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HOUSE OF REPRESENTATIVES
REPORT
No. 95-595

BANKRUPTCY LAW REVISION

REPORT

OF THE

COMMITTEE ON THE JUDICIARY

together with

SEPARATE, SUPPLEMENTAL, AND SEPARATE ADDITIONAL VIEWS

[Including Cost Estimate of the Congressional Budget Office]

[To accompany H.R. 8200]

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money involved in bankruptcy cases, litigants should not be required to submit to second-rate justice.[104]

An independent bankruptcy court would undoubtedly attract more qualified, experienced people to the job.[105] That change would begin to legitimize the bankruptcy court and the decisions of the bankruptcy judges in the eyes of those who only occasionally practice before the bankruptcy court, as well as in the eyes of the members of the Judicial Conference and those who regularly come in contact with the court.

The Department of Justice Committee on Revision of the Federal Judicial System (chaired by Solicitor General Robert H. Bork), in words equally applicable to the bankruptcy process, has described the crisis aptly:[106]

> Despite this rising overload, we are asking the judges of the Federal courts to perform their duties as effectively as their predecessors with essentially the same structure and essentially the same tools. They are performing wonders in coping with the rising torrent of litigation, but we cannot expect them to do so forever without assistance.

C. A SPECIALIZED COURT

The concept of a bankruptcy court that is separate and independent from the district court has been nearly universally supported. The Commission on the Bankruptcy Laws proposed it.[107] The National Bankruptcy Conference testified in support of the proposition.[108] The Commercial Law League of America and the American Bankers Association urged the Subcommittee to create an independent court system.[109] Finally, the American Bar Association, at its 1976 meeting and the Association of the Bar of the City of New York have called for the creation of an independent bankruptcy court.

During 35 days of hearings in the House and 20 days in the Senate not one witness reached the conclusion that the present bankruptcy court system should be retained.[110] The only opposition to the separation of the bankruptcy courts from the district courts has come from the Judicial Conference.[111] Its opposition has been belated at best

[104] Commission Minutes 8.

[105] At a Commission meeting, given the alternative, Chairman Marsh "expressed concern relative to the problem of securing able judges to fill the proposed judgeships if they were going to be classified as second-class members of the judiciary." Commission Minutes 4.

[106] Department of Justice Committee on Revision of the Federal Judicial System, The Needs of the Federal Courts 2 (1977) [hereinafter cited as Bork Comm. Rep.].

[107] COMMISSION REPORT, pt. I, 85–96.

[108] *Hearings*, pt. 1, at 599. The National Bankruptcy Conference (NBC) "is a nonprofit unincorporated organization composed of representatives of different groups who are interested in the administration of bankruptcy law, including bankruptcy judges, full-time professors, and practicing attorneys who specialize in this area. There are about 55 full members of the Conference and 15 associate members, and all sections of the country are represented among the membership." *Hearings*, pt. 3, at 1835. The NBC was instrumental in the enactment of the last major revision of the Bankruptcy Act, the Chandler Act, Act of June 22, 1938, c. 575, 52 Stat. 840; *Hearings*, supp. app. pt. 1, at 675–76, 874–1116.

[109] *Id.*, pt. 3, at 1538, 1748.

[110] The Brookings Institute recommended that the entire bankruptcy process, except for certain corporate reorganizations, be removed from the court system entirely, and transferred to an administrative agency. D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 196–218 (1971); *Hearings*, pt. 1, at 364–67. Professor Subrin recommended empirical analysis, though the thrust of the proposal was more toward the administrative aspects of bankruptcy, *Hearings*, pt. 2, at 1184–86.

[111] Resolution of Judicial Conference, Mar. 10, 1977. The resolution indicates, however, that the Conference may have proceeded on the assumption that the bill would "convert bankruptcy courts into separate . . . Article III courts, . . . giving article III tenure to referees in bankruptcy," *id.* As noted, the bill establishes new courts, unrelated to the present courts, and retires all current bankruptcy judges, p. 6 *supra*. Various segments of the Judicial Conference have joined the main body in disagreeing with the new court system, such as the Sixth Circuit Judicial Conference, the Seventh Circuit Judicial Conference and the Conference of Chief Judges of the Metropolitan United States District Courts.

Though there have been pending for over three years before the Bankruptcy Committee of the Judicial Conference two proposals that would have created independent bankruptcy courts, and though the Judicial Conference was requested to testify on those bills by each House of Congress, the Judicial Conference took no action until two months after the introduction of H.R. 6 on January 4, 1977.[112]

The objection of the Judicial Conference is that "the creation of a separate court to provide services in the limited field of bankruptcy, as a specialized court, is, in the opinion of this Committee, contrary to all trends of modern judicial administration. The creation of a separate court structure for bankruptcy cases would decrease the flexibility of the administration and the overall efficiency of the Federal courts." [113]

That statement bears examination. There is no clear trend in modern judicial administration away from the creation of specialized courts. To the contrary, Congress has, on three separate occasions in the past 25 years, confirmed the article III status of three specialized courts.[114] In addition, Congress constituted the United States Tax Court, a highly specialized forum, as an independent court only 8 years ago.[115] Any trend away from specialization in this country would be at odds with other systems of jurisprudence. European legal systems have long relied on specialized courts in order to expedite business.[116]

In bankruptcy, specialization is necessary to the functioning of the system. New bankruptcy judges, unfamiliar with bankruptcy adminis-

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[112] Director of the Administrative Office of the United States Courts, Annual Report, 1974, at 163; *id.*, 1975, at 157; Letter from Hon. Don Edwards, Chairman, Subcomm. on Civil and Constitutional Rights, to Berkeley Wright, Chief, Bankruptcy Division, Administrative Office of the United States Courts, Apr. 15, 1975; Letter from Sen. James O. Eastland, Chairman, Senate Comm. on the Judiciary, to Director, Administrative Office of the United States Courts, Oct. 25, 1973; Letter from William E. Foley, Deputy Director, Administrative Office of the United States Courts, to Sen. James O. Eastland, Chairman, Senate Comm. on the Judiciary, Nov. 1, 1973; *Senate Hearings on S. 235 and S. 236, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 906–08 (1975); History of Judicial Conference Involvement in Bankruptcy Revision Legislation, Memorandum prepared by the Staff of the Subcomm. on Civil and Constitutional Rights.

In response to questioning at the Senate hearings, *supra*, Berkeley Wright wrote to William Westphal, Chief Counsel of the Senate Subcomm. on Improvements in Judicial Machinery, two days after the hearing, on Nov. 13, 1975:

> As the two bills provide widely divergent solutions to the problems of the system, [Judge Weinfeld] felt that the Bankruptcy Committee and the Judicial Conference should give their consideration only after a single bill is prepared in the Senate Judiciary Subcommittee incorporating the best features of S. 236 and S. 235. When the bill is prepared, the Bankruptcy Committee will meet promptly to provide its recommendations to the Conference.

General Rowland Kirks, Director of the Administrative Office of the United States Courts, has recently stated that the Committee on Bankruptcy Administration "did not feel that it could then devote the time necessary to review" the bills pending in the 93d and 94th Congresses for nearly 3 years. Letter from Rowland Kirks to Hon. Don Edwards, chairman, Subcommittee on Civil and Constitutional Rights, May 18, 1977, at 1. However, upon the introduction of H.R. 6, the Committee on Bankruptcy Administration recommended, within 6 weeks of introduction, and the Judicial Conference adopted, within 9 weeks of introduction, a resolution disapproving H.R. 6. Further, the Judicial Conference has appointed a Special Committee on H.R. 6, which organized on Apr. 28, 1977, and will hold its final meeting on June 2, 1977, to consider the bill. The speed with which the Conference has been able to consider the bill has been in marked contrast to its pre-*Judiciary*, 94th Cong., 1st Sess. 906–08 (1975); History of Judicial Conference Involvement Bankruptcy Laws (2 years) or of the Subcommittees of Congress considering the legislation (nearly 4 years).

[113] Special Committee of the Judicial Conference to Review H.R. 6, Preliminary Report 1. Though not stated in the memorandum, it is not unlikely that the root of the Judicial Conference's opposition to the creation of an independent court is the same as the reason the Department of Justice opposes a grant of tenure to the judges of an independent court, pp. 26–27 *infra*. *See* Klee, Memorandum to Files Concerning Conversations on H.R. 6, May 13, 1977.

[114] Court of Claims, Act of July 28, 1953, c. 253, § 1, 67 Stat. 226; Court of Customs and Patent Appeals, Act of Aug. 25, 1958, Pub. L. 85–755, § 1, 72 Stat. 848; Customs Court, Act of July 14, 1956, c. 589, § 1, 70 Stat. 532.

[115] Act of Dec. 30, 1969, Pub. L. 91–172, § 951, 83 Stat. 730. *See* Dubroff, *The United States Tax Court: An Historical Analysis*, 41 ALBANY L. REV. 1 (1971).

[116] *See* Bork Comm. Rep. 10.

tration, take longer to decide matters and are less able to move cases, especially major business reorganizations, at the pace at which they must proceed in order to succeed.[116a] In large districts, where there is adequate judicial manpower, new bankruptcy judges are generally assigned simple cases until they become familiar with bankruptcy procedure.

The reason that the bankruptcy court system works as well as it does today is because the trial judges are specialists, experienced in handling the problems that arise. They are experienced because they handle exclusively bankruptcy cases. The statutory requirement of automatic reference of bankruptcy cases was enacted because the Judicial Conference requested Congress to recognize that the bankruptcy court is specialized, and that a generalist court is unable to make the bankruptcy system work as well as it does.[117]

The result is a specialized bankruptcy court that is in fact separate from the district courts for most purposes. A grant of statutory independence to bankruptcy courts would not decrease "flexibility of the administration * * * of the federal courts." Bankruptcy judges are not available now to hear and determine any matter that district courts may, but choose not to, hear. Bankruptcy judges are statutorily granted power only to decide matters that arise in bankruptcy cases.[118]

There has been a persistent objection to the creation of specialized courts.[119] The objection is difficult to understand, especially coming as it does from the Judicial Conference, which has among its membership judges from two of the three Article III specialized courts.[120] The trend in Congress has apparently been to confirm Article III status on specialized courts,[121] and to grant it where it did not previously exist, for the Tax Court.[122] Only the efforts of the Judicial Conference (plus some internecine haggling between the Departments of Justice and Treasury) prevented the conferral of Article III status on the Tax Court in 1969.[123] Instead, the Congress created a court "under Article I of the Constitution",[124] certainly an anomaly where matters of national concern are involved.[125]

Some of the opposition to specialized Article III courts may derive from a desire not to "fragment" the judicial power of the United States. Certainly the creation of additional Federal courts does not dilute the power of existing bodies. The growth of the Federal judiciary is ample

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[116a] "[J]udges of courts of specialized jurisdiction generally require 4 to 6 years experience on the bench before they can begin to approach maximum effectiveness." Letter from Hon. Conrad Cyr, President, National Conference of Bankruptcy Judges, to Hon. Don Edwards, Chairman, Subcomm. on Civil and Constitutional Rights, May 11, 1977, at 1.

[117] *See* p. 9 *supra*.

[118] Sec. 38, 11 U.S.C. 66 (1970).

[119] Judicial Conference Preliminary Report, *supra* note 113, at 1; Letter from William E. Foley, Deputy Director, Administrative Office of the United States Courts, to Hon. Emanuel Celler, Chairman, House Committee on the Judiciary, March 4, 1968; Dubroff *supra* note 115, at 48. *See* Letter from Chief Judge W. E. Drennen, United States Tax Court, to Chief Justice Earl Warren, February 28, 1969, at 2.

[120] 28 U.S.C. 331 (1970).

[121] *See* Dubroff, *supra* note 115; Acts cited, *supra* note 114; 93 CONG. REC. 8387 (1947) (Remarks of Mr. Robison).

[122] *See* Dubroff, *supra* note 115.

[123] *Id.* at 40–50.

[124] INT. REV. CODE § 7441.

[125] *See* Palmore v. United States, 411 U.S. 389, 407–08 (1973); Plumb, *The Tax Recommendations of The Commission on The Bankruptcy Laws: Tax Procedures*, 88 HARV. L. REV. 1360, 1468–69 (1975); Dubroff, *Federal Taxation*, 1973–74 ANN. SURVEY OF AMER. L. 265, 272–85 (1974).

testimony. The argument may be directed more toward fragmentation of Federal jurisdiction. That argument would favor the revesting of the district courts with the jurisdiction to hear and determine bankruptcy cases and matters, which is an unworkable solution.[126] Moreover, the suggestion fails to recognize the existence of three specialized Federal courts.

During the past 30 years, the number of bankruptcy cases filed annually has increased steadily from 10,000 to over 254,000.[127] Though there have been occasional minor dips in the growth of the number of filings, the clear trend is that bankruptcy matters are a permanent part of the judicial picture. A specialized court would not be in danger of having inadequate business. The desirability for flexibility in a court system derives from a need to adjust to widely varying caseloads. That factor is not present in bankruptcy.[128] There will be more than adequate work to justify a separate specialized bankruptcy court, just as the present caseload is adequate to justify nearly 200 full-time bankruptcy judges handling nothing but bankruptcy cases.

Thus, the question is not whether to create a separate specialized court, but whether to give independence to an existing separate specialized court which is unnecessarily tied to a generalized court that is little concerned with bankruptcy matters:[129]

> There has long since been a de facto separation of the bankruptcy courts from the district courts. The overload of the latter with nonbankruptcy criminal and civil cases has been repeatedly shown and emphasized by many studies and requires no detailed discussion here. The point is that while the district courts have been preoccupied with a rapidly increasing volume of nonbankruptcy litigation the bankruptcy courts have kept abreast of an equally rising tide of bankruptcies and the time has come to provide the latter authority and position commensurate with their responsibilities.

The answer clearly is yes.

III. Status of Proposed Bankruptcy Court

In establishing an independent bankruptcy court, Congress must determine the constitutional status conferred upon the court, and the jurisdiction and powers of the court. Specifically, Congress must determine whether the judges of the court will hold office for a term of years or "during good Behaviour."[130] H.R. 8200 proposes the establishment of Article III courts, with the proper constitutional safeguards, including the grant of tenure "during good Behaviour."[131] There are

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[126] Pp. 8–9 *supra*.

[127] *Hearings*, pt. 1, at 37; Administrative Office of the United States Courts, Tables of Bankruptcy Statistics for the Fiscal Year Ending June 30, 1975. The increase has been greater in nonbusiness cases, but the increase in business filings, in which the bulk of judicial time is consumed, *cf.* Commission Report, pt. I, at 86–87, has been steady and significant.

[128] To the extent that there is variation in the caseload, H.R. 8200 provides for the utilization of bankruptcy judges in other courts, p. 17 *infra*.

[129] *Hearings*, pt. 1, at 513. *Accord*, *id.* at 538.

[130] U.S. Const. art. III, § 1.

both policy considerations and constitutional issues surrounding the question of tenure of the new bankruptcy bench.[132]

A. POLICY CONSIDERATIONS

As noted above, a principal reason for the establishment of an independent court is to attract highly qualified judges. Life-tenure will contribute toward that goal. An attorney with a successful practice would be less likely to seek appointment to a fifteen year term, when the likelihood of reappointment at the expiration of the term is small. If the attorney's age is such that he would not be ready to retire at the end of the term, then he is unlikely to accept such an appointment.[133] There may be means to remedy the problem, such as senior status.[134] If that were the only problem, policy would not favor life tenure. Other reasons exist.[135]

A life-tenured judgeship is a more prestigious position than a term judgeship.[136] The Department of Justice recently observed that the more prestigious the position, the better the judges that will be attracted. It noted [137]

> We will never pay the incomes to judges that they could earn in other pursuits and we must not create conditions that require us to settle for second best in the federal courts.

Bankruptcy litigants are entitled to no less qualified judges than other federal litigants.[138]

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[132] H.R. 8200, § 201 (proposed 28 U.S.C. 153(a)). The Commission on the Bankruptcy Laws of the United States proposed a court whose judges were appointed for fifteen year terms, COMMISSION REPORT, pt. I, at 95; pt. II, at 15–16; H.R. 31, 94th Cong., 1st Sess. § 1 (proposed 11 U.S.C. 2–102) (1974). The National Bankruptcy Conference favors tenured judges, Resolution, Jan. 28, 1977. The Judicial Conference, because it opposes creation of a separate court, did not address the issue of the tenure of the judges of a new court. To do so, in light of the serious constitutional issues involved, pp. 18–33 *infra*, may constitute an advisory opinion by the judiciary, something the judiciary has refused to do since its inception as in violation of the "case or controversy" requirement of the Constitution, art. III, § 2; Letter from Chief Justice John Jay and Associate Justices of the Supreme Court to Secretary of State Thomas Jefferson, July 20, 1792, reprinted in BATOR, MISHKIN, SHAPIRO & WECHSLER, HART AND WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 64–66 (2d ed. 1973) [hereinafter cited as BATOR et al.].

[133] Other constitutional issues that relate to the status of the court, such as protection against diminution of compensation, and the vesting of the court with nonjudicial duties and powers, COMMISSION REPORT, pt. I, at 97; *see* National Mutual Ins. Co. I. Tidewater Transfer Co., 337 U.S. 582 (1949); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), have not presented any controversy, and are not considered here.

[134] *Cf.* COMMISSION REPORT, pt. I, at 95.

[135] *See* INT. REV. CODE § 7447(c); H.R. 31, 94th Cong., 1st Sess. § 1 (proposed 11 U.S.C. 2–103(c)) (1974). A provision for retirement on full salary after a fifteen-year term, and for recall to service, is, in practical terms, little different from the provisions governing retirement of tenured judges, 28 U.S.C. 294, 371–372 (1970), and in effect makes the judges life-time appointees; *see* Dubroff, *supra* note 115, at 48, 51, n. 335; Commission Minutes 17. In constitutional terms, the difference is significant; *see* Goldberg, *Is the Tax Court Constitutional?*, 35 MISS. L. REV. 382 (1964). Thus, little is gained by departure from the constitutional norm.

[136] The problem would be magnified at the beginning of the operation of the system. The Commission proposed a provision for staggering the terms of the initial appointees to the court. The judges would be divided into three groups, the terms of the first to expire after five years, the terms of the second after ten years, H.R. 31, 94th Cong., 1st Sess. § 1 (proposed 11 U.S.C. 2–102(c)) (1974). The judges under the Commission bill were to be appointed by the President with the advice and consent of the Senate, *id.* (proposed 11 U.S.C. 2–102(a)). Given the vagaries of Senatorial courtesy, a judge that had been out of the political process for five years when his term expired would take a severe risk of non-reappointment. The retirement benefits he would have accumulated after five years would be unlikely to compensate for the difficulty of attempting to return to private practice or to stay on in senior status; *see* COMMISSION REPORT, pt. I, at 95. That provision may discourage many potential new judges.

[137] Dubroff, *supra* note 115, at 49. *See* Commission Minutes 44. *Cf. id.* at 17 ("Judge Weinfeld reminded the Commissioners that district court judges are a rare breed.").

[138] Bork Comm. Rep. 7.

[139] Commission Minutes 8; note 78 *supra*.

