American Bankruptcy Institute Law Review

Volume 5 Number 1 Spring 1997

THE DELAWARE GAP: EXPOSING NEW FLAWS IN THE SCHEME OF BANKRUPTCY REFERRALS

Hon. Leif m. Clark [*FN:* U.S. Bankruptcy Judge, Western District of Texas, San Antonio Texas.]

Douglas E. Deutsch* [* Law Clerk to the Honorable Leif M. Clark, U.S. Bankruptcy Judge, Western District of Texas.]

Responding to a request for empirical information and analysis pertaining to whether bankruptcy case venue statutes and procedural rules should be modified, the Federal Judicial Center recently prepared a study to analyze administrative and demographic characteristics of large public companies that emerged from chapter 11 during 1994 and 1995. [*FN:* See Report to the Committee on the Administration of the Bankruptcy System, chapter 11 Venue Choice by Large Public Companies (1997) [hereinafter Report].] Due to their receipt of a high proportion of the large public company cases, the study's focus was keyed to two districts in particular, the District of Delaware and the Southern District of New York. [*FN:* See id.]

The results of the study, published in a report titled *chapter 11 Venue Choice by Large Public Companies* (the "Report"), could not pinpoint a precise reason why the Southern District of New York had become a "magnet" court, although it noted that many large companies had management based in Manhattan. [*FN:* See id. at III−7 − III−8.] The Report was able, however, to make some suggestion as to why Delaware had become a "magnet" court: the speed with which the court regularly confirmed prepackaged and prenegotiated filings. [*FN:* See id. at III−8.] This finding, while enlightening, seemed to have attracted little interest outside the bankruptcy community.

The Report also detailed some specific practices of the Delaware bankruptcy court which, it suggested, helped speed matters through the system. For instance, the Report noted that the regular practice was for the chief bankruptcy judge to be notified by debtor's local counsel before large cases were filed so as to arrange a convenient time to hear first day orders; that the chief judge examined both her own case load and the other bankruptcy judges' case loads to determine who should get the case prior to the filing; that local counsel was notified of the chief judge's decision concerning judge assignment prior to the case's filing; and finally, that local counsel provided a list of first−day motions to the assigned judge the day before the case was filed. [*FN:* See id. at III−9 − III−10.] The report of these specific practices received a great deal of attention.

On January 23, 1997, about two weeks after the report was issued, [*FN:* See Report , supra note 1 (noting that cover page indicates report was released on January 9−10, 1997).] Judge Joseph F. Farnan Jr., Chief District Judge of the District Court of Delaware, issued an order terminating the general order of reference as it applied to chapter 11 filings made on or after February 3, 1997. [*FN:* See Order Regarding Referral of Title 11 Proceedings to the United States Bankruptcy Judges for this District (January 23, 1997), reprinted in Delaware District Court Withdraws the Reference in chapter 11 Cases , Bankr. Ct. Dec., Feb. 4, 1997 at A1, A8.] The proffered justification for this extraordinary move was the enormous case load that the relatively large number instances of very large corporations filing chapter 11 petitions in that district were imposing on the two bankruptcy judges who sit there. [*FN:* See id.] The suddenness of this extraordinary move raised doubt about this explanation.

A number of observers have speculated that the move was not, as the order claims, issued to deal with a heavy caseload. [*FN:* See, e.g., Delaware's Withdrawal of the Reference: What it Means , Bankr. Ct. Dec., Feb. 11, 1997, at A1, A9; Claudia MacLachlan, Ex Parte Contacts Behind Delaware Bankruptcy Shakeup? , Nat. L.J., February 10, 1997 at A10 .] Rather, it has been

suggested that the district court was concerned with how cases were being distributed, with some implying that the distribution process was marked by certain kinds of *ex parte* contacts inimical to the appearance of even−handedness which all courts must strive to maintain. [*FN:* See Delaware's Withdrawal of the Reference , supra note 9, at A9 − A11.] Assuming that this was the case, [*FN:* The timing of the district court's move (shortly after the issuance of the Report), plus the fact that neither the bankruptcy judge nor the bar had raised any complaints about any sort of backlog, strongly suggest that the district court's proffered rationale was not the real motivation for its actions.] the question becomes, was modifying the general order of reference the appropriate method to deal with such a problem?

