

The Bankruptcy Act of 1984: *Marathon* Revisited

On June 29, 1984, after two years of vigorous debate, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984,¹ an Act that it hoped would resolve a continuing controversy over the bankruptcy system. The impetus for the new Act was the Supreme Court's 1982 holding in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*² that certain provisions of the Bankruptcy Reform Act of 1978 were unconstitutional. Despite this recent congressional amendment, however, serious constitutional and practical problems persist. A constitutional challenge appears inevitable: one that will force the Court to revisit the legal issues first raised in the *Marathon* case. But reconsideration of the 1984 Act may not be limited to the courts. Practical difficulties resulting from the Act's convoluted two-tiered structure could well force Congress again to reassess the organization of the bankruptcy system.

I. *History of the Bankruptcy Controversy*

The central issue in the Supreme Court's decision in *Marathon*, and the subject of continuing controversy concerning the bankruptcy courts, is whether to ground judicial authority to adjudicate bankruptcy claims and related issues in Article I or Article III of the Constitution. An "Article I" court is one that is created by Congress for special situations through its legislative powers as defined pursuant to one of its enumerated powers in Article I of the Constitution. In contrast, an "Article III" court is one fully within the definition of the judiciary as provided by Article III of the Constitution. It must be totally independent; thus, the judges must enjoy, among other things, lifetime tenure and protection against salary

1. The 1984 Act consists of three major sections: Title 1 creates a new bankruptcy court system; Title 2 creates 85 additional Article III district court and court of appeals judgeships, with forty of these positions to be appointed in 1984 and forty-five to be appointed in the following year; and Title 3 amends several sections of the U.S. Bankruptcy Code, including sections on consumer credit, grain storage facility bankruptcy, and the procedure for rejecting collective bargaining agreements in reorganization cases. See Bankruptcy Amendments and Federal Judgeships Act of 1984, 130 CONG. REC. H7471 (daily ed. June 29, 1984). President Reagan signed the bill on July 10, 1984, despite his objection to various provisions. Reagan found the limitation on the number of judges he could appoint during his first term in office particularly objectionable. N. Y. Times, July 11, 1984, at D12, col. 6.

2. 458 U.S. 50 (1982).

diminution.³

Until 1978, federal district courts had jurisdiction over bankruptcy issues, but bankruptcy "referees" were employed to undertake the preliminary considerations of most day-to-day bankruptcy disputes. This allocation of authority resulted in two major structural problems. First, the bankruptcy court operations were hampered both administratively and substantively because the bankruptcy court was not independent, but was "under the supervision of an unconcerned district court."⁴ This lack of independence caused problems in a number of areas. A primary difficulty was that the bankruptcy judges did not have control over their clerks and staff, their office space, and their office equipment or furnishings. With regard to their law clerks, for example, the district court judges had priority, with the official Clerk of each district court allowed to hire and fire bankruptcy clerks and assign them to whatever tasks were pressing at the district court, regardless of the wishes of the bankruptcy judges and the necessity for bankruptcy work to be performed. Moreover, bankruptcy judges had little input into the budgeting process, often could not participate in decision-making processes affecting their courts, and even had limited access to legal libraries necessary for completion of their duties.⁵ The legislative history of the 1978 Act reveals the result of these discrepancies in the system:

The lack of independence, both judicial and administrative, has seriously weakened the bankruptcy bench. The position of the bankruptcy judge beneath the district court has led to a serious morale problem among sitting bankruptcy judges, and a serious decline in the prestige and attractiveness of the job of bankruptcy judge. . . . [T]his subordinate position of the bankruptcy court has generated disrespect

3. 458 U.S. at 59.

4. H. R. REP. NO. 598, 95th Cong., 2d. Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 5965.

5. *Id.* at 5976-77. Among the decision-making processes from which the bankruptcy judges were excluded were the Judicial Conference activities to determine administrative matters, such as the Judicial Conference Bankruptcy Committee. *Id.* at 5977. With regard to the inadequate access to legal libraries, the House Report cited to a letter from Referee Saul Seidman, President, National Conference of Referees in Bankruptcy, to Judge Edward Weinfeld, Chairman, Judicial Conference Bankruptcy Committee, June 13, 1972, at 1, 3, which, in summary, reported:

The quality of bankruptcy judges' decisions suffers as a result. They are less able to be aware of the precedents, and thus less able to decide cases in light of developments in other bankruptcy courts. Litigants receive second-class justice as a result. This diminishes the faith in the bankruptcy system, and confirms the concept of the bankruptcy court as less than a full-fledged court, contrary to the stated goals of providing fair and qualified tribunals to bankruptcy litigants.

