# NOTE—THE QUESTIONABLE CONSTITUTIONALITY OF ARTICLE I BANKRUPTCY COURTS

## INTRODUCTION

Article III of the Constitution seems to mandate that Congress staff the courts of the United States with judges for life tenure of office with undiminishable compensation.[1] As the Supreme Court has noted, this reflects the framers' intent to protect judicial acts from legislative and executive coercion.[2] However, in some circumstances Congress has established federal tribunals that do not comply with the requirements of article III,[3] relying on the doctrine of legislative courts.[4] A recent example is the congressional response to the overburdened dockets of the federal district courts, in the creation of article I bankruptcy courts.[5]

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1. U.S. CONST. art. III, § 1. This article provides:

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

*Id.*

2. O'Donoghue v. United States, 289 U.S. 516, 531 (1933). *See* notes 106-07 and accompanying text *infra*.

3. *See* Crowell v. Benson, 285 U.S. 22, 56-57 (1932); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1928). To date, Congress has exercised its power to establish "legislative" or "article I" courts in two categories of cases. Under the first category, Congress is permitted to establish territorial courts lacking article III tenure and salary protection. The second category, which concerns subject matter jurisdiction, is composed of two components. Congress may create non-article III tribunals to adjudicate cases not traditionally viewed as "inherently judicial." Additionally, as a matter of functional necessity, Congress is empowered to establish courts whenever necessary to satisfy a vital constitutional need. Note, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779, 782 (1975) [hereinafter cited as *Masters and Magistrates*]. *See generally* Tushnet, *Invitation to a Wedding: Some Thoughts on Article III and a Problem of Statutory Interpretation*, 60 IOWA L. REV. 937, 940-59 (1975) [hereinafter cited as *Thoughts on Article III*]; Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM L. REV. 560, 570-80 (1980) [hereinafter cited as *Article III Limits*].

4. The doctrine derives from Chief Justice Marshall's opinion in American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828), in which the justice contrasted "constitutional" courts, established by Congress in accordance with article III, with "legislative" courts, which need not meet those requirements. Legislative courts are now primarily referred to as article I courts because many of these tribunals are established as "necessary and proper" exercises of an article I, § 8 legislative power. *See* notes 46-66 and accompanying text *infra*. *See generally* 1 MOORE'S FEDERAL PRACTICE ¶ 0.4 (2d ed. 1979); C. WRIGHT, FEDERAL COURTS § 11 (3d ed. 1976).

5. S. REP. No. 989, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5803-04. *See generally* Cyr, *Structuring a New Bankruptcy Court: A Comparative Analysis*, 52 AM. BANKR. L.J. 141, 143 (1978).

Congress reformed the Bankruptcy Act in 1978 by establishing bankruptcy courts staffed by judges who have fourteen year terms, unprotected salaries, and who may be removed from office for various non-impeachable offenses.[6] This enactment boldly expands existing limits on the doctrine of legislative courts, thus raising serious questions about the scope of congressional power to delegate article III judicial power to non-article III tribunals.

The issue of Congress' authority to delegate such broad jurisdiction upon legislative courts surfaced in the recent case of *Marathon Pipeline Co. v. Northern Pipeline Construction Co.*[7] In *Marathon* a federal district court held unconstitutional the sweeping powers given to bankruptcy judges by the 1978 Bankruptcy Reform Act.[8] The Supreme Court has recognized the importance of this issue in deciding to grant certiorari in the *Marathon* decision.[9]

This note analyzes the constitutionality of the new bankruptcy court in light of *Marathon*. A review of the current rationales for article I courts reveals that the new bankruptcy system cannot be justified in light of existing limits on Congressional power to create tribunals that do not comply with the requirements of article III.

## BACKGROUND

The Bankruptcy Reform Act[10] made significant changes not

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6. 28 U.S.C. §§ 153, 154 (Supp. 1979).

7. Marathon Pipeline Co. v. Northern Pipeline Constr. Co., No. 4-80-589, slip op. (D. Minn. July 24, 1981), *cert. granted*, 50 U.S.L.W. 3365 (U.S. Nov. 10, 1981).

On March 8, 1979, Northern Pipeline Construction Company of Burnsville, Minnesota, brought suit in federal court in Kentucky against Marathon Pipeline Company for claims arising out of a contract between the parties. On January 14, 1980, Northern filed for reorganization in United States Bankruptcy Court for the District of Minnesota. On March 25, 1980, Northern initiated an adversary proceeding against Marathon under the Bankruptcy Code, asserting the same breach of contract claims asserted in its suit pending in the Kentucky federal court. *Id.* Prior to the passage of the Bankruptcy Reform Act of 1978, bankruptcy courts had no subject matter jurisdiction to hear this type of case. See notes 14-15 and accompanying text *infra*.

