GOOD BEHAVIOR TENURE AND JUDICIAL POWER

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Obscure precedents, academic disagreement, and doctrinal confusion characterize the present scope and application of the tenure and salary requirements found in article III of the Constitution. In this article, Mr. Close examines the Supreme Court's current pronouncement that Congress may create nontenured tribunals in the District of Columbia and commit both felony trials and all post-conviction habeas corpus claims within the District to these tribunals exclusive of article III courts. The author contends that this position is inconsistent with the purpose of the tenure and salary proviso of article III and that it is supported by a rationale which is at best unclear. Offering alternative approaches to the issue, Mr. Close concludes that once Congress decides to commit inherently judicial business to a federal court that tribunal must be tenured.

INTRODUCTION: THE PURPOSE AND MEANING OF "GOOD BEHAVIOR" TENURE

To the framers of the Constitution the complete independence of the federal courts was essential, for, it was asked, "[t]o what quarter will you look for protection from an infringement on the Constitution, if you will not give [independent] power to the judiciary?"[1] When James Madison was asked what would guarantee the Bill of Rights as an effective check on the new government, he replied "independent tribunals of justice."[2] Thus the article III proviso of good behavior tenure[3] and undiminished salary was understood to be consitutionally necessary if the judges were to guarantee the Constitution to the

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[1] 3 ELLIOT'S DEBATES 554 (2d ed. 1836) [hereinafter cited as ELLIOT]; THE FEDERALIST No. 78, at 484 (H. Lodge ed. 1888) (A. Hamilton) [hereinafter cited as THE FEDERALIST].

[2] 1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789).

[3] Although good behavior tenure is commonly associated with the Act of Settlement, 12 & 13 Will. 3, ch. 2 § 3 (1700), which granted tenure to judges "*quamdiu se bene gesserint*," the concept actually dates as far back as Edward III. R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 125 (1973). The exact definition of good behavior tenure has perplexed constitutional scholars since its inception. The controversy has turned on whether "good behavior" means life tenure and whether impeachment is the sole means for removal. *See, e.g.*, 4 ELLIOT, *supra* note 1, at 443–44 (2d ed. 1836) (Senator Stone, 1802) (misbehavior not necessarily impeachable offense, hence, impeachment not exclusive); THE FEDERALIST, *supra* note 1, No. 79, at 492–93 (A. Hamilton) (impeachment the sole method of removal). *See generally* S. 1423, 95th Cong., 2d Sess. (1978); H.R. 1850, 8042, 95th Cong., 2d Sess. (1978) (establishing proce-

people.[4] Indeed, an overbearing legislature was so feared that at one point during the Convention of 1787 it was proposed,[5] with tentative agreement, that Congress not be permitted to increase judges' salaries during their continuance in office, in anticipation that such power would be used to influence their judgment.[6] The possibility of inflation during a long judicial tenure, however, made this proposal impractical, and it was ultimately rejected.[7] It is also important to note that judges of inferior federal courts were specifically included within the tenure and salary guarantees of article III. This fact is significant in view of the controversy over the establishment of lower federal courts, for the proposal to create federal courts of original jurisdiction was not readily accepted at the Convention. Opponents of the idea argued that state courts were the most appropriate tribunals to hear cases in the first instance[8] and that the establishment of inferior

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dures, other than impeachment, for removal of unfit federal judges); R. BERGER, *supra* at 122–92; Ziskind, *Judicial Tenure in the American Constitution: English & American Precedents*, 1969 SUP. CT. REV. 135; Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes From History*, 36 U. CHI. L. REV. 665 (1969); Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870 (1930).

[4] THE FEDERALIST, *supra* note 1, No. 78, at 484–87; 4 ELLIOT, *supra* note 1, at 442 (J. Mason in the Senate, 1800).

Article III, section 1 of the Constitution provides:

> 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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

[5] 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22, 226, 230, 237, 244 (Farrand ed. 1911) [hereinafter cited as FARRAND].

[6] *Id.* at 116, 126.

[7] 2 *id.* at 429–30. Madison, who trusted the judiciary over the legislature, favored the proposal and was never completely reconciled to the Convention's decision. *Id.* at 45; *see* 3 ELLIOT, *supra* note 3, at 535 (Virginia ratification convention); THE FEDERALIST, *supra* note 1, No. 48, at 309, 311–13 (J. Madison).

The principle of insulating the judiciary from pressure by the other branches came under question only once, and only Connecticut supported a proposal for a limited interference which would have allowed removal by the executive upon the application of both houses of Congress. 2 FARRAND, *supra* note 5, at 423, 428–29. This proposal mirrored the concept of good behavior tenure under the Act of Settlement. R. BERGER, *supra* note 3, at 125. Its express rejection secured judicial freedom from the federal executive as well as the federal legislature.

Whether good behavior tenure guarantees that the judge will have any business to perform, or whether it merely guarantees him a salary, has never been decided. *See* Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 141–43 (1970) (Douglas & Black, JJ., dissenting) (judges entitled to hear cases). When Congress abolished the Commerce Court, it was argued that it could not abolish judgeships. 48 CONG. REC. 7992–98 (1912) (remarks of Sen. Sutherland). Subsequently, the judges were transferred. Act of Oct. 22, 1913, ch. 32, 38 Stat. 219.

[8] 1 FARRAND, *supra* note 5, at 119.

federal courts constituted "an unnecessary encroachment on the jurisdiction" of state courts.[9] The initial persuasiveness of these arguments induced the Convention to pass a motion to strike "inferior tribunals" from the judiciary article.[10] This motion was ultimately defeated, however, when James Madison and James Wilson, noting the difference between establishing such courts absolutely and permitting the Congress to erect them if it chose, offered a compromise that would give the federal legislature the power to create lower federal courts at its own discretion.[11] But while this grant of authority came under heavy attack in the state conventions,[12] the tenure and salary limitations did not.[13] Thus, although power was grudgingly yielded to Congress to enable it to utilize lower federal courts in place of state courts, the power was yielded only upon the tenure and salary limitations.[14] These limitations, which had served as a check on executive despotism in England,[15] were seen as a means "to arrest the overbearing temper"[16] of Congress. Hence, if the constitutional language of article III and the intent of the framers are to be given their proper effect, any exercise of "judicial power"[17] by the United States must be subject to tenure and salary restraints.[18]

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[9] *Id.* at 124; *see* 2 *id.* at 45–46.

[10] 1 *id.* at 118, 125.

[11] *Id.* at 125.

[12] *See, e.g.*, 2 ELLIOT, *supra* note 1, at 408 (New York); 3 *id.* at 521-22, 569-70, 572 (Virginia); 4 *id.* at 136–37 (North Carolina).

[13] 2 *id.* at 489 (Pennsylvania); *see* 3 *id.* at 517 (Virginia). *See generally* THE FEDERALIST, *supra* note 1, No. 78, at 483 (A. Hamilton).

[14] *See* 3 FARRAND, *supra* note 5, at 393 (G. Morris, 1802). Governor Morris remarked:

> lest a doubt should be raised, they have carefully connected the judges of both [supreme and inferior] courts in the same sentence . . . . With salutory caution they devised this clause to arrest the overbearing temper which they knew belonged to Legisltive bodies.

Id. Although this was said before the Senate in 1802, it clearly reflected the Convention's intention to curb congressional power. *See also* 1 *id.* at 254 (Wilson); 2 *id.* at 79 (Ghorum).

At the Virginia ratification convention, some felt that the federal judges would not be sufficiently independent because of the federal legislature's power to increase their salaries. *See* 3 ELLIOT, *supra* note 1, at 563–64.

[15] R. BERGER, *supra* note 3, at 128–29.

[16] 3 FARRAND, *supra* note 5, at 393.

[17] For a general discussion of the judicial power, see notes 114–47 *infra* and accompanying text.

[18] Article III also restricts the objects of the judicial power to "cases" and "controversies," *see* Old Colony Trust Co. v. Comm'r, 279 U.S. 716, 722, 728–29 (1929), and delimits those cases and controversies to which the judicial power may be extended. Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809). These two restrictions serve to keep the judicial branch within certain parameters as against the other branches of the federal government, *see* THE FEDERALIST, *supra* note 1, No. 48, at 310 (J. Madison), and within certain limits as between the United States and the individual states. National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 631–33 (1949) (Vinson, C.J. & Douglas, J., dissenting).

As its history clearly shows, however, the tenure and salary clause has not been read in any simple and direct manner. Rather, this clause has been so beclouded by the expansion of an article I or "legislative"[19] court theory, which is free of tenure restrictions,[20] that its application has become ensnarled in a net of "intellectual chaos."[21] Two recent cases, *Palmore v. United States*[22] and *Swain v. Pressley*,[23] confirm Justice Frankfurter's statement that "confused and inadequate analysis is too apt gradually to lead to a course of decisions that diverges from the true ends to be pursued."[24] Both cases involved challenges, based on the tenure requirements of article III, to the legitimacy of the District of Columbia superior court and court of appeals, each of which was created by the congressional Reorganization Act of 1970 to hear local cases arising in the District.[25] These courts are presided over by judges appointed by the President to serve fifteen year terms, and subject during that time to removal by a commission.[26] This article will examine the *Palmore* and *Pressley* cases and attempt to suggest approaches to the tenure question which

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[19] For a comparison of article I or "legislative" courts with article III or "constitutional" courts, see Note, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 COLUM. L. REV. 133 (1962). The Note contains an admirable review of the prior law and theories which this article will not attempt to repeat.

[20] For a collection of opinions on the constitutionality of a proposed "article I" bankruptcy court with plenary jurisdiction over all suits affecting the bankrupt, staffed by judges with fifteen year terms, see *Hearings on H.R. 31 & H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 2682–2706 (1976) [hereinafter cited as *1976 Hearings*]. *Compare* 1976 Hearings, *supra* at 2685 (Dean Griswold's view) (Solicitor General in Palmore v. United States, 411 U.S. 389 (1973)) ("there is no doubt" of constitutionality of bankruptcy court with nontenured judges under article I of the Constitution) *with id.* at 2706 (Professor Wright's observation) (because Supreme Court has confused this area of law so thoroughly, I can only say that "I don't know how many angels can stand on the head of a pin until the Supreme Court tells me"). Under the new reform law bankruptcy judges are appointed by the President to serve for a term of fourteen years. Bankruptcy Reform Act of 1978, Pub. L. No. 91–190, §§ 152, 153, 92 Stat. 2657.

[21] P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 258 (2d ed. 1973) [hereinafter cited as HART & WECHSLER] (referring to Justice Sutherland's opinion in Williams v. United States, 289 U.S. 553 (1933) (holding Court of Claims judges are not protected by undiminishable salary)).

[22] 411 U.S. 389 (1973). For the most coherent analysis of the tenure clause as a restraint on the exercise of federal power, see Brief for Appellant at 20–47, Palmore v. United States, 411 U.S. 389 (1973) [hereinafter cited as Brief for Appellant], and Reply Brief for Appellant at 4–20, Palmore v. United States, 411 U.S. 389 (1973) [hereinafter cited as Reply Brief for Appellant].

[23] 430 U.S. 372 (1977).

[24] Sherman v. United States, 356 U.S. 369, 379 (1958) (Frankfurter, J., concurring) (footnote omitted).

[25] *See* D.C. CODE §§ 11-502(3), -901, -923(2) (1973); *Pressley*, 430 U.S. at 375–77; *Palmore*, 411 U.S. at 392–93, 392 n.2.

[26] *See* D.C. CODE § 11-1502 (1973); *Palmore*, 411 U.S. at 392–93.

would be more consistent with the purpose and intent of the tenure and salary proviso of article III.

PALMORE V. UNITED STATES AND *SWAIN V. PRESSLEY*

Palmore, a resident of Maryland,[27] was prosecuted in the Superior Court for the District of Columbia for the felony of carrying an unregistered pistol.[28] Palmore moved to dismiss the indictment for lack of jurisdiction, citing the tenure clause of article III.[29] He also moved to suppress the pistol seized, alleging that it was the re-

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[27] Reply Brief Appellant, *supra* note 22, at 17.

[28] D.C. CODE § 22-3204 (1973). Conviction carries a ten year maximum sentence.

