IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., at al.
Plaintiffs,
vs.

No. 13-465C
(Judge Sweeney)

THE UNITED STATES,
Defendant.

MOTION FOR LEAVE TO FILE AMICUS BRIEF OF CLASS PARTICIPANT MICHAEL SAMMONS

Michael Sammons, an eventual class participant in these consolidated takings cases, respectfully moves for leave to file the accompanying amicus brief consistent with the directive of the Federal Circuit to this Court:

> "(Sammons Article III challenge to the court's jurisdiction) must be addressed by the Court of Federal Claims ... even if Mr. Sammons is not a party and even if no party makes the argument he makes." Fairholme v. US, No. 17-1015 (Order filed 3/14/2017).

The Federal Circuit made clear that this Court erred in failing to distinguish between "statutory" jurisdiction (which certainly exists under the Tucker Act), and "constitutional" jurisdiction (which is *highly* questionable under Article III and Stern v. Marshall):

> "The court stated its statutory basis for its jurisdiction over takings cases ... but it did not analyze Mr. Sammons's constitutional contention, which invoked Stern v. Marshall, 564 U.S. 462 (2011), and other decisions, that only an Article III court may hear takings claims."

Of course, no party to this action can file such an Article III brief. Judge Sweeney made clear in her order denying leave to intervene, that if any

attorney *ever* challenged her authority as an Article I judge to hear Article III takings cases, she would impose dire sanctions.[1]

Therefore, should this Court happen to decide to respect the Federal Circuit's mandate that it *seriously* consider the challenge to its jurisdiction under Article III and Stern v. Marshall, rather than cavalierly brushing the colorable constitutional issue aside as "frivolous," "vexatious," "ill-conceived," "specious," and "vacuous," and, of course, assuming the Court now understands that "statutory" jurisdiction under the Tucker Act and "constitutional" jurisdiction under Article III are two separate and independent issues, the proposed attached Amicus Brief will help the Court understand this complex constitutional issue.[2]

Respectfully submitted,

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[1] One cannot help but reflect upon D.C. Circuit Judge Brown's dismay that the Government's conduct in the Net Worth Sweep could only be expected in a "banana republic." No doubt in such a republic, those in power, when their authority is rightfully challenged under the prevailing Constitution, would also threaten severe sanctions.

[2] As the Federal Circuit noted, the relevant takings history and law is provided in a "lengthy law review article addressing the issue (Sammons) raised regarding an entitlement to an Article III court for a takings claim. See Michael P. Goodman, *Taking Back Takings Claims: Why Congress Giving Just Compensation Jurisdiction to the Court of Federal Claims is Unconstitutional*, 60 Vill. L. Rev. 83 (2015)."

Certificate of Service

A true and exact copy was mailed and electronically delivered to all parties this 17 day of MAR, 2017.

Michael Sammons

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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THE UNITED STATES,
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AMICUS BRIEF OF CLASS PARTICIPANT MICHAEL SAMMONS REGARDING ARTICLE III AND STERN V. MARSHALL

The Article I Court of Federal Claims created in 1982 is exceptional in that it is currently the only non-Article III entity being asked to adjudicate a constitutional, as opposed to statutory, right. This violates Article III of the Constitution under the controlling Article III case of Stern v. Marshall, 131 S. Ct. 2594 (2011).

In the Federal Courts Improvement Act of 1982, Congress elevated the Article III judges of the Court of Claims to the new Article III Federal Circuit Court of Appeals for the Federal Circuit, and created a new ***Article I*** Court of Federal Claims with new ***Article I*** judges.

While numerous lower federal courts, all the courts of appeals, as well as the Supreme Court, have repeatedly held that the Article I Court of Federal Claims, created in 1982, has "statutory authority" under the Tucker Act, 28 USC 1491 to hear Fifth Amendment takings cases against the United States, no

federal appeals court has considered the separate and independent question as to whether that court has the "constitutional authority" under ***Article III*** to decide such cases.

Lower courts, frequently citing United States v. Causby, 328 U.S. 256, 267 (1946)("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine."), simply state that the issue "has been settled for decades" and fail to go further, seeing no distinction between the pre-1982 **Article III** Court of Claims and the post-1982 **Article I** Court of Federal Claims.

But in **Stern v. Marshall, 131 S. Ct. 2594, 2601 (2011)**, the Supreme Court emphasized that "statutory authority" and "constitutional authority" are two *separate* issues – and a court must have *both* to properly have jurisdiction over a particular case. **"We conclude that, although the (Article I) Court had the statutory authority to enter judgment on Vickie's claim, it lacked the constitutional (Article III) authority to do so."** *Id.* at 2601.