On appeal from a bankruptcy court order concluding that no constitutional infirmity invalidated the jurisdictional grant of authority under 28 U.S.C. § 1471, the Federal District Court for the District of Minnesota issued an order concluding that the delegation of authority in 28 U.S.C. § 1471, empowering bankruptcy judges to try cases otherwise relegated by the Constitution to article III judges, was an unconstitutional delegation of authority. *Id.*

8. *Id.*

9. *Id.* Jurisdiction was granted to the Supreme Court pursuant to 28 U.S.C. § 1252.

10. "The term 'Bankruptcy Code' is often used in connection with Title II of the United States Code as amended by Public Law No. 95-598. The numerous provisions of Public Law No. 95-598 that amend Title 28 of the United States Code have no common name or designation and will be referred to simply as . . . the Bankruptcy Reform Act." Kennedy, *The Bankruptcy Court Under the New Bankruptcy*

only in substantive bankruptcy law but also in the organization and structure of the judicial system which applies that law. The new bankruptcy system establishes a structure of judicial officers unprotected by article III's tenure and salary guarantees.[11] These nontenured officers, adjuncts to the district courts, are endowed with judicial power to issue binding judgments in a wide range of cases that fall within the subject matter limits of article III.[12]

One of the major purposes of the 1978 legislation was to enlarge the jurisdiction of the bankruptcy court.[13] A major weakness of the old bankruptcy system was that referees could hear only cases involving the actual disposition of debtors' property, or "summary" suits.[14] All other matters affecting the debtors' assets were deemed "plenary" suits and were heard separately in federal district or state courts.[15] This dichotomy between summary and plenary jurisdiction not only encouraged costly and time-consuming jurisdictional disputes, but also resulted in judgments in plenary suits that duplicated or contradicted the referee's determinations in the bankruptcy court proceedings.[16]

A second major reason for reforming the bankruptcy court system was that under the old referee system the bankruptcy court

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*Law: Its Structure and Jurisdiction*, 11 ST. MARY'S L.J. 251 (1979), *reprinted in* 55 AM. BANKR. L.J. 63, 66 (1981).

11. 28 U.S.C. §§ 151, 153, 154 (Supp. 1979).

12. 28 U.S.C. § 1481 (Supp. III 1979); U.S. CONST. art. III, § 2. The congressional testimony of an attorney who handled the bankruptcy reorganization of a major supermarket chain illustrates the potential breadth of this expanded jurisdiction. *See Bankruptcy Court Revision, Hearings on H.R. 8200 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on Judiciary*, 95th Cong. 1st Sess. 18-27 (1977) (statement of J. Stanley Shaw).

State law claims arising during the five year reorganization included disputes over the validity of contracts, landlord-tenant relationships, reclamation of goods, foreclosure of security interests, and alleged torts. *Id.* At the same time as the bankruptcy proceedings, the defendant was party to an action to enforce collective bargaining agreements and a Title VII employment discrimination action filed in response to massive layoffs. The trustee initiated an antitrust action against several of the supermarket's suppliers and a securities fraud action against the parent corporation. *Id.* Because each of these state and federal law disputes affected the bankrupt's assets, financial condition, and obligations, they were all "related to" the underlying reorganization proceeding, and thus come within the present jurisdiction of the new bankruptcy courts. *Id.*

13. S. REP. NO. 989, 95th Cong., 2d Sess. 5, 17, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5803.

14. H.R. REP. NO. 998, 95th Cong., 2d Sess. 5, 49, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6010. For a description of the role of bankruptcy referees, see 1 COLLIER ON BANKRUPTCY ¶ 1.02[2], at 1-4 to 1-9 (15th ed. 1981).

15. Seidman, *Summary or Plenary Jurisdiction*, 77 COM. L.J. 73, 75 (1972).

16. S. REP. NO. 989, 95th Cong., 2d Sess. 5, 17-18, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5803-04.

was not truly and completely a court.[17] The old bankruptcy courts were not independent; instead, they operated under the supervision of the district courts.[18] Referees could only hear suits referred to them by the district court judges and were dependent on the district judges to confirm their recommendations.[19] This resulted in delays in bankruptcy proceedings due to the district courts' overcrowded dockets.[20] These factors diminished the prestige of the decisions.[21] Thus, the limited jurisdiction and dependent status of referees hampered the bankruptcy court's operation both administratively and substantively.

The Bankruptcy Reform Act of 1978 remedied these problems through two broad reforms. First, it greatly expanded the jurisdiction of federal bankruptcy courts by eliminating the summary/plenary distinction.[22] This expansion was necessary in order to provide a forum capable of quickly and uniformly resolving all disputes that affect a given debtor.[23] The new bankruptcy courts have jurisdiction of "all civil proceedings arising under . . . or related to cases arising under" the federal substantive bankruptcy laws.[24] The bankruptcy courts' jurisdiction encompasses claims based on both federal and state law.[25] Further, the scope of the jurisdiction of the new bankruptcy courts will in most instances equal the jurisdiction of the federal district courts.[26] Thus, the only significant distinction between the range of matters heard by article I bankruptcy judges and that of article III district judges is that in the former all cases will be in some way related to an underlying bankruptcy proceeding.

