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LEGISLATIVE AND ADMINISTRATIVE COURTS:

Northern Pipeline and Related Developments in Federal Constitutional Law

Gerard J. Rehel, Jr.*

Winning Essay
1984 Law Student Essay Contest

1. Introduction

In 1982, the Supreme Court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co.¹ held that non-article III judges² could not constitutionally exercise jurisdiction vested in them under the Bankruptcy Reform Act of 1978. The decision has created a serious problem for Congress by forcing it to restructure the bankruptcy courts; however, the ramifications of Northern Pipeline extend far beyond the case's immediate impact on

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¹ 458 U.S. 50 (1982). Justice Brennan wrote the plurality opinion, joined by three other Justices. Justice Rehnquist joined by Justice O'Connor concurred separately. Justice White, joined by Justice Powell and the Chief Justice dissented. For commentaries see Currie, Bankruptcy Judges and the Independent Judiciary, 16 Creighton L. Rev. 441 (1983); King, Aftermath of Northern Pipeline, 40 Wash. & Lee L. Rev. 109 (1983); Krattenmaker, Article III and Judicial Independence: Why the Bankruptcy Courts are Unconstitutional, 70 Geo. L.J. 297 (1981); Redish, Legislative Courts Administrative Agencies and the Northern Pipeline Decision, 1983 Duke L.J. 197 (1983).

² Section 1 of article III of the Constitution says,

The judicial Power of the United States, shall be vested
in one Supreme Court, and in such inferior Courts as the

(Footnote continued on next page.)

bankruptcy adjudication.³ Non-article III officers currently exercise federal judicial power in several other contexts; after Northern Pipeline, the constitutionality of their exercise of jurisdiction is in question. Attention has particularly focused on adjudication of article III cases by Magistrates and by administrative agencies. Although the Federal Magistrates Act has thus far withstood attacks based on Northern Pipeline, the constitutionality of administrative adjudication is not as certain.

This paper reviews the Supreme Court's decision in Northern Pipeline, emphasizing the analysis of Justice Brennan's plurality opinion, and then applies this analysis to the Federal Magistrates Act. In particular, attention will be given to decisions of the U.S. Courts of Appeals, holding delegation to Federal Magistrates constitutional.⁴ The

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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 Section 1. Generally non-article III judges are considered to be those adjudicators who do not have the life term and fixed salary protections of article III. Northern Pipeline, 458 U.S. at 60, 61.

Bankruptcy Court Judges are appointed to office for a 14 year term by the President, with the advice and consent of the Senate. 28 U.S.C. Sections 152, 153(a) (Supp. IV 1976). Bankruptcy Judges are subject to removal by the judicial council of the circuit on account of "incompetency, misconduct, neglect of duty or physical or mental disability." 28 U.S.C. Section 153(b) (Supp. IV 1976). In addition, salaries of bankruptcy judges are subject to adjustment under the Federal Salary Act. 28 U.S.C. Section 154 (Supp. IV 1976).

³ The Court has stayed the effect of its order until October 4, 1982, in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." 102 S. Ct. at 2880. The stay was extended until December 24, 1982, but on December 23, 1982 a further extension was denied. 103 S. Ct. 662 (1982). The jurisdiction of the bankruptcy courts has been extended until April 30, 1984 by Public Law #98-249. A further extension of jurisdiction until May 25, 1984 is awaiting Presidential approval.

⁴ See Wharton-Thomas v. U.S., 721 F.2d 922 (3rd Cir. 1983); Pacemaker Diagnostic Clinic of America, Inc. v. Instrumedix, Inc., 725 F.2d 537 (9th Cir. 1984) (*en banc*). Both Circuits have held the Federal Magistrates Act constitutional, relying primarily upon the consent of the litigants (Footnote continued on next page.)

paper then distinguishes administrative agency adjudication from adjudication under the Federal Magistrates Act. Finally, the Northern Pipeline analysis is applied to administrative adjudication and compulsory arbitration. Arbitration provisions under the Railway Labor Act,⁵ the Federal Insecticide, Fungicide, Rodenticide Act,⁶ and the Employee Retirement Income Security Act⁷ will be discussed.

The paper concludes that under the Northern Pipeline analysis, certain administrative agency adjudication and several compulsory arbitration provisions unconstitutionally vest article III jurisdiction in non-article III judicial officers. While trends toward alternative dispute resolution are admirable and much needed,⁸ adjudication of common law disputes by non-article III officers violates the doctrine of separation of powers and deprives citizens of their constitutional right to a decision by an article III judge. Northern Pipeline may be an impediment to the growth of alternative dispute resolution, however it may also be the long awaited check on the "headless fourth branch" of the federal government.⁹

(Footnote continued from preceding page.)

which is obtained before a magistrate presides over a case. Other Circuits have also held the Act constitutional. See Collins v. Foreman, No. 83-7938, slip op. (2nd Cir. Feb. 22, 1984); Goldstein v. Kelleher, No. 83-1411, slip op. (1st Cir. 1984).

⁵ 45 U.S.C. Section 153 (1981).

⁶ 7 U.S.C. Section 136a (1982).

⁷ 29 U.S.C. Section 1401 (Supp. V 1981).

⁸ See Kritzer and Anderson, The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Made, and Cost In The American Arbitration Association and the Court, 8/1 The Just. Sys. J. 6 (1983); W. Burger, The Washington Post, January 25, 1982, p. 8. Chief Justice Warren Burger's concern of the ability of the courts to handle increasing litigation has been helpful to those who want to develop alternative forums of dispute resolution.

⁹ S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 103, 104 (1979). The criticism was directed in particular at the independent regulatory commissions, but experience teaches that agencies nominally accountable to the President often enjoy considerable de facto autonomy. Id.

11. Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

1. Holding

In Northern Pipeline, the U.S. Supreme Court held the bankruptcy court system unconstitutionally vested judicial power in non-article III judges.¹⁰ Although there are recognized exceptions to the article III requirement that the judicial power of the United States be exercised in article III courts, the Northern Pipeline Court held that the Bankruptcy Reform Act did not fall within any such exception.¹¹

Northern sued Marathon Pipe Line to recover damages for an alleged breach of contract.¹² Justice Brennan explained that such a right involved "the liability of one individual to another under the law as defined" and therefore a private right.¹³ Since it was a "private right" being adjudicated, the first exception allowing "public rights" to be delegated to non-article III judges, could not save the Reform Act. The Court examined the second exception allowing delegation of private rights to adjuncts.¹⁴ The adjunct exception requires the essential attributes of judicial power to be retained in an article III court.¹⁵ The Court found that these attributes of judicial power were not retained by an article III court; therefore, the Bankruptcy Reform Act was unconstitutional.

2. Analysis

Justice Brennan, distinguished between public and private rights, reasoned that while public rights can be adjudicated by a non-article III officer, private rights must be adjudicated by an article III court.¹⁶

¹⁰ 458 U.S. at 87.

¹¹ Id. at 64-67. The three recognized exceptions which the Court looked at were: 1) territorial courts, 2) courts-martial, and 3) courts that adjudicate public rights. Id. The Court also later looked to the adjunct exception, but found that this could not save the Reform Act. Id. at 86.

