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## Adjudication Under the Bankruptcy Amendments of 1984: An Examination of Congressional Response to the Northern Pipeline Decision

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# ADJUDICATION UNDER THE BANKRUPTCY AMENDMENTS OF 1984: AN EXAMINATION OF CONGRESSIONAL RESPONSE

TO THE NORTHERN PIPELINE DECISION.

John M. Evans \*/

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Second Prize

1984 Law Student Essay Contest

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Are recent criticisms of the 1984 Bankruptcy Amendments unfair to Congress? In the following essay, Mr. Evans examines the issues raised by Northern Pipeline from the viewpoint of the Congressional legal staff.

While article III, § 1, of the United States Constitution states that judicial power of the United States "shall" be vested in the Supreme Court and the inferior courts, 1/ historically Congress has opted not to vest all judicial power in the Federal courts. 2/ Congress has

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\*/ This essay was written while Mr. Evans was a 2nd-year law student at Valparaiso University. The author acknowledges the assistance of Professor Ivan E. Bodensteiner in preparing the final draft for publication.

1/ Article III provides in pertinent part: "The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST., art. III, § 1.

2/ As a matter of practical necessity, Congress, pursuant to its power under the necessary and proper clause, U.S. (Footnote Continued)

delegated judicial fact-finding and decision-making in numerous administrative agencies. 3/ These tribunals have been known as legislative 4/ and administrative courts. 5/

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(Footnote Continued)

Const., art. I, § 8, cl. 18, is empowered to establish courts of special expertise with judges lacking life tenure. See, Palmore v. United States, 411 U.S. 389, 407-08 (1973) (article III requirements "must in proper circumstances give way to accommodate plenary grants of power to Congress"). The notion of practical necessity also supports Congress' power to establish administrative agencies to adjudicate matters properly within the concern of Congress under its article I, § 8 powers. In Crowell v. Benson, 285 U.S. 22, 46 (1932), the Supreme Court declared that Congress may authorize adjudication by agencies of matters "particularly suited to examination and determination by administrative agencies specifically assigned to that task". The Constitution contains explicit, textual authority for the judiciary to appoint non-article III judges as subordinate officers. Article II, § 2, provides that "the Congress may by law vest the appointment of such inferior officers they think proper, in the President alone, in the Court of Law, or in the Heads of Departments." Pacemaker Diagnostic Clinic of America v. Instromedix, 725 F.2d 537, 545 (9th Cir. 1984); also see Go-Bart Importing Co. v. United States, 282 U.S. 344, 352-53 (1931) (commissioners are inferior officers); Rice v. Ames, 180 U.S. 371, 378 (1901) (Congress may authorize judges to appoint commissioners).

3/ General procedures for rulemaking and adjudication are set out in the Administrative Procedures Act (APA), 5 U.S.C. §§ 551-59 (1976). See, e.g., Federal Communication Act, 47 U.S.C. § 303 (1976); Federal Trade Commission Act, 15 U.S.C. §§ 47, 57(a) (1976); Labor Management Relations Act, 29 U.S.C. §§ 156, 160 (1983); Occupational Safety and Health Act, 29 U.S.C. §§ 655, 659 (1983).

4/ The Supreme Court enunciated the doctrine of legislative courts in 1828, holding that a court created by the Congress for the Florida Territory, whose judges did not enjoy life tenure or undiminished protection, could adjudicate an admiralty dispute--a case falling within the purview of article III. That court was held to be legitimately established under Congress' power to make "all needful rules and regulations respecting the territory

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In fact, legal scholars have observed that "as merely carbon copies of the traditional article III courts, a lawyer experienced in litigating cases in Federal courts would not find an administrative or non-article III court strange or unfamiliar". 6/

Until recently, the courts commonly upheld Congressional delegation of adjudication to administrative agencies. 7/ However, in 1982, the Supreme Court in Northern Pipeline Co. v. Marathon Pipeline Co. 8/ invalidated the Congressional delegation of article III judicial power to the bankruptcy courts. The decision created serious

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(Footnote Continued)  
belonging to the United States". American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828). Congress has created legislative courts to decide such particularized federal questions as military discipline, 10 U.S.C. § 867 (1976); and taxation, 26 U.S.C. § 7441 (1984).

5/ Adjudication is accorded a broad definition as an agency process for formulation of an order, or the "final disposition . . . (by) an agency in a matter other than rulemaking". 5 U.S.C. 551(6)-(7) (1976). U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act (1947), gives the following definition:  
" . . . adjudication is concerned with the determination of past and present rights and liabilities. Normally . . . the proceeding is characterized by an accusatory flavor and may result in disciplinary action."

6/ See G. Robinson & E. Gellhorn, The Administrative Process 29-30 (1974).

7/ See K. Davis, American Law Treatise, § 2.12 (Supp. 1970).

8/ 102 S. Ct. 2858 (1982) [hereinafter cited as Northern Pipeline].

problems for Congress, 9/ and Congressional response could have ramifications beyond bankruptcy adjudication. 10/

To fully appreciate the impact of this decision on adjudication under articles I and II of the U.S. Constitution, it must be viewed from the perspective of the Congressional response. It is the thrust of this article to examine the Congressional response 11/ to the problems raised in Northern Pipeline. Accordingly, this article briefly examines federal bankruptcy adjudication and the impact of the Northern Pipeline decision. The second section will analyze the principal provisions of the bankruptcy amendments. It will briefly sketch the various article III and article I legislative proposals which were the subject of Congressional debate. The analysis will show that Congress recognized four separate propositions for bankruptcy adjudication: judges are adjuncts under the close supervision of an article III court; issues not integral to core bankruptcy functions of restructuring debtor-creditor rights must be decided by an article III judge; parties must consent to have State lawsuits decided by a bankruptcy judge; and, parties' right to a full and automatic de novo review by an article III court. The third section briefly analyzes the Constitutional considerations of the statutory scheme and Congressional policy. The impact of this analysis will be an appreciation of not only the logic of current bankruptcy adjudication under article I, but also an understanding of what has been called a

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9/ The Northern Pipeline court held 1978 Bankruptcy Reform Act, P.L. 95-598, § 241(a) unconstitutional; [hereinafter referred to as the Act] and, the Court imposed a limited stay to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication . . ." 102 S. Ct. at 2880.

10/ For a discussion, see M. Redish, Legislative Courts, Administrative Agencies and the "Northern Pipeline" Decision, 1983 Duke L.J. 197-229 (1983).

11/ H.R. 5174, 98th Cong., 2d Sess., 130 Cong. Rec. H7471 (daily ed. June 29, 1984).

"frequently arcane" and "confusing" area of constitutional law--article III courts. 12/

## I. BANKRUPTCY ADJUDICATION

### A. Overview of Statutory Development

The Founding Fathers gave Congress plenary jurisdiction over bankruptcy. 13/ Precipitated by periodic financial crises and depressions, Congressional legislation has historically carried the notion of a fresh start for debtors and protection for creditors. 14/ In 1970,

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12/ Justices Rehnquist and O'Connor in Northern Pipeline concurring note: "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." 102 S. Ct. at 2281.

