court by changing its status from that of an executive agency to an article I court.<sup>56</sup> While previously there had been a question as to whether the Tax Court was an executive agency or judicial court, the question now is whether the Tax Court is an article I or an article III court.

### B. *The Status of the Tax Court Under the 1969 Tax Reform Act*

The criteria of *Glidden* is now the accepted authority to determine whether a court is an article I or an article III court,<sup>57</sup> and will be used here to examine the status of the Tax Court. First, the intent of Congress in the 1969 Tax Reform Act is to establish the Tax Court as an article I court. Section 951 states:

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decided around the time that the 1926 Act was passed, and is better cited to show that the Tax Court functions are strictly judicial in nature. A number of courts of appeals have declared that the Tax Court functions as a court with only judicial powers and had never been given any administrative powers. *See, e.g., Kenner v. Commissioner*, 387 F.2d 689 (7th Cir. 1968); *Reo Motors v. Commissioner*, 219 F.2d 610 (6th Cir. 1955); *Stern v. Commissioner*, 215 F.2d 701 (3d Cir. 1954). *But see* the following courts of appeals decisions where the judicial function of the Tax Court was recognized, yet the court of appeals insisted on terming the Tax Court an agency of the executive branch: *Nash Miami Motors, Inc. v. Commissioner*, 358 F.2d 636 (5th Cir. 1966); *Martin v. Commissioner*, 358 F.2d 63 (7th Cir. 1966); *Lasky v. Commissioner*, 235 F.2d 97 (9th Cir. 1956).

The Tax Court itself viewed its function as strictly judicial, whatever the label placed on the court. *See, e.g., Fairmount Aluminum Company v. Commissioner*, 22 T.C. 1377, 1384-85 (1954), where the court lists numerous congressional reports and hearings indicating the judicial nature of the Tax Court.

55. Even though the legislative history of the 1942 Act does not explain why the Tax Court was designated an independent agency in the executive branch, the hearings concerning the Revised Judicial Code in 1948 indicated the contrary congressional opinion on whether the Tax Court should become a court of record. *Hearings on H.R. 3214 Before a Subcommittee of the Senate Committee on the Judiciary*, 80th Cong., 2d Sess. 3214 (1948). In the original bill as passed through the House, the Tax Court was designated a court of record, but the Senate Committee on the Judiciary deleted the court of record provision.

56. The petitioner in *Burns, Stix Friedman & Co.*, *see* notes 73-76 *infra* and accompanying text, abandoned his argument that the transfer of the Tax Court from an independent agency in the executive department to a court of record under article I is a transfer without due process of law. The court in *Burns* stated that "the due process argument appears to have been disposed of by *Cheatham v. United States*, 92 U.S. 85, *Phillips v. Commissioner*, 283 U.S. 589, *Willmut Gas & Oil Co. v. Fly*, 322 F.2d 301, and other cases." 57 T.C. 392 n.4 (1971).

57. *See, e.g., Nash Miami Motors, Inc. v. Commissioner*, 358 F.2d 636 (5th Cir. 1966).

There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.<sup>58</sup>

Congressional intent alone, however, is not in itself sufficient to establish the status of a court.<sup>59</sup> That the Tax Court judges are neither granted lifetime tenure<sup>60</sup> nor guaranteed undiminished salary<sup>61</sup> also supports the analysis that it is an article I court.

The Tax Court, however, has several article III attributes. It handles only those matters termed "cases and controversies"<sup>62</sup> and functions only in the traditional manner of a court.<sup>63</sup> Further, the Tax

58. Tax Reform Act of 1969, § 951, INT. REV. CODE OF 1954, § 7441.

59. See note 28 *supra*. The major cases brought before the Supreme Court, such as *Bakelite* and *Glidden*, have involved courts declared to be article III courts by statute, or in which the contention has been that the courts are article III courts. Therefore, the intention-of-Congress test used in those cases may function differently when the intent of Congress is to create an article I court.

60. Tenure for judges is fifteen years, Tax Reform Act of 1969 § 952, INT. REV. CODE OF 1954, § 7443(e); and judges must retire at age seventy, Tax Reform Act of 1969 § 954, INT. REV. CODE OF 1954, § 7447(b). The provisions for removal of judges are limited, INT. REV. CODE OF 1954, § 7443(f):

(f) Removal from office—Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause.

But this standard is not identical to the provision in the Constitution for judges of article III courts, U.S. CONST. art. III, § 1:

The Judges, both of the supreme and inferior courts, shall hold their offices during good behavior . . . .

Even though tenure is limited to fifteen years, all judges are appointed automatically for additional terms if the judge so desires. See Gribbon, *Should the Judicial Character of the Tax Court be Recognized?*, 24 GEO. WASH. L. REV. 619 n.31 (1956). Therefore, the term of office of Tax Court judges may not be significantly different than that of federal district court judges who retire at age seventy.

61. The salary of Tax Court judges is tied to the identical salary as that of a federal district court judge, Tax Reform Act of 1969 § 953, INT. REV. CODE OF 1954, § 7443(c), but Congress could repeal the identical salary provision and reduce Tax Court judges' salaries.

62. See *Stern v. Commissioner*, 215 F.2d 701, 707 (3d Cir. 1954); *Fairmount Aluminum Company v. Commissioner*, 22 T.C. 1377 (1954), where it has been held that the Tax Court has never had administrative, investigative or regulatory functions. See also 9 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 50.03 (J. Malone ed. 1972).

Congress has clearly expressed a purpose to bestow judicial, as distinguished from administrative, functions on the Tax Court. H.R. REP. NO. 2, 70th Cong., 1st Sess. 31 (1927); S. REP. NO. 960, 70th Cong., 1st Sess. 38 (1927).

