THE WHITE HOUSE

WASHINGTON

January 21, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Proposed Testimony of Assistant Attorney General Rose on Bankruptcy Reform

The Department of Justice has submitted a proposed statement by Jon Rose on bankruptcy reform, to be delivered before the Senate Subcommittee on Courts on January 24. The testimony reviews problems which have arisen under the Emergency Rule system put in place upon expiration of the stay of the Northern Pipeline decision, and reiterates the Department's preference for an Article III solution to the bankruptcy crisis. In particular the testimony supports the second Judicial Conference proposal, which calls for bankruptcy administrators in each district to handle routine matters and to refer live disputes to district judges. One hundred and fifteen new district judgeships would be created to accommodate the increase in workload.

The testimony also discusses the two previous leading proposals, H.R. 7294, which would create a bankruptcy division (with 227 new judges) as part of the existing district courts, and H.R. 6978, which would create independent specialized Article III bankruptcy courts. The testimony states a strong preference among these alternatives for H.R. 7294, because it would maintain the historic unified Article III judiciary, permit bankruptcy division judges to handle other Article III fare when not occupied with bankruptcy matters, and attract abler candidates. The testimony concludes by opposing two modifications in H.R. 6978 in the newly-introduced H.R. 3. The first would restrict bankruptcy judges to bankruptcy matters, clearly marking them as second-class Article III judges. The second would stagger the appointment of the new judges over two and one-half years. As the testimony notes, the reason for this bloated transition period is wholly political, and will extend constitutional uncertainty in this area for an intolerable period.

I see no objections to the testimony. The approach supported -- 115 new bankruptcy judges, who could exercise other Article III jurisdiction -- is preferable from the Administration's standpoint to any staggered system or proposal to

isolate bankruptcy judges from broader responsibilities, yet is also more moderate than the original 227 new judges proposal. I also agree that the political basis for the staggered appointments proposal should be exposed. The bankruptcy system is in constitutional disarray, and if our opponents want to play politics with it that should be made clear to everyone concerned.

I have prepared a memorandum for internal use explaining the shift from supporting a proposal for 227 judges to one for 115.

Attachment

BANKRUPTCY REFORM PROPOSAL

The Supreme Court's decision last term in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982), invalidated the broad grant of jurisdiction to the Article I courts established by the Bankruptcy Reform Act of 1978. Congress has yet to pass corrective legislation, and the last stay of the decision expired on December 24, 1982. Since that time the district courts have been handling bankruptcy matters on an uncertain and unsatisfactory Emergency Rule basis.

During the last session of Congress, the Administration supported a proposal to create 227 new Article III judgeships to handle bankruptcy matters and, time permitting, other typical district court cases. This proposal was opposed by the Chief Justice, and Democratic legislators insisted on strictly limiting the new judges to bankruptcy matters. The Chief Justice (under the guise of the Judicial Conference) has now proposed the creation of 115 new Article III judgeships, and the establishment of a "bankruptcy administrator" in each judicial district. The administrator would handle routine matters and refer disputes to the new district judges for handling. When not occupied with bankruptcy matters the new judges could hear other cases.

This proposal is strongly supported by Senator Thurmond, and the Department of Justice proposes to support it in testimony to be delivered by Assistant Attorney General Jon Rose on January 24. While this new proposal appears to reduce by one-half the number of new appointments to be made by the President, the 115 appointments would be of district judges who could handle non-bankruptcy matters. The 227 appointees under the old proposal would doubtless be limited to bankruptcy matters (as specified in Rodino's new H.R. 3). The new proposal is also more realistic, as it has the support of the Chief Justice and Senator Thurmond.

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WHITE HOUSE
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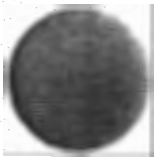

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Name of Correspondent: Gretchen C. Rose

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Subject: Statement Concerning Bankruptcy Reform

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STATEMENT

OF

JONATHAN C. ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

SUBCOMMITTEE ON COURTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

BANKRUPTCY REFORM

ON

JANUARY 24, 1983

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear again before you to present the views of the Department of Justice with respect to 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 adjunct bankruptcy courts created by the 1978 Bankruptcy Reform Act cannot constitutionally exercise the broad jurisdiction conferred on them by that Act. The Supreme Court's stay of that decision expired on December 24, 1982, and the Court denied the Solicitor General's motion for a further stay. As a result, the bankruptcy court system established by the 1978 Act is no longer functioning.

I.

In its place, the district courts are operating under an Emergency Rule proposed by the Judicial Conference and adopted by each district court. But this Rule is only a stopgap at best. In light of existing case burdens on the district courts, we do not believe that bankruptcy matters can be effectively handled by the district courts for any extended period of time under the Emergency Rule.

As I noted in my November 10, 1982, testimony, it is quite unclear exactly how the Rule will operate in adjudicating the many kinds of issues that arise in or are related to bankruptcy matters, or whether the Rule will, in its applications, be found consistent with the requirements of the Northern Pipeline decision. Though the United States, does not intend to challenge the general validity of the Rule as a litigant, others surely will. A definitive construction of the Rule by the courts, perhaps by the Supreme Court, will come only after months or years of litigation. Regardless of whether various aspects of the Rule are ultimately upheld or disallowed, the lingering uncertainty during that lengthy period of judicial construction will have a debilitating effect on bankruptcy litigants and on the bankruptcy system itself.

In the four weeks since the expiration of the Supreme Court's stay, evidence of practical problems under the Emergency Rule have only begun to trickle in. But the trend of these early indications is decidedly troubling. At a conference in Washington sponsored by Senator DeConcini and former Representative Butler on January 7, 1983 -- not even two weeks after the Emergency Rule took effect -- a number of distinguished bankruptcy practitioners and judges indicated various problems with the Emergency Rule that were already beginning to mount. I will not belabor the examples described at that conference, but a few deserve brief mention.

In several specific cases, creditors have refused to lend new money to debtors based on a bankruptcy judge's order, and title insurance companies have refused to rely on a bankruptcy judge's order that a debtor's property can be sold free of encumbrances. In other cases, attorneys have apparently taken the position that the automatic stay contained in Section 362 of Title 11 is of no further force and effect because the bankruptcy court has no jurisdiction to enforce the stay. Although the availability of a district judge to enter the necessary orders may ultimately resolve most such problems, the inevitable delay required may well disrupt a debtor's reorganization process where prompt refinancings and sales of excess property are essential. Disputes over whether certain matters are "related proceedings," which must be reviewed de novo by the court, will result in delay in many cases. At best, the Rule will give undue leverage to litigants who can take advantage of the delay resulting from objections to the jurisdiction of the bankruptcy judge.

The practical problems under the Emergency Rule are not limited to the parties to bankruptcy proceedings. At the January 7 Conference, several bankruptcy judges indicated that, because they cannot claim the absolute immunity of Article III judges and could be held personally liable for civil damages for actions taken in excess of their proper jurisdiction, they would decline to enter final orders in matters involving large sums of money. At least one bankruptcy judge has apparently declined to enter any final orders in this ground. Some standing trustees in

Chapter 13 cases have indicated a reluctance to make payments from funds held in trust on the basis of a bankruptcy judge's order.

Thus, parties to bankruptcy proceedings are increasingly resorting to the district courts for the entry of necessary orders. At best, this added burden on the district courts in some districts can be accommodated with only relatively minor delay in the bankruptcy proceedings or in other civil and criminal matters. In other districts, given substantial backlogs in civil and criminal matters and insufficient numbers of judges, the increased bankruptcy caseload will threaten all litigants with intolerable burdens.

In short, although the Emergency Rule may well be the only feasible response by the courts to the extreme circumstances created by Northern Pipeline, it is and must be only a short-term measure. Prompt action by Congress to restructure the bankruptcy court system is essential to return that system to a sound and workable basis.

II.

When I testified before you last November, I explained our objections to legislation which would attempt to confer substantial bankruptcy jurisdiction on an Article I bankruptcy court, such as the first proposal advanced by the Judicial Conference in November. It is one thing for the courts to adopt the Emergency Rule on an interim basis until Congress can

legislate a new court system. It would be quite another matter for Congress to attempt as a permanent solution the re-establishment of an Article I court, which presents many of the same uncertainties and litigation problems as the Emergency Rule.

In addition to resurrecting many of the problems of bifurcated jurisdiction which the Bankruptcy Reform Act of 1978 sought to solve, such an Article I solution rests on the speculation that a very narrow construction of Northern Pipeline ultimately will prevail in the Supreme Court. Until such a definitive ruling, the possibility of a new ruling that the grant of jurisdiction to Article I bankruptcy judges is unconstitutional would cast a shadow on all bankruptcy cases.

As I indicated in my earlier testimony, it is our view that a legislative proposal which 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 appointing Article III judges to determine bankruptcy cases and proceedings, there are several different alternatives to consider. Two of these

alternatives -- reflected in H.R. 7294 and H.R. 6978 in the last Congress -- were the subject of my testimony in November. H.R. 7294 would provide for the appointment of 227 additional district judges to sit in newly-created bankruptcy divisions of each district court. These district judges would be assigned principally to hear bankruptcy matters, but would be available to hear other matters before the district courts to the extent that bankruptcy matters did not require their full time. H.R. 6978, as reported by the House Judiciary Committee, was similar in approach except that it would create an independent bankruptcy court in each district.

Since my testimony last November, a new approach has been suggested by the Judicial Conference of the United States. This second Judicial Conference proposal, which came too late for active consideration by the last Congress, represents, in our view, a better solution to the bankruptcy court crisis than the others that Congress has thus far considered. I will discuss this alternative first before turning to those considered last fall.

A.

Under the Judicial Conference's proposal, a bankruptcy administrator would be appointed in each judicial district to supervise all bankruptcy cases and proceedings. In addition, the administrator would be authorized, with the consent of all

parties, to approve routine filings with the court and to grant many other uncontested motions. This would relieve the judges of the burden of managing bankruptcy cases and approving uncontested matters. However, the bankruptcy administrator would not be authorized to resolve disputes among the parties or to grant contested motions.

All contested matters in bankruptcy proceedings would be referred by the bankruptcy administrator to the district court for resolution. The administrator would also be able to lodge objections to a matter presented to him, which would also be determined by the district court. This would assure that all contested bankruptcy matters are decided by district judges. Under this proposal, the judges' role would be limited to resolving live disputes on the facts or the law. The routine administration of the large numbers of uncontested bankruptcies would be appropriately left to the bankruptcy administrator.