Id. at 5978 fn. 95.

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for it as an institution, which causes attorneys to avoid the system, even at great cost, and creditors, with millions of dollars at stake, to doubt the legitimacy of the operation and decisions of the bankruptcy court.⁶

A second structural problem with the bankruptcy system was that, since the bankruptcy referee was forced to take an active role supervising and administering the bankruptcy cases, it was difficult for the referee to remain unbiased in his adjudicative role. The close involvement essential to proper administration by necessity prevented the detachment required of a neutral judge. As pointed out in the legislative history: "No matter how fair a bankruptcy judge is, his statutory duties give him a certain bias in a case, and the bankruptcy court as a result has been viewed by many as an unfair forum."⁷

The structural flaws in the bankruptcy system were certainly understandable, considering that the substantive law of bankruptcy had been formulated in 1898, "in the horse and buggy era of consumer and commercial credit," with its last overhaul in 1938.⁸ Once the Great Depression had passed, bankruptcy disappeared from the public view, and the system fell into disrepair. With the development of the consumer credit industry, and the expansion of commercial credit which accompanied the adoption of the Uniform Commercial Code in the early 1960s, the capabilities of the old bankruptcy laws were stretched to their breaking point.⁹ The need for a massive reworking of the system was readily apparent.

In response to these inherent difficulties in the antiquated bankruptcy system, Congress created the Commission on the Bankruptcy Laws of the United States in 1970, to evaluate and propose changes in the bankruptcy laws.¹⁰ The final report of the Commission, submitted in 1973, expressed the need for a bankruptcy court system functionally independent from the district courts,¹¹ and recommended a separate Article I Bankruptcy Court modeled after the

6. *Id.* at 5978.

7. *Id.* at 5965-66.

8. *Id.* at 5965.

9. *Id.* The House Report stated: "Both substantive and administratively the bankruptcy system is straining on all sides to handle situations that the framers of the current law never dreamed would occur."

10. The Commission was established by Pub. L. 91-354, Act of July 24, 1970, 84 Stat. 468 and consisted of nine members. Three were appointed by the President; two each were appointed by the Speaker of the House, the President of the Senate, and the Chief Justice. H. R. REP. NO. 598, *supra* note 4, at 5963-64 n.1.

11. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H. R. DOC. NO. 137, pt. I, 93d Cong., 1st Sess. (1973), *cited in* S. REP. NO. 989, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5801 n. 1.

U.S. Tax Court.¹² The House Subcommittee on Civil and Constitutional Rights held hearings on the bankruptcy issue beginning in 1975,¹³ and in 1977 reported out a bill that established an Article III court patterned after the existing district court system.¹⁴ Following the Judiciary Committee's favorable action on the bill, the House passed similar legislation, H.R. 8200.¹⁵ However, the Senate adopted a conflicting bill, S. 2266, which called for a "hybrid court consisting of an article I bankruptcy trial court appended to an article III court of bankruptcy appeals."¹⁶ Congress passed a compromise package in 1978 that included the Senate's hybrid structure for the new Bankruptcy Court.¹⁷

The 1978 Act granted the new Bankruptcy Court jurisdiction over all "civil proceedings arising under title 11 [the Bankruptcy title] or arising in or *related to* cases under title 11."¹⁸ This delegation of trial authority to Article I rather than Article III judges was successfully challenged in the courts, with a plurality of the Supreme Court in *Marathon* holding the delegation unconstitutional. The plurality concluded that the Act impermissibly removed most, if not all, of the "essential attributes" of the judicial power of Article III courts and vested it in Article I bankruptcy adjuncts.¹⁹ The decision made

12. The United States Tax Court was created by the Tax Reform Act of 1969. Pub. L. No. 91-172, Sec. 951, 83 Stat. 730, *amending* I.R.C. § 7441. See Dubroff, *The United States Tax Court: An Historical Analysis*, 41 ALB. L. REV. 1 (1977).

13. In addition to considering the Commission's proposal, the Subcommittee also reviewed an alternative proposal submitted by the National Conference of Bankruptcy Judges, which was inconsistent with major provisions of the Commission's bill. H. R. REP. No. 595, *supra* note 4, at 5964.

14. See Report of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 95th Cong., 2d sess., (committee print 13, Jan. 1978), *cited in* S. REP. No. 989, *supra* note 9, at 5802 n.4.

15. For discussion of the House legislation's proposed establishment of an Article III bankruptcy court, see H. R. REP. No. 595, *supra* note 4, at 5972.