13/ "The Congress shall have power . . . to establish uniform laws on this subject of Bankruptcy." U.S. Const., art. I, § 8, cl. 4.

14/ The first American bankruptcy legislation on the federal level was enacted in 1800. See Warren, Bankruptcy in the United States History 12-19 (1935). It was modeled after existing English bankruptcy legislation, proceeding only for involuntary petition and applying primarily commercial interests. Bankruptcy Act 1800, Ch. 19, § 36, 2 Stat. 31. The second bankruptcy act was passed in 1841. The impetus was the great Panic of 1837. Warren at 52-79. The new act was a debtors' measure with an attendant right to a discharge for all natural persons seeking relief under it. Bankruptcy Act 1841, Ch. 9, § 1, 5 Stat. 441. After the Civil War in 1867, the third Statute was enacted. Bankruptcy Act 1867, Ch. 176, 14 Stat. 517. The act had many aspects of its predecessors including termination of bankruptcy proceedings by arrangement, assented to by three-fourths in value of the creditors, which placed the liquidation and distribution of assets in the hands of one or more trustees. Id. at § 43. An amendment in 1874

(Footnote Continued)

Congress, unhappy with bankruptcy procedures, established a Commission on Bankruptcy Laws to "study, analyze, evaluate and recommend changes to the Bankruptcy Act". <sup>15/</sup> By 1978, one observer noted that "the years of study make clear that the two major failings of the . . . system were the lack of simplicity in determining jurisdiction of the bankruptcy court and the low status and lack of power of the bankruptcy judges which resulted in disrespect for their position and inability to attract the best caliber judges". <sup>16/</sup> On such recommendations, the Congress passed the Bankruptcy Act of 1978. <sup>17/</sup>

Generally speaking, the principal changes made in the law consisted of revision of title 11 of the United States Code relating to bankruptcy, and a series of amendments to title 28 of that Code relating to organization and jurisdiction of the Federal courts in civil cases. <sup>18/</sup> In

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(Footnote Continued)

increased the number of creditors and the amount of claims required for involuntary petitions and introduced true majority compositions as a means for terminating bankruptcy proceedings. Act of June 22, 1874, Ch. 390, §§ 9, 12, 17, 18 Stat. 178. In 1898, the National Bankruptcy Act was passed. Bankruptcy Act 1898, Ch. 541, 30 Stat. 544. In 1938, it was amended by the Chancellor Act. That Act strengthened the rehabilitation provisions. Act of June 22, 1938, Ch. 575, 52 Stat., § 40. In 1964, in response to criticism that the system was defective because of the admixture of judicial, investigator, and administrative functions assigned to the referees, Congress gave the Supreme Court the power to prescribe general rules of practice and procedures. 28 U.S.C.A. § 2075 (1970). See Stanley, Gerth, et al., Bankruptcy: Problems, Process, Reform (1971).

<sup>15/</sup> Public Law 91-354, 84 Stat. 468 (1976).

<sup>16/</sup> H.R. 5174, 98th Cong., 2d Sess., 130 Cong. Rec. H7490 (daily ed. June 29, 1984).

<sup>17/</sup> Pub. L. No. 95-598, 92 Stat. 2549, codified as 11 U.S.C. § 101-151326 (Supp. 1984).

<sup>18/</sup> Justice Brennan in Northern Pipeline described the pre-1978 Act procedure:

(Footnote Continued)

addition, the Act established a system of bankruptcy courts with comprehensive jurisdiction over all cases governed by title 11 and all civil proceedings arising in or related to cases under title 11. 19/ The Act also strengthened the judicial status of the former referees in bankruptcy. 20/

More specifically, in terms of adjudication, the Act established a bankruptcy court in each of the Federal

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(Footnote Continued)

Before the Act, federal district courts served as bankruptcy courts and employed a "referee" system. Bankruptcy proceedings were generally conducted before referees, except in those instances in which a district court elected to withdraw a case from a referee . . . The referee's final order was appealable to the district court . . . 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 [1978] Act eliminates the referee system . . .

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 or arising in or related to cases under title 11."

102 S. Ct. at 2862 (footnote omitted) (emphasis added by the Court).

19/ Id.

20/ See 124 Cong. Rec., §§ 17404-17432 (1978).



judicial districts as an "adjunct" to the district court. 21/ The bankruptcy court judges were appointed for 14-year terms, subject to removal by the local circuit's judicial council on grounds of incompetence, misconduct, neglect of duty, or disability. 22/ Their salaries, set by statute, were subject to adjustment. 23/ Though the jurisdictional provision vested jurisdiction in the Federal courts, in a later section of the Act it provided that the "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". 24/

B. Analysis of the Northern Pipeline Decision

In Northern Pipeline Co. v. Marathon Pipeline Co., 25/ the appellant Northern Pipeline Construction Co. filed a petition for reorganization under Chapter 11 of the 1978 Bankruptcy Reform Act. 26/ While in proceedings for reorganization, Northern filed suit against the appellee Marathon Pipeline Company seeking damages for an alleged breach of contract and warranty, misrepresentation, coercion, and duress. 27/ The causes of action pleaded and the remedies sought to recover damages were based on State law. 28/ Marathon sought dismissal of the suit on the ground that the Act unconstitutionally conferred article III judicial power upon judges who lacked life tenure and

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21/ 28 U.S.C. § 1471(a) (Supp. 1984).

22/ Id.

23/ Id.

24/ 28 U.S.C. § 1471(c) (Supp. 1984).

25/ See, generally, M. Redish, supra at note 10.

26/ 102 S. Ct. at 2661.

27/ Id.

28/ The Act grants bankruptcy courts jurisdiction over "all civil proceedings 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) (Supp. 1983).

protection against salary diminution. 29/ The Bankruptcy Court denied the motion to dismiss, but on appeal the district court for the District of Minnesota granted the motion. 30/

The Supreme Court affirmed the district court's finding. 31/ The six-vote majority consisted of the plurality opinion written by Justice Brennan and a concurring opinion written by Justice Rehnquist joined in by Justice O'Connor. 32/ Their decision invalidated the assignment by Congress to bankruptcy judges of the broad jurisdictional powers granted under the Act. 33/

The plurality opinion found that the Act unconstitutionally conveyed the essential attributes of article III judicial power to the bankruptcy judge. 34/ To reach this conclusion, the plurality first noted that the judicial power of the United States must be exercised by judges who have "the attribute of life tenure and protection against

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29/ 102 S. Ct. at 2661.

30/ Id.

31/ Id. at 2662.

32/ Id. at 2800.