¹² Id. at 56. Northern Pipeline also alleged misrepresentation, coercion, and duress. Id.

¹³ Id. at 71, 72.

¹⁴ Id. at 77, see notes 23-32 and accompanying text infra.

¹⁵ Id. at 81.

¹⁶ Id. at 67-70. The Northern Pipeline Court cited to its recent reference to the public-private right dichotomy in Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 456 (1977). Id. at 67, 70. In Atlas Roofing, the Court held that the Seventh Amendment did not prohibit
(Footnote continued on next page.)

Only tribunals which are adjunct to article III courts can constitutionally adjudicate private rights.¹⁷ The Court analogized adjuncts to a jury or a special master.¹⁸

Public rights are those rights which arise "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive and legislative departments."¹⁹ The presence of the United States as a proper party to the proceeding is a necessary but not conclusive means of identifying a public right.²⁰ Justice Brennan explained that the justification for excluding public right adjudication from article III's mandatory core, is the principle of sovereign immunity.²¹ Absent the consent of Congress, sovereign immunity protects the

(Footnote continued from preceding page.)

Congress from assigning adjudication of public rights to an administrative forum with which a jury would be incompatible. 430 U.S. at 460. This reference by the Court to Atlas Roofing has been criticized by at least one commentator. See Redish, Legislative Courts, Administrative Agencies and the Northern Pipeline Decision, 1983 Duke L.J. 197, 207 (1983).

Redish argues that Atlas Roofing itself was controversial since the Seventh Amendment right to a jury trial had never been thought to turn on a public-private rights distinction but on an analogy to common law practice. Redish at 207. But Redish is so critical of the public-private right dichotomy, he fails to realize that the dichotomy itself is based upon an analogy to common law practice. See Northern Pipeline at 69, n. 23 (citing to Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284 (1856)). It is submitted common law private rights are those rights which must be adjudicated by an article III court and which entitles one to a trial by jury.

¹⁷ Id. at 80. Justice Brennan explained, "Congress' power to create adjuncts and assign them limited adjudicatory functions is in no sense an exception to Article III." Id. at 77. "Rather, such an assignment is consistent with Article III, so long as 'the essential attributes of the judicial power' are retained in the Article III court . . ." Id. Nevertheless, the creation of an adjunct is a mean by which a non-article III officer may adjudicate some federal judicial power.

¹⁸ Id. at 77.

¹⁹ Id. at 67, 68.

²⁰ Id. at 69 n. 23. The Court added that even with respect to matters that arguably fall within the scope of the public rights doctrine, the presumption is in favor of article III courts. Id.

²¹ Id. at 67. Sovereign immunity explains in part the doctrine of public rights. Id. The public rights doctrine also "draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political branches of government." Id.

government from suit. In giving consent, Congress may attach conditions as it deems proper and can indeed require that the suits be brought in a legislative court or agency specially created to consider them.²² Thus, public rights may be adjudicated at the determination of Congress, in a non-article III tribunal.

On the other hand, "the liability of one to another under the law as defined is a matter of private rights."²³ As an example of adjudication of private rights, the Court noted Crowell v. Benson,²⁴ which concerned the liability of an employer to his employee under the Longshoremen's and Harbor Workers' Compensation Act. Justice Brennan explains that disputes involving private rights must be adjudicated by an independent article III court since private right disputes "lie at the core of the historically recognized judicial power."²⁵

Two subclasses of private rights were identified by Justice Brennan.²⁶ The first are congressionally created private rights, and the second are common law private rights. Both subclasses of private rights are referable to adjuncts of article III courts so long as the essential attributes of judicial power are retained in an article III court.²⁷ Congressionally created private rights require fewer attributes be retained in an article III court than do common law private rights.²⁸

²² Id. at 67, 68. For a critique of this rationale, see Redish, Legislative Courts, Administrative Agencies and the Northern Pipeline Decision, 1983 Duke L.J. 197, 213 (1983).

²³ Id. at 69, 70.

²⁴ 285 U.S. 22 (1932), see notes 29 & 30 and accompanying text infra.

²⁵ 458 U.S. at 70.

²⁶ Id. at 78, 79 & 83.

²⁷ Id. at 77.

²⁸ Id. at 81. The Court explains that Crowell does not support the further proposition that Congress possesses the same degree of discretion in assigning traditional judicial power to adjuncts engaged in the adjudication of rights not created by Congress. Id. The Court upheld the adjudication of common law private rights in Raddatz, under more scrutiny than it gave the delegation of congressionally created private rights in Crowell. Id. at 82, 83. See note 32 and accompanying text infra.

When a congressionally created private right is at issue, limited attributes of judicial power can be delegated to an adjunct to adjudicate such a right.²⁹ As illustrated by Crowell, these attributes include:

1. power to adjudicate a specialized subject matter;
2. channeled fact finding, and
3. power to issue a limited type of order.

In addition, the adjunct must be subjected to a standard of judicial review less deferential than clearly erroneous, and it must need to enforce its order in an article III court.³⁰

When a common law private right is at issue, even less discretion exists on the part of Congress to prescribe the manner of adjudication.³¹ Justice Brennan indicated that decisions of adjuncts involving common law private rights must be subject to de novo review by the district court.³²

3. Summary

Northern Pipeline establishes two exceptions to the article III requirement that federal judicial power be exercised by article III courts. First, public rights, which at a minimum require the government as a party to the suit, may be delegated to non-article III tribunals. Secondly, private rights may be delegated to adjuncts of article III courts so long as the essential attributes of judicial power remain in an article III court.³³ The extent to which the attributes must remain in the article III court will depend on whether the private right is a congressionally created private right or a common law private right.

²⁹ Id. at 81. The rationale behind allowing an adjunct to adjudicate congressionally created private rights is "that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which the right may be adjudicated -- including the assignment to an adjunct of some functions historically performed by judges." Id.

³⁰ Id. at 84, 85.

³¹ Id. at 81, see note 28 and accompanying text supra.

³² Id. at 79. In Raddatz, the Supreme Court upheld the 1978 Magistrates Act, where the magistrate's proposed findings and recommendation were subject to de novo review. Id. The Court stressed that under the 1978 Act, the authority to make an informed, final determination remains with the judge. Id. at 81. The delegation of adjudication of common law private rights was upheld in Raddatz since "the ultimate decision is made by the district court. Id.

³³ Although the Northern Pipeline Court notes that the adjudication by an adjunct is not an exception to the article III requirement, it is a means by which a non-article III officer can exercise some federal judicial power.

When congressionally created private rights are adjudicated by adjuncts, attributes noted in Crowell may be delegated to the adjunct. De novo review is required when an adjunct adjudicates common law private rights.