16. For discussion of the Senate legislation's proposed establishment of an Article I bankruptcy court, see S. REP. No. 989, *supra* note 9, at 5802. In supporting its proposal, the Senate Report cited to Cyr, *Structuring a New Bankruptcy Court: A Comparative Analysis*, 52 AM. BANKR. L. J. 141 (1978).

17. The Bankruptcy Act of 1978, Pub. L. 95-598, 92 Stat. 2549 (1979).

18. 28 U.S.C. Sec. 1471(b) (1976 ed., Supp. IV) (emphasis added). In *Marathon*, the Supreme Court pointed out:

Although the Act initially vests this jurisdiction in district courts, 28 U.S.C. § 1471(a) (1976 ed., Supp. IV), it subsequently provides that "[t]he bankruptcy court for the district in which a case under title 11 is commenced shall exercise *all* of the jurisdiction conferred by this section on the district courts," § 1471(c) (1976 ed., Supp. IV) (emphasis added). Thus the ultimate repository of the Act's broad jurisdictional grant is the bankruptcy courts.
458 U.S. at 54 n. 3.

19. 458 U.S. at 84. Justice Brennan wrote the plurality opinion, which was joined by Justices Marshall, Blackmun and Stevens. Justice Rehnquist, joined by Justice O'Connor, concurred in the judgment, but argued that the decision should be limited to

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clear that the 1978 hybrid structure was impermissible, and that Congress would have to hammer out another agreement.

Following the *Marathon* decision, the Judicial Conference of the United States submitted an interim rule to the eleven Judicial Councils of the Circuits providing for the continuing operation of the bankruptcy system.²⁰ Essentially, the rule revived the pre-1978 system in which the district courts referred bankruptcy cases to Bankruptcy Courts, but the district court retained authority to enter any final order on issues only "related to" bankruptcy.²¹ Moreover, a bankruptcy referral could be withdrawn by the district court for any reason. The legitimacy of the interim rule, while repeatedly challenged, has been consistently upheld by district and circuit courts.²²

Congress finally passed a revised Bankruptcy Act on June 29, 1984. In essence, the new Act codifies the interim rule, vesting jurisdiction in district courts and relegating the bankruptcy judges to the stature of adjuncts of the district courts.²³ Congress again de-

the specific facts of the case, a contract claim arising under state law. According to Justice Rehnquist, "Marathon has simply been named defendant in a lawsuit about a contract, a lawsuit initiated by appellant Northern after having previously filed a petition for reorganization under the Bankruptcy Act." 458 U.S. at 89. Chief Justice Burger and Justice White filed dissenting opinions. Justice White, in a dissent joined by Chief Justice Burger and Justice Powell, stated:

We are, on the whole, a body of generalists. The addition of several hundred specialists may substantially change, whether for good or bad, the character of the federal bench.

458 U.S. at 118. He added that Congress may have desired to retain flexibility in case there was a reduced need for bankruptcy judges in the future. As such, Justice White wished to defer to congressional judgment. Since there was no majority opinion in *Marathon*, considerable uncertainty remains as to what authority the decision has.

20. See *White Motor Corporation v. Citibank*, 704 F.2d 254, 256 (6th Cir. 1983) (discussing the interim rule). To allow Congress an opportunity to respond to the *Marathon* decision, the Supreme Court stayed its judgment until October 4, 1982. 458 U.S. at 88. Congress extended four stop-gap authorizations to the Bankruptcy Courts, while it worked on the new legislation. *N. Y. Times*, June 30, 1984 at 38, col. 5.

21. *White Motor Corporation v. Citibank*, 704 F.2d at 256-57. The *Marathon* decision concentrated primarily on the 1978 Act's grant of jurisdiction to decide cases that were "related to" bankruptcy cases, rather than on those that would arise under the bankruptcy laws. 458 U.S. at 54.

22. Several bankruptcy judges interpreted the *Marathon* decision to have declared that the 1978 Act's jurisdiction provisions were unconstitutional, thus leaving the district courts without the jurisdiction to refer matters to the bankruptcy judges under the new rule. See, e.g., *In re Seven Springs Apartments*, 33 B.R. 458 (Bkrcty. N.D. Ga. 1983); *In re Conley*, 26 B.R. 885 (Bkrcty. M.D. Tenn. 1983); *Winters National Bank and Trust v. Schear Group*, 25 B.R. 463 (Bkrcty. S.D. Ohio 1982). Circuit Courts have overwhelmingly rejected this view, however, interpreting *Marathon* in a much narrower sense. Subsequently, the constitutionality of the interim rule was upheld by the circuit courts. See *Stewart v. Stewart*, 741 F.2d 127 (7th Cir. 1984); *In re Kaiser*, 722 F.2d 1574 (2nd Cir. 1983); *White Motor Corp. v. Citibank*, 704 F.2d 254; *Braniff Airways Inc. v. C.A.B.*, 700 F.2d 214 (5th Cir. 1983), cert. denied 103 S.Ct. 2122 (1983).