[29] Until the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, the local District of Columbia court's criminal jurisdiction which it exercised concurrently with the United States District Court for the District of Columbia, had consisted solely of misdemeanors and petty offenses. D.C. CODE § 11-963 (1967). Its judgments were reviewed by the District of Columbia court of appeals, which, in turn, was subject to review by the United States Court of Appeals for the District of Columbia Circuit. *Id.* § 11-321(a).

The Act increased the number of "local" judges and, with a minor exception, shifted general criminal jurisdiction, including felonies, to the local District of Columbia court exclusively. D.C. CODE §§ 11-502(3), -923(2) (1973). The District of Columbia court of appeals, moreover, is no longer reviewed by the District of Columbia Circuit, but is instead reviewed by the Supreme Court. *Id.* § 11-102 (1973); 28 U.S.C. § 1257(3) (1976).

The judges of the Superior Court for the District of Columbia (Superior Court) and the District of Columbia Court of Appeals (D.C. Court of Appeals) hold office for fifteen year terms. D.C. CODE § 11-1502 (1973). They are removable during that time, *inter alia*, for "conduct which is prejudicial to the administration of justice or which brings the judicial office into disrepute," *id.* § 11-1526(a)(2)(C), by a commission three of whose five members are appointed by the President. *Id.* § 11-1522(a)(1). It was of these latter provisions alone that Palmore complained. *See Palmore*, 411 U.S. at 392–93, 392 n.2. For a comprehensive treatment of the Act, see Williams, *District of Columbia Court Reorganization, 1970*, 59 GEO. L.J. 477 (1971).

The "judges" to which article III refers are the only appointed officers for whom the Constitution specifies any particular term of office. *See generally* Crenshaw v. United States, 134 U.S. 99, 107–08 (1890) (terms of midshipman's appointment may be subsequently altered by legislation). The fifteen year tenure of the Superior Court judges, with a possibility of a reappointment, is within the general pattern Congress has provided for important administrators. For example, members of the Board of Governors of the Federal Reserve System hold office for fourteen years, subject to removal "for cause" by the President. 12 U.S.C. §§ 241–42 (1976). Restricted removability is also a common feature of important officials whose function is of judicial nature. *See, e.g.*, Wiener v. United States, 357 U.S. 349, 355–56 (1958) (President cannot remove member of War Claims Commission where agency's function was of an "intrinsic judicial character" and Congress had not provided him authority); Humphrey's Ex'r v. United States, 295 U.S. 602, 625–30 (1935) (Federal Trade Commissioners may only be removed upon limited grounds specified in Trade Commission Act). *Cf.* Blair v. Oesterlein Co., 275 U.S. 220, 227 (1927) (Board of Tax Appeals possesses appellate powers which are judicial in character). *See also* Int. Rev. Code of 1954, ch. 76, §§ 7441, 7443(e), (f) (now I.R.C. §§ 7441, 7443(e), (f)) (Board of Tax Appeals shall be "an independent agency" with fixed term of office). For a discussion on the requirement of judicial review in the context of taxation, see note 93 *infra*.

sult of an unlawful arrest.[30] The District of Columbia superior court denied both motions and he was subsequently convicted.[31] He appealed to the District of Columbia court of appeals, where he also challenged the jurisdiction of that court,[32] and sought review on the merits of his motion to suppress. Relying on *National Mutual Insurance Co. v. Tidewater Transfer Co.*[33] for the proposition that Congress could establish courts in the district under article I "wholly separate and apart from its authority under article III," the court of appeals sustained both its jurisdiction and that of the court below against the tenure clause,[34] and affirmed on the merits the denial of

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[30] Palmore v. United States, 290 A.2d 573, 574–75 (D.C. 1972), *cert. denied*, 411 U.S. 389, 396–97 (1973). Palmore's fourth amendment claim illustrates, perhaps, why a litigant would prefer an inferior court with the "essential safeguard" of the tenure protections. *See* THE FEDERALIST, *supra* note 1, No. 78, at 488 (A. Hamilton). *Compare Palmore*, 290 A.2d at 580–84 (upholding police stop to permit random license inspections) *with* United States v. Montgomery, 561 F.2d 875, 878–80 (D.C. Cir. 1977) (holding same unconstitutional and disapproving *Palmore's* fourth amendment analysis).

The awkward and impolitic suggestion that the Superior Court and D.C. Court of Appeals judges may be influenced in their actions by a concern for their appointments nonetheless is firmly rooted in the Constitution. *See* THE FEDERALIST, *supra* note 1, No. 78, at 484 (A. Hamilton). Lest the influence of outside pressures be thought merely "theoretical," consider the case of Superior Court Judge Halleck. Considered a "liberal" judge, *see* Washington Post, Aug. 5, 1976, § C at 3, col. 2; *id.*, June 10, 1976, § C at 3, col. 1 (rulings on juvenile centers and women prisoners), who was often at odds with the United States attorneys, *e.g.*, *id.*, Mar. 12, 1976, § C at 2, col. 1; *id.*, Jan. 21, 1976, § C at 1, col. 1, Judge Halleck found himself in a bitter fight for his renomination, *id.*, Oct. 27, 1976, § A at 1, col. 1 (Judge Halleck sues tenure commission in United States district court), which he finally lost. *Id.*, May 21, 1977, § A at 1, col. 1 (President Carter will not renominate Judge Halleck). Certain United States attorneys "unofficially" played a key role in denying renomination to their nemesis. *Cohen Column*, *id.*, May 31, 1977, § C at 1, col. 1. The point is not whether Judge Halleck deserved to remain in office, but that even if he did, the renomination procedure impeaches at least the appearance of his neutrality. *See id.*, Jan. 7, 1977, § C at 7, col. 3 (certain lawyers and friends of Judge Halleck come to his aid). It has been remarked: "Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence." THE FEDERALIST, *supra* note 1, No. 78, at 489 (A. Hamilton).

[31] *See* Palmore v. United States, 290 A.2d 573, 574–75 (D.C. 1972), *aff'd*, 411 U.S. 389 (1973).

[32] *Id.* at 575–80. Insofar as both the District of Columbia Superior Court and Court of Appeals are "inferior courts" within the meaning of article III, and "tribunals inferior to the Supreme Court" under article I, section 8, clause 4 the same arguments apply to both courts. Strangely enough, the article I clause has never been held to authorize "article I" tribunals. *E.g.*, *Palmore*, 411 U.S. at 398; Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962) (plurality opinion).

[33] 337 U.S. 582 (1949). The Court, in *National Mutual Insurance Co.*, upheld the jurisdiction of the United States district court in Maryland over a suit between a Virginia corporation and a District of Columbia corporation over a contract governed by Maryland law. *Id.* at 583, 600.

[34] Palmore v. United States, 290 A.2d 573, 575–80 (D.C. 1972), *aff'd*, 411 U.S. 389 (1973).

the motion to suppress.[35] The Supreme Court granted a writ of certiorari to review the jurisdictional issue, but denied the writ on the motion to suppress.[36] Affirming the lower court's decision,[37] the Court held that Palmore was subject to federal sanctioning power in the District of Columbia for a violation of the local criminal code without the benefit of the tenure and salary provision of article III.[38]

Following *Palmore*, the Court in *Swain v. Pressley*,[39] extended this holding to a habeas petitioner presenting a case arising under the Constitution.[40] In that case, Pressley petitioned the United States

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[35] *Id.* at 580–84.

[36] *Palmore* purported to perfect an appeal. Brief for Appellant, *supra* note 22, at 2 (jurisdictional statement), 14–20. The Court postponed a notation of probable jurisdiction to a hearing on the merits. 409 U.S. 840 (1972). The Court decided that review was by certiorari, not appeal. *Palmore*, 411 U.S. at 396.

[37] 411 U.S. at 397 n.6. The denial of the writ on the fourth amendment issue apparently left Palmore free to pursue his possible remedy on habeas. He petitioned the United States District Court for the District of Columbia, but that court, relying on D.C. CODE § 23-110(g) (1973), dismissed for lack of jurisdiction. Palmore v. Superior Court, 515 F.2d 1294, 1297 (1975), *vacated and remanded*, 429 U.S. 915 (1976). On appeal, the District of Columbia Circuit reversed, en banc, construing section 110(g) as an exhaustion provision, since its habeas jurisdiction under 28 U.S.C. §§ 2241 (1970), had not been amended. The Court granted the United States' petition for a writ of certiorari, 424 U.S. 907 (1976), but then vacated and remanded *Palmore v. Superior Court* for further consideration in light of Stone v. Powell, 428 U.S. 465 (1976) (federal habeas relief will not lie for suppression claims where state has provided an opportunity for full litigation of federal claims). Superior Court v. Palmore, 429 U.S. 915 (1976).

[38] 411 U.S. at 410. Justice White's enthusiasm for a local court system in the District of Columbia that did not provide for lifetime tenure coupled with the suggestion that the provision of the 1970 Reorganization Act regarding the administration of the courts and judicial removal and suspension might well become "a model for the States," *id.* at 409–10, ignores the fact that good behavior was expected to be "the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws." THE FEDERALIST, *supra* note 1, No. 78, at 483 (A. Hamilton). For authority that the District of Columbia court's system is "a model for the States," see People v. Horan, 20 CRIM. L. REP. (BNA) 2251 (Colo. Sup. Ct., Nov. 22, 1976) (holding neither due process nor equal protection were violated by tenure "at the pleasure of the city council" while citing and relying on *Palmore*).

[39] 430 U.S. 372 (1977).

[40] As a constitutional law case, *Pressley* is carefully evasive. The Court did not decide whether Congress is obliged to allow review of the type of post conviction claim which *Pressley* presented. 430 U.S. at 380 n.13. The right to a tenured decision maker might turn on this question. HART & WECHSLER, *supra* note 21, at 341–44, 341 n.22; *cf.* Blount v. Rizzi, 400 U.S. 410, 419–20, 419 n.6 (1971) (hearing examiner not sufficiently independent to determine obscenity). If, however, the collateral attack is not a required remedy, it can only be because Pressley's trial was itself an adequate forum for final determination of all constitutional claims. HART & WECHSLER, *supra* note 21, at 341–44, 341 n.22; *cf.* Yakus v. United States, 321 U.S. 414, 428–31, 443–44 (1944) (constitutional validity of regulation may be withdrawn as defense in criminal trial where prior opportunity to challenge it before article III court deemed adequate).

Purportedly, *Pressley* raised no constitutional issue because the article III district court is open if the superior court remedy is "inadequate or ineffective." 430 U.S. at 381. *But see id.* at 384–86 (Burger, C.J., concurring) (suspension clause does not require collateral review). But since D.C. CODE § 23-110(g) was held not to be an exhaustion provision, it is almost impossible to imagine a case coming within the supposed exception. Clearly, it would not suffice to allege

District Court for the District of Columbia for a writ of habeas corpus to test his detention pursuant to a conviction in the superior court.[41] He alleged that he was denied the effective assistance of counsel and due process of law.[42] The district court dismissed the application on the authority of a provision in the District of Columbia code. This provision stated that a petition for a writ of habeas corpus filed on behalf of a prisoner authorized by the statute to apply for collateral relief by motion in the superior court "shall not be entertained by the Superior Court or by any Federal or State Court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief."[43] Reversing the district court, the United States Court of Appeals for the District of Columbia circuit held that the prisoner had exhausted his local remedies and that he was required to do no more under the code before filing a petition for habeas corpus in the district court.[44] On certiorari, the Supreme Court reversed the court of appeals, holding that the statute in question was not an exhaustion provision but in fact precluded district court habeas corpus jurisdiction.[45] Reading the statute in this manner, the Court found that replacing collateral review before a tenured tribunal with habeas corpus review before a nontenured tribunal did not violate either the tenure or suspension

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that the superior court was wrong on the law, for this would be no different than exhaustion. *In re* Galante, 437 F.2d 1164 (3d Cir. 1971) (section 2255 remedy not "inadequate or ineffective" because law in Court of Appeals for the Second Circuit on effective assistance of counsel less favorable than Third Circuit). For the same reason, it cannot suffice to allege that the superior court was wrong in finding the facts. *See* 430 U.S. at 383. Since the only difference between the superior court and the district court is tenure, the only case conceivably left to the district court is a habeas petition alleging that the judge's lack of tenure in the particular case had prejudiced the result directly. The Court suggests as much. *See* 430 U.S. at 383 n.20. This overrules *Glidden*, which held that the clause protects rights independently of any particular showing of prejudice. Glidden Co. v. Zdanok, 370 U.S. 530, 533–34 (1962) (plurality opinion), 589–90 (Douglas & Black, JJ., dissenting) (necessarily, by voting to reverse), 585–89 (Clark, J., & Warren, C.J., concurring) (implicitly, by reaching merits). Nevertheless, an allegation of partiality would clearly state a denial of due process, *e.g.*, Ward v. Village of Monroeville, 409 U.S. 57, 59–61 (1972), and thus *Pressley* reads the tenure clause as not granting anything not guaranteed by due process alone.