And while Stern dealt with a fundamental "common law" claim, it is difficult to imagine that the Supreme Court would have dealt differently with an at least as important "constitutional claim" arising directly under the Takings Clause of the Fifth Amendment to the U.S. Constitution itself.

For 35 years, the Article I Court of Federal Claims has been deciding constitutional takings claims in violation of Article III of the U.S. Constitution.

QUESTION PRESENTED

Whether the U.S. Court of Federal Claims, an Article I "legislative" court, presiding over a constitutional takings case against the United States, violates Article III and Stern v. Marshall, 131 S. Ct. 2594 (2011).

STATEMENT OF THE CASE

In 2008 the United States came to the aid of Federal National Mortgage Association (Fannie) and Federal Home Loan Mortgage Corporation (Freddie), collectively the "GSEs," during a time of national financial crisis. In return for its financial support, the United States received an option to purchase 79.9% of the GSEs for a token $10,000, as well as a 10% priority preferred dividend payment per year on all funds advanced to the GSEs.

By 2012 the country had substantially recovered and the GSEs revealed to the United States that they could now produce sustainable profits going forward. In fact, as expected by the Government, an accounting adjustment/reversal in 2013 would contribute to GSE profits of ***$130 BILLION*** in 2013 alone. Seeking to mitigate a looming debt ceiling crisis a desperate Treasury quickly and unilaterally changed the 2008 agreement to provide that ***all*** equity and ***all*** of the enormous expected profits in the GSEs would go to the

United States ... ***forever***. This was the infamous "Net Worth Sweep" ("NWS"). The Government's motive – its only motive – as in most white collar criminal cases in which a majority partner decides to steal his minority partner's share of a profitable business – was greed.

And although the Treasury provided $187 billion *in total* financial aid to the GSEs, the Treasury has been repaid to date with ***over $256 billion*** **(not even counting the *$100+ billion* value of their warrants to own 79.9% of the GSEs for a nominal cost)**, while the private investors in the GSEs –the Government's minority partners who had invested over $36 billion in GSE preferred stock - will never receive a penny from their investments in the GSEs under the NWS.

The "taking" of the private equity investors financial interests in the GSEs, the extinguishment of *all* future value in their GSE investments, constituted the largest, most blatant "regulatory taking" by the United States in the history of this nation. See generally Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104 (1978)(elements of a regulatory taking).

Plaintiff-Petitioner Michael Sammons is a GSE preferred stock investor, holding $1,000,000 in preferred shares. Sammons seeks monetary damages against the United States in the amount of $900,000. His sole cause of action is

an unconstitutional takings claim against the United States brought directly under the Takings Clause of the Fifth Amendment.

A number of class action cases were filed in the Court of Federal Claims all claiming the Net Worth Sweep constituted an unconstitutional taking without compensation. As a prospective class member Petitioner Sammons sought to intervene into those consolidated cases before the Honorable Margaret Sweeney. Sammons made clear that he sought to intervene for the sole purpose of challenging the jurisdiction of the court under Article III, arguing that any resulting decision would be void for want of jurisdiction and the entire class, which included him, would be prejudiced by, apart from wasted private and judicial resources, denial of an Article III forum, and the running of the statute of limitations. But as an initial matter, Sammons argued that since the court lacked Article III jurisdiction, Judge Sweeney also lacked constitutional authority to rule upon his motion to intervene. Judge Sweeney rejected the Article III challenge to her authority, and then proceeded to deny the motion to intervene (a motion premised only upon the Article III argument).

The Tucker Act, 28 U.S.C. §1491, states that the United States Court of Federal Claims shall have *exclusive* jurisdiction of all constitutional claims against the United States for money damages in excess of $10,000.

The problem is that the Court of Federal Claims is an Article I court, and not the Article III court which is constitutionally required to hear constitutional takings cases, as the Supreme Court made clear in Stern v. Marshall, 131 S. Ct. 2594 (2011).

WHY TAKINGS CLAIMS BELONG IN ARTICLE III COURTS: The Court of Federal Claims, Takings Claims, and Article III Values

The Court of Federal Claims operates much like a federal district court, but it deals exclusively with claims against the United States. Like district court decisions, the decisions of the Court of Federal Claims are final judgments. 28 U.S.C. § 1491(a)

The Court of Federal Claims is not entirely like the federal district courts, however. It is a specialized court with the unique responsibility, described in the Tucker Act:

> "[T]o render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

Beyond that specialized jurisdictional grant, there are important differences between the Court of Federal Claims and the federal district courts. One major difference is that there is no possibility of a jury hearing citizens'

complaints in the Court of Federal Claims. Rather, the judges on the court only conduct bench trials. 28 U.S.C. § 174

Moreover, Congress did not create the Court of Federal Claims as an independent "constitutional" court pursuant to Article III of the Constitution. Instead, Congress explicitly provided, when creating it, that the new Court of Federal Claims is a "legislative court," created pursuant to Article I. The distinction is one with a profound difference.