The creation of an Article III tribunal will add to the flexibility of the judicial system, a goal sought by the Judicial Conference.[139] Bankruptcy judges with Article III status will be able to sit by designation and assignment in other federal courts.[140] District and circuit judges will also be able to sit on bankruptcy courts.[141] Personnel may be used where needed to relieve local strains on the bankruptcy court system or on the district or circuit court systems. This is in marked contrast to the current system under which bankruptcy judges may not be used other than on bankruptcy matters.[142]

It also provides a substantial benefit over a nontenured judiciary, because nontenured judges would not be available to sit on tenured benches, and tenured judges would not be able to sit on the bankruptcy court.[143] The proposed Article III bankruptcy court is the most expeditious for the handling of the nation's judicial business.[144]

Finally, the increase in the stature of the bench caused by life-tenure would add much to the credibility now accorded present bankruptcy judges and their decisions.[145] The work of the bankruptcy courts, and the nature of bankruptcy, in which all parties lose something, must be above reproach if the system is to operate satisfactorily to all concerned.

B. CONSTITUTIONAL CONSIDERATIONS

1. Constitutional principles

Articles III, section 1, of the Constitution prescribes the norm for the establishment of a body that exercises "the judicial Power of the United States":[146]

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

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[139] Judicial Conference Preliminary Report, *supra* note 113, at 1.
[140] H.R. 7330, § 205 (proposed amendments to 28 U.S.C. 293).
[141] H.R. 7330, §§ 202–04, 206 (proposed amendments to 28 U.S.C. 291, 292, 294).
[142] *See* secs. 35, 38, 11 U.S.C. 63, 66 (1970).
[143] Glidden Co. v. Zdanok, 370 U.S. 530 (1962).
[144] The Conference of Chief Judges of the Metropolitan United States District Courts suggested the possibility of combining the office of bankruptcy judge and magistrate to add flexibility to the system, Resolution, adopted April 18, 1977. Without addressing the numerous reasons that militate against such a system, such as the need for specialization, the suggestion would not provide as adequate a solution to the need for flexibility as does H.R. 8200, because it could not provide for inter-district or inter-circuit designation and assignment. Moreover, it could not provide for designation and assignment to or from the courts of appeals; *see* Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

Life-tenure for the judges of the new bankruptcy court would not create a danger of a permanent judiciary without adequate judicial work. As noted above, pp. 15–16 *supra*, the bankruptcy caseload has been steadily increasing for over three decades. The prospect of a severe decline in the caseload is small, even in relatively prosperous times, because the nature of the economy is such that many economic units, both business and household, will fail financially, *see* COMMISSION REPORT, pt. I, 33–59. Even if there is a severe decline, a court with judges with 15-year terms would do little to aid reduction of the size of the judiciary. *See* note 134 *supra*. Tenured judges are now able to retire on full pay after fifteen years of service and the attainment of age 65, 28 U.S.C. 371 (1970). The Commission's proposal would have provided the same for the nontenured bankruptcy judges, COMMISSION REPORT, pt. II, at 17–20; H.R. 31, 94th Cong., 1st Sess. § 1 (proposed 11 U.S.C. 2–103) (1974). The fifteen-year cycle for reduction in the size of the court would be the same in either event, and the cost to the Government the same.

[145] *Cf.* COMMISSION REPORT, pt. I, at 92–93.
[146] U.S. CONST. art. III, § 1.

The Supreme Court has made clear "that the requirements of Article III . . . are applicable where laws of national applicability and affairs of national concern are at stake. . . ." [147] The Court went on to note, however, that those requirements "must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." [148]

Professor Herbert Wechsler, long a student of the Federal court system, commented: [149]

> That principle appears to me to place the proper values in the balance. The commitment of Article III, § 1 to permanent and tenured courts must be respected generally in creating jurisdiction to enforce laws of national applicability but the mandate may be relaxed by interpretation in light of "particularized needs" perceived by Congress in special areas of legislative competence to warrant such "distinctive treatment."

Professor Paul Mishkin, Professor Wechsler's co-author in the Second Edition of *Hart & Wechsler's The Federal Courts and the Federal System*, agrees: [150]

> If an exception to the life-tenure norm of Article III is to be valid, it cannot rest simply upon the fact that Article I specifically authorizes Congress to enact bankruptcy laws. If that norm is to be departed from, the departure should be justified by a strong showing of special need.

Professors Wechsler and Mishkin appear to read the phrase "specialized areas" in *Palmore* as referring to legislative areas, rather than geographical areas. While the phrase is not free from ambiguity, the context in which it appears, and the case in which it was used, concerned laws of local application only: criminal laws that applied only to the District of Columbia and were without national applicability. [151]

The phrase "plenary grants of power" sheds additional light on the meaning of the passage. In most other instances where the Congress has created and the Court has upheld nontenured judgeships,

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[147] Palmore v. United States, 411 U.S. 389, 407–08 (1973).

[148] *Id.* at 408.

[149] Letter from Professor Herbert Wechsler to Chairman Peter Rodino, June 2, 1976, in *Hearings*, pt. 4, at 2704, 2705 [hereinafter cited as Wechsler]. This letter, and the other letters referred to in this section, are reprinted in app. II, p. 49 *infra*.

[150] Letter from Professor Paul Mishkin to Chairman Peter Rodino, June 22, 1976, in *Hearings*, pt. 4, at 2696, 2697 [hereinafter cited as Mishkin].

[151] The full paragraph in which the phrase appears, 411 U.S. at 407–08, is as follows:

> It is apparent that neither this Court nor Congress has read the Constitution as requiring every Federal question arising under the Federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction. Rather, both Congress and this Court have recognized that State courts are appropriate forums in which Federal questions and Federal crimes may at times be tried; and that the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment. Here, Congress reorganized the court system in the District of Columbia and established one set of courts in the District with Art. III characteristics and devoted to matters of national concern. It also created a wholly separate court system designed primarily to concern itself with local law and to serve as a local court system for a large metropolitan area.

the court in question had jurisdiction over a geographical area over which Congress had plenary jurisdiction. In the leading case on nontenured judges, *American Ins. Co. v. Canter*,[152] Chief Justice Marshall upheld the exercise of admiralty jurisdiction by a territorial court in the then territory of Florida:[153]

> These courts, then, are not constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. . . . The jurisdiction with which they are invested, is not part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.

However, *American Ins. Co.* is not support for a Congressional power to use each of its powers to justify a separate court, in which judicial power of the United States may be vested:[154]

> Although admiralty jurisdiction can be exercised in the states, in those courts only which are established in pursuance of the third article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government.

Congress is not bound by the constitutional constraints of federalism in legislating for the territories. Thus, Marshall did not hold that because Congress created the territorial courts under a specifically granted power, it could vest them with Federal judicial power. He held directly to the contrary, finding the grant of judicial power to derive from Congress' plenary power, both State and Federal, over territories of United States. Later cases have continued to treat Congress' power over the territories as different from its Federal powers, enumerated in Article I, § 8,[155] and exercised in the States by "laws of national applicability" over "affairs of national concern."[156]

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[152] 26 U.S. (1 Pet.) 511 (1828).

[153] *Id.* at 546.

[154] *Id.*

[155] The exception is the grant to Congress in Article I, § 8, cl. 17, of "exclusive legislation" over the District of Columbia, which the Court has likened more to Congress' plenary powers over the territories than its enumerated Federal powers. *See* Palmore v. United States, 411 U.S. 389, 407–08 (1973). Other powers used to justify nontenured courts, such as the tax power, as treated differently for different reasons. *See* Ex Parte Bakelite Corp., 279 U.S. 438 (1929); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856); pp. 23–25 *infra*.

[156] In *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937), the Court stated:

> The national government may do for one of its dependencies [the Philippine Islands] whatever a state might do for itself or one of its political subdivisions, since over such a dependency the nation possesses the sovereign powers of a general government plus the powers of a local or a state government in all cases where legislation is possible.

In *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 619 (1838), the Court applied the same principle to Congressional power over the District of Columbia:

> There is in this district [of Columbia], no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice.

See Glidden Co. v. Zdanok, 370 U.S. 350, 544–45 (Plurality opinion of Justice Harlan); O'Donoghue v. United States, 289 U.S. 516, 535–39 (1933); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828); Plumb, *supra* note 125, at 1462–63. *See also* Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894 (1930).

In light of the history of the special treatment of the territories and the District, Justice Harlan, in *Glidden Co. v. Zdanok* described the scope of the Marshall opinion:[157]

> All the Chief Justice meant, and what the case has ever after been taken to establish, is that in the territories cases and controversies falling within the enumeration of Article III [those that a federal court might hear within the states] may be heard and decided in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies.
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> Marshall . . . recognized a greater flexibility in Congress to deal with problems arising outside the normal context of a federal system.

However, at the same time that Justice Harlan recognized Congress' plenary power over the territories, and the presumption that Congress may give the judges of territorial courts less than life tenure, he held otherwise where Congress acted under one of its specific powers:

> [T]he presumption should be reversed when Congress creates courts the continuing exercise of whose jurisdiction is unembarrassed by such practical difficulties. . . . [citation omitted] the Court of Claims and the Court of Customs and Patent Appeals were created to carry into effect power enjoyed by the National Government over subject matter—roughly, payment of debts and collection of customs revenue—and not over localities.

Justice Harlan did not resolve whether "that distinction deprives *American Insurance Co.* v. *Canter* of controlling force."[158] But that he raised the issue suggests that the grant of a specific power to Congress is a weak justification for avoiding the requirements of Article III,[159] and that *Palmore* may properly be read as confined to Congressional power in special geographical areas.[160]

Professor Krattenmaker agrees with this limitation on the scope of *Palmore*:[161]

> The territories and the District of Columbia have been treated specially because they are special. In those cases Congress is not legislating (and its judges are not judging) against a background of state law and in an area where the Constitution was designed to limit federal power. Instead,

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[157] 370 U.S. 530, 544–45. 547 (1962) (footnote omitted).

[158] *Id.* at 548.

[159] Mishkin 2697. *But see* Letter from Dean Erwin Griswold to Chairman Peter Rodino, May 24, 1976, in *Hearings*, pt. 4, at 2685 [hereinafter cited as Griswold]. *Cf.* Letter from Professor David Shapiro to Chairman Peter Rodino, May 17, 1976, in *Hearings*, pt. 4, at 2701 [hereinafter cited as Shapiro].

[160] *See* Glidden Co. v. Zdanok, 370 U.S. at 548, 581, where Justice Harlan entertained no doubt that "[t]he restraints of federalism are, of course, removed from the powers exercisable by Congress within the District." *Cf.* Plumb, *supra* note 125, at 1462.

[161] Letter from Prof. Thomas G. Krattenmaker to Chairman Peter Rodino, June 30, 1976, in *Hearings*, pt. 4, at 2688, 2690 [hereinafter cited as Krattenmaker]. *Accord*, Plumb, *supra* note 125, at 1462. *See* Wechsler 2704; Letter from Professor Jo Desha Lucas to Chairman Peter Rodino, June 23, 1976, in *Hearings*, pt. 4, at 2691, 2694 [hereinafter cited as Lucas].

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in both situations, Congressional powers are more analogous to those of state legislatures and there is less reason to read into Article III a requirement that all federal laws passed pursuant to such powers be committed for their application only to judges with tenure.

In conclusion,[162]

> [W]hen Congress decides to commit federal issues to a tribunal for judicial resolution, it must ordinarily tenure that tribunal. Any other reading of [Article III, section 1] simply reduces it to (1) a guarantee of tenure for Supreme Court justices and (2) a suggestion that Congress consider tenuring judges when any other federal court is established. . . . [T]hese views seem to me the clearest implication from the text of the Constitution. I also believe this is what Article III contemplated and that the issue of judicial independence was an important one to those who drafted the Constitution. . . . Article III, § 1 . . . is not a mere exhortation to Congress.

2. Bases for a nontenured bankruptcy court

Nevertheless, the Supreme Court has recognized the power of Congress to create nontenured tribunals in certain circumstances.[163] However, given the norm of a tenured judiciary, any attempt to create a court with nontenured judges should be approached with great care.[164] Even if *Palmore*'s statement concerning "specialized areas" is read to refer to substantive areas, the presumption remains in favor of a tenured judiciary, absent a sufficient justification for a departure from that norm. However, none of the justifications traditionally advanced to support a nontenured bench provide adequate support for the establishment of a nontenured bankruptcy tribunal.[165]

One rationale that has been used to support the grant of judicial power, albeit not always Federal judicial power, to nontenured judges has been the need of a body to exercise jurisdiction for a limited period,[166] such as in the territories, where the change of status of the territory to a State would change the nature of the judicial power

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[162] Krattenmaker 2690.

[163] Palmore v. United States, 411 U.S. 389 (1973); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Williams v. United States, 289 U.S. 553 (1933); Ex Parte Bakelite Corp. 279 U.S. 438 (1929); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828). *See* Burns, Stix Friedman & Co., Inc. 57 T.C 392, 395 (1971); Katz, *Legislative Courts*, 43 HARV. L. REV. 894 (1931).

[164] Congress has an independent obligation to determine the constitutionality of legislation, especially because the courts will give great weight to a Congressional determination. Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975). Thus, the following discussion will not consider only what the Supreme Court will do, but also what an independent examination of relevant constitutional principles shows.

[165] *But see* Shapiro 2702. *Cf.* Letter from Prof. Terrance Sandalow to Chairman Peter Rodino, July 15, 1976, in *Hearings*, pt. 4, at 2697, 2700 [hereinafter cited as Sandalow]. The main purpose of the tenure and salary provisions in Article III was the creation of an independent judiciary. Palmore v. United States, 411 U.S. 389, 409 (1973) (Douglas, J., dissenting); THE FEDERALIST No. 78 (A. Hamilton); Krattenmaker 2690. Political opposition to the creation of tenured judgeships may be based on a desire to avoid the constitutional design of total independence, *see* Dubroff, *supra* note 115. Such a reason could hardly provide adequate justification for the creation of a nontenured tribunal.

[166] The authority to establish courts for a limited purpose, which would exist for a limited time, has been recognized with respect to private land claims, United States v. Coe, 155 U.S. 76 (1894); Ex Parte Joins, 191 U.S. 93 (1903); and consular courts, granted by concession from foreign power; In re Ross, 140 U.S. 453 (1891). *See* Lucas 2694; Wechsler 2704.

exercised by the court.[167] While sitting in a territory, the court could exercise general judicial power, much as a State court does. After Statehood, a court established by Congress within the State may only exercise federal judicial power—that defined in Article III, section 2.[168] That rationale would not support the establishment of nontenured bankruptcy courts, because the bankruptcy jurisdiction proposed is general and permanent. In view of the facts that the present Bankruptcy Act has been law for nearly 80 years, and that the proposed legislation is of an equally permanent character,[169] the argument that the bankruptcy court established was for a transitory purpose would be difficult to sustain.[170]

Other rationales have been suggested to support nontenured status for federal courts, such as efficiency or expertise. In *Palmore*, one reason advanced for the creation of the District of Columbia court system separate from the district court of the District of Columbia was the need for speed and efficiency. In that circumstance, however, the need derived from the burden on the United States district court for the District of Columbia generated by its jurisdiction over both local matters and over laws of general national applicability.[171] When Congress established the District of Columbia courts, it noted the importance of creating a court that would handle exclusively local matters, expediting their consideration by removing them from the overburdened district court.

Upon examination, however, the efficiency rationale breaks down as support for depriving federal judges of tenure. As the Supreme Court has frequently noted, Congress' jurisdiction over the District is plenary, and not bound by the constraints of federalism. Under that proposition, Congress, without any pressing need for efficiency in the handling of local cases, could have established a nontenured tribunal to hear local matters. The efficiency rationale in *Palmore* went more to the reason for the separation of the local courts from the national court rather than to the legitimacy of establishing the local courts with nontenured judges.[172] Any other explanation would rely on the argument that nontenured judges are able to adjudicate and process cases more speedily than tenured judges. No empirical data supports this assertion.[173] To the contrary, Chief Justice Burger, in his report to the American Bar Association on the State of the Judiciary in February, 1977, asserted that tenured federal judges have become "more productive, currently disposing of 36 percent more cases than eight years ago." [174]

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[167] Glidden Co. v. Zdanok, 370 U.S. 530, 545–46 (1962).

[168] *Id.*

[169] *Compare* the bankruptcy act of 1800, which was enacted for a limited period only *Hearings*, supp. app. pt. 1, at 18. The bankruptcy acts of 1841 and 1867 were short-lived as well, though their original enactments were not limited. The former was repealed i 1843, *id.* at 28; the latter in 1878, *id.* at 63.

[170] Even if the court system were to change in the future, there would be no constitu tional objection to the disestablishment of the court system as far as tenure of judge Sections 291–94 of title 28, as proposed to be amended by H.R. 7330, § 205–206, permi designation and assignment of bankruptcy judges to other courts. Thus, even though th bankruptcy court would no longer exist, the judges of that court would be able to serve c other federal courts until all such judges had retired or died. The fact that those judg were originally assigned to a specific court does not prevent their use on other Article I courts. Glidden v. Zdanok, 370 U.S. 530 (1962). The demise of the Commerce Court in 191 provides an excellent example of the use of judges of a defunct court on other court Donegan v. Dyson, 269 U.S. 49 (1925).

[171] Palmore v. United States, 411 U.S. 389, 408–09 (1973).

[172] *See* Lucas 2694.

[173] Plumb, *supra* note 125, at 1469.

[174] Remarks of Chief Justice Warren Burger, *supra* note 79, at 9, n. 5.

The need for expertise has been advanced as a reason supporting the creation of nontenured judgeships. The examples of the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court, as well as of the ill-fated Commerce Court, demonstrate that expertise or specialization is not confined only to nontenured tribunals. There is nothing in the Constitution or practical experience to suggest that judges without tenure are better able to develop an expertise than tenured judges.[175]

The grant under Article I, section 8, of the Constitution of a specific power to Congress has been used to attempt to justify departure from the norm of a tenured judiciary.[176] Under this rationale, Congress may create tribunals to carry into execution any of the specific powers granted, and may dispense with the constitutional tenure and salary protections with respect to the judges.[177] It has been suggested that the power "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States" [178] is a specific grant of power to Congress,[179] and that the Tax Court provides ample precedent for the power of Congress to establish a court outside of the normal confines of Article III and under a specific power under Article I.[180]

However, it is not the grant of a specific power, but rather the nature of the taxing power, that justified a nontenured tax tribunal. "The right of the United States to collect its internal revenue by summary administrative proceedings has long been recognized." [181] Tax collection is an area that concerns "matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." [182] The Tax Court operates as a court, following judicial forms and procedures.[183] It is called a court.[184] Nevertheless, its jurisdiction is strictly limited,[185] and it determines only "matters, arising between the government and others." Further,

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[175] Plumb, *supra* note 125, at 1469. Moreover, as Justice Harlan suggested in *Glidden*, the issues of specialization and the requirements of Article III are wholly independent, 370 U.S at 584–85.

[176] Griswold 2685.

[177] The constitutional status of these so-called "courts" is discussed *infra*, pp. 31–33.

[178] U.S. CONST. art. I, § 8, cl. 4.

[179] Griswold 2685.

[180] COMMISSION REPORT, pt. I, at 95. *Cf. id.* at 97–98.