[41] Swain v. Pressley, 515 F.2d 1290, 1292 (D.C. Cir. 1975), *rev'd*, 430 U.S. 372 (1977).

[42] *Id.*

[43] D.C. CODE § 23-110 (1973).

[44] Swain v. Pressley, 515 F.2d 1290, 1294 (D.C. Cir. 1975), *rev'd*, 430 U.S. 372 (1977).

[45] 430 U.S. at 377–78. As a statutory case, *Pressley* decided that "[h]ere the statute could not be more plain [to exclude district court habeas]," 430 U.S. at 378 n.11, without even citing the statute thereby repealed in part, 28 U.S.C. § 2241 (1976). As a matter of precedent, it chose to ignore Gusik v. Schilder, 340 U.S. 128 (1950), which held that substantially similar language from Article 53 of the Articles of War was merely an exhaustion of remedies provision prior to habeas. 340 U.S. at 130 n.1, 132–33. For what reason the language in *Pressley* is considered "more plain" than in *Gusik* the Court did not verbalize.

clause of the Constitution.[46] *Pressley's* cursory citation to *Palmore* indicates that *Palmore's* reasoning represents the Supreme Court's[47] definitive view of the tenure clause.[48]

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[46] 430 U.S. at 381–84. The Court felt that the provision of the statute, allowing habeas corpus application to the district court where it appears that the remedy in the District of Columbia court is "inadequate or ineffective," made the new relief comparable to the previous habeas corpus remedy and rendered the substitute remedy constitutional. *Id.* at 380–81.

[47] In *Pressley,* Chief Justice Burger in an opinion joined by Justices Rehnquist and Blackmun, purported not to decide the question of whether the suspension clause protects the jurisdiction of article III courts. 430 U.S. at 385–86. Thus, although the United States can commit Pressley to prison without invoking the article III judicial power, and can keep him there without affording him article III habeas, the Chief Justice did not see the suspension clause as being implicated. He reasoned that at common law the writ was available: "(1) to compel adherence to prescribed procedures in advance of trial; (2) to inquire into the cause of commitment not pursuant to judicial process; [sic] and (3) to inquire whether a committing court had proper jurisdiction." *Id.* at 385. Since Pressley's petition did not fall within any of these categories, he could claim no rights under the suspension clause. However, since Chief Justice Burger felt that Pressley's petition did not fall within category two, he implicitly decided that article I courts are engaged in the judicial process within the meaning of the suspension clause. *See id.* at 384–86 (Burger, C.J., concurring in part).

Compare Justice Brandeis' formulation of the same problem:

> If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.

Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting). In an earlier decision, Ng Fung Ho v. White, 259 U.S. 276 (1922), Justice Brandeis applied this doctrine, holding that due process required an article III hearing on the issue of citizenship in a deportation proceeding. *Id.* at 281–85. It must be understood that *Pressley* overruled *Ng Fung Ho* as a constitutional case (codified at 8 U.S.C. § 1105a (1976)). The one difference is that the superior court and the District of Columbia Court of Appeals are subject to certiorari review by the Supreme Court. But certiorari, which is "not a matter of right," SUP. CT. R. 19(1), does not provide for Pressley what Justice Brandeis held was required for Gin Sang Get and Gin Sang Mo in *Ng Fung Ho. See* Brown v. Allen, 344 U.S. 443, 487–88 (Burton & Clark, JJ.), 489–97 (Frankfurter, J.), 513 (Black & Douglas, JJ.) (1953) (denial of certiorari not to be given weight on merits in subsequent habeas petition); Freund, *Remarks by Paul A. Freund, Symposium—Habeas Corpus—Proposals for Reform,* 9 UTAH L. REV. 27 (1964) (concluding that institutional differences make certiorari unfit to substitute for habeas).

[48] One could read *Palmore* as holding that "cases arising under . . . laws applicable only within the District of Columbia," 411 U.S. at 410, may be enforced without the restraint of the tenure clause. Indeed this is the sole basis for distinguishing O'Donoghue v. United States, 289 U.S. 516 (1933) (judges of former supreme court and court of appeals of District of Columbia protected by article III salary guaranty). 411 U.S. at 406–07. Pressley's petition to the district court presented a case arising under the sixth amendment and thus did not fall within *Palmore*'s "local law" rationale. Justice Stevens gave a very cursory answer to this possible "local" limitation of *Palmore*: "That holding necessarily determines that the judges of the Superior Court of the District of Columbia must be presumed competent to decide all issues, including constitutional issues, that routinely arise in the trial of criminal cases." 430 U.S. at 383. This answer was not inevitable. The competence of a tribunal to decide "questions" of a given law is distinct from its competence to decide cases "arising under" that law. Pratt v. Paris Gas Light & Coke

In contrast to the cursory opinion in *Pressley*,[49] the *Palmore* opinion canvassed the constitutional landscape. It relied variously on the inapplicability of the tenure clause to territorial courts, courts martial, "legislative" courts, and the District of Columbia clause, to sustain its result. Justly dissatisfied with its precedents, *Palmore* then cited the inapplicability of the tenure clause to state courts vindicating federal claims.[50] A careful analysis of

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Co., 168 U.S. 255, 259 (1897) (state court may adjudicate issue of patent law which appears in pleadings or testimony, although not case arising under patent laws); *see* Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 129 (1974) (action in quantum meruit does not arise under federal law for purposes of 28 U.S.C. § 1331(a) (1976) where federal law merely precludes certain defense in such an action). Thus, the *Palmore* holding "necessarily determines" the *Pressley* holding only if the District of Columbia code does not form a constitutionally distinct body of law for purposes of the tenure clause (as it does not for any other purpose, *see* notes 105–06 & 108 *infra*). By itself the result is unexceptional; indeed, this is what Palmore argued, Brief for Appellant, *supra* note 22, at 29–46; but it clearly destroys any "local law" premise for the holding of *Palmore*.

If there is a "local" rationale left after *Pressley*, it rests not upon the law to be enforced but upon the place of enforcement. Hence a citizen has less constitutional protection of all his rights when he enters the District of Columbia. This is what O'Donoghue v. United States, 289 U.S. 516, 540 (1933), rejected. *See* 62 COLUM. L. REV. 133, 154 n.149.

[49] *See* notes 40 & 45 *supra*.

[50] 411 U.S. at 390–91, 400–03, 407, 409–10. Justice White demonstrated that Congress could choose any court in which to sanction, including the prosecution of federal criminals in state courts. Apparently Justice White insinuates that the clause therefore does not limit the federal government, since when it chooses to enforce federal law in a state court it does so in a court to which the tenure and salary restrictions of article III do not apply. This turns Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247–50 (1833), on its head. Article III refers only to the "judicial power of the United States." Whenever a state court hears a case involving federal law (or any foreign law), the judicial power invoked is its own. Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 220–23 (1916); *cf.* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 338 (1816) ("It is the *case* . . . and not *the court*, that gives the [appellate] jurisdiction"); THE FEDERALIST, *supra* note 1, No. 82 (A. Hamilton); Warren, *Federal Criminal Laws & the State Courts*, 38 HARV. L. REV. 545, 596–97 (1925). Although Justice White's argument was aptly described as "almost cockeyed," Tushnet, *Invitation to a Wedding: Some Thoughts on Article III & a Problem of Statutory Interpretation*, 60 IOWA L. REV. 937, 938 (1975), Justice Stevens cited it favorably in *Pressley*. 430 U.S. 383 n.17. Two variations of the state court argument deserve brief mention. If the fact that Congress "was not constitutionally required to create inferior art. III courts," 411 U.S. at 401, implies that it may do so without the tenure restraints, then by the same logic, the fact that Congress is not required to enact any criminal statutes implies that it may do so in violation of the ex post facto clause. Similarly, the fact that Congress need not "invest them [federal courts] with all the jurisdiction it was authorized to bestow under art. III," 411 U.S. at 401, merely remakes the same argument. That the state courts might enforce federal laws, including criminal laws, *e.g.*, Act of March 2, 1799, ch. 43, § 28, 1 Stat. 733, 740 (prosecution of postal crimes in state courts), is exactly the argument used at the convention in 1787 against permitting Congress to create any lower federal courts at all. *See* notes 8–9 *supra* and accompanying text. It hardly implies a grant of power to create courts without the tenure restraints. *See generally* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 54-55 (1924).

both cases will show that *Palmore* misread its precedents and that the tenure clause in the wake of *Pressley* is almost wholly advisory.[51]

COURTS PRESIDED OVER BY NON-TENURED JUDGES

Territorial Courts

The territorial courts would seem to provide the best authority to sustain the *Palmore* and *Pressley* holdings.[52] Territorial courts exercise jurisdiction over criminal cases, including felonies, arising under the laws of Congress,[53] as well as laws enacted in the territories.[54]

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[51] *Compare Pressley*, 430 U.S. at 382 (dictum) ("We are fully cognizant of the critical importance of life tenure, particularly when judges are required to vindicate the constitutional rights of persons who have been found guilty of criminal offenses") *with id.* at 382 n.16 (tenure clause was satisfied by certiorari jurisdiction of Supreme Court). *But cf.* United States v. Wade, 388 U.S. 218, 224 (1976) (post indictment line up held "critical stage" at which right to assistance to counsel attaches).

[52] *Palmore*, 411 U.S. at 402–03.

[53] *See id.* at 403 n.11. Laws enacted by Congress and applicable only to a particular territory are "laws of the United States" within the meaning of article III. *E.g.*, Territory of Guam v. Olsen, 431 U.S. 195 (1977) (construing authority of Guam legislature under Organic Act for Guam).

[54] *See* 411 U.S. at 403 n.12. Local acts are also "laws of the United States" within the broad meaning of article III. *See* Simms v. Simms, 175 U.S. 162, 167–68 (1899) (appeal from judgment of divorce from Supreme Court of Arizona). In *Simms*, in response to the argument that Barber v. Barber, 62 U.S. (21 How.) 582 (1858) (family court matters beyond jurisdiction of federal courts) precluded the appeal, the Court expressly decided that the doctrine had no application either to the territorial courts or to its appellate jurisdiction from them. The appeal was dismissed, however, because a divorce could not be said to satisfy the requisite $5,000 in controversy and because it rested upon questions of fact, which the Court had no authority to review. The Court decided the effect under local law of a local procedural point overlooked below and thus, modified the judgment accordingly. This can only be done on the premise that such a law is a law of the United States. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 632–33 (1875). The Court still insists upon its constitutional power to decide cases arising under local laws. *E.g.*, De Castro v. Board of Comm'rs, 322 U.S. 451, 454–59 (1944); Bonet v. Texas Co. (Puerto Rico) Inc., 308 U.S. 463, 470–71 (1940).

The *Simms* answer is the correct one. The power exercised by territorial legislatures is granted by Congress and subject to its revocation. National Bank v. Yankton County, 101 U.S. 129, 133 (1879) (sustaining authority of Congress to nullify act of territorial legislature authorizing issuance of certain bonds). The same broad analysis of the "arising under" jurisdiction in Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 823–24 (1824), would apply to territorial law. In every such instance, the authority of the local legislature or court under the applicable organic act would form an ingredient of the case. Freeborn v. Smith, 69 U.S. (2 Wall.) 160, 173 (1864) (appellate jurisdiction rested upon Congressional legislative power); *see* Smith v. Adams, 130 U.S. 167, 173–74 (1889). *See also* Ingenohl v. Olsen & Co., 273 U.S. 541, 545 (1927).