The second major judicial reform established by the Bank-

17. H.R. REP. NO. 989, 95th Cong., 2d Sess. 5, 4, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 5965.

18. *Id.*

19. S. REP. NO. 989, 95th Cong., 2d Sess. 5, 16, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5802.

20. *See* H.R. REP. NO. 989, 95th Cong., 2d Sess. 5, 14, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 5975.

21. *Id.* at 5978.

22. S. REP. NO. 989, 95th Cong., 2d Sess. 5, 18 *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5804.

23. *Id.*

24. 28 U.S. § 1471(b). This grant of jurisdiction became effective on October 1, 1979.

25. H. REP. NO. 989, 95th Cong., 2d Sess. 5, 445, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6400.

26. 28 U.S.C. §§ 1471(b), (c) (Supp. 1979). *See also Bankruptcy Court Revision: Hearings on H.R. 8200 Before the Subcomm. on Civil and Constitutional Rights of the Committee on the Judiciary*,95th Cong., 1st Sess. 57 (1977) (statement of the Hon. Simon H. Rifkind, Past President American College of Trial Lawyers). When asked to distinguish the work of district judges and the new bankruptcy judges, Judge Rifkin responded "[t]hey will be, in a sense, indistinguishable."

ruptcy Reform Act strengthens the independence of the bankruptcy judges. Although they may not enjoin another court or punish certain kinds of criminal contempt, bankruptcy judges are endowed with other inherent powers of an article III federal court.[27] Additionally, as courts of original jurisdiction, the bankruptcy courts control their own dockets and the district courts no longer have the discretion to refer matters to referees.[28] Thus, the Reform Act vests the new bankruptcy courts with nearly the full array of judicial powers in order that they can efficiently resolve disputes without relying on the district court for time-consuming references and recommendations.

The scope of the bankruptcy courts' jurisdiction is unclear. In the Bankruptcy Reform Act Congress established a contradictory format for the bankruptcy courts jurisdiction vis-a-vis the district courts.[29] In section 1471(a) Congress appears to vest original and exclusive jurisdiction for all bankruptcy matters in the district courts.[30] In section 1471(b) Congress anticipates the removal of the exclusive jurisdiction granted in section 1471(a), but preserves the district court's power to hear matters arising under the Bankruptcy Code.[31] Then, in section 1471(c), Congress takes exclusive jurisdiction in bankruptcy matters away from the district courts and grants original jurisdiction to bankruptcy courts in a manner implying a grant of exclusive jurisdiction in all matters arising under the Bankruptcy Code.[32] In reality, Congress may have stripped the power of district courts to hear any matter arising under the Bankruptcy Code, and vested this power exclusively in

27. 28 U.S.C. § 1481 (Supp. 1979) provides: "A bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." *Id.*

28. 28 U.S.C. § 1471(c) (Supp. 1979) provides that "[t]he bankruptcy court for the district in which a case under Title II is commenced *shall exercise all of the jurisdiction* conferred . . . on the district courts." *Id.* (emphasis added). This language implies that all bankruptcy claims must be heard by bankruptcy judges. District court judges formerly had discretion to refer matters to referees. 11 U.S.C. § 66 (1976).

29. 28 U.S.C. § 1471(a), (b), (c) (Supp. 1979).

30. 28 U.S.C. § 1471(a) (Supp. 1979) provides: "Except as otherwise provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title II." *Id.*

31. 28 U.S.C. § 1471(b) (Supp. 1979) provides: "Notwithstanding any act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under Title II or arising in or related to cases under Title II." *Id.*

32. 28 U.S.C. § 1471(c) (Supp. 1979) provides: "The bankruptcy court for the district in which a case under Title II is commenced shall exercise all of the jurisdiction conferred by this section on the district courts." *Id.*

the new bankruptcy courts.[33]

Although the new bankruptcy judges hear virtually the same range of matters and exercise nearly identical powers as an article III district judge, these new judges are not article III judges. Because they do not enjoy life tenure and undiminishable salaries, the bankruptcy judges are article I judges; the bankruptcy court is thus an article I or legislative court.[34]

Thus, the constitutionality of the new bankruptcy system is uncertain. Article III on its face appears to require that *all* courts established by Congress comply with its requirements.[35] Consequently, the authority of Congress to delegate article III powers to article I courts is questionable. Accordingly, a comparison between the new bankruptcy system and the existing doctrine of article I courts as well as the justifications advanced for their constitutionality must be analyzed closely.