63. The federal circuit courts of appeals have ruled that the Tax Court functions only in a traditional judicial manner. *Kenner v. Commissioner*, 387 F.2d 689 (7th Cir. 1968); *Nash Miami Motors, Inc. v. Commissioner*, 358 F.2d 636 (5th Cir. 1966);

Court now operates under the same judicial review standard as other federal courts which handle tax matters.<sup>64</sup> Nevertheless, under the *Glidden* criteria it appears that the Tax Court is a legislative and not a constitutional court.

The policies articulated in the legislative history for giving the Tax Court article I status indicate a desire on the part of Congress to upgrade the effectiveness<sup>65</sup> of the Tax Court and to improve its image as an impartial tribunal. To accomplish this, Congress first eliminated the

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Martin v. Commissioner, 358 F.2d 63 (7th Cir. 1966); *Reo Motors, Inc. v. Commissioner*, 219 F.2d 610 (6th Cir. 1955); *Stern v. Commissioner*, 215 F.2d 701 (3d Cir. 1954). Cf. *Lasky v. Commissioner*, 235 F.2d 97 (9th Cir. 1956), where the opinion stressed the quasi-judicial nature of the Tax Court. See generally *Brown, The Nature of the Tax Court of the United States*, 10 U. PITT. L. REV. 298 (1949); *Ginsberg, Is the Tax Court Constitutional?*, 35 MISS. L.J. 382 (1964); *Gribbon, Should the Judicial Character of the Tax Court Be Recognized?*, 24 GEO. WASH. L. REV. 619 (1956); *Henke, The Tax Court, The Proposed Administrative Court, and Judicialization*, 18 BAYLOR L. REV. 449 (1966). It is true that the jurisdiction of the Tax Court is limited by Congress in the Internal Revenue Code, see generally 9 J. MERTENS, LAW OF FEDERAL INCOME TAXATION, §§ 50.07, 50.08 (J. Malone ed. 1972), but Congress may also limit the jurisdiction of article III courts. See *Glidden v. Zdanok*, 370 U.S. 530, 551-52, 567-68 (1962). The Tax Court has no equity function, see *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943); *Jefferson Loan Co. v. Commissioner*, 249 F.2d 364 (8th Cir. 1957), and operates under specific rules of procedure and evidence. See generally 9 J. MERTENS, *supra*, § 50.

64. In *Dobson v. Commissioner*, 320 U.S. 489 (1943), the Supreme Court attempted to grant the Tax Court a greater status in interpreting the Internal Revenue Code than that accorded to federal district courts since the Tax Court was a specialized administrative body of "experts." Congress overruled this doctrine in the Revenue Act of 1948, § 36, 62 Stat. 991, amending the Internal Revenue Code of 1939, § 1141(a), to give the identical scope of review to the Tax Court as is given to district court decisions. The intention of Congress was to treat the Tax Court as any other federal court. See S. REP. NO. 1559, 80th Cong., 2d Sess. 2, 13 (1948).

In addition, following its decision in *Golsen v. Commissioner*, 54 T.C. 742 (1970), the Tax Court now functions as any other district court with regard to its relationship to the various courts of appeal. Prior to *Golsen*, in *Lawrence v. Commissioner*, 27 T.C. 713 (1957), the Tax Court viewed its function as to establish a uniform interpretation of the tax laws. Accordingly, when the courts of appeals would be in conflict in their interpretation of the Internal Revenue Code, the Tax Court would not necessarily follow a conflicting court of appeals decision. But in *Golsen*, 54 T.C. at 757, the Tax Court reversed its stand and declared:

[I]t is our best judgment that better judicial administration. [*sic*] requires us to follow a Court of Appeals decision which is squarely in point where appeal from our decision lies to that Court of Appeals and that court alone.

65. To make the Tax Court more accessible to the average taxpayer, Congress established a small claims procedure whereby claims for less than \$1000 could be processed quickly without formal trial. Tax Reform Act of 1969 § 957, INT. REV. CODE OF 1954, § 7463.

practice of having one executive agency—the Tax Court—sit in judgment over the determinations rendered by another executive agency—the Internal Revenue Service—and instituted the Tax Court as a judicial body.<sup>66</sup> Congress also cloaked the Tax Court with procedural powers normally incident to article III courts. These included provisions to allow the Tax Court to enforce its own decisions<sup>67</sup> and punish for contempt.<sup>68</sup> Finally, to improve the desirability of judicial appointments, Congress provided for more uniform terms,<sup>69</sup> improved salary<sup>70</sup> and tenure,<sup>71</sup> and provided a retirement plan similar to that for other federal judges.<sup>72</sup>

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66. See S. REP. NO. 552, 91st Cong., 1st Sess. 302 (1969):

Since the Tax Court has only judicial duties, the committee believes it is anomalous to continue to classify it with quasi-judicial executive agencies that have rule-making and investigatory functions. The status of the Tax Court and the respect accorded to its decisions are high among those familiar with its work. However, its constitutional status as an executive agency, no matter how independent, raises questions in the minds of some as to whether it is appropriate for one executive agency to be sitting in judgment on the determinations of another executive agency.

67. Tax Reform Act of 1969 § 956, INT. REV. CODE OF 1954, § 7456:

(d) Incidental Powers.—The Tax Court and each division thereof shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

- (1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) misbehavior of any of its officers in their official transaction; or
- (3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

It shall have such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States.