Article III of the Constitution, which establishes an independent judiciary, is one of the three pillars of the triumvirate federal government, based upon the concept of separation of powers. As the Supreme Court recently noted, Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." Stern v. Marshall, 131 S.Ct. 2594, 2608 (2011). The Court stressed that:

> "[T]he basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government adopted in the Constitution, the judicial Power of the United States . . . can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto."

The entire purpose of Article III was to truly separate the judiciary from the other branches when we fear those other branches' influence:

> "In establishing the system of divided power in the Constitution, the Framers considered it essential that "the judiciary remain[] truly distinct from both the legislature and the executive." As Hamilton put it, quoting Montesquieu, "there is no liberty if the power of judging be not separated from the legislative and executive powers." Id. at 2608

To ensure that separation, and the independence of the courts, Article III creates two particular requirement:

> "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."

The Article I judges of the Court of Federal Claims have no such Article III protections and therefore remain subject to influence by the other two branches of government.

Congress has broad, but not limitless, authority to create non-Article III courts.

The first case in which the Supreme Court endorsed Congress' creation of non-Article III courts was Am. Ins. Co. v. Canter, 26 U.S. 511 (1828) wherein Chief Justice Marshall approved Congress' creation of "territorial courts." The justification, the Court stated, was simply that the territorial courts were "created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." The Canter decision was the first in a series of cases holding that

congressional authority to create non-Article III courts is derived from those congressional powers specifically enumerated in the Constitution. In Canter, the enumerated power was the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

Shortly thereafter, the Court relied upon that same rationale when it sustained Congress' creation of military courts pursuant to Congress' specifically delineated Article I powers "to provide and maintain a Navy," and "to make rules for the government of the land and naval forces." Dynes v. Hoover, 61 US 65, 78 (1857).

The Court similarly approved Congress' creation of the United States Court in the Indian Territory upon the basis that "[C]ongress possesses plenary power" over the tribes, Stephens v. Cherokee Nation, 174 US 445, 478 (1899), and it affirmed that Congress may create non-Article III consular courts based on its enumerated power to enter into treaties and deal with foreign countries, Ex parte Bakelite Corp., 279 US 438, 451 (1929).

In modern times, the Court has continued to consider whether Congress is effectuating a particular constitutional grant of power when deciding whether a legislative court is permissible. The Court's most recent explicit reliance upon that rationale was in 1973, in Palmore v. United States,411 US

389 (1973), when the Court reaffirmed that Congress may create non-Article III courts to adjudicate disputes within the District of Columbia based upon its Article I power to:

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

The Court later explained that this rationale applies when the subject matter considered by the courts at issue "involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue." Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 US 50, 66 (1982).

The first rationale that emerges from the Court's Article III jurisprudence is thus: if the subject with which an adjudicative body deals is one wholly within Congress' purview, such as the rules governing military conduct, Congress need not concern itself with Article III.

While the Court found that rationale applicable in cases involving congressional power over the territories, the military, the tribes, and the District of Columbia, the Court explicitly rejected the notion that takings claims are the province of the legislature back in 1893. In Monongahela Navigation Co. v. United States,148 US 312 (1893) the Court explained:

> "**[W]hen the taking has been ordered, then the question of compensation is judicial.** It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a **judicial inquiry**." (emphasis added)

The Takings Clause thus cannot be said to be "historically understood as giving the political Branches of Government" any control at all over the determination of just compensation. Rather, the historical understanding is that it grants that authority to the judiciary. The first rationale the Supreme Court used to permit Congressional use of legislative courts therefore does not appear to apply to takings claims.

Takings Claims Are Not "Public Rights"

An early attempt to define the line between those types of controversies that implicate Article III and those that do not was the Supreme Court's 1856 decision in Murray's Lessee v. Hoboken Land and Improvement Co., 59 US 272, 281 (1855). In that case, the Court held that a treasury official's determination that certain property would be sold in order for the United States to collect a debt did not, at that time, involve a "judicial controversy" at all. An Article III judge was not, therefore, necessary.

To contrast those types of cases that require an Article III judge with the types of adjudications that do not, the Court stated that Congress could not:

> "[B]ring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.* at 281

Through that statement, the Court provided what is perhaps the single most important justification that the Supreme Court has offered for permitting Congress to establish Article I courts: sovereign immunity. The rationale is that because the federal government generally enjoys sovereign immunity from suits, Congress need not permit its citizens to file lawsuits against the sovereign in the first place. Congress may choose to prohibit such lawsuits in any forum, and may therefore, if it chooses to permit the lawsuits at all, control the forum in which such suits may be brought. It may even relegate such lawsuits to a non-judicial forum.