To handle the increased workload on the district courts, the bill provides for the appointment of 115 additional district judges in the various districts. These judges are in addition to the 51 additional district and circuit judges recommended by the Judicial Conference to handle the existing backlogs of civil and criminal cases.

The proposal also would amend the Magistrates' Act, 28 U.S.C. § 636, to authorize magistrates to perform the same functions in bankruptcy cases that they presently do in civil and criminal cases. The magistrates would not be permitted to enter any dispositive orders in bankruptcy cases.

This proposal, we believe, provides a very favorable framework for a sound long-term solution to the current bankruptcy crisis. The appointment of Article III district judges to adjudicate all contested bankruptcy matters will resolve any constitutional doubts with respect to matters decided by them. At the same time, fewer new judges would be required under this proposal, because judges would not be required to consider the numerous routine motions and reports that arise in all bankruptcy cases, as long as no party objects. This would result in the more efficient use of judicial manpower, and would avoid the creation of new judgeships which might not be warranted in the years ahead.

This proposal would, we believe, be considerably less expensive than the proposals considered last year calling for the creation of 227 Article III judges to staff a separate bankruptcy court or a bankruptcy division of the district courts. The 227 judges proposed by these bills reflects the approximate number of existing judges (229 full-time and 12 part-time bankruptcy judges are currently authorized). The caseload figures reported by the Administrative Office to Congress on December 30, 1982,

however, reveal that 304 bankruptcy judges would be needed to handle the current caseload, assuming that the jurisdiction established by the 1978 Bankruptcy Reform Act were maintained. 1/ Thus, if Congress determines to address this problem by creating a separate Article III bankruptcy court to handle the duties of the former Article I bankruptcy court, it may be compelled by the current caseload to create 304 lifetime, Article III judges to handle bankruptcy matters, rather than the 115 proposed by the Judicial Conference.

An important advantage of the new proposal advanced by the Judicial Conference is that it would not cause the radical transformation of the character of the Article III judiciary that would result from the creation of a specialized bankruptcy court. The creation of a separate bankruptcy court would greatly expand the numbers of Article III judges with the infusion of a large contingent of specialized judges whose orientation and qualifications would tend to be far different from those of the existing federal judges of general jurisdiction.

It is very clear to us that we will not be able to find candidates of the same quality as existing federal judges to assume specialized bankruptcy judgeships. We are convinced, moreover,

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1/ Director of the Administrative Office's Report to Congress of December 30, 1982, pursuant to § 406 of Pub. L. No. 95-598.

that the broad bankruptcy jurisdiction created by the 1978 Bankruptcy Reform Act requires judges of the highest caliber. Bankruptcy matters are often highly complex and of extreme importance to the economic life of our country. To adjudicate all matters "related to" bankruptcy cases under the 1978 Act, the judge must not only be expert in bankruptcy matters, but also must be a generalist of abilities equal to those of any federal judge. It does not make sense to create such extensive jurisdiction over matters relating to bankruptcy and vest it in a "second-class" Article III judiciary.

Bankruptcy matters could be effectively handled by the creation of a relatively small number of additional district court judgeships under this proposal because it would, in addition, establish a corps of strong bankruptcy administrators. An administrator would be appointed in each district, or group of districts, to manage and supervise all bankruptcy estates and litigation. The administrator's function would be to monitor and expedite the administration of each estate, and to bring contested matters promptly to the district court for resolution. The bankruptcy administrator would be authorized to approve uncontested matters to avoid unnecessarily burdening the district courts with such matters. This system should speed the resolution of bankruptcy cases and avoid the unnecessary expense of jurisdictional disputes. Because the bankruptcy administrator could not act on any disputed matters but must refer them to the

district judge for resolution, questions concerning the allowable scope of his jurisdiction would be avoided entirely.

For these reasons, we urge that the Subcommittee give favorable consideration to this new proposal. I would note that we believe this proposal could be improved by the inclusion of a provision giving priority for bankruptcy cases in the district court over other matters, on motion of the bankruptcy administrator or a party, to assure that contested bankruptcy matters are not denied a prompt resolution because of a backlog of civil or criminal cases. The general approach of the bill, however, is sound. We would be pleased to work with the Subcommittee to refine the provisions of the bill.

B.

With respect to the earlier proposals to create bankruptcy divisions of the district courts, or independent bankruptcy courts, to adjudicate bankruptcy matters, my comments presented at the November 10 hearing are equally applicable here.

In summary, we prefer the approach reflected in H.R. 7294, which would create bankruptcy divisions as part of a unified federal district court. The 227 additional district judges would sit in the bankruptcy division principally to handle bankruptcy matters. To the extent that they were not required full-time to handle bankruptcy matters, the judges would be

available for assignment to hear other cases in the district court or to sit on other courts by designation.

This approach would assure that bankruptcy matters will be handled promptly and expeditiously by Article III district judges familiar with bankruptcy law and serve to keep bankruptcy matters separate from the backlog of civil and criminal cases in the district court. 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, by allowing assignment of non-bankruptcy matters to bankruptcy division judges when this will not interfere with the expeditious handling of bankruptcy matters.

By contrast, the approach reflected in H.R. 6978 would create an independent trial court system to handle bankruptcy matters, exclusive of the district courts. Although this would resolve with finality the constitutional infirmities of the 1978 Act, it also would present disadvantages that many commentators and legislators -- including members of this committee -- have sought to avoid. The creation of a completely new system of Article III courts with specialized subject matter jurisdiction 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 these courts would be limited principally to bankruptcy matters and would not have the prestige of district courts, the breadth and caliber of candidates available for appointment to these courts would be adversely affected.

C.

In the present Congress, a bankruptcy court bill has been introduced as H.R. 3, which parallels H.R. 6978 with two principal changes. The first of these changes we believe is unwise; the second would not, in our view, be responsible legislation.

In contrast to H.R. 6978, H.R. 3 would restrict bankruptcy judges to bankruptcy matters only, regardless of the relative caseloads of the bankruptcy courts and the district courts in each district. This would not only clearly mark the bankruptcy judges permanently as "second-class" Article III judges but would measurably impair the recruitment of the most capable and qualified candidates for the bench. Moreover, it would run the very real risk of creating a large number of life-tenured judges with insufficient work to do as bankruptcy filings decline over time.

The second change is much more fundamental, and holds the prospect of lingering uncertainty for at least 2½ more years. That change would provide that, instead of putting the new court system in place as soon as possible, the appointment of Article

III judges would be staggered over a period of years. The new court system would not be finally in place until October 1985.

This provision of H.R. 3 is particularly questionable, because it would essentially attempt to reinstate and continue for 2½ more years a bankruptcy court system that the Supreme Court has expressly ruled unconstitutional. At least some of the current Article I bankruptcy judges would be kept in office as long as September 30, 1985. Although some delay in appointing judges is inevitable, other bills have set a reasonable date of October 1, 1983. No reasonable person can contend that a "transition" period for the recruiting and appointment of new judges could not be completed in less than 2½ years. The reasons for this bloated "transition" period beyond the next presidential election appear to be wholly political and may make sense in those terms. However, there is a very serious risk that the Supreme Court will not tolerate the continuation of an unconstitutional bankruptcy court system during such an extended and politically-inspired "transition" period.

Those individuals and companies who, for whatever reason, find themselves in the bankruptcy courts should at least have the benefit of a workable and constitutionally sound court system, put in place as soon as possible. They should not be left in constitutional limbo for 2½ more years.

IV.

In conclusion, it is all too apparent that prompt legislative action is required to resolve the unfortunate crisis in which the bankruptcy system has been placed. The principal responsibility for enacting remedial legislation, of course, lies with the Congress, but we are willing to render assistance where we can.

Accordingly, I urge the Subcommittee promptly to develop legislation based on the model most recently proposed by the Judicial Conference. This would solve the problems facing the bankruptcy system in the most efficient manner, with the least cost and the least disruption of the current judicial system. The choice of a new framework for the Nation's bankruptcy court system should be based on the best long-term results, not on the basis of short-term or narrowly partisan concerns.

Mr. Chairman, that concludes my prepared statement. I would be pleased to answer any questions you or other members of the Subcommittee may have.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

January 24, 1983

MEMORANDUM FOR THE FILE

FROM: JOHN G. ROBERTS JGR

SUBJECT: Bankruptcy Reform Testimony of Jon Rose

I have advised Gregory Jones of OMB's legislative Reference Office that Counsel's Office approves of the above-referenced proposed testimony.

1/24/83

THE WHITE HOUSE
WASHINGTON

TO: John Roberts

FROM: *Richard A. Hauser*
Deputy Counsel to the President

FYI: _____

COMMENT: _____

ACTION: ✓

Pls advise DMB
if we can
make second
advice for file.

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

JAN 20 1983

January 20, 1983

LEGISLATIVE REFERRAL MEMORANDUM

SPECIAL

TO: Legislative Liaison Officer

Department of the Treasury

Administrative Office of the United States Courts

SUBJECT: Department of Justice testimony on bankruptcy reform

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than 2 P.M., FRIDAY, JANUARY 21. ORAL COMMENTS ACCEPTABLE.

Direct your questions to Gregory Jones (395-3802), of this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures
cc: A. Anderson
M. Esposito
M. Uhlmann
L. Kudlow
M. Horowitz
K. Wilson
J. Mitrisin
R. Hauser, 2nd Fl. WEST WING

DRAFT

STATEMENT

OF

JONATHAN C. ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

SUBCOMMITTEE ON COURTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

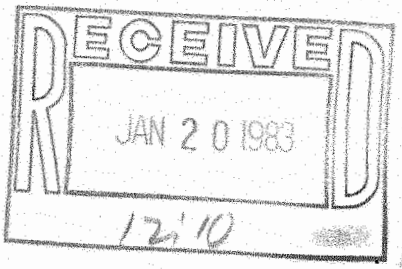
CONCERNING

BANKRUPTCY REFORM

ON

JANUARY 24, 1983

DRAFT



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As I noted in my November 10, 1982, testimony, it is quite unclear exactly how the Rule will operate in adjudicating the many kinds of issues that arise in or are related to bankruptcy matters, or whether the Rule will, in its applications, be found consistent with the requirements of the Northern Pipeline decision. Though the United States, does not intend to challenge the general validity of the Rule as a litigant, others surely will. A definitive construction of the Rule by the courts, perhaps by the Supreme Court, will come only after months or years of litigation. Regardless of whether various aspects of the Rule are ultimately upheld or disallowed, the lingering uncertainty during that lengthy period of judicial construction will have a debilitating effect on bankruptcy litigants and on the bankruptcy system itself.

