Consequently, for either of these reasons, the "strict scrutiny" authorized by *Graham* v. *Richardson*, *supra*, even if it is still applicable to discrimination against permanent resident aliens, has no proper application to the State's policy in this case. The only question, therefore, is whether "the State's classification rationally furthers the purpose identified by the State." *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 314 (1976). The State has articulated several purposes for its policy of denying in-state tuition to nonimmigrant aliens. One purpose is roughly to equalize the cost of higher education borne by those students who do and those who do not financially contribute to the University through income tax payments. The purpose surely is a legitimate one, and I should think it evident that the State's classification rationally furthers that purpose.[19]

V

On June 23, 1978, approximately two months after our decision in *Elkins* v. *Moreno*, *supra*, the University's Board of Regents adopted a "clarifying" resolution establishing beyond doubt that the State's policy excluding G–4 visa holders from eligibility for in-state tuition was not based on their lack of domicile. For this reason, we remanded the case to the District Court for further proceedings, having concluded that this case was no longer controlled by *Vlandis* v. *Kline*, 412 U. S. 441 (1973), as limited by *Weinberger* v. *Salfi*, 422 U. S. 749, 771 (1975). *Toll* v. *Moreno*, 441 U. S. 458, 461–462 (1979). On remand, the District Court concluded that although the clarifying resolution adopted on June 23, 1978, eliminated the "conclusive presumption" that respondents could not establish domicile, the existence of such a presumption before that date denied respondents due process under the teaching of *Vlandis* v. *Kline*, *supra*.

There is legitimate doubt whether at this late date anything remains of *Vlandis* v. *Kline* but its lifeless words on the pages of these Reports. Such doubts, however, need not be resolved in this case. The University has made clear that domicile is not the principal consideration underlying its tuition policy as applied to respondents, and in my view that policy is rationally related to other legitimate purposes proffered by the State. The classification challenged by respondents did not change on June 23, 1978. If the classification is valid today, as I believe it is, then it was valid before the State issued its "clarifying" resolution. A statute's consistency with the Due Process Clause or the Equal Protection Clause should not depend on which purpose State officials choose to emphasize at a particular time, as long as one of the State's purposes is rationally served by the statute. See *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it").

For the foregoing reasons, I would reverse the judgment of the Court of Appeals.

tuition to G–4 visa holders alone, strict scrutiny would not be called for. As argued in the text, G–4 visa holders and other nonimmigrant aliens, unlike permanent resident aliens who were the subject of discrimination in *Nyquist*, are not so similarly situated to citizens as to render distinctions between such aliens and citizens "suspect."

[19] As respondents note, G–4 visa holders do pay state taxes other than the income tax. State and local property taxes, however, do not enter the general funds of the State and thus do not support the operation of the University. Brief for Petitioners 29, n. 23. In any event, "a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970). Respondents' exemption from the income tax sufficiently distinguishes them from citizens and other aliens who do pay such taxes, and therefore contribute a greater portion of their incomes to support the University, that the State's decision to require higher tuition payments is certainly rational.

ROBERT A. ZARNOCH, Assistant Attorneys General of Maryland, Annapolis, Md. (STEPHEN H. SACHS, Attorney General of Maryland and DAVID H. FELDMAN, with him on the brief for) petitioners; JAMES R. BIEKE, Washington, D.C. (ALFRED L. SCANLAN and JOHN TOWNSEND RICH, with him on the brief) for respondents.

Nos. 81–150 AND 81–546

NORTHERN PIPELINE CONSTRUCTION CO., APPELLANT
81–150 *v.*
MARATHON PIPE LINE COMPANY AND UNITED STATES

UNITED STATES, APPELLANT
81–546 *v.*
MARATHON PIPE LINE CO. ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Syllabus

No. 81–150. Argued April 27, 1982—Decided June 28, 1982*

The Bankruptcy Reform Act of 1978 (Act) established a United States bankruptcy court in each judicial district as an adjunct to the district court for such district. The bankruptcy court judges are appointed for 14-year terms, subject to removal by the judicial council of the circuit in which they serve on grounds of incompetence, misconduct, neglect of duty, or disability. Their salaries are set by statute and are subject to adjustment. The Act grants the bankruptcy courts jurisdiction over "all civil proceedings arising under title 11 [bankruptcy] [of the United States Code] or arising in or related to cases under title 11." See 18 U. S. C. § 1471(b) (1976 ed., Supp. III). After it had filed a petition for reorganization in a Bankruptcy Court, appellant Northern Pipeline Construction Co. (Northern) filed in that court a suit against appellee Marathon Pipe Line Co. (Marathon) seeking damages for an alleged breach of contract and warranty, as well as for misrepresentation, coercion, and duress. Marathon sought dismissal of the suit on the ground that the Act unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary diminution. The Bankruptcy Court denied the motion to dismiss, but on appeal the District Court granted the motion.

Held: The judgment is affirmed.

12 B. R. 946, affirmed.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded that:

1. Section 1471's broad grant of jurisdiction to bankruptcy judges violates Art. III.

(a) The judicial power of the United States must be exercised by judges who have the attributes of life tenure and protection against salary diminution specified by Art. III. These attributes were incorporated into the Constitution to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches. There is no doubt that bankruptcy judges created by the Act are not Art. III judges.

(b) Article III bars Congress from establishing under its Art. I powers legislative courts to exercise jurisdiction over all matters arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations—non-Art. III courts of the Territories or of the District of Columbia, courts-martial, and resolution of "public rights" issues—in which the principle of independent adjudication commanded by Art. III does not apply. The bankruptcy courts do not lie exclusively outside the States, like the courts of the Territories or of the District of Columbia, or bear any resemblence to courts-martial, nor can the substantive legal rights at issue in the present action—the right to recover contract damages to augment Northern's estate—be deemed "public rights." There is no persuasive reason in logic, history, or the Constitution, why bankruptcy courts lie beyond the reach of Art. III.

(c) Section 1471 impermissibly removed most, if not all, the essen-

*Together with No. 81–546, *United States* v. *Marathon Pipe Line Co. et al.*, also on appeal from the same court.

tial attributes of the judicial power from the Art. III district court and vested those attributes in a non-Art. III adjunct. *Crowell* v. *Benson*, 285 U. S. 22, and *United States* v. *Raddatz*, 447 U. S. 667, distinguished. Congress does not have the same power to create adjuncts to adjudicate constitutionally recognized rights and state-created rights as it does to adjudicate rights that it creates. The grant of jurisdiction to bankruptcy courts cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.

2. The above holding that the broad grant of jurisdiction in § 1471 is unconstitutional shall not apply retroactively but only prospectively. Such grant of jurisdiction presents an unprecedented question of interpretion of Art. III, and retroactive application would not further the operation of the holding but would visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts.

JUSTICE REHNQUIST, joined by JUSTICE O'CONNOR, concluded that where appellee Marathon Pipe Line Co. has simply been named defendant in appellant's suit on a contract claim arising under state law, the constitutionality of the Bankruptcy Court's exercise of jurisdiction over that kind of suit is all that need be decided in this case; that resolution of any objections Marathon might make to the exercise of authority conferred on Bankruptcy Courts by the Bankruptcy Reform Act of 1978, on the ground that the suit must be decided by an Art. III court, should await the exercise of such authority; that so much of that Act as enables a Bankruptcy Court to entertain and decide appellant's suit over Marathon's objection violates Art. III; and that the Court's judgment should not be applied retroactively.

BRENNAN, J., announced the Court's judgment and delivered an opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined. BURGER, C. J., filed a dissenting opinion. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL, J., joined.

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS joined.

The question presented is whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in § 241(a) of the Bankruptcy Act of 1978, 28 U. S. C. § 1471 (1976 ed., Supp. III), violates Art. III of the Constitution.

I

A

In 1978, after almost ten years of study and investigation, Congress enacted a comprehensive revision of the bankruptcy laws. The Bankruptcy Act of 1978 (Act)[1] made significant changes in both the substantive and procedural law of bankruptcy. It is the changes in the latter that are at issue in this case.

Before the Act, federal district courts served as bankruptcy courts and employed a "referee" system. Bankruptcy proceedings were generally conducted before referees,[2] except in those instances in which the district court elected to withdraw a case from a referee. See Bkrptcy. Rule 102. The referee's final order was appealable to the district court. Bkrptcy. Rule 801. The bankruptcy courts were vested with "summary jurisdiction"—that is, with jurisdiction over controversies involving property in the actual or constructive possession of the court. And, with consent, the bankruptcy court also had jurisdiction over some "plenary" matters—such as disputes involving property in the possession of a third person.

The Act eliminates the referee system and establishes "in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district." 28 U. S. C. § 151(a) (1976 ed., Supp. III). The judges of these courts are appointed to office for 14-year terms by the President, with the advice and consent of the Senate. §§ 152, 153(a). They are subject to removal by the "judicial council of the circuit" on account of "incompetence, misconduct, neglect of duty or physical or mental disability." § 153(b). In addition, the salaries of the bankruptcy judges are set by statute and are subject to adjustment under the Federal Salary Act, 2 U. S. C. §§ 351–361. 28 U. S. C. § 154 (1976 ed., Supp. III).

The jurisdiction of the bankruptcy courts created by the Act is much broader than that exercised under the former referee system. Eliminating the distinction between "summary" and "plenary" jurisdiction, the Act grants the new courts jurisdiction over all "civil proceedings arising under title 11 [the Bankruptcy title] or arising in or *related to* cases under title 11." 28 U. S. C. § 1471(b) (1976 ed., Supp. III) (emphasis added).[3] This jurisdictional grant empowers bankruptcy courts to entertain a wide variety of cases involving claims that may affect the property of the estate once a petition has been filed under title 11 of the Act. Included within the bankruptcy courts' jurisdiction are suits to recover accounts, controversies involving exempt property, actions to avoid transfers and payments as preferences or fraudulent conveyances, and causes of action owned by the debtor at the time of the petition for bankruptcy. The bankruptcy courts can hear claims based on state law as well as those based on federal law. See 1 Collier on Bankruptcy, ¶3.01, at 3–47 to 3–48 (15th ed. 1981).[4]

The judges of the bankruptcy courts are vested with all of the "powers of a court of equity, law and admiralty," except that they "may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." 28 U. S. C. § 1481 (1976 ed., Supp. III). In addition to this broad grant of power, Congress has allowed bankruptcy judges the power to hold jury trials, § 1480; to issue declaratory judgments, § 2201; to issue writs of habeas corpus under certain circumstances, § 2256; to issue all writs necessary in aid of the bankruptcy court's expanded jurisdiction, § 451; see 28 U. S. C. § 1651 (1976 ed.); and to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of title 11, 11 U. S. C. § 105(a) (1976 ed., Supp. III).

The Act also establishes a special procedure for appeals

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[1] Pub. L. 95–598, 92 Stat. 2549. The Act became effective October 1, 1979.

[2] Bankruptcy referees were redesignated as "judges" in 1973. Bkrptcy. Rule 901(7). For purposes of clarity, however, we refer to all judges under the old Act as "referees."

[3] Although the Act initially vests this jurisdiction in district courts, 28 U. S. C. § 1471(a) (1976 ed., Supp. III), it subsequently provides that "[t]he bankruptcy court for the district in which a case under title 11 is commenced shall exercise *all* of the jurisdiction conferred by this section on the district courts," § 1471(c) (emphasis added). Thus the ultimate repository of the Act's broad jurisdictional grant is the bankruptcy courts. See 1 Collier on Bankruptcy ¶3.01, at 3–37, 3–44 to 3–49 (15th ed. 1981).

[4] With respect to both personal jurisdiction and venue, the scope of the Act is also expansive. Although the Act does not in terms indicate the extent to which bankruptcy judges may exercise personal jurisdiction, it has been construed to allow the constitutional maximum. See, *e. g.*, *In re Whippany Paper Board Co.*, 15 B.R. 312, 314–315 (Bkrptcy. Ct. D NJ 1981). With two exceptions not relevant here, the venue of "a proceeding arising in or related to a case under title 11 . . . [is] in the bankruptcy court in which such case is pending." 28 U. S. C. § 1473(a) (1976 ed., Supp. III). Furthermore, the Act permits parties to remove many kinds of action to the bankruptcy court. Parties "may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government unit to enforce such governmental unit's police or regulatory power". § 1478. The bankruptcy court may, however, remand such actions "on any equitable ground"; the decision to remand or retain an action is unreviewable. § 1478(b).

from orders of bankruptcy courts. The circuit council is empowered to direct the Chief Judge of the circuit to designate panels of three bankruptcy judges to hear appeals. 28 U. S. C. § 160 (1976 ed., Supp. III). These panels have jurisdiction of all appeals from final judgments, orders, and decrees of bankruptcy courts, and, with leave of the panel, of interlocutory appeals. § 1482. If no such appeals panel is designated, the district court is empowered to exercise appellate jurisdiction. § 1334. The court of appeals is given jurisdiction over appeals from the appellate panels or from the district court. § 1293. If the parties agree, a direct appeal to the court of appeals may be taken from a final judgment of a bankruptcy court. § 1293(b).[5]

The Act provides for a transition period before the new provisions take full effect in April 1984. Bankruptcy Act of 1978, §§ 401–411, 92 Stat. 2682–2688. During the transition period, previously existing bankruptcy courts continue in existence. § 404(a), 92 Stat. 2683. Incumbent bankruptcy referees, who served six-year terms for compensation subject to adjustment by Congress, are to serve as bankruptcy judges until March 31, 1984, or until their successors take office. § 404(b), 92 Stat. 2683.[6] During this period they are empowered to exercise essentially all of the jurisdiction and powers discussed above. See §§ 404, 405, 92 Stat. 2683–2685. See generally 1 Collier on Bankruptcy ¶¶ 7.04–7.05, 7–23 to 7–65 (15th ed. 1981). The procedure for taking appeals is similar to that provided after the transition period. See § 405(c)(1), 92 Stat. 2685.[7]

B

This case arises out of proceedings initiated in the United States Bankruptcy Court for the District of Minnesota after appellant Northern Pipeline Construction Co. (Northern) filed a petition for reorganization in January 1980. In March 1980 Northern, pursuant to the Act, filed in that court a suit against appellee Marathon Pipeline Co. (Marathon). Appellant sought damages for alleged breaches of contract and warranty, as well as for alleged misrepresentation, coercion, and duress. Marathon sought dismissal of the suit, on the ground that the Act unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary diminution. The United States intervened to defend the validity of the statute.

The bankruptcy judge denied the motion to dismiss. App. to Juris. Statement 27a–36a. But on appeal the District Court entered an order granting the motion, on the ground that "the delegation of authority in 28 U. S. C. § 1471 to the Bankruptcy Judges to try cases otherwise relegated under the Constitution to Article III judges" was unconstitutional. *Id.*, at 1a. Both the United States and Northern filed notices of appeal in this Court.[8] We noted probable jurisdiction. —— U. S. —— (1981).[9]

[5] Although no particular standard of review is specified in the Act, the parties in the present case seem to agree that the appropriate one is the clearly erroneous standard, employed in the old Bankruptcy Rule 801 for review of findings of fact made by a referee. See Brief for the United States 41; Tr. of Oral Arg. 27. See also *In re Rivers*, —— B.R. —— (Bkrptcy. Ct. ED Tenn. 1982); 1 Collier on Bankruptcy ¶ 3.03, at 3–315 (15th ed. 1981).

[6] Under the old Bankruptcy Act, referees could be removed by the district court for "incompetency, misconduct, or neglect of duty," 11 U. S. C. § 62(b) (1976 ed.); the same grounds for removal apply during the transition period, see § 404(d), 92 Stat. 2684.

[7] It appears, however, that during the transition period an appeal of a bankruptcy judge's decision may be taken to the district court even if an appellate panel of bankruptcy judges has been established.

[8] After Northern docketed an appeal in this Court, the District Court supplemented its order with a memorandum. App. to Juris. Statement 3a–26a.

[9] Two other bankruptcy courts have considered the constitutionality of § 1471: The Bankruptcy Court for the District of Puerto Rico determined it to be constitutional, *In re Segarra*, 14 B.R. 870 (1981), while the Bankruptcy Court for the Eastern District of Tennessee reached the opposite conclusion, *In re Rivers*, *supra*.

II

A

Basic to the constitutional structure established by the Framers was their recognition that "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (J. Madison), p. 300 (H. Lodge ed. 1888). To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct. "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley* v. *Valeo*, 424 U. S. 1, 122 (1976) (*per curiam*).

The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial. Hamilton explained the importance of an independent Judiciary:

> "Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws." The Federalist No. 78, p. 489 (H. Lodge ed. 1888).

The Court has only recently reaffirmed the significance of this feature of the Framers' design: "A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States* v. *Will*, 449 U. S. 200, 217–218 (1980).

As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch. It provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. The inexorable command of this provision is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III. Those attributes are also clearly set forth:

> "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." Art. III, § 1.

The "good Behaviour" Clause guarantees that Art. III

judges shall enjoy life tenure, subject only to removal by impeachment. *Toth* v. *Quarles*, 350 U. S. 11, 16 (1955). The Compensation Clause guarantees Art. III judges a fixed and irreducible compensation for their services. *United States* v. *Will*, *supra*, at 218–221. Both of these provisions were incorporated into the Constitution to ensure the independence of the judiciary from the control of the executive and legislative branches of government.[10] As we have only recently emphasized, "The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary," *id.*, at 217, while the principle of life tenure can be traced back at least as far as the Act of Settlement in 1701, *id.*, at 218. To be sure, both principles were eroded during the late colonial period, but that departure did not escape notice and indignant rejection by the Revolutionary generation. Indeed, the guarantees eventually included in Art. III were clearly foreshadowed in the Declaration of Independence, "which, among the injuries and usurpations recited against the King of Great Britain, declared that he had 'made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.'" *O'Donoghue* v. *United States*, 289 U. S. 516, 531 (1933). The Framers thus recognized that

> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" The Federalist No. 79 (A. Hamilton), p. 491 (H. Lodge ed. 1888) (emphasis in original).[11]

In sum, our Constitution unambiguously enunciates a fundamental principle—that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

B

It is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges. The bankruptcy judges do not serve for life subject to their continued "good Behaviour." Rather, they are appointed for 14-year terms, and can be removed by the judicial council of the circuit in which they serve on grounds of "incompetence, misconduct, neglect of duty or physical or mental disability." Second, the salaries of the bankruptcy judges are not immune from diminution by Congress. See *supra*, at 2. In short, there is no doubt that the bankruptcy judges created by the Act are not Art. III judges.

That Congress chose to vest such broad jurisdiction in non-Art. III bankruptcy courts, after giving substantial consideration to the constitutionality of the Act, is of course reason to respect the congressional conclusion. See *Fullilove* v. *Klutznick*, 448 U. S., 448 472–473 (1980) (opinion of BURGER, C. J.); *Palmore* v. *United States*, 411 U. S. 389, 409 (1973). See also *National Ins. Co.* v. *Tidewater Co.*, 337 U. S. 582, 655 (1949) (Frankfurter, J., dissenting).[12] But at the same time,

> "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker* v. *Carr*, 369 U. S. 186, 211 (1962).

With these principles in mind, we turn to the question presented for decision: whether the Bankruptcy Act of 1978 violates the command of Art. III, that the judicial power of the United States must be vested in courts whose judges enjoy the protections and safeguards specified in that Article.