33/ Id. at 2880; also, the judicial power is defined in § 2 of the article as extending (1) to all cases in law and equity arising under Constitution, laws and treaties of the United States; (2) to cases affecting ambassadors, ministers, and counsuls; (3) to cases in admiralty; (4) to controversies between states or between citizens of different states; and (5) to controversies to which the United States is a party. Justices of the Supreme Court and judges of the lower courts created by Congress under article III are entitled to hold office during good behavior, and they may not have their salaries diminished while in office. Moreover, article III judges are appointed by the President and confirmed by the Senate. U.S. Const., art. II, § 2.

34/ Id. at 2880.

salary diminution specified by article III". 35/ The bankruptcy judges created under the Act were not article III judges. 36/ Secondly, the court held that article III prohibits Congress from establishing under its article I powers legislative courts to exercise jurisdiction over all matters arising under the bankruptcy laws. 37/ The establishment of such courts did not fall within any of the recognized situations: 38/ the non-article III courts of the Territories or District of Columbia; courts established by Congress and the Executive to administer court martials; and, resolution of "public rights" issues in which the principle of independent adjudication commanded by article III does not apply. 39/ Further, § 1471 removed the

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35/ Id. at 2865; also note supra at footnote 1.

36/ Brennan notes that Congress did not constitute the bankruptcy court as a legislative court even though "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 bankruptcy courts should be established as independent legislative courts." Id. at 2867 n. 13.

37/ Id. at 2874.

38/ Id.

39/ Three narrow situations are subject to command that the judicial power must be vested in article III courts.

(a) Territorial Courts, see for discussion Murray's Lessee v. Hoboken Land and Improvement Co., 18 Harv. 272 (1855) (Congress may or may not bring within the cognizance of art. III certain matters as it deems proper); American Ins. Co. v. Canter, 1 Pet. 511 (1828), (court acknowledged Congress' authority to create courts for the territories). Kendall v. United States, 12 Pet. 524 (1838), (Congress has entire control over District of Columbia).

(b) Authority of Congress and Executive to establish and administer court martials, see generally, Northern Pipeline at 2868-2869.

(Footnote Continued)

essential attributes of judicial power for an article III district court and vested those attributes in a non-article III adjunct. 40/ Congress does not have the power to create adjuncts to adjudicate constitutionally recognized rights and state-created rights as it does to adjudicate rights that it creates. 41/

The concurrence emphasized that its holding was restricted to the unconstitutionality of the jurisdictional

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(Footnote Continued)

(c) Congress has power to establish legislative courts and administrative agencies to adjudicate cases involving public rights, see supra at note 2. Also, see discussion note, The Supreme Court, 1961 Term, 76 Harvard L. Rev. 160-164 (1962); and, note, Constitutional Law: Federal Courts: Separation of Powers Doctrine: Court Congestion: Glidden Co. v. Zdanak and Lark v. United States, 49 Cornell L. Quarterly, 138-144 (1964).

40/ Northern Pipeline at 2874. Bankruptcy Courts exercise far greater power than those adjuncts approved in either Crowell v. Benson, supra, and United States v. Raddatz, 447 U.S. 667 (1980). Id. at 2879. In Crowell and Raddatz, the Court approved the use of administrative officers and magistrates as adjuncts to article III courts. Crowell involved adjudication of Congressionally created rights. The Court approved fact finding by an administrative agency; approved the limited power to issue orders pursuant to specialized procedures as long as enforcement could be carried out only by an article III court; and agency orders could be set aside if not supported by evidence. See Crowell, 38-45.

41/ Northern Pipeline at 2875-2876. Also see United States v. Raddatz, supra, in which the Court upheld the 1978 Federal Magistrates Act, which sustained the use of adjunct fact-finders even in the adjudication of Constitutional rights as long as the adjuncts were subject to the direct control of an article III court. The Court held that the magistrates' proposed findings 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 667-677. See generally, note, United States v. Raddatz: Judicial Economy at the Expense of Constitutional Guarantees, 47 Brooklyn L. Rev. 559-596 (1981).

grant to the bankruptcy judge of the power to adjudicate claims or causes of action based upon State law. 42/ The concurrence saw no need to decide the constitutionality of the jurisdictional grant of other article III judicial powers. 43/ There was agreement between the plurality and the concurrence that causes of action based upon State law were a judicial power and could not be exercised by an article III court. 44/ Further, the majority also concurred

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42/ Northern Pipeline at 2881-2882.

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 2880 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.

43/ Id. at 2881.

44/ Id., also see discussion:

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 Northern Pipeline. 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, pp. 43-48; S.  
(Footnote Continued)

in the holding that the district court must be more than an appellate or reviewing court when it adjudicates state-based claims. 45/ The broad jurisdiction grant to the bankruptcy courts reduced the rule of article III courts to one of the appellate review. 46/ Thus, both opinions agreed that the bankruptcy judges could not be perceived as adjuncts to the article III courts to whom jurisdiction was granted by the Act.

## II. AN ANALYSIS OF BANKRUPTCY ADJUDICATION: CONGRESSIONAL CONSIDERATIONS OF ARTICLE III AND ARTICLE I COURTS

The drafters of the Constitution considered the creation of uniform bankruptcy law so important that they

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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.

Id. at 2880, n. 40.

45/ Id. at 2881.

46/ Justice Rehnquist states:

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, 52 S. Ct. 285, 76 L. Ed. 598 (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.

Id. at 2882.

included it in a special section of article I. 47/ This was one of the great reforms of the Constitution as the Founding Fathers wanted to get away from the concept of debtors prison with the establishment of the so-called fresh start. 48/ Thus, Congress under this constitutional scheme is given very broad plenary powers to establish national bankruptcy legislation.

Although Congress has plenary jurisdiction over bankruptcy, the plurality in the Northern Pipeline decision almost exclusively couched their opinion in terms of article I versus article III. 49/ It is not surprising then to find Congress responding with a number of highly debated legislative measures also couched in terms of article I versus article III. 50/ Congress has found that constitutionally bankruptcy adjudication rests on four separate propositions: 51/ (1) the bankruptcy judge as an adjunct under the supervision of the article III district court; (2) non-core bankruptcy function of restructuring debtor-creditor rights need be decided by an article III judge;

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47/ Article I, § 8, cl. 4 of the U.S. Constitution states: "The Congress shall have power . . . to establish uniform laws on the subject of Bankruptcy." Article III vests judicial power in one Supreme Court "and in such inferior courts as the Congress may from time to time ordain and establish". With respect to judges, Article III also requires that tenure during good behavior be granted and that a judge's salary not be reduced while in office. These requirements are institutional protections to insure the independence and impartiality of the federal judiciary, supra, note 1.

48/ See generally S. Riesenfeld, The Evolution of Modern Bankruptcy Law, 31 Minn. L. Rev. 401 (1947).