Local rules of decision are not, however, "laws of the United States" for purposes of the statutory grants of jurisdiction either to the district courts, *see* Shoshone Mining Co. v. Rutter, 177 U.S. 505, 510 (1900), or the Supreme Court on appeal. *See* Ortega v. Lara, 202 U.S. 339, 340–43 (1906). The circuit courts of appeals, however, have long had jurisdiction over local cases from territorial courts. 28 U.S.C. § 1291 (1976). *E.g.*, C. Brewer Puerto Rico Inc. v. Corchado,

Territorial judges need not hold office during good behavior.[55] Furthermore, as in the District of Columbia, "[i]n legislating for them, Congress exercises the combined powers of the general, and of a state government."[56] However, the history of the territories, together with an examination of the differences that exist between them and the District of Columbia, will show that the example of these territorial courts cannot sustain the facile conclusion that the tenure and salary protections are unnecessary in the nation's capital.[57]

The territories were first governed by the Northwest Ordinance of 1787,[58] which preceded the Constitution and which was once referred to in the Northwest as "our constitution."[59] Unlike the United States Constitution whose application to the territories was not originally recognized,[60] the Northwest Ordinance did not contain a separation of powers principle, nor did the territories adhere to such principles.[61] When Congress succeeded the Confederation and took control of the territories under its "general right of sovereignty,"[62] it was the contemporary understanding that the sep-

303 F.2d 654 (1st Cir. 1962) (construction of local statute); Electrical Research Prods. Inc. v. Gross, 86 F.2d 925, 926 (9th Cir. 1936) (common law action of replevin under Alaskan territorial law). Jurisdiction can only be sustained on the grounds that such cases arise under the laws of the United States for purposes of article III. *See* Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 303–04 (1809). For a detailed historical summary, see Blume & Brown, *Territorial Courts & Law*, 61 MICH. L. REV. 39, 467 (1962).

[55] McAllister v. United States, 141 U.S. 174, 188–89 (1891). Hence, undiminished salary is also inapplicable. *See* United States v. Fisher, 109 U.S. 143, 145 (1883).

[56] 411 U.S. at 403 (quoting American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828)).

[57] *See* 411 U.S. at 403, 403 n.10. Except for McAllister v. United States, 141 U.S. 174 (1891), *discussed in* notes 55 *supra* and 68 *infra*, none of the cases the *Palmore* Court cites in note 10 have even a remote bearing on the issue tendered in *Palmore*. Each deals with a procedural issue in a territorial court. Since it was not until 1938 that the first uniform civil rules were adopted for the district courts, HART & WECHSLER, *supra* note 21, at 674, the fact that territorial and district courts followed different procedures has no constitutional significance. The Court chose to be rather selective in the recitation of its "consistent view." *Compare* The "City of Panama," 101 U.S. 453 (1880) (admiralty jurisdiction vested in territorial court with non-tenured judge) *with* Benner v. Porter, 50 U.S. (9 How.) 235, 243–45 (1850) (federal court within state with non-tenured judge cannot exercise admiralty jurisdiction).

[58] *See* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.a.

[59] Blume & Brown, *supra* note 54, at 471.

[60] *Id.*

[61] *See* note 66 *infra*.

[62] American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828).

The territories can also be said to be governed under article IV which provides Congress with the "power to dispose to and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Although this language does not readily lend itself to a general power of sovereignty, which is in fact exercised, such power may be implied. *Cf.* Perez v. Brownell, 356 U.S. 44, 57 (1958) (power to regulate foreign affairs is inherent in "law-making organ of the Nation" without specific Constitutional grant); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–18 (1936) (foreign affairs said to be implied rather than enumerated power).

aration of powers principle did not limit Congress in providing for territorial governments even after the adoption of the Constitution.[63] Consequently, Congress enjoyed a degree of flexibility in governing the territories which it lacked at home. Historically then, the tenure clause[64] was never applicable to the territories, since the separation of powers principle upon which it rests[65] was never accepted there.[66]

The District of Columbia, however, is not a territory.[67] As to the particular guarantees of tenure and salary protections, two

[63] Although the Northwest Ordinance granted good behavior tenure to its judges, it did so independently of the tenure clause which it preceded. Good behavior tenure was a familiar concept at common law, *see* note 3 *supra*, and although as a constitutional mandate it rests upon the separation of powers principle, *see* note 65 *supra*, it may still be bestowed as a matter of legislative grace. *See* note 64 *infra*.

[64] Of course, Congress might choose to grant good behavior tenure to the territorial judges. Blume & Brown, *supra* note 54, at 78–93.

[65] Buckley v. Valeo, 424 U.S. 1, 12 n.10 (1976); THE FEDERALIST, *supra* note 1, No. 78 (A. Hamilton).

[66] The First Congress provided that: "The governor and judges, or a majority of them, shall adopt and publish in the district, such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district . . . ." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.a (adopting Northwest Ordinance of 1787).

History will explain this radical departure from the separation of powers principle. The Northwest Ordinance was adopted before the Constitution, and the Article of Confederation did not mandate any tripartite division of powers. When the First Congress adopted the Northwest Ordinance and amended it to conform to the new Constitution, it transferred the power of appointing territorial officers from the Congress to the President. 1 Stat. 52–53. But apparently the First Congress did not feel that the separation of powers was a constitutional mandate in the territorial governments. The Northwest Ordinance remained the model for subsequent territorial legislation. Blume & Brown, *supra* note 54, at 43. Thus, when the great Chief Justice decided that "the same limitation [of article III] does not extend to the territories," American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828), it was in the context of a body of law that predated article III itself. Marshall rested the source of this power only alternatively on the Constitution and spoke of a "general right of sovereignty" and the "general powers which [Congress] possesses over the territories of the United States." *Id.* For a judge who insisted on the enumeration of powers principle, *e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819), this might seem inconsistent, but, at least in foreign affairs, the proposition that Congress succeeds to the powers of the Confederacy, even when not enumerated, perhaps reflects the understanding of the times. 3 FARRAND, *supra* note 5, at 168–69 (Congress said to be endowed with sovereignty of Confederacy); 4 ELLIOT, *supra* note 1, at 448–49 (debate on Louisiana Treaty, 1803) (treaty attacked as unconstitutional and defended as extra-constitutional); *see* note 62 *supra*. *Compare* Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1782) (circuit court cannot act other than judicially) *with* Boggess v. Berry Corp., 233 F.2d 389, 391 (9th Cir. 1956) (territorial court not bound to judicial functions) (dictum).

[67] District of Columbia v. Carter, 409 U.S. 418, 432 (1973).

As a general principle, the federal government is subject to fewer restraints outside the United States than it is within. Entities nearer and more closely related to the federal government are subject to more restraints. To incorporated territories, *i.e.*, those destined for statehood, the strictest standards apply. Thompson v. Utah, 170 U.S. 343, 346–47 (1898) (petit jury applies in incorporated territory); Reynolds v. United States, 98 U.S. 145, 154 (1879) (grand jury); Webster v. Reid, 52 U.S. (11 How.) 437, 459–60 (1850) (seventh amendment). In unincorporated territories the standards are not as strict. Downes v. Bidwell, 182 U.S. 244, 290–91 (1901) (White, J.) (only "fundamental" restrictions apply in unincorporated territories); Hawaii v.

rationales have been advanced to justify a departure from the tenure and salary clauses in the territories. One theory is that the transitory nature of the incorporated territorial governments made the permanent appointments of article III unworkable.[68] The second theory is that the distance from Washington to the territories made the tenure and salary protections less necessary to the judges' independence.[69] While the territories were not governed directly from Washington,[70] the District of Columbia "is itself the seat of the National Government" and within this area Congress may "observe and, to a large extent, supervise the activities of local officials."[71] Furthermore, in contrast to the status of a territory which "has aptly been described as 'one of pupilage at best,' "[72] the District "is as lasting as the States

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Mankichi, 190 U.S. 197, 211–12, 216–18 (1903) (nonunanimous criminal verdict allowed); Dorr v. United States, 195 U.S. 138, 148–49 (1904) (jury trial not demanded for crimes in Philippines); Balzac v. Puerto Rico, 258 U.S. 298, 304–05 (1922) (same); *see* 48 U.S.C. §§ 1661(c), 1681(a) (Supp. 1977) (Eastern Samoa & Trust Territory of the Pacific) (executive, legislative and judicial powers to be vested in such persons and exercised as President shall direct). The fewest restraints apply in areas not subject to United States control. "The Constitution can have no operation in another country." *In re* Ross, 140 U.S. 453, 464 (1891). Since the obligations of United States citizenship are binding even abroad, *e.g.*, Kawakita v. United States, 343 U.S. 717, 732–33 (1952) (death sentence for treason by dual national living in Japan during war upheld), one would have thought that *Ross* was dead, Reid v. Covert, 354 U.S. 1, 10–12 (1957) (plurality opinion), but *Ross* was revived by *Palmore*, 411 U.S. at 404.

Thus, within the group of cases from *In re Ross* to *Thompson*, O'Donoghue v. United States, 289 U.S. 516, 535–45 (1933) (undiminishable salary guaranteed to District of Columbia judge), recognized that the permanent seat of the federal government was rightfully protected by all of the restraints on that government in favor of personal liberty and rejected the government's reliance on the territorial case law.

[68] Glidden Co. v. Zdanok, 370 U.S. 530, 545–46 (1962) (plurality opinion); McAllister v. United States, 141 U.S. 174, 187–88 (1891).

[69] Glidden Co. v. Zdanok, 370 U.S. 530, 546 (1962) (plurality opinion).

[70] *Id.*

[71] District of Columbia v. Carter, 409 U.S. 418, 429 (1973) (footnote omitted); *see, e.g.*, Ross v. United States *ex rel.* Prospect Hill Cemetery, 8 App. D.C. 32 (1896) (Congressional attempt to control decision of local court); 117 CONG. REC. 32581–87 (remarks of Senator Byrd criticizing superior court judge for dismissing prosecution and communicating his views to commission on judicial tenure); *Washington Post*, Apr. 3, 1976, § B at 2, col. 3 (Senate Judiciary Committee to probe allegations about Judge Halleck); *id.*, May 7, 1976, § A at 1, col. 3 (Committee subpoenas Bar Association poll on Judge Halleck).

[72] District of Columbia v. Carter, 409 U.S. 418, 431 (1973) (quoting Nelson v. United States, 30 F. 112, 115 (D. Ore. 1887)). *See generally* Presidential Proclamation No. 2695, 11 Fed. Reg. 7517, 60 Stat. 1352 (effective July 4, 1946) (independence to Philippines).

Like courts-martial, military commissions are bodies authorized by Congress to try offenses against the laws of war in proper cases. 10 U.S.C. § 821 (1976); *e.g.*, *id.* § 904 (aiding enemy triable to military commission); *id.* § 906 (spies: same). Both courts-martial and military commissions are "military tribunals, which are not courts in the sense of the Judiciary Article." *Ex parte* Quirin, 317 U.S. 1, 39 (1942); *see Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 251 (1863) (certiorari will not issue to review judgment of military commission, because it does not exercise judicial power); Hirota v. MacArthur, 338 U.S. 197, 200 (1949) (Douglas, J., concurring) (same).

from which it was carved or the union whose permanent capital it became."[73] Thus, that "same confluence of practical considerations that dictated" that territorial courts need not be presided over by tenured judges would have dictated precisely the opposite result in *Palmore* and *Pressley* had the court discussed them.[74]

Courts-Martial

Palmore also relied, in part, upon the example of the courts-martial to sustain the proposition that the judicial power invoked by the United States in a felony prosecution need not be restrained by the tenure and salary clause.[75] Court martial precedents, however, are inapt because courts-martial are executive tribunals which do not exercise "judicial power" as the Constitution defines it.[76] The power

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Moreover, aspects of evidence and double jeopardy differ between courts-martial and article III courts. *Compare* U.C.M.J. 36, 10 U.S.C. § 836 (1976) (President may prescribe rules of evidence and procedure in military courts) *with* United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) (effect of evidence in judicial tribunal exclusively judicial function). *Compare* Swain v. United States, 165 U.S. 553, 557–58, 564–65 (1897) (President has power to return case to court-martial for increased sentence under his general power to convene court-martial) *with Ex parte* Lang, 85 U.S. (18 Wall.) 163, 174–75 (1873) (payment of fine precludes imposition of imprisonment in lieu thereof even where imprisonment might lawfully have been first imposed by judicial tribunal).

