WHORM Subject File Code: FG050
(Federal Government Organizations: Judicial Branch)
Case File Number(s): 069500-072999
Box Number: 1

(MASENG/AB)

APRIL 2, 1982
1:30 P.M.

069634
FG050
LE
SP
PR005-02
PR007-01

TR

SIGNING CEREMONY: FEDERAL COURTS IMPROVEMENT ACT OF 1982

I AM PLEASED TO SIGN TODAY A BILL THAT MARKS ANOTHER MILESTONE IN THE STREAMLINING OF OUR FEDERAL COURT SYSTEM, THE FEDERAL COURTS IMPROVEMENT ACT OF 1982.

SENATOR STROM THURMOND, WHO COULD NOT BE WITH US TODAY BECAUSE OF A PREVIOUS COMMITMENT, AND SENATORS DOLE AND HEFFLIN, AND, OF COURSE, CONGRESSMEN PETER RODINO AND McCLORY PROVIDED THE EXCELLENT LEADERSHIP REQUIRED TO PASS THIS BILL. THESE REFORMS ARE THE RESULT OF BIPARTISAN COOPERATION IN THE CONGRESS AND THE HARD WORK OF DEDICATED PEOPLE IN ALL THREE BRANCHES OF GOVERNMENT.

ON BEHALF OF ALL OUR CITIZENS, I THANK THEM FOR THEIR EFFORTS.

THIS BILL WILL CONSOLIDATE THE COURT OF CLAIMS AND THE COURT OF CUSTOMS AND PATENT APPEALS TO FORM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT. THE MERGER WILL MAKE OUR JUDICIAL SYSTEM MORE EFFICIENT BY REDUCING PREVIOUSLY OVERLAPPING FUNCTIONS. IT WILL ALSO ENCOURAGE TECHNOLOGICAL RESEARCH AND DEVELOPMENT BY ENSURING THE UNIFORM APPLICATION OF THE PATENT LAWS. OTHER CHANGES WILL IMPROVE THE OVERALL MANAGEMENT OF THE FEDERAL COURTS.

I HOPE THAT THIS BILL AND THIS BIPARTISAN EFFORT WILL PAVE THE WAY TOWARD MORE REFORMS IN THE SYSTEM BY WHICH AMERICA DISPENSES JUSTICE UNDER LAW.

THERE ARE SEVERAL SIGNIFICANT PIECES OF LEGISLATION NOW PENDING BEFORE THE CONGRESS, SUCH AS THE CRIMINAL CODE REFORM, BAIL REFORM AND HABEAS CORPUS REFORM THAT WILL REQUIRE SIMILAR BIPARTISAN COOPERATION. I UNDERSTAND THE SENATE SOON WILL TAKE UP THE CRIMINAL CODE REFORM AND I LOOK FORWARD TO WORKING WITH CHAIRMAN RODINO AND MEMBERS OF THE HOUSE TO ENSURE SIMILARLY PROMPT ACTION ON THIS BILL.

I HAVE LONG SAID THAT GOVERNMENT'S FIRST DUTY IS TO PROTECT THE PEOPLE. BUT IN RECENT YEARS, DESPITE A RAPIDLY GROWING FEDERAL GOVERNMENT, CRIME RATES AROUND THE COUNTRY HAVE BEEN SOARING.

IF WE .. LD. .. NAT. CONTINU ... WRK. TOGETHR WE CN. RESTORE SFTY. ... AM. NABRHOODS & FULFILL OUR 1st DUTY ... REPs. ... AM. P.

(Maseng/AB)
April 1, 1982
6:00 p.m.

SIGNING CEREMONY FOR HR 4482: THE FEDERAL COURTS IMPROVEMENT ACT OF 1982, APRIL 2, 1982

I am pleased to sign today a bill that marks another milestone in the streamlining of our Federal court system, the Federal Courts Improvement Act of 1982.

Senator Strom Thurmond, who could not be with us today because of a previous commitment, and Senators Dole and Hefflin, and, of course, Congressmen Peter Rodino and McClory provided the excellent leadership required to pass this bill. These reforms are the result of bipartisan cooperation in the Congress and the hard work of dedicated people in all three branches of Government. On behalf of all our citizens, I thank them for their efforts.

This bill will consolidate the Court of Claims and the Court of Customs and Patent Appeals to form the United States Court of Appeals for the Federal Circuit. The merger will make our judicial system more efficient by reducing previously overlapping functions. It will also encourage technological research and development by ensuring the uniform application of the patent laws. Other changes will improve the overall management of the Federal courts.

I hope that this bill and this bipartisan effort will pave the way toward more reforms in the system by which America dispenses justice under law.

There are several significant pieces of legislation now pending before the Congress, such as the Criminal Code Reform, Bail Reform and Habeas Corpus Reform that will require similar bipartisan cooperation. I understand the Senate soon will take up the Criminal Code Reform and I look forward to working with Chairman Rodino and Members of the House to ensure similarly prompt action on this bill.

I have long said that Government's first duty is to protect the people. But in recent years, despite a rapidly growing Federal Government, crime rates around the country have been soaring. If we who lead this Nation continue to work together, we can restore safety to American neighborhoods, and fulfill our first duty as representatives of the American people.

Darman needs your concurrence

NC
60977

(MASENG/AB)

APRIL 2, 1982
1:30 P.M.

SIGNING CEREMONY: FEDERAL COURTS IMPROVEMENT ACT OF 1982

I AM PLEASED TO SIGN TODAY A BILL THAT MARKS ANOTHER MILESTONE IN THE STREAMLINING OF OUR FEDERAL COURT SYSTEM, THE FEDERAL COURTS IMPROVEMENT ACT OF 1982.

SENATOR STROM THURMOND, WHO COULD NOT BE WITH US TODAY BECAUSE OF A PREVIOUS COMMITMENT, AND SENATORS DOLE AND HE~~F~~FLIN, AND, OF COURSE, CONGRESSMEN PETER RODINO AND McCLORY PROVIDED THE EXCELLENT LEADERSHIP REQUIRED TO PASS THIS BILL. THESE REFORMS ARE THE RESULT OF BIPARTISAN COOPERATION IN THE CONGRESS AND THE HARD WORK OF DEDICATED PEOPLE IN ALL THREE BRANCHES OF GOVERNMENT.

O.K.

ON BEHALF OF ALL OUR CITIZENS, I THANK THEM FOR THEIR EFFORTS.

THIS BILL WILL CONSOLIDATE THE COURT OF CLAIMS AND THE COURT OF CUSTOMS AND PATENT APPEALS TO FORM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT. THE MERGER WILL MAKE OUR JUDICIAL SYSTEM MORE EFFICIENT BY REDUCING PREVIOUSLY OVERLAPPING FUNCTIONS. IT WILL ALSO ENCOURAGE TECHNOLOGICAL RESEARCH AND DEVELOPMENT BY ENSURING THE UNIFORM APPLICATION OF THE PATENT LAWS. OTHER CHANGES WILL IMPROVE THE OVERALL MANAGEMENT OF THE FEDERAL COURTS.

I HOPE THAT THIS BILL AND THIS BIPARTISAN EFFORT WILL PAVE THE WAY TOWARD MORE REFORMS IN THE SYSTEM BY WHICH AMERICA DISPENSES JUSTICE UNDER LAW.

THERE ARE SEVERAL SIGNIFICANT PIECES OF LEGISLATION NOW PENDING BEFORE THE CONGRESS, SUCH AS THE CRIMINAL CODE REFORM, BAIL REFORM AND HABEAS CORPUS REFORM THAT WILL REQUIRE SIMILAR BIPARTISAN COOPERATION. I UNDERSTAND THE SENATE SOON WILL TAKE UP THE CRIMINAL CODE REFORM AND I LOOK FORWARD TO WORKING WITH CHAIRMAN RODINO AND MEMBERS OF THE HOUSE TO ENSURE SIMILARLY PROMPT ACTION ON THIS BILL.