This is the first time a district court has withdrawn the general order of reference that was issued by every district court nationwide shortly after the 1984 Bankruptcy Amendments and Federal Judges Act was passed. [*FN:* See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98−353, 98 Stat. 333 (1984); see generally 1 Collier on Bankruptcy ¶ 3.01 [2] [a] (Lawrence P. King *et al.* eds., 15th ed. rev. 1996) (explaining 1984 Amendments).] What would happen should other district courts adopt the Delaware District Court's tactic for dealing with perceived improprieties on the part of the bankruptcy court? More importantly, what kind of framework ought we use to evaluate the propriety of the removal in each instance? This Article attempts to suggest a method to evaluate the appropriate use of the reference (and withdrawal of reference) powers conferred on district courts by section 157 of title 28. [*FN:* See 28 U.S.C. § 157 (1994) (describing cases that district courts and bankruptcy courts may hear).]

We begin this Article in Part I by examining the history of bankruptcy adjudication in this country. Tracing the evolution from direct district court supervision over bankruptcy matters in the 19th century to almost entire autonomy for bankruptcy judges after the passage of the 1978 Bankruptcy Act, we suggest that Congress' most recent moves indicate the intent to create largely independent bankruptcy courts−−subject, of course, to appellate review−−to the extent constitutionally permissible. The second portions of Part I examines an apparent impediment to that congressional desire, the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.* [*FN:* 458 U.S. 50 (1982).] In that examination, we note that *Marathon* addresses the constitutional issue of whether bankruptcy courts lacking the attributes of an article III tribunal can be vested with power to adjudicate certain matters that have traditionally been handled by article III courts. The Supreme Court found that they could not. [*FN:* See id. at 87.] The decision did not purport to deal with issues of court administration; instead it focused on powers related to *adjudicative authority*. [*FN:* See id. at 76−87.] Accordingly, we conclude that the *Marathon* decision itself, and the subsequent congressional "fix" for the constitutional issue, left the administrative independence of bankruptcy courts intact. Part II, recognizing that the Delaware District Court is required to respond to allegations of misconduct in the bankruptcy court, examines the options available to district courts that must either investigate for possible improprieties or punish a bankruptcy judge for misconduct. Finally, Part III reviews Congress' desire with respect to regarding the review of an errant bankruptcy judge and weighs Congress' intent against the means available to district courts. Part III concludes that while removal of general reference is a viable legal option, it is not the most appropriate remedy to handle wayward bankruptcy judges.

I. The Administration of Bankruptcy Matters

In the last two hundred years, administration of bankruptcy matters has shifted away from direct district court control to indirect circuit council control. This Part traces the twists and turns of that route, focusing on the independence that Congress sought to foster over the course of that evolution.

A. Early Bankruptcy Law

The Bankruptcy Clause of the Constitution allows Congress to "establish uniform laws on the subject of bankruptcies." [*FN:* See U.S. Const. art. I, § 8, cl. 4; see generally 1 Collier on Bankruptcy ¶ 0.02 (Lawrence P. King *et al.* eds. 14th ed. 1977). Despite this unequivocal provision, a dispute exists as to the best way to implement bankruptcy laws. In a 1963 address to the National Conference of Referees in Bankruptcy, Chief Justice Warren observed that there was no constitutional requirement that bankruptcy be administered by courts. He also noted that the executive branch through its alien custodian property administered claims against distribution of property at a fraction of the cost of bankruptcy court administration. See Frank R. Kennedy , Exercise by the Bankruptcy Courts of Administrative Functions, in The Development of Bankruptcy Law in the Courts of the 2nd Circuit 3 (United States Courts for the 2nd Circuit Committee on History and Commemorative Events ed., 1995). But see 1 Harold Remington, Bankruptcy § 13, at 27 (5th ed. 1950) (stating "by its very nature, the administration of insolvency cases is a judicial function, once the requisite legislation is set up, or at least a matter of judicial supervision").] Uniformity in bankruptcy laws, according to James Madison, is necessary because it:

is so intimately connected with the regulation of commerce, and will present so many frauds where the parties or their property may lie or be removed into different states that the expediency of it seems not likely to be drawn into question. [*FN:* The Federalist No. 42 (James Madison).]

