

# ORIGINAL

**Telephone:** (202) 554-2345

1	IN THE SUPREME COURT OF THE UNITED STATES		
2	- - - - -	x	:
3	NORTHERN PIPELINE CONSTRUCTION CO.,	:	:
4	Appellant	:	:
5	v.	:	No. 81-150
6	MARATHON PIPE LINE COMPANY AND	:	:
7	UNITED STATES; and	:	:
8	UNITED STATES,	:	:
9	Appellant	:	:
10	v.	:	No. 81-546
11	MARATHON PIPE LINE CO., ET AL.	:	:
12	- - - - -	x	:

Washington, D. C.  
 Tuesday, April 27, 1982

The above-entitled matter came on for oral  
 argument before the Supreme Court of the United States  
 at 2:19 o'clock p.m.

APPEARANCES:

REX E. LEE, ESQ. Solicitor General of the United States,  
 Department of Justice, Washington, D. C., on behalf of  
 Appellant United States

JOHN L. DEVNEY, ESQ., St. Paul, Minnesota, on behalf of  
 Appellant Northern Pipeline Construction Co.

MELVIN I. ORENSTEIN, ESQ., Minneapolis, Minnesota, on  
 behalf of the Appellee.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

REX E. LEE, ESQ.,

on behalf of Appellant United States

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JOHN L. DEVNEY, ESQ.,

on behalf of Appellant Northern

Pipeline Construction Co.

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MELVIN I. ORENSTEIN, ESQ.,

on behalf of the Appellee

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REX E. LEE, ESQ.,

on behalf of Appellant United States -

Rebuttal

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1                                P R O C E E D I N G S

2                        CHIEF JUSTICE BURGER: We will hear arguments  
3 next in Northern Pipeline Construction against Marathon  
4 and a related case. We will just wait for the courtroom  
5 to clear, Mr. Solicitor General. I think you may  
6 proceed now, Mr. Solicitor General.

7                        ORAL ARGUMENT OF REX E. LEE, ESQ.,  
8                        ON BEHALF OF APPELLANT UNITED STATES

9                        MR. LEE: Mr. Chief Justice, may it please the  
10 Court, at issue in this case is the constitutionality of  
11 the Bankruptcy Act of 1978 which represents Congress'  
12 most comprehensive effort in this century and perhaps in  
13 history to deal with bankruptcies.

14                      The problems that Congress identified were  
15 serious, including an increase in the number of annual  
16 filings from 10,000 a year to over 254,000 a year in a  
17 period of only three decades. One of the most serious  
18 impediments to an efficient bankruptcy system, Congress,  
19 found, was the court system and particularly the  
20 confusing distinction between summary and plenary  
21 jurisdiction.

22                      The 1978 Act creates a bankruptcy act in each  
23 district as an adjunct to the District Court. The  
24 judges of the new Bankruptcy courts are to be appointed  
25 to 14-year terms by the President with the advice and



1 consent of the Senate. They may be removed by the  
2 Judicial Council of the Circuit for incompetence,  
3 misconduct or disability, and they have plenary  
4 jurisdiction over bankruptcy matters.

5 QUESTION: Wasn't this on a phased-in basis,  
6 Mr. Solicitor General?

7 MR. LEE: That is correct -- six years. But  
8 the Act substantively would apply, with the exception of  
9 the personnel, over the interim period.

10 QUESTION: In 1984 the appointments would be --

11 MR. LEE: That is correct, Mr. Chief Justice.  
12 That is correct.

13 It is the government's position that the  
14 Constitution does not preclude Congress-chosen  
15 resolution of the important and difficult bankruptcy  
16 problems that Congress identified. Article I  
17 specification of Congressional power to establish  
18 uniform laws on the subject of bankruptcies throughout  
19 the United States includes the power to establish  
20 specialized bankruptcy courts and give them plenary  
21 jurisdiction over their narrow specialty -- bankruptcy.

22 There is nothing in the language of Article  
23 III nor its values that brings that Article into  
24 conflict in this case with Article I.

25 QUESTION: Are you saying, General, that

1 anytime Congress is granted a specific authority to  
2 legislation it has the authority to create a special  
3 systems of courts to handle --

4 MR. LEE: Certainly not.

5 QUESTION: But how do you distinguish?

6 MR. LEE: On the basis of the guidelines that  
7 this Court laid down in *Palmore*, which were that you  
8 have to have -- first of all, of course, you have to  
9 have one of the -- a specific grant of legislative  
10 authority to Congress.

11 But, in addition, you have to have a  
12 specialized area in which Congress concludes that there  
13 is a particularized need warranting distinctive  
14 treatment for a specialized court.

15 QUESTION: Can I stop you there?

16 MR. LEE: Surely.

17 QUESTION: When you say a "specialized area",  
18 do you mean an area where the judges filling the courts  
19 will have a specialized competence in a particular  
20 branch of law?

21 MR. LEE: As -- my answer to that is yes,  
22 Justice Rehnquist. As I read the Court's opinion in  
23 *Palmore*, I believe that is what the Court meant by  
24 specialized area, and certainly that is our view of what  
25 is meant by specialized area. But it has to be a

1 speciality.

2           QUESTION: But then it seems to me you have  
3 real trouble with this statute because the jurisdiction  
4 vested in the bankruptcy judges just covers the whole  
5 gamut of cases.

6           MR. LEE: That is one of the major criticisms  
7 that is raised against it by our opponents. My answer  
8 to that is two-fold. The first is that the fact that it  
9 does include a number of possible types of actions that  
10 the bankruptcy judge can entertain gets right to the  
11 heart of the fundamental problems that Congress  
12 identified as the serious impediment to an efficient and  
13 a fair bankruptcy system.

14           QUESTION: Is there a severability clause in  
15 the Acts that would sever the non-bankruptcy matters  
16 from the bankruptcy?

17           MR. LEE: I am not aware of a severability  
18 clause, Your Honor, but, of course, this Court has  
19 clarified on many occasions that that is not dispositive  
20 and, in effect, that the Court will interpret it in such  
21 a way as to --

22           QUESTION: Well, for example, if the habeas  
23 corpus jurisdiction were appealed to with respect to a  
24 bankruptcy judge and even though many people were  
25 somewhat puzzled by what habeas corpus has to do with

1 bankruptcy, but if the issue was raised there, could a  
2 court declare that section, the habeas corpus  
3 jurisdiction, violative of the Constitution without  
4 damaging the rest of the Act?

5 MR. LEE: I would think clearly so, and I  
6 would think also that there are other means available  
7 ultimately to this Court and, indeed, short of this  
8 Court that would be less severe, such as the Doctrine of  
9 Abstention is applicable in the case of the bankruptcy  
10 court. It, of the three avenues of appeal, eventually  
11 leads to Article III determination and ultimately,  
12 therefore, to this Court.

13 I realize that there is a parade of horrors  
14 that has been suggested. The reason that it has been  
15 suggested is that the distinction between plenary and  
16 summary jurisdiction led to a circumstance in which so  
17 many times in the complicated bankruptcy cases, and  
18 sometimes in the non-complicated ones, all of the assets  
19 of the bankrupt were being consumed by litigating this  
20 subject of whether it was summary or was plenary.