III. Application to the Federal Magistrates Act

1. Introduction

The debate over the constitutionality of the Federal Magistrates Act centers on the issue of whether essential attributes of judicial power are retained in an article III court.³⁴ Northern Pipeline requires de novo review when common law private rights are adjudicated by an adjunct, something other than de novo review has been accepted by the U.S. Courts of Appeals that have considered the constitutionality of the Act.³⁵

At issue is the 1979 addition of 28 U.S.C. Section 636(c) which allows a magistrate to conduct a civil trial involving common law private rights, but does not provide for de novo review by a district judge. In United States v. Raddatz,³⁶ the Supreme Court upheld the 1978 Federal Magistrates Act which had permitted district court judges to refer certain pretrial motions to a magistrate for initial determination. In upholding the Act, the Court observed that the magistrate's proposed findings were subject to de novo review by the district court.³⁷ Without de novo review

³⁴ Magistrates are non-article judges since they do not have life tenure or salary protection. Federal Magistrates serve for eight year terms and must retire at age seventy. 28 U.S.C. Section 631(d)(e) (Supp. V 1981). Magistrates may also be removed from office during a term for incompetency, misconduct, neglect of duty, or physical or mental disability, and a sitting magistrate's office may be terminated if the Judicial Conference decides that the office is no longer needed. 28 U.S.C. Section 631(l) (Supp. V 1981). The salaries of magistrates are also not protected since they may be changed by the judicial conference to further the expeditious administration of justice. 28 U.S.C. Section 633(c) (Supp. V 1981). This salary adjustment, however, is limited in that a magistrate's salary may be reduced during his term in office only to what it was at the beginning of the term. Id.

³⁵ See note 3 supra for a listing of the Courts of Appeals which have thus far upheld the Federal Magistrates Act as constitutional.

³⁶ 447 U.S. 667 (1980).

³⁷ Id. at 676, 677, 681-683.

by the district court, the issue arises whether essential attributes of judicial power are retained in an article III court.

The U.S. Courts of Appeals thus far to consider the issue, have held the Federal Magistrates Act constitutional. Courts have noted two factors upon which the Act withstands constitutional challenges. These factors are first, the consent of litigants, and secondly, the extensive control over the magistrates by article III courts.³⁸

2. Pacemaker Diagnostic Clinic of America
v. Instrumedix³⁹

Pacemaker Diagnostic Clinic of America charged Instrumedix with infringement of a patent. The parties consented to a trial before a magistrate. The magistrate found the patent valid but not infringed; both parties appealed directly to the Court of Appeals for the Ninth Circuit. The Court of Appeals, *sua sponte* raised the issue of the constitutionality of the Federal Magistrates Act.⁴⁰ A panel of three judges initially heard the appeal.⁴¹

The panel held that the Magistrates Act unconstitutionally vested non-article III officers with jurisdiction to exercise federal judicial power.⁴² Utilizing the *Northern Pipeline* analysis, the panel held that magistrates were adjudicating common law private rights without the essential attributes of judicial power remaining in an article III court.⁴³ The panel explained that magistrates make the ultimate decisions and enter final judgments. The panel concluded that litigant consent could not waive the jurisdictional requirement of article III.⁴⁴

³⁸ See *Pacemaker*, 725 F.2d at 542, 544; *Wharton-Thomas*, 721 F.2d 922, 930.

³⁹ 712 F.2d 1305 (9th Cir. 1983) reh'g granted, op. withdrawn, 718 F.2d 971 (9th Cir. 1983). *Pacemaker Diagnostic Clinic, Inc. v. Instrumedix*, 725 F.2d 537 (9th Cir. 1984) (*en banc*).

⁴⁰ 725 F.2d 537, 540.

⁴¹ 712 F.2d 1305.

⁴² *Id.* at 1307.

⁴³ *Id.* at 1310. The panel first explained that magistrates do not have the article III protections of life tenure and fixed salary. *Id.* at 1309. The adjudication could not be upheld as adjudication of public rights. *Id.* The Court then examined whether the adjudication could be upheld under the adjunct exception. *Id.* The panel concluded that since the ultimate decision was made by the magistrate, not the district court, the essential attributes of judicial power were not retained in an article III court. *Id.* at 1310.

⁴⁴ *Id.* at 1312. The panel viewed the requirement of adjudication of common law private rights by an article III court as a jurisdiction requirement, which could not be waived by the litigants. *Id.*

The Ninth Circuit, sitting en banc, reversed the panel and held the Federal Magistrates Act constitutional.⁴⁵ The court held that "in light of the statutory precondition of voluntary litigant consent and the provisions for the appointment and control of the magistrates by Article III courts, the conduct of civil trials by Magistrates is constitutional."⁴⁶

The court explained that the issue of separation of powers has two components.⁴⁷ "One axis reaches to the person affected by government action and encompasses his or her relation to a constitutional branch; the other axis runs from each government branch to the others to insure separation and independence in the constitutional structure."⁴⁸ Both components need to be satisfied to uphold the delegation of judicial power.⁴⁹

The first axis is the litigant's personal right to demand article III adjudication of a civil suit.⁵⁰ This personal right, like many other rights, can be waived by the litigant.⁵¹ The court explained that without litigant consent the adjudication by a magistrate of private rights would be unconstitutional.

⁴⁵ 725 F.2d 537 (9th Cir. 1984). Although the court felt that the patent issue may be a federally created right, the court reached the constitutional issue of common law private rights since the issue would arise in other civil cases. Id. at 541.

⁴⁶ Id. at 540.

⁴⁷ Id. at 541.

⁴⁸ Id.

⁴⁹ Id. Where a case is transferred from an article III court to a different forum, both the rights of the parties and the relations between the separate branches of government are implicated. Id. at 541. A mandatory provision for trial of an unrestricted class of civil cases by a magistrate would violate the constitutional rights of the litigants. Id. at 542. The component of the separation of powers rule that protects the integrity of the constitutional structure cannot be waived by the parties. Id. at 544.

⁵⁰ Id. at 541.

⁵¹ Id. The court explained that "authorities support the premise that article III adjudication is, in part, a personal right of the litigant." Id. (citing to Glidden Co. v. Zdanok, 370 U.S. 530, 536 (1962)).

The court noted that the Supreme Court has allowed criminal defendants to waive even fundamental rights. Id. at 543. The following rights
(Footnote continued on next page.)

The second axis concerns the doctrine of separation of powers.⁵² The issue is whether there is an impairment of the performance of the branch's essential role in the constitutional system. The court explained that there is a potential for such an impairment when there is an erosion of the central powers of the judiciary by permitting the delegation of its authority.⁵³ The court concluded that the Magistrates Act contained sufficient protection against such erosion of judicial power.

The sufficient protections in the Magistrates Act evolve around the extensive administrative control by article III courts over the magistrate system.⁵⁴ The court noted that an article III judge can cancel an order of reference,⁵⁵ and that the selection and retention of magistrates is the responsibility of article III judges.⁵⁶ The court concluded that these factors provided protection comparable to de novo review.⁵⁷

(Footnote continued from preceding page.)
may be waived:

the right to be free from self-incrimination, Garner v. United States, 424 U.S. 648 (1976); the right to counsel, Adams v. United States ex rel. McCann, 317 U.S. 269 (1942); the right to be free from unreasonable searches and seizures; Schneckloth v. Bustamonte, 412 U.S. 218 (1973); the right to a speedy trial, Barker v. Wingo, 407 U.S. 514 (1972); the right to a jury trial, Duncan v. Louisiana, 391 U.S. 145, 158 (1968); and even by pleading guilty, the right to trial itself. See Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L.Ed.2d 274 (1969).