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The practical problems under the Emergency Rule are not limited to the parties to bankruptcy proceedings. At the January 7 Conference, several bankruptcy judges indicated that, because they cannot claim the absolute immunity of Article III judges and could be held personally liable for civil damages for actions taken in excess of their proper jurisdiction, they would decline to enter final orders in matters involving large sums of money. At least one bankruptcy judge has apparently declined to enter any final orders in this ground. Some standing trustees in

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In short, although the Emergency Rule may well be the only feasible response by the courts to the extreme circumstances created by Northern Pipeline, it is and must be only a short-term measure. Prompt action by Congress to restructure the bankruptcy court system is essential to return that system to a sound and workable basis.

II.

When I testified before you last November, I explained our objections to legislation which would attempt to confer substantial bankruptcy jurisdiction on an Article I bankruptcy court, such as the first proposal advanced by the Judicial Conference in November. It is one thing for the courts to adopt the Emergency Rule on an interim basis until Congress can

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In addition to resurrecting many of the problems of bifurcated jurisdiction which the Bankruptcy Reform Act of 1978 sought to solve, such an Article I solution rests on the speculation that a very narrow construction of Northern Pipeline ultimately will prevail in the Supreme Court. Until such a definitive ruling, the possibility of a new ruling that the grant of jurisdiction to Article I bankruptcy judges is unconstitutional would cast a shadow on all bankruptcy cases.

As I indicated in my earlier testimony, it is our view that a legislative proposal which 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 appointing Article III judges to determine bankruptcy cases and proceedings, there are several different alternatives to consider. Two of these

alternatives -- reflected in H.R. 7294 and H.R. 6978 in the last Congress -- were the subject of my testimony in November. H.R. 7294 would provide for the appointment of 227 additional district judges to sit in newly-created bankruptcy divisions of each district court. These district judges would be assigned principally to hear bankruptcy matters, but would be available to hear other matters before the district courts to the extent that bankruptcy matters did not require their full time. H.R. 6978, as reported by the House Judiciary Committee, was similar in approach except that it would create an independent bankruptcy court in each district.

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A.

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parties, to approve routine filings with the court and to grant many other uncontested motions. This would relieve the judges of the burden of managing bankruptcy cases and approving uncontested matters. However, the bankruptcy administrator would not be authorized to resolve disputes among the parties or to grant contested motions.

All contested matters in bankruptcy proceedings would be referred by the bankruptcy administrator to the district court for resolution. The administrator would also be able to lodge objections to a matter presented to him, which would also be determined by the district court. This would assure that all contested bankruptcy matters are decided by district judges. Under this proposal, the judges' role would be limited to resolving live disputes on the facts or the law. The routine administration of the large numbers of uncontested bankruptcies would be appropriately left to the bankruptcy administrator.

To handle the increased workload on the district courts, the bill provides for the appointment of 115 additional district judges in the various districts. These judges are in addition to the 51 additional district and circuit judges recommended by the Judicial Conference to handle the existing backlogs of civil and criminal cases.

The proposal also would amend the Magistrates' Act, 28 U.S.C. § 636, to authorize magistrates to perform the same functions in bankruptcy cases that they presently do in civil and criminal cases. The magistrates would not be permitted to enter any dispositive orders in bankruptcy cases.

This proposal, we believe, provides a very favorable framework for a sound long-term solution to the current bankruptcy crisis. The appointment of Article III district judges to adjudicate all contested bankruptcy matters will resolve any constitutional doubts with respect to matters decided by them. At the same time, fewer new judges would be required under this proposal, because judges would not be required to consider the numerous routine motions and reports that arise in all bankruptcy cases, as long as no party objects. This would result in the more efficient use of judicial manpower, and would avoid the creation of new judgeships which might not be warranted in the years ahead.

This proposal would, we believe, be considerably less expensive than the proposals considered last year calling for the creation of 227 Article III judges to staff a separate bankruptcy court or a bankruptcy division of the district courts. The 227 judges proposed by these bills reflects the approximate number of existing judges (229 full-time and 19 part-time bankruptcy judges are currently authorized). The caseload figures reported by the Administrative Office to Congress on December 30, 1982,

however, reveal that 304 bankruptcy judges would be needed to handle the current caseload, assuming that the jurisdiction established by the 1978 Bankruptcy Reform Act were maintained. 1/ Thus, if Congress determines to address this problem by creating a separate Article III bankruptcy court to handle the duties of the former Article I bankruptcy court, it may be compelled by the current caseload to create 304 lifetime, Article III judges to handle bankruptcy matters, rather than the 115 proposed by the Judicial Conference.

An important advantage of the new proposal advanced by the Judicial Conference is that it would not cause the radical transformation of the character of the Article III judiciary that would result from the creation of a specialized bankruptcy court. The creation of a separate bankruptcy court would greatly expand the numbers of Article III judges with the infusion of a large contingent of specialized judges whose orientation and qualifications would tend to be far different from those of the existing federal judges of general jurisdiction.

It is very clear to us that we will not be able to find candidates of the same quality as existing federal judges to assume specialized bankruptcy judgeships. We are convinced, moreover,

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1/ Director of the Administrative Office's Report to Congress of December 30, 1982, pursuant to § 406 of Pub. L. No. 95-598.

that the broad bankruptcy jurisdiction created by the 1978 Bankruptcy Reform Act requires judges of the highest caliber. Bankruptcy matters are often highly complex and of extreme importance to the economic life of our country. To adjudicate all matters "related to" bankruptcy cases under the 1978 Act, the judge must not only be expert in bankruptcy matters, but also must be a generalist of abilities equal to those of any federal judge. It does not make sense to create such extensive jurisdiction over matters relating to bankruptcy and vest it in a "second-class" Article III judiciary.

Bankruptcy matters could be effectively handled by the creation of a relatively small number of additional district court judgeships under this proposal because it would, in addition, establish a corps of strong bankruptcy administrators. An administrator would be appointed in each district, or group of districts, to manage and supervise all bankruptcy estates and litigation. The administrator's function would be to monitor and expedite the administration of each estate, and to bring contested matters promptly to the district court for resolution. The bankruptcy administrator would be authorized to approve uncontested matters to avoid unnecessarily burdening the district courts with such matters. This system should speed the resolution of bankruptcy cases and avoid the unnecessary expense of jurisdictional disputes. Because the bankruptcy administrator could not act on any disputed matters but must refer them to the

available for assignment to hear other cases in the district court or to sit on other courts by designation.

This approach would assure that bankruptcy matters will be handled promptly and expeditiously by Article III district judges familiar with bankruptcy law and serve to keep bankruptcy matters separate from the backlog of civil and criminal cases in the district court. 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, by allowing assignment of non-bankruptcy matters to bankruptcy division judges when this will not interfere with the expeditious handling of bankruptcy matters.

By contrast, the approach reflected in H.R. 6978 would create an independent trial court system to handle bankruptcy matters, exclusive of the district courts. Although this would resolve with finality the constitutional infirmities of the 1978 Act, it also would present disadvantages that many commentators and legislators -- including members of this committee -- have sought to avoid. The creation of a completely new system of Article III courts with specialized subject matter jurisdiction 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 these courts would be limited principally to bankruptcy matters and would not have the prestige of district courts, the breadth and caliber of candidates available for appointment to these courts would be adversely affected.

C.

In the present Congress, a bankruptcy court bill has been introduced as H.R. 3, which parallels H.R. 6978 with two principal changes. The first of these changes we believe is unwise; the second would not, in our view, be responsible legislation.

In contrast to H.R. 6978, H.R. 3 would restrict bankruptcy judges to bankruptcy matters only, regardless of the relative caseloads of the bankruptcy courts and the district courts in each district. This would not only clearly mark the bankruptcy judges permanently as "second-class" Article III judges but would measurably impair the recruitment of the most capable and qualified candidates for the bench. Moreover, it would run the very real risk of creating a large number of life-tenured judges with insufficient work to do as bankruptcy filings decline over time.

The second change is much more fundamental, and holds the prospect of lingering uncertainty for at least 2½ more years. That change would provide that, instead of putting the new court system in place as soon as possible, the appointment of Article

III judges would be staggered over a period of years. The new court system would not be finally in place until October 1985.

This provision of H.R. 3 is particularly questionable, because it would essentially attempt to reinstate and continue for 2½ more years a bankruptcy court system that the Supreme Court has expressly ruled unconstitutional. At least some of the current Article I bankruptcy judges would be kept in office as long as September 30, 1985. Although some delay in appointing judges is inevitable, other bills have set a reasonable date of October 1, 1983. No reasonable person can contend that a "transition" period for the recruiting and appointment of new judges could not be completed in less than 2½ years. The reasons for this bloated "transition" period beyond the next presidential election appear to be wholly political and may make sense in those terms. However, there is a very serious risk that the Supreme Court will not tolerate the continuation of an unconstitutional bankruptcy court system during such an extended and politically-inspired "transition" period.

Those individuals and companies who, for whatever reason, find themselves in the bankruptcy courts should at least have the benefit of a workable and constitutionally sound court system, put in place as soon as possible. They should not be left in constitutional limbo for 2½ more years.

IV.

In conclusion, it is all too apparent that prompt legislative action is required to resolve the unfortunate crisis in which the bankruptcy system has been placed. The principal responsibility for enacting remedial legislation, of course, lies with the Congress, but we are willing to render assistance where we can.

Accordingly, I urge the Subcommittee promptly to develop legislation based on the model most recently proposed by the Judicial Conference. This would solve the problems facing the bankruptcy system in the most efficient manner, with the least cost and the least disruption of the current judicial system. The choice of a new framework for the Nation's bankruptcy court system should be based on the best long-term results, not on the basis of short-term or narrowly partisan concerns.

Mr. Chairman, that concludes my prepared statement. I would be pleased to answer any questions you or other members of the Subcommittee may have.

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WHCounsel		ORIGINATOR	84/09/06			1 1
		Referral Note:				
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		Referral Note:	84/09/07			
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C - Comment/Recommendation
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F - Furnish Fact Sheet to be used as Enclosure
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S - For Signature
X - Interim Reply

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U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

SEP 6 1984

MEMORANDUM TO FRED F. FIELDING
COUNSEL TO THE PRESIDENT

Re: Bankruptcy Amendments and
Federal Judgeship Act of 1984

I am enclosing herewith copies of the Attorney General's letters to Congress setting out the position that we will not be affording a defense in court to the provisions of the above-referenced statute which purport to reappoint to new positions under this Act judges whose terms of office had previously expired. This letter is consistent with and implements the President's July 10, 1984 signing statement.