21 The bankrupt could have his assets -- his  
22 assets distributed and could be declared a bankrupt, but  
23 in the event that he had a claim that needed to be  
24 satisfied or in the event that a claim needed to be  
25 satisfied against the bankrupt, that could not be



1 handled by the particular court. And that is the  
2 problem that Congress attempted to satisfy.

3 Now the theory, as has been suggested here,  
4 that this could lead to a rather broad range of  
5 potential types of lawsuits that would traditionally be  
6 handled by Article III courts, that could under the  
7 statute be handled by the Article I court.

8 The first answer to that is that that is the  
9 very type of problem that Congress saw as the most  
10 serious problem that was precluding an efficiency  
11 bankruptcy system. Now it may be that in some other  
12 case it will be a sufficient case of the Article I tail  
13 wagging the Article III dog, that there might be either  
14 some administrative problems, some prudential problems,  
15 or even some problems that would rise to the level of  
16 constitutionality.

17 But that is not this case. This case lies  
18 right at the core of the very problem that everyone  
19 agreed Congress needed to take care of, where the  
20 bankrupt had a claim against someone else, that in the  
21 process of his reorganization petition needed to be  
22 resolved. So that to the extent that there are  
23 constitutional problems raised by the parade of  
24 horrors, that is for another case and, indeed, I  
25 suspect that as is the case with the continuing

1 interpretation of many complex statutes it will be  
2 arrived at short of a determination of constitutionality.

3 QUESTION: Well, taking this very case for a  
4 moment, before this statute was passed, could the  
5 bankruptcy referee have entered a binding judgment in  
6 this particular dispute?

7 MR. LEE: Only if the parties consented.

8 QUESTION: And if they did not consent, they  
9 could not have?

10 MR. LEE: That is correct. That is correct.

11 QUESTION: And is it clear that the  
12 non-Article III judge does have the power -- you don't  
13 have any problem with him entering a binding judgment in  
14 a matter dependent upon state law between private  
15 parties?

16 MR. LEE: That is our position. It is, of  
17 course, subject to --

18 QUESTION: Is there any precedent for that at  
19 all?

20 MR. LEE: Well, there is the precedent in the  
21 MacDonald v. Plymouth, and Schumacher v. Beeler cases  
22 that that could be done by consent. Now concededly  
23 those were -- those were true adjuncts to the Article  
24 III court in those days, and that's my opponent's answer  
25 to that proposition.

1           Our rejoinder to it -- to save a little bit of  
2 his time by making his rejoinder -- our rejoinder to it  
3 is that in the Schumacher v. Beeler case the court, in  
4 talking about this consent jurisdiction to decide those  
5 kinds of cases, referred -- and I am quoting from page  
6 374 -- the Court said, "The Congress, by virtue of its  
7 constitutional authority over bankruptcies, could confer  
8 or withhold jurisdiction to entertain such suits,"  
9 which, at least by way of dictum, says that this court  
10 can do that very thing.

11           But the big point, Justice Stevens, in my  
12 view, is this. It is beyond dispute that this Court has  
13 held in a number of contexts in the past that Article  
14 III does not exhaust Congress' power to establish  
15 courts, and the mere fact that there is no precedent for  
16 this one, no square precedent for it, should not be that  
17 surprising because there was no square precedent for  
18 *Palmore* or for *Bakelite* or for *Crowell v. Benson*.

19           The control that is imposed on Congress' power  
20 to establish courts other than under Article III is the  
21 control that was articulated in *Palmore v. the United*  
22 *States*. That is to say, there must be a particularized  
23 need, a special area, requiring expertise requiring  
24 distinctive treatment.

25           QUESTION: Do you think special area language,

1 General Lee, might refer to a geographical area rather  
2 than --

3 MR. LEE: No, I do not, and, of course, it is  
4 fruitless for me to tell this Court what it meant by  
5 specialized area. There are the two different views,  
6 but I submit that if the Court in *Palmore* had meant  
7 specialized area to mean Federal real estate, it would  
8 have said so. Usually when this Court refers to  
9 enclaves it does not refer to them as specialized areas.

10 And, even more important, when you look at the  
11 whole concept of Congress' power to create non-Article  
12 III courts, it does tie back to the fact that some  
13 subject matters, some subject areas, by their nature do  
14 require specialized courts, and bankruptcy is one of  
15 those for two reasons.

16 The first reason is that if you look at that  
17 list, 17 powers, 17 clauses that consist of -- that  
18 constitute Article I, Section 8, of all of them there is  
19 none that is linked quite so directly to the resolution  
20 of private disputes as does bankruptcy.

21 QUESTION: Could Congress, Mr. Solicitor  
22 General, have made the administration of bankruptcy  
23 problems totally and wholly administrative with  
24 traditional judicial review without having any judges at  
25 all in the bankruptcy area?



1           MR. LEE: My answer to that question is yes.  
2 Congress could have done that. That is not the area  
3 that Congress --

4           QUESTION: You mean even resolving the dispute  
5 in this case?

6           MR. LEE: Oh, I don't -- well, I think that's  
7 why it would have been ineffective. I don't think they  
8 could have given the administratively --

9           QUESTION: Then answer to the Chief Justice is  
10 no.

11          MR. LEE: Well, they could not have -- yes,  
12 well. I simply misunderstood the Chief Justice -- the  
13 thrust of the Chief Justice's question.

14          Coming back to Justice O'Conner's question --

15          QUESTION: Well, what's your present answer to  
16 the Chief Justice's question?

17          MR. LEE: Well, my answer is that Congress  
18 could have solved this problem by relegating whatever  
19 power it could constitutionally have given to  
20 administrative agencies, but I do not think it could  
21 have given -- I don't think it could constitutionally  
22 have given to administrative entities the power to do  
23 the kinds of things that these judges have the power to  
24 do.

25          QUESTION: Name one. What is it?

1           MR. LEE: Well, entertain the suit in this  
2 case. I think that whatever -- that either under  
3 Article III or Article I there is a certain  
4 responsibility when it comes to deciding matters of that  
5 magnitude that they must be constituted with a judge.

6           And, indeed, if you look at the history of  
7 bankruptcy in this country, there has been about a  
8 two-century experiment with how to do it best. Almost  
9 from the beginnings of our republic, in 1800 the first  
10 bankruptcy statute was passed, and from then until 1841  
11 bankruptcy actions were strictly involuntary and  
12 retaliatory. They could only be used against the  
13 bankrupt.

14           The 1841 change provided for voluntary  
15 proceedings, and then, in 1898, there was the last major  
16 change, when Congress brought into existence the referee  
17 system with power to exercise summary jurisdiction.

18           The one constant feature over almost two  
19 centuries of bankruptcy is that this is a field that has  
20 been separate and specialized. It has never been  
21 anything but separate and specialized and, therefore,  
22 Justice O'Connor, I conclude that for this reason --  
23 plus the fact that bankruptcy itself really, almost by  
24 definition, anticipates the resolution of private  
25 controversies -- this, above all cases -- this above all

1 other areas is a specialized area.

2           QUESTION: Yes, but when you graft onto that  
3 the jurisdictional or this wide range of other cases is  
4 where you get into the problem. I assume under the Act  
5 it can even cover marital dissolution cases in state  
6 courts. There is virtually no limit.