Id. at 543.

52 Id. at 543, 544.

53 Id. at 544.

54 Id. at 544. "The statute invests the Article III judiciary with extensive administrative control over the management, composition, and operations of the magistrate system." Id.

55 725 F.2d at 545 (citing to 28 U.S.C. Section 636(c)(6)). The article III court has authority to cancel an order of reference, sua sponte or on application of the parties. Id.

56 Id. (citing to 28 U.S.C. Section 631). Therefore, magistrates are not directly dependent upon loyalty to offices in either of the political branches. Id.

57 Id. at 546. The court concluded that both Section 636(c), the procedure at issue in the case at bar; and Section 636(b), the issue of de novo review upheld in U.S. v. Raddatz, have their own potential defects and comparative advantages. Id.

3. Wharton-Thomas v. United States⁵⁸

A suit seeking compensation for personal injuries allegedly received in an automobile collision with a Postal Service vehicle was brought against the United States under the Tort Claims Act.⁵⁹ With the parties' consent, the case was tried before a federal magistrate. The magistrate found for the plaintiff; the plaintiff appealed the award as inadequate. The U.S. Court of Appeals for the Third Circuit raised the issue of the constitutionality of the Federal Magistrates Act sua sponte.⁶⁰

The court distinguished Wharton-Thomas from Northern Pipeline and U.S. v. Raddatz,⁶¹ on the grounds of litigant consent.⁶² The court reasoned that the ultimate decisions must remain in a district court only when there is no consent by the litigants to do otherwise.⁶³ The court explained that what was being waived was not jurisdiction of the trial court but a particular mode of trial or factfinder.⁶⁴

⁵⁸ 721 F.2d 922 (3rd Cir. 1983).

⁵⁹ Id. at 923. The court noted that in such an action the delegation may be constitutional based upon the public rights exception. Id. at 930. The court chose instead to decide the issue on the broader basis which it did. Id. The court did so since in a companion case, Williams v. Marsonelli, the public rights exception would not apply. Id.

It is arguable whether the right being adjudicated in Wharton-Thomas is a public right. The presence of the United States as a party to the action is only one factor pointing to a public right. See notes 19-22 and accompanying text supra. It is submitted that the adjudication of a personal injury suit is not an area traditionally thought to be within the prerogative of the executive branch. Therefore, the right being adjudicated here would seem to be better classified as a common law private right.

⁶⁰ Id. at 923. Plaintiff took a direct appeal to the magistrate's judgment, to the U.S. Court of Appeals for the Third Circuit. See 28 U.S.C. Section 636(c)(3) (Supp. V 1981).

⁶¹ 447 U.S. 667 (1980). For a discussion of U.S. v. Raddatz, see note 36 and accompanying text supra.

⁶² 721 F.2d at 928.

⁶³ Id.

⁶⁴ Id. at 926, 927.

The court went on to explain that magistrates function as an integral part of the district court. Magistrates are appointed and subject to dismissal by federal judges.⁶⁵ Consensual reference of a case to a magistrate may be vacated by a district judge, either *sua sponte* or on motion of the parties.⁶⁶ In its conclusion, the Wharton-Thomas Court noted four factors it had relied upon in holding the Federal Magistrates Act constitutional. It noted:

1. the reference to a magistrate is consensual;
2. the district judge has the power to vacate the reference;
3. the magistrate is appointed by the district judges, is a part of the district court, and is specially designated to try cases, and
4. the parties have a right to appeal to a district judge or the court of appeals.⁶⁷

4. Summary

The constitutionality of the Federal Magistrates Act has been upheld by the U.S. Courts of Appeals that have considered the issue. The Ninth Circuit relied upon both litigant consent and extensive administrative control by the district courts. The Third Circuit relied primarily upon litigant consent to uphold the Act.

It is submitted that the Ninth Circuit is correct in its analysis that litigant consent does not resolve all the constitutional problems with the Federal Magistrates Act. In addition to litigant consent, the doctrine of separation of powers requires essential attributes of judicial power be retained in an article III court.⁶⁸ Both Courts of Appeals noted several factors in addition to litigant consent which keep essential attributes in an article III court. These factors include:

⁶⁵ Id. (citing to 28 U.S.C. Sections 631(a) and 631(i) (1976 ed., Supp. v 1981)).

⁶⁶ Id. (citing to 28 U.S.C. Section 636(c)(6)).

⁶⁷ Id. at 930. It should be emphasized that the availability of appellate review in an article III court does not in itself satisfy constitutional requirements. Northern Pipeline, 458 U.S. at 86 n. 39.

⁶⁸ 725 F.2d at 544 (*en banc*). "on its most fundamental plan the separation of powers doctrine protects the whole constitutional structure by requiring that each branch retain its essential powers and independence." Id. (citing to Buckley v. Valeo, 424 U.S. 1 (1976)).

Although this paper examines the unconstitutional delegation of adjudication by federal compulsory arbitration provisions, the constitutionality of consensual arbitration under the Uniform Arbitration Act is not within the scope of this paper.

1. the district judge has the power to vacate the reference to a magistrate, and
2. magistrates are appointed by the district judge and are subject to dismissal by district judges.

As the Ninth Circuit explained, attributes retained in an article III court under the Magistrates Act protect the judiciary against intervention by the executive or legislative branches of government.⁶⁹ Magistrates are not dependent upon loyalty to any officer of either of the other branches of government. In sum, the Magistrates Act satisfied the doctrine of separation of powers since it sufficiently protects the judiciary from the encroachment of other branches of government.⁷⁰

IV. Federal Administrative Agencies

1. Introduction

Federal administrative agencies also perform adjudicatory functions.⁷¹ Administrative officers do not receive the fixed salary and life tenure protections of article III. Thus, the Northern Pipeline analysis has ramifications extending to administrative adjudication.

Two issues arise when the Northern Pipeline analysis is applied to administrative adjudication. The first is whether administrative agencies can without limit, constitutionally adjudicate public rights. Second, is whether administrative agencies can constitutionally adjudicate common law private rights.

2. Limitations on the Adjudication of Public Rights by Administrative Agencies.

Northern Pipeline establishes that public rights may be adjudicated at the determination of Congress, in a non-article III tribunal.⁷² Article III, Due Process, and the doctrine of separation of powers place very little limitation upon the adjudication of public rights by non-article III tribunals.

a. Article III Limitation

The Northern Pipeline Court noted that judicial review of administrative adjudication may be required by article III. The Court said:

⁶⁹ Id. at 545.

⁷⁰ Id. at 546.

⁷¹ See generally Davis, Administrative Law Sections 8.01-8.13 (1972).

⁷² See notes 19-22 and accompanying text supra.