23. The legislative history of the 1984 Act reveals that Representative Kastenmeier stated that the House's version of the Act "would codify" the interim rule, explaining:

bated the creation of Article III judges to sit on bankruptcy cases but decided to continue with the modification represented by the interim rule. The debate between Representative Kastenmeier and Representative Edwards highlighted some of the conflicts that preceded the passage of the Act.

Representative Kastenmeier, who proposed the amendment to create adjunct rather than Article III judges, stressed that the decision to create Article III judges would be irrevocable: "Once we have created them, we may not extinguish them . . . We can remove them . . . on grounds of impeachment alone."²⁴ He went on to point out that the Act would give the President the largest number of Article III appointments in U.S. history—227 lifetime judgeships. Kastenmeier added that "[t]he most fundamental problem" with the unamended bill, however, was that it would "radically restructure the Federal court system by granting the powers and privileges of Article III status to bankruptcy judges."²⁵

In contrast, Representative Edwards asserted that "[a]n Article I [bankruptcy] court, with splintered jurisdiction, would reverse all the reforms that [Congress] made in 1978," while it would also resurrect "all the problems of divided jurisdiction and [create] totally new doubtful jurisdictional boundaries."²⁶ Edwards contended that these concerns outweighed problems with Article III courts, stating:

Contrary to the myths raised by some, an Article III bankruptcy court would not elevate bankruptcy judges to the level of district court judges. As under present law, bankruptcy judges would not be paid

[I]t is virtually identical to the model rule currently in effect, where jurisdiction is vested in the district courts and the bankruptcy judges act as adjuncts of those district courts.

130 CONG. REC. H.1849 (daily ed. March 21, 1984) (statement of Rep. Kastenmeier). During the discussion of the compromise package which was signed into law, Kastenmeier stated that the main provisions of the House proposal relating to the jurisdiction of the bankruptcy court had "been retained in conference." 130 CONG. REC. H.7492 (daily ed. June 29, 1984) (statement of Rep. Kastenmeier).

24. 130 CONG. REC. H.1846 (daily ed. March 21, 1984) (statement of Rep. Kastenmeier).

Other Representatives were much more emphatic about their concerns with regard to the Presidential power of judicial appointment. Representative Crockett, for example, explained the implications of creating a new set of life-tenured judges:

I question whether the appointment of more than 200 new Article III judges, with all of the attendant privileges, including lifetime tenure, by the President would result in anything other than a new permanently irreducible court system dominated by conservative white male appointees insensitive to civil rights and labor issues and to the needs of poor and minority citizens.

130 CONG. REC. H.1851 (daily ed. March 21, 1984) (statement of Rep. Crockett).

25. 130 CONG. REC. H.1846 (daily ed. March 21, 1984) (statement of Rep. Kastenmeier).

26. *Id.* at H.1847.

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the same as district court judges, would not have the same jurisdiction, could not be assigned to other Federal district courts as district court judges may be, and would not have the same personnel and facilities as district court judges.²⁷

Kastenmeier's position ultimately prevailed in the Congress. Thus, under the 1984 Act, bankruptcy judges are adjuncts who can issue orders and judgments, but only in cases under Title 11 or "core proceedings" arising under Title 11 (those cases directly involving bankruptcy issues). For "non-core" proceedings (those cases merely "related to" Title 11), the bankruptcy courts are limited to submitting proposed findings of fact and conclusions of law to the district court, which would then issue any final order after a *de novo* review.²⁸

With the passage of the new legislation, Congress hoped to have effectively and constitutionally reformed the bankruptcy laws. Supporters of the legislation believed Congress had resolved the controversy created by the *Marathon* decision, since the two-tiered structure of the 1984 Act was designed to meet the constitutional requirements laid out in *Marathon*. The plurality decision could be read narrowly to invalidate only the delegation of authority to hear "bankruptcy related" claims to Article I courts. Under this interpretation, the 1984 Act would meet the plurality's objection by permitting *de novo* review by Article III courts on bankruptcy related claims.

An examination of the Act, however, reveals that it not only fails to respond adequately to the constitutional questions, but also creates practical problems that retard rather than advance prospects for bankruptcy reform.