7           MR. LEE: There are some who have suggested  
8 that, and my simple answer to that is that is not this  
9 case. It is going to be difficult enough, at best, to  
10 solve this case, and you don't need to solve the next  
11 one in the process of this one.

12           This case involves a commercial dispute in  
13 which the creditor had a contract -- excuse me, the  
14 debtor had a contract claim and this is right at the  
15 core of what Congress intended. And this is not, as  
16 least as far as I understand, part of the parade of  
17 horrors.

18           One final point with respect to *Palmore*. To  
19 the extent that there are any distinctions between  
20 *Palmore* and this case, they cut in favor of the  
21 constitutionality of the 1978 Act. One is that -- one  
22 of the distinctions is that this case does involve  
23 bankruptcy, which, as I say, does anticipate the  
24 resolution of conflicting private claims. And the  
25 second is that this case, that *Palmore* involved a

1 criminal prosecution and this case involves bankruptcy.

2           In terms of relevant constitutional values, if  
3 there is to be a distinction between criminal  
4 prosecutions on the one hand and bankruptcy on the  
5 other, certainly there is greater need for the  
6 protection of the more independent Article III judge  
7 where the interests at stake affect life and liberty as  
8 well as property, and I would like to reserve the rest  
9 of my time.

10           QUESTION: Well, one distinction between this  
11 and Palmore is that Palmore dealt with an area of 67  
12 square miles, and this covers the whole country.

13           MR. LEE: That is correct, but that is only  
14 saying, Justice Rehnquist, one arose under Clause 17 and  
15 this one arises under Clause 4.

16           QUESTION: But I think Palmore is more like  
17 Kanter in that respect.

18           MR. LEE: That is correct, and this one is  
19 more like Crowell v. Benson and Bakelite.

20           CHIEF JUSTICE BURGER: Mr. Devney.

21           ORAL ARGUMENT OF JOHN L. DEVNEY, ESQ.

22           ON BEHALF OF APPELLANT NORTHERN PIPELINE  
23           CONSTRUCTION CO.

24           MR. DEVNEY: Mr. Chief Justice, and may it  
25 please the Court, obviously our position coincides with



1 that of the Solicitor General. I would hope that I  
2 would not have to repeat what he has said about some of  
3 the areas. However, I am certainly available for  
4 questions.

5 I'd like to address the issue more in terms of  
6 not bankruptcy but the question of whether we are  
7 dealing with an Article III court as opposed to an  
8 Article I or a legislative court. And in that regard --  
9 and I think this is obviously the Solicitor's  
10 position -- it's our view that we're dealing with a  
11 properly constituted legislative court.

12 Now early in this argument Justice Rehnquist  
13 asked, I believe, what the limits were on Congress for  
14 the creation of legislative courts. History provides us  
15 with some idea of that, but at least as a lawyer who's  
16 read these rather difficult cases several times, the  
17 only true answer to that is, I don't know.

18 QUESTION: You have a lot of company.

19 MR. DEVNEY: I think that there is -- I think  
20 we know that the outer limits of that power is the  
21 existence of an enumerated power in Article I. I think  
22 the limitation, although I agree that *Palmore* sets up a  
23 condition that may have been appropriate in *Palmore*, I  
24 don't think it represents the outer limits of Congress'  
25 ability to set up Article I courts.

1 But as to how far Congress can go, I cannot  
2 literally formulate that proposition for this Court. I  
3 can say, and I do say, that the bankruptcy court does  
4 not represent a step past the outer limits.

5 QUESTION: Do you think Congress proceeded on  
6 this basis, on the Article III basis -- I mean, on the  
7 legislative court basis?

8 MR. DEVNEY: Yeah, I do.

9 QUESTION: You think both Houses did?

10 MR. DEVNEY: I do because the legislative --

11 QUESTION: Do you think both Houses did?

12 MR. DEVNEY: Pardon me?

13 QUESTION: Do you think both Houses did?

14 MR. DEVNEY: Well, I think both Houses were  
15 aware of the distinction.

16 QUESTION: You don't think they thought they  
17 were approaching it on an Article III basis with these  
18 kinds of judges just being an adjunct to the district  
19 court?

20 MR. DEVNEY: Well, that's obviously what their  
21 statute said, and I think, although it's inelegant, I  
22 think we see a belt and suspenders approach to the whole  
23 question.

24 QUESTION: Well, so they purported to create  
25 an Article III court, is that right?

1 MR. DEVNEY: No, they --

2 QUESTION: Appointed three officers.

3 MR. DEVNEY: They deposited jurisdiction  
4 initially in an Article III court, and then  
5 automatically delegated it to an Article I court.  
6 That's my understanding.

7 QUESTION: Well, do you think that's what they  
8 thought they were doing?

9 MR. DEVNEY: I sure do. I think that's what  
10 the statute very plainly says.

11 QUESTION: The statute was originally drafted  
12 with the Article III courts in mind, was it not?

13 MR. DEVNEY: In the House of Representatives I  
14 think that's true, Your Honor.

15 The point that I think it is important to  
16 recognize here is that when we talk about Kanter, when  
17 we talk about Palmore, when we talk about the  
18 territories, we are talking about something that is  
19 rather anomalous if we reflect on it for a moment, and I  
20 think the anomaly arises out of the fact that people  
21 tend to think of the Article III judicial requirements  
22 only in terms of what's been referred to in the briefs  
23 here as "federalism".

24 But Article III is something more than  
25 federalism. It's a guarantee to the citizens of this

1 country, whether they are citizens of a state or of a  
2 territory, that in certain circumstances, i.e., a case  
3 falling within the Federal judicial power, they are  
4 entitled to a Federal judge enjoying Article III  
5 protections.

6 Now, given that set of circumstances, and  
7 certainly Marshall understood that when he decided  
8 Kanter, he had no trouble at all saying, however, if  
9 it's a valid Article I exercise, we need not have an  
10 Article III judiciary. I think that's important because  
11 I think there's a tendency to say well, we're only  
12 talking about the territories and who cares about those  
13 folks.

14 In addition to that, we can talk about the  
15 Court of Military Appeals, and now we're no longer in  
16 the territories. Now we're talking about a court that  
17 operates nationally, that operates, at least  
18 theoretically, in every State in the Union. This is a  
19 court that at least, fortunately not at the present I am  
20 led to believe, but at least in the past, has been able  
21 to declare sentences of death. Certainly today he can  
22 deprive a man of his liberty.

23 QUESTION: Would you suggest there would be  
24 something improper about the Court of Military Appeals  
25 upholding a death sentence if Congress had authorized it?



1           MR. DEVNEY: No, not at all, but they are  
2 Article I judges.

3           QUESTION: So what?

4           MR. DEVNEY: My point is, is that that is not  
5 the distinction between Article I and Article III. The  
6 nature of the offense, the gravity of the crime play no  
7 role in the distinction between Article I and Article  
8 III.

9           QUESTION: You might broaden that -- the  
10 gravity of the problem.

11          MR. DEVNEY: Perhaps so, sir. But stop and  
12 reflect on this point. Here we're talking about a  
13 breach of contract case and the defendant in this breach  
14 of contract case has said I'm entitled to an Article III  
15 judge. Given -- because this is a serious matter and a  
16 Federal question and would or might otherwise fall  
17 within the Federal judicial power.