"Moreover, when Congress assigns these matters [public rights] to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Article III judicial review."⁷³ This position is in contradiction to the Supreme Court's decision in Schweiker v. McClure,⁷⁴ which upheld the adjudication of public rights by private insurance carriers without any governmental review.⁷⁵

b. Due Process Limitation

At issue in Schweiker was whether Congress could provide that hearings on disputed claims for medicare payments were to be held by private insurance carriers, without a right of appeal to a government officer.⁷⁶ The U.S. Supreme Court upheld the adjudication of these public rights by private insurance carriers.⁷⁷ The Court stated that due process

⁷³ 458 U.S. 50, 70 n. 23 (citing to Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. at 455 n. 13).

⁷⁴ 456 U.S. 188 (1982). In Schweiker, the Supreme Court, two months before it decided Northern Pipeline, upheld the adjudication of public rights by private insurance carriers without any governmental review. Although the Schweiker Court did not explicitly label the rights involved as public rights, the rights were public rights. Rights related to public benefits have traditionally been recognized as public rights. See Crowell, 285 U.S. at 51.

⁷⁵ Id. at 189, 190. The medicare payments at issue were Part B supplemental medical benefits. Id. In order to make the administration of the program more efficient, Congress authorized the Secretary to contract with private insurance carriers to administer the payment of Part B claims. 42 U.S.C. Section 1395 u (1976 and Supp. IV).

A rejected claimant has the right to have a carrier employee, other than the initial decision maker, review the written record and affirm or adjust the original determination. Id. at 191. If the amount in dispute is \$100 or more, a still dissatisfied claimant then has a right to an oral hearing. Id. An officer chosen by the carrier, who has not yet participated in the adjudication, presides over the hearing. Id. Neither the statute nor the regulations make provisions for further review of the hearing officer's decision. Id.

⁷⁶ 456 U.S. at 189.

⁷⁷ 456 U.S. at 200.

only required an impartial tribunal and a weighing of the costs and benefits of imposing additional procedures.⁷⁸

In evaluating whether the tribunal was impartial, the Court explained that there is a rebuttable presumption that the tribunal is impartial.⁷⁹ The Schweiker Court reasoned that since carriers paid all claims from federal funds and since salaries of hearing officers were paid by the federal government, there was no proof of financial interest on the part of the carriers.⁸⁰ Without proof of a financial interest on the part of the carrier, there was no basis for assuming a derivative bias among hearing officers.⁸¹

The Schweiker Court applied the test it adopted in Mathews v. Eldridge to weigh the costs and benefits of providing subsequent review of a carrier's decision. The Mathews test establishes three factors relevant to such an inquiry. These factors are:

1. first, the private interest that will be affected by official actions
2. second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards, and finally,
3. the Government's interest; including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁸²

In applying the Mathews test, the Schweiker Court assumed the first and third factors were met and focused on the second factor.⁸³ It noted that insurance carriers are directed to select "qualified individuals"

⁷⁸ Id. at 195, 198.

⁷⁹ Id. at 195 (citing to Withrow v. Larkin, 421 U.S. 35, 47 (1975); United States v. Morgan, 313 U.S. 409, 421 (1941)). The Court explained that the presumption could be rebutted by a showing of conflict of interest or some other specific reasons for disqualification. Id. The burden of establishing a disqualifying interest costs on the party making the assertion. Id. at 196.

⁸⁰ Id. at 196.

⁸¹ Id. at 197

⁸² Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

⁸³ 456 U.S. at 198.

who have a "thorough knowledge of the Medicare program." 84 The Court concluded that "appellees simply have not shown that the procedures prescribed by Congress and the Secretary are not fair or that different or additional procedures would reduce the risk of erroneous deprivation of Part B benefits."85

The Schweiker Court upheld as constitutional the delegation of adjudication of public rights by a private officer, without requiring any judicial review of the private officer. It concluded that due process did not require a right to appeal to a government official from an insurance carrier's decision denying an award of medicare benefits.

c. Doctrine of Separation of Powers

The doctrine of separation of powers prevents Congress, itself, from adjudicating public rights. As explained in Justice Powell's opinion in Immigration and Naturalization Service v. Chadha,86 a violation of separation of powers occurs when one branch assumes a function that more properly is entrusted to another.87

In Chadha, the Supreme Court held unconstitutional the legislative veto of a decision of the Immigration and Naturalization Service.88 Justice Powell reasoned that the veto violated the doctrine of separation of powers.89

Justice Powell explained that by exercising the legislative veto, the House assumed the functions of reviewing final agency action which is ordinarily entrusted to the federal courts. He explained,

84 Id. at 199 (quoting Department of HEW, Medical Part B Carriers Manual, ch. VII, p. 12-21 (1980)).

85 Id. at 200.

86 103 S. Ct. 2764, 2788 (1983) (Powell J., concurring).

87 Id. at 2790. Justice Powell explained that the doctrine of separation of powers may be violated in two ways. Id. First, a branch of government may interfere with the other's performance of its constitutionally assigned function. Id. Secondly, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another. Id.

88 Id. at 2788. The majority relied primarily upon the Presentment Clause and the bicameral requirement to hold the one-house veto of a decision of the Immigration and Naturalization Service unconstitutional. Id. at 2787.

89 Id. at 2789.

"[I]n my view, the legislative branch in effect acted as an appellate court by overruling the Service's application of established law to Chadha."⁹⁰ He concluded that Congress violated separation of powers since it assumed a function that the Constitution entrusted to the judiciary.⁹¹

Thus, Congress cannot vest in itself the adjudication of public rights. Such adjudication by Congress would undercut the very principle of separation of powers.

d. Summary

Although the doctrine of separation of powers prevents Congress from reserving to itself the adjudication of public rights, there is little restriction on the ability of Congress to delegate the adjudication of public rights to administrative agencies. Although it has been suggested that article III might require judicial review of adjudication of public rights, the Supreme Court's decision in Schweiker undercuts that argument.⁹² Schweiker also illustrates that due process places little restriction upon the delegation of adjudication of public rights.

3. Adjudication of Common Law Private Rights
by Administrative Agencies.

a. Analysis

Northern Pipeline identified two subclasses of private rights. First, congressionally created private rights, may be adjudicated by adjuncts to article III courts so long as the limitations listed in Crowell are imposed upon the adjunct.⁹³ Secondly, common law private rights may be adjudicated by adjuncts to article III courts so long as de novo review is maintained by the article III court.⁹⁴ Administrative agencies such as the Federal Trade Commission and the Interstate Commerce Commission frequently adjudicate common law private rights. Administrative

⁹⁰ Id. at 2791 n. 8. He added "[a]nd unlike a court or an administrative agency, it did not provide Chadha with the right to counsel or a hearing before acting." Id.

⁹¹ Id. at 2791.

⁹² See notes 73-75 and accompanying text supra.

⁹³ 458 U.S. at 78. Crowell concerned the liability of an employee to his employer under the Longshoremen's and Harbor Workers' Compensation Act. 285 U.S. 22 (1932).

⁹⁴ Id. at 79. As an example of the adjudication of common law private rights by an adjunct the Court noted U.S. v. Raddatz, 447 U.S. 667 (1980). See notes 36 & 37 and accompanying text supra.

agency adjudication is not usually subject to de novo review⁹⁵ and differs from adjudication by Federal Magistrates.