Appellants suggest two grounds for upholding the Act's conferral of broad adjudicative powers upon judges unprotected by Art. III. First, it is urged that "pursuant to its enumerated Article I powers, Congress may establish legislative courts that have jurisdiction to decide cases to which the Article III judicial power of the United States extends." Brief for the United States 9. Referring to our precedents upholding the validity of "legislative courts," appellants suggest that "the plenary grants of power in Article I permit Congress to establish non-Article III tribunals in 'specialized areas having particularized needs and warranting distinctive treatment,'" such as the area of bankruptcy law. *Ibid.*, quoting *Palmore* v. *United States*, 411 U. S. 389, 408 (1973). Second, appellants contend that even if the Constitution does require that this bankruptcy-related action be adjudicated in an Art. III court, the Act in fact satisfies that requirement. "Bankruptcy jurisdiction was vested in the district court" of

[10] These provisions serve other institutional values as well. The independence from political forces that they guarantee helps to promote public confidence in judicial determinations. See The Federalist No. 78 (A. Hamilton). The security that they provide to members of the Judicial Branch helps to attract well qualified persons to the federal bench. *Ibid.* The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism. See Kaufman, Chilling Judicial Independence, 88 Yale L. J. 681, 713 (1979). See generally Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 583–585 (1980).

[11] Further evidence of the Framers' concern for assuring the independence of the judicial branch may be found in the fact that the Constitutional Convention soundly defeated a proposal to allow the removal of judges by the executive and legislative branches. See 2 Farrand, Records of the Federal Convention 428–429 (1911); P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 7 (2d ed. 1973). Mr. Wilson, of Pennsylvania, commented that "The Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt." 2 Farrand, *supra*, at 429.

[12] It should be noted, however, that the House of Representatives expressed substantial doubts respecting the constitutionality of the provisions eventually included in the Act. The House Judiciary Committee and its Subcommittee on Civil and Constitutional Rights gave lengthy consideration to the constitutional issues surrounding the conferral of broad powers upon the new bankruptcy courts. The committee, the subcommittee, and the House as a whole initially concluded that Art. III courts were constitutionally required for bankruptcy adjudications. See H.R. 8200, 95th Cong., 1st Sess. (1977); Hearings on H.R. 31 and H.R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 2d Sess., 2081–2084 (1976); *id.*, at 2682–2706; H.R. Rep. No. 95–595, p. 39 (1977) ("Article III is the constitutional norm, and the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context"); *id.*, at 21–38; Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary, Constitutional Bankruptcy Courts, 95th Cong., 2d Sess., 33 (Comm. Print No. 3 1977) (concluding that the proposed bankruptcy courts should be established "under Article III, with all of the protection that the Framers intended for an independent judiciary"); Subcomm. on Civil and Connstitutional Rights of the House Comm. on the Judiciary, Report on Hearings on the Court Administration Structure for Bankruptcy Cases, 95th Cong., 2d Sess., 5 (Comm. Print No. 13 1978) (same); see generally Klee, Legislative History of the New Bankruptcy Law, 28 De Paul L. Rev. 941, 945–949, 951 (1979). The Senate bankruptcy bill did not provide for life tenure or a guaranteed salary, instead adopting the concept of a bankruptcy court with similarly broad powers but as an "adjunct" to an Art. III court. S. 2266, 95th Cong., 2d Sess. (1978). The bill that was finally enacted, denying bankruptcy judges the tenure and compensation protections of Art. III, was the result of a series of last minute conferences and compromises between the managers of both houses. See Klee, *supra*, at 952–956

the judicial district in which the bankruptcy court is located, "and the exercise of that jurisdiction by the adjunct bankruptcy court was made subject to appeal as of right to an Art. III court." *Id.*, at 12. Analogizing the role of the bankruptcy court to that of a special master, appellants urge us to conclude that this "adjunct" system established by Congress satisfies the requirements of Art. III. We consider these arguments in turn.

III

Congress did not constitute the bankruptcy courts as legislative courts.[13] Appellants contend, however, that the bankruptcy courts could have been so constituted, and that as a result the "adjunct" system in fact chosen by Congress does not impermissibly encroach upon the judicial power. In advancing this argument, appellants rely upon cases in which we have identified certain matters that "congress may or may not bring within the cognizance of [Art. III] courts, as it may deem proper." *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 284 (1855).[14] But when properly understood, these precedents represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III courts.[15] Rather, they reduce to three narrow situations not subject to that command, each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers. These precedents simply acknowledge that the literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole.

Appellants first rely upon a series of cases in which this Court has upheld the creation by Congress of non-Art. III "territorial courts." This exception from the general prescription of Art. III dates from the earliest days of the Republic, when it was perceived that the Framers intended that as to certain geographical areas, in which no State operated as sovereign, Congress was to exercise the general powers of government. For example, in *American Ins. Co.* v. *Canter*, 1 Pet. 511 (1828), the Court observed that Art. IV bestowed upon Congress alone a complete power of government over territories not within the States that comprised the United States. The Court then acknowledged Congress' authority to create courts for those territories that were not in conformity with Art. III. Such 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 jurisdiction with which they are invested . . . is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government." 1 Pet., at 546.

The Court followed the same reasoning when it reviewed Congress' creation of non-Art. III courts in the District of Columbia. It noted that there was in the District

> "no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice." *Kendall* v. *United States*, 12 Pet. 524, 619 (1838).[16]

Appellants next advert to a second class of cases—those in which this Court has sustained the exercise by Congress and the Executive of the power to establish and administer courts martial. The situation in these cases strongly resembles the situation with respect to territorial courts: It too 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. Art. I, § 8, cls. 13, 14, confer upon Congress the power "to provide and maintain a Navy," and "to make Rules for the Government and Regulation of the land and naval Forces." The Fifth Amendment, which requires a presentment or indictment of a grand jury before a person may be held to answer for a capital or otherwise infamous crime, contains an express exception for "cases arising in the land or naval forces." And Art. II, § 2, cl. 1, provides that "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Noting these constitutional directives, the Court in *Dynes* v. *Hoover*, 20 How. 65 (1858), explained:

> "These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by

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[13] The Act designates the bankruptcy court in each district as an "adjunct" to the district court. 28 U. S. C. § 151(a) (1976 ed., Supp. III). Neither House of Congress concluded that the bankruptcy courts should be established as independent legislative courts. See n. 12, *supra*.

[14] At one time, this Court suggested a rigid distinction between those subjects that could be considered only in Art. III courts and those that could be considered only in legislative courts. See *Williams* v. *United States*, 289 U. S. 553 (1933). But this suggested dichotomy has not withstood analysis. See Wright, Law of the Federal Courts 33–35 (3d ed. 1976). Our more recent cases clearly recognize that legislative courts may be granted jurisdiction over some cases and controversies to which the Art. III judicial power might also be extended. *E. g.*, *Palmore* v. *United States*, 411 U. S. 389 (1973). See *Glidden* v. *Zdanok*, 370 U. S. 530, 549–551 (1962) (Opinion of Harlan, J.).

[15] JUSTICE WHITE'S dissent finds particular significance in the fact that Congress could have assigned all bankruptcy matters to the state courts. *Post*, at 25. But, of course, virtually all matters that might be heard in Art. III courts could also be left by Congress to state courts. This fact is simply irrelevant to the question before us. Congress has no control over state court judges; accordingly the principle of separation of powers is not threatened by leaving the adjudication of federal disputes to such judges. See Krattenmaker, Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional, 70 Geo. L J. 297, 304–305 (1981). The Framers chose to leave to Congress the precise role to be played by the lower federal courts in the administration of justice. See Hart and Wechsler's The Federal Courts and the Federal System, *supra*, at 11. But the Framers did not leave it to Congress to define the character of those courts—they were to be independent of the political branches and presided over by judges with guaranteed salary and life tenure.

[16] We recently reaffirmed the principle, expressed in these early cases, that Art. I, § 8, cl. 17, provides that Congress shall have power "[t]o exercise exclusive legislation in all cases whatsoever, over" the District of Columbia. *Palmore* v. *United States*, 411 U. S. 389, 397 (1973). See also *Wallace* v. *Adams*, 204 U. S. 415, 423 (1907) (recognizing Congress' authority to establish legislative courts to determine questions of tribal membership relevant to property claims within Indian territory); *In re Ross*, 140 U. S. 453 (1891) (same, respecting consular courts established by concession from foreign countries). See generally 1 Moore, Federal Practice 46–49, 53–54 (2d. ed. 1982). But see *Reid* v. *Covert*, 354 U. S. 1 (1957).

civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other." *Id.*, at 79.[17]

Finally, appellants rely on a third group of cases, in which this Court has upheld the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving "public rights."[18] The "public rights" doctrine was first set forth in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1855):

> [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring 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 284 (emphasis added).

This doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued. See *id.* at 283–285; see also *Ex parte Bakelite Corp.*, 279 U. S. 438, 452 (1929). But the public-rights doctrine also draws upon the principle of separation of powers, and an historical understanding that certain prerogatives were reserved to the political branches of government. The doctrine extends only to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," *Crowell* v. *Benson*, 285 U. S. 22, 50 (1932), and only to matters that historically could have been determined exclusively by those departments, see *Ex parte Bakelite Corp.*, *supra*, at 458. The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to non-judicial executive determination, and that as a result 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. *Crowell* v. *Benson*, *supra*, at 50.[19]

The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are "inherently . . . judicial." *Ex parte Bakelite Corp.*, *supra*, at 458. See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, *supra*, at 280–282. For example, the Court in *Murray's Lessee* looked to the law of England and the States at the time the Constitution was adopted, in order to determine whether the issue presented was customarily cognizable in the courts. *Ibid.* Concluding that the matter had not traditionally been one for judicial determination, the Court perceived no bar to Congress' establishment of summary procedures, outside of Art. III courts, to collect a debt due to the Government from one of its customs agents.[20] On the same premise, the Court in *Ex parte Bakelite Corp.*, *supra*, held that the Court of Customs Appeals had been properly constituted by Congress as a legislative court:

> "The *full* province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. . . . The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of *which may be, and at times has been, committed exclusively to executive officers.*" 279 U. S., at 458 (emphasis added).[21]

The distinction between public rights and private rights has not been definitively explained in our precedents.[22] Nor is it necessary to do so in the present case, for it suffices to observe that a matter of public rights must at a minimum arise "between the government and others." *Ex Parte Bakelite Corp.*, *supra*, at 451.[23] In contrast, "the liability of one individual to another under the law as defined," *Crowell* v. *Benson*, 285 U. S., at 51, is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. See *Atlas Roofing Co.* v. *Occupational Safety Comm'n*, 430 U. S., at 450, n. 7; *Crowell* v. *Benson*, *supra*, at 50–51. See also Katz, Federal Legislative Courts, 43 Harv. L. Rev. 894, 917–918 (1930).[24] Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power.

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[17] See also *Burns* v. *Wilson*, 346 U. S. 137, 139–140 (1953). But this Court has been alert to ensure that Congress does not exceed the constitutional bounds and bring within the jurisdiction of the military courts matters beyond that jurisdiction, and properly within the realm of "judicial power." See, *e. g.*, *Reid* v. *Covert*, *supra*; *Toth* v. *Quarles*, 350 U. S. 11 (1955).

[18] Congress' power to create legislative courts to adjudicate public rights carries with it the lesser power to create administrative agencies for the same purpose, and to provide for review of those agency decisions in Art. III courts. See, *e. g.*, *Atlas Roofing Co.* v. *Occupational Safety Comm'n*, 430 U. S. 442, 450 (1977).

[19] See *Oceanic Nav. Co.* v. *Stranahan*, 214 U. S. 320, 339 (1909); Katz, Federal Legislative Courts, 43 Harv. L. Rev. 894, 915 (1930).

[20] Doubtless it could be argued that the need for independent judicial determination is greatest in cases arising between the government and an individual. But the rationale for the public-rights line of cases lies not in political theory, but rather in Congress' and this Court's understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact.

[21] See also *Williams* v. *United States*, 289 U. S. 553 (1933) (holding that Court of Claims was a legislative court and that salary of a judge of that court could therefore be reduced by Congress).

[22] *Crowell* v. *Benson*, 285 U. S. 22 (1932), attempted to catalogue some of the matters that fall within the public-rights doctrine:

"Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans." *Id.*, at 51 (footnote omitted).

[23] Congress cannot "withdraw from [Art. III] judicial cognizance *any* matter which, *from its nature*, is the subject of a suit at common law, or in equity or admiralty." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How., at 284 (emphasis added). It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing "private rights" from "public rights." And it is also clear that even with respect to matters that arguably fall within the scope of the "public rights" doctrine, the presumption is in favor of Art. III courts. See *Glidden* v. *Zdanok*, 370 U. S. 530, 548–549, and n. 21 (1962) (opinion of Harlan, J.). See also Currie, The Federal Courts and the American Law Institute, pt. 1, 36 U. Chi. L. Rev. 1, 13–14, n. 67 (1968). Moreover, when Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review. See *Atlas Roofing Co.* v. *Occupational Safety Comm'n*, 430 U. S. 442, 455, n. 13 (1977).

[24] Of course, the public-rights doctrine does not extend to any criminal matters, although the government is a proper party. See, *e. g.*, *Toth* v. *Quarles*, 350 U. S. 11 (1955).

In sum, this Court has identified three situations in which Art. III does not bar the creation of legislative courts. In each of these situations, the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority of Congress subject to the general prescriptions of Art. III.[25]

We discern no such exceptional grant of power applicable in the case before us. The courts created by the Bankruptcy Act of 1978 do not lie exclusively outside the States of the Federal Union, like those in the District of Columbia and the territories. Nor do the bankruptcy courts bear any resemblance to courts martial, which are founded upon the Constitution's grant of plenary authority over the Nation's military forces to the Legislative and Executive Branches. Finally, the substantive legal rights at issue in the present action cannot be deemed "public rights." Appellants argue that a discharge in bankruptcy is indeed a "public right," similar to such congressionally created benefits as "radio station licenses, pilot licenses, and certificates for common carriers" granted by administrative agencies. See Brief for the United States 34. But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not. Appellant Northern's right to recover contract damages to augment its estate is "one of private right, that is, of the liability of one individual to another under the law as defined." *Crowell* v. *Benson*, 285 U. S., at 51.[26]

Recognizing that the present case may not fall within the scope of any of any of our prior cases permitting the establishment of legislative courts, appellants argue that we should recognize an additional situation beyond the command of Art. III, sufficiently broad to sustain the Act. Appellants contend that Congress' constitutional authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States," Art. I, §8, cl.4, carries with it an inherent power to establish legislative courts capable of adjudicating "bankruptcy related controversies." Brief for the United States 14. In support of this argument, appellants rely primarily upon a quotation from the opinion in *Palmore* v. *United States*, 411 U. S. 389 (1973), in which we stated that

> "both Congress and this Court have recognized that . . . the requirements of Art. III, which are applicable where laws of national applicablity and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Id.*, 407–408.

Appellants cite this language to support their proposition that a bankruptcy court created by Congress under its Art. I powers is constitutional, because the law of bankruptcy is a "specialized area," and Congress has found a "particularized need" that warrants "distinctive treatment." Brief for the United States 20–33.

Appellants' contention, in essence, is that pursuant to any of its Art. I powers, Congress may create courts free of Art. III's requirements whenever it finds that course expedient. This contention has been rejected in previous cases. See, *e. g.*, *Atlas Roofing Co.* v. *Occupational Safety Comm'n*, *supra*, at 450, n. 7; *Toth* v. *Quarles*, 350 U. S. 11 (1955). Although the cases relied upon by appellants demonstrate that independent courts are not required for *all* federal adjudications, those cases also make it clear that where Art. III does apply, all of the legislative powers specified in Art. I and elsewhere are subject to it. See, *e. g.*, *Ex parte Bakelite Corp.*, 279 U. S., at 449; *Toth* v. *Quarles*, *supra*; *American Ins. Co.* v. *Canter*, 1 Pet., at 546; *Murray's Lessee*, 18 How., at 284. Cf. *Crowell* v. *Benson*, *supra*, at 51.

The flaw in appellants' analysis is that it provides no limiting principle. It thus threatens to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of "specialized" legislative courts. True, appellants argue that under their analysis Congress could create legislative courts pursuant only to some "specific" Art. I power, and "only when there is a particularized need for distinctive treatment." Brief for the United States 22–23. They therefore assert, that their analysis would not permit Congress to replace the independent Art. III judiciary through a "wholesale assignment of federal judicial business to legislative courts." *Ibid.* But these "limitations" are wholly illusory. For example, Art. I, §8, empowers Congress to enact laws, *inter alia*, regulating interstate commerce and punishing certain crimes. Art. I, §8, cls. 3, 6. On appellants' reasoning Congress could provide for the adjudication of these and "related" matters by judges and courts within Congress' exclusive control.[27] The potential

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[25] The "unifying principle" that JUSTICE WHITE'S dissent finds lacking in all of these cases, see *post*, at 14, is to be found in the exceptional constitutional grants of power to Congress with respect to certain matters. Although the dissent is correct that these grants are not explicit in the language of the Constitution, they are nonetheless firmly established in our historical understanding of the constitutional structure. When these three exceptional grants are properly constrained, they do not threaten the Framers' vision of an independent federal judiciary. What clearly remains subject to Art. III are all private adjudications in federal courts within the States—matters from their nature subject to "a suit at common law or in equity or admiralty"—and all criminal matters, with the narrow exception of military crimes. There is no doubt that when the Framers assigned the "judicial Power" to an independent Art. III branch, these matters lay at what they perceived to be the protected core of that power.

Although the dissent recognizes that the Framers had something important in mind when they assigned the judicial power of the United States to Art. III courts, it concludes that our cases and subsequent practice have eroded this conception. Unable to find a satisfactory theme in our precedents for analyzing this case, the dissent rejects all of them, as well as the historical understanding upon which they were based, in favor of an ad hoc balancing approach in which Congress can essentially determine for itself whether Art. III courts are required. See *post*, at 14–25. But even the dissent recognizes that the notion that Congress rather than the Constitution should determine whether there is a need for independent federal courts cannot be what the Framers had in mind. See *post*, at 22.

[26] This claim may be adjudicated in federal court on the basis of its relationship to the petition for reorganization. See *Williams* v. *Austrian*, 331 U. S. 642 (1947); *Schumacher* v. *Beeler*, 293 U. S. 367 (1934). See also *National Ins. Co.* v. *Tidewater Co.*, 337 U. S. 582, 611–613 (1949) (Rutledge, J., concurring); *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 472 (1957) (Frankfurter, J., dissenting). Cf. *Osborn* v. *United States Bank*, 9 Wheat. 738 (1824). But this relationship does not transform the state-created right into a matter between the Government and the petitioner for reorganization. Even in the absence of the federal scheme, the plaintiff would be able to proceed against the defendant on the state-law contractual claims.

[27] Nor can appellants' analysis logically be limited to Congress' Art. I powers. For example, appellants' reasoning relies in part upon analogy to our approval of territorial courts in *American Ins. Co.* v. *Canter*, 1 Pet. 511 (1828), and of the use of an administrative agency in *Crowell* v. *Benson*, 285 U. S. 22 (1932). Brief for the United States 15; Brief for Northern Pipeline Construction Co. 10. In those cases the Court recognized the right of Congress to create territorial courts pursuant to the authority granted under Art. IV, §3, cl. 2 and to create administrative tribunals to adjudicate rights in admiralty pursuant to the federal authority in Art. III §2 over admiralty jurisdiction. See *American Ins. Co.* v. *Canter*, *supra*, at 546; *Crowell* v. *Benson*, *supra*, at 39. This reliance underscores the fact that appellants offer no principled means of distinguishing between Congress' Art. I powers and any of Congress' other powers—including, for

for encroachment upon powers reserved to the Judicial Branch through the device of "specialized" legislative courts is dramatically evidenced in the jurisdiction granted to the courts created by the Act before us. The broad range of questions that can be brought into a bankruptcy court because they are "related to cases under title 11," 28 U. S. C. § 1471(b) (1976 ed., Supp. III), see *supra*, at 3, is the clearest proof that even when Congress acts through a "specialized" court, and pursuant to only one of its many Art. I powers, appellants' analysis fails to provide any real protection against the erosion of Art. III jurisdiction by the unilateral action of the political branches. In short, to accept appellants' reasoning, would require that we replace the principles delineated in our precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government.[28]

Appellants' reliance upon *Palmore* for such broad legislative discretion is misplaced. In the context of the issue decided in that case, the language quoted from the *Palmore* opinion, *supra*, at 21, offers no substantial support for appellants' argument. *Palmore* was concerned with the courts of the District of Columbia, a unique federal enclave over which "Congress has . . . entire control . . . for every purpose of government." *Kendall* v. *United States*, 12 Pet. 524, 619 (1838). The "plenary authority" under the District of Columbia clause, Art. I, § 8 cl. 17, was the subject of the quoted passage and the powers granted under that clause are obviously different in kind from the other broad powers conferred on Congress: Congress' power over the District of Columbia encompasses the *full* authority of government, and thus, necessarily, the executive and judicial powers as well as the legislative. This is a power that is clearly possessed by Congress only in limited geographic areas. *Palmore* itself makes this limitation clear. The quoted passage distinguishes the congressional powers at issue in *Palmore* from those in which the Art. III command of an independent Judiciary must be honored: where "laws of national applicability and affairs of national concern are at stake." 411 U. S., at 408. Laws respecting bankruptcy, like most laws enacted pursuant to the national powers catalogued in Art. I, § 8, are clearly laws of national applicability and affairs of national concern. Thus our reference in *Palmore* to "specialized areas having particularized needs" referrred only to *geographic* areas, such as the District of Columbia or territories outside the States of the Federal Union. In light of the clear commands of Art. III, nothing held or said in *Palmore* can be taken to mean that in every area in which Congress may legislate, it may also create non-Art. III courts with Art. III powers.