18          It certainly isn't any more a substantial  
19 question than any of those addressed by the Court of  
20 Military Appeals, which also operates throughout the  
21 states, and I think what we can say is -- and something  
22 that this Court has always recognized -- is that Federal  
23 questions need not be decided by Article III courts but  
24 can be decided by Article I courts as well. And of  
25 course that is obvious because that's all legislative

1 courts or Article I courts of this nation have ever done.

2 QUESTION: Well, Mr. Devney, do you think we  
3 can decide this case by saying yes, Congress could  
4 authorize the bankruptcy court to decide a contract case  
5 and we'll wait till the next case to decide whether it  
6 can handle a tort case or not?

7 MR. DEVNEY: No, I'm not suggesting that's the  
8 basis that you decide this case. I think --

9 QUESTION: We have to have some fairly  
10 generalized principle.

11 MR. DEVNEY: Well, I think the generalized  
12 principle is that this is a validly constituted Article  
13 I court.

14 QUESTION: And it can decide contract, tort,  
15 antitrust, any number of other things that might  
16 "pertain to" the bankruptcy.

17 MR. DEVNEY: Sure it can, but only if there is  
18 a bankruptcy. And that's the key to our position, Your  
19 Honor.

20 QUESTION: Well, what about -- by bankruptcy  
21 you would include a Chapter XI reorganization?

22 MR. DEVNEY: Oh, yes, sir.

23 QUESTION: And I suppose you could broaden the  
24 definition of a reorganization to include quite a  
25 variety of things, couldn't you?

1           MR. DEVNEY: Well, you might be able to. I  
2 think what we're talking about is jurisdiction under  
3 Title XI.

4           QUESTION: As it's now drafted.

5           MR. DEVNEY: Yes, sir. If there are no  
6 further questions, I thank the Court.

7           CHIEF JUSTICE BURGER: Mr. Orenstein.

8           ORAL ARGUMENT BY MELVIN I. ORENSTEIN, ESQ.

9                       ON BEHALF OF APPELLEES

10          MR. ORENSTEIN: Mr. Chief Justice, and may it  
11 please the Court, the constitutional challenge which is  
12 raised by Marathon in this matter is based upon Article  
13 III of the Constitution. That section of the  
14 Constitution mandates that when the judicial power --

15          QUESTION: Would you raise your voice a little  
16 bit, Mr. Orenstein?

17          MR. ORENSTEIN: Yes. That section of the  
18 Constitution mandates that when the judicial power of  
19 the United States is being exercised, the judges  
20 exercising that power must be vested with the salary and  
21 tenure protections of Article III of the Constitution.

22          The bankruptcy judges serve for 14 years.  
23 Their salary is subject to diminution by Act of  
24 Congress. They exercise the judicial power of the  
25 United States independent of the control of the Article

1   III court.  Therefore, the exercise of their  
2   jurisdiction in this matter is unconstitutional.

3           QUESTION:  How does that compare with the  
4   situation of the Court of Military Appeals?

5           MR. ORENSTEIN:  Your Honor, I believe that the  
6   Court of Military Appeals is based upon the principle  
7   that the commander-in-chief has a power to discipline  
8   his forces.  Now that is the power --

9           QUESTION:  But wasn't the court created as a  
10   civilian court, in effect as a check or a second look at  
11   the military decisions?

12          MR. ORENSTEIN:  That may be, but, Your Honor --

13          QUESTION:  Well, don't you think it is?

14          MR. ORENSTEIN:  The Military Court of Appeals?

15          QUESTION:  Yes.

16          MR. ORENSTEIN:  Yes.

17          QUESTION:  That was the purpose of it.

18          MR. ORENSTEIN:  Yes, but I think that those --  
19   the case you're raising, the military courts and the tax  
20   courts, for example, I think they fall within a  
21   particular category of cases which allow those courts to  
22   exercise jurisdiction which is not the jurisdiction of  
23   Article III of the Constitution.

24                 I say that for this reason.  There is a  
25   principle that this Court has developed in the past that



1 certain kinds of power is susceptible to judicial  
2 determination but in the first instance it may be  
3 exercised by the executive or the Congress because that  
4 department can exercise that power independent of the  
5 judicial system.

6           For example, in the military court situation I  
7 think it's been recognized that the power which is being  
8 exercised by the military courts in the first instance  
9 is a power which stems from the power of the  
10 commander-in-chief to discipline his forces. That  
11 doesn't involve the determination of contract rights or  
12 matters of national application as you have in the  
13 bankruptcy courts -- a very narrowly circumscribed area.

14           It is circumscribed as to time and to place  
15 and I think that that principle allows Congress to  
16 create courts outside of the structure of the  
17 Constitution. In effect, Your Honor, the kinds -- the  
18 kinds of values that are protected by Article III are  
19 the separation of powers at the Federal level and the  
20 division of powers between the Federal government and  
21 the states. When those powers are not deemed to be  
22 impaired, in my judgment, then Congress has been allowed  
23 by this Court to create courts outside of that structure.

24           QUESTION: You mean they could -- you could  
25 have a special -- an Article I court to decide every

1 case arising under one of the Bill of Rights or one of  
2 the Amendments, one of the first ten Amendments? What  
3 does it say? How about the -- just a First Amendment  
4 court, an Article I, First Amendment court? That  
5 wouldn't involve separation of powers between --  
6 necessarily between, in the Federal government or it  
7 wouldn't involve any questions of federalism.

8 MR. ORENSTEIN: Well, I think that any time  
9 that you have state-created rights in any sense that  
10 once you create --

11 QUESTION: Well, what about just -- the First  
12 Amendment only applies for a long time only applied to  
13 the Federal government and suppose there was some Act of  
14 Congress that was attacked as violative of the First  
15 Amendment? Could we have a special Article I court  
16 decide that case?

17 MR. ORENSTEIN: I don't think so. I don't  
18 think so, sir.

19 QUESTION: Well, why not?

20 MR. ORENSTEIN: Because I think that that --

21 QUESTION: That isn't a separation of powers  
22 question, is it?

23 MR. ORENSTEIN: Well, on the other hand, Your  
24 Honor, if --

25 QUESTION: Certainly isn't a federaliam

1 question.

2 MR. ORENSTEIN: No, but I think what that  
3 would lead to would be a position that Congress could  
4 establish those kinds of courts outside of the structure  
5 of the Constitution and at a point you would begin to  
6 dilute the Article III powers to a point where the  
7 courts couldn't serve their function.

8 QUESTION: Could you tell me, just summarize,  
9 what kind of matters did you say these new bankruptcy  
10 judges may decide that are beyond the control of any  
11 higher court -- of the district court or of the court of  
12 appeals?

13 MR. ORENSTEIN: Well, Your Honor, it seems to  
14 me that we're talking about the kinds of cases that  
15 prior to the Bankruptcy Reform Act could not have been  
16 brought in the state or the Article III district courts.

17 QUESTION: Well, I understand that. But there  
18 now can be. What matters are finally decided in the new  
19 bankruptcy courts that are not subject to control by the  
20 district court or by the court of appeals?

21 MR. ORENSTEIN: On the appeal process, you  
22 mean?

23 QUESTION: Yes.

24 MR. ORENSTEIN: Through the appeal process.

25 QUESTION: You just said that your fundamental

1 objection was that these courts can now finally decide  
2 things that Article III judges have no control over.