49/ Brennan states: "The question is whether the assignment . . . by Congress to bankruptcy judges of the jurisdiction granted . . . [in] the Bankruptcy Act of 1978 . . . violates Art. III of the Constitution." Northern Pipeline, supra, 2862.

50/ Congressional Research Service, Major Legislation of the Congress, MLC-008, 5 (1984).

51/ 130 Cong. Rec. E1107-9 (daily ed. March 20, 1984).

(3) parties' consent to a bankruptcy judge's jurisdiction over their case by specifically waiving their statutory right to trial by an article III judge in the first instance; and, (4) the parties' right to a full and automatic appeal to an article III court.

A. Article III Approach

H.R. 3 provides an example of an article III approach. 52/ Strongly supported by the leadership of the House Judiciary Committee, the bill proposed to establish a new bankruptcy court structured by establishing a court of record known as the U.S. Bankruptcy Court. 53/ The legislation provided for appointment of the bankruptcy judge under article III of the Constitution. 54/ The legislation sought guarantees of tenure and freedom from salary diminution. 55/ The proposal granted the bankruptcy court original and exclusive jurisdiction of all cases arising under title 11 of the Bankruptcy Code and conferred original, but not exclusive jurisdiction over all civil proceedings arising either under title 11 or related to cases under title 11. 56/

The opponents of this measure argued that this approach had many disadvantages. 57/ First, it would require an enormous increase in the number of life-tenured

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52/ The core of the controversy surrounding the attempt to reform the bankruptcy system is the division between the House and Senate over what approach to take to resolve the jurisdictional problems raised by Northern Pipeline. H.R. 3 favors an article III approach in contrast to the article I approach of S. 1013. This distinction is crucial, because it determines the authority and status of the judges who will decide the cases. Congressional Research Service, supra, note 50.

53/ 130 Cong. Rec., supra, note 51.

54/ Id.

55/ Id.

56/ Id.

57/ Id. at E1108.



judges. 58/ The number of article III judges would increase by thirty-five percent. 59/ "Moreover, this increase would be irrevocable. Article III judges can be removed only by impeachment." 60/ Second, the bill would involve a difficult transition period. 61/ For more than two years, lame duck non-tenured bankruptcy judges would exercise the same powers the Supreme Court held unconstitutional in Northern Pipeline. 62/ Third, opponents would hold that article III bankruptcy courts are unnecessary. 63/ Suggesting that they are not required by the Northern Pipeline decision, one commentator concluded:

The otherwise able lawyers who favor article III bankruptcy courts contend that they cannot understand the Northern Pipeline decision and that only an article III court is free from constitutional doubts. That is simply not so.

Northern Pipeline held only that judges who were neither appointed under article II nor subject to control by an article III court could decide suits that were not integral to a bankruptcy case. Northern Pipeline expressly approved prior Supreme Court cases that allow non-article III judges to perform other tasks. 64/

Further, the creation of an article III Bankruptcy court would give bankruptcy cases more preferential treatment or would involve strong pressure to allow article III bankruptcy judges to decide other types of cases. 65/ This

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58/ Id.

59/ Id.

60/ Id.

61/ Id.

62/ Id.

63/ Id.

64/ Id.

65/ Id.

view is bolstered by the argument that "bankruptcy cases should not be heard by the district courts because they would have to wait in line with other cases." 66/ Bankruptcy cases are not more important than criminal, civil rights, antitrust, and other Federal cases. 67/ Finally, it is suggested that bankruptcy cases must be handled quickly, and this can be done more efficiently by non-article III courts. 68/

A related criticism holds that if bankruptcy filings decline, there would be strong pressure to allow article III bankruptcy judges to decide other types of cases. 69/ "The danger in this" reports one critic, "is that the bankruptcy judges may not be qualified to decide these cases. 70/ These judges were chosen without regard for their fitness to hear criminal, civil rights, and other cases that require broader social and legal experiences." 71/ Further, it is suggested that raising the bankruptcy courts to article III status does not automatically increase the quality of the applicants. 72/ Presidential appointment decreases the pool of qualified applicants because only

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66/ Id.

67/ Id.

68/ Id.

69/ Id.

70/ Id.

71/ Id.

72/ Id.

those applicants in the President's party are likely to be chosen. 73/ Further it is noted: 74/

Presidential appointment works well for district and circuit judges, because many qualified lawyers are willing to serve, the range and importance of issues to be handled makes it appropriate to consider a potential judge's political philosophy, and the large impact and high visibility that an individual judge can have induces the President to choose a well-qualified candidate. The same conditions do not exist with respect to bankruptcy judgeships. There is not a huge pool of obviously qualified candidates, and the President does not have as strong an incentive to choose the best qualified of those candidates.

Most critics suggest that a non-article III approach would be likely to produce the most qualified candidates. 75/ Bankruptcy judges chosen by the Court of Appeals, for example, would likely come from a pool of the "best-qualified candidates regardless of political affiliation". 76/

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73/ Id. at E1109.

74/ Id.; But see Justice White observes:

. . . 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); cited in Northern Pipeline, supra at 2895.

75/ Id. at E1109.

76/ Id.

B. The Article I Approach

1. Advocates for Mandatory Abstention.

The Senate passed an article I scheme for bankruptcy judges in S. 1013. 77/ The basic provisions of the Senate measure allowed the use of bankruptcy judges as magistrates to handle bankruptcy cases or proceedings withdrawn by the district courts. 78/ The Senate bill required a bankruptcy forum to abstain when a State law claim had been filed in a State court of competent jurisdiction. 79/ The provision, known as mandatory abstention, was a central fixture of the Senate approach. 80/

Advocates of the Senate approach for mandatory abstention would argue that permitting Federal court adjudication of State law claims that could not otherwise be brought in Federal court gives the district courts and bankruptcy judges powers beyond the scope of article III. 81/ The concern is that a "purely State law case could be litigated in Federal court without the Federal question jurisdiction necessary under the Constitution for Federal court adjudication". 82/

Further, it is advocated that the Northern Pipeline decision is limited only to the question that bankruptcy judges cannot adjudicate claims or causes of action based

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77/ Congressional Research Service, supra.

78/ 130 Cong. Rec. S8887-8888 (daily ed. June 29, 1984).

79/ Id.

80/ Id. at 8887-8898.

81/ Id. at 8890.

82/ Id. Article III, § 2 specifies the type of cases that may be litigated in the Federal courts. Other than the cases involving a State as a party, these types of cases are basically two--cases "arising under Federal law and cases between the citizens of different states". U.S. CONST.

upon State law. 83/ Northern Pipeline did not decide that article III courts could constitutionally decide "all" claims or actions based on State law. 84/ Permitting district courts to exercise jurisdiction over related-to claims only partially solves the problem created by Northern Pipeline. Conferring jurisdiction on district courts without some independent basis creates an even greater constitutional problem. 85/

Moreover, the failure to adopt mandatory abstention restores the rule of Swift v. Tyson. 86/ Proponents of the Senate measure support this conclusion by noting that "this danger is not that Federal courts will ignore State law, but that they will be interpreting State law in the absence of constitutional jurisdiction". 87/ It is argued

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83/ Id. See Chief Justice Burger, dissenting:

. . . 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 commonlaw 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.