[181] Phillips v. Commissioner, 283 U.S. 589, 595 (1931); Burns, Stix Friedman & Co., Inc. v. Commissioner, 57 T.C. 392, 398 (1971). Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 277 (1856), recognized the existence of the power "since the establishment of the English monarchy." *Cf.* Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929); Ex Parte Bakelite Corp., 279 U.S. 438 (1929).

[182] Ex Parte Bakelite Corp., 279 U.S. 438, 451 (1929). In *Bakelite*, the Supreme Court upheld the grant of power to a then nontenured Customs Court, to determine tariffs and duties, even though such a matter is susceptible of judicial determination. Similarly, Congress has granted power to determine tax questions to the United States Tax Court. INT. REV. CODE, § 7442, a nontenured tribunal, *id.* § 7441, and to the district court, 28 U.S.C. 1340 (1970), and the Court of Claims, 28 U.S.C. 1491 (1970), both tenured. 28 U.S.C. 134, 173 (1970), and both exercising the "judicial Power of the United States." *See* Glidden Co. v. Zdanok, 370 U.S. 530 (1962). The jurisdictional bases of the various courts are different; *compare* INT. REV CODE. § 7442 *with* 28 U.S.C. 1340, 1491 (1970). Nevertheless, that the Courts of Appeals and the Supreme Court may hear appeals from Tax Court decisions; *see* Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929); 28 U.S.C. 1254 (1970); INT. REV. CODE § 7482, supports the proposition that certain matters are susceptible of determination by the judiciary and by the executive.

See Opinion of the Justices, 87 N.H. 492, 494 (1935):

> [Abatement and assessment of taxes] are administrative acts because they are performed in pursuance of executive duties. The authority of the courts to entertain appeals in respect to them is judicial because the rights of the litigants are then of sole consideration. Enforcement of the public interest is displaced by the administration of justice. The fact that the same question may be passed upon by both executive and judicial tribunals shows that it is not the question itself, but how it arises, that determines its allocation for determination.

[183] *See* INT. REV. CODE, §§ 7451–64.

[184] *Id.* § 7441.

[185] *Id.* § 7442.

it may not execute its decisions, nor may it render a monetary judgment.[186]

Even if the Tax Court's existence supports a Congressional power to create a tribunal to carry into execution a specific power, it can hardly be relied on as precedent for the creation, without regard to the requirements of Article III, of a tribunal with broad jurisdiction over matters not involving the government,[187] and with the full powers of a court of law, equity, and admiralty,[188] operating in an area in which courts traditionally have operated.[189]

Courts-martial also do not provide adequate precedent for the power of Congress to create special tribunals to carry into execution a specifically granted power.[190] Again, the nature of the power granted, not the grant itself, justifies the existence of courts-martial. The Supreme Court has long recognized that "the power to provide for the trial and punishment of military and naval offenses [by court-martial] . . . is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States."[191] The exception in the fifth amendment for "cases arising in the land or naval forces"[192] strengthens the conclusion that courts-martial are not precedent for general nontenured tribunals.[193]

More specifically, as Professor Wechsler has noted,[194]

> the fact that Article I delegates authority to Congress to "establish . . . uniform laws on the subject of bankruptcies throughout the United States" does not without more permit the administration of such laws by federal courts unprotected by the tenure provisions of Article III. The bankruptcy power is no different in this respect than the power to regulate commerce or any other source of national legislation.

Each of the specific powers under which a nontenured tribunal has been upheld is of a different nature than Congress' power to legislate with respect to bankruptcy, which does not involve the government. The "more" to which Professor Wechsler refers is, in each of those cases, a specially recognized relationship between the government and others, or a grant of plenary, nonfederal power. The other enumerated powers, bankruptcy included, are Federal in nature, and thus constrained by the requirements of federalism.

Moreover, if, as Professor Wechsler stated, "the bankruptcy power is no different in this respect than the power to regulate commerce or

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[186] Burns, Stix Friedman & Co. v. Commissioner, 57 T.C. 392, 396 (1971).
[187] H.R. 8200, § 243 (proposed 28 U.S.C. 1471). *See* pp. 6–7 *supra*.
[188] H.R. 8200, § 243 (proposed 28 U.S.C. 1481).
[189] *See* COMMISSION REPORT, pt. I, at 85–88.
[190] In this case, the power "To make Rules for the Government of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14.
[191] Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857).
[192] U.S. CONST. amend. V.
[193] *See* O'Callahan v. Parker, 395 U.S. 258 (1969) (Court-martial impermissible for civilian offense committed by serviceman in civilian attire while on evening pass); Toth v. Quarles, 350 U.S. 11 (1955) (Court-martial impermissible for ex-serviceman for service-related offense committed while still in the military); Ex Parte Quirin, 317 U.S. 1 (1942) (Court-martial permissible for enemy aliens). *Cf.* Kinsella v. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957) (Court-martial of civilian dependents impermissible); McElroy v. Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960) (Court-martial of civilian employees of the Army impermissible).
[194] Wechsler 2705. *Accord*, Mishkin 2697:

> If an exception to the life-tenure norm of Article III is to be valid, it cannot rest simply upon the fact that Article I specifically authorizes Congress to enact bankruptcy laws.

Cf. Krattenmaker 2690.

any other source of national legislation," then an argument that the bankruptcy power will support a nontenured court proves too much. It would permit Congress to establish nontenured tribunals under any of its enumerated powers. For example, under the Commerce Power, Congress has enacted antitrust legislation, providing both civil and criminal penalties for its violation. It could scarcely be argued that Congress could commit trial of violations to nontenured courts, even if the protections of indictment [195] and jury trial [196] were preserved.[197] More specifically, Article I, section 8, grants Congress the power "To provide for the Punishment of counterfeiting the Securities and current Coin of the United States." In spite of the explicit grant, Congress simply may not authorize the trial of such criminal cases other than before tenured judges.[198] As Justice Brandeis remarked in *Crowell v. Benson*,[199]

> If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.

In *Crowell*, Congress had established an administrative body with nontenured commissioners to determine a claim of private right arising under the Longshoremen's and Harbor Workers' Compensation Act.[200] The question was whether the parties were bound by the commissioner's determination of fact. The Court held that the determination was binding, reversible only under the "clearly erroneous" standard, except with respect to "jurisdictional facts", a distinction that may have since been repudiated.[201] Determinations of law, however, were not binding: the parties must be afforded an absolute right of appeal on legal questions.

> The decision may be read as resting upon the fact that all issues of law determined by the agency were subject to review in Article III courts. . . . To read the decision that way, however, would seem to point toward the conclusion that the salary and tenure provisions of Article III are applicable only to appellate judges, a limitation that finds no support in the language of the Article. See Currie, Federal Courts 167 (2d. ed. 1975).[202]

The Department of Justice has recently advanced another reason to avoid tenuring judges. The Report of the Department of Justice

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[195] U.S. CONST. amend. V.
[196] *Id.* amend. VI.
[197] When Congress did create a Commerce Court to hear commerce matters, Congress tenured its judges. Act of June 18, 1910, c. 309 § 1, 36 Stat. 539, 540. Congress did not assume that, because it acted under the Commerce Power, U.S. CONST. art I, § 8, cl. 3, it could deny tenure.
[198] *See* Palmore v. United States, 411 U.S. 389, 410 (1973) (Douglas, J., dissenting).
[199] 285 U.S. 22, 87 (1932) (Brandeis, J, dissenting).
[200] Act of March 4, 1927, c.509, 44 Stat. 1424.
[201] *See* 4 K. DAVIS, ADMINISTRATION LAW 156–61 (1958).
[202] Sandalow 2698. Professor Krattenmaker's letter suggests likewise that a limitation to appellate tribunals, or to the Supreme Court, of the tenure and salary provisions is insupportable. Krattenmaker 2690. *See* Opinion of the Justice, 87 N.H. 492, 493–94 (1935).

Committee on Revision of the Federal Judicial System stressed th need not to expand the Federal life-time bench because [203]

> Large numbers dilute the great prestige that properly attaches to a career on the federal bench . . .

Whether such a reason, assuming it is an accurate statement of th circumstances, constitutes a "strong showing of special need", make bankruptcy into a "specialized area having particularized needs an warranting distinctive treatment", or permits Congress to deprive lit gants of constitutional rights to which they would otherwise be entitle is doubtful at best.

The issue of whether a nontenured bankruptcy court is constitu tionally justifiable does not turn solely on the existence of one of th traditional grounds used to support establishment of nontenured tr bunals. The role of the bankruptcy court and the nature of the case it decides must also enter into any determination of the permissibilit of denying bankruptcy judges tenure,[204] for both constitutional an policy reasons.[205]

The bankruptcy court's general jurisdiction and broad judici powers [206] make it a true court, unlike specialized administrative tr bunals. To the extent that it is a specialized forum, its specializatio is unlike that of the Tax Court, where primarily issues under th Internal Revenue Code are decided; or of the Customs Court, Court of Customs and Patent Appeals, where the range of issues similarly limited. The nature of the work of the bankruptcy cou militates strongly toward its establishment under Article III, becau the bankruptcy law itself and the jurisdiction the court must exerci are "of national applicability." [207]

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[203] Bork Comm. Rep. 7. The statement was made in opposition to any proposal to large the number of judges on the Federal district courts. However, informal conver tions with the Office of Legislative Affairs of the Department of Justice have indica a similar basis for the Department's reluctance to endorse the Article III concept bankruptcy courts.

Even if this concern provided a legitimate constitutional basis for denying tenure some Federal judges, statistics indicate that the concern is unfounded. The follow table shows the increase in the population over the past 36 years, and the increase the number of lawyers and judges and in the number of United States district judg

Year	U.S. population	Lawyers and judges	U.S. distr judge
1940	131, 669, 275	177, 643	
1950	150, 697, 361	172, 290	
1960	179, 323, 175	260, 565	
1970	203, 211, 926	335, 166	
1976	214, 000, 000	425, 039	

AMERICAN BAR FOUNDATION, LAWYERS STATISTICAL REPORT 12. table G (1971). Moreo the total number of Federal, State, and local judges in relation to the total numbe lawyers has declined from 4.2 percent in 1948 to 3.2 percent in 1970. *Id.* The commi has found no empirical evidence to support the suggestion that making bankru judges tenured will detract from the stature of Federal judgeships and make it m difficult to find qualified applicants for appointment to the Federal bench.

An additional reason the Department opposes Article III status for the propo bankruptcy court concerns the proposed broad jurisdiction. *See* p. 33 *infra*. A limita on jurisdiction does not support a departure from the tenure norm of Article III, h ever, because the Constitution and the case law make abundantly clear the powe Congress to limit the jurisdiction of the Federal judiciary without depriving the ju of tenure. U.S. CONST. art III. § 2; Ex Parte Mc Cardle, 74 U.S. (7 Wall.) 506 (186 Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850).

[204] *See* Palmore v. United States, 411 U.S. 389, 408 (1973).

[205] *See id.* at 410 (Douglas, J., dissenting).

[206] P. 6–7 *supra*.

[207] Palmore v. United States, 411 U.S. 389, 408 (1973).

Thus, there is substantial doubt whether the various grounds discussed provide a rational basis that legally supports the establishment of a nontenured bankruptcy court.[208] Even if such a basis were to be found, it remains to be determined if there are any differences in the powers of a tribunal whose judges are tenured and one whose judges are not.

3. The Judicial Power

The powers of the Federal Government are divided into three: legislative, executive, and judicial. The Constitution makes explicit the grant of each of these three powers to each of the three branches of government,[209] and the case law has made clear that combination of the powers in any single branch is impermissible.[210]

The separation of powers doctrine means simply "that each of the three branches of our Government must restrict itself to its allocated sphere of activity: legislating, executing the law, or seeing to its interpretation." [211] It also means that Congress may not circumvent the rule by combining any of the powers in a single governmental body. For example, in *Buckley* v. *Valeo*, the Supreme Court held unconstitutional the Federal Elections Act's vesting of the appointment power in the Congress, because the Act allowed Congress to write the law and then see to its execution by the appointment of the officers charged with enforcement of the law.[212] The Court also held that the Federal Election Commission, as constituted, was a Congressional agency, because it was subject to Congress' control, and thus it could exercise only legislative, not legislative and executive, functions.[213] Similarly, the Court has prohibited Congress from conferring executive duties upon the courts,[214] and has prohibited the President from exercising legislative powers [215] or judicial powers.[216]

Though the doctrine of separation of powers is clear, the difficulty in application of the doctrine derives in part from the uncertainty surrounding the nature of each of the three powers conferred by the Con-

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[208] "A public interest to set up in the executive department a court of justice does not warrant a violation of the constitutional order prohibiting it." Opinion of the Justice, 87 N.H. 492, 495 (1935). *Contra,* Shapiro 2702. Prof. Shapiro suggests that the "extremely heavy burden of such cases and the expertise required to deal with them" may provide adequate justification for departure from the Article III norm. *Id.* Those grounds have been discussed, p. 22–23 *supra.* He also noted "the experimental aspects of the bankruptcy court proposal." Shapiro 2702. If that provides any justification at all it relates to the status of the bankruptcy judges during transition. H.R. 8200, § 404. After the transition period, the court established is permanent. During that period, the court remains a part of the district court. p. 6 *supra,* derives all of its powers from that Article III tribunal, and is not granted the full powers of the proposed post-transition court, *see id.*

[209] U.S. CONST. art. I, § 1; art. II, § 1; art. III, § 1.

[210] Buckley v. Valeo, 424 U.S. 1, 120–20 (1976); United States v. Nixon, 418 U.S. 683, 704 (1974); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 587–88 (1952).

[211] Testimony of Antonin Scalia, Asst. Atty. General, Office of Legal Counsel, on Reform of the Administrative Procedure Act, Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 3 (Apr. 28, 1976).

[212] *See* Springer v. Philippine Islands, 277 U.S. 189 (1928).

[213] The Court invalidated the Federal Election Commission's rule-making and adjudicatory functions, 424 U.S. at 137–43, leaving untouched its investigative functions, which is clearly within the legislative domain. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821).

[214] Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) in which the Justice found that the grant of power to the courts to decide a matter subject to later executive review was not a grant of "the judicial Power of the United States" and therefore could not be exercised by constitutional courts. Central to the case was the concept of finality, without which the judicial power was not being exercised. *See* Chicago & Southern Airlines v. Waterman S.S. Corp., 333 U.S. 103 (1948); BATOR et al., *supra* note 131, at 85–102 (2d ed. 1973).

[215] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[216] United States v. Nixon, 418 U.S. 683 (1974).

stitution, and in part because "there are few activities which are inherently executive, legislative, or judicial." [217] As Mr. Justice Curtis said in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*,[218]

> In short, the argument is, that if this were not in its nature, a judicial controversy, Congress could not have conferred on the district court power to determine it upon a bill filed by the collector. If it be such a controversy, then it is subject to the judicial power alone; and the fact that Congress has enabled the district court to pass upon it, is conclusive evidence that it is a judicial controversy.
>
> We cannot admit the correctness of the last position. . . . the argument leaves out of view an essential element in the case, and also assumes something which cannot be admitted.
>
> It assumes that the entire subject-matter is or is not, in every mode of presentation, a judicial controversy, essentially and in its own nature. . . .
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> * * * * *
>
> [T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting upon them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

The Court has long recognized that there are matters that "do not require judicial determination and yet are susceptible of it." [219]

This ambiguity does not occur only with respect to judicial matters. The susceptibility of certain matters to determination by more than one branch occurs in the relations between all three branches.

> Congress may certainly delegate to others, power which the legislature may rightfully exercise itself. . . . The courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended, that these things might not be done by the legislature, wthout the intervention of the courts; yet it is not alleged that the power may not be conferred on the judicial department.[220]

Likewise, Congress may delegate to the executive branch the powe

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[217] Scalia, *supra* note 211, at 6.

[218] 59 U.S. (18 How.) 272, 284 (1856). *Accord*, Opinion of the Justices, 87 N.H. 492, 4 (1935).

This is not to deny, however, that there are certain powers that may be committed *ex* to one branch. As Chief Justice Burger has made clear, United States v. Nixon, 418 U. 683, 704 (1974):

> The "judicial power of the United States" vested in federal courts by Art. III, § 1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the Veto power, or the Congress share with the Judiciary the power to override a presidential veto.

Moreover, "under certain circumstances the constitutional requirement of due proc is a requirement of judicial process." Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brande J., dissenting).

[219] Ex Parte Bakelite Corp., 279 U.S. 438, 451 (1929).

[220] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (Marshall, C. J.).

to make rules and regulations to carry into effect a general policy established by the Congress in a statute.[221]

However, there are some matters which may be performed only by one branch of the government. Chief Justice Marshall recognized that there is a line [222]

> which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details.

There is likewise a line that separates each branch from the others, and a line that separates those subjects on which the bodies of only that branch may act.

Marshall also noted that "the line has not been exactly drawn," and that "the precise boundary . . . is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily." [223] The Constitution and the case law give only general contours of the line.

The Constitution vests "all legislative power herein granted in the Congress of the United States." [224] The Supreme Court has defined the extent of the legislative power frequently,[225] and has stated in broad terms that "Congress has . . . exclusive constitutional authority to make laws necessary and proper to carry out the power vested by the Constitution 'in the Government of the United States, or in any Department or Officer thereof,' " [226] and to set the policies by which the nation will be governed.

The executive power is the power to see that the laws are faithfully executed, to recommend to Congress those laws that the President thinks wise, and to veto those he thinks bad.[227] The Constitution also vests explicitly the appointment power (subject to certain regulation by Congress), the pardon power, the power to call forth the militia, and the position of Commander-in-Chief of the armed forces, in the President.[228] All of these specific powers are attributes of the executive power.

Finally, Chief Justice Marshall left no doubt that "it is emphatically the province and the duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." [229] The exposition of the rule,

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[221] *Id.*; Springer v. Philippine Islands, 277 U.S. 189, 209, 210–11 (1928) (Holmes & Brandeis, J.J., dissenting); CONG. GLOBE, 39th Cong., 1st Sess. 186 (1866) (Remarks of Sen. Davis); 92 CONG. REC. 6445 (1946) (Remarks of Sen. Donnell); Scalia, *supra* note 211, at 4–7.

[222] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

[223] *Id.*

[224] U.S. CONST. art. I, § 1.

[225] *E.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821).

[226] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 585–89 (1952).

[227] *Id.* at 587.

[228] U.S. CONST. art. II, § 2.

[229] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). "An administrative officer in the discharge of his duties may have occasion to interpret and apply a law in order to enforce it, but he can have no such occasion in order to determine the rights of private litigants, since he may not be constitutionally authorized to take jurisdiction in respect to them." Opinion of the Justices, 87 N.H. 492, 495 (1935).

however, is not the ultimate reach of the judicial power:

> The award of execution is a part, and an essential part of every judgment passed by a court exercising the judicial power.[230]

An award of execution without a final judgment, however, would be premature. Thus, the courts have developed, from earliest times, a requirement of finality in the exercise of the judicial power.[231] The constitutional "case or controversy" requirement reflects this unique aspect of the judicial power, for it contains within it a requirement that the courts be the forum of last resort.[232] A court's power to apply the law with finality to particular cases is an empty power without the concommitant power to enforce its orders.[233] Conversely, a body that does not exercise judicial power may not enforce its own orders.[234]

This limitation is tacitly accepted in the proceedings of the administrative agencies and independent regulatory bodies. Generally, the agencies do not have the power to enforce their own orders. They must seek judicial enforcement, either by direct application to the courts, or through a request to the Attorney General to seek enforcement in the courts, unless the parties voluntarily comply with the agency's determination.[235]

The power to issue writs is intimately connected with the power of enforcement. A writ is a command to do an act that a court has determined is appropriate in the circumstances of a particular case. It would be anomalous for an executive agency or officer to issue a writ. It is an activity traditionally reserved to courts, and exclusively within the province of the judicial power.