I HAVE LONG SAID THAT GOVERNMENT'S FIRST DUTY IS TO PROTECT THE PEOPLE. BUT IN RECENT YEARS, DESPITE A RAPIDLY GROWING FEDERAL GOVERNMENT, CRIME RATES AROUND THE COUNTRY HAVE BEEN SOARING.

IF WE WHO LEAD THIS NATION CONTINUE TO WORK TOGETHER, WE CAN RESTORE SAFETY TO AMERICAN NEIGHBORHOODS, AND FULFILL OUR FIRST DUTY AS REPRESENTATIVES OF THE AMERICAN PEOPLE.

#

MEMORANDUM

072983PD
FG050

THE WHITE HOUSE

WASHINGTON

November 9, 1982

FOR: FILE

FROM: JUDY JOHNSTON

SUBJECT: Justice Testimony re Bankruptcy Judge Problem

Mike Uhlmann had already reviewed this testimony with OMB, Justice and Counsel's Office and passed along his comments directly to them.

I have relayed the above information to Dick Darman's office to close out action.

cc: Roger Porter

DOCUMENT NO. 105807 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

DATE: 11/9/82 ACTION/CONCURRENCE/COMMENT DUE BY: 10:00 am

SUBJECT: JUSTICE TESTIMONY RE BANKRUPTCY JUDGE PROBLEM

	ACTION	FYI		ACTION	FYI
HARPER	☐	☐	DRUG POLICY	☐	☐
PORTER	☐	☐	TURNER	☐	☐
BARR	☐	☐	D. LEONARD	☐	☐
BOGGS	☐	☐	OFFICE OF POLICY INFORMATION		
BRADLEY	☐	☐	HOPKINS	☐	☐
CARLESON	☐	☐	COBB	☐	☐
DENEND	☐	☐	PROPERTY REVIEW BOARD	☐	☐
FAIRBANKS	☐	☐	OTHER		
FERRARA	☐	☐		☐	☐
GALEBACH	☐	☐		☐	☐
GARFINKEL	☐	☐		☐	☐
GUNN	☐	☐		☐	☐
B. LEONARD	☐	☐		☐	☐
LI	☐	☐		☐	☐
MONTOYA	☐	☐		☐	☐
ROCK	☐	☐		☐	☐
ROPER	☐	☐		☐	☐
SMITH	☐	☐		☐	☐
UHLMANN	☐	☐		☐	☐
ADMINISTRATION	☐	☒		☐	☐

REMARKS:

MIKE UHLMANN FOR ACTION

May I please have any comments ASAP. (Just received)

Judy Johnston 11/9

Please return this tracking sheet with your response

Edwin L. Harper
Assistant to the President
for Policy Development
(x6515)

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

November 9, 1982

MEMORANDUM FOR CRAIG FULLER

FROM: ANNELISE ANDERSON for Annelise Anderson

SUBJECT: Proposed Justice Department testimony on bankruptcy reform legislation for November 10, 1982, hearing before Senate Judiciary Committee

As drafted, the proposed Justice Department testimony addresses two provisions of pending bankuptcy legislation. First, the testimony supports the approach taken in H.R. 7294 that would establish a bankruptcy division of the United States District Court in each judicial district to hear all matters relating to bankruptcy (the so-called Article III issue). Second, the testimony generally supports the transfer of the United States trustees program from the Justice Department to the Judiciary. The testimony also notes that the bankruptcy legislation under consideration in the House and the Senate contains a number of provisions to which the Adminstration does not object or on which it has not articulated positions.

OMB has no objection to the proposed Justice Department testimony as far as it goes. Both the Article III position taken by the testimony and the proposed transfer of the trustees program from Justice to the Judiciary make sense. We note, however, that the testimony leaves unaddressed several key provisions of the pending bankruptcy proposals, some of which the Administration has opposed and at least one of which the President vetoed previously when it was presented to him for his consideration as a discrete enrolled bill. More particularly, the testimony does not discuss provisions of the pending House legislation concerning -

- o Federal court reform;
- o Elimination of diversity jurisdiction;
- o Judicial survivors annuities;
- o Creation of a State Justice Institute;
- o Creation of a Federal Courts Study Commission;
- o Establishment of an Intercircuit Tribunal;
- o Authorizing new district and appellate court judgeships;
- o Restrictions on consumer bankruptcies;

- o Grain elevator bankruptcies; and
- o Special provisions concerning the Referees' Salary and Expense Fund.

Of the foregoing, the proposals concerning the State Justice Institute and the Referees' Salary and Expense Fund are particularly troublesome. With respect to the former provision, the bill would authorize the establishment of a State Justice Institute to foster improved judicial administration in the State courts of the United States. $70 million would be authorized for activities of the Institute over the next three years. Concerning the latter provision, the bill would extend private relief (albeit in the guise of legislation of general applicablility) to certain bankrupt estates that are liable for fees payable to the Referees' Salary and Expense Fund under provisions of the Bankruptcy Code as it existed until its comprehensive revision in 1978. The President vetoed a bill, H.R. 4353, at the end of the first session of the 97th Congress that would have granted similar private relief. Enactment of this provision would result in a revenue loss in excess of $22 million.

The Administration is on record as opposing the State Justice Institute and special bankruptcy fee relief legislation. For this reason, we strongly believe that the proposed Justice Department testimony should be amended beginning at the bottom of page 15 to state that there are a number of provisions of the pending bankruptcy legislation that the Administration opposes. It should explicitly oppose the State Justice Institute and the Referees' Salary and Expense Fund proposals and should explain our opposition. The testimony should also note that the Administration is looking at other pending proposals (e.g., the Federal Courts Study Commission) and may be providing additional views at a later time.

While we certainly do not believe that it is necessary to discuss every provision of the pending legislation, we are concerned that the testimony, as drafted, conveys the impression that the Administration is interested almost exclusively in the Article III courts question and has no objection to any of the bills' other provisions. The Article III controversy is of pressing concern; however, the testimony should explictly leave the door ajar to allow for the submission of further objections and views at a later date.

OMB staff will get back to Justice directly to ensure that the changes discussed above are made.

Document No. 072983CS

FG050

WHITE HOUSE STAFFING MEMORANDUM

DATE: November 8   ACTION/CONCURRENCE/COMMENT DUE BY: 10:00 TOMORROW November 9th

SUBJECT: JUSTICE TESTIMONY RE BANKRUPTCY JUDGE PROBLEM

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	FULLER	☐	☐
MEESE	☐	☑	GERGEN	☐	☑
BAKER	☐	☑	HARPER	☐	☑
DEAVER	☐	☐	JENKINS	☐	☐
STOCKMAN	☐	☐	MURPHY	☐	☐
CLARK	☐	☐	ROLLINS	☐	☐
DARMAN	☐P	☑SS	WILLIAMSON	☐	☑
DOLE	☐	☑	VON DAMM	☐	☐
DUBERSTEIN	☐	☑	BRADY/SPEAKES	☐	☐
FELDSTEIN	☐	☐	ROGERS	☐	☐
FIELDING	☐	☐	______	☐	☐

Remarks:

Please provide any comments/edits by 10:00 a.m. tomorrow.

Thank you.