For your information, I am also enclosing a copy of my August 27 opinion on this subject.

For your information, in sending the enclosed two letters to Congress, the Attorney General is following the unanimous recommendation of this Office, the Office of Solicitor General, the Civil Division, the Office of Legal Policy and the Office of Legislative and Intergovernmental Affairs. The Deputy Attorney General also concurred.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Enclosure

Office of the Attorney General
Washington, D. C. 20530

September 5, 1984

Honorable George Bush
President of the Senate
United States Senate
Washington, D.C. 20510

Dear Mr. President:

Section 205 of Public Law No. 98-166, 97 Stat. 1086, by continuing the authorities contained in § 21 of Public Law No. 96-132, 93 Stat. 1049-50, requires that the Attorney General "transmit a report to each House of the Congress" in any case in which the Attorney General determines that the Department of Justice "will refrain from defending . . . any provision of law enacted by the Congress in any proceeding before any court of the United States, or in any administrative or other proceeding, because of the position of the Department of Justice that such provision of law is not constitutional." This letter is submitted consistent with the notification requirement continued under Public Law No. 98-166.

Sections 106 and 121(e) (the "appointment provisions") of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (the "1984 Act"), purport to appoint to the new offices created under the 1984 Act all the bankruptcy judges who were in office at the time that the transition provisions of the Bankruptcy Reform Act of 1978, as amended (the "1978 Act"), expired on June 27, 1984. The validity of the appointment provisions is at issue in the case of In re Alexander Benny, Civ. No. 84-120 MISC RHS Bky. No. 3-82-00972 LK (N.D. Cal.). The court has asked for the views of the United States on the constitutionality of these provisions, and I have authorized the Solicitor General to intervene in the proceeding for the purpose of presenting argument to the court on the constitutional issues.

I believe that these provisions are unconstitutional and that they present one of those rare cases in which the Executive Branch may justifiably refrain from defending in court the constitutionality of legislation enacted by Congress because that legislation infringes on the constitutional power of the Executive. I have also determined, however, that the unconstitutional provisions are severable from the remainder of the 1984 Act. Accordingly, I have concluded that, although the Department will generally defend the constitutionality of the 1984 Act, we will refrain from the defense of the appointment provisions.

In reaching the decision not to defend the appointment provisions, we relied specifically on the Appointments Clause of the Constitution, which provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2. The Supreme Court has specifically held that this Clause prevents Congress from designating, by statute, who will serve as an officer of the United States. See Buckley v. Valeo, 424 U.S. 1, 127 (1976).

The 1984 Act was intended to restructure the bankruptcy system established by the 1978 Act which had been held unconstitutional by the Supreme Court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). The 1984 Act creates a new bankruptcy system and vests the power to appoint bankruptcy judges under the new system in the Judiciary. As an interim device, however, § 121(e) of the 1984 Act purports to appoint as bankruptcy judges those persons who were serving in that capacity on June 27, 1984. Under § 106, the term of office of each such individual was "extended to and expires four years after the date such bankruptcy judge was last appointed to such office or on October 1, 1986, whichever is later."

The interim appointment mechanism chosen by Congress is not consistent with the Appointments Clause as interpreted by the Supreme Court. It is, rather, an attempt by Congress to appoint to the new judgeships created by the 1984 Act the bankruptcy judges whose terms had already expired, and, thus, in practical effect and for constitutional purposes, to exercise the appointment power by Act of Congress. The 1984 Act was not passed by both Houses of Congress until June 29, 1984; it was not presented to the President until July 6, 1984; and it was not signed by the President until July 10, 1984. When the 1978 Act expired, however, the terms of office and the offices held by the judges who were previously appointed as bankruptcy judges both expired. In short, as of June 28, 1984, these judges no longer held positions as bankruptcy judges. Thus, §§ 106 and

121(e) operate as new appointments of these former judges to the new positions under the 1984 Act. That they do so is clear from a number of Supreme Court cases which have considered the effect of attempted presidential reappointments. In Mimmack v. United States, 97 U.S. 426, 437 (1878), the Court held that an attempt by the President to revoke his acceptance of a resignation by an Army captain was not effective because the captain ceased to be an officer after being notified that his resignation was accepted, and "nothing could reinstate him in the office short of a new nomination and confirmation." See also United States v. Corson, 114 U.S. 619 (1885) (attempt to revoke order of dismissal of officer; same result); Blake v. United States, 103 U.S. 227 (1880) (person who ceased to be an officer in the Army could not again become an officer except upon a new appointment, by and with the advice and consent of the Senate). The appointment of officers of the United States by Congress through the appointment provisions of the 1984 Act contravenes the clear prohibition against such congressional appointments. See Buckley v. Valeo, 424 U.S. at 127; cf. United States v. Will, 449 U.S. 200, 225 n.29 (1980) (retroactivity of the effective date and time of legislative enactments).

The President noted his reservations about the appointment provisions in his statement upon signing the bill into law. The President stated that he had been informed by the Department of Justice that the provisions in the bill seeking to continue in office all existing bankruptcy judges are inconsistent with the Appointments Clause of the Constitution. The President also noted that the Administrative Office of the U.S. Courts had reached the same conclusion. He stated that he signed the bill after having received assurances from the Administrative Office that bankruptcy cases could be handled without reliance on the invalid provisions. The President urged Congress "immediately to repeal the unconstitutional provisions in order to eliminate any confusion that might remain with respect to the operation of the new bankruptcy system." See 20 Weekly Comp. Pres. Doc. 1010, 1011 (July 10, 1984).

My determination that the Department will refrain from the defense of the appointment provisions reflects the President's statements regarding the unconstitutionality of those provisions. Moreover, consistent with the President's statement that bankruptcy cases may be handled by the courts without reliance on the invalid provisions, I have determined that the unconstitutional provisions are severable from the remainder of the 1984 Act. The Supreme Court's most recent statement of the principles for determining whether an unconstitutional provision can be severed from the remainder

of a statute appears in Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983). In Chadha, the Court identified three factors favoring a finding of severability: first, the absence of any clear indications that Congress would have intended additional sections, or the entirety of an act, to fall because of the invalidity of a single provision; second, the inclusion of a severability clause; and third, that what remains after severance is "fully operative as a law." See id. at 2774-75, quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932).

Under these principles, I have concluded that the appointment provisions of the 1984 Act are severable from the remainder of the 1984 Act. First, we have been unable to locate anything in the language of the 1984 Act or in the legislative history that would overcome the presumption of severability that normally applies. Second, the Act does contain a severability clause. Finally, there is no doubt that the remaining provisions of the 1984 Act would be "fully operative as a law" without the operation of the appointment provisions. Under § 104 of the 1984 Act, bankruptcy judges are to be appointed, after the transition period during which the appointment provisions were to have been effective, by the courts of appeals for the circuits in which the judgeships are located. If, as I believe, the appointment provisions are invalid, this appointment procedure may be implemented immediately, and new bankruptcy judges may be appointed by the courts of appeals. Thus, the 1984 Act can operate fully without the appointment provisions.

Our position relative to the defense of the appointment provisions of the 1984 Act is consistent with the historic practice of the Department of Justice. Although the Department will, in general, defend the constitutionality of a statute which has been challenged in litigation, there are certain rare instances in which it will refrain from that defense. In a letter to Senators Thurmond and Biden, dated April 6, 1981, I reiterated this preexisting policy:

> The Department appropriately refuses to defend an Act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid.

I believe that the appointment provisions of the 1984 Act fit within the first of these two narrow categories. Although the operation of these particular provisions most directly

impinges upon the appointment power of the courts of appeals, the principle of congressional appointment of officers of the United States that these provisions would establish would ultimately have a serious impact on the Executive. In most instances, the power to appoint officers of the United States is lodged in the President or his subordinates. Because of the potential effect on the President's powers of this enactment, I have determined that the Department will refrain from defending the constitutionality of the appointment provisions.

Sincerely,

William French Smith
Attorney General

Office of the Attorney General
Washington, D. C. 20530

September 5, 1984

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Section 205 of Public Law No. 98-166, 97 Stat. 1086, by continuing the authorities contained in § 21 of Public Law No. 96-132, 93 Stat. 1049-50, requires that the Attorney General "transmit a report to each House of the Congress" in any case in which the Attorney General determines that the Department of Justice "will refrain from defending . . . any provision of law enacted by the Congress in any proceeding before any court of the United States, or in any administrative or other proceeding, because of the position of the Department of Justice that such provision of law is not constitutional." This letter is submitted consistent with the notification requirement continued under Public Law No. 98-166.

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I believe that these provisions are unconstitutional and that they present one of those rare cases in which the Executive Branch may justifiably refrain from defending in court the constitutionality of legislation enacted by Congress because that legislation infringes on the constitutional power of the Executive. I have also determined, however, that the unconstitutional provisions are severable from the remainder of the 1984 Act. Accordingly, I have concluded that, although the Department will generally defend the constitutionality of the 1984 Act, we will refrain from the defense of the appointment provisions.

In reaching the decision not to defend the appointment provisions, we relied specifically on the Appointments Clause of the Constitution, which provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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The interim appointment mechanism chosen by Congress is not consistent with the Appointments Clause as interpreted by the Supreme Court. It is, rather, an attempt by Congress to appoint to the new judgeships created by the 1984 Act the bankruptcy judges whose terms had already expired, and, thus, in practical effect and for constitutional purposes, to exercise the appointment power by Act of Congress. The 1984 Act was not passed by both Houses of Congress until June 29, 1984; it was not presented to the President until July 6, 1984; and it was not signed by the President until July 10, 1984. When the 1978 Act expired, however, the terms of office and the offices held by the judges who were previously appointed as bankruptcy judges both expired. In short, as of June 28, 1984, these judges no longer held positions as bankruptcy judges. Thus, §§ 106 and

121(e) operate as new appointments of these former judges to the new positions under the 1984 Act. That they do so is clear from a number of Supreme Court cases which have considered the effect of attempted presidential reappointments. In Mimmack v. United States, 97 U.S. 426, 437 (1878), the Court held that an attempt by the President to revoke his acceptance of a resignation by an Army captain was not effective because the captain ceased to be an officer after being notified that his resignation was accepted, and "nothing could reinstate him in the office short of a new nomination and confirmation." See also United States v. Corson, 114 U.S. 619 (1885) (attempt to revoke order of dismissal of officer; same result); Blake v. United States, 103 U.S. 227 (1880) (person who ceased to be an officer in the Army could not again become an officer except upon a new appointment, by and with the advice and consent of the Senate). The appointment of officers of the United States by Congress through the appointment provisions of the 1984 Act contravenes the clear prohibition against such congressional appointments. See Buckley v. Valeo, 424 U.S. at 127; cf. United States v. Will, 449 U.S. 200, 225 n.29 (1980) (retroactivity of the effective date and time of legislative enactments).