The constitutional basis for the new bankruptcy court is not unlike that of many constitutionally valid article I courts.[36] Yet, closer examination of these other article I tribunals reveals that they are much more limited courts, whose jurisdiction is restricted to discrete and specialized areas.[37] The new courts of bankruptcy, on the other hand, exercise broad powers and jurisdiction normally reserved for article III tribunals.

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33. 1 COLLIER ON BANKRUPTCY ¶ 3.01(11)(d)(ii), at 3-39 (15th ed. 1981).

34. 28 U.S.C. §§ 153(a), 154 (Supp. 1979); *see* note 4 and accompanying text *supra*.

35. U.S. CONST. art. III. § 1.

36. Congress, under U.S. CONST. art. I, § 8, cl. 4, has the authority "[t]o establish . . . uniform laws, on the subject of Bankruptcies throughout the United States." Clause 18 of the same section gives Congress the power "[t]o make all laws, which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ." This is similar to Congress' plenary power to legislate for the District of Columbia conferred by U.S. CONST. art. I, § 8, cl. 17, which enabled Congress to select the appropriate court to hear and determine particular criminal cases within the District. Palmore v. United States 411 U.S. 389 (1973). The Court of Customs Appeals "was created by Congress by virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution" under U.S. CONST. art. I, § 8, cl. 1, 18. Ex parte Bakelite Corp. 279 U.S. 438, 458 (1929). The military courts are legislative courts created under Congress' authority to "make Rules for the Government and Regulations of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14; Toth v. Quarles, 350 U.S. 11 (1955). In U.S. CONST. art. I, § 8, cl. 1, Congress is given the power to lay and collect taxes, and it was by virtue of this power that the article I Tax Court was created. Burns, Stix, Friedman & Co. v. Commissioner, 57 T.C. 392 (1971).

37. See notes 38-45 and accompanying text *infra*.

## ANALYSIS

### THE DOCTRINE OF LEGISLATIVE COURTS

The doctrine of legislative or article I courts recognizes the practicality of enabling Congress to provide more flexible and effective mechanisms for resolving disputes by authorizing exceptions to the article III tenure and salary requirements.[38] Although the doctrine is now well established, the Supreme Court has not yet clearly defined the limits on Congress' authority to create these non-article III tribunals.[39]

Consequently, it is uncertain whether the article I bankruptcy court may constitutionally be vested with the all encompassing jurisdiction and power assigned to it in the Bankruptcy Reform Act.[40] Generally, the Court's pronouncements in this area recognize two particular situations in which other constitutional grants of power may authorize creation of tribunals not subject to article III constraints.[41] The first situation concerns primarily territorial or special geographic areas, such as federal enclaves, and arises under the Constitution pursuant to Congress' plenary power to govern a number of specific geographical areas.[42] The second focuses on particular subject matter areas without regard to territorial or geographic limitations.[43] Overall, it appears that Congress has broad power to create such courts in the first situation,[44] but a more limited authority in the second.[45]

#### *Geographical Area as a Basis for Article I Courts*

Chief Justice Marshall's opinion in *American Insurance Co. v. Canter*[46] marked the inception of the doctrine of legislative courts. The Court in *Canter* upheld the admirality jurisdiction of a court

38. *Article III Limits, supra* note 3, at 570-71. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 396 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

39. The Court expressly declined the opportunity to define Congressional limitations concerning the creation of non-Article III courts in Glidden Co. v. Zdanok, 370 U.S. 530, 549 (1962). *See* H. REP. NO. 595, 95th Cong., 2d Sess. 70, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6030.

40. Plumb, *The Tax Recommendations of the Commission of the Bankruptcy Laws—Tax Procedures*, 88 HARV. L. REV. 1360, 1468 (1975).

41. See note 3 *supra*.

42. *E.g.*, Palmore v. United States, 411 U.S. 389, 402-03 (1973) (congressional authority under article IV to create non-article III court for the District of Columbia upheld); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828).

43. *See Masters and Magistrates, supra* note 3, at 781-82.

44. See notes 46-58 and accompanying text *infra*.

45. See notes 60-90 and accompanying text *infra*.

46. 26 U.S. (1 Pet.) 511 (1828).

created by the territorial legislature of Florida which was comprised of untenured judges.[47] Writing for the majority, Chief Justice Marshall determined that territorial courts are not constrained by Article III because they do not exercise Article III judicial power; instead, it was article IV from which Congress derived the combined powers of a local and general government over the territories.[48] This plenary sovereign power included the right to establish courts, which, like the state courts, did not have to conform to article III requirements,[49] but could nonetheless exercise article III subject matter jurisdiction, including admiralty cases.[50]

The power of Congress to govern the District of Columbia parallels to a great extent its control over the territories. In both the local government is under the control of the federal sovereign.[51] Thus, Congress may grant jurisdiction to courts created for these geographical areas over subject matter otherwise reserved to the states. In *Palmore v. United States*,[52] the Supreme Court sustained congressional power to create local non-Article III courts for the District of Columbia.[53] Responding to a claim that tenured article III judges were required to try a criminal case arising under a District of Columbia law enacted by Congress, the Court emphasized that not all cases arising under federal law must be heard by article III judges.[54] Comparing the local District of Columbia courts to state courts, it held that the defendant, who had violated a law of only local applicability, was no more entitled to an article III judge than any other criminal defendant in a state court.[55]

The Court has applied similar reasoning to sustain article I courts in other geographical areas subject to exclusive congressional control.[56] However, the Court also suggested that any arti-

47. *Id.* at 546. Florida had not yet become a state. The territorial legislature that enacted the law was established by Congress in execution of its article IV power over territories belonging to the United States. *Id.* at 542.