Richard G. Darman
Assistant to the President
(x2702)

Response:

File Closed

EHD
Red
Diana (Comments to Nancy by 5:00 p.m. 11/8) Document No. ______
Bill T " " " "

WHITE HOUSE STAFFING MEMORANDUM

NOV 8 1982

DATE: November 8 ACTION/CONCURRENCE/COMMENT DUE BY: ~~10:00 TOMORROW~~ November 9th

SUBJECT: JUSTICE TESTIMONY RE BANKRUPTCY JUDGE PROBLEM

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	FULLER	☐	☐
MEESE	☐	☑	GERGEN	☐	☑
BAKER	☐	☑	HARPER	☐	☑
DEAVER	☐	☐	JENKINS	☐	☐
STOCKMAN	☐	☐	MURPHY	☐	☐
CLARK	☐	☐	ROLLINS	☐	☐
DARMAN	☐P	☑SS	WILLIAMSON	☐	☑
DOLE	☐	☑	VON DAMM	☐	☐
DUBERSTEIN	☐	☑	BRADY/SPEAKES	☐	☐
FELDSTEIN	☐	☐	ROGERS	☐	☐
FIELDING	☐	☐	______	☐	☐

Remarks:

Please provide any comments/edits by 10:00 a.m. tomorrow.

Thank you.

Richard G. Darman
Assistant to the President
(x2702)

'82 NOV -9 A10:19

Response:

November 8, 1982

No comments.

Elizabeth H. Dole

Document No. ____________

WHITE HOUSE STAFFING MEMORANDUM

DATE: November 8 ACTION/CONCURRENCE/COMMENT DUE BY: 10:00 TOMORROW November 9th

SUBJECT: JUSTICE TESTIMONY RE BANKRUPTCY JUDGE PROBLEM

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	FULLER	☐	☐
MEESE	☐	☑	GERGEN	☐	☑
BAKER	☐	☑	HARPER	☐	☑
DEAVER	☐	☐	JENKINS	☐	☐
STOCKMAN	☐	☐	MURPHY	☐	☐
CLARK	☐	☐	ROLLINS	☐	☐
DARMAN	☐P	☑SS	WILLIAMSON	☐	☑
DOLE	☐	☑	VON DAMM	☐	☐
DUBERSTEIN	☐	☑	BRADY/SPEAKES	☐	☐
FELDSTEIN	☐	☐	ROGERS	☐	☐
FIELDING	☐	☐	____________	☐	☐

Remarks:

Please provide any comments/edits by 10:00 a.m. tomorrow.

Thank you.

Richard G. Darman
Assistant to the President
(x2702)

Response: FYI | No Comments HBo
/ No Comment / DS

OK for [signature]

'82 NOV -6 A10:23

Document No. ______________

WHITE HOUSE STAFFING MEMORANDUM

DATE: November 8 ACTION/CONCURRENCE/COMMENT DUE BY: 10:00 TOMORROW
November 9th

SUBJECT: JUSTICE TESTIMONY RE BANKRUPTCY JUDGE PROBLEM

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	FULLER	☐	☐
MEESE	☐	☑	GERGEN	☐	☑
BAKER	☐	☑	HARPER	☐	☑
DEAVER	☐	☐	JENKINS	☐	☐
STOCKMAN	☐	☐	MURPHY	☐	☐
CLARK	☐	☐	ROLLINS	☐	☐
DARMAN	☐P	☑SS	WILLIAMSON	☐	☑
DOLE	☐	☑	VON DAMM	☐	☐
DUBERSTEIN	☐	☑	BRADY/SPEAKES	☐	☐
FELDSTEIN	☐	☐	ROGERS	☐	☐
FIELDING	☐	☐	______________	☐	☐

Remarks:

Please provide any comments/edits by 10:00 a.m. tomorrow.

Thank you.

Ned 11-8
11:30

Richard G. Darman
Assistant to the President
(x2702)

Response:

No comments

Dave 11/8 9:30

'82 NOV -9 A9:41

Document No. ______

WHITE HOUSE STAFFING MEMORANDUM

DATE: November 8 ACTION/CONCURRENCE/COMMENT DUE BY: 10:00 TOMORROW November 9th

SUBJECT: JUSTICE TESTIMONY RE BANKRUPTCY JUDGE PROBLEM

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	FULLER	☐	☐
MEESE	☐	☑	GERGEN	☐	☑
BAKER	☐	☑	HARPER	☐	☑
DEAVER	☐	☐	JENKINS	☐	☐
STOCKMAN	☐	☐	MURPHY	☐	☐
CLARK	☐	☐	ROLLINS	☐	☐
DARMAN	☐P	☑SS	WILLIAMSON	☐	☑
DOLE	☐	☑	VON DAMM	☐	☐
DUBERSTEIN	☐	☑	BRADY/SPEAKES	☐	☐
FELDSTEIN	☐	☐	ROGERS	☐	☐
FIELDING	☐	☐	______	☐	☐

Remarks:

Please provide any comments/edits by 10:00 a.m. tomorrow.

Thank you.

Richard G. Darman
Assistant to the President
(x2702)

Response:

072983CS
1120
1130
FG050
JL002
FG017
FG036

THE WHITE HOUSE
WASHINGTON

CABINET AFFAIRS STAFFING MEMORANDUM

DATE: Nov. 8, 1982 NUMBER: ~~072983CA~~ DUE BY:

SUBJECT: Bankruptcy Testimony by Jonathan Rose Scheduled for ~~Monday, November~~ 8. Wednesday, Nov. 10

	ACTION	FYI
ALL CABINET MEMBERS	☐	☐
Vice President	☐	☐
State	☐	☐
Treasury	☐	☐
Defense	☐	☐
Attorney General	☐	☐
Interior	☐	☐
Agriculture	☐	☐
Commerce	☐	☐
Labor	☐	☐
HHS	☐	☐
HUD	☐	☐
Transportation	☐	☐
Energy	☐	☐
Education	☐	☐
Counsellor	☐	☐
OMB	☑	☐
CIA	☐	☐
UN	☐	☐
USTR	☐	☐
CEA	☐	☐
CEQ	☐	☐
OSTP	☐	☐
______	☐	☐
______	☐	☐

	ACTION	FYI
Baker	☐	☐
Deaver	☐	☐
Clark	☐	☐
Darman *(For WH Staffing)*	☑	☐
Harper	☐	☐
Jenkins	☐	☐
______	☐	☐
______	☐	☐
______	☐	☐
______	☐	☐
______	☐	☐
______	☐	☐
______	☐	☐
CCCT/Gunn	☐	☐
CCEA/Porter	☐	☐
CCFA/Boggs	☐	☐
CCHR/Carleson	☐	☐
CCLP/Uhlmann	☐	☐
CCMA/Bledsoe	☐	☐
CCNRE/Boggs	☐	☐

REMARKS:

Please review the attached and submit any comments you may have by NO LATER THAN 10 A.M., TUESDAY, NOVEMBER 9.

Sorry about the short turnaround.

RETURN TO:

☑ Craig L. Fuller
Assistant to the President
for Cabinet Affairs
456-2823

☐ Becky Norton Dunlop
Director, Office of
Cabinet Affairs
456-2800

THE WHITE HOUSE
WASHINGTON

CABINET AFFAIRS STAFFING MEMORANDUM

DATE: Nov. 8, 1982 NUMBER: 072983CA DUE BY: ______

SUBJECT: Bankruptcy Testimony by Jonathan Rose Scheduled for ~~Monday, November 8~~ Wednesday, Nov. 10

	ACTION	FYI
ALL CABINET MEMBERS	☐	☐
Vice President	☐	☐
State	☐	☐
Treasury	☐	☐
Defense	☐	☐
Attorney General	☐	☐
Interior	☐	☐
Agriculture	☐	☐
Commerce	☐	☐
Labor	☐	☐
HHS	☐	☐
HUD	☐	☐
Transportation	☐	☐
Energy	☐	☐
Education	☐	☐
Counsellor	☐	☐
OMB	☑	☐
CIA	☐	☐
UN	☐	☐
USTR	☐	☐
CEA	☐	☐
CEQ	☐	☐
OSTP	☐	☐
______	☐	☐
______	☐	☐

	ACTION	FYI
Baker	☐	☐
Deaver	☐	☐
Clark	☐	☐
Darman *(For WH Staffing)*	☑	☐
Harper	☐	☐
Jenkins	☐	☐
______	☐	☐
______	☐	☐
______	☐	☐
______	☐	☐
______	☐	☐
______	☐	☐
______	☐	☐
CCCT/Gunn	☐	☐
CCEA/Porter	☐	☐
CCFA/Boggs	☐	☐
CCHR/Carleson	☐	☐
CCLP/Uhlmann	☐	☐
CCMA/Bledsoe	☐	☐
CCNRE/Boggs	☐	☐

REMARKS:

Please review the attached and submit any comments you may have by NO LATER THAN 10 A.M., ~~TUESDAY, NOVEMBER 9~~ Tuesday, November 9.