3 MR. ORENSTEIN: Yes. When I am speaking of  
4 control, Your Honor, I am speaking of control at the  
5 trial level. I heartily believe that the appellate  
6 review system would justify an answer to Article III if  
7 that were -- you know, the Constitution specifically  
8 provides that both the judges of the Supreme Court and  
9 the judges of the inferior court must be vested with the  
10 salary and tenure protections.

11 It would even, it seems to me that argument  
12 would lead you to a further problem with the district  
13 court judges themselves. If you could take the position  
14 that an appellate --

15 QUESTION: What is the standard of review on  
16 facts? Is it clearly erroneous?

17 MR. ORENSTEIN: Yes, under Rule 810 of the  
18 Bankruptcy --

19 QUESTION: And so that no Article III judges  
20 on review can upset the factfindings unless there are  
21 clearly erroneous, is that right?

22 MR. ORENSTEIN: Yes, that's right.

23 QUESTION: But I suppose all questions in law  
24 are subject to being reviewed.

25 MR. ORENSTEIN: Questions of law would be



1 subject to review, that is correct, but it seems to me  
2 that the factfinding process is the important process  
3 which is involved here, and that to in some way take the  
4 position that that process, if it's subject to review,  
5 is sufficient to satisfy the Article III values, it  
6 seems to me is to ignore the reality of the factfinding  
7 process and its impact in a trial situation.

8           And I just can't believe that the appeal  
9 process is the kind of process which this Court would  
10 consider as satisfactory to meet the Article III  
11 standards -- or the delegation standards which this  
12 Court has articulated in the Raddatz case, in United  
13 States v. Raddatz.

14           QUESTION: Mr. Orenstein, isn't there another  
15 consideration? Maybe I misunderstand the statute, but  
16 supposing nobody ever takes an appeal. Isn't it  
17 possible that the acts of the bankruptcy judges and  
18 bankruptcy courts will have the force and effect of a  
19 regular judgment?

20           MR. ORENSTEIN: That's right. And there's a  
21 further problem. In the bankruptcy setting we have now  
22 panels of bankruptcy judges that are set up as an appeal  
23 court, so we now have a situation where you'd have to  
24 take two appeals in order to get up to an Article III  
25 judge, and it seems to me as a practical matter that

1 that just, in most cases, can't happen. It's just too  
2 much of a burden to require people to take two appeals  
3 to get up to an Article III judge to get the kind of  
4 protection that the Article III section of the  
5 Constitution deems to be so important.

6 And it seems to me you also get to the remand  
7 problem. If you're going to go all the way up, you  
8 ultimately are going to come all the way down before an  
9 Article I judge who is going to make that decision. So  
10 that no matter how you slice it, ultimately, if you will  
11 take that approach -- the appeal approach -- to satisfy  
12 Article III, you wind up with an Article I judge -- or,  
13 rather, a non-Article III officer deciding important  
14 values which Article III was designed to protect.

15 QUESTION: Aren't you now addressing the  
16 wisdom of the statute of deferring the time when Article  
17 III court can review rather than the constitutionality?

18 MR. ORENSTEIN: No, Your Honor, I --

19 QUESTION: Just because it's inconvenient  
20 doesn't make something unconstitutional.

21 MR. ORENSTEIN: All right. I think that  
22 that's probably true.

23 QUESTION: Probably?

24 MR. ORENSTEIN: Yes, okay, that's true.

25 That's true, but, you know, on the other side of that

1 coin, Your Honor, is this. The principle which is being  
2 argued in this case is that in the name of convenience  
3 and expeditency that we ought to sacrifice the values of  
4 Article III. That's the other side of the coin.

5           Expediency and need, it seems to me, in one  
6 case is the same in the sense of constitutional --

7           QUESTION: You're saying just because it's  
8 convenient doesn't make it constitutional?

9           MR. ORENSTEIN: That's right. I guess that's  
10 the other side of the coin.

11          QUESTION: Counsel, on the other hand, the  
12 Article III judges aren't around looking for business,  
13 in case you don't know that.

14          MR. ORENSTEIN: Your Honor, I think I wanted  
15 to be clear on something. I got an impression that the  
16 government here is taking the position somehow that  
17 we're attacking the entire jurisdiction, we're attacking  
18 the entire bankruptcy court. We're not doing that  
19 there. We understand that we don't want to dislocate  
20 the system. That is a practical problem.

21          On the other hand, of course, we think there  
22 are certain Article III values that ought to be  
23 protected. I don't believe that the kind of problem or  
24 dislocation you may be concerned about would occur.  
25 This is the same situation which has occurred or existed

1 for 200 years. These same cases have always been  
2 brought before the Article III courts. These same cases  
3 have always been tried in the state courts.

4           So that you really don't -- there is a lot of  
5 horribles, perhaps, paraded around here, but, as I say,  
6 this is a situation we've existed with all these years.

7           QUESTION: Yyou say that you are not attacking  
8 all of them. Now, going to this matter of convenience  
9 or inconvenience, could, conceivably, an Article III  
10 court somewhere decide that the appeal from the  
11 bankruptcy, article on bankruptcy judges to the  
12 three-panel Article I group was either unconstitutional  
13 or else under the supervisory powers of the court,  
14 possibly, but only possibly, that there must be an  
15 appeal directly to the Article III United States Court  
16 of Appeals and then solve that problem?

17           MR. ORENSTEIN: Well, as I have indicated,  
18 Your Honor, I think that it's not a question of  
19 convenience, in my judgment, to assert that the appeal  
20 process satisfies the control relationships which have  
21 to exist between an Article III court and this  
22 delegate. In my judgment, in effect you have an Article  
23 I officer for all practical purposes deciding the final  
24 rights between these parties.

25           And there is a constitutional provision which



1 very clearly, it seems to me, says that both the judges  
2 of the Supreme Court and the inferior courts must be  
3 vested with these salary and tenure protections. It was  
4 never intended, I think, constitutionally that we could  
5 have a layer of Federal trial courts at the district  
6 level who didn't have to be tenured.

7           It seems to me the same proposition applies,  
8 and when Congress creates inferior federal courts, I  
9 think it is required by constitutional mandate that they  
10 tenure those judges.

11           QUESTION: Mr. Orenstein, how do you  
12 distinguish the case of the magistrates that we were  
13 concerned with in Raddatz?

14           MR. ORENSTEIN: I really don't distinguish  
15 it. I think that the magistrates -- that case is a good  
16 model, it seems to me, for what we have here. I think  
17 that that case, which laid down two broad principles, as  
18 I understand them -- the principles were that the final  
19 decision has to be made by the Article III judge and,  
20 secondly, that the delegate has to serve -- the  
21 magistrate, the non-Article III officer has to serve --  
22 in an advisory, subordinate capacity to the Article III  
23 judge. That is, the Article III judge must have  
24 complete and direct control of the activities of that  
25 magistrate.

1           Now in the magistrates cases -- and of course  
2 that was sustained. The delegation of power in that  
3 case was sustained and it seems to me it was sustained  
4 because, as this Court said, there was complete control  
5 over the activities of that non-Article III officer and  
6 the Court did make the final decision.