In sum, Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Art. III does not apply. Nor can we discern any persuasive reason, in logic, history, or the Constitution, why the bankruptcy courts here established lie beyond the reach of Art. III.

IV

Appellants advance a second argument for upholding the constitutionality of the Act: that "viewed within the entire judicial framework set up by Congress," the bankruptcy court is merely an "adjunct" to the district court, and that the delegation of certain adjudicative functions to the bankruptcy court is accordingly consistent with the principle that the judicial power of the United States must be vested in Art. III courts. See Brief for the United States 11–13, 37–45. As support for their argument, appellants rely principally upon *Crowell* v. *Benson*, *supra*, and *United States* v. *Raddatz*, 447 U. S. 667 (1980), cases in which we approved the use of administrative agencies and magistrates as adjuncts to Art. III courts. Brief for the United States at 40–42. The question to which we turn, therefore, is whether the Act has retained "the essential attributes of the judicial power," *Crowell* v. *Benson*, *supra*, at 51, in Art. III tribunals.[29]

The essential premise underlying appellants' argument is that even where the Constitution denies Congress the power to establish legislative courts, Congress possesses the authority to assign certain factfinding functions to adjunct tribunals. It is, of course, true that while the the power to adjudicate "private rights" must be vested in an Art. III court, see Part III, *supra*,

> "this Court has accepted factfinding by an administrative agency, . . . as an adjunct to the Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of a

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example, those conferred by the various amendments to the Constitution, *e. g.*, U. S. Const. Amdt. XIII, XIV, XV, XVI, XIX, XXIII, XXIV, XXVI.

[28] JUSTICE WHITE'S suggested "limitations" on Congress' power to create Art. I courts are even more transparent. JUSTICE WHITE'S dissent suggests that Art. III "should be read as expressing one value that must be balanced against competing constitutional concerns and legislative responsibilities," and that the Court retains the final word on how the balance is to be struck. *Post*, at 22–23. The dissent would find the Art. III "value" accommodated where appellate review to Art. III courts is provided and where the Art. I courts are "designed to deal with issues likely to be of little interest to the political branches." *Post*, at 24–25. But the dissent's view that appellate review is sufficent to satisfy either the command or the purpose of Art. III is incorrect. See n. 39, *infra*. And the suggestion that we should consider whether the Art. I courts are designed to deal with issues likely to be of interest to the political branches would undermine the validity of the adjudications performed by most of the administrative agencies, on which validity the dissent so heavily relies.

In applying its ad hoc balancing approach to the facts of this case, the dissent rests on the justification that these courts differ from standard Art. III courts because of their "extreme specialization." As noted above, "extreme specialization" is hardly an accurate description of bankruptcy courts designed to adjudicate the entire range of federal and state controversies. See *infra*, at 34–35. Moreover, the special nature of bankruptcy adjudications is in no sense incompatible with performance of such functions in a tribunal afforded the protection of Art. III. As one witness pointed out to Congress:

"Relevant to that question of need, it seems worth noting that Article III itself permits much flexibility; so long as tenure during good behavior is granted, much room exists as regards other conditions. Thus it would certainly be possible to create a special bankruptcy court under Article III and there is no reason why the judges of that court would have to be paid the same salary as district judges or any other existing judges. It would also be permissible to provide that when a judge of that court retired pursuant to statute, a vacancy for new appointment would not automatically be created. And it would be entirely valid to specify that the judges of that court could not be assigned to sit, even temporarily, on the general district courts or courts of appeals." Hearings on H.R. 31 and H.R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 2d Sess., 2697 (letter of Paul Mishkin).

[29] JUSTICE WHITE'S dissent fails to distinguish between Congress' power to create adjuncts to Art. III courts, and Congress' power to create Art. I courts in limited circumstances. See *Post*, at 12–13. Congress' power to create adjuncts and assign them limited adjudicatory functions is in no sense an "exception" to Art. III. Rather, such an assignment is consistent with Art. III, so long as "the essential attributes of judicial power" are retained in the Art. III court, *Crowell* v. *Benson*, 285 U. S., at 51, and so long as Congress' adjustment of the traditional manner of adjudication can be sufficiently linked to its legislative power to define substantive rights, see *infra*, at 32–33. Cf. *Atlas Roofing Co.* v. *Occupational Safety Comm'n.*, 430 U. S., at 450, n. 7.

special master. *Crowell* v. *Benson*, 285 U. S. 22, 51–65 (1932)." *Atlas Roofing Co.* v. *Occupational Safety Comm'n*, 430 U. S. 442, 450, n. 7 (1977).

The use of administrative agencies as adjuncts was first upheld in *Crowell* v. *Benson*, *supra*. The congressional scheme challenged in *Crowell* empowered an administrative agency, the United States Employees' Compensation Commission, to make initial factual determinations pursuant to a federal statute requiring employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States. The Court began its analysis by noting that the federal statute administered by the Compensation Commission provided for compensation of injured employees "irrespective of fault," and that the statute also prescribed a fixed and mandatory schedule of compensation. *Id.*, at 38. The agency was thus left with the limited role of determining "questions of fact as to the circumstances, nature, extent and consequences of the injuries sustained by the employee for which compensation is to be made." *Id.*, at 54. The agency did not possess the power to enforce any of its compensation orders: On the contrary, every compensation order was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be "in accordance with law" and supported by evidence in the record. *Id.*, at 44–45, 48. The Court found that in view of these limitations upon the Compensation Commission's functions and powers, its determinations were "closely analogous to findings of the amount of damages that are made, according to familiar practice, by commissioners or assessors." *Id.*, at 54. Observing that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges," *id.*, at 51, the Court held that Art. III imposed no bar to the scheme enacted by Congress, *id.*, at 54.

Crowell involved the adjudication of congressionally created rights. But this Court has sustained the use of adjunct fact-finders even in the adjudication of constitutional rights—so long as those adjuncts were subject to sufficient control by an Art. III district court. In *United States* v. *Raddatz*, *supra*, the Court upheld the 1978 Federal Magistrates Act, which permitted district court judges to refer certain pretrial motions, including suppression motions based on alleged violations of constitutional rights, to a magistrate for initial determination. The Court observed that the magistrate's proposed findings and recommendations were subject to *de novo* review by the district court, which was free to rehear the evidence or to call for additional evidence. *Id.*, at 676–677, 681–683. Moreover, it was noted that the magistrate considered motions only upon reference from the district court, and that the magistrates were appointed, and subject to removal, by the district court. *Id.*, at 685 (BLACKMUN, J., concurring).[30] In short, the ultimate decisionmaking authority respecting all pretrial motions clearly remained with the district court. *Id.*, at 682. Under these circumstances, the Court held that the Act did not violate the constraints of Art. III. *Id.*, at 683–684.[31]

Together these cases establish two principles that aid us in determining the extent to which Congress may constitutionally vest traditionally judicial functions in non-Art. III officers. First, 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.[32] Thus *Crowell* recognized that Art. III does not require "all determinations of fact [to] be made by judges," 285 U. S., at 51; with respect to congressionally created rights, some factual determinations may be made by a specialized factfinding tribunal designed by Congress, without constitutional bar, *id.*, at 54. Second, the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Art. III court. Thus in upholding the adjunct scheme challenged in *Crowell*, the Court emphasized that "the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases." *Ibid.* And in refusing to invalidate the Magistrates Act at issue in *Raddatz*, the Court stressed that under the congressional scheme "'[t]he authority—and the responsibility—to make an informed, final determination . . . remains with the judge,'" 447 U. S., at 682, quoting *Mathews* v. *Weber*, 423 U. S. 261, 271 (1976); the statute's delegation of power was therefore permissible, since "the ultimate decision is made by the district court," 447 U. S., at 683.

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[30] Thus in *Raddatz* there was no serious threat that the exercise of the judicial power would be subject to incursion by other branches. "The only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without the judicial department". 447 U. S., at 685. (BLACKMUN, J., concurring).

[31] Appellants and JUSTICE WHITE'S dissent also rely on the broad powers exercised by the bankruptcy referees immediately before the Bankruptcy Act of 1978. See *post*, at 4–12. But those particular adjunct functions, which represent the culmination of years of gradual expansion of the power and authority of the bankruptcy referee, see 1 Collier on Bankruptcy ¶ 1.02 (15th ed. 1981), have never been explicitly endorsed by this Court. In *Katchen* v. *Landy*, 382 U. S. 323 (1966), on which the dissent relies, there was no discussion of the Art. III issue. Moreover, when *Katchen* was decided the 1973 Bankruptcy Rules had not yet been adopted, and the District Judge, after hearing the report of magistrate, was free to "modify it or . . . reject it in whole or in part or . . . receive further evidence or . . . recommit it with instructions." Gen. Order in Bankruptcy No. 47, 305 U. S. 679 (1935).

We note, moreover, that the 1978 Act made at least three significant changes from the bankruptcy practice that immediately preceded it. First, of course, the jurisdiction of the bankruptcy courts was "substantially expanded by the Act." H.R. Rep. No. 95–595, *supra*, p. 13 (1977). Before the Act the referee had no jurisdiction, except with consent, over controversies beyond those involving property in the actual or constructive possession of the court. 11 U. S.C. § 46(b) (repealed). See *MacDonald* v. *Plymouth Trust Co.*, 296 U. S. 263, 266 (1932). It cannot be doubted that the new bankruptcy judges, unlike the referees, have jurisdiction far beyond that which can be even arguably characterized as merely incidental to the discharge in bankruptcy or a plan for reorganization. Second, the bankruptcy judges have broader powers than those exercised by the referees. See *infra* at 34–35; H.R. Rep. 95–595, *supra*, p. 12 and nn. 63–68. Finally, and perhaps most significantly, the relationship between the district court and the bankruptcy court was changed under the 1978 Act. Before the Act, bankruptcy referees were "subordinate adjuncts of the district courts." *Id.*, at 7. In contrast, the new bankruptcy courts are "independent of the United States district courts." *Ibid.*; Collier on Bankruptcy, ¶ 1.03, at 1–9 (15th ed. 1981). Before the Act, bankruptcy referees were appointed and removable only by the district court. 11 U. S.C. § 62 (repealed). And the district court retained control over the reference by his power to withdraw the case from the referee. Bkrptcy. Rule 102. Thus even at the trial stage, the parties had access to an independent judicial officer. Although Congress could still lower the salary of referees, they were not dependent on the political branches of government for their appointment. To paraphrase JUSTICE BLACKMUN's observation in *Raddatz*, *supra*, the primary "danger of a 'threat' to the independence of the [adjunct came] from within, rather than without the judicial department." 447 U. S., at 685 (concurring opinion).

[32] Contrary to JUSTICE WHITE'S suggestion, we do not concede that "Congress may provide for initial adjudications by Article I courts or administrative judges of all rights and duties arising under otherwise valid federal laws." See *post*, at 3. Rather we simply reaffirm the holding of *Crowell*—that Congress may assign to non-Art. III bodies some adjudicatory functions. *Crowell* itself spoke of "specialized" functions. This case does not require us to specify further any limitations that may exist with respect to Congress' power to create adjuncts to assist in the adjudication of federal statutory rights.

These two principles assist us in evaluating the "adjunct" scheme presented in this case. Appellants assume that Congress' power to create "adjuncts" to consider all cases related to those arising under title 11 is as great as it was in the circumstances of *Crowell*. But while *Crowell* certainly endorsed the proposition that Congress possesses broad discretion to assign factfinding functions to an adjunct created to aid in the adjudication of congressionally created statutory rights, *Crowell* does not support the further proposition necessary to appellants' argument—that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights *not* created by Congress. Indeed, the validity of this proposition was expressly denied in *Crowell*, when the Court rejected "the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a *constitutional* right may be involved," 285 U. S., at 60–61 (emphasis added),[33] and stated that

> "the essential independence of the exercise of judicial power of the United States in the enforcement of *constitutional* rights requires that the Federal court should determine . . . an issue [of agency jurisdiction] upon its own record and the facts elicited before it." *Id.*, at 64 (emphasis added).[34]

Appellants' proposition was also implicitly rejected in *Raddatz*. Congress' assignment of adjunct functions under the Federal Magistrates Act was substantially narrower than under the statute challenged in *Crowell*. Yet the Court's scrutiny of the adjunct scheme in *Raddatz*—which played a role in the adjudication of *constitutional* rights—was far stricter than it had been in *Crowell*. Critical to the Court's decision to uphold the Magistrates Act was the fact that the ultimate decision was made by the district court. 447 U. S., at 683.

Although *Crowell* and *Raddatz* do not explicitly distinguish between rights created by Congress and other rights, such a distinction underlies in part *Crowell*'s and *Raddatz*'s recognition of a critical difference between rights created by federal statute and rights recognized by the Constitution. Moreover, such a distinction seems to us to be necessary in light of the delicate accommodations required by the principle of separation of powers reflected in Art. III. The constitutional system of checks and balances is designed to guard against "encroachment or aggrandizement" by Congress at the expense of the other branches of government. *Buckley* v. *Valeo*, 424 U. S., at 122. But when 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.[35] 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. No comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.

We hold that the Bankruptcy Act of 1978 carries the possibility of such an unwarranted encroachment. Many of the rights subject to adjudication by the Act's bankruptcy courts, like the rights implicated in *Raddatz*, are not of Congress' creation. Indeed, the case before us, which centers upon appellant Northern's claim for damages for breach of contract and misrepresentation, involves a right created by *state* law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the bankruptcy court.[36] Accordingly, Congress' authority to control the manner in which that right is adjudicated, through assignment of historically judicial functions to a non-Art. III "adjunct," plainly must be deemed at a minimum. Yet it is equally plain that Congress has vested the "adjunct" bankruptcy judges with powers over appellant's state-created right that far exceed the powers that it has vested in administrative agencies that adjudicate only rights of Congress' own creation.

Unlike the administrative scheme that we reviewed in *Crowell*, the Act vests all "essential attributes" of the judicial power of the United States in the "adjunct" bankruptcy court. First, the agency in *Crowell* made only specialized, narrowly confined factual determinations regarding a particularized area of law. In contrast, the subject matter jurisdiction of the bankruptcy courts encompasses not only traditional matters of bankruptcy, but also "all civil proceedings arising under title 11 or arising in or *related to* cases arising under title 11." 28 U. S. C. § 1471(b) (1976 ed., Supp. III) (emphasis added). Second, while the agency in *Crowell* engaged in statutorily channeled factfinding functions, the bankruptcy courts exercise "*all* of the jurisdiction" conferred by the Act on the district courts, § 1471(b) (emphasis added). Third, the agency in *Crowell* possessed only a limited power to issue compensation orders pursuant to specialized procedures, and its orders could be enforced only by order of the

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[33] The Court in *Crowell* found that the requirement of *de novo* review as to certain facts was not "simply the question of due process in relation to notice and hearing," but was "rather a question of the appropriate balance of Federal judicial power." 285 U. S., at 56. The dissent agreed that some factual findings cannot be made by adjuncts, on the ground that "under certain circumstances, the constitutional requirement of due process is a requirement of [Art. III] judicial process." *Id.*, at 87 (Brandeis, J., dissenting).

[34] *Crowell*'s precise holding, with respect to the review of "jurisdictional" and "constitutional" facts that arise within ordinary administrative proceedings, has been undermined by later cases. See *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 53 (1936). See generally 4 K. Davis, Administrative Law Treatise §§ 29.08, 29.09 (1st ed. 1958). But the general principle of *Crowell*—distinguishing between congressionally created rights and constitutionally recognized rights—remains valid, as evidenced by the Court's recent approval of *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922), on which *Crowell* relied. See *Agosto* v. *INS*, 436 U. S. 748, 753 (1978) (*de novo* judicial determination required for claims of American citizenship in deportation proceedings). See also *United States* v. *Raddatz*, 447 U. S., at 682–684; *id.*, at 707–712 (MARSHALL, J., dissenting).

[35] Drawing the line between permissable extensions of legislative power and impermissible incursions into judicial power is a delicate undertaking, for the powers of the Judicial and Legislative Branches are often overlapping. As Justice Frankfurter noted in a similar context, "To be sure the content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed." *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, 610 (1952) (concurring opinion). The interaction between the Legislative and Judicial Branches is at its height where courts are adjudicating rights wholly of Congress' creation. Thus where Congress creates a substantive right, pursuant to one of its broad powers to make laws, Congress may have something to say about the proper manner of adjudicating that right.

[36] Of course, bankruptcy adjudications themselves, as well as the manner in which the rights of debtors and creditors are adjusted, are matters of federal law. Appellant Northern's state-law contract claim is now in federal court because of its relationship to appellant's reorganization petition. See n. 26, *supra*. But Congress has not purported to prescribe a rule of decision for the resolution of appellant's contractual claims.

district court. By contrast, the bankruptcy courts exercise all ordinary powers of district courts, including the power to preside over jury trials, 28 U. S. C. § 1480 (1976 ed., Supp. III), the power to issue declaratory judgments, § 2201, the power to issue writs of habeas corpus, § 2256, and the power to issue any order, process or judgment appropriate for the enforcement of the provisions of title 11, 11 U. S. C. § 105(a) (1976 ed., Supp. III).[37] Fourth, while orders issued by the agency in *Crowell* were to be set aside if "not supported by the evidence," the judgments of the bankruptcy courts are apparently subject to review only under the more deferential "clearly erroneous" standard. See n. 5, *supra*. Finally, the agency in *Crowell* was required by law to seek enforcement of its compensation orders in the district court. In contrast, the bankruptcy courts issue final judgments, which are binding and enforceable even in the absence of an appeal.[38] In short, the "adjunct" bankruptcy courts created by the Act exercise jurisdiction behind the facade of a grant to the district courts, and are exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz*.[39]

We conclude that § 241(a) of the Bankruptcy Act of 1978 has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.

V

Having concluded that the broad grant of jurisdiction to the bankruptcy courts contained in § 241(a) is unconstitutional, we must now determine whether our holding should be applied retroactively to the effective date of the Act.[40] Our decision in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971), sets forth the three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are, first, whether the holding in question "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier cases, *id.*, at 106; second, "whether retrospective operation will further or retard [the] operation" of the holding in question, *id.*, at 107; and third, whether retroactive application "could produce substantial inequitable results" in individual cases, *ibid.* In the present case, all of these considerations militate against the retroactive application of our holding today. It is plain that Congress' broad grant of judicial power to non-Art. III bankruptcy judges presents an unprecedented question of interpretation of Art. III. It is equally plain that retroactive application would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. We hold, therefore, that our decision today shall apply only prospectively.[41]

The judgment of the District Court is affirmed. However, we stay our judgment until October 4, 1982. This limited stay will 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. See *Buckley* v. *Valeo*, 424 U. S. 1, 143 (1976); cf. *Georgia* v. *United States*, 411 U. S. 526, 541 (1973); *Fortson* v. *Morris*, 385 U. S. 231, 235 (1966); *Maryland Comm.* v. *Tawes*, 377 U. S. 656, 675–676 (1964).