Attributes which remain in an article III court when a magistrate adjudicates an issue do not remain in the court when an administrative agency adjudicates an issue.⁹⁶ First, adjudication by an administrative agency is not necessarily consensual. The exhaustion doctrine requires adjudication before an agency.⁹⁷ Secondly, administrative officers are not appointed or removed by article III judges.⁹⁸ Third, an article III judge cannot sua sponte, remove a case from an administrative agency.

De novo review of administrative agencies is the exception rather than the rule.⁹⁹ Equivalents to de novo review which upheld the Magistrates Act are not present in administrative adjudication. Thus, adjudication of common law private rights by administrative agencies is unconstitutional.

95 Various findings of administrative agencies are subject to various standards of review. Conclusions of law are reviewed de novo. 5 U.S.C. Section 706(2)c. Findings of facts are upheld if there is substantial evidence to support the finding. 5 U.S.C. Section 706(2)E. Determinations of policy are reviewed under the arbitrary and capricious/abuse of discretion standard. 5 U.S.C. Section 70(6)(2)A.

96 The attributes which remain in an article III court are listed in the text accompanying note 67 supra.

97 The exhaustion doctrine requires that a litigant exhaust his administrative remedy before he is entitled to judicial relief. Myers v. Bethlehem Shipbuilding Co., 303 U.S. 41, 50-51. See, e.g., Andrews v. Louisville & Nashville Railroad, 406 U.S. 320 (1972) and notes 115-128 and accompanying text infra. For a general discussion of the exhaustion doctrine see generally Davis, Administrative Law Sections 20.01-20.10 (1972).

98 In contrast to federal magistrates who are appointed by article III judges, administrators of federal agencies are generally appointed by the executive branch. See generally Schwartz, Administrative Law Section 6 (1976).

99 See note 92 supra.

b. Interstate Commerce Commission (I.C.C.)

The I.C.C. is an example of an administrative agency unconstitutionally adjudicating common law private claims. In addition to other disputes, the I.C.C. adjudicates contract-rate disputes between individuals and railroads.¹⁰⁰ Although much of its adjudication involves public rights, the I.C.C. cannot constitutionally adjudicate private rights. The Northern Pipeline Court noted that although bankruptcy itself may be a public right, bankruptcy judges could not annex to that right, the adjudication of private rights.¹⁰¹

The U.S. Court of Appeals for the Sixth Circuit has taken a different view in its recent decision in Detroit, Toledo and Ironton Railroad Co. and Grand Trunk Western Railroad v. Consolidated Rail Corporation (DTI/GTW v. Conrail). DTI/GTW filed suit against Conrail seeking an injunction to prevent an alleged breach of contract by Conrail. Conrail proposed to cancel certain joint rates, allegedly in violation of its contract with DTI/GTW. Applying the doctrine of primary jurisdiction, the Sixth Circuit dismissed the complaint and held that jurisdiction belonged to the I.C.C.¹⁰²

The Court of Appeals rejected DTI/GTW's argument that adjudication by the I.C.C. was an unlawful delegation of adjudication of private rights. The court reasoned that DTI/GTW's argument "assumes that the controversy in this case concerns private contractual rights only."¹⁰³ The Court labeled the entire controversy as involving public rights and held "the plenary control of the I.C.C. over rail rates appears clearly to bring tariff disputes within the definition of public rights controversies."¹⁰⁴

It is submitted that the Court of Appeals rationale has already been rejected by the U.S. Supreme Court in Northern Pipeline.¹⁰⁵ The

¹⁰⁰ See Guandolo, Transportation Regulation, at 299 (1972).

¹⁰¹ 458 U.S. at 71. The Court explained that the restructuring of debtor-creditor relations may well be a public right but it must be distinguished from the right to recover contract damages which is obviously a private right. *Id.* The Court rejected the argument that the authority of Congress to adjudicate bankruptcies carried with it an inherent power to adjudicate bankruptcy-related controversies. *Id.* at 72.

¹⁰² DTI/GTW v. Conrail, No. 82-1890, slip op. (6th Cir. Feb. 1, 1984). The doctrine of primary jurisdiction prohibits a court from exercising jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the Court. See generally Davis, Administrative Law Sections 19.01-19.06 (1972).

¹⁰³ DTI/GTW v. Conrail, No. 82-1890, slip op. at 6.

¹⁰⁴ *Id.*

¹⁰⁵ See note 101 *supra*.

DTI/GTW Court threw a blanket label on the entire controversy and ignored individual issues. Because a controversy may involve some public rights doesn't give the court jurisdiction over private right issues. The Northern Pipeline Court noted that bankruptcy itself may be a public right, but that did not make constitutional the adjudication of private contract issues.¹⁰⁶

It is further submitted that the contract issue in DTI/GTW was common law private right, just as the contract issue in Northern Pipeline.¹⁰⁷ public rights involve at a minimum the government as a party. The government was not a party to this action.¹⁰⁸ DTI/GTW involved a contract action any one individual against another; therefore, common law private rights.

The adjudication of a common law private right by an adjunct requires the adjunct's finding be reviewed de novo. An article III court does not have general de novo review over the I.C.C.¹⁰⁹ Nor is there any equivalent of de novo review maintained by the district court over the I.C.C.¹¹⁰ Thus, adjudication of common law private rights by the I.C.C. as unconstitutional.

¹⁰⁶ Id.

¹⁰⁷ In Northern Pipeline, Northern sued Marathon for an alleged breach of contract. 458 U.S. at 87. Here DTI seeks an injunction against Conrail to prevent Conrail from breaching its contract. DTI/GTW v. Conrail, slip op. at 1, 2.

¹⁰⁸ See notes 19-22 and accompanying text supra. And even if the issue here could be characterized as a federally created right, delegation would be unconstitutional since I.C.C. orders are enforceable without an article III court so determining. See list of attributes in text accompanying note 29 supra.

¹⁰⁹ The standard of review of a finding of an administrative agency will depend upon the issue under review. See note 95 supra.

¹¹⁰ The equivalents of de novo review noted by the U.S. Courts of Appeals are not present. In addition to the ability of an article III judge to appoint or remove a magistrate, an article III judge can remove a case from a magistrate's consideration. See notes 34-70 and accompanying text supra. Article III judges cannot remove or appoint administrators. Nor can a dispute be removed from an agency's consideration.

4. Adjudication of Common Law Private Rights by Compulsory Arbitration

a. Introduction

Compulsory arbitration has been looked to as an alternative to administrative adjudication,¹¹¹ and has been utilized to adjudicate common law private rights. Arbitration is conducted by an arbitrator who does not have life tenure or a fixed salary.¹¹² Since compulsory arbitration is non-consensual and judicial review of arbitrator's decisions is almost non-existent,¹¹³ delegation of adjudication of common law private rights to arbitrators is unconstitutional.¹¹⁴

b. Railway Labor Act¹¹⁵

Section 153 of the Railway Labor Act requires arbitration of disputes between an employee and a carrier growing out of "agreements concerning rates of pay, rules or working conditions."¹¹⁶ The arbitration is conducted by the Adjustment Board.¹¹⁷ The Board is exempt from the procedural requirements of the Administrative Procedure Act.¹¹⁸ Decisions of the Board are virtually immune from judicial review, since review is limited to fraud or lack of jurisdiction.¹¹⁹

In the 1972 case of Andrews v. Louisville & Nashville Railroad Co.,¹²⁰ an employee, claiming he was wrongfully discharged from his employment by the railroad, filed suit against the railroad. The federal

¹¹¹ See note 8 and accompanying text supra.