Sorry about the short turnaround.

RETURN TO:

☑ Craig L. Fuller
Assistant to the President
for Cabinet Affairs
456-2823

☐ Becky Norton Dunlop
Director, Office of
Cabinet Affairs
456-2800

ID # 072983 CU

FG050

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING

☐ H - INTERNAL

☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) ___/___/___

Name of Correspondent: Jonathan Rose

☐ **MI Mail Report** **User Codes: (A)** ______ **(B)** ______ **(C)** ______

Subject: Bankruptcy Testimony scheduled for NOV 10 82

ROUTE TO: **ACTION** **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CWHolland	ORIGINATOR	82/11/06		C	82/11/06
	Referral Note:				
CWFIEL	I	82/11/06		C	82/11/06
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments:

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

RECORDS MANAGEMENT ONLY

CLASSIFICATION SECTION

No. of Additional Correspondents: ______ Media: X Individual Codes: 1130 ____ ____

Prime Subject Code: FG050 Secondary Subject Codes: JL002 FG017 FG036

PRESIDENTIAL REPLY

Code	Date	Comment	Form
C		Time:	P-
DSP		Time:	Media:

SIGNATURE CODES:

CPn - Presidential Correspondence
- n - **0** - Unknown
- n - **1** - Ronald Wilson Reagan
- n - **2** - Ronald Reagan
- n - **3** - Ron
- n - **4** - Dutch
- n - **5** - Ron Reagan
- n - **6** - Ronald
- n - **7** - Ronnie

CLn - First Lady's Correspondence
- n - **0** - Unknown
- n - **1** - Nancy Reagan
- n - **2** - Nancy
- n - **3** - Mrs. Ronald Reagan

CBn - Presidential & First Lady's Correspondence
- n - **1** - Ronald Reagan - Nancy Reagan
- n - **2** - Ron - Nancy

MEDIA CODES:

- **B** - Box/package
- **C** - Copy
- **D** - Official document
- **G** - Message
- **H** - Handcarried
- **L** - Letter
- **M** - Mailgram
- **O** - Memo
- **P** - Photo
- **R** - Report
- **S** - Sealed
- **T** - Telegram
- **V** - Telephone
- **X** - Miscellaneous
- **Y** - Study

U.S. Department of Justice

Office of Legal Policy

NOV -6 1982

Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

November 5, 1982

TO: Fred F. Fielding
Counsel to the President

FROM: Jonathan C. Rose JCR
Assistant Attorney General

SUBJECT: Bankruptcy Testimony

Attached is a copy of my draft testimony on the Bankruptcy judge problem which I plan to deliver on Wednesday, November 10 before Sen. Dole's Subcommittee on Courts. I would very much appreciate any comments by 2 P.M. Monday, November 8, so that I may submit the testimony to the Committee on time.

Attachment

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you to present the views of the Department of Justice on the several legislative proposals to restructure the Nation's bankruptcy court system. As you are well aware, the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982), has determined that the system of Article I bankruptcy courts */ created by the 1978 Bankruptcy Reform Act cannot constitutionally exercise the broad jurisdiction conferred on them by that Act. On October 4, 1982, the Supreme Court agreed to extend its stay of that decision until December 24, 1982. This leaves very little legislative time to adopt a constitutional and workable bankruptcy court system.

I would like to make clear at the outset that I cannot overstate the need for the enactment of remedial legislation before the Supreme Court's stay expires. The plurality and concurring opinions in the Northern Pipeline case have left many

*/ Article I courts are legislative courts established by the Congress to be manned by judges without the protection against salary dimunition and without life tenure.

important questions unanswered, and the extent to which the bankruptcy courts and the district courts will be able to adjudicate bankruptcy matters after December 24 is highly unclear. It is, indeed, somewhat uncertain that any court will have jurisdiction over bankruptcy matters after December 24. While we believe it is likely that some bankruptcy jurisdiction would remain in the district courts after December 24, */ it is much less clear that the district courts would retain the broad jurisdiction created by the 1978 Bankruptcy Reform Act over matters "related to" bankruptcy issues.

The Administrative Office of the United States Courts has promulgated a proposed district court local rule to govern the operation of the bankruptcy courts after December 24 if no legislation is adopted. The proposed rule assigns to the bankruptcy courts in each district the district court's jurisdiction over "[a]ll cases under Title 11 and all civil proceedings arising in or related to cases under Title 11." Proposed Rule (b)(1). District courts are authorized to withdraw

---

*/ Various arguments have been presented in favor of the conclusion that bankruptcy jurisdiction will return to the district courts after December 24. See Bankruptcy Court Act of 1982, H.R.Rept. No. 97-807, 97th Cong., 2d Sess. 30-49 (1982) ("House Report"). The clearest case, however, is made by 28 U.S.C. 1334, which provides that "[t]he district courts shall have original jurisdiction *** of all matters and proceedings in bankruptcy." Although § 1334 was amended by Section 238(a) of the 1978 Act, 92 Stat. 2668, to limit district courts to appellate bankruptcy jurisdiction, those amendments do not take effect until April 1, 1984. See § 402(b) of the Act, 92 Stat. 2682.

any reference to a bankruptcy judge, in whole or part, upon the court's own motion or the motion of a party. Id., (b)(2). In addition, the district courts must review de novo any proposed judgment of a bankruptcy court in any proceeding "related to" but not "arising under" a case under Title 11 and in any other proceeding where such de novo review is constitutionally required. Id., (c)(3), (c)(5)(A)(iii), (c)(5)(B). However, the proposed rule does not define those other cases in which district court de novo review is constitutionally required.

We are uncertain whether the proposed rule would withstand a judicial challenge. The proposed rule is based on the assumption that the Court's decision has left untouched the broad bankruptcy jurisdiction conferred upon the district courts by Section 241(a) of the Act, in 28 U.S.C. 1471(a) and (c). In fact, it is unclear whether the Court's holding may be limited in that fashion. See 102 S. Ct. at 2880 n.40 (plurality opinion); id. at 2882 (Rehnquist, J., concurring). Furthermore, there are serious questions whether the proposed rule legitimately may assign to the bankruptcy courts significant portions of the district courts' broad bankruptcy jurisdiction under the Act, since this is precisely what the Court refused to do in holding that the jurisdiction which the bankruptcy courts cannot constitutionally exercise could not be severed from the remainder of the bankruptcy jurisdiction conferred under the 1978 Act.

We have no confidence that the proposed rule will be proven an effective interim remedy to the bankruptcy court crisis, thereby enabling the Congress to take more time to determine how it wishes to resolve this matter. The permissible scope of district court jurisdiction over bankruptcy matters would, of course, be subject to substantial litigation before it could be firmly settled. Even more extensive and difficult litigation would be required to determine which questions could be safely delegated to the bankruptcy courts and which would have to be heard *de novo* by the district courts.