68. *Id.*

69. See S. REP. NO. 552, 91st Cong., 1st Sess. 302-03 (1969).

70. See note 61 *supra*.

71. See note 60 *supra*.

72. See S. REP. NO. 552, 91st Cong., 1st Sess. 302 (1969); Tax Reform Act of 1969 § 954, INT. REV. CODE OF 1954, § 7447.

Prior to the passage of the 1969 Tax Reform Act, some had urged that the Tax Court be made an established court of record under article III rather than under article I. One possible reason for its establishment under article I may have been political pressure from the Internal Revenue Service. Prior to the passage of the Act, one commentator discussed in detail the political conflict between the Justice Department and the Internal Revenue Service over responsibilities in Tax Court litigation. See Henke, *The Tax Court, The Proposed Administrative Court, and Judicialization*, 18 BAYLOR L. REV. 449, 465 (1966). At present, lawyers from the Internal Revenue Service represent the government in trials before the Tax Court. L. KEIR & D. ARGUE, *TAX COURT PRACTICE* 36 (4th ed. 1970). The Internal Revenue Service may have feared that if the Tax Court became an article III court, all tax litigation would be taken over by the Justice Department. This question, of course, has no bearing on the status of the Tax Court. It would be relatively simple to add a provision to the law spe-

### C. *Post-1969 Decisions Regarding Tax Court Status*

In a recent case, the Tax Court and the District Court for the Eastern District of Missouri have confirmed the analysis that the Tax Court is an article I court. In *Burns, Stix Friedman & Co. v. Commissioner*,<sup>73</sup> taxpayer, alleging that any action taken by the Tax Court "would be an exercise of judicial power which can only be exercised by a court established under article III of the Constitution,"<sup>74</sup> filed a motion to halt further action in his case pending before the Tax Court. The taxpayer argued that since the Tax Court adjudicates only cases or controversies arising under the laws of the United States,<sup>75</sup> Congress has exceeded its authority by creating the Tax Court under article I without regard to the limitations of article III. The taxpayer then concluded that this power can be granted only to article III courts.<sup>76</sup> In answering this argument, the majority opinion stressed the jurisdictional aspects of the Tax Court. The court first noted that several prior decisions had sustained the constitutionality of the Tax Court's predecessors, and that the Tax Reform Act of 1969 did not materially change the basic jurisdiction of the court.<sup>77</sup> Secondly, the court traced the history of legislative courts from *Canter* to *Glidden*, indicating that these courts have always heard matters susceptible of judicial determination, and that Congress has the authority to grant judicial

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cifically requiring Internal Revenue Service lawyers to represent the government before the Tax Court as an article III court. Another possible reason for its creation under article I may have been to continue to allow accountants to practice before the Tax Court, since there is some doubt whether accountants can practice before an article III court. Section 7452 of the Internal Revenue Code of 1954 grants accountants the right to practice before the Tax Court. This has often been cited as the main reason for not granting full judicial status to the Tax Court. See Henke, *The Tax Court, The Proposed Administrative Court, and Judicialization*, 18 BAYLOR L. REV. 449, 465 (1966); Rembar, *The Practice of Taxes*, 54 COLUM. L. REV. 338, 347 (1954); Note, *Procedural and Administrative Changes in the Tax Court Created by the Tax Reform Act of 1969*, 8 HOUSTON L. REV. 395, 401 (1970). But since federal courts have traditionally determined who shall be eligible to practice before them pursuant to 28 U.S.C. § 2071, it should be possible for the Tax Court itself to continue to allow accountants to practice before the court. Perhaps Congress may just have desired to maintain a closer control over the operation of the court by limiting the tenure of its judges. See Note, *Procedural and Administrative Changes in the Tax Court Created by the Tax Reform Act of 1969*, 8 HOUSTON L. REV. 395, 401 (1970).

73. 57 T.C. 392 (1971).

74. *Id.*

75. See note 62 *supra*.

76. 57 T.C. at 393.

77. *Id.* at 395.

power to courts other than article III courts.<sup>78</sup> The court, employing the *Bakelite* test,<sup>79</sup> held that the matters determined by the Tax Court are susceptible of judicial determination and yet from their nature do not require it, and therefore that these matters are acceptable for adjudication by an article I court.<sup>80</sup> The concurring opinion merely reasoned that since the Tax Court was constitutional before the Act, it is constitutional after the Act since the Act had not made "unconstitutional that which was valid prior thereto."<sup>81</sup> The majority made a weak argument in distinguishing *Glidden*, stating that the issue was not whether the Tax Court could be an article III court if it were given article III attributes, but was rather whether Congress could constitutionally grant the judicial power to hear tax matters to an article I court.<sup>82</sup> Even though the issue in *Glidden* was not identical to the issue here, the criteria laid out in *Glidden* could have been used effectively to analyze the case. If the *Glidden* criteria had been used and if the court had focused upon the limited tenure and salary provision of the Tax Reform Act of 1969, then the same result would have been reached, but along a more traditional case law analysis.

While litigation was pending in the Tax Court, the taxpayers had brought a separate action against the District Internal Revenue Director, alleging that the Tax Court was an unconstitutional body as organized under the Tax Reform Act.<sup>83</sup> The district court dismissed this contention of the taxpayer, declaring:

The 1969 legislation changed the status of the Tax Court from "independent agency in the Executive Branch of the Government" to a "court of record" established under Article I of the Constitution of the United States. Courts have long recognized the authority of Congress to establish specialized courts or courts of limited jurisdiction outside the authority of Article III of the Constitution.<sup>84</sup>

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78. *Id.* The majority did not find any of the major cases on the status of legislative courts controlling because of the difference in the issues. Nevertheless, the majority found support from both *Glidden* and *Bakelite*.

79. See text accompanying note 17 *supra*.

80. 57 T.C. at 398.

81. *Id.* at 401. The concurring opinion actually employed three steps to reach their result: first, Congress has the power to establish legislative courts; second, the Tax Court since 1926 has been a court in all but the label placed on it by Congress; and therefore, third, that nothing in the Tax Reform Act made unconstitutional that which was valid before.

82. *Id.* at 400.

83. *Stix Friedman & Co. v. Coyle*, 340 F. Supp. 4 (E.D. Mo. 1972).

84. *Id.* at 6, 7. This decision was affirmed on appeal, 467 F.2d 474 (8th Cir.