Although constitutionally permitted, it was not until 1800 that Congress passed the first bankruptcy laws. [*FN:* In fact, as this Article will explore, see text infra , during the country's first century under the constitution, the bankruptcy power was largely unexercised. See Charles J. Tabb, The History of the Bankruptcy Laws in the United States , 3 Am. Bankr. Inst. L. Rev. 5, 14 (1995).] That grant, appropriately titled the Bankruptcy Act of 1800, [*FN:* See Act of April 4, 1800, ch. 21, 2 Stat. 19 (repealed 1803).] provided the district court with the power,

to appoint such good and substantial persons, being citizens of the United States, and resident in such district, as such judge shall deem proper, not exceeding three, to be commissioners of the said bankrupt. [*FN:* See id. at 21, see also Kennedy, supra note 17, at 3.]

These commissioners, in turn, appointed assignees to effect the liquidation and distribution of the estate. [*FN:* See Act of April 4, 1800, ch. 21, 2 Stat. 19, 23 (repealed 1803). Creditors were, however, allowed to replace assignees with one they elected. *Id.*] The 1800 Act, designed purely as a creditor's remedy, [*FN:* See id. at 21−22; see also Tabb, supra note 19, at 14.] was short lived. It was repealed in 1803. [*FN:* See Act of December 19, 1803, ch. 6, 2 Stat. 248 (1803).]

The next attempt by Congress to enact bankruptcy laws occurred in 1841. [*FN:* Bankruptcy Act of 1841, ch. 7, 5 Stat. 440 (repealed 1843); see also Collier , supra note 17, ¶ 0.05 (discussing prior legislative action which failed).] For the first time in American history, an Act allowed debtors to file for bankruptcy and to receive a discharge. [*FN:* See Tabb , supra at note 19, at 17.] Jurisdictionally, the 1841 Act provided "the district court in every district . . . jurisdiction in all matters and proceedings in bankruptcy." [*FN:* See Bankruptcy Act of 1841, ch. 7, 5 Stat. at 443, 445.] It also allowed the district judge to appoint an "assignee" in whom the "bankrupt's" property was vested. [*FN:* Id .] After little more than a year in operation, the Act of 1841 was repealed. [*FN:* See Act of March 3, 1843, ch. 82, 5 Stat. 614.]

In 1867, Congress adopted "uniform laws" that are much more comparable to the system in place today. [*FN:* See Tabb, supra note 19, at 19.] Under the 1867 Act, district courts were vested with original jurisdiction over bankruptcy matters. [*FN:* See Act of March 2, 1867, 14 Stat. 517 (repealed 1878); Collier, supra note 12, ¶ 1.01[1] (discussing 1867 Act as granting bankruptcy courts with original jurisdiction).] District judges then could exercise their power to appoint "registers in bankruptcy, to assist the judge of the district court in the performance of his duties under this act." [*FN:* See Act of March 2, 1867, 14 Stat. at 518.] The register was subject to the direction and supervision of the district court. [*FN: Id.*] The 1867 Act was repealed in 1878. [*FN:* Act of June 7, 1878, ch. 160, 20 Stat. 99.]

Finally, in 1898 Congress enacted a bankruptcy act which stood the test of time. The Bankruptcy Act of 1898 (the "Act") [*FN:* Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978).] established the district courts as "courts of bankruptcy" but allowed the courts to refer the bulk of matters to "referees in bankruptcy." [*FN: Id.* at 555. Referees were so denominated "not because they wore striped shorts and blew whistles but because a wide variety of cases . . . were referred to them." Vern Countryman, Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process, 22 Harv. J. on Legis . 1, 2 1985).] The duties and responsibilities of referees, the predecessors to today's bankruptcy judges, evolved tremendously over the 80 year tenure of the Act.