4. Powers of the Proposed Bankruptcy Court

Against this background of separation of powers, the determination of the branch of government in which a nontenured bankruptcy court is placed becomes important, because it defines the power that may be conferred upon the court. Some have suggested that the tenure

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[230] Gordon v. United States, published at 117 U.S. 697, 702 (1865) (Taney, C. J.) reported in United States v. Jones, 119 U.S. 477, 478 (1886), and cited with approval in Glidden Co. v. Zdanok, 370 U.S. 530, 569 (1962) (Harlan J.).

[231] Tutun v. United States, 270 U.S. 568 (1926); United States v. Ferreira, 54 U.S. (13 How.) 40 (1852); Hayburn Case, U.S. (2 Dall.) 409 (1792).

[232] *See* cases note 231 *supra*; BUTOR et al., *supra* note 131, at 85–102.

[233] Gordon v. United States, 117 U.S. 697 (1865). The court not only determines what substantive law applies to the facts in the case before it, but also determines the consequences that the law prescribes are to flow from its first determination. This is another instance of the application of the law (of sanctions, damages, remedies, etc.). Only after the court has determined the appropriate consequences may they be executed against or in favor of one of the parties to the case.

[234] For example, the executive, in the office of a prosecutor, could not convict, sentence, and jail an individual, and then seek a judicial determination of the propriety of his action in light of the facts of the case. *Accord*, Opinion of the Justices, 87 N.H. 492, 495 (1935).

[235] The National Labor Relations Board provides an example. It must seek enforcement of its orders in the courts of appeals. National Labor Relations Act § 10(e), 29 U.S.C. 160(e) (1970).

To the extent that there are exceptions to the general rule, they may be categorized under the headings of cases where the government is in physical control of the property or facility in dispute, or where the government's affirmative approval is a prerequisite to action by the party to the dispute (such as in a licensing proceeding). In those cases in which no enforcement order is necessary, the government is the prosecuting party. *See* Hart, *The Power of the Congress to Limit the Jurisdiction of Federal Courts: An Exercise in the Dialectic*, 66 HARV. L. REV. 851, 1362 (1953). Bankruptcy generally falls in neither of these categories.

of the judges has no effect on what power may be conferred, arguing that judicial power is permissibly granted to any tribunal.[236] *American Ins. Co. v. Canter* and *Palmore v. United States* have been cited in support.[237] However, as previously noted, those cases concerned geographical areas over which Congress has plenary power,[238] and though judicial power may have been granted, "the judicial Power of the United States" as defined in Article III, that is, Federal judicial power, was clearly not granted. And as Mr. Justice Harlan suggested in *Glidden Co. v. Zdanok*, that distinction is crucial when Congress attempts to exercise its powers within the States and within the context and confines of a Federal system.[239]

"Article I courts . . . are agencies of the legislative or executive branch." [240] Any grant of federal judicial power would be inconsistent with the doctrine of separation of powers. The powers and jurisdiction that a bankruptcy court must exercise are extensive. The case law surrounding nontenured tribunals and surrounding the separation-of-powers doctrine are doubtful support for a grant of those powers and jurisdiction to a bankruptcy tribunal that is not granted judicial power.

The leading case in support of the grant to an Executive Branch body of powers in the context of judicial procedures is *Crowell v. Benson*. In that case, the Court upheld a grant of power to an administrative agency of the fact-finding function, subject to review only on a clearly erroneous standard, in a case involving matters of private rights. The legislation in question, however, reserved an absolute right of appeal on all questions of law. The opinion stressed the limited nature of the grant involved, noting that "the statute has a limited application, being confined to . . . the method of determining the questions of fact, which arise in the routine of making compensation awards," [241] and that "there is no requirement, that in order to maintain the essential attributes of judicial power, all determinations of fact in constitutional courts shall be made by judges." [242]

Professor Sandalow, in discussing the scope of the *Crowell* decision and the extent of the support it provides for nontenured courts, observed that the "Court's characterization of the agency's power is not entirely accurate, since the latter necessarily determined issues of law also [in the first instance] . . . ." [243] However, he went on to state that in spite of the broader nature of the agency's power than that described by the Court, "the agency's powers were not nearly

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[236] Griswold 2685.
[237] *Id.*
[238] Pp. 18–22 *supra*.
[239] 370 U.S. 530, 546–47 (1962).
[240] Glidden Co. v. Zdanok, 370 U.S. 530, 599 (1962) (Douglas, J. dissenting).
Chief Justice Burger has emphasized the point very recently. In *Swain v. Pressley*, No. 75-811, Slip Opinion of Burger, C. J. 2 (U.S. March 22, 1977), a case that concerned the requirement of exhaustion of habeas remedies in the local District of Columbia courts before resort could be had to the U.S. District Court for the District of Columbia, the Chief Justice, in a concurrence joined by two other justices, stated.

> A doctrine that allowed transfer of the historic habeas jurisdiction to an Article I court could raise separation-of-powers questions, since the traditional Great Writ was largely a remedy against executive detention.

[241] 285 U.S. 22, 54 (1932).
[242] *Id.* at 51.
[243] Sandalow 2698.

as extensive as those contemplated for the proposed bankruptcy court." [244] Professor Krattenmaker went further: [245]

> No administrative agency has such powers and no case that I am aware of remotely suggests that Congress can create tribunals with such powers yet not tenure its judges.

Thus, there is a reasonable, and perhaps a serious, doubt that the powers contemplated may be granted to a nontenured bench. The precise extent of the limitations that would be required, however, are uncertain. As Chief Justice Marshall said, the line between the various powers that may be granted to different branches of the government "has not been exactly drawn," and "the precise . . . boundary . . . is a subject of delicate and difficult inquiry . . . ." [246]

Professor Wechsler suggests that in light of the power to punish for contempt and to issue writs of execution, there is no room "to regard the court as a judicialized administrative agency in an area where the administrative process could be alternately employed." [247] The courts have never held that an administrative agency, or executive branch "court", could hold a jury trial, and the case law is clear that the right to a jury trial does not exist in the administrative context.[248] The power to enjoin a State court or official is a sensitive one, as the Supreme Court recently stated,[249] and the permissibility of a grant of such a power to other than a constitutional court is at best doubtful. Finally, a grant of the power to issue a writ of habeas corpus to a nontenured bankruptcy court, especially to a State official, is similarly suspect.[250]

In addition, the Department of Justice has recognized that the broad grant of jurisdiction may raise constitutional issues if granted to a nontenured court.[251] The Hearings and the Commission Report are replete with evidence of the need for expanded jurisdiction of the bankruptcy court.[252] The Department recognized, however, that the

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[244] *Id.*

[245] Krattenmaker 2690.

[246] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43, 46 (1825). The Justices of the New Hampshire Supreme Court were not so reticent when it came to the judiciary:

> [T]he function of trying and deciding litigation is strictly and exclusively for the judiciary when it is between private parties, neither of whom seeks to come under the protection of a public interest and to have it upheld and maintained for his benefit.

Opinion of the Justices, 87 N.H. 492, 495 (1935).

[247] Wechsler 2705; pp. 30–31 *supra*. *Accord*, Sandalow 2700; Shapiro 2703.

[248] *See* Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, No. 75–746 (U.S. Mar. 23, 1977); BATOR et al., *supra* note 131, at 338–39; Note, *Application of Constitutional Guarantees of Jury Trial to the Administrative Process*, 56 HARV. L. REV. 282 (1942):

> [T]he trial by jury contemplated in the federal and state constitutions not only requires the submission of questions of fact to a group of impartial men, but demands a trial in a court with a judge to guide the jury in performance of its functions.

citing Capitol Traction v. Hof, 174 U.S. 1 (1899); Middleton v. Texas Power & Light Co., 108 Tex. 96 (1916), *aff'd*, 249 U.S. 152 (1919).

Further, there is some suggestion in the case law that "the guarantee [of a jury] can not deprive a public official [under the proposed legislation, the bankruptcy judge] of the discretion given him by statute." Note, *supra*, at 292, citing McInnish v. Board of Education, 187 N.C. 494 (1924).

[249] Younger v. Harris, 401 U.S. 37 (1971).

[250] Swain v. Pressley, No. 75–811, Slip Opinion of Burger, C.J. 2 (U.S. March 22, 1977) note 240 *supra*.

[251] Letter from Patricia Wald, Asst. Atty. General, Office of Legislative Affairs, to Don Edwards, Chairman, Subcomm. on Civil and Constitutional Rights, March 16, 1977, at 3. The Department has opposed expanded jurisdiction for the bankruptcy courts. *Hearings*, pt. 4, at 2097–98, though the reasons seem to suggest more the parochial interest of the United States as a potential debtor of a bankrupt estate and a desire to be sued in a more familiar forum, than any constitutional objection to expanded jurisdiction.

[252] COMMISSION REPORT, pt. I, at 88–92; pt. II, at 30–33; *Hearings*, pt. 4, at 2736–3 (index).

"constitutional uncertainties posed by the expanded jurisdiction given to the bankruptcy courts in previous legislation (*e.g.*, H.R. 31 and H.R. 32) are eliminated in H.R. 6 by granting the bankruptcy courts Article III status." [253]

In sum, the Constitution suggests that an independent bankruptcy court must be created under Article III. Article III is the constitutional norm, and the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context. Even if they were present, the text of the Constitution and the case law indicate that a court created without regard to Article III most likely could not exercise the power needed by a bankruptcy court to carry out its proper functions. In view of Congress' independent obligation, and the Congressional oath, to support the Constitution, the decision on this issue should not simply be thrown to the courts. Congress should establish the proposed bankruptcy court under Article III, with all of the protection that the Framers intended for an independent judiciary.

IV. Appeals

H.R. 8200, in conjunction with the separation of the bankruptcy courts from the district courts and the establishment of constitutional courts, removes the intermediate appellate step in present law of appeals to the district courts. The bill permits appeals to go directly to the courts of appeals. The reasons are based on sound judicial policy, and are independent of the need for a separate bankruptcy court.

A. THE PRESENT APPELLATE STRUCTURE

The present appellate procedure in bankruptcy cases is the result of an evolution that paralleled the evolution of the bankruptcy courts themselves.[254] Appeals from bankruptcy judges' decisions and orders lie to the district courts,[255] and from there to the courts of appeals.[256] The practice and standards on appeal from a bankruptcy judge to a district judge are nearly the same as the practice and standards on appeal from any trial court to an appellate tribunal.[257]

Before the Chandler Act,[258] referees in bankruptcy exercised powers more akin to those of special masters than of trial judges.[259] Reviews of their orders proceeded as would review of special masters' orders.[260] In 1938, referees' jurisdiction was expanded.[261] The appellate procedure was also revised to bring practice more into conformity with general appellate practice.[262] Nevertheless, the revision was not complete, and the power of the district judge to review the referee's finding remained greater than that of an ordinary appellate tribunal.[263]

[253] Leiter, *supra* note 251, at 3.
[254] Pp. 2–4 *supra*.
[255] Sec. 39c, 11 U.S.C. 67c (1970); Rules 801–05.
[256] Sec. 24a, 11 U.S.C. 47a (1970).
[257] *See generally* Rules 801–14; Advisory Committee Notes to Rules 801–14, Colliers Pamphlet Edition, Bankruptcy Act and Rules, pt. 2, at 962–71 (1976).
[258] Act of June 22, 1938, c. 575, 52 Stat. 840.
[259] *See* Act of July 1, 1898, c. 541, § 39a(5), 30 Stat. 544, 555–56; p. 2 *supra*.
[260] *See* H. R. Rep. No. 1409, 75th Cong., 1st Sess. 11 (1937); *Hearings*, supp. app. pt. 1, at 681.
[261] Act of June 22, 1938, c. 575, 52 Stat. 840, 857–58; *Hearings*, supp. app. pt. 1, at 683.
[262] H.R. Rep. No. 1409, 75th Cong., 1st Sess. 11 (1937); *Hearings*, supp. app. pt. 1, at 684.
[263] In re Lindholm, 134, F. Supp. 301 (D.N.D. 1955). *See* Dunsdon v. Federal Land Bank, 137 F.2d 84 (8th Cir. 1943).

APPENDIX II

Reprinted from *Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st and 2d Sess., pt. 4, at 2682–2706 (1975–76).

[The following letter from Chairman Rodino was sent to several constitutional experts. The replies received follow the Chairman's letter.]

APRIL 30, 1976.

There are presently pending before the Committee on the Judiciary two bills, H.R. 31 and H.R. 32, which would substantially revise the Bankruptcy Act. Both bills contemplate the establishment of a new court system to process bankruptcy cases.

H.R. 31, drafted by the Congressionally created Commission on the Bankruptcy Laws of the United States, would establish an "Article I court", the judges of which would be appointed by the President, by and with the advice and consent of the Senate, for fifteen year terms. The Commission modeled its new bankruptcy court after the United States Tax Court, 26 U.S.C.A. 7441–7448. H.R. 32, drafted by the National Conference of Bankruptcy Judges, would create the same sort of court, with the same attributes, but the judges would be appointed by the circuit council which governs the district in which the judge is to sit.

Under both bills, the bankruptcy judges would be removable only for incapacity, misconduct, or neglect of duty. The removal procedure requires the Director of the Administrative Office of the U.S. Courts to report possible grounds for removal to the Chief Justice, who must appoint a judge of the United States to investigate the charges. If the investigating judge finds sufficient grounds for the filing of charges, he must report to the Chief Justice. The Chief Justice must furnish a copy of the charges to the bankruptcy judge, who is given an opportunity to defend himself, and must appoint a commission of three other judges to hear and determine the charges. The commission's determination is subject to review by the Courts of Appeal and the Supreme Court.

The new court, under bills, would be given jurisdiction broader than that presently exercised by district courts sitting in bankruptcy and by referees in bankruptcy. The goal of both the Commission and the Judges was to create an independent bankruptcy court that could bear all matters that might arise if the administration of a bankruptcy case. Thus, the present distinction between summary and plenary jurisdiction of the referee, based on possession of property by the debtor or trustee (essentially making summary jurisdiction *in rem* would be abolished. The court's process would run throughout the United States and all actions related to a bankrupt estate would be tried in the new bankruptcy court. See *Williams* v. *Austrian*, 331 U.S. 642 (1947); *Schumacher* v. *Becler*, 293 U.S. 367 (1934). The court would not exercise any criminal jurisdiction. All actions which could be brought in the bankruptcy court would be removable to the bankruptcy court, from either State or Federal courts.

In addition, the new bankruptcy court would be given all powers, judicial in nature, necessary to carry out its responsibilities, including the power to cite and punish contempts, to hold jury trials, to enjoin other courts and proceedings in them, and to enter judgment and issue writs of execution. Its orders would be

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final unless appealed, much in the same way that the orders of a district court are final. Under H.R. 31, appeals would go to the district court; under H.R. 32, they would lie to the circuit court of appeals.

As part of the Committee's study of these proposals, we wish to examine the constitutionality of conferring the jurisdiction contemplated on the courts described above. We wish to consider these issues both in terms of what would withstand attack before the Supreme Court, and in terms of Congress' independent responsibility to determine the constitutionality of legislation. We request your consideration of this problem. Specifically, we would like you to address the following questions:

1. What is the constitutional status of the described courts, if such a determination is important?

2. May either of the courts described exercise the full jurisdiction described? If not, what limits must be placed on their powers?

3. Does the exercise of the jurisdiction described constitute the exercise of "the judicial power of the United States" as described in Article III, section 1, of the Constitution? If not, what does constitute the exercise of the judicial power?

4. May the powers and jurisdiction described be exercised by anyone other than a life-tenured, salary-protected judge, or an appointee of such a judge, who is under the judge's supervision, control and review?

One solution, short of creation of Article III courts, which has been posed to the problems raised by these questions, is to create a bankruptcy court that is an adjunct of the circuit courts of appeals, much as the current bankruptcy courts are adjuncts of the district courts. The Judges bill, H.R. 32, in large part attempts to achieve this result, by vesting appointment and appellate power in the circuit courts. The Committee would be interested in your opinion on the constraints that the Constitution places on such an arrangement. Specifically,

5. How much control, and of what sort, must the bill allow the circuit court to retain over the bankruptcy judge?

6. Does that control include the power to remove the bankruptcy judges for other than cause, or in other than the method outlined above?

7. Does it include the power to hear new evidence on review or appeal of a decision of a brankruptcy judge?

8. May the bankruptcy court be given the power to cite for contempt, hold jury trials, enter final judgments, and issue writs of execution?

The present relationship between the referees and the district courts come close to little effective control. Except for historical considerations, does current law delegate too much power to the referees?

Little has been written in this area specifically discussing the constitutional status of the proposed bankruptcy courts. The Commission's Report dismissed the issue as unimportant. However, a recent article by W. Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws: Tax Procedure*, 88 Harv. L. Rev. 1360, 1457–69 (1975), does address the issue directly. We would appreciate your review of that portion of Mr. Plumb's work, and your comments on it.

Finally, the recent case of *Buckley* v. *Valeo*, holding the composition of the Federal Election Commission in violation of the Appointments Clause, Article II, section 2, of the Constitution, has raised the issue of the method of appointment of the first bankruptcy judges to serve on the new court. The Commission bill recommends to the President that he appoint those bankruptcy judges currently serving who are qualified to serve on the new court. The Judges bill, however, automatically extends the terms of sitting referees to the effective date of the Act (one year after enactment), and then makes the sitting referees in office on the effective date of the Act bankruptcy judges of the new court for a six year transitional term. At the end of the six year transitional term, the bill requires the judicial councils to make appointments of new judges from sitting judges, so far as practicable.

In light of *Buckley* and relevant case law, we wish to ascertain the constitutionality of such an automatic "fold-in" for the six year transitional term, and of the preference required for the first full term. This question should be considered in four possible settings; namely, transition from the current system of appointment by the district courts for six year terms to a position with limited jurisdiction, to each of the three court structures outlined above, and to a full

Article III court. An additional alternative may be to stagger the appointments of the new bankruptcy judges so that all current judges would be continued in office until the end of their current terms, regardless of the effective date of the Act, while new judges are appointed to fill the vacancies that arise, thus creating a court where judges appointed by different methods sit concurrently. Would your answers be different if the referees were continued for the transitional term as referees with expanded powers, rather than as bankruptcy judges?

The Committe would deeply appreciate your consideration of the questions presented, and as detailed a response as you are able to prepare within the next few weeks.

With best regards.

Sincerely,

PETER W. RODINO, Jr.,
Chairman.

COVINGTON & BURLING,
Washington, D.C., June 3, 1976.