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

Were I to agree with the plurality that the question presented by this case is "whether the assignment by Congress

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[37] The limitations that the judges "may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment," 28 U. S. C. § 1481 (1976 ed., Supp. III), are also denied to Art. III judges under certain circumstances. See 18 U. S. C. §§ 401, 402, 3691; 28 U. S. C. § 2283.

[38] Although the entry of an enforcement order is in some respects merely formal, it has long been recognized that

"'The award of execution . . . is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment in the legal sense of the term, without it.'" *ICC* v. *Brimson*, 154 U. S. 447, 484 (1894), quoting Chief Justice Taney's memorandum in *Gordon* v. *United States*, 117 U. S. 697, 702 (1864).

[39] Appellants suggest that *Crowell* and *Raddatz* stand for the proposition that Art. III is satisfied so long as some degree of appellate review is provided. But that suggestion is directly contrary to the text of our Constitution: "The Judges, *both* of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall . . . receive [undiminished] Compensation." Art. III, § 1 (emphasis added). Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level. The Court responded to a similar suggestion in *Crowell* by stating that to accept such a regime,

"would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law." 285 U. S., at 57.

Cf. *Ward* v. *Village of Monroeville*, 409 U. S. 57, 61–62 (1972); *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 883 (1824).

JUSTICE WHITE'S dissent views the function of the Third Branch as interpreting the Constitution in order to keep the other two branches in check, and would accordingly find the purpose, if not the language, of Art. III satisfied where there is an appeal to an Art. III court. See *post*, at 24. But in the Framers' view, Art. III courts would do a great deal more than, in an abstract way, announce guidelines for the other two branches. While "expounding" the Constitution was surely one vital function of the Art. III courts in the Framers' view, the tasks of those courts, for which independence was an important safeguard, included the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law. As Hamilton noted, "it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society." The Federalist No. 78, p. 488 (H. Lodge ed. 1888). In order to promote the independence and improve the quality of federal judicial decision making in all of these areas, the Framers created a system of independent federal courts. See The Federalist Nos. 78–82.

[40] It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes. See H.R. Rep. No. 95–595, *supra*, p. 43–48; S. Rep. No. 95–989, p. 17 (1978). Nor can we assume, as THE CHIEF JUSTICE suggests, *post*, at 2, that Congress' choice would be to have this case "routed to the United States district court of which the bankruptcy court is an adjunct." We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III, in the way that will best effectuate the legislative purpose.

[41] See also *Buckley* v. *Valeo*, 424 U. S., at 142; *Chicot County Drainage Dist.* v. *Bank*, 308 U. S. 371, 376–377 (1940); *Insurance Corp.* v. *Compagnie des Bauxites*, —— U. S. ——, ——, n. 9 (1982).

to bankruptcy judges of the jurisdiction granted in § 241(a) of the Bankruptcy Act of 1978 . . . violates Art. III of the Constitution," *ante*, at 1, I would with considerable reluctance embark on the duty of deciding this broad question. But appellee Marathon Pipe Line Co. has not been subjected to the full range of authority granted Bankruptcy Courts by § 241(a). It was named as a defendant in a suit brought by appellant in a United States Bankruptcy Court. The suit sought damages for, *inter alia*, breaches of contract and warranty. Marathon moved to dismiss the action on the grounds that the Bankruptcy Act of 1978, which authorized the suit, violated Art. III of the Constitution insofar as it established Bankruptcy Judges whose tenure and salary protection do not conform to the requirements of Art. III.

With the case in this posture, Marathon has simply been named defendant in a lawsuit about a contract, a lawsuit initiated by appellant Northern after having previously filed a petition for reorganization under the Bankruptcy Act. Marathon may object to proceeding further with this lawsuit on the grounds that if it is to be resolved by an agency of the United States, it may be resolved only by an agency which exercises "the judicial power of the United States" described by Art. III of the Constitution. But resolution of any objections it may make on this ground to the exercise of a different authority conferred on Bankruptcy Courts by the 1978 Act, see *ante*, at 2–4, should await the exercise of such authority.

> "This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, New York & Philadelphia S.S. Co.* v. *Commissioners of Emmigration*, 113 U. S. 33. 39." *United States* v. *Raines*, 362 U. S. 17, 21 (1960).

Particularly in an area of constitutional law such as that of "Art. III Courts," with its frequently arcane distinctions and confusing precedents, rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy.

From the record before us, the lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789. There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims of Northern arise entirely under state law. No method of adjudication is hinted, other than the traditional common law mode of judge and jury. The lawsuit is before the Bankruptcy Court only because the plaintiff has previously filed a petition for reorganization in that Court.

The cases dealing with the authority of Congress to create courts other than by use of its power under Art. III do not admit of easy synthesis. In the interval of nearly 150 years between *American Insurance Co.* v. *Canter*, 1 Pet. 511 (1828), and *Palmore* v. *United States*, 411 U. S. 389 (1973), the Court addressed the question infrequently. I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes, or whether instead they are but landmarks on a judicial "darkling plain" where ignorant armies have clashed by night, as JUSTICE WHITE apparently believes them to be. None of the cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected against its will under the provisions of the 1978 Act. To whatever extent different powers granted under that Act might be sustained under the "public rights" doctrine of *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1855), and succeeding cases, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained.

I am likewise of the opinion that the extent of review by Art. III courts provided on appeal from a decision of the Bankruptcy Court in a case such as Northern's does not save the grant of authority to the latter under the rule espoused in *Crowell* v. *Benson*, 285 U. S. 22 (1932). All matters of fact and law in whatever domains of the law to which the parties' dispute may lead are to be resolved by the Bankruptcy Court in the first instance, with only traditional appellate review apparently contemplated by Art. III courts. Acting in this manner the Bankruptcy Court is not an "adjunct" of either the District Court or the Court of Appeals.

I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III of the United States Constitution. Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority to Bankruptcy Courts under § 241(a), see *ante*, at 37 n. 40, I concur in the judgment. I also agree with the discussion in Part V of the plurality opinion respecting retroactivity and the staying of the judgment of this Court.

CHIEF JUSTICE BURGER, dissenting.

I join JUSTICE WHITE's dissenting opinion, but I write separately to emphasize that, notwithstanding the plurality opinion, the Court does *not* hold today that Congress' broad grant of jurisdiction to the new bankruptcy courts is generally inconsistent with Article III of the Constitution. Rather, the Court's holding is limited to the proposition stated by JUSTICE REHNQUIST in his concurrence in the judgment—that a "traditional" state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an "Article III court" if it is to be heard by any court or agency of the United States. This limited holding, of course, does not suggest that there is something inherently unconstitutional about the new bankruptcy courts; nor does it preclude such courts from adjudicating all but a relatively narrow category of claims "arising under" or "arising in or related to cases under" the Bankruptcy Act.

It will not be necessary for Congress, in order to meet the requirements of the Court's holding, to undertake a radical restructuring of the present system of bankruptcy adjudication. The problems arising from today's judgment can be resolved simply by providing that ancillary common-law actions, such as the one involved in this case, be routed to the United States district court of which the bankruptcy court is an adjunct.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

Article III, § 1 of the Constitution is straightforward and

uncomplicated on its face:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."

Any reader could easily take this provision to mean that although Congress was free to establish such lower courts as it saw fit, any court that it did establish would be an "inferior" court exercising "judicial power of the United States" and so must be manned by judges possessing both life-tenure and a guaranteed minimal income. This would be an eminently sensible reading and one that, as the plurality shows, is well-founded in both the documentary sources and the political doctrine of separation of powers that stands behind much of our constitutional structure. *Ante*, at 6–9.

If this simple reading were correct and we were free to disregard 150 years of history, this would be an easy case and the plurality opinion could end with its observation that "[i]t is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Reform Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges." *Ante*, at 9. The fact that the plurality must go on to deal with what has been characterized as one of the most confusing and controversial areas of constitutional law[1] itself indicates the gross oversimplification implicit in the plurality's claim that "our Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary [and] provides clear institutional protections for that independence." *Ante*, at 9. While this is fine rhetoric, analytically it serves only to put a distracting and superficial gloss on a difficult question.

That question is what limits Article III places on Congress' ability to create adjucative institutions designed to carry out federal policy established pursuant to the substantive authority given Congress elsewhere in the Constitution. Whether fortunate or unfortunate, at this point in the history of constitutional law that question can no longer be answered by looking only to the constitutional text. This Court's cases construing that text must also be considered. In its attempt to pigeon-hole these cases, the plurality does violence to their meaning and creates an artificial structure that itself lacks coherence.

I

There are, I believe, two separate grounds for today's decision. First, non-Article III judges, regardless of whether they are labelled "adjuncts" to Article III courts or "Article I judges," may consider only controversies arising out of federal law. Because the immediate controversy in this case—Northern Pipeline's claim against Marathon—arises out of state law, it may only be adjudicated, within the federal system, by an Article III court.[2] Second, regardless of the source of law that governs the controversy, Congress is prohibited by Article III from establishing Article I courts, with three narrow exceptions. Adjudication of bankruptcy proceedings does not fall within any of these exceptions. I shall deal with the first of these contentions in this section.

[1] *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 534 (1962) (Harlan, J., plurality opinion)

[2] Because this is the sole ground relied upon by the concurring Justices, this is the effective basis for today's decision.

The plurality concedes that Congress may provide for initial adjudications by Article I courts or administrative judges of all rights and duties arising under otherwise valid federal laws. *Ante*, at 30. There is no apparent reason why this principle should not extend to matters arising in federal bankruptcy proceedings. The Court attempts to escape the reach of prior decisions by contending that the bankrupt's claim against Marathon arose under state law. Non-Article III judges, in its view, cannot be vested with authority to adjudicate such issues. It then proceeds to strike down §241(a) on this ground. For several reasons, the Court's judgment is unsupportable.

First, clearly this ground alone cannot support the Court's invalidation of §241(a) on its face. The plurality concedes that in adjudications and discharges in bankruptcy, "the restructuring of debtor-creditor relations, which lies at the core of the federal bankruptcy power," *ante*, at 21, and "the manner in which the rights of debtors and creditors are adjusted," *ante*, at 34, n. 36, are matters of federal law. Under the plurality's own interpretation of the cases, therefore, these matters could be heard and decided by Article I judges. But because the bankruptcy judge is also given authority to hear a case like that of petitioner against Marathon, which the Court says is founded on state law, the Court holds that the section must be stricken down on its face. This is a grossly unwarranted emasculation of the scheme Congress has adopted. Even if the Court is correct that such a state law claim cannot be heard by a bankruptcy judge, there is no basis for doing more than declaring the section unconstitutional as applied to the claim against Marathon, leaving the section otherwise intact. In that event, cases such as this one would have to be heard by Article III judges or by state courts—unless the defendant consents to suit before the bankruptcy judge—just as they were before the 1978 Act was adopted. But this would remove from the jurisdiction of the bankruptcy judges only a tiny fraction of the cases he is now empowered to adjudicate and would not otherwise limit his jurisdiction.[3]

Second, the distinction between claims based on state law and those based on federal law disregards the real character of bankruptcy proceedings. The routine in ordinary bankruptcy cases now, as it was before 1978, is to stay actions against the bankrupt, collect the bankrupt's assets, require creditors to file claims or be forever barred, allow or disallow claims that are filed, adjudicate preferences and fraudulent transfers, and make pro rata distributions to creditors, who

[3] The plurality attempts to justify its sweeping invalidation of §241(a), because of its inclusion of state-law claims, by suggesting that this statutory provision is nonseverable. *Ante*, at n. 40. The concurring Justices specifically adopt this argument as the reason for their decision to join the judgment of the Court. The basis for the conclusion of nonseverability, however, is nothing more than a presumption: "Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances, we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters." *Ibid.* Although it is possible, as a historical matter, to find cases of this Court supporting this presumption, see *e. g.*, *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 242 (1929), I had not thought this to be the contemporary approach to the problem of severability, particularly when dealing with federal statutes. I would follow the approach taken by the Court in *Buckley* v. *Valeo*, 424 U. S. 1, 108 (1976): "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210 (1932). This presumption seems particularly strong when Congress has already "enacted those provisions which are within its power, independently of that which is not"—*i. e.*, in the old Bankruptcy Act.

will be barred by the discharge from taking further actions against the bankrupt. The crucial point to be made is that in the ordinary bankrupcty proceeding the great bulk of creditor claims are claims that have accrued under state law prior to bankruptcy—claims for goods sold, wages, rent, utilities and the like. "[T]he word debt as used by the Act is not confined to the technical common law meaning but . . . extends to liabilities arising out of breach of contract . . . to torts . . . and to taxes owing to the United States or state or local governments." 1 Collier on Bankruptcy 88 (14th ed. 1976). Every such claim must be filed and its validity is subject to adjudication by the bankruptcy court. The existence and validity of such claims recurringly depends on state law. Hence, the bankruptcy judge is constantly enmeshed in state law issues.

The new aspect of the Bankruptcy Act of 1978, in this regard, therefore, is not the extension of federal jurisdiction to state law claims, but its extension to particular kinds of state law claims, such as contract cases against third parties or disputes involving property in the possession of a third person.[4] Prior to 1978, a claim of a bankrupt against a third party, such as the claim against Marathon in this case, was not within the jurisdiction of the bankruptcy judge. The old limits were based, of course, on the restrictions implicit within the concept of *in rem* jurisdiction; the new extension is based on the concept of *in personam* jusisdiction. "The bankruptcy court is given in personam jurisdiction as well as in rem jurisdiction to handle everything that arises in a bankruptcy case." H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1977). The difference between the new and old Act, therefore, is not to be found in a distinction between state law and federal law matters; rather, it is in a distinction between *in rem* and *in personam* jurisdiction. The majority at no place explains why this distinction should have constitutional implications.

Third, all that can be left of the majority's argument in this regard is that state law claims adjudicated within the federal system must be heard in the first instance by Article III judges. I shall argue below that any such attempt to distinguish Article I from Article III courts by the character of the controversies they may adjudicate fundamentally misunderstands the historical and constitutional significance of Article I courts. Initially, however, the majority's proposal seems to turn the separation of powers doctrine, upon which the majority relies, on its head: Since state law claims would ordinarily not be heard by Article III judges—*i. e.*, they would be heard by state judges—one would think that there is little danger of a diminution of, or intrusion upon, the power of Article III courts, when such claims are assigned to a non-Article III court. The plurality misses this obvious point because it concentrates on explaining how it is that federally created rights can ever be adjudicated in Article I courts—a far more difficult problem under the separation of powers doctrine. The plurality fumbles when it assumes that the rationale it develops to deal with the latter problem must also govern the former problem. In fact, the two are simply unrelated and the majority never really explains the separation of powers problem that would be created by assigning state law questions to legislative courts or to adjuncts of Article III courts.

One need not contemplate the intricacies of the separation of powers doctrine, however, to realize that majority's position on adjudication of state law claims is based on an abstract theory that has little to do with the reality of bankruptcy proceedings. Even prior to the present Act, bankruptcy cases were generally referred to bankruptcy judges, previously called referees. Bankruptcy Rule 102(a). Section 66 of Title 11 described the jurisdiction of the referees. Their powers included the authority to

> "consider all petitions referred to them and make the adjudications or dismiss the petition . . . grant, deny or revoke discharges, determine the dischargeability of debts, and render judgments thereon [and] perform such of the duties as are by this Title conferred on courts of bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of courts of bankruptcy of their respective districts, except as herein otherwise provided."

The bankruptcy judge possessed "complete jurisdiction of the proceedings." 1 Collier on Bankruptcy 65 (14th ed. 1976). The referee would initially hear and decide practically all matters arising in the proceedings, including the allowance and disallowance of the claims of creditors.[5] If a claim was disallowed by the bankruptcy judge and the decision was not reversed on appeal, the creditor was forever barred from further action against the bankrupt. As pointed out above, all of these matters could and usually did involve state law issues. Initial adjudication of state law issues by non-Article III judges is, then, hardly a new aspect of 1978 Act.

Furthermore, I take it that the Court does not condemn as inconsistent with Article III the assignment of these functions—*i. e.*, those within the summary jurisdiction of the old bankruptcy courts—to a non-Article III judge, since, as the plurality says, they lie at the core of the federal bankruptcy power. *Ante*, at 21. They also happen to be functions that have been performed by referees or bankruptcy judges for a very long time and without constitutional objection. Indeed, we approved the authority of the referee to allow or disallow claims in *Katchen* v. *Landy*, 382 U. S. 323 (1966). There, the referee held that a creditor had received a preference and that his claim could therefore not be allowed. We agreed that the referee had the authority not only to adjudicate the existence of the preference, but also to order that the preference be disgorged. We also recognized that the referee could adjudicate counterclaims against a creditor who files his claim against the estate. The 1973 Bankruptcy Rules make similar provision. See Rule 306(c), Rule 701, and Advisory Committee Note to Rule 701. Hence, if Marathon had filed a claim against the bankrupt in this case, the trustee could have filed and the bankruptcy judge could have adjudicated a counterclaim seeking the relief that is involved in this case.

Of course, all such adjudications by a bankruptcy judge or referee were subject to review in the District Court, on the record. See 11 U. S. C. § 67(c) (1976). Bankruptcy Rule 810, transmitted to Congress by this Court, provided that the District Court "shall accept the referee's findings of fact unless they are clearly erroneous." As the plurality recognizes, *ante*, at 4, the 1978 Act provides for appellate review in Article III courts and presumably under the same "clearly erroneous standard." In other words, under both the old and new act, initial determinations of state law questions were to be made by non-Article III judges, subject to review by Article III judges. Why the differences in the provisions

[4] Even this is not entirely new. Under the old Act, in certain circumstances, the referee could actually adjudicate and order the payment of a claim of the bankrupt estate against another. In *Katchen* v. *Landy*, 382 U. S. 323 (1966), for example, we recognized that when a creditor files a claim, the referee is empowered to hear and decide a counter-claim against that creditor arising out of the same transaction. A similar situation could arise in adjudicating setoffs under former § 68 of the Bankruptcy Act.

[5] "The judicial act of allowance is one, of course, that is performed by the referee where the proceedings have been generally referred." 3 Collier on Bankruptcy 229 n. 3 (14th ed. 1977).

for appeal in the two Acts are of unconstitutional dimension remains entirely unclear.

In theory and fact, therefore, I can find no basis for that part of the majority's argument that rests on the state-law character of the claim involved here. Even if prior to 1978, the referee could not generally participate in cases aimed at collecting the assets of a bankrupt estate, he nevertheless repeatedly adjudicated issues controlled by state law. There is very little reason to strike down § 241(a) on its face on the ground that it extends, in a comparatively minimal way, the referees authority to deal with state law questions. To do so is to lose all sense of proportion.

II

The plurality unpersuasively attempts to bolster its case for facial invalidity by asserting that the bankruptcy courts are now "exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz*." *Ante*, at 35. In support of this proposition it makes five arguments in addition to the "state-law" issue. Preliminarily, I see no basis for according standing to Marathon to raise any of these additional points. The state-law objection applies to the Marathon case. Only that objection should now be adjudicated.[6]

I also believe that the major premise of the plurality's argument is wholly unsupported: There is no explanation of why *Crowell* and *Raddatz* define the outer limits of constitutional authority. Much more relevant to today's decision are first, the practice in bankruptcy prior to 1978, which neither the majority nor any authoritative case has questioned, and second, the practice of today's administrative agencies. Considered from this perspective, all of the plurality's arguments are unsupportable abstractions, divorced from the realities of modern practice.