84/ 130 Cong. Rec., supra, S8896.

85/ Id., S8893.

86/ Id.; see Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

87/ 130 Cong. Rec., supra, S8893.

that Erie v. Tompkins "stands for the proposition that Federal courts should not be reaching their own interpretation of State law without an article III basis". 88/ One commentator points out: 89/

In the absence of the bankruptcy of one party, no one questions that a State tort or contract claim would be adjudicated to completion in State court without any feasible assertion of Federal question jurisdiction. Financial status, however, is not mentioned as a qualification for Federal question jurisdiction in article III. Thus, the provisions allowing any case "related to" bankruptcy to be adjudicated in Federal court violates article III. Purely State law claims cannot be adjudicated in a Federal court.

There is a sense that depriving certain parties the protections of State law merely because "they happen to be doing business with or be injured by a party who later went bankrupt" imposes a jurisdictional deprivation. 90/ The State law claimant may not litigate in the forum in which the injury or infraction arose, but rather might be forced to litigate great distances for the situs of the harm. 91/ Thus, the lack of mandatory abstention is perceived as a bypassing of the Constitution preservation of State court jurisdiction over purely State law issues.

Finally, the Bankruptcy Reform Act of 1979 was styled as a bill to promote more efficiency by consolidating all State law authority in the Federal courts. 92/ Proponents of mandatory abstention contend that the Federal government is not promoting uniformity. It is noted:

Federal government is not always the most efficient system. It does not always promote

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88/ Id.; see Erie Railroad v. Tompkins, 304 U.S. 64 (1938).

89/ 130 Cong. Rec., supra, S8893.

90/ Id.

91/ Id.

92/ Id. at S8897.

uniformity. What it has done, however, over the past two centuries is help protect our liberties by separating and dispersing governmental authority, including judicial authority. The issue is which level of government ought to interpret State law--the Federal courts or the State courts. The Constitution resolved that question in article III and this bill is infirm to the degree it departs therefrom. 93/

2. Conference Report: Bankruptcy Amendments of 1984. 94/

Despite the concerns for mandatory abstention, the legislation ultimately adopted was H.R. 5174. 95/ Patterned after the interim rules promulgated by the Judicial Conference after the Northern Pipeline decision, the original House version somewhat paralleled S. 1013 in its article I approach. 96/ As the product of the Conference Report, H.R. 5174 contained an article I structure basically the same as it had passed the House; provision for authorizing the appointment of 85 district and circuit court judges; and, substantive changes in the Bankruptcy Code in the so-called consumer credit amendments. 97/ The following briefly analyzes the amendments relating to the article I structure.

a. Section 101(a): This section provides for Federal district courts to have original jurisdiction 98/

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93/ Id. at S8893.

94/ H.R. 5174, supra, note 16.

95/ 130 Cong. Rec. E1107, (daily ed. March 20, 1984).

96/ Id.

97/ H.R. 5174, supra, note 16.

98/ TITLE I--BANKRUPTCY JURISDICTION AND PROCEDURE.  
Sec. 101. (a) Section 1334 of of title 28, United States Code, is amended to read as follows:

§ 1334. Bankruptcy cases and proceedings  
(Footnote Continued)

over all civil proceedings "arising under," "arising in," or "related to" cases under title 11. This section of the bill amends §§ 1334 (a), (b), and (c) (2). 99/ These subsections

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(Footnote Continued)

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

H.R. 5174, Conference Report, supra, note 16.

99/ § 1334. Bankruptcy cases and proceedings.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(Footnote Continued)



vest jurisdiction for adjudication of all actions based upon State law in article III courts. 100/ Before Northern Pipeline, bankruptcy courts exercised jurisdiction over these pure state-created actions by viewing them as "related to cause under Title 11." 101/ The Supreme Court had held that these functions were judicial, and under the Constitution judicial power could only be exercised by article III courts. 102/

b. Section 104(a): Title 28 is amended adding Chapter 6, which includes §§ 151 through 158. 103/ Section 151 provides for a bankruptcy court in each unit of the district court. 104/ Section 152 establishes the procedures for appointment of bankruptcy judges by the circuit Court of Appeals for each circuit after considering the

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(Footnote Continued)

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

100/ 130 Cong. Rec., S. 8896.

101/ Id.

102/ Id.

103/ H.R. 5174, Conference Report, supra, note 16.

104/ § 151. Designation of bankruptcy courts. In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

Id.

recommendations of the Judicial Conference. 105/ Each bankruptcy judge is to serve a term of fourteen years. A bankruptcy judge may be removed only for incompetence, misconduct, neglect of duty, or physical or mental disability by the judicial council of the circuit in which the judge's duty station is located. 106/ Section 153 provides for a salary at an annual rate determined by the Federal Salary Act. 107/ Section 154 allows a division of

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105/ § 152. Appointment of bankruptcy judges.

(a)(1) The United States court of appeals for the circuit shall appoint bankruptcy judges for the judicial districts established in paragraph (2) in such numbers as are established in such paragraph. Such appointments shall be made after considering the recommendations of the Judicial Conference submitted pursuant to subsection (b). Each bankruptcy judge shall be appointed for a term of fourteen years, subject to the provisions of subsection (e). Bankruptcy judges shall serve as judicial officers of the United States district court established under Article III of the Constitution.

Id.

106/ (e) A bankruptcy judge may be removed during the term for which such bankruptcy judge is appointed, only for incompetence, misconduct, neglect of duty, or physical or mental disability and only by the judicial council of the circuit in which the judge's official duty station is located. Removal may not occur unless a majority of all of the judges of such council concur in the order of removal. Before any order of removal may be entered, a full specification of charges shall be furnished to such bankruptcy judge who shall be accorded an opportunity to be heard on such charges.

Id.

107/ § 153. Salaries; character of service.

(a) Each bankruptcy judge shall serve on a full-time basis and shall receive as full compensation for his services a salary at an annual rate determined  
(Footnote Continued)

business and an appointment of a chief judge in each district court having more than one bankruptcy judge. 108/ Section 155 permits a bankruptcy judge to be transferred to serve temporarily as a bankruptcy judge in any judicial district. 109/ Section 156 established a staff to support the bankruptcy court. Section 157 (a) through (d) establishes the procedures under which the bankruptcy court may operate. 110/ Subsection 157(a) provides for referral

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(Footnote Continued)

under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361) as adjusted by section 461 of this title, to be paid at such times as the Judicial Conference of the United States determines.

Id.

108/ See § 154. Division of business; Chief judge., Id.

109/ H.R. 5174, supra, H. 7473.