If district courts recognize the problems with the rule and withdraw the reference of many bankruptcy matters from the bankruptcy courts or attempt to review *de novo* large numbers of bankruptcy matters, the resulting delays will severely hinder the operation of the bankruptcy system. The district courts are not at present capable of expeditiously handling both their own large workloads and the enormous volume of bankruptcy matters. Over 700,000 bankruptcy estates -- and 100,000 adversary proceedings -- currently are pending. New bankruptcy petitions are being filed at the rate of more than 10,000 per week. */

On the other hand, if the district courts permit the bankruptcy courts to adjudicate a broad range of cases and proceedings pursuant to the local rule, there is a substantial

---

*/ Administrative Office of the United States Courts, *1982 Annual Report of the Director*, 8, 10 (preliminary ed., September 22, 1982).

risk that these cases and proceedings will have to be relitigated if the local rule is found invalid. Under either alternative, the bankruptcy court system will operate under a cloud of uncertainty. In light of such jurisdictional uncertainty, it would be especially difficult to proceed with any large commercial bankruptcies or reorganizations, where debtors, creditors, and purchasers of assets must be able to rely on the validity of the bankruptcy court's orders and cannot proceed subject to the risk of judicial invalidation of their acts.

In short, we do not believe that the bankruptcy court system can operate effectively after December 24 in the absence of remedial legislation. The disruption of this system would ultimately result in losses of millions of dollars and thousands of jobs, as reorganizations of our nation's productive resources are delayed by the legal uncertainties outlined above.

Nor can we rely on the prospect of a further stay from the Supreme Court. The Court's stay has been extended once, to coincide with the adjournment of this Congress, almost six months after the Court's decision. As a practical matter, the deferral of this issue until the next Congress would make final action by Congress unlikely before the late spring, a delay the Court likely will not countenance.

Thus, it is essential that remedial legislation to deal with the _Northern Pipeline_ decision be enacted before the end of the current session.

II.

In view of the strong opposition of the Judicial Conference and others to the establishment of an Article III court of specialized jurisdiction for bankruptcy matters, over the summer since the _Northern Pipeline_ decision, the Department attempted to develop an Article I solution that was both workable and constitutional. Unfortunately, our extensive review has led to the conclusion that we cannot recommend to the Congress any Article I solution that is either workable as a practical matter or sufficiently free of constitutional doubt.

It is very difficult to determine from the opinions filed in _Northern Pipeline_ exactly what aspects of bankruptcy proceedings might or might not be constitutionally adjudicated by a non-Article III tribunal. The rationales advanced by both the plurality opinion and the concurring opinion are, however, sufficiently sweeping that it is extremely doubtful that the proposal to reestablish an Article I bankruptcy court advanced by the Judicial Conference would provide a workable bankruptcy tribunal that would be both effective and capable of withstanding constitutional scrutiny.

The plurality opinion of four justices distinguished between "public rights" which may be adjudicated by an Article I tribunal and "private rights" which may not. That opinion did not delineate what constitute "public rights" but noted generally that they must at a minimum arise "between the government and others." 102 S. Ct. at 2870. By contrast, private rights, which must be adjudicated by Article III courts, are those involving "the liability of one individual to another." 102 S. Ct. at 2870-71. Though it may be possible to argue that some aspects of bankruptcy proceedings involve matters of "public right," the adjudication of creditors' claims against a bankrupt, which forms the heart of many bankruptcy proceedings, would seem to involve primarily the "private rights" of the parties.

The concurring opinion of Justices Rehnquist and O'Connor was expressly limited to the particular type of claim involved in the case (i.e., a bankrupt's common law claim against a third party uninvolved in the bankruptcy proceeding). Nevertheless, the rationale advanced is in some respects no less sweeping than that of the plurality opinion. Justice Rehnquist's opinion suggests that matters arising under state law, as well as "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," must be tried by Article III courts. 102 S. Ct. at 2881. This could entail a vast number of matters in and related to bankruptcy.

The Judicial Conference has argued, similar to the view expressed in Chief Justice Burger's dissenting opinion, 102 S. Ct. at 2882, that the decision in Northern Pipeline should be read to require only that actions at common law arising under state law must be decided by an Article III tribunal. */ It is apparently the view of the Judicial Conference that matters "arising under" bankruptcy law, do not entail issues of state common law and, accordingly, may be constitutionally considered by an Article I tribunal.

The analysis and proposal offered by the Judicial Conference present a number of problems. First, we would not advise Congress to base its legislative solution to this problem on the speculation that the more narrow construction of Northern Pipeline advanced by the Judicial Conference will ultimately prevail in the Supreme Court. Second, even under the construction of Northern Pipeline advanced by the Judicial Conference, there are significant constitutional problems in attempting to adjudicate a large proportion of the matters "arising under" bankruptcy law in an Article I tribunal. Cases arising under bankruptcy law frequently entail consideration of state law or traditional common law issues in many different

---

*/ Report of the Judicial Conference of the United States on Northern Pipeline Construction Co. v. Marathon Pipe Line Co., and Proposals for Remedial Congressional Action, 11 (1982).

contexts. */ To cite an obvious example, proofs of claim offered by a claimant against a bankrupt will generally be predicated on state law (of contract, property, domestic relations, etc.). Thus, it is not at all clear even under the construction of Northern Pipeline offered by the Judicial Conference a workable Article I bankruptcy court is possible.

Finally, the Judicial Conference proposal would reduce the efficiency of the bankruptcy system established in 1978 by bifurcating proceedings between an Article I and an Article III tribunal. One of the most important purposes of the 1978 reforms was the consolidation of bankruptcy proceedings before a single forum with jurisdiction over all relevant matters. This put an end to costly delays and jurisdictional litigation which had plagued bankruptcy adjudication prior to 1978. The bifurcated system proposed by the Judicial Conference would resurrect some of these same problems. Moreover, it would place a burden of uncertain dimensions on the existing district court calendars.

For these reasons, the Department has concluded that only an Article III approach will provide the workable and constitutional solution that is essential to assure the continued integrity of the bankruptcy system. Grave constitutional doubts would surround any further temporizing with an Article I solution

---

*/ In their letter of September 20, 1982 to the Chairman, Professors Countryman, Kennedy and King present a more extensive analysis of this problem.

and would cast a shadow on all bankruptcy cases raising the possibility of a new ruling that such a bankruptcy court structure is unconstitutional. In our judgment, a legislative proposal that simply offers an opportunity for more litigation to test its constitutional validity is no solution at all. The appointment of Article III judges will resolve any constitutional concerns, allow the consolidated disposition of all related bankruptcy matters, and attract the highest caliber of lawyers to the bench.

III.

Once a decision is made in favor of the Article III approach, there are two possible approaches to consider. One approach, reflected in H.R. 6978, as reported by the House Judiciary Committee, is to constitute the bankruptcy courts as Article III courts independent of the existing district courts. The other approach is reflected in H.R. 7294 (introduced by Rep. Butler) and in the unnumbered Senate amendments. It would provide for the appointment of additional Article III judges to sit in a new bankruptcy division of each federal district court. For the reasons I summarize below, the Department of Justice favors the second alternative, the creation of bankruptcy divisions of the district courts.

Although H.R. 6978 would resolve with finality the constitutional infirmities of the 1978 Act, it also presents a number of disadvantages that many commentators and legislators -- including members of this committee -- have sought to avoid. Specifically, H.R. 6978 would create a complex system of Article III courts with specialized subject matter jurisdiction. This would be a dramatic departure from the historic practice of federal trial courts of general jurisdiction. Moreover, the appointment of a fixed number of specialized judges in each district may result in undesirable rigidity and inefficiency as the bankruptcy caseloads in each district change over time. Further, because the jurisdiction of these courts would be limited solely to bankruptcy, the breadth and caliber of candidates available for appointment to these courts would be adversely affected.

In other respects as well, the approach has drawbacks. The creation of separate bankruptcy courts in each district, together with separate clerks and other officers, would inevitably result in duplication and inefficiency. There is considerable merit to the argument against creating a new Article III court system which, in some sense, would compete with the existing district court system.

Upon careful consideration, the Department of Justice favors the bankruptcy division approach reflected in Representative Butler's bill and in the proposed Senate amendments. This approach, we feel, will retain the advantages of an Article III approach while avoiding the disadvantages of an independent bankruptcy court system.