One of the most important cases in which the Court expressly relied upon the sovereign-rights based "public rights" doctrine is the Ex parte Bakelite Corp., *supra*, decision of 1929. In Bakelite, the Court upheld Congress' authority to establish the Court of Customs Appeals as an Article I court. The Court explained that Article I courts:

> "[M]ay be created 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.

> The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals."

As is clear from that passage, the Court viewed the fact that a matter is one "arising between the government and others" as a necessary, but not sufficient, condition to conclude that a right is a "public right." The Court's rationale for the public rights distinction was sovereign immunity: "The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide . . . ."

The public rights doctrine has been extensively discussed and applied in the Court's recent Article III decisions. In Northern Pipeline, Justice Brennan's plurality decision explicitly recognized that the primary justification for excluding public rights from Article III is "the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued." This assessment is really no different from the rationale captured in Justice Brennan's discussion of Congress' Article I power, which, he explained, permits establishing non-Article III entities for areas that have "been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue." The rationale is that when a matter is one that "the Framers expected that Congress would be free to commit ... completely to nonjudicial executive determination . . . there

can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency."

In sum, "public rights" are those matters involving disputes between an entity and the federal government to which sovereign immunity applies, "matters that could be conclusively determined by the Executive and Legislative branches," as contrasted with "matters that are 'inherently . . . judicial.'" Northern Pipeline, 458 US at 68.

The majority of the cases heard in the Court of Federal Claims involve waivers of sovereign immunity and therefore fit into the "public rights" category that the Supreme Court has described. With respect to the majority of the cases for monetary compensation filed in the Court of Federal Claims, that rationale for permitting Congress to elect to have an Article I legislative court decide them has some common-sense appeal. After all, if the alternative is that Congress could choose not to permit the case in the first place, it is not irrational that Congress gets to choose its own forum when it magnanimously allows its citizens to sue.

But that rationale does not work for cases that Congress could not have prevented a citizen from filing. If a citizen could file a claim regardless of Congress' permission to do so, then the sovereign immunity rationale has no

force, and Congress may not rely upon this rationale to relegate a case to an Article I court. Such is the case for takings claims, which do not involve waivers of sovereign immunity and are therefore not public rights.

The first evidence that takings claims are not public rights is the Court's 1893 decision in Monongahela. As discussed earlier, the Court therein held that determining just compensation is not a task for Congress but is instead a "***judicial inquiry***." That statement directly undermines the notion that takings claims are public rights, which, the Court has said, "do not require judicial determination . . . ." See Ex parte Bakelite Corp., 279 US 438, 451 (1929).

The Court has since made even clearer that a waiver of sovereign immunity is not necessary for citizens to file a takings claim. Indeed, that takings claims are not limited by sovereign immunity makes perfect sense. For an action to constitute a taking in the first place, the government must exercise its power pursuant to its sovereign power of eminent domain. If the government could do so while simultaneously asserting that, as sovereign, it may not be sued to collect compensation for that taking, then the constitutional command, "nor shall private property be taken for public use, without just compensation," would have no meaning whatsoever.

The Court has described this principle, that the Takings Clause has independent force without the government's permission or waiver of sovereign

immunity, as the "self-executing" nature of the Clause. United States v. Clarke, 445 US 253, 257 (1980). The Court has explained that while the government can file a claim to condemn or formally take a property, the government may also take property by "physically entering into possession and ousting the owner," in which case owners can also file "inverse condemnation" cases to seek the compensation to which they are entitled by the Fifth Amendment. The Court has explained that "[t]he owner's right to bring such a suit derives from 'the self-executing character of the constitutional provision with respect to condemnation." Kirby Forest Indus., Inc. v. United States, 467 US 1, 5 (1984).

In a landmark decision, in which the Court explained that the Tucker Act is a jurisdictional statute that does not itself waive sovereign immunity as to the types of cases for which it grants jurisdiction, the Supreme Court was careful to distinguish takings claims from other types of claims against the United States. See United States v. Testan, 424 US 392, 400-01 (1976). The Court explained the general rule that "[i]n a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity," and rejected a contrary rule based upon cases applying the Takings Clause. *Id.* The Court distinguished the takings cases from the general rule by explaining that "[t]hese Fifth Amendment cases are tied to the language, purpose, and self-executing aspects of that constitutional provision, and are not authority to the

effect that the Tucker Act eliminates from consideration the sovereign immunity of the United States."