The history of the Tax Court, the Supreme Court decisions defining legislative versus constitutional courts, and the recent decisions by the Tax Court and the federal district court indicate that the present United States Tax Court is a legislative court established under article I of the Constitution.

#### IV. THE COURTS OF THE DISTRICT OF COLUMBIA

##### A. *Pre-1970 Court Structure of the District of Columbia*

Prior to the District of Columbia Court Reform and Criminal Procedure Act of 1970, there were two distinct court systems with overlapping jurisdiction in the District of Columbia. One was the federal court system, including the United States District Court<sup>85</sup> and the United States Court of Appeals,<sup>86</sup> and the other was the District's own judicial system, with both trial and appellate courts.<sup>87</sup>

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1972). In an earlier case, *Toberman Grain Company v. Coyle*, 326 F. Supp. 337 (E.D. Mo. 1971), the taxpayer alleged that the Tax Court was unconstitutional, but did not ask the court to decide the constitutionality of the court.

85. In 1801, Congress established the Circuit Court of the District of Columbia as the District's highest court. In 1863, the District Supreme Court replaced the Circuit Court as the highest tribunal. Both courts were referred to as "courts of the United States," with their judges having lifetime tenure. Congress in 1901 provided that the District Supreme Court "shall have and exercise the same powers and jurisdiction as the other courts of the United States." It is now called the United States District Court for the District of Columbia. *See* 28 U.S.C. §§ 88, 132 (1970). For a history of the District of Columbia courts up to 1930, *see* O'Donoghue v. United States, 289 U.S. 516, 548 (1933).

86. In 1893, in accord with the nationwide establishment of federal appellate courts, the District Court of Appeals was established, Act of Feb. 9, 1893, 27 Stat. 434, and is now the United States Court of Appeals for the District of Columbia Circuit, 28 U.S.C. §§ 41, 43 (1970). *See* H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 47 (2d ed. 1973).

87. The District of Columbia has always had its own independent court system with "distinctly local jurisdiction," although these courts shared some concurrent jurisdiction with the District federal courts. The local court system consisted of three levels. At the trial court level were the Juvenile Court, Act of Dec. 23, 1963, Pub. L. No. 88-241, § 1, 77 Stat. 496; and Municipal Court, officially called the Court of General Sessions, Act of Dec. 23, 1963, Pub. L. No. 88-241, § 1, 77 Stat. 487. The Municipal Court included civil and criminal divisions, Act of Dec. 23, 1963, Pub. L. No. 88-241, § 1, 77 Stat. 487; a small claims and conciliation branch, Act of Dec. 23, 1963, Pub. L. No. 88-241, § 1, 77 Stat. 494; a domestic relations branch, Act of Dec. 23, 1963, Pub. L. No. 88-241, § 1, 77 Stat. 492; and a landlord and tenant branch, Act of Dec. 23, 1963, Pub. L. No. 88-241, § 1, 77 Stat. 487 (revision notes). At the first appellate level, the District of Columbia Court of Appeals reviewed decisions of the municipal and juvenile courts and of certain administrative agencies of the District. Act of Dec. 23, 1963, Pub. L. No. 88-241, § 1, 77 Stat. 485. At the



The precise constitutional status of the federal courts within the District of Columbia had been the subject of frequent litigation. Initially, the federal courts of the District of Columbia were termed wholly "judicial,"<sup>88</sup> implying an article III origin. In *Federal Radio Commission v. General Electric Co.*,<sup>89</sup> however, the Supreme Court characterized the District of Columbia federal courts as "legislative," basing its decision on the article I<sup>90</sup> grant to Congress to control the affairs of the District of Columbia.<sup>91</sup> This decision was followed by *O'Donoghue v. United States*,<sup>92</sup> in which the Court held that the salaries of the federal judges of the district and appellate courts could not be diminished, since they sat on article III courts, and, therefore, were within the protection of article III.<sup>93</sup> After *O'Donoghue*, the federal courts for the District of Columbia were termed "hybrids," that is, endowed with both article I and article III characteristics.<sup>94</sup>

Finally, in 1970, the "most comprehensive reform of the judicial system in the District of Columbia ever undertaken by the President

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third level, the United States Court of Appeals for the District of Columbia Circuit reviewed decisions of the United States District Court and the District of Columbia Court of Appeals, with final review to the United States Supreme Court. Act of Dec. 23, 1963, Pub. L. No. 88-241, § 1, 77 Stat. 479.

88. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 623 (1838):

Here, then, is the delegation to this circuit court of the whole judicial power in this district, and in the very language of the Constitution [art. III, §2], which declares that the judicial power shall extend to all cases in law and equity arising under the laws of the United States . . . .

89. 281 U.S. 464 (1930).

90. U.S. CONST., art. I, § 8, cl. 17:

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . . .

91. 281 U.S. 464, 468 (1930). The Court stated that "the courts of the District of Columbia are not created under the judiciary article of the Constitution but are legislative courts . . . ."

92. 289 U.S. 516 (1933). This suit was brought by judges of the Supreme Court of the District of Columbia and the Court of Appeals for the District of Columbia (later the United States District Court and the United States Court of Appeals for the District of Columbia Circuit) to recover salaries withheld by the Comptroller General based on his construction of a congressional act.

93. *Id.* at 551.

94. See generally *Hobson v. Hansen*, 265 F. Supp. 902 (D.D.C. 1967); 1 J. MOORE, FEDERAL PRACTICE ¶ 0.4 [4] (2d ed. 1972); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS §11 (2d ed. 1970).