When the Act was originally adopted, referees were compensated on a fee basis. [*FN:* See Act of July 1, 1898, ch. 541, § 40, 30 Stat. 544, 556 (repealed 1978).] Thus, referees had an interest in maximizing estate recovery to the detriment of debtors. During the 1930s and 40's, Congress appears to have recognized that fostering partiality in a branch of the federal courts was not appropriate. Accordingly, Congress made changes to create a more independent referee by passing the Chandler Act in 1938. [*FN:* Act of June 22, 1938, ch. 575, 52 Stat. 840 (amending Act of 1898, and repealed in 1978).] The Act increased the power of referees by removing many of the administrative duties and transferring them elsewhere−−either to the clerk or the trustee. [*FN: Id.* § 22, at 854.] In 1946, referees were removed from the fee system and made salaried officers of the district court. [*FN:* Act of June 28, 1946, ch. 512, § 6, 60 Stat. 323, 326−27 (repealed 1978).] Referees, however, remained judicial officers of the court of bankruptcy, "in effect, subordinate to the judge of the court of bankruptcy." [*FN:* See Collier, supra note 12, ¶ 1.01[1][a][ii].] Thus, referees were still appointed by and subject to the direction of the district court.

Despite the reforms passed both before and after World War II, the problem of jurisdiction remained unresolved. Referee jurisdiction under the Bankruptcy Act was limited to "summary jurisdiction." According to one commentator, this meant,

that courts had jurisdiction only over that property that was either actually or constructively possessed by the debtor on the date of bankruptcy. In addition, the court had personal jurisdiction over the debtor and other persons who consented to the court's jurisdiction By basing jurisdiction on possession or consent, however, many disputes that arose in bankruptcy cases fell outside the scope of the bankruptcy court's jurisdiction and therefore had to be adjudicated in nonbankruptcy state or federal courts. For example, when a trustee filed a complaint in a bankruptcy court charging that the estate owned an easement adjoining the debtor's real estate and that he was entitled to construct improvements there, the court of appeals held that bankruptcy court lacked jurisdiction to deal with the issue. Similarly, a bankruptcy court had no jurisdiction to determine whether a discharged debt had been reaffirmed. As a result, bankruptcy judges were unable to preside over many significant issues that had a direct impact on the bankruptcy case. [*FN:* Benjamin Weintraub & Alan N. Resnick, Bankruptcy Law Manual ¶ 6.01, at 6−3 (1986); see also Countryman, supra note 36, at 2; see, e.g., Weidhorn v. Levy, 253 U.S. 268,−− (1920) (holding bankruptcy referee did not have jurisdiction over plenary suit in equity brought by Trustee against third party to set aside fraudulent transfer).]

In 1973, rules were promulgated which ostensibly provided some independence to the officers who determined bankruptcy matters−−referees were redesignated "bankruptcy judges." [*FN:* Fed. R. Bankr. P. 901(7).] Concomitantly, the new rules also removed more of the bankruptcy judge's administrative duties. According to the House Judiciary Report, these changes "more than any change in the preceding 40 years, . . . recognize[d] the judicial character of the office of bankruptcy judge, and the primary judicial nature of the work the bankruptcy judge performs and the contact creditors and debtor alike have with the bankruptcy judge." [*FN:* H.R. Rep. No. 95−595 , at 9 (1977), reprinted in 1978 U.S.C.C.A.N. 5963.] Jurisdictional distinctions, however, still remained the cause of much confusion. [*FN:* See generally H.R. Doc. No. 93−137 (1973), reprinted in Collier , supra note 12, at app. 4−336 − 4−341; Bankruptcy Reform Act of 1978: Hearings H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary , 94th Cong., 1st and 2d Sess. 2682−2706 (1975−76) (regarding expert opinion on constitutionality of jurisdictional arrangement).]

B. Creating the Bankruptcy Code

Against this backdrop, Congress decided to act. A federal commission was appointed to review bankruptcy law. [*FN:* Act of July 24, 1970, Pub. L. No. 91−354, § 1(b), 84 Stat. 468, 468 (1970), reprinted in Collier, supra , note 12, at app. 4−595.] It recommended that the jurisdictional problems under the old Act be eliminated by giving the bankruptcy courts jurisdiction over "all controversies that arise out of a [bankruptcy] case," without regard to possession of property or consent of the defendant. [*FN:* H.R. Doc. No . 93−137, pt. 2 at 30 (1973).] The commission also recommended that bankruptcy courts be established as courts independent of the district courts and that bankruptcy judges be appointed by the President, with the advice and consent of the Senate, for 15 year terms. [*FN: Id.* at 15−16.] Perhaps reticent about entering such a contested ruckus, the Commission largely ignored the inherent constitutional conflicts that providing such encompassing jurisdiction to non−article III courts created. [*FN:* In a very brief review of the issue, the Commission found that there was no impediment to Congress creating legislative (article I) courts to address bankruptcy matters. See id. at ??, reprinted in Collier , supra note 12, at app. 4−348 − 4−349. Of course, the very creation of a "court" indicates, at least constitutionally, that bankruptcy matters were to be decided by Article III jurists. Conversely, lack of life tenure and the ability to reduce a bankruptcy judge's salary indicate that such a jurist could not fall under Article III of the constitution. This dichotomy is not easily resolved. Accordingly, for the sake of simplicity, this article will refer to a bankruptcy judge's status as that of a non−Article III judge.]