To the extent there was any lingering doubt that the Takings Clause trumps the government's assertion of sovereign immunity, the Court removed that doubt in 1987, in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 US 304 (1987). In that case, the government argued, as amicus curiae, that the "Constitution did not work a surrender of the immunity of the States, and the Constitution likewise did not withhold this essential 'attribute of sovereignty' from the Government of the United States." Rejecting that argument, the Court held that its cases "make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking." First English, 482 US at 316 n.9.

After First English, it is now explicit that property owners enjoy the right to bring takings claims, not because Congress has consented to their doing so, but because the Constitution guarantees that right. It is the recognition of that self-executing provision that forecloses the Court of Federal Claims' consideration of takings cases.

Takings Claims Are Neither Created by Congress nor Closely Intertwined with a Federal Regulatory Program Congress Has Enacted

Another factor, which is an extension of the previously described "public rights" doctrine, is the notion that Congress has augmented authority to use non- Article III entities to resolve disputes when they involve rights Congress has itself created. This is the consideration that justifies much of the administrative state.

When discussing the public rights doctrine in his Northern Pipeline plurality decision, Justice Brennan stressed that one limitation upon the public rights doctrine is that it involves matters that "at a minimum arise 'between the government and others.'" Northern Pipeline, 458 US at 69. He also opined, however, that "it is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated— including the assignment to an adjunct of some functions historically performed by judges." Elaborating upon that principle, he stated:

> "[W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created."

Justice Brennan contrasted that situation with one in which the rights at issue are not created by Congress. In that case, he explained, Congress has less

discretion to assign fact finding related to that issue to a non-Article III entity. See *id.* at 81-82.

This factor is not unlike the sovereign immunity rationale underlying the public rights exception. In the public rights context, the rationale is that if Congress permits suits against the government when it had no obligation to do so, Congress may specify how those lawsuits proceed. Similarly, the rationale here is that if Congress creates rights between private parties, again when it had no obligation to do so, Congress may specify how lawsuits involving those rights proceed. This doctrine is thus an extension of the public rights rationale described earlier, and in modern cases, the courts describe the public rights doctrine as including both categories of cases, that is, both those disputes that involve the government as a party as well as those involving private entities' dispute over a federally created right.

The Supreme Court overtly relied upon this rationale in Thomas v. Union Carbide Agricultural Products Co.,473 US 568 (1985) when it upheld Congress' decision to require binding arbitration within the federal regulatory scheme involving pesticides. There, the Court, describing the doctrine as the public rights doctrine, stated:

> "In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that "could be conclusively determined by the

> Executive and Legislative Branches," the danger of encroaching on the judicial powers is reduced. Id. at 589.

The Court then noted that the dispute in that case involved a right that was created by Congress, and explained that, accordingly, "Congress, without implicating Article III, could have authorized EPA to charge follow-on registrants fees to cover the cost of data and could have directly subsidized data submitters for their contributions of needed data." Because the dispute therefore involved a function that the Court described as "essentially legislative," the Court held that it could be resolved by non-Article III entities.

Shortly after that decision, in Commodity Futures Trading Commission v. Schor,478 US 833 (1986), the Court extended the doctrine beyond those rights actually created by Congress to also permit a non-Article III entity to consider additional counterclaims that were not created by Congress, as long as adjudication of those additional claims is necessary in order to effectively adjudicate the congressionally created right. The Court stated:

> "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly private right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."

In Granfinanciera, S.A. v. Nordberg, 492 US 33 (1989) the Court again described this extension of the public rights doctrine. *Id.* at 54-56. While the dispute was between two private parties and did not technically involve the federal

government, Justice Brennan, writing for the majority, described the public rights doctrine as broad enough to encompass litigation between private parties if that litigation is pursuant to a complex regulatory scheme. The Court described the doctrine as involving those rights that are "closely intertwined with a federal regulatory program Congress has power to enact."

Takings claims do not fit into this category. Unlike those subject matters that Congress may have a justifiable basis for keeping under its thumb, Congress did not create takings claims. Unlike the "essentially legislative" task at issue in Thomas, deciding takings claims is a "judicial inquiry."

The Court of Federal Claims is exceptional in that it is currently the only non-Article III entity being asked to adjudicate a constitutional, as opposed to statutory, right. The constitutional problem identified in this case therefore does not encompass Congress' use of agency adjudicators in the various areas in which they are currently employed. Unlike the various administrative entities that fit within this exception, the justification does not apply to the Court of Federal Claims considering takings cases.

Stern v. Marshall

The Supreme Court considered another challenge to the constitutionality of a non- Article III entity in its 2011 decision in Stern v. Marshall, 131 S. Ct. 2594 (2011). In Stern, the question was whether an Article I bankruptcy

court's consideration of a counterclaim of tortious interference violates Article III.