For a critical examination of the District of Columbia court status prior to the Court Reorganization Act, see Comment, *The District of Columbia Courts: Judicial or Legislative?*, 58 NW. U.L. REV. 401 (1963).

and Congress"<sup>95</sup> altered the status of all the District of Columbia courts.<sup>96</sup>

### B. *The Effect of the District of Columbia Court Reform and Criminal Procedure Act of 1970 on D.C. Courts*

Prompted by the ever-increasing rate of crime in the nation's capital and the inability of the District of Columbia's courts to handle this volume,<sup>97</sup> Congress passed the District of Columbia Court Reform and Criminal Procedure Act of 1970.<sup>98</sup> The Act is more commonly known as the "D.C. Crime Bill" because of the controversial sections<sup>99</sup> on the juvenile code,<sup>100</sup> authority for the issuance of so-called "no-knock" warrants,<sup>101</sup> a comprehensive wiretapping law,<sup>102</sup> and authorization for pretrial detention in lieu of bail for certain persons charged with dangerous or violent crimes.<sup>103</sup> Title I of the Act contains the provisions concerning the court reorganization with which we are concerned.<sup>104</sup>

95. See Reilly, *The District of Columbia Court Reorganization Act: Appellate Review in a Period of Transition*, 30 FED. B.J. 258 (1971).

96. The Court Reorganization Act provides for a gradual changeover to the new system in three separate stages, the first stage commencing February 1, 1971, the second stage on August 1, 1972, and the final stage on August 1, 1973. This note will not examine any of the multiple features of the Court Reorganization Act dealing with this transitional period. For a discussion of court procedure during this period of transition, see generally Kern, *The District of Columbia Court Reorganization Act of 1970: A Dose of the Conventional Wisdom and a Dash of Innovation*, 20 AM. U.L. REV. 237 (1970); Reilly, *District of Columbia Court Reorganization Act: Appellate Review in a Period of Transition*, 30 FED. B.J. 258 (1971); Williams, *District of Columbia Court Reorganization, 1970*, 59 GEO. L.J. 477 (1971).

97. See Kern, *The District of Columbia Court Reorganization Act of 1970: A Dose of the Conventional Wisdom and a Dash of Innovation*, 20 AM. U.L. REV. 237 (1970).

98. See note 1 *supra*.

99. The D.C. Crime Bill was greeted with cries of "repression" and "police state" from the news media. See Wicker, *In the Nation: No Sale on Preventive Detention*, N.Y. Times, July 19, 1970, § 4, at 12, col. 4 (city ed.); N.Y. Times, July 17, 1970, § 1, at 30, col. 2 (city ed.):

A Senate-House conference committee has reported out an anti-crime bill for the District of Columbia which has been variously characterized as violative of no less than five constitutional amendments and as a blueprint for a police state . . . .

See also Schwartz, S. 30: "The Seeds of Repression," 211 THE NATION 70 (1970).

100. D.C. CODE ANN. §§ 16-2301 to -2337 (Supp. V, 1972).

101. D.C. CODE ANN. § 23-591 (Supp. V, 1972).

102. D.C. CODE ANN. §§ 23-541 to -556 (Supp. V, 1972).

103. D.C. CODE ANN. §§ 23-1321 to -1332 (Supp. V, 1972).

104. See generally Williams, *District of Columbia Court Reorganization, 1970*, 59 GEO. L.J. 477 (1971). Mr. Williams was intimately acquainted with the development of the congressional conference bill and the entire 17-month legislative process that

The intent of Congress in passing the bill was to eliminate any local jurisdiction from the United States District Court and the United States Court of Appeals and to transfer all jurisdiction over local matters to a "largely independent local court system."<sup>105</sup> This is evidenced by section 111 of the Court Reorganization Act, which declares:

The judicial power in the District of Columbia is vested in the following courts:

- (1) The following Federal Courts established pursuant to Article III of the Constitution:
  - (A) the Supreme Court of the United States
  - (B) the United States Court of Appeals for the District of Columbia Circuit
  - (C) the United States District Court for the District of Columbia.
- (2) The following District of Columbia courts established pursuant to article I of the Constitution:
  - (A) the District of Columbia Court of Appeals
  - (B) the Superior Court of the District of Columbia.<sup>106</sup>

Under the Court Reorganization Act, the United States District Court and United States Court of Appeals for the District of Columbia are no different than any other article III court.<sup>107</sup> Thus, the jurisdiction once exercised by the District's federal courts over local civil and criminal matters will now be transferred to a new court system.<sup>108</sup> The Act declares that the District of Columbia Court of Appeals shall be the "highest court of the District of Columbia" with appeal directly<sup>109</sup> to the United States Supreme Court rather than to the United States Court

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went into the bill. In addition to discussing each section of the bill, Mr. Williams includes many citations to the congressional hearings and reports on the bill.

105. *Bland v. Rodgers*, 332 F. Supp. 989, 991 (D.D.C. 1971); Williams, *supra* note 96, at 533; S. REP. NO. 91-405, 91st Cong., 1st Sess. 4, 18 (1969); H. REP. NO. 91-907, 91st Cong., 2nd Sess. 23, 34, 35 (1970).

106. D.C. CODE ANN. § 11-101 (Supp. V, 1972).

107. D.C. CODE ANN. §§ 11-301, -501 to -503 (Supp. V, 1972). The jurisdiction of the District of Columbia federal courts will henceforth be limited to diversity of citizenship actions and federal questions, which excludes interpretation of District of Columbia statutes. 28 U.S.C. §§ 1331, 1332 (1970); Court Reorganization Act § 172(c)(1), 84 Stat. at 590, *amending* 28 U.S.C. § 1363 (1970). In *Palmore v. United States*, 290 A.2d 573 (Ct. App. D.C. 1972), *prob. juris. noted*, 409 U.S. 840 (1972), the court rejected defendant's contention that the violation of District of Columbia criminal laws, although laws passed by Congress, were cases arising under the laws of the United States and hence "federal questions." 290 A.2d at 578.