Although Congress did not seem troubled about adopting recommendations that would significantly broaden bankruptcy court jurisdiction, the possibility that allowing non−Article III administration of that authority might be unconstitutional proved to be of great concern in the House. [*FN:* See H.R. Rep. No. 95−595 (1977), reprinted in 1978 U.S.C.C.A.N. 5963.] While the House sought to create a new bankruptcy court which would retain attributes that make it a "fair and credible forum" operating "efficiently and quickly," it also needed to pay heed to constitutional concerns. [*FN:* Id .] The House did not want to create a system that circumvented the constitutional design of a tripartite government or undermined the impartiality of the federal courts, by assigning controversies to judges who were not insulated from political pressure. [*FN:* See Maryellen Fullerton, No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts , 49 Brook. L. Rev. 207, 215 (1983).] After serious investigation and debate, two clear positions developed.

On one side, proponents of article III bankruptcy judges argued that bankruptcy litigation had become so complex that it required an expert federal judge to dispose of it. They also argued that the broad jurisdictional grant guaranteed the reconstituted bankruptcy courts a wider variety of legal issues. Without article III status, there was "'substantial doubt' [that] a non−Article III court [c]ould [] constitutional[ly]" dispose of all those matters. [*FN:* See Countryman, supra note 36, at 7 (citations omitted).] The proponents also contended that the enhanced status would attract better−qualified judges. [*FN:* See H.R. Rep. No. 95−595 (1977), reprinted in 1978 U.S.C.C.A.N. 5963 (noting disputes that arise in bankruptcy courts are of such seriousness and consequence that litigants should receive the highest quality of judges; promoting article III status is appropriate method to obtain such judges).]

On the other side, those who favored article I bankruptcy courts believed that transforming bankruptcy judges into article III appointments would set an undesirable precedent toward specialization and would give bankruptcy matters undeserved priority over other types of federal litigation. They also suggested that the move would dramatically dilute the prestige and influence of federal judges. Of course this last suggestions was of particular concern to the Judicial Conference, a statutorily authorized conference of article III judges created to promote uniform management and ensure the expeditious completion of court business, [*FN:* See 28 U.S.C. § 331 (1994) (providing for Judicial Conference).] who also were probably the most influential group opposing the adoption of article III status for bankruptcy judges. [*FN:* The Judicial Conference went so far as to adopt a resolution opposing article III status for bankruptcy judges. See Countryman, supra note 36, at 7−8 (citing Judicial Conference of the U.S., Report of Proceedings 23−24 (Mar. 1977)).]

After passage of a House bill which provided Article III status for bankruptcy judges, a Senate bill was passed which proposed to make bankruptcy judges non−Article III. [*FN:* See S. Rep. No. 95−989 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5802 (arguing bankruptcy courts should be adjuncts of district courts).] House conferees ultimately agreed to the Senate's version, and the new bill passed the House on September 28, 1978. [*FN:* See Countryman, supra note 36, at 10.] The compromise was briefly derailed when Chief Justice Warren Burger called several senators to voice his displeasure with the provisions allowing bankruptcy judges to be appointed by the President, adding bankruptcy judges to the judicial conference, and making bankruptcy courts adjuncts of circuit rather than the district courts. [*FN:* Although justified by the information officer at the Supreme Court as the exercise of his role as Chairman of the Judicial Conference to "tell Congress what it thinks of bills affecting the court system," see Countryman, supra note 36, at 10−11, the propriety of the Chief Justice's calls are particularly suspect. According to Professor Countryman: That is a rather free−handed interpretation of the statute creating the Judicial Conference, which provides that '[t]he Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendation for legislation.' It is particularly unusual when read in connection with a section of the federal Criminal Code forbidding the use of any federally appropriated funds, unless expressly authorized by Congress, to pay for any 'telephone, letter, . . . or other device' intended to influence the vote of any member of Congress, unless on the request of such member. *Id.* at 11.]