The first three arguments offered by the plurality, *ante*, at 34–35, focus on the narrowly defined task and authority of the agency considered in *Crowell*: The agency made only "specialized, narrowly confined factual determinations" and could issue only a narrow class of orders. Regardless of whether this was true of the Compensation Board at issue in *Crowell*, it certainly was not true of the old bankruptcy courts, nor does it even vaguely resemble current administrative practice. As I have already said, general references to bankruptcy judges, which was the usual practice prior to 1978, permitted bankruptcy judges to perform almost all of the functions of a bankruptcy court. Referees or bankruptcy judges not only exercised summary jurisdiction but could also conduct adversary proceedings to:

> "(1) recover money or property . . . . (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to make a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay . . . (7) determine the dischargeability of a debt." Bankruptcy Rule 701.

Although there were some exceptions to the referees authority, which have been removed by the 1978 Act, the additions to the jurisdiction of the bankruptcy judges were of marginal significance when examined in the light of the overall functions of those judges before and after 1978. In my view, those changes are not sufficient to work a qualitative change in the character of the bankruptcy judge.

The plurality's fourth argument fails to point to any difference between the new and old bankruptcy acts. While the administrative orders in *Crowell* may have been set aside by a court if "not supported by the evidence," under both the new and old acts at issue here, orders of the bankruptcy judge are reviewed under the "clearly erroneous standard." See Bankruptcy Rule 810. Indeed, judicial review of the orders of bankruptcy judges is more stringent than that of many modern administrative agencies. Generally courts are not free to set aside the findings of administrative agencies, if supported by substantial evidence. But more importantly, courts are also admonished to give substantial deference to the agency's interpretation of the statute it is enforcing. No such deference is required with respect to decisions on the law made by bankruptcy judges.

Finally, the plurality suggests that, unlike the agency considered in *Crowell*, the orders of a post-1978 bankruptcy judge are final and binding even though not appealed. *Ante*, at 35. To attribute any constitutional significance to this, unless the plurality intends to throw into question a large body of administrative law, is strange. More directly, this simply does not represent any change in bankruptcy practice. It was hornbook law prior to 1978 that the authorized judgments and orders of referees, including turnover orders, were final and binding and *res judicata* unless appealed and overturned:

> "The practice before the referee should not differ from that before the judge of the court of bankruptcy and, apart from direct review within the limitation of § 39(c), the orders of the referee are entitled to the same presumption of validity, conclusiveness and recognition in the court of bankruptcy or other courts." 1 Collier on Bankruptcy 65 (14th ed. 1976).

Even if there are specific powers now vested in bankruptcy judges that should be performed by Article III judges, the great bulk of their functions are unexceptionable and should be left intact. Whatever is invalid should be declared to be such; the rest of the 1978 Act should be left alone. I can account for the majority's inexplicably heavy hand in this case only by assuming that the Court has once again lost its conceptual bearings when confronted with the difficult problem of the nature and role of Article I courts. To that question I now turn.

III

A

The plurality contends that the precedents upholding Article I courts can be reduced to three categories. First, there are territorial courts, which need not satisfy Article III constraints because "the Framers intended that as to certain geographical areas . . . Congress was to exercise the general powers of government."[7] *Ante*, at 13. Second, there are courts martial, which are exempt from Article III limits because of 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." *Ante*, at 15. Finally, there are those legislative courts and administrative agencies that adjudicate cases involving public rights—controversies between the government and private parties—which are not covered by Article III because the controversy could have been resolved by the executive alone without judicial review. See *ante*, at 17. Despite the plurality's attempt to cabin the domain of Article I courts, it is quite unrealistic to consider these to be

[6] On this point I am in agreement with the concurring Justices.

[7] The majority does not explain why the constitutional grant of power over the territories to Congress is sufficient to overcome the strictures of Article III, but presumably not sufficient to overcome the strictures of the Presentment Clause or other executive limits on congressional authority.

only three "narrow," *ante*, at 13, limitations on or exceptions to the reach of Article III. In fact, the plurality itself breaks the mold in its discussion of "adjuncts" in Part IV, when it announces that "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated." *Ante*, at 30. Adjudications of federal rights may, according to the plurality, be committed to administrative agencies, as long as provision is made for judicial review.

The first principle introduced by the plurality is geographical: Article I courts presumably are not permitted within the states.[8] The problem, of course, is that both of the other exceptions recognize that Article I courts can indeed operate within the States. The second category relies upon a new principle: Article I courts are permissible in areas in which the Constitution grants Congress "extraordinary control over the precise subject matter." *Ante*, at 15. Preliminarily, I do not know how we are to distinguish those areas in which Congress' control is "extraordinary" from those in which it is not. Congress' power over the armed forces is established in Art. I, §8, cls. 13, 14. There is nothing in those clauses that creates congressional authority different in kind from the authority granted to legislate with respect to bankruptcy. But more importantly, in its third category, and in its treatment of "adjuncts", the plurality itself recognizes that Congress can create Article I courts in virtually all the areas in which Congress is authorized to act, regardless of the quality of the constitutional grant of authority. At the same time, territorial courts or the courts of the District of Columbia, which are Article I courts, adjudicate private, just as much as public or federal, rights.

Instead of telling us what it is Article I courts can and cannot do, the plurality presents us with a list of Article I courts. When we try to distinguish those courts from their Article III counterparts, we find—apart from the obvious lack of Article III judges—a series of non-distinctions. By the plurality's own admission, Article I courts can operate throughout the country, they can adjudicate both private and public rights, and they can adjudicate matters arising from congressional actions in those areas in which congressional control is "extraordinary." I cannot distinguish this last category from the general "arising under" jurisdiction of Article III courts.

The plurality opinion has the appearance of limiting Article I courts only because it fails to add together the sum of its parts. Rather than limiting each other, the principles relied upon complement each other; together they cover virtually the whole domain of possible areas of adjudication. Without a unifying principle, the plurality's argument reduces to the proposition that because bankruptcy courts are not sufficiently like any of these three exceptions, they may not be either Article I courts or adjuncts to Article III courts. But we need to know why bankruptcy courts can not qualify as Article I courts in their own right.

B

The plurality opinion is not the first unsuccessful attempt to articulate a principled ground by which to distinguish Article I from Article III courts. The concept of a legislative, or Article I, court was introduced by an opinion authored by Chief Justice Marshall. Not only did he create the concept, but at the same time he started the theoretical controversy that has ever since surrounded the concept:

> "The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause wich enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States." *American Insurance Co.* v. *Canter*, 1 Pet. 511, 546 (1828).

The proposition was simple enough: Constitutional courts exercise the judicial power described in Article III of the Constitution; legislative courts do not and cannot.

There were only two problems with this proposition. First, *Canter* itself involved a case in admiralty jurisdiction, which is specifically included within the "judicial power of the United States" delineated in Article III. How, then, could the territorial court not be exercising Article III judicial power? Second, and no less troubling, if the territorial courts could not exercise Article III power, how could their decisions be subject to appellate review in Article III courts, including this one, that can exercise only Article III "judicial" power? Yet from early on this Court has exercised such appellate jurisdiction. *Benner* v. *Porter*, 9 How. 235, 243 (1850); *Clinton* v. *Englebrecht*, 13 Wall. 434 (1872); *Reynolds* v. *United States*, 98 U.S 145, 154 (1878); *United States* v. *Coe*, 155 U. S. 76, 86 (1894); *Balzac* v. *Porto Rico*, 258 U. S. 298, 312–313 (1922). The attempt to understand the seemingly unexplainable was bound to generate "confusion and controversy." This analytic framework, however—the search for a principled distinction—has continued to burden the Court.

The first major elaboration on the *Canter* principle was in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856). The plaintiff in that case argued that a proceeding against a customs collector for the collection of moneys claimed to be due to the United States was an exercise of "judicial power" and therefore had to be carried out by Article III judges. The Court accepted this premise: "It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power." *Id.*, at 275. Having accepted this premise, the Court went on to delineate those matters which could be determined only by an Article III court, *i. e.*, those matters that fall within the nondelegable "judicial power" of the United States. The Court's response to this was twofold. First, it suggested that there are certain matters which are inherently "judicial": "[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Id.*, at 284. Second, it suggested that there is another class of issues that, depending upon the form in which Congress structures the decisionmaking process, may or may not fall within "the cognizance of the courts of the United States." *Ibid.* This latter category consisted of the so-called "public rights." Apparently, the idea was that Congress was free to structure the adjudication of "public rights" without regard to Article III.

[8] Had the plurality cited only the territorial courts, the principle relied on perhaps could have been the fact that power over the territories is provided Congress in Article IV. However, Congress' power over the District of Columbia is an Article I power. As such, it does not seem to have any greater status than any of the other powers enumerated in Art. I, §8.

Having accepted the plaintiff's premise, it is hard to see how the Court could have taken too seriously its first contention. The Court presented no examples of such issues that are judicial "by nature" and simply failed to acknowledge that Article I courts already sanctioned by the Court—*e. g.*, territorial courts—were deciding such issues all the time. The second point, however, contains implicitly a critical insight; one that if openly acknowledged would have undermined the entire structure. That insight follows from the Court's earlier recognition that the term "judicial act" is broad enough to encompass all administrative action involving inquiry into facts and the application of law to those facts. *Id.*, at 280. If administrative action can be characterized as "judicial" in nature, then obviously the Court's subsequent attempt to distinguish administrative from judicial action on the basis of the manner in which Congress structures the decision cannot succeed. There need be no Article III court involvement in any adjudication of a "public right", which the majority now interprets as any civil matter arising between the Federal Government and a citizen. In that area, whether an issue is to be decided by an Article III court depends, finally, on congressional intent.

Although *Murray's Lessee* implicitly undermined Chief Justice Marshall's suggestion that there is a difference in kind between the work of Article I and that of Article III courts, it did not contend that the Court must always defer to congressional desire in this regard. The Court considered the plaintiff's contention that removal of the issue from an Article III court must be justified by "necessity." Although not entirely clear, the Court seems to have accepted this proposition: "[I]t seems to us that the just inference from the entire law is, that there was such a necessity for the warrant." *Id.*, at 285.[9]

The Court in *Murray's Lessee* was precisely right: Whether an issue can be decided by a non-Article III court does not depend upon the judicial or nonjudicial character of the issue, but on the will of Congress and the reasons Congress offers for not using an Article III court. This insight, however, was completely disavowed in the next major case to consider the distinction between Article I and Article III courts, *Ex Parte Bakelite Corp.*, 279 U. S. 438 (1929), in which the Court concluded that the Court of Customs Appeals was a legislative court. The Court there directly embraced the principle also articulated in *Murray's Lessee* that Article I courts may not consider any matter "which inherently or necessarily requires judicial determination," but only such matters as are "susceptible of legislative or executive determination." 279 U. S., at 453. It then went on effectively to bury the critical insight of *Murray's Lessee*, labelling as "fallacious" any argument that "assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred." *Id.*, at 459.[10]

The distinction between public and private rights as the principle delineating the proper domains of legislative and constitutional courts respectively received its death blow, I had believed, in *Crowell* v. *Benson*, 285 U. S. 22 (1932). In that case, the Court approved an administrative scheme for the determination, in the first instance, of maritime employee compensation claims. Although acknowledging the framework set out in *Murray's Lessee* and *Ex Parte Bakelite*, the Court specifically distinguished this case: "The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined."[11] *Id.*, at 51. Nevertheless, the Court approved of the use of an Article I adjudication mechanism on the new theory that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." *Ibid.* Article I courts could deal not only with public rights, but also, to an extent, with private rights. The Court now established a distinction between questions of fact and law: "The reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases."[12] *Id.*, at 54.

Whatever sense *Crowell* may have seemed to give to this subject was exceedingly shortlived. One year later, the Court returned to this subject, abandoning both the public/private and the fact/law distinction and replacing both with a simple literalism. In *O'Donoghue* v. *United States*, 289 U. S. 516 (1933), considering the courts of the District of Columbia, and in *Williams* v. *United States*, 289 U. S. 553 (1933), considering the Court of Claims, the Court adopted the principle that if a federal court exercises jurisdiction over cases of the type listed in Art. III, §2 as falling within the "judicial power of the United States," then that court must be an Article III court:

> "The provision of this section of the article is that the 'judicial power shall extend' to the cases enumerated, and it logically follows that where jurisdiction over these cases is conferred upon the courts of the District, the judicial power, since they are capable of receiving it, is *ipso facto*, vested in such courts as inferior courts of the United States." *O'Donoghue*, *supra*, at 545.[13]

In order to apply this same principle and yet hold the Court of Claims to be a legislative court, the Court found it necessary in *Williams*, *supra*, to conclude that the phrase "controversies to which the United States shall be a party" in Artice III must be read as if it said "controversies to which the United States shall be a party plaintiff or petitioner."[14]

By the time of the *Williams* decision, this area of the law was mystifying to say the least. What followed helped very little, if at all. In the next two major cases the Court could not agree internally on a majority position. In *National Insurance Co.* v. *Tidewater Co.*, 337 U. S. 582 (1949), the Court upheld a statute giving federal district courts jurisdic-

[9] By stating that "of this necessity congress alone is the judge," 18 How., at 285, the Court added some serious ambiguity to the standard it applied. Because this statement ends the Court's analysis of the merits of the claim, it does not seem to mean that the Court will simply defer to congressional judgment. Rather, it appears to mean that the Court will review the legislative record to determine whether there appeared to Congress to be compelling reasons for not establishing an Article III court.

[10] The Court did not, however, entirely follow this priciple, for it stated elsewhere that "there is propriety in mentioning the fact that Congress always has treated [the Court of Claims as an Article I court]." 279 U. S., at 454.

[11] The plurality is clearly wrong in citing *Crowell* in support of the proposition that matters involving private, as opposed to public, rights may not be considered in a non-Article III court. *Ante*, at 19.

[12] *Crowell* also suggests that certain facts—constitutional or jurisdictional—must also be subject to *de novo* review in an Article III court. I agree with the plurality that this aspect of *Crowell* has been "undermined by later cases," *ante*, at 32 n. 34. As a matter of historical interest, however, I would contend that *Crowell*'s holding with respect to these "facts" turned more on the questions of law that were inseparably tied to them, than on some notion of the inadequacy of a non-Article III factfinder.

[13] *O'Donoghue* does not apply this principle wholly consistently: It still recognizes a territorial court exception to Article III's requirements. It now bases this exception, however, not on any theoretical difference in principle, but simply on the "transitory character of the territorial governments." 289 U. S., at 536.

[14] See Hart & Wechsler, The Federal Courts and The Federal System 399 (reviewing the problems of the *Williams* case and characterizing it as an "intellectual disaster").

tion over suits between citizens of the District of Columbia and citizens of a State. A majority of the Court, however, rejected the plurality position that Congress had the authority to assign Article I powers to Article III courts, at least outside of the District of Columbia. Only Chief Justice Vinson in dissent reflected on the other side of this problem: whether Article I courts could be assigned Article III powers. He entirely disagreed with the conceptual basis for *Williams* and *O'Donoghue*, noting that to the extent that Article I courts consider non-Article III matters, appellate review by an Article III court would be precluded. Or conversely, since appellate review is exercised by this Court over Article I courts, Article I courts must "exercise federal question jurisdiction." *Id.*, at 643. Having gone this far, the Chief Justice was confronted with the obvious question of whether in fact "the distinction between constitutional and legislative courts is meaningless." *Id.*, at 644. Although suggesting that outside of the territories or the District of Columbia there may be some limits on assignment to Article I courts of matters that fall within Article III jurisdiction—apart from federal question jurisdiction—for the most part the Chief Justice ends up relying on the good will of Congress: "[W]e cannot impute to Congress an intent now or in the future to transfer jurisdiction from constitutional to legislative courts for the purpose of emasculating the former." *Ibid.*

Another chapter in this somewhat dense history of a constitutional quandry was provided by Justice Harlan's plurality opinion in *Glidden Company* v. *Zdanok*, 370 U. S. 530 (1962), in which the Court, despite *Bakelite* and *Williams*—and relying on an Act of Congress enacted since those decisions—held the Court of Claims and the Court of Customs and Patent Appeals to be Article III courts. Justice Harlan continued the process of intellectual repudiation begun by Chief Justice Vinson in *Tidewater*. First, it was clear to him that Chief Justice Marshall could not have meant what he said in *Canter* on the inability of Article I courts to consider issues within the jurisdiction of Article III courts: "Far from being 'incapable of receiving' federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts and have been subjected to the appellate jurisdiction of this Court precisely because they do so." *Id.*, at 545 n. 13. Second, exceptions to the requirements of Article III, he thought, have not been founded on any principled distinction between Article I issues and Article III issues; rather, a "confluence of practical considerations," *id.*, at 547, account for this Court's sanctioning of Article I courts:

> "The touchstone of decision in all these cases has been the need to exercise the jurisdiction then and there and for a transitory period. Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, the practical necessities, and the possible alternatives." *Id.*, at 547–548.

Finally, recognizing that there is frequently no way to distinguish between between Article I and Article III courts on the basis of the work they do, Justice Harlan suggested that the only way to tell them apart is to examine the "establishing legislation" to see if it complies with the requirements of Article III. This, however, comes dangerously close to saying that Article III courts are those with Article III judges; Article I courts are those without such judges. One hundred and fifty years of constitutional history, in other words, had led to a simple tautology.

IV

The complicated and contradictory history of the issue before us leads me to conclude that Chief Justice Vinson and Justice Harlan reached the correct conclusion: There is no difference in principle between the work that Congress may assign to an Article I court and that which the Contitution assigns to Article III courts. Unless we want to overrule a large number of our precedents upholding a variety of Article I courts—not to speak of those Article I courts that go by the contemporary name of "administrative agencies"—this conclusion is inevitable. It is too late to go back that far; too late to return to the simplicity of the principle pronounced in Article III and defended so vigorously and persuasively by Hamilton in The Federalist Nos. 78–82.

To say that the Court has failed to articulate a principle by which we can test the constitutionality of a putative Article I court, or that there is no such abstract principle, is not to say that this Court must always defer to the legislative decision to create Article I, rather than Article III, courts. Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on how that balance is to be struck.

Despite the principled, although largely mistaken, rhetoric expanded by the Court in this area over the years, such a balancing approach stands behind many of the decisions upholding Article I courts. Justice Harlan suggested as much in *Glidden*, although he needlessly limited his consideration to the "temporary" courts that Congress has had to set up on a variety of occasions. In each of these instances, this Court has implicitly concluded that the legislative interest in creating an adjudicative institution of temporary duration outweighed the values furthered by a strict adherence to Article III. Besides the territorial courts approved in *Canter*, *supra*, these courts have included the Court of Private Land Claims, *United States* v. *Coe*, 155 U. S. 76 (1894), the Choctaw and Chickasaw Citizenship Court, *Stephens* v. *Cherokee Nation*, 174 U. S. 445 (1899); and consular courts established in foreign countries, *In re Ross*, 140 U. S. 453 (1891). This same sort of "practical" judgment was voiced, even if not relied upon, in *Crowell*, *supra*, with respect to the Employees' Compensation Claims Commission, which was not meant to be of limited duration: "[W]e are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved." 285 U. S., at 54. And even in *Murray's Lessee*, there was a discussion of the "necessity" of Congress' adopting an approach that avoided adjudication in an Article III court. 18 How., at 285.

This was precisely the approach taken to this problem in *Palmore* v. *United States*, 411 U. S. 389 (1973), which, contrary to the suggestion of the majority, did not rest on any theory of territorial or geographical control. *Ante*, at 24. Rather, it rested on an evaluation of the strength of the legislative interest in pursuing in this manner one of its constitutionally assigned responsibilities—a responsibility not different in kind from numerous other legislative responsibilities. Thus, *Palmore* referred to the wide variety of Article I courts, not just territorial courts. It is in this light that the critical statement of the case must be understood:

> "[T]he requirements of Article III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Id.*, at 407–408.