108. See note 105 *supra*.

109. D.C. CODE ANN. § 11-102 (Supp. V, 1972).

of Appeals for the District of Columbia as was the situation previously.<sup>110</sup> The trial level court system in the District will be the Superior Court of the District of Columbia.<sup>111</sup>

Although the Act will have the direct impact of increasing the financial and durational attractiveness of the bench of the District local courts,<sup>112</sup> the Court Reorganization Act does not confer the same guarantee against undiminished salary and lifetime tenure as the Constitution affords judges of the federal "constitutional" courts.<sup>113</sup> The Act does, however, make significant strides towards improving the accountability<sup>114</sup> and productivity of the District of Columbia courts.<sup>115</sup>

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110. Act of Dec. 23, 1963, Pub. L. No. 88-241, § 1, 77 Stat. 479. While this technically places the District of Columbia Court of Appeals on the same level as the various state supreme courts, there are a number of notable deviations from Supreme Court review of state supreme court decisions and from the stare decisis effect of state court decisions. See generally Williams, *supra* note 104, at 492-500. One example of this is that the Supreme Court retains authority to interpret the meaning of statutes applicable exclusively to the District of Columbia along with all other statutes of the United States, while the individual state supreme courts interpret the meaning of their own state statutes. Court Reorganization Act § 172(a)(1), 84 Stat. at 590, amending 28 U.S.C. § 1257 (1970). Another example is that, while a decision of the District of Columbia Court of Appeals holding a District of Columbia statute invalid may be reviewed by appeal to the Supreme Court, a decision of the supreme court of a state holding a state statute to be constitutionally invalid would be reviewable in the Supreme Court of the United States only by writ of certiorari. 28 U.S.C. § 1257(1)(3) (1970).

111. D.C. CODE ANN. §§ 11-101, -901, -902 (Supp. V, 1972). This court reflects a consolidation of the numerous local trial courts and the transfer of local jurisdiction away from the federal district court. Compare D.C. CODE ANN. §§ 11-501 to -503, 11-921 to -923 (Supp. V, 1972), with Act of Dec. 23, 1963, Pub. L. No. 88-241, § 1, 77 Stat. 482, 483. The Superior Court will have a Civil Division, Criminal Division, Family Division, Probate Division, and Tax Division.

112. See Williams, note 104 *supra*, at 517. To enhance the attractiveness of appointment to the local bench, the term of office was increased from ten to fifteen years, retirement benefits were increased. The salaries of the District of Columbia judges are tied to the salaries of federal judges. Superior Court judges receive ninety percent of the salary of federal district judges and Court of Appeals judges receive a similar proportion of the salary of federal circuit judges. D.C. CODE ANN. §§ 11-703 (b), -904(b), -502, -1561 to -1571, -195(a) to (c) (Supp. V, 1972).

113. See note 32 *supra* and accompanying text.

114. To improve accountability, filing of financial statements are required, residency requirements are provided for the choosing of judges, and a removal commission is established with broad powers to remove judges for reasons in addition to those required for removal of judges of article III courts. See generally Williams, *supra* note 104, at 511-26. D.C. CODE ANN. §§ 11-1501, -1521 to -1530 (Supp. V, 1972).

115. To better monitor judicial productivity, provisions were added to require additional reports on the operation of the court, to reduce vacation, and to create a court administrative office. D.C. CODE ANN. §§ 11-709, -909, -1505, -1701 to -1747 (Supp.

Given this outline of the Court Reorganization Act, an application of the *Glidden* standards<sup>116</sup> would appear to indicate that the United States District Court and United States Court of Appeals for the District of Columbia are exclusively "constitutional" courts<sup>117</sup> and that the two local courts of the District of Columbia are "legislative." The primary considerations directing this conclusion are the limited salary and tenure provisions for the two local courts and the expression of congressional intent. A direct effect of this reorganization will be to end the hybrid status of the United States District Court and United States Court of Appeals for the District of Columbia.<sup>118</sup> Presumably, these courts will now be limited solely to the adjudication of cases and controversies.

### C. *Post Court Reorganization Act Decisions Regarding Court Status*

Since the passage of the Court Reorganization Act, two decisions have upheld the constitutionality of the new court system. In *Bland v. Rogers*<sup>119</sup> the United States District Court for the District of Columbia dealt with a constitutional challenge to the limitation of judicial review of habeas corpus actions to the local courts of the District. The court, relying upon congressional intent, upheld the divestiture of such actions from the federal courts of the District.<sup>120</sup> Presumably, this

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V, 1972). See also Kern, *The District of Columbia Court Reorganization Act of 1970: A Dose of the Conventional Wisdom and A Dash of Innovation*, 20 AM. U.L. REV. 237, 243-51 (1970). Williams, *supra* note 104, at 526-32.

116. See notes 29-32 *supra* and accompanying text.

117. Even prior to the Act, Professor Wright felt that, though the D.C. federal courts were theoretically "hybrid," for all practical purposes they were "constitutional." C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 11 (2d ed. 1970).

118. Prior to the Court Reorganization Act, the D.C. federal courts performed some duties not allowed other federal courts. See note 37 *supra*. Although prior to the Act, the District federal courts could hear such matters as probate and divorce, these matters are still considered to be cases and controversies under the Constitution and could be heard by all federal courts if the federal courts desired to hear such matters. See C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 25 (2d ed. 1970). As a further example the District Court for the District of Columbia upheld its right to appoint members of the local board of education in *Hobson v. Hansen*, 265 F. Supp. 902 (D.D.C. 1967), basing its authority on the "hybrid" nature of the court.

119. 332 F. Supp. 989 (D.D.C. 1971). *Bland* involved a habeas corpus suit of a 16 year old involved in a postal robbery, detained as an adult under the Criminal Procedure Act. The suit was originally filed in the Superior Court but was removed to the United States District Court.

120. *Id.* at 991:

This court recognizes the overriding intent of Congress to create a largely

holding will be extended beyond habeas corpus actions.