[73] O'Donoghue v. United States, 289 U.S. 516, 538 (1933).

[74] American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828); *Palmore*, 411 U.S. at 404 (quoting Glidden Co. v. Zdanok, 370 U.S. 530, 547 (1962) (plurality opinion)). For a different, but not inconsistent, hypothesis, see note 66 *supra*.

[75] 411 U.S. at 404.

[76] With respect to jurisdictional challenges to courts-martial, the Court has said:

> Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.

Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857). "[T]rial of soldiers to maintain discipline is merely incidental to an army's primary fighting function." United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955). "In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command." Reid v. Covert, 354 U.S. 1, 36 (1957) (plurality opinion) (serviceman's wife not triable to court martial). "A court-martial . . . remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved." O'Callahan v. Parker, 395 U.S. 258, 265 (1969) (footnote omitted) (serviceman not subject to court martial for crime not service connected).

The laws of war give executive a narrow authority to set up courts in conquered areas immediately following the cessation of hostilities. Madsen v. Kinsella, 343 U.S. 341, 358 (1952) (Allied court for occupation of Germany); Santiago v. Nogueras, 214 U.S. 260, 264–66 (1909) (provisional tribunal in Puerto Rico following cession by Spain); Mechanics' Bank v. Union Bank, 89 U.S. (22 Wall.) 276, 295 (1874); The Grapeshot, 76 U.S. (9 Wall.) 129, 131–32 (1869) (provisional courts upon conquest of Confederacy). International law, with Congressional approval, may sustain other courts. *See* 48 U.S.C. §§ 1661(c), 1681(a) (Supp. 1978) (Presidential authority over Eastern Samoa & Trust Territory of the Pacific).

to try and punish members of the armed forces for military and naval offenses, which is derived from article II, is not connected in any way with article III of the Constitution and is limited only by the standards accepted and "practiced by civilized nations."[77] The exercise of this power serves "to maintain discipline" and is considered "incidental to an army's primary fighting function."[78] As a specialized instrument for preserving discipline within the military apparatus, courts-martial are not subject to the particular restraints and procedures which the Constitution places upon the judicial power.[79] Hence, good behavior tenure is not applicable to courts-martial.[80] Because of the particularized purpose and nature of these courts, their lack of lifetime tenured judges does not provide sufficient precedent to sustain the *Palmore* decision. Indeed, previous military case law suggested that article III itself circumscribed their jurisdiction.[81]

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[77] Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857).

[78] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

[79] For example, fifth amendment grand juries and article III petit juries do not apply to courts-martial. United States v. Burney, 6 U.S.C.M.A. 776, 784, 21 C.M.R. 98, 106 (1956) (jurisdictional holding overruled by McElroy v. Guagliardo, 361 U.S. 281, 284 (1960) (overseas civilian employee in non-capital case not subject to courtmartial)). The right of confrontation is not applicable. *See* United States v. Sutton, 3 U.S.C.M.A. 220, 222–24, 11 C.M.R. 220, 222–24 (1953) (deposition on written interrogatories taken without presence of accused admissible). Double jeopardy is not constitutionally prohibited in court martial proceedings. Swain v. United States, 165 U.S. 553 (1897).

By statute, sections, of the Bill of Rights prevail in court-martial proceedings. *E.g.*, U.C.M.J. 27, 70, 10 U.S.C. §§ 827, 870 (1976) (assistance of counsel); U.C.M.J. 31, 10 U.S.C. § 831 (1976) (self-incrimination). It has never been decided whether the Bill of Rights applies to courts-martial *proprio vigore* or only by reference to the due process clause. *See* Mittendorf v. Henry, 425 U.S. 25, 33–34 & nn.12 & 13 (1976). *Compare* Wiener, *Courts-Martial & the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 266 (1958) (Bill of Rights does not apply, but urges due process approach) *with* Henderson, *Courts-Martial & the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957) (only grand and petit juries are to be excluded). Apparently, Presidents Madison, Monroe, and John Quincy Adams did not think that the right to assistance of counsel, for example, applied to a court martial. Wiener, *supra* at 45–49.

[80] O'Callahan v. Parker, 395 U.S. 258, 264–65 (1969); 10 U.S.C. § 867 (1976) (fifteen year terms for members of United States Court of Military Appeals).

[81] In striking down an assertion of court-martial jurisdiction over an ex-serviceman, the Court in United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955), stated that "any expansion of court-martial jurisdiction . . . necessarily encroaches on the jurisdiction of federal courts set up under Article III. . . ." *Id.* at 15; *cf.* Reid v. Covert, 354 U.S. 1, 37 (1957) (proceeding on similar analysis); McClaughry v. Deming, 186 U.S. 49, 67–68 (1902) (defendant cannot confer court martial jurisdiction by consent; habeas allowed). *See generally* G. GUNTHER, CONSTITUTIONAL LAW 118–23 (9th ed. 1975).

The same restrictive rationale which circumscribes courts-martial also limits the other executive tribunals. *Compare Ex parte* Quirin, 317 U.S. 1 (1942) (enemy belligerent in wartime not entitled to article III court) *with Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 122 (1866) (Constitution infringed upon when Milligan, a civilian, tried by a military commission "not ordained

Legislative Courts

Palmore's citation to "legislative" court precedents,[82] accompanied by the obsequious suggestion that the same "practical considerations,"[83] which justified the creation of these courts with judges appointed for limited terms,[84] would also justify the absence of tenured judges in a federal court with general felony and habeas jurisdiction overstated the possible reach of these holdings. These judicial bodies were conceptualized with a reasonable degree of clarity when the Supreme Court in *Ex parte Bakelite*[85] noted that legislative courts may serve as "special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it."[86]

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and established by Congress, and not composed of judges appointed during good behavior") (note, *Milligan's* holding did not turn on congressional consent). This restrictive view of the congressional power to authorize executive trials remained the law a century later. *See* Kinsella v. Singleton, 361 U.S. 234, 249 (1960) (article III held to invalidate overseas courtmartial of civilian in non-capital case). The President's authority to establish provisional courts is also limited. *See* Jecker v. Montgomery, 54 U.S. (13 How.) 498, 515 (1851) (prize court in California during Mexican War held invalid).

[82] 411 U.S. at 404 (citing United States v. Coe, 155 U.S. 76, 85–86 (1894) (Court of Private Land Claims); Stephens v. Cherokee Natiôn, 174 U.S. 445 (1899); *Ex parte* Joins, 191 U.S. 93 (1903); Wallace v. Adams, 204 U.S. 415 (1907) (Indian citizenship courts)).

[83] 411 U.S. at 404. What those "practical considerations" are, Justice White does not mention. *Id.* at 409–10. No attempt is made to demonstrate that the "local" nature of the court had some "practical" impact on the tenure clause. The congressional attention was focused not on the local nature of the court but on the advisability of good behavior tenure itself. *See Hearings on S. 1066 Before the Senate Comm. on the District of Columbia & the Senate Subcomm. of the Comm. on the Judiciary*, 91st Cong., 1st Sess., pt. 3, at 612–17, 633, 651–52, 808 (1969) (maintaining that tenure commission would remedy defects of excessive independence of life tenure). The only real "practical" argument was that the impeachment process was too cumbersome a method of removal. S. REP. NO. 405, 91st Cong., 1st Sess. 11 (1969). While this argument might allow the judiciary to be given authority to police itself, R. BERGER, *supra* note 3, at 122–92, it does not sustain the broader proposition that the executive and legislative departments may do so other than by impeachment, and in any event is not a "local" argument. *See also* Traynor, *Who Can Best Judge the Judges?*, 53 VA. L. REV. 1266, 1276 (1967); notes 32, 38, 70 *supra*.

[84] 411 U.S. at 404 (quoting Glidden Co. v. Zdanok, 370 U.S. 530, 547 (1962) (plurality opinion)).

[85] 279 U.S. 438 (1929) (writ of prohibition, to prevent Court of Customs and Patent Appeals from acting beyond article III "case," denied).

[86] *Id.* at 451 (quoted in Glidden Co. v. Zdanok, 370 U.S. 530, 548–49 (1962) (plurality opinion) (Court of Claims and Court of Customs and Patent Appeals have judges protected by article III tenure and undiminishable salary)). *Glidden* did not undermine this proposition; it expressly affirmed it. Justice Harlan's holding rested squarely on the proposition that "because Congress may employ such tribunals assuredly does not mean that it must." Glidden Co. v. Zdanok, 370 U.S. at 549. Since Justice Clark's concurrence rested upon the proposition that the article III status of the courts had been conferred by legislation subsequent to *Ex parte* Bakelite, 279 U.S. 438 (1929), and Williams v. United States, 289 U.S. 553 (1933), he must also be read as agreeing with Justice Harlan on this point. 370 U.S. at 585-89 (Clark, J., concurring).

When these various matters are analyzed, they represent a class of business which historically either Congress or the executive might have handled directly and so might have been disposed of indirectly through nontenured administrators or judges.[87] Thus, patent claims,[88] membership in the Indian tribes,[89] settlement of territorial land claims,[90] private claims arising under treaty settlements,[91] or payment of claims against the United States[92] may be dealt with directly by Congress or the executive. The Government may, by entrusting these matters to some person or agency, avoid resorting to article III power.[93] If the business be of a kind which is capable of

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[87] *See* notes 88–93 *infra*.

[88] Congress might itself grant a patent. *See, e.g.*, Priv. L. No. 93-60, 88 Stat. 2368 (1974) (altering patent laws in favor of private applicant). It might delegate that task to an executive agency. Act of April 10, 1790, ch. 7, § 1, 1 Stat. 109 (Secretaries of State, War & Attorney General to grant letters patent to applicants, subject to presidential review). It might commit the work to an article III court. Glidden Co. v. Zdanok, 370 U.S. 530 (1962). Obviously, the difference between an "article I" or "legislative" court and an executive agency is purely in name. *See* note 29 *supra*.

[89] *See* note 82 *supra*. Wallace v. Adams, 204 U.S. 415 (1907), sustained a congressional revision of the United States Court for the Southern District of the Indian Territory precisely on the ground that Congress itself had complete power over these questions. *Id.* at 421–25.

[90] United States v. Coe, 155 U.S. 76, 85–86 (1894) (upholding legislative court settlement of private land claims in territories; expressly limiting holding to territories); Astiazaran v. Santa Rita Land & Mining Co., 148 U.S. 80, 81–83 (1893) (private land claim in territory cannot be judicially contested while congressional resolution of such claims is pending); Vance v. Burbank, 101 U.S. 514 (1879) (Land Department's denial of patent for certain lands held not subject to judicial review); Tameling v. United States Freehold Co., 93 U.S. 644, 662–63 (1877) (congressional action confirming private land claims in territory not subject to judicial review).

[91] Grisar v. McDowell, 73 U.S. (6 Wall.) 363, 379 (1868) (legislative settlement of claims under Mexican law to San Francisco property); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 459–61 (1899) (same power asserted) (dictum).

[92] *E.g.*, Priv. L. No. 93-80, 88 Stat. 2375 (1974) (settlement of claim against United States); De Groot v. United States, 72 U.S. (5 Wall.) 419, 430–33 (1867) (congressional act held to control decisions of court of claims); Act of Mar. 4, 1931, ch. 522, tit. III, § 3, 46 Stat. 1552, 1622 (vacating and remanding judgment against United States in Pocono Pines Assembly Hotel Co. v. United States, 69 Ct. Cl. 91 (1930)); *see* Pope v. United States, 323 U.S. 1, 6–9 (1944) (private legislation may direct court of claims to redetermine suit previously rejected, on rationale that the act created a new cause of action); *cf.* United States v. Babcock, 250 U.S. 328, 331 (1919) (Treasury Department may finally determine reimbursement to military officer for property lost in service without judicial review).