Hon. PETER W. RODINO, Jr., M.C.
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN RODINO: This will respond to your letter of April 30 concerning the proposed bankruptcy legislation.

I assume the letter was directed to me because of my involvement in *Buckley* v. *Valeo*, and I will limit my comments to the questions you raise on that subject, except for a few preliminary general observations.

On the Article III question, it seems pretty clear to me that the proposed bankruptcy court would indeed be exercising the judicial power of the United States and would have to be constituted in accordance with the requirements of Article III. Mr. Plumb's argument to that effect is, I believe, highly persuasive. If Congress for some reason does not wish to create an Article III court, conceivably the problem could be resolved by making the court an adjunct of the courts of appeals; I have no expertise on precisely how much control by them would be required, or whether current law delegates too much power to the referees.

As to the *Buckley* v. *Valeo* question, on the assumption (contrary to my belief) that the bankruptcy court could be established as a legislative court not subject to Article III, I see no substantial problem with the provisions of H.R. 32 regarding continuance of sitting referees in office as bankruptcy judges of the new court. The governing cases are *Shoemaker* v. *United States*, 147, U.S. 282 (1893), which held that "Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed," 147 U.S. at 301, and *Wood* v. *United States*, 107 U.S. 414 (1882), which is to the same effect. The referees are already inferior officers of the United States and have been appointed properly by the courts pursuant to Article II, Section 2, clause 2 of the Constitution. The *Shoemaker* and *Wood* cases stand for the proposition that such officials may be changed in rank, or given increased powers and duties, by Congress without a new Article II appointment. While there is a suggestion in *Shoemaker* that the result might be otherwise if the additional duties were not "germane to the offices already held by" the officers in question, *id.*, I do not believe that could reasonably be argued with respect to the transformation of the referees into bankruptcy judges.

Even if the new bankruptcy court must be an Article III court, the same result would follow. While historically Article III judges have been selected through appointment by the President and confirmation by the Senate, the fact is that Article III prescribed no means for appointments of judges; the operative provision remains Article II, Section 2, clause 2, which permits Congress "by law [to] 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." Under this language, all judges of inferior courts—that is, of all courts other than the Supreme Court—could be selected, pursuant to Act of Congress, by means other than presidential appointment and Senate confirmation: *e.g.*, federal judges could be appointed by the Attorney General, or district judges could be appointed by the courts of appeals. It would follow that, since the referees have

properly been appointed by courts of law, and since Article III judges may be appointed in the same manner, the H.R. 32 provision is not troublesome. And as indicated above, I do not think that the change from referee to bankruptcy judge (whether Article III judge or not) would involve so drastic an expansion of prior powers and duties as to require a new appointment under the "germaneness" requirement suggested by *Shoemaker*.

Yours sincerely,

BRICE M. CLAGETT, Esq.

JONES, DAY, REAVIS & POGUE,
Washington, D.C., May 24, 1976.

In Re: H.R. 31 and H.R. 32—Revision of the Bankruptcy Act.

Hon. PETER W. RODINO, Jr.,
Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN RODINO: Your letter of May 5th has been on my desk for some time while I have tried to think through my response. The questions you have asked are important and difficult ones, and a complete answer to them would involve much research, and take more time than I have available. I have finally concluded that I should respond with a shorter letter in which I will try to give you the substance of my thinking in this area.

In this letter, I will follow the numbers indicated with respect to the questions stated in your letter.

1. The courts which would be established under H.R. 31 and H.R. 32, as summarized in your letter, would be courts established under the power of Congress to legislate, that is, they would be Article I courts. In my view, there is no doubt of the power of Congress to establish such courts.

Under clause 4 of Section 8 of Article I of the Constitution, Congress is expressly given power "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States"; and by clause 18 of the same Section, Congress is given power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, . . ." This is similar to the power given to Congress by clause 1 of the same Section "To lay and collect Taxes," under which, with the "necessary and proper" clause, Congress has established the United States Tax Court, and various other tribunals at various times, such as courts for the Territories of the United States, and for the District of Columbia.

The constitutional validity of such courts cannot seriously be questioned. The decisions go back as far as 1828, when *American Insurance Co.* v. *Canter*, 1 Peters 511, was decided. That case upheld the power of Congress to establish Territorial courts in Florida, although they were not Article III courts, that is, "such inferior Courts as the Congress may from time to time ordain and establish" under Section 1 of Article III. See also *Cary* v. *Curtis*, 3 Howard 236, 245 (1845), where the Court said that "The judicial power of the United States" is "dependent from its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction, either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."

The most recent expression of the law in this area is found in the decision of *Palmore* v. *United States*, 411 U.S. 389 (1973), which upheld the constitutional validity of the courts established by Congress for the District of Columbia by the District of Columbia Reform and Criminal Procedure Act of 1970, 84 Stat. 473—specifically the Superior Court for the District of Columbia and the District of Columbia Court of Appeals. In an opinion by Mr. Justice White, the Court reviewed the decisions in this area, and specifically upheld the power of Congress to establish these courts under Article I of the Constitution rather than under Article III.

In my view, the proposed bankruptcy courts would be validly established by Congress under the powers given to them by Article I of the Constitution.

2. In my view, the courts described could validly exercise the full jurisdiction described in your letter. I have not seen the exact terms of the bills referred to in your letter, and it may be that there are some special situations

or circumstances which would present questions. Generally speaking, though, I would not think there was reason to doubt the constitutional validity of giving the courts a broad jurisdiction, as long as it was adequately connected with the power given by the Constitution to Congress to establish "uniform laws on the subject of Bankruptcies throughout the United States."

3. The exercise of the jurisdiction described would constitute the exercise of "the judicial power of the United States," but the power may be exercised under Article I, as well as under Article III. This matter is fully discussed in the *Palmore* decision, which seems to me to leave no real basis for a valid constitutional doubt.

4. From the discussion above, and specifically from the *Palmore* decision, it follows that the powers and jurisdiction described may be exercised by a judge appointed under a statute authorized by Article I, that is, by a judge who is not life tenured or salary protected.

I now turn to your second group of questions.

In my view, as presently advised, it would be undesirable to make the bankruptcy courts be adjuncts of the circuit courts of appeals. Those courts are overwhelmed with business as they now stand. Moreover they are not very well organized nor qualified to carry out administrative duties. It would be my best judgment or guess that assigning control to the circuit courts of appeals would mean that assigning control to the circuit courts of appeals would mean, as a practical matter, that there was very little effective control.

I turn now to your specific questions in this area.

5. As far as I can see, there is no amount of control which "must" be allowed by the bill to the circuit courts. It seems to me that that is entirely a matter for the judgment of Congress. In my own view, it would be highly undesirable to have the appointing power in the circuit courts. If we are to have separate bankruptcy courts—which I favor—I think that the appointment should be by the President, with confirmation by the Senate. However, as I have indicated, the amount of control which should be exercised by the circuit courts of appeals is, in my opinion, and within very wide limits, subject to determination by Congress.

6. I do not suppose that control should be given to the courts of appeals to remove the bankruptcy judges for other than cause.

7. As far as I can see, the Constitution makes no requirement as to whether the circuit courts of appeals could hear new evidence on review or appeal of a decision of a bankruptcy court. As I see it, this is entirely a matter for Congress. My own recommendation would be that Congress should not provide for hearing new evidence. In this connection, the method long followed for review of decisions of the United States Court seems to provide a good analogy.

8. In my view the powers given to Congress by Article I of the Constitution are sufficient to enable Congress to establish bankruptcy courts which have powers to cite for contempt, hold jury trials, enter final judgments, and issue writs of execution. Such powers have long been exercised by Territorial courts, and are now exercised in the District of Columbia. Similar powers were exercised by the Court of Claims during the long period before it came to be regarded as an Article III court.

I have examined Mr. Plumb's article in 88 Harv. L. Rev. 1360, specifically at pages 1457–69. This seems to me to be an excellent discussion of the problems, including a useful assessment of the far from clear opinions in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949). I would agree with Mr. Plumb that there is no doubt of the constitutional validity if a statute enacted by Congress which assigns to an Article I court the ordinary problems of the "administration" of bankruptcy. I would also agree with Mr. Plumb that the constitutional validity of such a statute may "be regarded as at best uncertain at least so far as it [the bankruptcy court] would have jurisdiction of suits by the trustee against adverse parties other than the United States." 88 Harv. L. Rev. 1468. That much is novel, and, as far as I know, not directly supported by any decision of the Supreme Court of the United States. However, I know of no decision which holds that a statute giving the court such powers would be unconstitutional. And I think that it is at least fairly arguable that giving a bankruptcy court such jurisdiction does come within the power given to Congress by the Constitution "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Such suits "by the trustees against adverse parties other than the United States" are surely a direct incident of the bankruptcy. They must be resolved if the bankruptcy is effective.

Considering the broad interpretation usually given to the "necessary and proper" clause, I should think that a strong case could be made for the proposition that the enactment of such powers in the bankruptcy court is "necessary and proper" to the effective exercise by Congress of its power to make a Uniform Bankruptcy Act, if that is the judgment of Congress.

With respect to the transitional designation of judges for the new bankruptcy court, the problems are largely novel, and extremely difficult. I do not think that the recent decision in *Buckley* v. *Valeo* has much to do with this, since it did not involve any "fold-in." There remains the question whether Congress can constitutionally carry forward existing appointees into the new courts, if new bankruptcy courts are established.

Here, again, the analogy of the Tax Court is fairly close. When the Tax Court was made an Article I court, about 1970, the existing judges were folded-in, and that seemed the natural and appropriate thing to do. As far as I know, the constitutional validity of this has never been questioned. Nevertheless, the judges involved had previously been named (and confirmed) to "an independent agency in the executive branch of the government," which, despite the fact that it looked and acted like a court, actually exercised no judicial power. See *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716 (1929). When the Tax Court became an Article I court, judicial power was conferred on it, as Congress had power to do, *Ex parte Bakelite Corp.*, 279 U.S. 438, 449 (1929), where the Court said that—

> It long has been settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with power in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution.

Thus, "judicial power" was first conferred on the judges of the Tax Court when, in 1970, it became an Article I court. It could have been contended, with some plausibility, that these judges then filled a new office, exercising judicial power, while they previously had been in the "executive branch of the government" with the consequence that a new nomination and confirmation was required. Though such an argument can be made mechanically or analytically, it does not have much of substance to it. Though the judges of the Tax Court did not exercise "judicial power" before 1970, Congress had authorized that they be called judges and that their tribunal should be known as the "Tax Court of the United States." And the tribunal did, from the beginning, act like a court. There was, undoubtedly, some change when the formal "judicial power" was conferred on them, but it was not a very great change. To say that that required new nomination and confirmation would be a little like saying that all the judges of the lower federal courts required new nomination and confirmation in 1875 when, for the first time (except for a very brief period early in the nineteenth century) federal question jurisdiction was conferred on them.

Another analogy is found in the membership of the United States Commission on Civil Rights. This agency was first created by Congress in 1957. At all times, it has had a limited duration, the period of its duration having been extended by Congress on several occasions. Persons have been nominated and confirmed as members of the Civil Rights Commission. It could be contended that this nomination and confirmation was for the term ending with the then expiration of the Commission. Thus, when that term was extended by Congress, it could be contended that a new nomination and confirmation was required, since the members were then entering into a new term. Or, to put it another way, it could be contended that Congress, by extending the term of the Commission, was actually designating the members for the new term. Actually, no such contention has ever been made. Several members of the Commission have held office over one or more extensions of the term, and this has never been regarded as amounting to an appointment for a new term.

I would conclude that there is no substantial doubt about the constitutional validity of the folding-in of the judges of the United States Tax Court, although I recognize that I can point to no decision which clearly establishes this. If I am sound in this conclusion, it is an important step towards resolving the problem with respect to the judges of the proposed bankruptcy court.

There are differences. In the case of the United States Tax Court (and of the United States Commission on Civil Rights) the persons involved had been nominated by the President and confirmed by the Senate. In the case of the present referees in bankruptcy (often called today "bankruptcy judges") the

appointments have been by district courts, and none of them has been nominated or confirmed. To this extent, the analogy of the judges of the Tax Court is not controlling. However, the referees in bankruptcy have been exercising judicial powers, though under the direction and control of the district judges. They could continue to exercise essentially the same powers once the new court was established, though, presumably, under the direction of the United States Courts of Appeals.

I think it is fairly arguable that a suitable transfer provision with respect to the referees would be constitutional. I would not myself favor appointment by the judicial councils. In the long run, I think that the judges of the bankruptcy court should be nominated by the President and confirmed by the Senate, just as is the case now with respect to the judges of the Tax Court. Still, there are problems about doing this all at once, and one of these problems is the sheer difficulty of getting on with the work in the bankruptcy court while the nominations and confirmations are being carried out. Although I cannot point to a case upholding it, I would think that a strong case can be made for the proposition that the existing referees should continue in office, subject to supervision by the circuit courts of appeals, and, perhaps, for staggered terms of two years, four years, and six years, and that their successors, after the completion of these terms, would be nominated by the President and confirmed by the Senate.

If the existing referees have appointments for designated terms, it could be provided that they should continue as judges of the bankruptcy court until the expiration of those terms. This is, in essence, what was done with the judges of the United States Tax Court. That would provide for staggered separations, so that all of the new appointments would not come at once. If it was thought to be helpful, the existing referees could be continued as referees, with expanded powers, until the expiration of their terms, at which point their successors would be named as bankruptcy judges. As I have indicated, I would favor that the designation at that time should be made by the President, with confirmation by the Senate, although I am by no means prepared to say that appointment by the judicial councils would be unconstitutional. After all, the Constitution does provide (Article II, Section 2, clause 2) that "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." However, as far as I know, Congress has never authorized the appointment of judges, or the appointment of persons directly exercising judicial power under either Article I or Article III, in the Courts of Law, or in anyone other than the President, with confirmation by the Senate.

As I said at the beginning of this letter, the questions which you ask are large and complex—as well as significant and interesting. I trust that you will understand that I have not undertaken to give comprehensive consideration to all of the problems. I have, however, drawn on my study and experience, including participation as a counsel in cases as far apart in time as *O'Donoghue* v. *United States*, 289 U.S. 516 (1933). and *Palmore* v. *United States*, 411 U.S. 389 (1973).

I hope that these responses to your questions will be of some use to you and to your Committee.

With best wishes,

Very truly yours,

ERWIN N. GRISWOLD.

GEORGETOWN UNIVERSITY LAW CENTER,
Washington, D.C., June 30, 1976.

Hon. PETER W. RODINO, Jr.,
Committee on the Judiciary, House of Representatives,
Washington, D.C.

DEAR CHAIRMAN RODINO: Please excuse my delay in responding to your request for my views concerning the constitutionality of the pending bankruptcy bills. I appreciate greatly your giving me an opportunity to express my views on these issues.

As a preliminary matter. I should like to disclose a possible source of bias. My colleague, Dean Frank Flegal, litigated the case of Palmore v. United States, 411 U.S. 389 (1973) and as I became convinced that his position was correct I assisted in development of the *Palmore* brief before the Supreme Court. As you are aware, that case is now before the Supreme Court again where one of the

issues is whether Congress may commit all post-conviction habeas corpus claims to federally-created Article I courts exclusive of Article III tribunals. I am presently assisting Dean Flegal in the preparation of that brief. While I have thus come to have some views on the meaning of the Article III requirements, I nevertheless believe they have come from an initial inquiry that was open minded.

In analyzing the questions you have presented, I think certain caveats are in order. First, I believe Congress truly has a large role to play in this area. While the federal judiciary would undoubtedly have the final say with respect to the constitutionality of the proposals you have outlined, there is much room here for deference to Congressional insights. In particular, if the Congress fully considers the matter and provides solid data and historical support for committing some of these issues to Article I courts, I believe the Supreme Court would be at least pre-disposed to respect that judgment. For the cases suggest that the Court is seeking to give a practical, not simply theoretical, content to the legal requirement that Article III mandates a tenured judiciary in some instances. On the other hand, if the Congressional decision is ultimately to be only a reflection of the relative political power of these who wish to protect incumbent bankruptcy referees as against those who believe in a strong and independent judiciary, then I would assume the resultant Congressional determination (if it would be of any utility at all) would probably simply constitute one more reason for the federal courts to impose a contrary will on the Congress. In short, if Congress shows a careful concern for the values underlying Article III, I would expect your resolution of this difficult issue to carry great weight with the Court.

Second, this is a most difficult area of constitutional law. The precedents are horribly murky, doctrinal confusion abounds, and the constitutional text is by no means clear. No litigant has ever prevailed in the Supreme Court upon a claim that he had a constitutional right to trial or appeal before a tenured federal judge. On the other hand, judges have prevailed in claims that they were entitled to Article III protection and all the decisions seem to assume that there remains a bedrock of cases, as yet not described, for which the Constitution requires a tenured federal judiciary.

Because I am sure you and your committee have reviewed the precedents, I see no need to repeat them here. Instead, I will confine myself to trying to state what I believe a fresh look at the Constitution and the cases decided to date suggest are, or should be, the prevailing constitutional norms.

By way of summary, I should say that I have reviewed Mr. Plumb's article, as you requested, and am largely in agreement with it. Clearly, the judges you describe under both pending bills would be "Article I judges" because in neither case would they enjoy life tenure. The issue, then, would be whether Congress may simultaneously (1) create a federal bankruptcy court of nation-wide jurisdiction and (2) not tenure the judges on that court. This statement of the issue is important, I believe, because it goes to the core of the meaning of Article III, § 1. I do not believe that the text can be said to require that certain cases must be heard by Article III judges; Congress can always leave federal law to be enforced by the state courts. Rather, Article III, § 1 is designed to state a limit on the power of Congress to establish a federal judicial system. The true constitutional question, and the precise issue in this case, is once Congress decides to commit an aspect of federal law to a federally-created judiciary, must that judiciary be tenured?

I would begin by concluding that the present practice of utilizing referees in bankruptcy is no support for the constitutionality of either H.R. 31 or H.R. 32. While I do not doubt that portions of a matter that must be heard by an Article III judge may be delegated by him to someone not enjoying life tenure, under the bills you describe the contemplated new judges would be far too independent to qualify under such an exemption. If the Constitution requires that a matter be heard by an Article III judge, I would simply assume that this means he, not his delegate, could hold jury trials or punish for contempt or enter final judgments. Otherwise, such a constitutional rule would have no independent significance. These bills would apparently establish only a limited appellate review function for Article III judges over the decisions of the newly-created bankruptcy judges.

That these federally-created Article I judges would be construing and enforcing federal law is not, of course, the end of the matter. As Mr. Plumb points out, Congress has been held to have power to establish Article I courts that administer federal law in the territories, in the District of Columbia and in suits against the United States.

However, I do believe that the fact that the bills propose to create federal judges hearing federal cases is still the most important consideration. I can find no other way to read Article III, §1 of the constitution except as a statement that when Congress decides to commit federal issues to a tribunal for judicial resolution, it must ordinarily tenure that tribunal. Any other reading of that section of the constitution simply reduces it to (1) a guarantee of tenure for Supreme Court justices and (2) a suggestion that Congress consider tenuring judges when any other federal court is established. The territories and the District of Columbia have been treated specially because they are special. In those cases Congress is not legislating (and its judges are not judging) against a background of state law and in an area where the Constitution was designed to limit federal power. Instead, in both situations, Congressional powers are more analogous to those of state legislatures and there is less reason to read into Article III a requirement that all federal laws passed pursuant to such powers be committed for their application only to judges with tenure.