The majority began and ended its analysis of that question by reflecting upon the purpose of that constitutional provision. The Court also assessed whether the case fit within any of the Court's prior Article III exceptions.

First, the Court discussed the suggestion that the proceeding involved public rights. The Court began by rejecting the applicability of the original understanding of the public rights doctrine to the counterclaim, noting that it is "not a matter that can be pursued only by grace of the other branches," or "one that 'historically could have been determined exclusively by' those branches," but was instead one that "does not 'depend on the will of congress;' Congress has nothing to do with it." *Id.* at 2608

The Court then concluded that it also did not fall into one of the extensions of the public rights doctrines, as it "does not flow from a federal statutory scheme," and "is not 'completely dependent upon' adjudication of a claim created by federal law . . . ." *Id.* at 2614. The Court concluded that the counterclaim "does not fall within any of the varied formulations of the public rights exception in this Court's cases." In so concluding, the Court also noted that bankruptcy courts do not fit within the extension of the public rights doctrine that the Court had described in Schor:

> "We deal here not with an agency but with a court, with substantive jurisdiction reaching any area of the corpus juris. This is not a situation in which Congress devised an "expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task." The "experts" in the federal system at resolving common law counterclaims such as [the one at issue] are the Article III courts, and it is with those courts that [the] claim must stay."

The Court next considered whether the bankruptcy courts' role could be described as that of an adjunct to the district courts. Because the bankruptcy courts did more than fact finding, instead deciding "'[a]ll matters of fact and law in whatever domains of the law to which' the parties' counterclaims might lead," and the bankruptcy courts have power to enter final judgments, the Court concluded that they were not adjuncts. *Id.* at 2618-19.

Both the Schor majority and Stern dissent noted that in the bankruptcy context, the litigants could have chosen to have the claims at issue decided by an Article III court but elected the bankruptcy forum instead. In contrast, plaintiffs seeking to file a takings claim for greater than $10,000 have only one forum available to them: the Court of Federal Claims.

Finally it must be noted that not even Congress expected constitutional takings cases to be decided in its new Article I Court of Federal Claims. A senate report captures Congress' thoughts about why it departed from the requirements of Article III:

> "The court will be established under Article I of the Constitution of the United States. Because 28 U.S.C. 2509 of existing law gives the trial judges of the Court of Claims jurisdiction to hear congressional reference cases, which are not 'cases and controversies' in the constitutional sense, and because the cases heard by the Claims Court are in many ways essentially similar to the limited jurisdiction cases considered by the tax court, judges of the Claims Court are made Article I judges rather than Article III judges." S. Rep. No. 97-275, at 13 (1981).

Thus, according to Congress, the Court of Federal Claims is an Article I court so that it can continue to hear congressional reference cases and because the cases heard by the newly created court are similar to those heard by the tax court. While those justifications may or may not be valid with respect to some aspects of the court's jurisdiction, they do not justify Congress' decision to give the court jurisdiction to consider takings cases. Congress' desire to maintain some entity to consider congressional reference cases is understandable, as Congress reasonably wants an expert body to assist it in determining when to issue private bills. That Congress may create such a body says nothing about whether it must be the same body that considers takings claims. If Congress wants to be able to send congressional reference cases—which are not "cases or controversies" and therefore do not require adjudication by an Article III court—to some entity of its creation, it may, of course, do so. By sweeping up takings cases in the same basket Congress created to deal with private bills, one can fairly say that Congress "sought to aggrandize its own constitutionally delegated authority by encroaching upon a field of authority that the

Constitution assigns exclusively to another branch," which is precisely what the Stern dissent said it may not do.

Congress' second rationale for making the Court of Federal Claims an Article I court, its recognition that the Court of Federal Claims "in many ways" resembles the tax court, also does not encompass takings cases. Instead, it appears that Congress was referring to the other subject matters the court considers, such as contract disputes and tax cases. While the public rights rationale could be applied both to those aspects of the court's jurisdiction as well as to the tax court, this brief has already demonstrated why it does not justify the Court of Federal Claims considering takings cases. Takings claims thus fall outside the "many ways" those courts are similar. The "concerns that drove Congress to depart from the requirements of Article III" therefore simply do not apply to that aspect of the court's jurisdiction.

Finally, the Schor Court weighed in favor of non-Article III adjudication that deciding the otherwise impermissible claim was "incidental to, and completely dependent upon, adjudication of claims created by federal law." The Court noted that the situation wherein the CFTC decided claims not created by federal law "in actual fact is limited to claims arising out of the same transaction or occurrence as the (created by federal law) claim." In contrast, the Court of Federal Claims considers takings claims not only as counterclaims

or when they are incidental to other claims but also entirely independent of its other jurisdictional grants.