In the second case, *Palmore v. United States*,<sup>121</sup> the defendant attacked the constitutional fabric of the Superior Court of the District of Columbia. Defendant argued that his suit was within the ambit of article III because the applicable District of Columbia statute under which he had been convicted was within the "laws of the United States," thus creating a federal question, and because the United States was a party to the action.<sup>122</sup> Therefore, he asserted, once a case or controversy was within "the judicial power of the United States" as defined in article III, Congress cannot constitutionally confer jurisdiction of that case upon a non-article III court.<sup>123</sup> The court rejected defendant's argument that Congress *must* vest jurisdiction over local felonies *only* in article III courts, relying upon the inherent plenary powers of Congress under article I. The court indicated that the District clause in the Constitution, article I, section 8, clause 17, has been used in the past in a dual fashion to broaden the traditional boundaries of article III regarding the judicial powers of the District of Columbia courts. Congress, by vesting article I subject matter in the federal constitutional courts of the District, has given these courts jurisdiction beyond the traditional article III limitation of "case or controversy."<sup>124</sup> In addition, Congress has employed the District clause to allow article I judges to hear and determine subject matter which is within the ambit of article III, such as local misdemeanors and local felonies.<sup>125</sup> Because the Court of Appeals recognized these two possi-

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independent local court system as well as their concern for "orderliness" which underlies the customary deference accorded to the local administration of local matters.

The federal court allowed the petition for habeas corpus in this case since the Superior Court had denied relief "without prejudice to its being filed in the United States District Court for the District of Columbia." *Id.* at 990.

121. 290 A.2d 573 (Ct. App. D.C. 1972), *prob. juris. noted*, 409 U.S. 840 (1972). The defendant had been convicted in Superior Court of carrying a dangerous weapon after a prior felony conviction. This conviction was affirmed by the Court of Appeals.

122. *Id.* at 575. The defendant's theory as to "federal question" jurisdiction appears to be answered in the Court Reorganization Act. See note 107 *supra*. The defendant's theory as to the effect of the United States being a party would appear to be fallacious, since the Court of Claims and Tax Court were at one time or another article I courts in which the United States was usually a party to the suit.

123. 290 A.2d at 575.

124. See note 94 *supra* (hybrid court).

125. Cf. note 62 *supra* (Tax Court).

bilities, that is, article I courts vested with article III subject matter and article III courts vested with non-article III subject matter, it concluded that Congress could constitutionally grant a species of judicial power to the District's courts free of the limitations in article III.<sup>126</sup> If the defendant's contention had been accepted, the upshot would have been to limit severely the adjudicatory power of article I courts such as the Tax Court and the Court of Military Appeals.<sup>127</sup> The court's argument is weakened, however, by its reliance on the constitutionality of the past hybrid status of the District federal courts because the Court Reorganization Act, indicating congressional intention, directly attempts to terminate that hybrid status.<sup>128</sup>

Defendant's second argument was that "in the District of Columbia, Congress, at least since 1863, has conferred jurisdiction over local felonies in article III courts and therefore it cannot *now* be permitted to withdraw that jurisdiction from these courts and vest it in an article I court system."<sup>129</sup> The resolution of the defendant's argument depended upon a determination of which article of the Constitution gave the courts of the District of Columbia their jurisdiction over local felonies and misdemeanors.<sup>130</sup> The court first looked to the historical record to ascertain congressional intent and found the record silent.<sup>131</sup> To resolve the issue, the court was persuaded that:

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126. *Id.* at 576. The court also recognized that there are some excellent reasons to designate all District of Columbia courts as article III courts:

There may be, of course, substantial and persuasive reasons for creating all courts in the District with lifetime tenure and undiminishable salary for judges so as to be completely free of possible legislative influence. *See generally* O'Donoghue v. United States. . . . However, Congress has chosen in its legislative wisdom to follow the example of numerous states [46] which do not provide for such tenure or salary, and we find this choice to be a legitimate means by which Congress may accomplish the permissible end of creating a "local" court system under the District Clause.

*Id.* at 578.

127. For example, if all jurisdiction involving cases arising under the laws of the United States or cases to which the "United States is a party" were divested from the Tax Court, then the Tax Court would have very few cases to hear and the burden of these divested cases would be placed upon the United States District Court or Court of Claims. *See* note 62 *supra*.

128. *See* note 118 *supra* and accompanying text.

129. 290 A.2d at 578. One argument evidently not made by the defendant is that the divesting of criminal jurisdiction from the federal court was the divesting of defendant's right to have his case tried in federal court and was therefore a denial of due process of law.

130. The test to which the court looks here is the *Bakelite* test. *See* text accompanying note 18 *supra*.

131. 290 A.2d at 578.

By virtue of the restricted locale of the conduct proscribed by the first District of Columbia Code, the fact that inferior article III courts throughout the several states are incapable of receiving jurisdiction over purely local offenses and the general reluctance in the early days of our nation's history to *expand* the article III judicial power, Congress conveyed the judicial power over District of Columbia felonies to the courts in the District under the *District clause*.<sup>132</sup>

Whether or not this argument is persuasive is not essential to the holding, for the court noted that even if jurisdiction had been vested under article III rather than under the District clause, Congress, recognizing the history of legislative courts, could constitutionally divest that jurisdiction from article III courts.<sup>133</sup> Based on this reasoning, the court rejected defendant's historical argument. Therefore, if the Court Reorganization Act withstands constitutional attack, the effect will be that "if the conduct violates a local statute, a local court has jurisdiction to hear and determine their case, if the conduct violates a general federal statute, an article III federal court will have jurisdiction."<sup>134</sup> This effect will make the District local courts similar to the judiciary existing in each individual state.<sup>135</sup>

132. *Id.* at 579 (emphasis original).

133. *Id.* at 580.