The President noted his reservations about the appointment provisions in his statement upon signing the bill into law. The President stated that he had been informed by the Department of Justice that the provisions in the bill seeking to continue in office all existing bankruptcy judges are inconsistent with the Appointments Clause of the Constitution. The President also noted that the Administrative Office of the U.S. Courts had reached the same conclusion. He stated that he signed the bill after having received assurances from the Administrative Office that bankruptcy cases could be handled without reliance on the invalid provisions. The President urged Congress "immediately to repeal the unconstitutional provisions in order to eliminate any confusion that might remain with respect to the operation of the new bankruptcy system." See 20 Weekly Comp. Pres. Doc. 1010, 1011 (July 10, 1984).

My determination that the Department will refrain from the defense of the appointment provisions reflects the President's statements regarding the unconstitutionality of those provisions. Moreover, consistent with the President's statement that bankruptcy cases may be handled by the courts without reliance on the invalid provisions, I have determined that the unconstitutional provisions are severable from the remainder of the 1984 Act. The Supreme Court's most recent statement of the principles for determining whether an unconstitutional provision can be severed from the remainder

of a statute appears in Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983). In Chadha, the Court identified three factors favoring a finding of severability: first, the absence of any clear indications that Congress would have intended additional sections, or the entirety of an act, to fall because of the invalidity of a single provision; second, the inclusion of a severability clause; and third, that what remains after severance is "fully operative as a law." See id. at 2774-75, quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932).

Under these principles, I have concluded that the appointment provisions of the 1984 Act are severable from the remainder of the 1984 Act. First, we have been unable to locate anything in the language of the 1984 Act or in the legislative history that would overcome the presumption of severability that normally applies. Second, the Act does contain a severability clause. Finally, there is no doubt that the remaining provisions of the 1984 Act would be "fully operative as a law" without the operation of the appointment provisions. Under § 104 of the 1984 Act, bankruptcy judges are to be appointed, after the transition period during which the appointment provisions were to have been effective, by the courts of appeals for the circuits in which the judgeships are located. If, as I believe, the appointment provisions are invalid, this appointment procedure may be implemented immediately, and new bankruptcy judges may be appointed by the courts of appeals. Thus, the 1984 Act can operate fully without the appointment provisions.

Our position relative to the defense of the appointment provisions of the 1984 Act is consistent with the historic practice of the Department of Justice. Although the Department will, in general, defend the constitutionality of a statute which has been challenged in litigation, there are certain rare instances in which it will refrain from that defense. In a letter to Senators Thurmond and Biden, dated April 6, 1981, I reiterated this preexisting policy:

> The Department appropriately refuses to defend an Act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid.

I believe that the appointment provisions of the 1984 Act fit within the first of these two narrow categories. Although the operation of these particular provisions most directly

impinges upon the appointment power of the courts of appeals, the principle of congressional appointment of officers of the United States that these provisions would establish would ultimately have a serious impact on the Executive. In most instances, the power to appoint officers of the United States is lodged in the President or his subordinates. Because of the potential effect on the President's powers of this enactment, I have determined that the Department will refrain from defending the constitutionality of the appointment provisions.

Sincerely,

William French Smith
Attorney General

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

AUG 27 1984

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Recommendation that Department Not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984

This memorandum supplements our previous memoranda of June 29, 1984, (to Assistant Attorney General McConnell, from Acting Assistant Attorney General Tarr) and July 6, 1984, (to Deputy Attorney General Dinkins, from Acting Assistant Attorney General Tarr) concerning the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the 1984 Act). As we indicated in our previous memoranda, and as we set forth in greater detail below, we believe that the provisions ("Grandfather Provisions") of the 1984 Act that purport to reinstate all bankruptcy judges who were in office at the time of the expiration on June 27, 1984 of the transition provisions of the Bankruptcy Reform Act of 1978, as amended, (the 1978 Act), are constitutionally defective. We further believe that the constitutional defects are sufficiently serious and would have such a significant impact on the appointment (and, potentially, the removal) power of the Executive that the Department should refrain from defending their constitutionality. The Department, however, should be prepared to defend the other provisions of the 1984 Act if they are challenged in court. We specifically recommend that the Department set forth its position regarding the Grandfather Provisions in the case of In re Alexander Benny, Civ. No. 84120 MISC RHS BKY. No. 3-82-00972 LK (N.D. Cal.), as generally articulated in a draft brief prepared by the Civil Division and transmitted to this Office on August 23, 1984.

Under § 205 of Public Law No. 98-166, which continues the authorities contained in § 21 of Public Law No. 96-132, 93 Stat. 1049-50, the Attorney General is required to "transmit a report to each House of the Congress" in any case in which he determines that the Department of Justice "will refrain from defending . . . any provision of law enacted by the Congress in any proceeding before any court of the United States, or in any administrative or other proceeding, because of the position of the Department of Justice that such provision of law is not constitutional." Thus, if you concur that the Department should not defend the constitutionality of the Grandfather Provisions and should, as we recommend, participate in the Benny litigation consistent with our views and those of the Civil Division, Congress must be notified of that decision. If you concur, we will, with the participation of the Civil Division, draft a proposed letter to Congress. We have set forth below the reasons why we believe the Department should affirmatively contest, rather than defend, the constitutionality of the Grandfather Provisions.

I

BACKGROUND

The 1978 Act was a comprehensive revision of the bankruptcy laws in which Congress made significant changes to both the substantive and procedural law of bankruptcy. See generally Pub. L. No. 95-598, 92 Stat. 2649. The procedural changes included modifications to the jurisdiction and the method of appointment, of bankruptcy judges (previously referees in bankruptcy), to preside over bankruptcy proceedings. Section 201(a) of the 1978 Act provided for presidential appointment of bankruptcy judges, who were to serve for a term of 14 years. See 92 Stat. 2657. These judges were made subject to removal by the judicial council on account of "incompetency, misconduct, neglect of duty, or physical or mental disability." Id. Because of their removability and the fixed term of their appointments, it was clear that these bankruptcy judges were not intended by Congress to be judges in the sense envisioned by Article III of the Constitution.

The 1978 Act provided for a transition period before the new appointment procedures would take full effect on April 1, 1984. See 92 Stat. 2682-88. The transition provisions provided that the previously existing bankruptcy courts would continue in existence and that incumbent bankruptcy referees (who had been and would continue to be during this transition

period appointed by the district courts to serve 6-year terms) would continue after the expiration of their terms with no fresh appointment to be bankruptcy judges until the expiration of the transition provisions. A bankruptcy referee would not be continued only if the chief judge of the circuit court, after consultation with a merit screening committee, found the referee to be not qualified.

The 1978 Act granted broad jurisdiction to bankruptcy courts over bankruptcy and related matters. Although the Act initially vested this jurisdiction in the district courts, the bankruptcy courts (and the bankruptcy judges) were empowered to exercise all of the jurisdiction conferred upon the district courts with respect to bankruptcy matters. See 92 Stat. 2668. This jurisdiction included not only civil proceedings arising under the Bankruptcy Act, but also a wide variety of cases that might affect the property of an estate once a bankruptcy petition had been filed. Thus, included within the bankruptcy courts' jurisdiction were various types of contract actions, including claims based on state law.

The constitutionality of this broad grant of jurisdiction to the bankruptcy judges was challenged in a case that was decided by the Supreme Court as Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). In Northern Pipeline, the Court declared that the broad grant of jurisdiction to bankruptcy courts, at least insofar as it included contract actions arising under state law, was inconsistent with the requirements of the Constitution that such actions, if heard in federal court, must be heard by judges with the protections and independence provided by Article III. The Court did not, however, apply its decision retroactively. In fact, the Court stayed the effect of its decision for three months in order to give Congress a chance to reconstitute the bankruptcy court system. The Court subsequently extended the stay, at the Solicitor General's request, for an additional three months until December 24, 1982, 103 S. Ct. 200 (1982), but it denied the Solicitor General's request for a further extension thereafter. 103 S. Ct. 662 (1982).

Although Congress failed to act by the deadline imposed by the Supreme Court, the bankruptcy court system continued to operate through various ad hoc arrangements. Because the 1978 Act had initially granted jurisdiction over all bankruptcy proceedings to the district courts, the district courts resumed jurisdiction over all cases with respect to which bankruptcy court jurisdiction had been held unconstitutional under Northern Pipeline. See Memorandum for Assistant Attorney General Rose,

Office of Legal Policy, from Assistant Attorney General Olson, Office of Legal Counsel, re: Federal Bankruptcy Jurisdiction after October 4, 1982 (September 1, 1982). Thus, although the bankruptcy judges were disabled under Northern Pipeline from exercising the broad jursidiction conferred by the 1978 Act, the district courts were able to utilize these courts for the resolution of certain bankruptcy matters under a temporary delegation of authority. The constitutionality of this interim arrangement was upheld by several courts of appeals. See, e.g., In Re Kaiser, 722 F.2d 1574 (2d Cir. 1983); White Motor Corp. v. Citibank, N.A., 704 F.2d 254 (6th Cir. 1983); In Re Hansen, 702 F.2d 728 (8th Cir.), cert. denied, 103 S. Ct. 3539 (1983).

After Northern Pipeline, Congress labored for almost two years to adopt corrective legislation. Under the 1978 Act, the transition provisions were to expire at midnight on March 31, 1984. Congress passed four consecutive eleventh-hour extensions of the transition provisions in order to delay the demise of the bankruptcy courts and the terms of the bankruptcy judges. Each such extension was passed by Congress and signed into law by the President before the expiration of the prior period. Ultimately, however, both the courts and the appointments expired on June 27, 1984, without Congress's passing either a new bankruptcy act or another temporary extension. 1/ The 1984 Act was not passed by both Houses of Congress until June 29, 1984; it was not presented to the President until July 6, 1984; and it was not signed by the President until July 10, 1984. Thus, at the time the transition provisions expired, there were no bankruptcy courts and no bankruptcy judges. When the

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1/ The original transition provisions stated that the term of a bankruptcy judge serving as a referee in bankruptcy when the 1978 Act was enacted would expire "on March 31, 1984 or when his successor takes office." (emphasis added.) Thus, it is arguable that under these original provisions the appointments of the "transition" bankruptcy judges would have continued on even after the expiration of the transition provisions. All four of the extension acts, however, contained specific provisions that declared that the term of office of the transition bankruptcy judges would expire at the conclusion of the extension period. See, e.g., § 2 of Pub. L. No. 98-249 (March 31, 1984). Thus we believe these actions by Congress made clear that the offices of bankruptcy judges expired at the end of the extension period.

transition provisions expired, the Administrative Office of the U.S. Courts implemented a system under which the district courts handled bankruptcy matters with the assistance of the former bankruptcy judges, who performed their duties either as magistrates or consultants.