110/ § 157. Procedures.

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to--

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interest for the purposes of confirming a plan under chapter 11 or 13 of title 11

(Footnote Continued)

of "all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case

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(Footnote Continued)

but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity-security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under

(Footnote Continued)

under title 11." 111/ Subsections (b)(1) through (5) empower bankruptcy judges to hear and determine all core

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(Footnote Continued)

section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

H.R. 5174, Conference Report, supra, at H. 7473.

111/ Id.

proceedings, subject to traditional appellate review. 112/ One Congressional commentator notes that "this jurisdiction in core bankruptcy proceedings is broader than the summary jurisdiction of the bankruptcy courts under pre-1978 law". 113/ This subsection also attempts to insure that the liquidation or estimation of contingent personal injury tort

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112/ Id. § 157. Procedures.

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c) (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this sub-section, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

113/ H.R. 5174, Conference Report, supra, at H. 7473.

claims not be considered "core proceedings," removing them to the district court. The bankruptcy judge may conduct a hearing and enter a proposed judgment in State law cases, but the district court enters the final judgment after reviewing the transcript. 114/ The parties may consent to have a bankruptcy judge enter a judgment, without waiving the right to appellate review. 115/ Finally, subsection (d) provides for recall to the district of all proceedings involving claims that do not arise under title 11, are not proceedings arising under title 11, or are proceedings arising in a case under title 11. 116/

Section 158 establishes the appeals procedure. It provides for the "district courts of the United States" to have "jurisdiction to hear appeals from final judgments, orders, and decrees . . ." 117/ The judicial council may establish a bankruptcy appellate panel, but no appeal may be referred to the panel unless the district judges for the

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114/ Id.

115/ Id.

116/ Id.

117/ § 158. Appeals.

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b) (1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

H.R. 5174, Conference Report, supra, at H. 7474.

district, by majority vote, authorize such referral. 118/ The procedures attempt to correct the holding in the North-ern Pipeline decision that the bankruptcy judge's power, as granted under the Code, impermissibly reduced the Code's broad jurisdictional grant to the article III courts to one of appellate review. 119/ The court noted that "acting in this manner the Bankruptcy Court is not an 'adjunct' of either the District or the Court of Appeals". 120/

c. Section 121: This section amends § 122 of the Act. It provides that the bill should become effective on the date it is enacted. The provision means that the amendments do not apply to title 11 proceedings pending in district court. At the time the legislation was passed, bankruptcy claims were being adjudicated by bankruptcy judges with district courts serving the review function as provided by the Emergency Rules. Applying the amendments in such a way extends the life of the Emergency Rules for those adjudications under title 11 that are pending prior to the effective date of the Act.

### III. CONSTITUTIONAL CONSIDERATIONS OF THE STATUTORY SCHEME AND CONGRESSIONAL POLICY

Congress styled the jurisdictional provisions of the Bankruptcy Act to conform exactly to those previously upheld by the Supreme Court. 121/ To accomplish this

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118/ Id.

119/ Id.

120/ Id.

121/ 130 Cong. Rec. E1108 (daily ed. March 20, 1984); note also Interview with Sally Rogers, Staff Counsel for Senator Thurmond, Senate Judiciary Committee (July 17, 1984):

. . . if Brennan's position had gotten another vote and were indeed the majority opinion of the Court, that opinion would probably have dictated . . . you fit in one of these pigeonholes . . . territorial court or public right or whatever, you have to be an Article III judge, and it would be very unclear how much of the bankruptcy jurisdiction would fall into those

(Footnote Continued)



scheme, proponents of the amendment reduced the Northern Pipeline decision to two principles and styled the Amendments after the Federal Magistrates Act of 1984. 122/ In doing so, Congress intended to accomplish two things: first, develop a statutory scheme that offered constitutional certainty; 123/ and, second, develop a fair and flexible bankruptcy adjudication system for the courts and the litigants. 124/ The basic provisions of the Bankruptcy Amendments, therefore, can best be illuminated by a brief analysis of these constitutional considerations. Further, a short discussion of Congressional policy will be useful in understanding rationale behind the statutory scheme.

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(Footnote Continued)  
pigeonholes.

. . . the true scope of the Northern Pipeline opinion is to be found in reading Rehnquist's and O'Connor's concurring opinion, which gave them the majority result . . . Rehnquist basically says, "I don't know what article III and non-article III can do or not do, I just know they cannot do what they tried to do here. You have to be an article III judge to hear this type of case."

122/ Commentary of H.R. 5174, Congressman Kastenmeier notes: My amendment is entirely consistent with the Supreme Court's opinion in Northern Pipeline. Northern Pipeline held that: First, bankruptcy judges were not true adjuncts of the district courts because the district courts had no control over them; and second, a separate non-article III court could not properly decide State law claims that were not integral to the core bankruptcy function of restructuring debtor-creditor rights.

Id. at E1109.

123/ Id. at E1107-1108.

124/ Id. at E1107-1109.

A. Constitutional Considerations

1. Bankruptcy judges as adjuncts of district court.

As a general rule, the bankruptcy judge must be a subordinate part of the article III court and not a distinct entity. 125/ Under the amendments, the bankruptcy judges perform judicial duties which would otherwise be performed by an article III district judge. 126/ The legislation "vests bankruptcy jurisdiction in the district court with the adjunct article I bankruptcy court to exercise jurisdiction". 127/ The district court directly controls the range of duties and responsibilities of the adjuncts whom they appoint as well as the procedure they follow. 128/ In this manner, the bankruptcy court does not operate as a separate, specialized tribunal; rather, Congress has determined that the jurisdiction exercised by the court is that of the district court itself.

Proponents draw an analogy between the bankruptcy courts and legislative and administrative courts. 129/ The

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125/ Northern Pipeline, supra, at 2874.

126/ H.R. 5174, Conference Report, supra, § 101(a) amending § 1334.

127/ Id.

128/ Id. at § 104(a) amending § 157, Procedures.

129/ Congressman Kastenmeier, principal sponsor of H.R. 5174, notes: "The powers that bankruptcy judges would perform . . . conform exactly to those previously upheld by the Supreme Court. Their powers in Northern Pipeline-type suits are identical to the Magistrates which the Supreme Court upheld in United States v. Raddatz, 447 U.S. 667 (1980)." 130 Cong. Rec. E1108; note also, ". . . the new bankruptcy courts are very similar, in fact, almost parallel to the magistrates courts. One of the victories for the bankruptcy judges is that the legislation called these officials judges, as opposed to magistrates, or referees. There was some sentiment that they not be called judges." Interview with Peter Velde, Staff Counsel, Senate Sub-committee on the Courts (July 17, 1984).