7           None of that is present here. When a case  
8 comes into the bankruptcy court it starts off by  
9 complaint. It goes to discovery. It goes to trial by  
10 jury and it goes to judgment in the bankruptcy court.  
11 The Article III judge never gets into the act.

12           QUESTION: Can these judges empanel a jury?

13           MR. ORENSTEIN: Yes, sir. They can try cases  
14 by jury. The power that these judges can --

15           QUESTION: So can the magistrates.

16           MR. ORENSTEIN: Pardon?

17           QUESTION: So can the magistrates.

18           MR. ORENSTEIN: Yeah, but by consent, as I  
19 understand it.

20           QUESTION: Counsel, I get the feeling that  
21 you're making a beautiful lawyer for Congress. But  
22 we're not Congress. Congress has the power to determine  
23 jurisdiction of the Federal courts, and you are arguing  
24 that this just is a bad way of doing it. Assuming it's  
25 bad --

1           MR. ORENSTEIN: Yes.

2           QUESTION: Assuming it's a worse way of doing  
3 it, is it constitutional?

4           MR. ORENSTEIN: Yes.

5           QUESTION: And you haven't said anything to me  
6 to convince me that it's not constitutional for Congress  
7 to do this.

8           MR. ORENSTEIN: Well, Your Honor --

9           QUESTION: Congress is the one to make the  
10 determination as to whether this should be an Article I  
11 or an Article III court. That's Congress' job.

12          MR. ORENSTEIN: Okay. Your Honor, Congress  
13 didn't make this an Article I court. Congress didn't  
14 intend to create an Article I court. Congress intended  
15 to create an Article III delegation to the non-Article  
16 III officers and that's the question.

17          QUESTION: Well, what do you want us to do, to  
18 abolish the bankruptcy court?

19          MR. ORENSTEIN: No, I don't, Your Honor. What  
20 I want you to do is to set aside the jurisdiction  
21 represented by this case before you.

22          QUESTION: Well, that's the Congress' doing.

23          MR. ORENSTEIN: Well, I don't think --

24          QUESTION: Congress -- you said jurisdiction.

25          MR. ORENSTEIN: Yes, but, Your Honor --

1           QUESTION: Congress determines the  
2 jurisdiction of all Federal courts.

3           MR. ORENSTEIN: Your Honor, I don't believe  
4 that Congress can create courts to exercise jurisdiction  
5 unless those jurisdictional bases are within the limits  
6 of the Constitution. What I am saying is --

7           QUESTION: Of course.

8           MR. ORENSTEIN: There are limits to Congress'  
9 ability to create courts and to confer jurisdiction upon  
10 those courts, and this case involves a --

11          QUESTION: Well, couldn't Congress take all of  
12 the jurisdiction of bankruptcy from the Article III  
13 courts and give it to an Article I court?

14          QUESTION: I suppose that's the issue, isn't  
15 it?

16          MR. ORENSTEIN: No. I don't think it could.  
17 I don't think it can.

18          QUESTION: Why not?

19          QUESTION: Even when it allows appellate  
20 review by an Article III court?

21          MR. ORENSTEIN: Well, Your Honor, I have  
22 already gone through that appeal argument and I suppose  
23 you may or may not be persuaded or convinced, but it's  
24 really the best argument I can make, is that the  
25 Constitution is very specific in this area, that both



1 judges on the appellate level and on the basic level  
2 have to be tenured with the Article III protections.

3 QUESTION: Well, what if you don't call them  
4 judges? What about administrators? What about the  
5 National Labor Relations Board, for example? You can't  
6 upset their factfindings either if they are supported by  
7 substantial evidence.

8 MR. ORENSTEIN: Well, but now you're getting  
9 into the question of can you create this court as an  
10 agency with all of these kinds of powers and with all of  
11 the --

12 QUESTION: I know, but all you're doing --  
13 arguably, all you're doing is changing the name on the  
14 organization. You don't call it a court; you call it an  
15 agency and you call members of the board or  
16 administrators.

17 MR. ORENSTEIN: No. I don't think that would  
18 work, Your Honor, because, you know, whatever label you  
19 put on something doesn't mean anything unless you look  
20 at what it does and what it can do.

21 QUESTION: Let me just -- you know what the  
22 National Labor Relations Board can do. They can make  
23 determinations of unfair labor practices and award back  
24 pay in very, very large amounts.

25 QUESTION: Has that award got any legal effect

1 until a court enters it?

2 QUESTION: Until it is enforced by the Court  
3 of Appeals.

4 QUESTION: Or do they have to petition an  
5 Article III judge to get it enforced?

6 MR. ORENSTEIN: That may be true. I am not  
7 entirely --

8 QUESTION: That may be true, but when they  
9 petition for enforcement, the Article III court has no  
10 authority to upset any factfinding that is supported by  
11 substantial evidence.

12 MR. ORENSTEIN: I agree.

13 QUESTION: And in this bankruptcy court  
14 nothing is final if somebody wants to appeal.

15 MR. ORENSTEIN: But you have a different  
16 principle with the NLRB. That principle is based upon  
17 Congress' right to create an agency and that --

18 QUESTION: Where did they get that, to decide  
19 these cases?

20 MR. ORENSTEIN: Okay. This Court has long ago  
21 stated that there are certain kinds of factfinding  
22 functions which can be delegated to an agency, and  
23 that's done on the basis of --

24 QUESTION: What about -- what's the matter  
25 with delegating pursuant to the bankruptcy power, the

1 kind of factfinding that is delegated to these  
2 bankruptcy judges?

3 MR. ORENSTEIN: Because there are certain  
4 areas in which this Court has said the Congress can make  
5 this kind of a delegation and these are areas involving  
6 public rights where a sovereign is suing to enforce a  
7 particular statute under Federally-enacted legislation.  
8 There are certain kinds of rights that --

9 QUESTION: The sovereign isn't suing for  
10 anything in the National Labor Relations Board. Private  
11 parties litigate before it.

12 MR. ORENSTEIN: Okay. Then if it is a private  
13 party situation, then you have to have, as this case  
14 said in the Crowell case, you must have a relationship  
15 between that factfinder and the Article III court which  
16 is a properly controlled relationship. And that's what  
17 we're complaining about here.

18 QUESTION: Do you think as long as the  
19 sovereign is enforcing its own laws it can create  
20 anything it wants -- have the disputes adjudicated by  
21 any kind of --

22 MR. ORENSTEIN: No.

23 QUESTION: How about a criminal case?

24 MR. ORENSTEIN: I don't think it can because  
25 this Court has stated many times that you can't take

1 private rights, contract rights, tort rights, away from  
2 the judicial cognizance.

3 QUESTION: Let me back up to one of your  
4 earlier responses. It gave me the impression that you  
5 thought that the Congress of the United States had to  
6 get some leave or approval from the judiciary in order  
7 to create the Labor Board or the Federal Communications  
8 Commission.

9 Congress was exercising its own inherent  
10 constitutional powers, was it not, when they created  
11 these agencies?

12 MR. ORENSTEIN: When it creates agencies,  
13 yes. I didn't intend to say --

14 QUESTION: Now the Federal Communication  
15 Committee can give -- Commission can give or it can take  
16 away a broadcast license worth hundreds of millions of  
17 dollars.