II. *Constitutional Implications of the 1984 Act*

During the debate on the Conference Report of the 1984 bill, members of Congress continued to raise questions about the potential constitutionality of the Act. As Representative Edwards claimed:

When H.R. 5174 [the 1984 Act] becomes the law of the land, the Supreme Court will have to confront the constitutionality of the course Congress has chosen to take, as it did not confront the interim rule which kept the courts operating after the stay of the *Marathon* decision expired. I am convinced that a decision in a case which we may

27. *Id.*

28. See Bankruptcy Amendments and Federal Judgeship Act of 1984, § 157 (b), (c), and (d), 130 CONG. REC. H7473 (daily ed. June 29, 1984). For a discussion of the definition of "core proceedings" under the 1984 Act, see *infra* text accompanying note 34.

call *Marathon II*, . . . will confirm the original wisdom of the House of Representatives in 1978 and of the House Judiciary Committee in 1982 and 1983 in establishing a life-tenured bankruptcy court system.²⁹

These remarks serve at the very least to emphasize that the Act's constitutionality is still an open question. A closer look at the holding of *Marathon* lends support to this view.

In the *Marathon* case, Northern Pipeline Construction filed a petition for reorganization in 1980 and subsequently sued Marathon Pipe Line in the bankruptcy court for damages due to alleged breaches of contract, misrepresentation, coercion and duress. Marathon moved to dismiss the suit on the ground that the 1978 Act unconstitutionally conferred Article III judicial powers upon bankruptcy judges who lacked life tenure and protections against salary diminution. The district court granted Marathon's motion, and Northern Pipeline appealed.

Northern Pipeline advanced two rationales for upholding the constitutionality of the 1978 jurisdictional grant: first, that the establishment of bankruptcy courts fell within Congress' Article I power to create legislative courts; and second, that even if the Constitution required that "non-core" bankruptcy-related issues be adjudicated in Article III courts, the 1978 Act in fact satisfied this requirement because the bankruptcy judges were mere adjuncts. Neither argument was accepted by the plurality. As to the first rationale, the Court in *Marathon* clearly limited the ability of Congress to establish legislative courts to very few circumstances. Traditionally, Congress could establish such courts only where the legislature has a special claim of jurisdiction.³⁰ The Court found no special reason to permit Congress to establish legislative courts to adjudicate all matters related to the bankruptcy laws.³¹

29. 130 CONG. REC. H7490-91 (daily ed. June 29, 1984). See also comments of Representative Sawyer (" . . . I am not sure by going the article I route judges instead of article III judges . . . that we might not back right into another constitutional problem.") and Representative Glickman (" . . . I fear that we have not finally resolved the constitutional issues facing article I judges and that we probably will revisit this issue in the next few years; even the Supreme Court may revisit it sooner.") 130 CONG. REC., at H7493.

30. According to the plurality in *Marathon*, legislative courts have been allowed only in such limited circumstances as courts for the Territories and for the District of Columbia (both of which involved "no division of power between the general and state governments," 458 U.S. at 65, quoting *Kendall v. U.S.*, 37 U.S. 524, 619 (1838)), or for courts which adjudicate "public rights," defined as matters that could be conclusively determined by the executive and legislative branches, as opposed to those matters that are "inherently judicial." 458 U.S. at 67-68.

31. 458 U.S. at 76.

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The plurality then discussed whether the bankruptcy courts could be considered as mere adjuncts to Article III courts, and thus satisfy constitutional requirements. Although the Supreme Court had previously approved a magistrate system, whereby a district court could refer certain pretrial motions to a magistrate for initial determination, the Court noted that the magistrate's "proposed findings and recommendations were subject to de novo review by the district court."³² Because the functions performed by the bankruptcy "adjunct" pursuant to the 1978 Act were not similarly "limited in such a way that 'the essential attributes' of judicial power [were] retained in the Article III court," the Court invalidated the grant.³³

Because the *Marathon* Court focused on issues "related to" bankruptcy, and failed to address those issues "arising in" bankruptcy, the 1984 congressional amendments concentrated on the former. By vesting in the district court final authority on the "non-core proceedings," while retaining in the bankruptcy court authority for "core proceedings," the Act would seemingly comply with the standards enunciated in *Marathon*. This compliance is not enough to validate the 1984 Act, however, because the Act violates other constitutional standards unaddressed by the *Marathon* Court.