I hold these views not only because they seem consistent with the decided cases, as Mr. Plumb's article demonstrates, and because they seem to me the clearest implication from the text of the constitution. I also believe this is what Article III contemplated and that the issue of judicial independence was an important one to those who drafted the Constitution. One of the complaints uttered in the Declaration of Independence was that the King of Great Britain "has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." Hamilton reported in the Federalist, No. 78 that the secure tenure of the federal judiciary "is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws." Article III, § 1 reflects these beliefs of those who fought for our independence and who wrote our Constitution; it is not a mere exhortation to Congress.

The true difficulty these views present is in explaning the many federal administrative agencies that frequently hear and decide in the first instance claims under federal law. As Professor Currie has demonstrated, it is hard to square this fact of administrative power with the basic requirement of Article III, § 1 that when Congress establishes an adjudicatory tribunal it must ordinarily confer tenure on the judges. See Currie, *Federal Jurisdiction in a Nutshell* at 36–42. For purposes of the new Bankruptcy Act, however, I think that the administrative agency analogy is inapplicable. For, as I understand it, the bankruptcy court would be issuing final judgments in suits entirely between private parties, with direct impact on the legal rights of third parties, and in many cases based upon causes of action founded on state law. Further, the court would issue its own process, have the power to cite for contempt and would hold jury trials. No administrative agency has such powers and no case that I am aware of remotely suggests that Congress can create tribunals with such powers yet not tenure its judges. Unless the Supreme Court is prepared to announce that Article III, § 1 has no force beyond tenuring the Supreme Court or that it requires tenured trial judges only in criminal cases (an intermediate position that has no textual support in the Constitution) then I believe that one limit on Congress' authority to establish its own judicial system for enforcing federal bankruptcy laws is that the judiciary so created must be independent of the rest of the federal establishment. I believe this is not only good law, it's sound constitutional policy. The tenure requirement of Article III is one aspect of the system of separation of powers designed by the authors of the Constitution to prevent a monolithic federal establishment from concentrating power in the hands of one branch of the national government.

Perhaps were Congress to provide for de novo re-trial and review of decisions by these new Article I bankruptcy judges by established Article III courts this difficulty could be averted. I see no reason, however, why you would wish to create such an inefficient system.

You have also asked me to consider the manner of appointment of the bankruptcy judges in light of *Buckley* v. *Valeo*. I have no doubt that such judges would be "officers of the U.S." within the meaning given that phrase in *Buckley*, unless the case is to be limited to people exercising judicial, law-making and prosecutorial functions all at once. Nothing in *Buckley* suggests to me that such a narrow confinement of the case is likely.

The question would be, then, whether existing bankruptcy referees could be "folded in" because they were earlier appointed to similar positions in a con-

stitutional manner or because their appointment would be only temporary *Buckley* does not directly address this problem. However, I am sure that the appointment power is a personal one. That is, one President cannot make another President's appointments (President Ford and the Senate could not now appoint someone to serve as Attorney General commencing in 1986). Consequently, I am inclined to think that when a new agency or tribunal is established the Constitution requires that its members be freshly appointed by present authority, not simply plucked from an analogous establishment. (For example, I do not believe Congress could have provided that all FTC commissioners should automatically become commissioners of the Consumer Product Safety Commission when that agency was first created). The bankruptcy courts contemplated in H.R. 31 and 32 seem to me sufficiently different in character than those under the present system so that a fresh appointments process is required, and certainly should fall within this principle if they are to be tenured under Article III.

I hope the above is of some use to you and would be happy to answer any further questions you may have or to elaborate on any matters where I've not been sufficiently clear. May I say that I admire greatly the pains you are taking to consider fully and fairly these important constitutional issues. Such work is of great service to the country and the Constitution.

Sincerely,

THOMAS G. KRATTENMAKER,
Professor of Law.

THE UNIVERSITY OF CHICAGO,
THE LAW SCHOOL,
Chicago, Ill., June 23, 1976.

PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, Congress of the United States, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN RODINO: In response to your letter of April 30, I shall record my observations in clusters, since in some instances they overlap the questions that are put in your letter.

THE FIRST GROUP OF QUESTIONS

1. What is the constitutional status of the described courts?
2. May either of the courts described exercise the full jurisdiction described? If not, what limits must be placed on their powers?
3. Does the exercise of the jurisdiction described constitute the exercise of "the judicial power of the United States"?
4. May the powers and jurisdiction described be exercised by anyone other than a life-tenured, salary-protected judge, or an appointee of such a judge, who is under the judge's supervision, control and review?

The answers to these questions are necessarily interrelated. Perhaps the most important of them is the third. This is so because the question of what jurisdiction can be conferred in a sense depends upon the constitutional status of the court, while the constitutional status of the court in a sense depends upon the jurisdiction conferred.

The position of cases "in bankruptcy" constitutionally is not altogether free from doubt. Article III, sec. 2 defines the judicial power of the United States as embracing "all Cases, in Law and Equity, arising under this Constitution the Laws of the United States, and Treaties made, or which shall be made, under their Authority" and "all Cases of admiralty, and maritime jurisdiction." Two questions arise. First, whether the bankruptcy proceeding itself is a "case in equity" or a thing sui generis provided for by Article I, § 9, and second, assuming arguendo that the bankruptcy proceeding is sui generis, do they include proceedings between the trustee and third parties which normally would be the subject of ordinary suits in law or equity or admiralty.

The first question, in the context of non-judicial adjudication, has never been raised inasmuch as the jurisdiction in such proceedings from the first has been vested in the district courts. Such proceedings have been characterized as "in the nature of proceedings in equity." See *Bardes v. Hawarden Bank*, (1900) 178 US 524.

The second question, the status of plenary suits has frequently been raised, however, and in the course of such litigation the constitutional basis for federal

jurisdiction of bankruptcy matters in general has sometimes been alluded to The statements in the cases are not easy to reconcile. In *Mitchell v. Great Works Milling and Mfg. Co.*, 17 Fed Cas. 497, No. 9662, Mr. Justice Story, in treating of the congressional power to confer jurisdiction on the district courts in plenary suits, observed:

> To us it seems perfectly clear, that Congress possess a complete constitutional authority to enact such a law for such an object; for the judicial power, by the constitution, extends 'to all cases in law and equity, arising under the constitution and the laws and treaties made, or which shall be made under their authority;' and further Congress are authorized 'to pass uniform laws on the subject of bankruptcies throughout the United States.' The judicial power has, in this respect, under the constitution, always been construed to be coextensive with the legislative powers, upon the plain ground, that the constitution meant to provide ample means to accomplish its own ends by its own courts.

In other cases a distinction has been drawn between the origin of jurisdiction in summary proceedings on the one hand, and plenary suits on the other. Thus in *Morgan* v. *Thornhill*, 78 US (11 Wall) 65, Mr. Justice Clifford observed:

> Independent of the Bankruptcy Act the District Courts possess no equity jurisdiction whatever, as the previous legislation of Congress conferred no such authority upon those courts since the prior Bankruptcy Act was repealed. Whatever jurisdiction, therefore, they possess in that behalf is wholly derived from the Bankruptcy Act now in force.
>
> Undoubtedly the jurisdiction conferred by the third clause of the second section is of the same character as that conferred upon the Circuit Court by The Eleventh Section of the Judiciary Act, and it follows that final judgments in civil actions and final decrees in suits in equity rendered in such cases, where the sum or value exceeds two thousand dollars, exclusive of costs, may be re-examined in this court when properly removed here by writ or error or appeal, as required by existing laws.
>
> Concurrent jurisdiction with the District Courts of all suits at law or in equity are the words of that clause, showing conclusively that the jurisdiction intended to be conferred is the regular jurisdiction between party and party, as described in the Judiciary Act and the third article of the Constitution.
>
> Cases arising under that clause, where the amount is sufficient, are plainly within the ninth section of the Bankruptcy Act, and as such may be removed here for re-examination, but the revision contemplated by the first clause is evidently of a special and summary character, substantially the same as that given by the prior Bankruptcy Act, as sufficiently appears from the words 'general superintendence,' preceding and qualifying the word 'jurisdiction,' and more clearly from the fact that the jurisdiction extends to mere questions as contradistinguished from judgments or decrees as well as to cases, showing that it includes the latter as well as the former, and that the jurisdiction may be exercised in chambers as well as in court, and in vacation as well as in term time.

This distinction between "special superintendence and jurisdiction" on the one hand, and "the regular jurisdiction" on the other was adverted to in *Bardes v Hawarden Bank*, 178 US 524, quoting from the *Morgan* case, and reiterated in *Schumacher* v. *Beeler*, 293 US 367, 372, citing *Bardes* and *Morgan* ("The jurisdiction of such suits in law and equity was of the same character as that conferred upon the Circuit Courts by the eleventh section of the Judiciary Act of 1789").

In *National Mut. Life Ins. Co. v. Tidewater Transfer Co.*, 337 US 582, Mr Justice Jackson reads the *Schumacher* case as holding that the jurisdiction of plenary suits arising out of bankruptcy proceedings was conferred upon the courts in an exercise of authority under Article I, but this view of the Article I power appears to have been rejected by six members of the Court, Mr. Justice Frankfurter putting the holdings in *Schumacher* and *Williams v. Austrian* on the "arising under" language of Art. III, sec. 2, in the same fashion as Mr. Justice Story had in the *Mitchell* case.

In *Katchen v. Landy*, 382 US 323, Mr. Justice White refers to bankruptcy courts as "essentially courts of equity" (p. 395), and on the ground that trial of claims "are inherently proceedings in equity," the Seventh Amendment does not require a jury trial. See also *Local Loan Co. v. Hunt*, 292 US 234.

In summary, it can be argued with some citations that seem to lend support that all the present jurisdiction in bankruptcy cases derives from Article III, that the plenary jurisdiction does, but the summary jurisdiction does not, or that none of it does.

Personally I believe that an argument for an Article I court that depended upon the assumption that the court exercised no jurisdiction that is provided for in Article III would be gossamer. This is particularly true by virtue of the fact that in *National Mut. Life Ins. Co. v. Tidewater Transfer Co.*, six of the members of the Court were of the opinion that Article I cannot be relied upon to support conferral on an Art III court of jurisdiction not within the "judicial power." After all, the district courts have exercised *all* jurisdiction contemplated for the new bankruptcy court for 175 years.

Question 1 is difficult to answer. Independent of the distinction between Article III and Article I courts, Congress can create specialized courts under Article III, and has done so in a number of instances—witness the short lived Commerce Court, and today, of course, the Court of Claims, Court of Customs and Patent Appeals. Most recently there is the special railroad court. Indeed, in 1789 the Article III jurisdiction was conferred in part on the district courts, in part on the circuit courts, and left in part to the state courts. The proposed Bankruptcy Courts do not differ in function from the district courts except for the jurisdictional limitations and the absence of the protection of tenure and pay. Assuming for a moment that the Supreme Court would come to the conclusion that they exercise nothing but Article III jurisdiction, it would have to face the issue of whether the provisions on tenure and salary could be struck down without doing violence to the rest of the statute. It has been emphasized that the congressional intention is important. See, e.g., *Glidden Co. v. Zdanok*, 370 US 530; *Palmore v. United States*, 411 US 389.

If the Court found that all the jurisdiction contemplated was exercisable by an Article I court undoubtedly it would accept the label placed on the court by Congress. *Palmore, supra.*

If the Court should come to the conclusion that some of the jurisdiction conferred could be given to a non-tenured court and some could not, it would have to choose between paring the court to Article I size or disregarding the label and striking the tenure and pay provisions. As a third alternative it might declare the amendments unconstitutional.

Thus, Question 1 really asks for the sum of the answers to the other three questions.

The answer to Question 4 necessarily must be speculative, since the Supreme Court cases dealing with the subject matter are far from clear. They are collected and discussed in *Palmore v. United States, supra*, upholding the 1970 reorganization of the District of Columbia courts, including the tenure and removal sections of the District of Columbia Code over an Article III objection. In *Palmore*, the instances in which the Congress has created untenured Article I courts are listed:

(1) *The territories*
American Ins. Co. v. Canter, 1 US (Pet.) 511.

(2) *Unincorporated districts outside the United States*
Downs v. Bidwell, 182 US 244.
Balzac v. Porto Rico, 258 US 312.

(3) *Military courts*
Toth v. Quarles, 350 US 11.

(4) *Private land claims*
United States v. Coe, 155 US 76.

(5) *Choctaw and Chicasaw Citizenship*
Stevens v. Cherokee Nations, 174 US 445.
Ex Parte Joins, 191 US 93.

(6) *Consular courts*
In re Ross, 140 US 453.

(7) *The Court of Claims and Court of Patent Appeals*
Glidden Co. v. Zdanok, 370 US 530.
Ex Parte Bakelite, 279 US 438.

(8) *The courts of the District of Columbia*
Palmore v. United States, 411 US 389.

It will be noted that the tenure and pay provision does not have a very good track record. Only in the case of the United States Court of Appeals and District Court of the District of Columbia has the Court applied the provision to a

court arguably an Article I court and then only on the basis of intention of Congress, evidenced by the grant of tenure and the nature of the jurisdiction conferred. In no instance has it flatly rejected the label attached by Congress. In *Palmore*, Mr. Justice White made it plain that the practical problem that Congress is addressing is an important consideration. He made it abundantly clear that the Constitution does not require that all the judicial power must be conferred on Article III courts, nor guarantee to litigants in all the cases listed in Article III, sec. 2, a trial before a tenured and salary-protected judge. In addition to the instances listed above in which litigation has been handled by non-tenured federal courts, he pointed out that until 1875 federal claim cases were almost entirely relegated to trial by largely untenured state judges.

There is much in the *Palmore* case that suggests that the transfer of the bankruptcy jurisdiction to an Article I court would be within the power of Congress. The jurisdiction exercised by the D.C. court in *Palmore* was criminal, surely the type of jurisdiction calling most clearly for independence of the judge. Previously it had been exercised by the United States District Court for the District of Columbia, which in *O'Donoghue v. United States*, 289 US 516, was held to be constitutional (Art. III) court. The Court noted that the Act of 1970 stemmed from the fact that "Congress had concluded that there was a crisis in the judicial system of the District of Columbia, that case loads had become unmanageable."

On the other hand, there are equally opposed observations. Justice White continued: "The remedy in part, was to relieve the regular Article III courts, that is, the United States District Court of the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, from the smothering responsibility for the great mass of litigation, civil and criminal, that inevitably characterizes the court system in a major city and to confine the work of those courts to that which, for the most part, they were designed to do, namely, to try cases arising under the Constitution and the nationally applicable laws of Congress." He went on to emphasize that the jurisdiction conferred was to try those "distinctly local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the local jurisdiction."

The bankruptcy analogy is therefore not complete. By constitutional requirement bankruptcy laws must be uniform. The jurisdiction is nationwide. It is a jurisdiction that quite clearly could be, and was, for nearly two centuries, vested in the district courts. The proposed new court in no way differs from the district courts, except that it is vested with a specialized jurisdiction. It punishes for contempt, renders judgments, tries jury cases, executes its judgments, seizes vessels, and in every way looks like the district court, except its judges are not tenured.

The answers to the question thus presents a dilemma. While there are favorable analogies to be drawn, almost every argument proves too much. If the fact that jurisdiction might have been left in the state courts avoids the tenure and salary protection, the concession by Mr. Justice White that Congress need not vest the entire judicial power and may leave any or all of the trial court jurisdiction to the state courts carries with it the conclusion that Congress may vest the same power in non-tenured judges, then the provision of Article III, sec. 2 dealing with cases arising under the Constitution, laws and treaties was surplusage and the tenure and salary protection provision is applicable only to those heads of jurisdiction, like the diversity jurisdiction, that appear only in the third article.

Those instances in which the power to create Article I courts has actually been upheld have been largely those in which the court has sat in an area over which the Congress has had total sovereignty, the territories, unincorporated areas outside the continental United States, and the District of Columbia, or in which the courts have exercised some temporary dispute settling function, such as the Choctaw ond Chickasaw citizenship, land claims, consular courts. The temporary character of these courts has made the life tenure requirement of Article III particularly inappropriate. The exception has been the military courts, which are justified by both history and practical necessity.

So far no mention has been made of the Tax Court, the constitutionality of which apears never to have been directly ruled upon by the Supreme Court. The jurisdiction of the Tax Court is limited to matters that relate to the relationship between citizens and the government, rather than suits dealing with rights of private parties among themselves, a distinction recognized in *Ex Parte Bakelite*, 279 US 438, and reiterated in *Crowell v. Benson*, 285 US 22. The matters cog-

nizable by the Tax Court could be, and were under earlier legislation, decided within the Treasury Department, and the taxpayer today has the alternative of paying the tax and suing in the district court.

This leads to the answer to Question 4—What portion of the present jurisdiction of the district court could be given to non-tenured judges? Separation of powers, like the salary and tenure clause, has not had a very good track record. In *Crowell* v. *Benson*, *supra*, by analogy to juries, masters and surveyors, the Court held that the determination of facts in a dispute that in other contexts would have been a common law action could be committed to a single administrative official, save for jurisdictional facts. The jurisdictional facts doctrine was rejected by Mr. Justice Brandeis in his dissent and Professor Davis has stated that it has been largely abandoned in subsequent cases. See 4 Davis, Administrative Law (1958) 156–61. Cf. *Jacobellis* v. *Ohio*, 378 US 184, 190. In *Crowell*, Mr. Justice Brandeis went so far as to state, "If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminuation of the jurisdiction of the federal courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process." Writing before the *Crowell* decision, Professor Wilbur Katz suggested that cases in bankruptcy are in this category. Katz, Federal Legislative Courts, 43 Harv. L. Rev. 894.

If the Supreme Court should hold that the whole jurisdiction in bankruptcy matters cannot be vested in a legislative court, my hunch is that it will limit this principle to jurisdiction of plenary actions under the present Act, and conceivably the initial adjudication of bankruptcy.

The second cluster of questions, 5–8, relate back to the answers to questions 1 through 4. To the extent that the Supreme Court would uphold commission of bankruptcy matters to a legislative court, there would be no necessity to provide for control of the judge by the court of appeals, or removal of the judge by the court of appeals, either for cause or otherwise. Nor would there be a necessity for provision for the taking of new evidence. So much is clear from the present operation of the Tax Court, and indeed from the operation of many administrative agencies, and seems to be squarely within the decision in *Crowell* v. *Benson*, 284 US 22, except to the extent that the jurisdictional facts doctrine of the *Crowell* case may have any present day life.

So with the power to cite for contempt, issue writs of execution, and hold jury trials. Of course Article I courts in the territories do all this. On the other hand, if the Court were to hold that the plenary jurisdiction, for example, was Article III business purely, the need for holding jury trials and issuing writs of execution would be largely academic. As to final judgments, I see no reason why such might not be entered in any event.