18 MR. ORENSTEIN: That's correct.

19 QUESTION: And that's subject to review by a  
20 court of appeals in the first instance, but, as Justice  
21 White pointed out, the court of appeals is at least  
22 bound to affirm what the Commission has done if it's  
23 supported by substantial evidence, even if they disagree  
24 with the result reached, is that not so?

25 MR. ORENSTEIN: That's right.

1 QUESTION: It's true of the Federal Power  
2 Commission?

3 MR. ORENSTEIN: Yes, but, you know, now, Your  
4 Honor, you're moving into the whole area of agency  
5 factfinding power which I think is controlled by some  
6 different principles, and the kind of principle you're  
7 trying to apply here, at least this Court in the past --

8 QUESTION: What is it -- what is that  
9 different principle?

10 MR. ORENSTEIN: It's a doctrine which this  
11 Court has announced in the past.

12 QUESTION: Suppose you filed before the  
13 Interstate Commerce Commission and you want to get  
14 reparations from another party. So here's a dispute  
15 between a shipper and a carrier in the court, and  
16 reparations are awarded.

17 MR. ORENSTEIN: All right.

18 QUESTION: Worth a million dollars.

19 MR. ORENSTEIN: Your Honor, I believe --

20 QUESTION: And no court can touch it.

21 MR. ORENSTEIN: Yeah, but that's under a  
22 public statute, as I understand it.

23 QUESTION: What is it?

24 MR. ORENSTEIN: I understand it's under --

25 QUESTION: Under a public statute?



1           MR. ORENSTEIN: Well, a statute which confers  
2 a public right upon the individuals. It's not -- it's  
3 not the private rights.

4           Your Honors, it seems to me if you were to  
5 employ that principle that you can take private rights  
6 and matters under the antitrust laws and matters under  
7 the whole range of federal legislation and move them out  
8 of the Article III protection that you have in effect  
9 nullified the Article III values.

10           It seems to me this Court has very carefully  
11 in the last year or so, in the Hubert F. Will case  
12 articulated and affirmed those values as being as  
13 important today as they were 200 years ago, and it just  
14 seems to me that if you consider those values as being  
15 important that you can't allow a process by which  
16 Congress can erode or eat way into the Article III  
17 jurisdiction.

18           It seems to me that this Court has, from time  
19 to time, very carefully tried to develop principles  
20 which avoid that problem.

21           QUESTION: Suppose that when Congress passed  
22 this act it had called these bankruptcy people  
23 bankruptcy magistrates and --

24           MR. ORENSTEIN: Okay.

25           QUESTION: What about it. Does the name make

1 any difference in terms of their function?

2 MR. ORENSTEIN: The label does not make any  
3 difference, in my judgment. It's what they can do and  
4 what they can't do that makes the difference.

5 The whole Magistrates Act really is built  
6 pretty well to cover the problem. The Magistrates Act  
7 says, you know, that the Article III judge has got the  
8 power to refer and has got the power to determine what  
9 kind of conditions to make reference. He's got the  
10 power to withdraw. He's got the power to accept,  
11 modify, reject, and take new evidence. He makes rules  
12 for those magistrates. There's a whole consent package  
13 which protects the jury rights of those parties.

14 That's the kind of adjunct relationship that  
15 should have been created under the Bankruptcy Act and  
16 the Reform Act and they just didn't do it. They didn't  
17 have the time, and I think there's a reason for it.  
18 They really thought that this was a separate system of  
19 courts. They really designed it that way. They set  
20 these judges up. They said on the conferences this is a  
21 Court of the United States. It's in no sense an aid or  
22 a court which is in a subordinate position.

23 The very purpose that was argued before  
24 Congress was that these referees had to be raised to the  
25 same equal rank and importance of the Article III judges

1 and they started out with that concept. And that's what  
2 they got. In fact, you didn't get an adjunct court.  
3 You got a label that says this is an adjunct court, but  
4 that court itself --

5 QUESTION: Nothing unusual about Congress  
6 changing its positions during the course of the  
7 evolution of a statutory scheme, is there?

8 MR. ORENSTEIN: Oh, no.

9 QUESTION: They start out on one tack and have  
10 amendments, conferences, and --

11 MR. ORENSTEIN: No. My only point is that  
12 there are certain prescribed standards here which I  
13 think should have been met and they weren't met because  
14 Congress just didn't get it all together. There was a  
15 compromise. If they were going to create an adjunct  
16 court, adjunct is a label. It really doesn't mean  
17 anything.

18 Adjunct has to take on its meaning by the  
19 functions which these Article III judges can perform in  
20 relation to the level or the supervision of the Article  
21 III court. Adjunct implies a subordinate position -- an  
22 adjunct of something. This court is not an adjunct to  
23 anything. These judges make the final decisions. They  
24 are final factfinders. And the only time that you can --

25 QUESTION: You mean more final than any of the

1 Commissions that Justice White and others have mentioned  
2 to you?

3 MR. ORENSTEIN: In the --

4 QUESTION: That is, the Federal  
5 Communications, the Federal Power, Labor Board,  
6 Interstate Commerce?

7 MR. ORENSTEIN: They're not any more final in  
8 that sense. But they exercise different powers. They  
9 can try jury cases. There isn't any agency I know that  
10 tries jury cases. There isn't any agency I know that  
11 issues a writ.

12 QUESTION: That stands the argument on its  
13 head. You would think that if they can award back pay  
14 and reparations without a jury, you'd think it would be  
15 even more invalid, but it isn't.

16 MR. ORENSTEIN: No, I think that gets into a  
17 question of what kinds of rights you are entitled to a  
18 jury trial in. Under the Act, which you suggest, I  
19 suspect --

20 QUESTION: You get a money award. You get a  
21 money award for having fired somebody illegally. That  
22 sounds pretty legal, isn't it?

23 MR. ORENSTEIN: Yes, but --

24 QUESTION: Could territorial judges try jury  
25 cases?

1           MR. ORENSTEIN: Yes, I think they could  
2 because I think that once you get into the territories  
3 then you're not concerned with the kinds of separation  
4 of powers. You've got a plenary power in Congress to  
5 legislate over those areas. You don't have a competing  
6 judiciary. You don't have a competing state  
7 sovereign -- those kind of values which Article III  
8 attempts to protect.

9           The whole problem of encroachment of Federal  
10 power is not at issue in the territories because  
11 Congress has the plenary power under those circumstances  
12 to legislate. It can act both as a state and as a  
13 sovereign if it so chooses, because it was given that  
14 power specifically under the Constitution.

15          QUESTION: Well, until they became states, I  
16 should think the people in Hawaii and Alaska thought  
17 they were entitled to the same kind of rights as people  
18 in Pennsylvania and Minnesota.

19          MR. ORENSTEIN: Well, in the due process  
20 sense, certainly so. In the structural sense it's not  
21 the same problem. There's a tendency to confuse the  
22 two. The structural problem -- really, the Constitution  
23 was designed to do a certain thing, and that was to make  
24 sure that there was no alliance between the non-Article  
25 III judges and the Congress which would in some way



1 allow the federal programs to be applied in prejudice to  
2 the rights of the states and individuals or litigants  
3 who have those rights conferred upon them by the state  
4 laws.