I do not suggest that the Court should simply look to the strength of the legislative interest and ask itself if that interest is more compelling than the values furthered by Article III. The inquiry should, rather, focus equally on those Article III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Article III values should then be measured against the values Congress hopes to serve through the use of Article I courts.

To be more concrete: *Crowell, supra,* suggests that the presence of appellate review by an Article III court will go a long way toward insuring a proper separation of powers. Appellate review of the decisions of legislative courts, like appellate review of state court decisions, provides a firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority. Obviously, therefore, a scheme of Article I courts that provides for appellate review by Article III courts should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court.

Similarly, as long as the proposed Article I courts are designed to deal with issues likely to be of little interest to the political branches, there is less reason to fear that such courts represent a dangerous accumulation of power in one of the political branches of government. Chief Justice Vinson suggested as much when he stated that the Court should guard against any congressional attempt "to transfer jurisdiction for the purpose of emasculating" constitutional courts. *National Insurance Co.* v. *Tidewater Co.*, 337 U. S., at 644.

V

I believe that the new bankruptcy courts established by the Bankruptcy Reform Act of 1978, 28 U. S. C. § 1471 (1976 ed., supp. III), satisfy this standard.

First, ample provision is made for appellate review by Article III courts. Appeals may in some circumstances be brought directly to the district courts. 28 U. S. C. § 1334. Decisions of the district courts are further appealable to the court of appeals. § 1293. In other circumstances, appeals go first to a panel of bankruptcy judges, § 1482, and then to the court of appeals. § 1293. In still other circumstances — when the parties agree — appeals may go directly to the court of appeals. In sum, there is in every instance a right of appeal to at least one Article III court. Had Congress decided to assign all bankruptcy matters to the state courts, a power it clearly possesses, no greater review in an Article III court would exist. Although I do not suggest that this analogy means that Congress may establish an Article I court wherever it could have chosen to rely upon the state courts, it does suggest that the critical function of judicial review is being met in a manner that the Constitution suggests is sufficient.

Second, no one seriously argues that the Bankruptcy Reform Act represents an attempt by the political branches of government to aggrandize themselves at the expense of the third branch or an attempt to undermine the authority of constitutional courts in general. Indeed, the congressional perception of a lack of judicial interest in bankruptcy matters was one of the factors that led to the establishment of the bankruptcy courts: Congress feared that this lack of interest would lead to a failure by federal district courts to deal with bankruptcy matters in an expeditious manner. H.R. Rep. No. 95–595, 95th Cong., 1st Sess. 14 (1977). Bankruptcy matters are, for the most part, private adjudications of little political significance. Although some bankruptcies may indeed present politically controversial circumstances or issues, Congress has far more direct ways to involve itself in such matters than through some sort of subtle, or not so subtle, influence on bankruptcy judges. Furthermore, were such circumstances to arise, the Due Process Clause might very well require that the matter be considered by an Article III judge: Bankruptcy proceedings remain, after all, subject to all of the strictures of that constitutional provision.[15]

Finally, I have no doubt that the ends that Congress sought to accomplish by creating a system of non-Article III bankruptcy courts were at least as compelling as the ends found to be satisfactory in *Palmore, supra,* or the ends that have traditionally justified the creation of legislative courts. The stresses placed upon the old bankruptcy system by the tremendous increase in bankruptcy cases were well documented and were clearly a matter to which Congress could respond.[16] I don't believe it is possible to challenge Congress' further determination that it was necessary to create a specialized court to deal with bankruptcy matters. This was the nearly uniform conclusion of all those that testified before Congress on the question of reform of the bankruptcy system, as well as the conclusion of the Commission on Bankruptcy Laws established by Congress in 1970 to explore possible improvements in the system.[17]

The real question is not whether Congress was justified in establishing a specialized bankruptcy court, but rather whether it was justified in failing to create a specialized, Article III bankruptcy court. My own view is that the very fact of extreme specialization may be enough, and certainly has been enough in the past,[18] to justify the creation of a legislative court. Congress may legitimately consider the effect on the federal judiciary of the addition of several hundred specialized judges: We are, on the whole, a body of generalists.[19] The addition of several hundred specialists may substantially change, whether for good or bad, the character of the federal bench. Moreover, Congress may have desired to maintain some flexibility in its possible future responses to the general problem of bankruptcy. There is no question that the existence of several hundred bankruptcy judges with life-tenure would have severely limited Congress' future options. Furthermore, the number of bankruptcies may fluctuate producing a substantially reduced need for bankruptcy judges. Congress may have thought that, in that event, a bankruptcy specialist should not as a general matter serve as a judge in the countless nonspecialized cases that come before the federal district courts. It would then face the prospect of large numbers of idle federal judges. Finally, Congress may have believed that the change from bankruptcy referees to Article I judges was far less dramatic, and so less disruptive of the existing bankruptcy and constitutional court systems, than would be a change to Article III judges.

For all of these reasons, I would defer to the congressional judgment. Accordingly, I dissent.

JOHN L. DEVNEY, St. Paul, Minn. (JEFFREY F. SHAW, BRIGGS and MORGAN, with him on the brief) for petitioner in No. 81-150; REX E. LEE, Solicitor General, Justice Department, Washington, D.C. (J. PAUL

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[15] See *Crowell* v. *Benson* 285 U. S. 22, 87 (Brandeis, J., dissenting) ("If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under the circumstances, the constitutional requirement of due process is a requirement of judicial process.")

[16] "During the past 30 years, the number of bankruptcy cases filed annually has increased steadily from 10,000 to over 254,000." H.R. Rep. No. 95–595, at 21.

[17] See H.R. Doc. No. 93–137 (Pt1), 93d Cong., 1st Sess. 85–96 (1973).

[18] Consider, for example, the Court of Customs and Patent Appeals considered in *Ex Parte Bakelite, supra,* or the variety of specialized administrative agencies that engage in some form of adjudication.

[19] In 1977, there were approximately 190 full-time and 30 part-time bankruptcy judges throughout the country. H.R. Rep. 95–595, at 9.

McGRATH, Assistant Attorney General, STEPHEN M. SHAPIRO, Deputy Solicitor General, ALAN I. HOROWITZ, Assistant to the Solicitor General, WILLIAM KANTER and MICHAEL F. HERTZ, Justice Department attorneys, with him on the brief) for petitioner in No. 81-546; MELVIN L. ORENSTEIN, Minneapolis, Minn. (JAMES P. McCARTHY, LETITIA J. GRISHAW, LINDQUIST & VENNUM, CHARLES S. GASSIS, BROWN, TODD & HEYBURN, JOHN E. COMPSON, and KENNETH J. ORLOWSKI, with him on the brief) for respondents.

Nos. 81-389 AND 81—390

UNION LABOR LIFE INSURANCE COMPANY, PETITIONER,

81-389 *v.*

A. ALEXANDER PIRENO

NEW YORK STATE CHIROPRACTIC ASSOCIATION, PETITIONER,

81-390 *v.*

A. ALEXANDER PIRENO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Syllabus

No. 81-389. Argued April 27, 1982—Decided June 28, 1982*

As required by New York law, petitioner Union Labor Life Insurance Co. (ULL) issues health insurance policies covering certain policyholder claims for chiropractic treatments. Some ULL policies limit the company's liability to "reasonable" charges for "necessary" medical care and services. In order to determine whether particular chiropractors' treatments and fees were necessary and reasonable, ULL arranged with petitioner New York State Chiropractic Association (NYSCA), a professional association of chiropractors, to use the advice of its Peer Review Committee, which was established primarily to aid insurers in evaluating claims for chiropractic treatments, and which is composed of ten practicing New York chiropractors. Respondent is a licensed chiropractor practicing in New York. On a number of occasions ULL referred his treatments of ULL policyholders, and his charges for those treatments, to the Committee for review. The Committee sometimes concluded that respondent's treatments were unnecessary or his charges unreasonable. Respondent brought suit in Federal District Court, alleging that petitioners' peer review practices violated § 1 of the Sherman Act because petitioners had used the Committee as the vehicle for their conspiracy to fix the prices that chiropractors would be permitted to charge for their services. The District Court granted petitioners' motion for summary judgment dismissing respondent's complaint, on the ground that ULL's use of NYSCA's Peer Review Committee was exempted from antitrust scrutiny by § 2(b) of the McCarran-Ferguson Act, which applies to the "business of insurance." The Court of Appeals reversed and remanded the action for further proceedings.

Held: ULL's use of NYSCA's Peer Review Committee does not constitute the "business of insurance" within the meaning of § 2(b) of the McCarran-Ferguson Act, and thus is not exempt from antitrust scrutiny. *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, controlling.

(a) There are three criteria relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b): first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. *Royal Drug Co., supra.*

(b) With regard to the first criterion, petitioners' arrangement plays no part in the spreading and underwriting of a policyholder's risk, because it is logically and temporally unconnected to the contract entered by the policyholder and ULL, which was the actual risk-transferring event. As to the second criterion, ULL's use of NYSCA's Peer Review Committee is distinct from ULL's contracts with its policyholders, and constitutes a separate arrangement between the insurer and third parties not engaged in the business of insurance. Nor does the challenged arrangement satisfy this criterion on the asserted ground that it directly involves the "interpretation" and "enforcement" of the insurance contract, because ULL's procedure for deciding whether claims are covered is a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid. As respects the third criterion, it may be assumed that the challenged arrangement need not be denied the § 2(b) exemption *solely* because it involves parties outside the insurance industry—namely, practicing chiropractors serving on the Peer Review Committee. But such arrangements can hardly be said to lie at the center of the legislative concern underlying § 2(b), which was with the protection of *intra*-industry cooperation in the underwriting of risks. More importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in noninsurance markets.

650 F. 2d 387, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined.

JUSTICE BRENNAN delivered the opinion of the Court.

In this case we consider an alleged conspiracy to eliminate price competition among chiropractors, by means of a "peer review committee" that advised an insurance company whether particular chiropractors' treatments and fees were "necessary" and "reasonable." The question presented is whether the alleged conspiracy is exempt from federal antitrust laws as part of the "business of insurance" within the meaning of the McCarran-Ferguson Act.[1]

I

Petitioners are the New York State Chiropractic Association (NYSCA), a professional association of chiropractors, and the Union Labor Life Insurance Company (ULL), a Maryland insurer doing business in New York. As required by New York law, ULL's health insurance policies cover certain policyholder claims for chiropractic treatments. But certain ULL policies limit the company's liability to "the *reasonable* charges" for "*necessary* medical care and services." App. 19a, 22a (emphasis added). Accordingly, when presented with a policyholder claim for reimbursement for chiropractic treatments, ULL must determine whether the treatments were necessary and whether the charges for them were reasonable. In making some of these determinations, ULL has arranged with NYSCA to use the advice of NYSCA's Peer Review Committee.

The Committee was established by NYSCA in 1971, primarily to aid insurers in evaluating claims for chiropractic treatments.[2] It is composed of ten practicing New York chiropractors, who serve on a voluntary basis. At the request of an insurer, the Committee will examine a chiropractor's treatments and charges in a particular case, and will render an opinion on the necessity for the treatments and the reasonableness of the charges made for them. The opinion

*Together with No. 81-390, *New York State Chiropractic Assn.* v. *Pireno*, also on certiorari to the same court.

[1] 59 Stat. 33, as amended, 15 U. S. C. §§ 1011–1015. The Act provides in relevant part:

"2(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"2(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance. . . .

. . . . . .

"3(b) Nothing contained in this chapter shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U. S. C. §§ 1012(a)-(b), 1013(b).

[2] The Committee's advice is also available to patients, governmental agencies, and chiropractors themselves, but insurers are the principal users. *Pireno* v. *New York State Chiropractic Ass'n*, 650 F. 2d 387, 388 (CA2 1981).

NORTHERN V. MARATHON

MEMORANDUM OF DISCUSSION POINTS

I. Statement of the Problem

The Supreme Court has held unconstitutional the portion of The Bankruptcy Reform Act of 1978 ("Act") which established the bankruptcy courts as Article I (of the United States Constitution) adjuncts to the district courts instead of Article III courts. The differences are tenure, i.e., 14 year terms instead of lifetime appointments and the retention by Congress of the right to reduce compensation during tenure.

II. Preferred Cure

While several alternatives exist, the simplest, most efficient, and most direct approach from the standpoint of the legal and business communities would be to make the office of bankruptcy judge an Article III court.

III. Discussion Points

1. Bifurcation of Jurisdiction - One of the major positive reforms of the Act was the elimination of litigation over jurisdiction. Any solution which recreates the distinction between plenary and summary bankruptcy court jurisdiction would constitute a return to an unwieldy and undesirable approach to litigation involving the debtor and the debtor's property.

2. Threat of Discontinuity - Any solution which contemplates a wholesale replacement of the sitting bankruptcy judges would create as much chaos in the bankruptcy courts as would taking no action and allowing the temporary stay granted by the Supreme Court in Northern v. Marathon to expire. On the other hand, any mandatory reappointment of the entire existing bankruptcy bench would be undesirable and, unconstitutionally, usurp the rights of the President.

3. Impasse Between Houses of Congress - Competing voices pro and con, important and perhaps necessary reforms of the Act and questions unrelated to tenure and bankruptcy judges' create the strong possibility of an impasse which could lead to the Supreme Court's temporary stay expiring without action. Therefore, the preferred approach would be a clean bill which simply provides for Article III judges.

4. Related Difficulaties

a. Need for Urgency - Uncertainty over the bankruptcy courts' power to act cannot be allowed to continue. Bankruptcy judges are continuing matters or abstaining wherever the possibility of a successful attack on constitutional grounds may be made.

b. Creation of Unnecessary Litigation - Failure of Congress to act promptly will lead to the necessity for constitutional challenges on a claim-by-claim basis as indicated by the Supreme Court in Footnote 40 on Page 37 of the Decision.

c. SIPA - The bankruptcy courts have been given jurisdiction in connection with liquidations under Acts which are related in some respects to bankruptcy. For example, the Securities Investors Protection Act of 1970 (SIPA). There are several substantial stockbroker liquidations being administered by the bankruptcy courts at the present time under SIPA. The same type of constitutional attack on the jurisdiction of the bankruptcy court could be made in those situations.

5. Suggested Items to Include in the Bill

a. Salary - The bankruptcy judges' salary should be set at a figure which will bear the same relationship to the salary of the district court judges as the salary of the district court judges bearsto the judges of the courts of appeal.

b. Emoluments - The bankruptcy judges emoluments should be the same as those of the district courts. This would include clerks, law clerks, reporters, secretaries, etc.

c. Cut-off Age - The bill should recommend to the President that priority of consideration be given to all sitting bankruptcy judges who are presently age 60 or younger. This would not preclude the President from appointing bankruptcy judges over age 60, but would simply not give them the same priority. The reasons for the use of age 60 are:

(i) That is the cut-off date used by the American Bar Association Committee on Judicial Qualification in the evaluation of persons for appointment to the district court.

(ii) It would affect about 50% of the sitting bankruptcy judges.

d. Office Abatement Upon Death - When a bankruptcy judge dies the position should terminate unless Congress recreates it upon the recommendation of the judicial council of the circuit. This is the simplest way to be sure that we won't have too many bankruptcy judges in the future.

e. Senior Status - Bankruptcy judges should be given senior status upon reaching age 65 so that the bankruptcy bench could utilize senior bankruptcy judges in the same way as the district courts do at the present time.

f. Designation and Assignment - Broad designation and assignment powers should be given to the chief judge of the circuit so that bankruptcy judges can be used to cover for district judges or circuit judges, and vice-versa, in order to relieve pressures on the district courts and the bankruptcy courts when necessary.

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PLEASE REFER YOUR REPLY TO:

LOS ANGELES OFFICE

July 8, 1982

William Barr
Deputy Asst. Director
Office of Policy Development
The White House
Washington, D. C. 20500

Dear Bill:

My partner, Joseph Weissman, Ronald Trost (partner, Sidley & Austin) and Ronald Orr (partner, Gibson, Dunn, & Crutcher and Chairman, Commercial Law and Bankruptcy Section, Los Angeles County Bar Association) will meet with you and Mr. Uhlman at 10:00 a.m. on Tuesday, July 13th. They will come to room 235, Old Executive Office Building, after checking in at the northwest entrance on 17th St.

I understand they hope to also meet with Ken Starr and Ted Olsen at Justice on Tuesday afternoon.

Thank you and Mike Uhlman for making yourselves available on such short notice to discuss this very important matter.

Sincerely,

Evelle J. Younger

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515
Telephone: 202-225-3951

July 12, 1982

Mr. Michael Uhlmann
Special Assistant to the
President
The White House
Washington, D.C. 20500

Dear Michael:

I am enclosing a copy of a summary of courts decision; an article from the Legal Times which is as good an analysis as we have seen so far; excerpts from the report of the House of Representatives from 1977 which sets forth in one place the considerations for a separate Article III Bankruptcy Court (which the plurality of the Supreme Court read); also portion of special report on court administrative structure for bankruptcy cases; and a copy of H.R. 6109.

We have not yet put together a section by section or a summary; as soon as we have, we will send it over.

Sincerely,

Alan A. Parker
General Counsel

AAP:plw

93th Congress
2d Session
COMMITTEE PRINT
No. 13

BANKRUPTCY COURTS

REPORT

OF THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

HEARINGS ON THE COURT ADMINISTRATIVE STRUCTURE FOR BANKRUPTCY CASES
DECEMBER 12, 13, 14, 1977

JANUARY 1978

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
21-199 WASHINGTON : 1978

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BANKRUPTCY COURTS

H.R. 8200 represents the first major bankruptcy law revision in 40 years. It has been under study for nearly 7 years, beginning in 1971 with the congressionally created Commission on the Bankruptcy Laws of the United States. The bill, a bipartisan effort, was reported unanimously by the Subcommittee on Civil and Constitutional Rights on May 16, 1977. The Committee on the Judiciary reported the bill favorably on July 19, 1977, by a vote of 26–3, with one Member voting present, and re-reported the bill, after adoption of an amendment requested by the Ways and Means Committee, on September 8, 1977, by a vote of 23–8.

The House began consideration of H.R. 8200 on October 27, 1977. On Friday, October 28, 1977, by a vote of 183–158, with one Member voting present and 92 Members absent, the Committee of the Whole adopted an amendment offered by Mr. Danielson. The scope of the amendment and its impact on the bill were so significant that the floor manager, Mr. Edwards of California, immediately moved that the Committee of the Whole rise. That motion was agreed to, and the Committee of the Whole suspended consideration of the bill.

The Subcommittee on Civil and Constitutional Rights held hearings December 12, 13, and 14, 1977, to explore the amendment adopted and alternatives to both the amendment and H.R. 8200. Witnesses included representatives of every major organization that has taken a position on the Danielson amendment.

In order to explain H.R. 8200 and the Danielson amendment, it is first necessary to describe the current court and administrative structure for bankruptcy cases.

THE CURRENT SYSTEM

Unlike most Federal laws, in order for debtors or creditors to use the bankruptcy laws, it is necessary to commence a case in a Federal court. Under current law, bankruptcy cases are filed in district court, but are immediately referred to bankruptcy judges (formerly called referees in bankruptcy).

After the reference, all bankruptcy proceedings are before the bankruptcy judge. Bankruptcy judges' orders are final.

Even though the number of bankruptcy cases exceeds the combined total of all other Federal civil and criminal cases, district judges spend less than 1 percent of their time on bankruptcy cases. There are currently 235 bankruptcy judges who do the work. They are appointed by the district courts for 6-year terms. Their annual salary is $48,500, plus the Government contributes an additional $3,400 annually for retirement benefits.

The staffs of bankruptcy judges are limited. They do not have the assistance of law clerks to aid them in legal research or other tasks.

They do not generally have court reporters to make a record of proceedings in court. Although the Bankruptcy Act specifies that the bankruptcy judges shall have control over their clerks of court, 15 district courts have denied them that control.