48. *Id.* at 546.

49. For example, it would be inappropriate to grant lifetime tenure to a federal territorial judge due to the likelihood of replacement in the event the territory achieved statehood. *See Thoughts on Article III, supra* note 3, at 945-46; *Article III Limits, supra* note 3, at 570 n.80.

50. 26 U.S. (1 Pet.) at 546.

51. U.S. CONST. art. I, § 8, cl. 17.

52. 411 U.S. 389 (1973).

53. *Id.* at 410.

54. *Id.* at 407.

55. *Id.* at 410.

56. *See, e.g.*, Balzac v. Puerto Rico, 258 U.S. 298 (1922) (courts in unincorporated territories outside the mainland United States); Stephens v. Cherokee Nation, 174 U.S. 445 (1899) (United States Court in Indian Territory); United States v. Coe, 155 U.S. 76 (1894) (court of private land claims in the western territories); In re Ross, 140 U.S. 453 (1891) (consular courts).

cle I court established within the United States to hear a broad range of article III cases of *national* applicability would be unconstitutional.[57] Under these precedents, the new nationwide bankruptcy system appears to be unconstitutional because it vests nearly the full range of civil article III subject matter jurisdiction in article I officers.[58]

*Subject Matter Jurisdiction as a Basis for Article I Courts*

Arguably, bankruptcy courts may be justified under a branch of the legislative court doctrine which permits the creation of non-article III tribunals when necessary and proper to resolve cases arising under the substantive powers conferred by article I.[59] However, when the two major theoretical justifications for these subject matter article I courts are examined, it appears the jurisdiction exercised by the bankruptcy court is not authorized by their limited principles.

*i) The "Inherently Judicial" Test*

In *Ex parte Bakelite Corp.*,[60] the Court held that legislative courts may "examine and determine various matters . . . which from their nature do not require judicial determination and yet are susceptible of it."[61] The Court in *Bakelite* also established that Congress cannot relegate inherently judicial matters to a legislative court.[62]

The use of the "inherently judicial" formula as the criterion for determining whether a court is one created pursuant to article I or article III is derived primarily from a historical analysis.[63] If a particular type of controversy has historically required resort to common law, equity, or admiralty courts, then it is inherently judicial

57. 411 U.S. at 408. The court stressed that the requirements of article III must apply to courts which rule on laws of national applicability and affairs of national concern. *Id.*

58. See note 27-28 and accompanying text *infra*.

59. *Article III Limits, supra* note 3, at 573. *See* U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . [t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States"); U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish . . . uniform laws on the subject of Bankruptcies throughout the United States").

60. 279 U.S. 438 (1929).

61. *Id.* at 451.

62. *Id.* at 458. *But cf.* Glidden Co. v. Zdanok, 370 U.S. 530, 548-49 (1962) (the Supreme Court restated the *Bakelite* "inherently judicial" test, but did not reach the question of whether Congress could relegate inherently judicial business to non-Article III tribunals).

63. *Masters and Magistrates, supra* note 3, at 784.

and must be heard in an article III court if heard in a federal court at all.[64] In *Bakelite*, in which the status of the Court of Claims was examined, the Supreme Court found nothing inherently judicial in suits concerning customs collections because such matters had previously been determined by Congress or by executive agencies.[65] Consequently, the Court of Claims was characterized as not exercising the judicial power reserved for article III courts and was considered an article I court.[66]

As applied by the Supreme Court, the "inherently judicial" test implies that the subject matter jurisdiction of article I courts is restricted to specialized areas.[67] The new bankruptcy courts, on the other hand, are article I courts vested with a jurisdictional reach at times as great as that of the district courts.[68] Under the "inherently judicial" test, the limits on the new bankruptcy courts cannot be justified on the basis that the matters it will hear could likewise be resolved by executive or legislative officers. The resolution of bankruptcy matters has traditionally taken place in the courts rather than administrative agencies because they involve contract, debt, and property claims rooted in common law.[69] Further, there is a right to a jury trial in many cases heard by the new bankruptcy courts.[70] Thus, the jurisdiction of the bankruptcy court, an article I court, is comprised of inherently judicial matters which have historically been relegated to article III courts.[71]

*ii) The Special Governmental Need Test*

A second justification for subject matter article I courts is grounded in the necessary and proper clause. Where an execution of an article I grant of power requires a matter be resolved by a non-article III tribunal, Congress may establish a legislative

64. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 Harv.) 272, 284 (1856).