How the Court of Federal Claims Came to Be an Article I Court that Decides Takings Claims

In 1929, the Supreme Court altered its treatment of the Court of Claims, beginning to describe it not as subject to Article III, but instead as a legislative court established pursuant to Congress' Article I power. The Court first did so in dicta in the 1929 Bakelite decision involving the Court of Customs Appeals, opining that the Court of Claims:

> "[W]as created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies."

While the Court recognized that "[o]ther claims have since been included in the delegation," the Court declared that "the court is still what Congress at the outset declared it should be—'a court for the investigation of claims against the United States.' The matters made cognizable therein include nothing which inherently or necessarily requires judicial determination." Ex parte Bakelite, 279 US at 452-53.

Interestingly, even as the Justices changed course about whether the Court of Claims was an Article I or Article III court, the Supreme Court did not

waver in its understanding that the basis of the Court of Claims' jurisdiction is a waiver of sovereign immunity. Indeed, as revealed in the Bakelite decision, the entire justification for determining that the Court of Claims was an Article I court was that the Court decided that Congress could have, if it had elected to do so, done all of the work then being done by the Court of Claims. This is explicit in the Court's statement that the Court of Claims' jurisdiction includes "nothing which inherently or necessarily requires judicial determination." Id. at 453.

The Bakelite Court also noted the long history of the Court of Claims' issuing advisory opinions to Congress and noted that "a duty to give decisions which are advisory only, and so without force as judicial judgments, may be laid on a legislative court, but not on a constitutional court established under article 3." The Bakelite Court recognized that the Court of Claims was "undoubtedly and completely under the control of Congress." *Id.* at 455.

The Court expressly adopted the sovereign immunity/public rights rationale as its justification for determining that the Court of Claims could conduct its proceedings as a legislative court in the 1933 decision Williams v. United States, 289 US 553 (1933). The question presented in that case was whether Congress could reduce the salary of a judge serving on the old Court of Claims. The Court held:

> "Since all matters made cognizable by the Court of Claims are equally susceptible of legislative or executive determination, they are, of course, matters in respect of which there is no constitutional right to a judicial remedy, and the authority to inquire into and decide them may constitutionally be conferred on a nonjudicial officer or body."

The Court explained that the reason for its decision was the dicta presented in Bakelite: that the Court of Claims' function, "to examine and determine claims for money against the United States. . . . is one which Congress has a discretion either to exercise directly or to delegate to other agencies," and that "none of the matters made cognizable by the court inherently or necessarily requires judicial determination." The Court explicitly held that the earlier utterances describing the Court as subject to Article III had been dicta. The Court never questioned, but instead explicitly relied upon, the proposition that the entire basis of the jurisdiction of the Court of Claims involved waivers of sovereign immunity. *Id.* at 568 (collecting supporting cases).

Congress had never actually asked for authority to downgrade the court's status to an Article I court, however. Congress therefore attempted to undo the Williams holding in 1953, by expressly declaring that the Court of Claims was "established under Article III of the Constitution of the United States." See "An Act to Amend Title 28" (1953)("Such court is hereby declared to be a court established under Article III ...")

In 1962, the Supreme Court again considered the Court of Claims' status in Glidden Co. v. Zdanok, 370 US 530 (1962) this time affirming that the Court of Claims was indeed a true Article III court. The Glidden decision was quite critical of the earlier Williams decision, which it described as of "questionable soundness." *Id.* at 543. The Glidden Court recognized that the earlier Williams decision equated Congress' perceived ability to establish the Court of Claims as an Article I court with Congress having actually done so. As the Court noted, however, those propositions need not logically follow. Without addressing the extent of Congress' power to do something it had not done, the Court explicitly disagreed with the conclusion that the Court of Claims was an Article I court, holding instead that Congress had actually established that entity as an Article III court.

Most importantly for this brief, while so holding, the Court in Glidden not only did not agree with the Williams holding—that Congress could commit the work then being performed by the Court of Claims to a non-Article III tribunal—but also explicitly refused to assess that question. The Court instead took the opportunity to indicate that it had "certain reservations about" the accuracy of the Williams Court's description of the jurisdiction of the Court of Claims. The Court explicitly recognized that, contrary to the Williams Court's description of that jurisdiction, the grant of authority "to award just

compensation for a governmental taking, empowered [the Court of Claims] to decide what had previously been described as a judicial and not a legislative question." Because the Court determined that the Court of Claims was an Article III court, it never had an occasion to correct that error.