Supreme Court has frequently upheld the judicial power of legislative courts and has never found that such power has been improperly committed to administrative agencies in the first instance. 130/ Underscoring this view are the Congressional proceedings of the Conference Report: 131/

The powers that bankruptcy judges would perform under my amendment conform exactly to those previously upheld by the Supreme Court. Their powers in Northern Pipeline-type suits are identical to the powers of magistrates which the Supreme Court upheld in United States v. Raddatz, 447 U.S. 667 (1980), and approved in Northern Pipeline.

Congress has delegated the fact-finding and decision-making function to both types of tribunals in many areas of law, 132/ including some historically subject to commonlaw adjudication. 133/ The decision of these two bodies are often final and unenforceable, subject only to subsequent appeal in an article III court.

It is not surprising to find a teaching of the Magistrate experience cited by the Northern Pipeline decision in that there must be more than simple appellate review. 134/ Acknowledging this fact, Congress designed in the Bankruptcy Amendments 135/ and Federal Magistrates

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130/ Davis, supra, at note 7.

131/ 130 Cong. Rec. at E1108. The sponsors note the bankruptcy judges' powers are like those of an administrative agency, upheld in Crowell, supra, at note 2, and also approved in Northern Pipeline, supra. Id.

132/ Supra at note 3.

133/ See K. Davis, Administrative Law Text 524-44 (3rd ed. 1979).

134/ Northern Pipeline, supra, at 2879, n. 39.

135/ H.R. 5174, supra; see note 11.

Acts 136/ "de novo determination" 137/ with respect to the adjuncts' findings by the district court. An appeal to an article court lies in every instance for a decision of an adjunct. 138/ This vital safeguard protects the bankruptcy judge's decisions from jurisdictional attack, even assuming the position of some of the critics that the bankruptcy judges could not constitutionally exercise any adjudicator power as a "de facto" independent entity from the article III courts. 139/

2. Traditional bankruptcy claims can be adjudicated by non-article III judges.

The thrust of the Northern Pipeline holding is that peripheral, non-traditional issues such as claims by the bankrupt against non-creditors cannot be adjudicated by a non-article III judge. 140/ The bankruptcy amendments

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136/ 28 U.S.C.A. § 636(c).

137/ Hearing de novo. Generally, a new hearing or a hearing for a second time, contemplating an entire trial in same manner in which matter was originally heard and a review of previous hearing. On hearing "de novo" court hears matter as court of original and not appellate jurisdiction. Black Law Dictionary 649 (5th ed. 1979). See Collier & Wallis v. Astor, 9 Cal. 2d 202, 70 P.2d 171, 173.

138/ H.R. 5174, supra; see note 117. Also United States v. Raddatz, 447 U.S. at 683 and n. 11.

139/ 130 Cong. Rec. at E1108 (daily ed. March 20, 1984).

140/ The powers the bankruptcy judge may exercise depend upon whether the proceeding arises under State law or Federal bankruptcy law. The Supreme Court states in Northern Pipeline:

[W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumption, 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 that specialized adjudicative task related  
(Footnote Continued)

respond to this holding in several ways. 141/ First, the amendment authorizes bankruptcy judges to decide only core proceedings, subject to appellate review. 142/ Core proceedings include all those in which the right to relief is created by Federal law, "whether or not the proceeding concerns property in the possession or constructive possession of the trustee". 143/ Second, the legislation institutes several protective features for the adjudication of all bankruptcy cases "related" and traditional. 144/ District courts have specific authority to revoke the referral of any case to the bankruptcy court upon the district court's own motion or upon the request of the party for any reason. 145/ Finally, district courts may hold a hearing and receive evidence in cases first adjudicated by the bankruptcy court. The district court need give no difference to the bankruptcy judge's factual finding or interpretations of law. 146/ The district court may modify, in whole or in part, any order or judgment issued by the bankruptcy judge. 147/

### 3. Impact of Consent of the Parties.

Whether Congress can authorize bankruptcy judges to exercise jurisdiction over article III cases and controversies is not a constitutional issue because of consent of

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(Footnote Continued)

to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created. 458 U.S. at 83.

Kastenmeier, Id. at E1109.

141/ Id.

142/ Id.; also see note 117.

143/ Id.; 130 Cong. Rec. H7493 (daily ed. June 29, 1984).

144/ Id.; also see note 99.

145/ Id.; also see note 112.

146/ Id.; also see note 112.

147/ Id.; see also note 112.

the parties. 148/ The Bankruptcy Amendments limit the civil trial jurisdiction of the bankruptcy judges "to those proceedings related to a case under title 11 . . ." and, to "hear and determine and enter appropriate orders and judgments, subject to review . . ." 149/ In short, the litigants retain an absolute right to have their civil case tried by an article III judge. 150/ They must affirmatively and mutually relinquish that right in order for the bankruptcy court to try the litigation.

In Northern Pipeline, the Supreme Court did not consider the constitutional implications of consent by the parties to go before a non-article judge, because the parties did not consent to such a procedure. 151/ However, the court did indicate that consent is important to the constitutional analysis. Brennan in his plurality opinion notes that "[b]efore 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". 152/ Rehnquist in his concurring opinion comments: "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." 153/ Burger in his dissenting opinion offers this observation: ". . . a 'traditional' State commonlaw 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' . . ."

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148/ 130 Cong. Rec. at E1110 (daily ed. March 20, 1984).

149/ Id.; see also note 112.

150/ Northern Pipeline, supra, at 2881 (Rehnquist, J. concurring). See also Glidden Co. v. Zdanak, 370 U.S. 530, 536 (1962); Palmore v. United States, 411 U.S. 389, 411 (1973).

151/ Northern Pipeline, supra, at 2876, n. 31, see, e.g., United States v. Raddatz, supra.

152/ Northern Pipeline at 2876, n. 31.

153/ Id. at 2882.

(emphasis added). 154/ It is well settled that once a case lies within the subject matter jurisdiction of a Federal court, the parties may, with approval of the court waive personal rights or consent to variation in the method of litigation including referral of the case to a non-article III bankruptcy judge. 155/

Permitting parties to consent to have State lawsuits decided by a bankruptcy judge is based on the magistrates model. 156/ Summarizing this analogy, one proponent noted that "the U.S. magistrates system is partly based upon consent . . ." and "since 1979 four circuit courts of appeal have considered the constitutionality of consent jurisdiction for magistrates and each of them has upheld it." 157/ The conclusions of the Congressional comments is that the bill's consensual reference provision is constitutional.

In Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 158/ the Ninth Circuit recently upheld consensual reference of an entire case to a non-article III adjunct. Reversing a panel decision, the court agreed with the conclusion of the Third Circuit in Wharton-Thomas v. United States, that consent of the parties under the Magistrates Act cures any constitutional defect. 159/ At issue was the consent provisions of the Magistrates Act which authorizes the non-article III adjuncts, when specially designated by the district court, to exercise jurisdiction

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154/ Id.