The question whether the present system delegates too much power to the referee; my knowledge of bankruptcy practice is very limited so I have no opinion on the subject of abuses by referees. I should think, however, that real abuse could be corrected by the court. The whole question of the nature of dispute settling institutions is largely one of history and tradition. If the appointment process works and the bankruptcy referee operates under rules designed to produce a fair adjudication, there seems to be no reason why his conduct of the trial is likely to be more abusive than if the trial were conducted by a judge.

I have read the *Plumb* article. I postponed doing so until I could explore the matter independently. I find that I am in general agreement with the position of Mr. Plumb that the constitutionality of the proposal is doubtful to the extent that it transfers to a non-tenured court cases and controversies that are the daily business of the Article III courts, just because such cases arise out of the fact of bankruptcy.

As to the proposals for appointment, as I read the *Buckley* case, and indeed Art. II, § 2, cl. 2 of the Constitution, any type of statutory covering in of present referees past their terms would be unconstitutional. There is certainly no reason that staggered terms would be so, however, and I see no reason why a preference for appointing present referees could not be expressed, though I assume that the President and the Senate could ignore it.

Since Art. II, sec. 2, cl. 2 reads "Judges of the Supreme Court, and all other Officers of the United States," there appears to be no question at all as to the status of the proposed judges as "officers of the United States," whether they are Article III judges or Article I judges. In this sense the case is *a fortiori*

under the *Buckley* decision. The fact that their terms are extended, rather than newly appointed does not seem to me to make Art. II, sec. 2, cl. 2 less applicable. While the motive in the instant case appears to be perfectly pure, it would be a dangerous general principle to permit Congress by statute to cover in present officers the appointment of whose successors in office is given by the constitution to the President and the Senate.

Provision may be made for an initial 6 year term, no doubt, and I suppose appointment by judicial councils might be held to be appointment by the Courts of Law within Art. II, sec. 2, cl. 2. And nothing precludes the appointing authority from appointing present referees. I suspect that given the special knowledge required, this would be the general result whether the appointments were made by the President or the judicial councils. Personally, however, I think it would be unwise to jeopardize the scheme by any form of attempted legislative covering-in.

With best regards,

JO DESHA LUCAS,
Professor of Law.

UNIVERSITY OF CALIFORNIA, BERKELEY,
Berkeley, Calif., May 17, 1976.

HON. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary, Congress of the United States, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN RODINO: I have your letter of April 30 concerning the constitutional problems connected with the provisions of H.R. 31 and H.R. 32 which would establish a new kind of bankruptcy court.

As your letter suggests, the constitutional questions raised by these proposals are numerous and interesting, and they obviously deserve careful consideration. I can certainly understand, and approve, your desire to secure advice from scholars in the field. However, I regret that I am unable to undertake the study you request at this time.

Sincerely yours,

PAUL J. MISHKIN,
Emanuel S. Heller Professor of Law.

JUNE 7, 1976.

PAUL J. MISHKIN,
Emanuel S. Heller Professor of Law, University of California, School of Law, Berkeley, Calif.

DEAR PROFESSOR MISHKIN: I am sorry that you have been unable to find the time to respond in detail to my earlier letter to you concerning the bankruptcy court system. I can understand your busy schedule, but I regret that we shall not have the benefit of your scholarship in this difficult area.

I have received responses to my earlier letter from two of your co-authors of the Second Edition of the Hart and Wechsler case book, and thought you might be interested to see their views. While I appreciate your inability to study this matter in depth, I hope that you may be able to take a moment to comment on the views of your colleagues.

The Committee will be grateful for any thoughts you might provide.

With best regards.

Sincerely,

PETER W. RODINO, JR.,
Chairman.

UNIVERSITY OF CALIFORNIA, BERKELEY,
Berkeley, Calif., June 22, 1976.

HON. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.
Washington, D.C.

DEAR MR. CHAIRMAN: I am happy to respond to your letter of June 7.

In view of your earlier letter and the statements by Professors Shapiro and Wechsler which you sent me, I hardly need to say that I too believe there is no

simple categorical answer to the question of the constitutionality of the new bankruptcy courts contemplated by H.R. 31 and 32. I also agree with my colleagues that the validity of establishing either of the proposed court systems ultimately turns on whether there is sufficient special justification for dispensing with the guarantee of tenure during good behavior—whether, in the terms used by Justice White in *Palmore* v. *United States* [411 U.S. 389 (1973)], there are "particularized needs" in the bankruptcy area sufficient to warrant such "distinctive treatment".

To the extent that there is divergence in the attitudes expressed in the two statements, I share the view expressed by Professor Wechsler. The basic norm for federal courts with jurisdiction to administer national law throughout the United States is that prescribed by Article III. Certainly the proposed courts would be no less "courts" than any other federal court. The power to enjoin proceedings in other courts, state and federal, highlights this. But it also appears clearly from the scope of the jurisdiction, and the power to issue coercive judgments and levy executions, as well as the authority to punish for contempt. Moreover, as Professor Wechsler said, bankruptcy proceedings are "Cases . . . arising under" federal law within the meaning of Article III. [See also my article on "arising under" jurisdiction, 53 Columbia L. Rev. 157, 189 *et seq.* (1953)] If an exception to the life-tenure norm of Article III is to be valid, it cannot rest simply upon the fact that Article I specifically authorizes Congress to enact bankruptcy laws. If that norm is to be departed from, the departure should be justified by a strong showing of special need.

Relevant to that question of need, it seems worth noting that Article III itself permits much flexibility; so long as tenure during good behavior is granted, much room exists as regards other conditions. Thus, it would certainly be possible to create a special bankruptcy court under Article III and there is no reason why the judges of that court would have to be paid the same salary as district judges or any other existing judges. It would also be permissible to provide that when a judge of that court retired pursuant to statute, a vacancy for a new appointment would not automatically be created. And it would be entirely valid to specify that the judges of that court could not be assigned to sit, even temporarily, on the general district courts or courts of appeals. I mention these possibilities not to advocate them, but rather to emphasize that the judgment of necessity for creating an Article I court ought appropriately to take into account the alternatives available within Article III.

Finally, I agree with the very strong doubts expressed by both of my colleagues that any method of appointing the judges of the proposed court would be valid other than new nominations in accordance with Article II, clause 2, section 2 of the Constitution.

I hope these comments will be of some help to the Committee. I still regret that I was not able to write a full answer to your initial letter, but much less so now that I know the Committee has had the benefit of Professor Shapiro's and Professor Wechsler's statements.

Sincerely yours,

PAUL J. MISHKIN,
Emanuel S. Heller Professor of Law.

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL,
Ann Arbor, Mich., July 15, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN RODINO: I am writing in belated response to your letter of May 4 requesting my views on various constitutional issues raised by H.R. 31 and H.R. 32, alternative proposals to revise the Bankruptcy Act. Other commitments have prevented a prompt reply and, even now, do not permit me to address all the issues you have raised in the detail required by their extraordinary complexity. I have, however, set forth below a brief statement of my views concerning what I understand to be the two major questions before the Committee: (1) whether Congress may confer the full range of powers recommended by the Bankruptcy Commission upon a bankruptcy court composed of judges who lack the tenure

and salary guarantees provided by Article III of the Constitution; and (2) whether Congress may provide that sitting bankruptcy referees shall automatically be "folded in" as the judges of a new bankruptcy court for a six-year traditional term.

I

The most obvious construction of Article III of the Constitution is that it imposes a conditional limitation on Congressional power: if Congress decides to establish an "inferior court" to exercise the "judicial power of the United States," that court must be composed of judges with the salary and tenure guarantees provided by Article III. Nevertheless, from time to time, Congress has enacted and the Supreme Court has sustained legislation conferring judicial power upon federal courts whose judges lack those guarantees. The opinions of the Court sustaining Congressional authority to create, and confer judicial power upon, these so-called "legislative courts" do not, however, rest upon a consistent or clearly discernible rationale. In these circumstances, prediction as to whether the Supreme Court would sustain the proposed bankruptcy court is hazardous.

(1) None of the decisions sustaining the creation of legislative courts provides clear authority for the proposed bankruptcy court. One line of decisions, for example, sustains the creation of such courts in geographic areas in which Congress exercises plenary authority, with powers of governance equivalent to those of a state legislature. See, e.g., *Palmore v. United States*, 411 U.S. 389 (1973); *American Ins. Co. v. Cantor*, 1 Pet. 511 (1828). Another upholds the power of Congress to employ legislative courts for the adjudication of claims against the government, "matters which from their nature do not require judicial determination and yet are susceptible of it." *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). See also *United States v. Coe*, 155 U.S. 76, 85–86 (1894). Since the bankruptcy power is a national power and the adjudication of bankruptcy cases involves the determination of private controversies, neither of these lines of decision provides direct support for the creation of the proposed bankruptcy court.

Somewhat more closely in point is the decision of the Supreme Court in *Crowell v. Benson*, 285 U.S. 22 (1932), involving the validity of legislation which authorized an administrative agency to determine workmen's compensation claims, subject to review in the courts. The legislation was sustained, even though the agency was empowered to adjudicate claims "of private right," but the bearing of the Court's rationale upon the validity of the proposed bankruptcy court is not entirely clear. The decision may be read as resting upon the fact that all issues of law determined by the agency were subject to review in Article III courts. Read in that way, *Crowell* tends to support the power of Congress to establish the bankruptcy court as a legislative court, for under both H.R. 31 and H.R. 32 the bankruptcy court's decisions would be reviewable in an Article III court. To read the decision that way, however, would seem to point toward the conclusion that the salary and tenure provisions of Article III are applicable only to appellate judges, a limitation that finds no support in the language of the Article. See Currie, *Federal Courts* 167 (2d ed. 1975).

Crowell may be read more narrowly, as resting upon the ground that the agency was not authorized to exercise the full range of powers traditionally associated with "the judicial power." Thus, the opinion stresses that "statute has a limited application, being confined to . . . the method of determining the questions of fact, which arise in the routine of making compensation awards . . . ," 285 U.S. at 54, and that "there is no requirement, that in order to maintain the essential attributes of judicial power, all determinations of fact in constitutional courts shall be made by judges." 285 U.S. at 51. The Court's characterization of the agency's power is not entirely accurate, since the latter necessarily determined issues of law also, but it remains true that the agency's powers were not nearly as extensive as those contemplated for the proposed bankruptcy court. The latter would, for example, have contempt power, the power to execute judgments, and the power to enjoin proceedings in state courts. The breadth of these powers, in contrast with those of the agency sustained in *Crowell*, leads me to conclude that the Court's decision there is at best uncertain authority for the Commission's recommendation.

(2) Although the decisions sustaining the creation of legislative courts, considered singly, do not strongly support the proposed bankruptcy court, they may in combination provide greater support for it. It may be, in other words, that prior decisions sustaining legislative courts should not be understood as though each rested on a distinct and limited rationale but, rather, as particular appli-

cations of a more general principle that Congress may, as an incident of its powers under Article I and in pursuit of a valid legislative purpose, commit adjudication of cases "arising under federal law" to tribunals not established pursuant to Article III. See Hart & Wechsler, *The Federal Courts and the Federal System* 396–97 (2d ed. 1973).

Support for the latter view may be found in both *Palmore* and *Crowell*, each of which stressed the importance of the practical considerations that had led Congress to dispense with Article III courts in the particular contexts. See 411 U.S. at 408–10; 285 U.S. at 54.

[B]oth Congress and this Court have recognized [the Court wrote in *Palmore*] . . . that the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect specialized areas having particularized needs and warranting distinctive treatment. 411 U.S. at 407–08.

The Court's statement is not free from ambiguity, but it is at least susceptible to the interpretation that Article III does not preclude Congress from concluding that functional considerations justify the use of legislative courts "in specialized areas having particular needs and warranting distinctive treatment."

(3) The propriety of reading the Supreme Court's prior decisions broadly, in the manner suggested immediately above, confronts two potential obstacles. First, the premise of *Glidden* v. *Zdanok*, 370 U.S. 530 (1962), was that Congress may not authorize the judges of a legislative court to sit by designation on an Article III court. It might be argued that this premise is inconsistent with broad Congressional authority to confer power that is "inherently judicial" upon a legislative court. See Currie, *The Federal Courts and the American Law Institute*, 36 U. of Chi. L. Rev. 1, 13, n. 67 (1968). *Glidden* need only be understood to mean, however, that Congress may not confer the full scope of "federal question" jurisdiction on legislative courts. That is, plainly, a goodly ways from a holding that Congress may not employ legislative courts upon the basis of particularized judgments "in specialized areas having particular needs and warranting distinctive treatment."

Second, and rather more troublesome, are the implications of a line of decisions denying Congressional authority to extend court-martial jurisdiction to civilians and to members of the armed services charged with offenses that are not "service-connected." See, e.g., *O'Callahan* v. *Parker*, 395 U.S. 258 (1969); United States *ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955). Although the statutory provisions involved in those cases represented particularized Congressional judgments concerning the need to employ courts-martial rather than Article III courts, they were nevertheless invalidated by the Supreme Court, at least in part upon the ground that they were inconsistent with the Article III guarantee of a trial presided over by a judge with tenure and salary guarantees. The court-martial decisions establish, at a minimum, that Congress does not have unfettered authority under Article I to determine that particular categories of cases "arising under federal law" should be adjudicated outside Article III courts. They do not, however, establish that Congress lacks such authority entirely: only that its determinations are subject to review and reversal in the courts. So interpreted, the court- martial decisions decide only that Congress had insufficient reason to employ courts-martial rather than Article III courts for the trial of criminal charges that do not involve service-connected offenses by members of the armed services. Although this interpretation of the decisions is not a necessary one, it is strongly supported by language in the opinions indicating the Court's special sensitivity to the need for independent judges in criminal cases and its suspicions concerning courts-martial.

(4) There is no certain answer to the question how these diverse strands should be pulled together. My own judgment, on balance, is that Congress does have the power to determine upon the basis of particularized judgments that legislative courts should be created in "specialized areas having particular needs and warranting distinctive treatment." The judgment of Congress is, no doubt, subject to judicial review as in the court-martial cases, but as in other areas of the law it is to be expected that the courts will approach that judgment with deference.

To put the issue in this way, however, is to emphasize the responsibility of the Congress to determine whether there are sufficiently compelling reasons for creating a bankruptcy court whose judges lack the tenure and salary guarantees provided by Article III. My knowledge of bankruptcy and of the Commission's

recommendations are insufficient to warrant a judgment as to whether there are such reasons. The experimental nature of the court, the need for a large number of judges having specialized qualifications, and uncertainty concerning the court's future caseload are undoubtedly relevant factors. But how heavily they weigh and whether there are other relevant factors are matters beyond my ken.

(5) If the Committee concludes that there are adequate reasons for creating the bankruptcy court as a legislative court, there are two issues concerning the scope of the court's power that merit special attention.

First, the question has been raised whether, even if Congress may authorize a legislative court to adjudicate the bankruptcy claim itself, it may also authorize such a court to adjudicate non-federal causes of action to which the trustee has succeeded. Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws—Tax Procedures*, 88 Harv. L. Rev. 1360, 1468 (1975). I see no reason to distinguish between the two types of claims for this purpose. Congressional authority over bankruptcy has long been held adequate to permit Congress to extend the jurisdiction of federal courts to non-federal claims by or against a trustee. See, e.g., *Schumacher* v. *Beeler*, 293 U.S. 367 (1934). The fact that this jurisdiction has heretofore been conferred upon Article III courts is not significant. The same considerations that would warrant creation of a non-Article III court to adjudicate the federal law claim in bankruptcy appear to be equally applicable to ancillary state law claims.

A second and more difficult question is whether Congress may authorize the proposed bankruptcy court to exercise contempt powers. Although *Palmore* sustained the power of Congress to vest criminal jurisdiction in legislative courts, the court-martial cases discussed above suggest that the independence of judges in criminal cases is an especially sensitive issue. It would, therefore, be desirable for the Committee to consider whether the full range of contempt powers contemplated by the pending bills should be vested in the bankruptcy court.

II

The question whether Congress may provide that sitting referees shall automatically be "folded in" as judges of a new bankruptcy court during a six-year transitional term is less complex than the previous question, but the answer to it is no more certain. Judges of the bankruptcy court would undoubtedly be "officers of the United States" and, as such, the manner of their appointment would be governed by Article II, § 2, cl. 2 of the Constitution. *Buckley* v. *Valeo*, 44 L. W. 4127, 4164 (1967). It is also clear that, by vesting the power to appoint such officers elsewhere. Article II, § 2, cl. 2, denies it to the Congress. The question, therefore, is whether legislation "folding in" the bankruptcy referees for a six-year transitional term constitutes an exercise of the appointment power.

A negative answer to that question might conceivably be grounded in a judgment that the proposed legislation would merely represent an increase in the powers of the referees, not the appointment of them to a new office. Cf. *Shoemaker* v. *United States*, 147 U.S. 301 (1893). Even if such a judgment could be sustained, which is doubtful, there is at least some authority in the state courts that legislative extension of a term of office constitutes an "appointment." See *Richman* v. *Ligham*, 22 N.J. 40, 123 A. 2d 372 (1956).

The fact that the legislation would extend to the entire class of referees and would not involve the designation of particular individuals might, however, justify a conclusion that it does not represent an exercise of the appointment power. Article II, § 2, cl. 2, as the Court stressed in *Buckley* v. *Valeo*, was aimed at preventing Congress from "aggrandizing itself at the expense of the other two branches." 44 L. W. at 4165. It is, thus, a particular expression of the more general concern underlying the separation of powers, that of preventing the accumulation of legislative, executive, and judicial powers in the same hands. See *The Federalist Nos. 47 and 48*. Measured against that purpose, legislation "folding in" sitting referees as judges of a new bankruptcy court during a transitional period does not appear impermissible. The Congress would not have designated particular individuals to serve on the court, nor would it have the power to reappoint them. There would be, accordingly, no reason to fear that the judges would be beholden to the Congress and therefore subject to domination by it.

The persuasiveness of this argument would be increased if the "folding in" provision were supported by important and legitimate legislative purposes. Obviously, Congress does have a legitimate interest in assuring a smooth tran-

sition from the present system. Whether that interest would be served by the "folding in" provision is, however, a separate question and one beyond my present competence. The Committee will not doubt wish to examine that question with care.

I hope these comments will be of some use to the Committee. If, as the work of the Committee progresses, I can be of further service, I trust you will not hesitate to call upon me.

Sincerely,

TERRANCE SANDALOW, *Professor of Law.*

HARVARD LAW SCHOOL,
Cambridge, Mass., May 17, 1976.

HON. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN RODINO: This letter is written in reply to your letter of April 30, 1976, raising a number of questions relating to H.R. 31 and H.R. 32. I hope you will forgive the delay in replying, but I have not been well, and I have been quite busy in the last weeks finishing the work of the semester.

Although I do not feel competent to deal with all of the important questions you raise, I will try to address myself to the two principal issues: (1) the status and constitutionality of the proposed new court system for dealing with bankruptcy matters, and (2) the matter of appointments to the proposed court, especially in light of the Supreme Court's recent decision in *Buckley* v. *Valeo*. In preparing this letter, I have had an opportunity to consult with Professor Paul Bator, who is thoroughly familiar with the problem of "legislative" and "constitutional" courts and who is responsible for the materials on that subject in Hart & Wechsler, The Federal Courts and the Federal System, Chapter IV (2d ed. 1973).