Other inadequacies in current law affect litigants more directly. First, the jurisdiction of the bankruptcy court to hear all matters that are necessary to wind up the estate of a bankrupt individual or business is limited. The limits date from 1898, when referees in bankruptcy were unsalaried, ad hoc assistants to district judges. Under those limits, which still exist, a bankruptcy judge may hear a dispute only if it concerns the proper disposition of property that the bankruptcy court has in its possession, or if the defendant in the dispute consents to having it heard before the bankruptcy judge. The limits on jurisdiction are not based on the subject matter of the dispute, the law on which the dispute turns, or the existence of a State, as opposed to a Federal, interest in the dispute. Thus, bankruptcy judges currently hear a full range of Federal and State law issues, so long as possession or consent is present.

Litigation over jurisdiction in the bankruptcy court has abounded. Because determination of a dispute in a court other than the bankruptcy court takes substantially longer, the trustee in bankruptcy, whose duty is to wind up the affairs of the estate quickly, brings disputes to the bankruptcy court. The defendant, who will always profit by delay, normally objects to the jurisdiction of the bankruptcy court. Litigation over the limited jurisdiction wastes an enormous amount of bankruptcy court time, delays creditors from getting their money, and often causes the trustee to abandon lawsuits that he could otherwise pursue for the benefit of creditors. The limited jurisdiction of the bankruptcy court is the most significant problem facing the bankruptcy courts and litigants in the bankruptcy courts today. Not one witness supported the possession/consent limit on jurisdiction.

There are other wasteful limits on bankruptcy courts' powers. The contempt power of the bankruptcy court is limited to a fine of $250. If misconduct is more serious and warrants a higher fine or imprisonment, the issue must go to the district court. As a result, those that deal with the bankruptcy court accord it less respect, making it difficult for the judges to do their jobs. One auctioneer in New York, though ordered by the bankruptcy court not to sell property of the bankrupt estate, defied the court and sold the property, saying, "I've done this before and haven't gone to jail yet."

Bankruptcy judges are currently required by statute to supervise the administration of bankruptcy cases. They must appoint bankruptcy trustees, and consult with them regularly, usually without any adverse party present. Through them, the bankruptcy judge learns much about a case. When later required to decide a dispute, the information the judge has gained from those consultations colors his objectivity as a factfinder. Because he has often worked with the trustee in matters that lead up to the dispute, he is in essence one of the parties to the case. His impartiality and fairness are severely compromised. As Harold Marsh, former Chairman of the Bankruptcy Commission, made clear, "the bar in general does not have confidence in the present court structure."

The current system creates other conflicts of interest. The bankruptcy judge appoints, and then must review, the actions of the

trustee. Many litigants feel that they cannot receive a fair hearing in a dispute against a trustee before the judge that appointed their opponent, the trustee. In addition, the district court appoints the bankruptcy judge and then must review his orders. The same appearance of unfairness and conflict of interest exists in that relationship. George Treister of the National Bankruptcy Conference emphasized that the current system "is not working well . . . because too many people, particularly those outside the system, feel it is working unfairly."

Finally, bankruptcy judges are appointed by district courts, and bankruptcy courts are subordinate adjuncts of the district court. Bankruptcy judges are perceived by many as district judges' assistants, and bankruptcy courts are perceived as second-rate, second-class courts. The National Bankruptcy Conference explained:

> Due in large part to its present relationship with the District Court—one that has not been unreasonably referred to as a stepchild position—the bankruptcy court cannot attract sufficient numbers of highly qualified appointees to its bench. An outstanding lawyer does not customarily aspire to be someone else's assistant.

Yet bankruptcy cases are not second-rate or unimportant. There are more bankruptcy cases annually than all Federal civil and criminal cases combined. The cases are not administrative matters, easily processed or categorized. They affect the entire range of Federal and State substantive law. They involve nearly 10 million debtors and creditors annually, over $27 billion of property and nearly $43 billion in creditor's claims. They include Penn Central, W. T. Grant, and Railway Express, and may soon involve major municipalities.

BANKRUPTCY CASES

A bankruptcy case is fundamentally different from an ordinary civil or ciminal case. In an ordinary civil or criminal case, there is one or a group of plaintiffs who sue one or a group of defendants for a specified remedy based on a limited set of issues. The court determines those issues, and then makes whatever order is appropriate. In a bankruptcy case, however, there is one or a group of debtors, and dozens, scores, or hundreds of creditors. The purpose of the case is to collect all of the assets of the debtor, to settle all of the debtor's legal ralationships with others, and to distribute the assets to the creditor's according to their relative rights. It is a process of administration during which disputes concerning the debtor's right to property, the validity of creditors' claims, the debtor's right to a discharge, and innumberale other issues arise, all of which must be determined by a court of law. For example, one witness told the subcommittee that in one recent case in New York involving a major supermarket chain, over 500 separate lawsuits arose during the administration of the case. That is not uncommon.

As a result, bankruptcy cases are handled completely separately from normal civil and criminal cases in the district courts. Bankruptcy judges do virtually all of the judicial work in bankruptcy cases. District judges rarely become involved. Every witness recognized the separate nature of the bankruptcy caseload, and advocated a system under which specialized judicial officers hear bankruptcy cases.

The need for separation is accentuated by the need for speed in bankruptcy cases. While all litigation should be expeditiously terminated, by the nature of bankruptcy, assets are deteriorating in value.

The faster a case is terminated, the more creditors will receive. Both the Congress and the Supreme Court have recognized this at least since the 1840's. Moreover, in a reorganization case, speed is essential to success: Creditors will not wait for a company to reorganize, but will favor liquidation, with the consequent loss of jobs and investments.

H.R. 8200

Title II of H.R. 8200 replaces the current antiquated bankruptcy courts with a system designed to remedy the problems that exist and that will meet constitutional requirements. In place of the 235 bankruptcy judges now sitting as subordinate adjuncts of the district courts, the bill establishes a court that is independent of the district courts. The change in the court will reduce the number of judges needed to far less than 235, though the precise number is left to be determined after a 5-year study and transition period to the new court system.

The judges of the new court will be appointed by the President with the advice and consent of the Senate. Because the Constitution vests the appointment of Federal judges in the President, the bill does not "fold in" the current bankruptcy judges into the new court, but instead retires them at the end of the 5-year transition period.

The bill grants the courts the full staff required for the operation of a Federal court, including clerks, law clerks, and court reporters, though it does not require any new courtrooms, because existing facilities will generally suffice. The hearings indicate that giving bankruptcy judges adequate staff will expedite court business, and will relieve some burden from the judges themselves, thus reducing the number of judges needed.

Jurisdiction of the bankruptcy court is expanded, as recommended unanimously in hearings in both the 94th and 95th Congresses. Under the expanded jurisdiction of H.R. 8200, the bankruptcy court will be able to dispose of all matters relating to bankruptcy cases, and complete them quickly and economically. The expanded jurisdiction of the bankruptcy court will bring some suits into bankruptcy courts that are not heard there today; during the hearings, the Judicial Conference has estimated the number at less than 600 annually. The elimination of litigation over jurisdiction will reduce the judicial time required in bankruptcy cases, and will more than offset the time required to handle the few cases brought in by the expanded jurisdiction of the court. Thus, expanded jurisdiction will also contribute to the reduction in the number of judges needed.

Bankruptcy judges will be given power to enforce their orders, both through the issuance of writs of execution and injunctions, and through the contempt power. The expanded power will add to the effectiveness of the bankruptcy court. It will expedite the handling of bankruptcy cases by placing complete responsibility and control in one place, again reducing the number of judges needed.

Title II of H.R. 8200 also creates the office of U.S. trustee to relieve bankruptcy judges of time-consuming administrative and supervisory functions. The change will eliminate the conflict of interest and pro-estate bias that the Bankruptcy Act now requires of bankruptcy judges, and will insure fairer hearings for all bankruptcy litigants. It will also reduce the time bankruptcy judges will be required to spend on cases, and thus reduce the number of judges needed.

H.R. 8200 eliminates the conflict of interest by completely separating the appointing and reviewing authority for all bankruptcy officials: Bankruptcy judges will be appointed by the President and reviewed by circuit judges; U.S. trustees will be appointed by the Attorney General and reviewed by bankruptcy judges; private trustees will be appointed by U.S. trustees and reviewed by bankruptcy judges.

The bankruptcy court, under H.R. 8200, will meet the requirements of Article III of the Constitution, which states:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .

The expansion of jurisdiction and powers of the bankruptcy court which has been universally recommended, is a grant of "the judicial Power of the United States," and requires that the courts to which that power is granted be created in accordance with article III, whether the court is part of and subordinate to, or independent of, the district courts.

In addition to meeting constitutional requirements, H.R. 8200 would have another benefit. The Attorney General, the Judicial Conference, and other witnesses have emphasized that the prestige of article III status is necessary to attract the best judges to the bench. Bankruptcy courts do not offer that now, and have suffered accordingly. Professor Vern Countryman of Harvard Law School insisted, "We need to elevate the status of this court so that we can attract better people." H.R. 8200 would offer that status, and would make the bankruptcy bench equal in quality to the district court bench.

The court and administrative structure for bankruptcy cases in H.R. 8200 is supported by numerous organizations, including the National Bankruptcy Conference, the Commercial Law League of America, the American Bankers Association, the Robert Morris Associates (the National Association of Commercial Bank Lending Officers), the National Conference of Bankruptcy Judges, and numerous State and local bar associations.

THE DANIELSON AMENDMENT

Description

The Danielson amendment undoes most of the changes from current law contained in H.R. 8200. It returns the bankruptcy courts to the district courts, making them subordinare adjunts of the district courts. It completely deprives bankruptcy judges of control over their clerks, and makes no provision for staff, such as law clerks, which could significantly aid the judges in legal research and related matters. There is no provision for court reporters. The amendment adds to the administrative, supervisory, and enforcement duties of the bankruptcy judges.

The Danielson amendment retains the unproductive possession/consent jurisdiction limitation, and adds an additional ground on which to litigate jurisdiction: The bankruptcy court will have jurisdiction if the lack of jurisdiction in a particular instance would cause a loss of assets or have an adverse impact on the estate (the so-called "jurisdiction by detriment" proposal). Litigation over jurisdiction by detriment would be in the district court, adding to their already too heavy caseload, while litigation over possession or consent would proceed in bankruptcy court. Finally, if jurisdiction by detriment

exists, the district court, could retain the case itself or transfer it to the bankruptcy court. The amendment permits each district court to have a different rule.

The amendment makes only minor changes in the current court system. It increases the terms of bankruptcy judges from 6 to 15 years, and places the appointment power in the judicial councils of the circuits rather than in the district courts, as under current law.

The amendment retains the U.S. trustee system, but has the U.S. trustees and their assistants appointed by the district courts. The Judicial Conference will determine the number of U.S. trustees and assistant U.S. trustees, and will be responsible for general coordination and assistance.

Problems

The effect of the amendment is to eviscerate title II of H.R. 8200 and to increase significantly the number of bankruptcy judges that will be needed. The lack of provision for adequate staff and the increased administrative duties of the bankruptcy judges will require the judges to do work that could as easily be handled by less expensive personnel, such as law clerks and U.S. trustees. The lack of court reporters will require bankruptcy judges to take and preserve evidence, as they do now, and will deprive litigants of adequate records on appeal. Moreover, the amendment permits the Judicial Conference to determine the number of bankruptcy judgeships, removing important Congressional control over the total number of judges.

The changes in the jurisdiction of the bankruptcy court under the amendment will continue to require the bankruptcy court and the district court to waste too much time determining whether the court has jurisdiction, again increasing the number of judges needed to handle bankruptcy cases. The provision permitting a different jurisdictional rule in each judicial district will encourage forum-shopping and generate uncertainty for both parties and courts. Every witness during the recent hearings, including the Attorney General and the Judicial Conference (which had originally spawned the idea) opposed the Danielson jurisdictional proposal. The National Bankruptcy Conference called it "a step backward." Harold Marsh, former Chairman of the Bankruptcy Commission, called it "an absolute disaster."

Appointment of bankruptcy judges by circuit councils will generate problems as well. Judge Shirley Hufstedler of the U.S. Court of Appeals for the Ninth Circuit testified that the judicial councils:

> . . . don't have any particular reason to do a good job at it. We cover an enormous geographical territory. We simply don't have access, nor staff, to acquire enough information to enable us to do a good job.

Attorney General Griffin Bell, formerly a circuit judge, told the subcommittee that:

> the judicial council won't know anything about who these applicants for jobs in Atlanta are, say. They're going to call the district judges and ask them to tell them; that's where they're going to get the names anyway.

The change of appointment power poses two greater problems. First, the theory on which the amendment tries to avoid the article III requirement of tenured judges is that bankruptcy judges will be officers

of, and derive their powers from, the district courts. With the appointment power in the circuit councils, however, they become officers of the circuit councils, and the constitutional theory on which the amendment is supported fails.

More serious, however, the amendment vests the appointment power in the judicial councils rather than in the courts of appeals. In 1976, the Supreme Court made clear that such a provision would violate the Appointments Clause of the Constitution (article II, section 2), which requires appointments by the judiciary to be made by courts of law. Judge Ruggero Aldisert of the U.S. Court of Appeals for the Third Circuit, speaking for the Judicial Conference of the United States, told the subcommittee that a judicial council is not a court of law. Prof. Frank Kennedy of the University of Michigan Law School could not find "any constitutional authority for vesting the authority to appoint in a council." The appointment provision may render the entire court system unconstitutional and unable to exercise any of the powers of a bankruptcy court until Congress adopts remedial legislation. The hundreds of thousands of bankruptcy cases annually are too important to permit such a hiatus.

The Danielson amendment does not adequately separate the administrative and judicial functions of the bankruptcy judges. Significant conflict of interest and patronage problems exist today in the bankruptcy court's appointment of bankruptcy trustees. Placement of the U.S. trustee in the judicial structure adjacent to the bankruptcy court, as proposed by the amendment, will generate the same discredited close relationship between trustees and bankruptcy judges that exists today, and will significantly increase patronage for Federal judges.

The amendment does not completely eliminate the conflict of interest problems in the current system caused by the combination of appointing and review authority. Bankruptcy judges will be appointed by circuit judges on the recommendation of district judges and reviewed by district and circuit judges; United States trustees will be appointed by district judges, and reviewed by bankruptcy judges and district judges.

The two most significant deficiencies in the Danielson amendment, however, are less tangible, but nonetheless important. First, the amendment retains the bankruptcy court as a subordinate adjunct of the district court. As such, it will continue to be perceived as a second-class forum, will fail to attract as high a caliber judge as an independent court would, and will continue to accord bankruptcy litigants second-class treatment. All other Federal litigants are entitled to have their cases heard before a full judge. Only bankruptcy litigants would be relegated to judges' assistants. This becomes more important as the jurisdiction of the bankruptcy court is expended to bring in more and more litigants.

Second, the status of the bankruptcy judge under the Danielson amendment is the same as the status of a U.S. magistrate. The granting of nearly complete case-dispositive powers, contempt powers, and coercive jurisdiction to an official that is, in essence, the equivalent of a magistrate is unprecedented in Federal judicial history. Herbert

Hinkel, Esq., of New York, appearing for the Robert Morris Associates recognized the anamoly of the adjunct system: "To establish this court, to make it less than an article III court, is about as reasonable as passing a law which provided for all Federal cases to be drawn by lot by magistrates, and to be tried by those magistrates."

Though bankruptcy judges exercise many powers today, the expanded jurisdiction proposed by the amendment, even though not as great as that contemplated by H.R. 8200, trespasses on the "judicial Power of the United States," and borders on the unconstitutional. Even if the system is ultimately upheld, the litigation over the extent of the permissible powers of the bankruptcy judges could occupy years, generating uncertainty for millions of litigants and leaving in doubt the disposition of billions of dollars of assets. Mr. Marsh made clear that "any time I represented a defendant in that court, one of the defenses would be that the court itself is unconstitutional."

CONCLUSION

Chairman Don Edwards said toward the end of the hearings:

> For the last 5 or 6 years we have been hearing witnesses—banks, commercial law representatives, merchants, business people, and the general public complaining about the referee system. Actually, we have not had one witness, except the district judges, who have said that it's working well and that we should be proud of it. Incidentally, I include the bankruptcy judges in there. We haven't had a single bankruptcy judge that's ever told this committee or the Commission that the changes as contemplated in H.R. 8200 would not be the best that could happen to the bankruptcy situation in the United States now.

Judges that have opposed H.R. 8200 include the Judicial Conference, former Judge Griffin Bell, Judge Shirley Hufstedler, and Judge Simon Rifkind, speaking for the American College of Trial Lawyers. One reason that has frequently surfaced for their opposition is that article III bankruptcy judges rather than subordinate bankruptcy judges will decrease the prestige of Federal district judges. Judge Edward Weinfeld told the subcommittee, "Any proliferation of the court diminishes its strength in terms of public prestige." To the contrary, John Ingraham, a banker, noted, "Improvement of the status of the Bankruptcy Court would not reduce the stature of the District Court but rather would increase public esteem for the Federal judiciary generally."

Another reason advanced in opposition to H.R. 8200 is that it violates the concept of a unified trial court of general jurisdiction. However, creation of the bankruptcy court as a subordinate court, as the Danielson amendment proposes, does not unify the trial courts. Again, John Ingraham, speaking as a layman, observed, "Even a banker can recognize that today the Bankruptcy Court constitutes a separate court system."

While both H.R. 8200 and the Danielson amendment create a separate court with specially designated judges to hear all bankruptcy cases, the Danielson amendment increases significantly the number of judges needed, and thus the cost of the legislation, because litigation over jurisdiction and the bankruptcy judges' administrative duties both will be increased, unlike H.R. 8200. The Danielson amendment provides inadequate staff, increasing the number of judges needed, unlike H.R. 8200. The Danielson amendment will generate serious constitutional uncertainties concerning the appointment power and the jurisdiction and powers of the bankruptcy courts, unlike H.R. 8200. As one witness emphasized, the amendment "makes bad matters worse without solving anything."

DON EDWARDS, *Chairman.*
JOHN F. SEIBERLING.
ROBERT F. DRINAN.
HAROLD L. VOLKMER.
ANTHONY C. BEILENSON.
M. CALDWELL BUTLER.
ROBERT MCCLORY.

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BANKRUPTCY COURT DECISIONS

News And Comment

SUPREME COURT

SUPREME COURT FINDS BANKRUPTCY COURT JURISDICTION UNCONSTITUTIONAL

The grant of bankruptcy court jurisdiction in Section 241(a) of the Bankruptcy Act of 1978, 28 U.S.C. Section 1471 (1976 ed., Supp. III) is unconstitutional, rules the United States Supreme Court. Because the Court finds that the impermissible grant of jurisdiction over the instant contract dispute is not severable from the remaining grant of authority under Section 241(a), the court invalidates the entire jurisdictional basis underlying the bankruptcy court system. However, the holding is given prospective effect only, and the Court stays its judgment until October 4, 1982 in order to give Congress time to enact corrective legislation.

Initially, the Court observes that bankruptcy judges are clearly not Article III judges. Bankruptcy judges do not serve for life during good behavior, and their salaries are not immune from diminution by Congress. Both of these protections are guaranteed to Article III judges by Article III, Section 1. Therefore, the issue is whether, by vesting Article III judicial power in non-Article III courts, Congress violated the Constitution, and especially the doctrine of separation of powers.

Precedent establishes three narrow situations in which it has been recognized that "the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of power," the Court finds in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (6/28/82). First, creation of the territorial courts is justified by the general powers of government which Congress exercises over those geographical areas where no State operates as sovereign. Second, the courts martial are authorized by the power over the military which the Constitution confers on Congress and the President. Finally, the constitutionality of legislative courts which Congress has created to adjudicate cases involving "public rights" derives from the in-house nature of disputes between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative branches.

No comparable exceptional grant of power applies to bankruptcy court jurisdiction, the Court determines. The bankruptcy courts do not lie exclusively outside the States of the Federal Union; they do not resemble the courts martial; and the substantive legal rights at issue in the contract dispute between the litigants in the instant case cannot be deemed "public rights."