5           QUESTION: Of course, Mr. Orenstein, in your  
6 home state of Minnesota you had a territorial federal  
7 court at one time, and -- but let me ask a question  
8 before you sit down that I'd like to have your comment  
9 on.

10           This Act has been in effect for a little while.

11           MR. ORENSTEIN: Yes.

12           QUESTION: And certainly there have been a lot  
13 of bankruptcy proceedings and related proceedings that  
14 have gone down through the process. If Chief Judge  
15 Lord's opinion should be, or judgment should be affirmed  
16 here, do you have any comment on how the  
17 unconstitutionality can be cured with all of these  
18 things in the background. It is to operate  
19 prospectively or all these proceedings are rendered null  
20 and void?

21           MR. ORENSTEIN: Your Honor, first let me say  
22 that I'm not asking that we go as far as Judge Lord  
23 went. He struck down the entire quantum of jurisdiction  
24 and I -- as far as I'm concerned, the focus of this case  
25 is narrower.

1           But, you know, this Court has, from time to  
2 time, struck down jurisdictional exercises, for example  
3 the O'Callahan v. Parker case, and there was a  
4 bankruptcy case, by the way, called Chicotte County  
5 Drainage District v. Baxter Bank in which the bankruptcy  
6 court jurisdiction was stuck down, exactly the same kind  
7 of problem we have here, and the Court held that on  
8 collateral attack when another creditor tried to bring  
9 it up in a later suit that it was res judicata. And so  
10 those cases, all the cases that have gone to judgment  
11 and sworn are res judicata.

12           Insofar as the retroactivity or prospectivity,  
13 this Court in a number of cases has treated that issue.  
14 One was Gross v. Maiden, and there are some others,  
15 where this Court has -- in effect, it took the  
16 O'Callahan case and -- where that jurisdiction had been  
17 knocked out -- and said that that case would not apply  
18 retroactively. We apply prospectivity.

19           So I feel this Court has left itself plenty of  
20 room in this area to work out those kind of problems so  
21 as not to result in any major dislocations.

22           QUESTION: You don't see any problem in this  
23 Court removing Article I judge to an Article III judge,  
24 do you?

25           MR. ORENSTEIN: No, I don't see any problem

1 with that at all.

2 QUESTION: You don't see any problem at all?

3 MR. ORENSTEIN: No.

4 Thank you.

5 CHIEF JUSTICE BURGER: Mr. Solicitor General,  
6 you have three minutes remaining.

7 REBUTTAL ORAL ARGUMENT OF REX E. LEE, ESQ.,

8 ON BEHALF OF APPELLANT UNITED STATES

9 MR. LEE: Just very briefly, Mr. Orenstein  
10 spoke of Article III values. There are two  
11 constitutional values that are implicated in this case.  
12 They come from two sources -- Article I and Article  
13 III -- both a part of the Constitution and both must be  
14 taken into account.

15 On the Article I side, Congress has the  
16 responsibility to establish uniform laws of bankruptcy.  
17 This Court has clarified in several opinions -- Rostker  
18 and Palmore among them -- that Congress is entitled to  
19 particular deference that there is evidence that  
20 Congress actually analyzed the constitutional and did  
21 its best to resolve it.

22 The legislative history leaves no doubt that  
23 Congress, when it enacted the 1978 Act, had before it  
24 the Palmore standards and did its best to apply them.  
25 Those standards, by their very definition --

1 specialization of the area, particularization of the  
2 need, and distinctiveness of the appropriate  
3 treatment -- are the kind of thing that lend themselves  
4 best to congressional factfinding and decision.

5           On the Article III side, it is frankly  
6 difficult to see what damage, if any, has been done by  
7 this Act. I have been puzzled throughout my entire  
8 consideration of this case -- and, frankly, I was  
9 puzzled during Mr. Orenstein's argument. I am not  
10 certain whether the opponents of this statute would like  
11 it to be more like an Article III court or less like an  
12 Article III court.

13           But in any event, we agree with the Appellee  
14 on this proposition, that the tenure and compensation  
15 guarantees are rooted in separation of powers concerns  
16 in the sense that the independence of the judiciary with  
17 which we are concerned is largely an independence from  
18 other branches of government.

19           QUESTION: May I just confirm one thing?

20           MR. LEE: Yes, sir.

21           QUESTION: You don't go so far as to adopt  
22 Justice Jackson's rationale?

23           MR. LEE: Absolutely not.

24           QUESTION: In the Tidewater case?

25           MR. LEE: Absolutely not. The Article III

1 concerns would be the greatest, therefore, in those  
2 cases where another branch of government is always or  
3 frequently the other party. That is the case with the  
4 Court of Claims, Tax Court or the Court of Military  
5 Appeals. It is not the case with bankruptcy.

6           The Appellee's view is, apparently, that  
7 Congress must either give primary jurisdiction over  
8 bankruptcy to the district courts, which Congress have  
9 determined over eight years of consideration of this  
10 problem will not work, or confer Article III status on  
11 bankruptcy courts, thereby swelling the ranks of the  
12 tenured judiciary in a proportion that has never  
13 occurred in this country and would raise serious  
14 questions about diluting the quality of the Article III  
15 judiciary and there is evidence of that concern in the  
16 House report.

17           I know of nothing in the Constitution, and  
18 certainly nothing in common sense, that so limits  
19 Congress' choices and the decision of the district court  
20 should be reversed.

21           QUESTION: From what article of the  
22 Constitution, Mr. Solicitor General, did the Congress  
23 derive its power to create the Labor Board, the FCC, the  
24 Federal Power and all the rest of them?

25           MR. LEE: It's my understanding -- I could be



1 wrong -- it was under the commerce clause.

2 QUESTION: And in what Article do we find the  
3 commerce clause?

4 MR. LEE: Well, that's Article I.

5 QUESTION: And the judges of the territories  
6 and these bankruptcy judges?

7 MR. LEE: That would be Article IV. Article  
8 IV.

9 QUESTION: General Lee, on this point, I mean,  
10 if we were to focus primarily on Article I, it's Article  
11 I that gives the Congress the power to constitute  
12 tribunals inferior to this Court.

13 MR. LEE: That is correct.

14 QUESTION: So if you were to rely on that,  
15 then any lower court judge could be --

16 MR. LEE: That's a good point, Justice  
17 O'Connor. That's Clause 4 of Article I, Section 8 --  
18 excuse me, Clause 9. And as I read that one, I think  
19 what that refers to exclusively is the authority to  
20 create Article III courts.

21 QUESTION: Well, then, you run into the  
22 necessary and proper clause, too. So to rely on Article  
23 I would lead us into a lot of difficult --

24 MR. LEE: Excuse me. That was just -- and  
25 what I mean is Article I, Section 8, Clause 4.

1                   QUESTION: Yes.

2                   MR. LEE: Thank you.

3                   CHIEF JUSTICE BURGER: Thank you, gentlemen.

4 The case is submitted.

5                   (Thereupon, at 3:17 o'clock p.m., the case in

6 the above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Northern Pipeline Construction Co., Appellant v. Marathon Pipe Line Company and United States; and United States, Appellant v. Marathon Pipe Line Co., Et Al

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No. 81-150 & 81-546

and that these pages constitute the original transcript of the proceedings for the records of the Court.

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