155/ See, e.g., Pacemaker Diagnostic Clinic of America v. Instromedix, Inc., 725 F.2d 537 (9th Cir. 1984); Wharton-Thomas v. United States, 721 F.2d 992 (3d Cir. 1983); Goldstein v. Kelleher, 728 F.2d 32 (1st Cir. 1984); Collins v. Forman, 729 F.2d 108 (2d Cir. 1984).

156/ 130 Cong. Rec., E1109 (daily ed. March 20, 1984).

157/ Id., see note 155.

158/ Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, 725 F.2d at 547 [hereinafter cited as Pacemaker].

159/ Id. at 540.

over civil cases, provided the parties consent to the reference. 160/ The challenge to the statute was based on the implicit command of article III that judicial power of the United States is confined to judges holding commissions under and cloaked with the protections of that article. 161/ In rejecting this contention, the court noted that the Act invests in the article III judiciary exclusive control, the power to cancel a reference, and the power to designate magistrate position and to select and remove individual magistrates. 162/ The court concluded that this is sufficient protection for the judiciary from encroachment of other branches of government to satisfy the separation of powers embodied in article III. 163/

#### B. Policy Considerations

The Bankruptcy Amendments of 1984 are styled as a measure to improve the fairness and efficiency of bankruptcy adjudication. 164/ The principal rationale of H.R. 5174 was to "assist the district courts in cases, much like the magistrates now help the district court handle criminal and civil cases". 165/ It was estimated that the bankruptcy judges would be able to enter final judgments in 95 percent of the cases that do not require involvement by an article III judge. 166/ In the remaining five percent of the bankruptcy cases, the bankruptcy judge would enter a proposed judgment. 167/ The district court, after reviewing

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160/ Id. at 547.

161/ Id. at 540.

162/ Id. at 542-3.

163/ Id. at 547.

164/ 130 Cong. Rec. E1107-9 (daily ed. March 20, 1984); compare 130 Cong. Rec. S8893 (daily ed. June 29, 1984).

165/ 130 Cong. Rec. at E1108.

166/ Id.

167/ Id.



the record but hold a second hearing and promptly enter final judgment. 168/

Proponents of the non-article III approach note that the amendments do not offend any of the original concerns that lead to the 1978 Reform Act. 169/ They note that "the two evils of the jurisdictional provisions of pre-1978 bankruptcy laws were numerous disputes as to whether proceedings were properly in bankruptcy court or State court, and delayed judgments in those matters that had to be tried in State courts". 170/ The strategy of the amendment is to provide for a single prompt forum for the bulk of bankruptcy litigation. 171/ This is accomplished by eliminating the "distinction between core bankruptcy matters and those arising under State law . . ." 172/

In addition, it was anticipated that the measure would add flexibility to the courts and to the litigants to dispose of bankruptcy cases expeditiously. 173/ Ultimately, this would lead to a decrease in the expense of bankruptcy litigation and improve the quality of the judiciary. 174/

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168/ Id.

169/ Id.

170/ Id.

171/ Id.

172/ Id.

173/ Id.

174/ Id.; Contrast, Justice Douglas comments:

Judges who sit on Article I courts are chosen for administrative or allied skills, not for their qualifications to sit in cases involving the vast interests of life, liberty, or property for whose protection the Bill of Rights and the other guarantees in the main body of the Constitution, including the ban on bills of attainder and ex post facto laws, were designed. Judges who might be confirmed for an Article I court might never pass muster for the onerous and life-or-death duties of Article III judges.

(Footnote Continued)

#### IV. CONCLUSIONS

Davis has observed that "although administrative law comes from many sources, the principal lawmaker is and will continue to be the Supreme Court." <sup>175/</sup> This is certainly true for legislative and administrative courts, as well as article III courts. In 1978, Congress attempted to solve a failing bankruptcy court system with a non-article III structure. The Supreme Court in Northern Pipeline found this solution unconstitutional. Congress was prohibited from establishing under its article I powers legislative courts to exercise jurisdiction over all matters arising under bankruptcy law. Congressional response was to redevise an article I scheme. Modeled after the Magistrates Act, the scheme appears to meet all the Constitutional objections of Northern Pipeline. Although this article I scheme is similar in many respects to the original act, it does contain substantive changes. The article I "judge" is an adjunct under closer supervision of the article III court. Those non-core or matters not related to the bankruptcy must be decided by the article III district court. The parties to a bankruptcy proceeding could consent to a bankruptcy judge's jurisdiction. Finally, the parties had a right to a full "de novo" appeal to an article III court. Thus, the impact of the Supreme Court's decision made the Congress reconsider its procedural approach to bankruptcy adjudication.

It should not be surprising that after 150 years, Congress still has Constitutional problems with some of its statutory schemes. One scholar observed that "to differentiate the judicial from the administrative by an analysis of the operation performed in carrying out the two functions is as a general proposition a fatal task". <sup>176/</sup> Congress wrestled with an article III and an article I approach. In closing the article I approach, Congress left open a door to future Constitutional challenges. The most obvious challenge will be on the issue of mandatory abstention.

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(Footnote Continued)

Glidden Co. v. Zdanak, supra, at 1502.

<sup>175/</sup> Davis, supra, Preface.

<sup>176/</sup> R. Brown, Administrative Commissions and the Judicial Power, 19 Minn. L. Rev. 274 (1935).

Permitting Federal court adjudication over State law claims that could not otherwise be brought in Federal court will generate future jurisdictional challenges. The lessons the Bankruptcy Amendments offer is that article I and article III courts will be able to function constitutionally as long as that ultimate decision lies with the judicial court. The Bankruptcy Amendments recognize the importance of the bankruptcy judge as a complement to the article III bench. The amendments embody many of the same concepts that are contained in the Federal Magistrates Act. In this sense, Congress has developed the correct solution to a confusing area of Constitutional law.

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From a platform in Hyde Park, at Speaker's Corner, a left-wing agitator was haranguing the crowd on the benefits to be derived from full-blooded Socialism. "When the dawn of freedom comes," he said, turning to a little man in a cloth cap on the edge of the crowd, "you will be riding down Park Lane in a Rolls-Royce car, with a top hat on your head."

"Beg pardon, Guv," said the little man, "I couldn't see meself in a top 'at. I'd rather stick to me old titfer."

"Very well, then," said the orator. "When the dawn of freedom comes, my friend, you will be riding down Park Lane in a Rolls-Royce car, wearing you own old titfer."

"Beg pardon, Guv," said the little man. "Couldn't really see meself in a Rolls-Royce. Think I'd be far better on me old bike."

"Look here," said the orator. "When the dawn of freedom comes, you'll do what you're bloody well told."

From Kindly Sit Down!, a compilation of after-dinner stories told by members of parliament. The compilation was edited and copyrighted by Jack Aspinwall, MP, and published by Buchan & Enright, London (1983). The selection quoted above was contributed by Percy Grieve, QC, MP, who, we suspect, is a Tory member.