[93] Article I, section 8, clause 1 provides that "[t]he Congress shall have Power. . . . [t]o lay and collect Taxes;" accordingly, it may do so without resort to the judicial process. Phillips v. Commissioner, 283 U.S. 589, 599–600 (1931). However, Congress has never attempted to lay and collect taxes without allowing the taxpayer some opportunity for judicial review. HART & WECHSLER, *supra* note 21, at 332–34 (The Dialogue). Thus, the tax court was said to be "an independent agency in the Executive Branch," Int. Rev. Code of 1954, ch. 76, § 7441, 68A Stat. 879 (1954) (before 1969 amendment), or an "article I court." *Id.* § 7441, *as amended by* Pub. L. No. 91-172, § 951, 83 Stat. 730 (1969). Its "judges" hold office for fifteen year terms, subject to possible removal. *Id.* § 7443(e), (f).

The congressional power over other matters is also broad. *See, e.g.*, Lloyd Sabaudo Societa v. Elting, 287 U.S. 329, 335–38 (1932) (fines may be imposed without judicial action upon

judicial resolution,[94] Congress may choose to entrust it to an article III court if the matter presents a "case"[95] within the meaning of that article and the finality and independence[96] of that branch are respected. This is the class of business whose "mode of determining . . . is completely within congressional control."[97]

THE DISTRICT OF COLUMBIA ARGUMENT

Palmore might have been read as a holding limited to "cases arising under . . . laws applicable only within the District of Columbia."[98] But although Congress possesses the power to legislate within the district in the same way that a state may pass laws,[99] "[t]his power, like all others which are specified, is conferred on Congress as the legislature of the Union: for, strip them of that character, and they would not possess it."[100] Of course, it is only in

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persons importing diseased aliens); Passavant v. United States, 148 U.S. 214, 219–22 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 659–60 (1892) (admission proceeding; habeas) (power to forbid foreign national to land "belongs to the political department" and correctness of factual determination not subject to judicial review); Auffmordt v. Hedden, 137 U.S. 310, 323–26 (1890) (Treasury Department appraisers may make final decision on dutiable value of imported merchandise without judicial redetermination).

Congressional authority over immigration continues to be broadly viewed. Fiallo v. Bell, 430 U.S. 787, 791–92 (1977) (sustaining classifications based on illegitimacy and gender); Priv. L. No. 93-58, 88 Stat. 2367 (1974) (private immigration act).

[94] *Compare* Luther v. Borden, 48 U.S. (7 How.) 1, 38–43 (1849) (political legitimacy of state government cannot be judicially determined) *with* Baker v. Carr, 369 U.S. 186 (1962) (equality of representation is judicial question).

[95] Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 722, 728–29 (1929) (review of Tax Court (then Board of Tax Appeals) held article III "case"); Tutun v. United States, 270 U.S. 568, 568–69 (1926) (uncontested award of naturalization presents article III "case").

[96] Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113–14 (1948) (presidential review of decisions precludes jurisdiction to review CAB orders).

[97] 279 U.S. at 451.

[98] 411 U.S. at 410.

[99] *Id.* at 397 (quoting Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899)). Like United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955), *discussed in* note 81 *supra*, *Capital Traction* was an odd case for Justice White to cite in view of its outcome. *See* note 126 *infra*.

[100] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 424 (1821).

Thus such laws are "laws of the United States" within the meaning of article III. *See, e.g.*, United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 488 (1950) ("[I]n the District of Columbia, the appellate jurisdiction given to the supreme court, can be maintained only on the ground that the laws of the district are laws of the United States. . . ."); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 523 n.a, *aff'g juris.*, 27 U.S. (2 Pet.) 554 (1828); Kent v. United States, 383 U.S. 541, 557–63 (1966) (procedural issue in juvenile court); Fisher v. United States, 328 U.S. 463, 467–68, 476 (1946) (local murder statute and appropriate jury instructions).

For the same reason, rights claimed under a District of Columbia statute are federal rights within the meaning of the supremacy clause. *See, e.g.*, Ancient Egyptian Order v. Michaux, 279 U.S. 737, 744–45 (1929) (reviewing state court decision).

its character as a national legislature that Congress can exercise this power, "for, it is in that character alone, that the constitution confers on them this power of exclusive legislation."[101] In contrast, state courts are not federal courts and therefore do not exercise the "judicial power" of the United States.[102] The purpose of the tenure clause was to restrain the federal government, not the states.[103] As the nation's capital, though, the District of Columbia is guaranteed all the protections secured by the constitutional restraints on the federal government in favor of personal liberty.[104] Accordingly, Congress does not stand to the district as a state legislature to a state.[105] Furthermore, Congress' power is restricted to "legislation,"[106] and

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Contrary to frequent suggestions, *e.g.*, Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894, 903 (1930), the common law jurisdiction of the District of Columbia courts also presents cases arising under the "laws of the United States" for purposes of article III. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, Brandeis & Stone, JJ., dissenting) (Court observed that common law "whether called common law or not, is not common law generally but the law of that state existing by the authority of that state"). Since the sovereign in the district is the United States, Metropolitan R.R. Co. v. District of Columbia, 132 U.S. 1, 9 (1889) (dictum) (interpreting common law statute of limitations); United States v. Williams, 28 F. Cas. 647, 657–58 (C.C.D.C. 1833) ("local" crime properly cognizable in article III court), it is its authority by which the law exists in District of Columbia. *See* Embry v. Palmer, 107 U.S. 3, 9 (1882) (judgment of District of Columbia court in common law case to be given recognition as federal judgment under supremacy clause). All such common law cases can be said to arise under the Organic Act for the District of Columbia, Act of Feb. 27, 1801, ch. 15, §§ 1, 3, 5, 2 Stat. 103, granting jurisdiction to the circuit court in cases of law and equity, where either or both parties shall be found or resident within District of Columbia. *Compare* Pang-Tsu Mow v. Republic of China, 201 F.2d 195, 198 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) (suit between aliens sustained) *with* Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809) (suit between aliens does not fall within article III by virtue of parties). The Superior Court now exercises the common law jurisdiction of the first circuit court. D.C. CODE § 11-921 (1973).

[101] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 424 (1821).

[102] *See* note 50 *supra*.

The converse proposition is also true. Federal courts, when hearing cases governed by state law (or any foreign law), exercise the judicial power of the United States and are governed by the attributes of that power. *See* Hanna v. Plummer, 380 U.S. 460, 473 (1965) (federal rules govern all proceedings in federal courts); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 533–40 (1958) (particular issue for jury, not judge, despite contrary state law); Herron v. Southern Pac. Co., 283 U.S. 91, 94 (1931) (directing a verdict governed by federal, not state, law).

[103] *See* notes 1–6, 14–18 *supra* and accompanying text. Since the impeachment power extends only to the President, Vice President, and civil officers of the United States, U.S. CONST. art. II, § 4, state judges enjoy an independence from Congress that is not shared by article III judges.

[104] O'Donoghue v. United States, 289 U.S. 516, 535–45 (1933).

[105] *See* notes 98–99 *supra* and accompanying text.

[106] U.S. CONST. art. I, § 8, cl. 17. Thus, Congress is not given power to try and punish Palmore for a felony. *See* notes 148 & 149 *infra* and accompanying text.

neither prior to[107] nor subsequent to[108] *Palmore* has anyone on the Court ever suggested that article I, section 8, clause 17 formed a body of law distinct from the other clauses of article I, section 8 as to its manner of enforcement.[109] At any rate, *Pressley* made it clear that, if the *Palmore* holding were limited at all, it would be limited not by the character of the law to be enforced but by the place of enforcement.[110] However the Constitution defines federal "matters of strictly local concern,"[111] the application of this proposition to the

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[107] United States v. More, 7 U.S. (3 Cranch) 159, *appeal dismissed*, 7 U.S. (3 Cranch) 172 (1805) (article III salary guaranty extended to "local" justice of the peace). *Compare* Capital Traction Co. v. Hof, 174 U.S. 1 (1899) (seventh amendment applicable to "local" cases) *with* Melancon v. McKeithen, 345 F. Supp. 1025, 1045 (E.D. La.), *aff'd mem. sub nom.*, Mayes v. Ellis, 409 U.S. 943 (1972) (seventh amendment not applicable to states). *Compare* District of Columbia v. Colts, 282 U.S. 63, 74 (1930) (article III jury guaranteed for District of Columbia code offense) *and* Callan v. Wilson, 127 U.S. 540, 548–50 (1888) (jury guarantee for District of Columbia code offense rested on article III and sixth amendment) *with* Maxwell v. Dow, 176 U.S. 581, 586 (1900) (petit jury not then incorporated into fourteenth amendment). *Compare* United States v. Moreland, 258 U.S. 433 (1922) (grand jury required for District of Columbia code case) *with* Hurtado v. California, 110 U.S. 516 (1884) (grand juries not required of states). *Compare* Brown v. Board of Educ., 347 U.S. 483 (1954) (fourteenth amendment prohibits racial segregation in public schools) *with* Bolling v. Sharpe, 347 U.S. 497 (1954) (racial discrimination prohibited by fifth amendment in District of Columbia).

[108] *Compare* Pernell v. Southall Realty Co., 416 U.S. 363 (1974) (statute abolishing jury trial in local landlord-tenant disputes unanimously held unconstitutional) *with* Alexander v. Virginia, 413 U.S. 836 (1973) (seventh amendment inapplicable to state).

[109] Three moribund "hybrid" cases have held that Congress may confer administrative or legislative powers upon the District of Columbia courts, subject to the guarantees of personal liberty in the Constitution: Keller v. Potomac Elec. Power Co., 261 U.S. 428, 443 (1923) (holding that power to amend an order which established utility rates was "legislative"); Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464, 467 (1930) (holding that an order to Radio Commission to grant license was "administrative"); Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 699–700 (1927) (holding that limited res judicata effect of judgment of Court of Appeals of the District of Columbia in trademark *inter partes* proceeding prevented an article III "case" from being presented).

However, the rationale of these three cases does not survive. *Keller* is no longer valid as applied to its facts. Glidden Co. v. Zdanok, 370 U.S. 530, 580 n.53 (1962) (plurality opinion); *see* United States v. First City Nat'l Bank, 386 U.S. 361, 369 (1967). In regard to *General Electric*, the "proposition that the granting or renewal of a license is 'purely administrative,' seems in the perspective of the 1970's a little queer. . . ." K. DAVIS, ADMINISTRATIVE LAW TEXT 536 (3d ed. 1972). Thus, there never has been a "hybrid" court system in the District of Columbia. The above cases were "ill-considered decisions" in a "relatively new subject." HART & WECHSLER, *supra* note 21, at 340 (The Dialogue).

Justice Jackson, accepting the "hybrid" theory, logically extended it beyond the District of Columbia. National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 589–604 (1949) (plurality opinion rejected by a majority). There is nothing peculiarly local about rate-making, licensing or trademarks. Only *Keller* could, in fact, be grounded upon article I, section 8, clause 17.

[110] *See* note 48 *supra*.

[111] *Palmore*, 411 U.S. at 407. Notice that under the *Palmore-Pressley* formulation, if a "local" statute infringes upon a "national" right, *e.g.*, freedom of speech, the national right is no longer protected by the tenure guaranty. Precisely what statutes of Congress are constitutionally

District of Columbia was exactly what *O'Donoghue v. United States*[112] rejected.[113]

DRAWING THE LINE: INHERENTLY JUDICIAL BUSINESS

Until *Palmore*, it was recognized however that some business was "inherently" judicial, that is, that it not merely permits but requires a judicial, as opposed to executive or legislative, determination.[114] This proposition necessarily follows from the separation of powers principle. Were it otherwise, the executive and legislative branches would entirely supplant the judiciary.[115] If a line is not drawn to contain the expansive jurisdiction of "legislative" or "article I" courts, Congress may circumvent at will what was thought to be the most effective check on its power.[116] A distinction, therefore, must be

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"local" is difficult to forecast. *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973); Smith v. United States, 431 U.S. 291, 000 (1977).