Furthermore, bankruptcy does not constitute a fourth exception to the general mandates of Article III. Permitting Congress to create legislative courts pursuant to any of its Article I powers would eliminate all limitations on the distinctions between Article III and Article I tribunals, the Court declares. "In sum, Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws."

The bankruptcy courts' status as adjuncts to the district courts does not solve the constitutional problems, the Court determines. Adjuncts to Article III tribunals may properly exercise jurisdiction only over rights created by federal statute, while the instant case involves a right created by state law. Moreover, "the functions of the adjunct must be limited in such a way that 'the essential attributes' of judicial power are retained in the Art. III court." The Bankruptcy Act vests all "essential attributes" of the judicial power of the United States in the bankruptcy courts. "We conclude

that § 241(a) of the Bankruptcy Act of 1978 has impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct."

Justices Rehnquist and O'Conner, concurring in the result, would restrict the scope of the decision to a finding that the bankruptcy courts cannot adjudicate state-created contract rights. The Justices agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority under Section 241(a).

In a dissent joined by Chief Justice Burger and Justice Powell, Justice White concludes that "There is no difference in principle between the work that Congress may assign to an Article I court and that which the Constitution assigns to Article III courts." Justice White goes on to say that "Article III . . . should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities." In light of the availability of appeal to Article III tribunals from the bankruptcy courts, the nonpolitical nature of bankruptcy matters, and the compelling practical need for the bankruptcy court system, he would defer to the congressional judgment expressed in the enactment of Section 241(a).

Chief Justice Burger, in a separate dissent, emphasizes that the Court's holding is limited to the proposition stated by Justice Rehnquist, that questions of state law "related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an 'Article III court' if it is to be heard by any court or agency of the United States." He suggests that Congress need only provide for ancillary common-law actions such as that involved here to be routed to the district court of which the bankruptcy court is an adjunct.

ANALYSIS AND PERSPECTIVE

BANKRUPTCY

High Court Decision to Influence Bankruptcy Cases

By Richard P. Krasnow

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The recent Supreme Court decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ____ U.S. ____ (1982), will have a major impact on pending and future bankruptcy and reorganization cases under the Bankruptcy Reform Act of 1978.[1] The Bankruptcy Reform Act revised the structure of the bankruptcy courts and expanded their jurisdiction. The bankruptcy courts, however, were not constituted as courts under Article III of the Constitution. In *Northern Pipeline*, a plurality of the Court concluded that the grant of expanded jurisdiction to a non-Article III court did not pass constitutional muster.

Historically, a major objective of the federal bankruptcy laws has been to seek to consolidate in one forum as many matters relating to a bankruptcy or reorganization case as possible. Accordingly, the subject matter jurisdiction of courts of bankruptcy traditionally been broad. Under §2 of the former Bankruptcy Act, the bankruptcy courts had authority not only to determine the validity of all claims asserted against an estate, but also to cause estates to be "collected, reduced to money, and distributed, and determine controversies in relation thereto. . . ."

This grant of jurisdiction was vested in the district court (Section 1 of the former Bankruptcy Act) but, in practice, either by reference from the district court (Section 22 of the former Bankruptcy Act), or subsequently when the Supreme Court promulgated the Rules of Bankruptcy Procedure in 1973 by automatic operation of such rules (Bankruptcy Rule 102), the bankruptcy court exercised substantially all of such jurisdiction. It did so, however, as an adjunct of the district court, a court under Article III of the Constitution.

Authority Predicated

The jurisdiction of the bankruptcy court under the former Bankruptcy Act did have certain significant limitations. The bankruptcy court's authority to adjudicate controversies was predicted in straight liquidation proceedings upon the court having exclusive jurisdiction over either all property in its actual or constructive possession,[2] or, under the various reorganization chapters of the statute, all of the debtor's property wherever located.[3] Thus, the court's jurisdiction was *in rem*. While the *in rem* nature of the bankruptcy court's jurisdiction was not as problematical when the court was requested to adjudicate disputes relating to tangible property, that was not the case when it came to intangibles such as choses in action.

When the bankruptcy court was requested by a trustee, or a debtor in possession in a reorganization case, to adjudicate state or federally created claims the bankruptcy court only could adjudicate such claims asserted if the defendant had consented, or failed to object, to the court's exercise of such *in personam* or "summary" jurisdiction.[4] If the dispute did not relate to property over which the court had jurisdiction or the defendant's express or implied consent was lacking, the dispute was deemed "plenary" in nature and could only be resolved in that forum, be it a state or district court, in which the bankrupt or debtor could have commenced the litigation absent the existence of the bankruptcy case.[5]

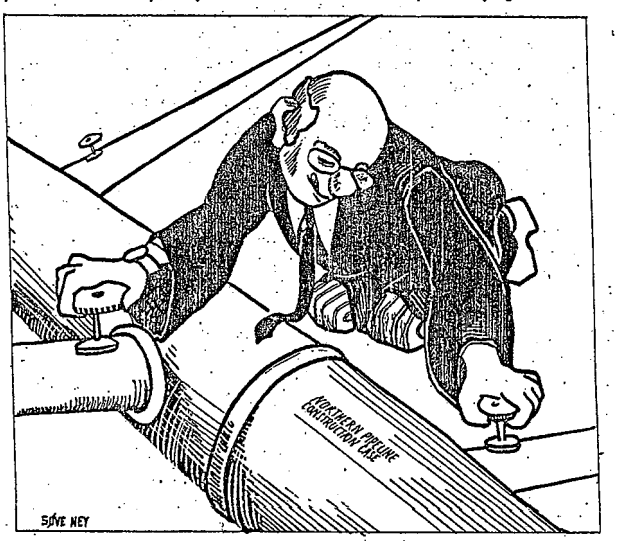

Illustration by Stephanie Ney

Bifurcation—Fragmentation

This bifurcation of summary and plenary jurisdiction often resulted in a fragmentation of litigation requiring a trustee or debtor in possession to commence lawsuits throughout the country. One of the major reforms that Congress sought to achieve when it enacted the Bankruptcy Reform Act of 1978 was the elimination of such jurisdictional disputes by expanding the jurisdiction of the bankruptcy courts to include "original but not exclusive jurisdiction of all civil proceedings arising under title 11 [the Bankruptcy Code] or arising in or related to cases under title 11."[6] Thus, the concept of summary and plenary jurisdiction was eliminated. The Bankruptcy Court, with certain exceptions, was given *in personam* jurisdiction over everyone.

This expansive jurisdiction of the court, however, did not come easily. It was the subject of substantial Congressional debate, much of which related to the issue of whether or not the bankruptcy courts should be constituted as courts under Article III of the Constitution.[7] Article III provides certain safeguards to insure the independence of the federal judiciary. Thus, Article III judges enjoy the protection of a lifetime tenure, subject only to impeachment, and irreducible salaries. The House concluded that, given the broad jurisdictional power being conferred on the bankruptcy courts, Article III status was mandated.[8] The Senate, however, concluded to the contrary and chose instead to characterize the bankruptcy courts as Article I courts, thereby depriving the bankruptcy judges of the security of job and salary afforded to Article III judges.[9] Thus, the Senate sought to perpetuate the concept underlying the former Bankruptcy Act that the bankruptcy courts are adjuncts of the district court.

Conflict 'Resolved'

This conflict between the House and Senate approaches, and the constitutional infirmities which were recognized to exist under the Senate approach, were "resolved" in the Bankruptcy Reform Act of 1978 by a compromise which resulted in the district courts having original and exclusive jurisdiction of all cases under the Bankruptcy Code, but with such jurisdiction being solely exercisable by the bankrupty court.[10]

The Bankruptcy Reform Act changed the method of appointment and tenure of bankruptcy judges. After a transition period and commencing October 1, 1984, the tenure of bankruptcy judges will be increased from six to 14 years and they will be appointed by the President, with the advice and consent of the Senate, rather than the district judges in the districts in which they sit as provided in the former Bankruptcy Act. Bankruptcy judges will be subject to removal by the judicial council of the circuits in which they sit on account of "incompetency, misconduct, neglect of duty or physical and mental disability."[11] Additionally, their salaries are subject to adjustment.[12]

In *Northern Pipeline*, the plurality of the Supreme Court held that this political compromise was constitutionally unacceptable. Although the issue before the Court related only to whether it was constitutional to grant jurisdiction to the bankruptcy courts with respect to the adjudication of state law claims where the defendant had not consented to the court's jurisdiction, in holding that it was not, the plurality applied the draconian remedy of declaring the jurisdictional provisions of the Bankruptcy Reform Act unconstitutional in their entirety.

Plenary Suit

Northern Pipeline arises in the context of Northern Pipeline seeking damages for alleged breaches of contract and warranty, misrepresentation, coercion and duress in an action commenced by it in the bankruptcy court in which its reorganization case was pending. All of these claims apparently were based upon state law. Marathon had not consented to the jurisdiction of the bankruptcy court. Thus, under the former Bankruptcy Act, the suit was "plenary" in nature and, had the former Bankruptcy Act been applicable, Northern would have had to have brought the suit either in the district court or state court. Marathon sought dismissal of the suit on the grounds that the jurisdictional provisions of the Bankruptcy Reform Act, which enabled the bankruptcy court to hear the action, represented in unconstitutional confirmant of Article III jurisdiction upon judges were not afforded the same permanency of position and salary afforded to Article III judges. Justice William J. Brennan, Jr. in a plurality decision joined in by Justices Thurgood Marshall, Harry A. Blackmun and John Paul Stevens, agreed.

The plurality notes the linchpin of the judiciary's ability to exercise its judicial power free of executive and legislative intrusion is the protection afforded it under Article III of both life tenure and irreducible salaries. The Court essentially concludes that in view of the pervasive jurisdiction granted to the bankruptcy courts, particularly their ability to adjudicate state law claims, and the indisputable fact that such judges are not afforded such protections, Congress either must provide such security to bankruptcy judges by elevating them to Article III status or restrict their jurisdiction.

Basically, two major arguments were raised in support of the expanded jurisdiction of the bankruptcy courts. First, although Congress did not expressly constitute the bankruptcy courts as legislative courts under Article I, it could have done so. Had it done so, it was argued, the bankruptcy court could have properly exercised the expanded jurisdiction. The plurality rejects this argument, noting that on the basis of case law stretching over 150 years, there were only three clear and narrow situations in which Congress could delegate judicial functions to an Article I court. These were territorial courts, which included the courts system established in the District of Columbia; courts martial; and courts and administrative agencies created to adjudicate cases involving public rights. Although at first glance it would appear that, given that Article I mandates the establishment of uniform federal laws on bankruptcy the bankruptcy courts would fall within the last

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ANALYSIS AND PERSPECTIVE

Congress Must Decide Status of Bankruptcy Judges

Continued from page 12

category, the Court concludes otherwise. The public rights doctrine, the Court notes, relates only to disputes between the government and others. Disputes between two individuals, however, are a matter of private rights and "lie at the core of the historically recognized judicial power."

Emasculated Judiciary

While recognizing that "the restructuring of debtor-creditor relations is the core of the federal bankruptcy power . . ." and as such could be considered a public right, the Court refuses to recognize that the adjudication of private rights, even within the context of the restructuring of debtor-creditor relations, would permit such an adjudication to be made by an Article I court. The court also dismisses as an argument predicated upon expediency rather than constitutionality the contention that, given the specialized area of bankruptcy and the particularized need for pervasive jurisdiction in *resolving* bankruptcy matters, the delegation of jurisdiction was permissible. It notes that if, as suggested, Congress could delegate judicial power to an Article I court merely because of the listing of an area in Article I such as bankruptcy or interstate commerce, then the Article III guarantee of an independent judiciary could be emasculated.

The thrust of the second major argument raised and rejected by the plurality was the contention that inasmuch as the jurisdictional provisions of the Bankruptcy Reform Act state that such jurisdiction is to be granted to the district court, albeit exercised only by the bankruptcy court, the bankruptcy court is an adjunct of an Article III court. As such, it may exercise its jurisdiction without violating Article III.

The Court noted that Congress could assign to an adjunct tribunal certain limited functions of an Article III court such as fact-finding in respect of narrowly confined factual determinations relating to federally created rights. However, where, as with bankruptcy courts, the functions assigned to the adjunct involve determinations concerning state and federally created rights, subject only to restricted review by the Article III court—and the adjunct also may enforce its own orders and determinations—then that tribunal is no longer a mere adjunct. Rather, it has the "essential attributes of the judicial power" of the Article III district court.

White Dissents

In his dissenting opinion, Justice White, joined by both Chief Justice Warren E. Burger, who also wrote a separate dissenting opinion, and Justice Lewis F. Powell Jr., accuses the plurality of basing its decision on "unsupportable abstractions, divorced from the realities of modern practice." Justice Byron R. White suggests that, in reality, the distinctions between Article I and Article III are so fine as to be almost meaningless. Indeed, he posits that it is possible to glean from the Court's prior decisions the principle that the distinguishing factor between Article I and Article III courts is that Article III courts are courts with Article III judges and Article I courts are courts without Article III judges.

Cognizant that such a tautology does not respond to the obvious necessity of determining that which Congress may properly delegate to an Article I court, the dissent indicates that the proper rule to be applied in determining whether or not the jurisdiction that Congress has granted to an Article I court may be constitutionally exercised by that court should be determined not by rigid rules, as suggested by the plurality, but rather by a balancing of the advantages and benefits that Congress sought to achieve through the use of Article I courts rather than Article III courts.

The Court noted that Congress could assign to an adjunct tribunal certain limited functions of an Article III court, such as fact-finding in respect of narrowly confined factual determinations relating to federally created rights.

Justice White also notes that another factor in this balancing is whether the determinations made by the Article I court are reviewable by an Article III court, thus indirectly maintaining the historical benefits of an Article III court. The dissent concludes that an opportunity for appellate review by an Article III court, which the plurality felt was insufficient to cure a basic constitutional infirmity, addresses the fear of the plurality, however theoretical, that, given that bankruptcy judges are not afforded the protections of Article III judges, they could be subject to political and other pressure in connection with their adjudication of state law claims.

In view of the specialized nature of bankruptcy, the necessity for flexibility in addressing future problems which may arise in bankrupty, the fluctuating nature of the bankruptcy practice, and the availability of such appellate review by Article III courts, the dissent believes that the balance tips in favor of the jurisdictional scheme provided for in the Bankruptcy Reform Act.

Expresses Puzzlement

In view of the extensive jurisdiction of the bankruptcy court under the former Bankruptcy Act, the dissent expresses puzzlement over the plurality's concern with the extension of the bankruptcy courts' jurisdiction under the Bankruptcy Reform Act. Justice White correctly notes that under the former statute the bankruptcy court always had jurisdiction to adjudicate state law claims either in respect of the adjudication of the validity of claims asserted by creditors or when a litigant consented to the bankruptcy court's jurisdiction. Although not referred to by Justice White, the Supreme Court itself recognized that jurisdiction could be conferred by consent when it promulgated the Rules of Bankruptcy Procedure in 1973.[13]

Thus, if the Northern Pipeline reorganization case had been governed by the former Bankruptcy Act, had Marathon consented to the court's jurisdiction by filing a proof of claim or otherwise, Northern Pipeline could have asserted the very state law claims at issue. The true distinction, therefore, between the former Bankruptcy Act and the Bankruptcy Reform Act is clearly not an expansion of fundamental subject matter jurisdiction, since the subject matter, state law claims, could be considered by the bankruptcy court under the former statute. Rather, it is conversion of the court's jurisdiction from *in rem* to *in personam*. Justice White suggests that this kind of expansion of jurisdiction, rather than one which enables the courts to adjudicate federal and state law issues, is one as to which there should be no constitutional implications.

In a rather interesting response to this argument, the plurality states in a footnote that, while the bankruptcy court may have been able through decisional law to exercise such broad powers under the former Bankruptcy Act, such expansion was not explicitly endorsed by the Court. Is the plurality now suggesting that there may have been constitutional infirmities to the powers which have been exercised by the bankruptcy courts for some years and which are presently being exercised by the courts in pending cases still governed by the former Bankruptcy Act?

Where do we go from here? Noting that the ability of the bankruptcy courts under the Bankruptcy Reform Act to adjudicate those issues which the court concluded it could not was an integral element of the comprehensive restructuring of the bankruptcy laws, the plurality rejected the comments made by Justice Rehnquist in his concurring opinion and by Chief Justice Burger and Justice White in their dissenting opinions that the Court should have limited its ruling to declaring that the jurisdictional provisions of the Bankruptcy Reform Act were only unconstitutional in respect of the adjudication of state created claims. By declaring the jurisdictional provisions unconstitutional in their entirety, the Court has forced Congress to face on all fours the controversial issue of elevating bankruptcy judges to Article III status.

Time Constraints

The time within which Congress must decide the issue is short. While the Court declared the jurisdictional provisions unconstitutional, it ruled that its holding was prospective only and stayed the enforcement of its order until Oct. 4, 1982. Between now and that date, not only must Congress decide whether or not to afford Article III status to bankruptcy judges, but, if it chooses to do so, as the decision now stands, prior to Oct. 4, 1982, the President must appoint, with the advice and consent of the Senate, the requisite number of life tenure judges.

Although in anticipation of the Court's decision on April 20, 1982, Rep. Peter W. Rodino Jr. (D-N.J.) submitted a bill that would make bankruptcy judges Article III judges, as presently written that portion of the bill that would grant life tenure would not become effective until April 1, 1984.[14] Alternatively, Congress could revert back to the law under the former Bankruptcy Act, at least in respect of the adjudication of state law claims, i.e., such claims only may be litigated to the extent that the litigants have consented to the jurisdiction of the court. Whether that represents a feasible approach depends upon one's view of the plurality suggestion in the footnote discussed above that the expansion of the bankruptcy courts' jurisdiction to include such power is open to question.

The other significant problem created by the Supreme Court's ruling is the unanswered question as to what bankruptcy judges are to do now through Oct. 4, 1982, in respect of pending proceedings. What effect is there to the staying of an order holding the jurisdiction of the court unconstitutional? Although the plurality notes that it wants to avoid impairing the interim administration of bankruptcy cases, it does not provide the lower courts with any precise guidelines.

By depriving the bankruptcy court of any jurisdiction, has the Court deprived financially distressed debtors who have not already done so an opportunity to avail themselves of any form of relief from the bankruptcy courts? Indirectly, the plurality cites to one of the Court's prior decisions[15] for the proposition that a state legislature that is unconstitutionally apportioned may continue to conduct its business. Is that analogous to a determination that the court is constitutionally devoid of any jurisdiction?

The Northern Pipeline decision clearly has not concluded the debate concerning the status of the bankruptcy courts. It is evident that Congress has its work cut out for it over the next three months.

[1] Pub. L. 95-595, 92 Stat. 2549 (effective Oct. 1, 1979).
[2] Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940).
[3] Sections 77(a), 82(a) 111, 311, 411 and 611 of the former Bankruptcy Act.
[4] Section 2a(7) of the former Bankruptcy Act.
[5] Section 23(b) of the former Banrkuptcy Act.
[6] 18 U.S.C. §1471.
[7] *See*, 1 Collier on Bankruptcy, ¶1.03[2]-[5], at 1-12 to 1-58 (15th ed. 1981).
[8] H.R. 8200, 95th Cong. 1st Sess. (1977).
[9] S. 2266, 95th Cong., 2d Sss. (1978).
[10] 18 U.S.C. §§1471(a) and (c).
[11] 18 U.S.C. §§152, 153(a), 153(b).
[12] Federal Salary Act, 2 U.S.C. §351-361; 28 U.S.C. §154.
[13] Bankruptcy Rule 915.
[14] H.R. 6109, 97th Cong., 2d Sess. (1982).
[15] Toombs v. Fortson, 384 U.S. 210 (1966), *per curiam, aff'g*, 241 F. Supp. 65 (N.D. Ga. 1965). ■

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