This approach would establish a bankruptcy division of the district court in each district to hear all matters relating to bankruptcy. In recognition that the existing district courts would be unable to manage the large volume of bankruptcy filings, the bills would provide for the appointment of 227 additional district judges who would principally handle bankruptcy matters. These district judges would have the same rights and privileges provided by law for district judges. To the extent that they were not needed to handle bankruptcy matters, the judges could be assigned to hear other cases in the district court or designated to sit on other courts. The bills, however, would allow such designation and assignment of district judges in the bankruptcy divisions only where the disposition of bankruptcy matters will not be delayed.

This approach will promote expertise among judges in the bankruptcy divisions of the district courts, assuring that bankruptcy matters will be handled promptly and expeditiously by Article III district judges familiar with bankruptcy law. The assignment of district judges specifically to the bankruptcy divisions will assure that bankruptcy matters will be kept separate from the backlog of civil and criminal cases in the district court and unaffected by the Speedy Trial Act and other laws requiring priority for certain criminal and civil cases. At the same time, the approach would allow the efficient integration of the workload and judicial resources of the courts, under the general management of the chief judges of the district and the circuit.

In other respects, H.R. 7294 and the Senate amendments closely resemble H.R. 6978, and the provisions of the 1978 Act upon which it is based. Except for conforming changes reflecting the establishment of bankruptcy divisions of the district courts rather than independent bankruptcy courts, all three bills are essentially identical with respect to jurisdiction, venue, and appeals. Final decisions of the district courts in bankruptcy cases would be taken to the court of appeals for the circuit, except that the judicial council of each circuit would retain the option of appointing bankruptcy appellate panels as an intermediate appellate forum.

Finally, H.R. 7294 and the Senate amendments would create a system of interim bankruptcy courts for the transition period beginning on the date of enactment and ending on September 30, 1983. These provisions are essentially identical to H.R. 6978, except that the effective date of the permanent court system is appropriately moved from April 1 to October 1, 1983, to accommodate the delays and difficulties inherent in nominating and confirming the additional judges. In addition, the retirement provisions for transitional bankruptcy judges not appointed as permanent judges are amended to conform to the provisions for Congressional pensions.

IV.

Before I conclude, I would like to comment briefly on the provisions contained in H.R. 7294 and in the Senate amendments with respect to the United States trustees program.

The current United States trustees program is a pilot program established by the 1978 Act in selected judicial districts and is scheduled to terminate in 1984. The purpose of this program is to facilitate the disposition of bankruptcy cases by relieving the bankruptcy judges of some of the administrative burden and vesting those duties in the United States trustee, who is appointed and supervised by the Attorney General.

The bills would transfer jurisdiction of the program from the Attorney General to the Judicial Branch. The Department of Justice endorses that transfer, since the function of the United States trustees -- to assist in the administration of bankruptcy cases -- seems more appropriately vested in the Judicial than the Executive Branch. The bills would establish an independent Administrative Center of the United States Trustees to exercise this function. We note, however, that 28 U.S.C. § 604(f) presently authorizes the Director of the Administrative Office of the United States Courts to appoint and supervise private trustees in districts where the United States trustee program is not applicable. For this reason, the Subcommittee may wish to consider vesting supervisory functions over the United States trustees in the existing Administrative Office, rather than in a newly-created independent office.

In addition, the bills would expand the United States trustee program to a permanent, nationwide basis, with the appointment of a United States trustee in any district in which the district judges in the bankruptcy division so request, and also would expand somewhat the authority of the United States trustees. We take no position at this time on the advisability of those legislative proposals to broaden the program. We note that an evaluation of the entire program is currently under way, as required by the 1978 Act, but this review will not be completed for another year. We are awaiting the results of this evaluation before taking a position on substantive amendments to the United States trustee program.

V.

There are numerous other provisions of the Senate amendments. Some, the Administration has supported in the past as separate legislation. With respect to others, we have taken no position. To our mind, the essential necessity is for legislation establishing a constitutionally sustainable bankruptcy court system by December 24. If desirable provisions can be added, we do not object. However, a legislative solution to the Northern Pipeline decision must not be blocked by those with extraneous legislative objectives.

That concludes my prepared remarks, Mr. Chairman. I would be pleased to answer the questions you and the members of the Subcommittee may have.

NOV 8 1982

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO	Mike Uhlmann	Take necessary action	☐
√	Dick Hauser 2FI WW. WH	Approval or signature	☐
	Annelise Anderson	Comment	☐
	Mike Horowitz	Prepare reply	☐
	Karen Wilson	Discuss with me	☐
	Adrian Curtis	For your information	☐
		See remarks below	☐
FROM	Greg Jones (GJ)	DATE	11/8/82

REMARKS

Please review the attached Justice statement on bankruptcy and get back to me by 10 AM Tuesday, November 9, 1982.

My concern is that the statement leaves unaddressed certain provisions of HR 7294 ** and the Senate amendments (e.g., the creation of a State Justice Institute and special bankruptcy fee relief) that the Administration has opposed in the past.

I propose to tell Justice that it needs to try and get these provisions out of the legislation.

cc: Jim Murr

**An outline of HR 7294 is attached.

Discussed w/ Mike Uhlmann. Don't share Greg Jones's concern since this testimony is directed at bankruptcy only. Felt that statement on pp 15-16 might be stronger but did not object to Rose's text as written.

11/9/82
RMS

OMB FORM 4
Rev Jul 82

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you to present the views of the Department of Justice on the several legislative proposals to restructure the Nation's bankruptcy court system. As you are well aware, the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982), has determined that the system of Article I bankruptcy courts */ created by the 1978 Bankruptcy Reform Act cannot constitutionally exercise the broad jurisdiction conferred on them by that Act. On October 4, 1982, the Supreme Court agreed to extend its stay of that decision until December 24, 1982. This leaves very little legislative time to adopt a constitutional and workable bankruptcy court system.

I would like to make clear at the outset that I cannot overstate the need for the enactment of remedial legislation before the Supreme Court's stay expires. The plurality and concurring opinions in the Northern Pipeline case have left many

---

*/ Article I courts are legislative courts established by the Congress to be manned by judges without the protection against salary dimunition and without life tenure.

important questions unanswered, and the extent to which the bankruptcy courts and the district courts will be able to adjudicate bankruptcy matters after December 24 is highly unclear. It is, indeed, somewhat uncertain that any court will have jurisdiction over bankruptcy matters after December 24. While we believe it is likely that some bankruptcy jurisdiction would remain in the district courts after December 24, */ it is much less clear that the district courts would retain the broad jurisdiction created by the 1978 Bankruptcy Reform Act over matters "related to" bankruptcy issues.

The Administrative Office of the United States Courts has promulgated a proposed district court local rule to govern the operation of the bankruptcy courts after December 24 if no legislation is adopted. The proposed rule assigns to the bankruptcy courts in each district the district court's jurisdiction over "[a]ll cases under Title 11 and all civil proceedings arising in or related to cases under Title 11." Proposed Rule (b)(1). District courts are authorized to withdraw

---

*/ Various arguments have been presented in favor of the conclusion that bankruptcy jurisdiction will return to the district courts after December 24. See Bankruptcy Court Act of 1982, H.R.Rept. No. 97-807, 97th Cong., 2d Sess. 30-49 (1982) ("House Report"). The clearest case, however, is made by 28 U.S.C. 1334, which provides that "[t]he district courts shall have original jurisdiction *** of all matters and proceedings in bankruptcy." Although § 1334 was amended by Section 238(a) of the 1978 Act, 92 Stat. 2668, to limit district courts to appellate bankruptcy jurisdiction, those amendments do not take effect until April 1, 1984. See § 402(b) of the Act, 92 Stat. 2682.

any reference to a bankruptcy judge, in whole or part, upon the court's own motion or the motion of a party. _Id._, (b)(2). In addition, the district courts must review _de novo_ any proposed judgment of a bankruptcy court in any proceeding "related to" but not "arising under" a case under Title 11 and in any other proceeding where such _de novo_ review is constitutionally required. _Id._, (c)(3), (c)(5)(A)(iii), (c)(5)(B). However, the proposed rule does not define those other cases in which district court _de novo_ review is constitutionally required.