The Court's broad conclusion that there is no "persuasive reason, in logic, history, or the Constitution" to support legislative courts in bankruptcy³⁴ would seem to bar Article I jurisdiction on both "core" and "non-core" issues. Moreover, the range of issues that could be raised in "core" bankruptcy proceedings is so broad that the 1984 grant of authority to bankruptcy courts seems to conflict with the Court's intentions in *Marathon* to keep "essential attributes" of Article III courts from being granted to Article I courts. As the House Judiciary Committee reported in regard to the powers of bankruptcy courts prior to the 1978 Act:

The variety of legal issues encountered is almost endless. The Bankruptcy Act [existing prior to 1978] requires application of the broadest spectrum of other laws governing, for example, taxes, torts, negotiable instruments, contracts, spendthrift and other trusts, mortgages, conveyances, landlord and tenant relationships, partnerships, mining, oil

32. 458 U.S. at 79.

33. 458 U.S., at 79, citing *United States v. Raddatz*, 447 U.S. 667 (1980).

"In short," the Court concluded in *Marathon*, "the ultimate decisionmaking authority respecting all pretrial motions [in the magistrate system] clearly remained with the district court. . . . [Therefore,] the [1978 Federal Magistrates] Act did not violate the constraints of Article III." *Id.*

34. 458 U.S. at 76. The Court stressed that the district court, not the adjunct, had to have the authority to make "an informed, final determination," which the 1978 Act did not provide. 458 U.S. at 81.

and gas extraction, domestic relations, labor relations, insurance, Securities and Exchange Commission statutes, regulations and decisional law' Bankruptcy courts are frequently confronted with constitutional issues. Much of the decisional law surrounding the requirement of the fifth amendment with respect to property rights derives from bankruptcy cases. The courts have also considered issues such as State sovereignty and federalism; first amendment rights; the scope of the contracts clause; the jurisdiction and powers of Federal courts; and legitimacy of congressional grants of jurisdiction, to name only a few that have arisen. The issues resolved at the trial level in the bankruptcy court system are myriad.³⁵

Although the Report did not distinguish between "core" and "non-core" proceedings, it seems likely, considering the broad definition of "core" proceedings under the Act, that many of these issues would have to be decided by the bankruptcy courts. The 1984 Act, for example, defines "core" proceedings as including, but not being "limited to," such matters as those concerning the administration of the estate; counterclaims by the estate against persons filing claims against the estate; orders in respect to obtaining credit; proceedings to determine, avoid, or recover fraudulent conveyances; determinations as to the dischargeability of certain debts; objections to discharges; and orders approving the use or lease of property, including the use of cash collateral.³⁶ The range of possible cases that could arise under the "core" rubric, therefore, is quite broad. Similarly, the legislative history of the 1984 Act demonstrates that the intent of Congress was to define "core proceedings" very expansively. Representative Kastenmeier, for example, emphasized in his discussion of the 1984 Act that only "a narrow category of cases are not [to] be construed as core proceedings."³⁷ As a result, it is likely that the jurisdiction of the bankruptcy judge, even when restricted by the 1984 Act to "core" proceedings, could still constitute an "unwarranted encroachment upon the judicial power of the United

35. H. R. REP. NO. 595, *supra* note 4, at 5971-72, quoting *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 & 2d Sess., pt. 1 at 531 (1975-76).

36. See Bankruptcy Amendments and Federal Judgeship Act of 1984, § 157(b)(2), 130 CONG. REC. H7473 (daily ed. June 29, 1984). In addition, the bankruptcy judge is responsible for determining what is a "core proceeding" in which he or she may issue a final order. § 157(b) (3). The district court can, however, withdraw any case from the bankruptcy court for cause shown, although it is not clear what is required to show such "cause." § 157(d).

37. 130 CONG. REC. H7492 (daily ed. June 29, 1984) (statement of Rep. Kastenmeier) (footnotes omitted). In fact, the conference committee, which resolved the differences between the House and Senate bills, specifically rejected the Senate's attempts to limit the jurisdiction of bankruptcy judges. *Id.*

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States” of the sort condemned by the Court in *Marathon*.³⁸

The widely held perception that district judges are uninterested in dealing with bankruptcy matters,³⁹ and therefore reluctant to limit the authority of bankruptcy judges, may become a factor if the Supreme Court is called upon to determine the constitutionality of the 1984 Act. The district judges’ perceived reluctance to supervise bankruptcy judges, or merely to rubber stamp those decisions they do review, results in a surrender of Article III authority and a corresponding *de facto* encroachment by bankruptcy judges. Furthermore, the right to appeal the bankruptcy judges’ decisions in core proceedings to the district courts under the 1984 Act may not provide sufficient protection to satisfy the plurality’s concerns in *Marathon*. Under the Act, the district court can overturn a “core” decision by a bankruptcy judge only upon finding that the decision was “clearly erroneous,”⁴⁰ in contrast to the *de novo* review allowed for “non-core” proceedings. Thus, the large majority of core proceeding decisions are immunized from review.⁴¹

38. 458 U.S. at 84.