65. Ex parte Bakelite, 279 U.S. 438, 452-53 (1929).

66. *Id.* at 458-59. Under this historic rationale, criminal cases and any suit involving a right to jury trial would be inherently judicial. Comment, *The Distinction Between Legislative and Constitutional Courts and Its Effects on Judicial Assignment*, 62 COLUM. L. REV. 133, 159 n.172 (1962).

67. *See* Ex parte Bakelite, 279 U.S. 438, 458-59 (1929). *See also* Glidden v. Zdanok, 370 U.S. 530, 548 (1961).

68. 28 U.S.C. § 1471(c).

69. *Article III Limits*, *supra* note 3, at 576.

70. 28 U.S.C. § 1480(a); *Article III Limits*, *supra* note 3, at 576. For an explanation of the jury process in Bankruptcy Courts, see 1 COLLIER ON BANKRUPTCY ¶ 3.01[4] at 3-84-2 to 3-98 (15th ed. 1981).

71. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 Harv.) 272, 284 (1856); *see also* Bondurant, *The Bankruptcy Court as a Constitutional Court*, 45 AM. BANKR. L. J. 235, 236 (1971).

court.[72] This rationale is based on functional considerations of governmental need rather than historical considerations.[73] In *Palmore v. United States*,[74] the Court held that article III tenure and salary requirements may be disregarded only in order to "accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment."[75] It has been contended that the governmental need test is derived from *Palmore*.[76] However, *Palmore* was decided under Congress' grant of power over the District of Columbia,[77] in a "territorial-geographic area" context, and does not seem to provide support for legislative courts in subject matter areas.[78]

The Supreme Court's decisions in the areas of military and tax law seem adequately justified under the special governmental need approach.[79] The article I military courts have been justified by the special need for swift and flexible military discipline which is necessary to establish an effective national defense.[80] Because of the nature of military affairs, executive and congressional authority in this area has been paramount.[81] Nevertheless, the Court has limited the "special governmental need" justification to situations clearly implicating special concerns of military discipline in order to avoid circumventing article III.[82]

The article I Tax Court has been justified on the ground that if tax disputes could be adjudicated only by article III courts, the congressional taxing power could conceivably be done away with

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72. *Article III Limits, supra* note 3, at 576.

73. *Masters and Magistrates, supra* note 3, at 786.

74. 411 U.S. 389 (1973).

75. *Id.* at 407-08.

76. *See* H. REP. NO. 595, 95th Cong., 2d Sess. 70, 80 *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6041.

77. Palmore v. United States, 411 U.S. 397, 410 (1973). *See* U.S. CONST. art. I, § 8, cl. 17.

78. Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 VA. L. J. 697, 716 (1974) [hereinafter cited as *The Validity of United States Magistrates' Criminal Jurisdiction*].

79. *Masters and Magistrates, supra* note 3, at 786.

80. O'Callahan v. Parker, 395 U.S. 258, 265 (1969); Burns v. Wilson, 346 U.S. 137, 140 (1953); *Masters and Magistrates, supra* note 3, at 786, n.48.

81. Dynes v. Hoover, 61 U.S. (20 Harv.) 65, 79 (1857).

82. *See* O'Callahan v. Parker, 395 U.S. 258, 272-73 (1969) (soldiers are entitled to a hearing in an article III court when charged with an offense that is not related to military service); Reid v. Covert, 350 U.S. 1, 19 (1957) (civilian dependants of soldiers must be tried in article III courts); Toth v. Quarles, 350 U.S. 11, 15 (1955) (ex-soldiers may not be court-martialed for crimes committed while soldiers); *see also The Validity of United States Magistrates' Criminal Jurisdiction, supra* note 78, at 714.

by a hostile judiciary.[83] However, the Tax Court does not exercise the full range of judicial power. The court cannot enter binding judgments, but simply declares the amount a taxpayer owes,[84] and it lacks the coercive powers of article III courts.[85] Thus, the Tax Court is highly specialized, and functionally it does little more than an administrative agency.[86]

The bankruptcy court's broad powers and jurisdiction make it a true court, unlike specialized administrative tribunals.[87] To the extent it is a specialized court, its specialization is unlike that of the article I tax or military courts, because the powers and jurisdiction it must necessarily exercise are extensive and "of national applicability."[88] The "need" to relieve district courts and resolve disputes quickly and efficiently[89] does not satisfy the special governmental need justification approved in prior court decisions, since so liberal a fulfillment of this need does not appear to be necessary and proper to the effectuation of substantive powers granted to Congress by article I.[90] Thus, it seems doubtful the legislative court doctrine provides support for the article I bankruptcy court.