We are uncertain whether the proposed rule would withstand a judicial challenge. The proposed rule is based on the assumption that the Court's decision has left untouched the broad bankruptcy jurisdiction conferred upon the district courts by Section 241(a) of the Act, in 28 U.S.C. 1471(a) and (c). In fact, it is unclear whether the Court's holding may be limited in that fashion. _See_ 102 S. Ct. at 2880 n.40 (plurality opinion); _id._ at 2882 (Rehnquist, J., concurring). Furthermore, there are serious questions whether the proposed rule legitimately may assign to the bankruptcy courts significant portions of the district courts' broad bankruptcy jurisdiction under the Act, since this is precisely what the Court refused to do in holding that the jurisdiction which the bankruptcy courts cannot constitutionally exercise could not be severed from the remainder of the bankruptcy jurisdiction conferred under the 1978 Act.

We have no confidence that the proposed rule will be proven an effective interim remedy to the bankruptcy court crisis, thereby enabling the Congress to take more time to determine how it wishes to resolve this matter. The permissible scope of district court jurisdiction over bankruptcy matters would, of course, be subject to substantial litigation before it could be firmly settled. Even more extensive and difficult litigation would be required to determine which questions could be safely delegated to the bankruptcy courts and which would have to be heard _de novo_ by the district courts.

If district courts recognize the problems with the rule and withdraw the reference of many bankruptcy matters from the bankruptcy courts or attempt to review _de novo_ large numbers of bankruptcy matters, the resulting delays will severely hinder the operation of the bankruptcy system. The district courts are not at present capable of expeditiously handling both their own large workloads and the enormous volume of bankruptcy matters. Over 700,000 bankruptcy estates -- and 100,000 adversary proceedings -- currently are pending. New bankruptcy petitions are being filed at the rate of more than 10,000 per week. */

On the other hand, if the district courts permit the bankruptcy courts to adjudicate a broad range of cases and proceedings pursuant to the local rule, there is a substantial

---

*/ Administrative Office of the United States Courts, _1982 Annual Report of the Director_, 8, 10 (preliminary ed., September 22, 1982).

risk that these cases and proceedings will have to be relitigated if the local rule is found invalid. Under either alternative, the bankruptcy court system will operate under a cloud of uncertainty. In light of such jurisdictional uncertainty, it would be especially difficult to proceed with any large commercial bankruptcies or reorganizations, where debtors, creditors, and purchasers of assets must be able to rely on the validity of the bankruptcy court's orders and cannot proceed subject to the risk of judicial invalidation of their acts.

In short, we do not believe that the bankruptcy court system can operate effectively after December 24 in the absence of remedial legislation. The disruption of this system would ultimately result in losses of millions of dollars and thousands of jobs, as reorganizations of our nation's productive resources are delayed by the legal uncertainties outlined above.

Nor can we rely on the prospect of a further stay from the Supreme Court. The Court's stay has been extended once, to coincide with the adjournment of this Congress, almost six months after the Court's decision. As a practical matter, the deferral of this issue until the next Congress would make final action by Congress unlikely before the late spring, a delay the Court likely will not countenance.

Thus, it is essential that remedial legislation to deal with the Northern Pipeline decision be enacted before the end of the current session.

II.

In view of the strong opposition of the Judicial Conference and others to the establishment of an Article III court of specialized jurisdiction for bankruptcy matters, over the summer since the Northern Pipeline decision, the Department attempted to develop an Article I solution that was both workable and constitutional. Unfortunately, our extensive review has led to the conclusion that we cannot recommend to the Congress any Article I solution that is either workable as a practical matter or sufficiently free of constitutional doubt.

It is very difficult to determine from the opinions filed in Northern Pipeline exactly what aspects of bankruptcy proceedings might or might not be constitutionally adjudicated by a non-Article III tribunal. The rationales advanced by both the plurality opinion and the concurring opinion are, however, sufficiently sweeping that it is extremely doubtful that the proposal to reestablish an Article I bankruptcy court advanced by the Judicial Conference would provide a workable bankruptcy tribunal that would be both effective and capable of withstanding constitutional scrutiny.

The plurality opinion of four justices distinguished between "public rights" which may be adjudicated by an Article I tribunal and "private rights" which may not. That opinion did not delineate what constitute "public rights" but noted generally that they must at a minimum arise "between the government and others." 102 S. Ct. at 2870. By contrast, private rights, which must be adjudicated by Article III courts, are those involving "the liability of one individual to another." 102 S. Ct. at 2870-71. Though it may be possible to argue that some aspects of bankruptcy proceedings involve matters of "public right," the adjudication of creditors' claims against a bankrupt, which forms the heart of many bankruptcy proceedings, would seem to involve primarily the "private rights" of the parties.

The concurring opinion of Justices Rehnquist and O'Connor was expressly limited to the particular type of claim involved in the case (i.e., a bankrupt's common law claim against a third party uninvolved in the bankruptcy proceeding). Nevertheless, the rationale advanced is in some respects no less sweeping than that of the plurality opinion. Justice Rehnquist's opinion suggests that matters arising under state law, as well as "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," must be tried by Article III courts. 102 S. Ct. at 2881. This could entail a vast number of matters in and related to bankruptcy.

The Judicial Conference has argued, similar to the view expressed in Chief Justice Burger's dissenting opinion, 102 S. Ct. at 2882, that the decision in Northern Pipeline should be read to require only that actions at common law arising under state law must be decided by an Article III tribunal. */ It is apparently the view of the Judicial Conference that matters "arising under" bankruptcy law, do not entail issues of state common law and, accordingly, may be constitutionally considered by an Article I tribunal.

The analysis and proposal offered by the Judicial Conference present a number of problems. First, we would not advise Congress to base its legislative solution to this problem on the speculation that the more narrow construction of Northern Pipeline advanced by the Judicial Conference will ultimately prevail in the Supreme Court. Second, even under the construction of Northern Pipeline advanced by the Judicial Conference, there are significant constitutional problems in attempting to adjudicate a large proportion of the matters "arising under" bankruptcy law in an Article I tribunal. Cases arising under bankruptcy law frequently entail consideration of state law or traditional common law issues in many different

---

*/ Report of the Judicial Conference of the United States on Northern Pipeline Construction Co. v. Marathon Pipe Line Co., and Proposals for Remedial Congressional Action, 11 (1982).

contexts. */ To cite an obvious example, proofs of claim offered by a claimant against a bankrupt will generally be predicated on state law (of contract, property, domestic relations, etc.). Thus, it is not at all clear even under the construction of Northern Pipeline offered by the Judicial Conference a workable Article I bankruptcy court is possible.

Finally, the Judicial Conference proposal would reduce the efficiency of the bankruptcy system established in 1978 by bifurcating proceedings between an Article I and an Article III tribunal. One of the most important purposes of the 1978 reforms was the consolidation of bankruptcy proceedings before a single forum with jurisdiction over all relevant matters. This put an end to costly delays and jurisdictional litigation which had plagued bankruptcy adjudication prior to 1978. The bifurcated system proposed by the Judicial Conference would resurrect some of these same problems. Moreover, it would place a burden of uncertain dimensions on the existing district court calendars.

For these reasons, the Department has concluded that only an Article III approach will provide the workable and constitutional solution that is essential to assure the continued integrity of the bankruptcy system. Grave constitutional doubts would surround any further temporizing with an Article I solution

---

*/ In their letter of September 20, 1982 to the Chairman, Professors Countryman, Kennedy and King present a more extensive analysis of this problem.

and would cast a shadow on all bankruptcy cases raising the possibility of a new ruling that such a bankruptcy court structure is unconstitutional. In our judgment, a legislative proposal that simply offers an opportunity for more litigation to test its constitutional validity is no solution at all. The appointment of Article III judges will resolve any constitutional concerns, allow the consolidated disposition of all related bankruptcy matters, and attract the highest caliber of lawyers to the bench.