Within the District of Columbia, the *Palmore-Pressley* rulings could produce anomalous results. For example, under 18 U.S.C. §§ 921 to 928 (1976) (firearms), interstate commerce includes "commerce . . . within . . . the District of Columbia." 18 U.S.C. § 921(a)(2) (1976). If a defendant can show that a given firearm crossed the district line, could he then demand a tenured judge? Even if the *Palmore-Pressley* formulation is limited to article I, § 8, cl. 17 of the Constitution, every prosecution under the Assimilative Crimes Act, 18 U.S.C. §§ 7, 13 (1970), falls within it. Note the problem of overlapping jurisdiction. *Compare* 18 U.S.C. §§ 1114, 1751 (1976) (murder of federal official) *and* 26 U.S.C. §§ 4704(a), 4723 (1976) (drugs) *with* D.C. CODE § 22-2401 (1973) (murder) *and* D.C. CODE § 33-402 (1973) (drugs).

It is interesting to note that approximately twenty-three percent of the United States (excluding Alaska and Hawaii) constitutes the federal public lands. *Report of the Interdepartmental Comm. for the Study of Jurisdiction Over Federal Areas Within the States*, Pt. 1, 123 (1956), in HART & WECHSLER, *supra* note 21, at 1269. The article IV property power gives Congress proprietorship, as well as legislative jurisdiction, over the public lands. Such congressional power overrides state law by virtue of the supremacy clause. Kleppe v. New Mexico, 426 U.S. 529 (1976) (rejecting contrary argument).

[112] 289 U.S. 516, 540 (1933).

[113] *See* notes 5, 48 & 67 *supra*.

[114] Glidden Co. v. Zdanok, 370 U.S. 530, 549 (1962) (plurality opinion) (dictum); *Ex parte* Bakelite, 279 U.S. 438, 453, 458 (1929) (dictum); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280–81, 284 (1856) (dictum). For a discussion on the characterization of inherently judicial business and its relation to federal habeas corpus review, see note 47 *supra*.

[115] Bayard v. Singleton, 1 N.C. 48 (1787) (holding statute depriving certain litigants of a judicial determination of title to land unconstitutional). Even Louis Boudin, who was hostile to the claim that the judiciary had any general power to declare statutes unconstitutional, 1 L. BOUDIN, GOVERNMENT BY JUDICIARY, iii-viii (1932), accepted at least this premise.

> [T]he question [in *Bayard*] was . . . whether there should be a trial at all—that is to say, whether the judges had a right to hear the case. And one need not be a supporter of the Judicial Power in any of its formulations in order to believe that the Judiciary have a right to hear and determine cases. . . . [and] that the Legislature may not abolish all courts when the Constitution provides for their existence.

Id. at 66.

[116] *See* notes 1, 2, 14 & 71 *supra*.

drawn between what may be thought of as inherently judicial business and that which is of a legislative or executive character.

A thorough analysis of the problem would require a sensitive regard for precedent, for "judicial power" is not a self-defining term. Rather, it "sums up the whole history of the administration of justice in English and American courts through the centuries."[117] However, some possible approaches may be suggested, although it should be borne in mind that while the extreme position of *Palmore* and *Pressley* is rejected, the other extreme—that every adjudicatory tribunal must be staffed by a tenured judge[118]—is also untenable on historical grounds. For example, a board of commissioners was approved by the First Congress to settle accounts between the United States and the individual states,[119] even though such suits were within the original jurisdiction of the Supreme Court.[120] Moreover, history will show that, even in the criminal field, "judicial power" did not necessarily include every case.[121] If it includes anything in the civil law, it certainly includes whatever rights are protected under the suspension clause.[122]

One possible approach would be to view the right to an article III tribunal as having been subsumed under those particular constitutional guarantees which govern the federal judicial process.[123] For

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[117] Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1017 (1924).

[118] *E.g.*, Tushnet, *supra* note 50, at 957.

[119] Act of Aug. 5, 1789, ch. 6, 1 Stat. 49.

[120] United States v. Texas, 143 U.S. 621, 639–40 (1892).

[121] There is a class of "petty" offenses which do not require the full protection of the judicial process for their adjudication. Frankfurter & Corcoran, *Petty Federal Offenses & the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926); Doub & Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need & Constitutionality*, 107 U. PA. L. REV. 443, 462–67 (1959). Palmore did not argue that a tenured judge was needed for every parking ticket. *See* Reply Brief for Appellant, *supra* note 22, at 12–13. The historical answer is that the justice of the peace was known to the Framers and they provided tenure only for "judges." However, this does not mean the justice of the peace can take over the judge's job. Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 VA. L. REV. 697, 704–05 (1974) (drawing an historical distinction between "minor" and "petty" offenses and concluding that magistrates are restricted to the latter). *See also* S. 1613, 95th Cong., 2d Sess. (1978) (expands jurisdiction of magistrates). The only constitutional difference between Superior Court judges and United States Commissioners is that the latter are appointed by the district judges for eight year terms and removable by them only, 28 U.S.C. § 631(a), (h) (1970), and thus are more insulated from the influence of the other branches. Superior court judges are removable by a commission dominated by presidential appointees. D.C. CODE §§ 11-1521,-1522 (1973).

[122] *Pressley*, 430 U.S. at 384–86 (Burger, C.J., concurring); *see* Ng Fung Ho v. White, 259 U.S. 276, 281–85 (1922).

[123] *Palmore*, 411 U.S. at 414–15 (Douglas, J., dissenting) (semble); Glidden Co. v. Zdanok, 370 U.S. 530, 598–602 (1962) (Douglas, J., dissenting) (semble).

instance, since the article III right to a jury trial applies to crimes with possible imprisonment exceeding six months,[124] one might then conclude that within this class of crimes "the constitutional requirement of due process is a requirement of judicial process"[125] which includes the peculiarly federal judicial guarantee of a judge with good behavior tenure. Similarly, one can read the seventh amendment to include the presumption that the business within its scope be entrusted to an article III tribunal; in fact, it has been so interpreted.[126] By a parity of reasoning, the right to a grand jury indictment guarantees an article III court to which the indictment is returnable, and this was also once the Supreme Court's view of the law.[127] This approach falters, however, with admiralty cases and cases at equity, because the Constitution specifies no procedures for them. Therefore, an appeal to some historical precedent outside the text of the Constitution, rather than the Delphic reference to "judicial power," is necessary.[128]

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[124] *See* Cheff v. Schnackenburg, 384 U.S. 373, 378–80 (1966).

In Atlas Roofing Co. v. OSHA, 430 U.S. 442 (1977), the government argued that only the sixth amendment, and not the seventh, stood between it and the citizen. *Id.* at 449–50 n.6. Assuming this proposition, and applying it to its extreme, it follows that between the government and the individual only the "trial of all crimes" is inherently judicial. However, this would still afford a significant review of the government's actions. Primarily, the extent to which the government could affirmatively injure anyone without resort to the judicial process is thereby limited. *E.g.*, Harmon v. Brucker, 355 U.S. 579, 581–82 (1958) (judicial review of less than honorable discharge); Lipke v. Lederer, 259 U.S. 557, 562 (1922) ("tax" held "penalty;" collection enjoined). The central question would be what scope of review would be available to a defendant when the government sought to enforce its decisions with criminal sanctions. It seems clear that the constitutionality of the underlying legislation could not be withdrawn. *See* Johnson v. Robison, 415 U.S. 361, 366–68 & n.8 (1974). The regularity and fairness of the proceedings which lead to the formulation of an enforceable duty needed to conform to due process, is a question open to the court. *See* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). *But see* HART & WECHSLER, *supra* note 22, at 341–44 (The Dialogue). A defect in this approach is that if there is a right to a judicial hearing in cases like Johnson v. Robison, it does not rest upon the "trial of all crimes."

[125] Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting).

[126] Capital Traction Co. v. Hof, 174 U.S. 1, 17–18 (1899) (trial by jury of twelve before justice of the peace not trial by jury within meaning of seventh amendment). Note that the Organic Act for the District of Columbia, Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 103, 107, provided that justices of the peace, who held office for five year terms, could try private suits only to the value of twenty dollars.

In some recent decisions the "judge" guarantee of *Capital Traction* has been eroded. Pernell v. Southall Realty, 416 U.S. 363 (1974), which applied the seventh amendment to the superior court (note 121 *supra*), overruled, by implication, *Capital Traction*, regarding this issue. Moreover, dicta in Atlas Roofing Co. v. OSHA, 430 U.S. 442, 451–57 (1977), might lead one to believe that there is no "jury" guarantee either.

[127] Forsyth v. United States, 50 U.S. (9 How.) 570, 575–77 (1850).

[128] *See* Frankfurter & Landis, *supra* note 117, at 1016–23. *See generally* Frankfurter & Corcoran, *supra* note 121.

Another possible approach is represented by a class of administrative cases which involve alleged governmental transgressions against constitutional rights.[129] These cases stand for the proposition "that the judicial function vested in the courts by article III encompasses a power—perhaps a duty—to determine *de novo* the relevant facts in all cases involving constitutional limits."[130] Hence, if the Government's authority to seize and suppress books, for example, is limited to the "constitutional fact of obscenity,"[131] then only a "fully judicial,"[132] that is, article III, tribunal could determine the facts and apply the law to them. Similarly, since the Government has no authority to take private property except upon payment of just compensation, an article III court must be satisfied that the compensation paid was just.[133] On the other hand, since no particular amount of taxation represents the constitutional limit of the taxing power, it would be unnecessary for the taxpayer to have an article III court pass upon the correctness of his tax bill. Of course, due process demands that both the correct law be applied and a fair method of assessment be employed. For this more limited constitutional inquiry Justice Brandeis's formulation in *St. Joseph Stock Yards Co. v. United States*[134] "that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly," serves adequately.[135] The record upon which review is to be granted

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[129] *See, e.g.*, Blount v. Rizzi, 400 U.S. 410, 412–22, 418–19 n.56 (1971) (determination of obscenity); Freedman v. Maryland, 380 U.S. 51, 58–60 (1965) (same); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51–54 (1936) (constitutionality of order); Crowell v. Benson, 285 U.S. 22, 54–61 (1932) (agency's constitutional power); Ng Fung Ho v. White, 259 U.S. 276, 281–85 (1922) (review of deportation); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289 (1920) (award of just compensation).

[130] Jaffee, *Judicial Review: Constitutional & Jurisdictional Fact*, 70 HARV. L. REV. 953, 975 (1957); *see* Beneficial Corp. v. FTC, 542 F.2d 611, 618–20 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977) (first amendment demands "more searching" judicial examination of agency action); McKinney v. Parsons, 488 F.2d 452, 453 (5th Cir. 1974) (district judge, not merely magistrate, must view "obscene" materials).

[131] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 102 (1973) (Brennan, J., dissenting).

[132] Blount v. Rizzi, 400 U.S. 410, 418 n.5; *see id.* at 419 n.6.

[133] *See* United States v. New River Collieries, 262 U.S. 341, 343–44 (1923) (just compensation is judicial, not executive or legislative, determination).

[134] 298 U.S. 38 (1936).

[135] *Id.* at 84 (Brandeis, J., concurring). *See also* HART & WECHSLER, *supra* note 21, at 343 n.23 (The Dialogue).

Justice Brandeis was correct in asserting that the majority's position was basically that a judge has greater power to set aside an administrative finding of fact than he does to set aside a jury's verdict. 298 U.S. at 84. Justice Black indirectly answered him in United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 18 n.11 (1955), when he gave support to a statement from II WILSON'S WORKS 222 (Andrews ed. 1896): "Juries undoubtedly may make mistakes. . . . But

in "constitutional" cases was loosely defined by the majority in *St. Joseph Stock Yards Co.* as comprising those facts presented at the hearing below, unless they are clearly "overborne" by other evidence.[136] In this respect, *Crowell v. Benson*,[137] supporting *de novo* review of administrative records,[138] is not to be regarded as a seminal opinion.[139]

The virtue of this latter approach is that it ties the application of the tenure clause to its purpose. The judiciary was "designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority."[140] As Professor Jaffee suggests, where the federal sovereign attempts to make a final determination in law respecting fundamental rights, an article III court is necessary.[141] For if a court with "complete independence"[142] cannot pass upon the question, the "particular rights or privileges would amount to nothing."[143] This formulation is the very least required to preserve a separate grant of judicial power.

One objection to this approach, however, is that it surely reads the tenure clause for less than it might be worth. It was not constitutional violations alone that Hamilton thought the clause protected;[144] allowing decisions of nonconstitutional issues by nontenured judges

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changed as they constantly are, their errors and mistakes can never grow into a dangerous system."