The 1984 Act, however, purported to continue in the new offices created by that Act the judges whose positions and terms had gone out of existence on June 27th. Section 121(e) states that the term of any bankruptcy judge who was serving on June 27, 1984, is extended to the day of enactment of the 1984 Act (July 10, 1984). Section 106 purports to extend the retroactive appointments so that they will expire on the date "four years after the date such bankruptcy judge was last appointed to such office or on October 1, 1986, whichever is later."

Although the President decided to sign the bankruptcy bill, he included the following language in his signing statement:

> I sign this bill with the following additional reservations. I have been informed by the Department of Justice that the provisions in the bill seeking to continue in office all existing bankruptcy judges are inconsistent with the Appointments Clause of the Constitution. I am also advised that the Administrative Office of the U.S. Courts has reached the same conclusion. Therefore, I sign this bill after having received assurances from the Administrative Office that bankruptcy cases may be handled in the courts without reliance on those invalid provisions. At the same time, however, I urge Congress immediately to repeal the unconstitutional provisions in order to eliminate any confusion that might remain with respect to the operation of the new bankruptcy system.

The Director of the Administrative Office of the United States Courts issued, on July 20, 1984, a memorandum to all federal courts of appeals, district courts and former bankruptcy judges in which he stated that the 1984 Act "may not be constitutionally valid." Because of the "inherent risk of the invalidation of judicial actions taken by bankruptcy judges . . . ,"

the Director concluded:

> I have therefore decided, upon advice of my General Counsel, and in accordance with my responsibilities under section 604 of title 28 of the United States Code, that I will not approve payment of salary to any former bankruptcy judge purporting to exercise judicial authority under the provisions contained in section 121.

While the Administrative Office subsequently decided not to withhold the pay of the former bankruptcy judges, its position on the constitutionality of the provision has not been altered. It was the apparent intent of the Administrative Office that the bankruptcy system continue to operate with the prior bankruptcy judges' functioning in the manner of magistrates or consultants to assist the district courts until remedial legislation could be obtained when Congress returned from its recess, or until the courts of appeals could exercise their authority under the 1984 Act to appoint new bankruptcy judges to 14-year terms. The latter process, because of the appointment procedures imposed upon the courts, was expected to take at least two months.

II

THE CONSTITUTIONALITY OF THE GRANDFATHER PROVISIONS

It is beyond dispute that Congress could not constitutionally appoint bankruptcy judges. The Appointments Clause of the Constitution, Art. II, § 2, cl. 2, provides that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments

In Buckley v. Valeo, 424 U.S. 1 (1976), the Court held that "any appointee exercising significant authority pursuant to the laws of the United States" is an officer of the United States who must be appointed in accordance with the

Appointments Clause. Id. at 126. The Court also explicitly held that neither Congress nor its officers may appoint officers of the United States. Id. at 127.

This prohibition is not altered by Congress's plenary power to establish "uniform laws on the subject of Bankruptcies throughout the United States" under Art. 1, § 8 of the Constitution. Thus, the Court in Buckley held:

> The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause. Unless their selection is elswhere provided for, all Officers of the United States are to be appointed in accordance with the Clause.

Id. at 132 (emphasis in original). Likewise, the Court ruled that the Necessary and Proper Clause of the Constitution cannot authorize Congress to do what the Appointments Clause forbids. Id. at 134-35.

However, Congress did not purport in the Grandfather Provisions to make appointments, but rather only to extend the terms of persons previously appointed in accordance with the Constitution. Had Congress extended the terms before they expired on June 27, 1984, a different and more difficult issue would be presented. See Myers v. United States, 272 U.S. 52, 128-29 (1926) (Congress may prescribe duties, terms and compensation for public offices); Shoemaker v. United States, 147 U.S. 282 (1893) (Congress may add new duties that are germane to the functions already performed by a current officer of the United States). Thus, while a congressional extension of the term of an appointment could well raise constitutional questions, it would be qualitatively different than what Congress did in the 1984 Act. Here it is clear that both the terms of bankruptcy judges and their offices expired on June 27, 1984, two days before Congress enacted the Grandfather Provisions and nearly two weeks before the President signed them into law. Thus, the effect of Congress's action was to reinstate and recreate officers of the United States whose status as such had terminated, albeit only for a short period. The critical issue, therefore, is whether Congress may constitutionally achieve this result by purporting to extend retroactively the offices and terms of the bankruptcy judges who were sitting on June 27. While

credible arguments can be made in favor of the validity of Congress's action, we conclude that this aspect of the 1984 Act violates the Appointments Clause.

The Supreme Court has recognized that the Appointments Clause is a direct limitation on Congress's power and essential to the operation of the separation of powers established by the Framers of the Constitution. Buckley v. Valeo, 424 U.S. at 118-19. Thus, the Court has held that the limitations imposed by the Appointments Clause must be strictly construed, stating:

> that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices . . . [and] that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, [Senate advice and consent] in the work of the executive, are limitations to be strictly construed and not to be extended by implication . . . .

Myers v. United States, 272 U.S. at 164.

The Court's decisions concerning efforts to reinstate former officers of the United States reflect this strict construction. In Mimmack v. United States, 97 U.S. 426 (1878), for example, the President accepted the resignation of an army captain on November 8, 1868, but attempted to revoke his acceptance about one month later, on December 11, 1868. The Court held that the attempted revocation was invalid, stating:

> Officers of this kind are nominated by the President and confirmed by the Senate; and if the petitioner ceased to be such an officer when notified that his resignation had been accepted, it requires no argument to show that nothing could reinstate him in the office short of a new nomination and confirmation.

97 U.S. at 437. It is noteworthy that in this context the attempted action would have constituted a presidential evasion of legislative prerogatives. The 1984 Act reflects an attempted Legislative Branch encroachment into authority lodged in other Branches.

The Court considered an analgous situation in United States v. Corson, 114 U.S. 619 (1885). In that case, President Lincoln dismissed a military officer from the service on March 27, 1865. Shortly thereafter, on June 9, 1865, President Johnson revoked the order of dismissal and restored the officer to his former position. The Court found that as a result of President Lincoln's order, the officer "was disconnected from that branch of the public service as completely as if he had never been an officer of the army." 114 U.S. at 621. Accordingly, the Court held that the Appointments Clause barred President Johnson from reinstating the officer save with the advice and consent of the Senate, stating:

> The death of the incumbent could not more certainly have made a vacancy than was created by President Lincoln's order of dismissal from the service. And such vacancy could only have been filled by a new and original appointment, to which, by the Constitution, the advice and consent of the Senate were necessary; . . . .

114 U.S. at 622. See also, Blake v. United States, 103 U.S. 227, 237 (1880) ("Having ceased to be an officer in the army, he could not again become a post-chaplain, except upon a new appointment, by and with the advice and consent of the Senate.").

These precedents teach that from the moment an incumbent loses his status as an officer of the United States, he cannot be restored to office save by a new appointment in accordance with the Appointments Clause. While these particular cases protect the Senate's right under the Appointments Clause to consent to appointments, we see no principled basis for finding the President's appointment power to be entitled to less protection in the context of an attempt by Congress to exercise that power. In fact, these cases show that the Court has been sensitive to erosion of the separation of powers principles at stake, which principles act neutrally to protect the process rather than any particular office holder.

Indeed, Congress by its actions has acknowledged that it lacks power to reappoint an officer of the United States. Thus, Congress has on occasion changed the retirement pay of military officers by retroactively changing their rank as of the date of their retirement, but has recognized that it

cannot place an officer who was discharged from service on the retired list without first providing for his reappointment:

> Congress has frequently exercised the power of changing the mere rank of officers without invoking the constitutional power of the Executive to appoint the incumbents to new offices. But when it has been the purpose to place on the retired list one who has been discharged from service, who no longer holds any office in the Army, Congress has provided for his restoration or reappointment in the manner pointed out by the Constitution, generally by the President alone, and then has authorized his retirement.

Wood v. United States, 15 Ct. Cl. 151, 161 (1879), aff'd 107 U.S. 414 (1882). See, e.g., Collins v. United States, 14 Ct. Cl. 568, 15 Ct. Cl. 22 (1879).

A much more recent case, United States v. Will, 449 U.S. 200 (1980), also supports the conclusion that direct constitutional limitations on congressional power will be strictly enforced. In that case, the Court considered a statute repealing a scheduled cost-of-living salary increase for judges. One of the four separate measures under consideration in Will became law when signed by the President on October 1, hours after the increase took effect. Although no judge ever received the increased salary, and although the statute would have been constitutional if it had been signed by the President a few hours earlier, the Court held that the statute violated the Compensation Clause because it purported to repeal a salary increase technically already in force. 449 U.S. at 225. In reaching this result, the Court noted, '"'[w]henever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day, as readily as into fractions of any other unit of time.'"' Id. at n.29, quoting Louisville v. Savings Bank, 104 U.S. 469, 474-75 (1881), quoting Grosvenor v. Magill, 37 Ill. 239, 240-41 (1865).

This principle that direct constitutional limitations on the powers of a Branch of Government, here Congress, must be strictly enforced distinguishes the cases in which the Court has upheld retroactive statutes. E.g. Pension Benefit Guaranty Corp. v. R. A. Gray & Co., ____ U.S. ___, 104 S. Ct. 2709 (June 18, 1984); United States v. Darusmont, 449 U.S. 293 (1981). These cases concern the limits on retroactive economic legislation imposed by the Due Process Clause, not an explicit constitutional limitation on congressional power central to

the separation of powers. We are not aware of any case in which the Court has allowed Congress to accomplish by indirection, through the guise of retroactive legislation, what it could not do directly under the Constitution.