III.

Once a decision is made in favor of the Article III approach, there are two possible approaches to consider. One approach, reflected in H.R. 6978, as reported by the House Judiciary Committee, is to constitute the bankruptcy courts as Article III courts independent of the existing district courts. The other approach is reflected in H.R. 7294 (introduced by Rep. Butler) and in the unnumbered Senate amendments. It would provide for the appointment of additional Article III judges to sit in a new bankruptcy division of each federal district court. For the reasons I summarize below, the Department of Justice favors the second alternative, the creation of bankruptcy divisions of the district courts.

Although H.R. 6978 would resolve with finality the constitutional infirmities of the 1978 Act, it also presents a number of disadvantages that many commentators and legislators -- including members of this committee -- have sought to avoid. Specifically, H.R. 6978 would create a complex system of Article III courts with specialized subject matter jurisdiction. This would be a dramatic departure from the historic practice of federal trial courts of general jurisdiction. Moreover, the appointment of a fixed number of specialized judges in each district may result in undesirable rigidity and inefficiency as the bankruptcy caseloads in each district change over time. Further, because the jurisdiction of these courts would be limited solely to bankruptcy, the breadth and caliber of candidates available for appointment to these courts would be adversely affected.

In other respects as well, the approach has drawbacks. The creation of separate bankruptcy courts in each district, together with separate clerks and other officers, would inevitably result in duplication and inefficiency. There is considerable merit to the argument against creating a new Article III court system which, in some sense, would compete with the existing district court system.

Upon careful consideration, the Department of Justice favors the bankruptcy division approach reflected in Representative Butler's bill and in the proposed Senate amendments. This approach, we feel, will retain the advantages of an Article III approach while avoiding the disadvantages of an independent bankruptcy court system.

This approach would establish a bankruptcy division of the district court in each district to hear all matters relating to bankruptcy. In recognition that the existing district courts would be unable to manage the large volume of bankruptcy filings, the bills would provide for the appointment of 227 additional district judges who would principally handle bankruptcy matters. These district judges would have the same rights and privileges provided by law for district judges. To the extent that they were not needed to handle bankruptcy matters, the judges could be assigned to hear other cases in the district court or designated to sit on other courts. The bills, however, would allow such designation and assignment of district judges in the bankruptcy divisions only where the disposition of bankruptcy matters will not be delayed.

This approach will promote expertise among judges in the bankruptcy divisions of the district courts, assuring that bankruptcy matters will be handled promptly and expeditiously by Article III district judges familiar with bankruptcy law. The assignment of district judges specifically to the bankruptcy divisions will assure that bankruptcy matters will be kept separate from the backlog of civil and criminal cases in the district court and unaffected by the Speedy Trial Act and other laws requiring priority for certain criminal and civil cases. At the same time, the approach would allow the efficient integration of the workload and judicial resources of the courts, under the general management of the chief judges of the district and the circuit.

In other respects, H.R. 7294 and the Senate amendments closely resemble H.R. 6978, and the provisions of the 1978 Act upon which it is based. Except for conforming changes reflecting the establishment of bankruptcy divisions of the district courts rather than independent bankruptcy courts, all three bills are essentially identical with respect to jurisdiction, venue, and appeals. Final decisions of the district courts in bankruptcy cases would be taken to the court of appeals for the circuit, except that the judicial council of each circuit would retain the option of appointing bankruptcy appellate panels as an intermediate appellate forum.

Finally, H.R. 7294 and the Senate amendments would create a system of interim bankruptcy courts for the transition period beginning on the date of enactment and ending on September 30, 1983. These provisions are essentially identical to H.R. 6978, except that the effective date of the permanent court system is appropriately moved from April 1 to October 1, 1983, to accommodate the delays and difficulties inherent in nominating and confirming the additional judges. In addition, the retirement provisions for transitional bankruptcy judges not appointed as permanent judges are amended to conform to the provisions for Congressional pensions.

IV.

Before I conclude, I would like to comment briefly on the provisions contained in H.R. 7294 and in the Senate amendments with respect to the United States trustees program.

The current United States trustees program is a pilot program established by the 1978 Act in selected judicial districts and is scheduled to terminate in 1984. The purpose of this program is to facilitate the disposition of bankruptcy cases by relieving the bankruptcy judges of some of the administrative burden and vesting those duties in the United States trustee, who is appointed and supervised by the Attorney General.

The bills would transfer jurisdiction of the program from the Attorney General to the Judicial Branch. The Department of Justice endorses that transfer, since the function of the United States trustees -- to assist in the administration of bankruptcy cases -- seems more appropriately vested in the Judicial than the Executive Branch. The bills would establish an independent Administrative Center of the United States Trustees to exercise this function. We note, however, that 28 U.S.C. § 604(f) presently authorizes the Director of the Administrative Office of the United States Courts to appoint and supervise private trustees in districts where the United States trustee program is not applicable. For this reason, the Subcommittee may wish to consider vesting supervisory functions over the United States trustees in the existing Administrative Office, rather than in a newly-created independent office.

In addition, the bills would expand the United States trustee program to a permanent, nationwide basis, with the appointment of a United States trustee in any district in which the district judges in the bankruptcy division so request, and also would expand somewhat the authority of the United States trustees. We take no position at this time on the advisability of those legislative proposals to broaden the program. We note that an evaluation of the entire program is currently under way, as required by the 1978 Act, but this review will not be completed for another year. We are awaiting the results of this evaluation before taking a position on substantive amendments to the United States trustee program.

V.

There are numerous other provisions of the Senate amendments. Some, the Administration has supported in the past as separate legislation. With respect to others, we have taken no position. To our mind, the essential necessity is for legislation establishing a constitutionally sustainable bankruptcy court system by December 24. If desirable provisions can be added, we do not object. However, a legislative solution to the Northern Pipeline decision must not be blocked by those with extraneous legislative objectives.

That concludes my prepared remarks, Mr. Chairman. I would be pleased to answer the questions you and the members of the Subcommittee may have.

OUTLINE OF H.R. 7294 - COURT REFORM AND BANKRUPTCY LEGISLATION

Title I - Court Reform

A. Federal Court Reform (Maurice)

1. Supreme Court Review

2. Jurors and Summons for Jury Service

3. Civil Priorities

Limits Supreme Court review of certain cases; changes jury services provisions; places priority on cases involving habeas corpus and recalcitrant witnesses.

B. Diversity Jurisdiction

Eliminates diversity jurisdiction.

C. Judicial Survivors Annuities

Hilda is looking at this.

D. State Justice Institute

We oppose creation of the Institution.

E. Federal Courts Study Commission

I assume we would oppose this. (Maurice)

F. Intercircuit Tribunal.

Would establish a sort-of intermediate court between Circuit Courts and Supreme Court. (Maurice)

G. United States Trustee Program

Makes this program permanent.

Title II - Judicial Powers

A. Bankruptcy Court Act

Makes Bankruptcy Courts Article III courts. (Greg)

B. Omnibus Judgeships

Creates a number of new district and circuit court judgeships. (Maurice)

Title III - Bankruptcy Improvements (Greg)

A. Consumer Credit

Makes it harder to take straight bankruptcy. We support.

B. Grain elevator bankruptcy.

Special problems of farmers with grain stored in elevators.

We do not object.

C. Leasehold Management

No position.

D. Referees Salary and Expense Fund ***

Special interest provisions that we oppose.

Title IV - Technical Bankruptcy Amendments

We do not object.

***NOTE: Special relief for WT Grant estate and a few others will result in revenue loss in excess of $22 million.