[136] 298 U.S. at 53–54.

[137] Crowell v. Benson, 285 U.S. 22 (1932).

[138] *Id.* at 57.

[139] *See* Strong, *Judicial Review: A Tridimensional Concept of Administrative—Constitutional Law*, 69 W. VA. L. REV. 249, 274–75 (1967).

[140] THE FEDERALIST, *supra* note 1, No. 78, at 485 (A. Hamilton); *accord*, Powell v. McCormack, 395 U.S. 486, 547–50 (1969). Hamilton's statement applies as well to the executive. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585–89 (1952).

[141] *See* Jaffee, *supra* note 130, at 975, 984–85; *see, e.g.*, Crowell v. Benson, 285 U.S. 22, 57 (1932). However, *Crowell* seems to be wrong in applying its theory (court must review finding of facts necessary to sustain the constitutionality of the government's action) to its facts (enjoining the enforcement of an award of compensation under the Longshoremen's and Harbor Workers' Compensation Act). Surely a common law employment relationship does not represent a constitutional limit upon the imposition of liability, as Justice Brandeis contended. *Id.* at 81–84.

[142] THE FEDERALIST, *supra* note 1, No. 78, at 484 (A. Hamilton).

[143] *Id.* at 485.

[144] *Id.* at 488–89. This larger view of the purpose of the tenure clause was expressed by Hamilton:

> But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the inquiry of the private rights of particular classes of citizens, by unjust and partial laws.

Id. at 488.

presiding over article I administrative proceedings undercuts the scope of this clause. On the other hand, the historically demonstrable purpose of this clause is clear only as a protection for "constitutional" rights.[145] Apparently, even an administrative agency established under article I may ultimately interpret its own law, excluding constitutional issues,[146] although it is not clear exactly what "law" is included in this interpretation.[147]

But however one draws the line, *Palmore* steps over it. Not only is the "trial of all crimes" mentioned in the text of article III itself, but such a trial is further surrounded with the judicial safeguards of the fifth and sixth amendments. In addition, the necessity of a fully judicial proceeding before the imposition of punishment is further manifested by the bill of attainder[148] clause, which generally prohibits any legislative imposition of punishment.[149] The executive is equally powerless to enforce a sentence of imprisonment without a judicial trial.[150] Viewing the issue in a constitutional light, Palmore's deprivation of liberty cannot be made "without the sanction afforded by [federal] judicial proceedings," as the government's authority to imprison Palmore for ten years is constitutionally limited to a finding that he violated the applicable criminal statute.[151]

Pressley, however, completely divorced the concept of "judicial proceedings" from article III. The issue there was whether one who has been convicted and sentenced without "full judicial participa-

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[145] R. BERGER, CONGRESS V. THE SUPREME COURT 117–19 (1969).

[146] Johnson v. Robison, 415 U.S. 361, 366–68 (1974) (Congress may preclude courts of United States from reviewing question of law arising under statute, although it may not preclude review of issues arising under Constitution).

[147] HART & WECHSLER, *supra* note 21, at 340–41 (The Dialogue).

[148] U.S. CONST. art. I, § 9, cl. 3.

[149] United States v. Brown, 381 U.S. 437, 442–46 (1965) (disability imposed upon Communist party members prohibited); United States v. Lovett, 328 U.S. 303, 315 (1946) (prohibition against payment of salary to three named employees invalid).

Of course, Congress may punish its own members for "disorderly behavior," U.S. CONST. art. I, § 5, cl. 2, and may punish a nonmember for contempt, Barry v. United States *ex rel.* Cunningham, 279 U.S. 597 (1929) (compelling attendance of witness); McGrain v. Daugherty, 273 U.S. 135 (1927) (witness' refusal to answer questions). But this power is limited to the "right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty." Marshall v. Gordon, 243 U.S. 521, 542 (1917).

The contempt power is now customarily enforced through the judicial power. 2 U.S.C. § 192 (1976); *In re* Chapman, 166 U.S. 661 (1897).

[150] Wong Wing v. United States, 163 U.S. 228, 237–38 (1896) (imprisonment for one year at hard labor cannot be imposed except upon judicial action); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 122 (1866); *see* United States v. Berry, 4 F. 779, 780 (D. Colo. 1880) (limiting authority of United States commissioner to act in criminal matters).

[151] Ng Fung Ho v. White, 259 U.S. 276, 284 (1921).

tion"[152] may nonetheless have a "fully judicial"[153] review on habeas of his constitutional claims.[154] Thus, *Pressley* stands for the proposition that a court "established pursuant to article I"[155] can finally adjudicate the merits of constitutional rights, even in cases involving ten years imprisonment.[156]

CONCLUSION

The purpose of the tenure clause is to restrain the federal government by preserving the independence of the federal judiciary.[157] Thus, it is applicable only to federal courts, not to state courts as state courts do not exercise the judicial power of the United States.[158] Courts-martial are executive tribunals, territorial courts exist apart from the separation of powers principle, and legislative courts are, or at least were prior to *Palmore*, characterized as tribunals restricted to a particular class of business which was not considered inherently "judicial." Moreover, Congress does not stand to the District as a state legislature stands to a state.[159]

Palmore, however, rejected all of these propositions. It was the first case to suggest that a constitutional restraint inapplicable to the states was therefore inapplicable to the federal government.[160] It was also the first case to suggest that the process deemed adequate for courts-martial was therefore adequate for civilian courts.[161] As a

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[152] Blount v. Rizzi, 400 U.S. 410, 419 n.6 (1970). Note that *Pressley* is consistent with *Rizzi* in that it declined to hold that a nontenured judge was "exactly commensurate" with a tenured one, 430 U.S. at 379–81. It did, however, decide that the lack of a tenured judge did not render the habeas corpus relief under D.C. CODE § 23–110(g) (1973) "inadequate or ineffective." 430 U.S. at 381–83.

[153] Blount v. Rizzi, 400 U.S. 410, 418 n.5 (1970).

[154] Thus the relationship between the suspension clause and the article III judicial power was squarely presented, contrary to the Chief Justice's view. *See* note 47 *supra*.

[155] D.C. CODE § 11–101(2) (1973). *See also* THE FEDERALIST, *supra* note 1, No. 48, at 310 (J. Madison) (legislative encroachment on other departments will first occur in subtle measures).

[156] *See generally* Estep v. United States, 327 U.S. 114 (1946) (reviewability of draft board determination of draft status in draft dodging prosecution); HART & WECHSLER, *supra* note 21, at 342–43 (The Dialogue).

[157] *See* notes 1–4, 16 *supra* and accompanying text.

[158] *See* note 50 *supra*.

[159] *See* notes 99 & 100 *supra* and accompanying text.

[160] *See* notes 107 & 108 *supra*. *Palmore* perhaps should be read as the incorporation movement in headlong retreat (or triumph). Good behavior tenure, having failed of incorporation, will not be held to restrain the federal government either. *Cf.* Atlas Roofing Co. v. OSHA, 430 U.S. 442, 449–61 (1977) (seventh amendment; same author, same result). Justice Harlan warned against the pitfalls of selective incorporation, which embodies Justice White's approach. *See* Williams v. Florida, 399 U.S. 78, 129–38 (1970) (White, J., concurring).

[161] *Contra*, Parker v. Levy, 417 U.S. 733, 743 (1974).

"practical" precedent, *Palmore* took the limited territorial rational and applied it precisely where it can least apply, that is, to a court which is neither in a transitional stage nor far from the pressures of the federal government.[162] Moreover, it was the first case to intimate that the way federal power is exercised abroad might be a model for the way it is exercised at home.[163] As a "legislative" court case, it held that the congressional power over Indian tribe membership, implied a like power to try and sentence felony cases.[164]

The *Palmore* and *Pressley* reasonings would be less strained if the necessary premise of the holding were admitted forthrightly. The Superior Court for the District of Columbia is an article III court; all of its cases arise under the laws of the United States.[165] It is the United States which prosecutes felonies in that court; thus, it exercises powers inherently judicial and forbidden to the other branches, however the separation of powers doctrine is defined.[166] The "article I" pretense, therefore, means nothing more than an article III court deprived of its constitutional independence.[167]

Insofar as the tenure clause represents not merely federal law but the law of federalism, the result should resurrect other past arguments.[168] The remaining question is whether the future will read each case for "the least it has to be worth."[169]

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[162] *See* notes 67–74 *supra* and accompanying text.

[163] *See generally* note 67.

[164] *But see* notes 148–49 *supra*.

[165] *See* note 100 *supra*.

[166] *See* notes 148–56 *supra* and accompanying text.

[167] If there is any other conclusion, one might ask how, or whether, the superior court has the power to declare congressional statutes unconstitutional. Although in form the Superior Court of the District of Columbia is constitutionally indistinguishable from an administrative agency, *see* notes 29, 88 & 93 *supra*, administrative tribunals do not possess this power. Johnson v. Robison, 415 U.S. 361, 366–68 (1974). As tribunals without good behavior tenure, they are "incapable of receiving" the judicial power of the United States. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828). To say that the Superior Court possesses this power because Congress granted it begs the question. If Congress has to allow that tribunal to hold its statutes unconstitutional, then how may Congress determine what degree of independence it will allow those judges? Good behavior tenure and the power of judicial review are constitutional twins; neither has any meaning without the other. *See* R. BERGER, *supra* note 145, at 117–19; notes 4 & 14 *supra*.

[168] If Palmore, a Maryland resident, were to petition a Maryland state court for a writ of habeas corpus, what would happen to the "meandering and poorly reasoned" rule in Tarble's Case, 80 U.S. (13 Wall.) 397 (1872) (state court may not issue the writ to federal detainee)? HART & WECHSLER, *supra* note 21, at 91 (Supp. 1977). Apart from service of process problems and assuming a ground for relief under the Constitution, what basis exists for exclusive federal jurisdiction? The denial of certiorari is not even given weight on the merits in a subsequent habeas petition. Brown v. Allen, 344 U.S. 443, 487–88 (1953) (Burton & Clark, JJ.), 489–98 (Frankfurter, J.), 513 (Black & Douglas, JJ.). What restraints did the states place upon the federal government by virtue of the suspension clause, the tenure clause, the tenth amend-

ment, and the enumeration of powers principle? *See generally* HART & WECHSLER, *supra* at 357–60, 1513.

[169] HART & WECHSLER, *supra* note 21, at 330 (The Dialogue); Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws—Tax Procedures*, 88 HARV. L. REV. 1360, 1457–69 (1975), noted that the proposed bankruptcy court "goes beyond any existing precedent," *id.* at 1468, since a nontenured judge would be deciding cases governed by state law. *See* note 20 *supra*. Yet, after *Pressley*, "article I" courts are not restricted to article I legislative powers, unless Congress has the power to define the substantive scope of the sixth amendment in the District of Columbia.

Whether Congress has legislative jurisdiction over all suits involving the bankrupt has never been determined. Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448, 474 (1957) (Frankfurter, J., dissenting); *cf.* United States v. Flores, 289 U.S. 137, 146–50 (1933) (article III grant of judicial jurisdiction over admiralty held to imply article I grant of legislative jurisdiction). If a defendant has a right to insist upon a state, rather than federal, forum, the right rests upon the enumeration of cases and controversies to which the federal judicial power may extend. *See* note 18 *supra*. Assuming all suits involving the bankrupt are cases "arising under" federal law, *see* Williams v. Austrian, 331 U.S. 642, 652–54, 661–62 (1947); Schumacher v. Beeler, 293 U.S. 367, 374 (1934), surely a difficult problem, *compare* National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 594–99 (1949) (bankruptcy suits do not arise under federal law within the meaning of article III) (plurality opinion rejected by a majority) *with id.* at 611–13 (concurring opinion), 652 n.3 (Frankfurter, J., dissenting) (such suits arise under the applicable bankruptcy statute), the defendant cannot object to federal jurisdiction, but can merely complain of the lack of tenure protections. *See generally* Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953). Although his claim has merit, *see* note 144 *supra* and accompanying text, he certainly makes a less compelling case than *Palmore* or *Pressley* presents, where the defendant presumably bears the animosity of the community and where the opposing party can influence the judge's reappointment.