134. *Id.* The *Bland* and *Palmore* decisions dealt with criminal proceedings, the area in which the effect of court reorganization is greatest. Prior to the Act, concurrent jurisdiction over criminal matters existed in both federal and District local courts, often resulting in delays in the disposition of criminal matters. The House District Committee in March of 1970 complained:

[T]he fact is that the diversity of Federal and local interest [in the District of Columbia] has led to the jurisdictional disarray which presently exists—the local court handles some federal misdemeanors, the Federal Court has jurisdiction of local felonies and concurrent jurisdiction over local misdemeanors, the local court makes determinations as to certain administrative procedures appeals, the Federal court hears others without apparent distinction as to local-Federal interest; the Federal court tries cases that would elsewhere be within the state system. And then there is the overall problem of concurrent jurisdiction, producing delays in the disposition of criminal matters, described as "ping-pong," in derogation of the public and federal interest.

H.R. REP. NO. 907, 91st Cong., 2d Sess. 33 (1970). Under the Act, most of the criminal cases that had been heard in federal courts must now be brought only in District local courts, and the federal courts will hear only those criminal matters that may be brought in other similar federal courts. See notes 107 and 108 *supra*.

135. 290 A.2d at 580, where the court stated:

What Congress has done by enacting the 1970 Court Reform Act is to treat criminal offenders in the District of Columbia as they would be treated in any state.

The court also indicates that, since 46 states do not require judges who hear local



## V. CONCLUSION

A key policy and legal issue to be considered is whether the Tax Court and the District of Columbia local courts should be article III, rather than article I, courts.

### A. *The Tax Court*

Despite the reasons advanced for the designation of the Tax Court as an article I court,<sup>136</sup> there are important policy considerations supporting the proposition that the Tax Court should be established as an article III court. One reason lies in the concept of separation of powers.<sup>137</sup> The primary factor for removing the Tax Court from the legislative or executive branches would be to establish a truly independent judiciary. Without lifetime tenure and undiminishable salary the judiciary cannot, in theory, be totally independent.<sup>138</sup> This lack of "theoretical" independence, although subtle, leaves nagging doubts in the minds of some as to the impartiality of the court. Such doubts cannot possibly be eliminated until the Tax Court becomes separate and independent.<sup>139</sup> A parallel aspect of this independence is that granting article III status to the Tax Court would increase respect for it as a judicial institution. Additionally, as an article III court the Tax Court would be administered under the Office of the United States Courts, which would handle all appropriations and secure courtrooms for the Tax

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felonies to have lifetime tenure, the District of Columbia local courts are not peculiar. *Id.* at 578 n.12.

The court in *Palmore* also felt compelled to accept the distinction employed in *O'Donoghue* between territorial courts and the District of Columbia courts. *Id.* at 576. Nevertheless, the court cited with apparent approval arguments by the Government that the District of Columbia local courts are similar to the old territorial courts, in that the District may become a state or at least obtain sufficient home rule so as to become capable of creating its own judicial system and would not have the need for large numbers of lifetime article III judges, whose principle function had been to adjudicate local matters. *Id.* at 576 n.5. The Supreme Court in a recent decision where the issue was whether the District of Columbia could be considered a "state" or "territory" pursuant to an alleged violation of § 1983 of the Civil Rights Act appears to have rejected the theory that the District of Columbia has a status analogous to a territory or a state. *District of Columbia v. Carter*, 93 S. Ct. 602 (1973).

136. See note 72 *supra*.

137. One commentator makes a strong argument that without article III status the Tax Court violates the separation of powers concept and is therefore unconstitutional. See Ginsberg, *Is the Tax Court Constitutional?*, 35 *Miss. L.J.* 382 (1964).

138. See note 32 *supra*.

139. See note 66 *supra*.

Court across the nation.<sup>140</sup> Finally, the Federal Rules of Civil Procedure and Evidence would then be used by the Tax Court, greatly increasing the discovery possibilities.<sup>141</sup>

### B. *The District of Columbia Courts*

Although there are cogent reasons supporting the designation of the District local judges as judges of article I courts,<sup>142</sup> there is at least one important policy consideration in support of the argument that the District of Columbia local judges should be granted article III protection—the separation of powers doctrine. In *O'Donoghue* the Supreme Court voiced the fear that Congress might unduly influence the courts of the District if the judges were not granted constitutional status:

Indeed, the reasons . . . which impelled the adoption of the constitutional limitation [lifetime tenure and undiminishable salary], apply with even greater force to the courts of the District than to the inferior courts of the United States located elsewhere, because the judges of the former courts are in closer contact with, and more immediately open to the influences of the legislative department, and exercise a more extensive jurisdiction in cases affecting the operations of the general government and its various departments.<sup>143</sup>

The separation of powers doctrine should apply equally to judges of the District local courts as it does to judges of the District federal courts, since both court systems receive their laws from Congress and both would be subjected to congressional pressures.

Based on the necessity to maintain an independent judiciary, Congress should re-evaluate the status of the Tax Court and the local courts of the District of Columbia and grant these courts article III status.

140. See Henke, *The Tax Court, The Proposed Administrative Court, and Judicialization*, 18 BAYLOR L. REV. 449, 467 (1966).

141. At present the discovery rules for the Tax Court are not as broad as those in other federal courts. See Kominsky, *The Case for Discovery Procedure in the Tax Court*, 36 TAXES 498 (1958); Note, *Procedural and Administrative Changes in the Tax Court Created by the Tax Reform Act of 1969*, 8 HOUSTON L. REV. 395, 399 (1970). But since the Tax Court may adopt its own rules of procedure, INT. REV. CODE OF 1954, § 7453, it would not be necessary to achieve article III status in order to change the discovery rules.

142. See note 126 *supra*. Another reason for designation under article I may have been that Congress desired to retain more control over the District of Columbia judiciary by limiting the tenure of its judges. See Williams, *supra* note 96, at 490.

143. *O'Donoghue v. United States*, 289 U.S. 516, 535 (1932).