The status of the Court of Claims as an Article III court ended when Congress passed the Federal Courts Improvement Act of 1982: "An Act to establish a United States Court of Appeals for the Federal Circuit, to establish a United States Claims Court, and for other purposes." When Congress created that new structure, it was focused upon the creation of a new appellate court, the United States Court of Appeals for the Federal Circuit, which would, for the first time, consolidate patent appeals into a single court. To create the new appellate court, Congress, after ten years of study, decided to merge the Court of Customs and Patent Appeals with the appellate division of the Court of Claims. Congress simply moved the Court of Claims judges to the newly created appellate court.

But Congress still had to create a trial court to deal with the cases that had been decided by the old Court of Claims. In what appears to have been almost an afterthought, in the same act that created the Federal Circuit, Congress "elevated" the commissioners of the old Court of Claims, making those judges the first to serve on a new trial court, the United States Claims Court,

which would later come to be called the United States Court of Federal Claims. To explain the structure of the new trial court responsible for deciding claims against the federal government—claims previously the responsibility of the old Court of Claims—Congress stated:

> "The establishment of the Claims Court accomplishes a much needed reorganization of the current system by assigning the trial function of the court to trial judges whose status is upgraded and who are truly independent. Presently, the commissioners of the Court of Claims are appointed by the Article III judges of that court and do not have the power to enter dispositive orders; final judgment in a case must be made by the Article III judges after reviewing findings of fact and recommendations of law submitted by a commissioner. The creation of the United States Claims Court will reduce delay in individual cases and will produce greater efficiencies in the handling of the court's docket by eliminating some of the overlapping work that has occurred as a result of this process."

The creation of that new entity did not have the effect that Congress intended. Congress believed that the role of the Court of Federal Claims judges was to serve as "upgraded" versions of the commissioners from the old Court of Claims. That is not an accurate description of the solution that was implemented, however. While the status of the individual commissioners was upgraded from their previous positions as adjuncts to Article III judges, those newly elevated judges do not fill the role of the old commissioners. Unlike the commissioners who they replaced, the Court of Federal Claims judges issue final judgments that are not reviewed by Article III judges before the final judgments are issued.

In addition, while the traditional role of the old Court of Claims was limited to the award of monetary damages, the court now has expanded authority "[t]o provide an entire remedy and to complete the relief afforded by the judgment," which involves the granting of some equitable relief. The judges of the Court of Federal Claims therefore exercise authority that is more akin to the authority of the Article III judges of the Court of Claims. From the perspective of litigants bringing claims in the Court of Federal Claims, the Court of Federal Claims judges stepped into the shoes of the old Article III judges of the Court of Claims, not the commissioners of that dissolved body. When the appropriate comparison is made, the new trial court judges have a reduced, not upgraded, status.

In addition, while Congress believed that in creating the Court of Federal Claims it was creating judges who are "truly independent," in effect Congress reduced the independence of the body that decides monetary claims against the United States. While the judges who had previously heard such claims were Article III judges, the judges who now hear those cases are appointed for limited terms and do not enjoy Article III's protections. Because the central purpose of Article III is to ensure the independence of the judiciary, by substituting Article I judges into the role once filled by Article III judges, Congress has actually reduced the independence of that body. Thus, through

the 1982 restructuring, Congress, in effect, changed its mind about its decision to permit citizens to bring lawsuits for money to the judiciary. Instead it has decided that when citizens sue the federal government and believe they are entitled to more than $10,000, they may only pursue those large claims in legislative courts controlled by Congress. And while it is not at all clear that Congress intended that effect, it is crystal clear that the result was Article I judges unconstitutionally deciding takings claims which require Article III judges.

CONCLUSION

The Supreme Court has not discussed whether the current structure of the Court of Federal Claims comports with the requirements of Article III. The Supreme Court has granted certiorari to takings cases originating in the Court of Federal Claims on multiple occasions. See, e.g., Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012). When the Court has granted certiorari, it appears to have assumed that jurisdiction is proper based upon its statutory source, the Tucker Act, without assessing the Act's constitutionality. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016–17 (1984) (citing United States v. Causby, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine.")). Such cases, in addition to being dicta where

the Article III has never been raised, briefed, or considered by the Supreme Court, also flow from cases decided before 1982 when the Article III Court of Claims was replaced by the Article I Court of Federal Claims.

It is the Constitution itself which requires that takings claims be heard only by Article III courts. A waiver of sovereign immunity is not required. "Congress has nothing to do with it." Determining damages from a takings is a "judicial function" which requires an Article III court, not an Article I legislative court, or any other agency or entity Congress happens to create.

Respectfully submitted,

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Certificate of Service

A true and exact copy was mailed and electronically delivered to all parties this 17 day of MAR, 2017.

Michael Sammons