While the conclusion that the moment an officer of the United States loses his status as such he cannot be reinstated except in accordance with the Appointments Clause is admittedly a technical one, it is no more technical than the Will Court's holding that a judicial salary increase is fully protected by the Compensation Clause the moment it takes effect. Moreover, the Court embraced precisely this construction of the Appointments Clause with respect to limitations on Presidential power in Mimmack, Corson and Blake. The Supreme Court has not hesitated to enforce structural provisions of the Constitution in their technical sense, undoubtedly because it is extremely difficult to locate a stopping point once the initial erosion is permitted. Here, if a two week hiatus were to be tolerated, where would the line be drawn? A great deal of uncertainty and litigation would undoubtedly follow. On the other hand, requiring Congress to act, if it wishes to do so, before legislation expires, is not unduly burdensome. Here, for example, Congress extended the terms of the bankruptcy judges four times before it finally failed to meet its own deadline.

One could argue against this reading of the Appointments Clause that the values protected by that provision are not implicated by Congress's action at issue here. In this regard, it is significant that the persons whose terms were extended were initially appointed in accordance with the Appointments Clause, and that Congress extended the terms of all sitting bankruptcy judges without attempting to evaluate the wisdom of retaining any particular individual. Moreover, Congress acted on an emergency basis in the face of perceived potential disruption of the bankruptcy system. However, the fact that the initial appointments were made in accordance with the Constitution does not distinguish Mimmack, Corson and Blake. Furthermore, an emergency cannot create powers not afforded a particular branch of Government under the Constitution. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952)(President's seizure of steel mills during Korean War held unconstitutional as violation of separation of powers).

For these reasons, we conclude that once the terms and offices of the bankruptcy judges expired on June 27, those officers could not be reinstated except by a new appointment made in accordance with the Appointments Clause. Congress could not evade this requirement through the fiction of retroactively extending the terms of the judges who were

sitting on June 27. While this conclusion may appear to some to be technical and restricts a convenient and efficient mechanism for dealing with an emergency, we believe that it is correct in light of the language and intent of the Constitution as interpreted by the Supreme Court. As the Court stated in INS v. Chadha, 103 S. Ct. 2764, 2788 (1983):

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President.

III

THE SEVERABILTY OF THE GRANDFATHER PROVISIONS

The Supreme Court has consistently held that whether an unconstitutional provision may be severed from a statutory scheme is a matter of congressional intent, and that the invalid portions of a statute should be severed "[u]nless it is evident that the legislature would not have enacted those provisions that are within its power, independently of that which is not." Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932). See, e.g., Buckley v. Valeo, 424 U.S. at 108. In reaffirming these principles in INS v. Chadha, the Court identified three basic principles with respect to severability. First, the Court reiterated the basic rule, stating:

> Only recently this Court reaffirmed that the invalid portions of a statute are to be severed "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.'" Buckley v. Valeo, 424 U.S. 1, 108 . . . (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 . . . (1932).

103 S. Ct. at 2774. Second, the Court stated that a severability clause is strong evidence that Congress did not intend for the entire statute to fall when one of its provisions is held to be unconstitutional. Accordingly, therefore, the presence of such a clause in the statutory scheme reinforces the presumption of severability. Id. Finally, the Court held that "[a] provision is further presumed severable if what remains after severance is 'fully operative as a law.' Champlin Refining Co. v. Corporation Comm'n, supra, 286 U.S. at 234." 103 S. Ct. at 2775.

Applying these principles, we conclude that the Grandfather Provisions of the 1984 Act are severable. We have been unable to locate anything in the language of the 1984 Act or its legislative history tending to rebut the usual presumption of severability. To the contrary, § 119 provides:

> If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby.

This severability clause is, as noted above, persuasive evidence of congressional intent.

Finally, the remaining provisions of the 1984 Act would be "fully operative as a law" in the absence of the Grandfather Provisions. Under § 104 of the 1984 Act, bankruptcy judges are to be appointed by the courts of appeals for the circuits in which the judgeships are located. The Grandfather Provisions are designed to facilitate the transition to appointments by the court of appeals by providing a temporary starting corps of judges. If the Grandfather Provisions are invalidated, the courts of appeals could appoint bankruptcy judges in accordance with the appointment scheme created by the 1984 Act. The courts of appeals would determine whether to reappoint some or all of the bankruptcy judges who were sitting on June 27. But whatever the courts' decisions in this regard, the bankruptcy court structure and the substantive provisions of bankruptcy law established by the 1984 Act would remain in place. Moreover, because § 101 of the 1984 Act assigns plenary jurisdiction over bankruptcy matters to the federal district courts, they will be able to establish suitable arrangements for handling bankruptcy cases pending appointment of bankruptcy judges by the courts of appeals. Thus, the 1984 Act could operate fully without the Grandfather Provisions.

For these reasons, we conclude that the Grandfather Provisions are severable.

IV

WHETHER THE DEPARTMENT SHOULD DEFEND THE CONSTITUTIONALITY OF THE GRANDFATHER PROVISIONS

The President and his subordinates have a constitutionally imposed duty "to take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. Attorneys General have generally construed this obligation to include the enforcement and the defense in court of laws enacted by Congress irrespective of questions which have been or might be raised regarding their constitutionality:

> [I]t is not within the province of the Attorney General to declare an Act of Congress unconstitutional - at least, where it does not involve any conflict between the prerogatives of the legislative department and those of the executive department - and that when an act like this, of general application, is passed it is the duty of the excutive department to administer it until it is declared unconstitutional by the courts.

31 Op. A. G. 475, 476 (1919). See also, e.g., 40 Op. A.G. 158 (1942); 39 Op. A.G. 11 (1937); 38 Op. A.G. 252 (1935); 38 Op. A.G. 136 (1934); 36 Op. A.G. 21 (1929).

Like the courts, the Executive should (and does) apply a presumption in favor of the constitutionality of a federal statute, e.g., INS v. Chadha, 103 S. Ct. 2764, 2780 (1983). Members of Congress take an oath to uphold the Constitution, and the Executive should presume that, in passing legislation, Members of Congress have acted with due regard for their responsibilities to the Constitution. See Rostker v. Goldberg, 453 U.S. 57, 64 (1981).

The Executive's duty faithfully to execute the law and recognition of the presumption of constitutionality generally accorded duly enacted statutes result in all but the rarest of situations in the Executive's enforcing and defending laws enacted by Congress. United States v. Lee, 106 U.S. 196, 220 (1882) ("No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.")

There are sound reasons of policy for this general practice. Our constitutional system is delicately balanced by the division of power among the three Branches of the Government. Although each Branch is not "hermetically" sealed from the others, Buckley v. Valeo, 424 U.S. at 121, and certain areas of overlapping responsibility may be identified, the quintessential functions of each Branch may be easily stated. It is axiomatic that the Legislature passes the laws, the Executive executes the laws, and the Judiciary interprets the laws. Any decision by the Executive that a law is not constitutional and that it will not be enforced or defended tends on the one hand to undermine the function of the Legislature and, on the other, to usurp the function of the Judiciary. It is generally inconsistent with the Executive's duty, and contrary to the allocation of legislative power to Congress, for the Executive to take actions which have the practical effect of nullifying an Act of Congress. It is also generally for the courts, and not the Executive, finally to decide whether a law is constitutional. Any action of the President which precludes, or substitutes for, a judicial test and determination would at the very least appear to be inconsistent with the allocation of judicial power by the Constitution to the courts.

Exceptions to this general rule, however rare, do and must exist. These arise whenever the role of enforcing and defending a federal statute may not sufficiently discharge the Executive's constitutional duty. The President's veto power will usually be adequate to express and implement the President's judgement that an act of Congress is unconstitutional. By exercising his veto power, the President may fulfill his responsibility under the Constitution and also impose a check on the power of Congress to enact statutes that violate the Constitution. On some occasions, however, the exercise by the President of his veto power may not be feasible. For example, an unconstitutional provision may be a part of a larger and vitally necessary piece of legislation. The Supreme Court has held that the President's failure to veto a measure does not prevent him subsequently from challenging the Act in court, nor does presidential approval of an enactment cure constitutional defects. National League of Cities v. Usery, 426 U.S. 833, 841 n.12 (1976); Myers v. United States, 272 U.S. 52 (1926).

Cases in which the Executive has chosen not to defend an Act of Congress may be placed in one of two categories. One category of cases involves statutes believed by the Executive to be so clearly unconstitutional as to be indefensible but which do not trench on separation of powers. Refusals to

execute or defend statutes based upon a determination that they meet these criteria are exceedingly rare. 2/

The other category involves statutes which are both believed by the Executive to be unconstitutional (although

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2/ Our research has uncovered only three documented situations of this nature, although we cannot be sure there are not others since informal (or even formal) decisions not to execute statutes would not necessarily be recorded in such a way as to make them accessible to us. And, if the Executive refused to enforce or defend the statute, the matter may never have come to the courts, or if it did, would have been unlikely to leave a prominent mark.

The first instance of refusal to defend such a statute which we have located occurred in 1962 in the context of a private civil rights action contesting the constitutionality of a federal law that provided federal funds for hospitals having "separate but equal facilities." In that case, Simkins v. Moses H. Cone Memorial Hospital, 211 F. Supp. 628, 640 (M.D.N.C. 1962), rev'd 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964), the United States intervened and took the position that the statute in question, then 42 U.S.C. § 299e(f), was unconstitutional.

On October 11, 1979, former Attorney General Civiletti, over the strong objection of this Office, notified Congress by identicial letters to the Speaker of the House and the President pro tempore of the Senate that the Department would not defend § 399(a) of the Public Broadcasting Act of 1967, 47 U.S.C. § 399(a). That decision was reversed by you in your letter to Chairman Thurmond and Senator Biden of the Senate Committee on the Judiciary of April 6, 1981; your reversal was more than adequately vindicated when the Supreme Court struck down, by only a 5-4 vote, that aspect of § 399(a) which had been viewed by this Office in 1979 as least susceptible to a credible defense, in contrast to the other provisions which we believed to be clearly defensible. See FCC v. League of Women Voters of California, No. 82-912 (S. Ct. July 2, 1984).

Finally, on January 13, 1981 former Attorney General Civiletti, with the concurrence of this Office, informed Congress by identical letters to the Speaker of the House and the President pro tempore of the Senate that the Department would not prosecute, under 18 U.S.C. § 1461 and 39 U.S.C. § 3001(e), the mailing of truthful, non-deceptive advertising regarding legal abortions.

not necessarily so clearly unconstitutional as statutes falling in the first category) and which usurp executive authority and therefore weaken the President's constitutional role. The following statement of President Andrew Johnson's counsel in an early recorded statement addresses the President's responsibilities with respect to the second of these categories:

> If the law be upon its very face in flat contradiction of plain expressed provisions of the Constitution, as if a law should forbid the President to grant a pardon in any case, or if the law should declare that he should not be Commander-in-Chief, or if the law should declare that he should take no part in the making of a treaty, I say the President, without going to the Supreme Court of the United States, maintaining the integrity of his department, which for the time being is entrusted to him, is bound to execute no such legislation; and he is cowardly and untrue to the responsibility of his position if he should execute it.