In light of the foregoing discussion, it appears the cases dealing with legislative courts provide scant authority for the nationwide bankruptcy system. However, the development of administrative law furnishes additional support for the authority of Congress to grant power to non-article III tribunals.

*Other Justifications for Article I Courts*

*i) Comparison with Administrative Agencies*

The Supreme Court decision in the landmark case of *Crowell*

83. Burns, Stix, Friedman & Co. v. Commissioner, 57 T.C. 392, 398 (1971).

84. *Id.* at 396.

85. *Id.*

86. *See* Phillips v. Commissioner, 283 U.S. 589, 595 (1931). The tax court does not present the same constitutional concerns as a bankruptcy court because the right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Moreover, tax litigants have the prerogative to bring their cause of action in federal district court. *See* 28 U.S.C. § 1340. Bankruptcy litigants have no such choice. *See* note 33 and accompanying text *supra*. *But cf.* H. DUBROFF, FEDERAL TAXATION, 73-74 ANN. SURV. AM. L. 265, 285 (1973) (the need for resolution of the status of the tax court by the Court would best be obviated by congressional recognition that a body exercising exclusively judicial functions should be established under article III, not article I).

87. H. REP. NO. 595, 95th Cong., 2d Sess. 30, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 5993.

88. *Id. See* Palmore v. United States, 411 U.S. 389, 407-08 (1975).

89. See notes 13-20 and accompanying text *supra*.

90. H. REP. NO. 595, 95th Cong., 2d Sess. 27, *reprinted in* 1978 U.S. CODE & AD. NEWS 5963, 5988.

*v. Benson*[91] upheld legislation which authorized an administrative body with nontenured commissioners to determine a claim of private right arising under the Longshoremen's and Harbor Workers' Compensation Act.[92] The question was whether the parties were bound by the commissioner's determination of fact.[93] The Court held that the determination was binding, reversible only under the clearly erroneous standard.[94] Determinations of law, however, were not binding; the parties must be afforded an absolute right of appeal on legal questions in an article III court.[95]

*Crowell* does not stand for the proposition that Congress can create legislative courts to hear any federal question as long as appellate review in an article III court is available.[96] Such an interpretation renders meaningless the requirement that life tenure and salary provisions of article III apply with equal force to all levels of the judiciary.[97] Furthermore, in holding that administrative agencies can constitutionally render binding determinations of fact, the Court in *Crowell* emphasized that fact finding is not an essential attribute of judicial power.[98] Thus, *Crowell* provides little support for the view that Congress can delegate federal question cases to legislative courts.

Moreover, the functional differences between agencies and courts prevent reliance on administrative agencies as justification for article I courts. Although administrative agencies can adjudicate questions of law,[99] their decisions are not final, but subject to review in article III courts.[100] Similarly, although agencies can apply for coercive orders, they can enforce them only with the aid of

91. 285 U.S. 22 (1932).

92. *Id.* at 50, 65.

93. *Id.* at 49.

94. *Id.* at 51.

95. *Id.* at 54.

96. *Article III Limits, supra* note 3, at 578; *but cf.* Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U.L. REV. 1297, 1316-17 (1975).

97. *Article III Limits, supra* note 3, at 591-92.

98. 285 U.S. 22, 51 (1932). Thus, Congress can delegate fact finding to non-article III officers. This does not, however, support the delegation of article III decisionmaking power to the article I bankruptcy court. *See* United States v. Roddatz, 447 U.S. 667, 681 (1980) (Because the Magistrate Act of 1968 placed ultimate adjudicatory authority in the district court judge, there was no need to decide whether Congress could constitutionally have delegated the task of rendering a final decision on a suppression motion to a non-article III officer). *See* Horton v. State Bank and Trust Co., 590 F.2d 403, 404 (1st Cir. 1979) (discretionary authority to enter final judgment is fundamentally an exclusive power of article III courts). *See also* Reciprocal Exch. v. Noland, 542 F.2d 462, 463 (8th Cir. 1976) (article III forbids judges from delegating final decisionmaking authority).

99. 5 U.S.C. §§ 554(a), 557(C)(3)(a) & (b) (1976).

100. 5 U.S.C. § 702 (1976).

an article III court.[101] Thus, in establishing administrative agencies, Congress has not endowed them with full judicial power.

In contrast to administrative agencies, the new bankruptcy courts are endowed with nearly full judicial power,[102] and no case law suggests that Congress can create tribunals with such power and yet not tenure its judges. Therefore, administrative agencies do not provide a precedent for the salary and tenure restrictions place upon article I bankruptcy courts which possess nearly the full panoply of judicial powers.