39. See H. R. REP. NO. 595, *supra* note 4, at 5976 (“district judges have long made clear their lack of interest in bankruptcy matters). In *Matter of Wildman*, 30 B.R. 133, 154 (Bkrcty N.D. Ill. 1983), Bankruptcy Judge Merrick asserted that the district and circuit judges had upheld the interim rule because of their desire “to enable district courts to delegate their bankruptcy jurisdiction to bankruptcy courts.” He accused the judges who passed upon the rule of acting “unlawfully and unethically” in not recusing themselves “because of their recognized bias.”

40. See *Osborne v. Production Credit Association*, No. 84-C-43-C, Slip Op. (W.D. Wis. Sept. 18, 1984) (“28 U.S.C. § 158 [created under the 1984 Act] . . . provides that appeals from decisions of bankruptcy judges ‘shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts.’ 28 U.S.C. § 158(c). Since Rule 52(a), Federal Rules of Civil Procedure, applies the clearly erroneous standard to appeals taken from district courts to courts of appeals, the clear implication of both section 158(c) and the special *de novo* review procedure of section 157(c)(1) is that Congress intended that the clearly erroneous standard apply in appeals from decisions of bankruptcy judges in ‘core’ proceedings.”).

This court decision is supported upon evaluating the 1984 Act, which provides in section 158(a) that “[t]he district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees . . . of bankruptcy judges. . .” Whereas section 157(c)(1) specifies that district courts may conduct a *de novo* review of “non-core” proceedings dealt with by bankruptcy judges, no such provision exists with regard to the appeals allowed from final orders issued by bankruptcy judges in “core” proceedings. In addition, section 158(c) states:

An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the court of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

This makes very clear that the district court is to evaluate decisions of bankruptcy judges on core proceedings in the same manner as appeals courts normally consider district court decisions; through a “clearly erroneous” standard.

41. It might be argued that section 157(d) of the 1984 Act—allowing the district to withdraw any case from the bankruptcy judge “for cause shown” or if it involves a case

There continues to be much controversy over the constitutionality of the 1984 Bankruptcy Act.⁴² The preceding observations are only suggestive of some of the possible objections to the compromise arrangements developed by Congress in re-authorizing the bankruptcy courts. Because of the on-going debate over the constitutional validity of the Congressional solution, the bankruptcy system has been left in a state of confusion.

III. *Practical Difficulties of the 1984 Act*

In addition to constitutional problems, the congressional decision to develop an adjunct system for the bankruptcy courts, rather than to create Article III judges outright, promises to cause severe practical difficulties in bankruptcy litigation. Because of the two-tiered structure that now exists (with the district court making all final decisions on non-core proceedings, as well as having to review motions to withdraw cases from the bankruptcy courts), the parties may very well be forced to litigate two cases—first in the bankruptcy court, and again in the district court. This will not only be extremely costly, but undoubtedly will result in much delay.

Judge Merrick, a bankruptcy judge who threatened to resign in protest of the 1984 Act, predicted that bankruptcy cases that had previously taken six months to a year to resolve might now take several years.⁴³ Representative Edwards added: "Anytime you have to go back and forth from one court to another, it's going to be devastating. Many Chapter 11 cases have an urgency about them that must be respected and this won't happen because they won't be able to get quick, authoritative decision-making that good business re-

which "requires consideration of both Title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce"—gives the district court "ultimate authority" over the bankruptcy court, thus meeting Article III requirements. However, even if a district judge were inclined to exercise this authority, she would have no authority to do so if the bankruptcy judge was properly issuing final orders for core proceedings, since there would not be proper "cause." Moreover, the Act's legislative history indicates that the latter part of the provision, relating to "other laws," was to be "construed narrowly." 130 CONG. REC. H1850 (daily ed. March 21, 1984) (statement of Rep. Kastenmeier). Therefore, bankruptcy judges would still exert significant Article III powers.

42. Another constitutional objection has recently been raised in regard to the appointment of bankruptcy judges under the new Act. Officially, the authorization for the interim bankruptcy system had expired on June 27, 1984, and Congress subsequently reappointed the bankruptcy judges on June 29, when it passed the 1984 Act. This extension of bankruptcy judges' terms "may be regarded as Congressional usurpation of the appointment powers normally reserved to the Government's judicial and executive branches." N. Y. Times, June 30, 1984, at 35, col. 2.