After reviewing the Chief Justice's criticisms, an amended compromise measure passed the Senate on October 5. Fostering the prospect of bankruptcy court independence, and retained appointment by the President, [*FN:* 124 Cong. Rec. 33,991 (1978) (Senate amendment to H.R. 8200). The Commission Report had indicated that allowing district court judges to continue to appoint bankruptcy judges would leave the impression that, on appeal, a district judge would affirm the bankruptcy judge's opinion simply because he or she wants to confirm the correctness of their appointment choice. H.R. Doc. No . 93−137, reprinted in Collier , supra note 12, at app. 4−345.] but made bankruptcy courts "adjuncts" of the district courts (rather than the court of appeals). The bill also expanded jurisdiction of the district courts over bankruptcy matters but delegated the exercise of all of that jurisdiction to the newly created bankruptcy courts. [*FN:* 124 Cong. Rec. 33,990−34,019 (1978); see also Weintraub & Resnick , supra note 42, at 6−5 ("From the time a case was commenced by filing a petition with the clerk of the bankruptcy court, the Bankruptcy Reform Act gave bankruptcy courts original, but not exclusive, jurisdiction over all civil proceedings arising under the Bankruptcy Code or arising in or relating to a bankruptcy case.") (citations omitted).] The change in adjunct status (from circuit to district court) appears to have served only a political end. The district court's power was automatically transferred to the bankruptcy court by the terms of the statute. The diminishment in stature seems primarily to have served the purpose of satisfying the injured sensibilities of the Chief Justice. Notwithstanding the compromises, one of the principal goals of the new Bankruptcy Code, a unified bankruptcy jurisdictional system, had been satisfied. [*FN:* See S. Rep. No. 95−595 (1977), reprinted in 1978 U.S.C.C.A.N. 5963 (accompanying H.R. 8200).]

Although all aspect of the newly created bankruptcy courts were not to take effect until April 1, 1984, [*FN:* See Act of November 6, 1978, Pub. L. No. 95−598, § 402(b), 92 Stat. 2549, 2682.] the new, all−encompassing jurisdictional provisions, including their exercise by bankruptcy judges, became immediately effective. [*FN:* See id. § 405(b), 92 Stat. at 2685. The old bankruptcy courts were extended to March 31, 1984. *Id.* § 404(a), 92 Stat. at 2683. Section 405(b) made the new jurisdictional provisions, which were to take effect on April 1, 1984, applicable to the courts continued by section 404(a). *Id.* § 405(b), 92 Stat. 2685; see also

Countryman, supra note 36, at 12 (stating that new law "inartfully" applied new jurisdictional provisions to old, continued bankruptcy courts); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 54−56 (1982) (noting broad jurisdiction granted under 1978 Act and application of that jurisdiction during transition period).] Unsurprisingly, it was not long before the Article III jurisdictional problems prophesized by the House soon became a concrete case for the Supreme Court. [*FN:* See supra note 50 and accompanying text. See also Countryman, supra note 36, at 7 (noting House Judiciary Committee concluded there was "substantial doubt" that non−Article III court would be constitutional)]

C. A Bump in Bankruptcy Adjudication

Two months after filing for reorganization, Northern Pipeline Construction Company ("Northern") filed a suit in bankruptcy court against Marathon Pipe Line Co. ("Marathon"). [*FN:* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co , , 458 U.S. 50, 56 (1982).] Northern sought damages for alleged breaches of contract and warranty, misrepresentation, coercion and duress. [*FN:* *Id.* at 56.] In response, Marathon sought dismissal of the suit on grounds that the jurisdictional grant impermissibly conferred Article III judicial power upon judges who lacked life tenure and protection against salary diminution. [*FN:* *Id.* at 56−57.] After a dismissal of Marathon's motion by the bankruptcy court, [*FN:* Northern Pipeline Constr. Co. v. Marathon Pipeline Constr. Co. (*In re* Northern Pipeline Constr. Co.), 6 B.R. 928, 932 (Bankr. D. Minn. 1980).] and a grant of Marathon's motion on appeal to the district court, [*FN:* Marathon Pipeline Co. v. Northern Pipeline Constr. Co., 12 B.R. 946, 956 (D. Minn. 1981).] the Supreme Court agreed to hear the matter. [*FN:* Northern v. Marathon, 458 U.S. at 57. The direct appeal of certain matters to the Supreme Court from the district court (bypassing the circuit) was authorized by statute. See 28 U.S.C. § 1252, repealed by Pub. L. No. 100−352, § 1, 102 Stat. 662 (1988).]