Although the bankruptcy courts established under the Bankruptcy Reform Act seem to exceed the limits on non-article III courts, this does not necessarily resolve the constitutional issue. The Supreme Court's pronouncements in this area are confusing and offer unsatisfactory guidance.[103] In addition to the traditional grounds used to support establishment of legislative courts, the strong public policy considerations surrounding article III must be taken into account.

*ii) Federalism and Separation of Powers*

A further limitation on the power of Congress to establish non-article III tribunals is evidenced by the separation of powers doctrine. The basic concept encompassed by the doctrine is relatively simple. The powers of the federal government are divided into three branches: the legislative, the executive and the judiciary.[104] The framers of our Constitution, well aware of the tyranny that lies in excessive concentrations of governmental power, sought to limit the total power of our national government by confining each of the three branches to its allocated sphere of activity.[105] Each branch serves as a check against the abuse of power by the others. The tenure and salary provisions of article III are among the checks and balances that preserve this separation of powers.[106] These provisions guarantee that the legislative and executive branches will not be able to control the judiciary by tampering with judges' salary and continuation in office.[107] Additionally, by insulating the judiciary from executive and legislative influence, article III prevents these branches from infringing upon the rights

101. 5 U.S.C. § 304(a) (1976).
102. See notes 29-32 and accompanying text *supra*.
103. *See Article III Limits, supra* note 3, at 580.
104. U.S. CONST. arts. I, II, III.
105. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 126 (1978).
106. *Id.*
107. THE FEDERALIST No. 78 (A. Hamilton).

of individuals.[108] Thus, the tenure and salary protections under article III secure the independence of the judiciary and help to preserve the balance of power among the branches of our national government.

The tenure and salary provisions also play a role in preserving the balance of power between the national government and the states. The framers foresaw a federal judiciary that would protect federal interests and maintain the supremacy of federal law,[109] but that would not interfere with the legitimate functions of state judicial systems.[110] The tenure and salary provisions of article III serve these federalism concerns by assuring an impartial and independent forum for suits in which a state is a party. Such provisions ensure that the legislative and executive branches will not be able to manipulate the judiciary.[111] Conversely, by insulating the judiciary from influence by the states, the provisions protect federal interests.[112]

The principles of federalism and separation of powers guarded by article III are infringed by the new bankruptcy court because its jurisdiction encompasses a broad range of article III cases.[113] The separation of powers principle is undermined by the vesting of nearly the full panoply of district court jurisdiction and power[114] in judges whose term of employment and level of compensation are controlled by Congress.[115] Likewise, the federalism concerns underlying article III are threatened because the bankruptcy court's jurisdiction encompasses many claims grounded solely in state law.[116] Thus, every litigant connected with a bankruptcy would seem to be denied an independent and impartial forum in which to have his dispute resolved, regardless of the nature of his dispute.

## CONCLUSION

In *Marathon Pipeline Co. v. Northern Pipeline Construction Co.*, the Supreme Court faces a perplexing dilemma. The new

108. *Id.*
109. THE FEDERALIST No. 22 (A. Hamilton).
110. *See, e.g.*, HART & WECHSLER, note 38 *supra*, at 11-12. *See generally* National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 647-49 (1949) (Frankfurter, J., dissenting).
111. THE FEDERALIST No. 78 (A. Hamilton) (the tenure provision in article III is designed to "secure a sturdy, upright, and impartial administration of the laws").
112. Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1032 n.55 (1979).
113. See notes 12, 22-28, and accompanying text *supra*.
114. *Id.*
115. See note 5 *supra*.
116. See note 25 and accompanying text *supra*.

Bankruptcy Code provides a solution to two serious problems under the old system. First, it greatly expanded the jurisdiction of federal bankruptcy courts by eliminating the summary/plenary distinction.[117] This prevents the time-consuming jurisdictional disputes and duplicity of judgments that resulted under the old system.[118] Second, it strengthened the independence of bankruptcy judges, preventing the many delays associated with control by the federal district courts.[119] The success of the new Bankruptcy Code in remedying these problems cannot be ignored by the Court.

However, the Constitution suggests that a court granted the judicial power of the United States, such as the bankruptcy court, should have judges who are granted undiminishable salary and lifetime tenure.[120] The rationales supporting the jurisdiction of legislative article I courts—geographical necessity, removal of matters not inherently judicial, and special government need—provide no justification for the nationwide bankruptcy system.[121] Moreover, denying parties their right to be heard before an article III judge violates the strong public policies of separation of powers and federalism that underlie article III.[122] Thus, the Bankruptcy Reform Act appears to unconstitutionally delegate the judicial power of the United States to the nontenured article I bankruptcy court.

*Patrick J. Phipps—'82*

117. See notes 22-26 and accompanying text *supra*.
118. See notes 13-16 and accompanying text *supra*.
119. See notes 17-21, 27-28, and accompanying text *supra*.
120. See note 1 and accompanying text *supra*.
121. See notes 38-90 and accompanying text *supra*.
122. See notes 104-16 and accompanying text *supra*.