43. Wall Street Journal, July 13, 1984, at 3, col. 4.

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quires.”⁴⁴ Ironically, an important goal of the 1978 reforms had been to “enlarge the jurisdiction of the bankruptcy court,” because, as the Senate Judiciary Committee explained during its analysis of the 1978 Act:

[T]he jurisdictional limitations presently imposed on the bankruptcy courts have embroiled the court and the parties in voluminous litigation whose sole function is to determine whether the court possesses the requisite summary jurisdiction to determine the merits of issues often necessarily heard by the court in determining its jurisdictional question. Upon a finding that it lacks summary jurisdiction, the bankruptcy court is required to dismiss the action, whereupon it is necessary for the parties to proceed anew with a plenary action in either the U.S. district court or an appropriate state court to try issues already substantially tried in the summary proceedings before the bankruptcy court. Frequently, the liquidation of bankrupt estates and the rehabilitation of debtors are significantly prejudiced thereby.⁴⁵

The 1978 Act had attempted to overcome such jurisdictional problems by vesting enhanced authority in the bankruptcy judges. But, in response to *Marathon*, the Congress returned to the debilitating disarray of the earlier system by re-establishing, in the 1984 Act, a highly complex two-tiered structure.

Moreover, making the bankruptcy judges adjuncts to the district courts may appear to diminish the prestige of the office. These problems of delay, confusion and diminished prestige contradict the basic purposes of the reform movement that led the 1978 Act. As Edwards explained during debate on the 1984 Act:

The years of study that [led] to the passage of the 1978 bankruptcy law made clear that the two major failings of the prior bankruptcy referee system were the lack of simplicity in determining jurisdiction of the bankruptcy court and the low status and lack of power of the bankruptcy judges which resulted in disrespect for the position and inability to attract the best caliber judges. . . . [The 1984 Act, however,] undoes the court reform accomplished in 1978, makes the pre-1978 jurisdictional system seem simple by comparison, and makes the job of bankruptcy judge even less attractive than under the pre-1978 system.⁴⁶

44. *Id.* at col. 5 (quoting Rep. Edwards). The results of the Act caused Vern Countryman, a Harvard Law School professor who specializes in bankruptcy, to call the bill “the most incompetent piece of legislation around.” *Id.* at col. 4.

45. S. REP. NO. 989, *supra* note 9, at 5803-04.

46. 130 CONG. REC. H7490 (daily ed. June 29, 1984) (statement of Rep. Edwards). Edwards argued that the original position of the House in 1978, calling for the establishment of Article III bankruptcy judges, was the preferred solution, which “proved prophetic” when in *Marathon* the Supreme Court ruled the 1978 compromise to be unconstitutional. *Id.*

The 1984 compromise adopted in response to *Marathon* appears to be no more effective than its 1978 predecessor, and may in fact be even more flawed.

IV. *Conclusion*

The constitutional infirmities and practical difficulties discussed in this Comment raise serious questions about the value of the 1984 Bankruptcy Act. While there may have been strong policy and political reasons to keep bankruptcy judges under Article I rather than Article III,⁴⁷ the structure established by the 1984 Amendments seriously impedes the practical operation of the bankruptcy system. Moreover, the rationale behind the *Marathon* decision would seem to prohibit the authority granted to the bankruptcy courts, even with the core/non-core distinctions. Although a narrow reading of *Marathon* could justify the amendments on their face, the structure may be unconstitutional in practice because the statutory jurisdictional limitations may not effectively restrict the scope of adjunct authority. Regardless of whether the Supreme Court is ultimately forced to rule on the constitutionality of the 1984 Bankruptcy Act, it is likely that Congress will eventually have to return to the drawing board in another effort to design a bankruptcy system that is efficient as well as constitutional.

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47. See discussion of the debate between Kastenmeier and Edwards, *supra* text accompanying notes 22-25. Justice White, in his dissenting opinion in *Marathon*, also listed several policy reasons for the congressional decision to adopt Article I judges. These included the concerns that: several hundred bankruptcy specialists added to the federal judiciary might "substantially change, whether for good or bad, the character of the federal bench;" that "the existence of several hundred bankruptcy judges with life tenure would have severely limited Congress' future options;" that "the number of bankruptcies may fluctuate producing a substantially reduced need for bankruptcy judges," with Congress then having to "face the prospect of large numbers of idle federal judges;" and that "the change from bankruptcy referees to Art. I judges [would be] far less dramatic, and so less disruptive of the existing bankruptcy and constitutional court systems, than would be a change to Art. III judges." 458 U.S. at 118 (White, J., dissenting).