2 Trial of Andrew Johnson 200 (Washington 1868). This statement, of course, was made in the context of the attempt to impeach President Johnson for, inter alia, having refused to obey the Tenure in Office Act, an act "which he believed with good reason . . . to be unconstitutional . . . . " 38 Op. A.G. 252, 255 (1935).

This early statement anticipated a practice that has subsequently been followed by the Executive under which the President need not blindly execute or defend laws enacted by Congress if such laws trench on his constitutional power and responsibility. Of course, under that practice the President is obligated to respect and follow the decisions of the courts as the ultimate arbiters of the Constitution.

This category of cases exists because, in addition to the duty of the President to uphold the Constitution in the context of the enforcement of Acts of Congress, the President also has a constitutional duty to protect the Presidency from encroachment by the other Branches. He takes an oath to "preserve, protect and defend" the Constitution. An obligation to take action to resist encroachments on his institutional authority by the Legislature may be implied from that oath, especially where he may determine it prudent to present his point of view in court. In this regard, we believe that the President must, in appropriate circumstances, resist measures which would impermissibly weaken the Presidency: "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." INS v. Chadha, 103 S. Ct. at 2784 (emphasis added).

This duty to preserve the institution of the Presidency, captured above in the words of President Andrew Johnson's counsel, was articulated eloquently and somewhat more authoritatively by Chief Justice Chase, who presided over the trial in the Senate of President Johnson. Chief Justice Chase declared that the President had a duty to execute a statute passed by Congress which he believed to be unconstitutional "precisely as if he held it to be constitutional." However, he added, the President's duty changed in the case of a statute which

> directly attacks and impairs the executive power confided to him by [the Constitution]. In that case it appears to me to be the clear duty of the President to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the judicial tribunals.
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> * * *
>
> How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no right to defend it against an act of Congress, sincerely believed by him to have passed in violation of it? 3/

(Emphasis in original.) If the President does not resist intrusions by Congress into his sphere of power, Congress may not only successfully shift the balance of power in the particular case but may succeed in destroying the presidential authority and effectiveness that would otherwise act as a check on Congress's exercise of power in other circumstances.

The major historical examples of refusal by the Executive to enforce or defend an Act of Congress have been precipitated by Congress's attempt to alter the distribution of constitutional power by arrogating to itself a power which the Constitution does not confer on Congress but, instead, reposes in the Executive.

3/ R. Warden, An Account of the Private Life and Public Services of Salmon Portland Chase 685 (1874). Chief Justice Chase's comments were made in a letter written the day after the Senate had voted to exclude evidence that the entire cabinet had advised President Johnson that the Tenure of Office Act was unconstitutional. Id. See M. Benedict, The Impeachment and Trial of Andrew Johnson 154-55 (1973). Ultimately, the Senate did admit evidence that the President had desired to initiate a court test of the law. Id. at 156.

In such situations, a fundamental conflict arises between the two Branches, and this conflict has generally resulted in Attorneys General presenting to the courts the Executive's view of what the Constitution requires. The potential for such a conflict's arising was expressly recognized by Attorney General Palmer in 1919 when he issued the Opinion, quoted above, that the general duty of the Attorney General to enforce a statute did not apply in the case of a conflict between the Executive and the Legislature. See 31 Op. A.G. 475, 476 (1919), quoted at p. 14 supra.

Seven years later, this caveat to the general rule was applied when the President acted contrary to a statute prohibiting the removal of a postmaster. That act lead to litigation in which the Executive challenged, successfully, the constitutionality of that statute in litigation brought by the removed postmaster. Myers v. United States, 272 U.S. 52 (1926). Myers appears to be the first case in which the Executive acted contrary to and then directly challenged the constitutionality of a federal statute in court:

> In the 136 years that have passed since the Constitution was adopted, there has come before this Court for the first time, so far as I am able to determine, a case in which the government, through the Department of Justice, questions the constitutionality of its own act.

Id. at 57 (condensation of oral argument of counsel for appellant Myers). 4/

Almost a decade later, the Executive argued, unsuccessfully, that § 1 of the Federal Trade Commission Act would be unconstitutional if interpreted to prohibit the President's removal of a member of the Federal Trade Commission. Humphrey's Executor v. United States, 295 U.S. 602 (1935). A similar argument was advanced, again unsuccessfully, by the Executive with respect to

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4/ It is perhaps noteworthy that this condensation of the argument of appellant Myers' counsel goes on to record counsel's view that as to the appearance of the Department of Justice in opposition to the statute, "I have no criticism to offer; I think it is but proper." Further, that condensation of the oral argument does not record any observations whatsoever on this point by Senator George Wharton Pepper, who appeared as counsel for the Senate and House of Representatives as amicus curiae. See 272 U.S. at 65-77.

an analogous removal issue in the case of Wiener v. United States, 357 U.S. 349 (1958). Between these two cases, the Executive carried out, but then refused to defend when sued, and indeed successfully challenged the constitutionality of, a statute which directed that the salaries of certain federal employees not be paid. United States v. Lovett, 328 U.S. 303 (1946). 5/ In 1976, the Appointments Clause was once again at issue when the Executive challenged, successfully, the appointment of members of the Federal Election Commission by officers of Congress. Buckley v. Valeo, 424 U.S. 1 (1976).

In addition to these examples, there have been and continue to be a number of cases involving the constitutionality of so-called legislative veto devices in which the Executive has successfully challenged the constitutionality of legislative vetoes. Representative of this class of cases is, of course, INS v. Chadha, 103 S. Ct. 2764 (1983). As is true of the other cases discussed above, the Court has never suggested that there has been any impropriety in the Executive's conduct. 6/

5/ The Supreme Court decided that the statute in question was unconstitutional as a bill of attainder, a constitutional defect not necessarily suggesting a clash between legislative and executive power. Because the statute was directed at subordinates of the President, however, the case took on that characteristic both as regards the bill of attainder issue and, more specifically, with respect to the argument advanced by the employees and joined in by the Solicitor General that the statute at issue constituted an unconstitutional attempt by Congress to exercise the power to remove Executive Branch employees. See United States v. Lovett, 328 U.S. 303 (1946), Br. for United States at 10-56. Thus, Lovett falls squarely within the second category of cases as representing a clash between legislative and executive power.

6/ On July 30, 1980 Attorney General Civiletti transmitted to Chairman Baucus of the Subcommittee on Limitations of Contracted and Delegated Authority of the Senate Committee on the Judiciary a detailed explanation of this Department's policy with regard to defending federal statutes against constitutional challenges. It is perhaps noteworthy that in his letter to the Attorney General, as observed by the Attorney General at p. 2 of his response, Chairman Baucus had excluded from his broad inquiry "those situations where the Acts themselves touch on constitutional separation of powers between Executive and Legislative Branches . . . ." Given the otherwise broad nature of Chairman Baucus' inquiry and the pendency of Chadha in the Ninth Circuit, it would be reasonable to infer from his request an absence of concern as regards the Attorney General's challenge to the constitutionality of such devices.

The general policy outlined above was rearticulated during this Administration in your letter of April 6, 1981, to Chairman Thurmond and Senator Biden of the Senate Committee on the Judiciary in response to their request that the Department reconsider its decision not to defend a provision of the Federal Communications Act being challenged in a case brought by the League of Women Voters in 1979. See note 2 supra. That letter stated your view that the Executive "appropriately refuses to to defend an Act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid."

As indicated by our discussion of the merits of the constitutionality of §§ 106 and 121 of the Bankruptcy Amendments and Federal Judgeship Act of 1984 in part II above, the practical and legal effect of those provisions is to grant Congress the power to appoint officers of the United States. It is true that under the 1984 Act the power to make fresh appointments under that act is vested in the courts rather than in the President or a head of a department. It is also true that bankruptcy referees whose terms were purportedly retroactively extended by the 1984 Act were themselves appointed by the district courts both prior to 1978 and under the transition provision of the 1978 Act. Thus, an agrument could be made that the action of Congress in this situation does not infringe so directly on the power of the President as to place this particular enactment in the category of statutes thought to invade the prerogatives of the Executive. That argument is, however, untenable.

There can be no doubt that in the 1984 Act Congress could have placed the appointment power in the President, with or without the advice and consent of the Senate, the Heads of Departments, or the Courts pursuant to the Appointments Clause. If it were established that Congress could indeed make appointments in the manner they are made by the 1984 Act, there surely would be no principled basis upon which that power could be limited under the Appointments Clause to the appointment of officers whose appointments were generally assigned to the courts -- as opposed to the President or Heads of Departments. Thus, the principle of constitutional law involved squarely implicates the constitutional prerogatives of the Executive and warrants a challenge to the 1984 Act on this point by the Executive under

the precedent discussed with respect to the second category of situations in which the Executive has historically refrained from defending the constitutionality of an Act of Congress. The inescapable fact is that if Congress may, as Congress would have it, retroactively extend the term of an officer of the United States whose term has expired, Congress presumptively could do so as regards any officer, thereby depriving the President or his subordinates of the important control they exercise through the appointment process. 7/

We would add that this is not a case in in which the Department's refusal to enforce or defend might produce a nullification of the Act of Congress which no private person could prevent nor Congress effectively challenge. Although it is not necessary to conclude that the obligation to defend the statute would be different in the absence of a lawsuit previously filed by private persons, given the fact that such a lawsuit has been filed, and that the courts will determine the constitutional issue, we believe that the judicial -- in fact, the constitutional -- system will be better served by early rather than delayed resolution of the issue.

Therefore, we believe that this is a case in which the Department, amply supported by prior precedent, should depart from its usual practice of defending the constitutionality of federal statutes. We recommend that an appropriate letter be sent to the President of the Senate and the Speaker of the House to inform them of the Department's decision to defend the constitutionality of the 1984 Act as a whole, but to

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7/ Indeed, if Congress could retroactively extend the terms of officers whose terms have expired, Congress could arguably not only arrogate to itself, as it does here, the power to appoint, but could exercise that power even in the context of an office's having been filled in the interim by the President pursuant to his authority to make recess appointments; on such a hypothetical set of facts, Congress would not only have purported to appoint one officer but would, in doing so, have purported to remove another.

refrain from defending the constitutionality of the Grandfather Provisions and will, if you concur, prepare such a letter with participation of the Civil Division.

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cc: Carol E. Dinkins
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