¹¹² Article III requires judicial power be vested in officers with life tenure and salary protection. See note 2 supra.

¹¹³ Arbitration provisions provide for little judicial review. For example, the Railway Labor Act provides for review only for fraud or lack of jurisdiction. 45 U.S.C. Section 153(p).

¹¹⁴ Northern Pipeline established that common law private rights may be adjudicated by adjuncts if de novo review is provided by the article III court. See notes 31 & 32 and accompanying text supra.

¹¹⁵ 45 U.S. C. Sections 151-188 (1981).

¹¹⁶ Id. at Section 153.

¹¹⁷ Id.

¹¹⁸ 5 U.S.C. Section 551(1).

¹¹⁹ 45 U.S.C. Section 153(p).

¹²⁰ 406 U.S. 320 (1972).

district court dismissed the complaint for plaintiff's failure to exhaust his administrative remedies under Section 153 of the Railway Labor Act. The U.S. Supreme Court affirmed the federal court.¹²¹

The U.S. Supreme Court held that Section 153 was the only remedy available to the aggrieved party.¹²² The Court explained that since the only source of the plaintiff's right not to be discharged was the collective bargaining agreement between the employer and the union,¹²³ the claim fell subject to the Act's requirement that it be submitted to the Adjustment Board.¹²⁴ The Court did not consider constitutional questions not raised by either party.¹²⁵ The dissent was not as restrained. It characterized the issue as a common law private right with a constitutional right to be adjudicated in a court before a jury.¹²⁶

It is submitted that adjudication by the Adjustment Board of a wrongful discharge claim under Section 153 of the Railway Labor Act is unconstitutional. A wrongful discharge claim is a common law private right.¹²⁷ The adjudication of a common law private right by an adjunct is permissible only if an article III court has de novo review of the adjunct's findings. Decisions of the Adjustment Board are virtually exempt from any judicial review.¹²⁸

¹²¹ Id. at 320, 321.

¹²² Id. at 325.

¹²³ Id. at 324. It was conceded by both parties that the only basis of the wrongful discharge claim was the collective bargaining contract. Id. With the expansion of the law of wrongful discharge such a concession is unlikely to be made. For a discussion of the law of wrongful discharge see Perritt, Employee Dismissal Law and Practice (1984).

¹²⁴ Id.

¹²⁵ Id. at 324-325 (citing to Rule 23(1)(C) and Mazur v. Stein, 347 U.S. 201, 206 n. 5 (1954)). The majority criticized the dissent for reaching the issue of a Seventh Amendment right to a jury. Neither party had argued the issue. Id.

¹²⁶ Id. at 330, 331 (Douglas, J., dissenting).

¹²⁷ It has been argued that a collective bargaining agreement is really a congressionally created right because it is enforceable only because of a statute. For a discussion of the nature of a collective bargaining agreement see D. Feller, A General Theory of the Collective Bargaining Agreement, 61 California Law Review 663 (1973). Even if the issue of wrongful discharge is a congressionally created right, the lack of any judicial review of the decision of the Adjustment Board would still invalidate the delegation under the Crowell attributes listed in note 29 and accompanying text supra.

¹²⁸ See note 110 supra.

c. Federal Insecticide, Fungicide, Rodenticide Act (FIFRA)¹²⁹

Each application for the registration of a pesticide is required to file certain information and testing data in support of its application for registration.¹³⁰ Section 136(a) 1D authorizes the Administrator to use information, research and test results submitted by a previous application for registration after 1969, to support a subsequent application. The Administrator is authorized to use the information only if the subsequent applicant has offered to compensate the original submitter. Disputes as to compensation are submitted to binding arbitration, to be conducted by an arbitrator from the Federal Mediation and Conciliation Service.¹³¹ An original submitter who refuses to participate in the arbitration proceeding forfeits the right to compensation. Conclusions of the arbitrator as to the amount of compensation are unreviewable by any court absent fraud or misrepresentation.¹³²

It has been argued that this adjudication by an arbitrator of property rights in information and test results given the EPA, is an unconstitutional delegation of adjudication of common law private rights. Two U.S. District Courts¹³³ and the Court of Appeals for the Third Circuit have considered the argument. The two District Courts concluded that such delegation is unconstitutional under Northern Pipeline. The U.S. Court of Appeals for the Third Circuit held the delegation constitutional, since there exists no property rights.¹³⁴

In Union Carbide Agricultural Product Co. v. Ruckleshaus, the U.S. District Court for the Southern District of New York, concluded that the arbitration provision was unconstitutional.¹³⁵ The court explained, ". . . what is dispositive here is the fact that the proposed arbitration procedure commits to arbitrators the power to resolve valuation issues without judicial review."¹³⁶

¹²⁹ 7 U.S.C. Section 136a (1982).

¹³⁰ Id.

¹³¹ Id.

¹³² Id.

¹³³ Union Carbide Agricultural Products Co. v. Ruckleshaus, 571 F. Supp. 117 (S.D.N.Y. 1983), Monsanto Comp. v. Acting Administrator, United States Environmental Protection Agency, 564 F. Supp. 552 (E.D. Missouri 1983).

¹³⁴ Mobay Chemical Corp. v. Gorsuch, 682 F.2d 419 (3rd Cir. 1982); Chevron Chemical Corp. v. Costle, 641 F.2d 104 (3rd Cir. 1981). Both decisions of the Third Circuit were made before Northern Pipeline. Therefore, neither of them took into account the analysis of Northern Pipeline.

¹³⁵ 571 F. Supp. at 124.

¹³⁶ Id.

The court looked to Northern Pipeline and found that the essential attributes of judicial power were not retained in an article III court.

In accord with Union Carbide is Monsanto Co. v. Acting Administrator, United States Environmental Protection Agency. In Monsanto, the U.S. District Court for the Eastern District of Missouri also held that "the arbitration scheme . . . delegates judicial power to determine property right disputes without the necessary prerequisites of Article III of the Constitution."¹³⁷

In contrast, the U.S. Court of Appeals for the Third Circuit in Mobay Chemical Corporation v. Gorsuch, reaffirmed its holding in Chevron Chemical Company v. Costle.¹³⁸ The Mobay court held that an applicant does not have a property interest in data submitted to the Environmental Protection Agency. The court reasoned that since there was no property interest, the compulsory arbitration provisions did not deprive the original submitters of the right to a judicial determination of just compensation.¹³⁹

It is submitted that the Mobay court mischaracterized what was at issue. The issue was whether litigants have a right to adjudicate their dispute in an article III court. It is further submitted that this property right is a common law private right.¹⁴⁰ As a common law private right, it may be adjudicated by an adjunct, so long as de novo review by

¹³⁷ 564 F. Supp. at 567, j'ur. noted Ruckelshaus v. Monsanto Co., 104 S. Ct. 230 (1983).