I

(a) As you state in your letter, it is clear that the court contemplated in H.R. 31 and H.R. 32 would be a "legislative" or Article I court, especially in view of the fact that the judges who would serve on that court would not have life tenure and the other attributes of judges in Article III courts. It does not follow from that conclusion, however, that the proposed court would be precluded from handling matters relating to bankruptcy, since it is now well established that, at least apart from certain matters that may be "inherently judicial," Congress may invest non-Article III forums with jurisdiction in cases that may also be delegated to Article III courts.

(b) There are a number of Supreme Court decisions that bear on the questions presented, and they are not all easily reconciled, but in my opinion two of the key cases are *Crowell* v. *Benson*, 285 U.S. 22 (1932), and *Palmore* v. *United States*, 411 U.S. 389 (1973). In *Crowell*, the Court upheld the delegation to an administrative agency of jurisdiction over matters of "private right" arising under the Longshoremen's and Harbor Workers' Compensation Act. In doing so, the Court emphasized the need perceived by Congress for "a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of a most serious burden," and also emphasized the preservation in Article III courts of the power of judicial review to "insure the proper application of the law."

In *Palmore*, the Court upheld the power of Congress, acting pursuant to its authority over the District of Columbia in Article I, to provide for the trial of local criminal cases in non-Article III courts. The Court noted that early in our history, enforcement of the federal criminal laws had been left to state courts, that enforcement of federal rights was still available in state courts, that jurisdiction in court-martial proceedings was vested in non-Article III forums, and that "the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." As the Court observed, Congress was aware of the crisis in the judicial system in the District of Columbia and came to the justifiable conclusion that a system of courts with non-tenured judges, subject to removal or

suspension by a judicial commission under certain circumstances, "would be more workable and efficient in administering and discharging the work of a multi-faceted metropolitan court system."

(c) Despite the suggestion to the contrary, in Currie, *The Federal Courts and the American Law Institute*, 36 U. Chi. L. Rev. 1, 13 n. 67 (1968), I do not believe the important principles articulated in *Crowell* v. *Benson* were undercut in *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1963), holding that judges from the Court of Claims and Court of Customs and Patent Appeals could sit by designation on other Article III courts. There was no opinion for the Court in that case, and the plurality opinion of Justice Harlan, while suggesting that some business may be "inherently judicial," essentially went no further than to state that judges from one Article III court might properly sit on another. I certainly agree that a serious constitutional question would be posed if one who was not an Article III judge were to sit on an Article III court, but I do not think that precludes Congress from exercising its powers under Article I to vest jurisdiction of a wide variety of matters in non-Article III forums.

(d) Putting aside for a moment the question of the contempt power, I believe this background furnishes strong support for the vesting of jurisdiction over bankruptcy matters in a non-Article III court, provided at least that there is a functional justification for such action, that the right to trial by jury is not violated, and that adequate provision for judicial review by an Article III court is made. See Hart & Wechsler, The Federal Courts and The Federal System, 396–400 (2d ed. 1973). On the question of functional justification, the fact that a number of important functions have long been carried out by bankruptcy referees is certainly relevant, as is the extremely heavy burden of such cases and the experitise required to deal with them. (I note, in passing, that no non-judicial functions are to be exercised by the new bankruptcy court, but as in the case of the Tax Court, I do not regard that fact as detracting significantly from the need for a specialized tribunal acting outside the bounds of Article III.) It is important, however, that Congress make clear, in its consideration of the establishment of a non-Article III court, that it has taken these functional matters into account and, in particular, that it has laid a foundation for the appointment of non-tenured judges to that court. While I am not sufficiently familiar with substantive bankruptcy law to deal in detail with this question, it does seem to me that the specialized nature of the field, the experimental aspects of the bankruptcy court proposal, and the difficulty of predicting far in advance whether bankruptcy litigation will increase or decline, are important factors.

As to jury trial, there seems to be no problem, since both bills provide for the use of juries whenever needed, and the guarantee of the Seventh Amendment does not, I believe, require that a jury trial, if one is to be had, take place in an Article III court presided over by an Article III judge. I know of no authority on this point, but it seems to me that the essence of the Seventh Amendment is the preservation of the right to a *jury*, not to an Article III judge.

As to judicial review, it appears that in general both bills make ample provision for the consideration of questions of law by Article III courts. I do note one problem, however. H.R. 31 precludes judicial review at the instance of the SEC in § 2–210(B) and, in certain instances, at the instance of the administrator in § 2–210(C). I do not know the reasons for these provisions, and it may well be in any event that preclusion of review at the instance of a Government agency poses no problem under *Crowell* v. *Benson*, but I do believe these provisions should be carefully considered in light of the *Crowell* problem, as well as the more practical question whether a Government agency should, as a matter of policy, be foreclosed from appealing questions of law.

There remains the difficult question raised by Mr. Plumb in his article in 88 Harvard Law Review 1360, 1468 (1975). Conceding the authority of *Crowell* and other cases, he states that "where federal law does not create the right of action but merely appoints an administrator of private assets which include a preexisting non-federal cause of action, and provides the forum in which such action may be litigated, it goes beyond any existing precedent, relating either to administrative agencies or to legislative courts, to say that the nonconsenting defendant must submit to a federal trial in a court not established under Aricle III."

There are several reasons why I disagree with the implication of this passage that delegation of such cases to an Article I court would run afoul of the Constitution. First, the fact that such cases may be tried in state courts makes it clear that an Article III court is not required. Second, whatever the meaning of

"inherently judicial" in Justice Harlan's opinion in *Glidden*, I do not believe such cases are "inherently" less suitable for adjudication in an Article I forum than the private controversy in *Crowell*. Third, unlike diversity of citizenship cases where the *sole* power of Congress to vest jurisdiction derives from Article III, the power of Congress to vest jurisdiction in bankruptcy over claims by or against private parties derives, I believe, from the bankruptcy power in Article I, even though such claims may be governed by state law, and thus it seems to me that *Crowell* is very much in point. *Cf. Osborn* v. *Bank of the United States*, 9 Wheat. 738 (U.S. 1824). In other words, whether or not diversity cases could be relegated by Congress to a non-Article III federal forum, I think claims by or against private parties in a bankruptcy proceeding may properly be. Finally, the functional considerations referred to earlier seem to me to be as capable of application to controversies governed by state law as to those governed by federal law, especially when the need for unified administration of a bankrupt's estate is considered.

(e) I have previously deferred the question of the contempt power vested in the proposed bankruptcy court by § 2-209 of H.R. 31 and § 2-208 of H.R. 32. (I am referring here only to criminal, and not to civil, contempt.) Although the vesting of criminal jurisdiction in non-Article III courts has been upheld in *Palmore* and in the area of courts-martial, a number of Supreme Court decisions limiting court-martial jurisdiction demonstrate the Court's growing sensitivity to the vesting of federal criminal jurisdiction in non-Article III courts and its emphasis on the safeguards afforded by an Article III court in criminal matters. While the right of trial by jury is an aspect of this concern, so too is the presence of a judge with life tenure and other guarantees. See Hart & Wechsler, The Federal Courts and The Federal System, 372-75 (2d ed. 1973), and cases cited therein, especially *O'Callahan* v. *Parker*, 395 U.S. 258 (1969).

Contempt, of course, is in many ways different from other criminal offenses, and bankruptcy judges would clearly be more independent in form and substance than the judges in court-martial proceedings. Nevertheless, you may want to consider distinguishing between the punishment of those contempts over which jurisdiction must be vested in the bankruptcy court if it is to function effectively as a court (in particular, summary criminal contempt proceedings involving conduct that poses an imminent threat to the order and decorum required for fair adjudication) and the punishment of other contempts, where minimal delay and adjudication in another forum would not threaten the ability of the bankruptcy court to carry out its duties. I do not know whether such a distinction is constitutionally required, but I believe there may well be a problem.

II

On pages 3 and 4 of your letter, you raise a number of questions about the appointment of judges to the new bankruptcy court, in light of the Supreme Court's recent decision in *Buckley* v. *Valeo*, 96 S. Ct. 612 (1976). My essential conclusion, which I will try to spell out more fully below, is that anything short of Presidential appointment, with the consent of the Senate, would raise the most serious constitutional questions.

(a) I do not think there is any doubt that the judges of the new court would be "Officers of the United States" within the meaning of Article II, and thus appointment by Congress would not be valid under the *Buckley* decision. *Buckley* did not reach the question of when an Officer is "inferior," and thus subject to appointment by the Heads of Departments or the Courts of Law, instead of the President himself. Although the judgment of Congress is undoubtedly entitled to great weight on this question, I have the gravest doubt whether the judges of this new court could be regarded as "inferior" under Article II. The court will have powers considerably broader than those of bankruptcy referees under present law, and although subject to judicial review, it would, I think be essentially an independent body under both H.R. 31 and H.R. 32. The judges would have extremely important and broad-ranging functions to perform, and they would hold the highest positions in the new court.

(b) Despite *Buckley*, I doubt that there is any infirmity in a "recommendation" by Congress as to the initial appointments to the new court. Such a recommendation is by definition not binding and, whether the recommendation is followed or not, it is hard to see how it could be challenged if the President exercised his own judgment. The question whether such a recommendation should be made, as a matter of policy, is not one on which I feel that I have any special competence.

(c) If I am right up to this point, then I do not think Congress can provide that the sitting referees shall be judges of the new court during a "transitional"

term, whatever its duration I recognize that it does not violate Article II to expand the powers of an existing body, and I recognize also that the line between such expansion and the creation of a new body may in some instances be hard to draw. But the new bankruptcy court would in so many ways be different from the existing system of referees that to move the referees over to be judges of the new court would, I think, be to "appoint" them, not merely to expand their powers. There is surely a difference between adding some new unfair labor practices to the NLRA, for example, and establishing a new labor court with a provision that all present NLRB members shall be its first judges.

(d) Assuming that the present referees are "inferior" officers, and thus susceptible of appointment by someone other than the President, I have already expressed the view that the judges of the new bankruptcy court under H.R. 32 would not be regarded as inferior and thus could not be appointed by the judicial councils. Although I cannot cite authority for this proposition, I think it is supported by the scope of the judges' functions and the responsibility they will exercise.

* * * * * * *

I hope these comments are helpful, and not overlong, and that you will not hesitate to let me know if there is anything that needs clarification or if I can be of assistance in any other way.

Sincerely,

DAVID L. SHAPIRO.

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
New York, N.Y., June 2, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I regret that my academic and professional commitments are so heavy at this time of year that I have been unable to provide a detailed answer to the questions you invite me to consider in your letter of April 30 concerning H.R. 30 and 31. I have, however, thought about the major issues and submit herewith a brief statement of my views.

First. I have no doubt that proceedings in bankruptcy are cases "arising under" federal law within the meaning of Article III, § 2 of the Constitution. Mr. Justice Jackson's statement in *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 599 (1949), that such cases arise under Article I but not Article III was disavowed by a majority of that Court and does not withstand analysis. See *e.g.* Frankfurter, J., dissenting in *Tidewater*, 337 U.S. at 652 n. 3.

Second. If Congress elects to establish an "inferior" court for the adjudication of cases to which the judicial power of the United States "extends" under Article III, rather than to remit their adjudication to the courts of the several states, the text of the Constitution suggests upon its face that the court thus established must have the attributes as to salary and tenure of the judges prescribed by Article III, § 1. To put the matter in another way, the text of the Constitution suggests an understanding and a purpose that any federal inroads on the antecedent, general judicial jurisdiction of the states would be made only by vesting jurisdiction in Article III federal courts.

Third. That simple constitutional plan could not survive the test of time. In the first place, it took no account of military tribunals contemplated by Article I, § 8, cl. 14 and by the Fifth Amendment. In the second place, it was inapplicable to the territorial courts designed by Congress to be transient, or, by parity of reasoning, to other temporary tribunals dealing with matters arising outside the states, as in Indian territory or foreign countries. In the third place, it had doubtful applicability to subjects that Congress could constitutionally deal with itself or through a committee, such as monetary claims against the United States. If adjudication need not be committed to a court at all, it seemed unreasonable to regard it as essential that once a court was chosen, it must be permanent and tenured. Similarly, once room was found in the constitutional plan for the employment of administrative tribunals with adjudicative functions, it would hardly have been reasonable to deny that Congress, if it so elected, could alternatively vest the same functions in an untenured court, subject to such judicial review in a tenured court as the Constitution may require.

Fourth. These difficulties with the apparently simple constitutional plan of the rationalization was the distinction drawn by Chief Justice Marshall in the case of a territorial court (*American Ins. Co.* v. *Canter*, 1 Pet. 511, 546 [1828] between "legislative" and "constitutional" courts, a distinction which, as Justice Harlan noted in 1962 (*Glidden Co.* v. *Zdanok*, 370 U.S. 530, 534) "has been productive of much confusion and controversy." That confusion may be traced through the opinions involving the Court of Claims, the Court of Customs and Patent Appeals and the District of Columbia courts, once held to be "legislative", though only the local courts of the District (*Palmore* v. *United States*, 411 U.S. 389 [1973]), the Tax Court and surviving territorial courts are so regarded now.

Fifth. Given the development that I have traced, it is not surprising that neither decisional doctrine nor other authoritative sources delimit with precision the extent to which Congress may constitutionally commit the administration of federal laws to tribunals unprotected by the tenure provisions of Article III. The most recent judicial statement in Mr. Justice White's opinion for the Court in *Palmore* (411 U.S. at 407–8) carefully avoids a rigid formulation, saying:

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

That principle appears to me to place the proper values in the balance. The commitment of Article III, § 1 to permanent and tenured courts must be respected generally in creating jurisdiction to enforce laws of national applicability but the mandate may be relaxed by interpretation in light of "particularized needs" perceived by Congress in special areas of legislative competence to warrant such "distinctive treatment".

That formulation seems to me to rationalize the cases where legislative courts have been employed and their validity sustained and provide a guide for future action. It suggests that the question to be asked and answered in the present case reduces to what the needs in bankruptcy may be that warrant dispensation with the guarantee of tenure in establishing the special courts. Given the fact that the intended jurisdiction goes beyond the marshalling and distribution of assets in possession to actions against debtors of the bankrupt leading to coercive judgments and to injunctions against state proceedings, I should suppose that Congress would require a strong showing to be made. That the Commission did not regard this as a major problem suggests to me that it placed an uncritical reliance on Justice Jackson's statement in *Tidewater* that bankruptcy proceedings do not arise under federal law, within the meaning of Article III. The important point, in my view, is that the fact that Article I delegates authority to Congress to "establish . . . uniform laws of the subject of bankruptcies throughout the United States" does not without more permit the administration of such laws by federal courts unprotected by the tenure provisions of Article III. The bankruptcy power is no different in this respect than the power to regulate commerce or any other source of national legislation.

Sixth. The foregoing doubts are, of course, compounded by the fact that the new court would be endowed with power to punish for contempt and to issue writs of execution. There is no room in light of these provisions to regard the court as a judicialized administrative agency in an area where the administrative process could alternatively be employed.

Seventh. The problem of the bills would not, in my view, vary if the bankruptcy court were to be created as an "adjunct of the courts of appeals," nor does it matter whether the route of appeal is to the courts of appeals or to the district courts. What is decisive is the scope of the jurisdiction and authority conferred on the bankruptcy court.

Eighth. Finally, and apart from the considerations previously noted, I have the gravest doubt that present incumbents can be ensconced as judges of a court with qualitatively different power than the present referees rather than newly appointed in accordance with Article II. Whether the present referees could be continued "with expanded powers" turns, of course, on what the nature of the expansion is. If it extended to the scope now contemplated for the court, my doubts would be the same. *Cf. Shoemaker* v. *United States*, 147 U.S. 282, 301 (1893).

I trust that this summary of my views may be of use to the Commitee and I say again that I regret that time did not permit me to prepare a more extensive memorandum.

With high regard, I am
Yours faithfully,

HERBERT WECHSLER.

THE UNIVERSITY OF TEXAS AT AUSTIN,
Austin, Tex., June 4, 1976.

Hon. PETER W. RODINO, Jr.,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: I regret very much that I am so slow in responding to your letter of April 30th regarding the bills to revise the bankruptcy act and regret even more that my response will not be very helpful.

The questions that you pose in your letter are extremely difficult. The metaphysics of what is the judicial power of the United States that, under Article III, can only be exercised by "constitutional courts" are extremely complex and on many of the questions you pose no one can give an answer with any assurance until the Supreme Court has spoken. The difficulty in this area is shown by the trouble the Court has had in grappling with these cases when they have come to it.

This is shown by the well known decision in *National Mutual Insurance Co.* v. *Tidewater Transfer co., Inc.*, 337 U.S. 582 (1949). That case was argued on November 8, 1948, but it was not decided until June 20, 1949. It took the Supreme Court more than seven months to decide a seemingly simple question, there are four opinions occupying 71 pages in United States Reports, and the four opinions are wildly at variance with each other, with the Court ultimately upholding 5–4 the statute there involved though majorities of the justices rejected each of the arguments in support of the statute. The Court had similar problems with *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962). There, with only seven justices participating, there were three opinions, running to 76 pages, and a majority of the sitting justices rejected each of the lines of argument in support of the validity of the statutes there involved but the Court held the statutes valid. See Wright, *Federal Courts* 32–33 (2d ed. 1970).

The fact that the subject you are working on is bankruptcy further complicates the matter. Although we know from *Williams* v. *Austrian* and *Schumacher* v. *Beeler* that "constitutional courts" can hear plenary actions in bankruptcy, we do not know why this is so. As astute a student of federal jurisdiction as Felix Frankfurter tried to explain this in his opinion in the *National Mutual* case, 337 U.S. at 652 n. 3. He spoke to the matter again in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 471–484 (1957). Yet the explanations he offers in those two opinions do not seem to me to be wholly consistent.

Thus, though I have thought carefully about this since I first received your letter, and had hoped that I could provide a more helpful conclusion for you, I regret to have to say that the only one of your questions that I can answer is the first. Certainly the courts contemplated by the two bills before you would be "legislative courts," created by Congress by virtue of its Article I power to make bankruptcy laws. In the present state of knowledge, I fear that to say anything more than this would be sheer guesswork. I do not know how many angels can stand on the head of a pin until the Supreme Court tells me. I do not mean by use of that phrase to suggest that the questions you pose are not important ones or that they are not very proper questions for you to raise, but only that the Supreme Court has made such a mess of this phase of the law that medieval theologians would be as reliable a source of guidance on it as modern professors.

I have read the portion of Mr. Plumb's article to which you referred in his letter. I agree with the doubts he raises and would add a further doubt whether Article I judges can be given power to punish for contempt. But both he and I are shooting in the dark, and the Supreme Court may tell us that we are quite wrong.

I wish I could be more helpful and do not envy you and the Judiciary Committee the difficult task these bills raise for you.

Sincerely,

CHARLES ALAN WRIGHT,
McCormick Professor of Law.

Rodino –
- purely Article III court
- no substantive amendments

Senate –
Dole – Comer
Thurmond – Sally Rodgers

Thurmond wants Art I system

Take WH intervention needed w/ Thurmond & Dole

Jeff Stewart – interim
① bifurcated
② American Ins. Co v. 356 Bales of Cotton (Center of