¹³⁸ 682 F. 2d at 422. The Mobay panel was bound by its decision in Chevron. Third Circuit, Internal Operation, Procedures Ch. VIIIC (1980). The Mobay panel explained "moreover, the arguments advanced in this appeal fail to convince us that Chevron should be reconsidered by the court en banc." 682 F.2d at 422.

¹³⁹ Id. at 422.

¹⁴⁰ The property right involved here is not a public right since the determination of just compensation is inherently a judicial inquiry which neither Congress or the Executive may assume. See United States v. New River Culleries Co., 262 U.S. 341, 343-44 (1923); Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).

Even if the property right here could be characterized as a congressionally created private right, the delegation is still unconstitutional since the lack of judicial review would not meet the Crowell attributes test. See note 29 and accompanying text supra.

a district court is provided.¹⁴¹ Since review by a district court is limited under the Act to fraud or misrepresentation, the arbitration is unconstitutional.

d. Employee Retirement Income Security Act (ERISA)¹⁴²

The constitutionality of the compulsory arbitration provision of Section 1401 of the Multiemployer Pension Plan Amendment Act of 1980 (MPPAA) of ERISA is also at issue. Section 1401 requires disputes between an employer and the plan sponsor concerning withdrawal liability be resolved through arbitration.

The MPPAA was enacted in response to Congress' concern that the large multiemployer pension plans were often under-funded and that employers, knowing that the plans were under-funded, had incentive to withdraw from the plans early to avoid liability. The MPPAA was designed to discourage early withdrawals by imposing liability on withdrawing employers immediately upon withdrawal from the plan, for the employer's proportionate share of the unfunded vested liabilities.

The constitutionality of the arbitration provision was at issue in Peick v. Pension Benefit Guaranty Corporation.¹⁴³ The U.S. Court of Appeals for the Seventh Circuit rejected the claim of Peick that the arbitration provision abridged his right of "access to courts".¹⁴⁴ The court further explained that there was no deprivation of a Seventh Amendment right to a jury since what was being adjudicated was a public right.¹⁴⁵

¹⁴¹ It has been argued that the requirement of *de novo* review could be satisfied if a separate cause of action existed for the taking of property, under the Tucker Act. 28 U.S.C. Section 1491 (Supp. V 1981). For a discussion of why such a remedy is not available see Brief of Appellee Monsanto Company at 40-45, Monsanto Co. v. Acting Administrator, United States Environmental Protection Agency, 564 F. Supp. 552 (E.D. Missouri 1983) *jur. noted* Ruckelshaus v. Monsanto Co., 104 S. Ct. 230 (1983).

¹⁴² 29 U.S.C. Section 1401 (Supp. V. 1981).

¹⁴³ Peick v. Pension Benefit Guaranty Corporation, No. 82-2081, slip op. (7th Cir. Dec. 19, 1983). Petition for cert. filed 52 U.S.L.W. 3583 (1984) (No. 83-1246).

¹⁴⁴ Id. at 3.

¹⁴⁵ Id. The Northern Pipeline court analogized its distinction between public and private rights for the purpose of article III to the public and private rights distinction used to determine the Seventh Amendment right to a jury trial. 458 U.S. at 70 (citing to Atlas Roofing Co. v. Occupational Safety & Health Review Commission, 430 U.S. 456 (1977)).

It is submitted that the Court of Appeals for the Seventh Circuit was incorrect in characterizing the issue of withdrawal liability as a public right, although the Court was correct in upholding the constitutionality of Section 1401. Disputes over withdrawal liability concern congressionally created private rights.¹⁴⁶ The enforcement of pension funds has long been considered a matter of private rights.¹⁴⁷

Under the Northern Pipeline analysis, adjudication of congressionally created private rights can be delegated to an adjunct so long as only the attributes listed in Crowell are delegated.¹⁴⁸ The issue of judicial review is of primary concern here. The decision of the adjunct must be subjected to a standard of review less deferential than a "clearly erroneous" standard.

Section 1401(c) of the MPPAA gives the findings of an arbitrator a rebuttable presumption of being correct.¹⁴⁹ Such a presumption, is less deferential than a "clearly erroneous" standard of review,¹⁵⁰ and therefore, meets the Northern Pipeline requirements for the delegation of the adjudication of congressionally created private rights.

V. Conclusion

Northern Pipeline has established an analysis to determine whether a particular delegation of judicial power to a non-article III officer is constitutional. Public rights may be adjudicated by non-article III officers. Private rights must be adjudicated in an article III

¹⁴⁶ The adjudication of withdrawal liability does not involve a public right since the United States will not always be a party to such an action. The presence of the United States in a suit is necessary before a disputed right may be characterized as a public right. See Northern Pipeline, 458 U.S. at 69.

¹⁴⁷ See 60 Am.Jur. 2d Pensions and Retirement Funds Section 74 (1972).

¹⁴⁸ See notes 29 & 30 and accompanying text supra.

¹⁴⁹ 29 U.S.C. Section 1401(c) (Supp V. 1981).

¹⁵⁰ The rebuttable presumption of Section 1401(c) is also clearly less deferential than the virtual lack of review given an arbitrator's decision under the Railway Labor Act and FIFRA.

court although they may also be adjudicated by adjuncts to article III courts. Common law private rights may be adjudicated by an adjunct to an article III court so long as the article III court has de novo review over the findings of the adjunct.

The Federal Magistrates Act has been upheld as constitutional by the U.S. Courts of Appeals which have considered it. Litigant consent and extensive administrative control over the adjudication by magistrates, has been held to be the equivalent of de novo review.

When administrative officers or arbitrators are used to resolve a dispute of common law private rights, their decisions are generally not reviewed de novo.¹⁵¹ Nor is any equivalent of de novo review present. First, compulsory arbitration is non-consensual. Secondly, administrative officers and arbitrators are not appointed or removed by an article III judge. Third, cases before the agency or arbitrator cannot be removed by an article III judge.

The Railway Labor Act and FIFRA compulsory arbitration provisions have been used to resolve contract and property right disputes. Resolution of these common law private rights by compulsory arbitration is unconstitutional. De novo review of the arbitrator's decision must be provided by an article III court.

It is submitted that at a minimum, a less deferential standard of review be given to an arbitrator's findings under the Railway Labor Act and FIFRA. A standard of review analogous to that given an arbitrator's findings under the MPPAA, may save the compulsory arbitration provisions. The issue remains as to whether the article III requirements will be met by anything short of de novo review of an arbitrator's determination of common law private rights.

¹⁵¹ To satisfy the requirement of de novo review, a separate cause of action in addition to compulsory arbitration, could be recognized. For a wrongful discharge claim under the Railway Labor Act, one should be able to maintain a cause of action in tort or contract, or an action under Section 301 of the Labor-Management Relations Act. Suits for the taking of property without just compensation under FIFRA should be able to be maintained under the Tucker Act. 28 U.S.C. Section 1491 (Supp. V. 1981). See note 141 supra.