In *Northern Pipeline Construction Co. v. Marathon Oil Pipe Line Co.*, [*FN:* 458 U.S. 50 (1982).] Justice Brennan, writing for a plurality, [*FN:* Justices Marshall, Blackmun and Stevens concurred with Justice Brennan's opinion.] noted that the elimination of the distinction between "summary" and "plenary" jurisdiction resulted in "new" bankruptcy courts having jurisdiction over a broad and pervasive range of state and federal law matters because any civil proceeding "arising under title 11" or that "arose in" or was "related to cases under title 11," would fall within federal bankruptcy jurisdiction. [*FN:* 458 U.S. at 54.] Acknowledging that one of the express purposes of the Bankruptcy Reform Act of 1978 was "to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes," [*FN:* *Id.* at 87 n.40.] the Brennan Court, nevertheless, could not square this broad grant of power to the new non−Article III bankruptcy courts with the doctrine of separation of powers. [*FN:* Id . at 87.]

Justice Brennan explained that the Framers created three separate and distinct branches of government to ensure against tyranny. [*FN:* *Id.* at 57.] One branch was never to be aggrandized at the expense of another. [*FN:* *Id.* at 57−58 (citing Buckley v. Valeo, 424 U.S. 1, 122 (1976)).] The judiciary itself, he continued, was created to be completely independent in order to ensure that "nothing would be consulted but the Constitution and the laws." [*FN:* Marathon, 458 U.S. at 58 (citing The Federalist No. 78, at 489 (Alexander Hamilton) (H. Lodge ed., 1888)).] To ensure that independence, Article III of the Constitution vests judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." [*FN:* *Id.* (citing U.S. Const. Art. III, § 1).] Accordingly, when judicial power of the United States is to be exercised, courts must have the attributes prescribed in Article III: life tenure, subject only to removal by impeachment, and fixed and irreducible compensation for service. [*FN:* *Id.* at 58−59. Article III, section 1 states: "[the] Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1.]

Justice Brennan then examined the jurisdictional grant provided to bankruptcy courts by the Bankruptcy Reform Act of 1978 and [*FN:* *Id.* at 74.] concluded that the power to hear and make final determinations on rights created by state law was far removed from the penumbra of "traditional" bankruptcy matters that Congress could regulate without the necessity of an Article III court. [*FN:* *Id.* at 84.] In particular, the *Marathon* court questioned how a bankruptcy court could adjudicate disputes that were "related to" bankruptcy simply because one of the parties in the dispute happened to file a bankruptcy petition. [*FN:* Marathon , 458 U.S. at 74.]

State created rights, noted the Court, are rights that exist "independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court." [*FN:* *Id.* at 84.] Clearly such rights must be adjudicated by a court with all the "essential attributes" of an article III court. [*FN:* *Id.* at 84−85.] Yet, according to the *Marathon* court, the present bankruptcy statute did not limit bankruptcy adjudication to traditional bankruptcy matters. Instead, the bankruptcy statute provided jurisdiction for "all civil proceedings arising under title 11 or arising in or related to cases

under title 11." [*FN: Id.* at 85 (citing 28 U.S.C. 1 1471(c) (1976 ed., Supp. IV)).] Nor did the bankruptcy statute limit the bankruptcy court to fact finding. [*FN: Id.* at 87.] Rather, the *Marathon* court noted, the statute granted bankruptcy courts "all of the jurisdiction" conferred by the Act on the district courts. [*FN:* Marathon , 458 U.S. at 87.] Additionally, the bankruptcy courts had been provided with extraordinary powers that normally can only be exercised by district courts. [*FN: Id.*] For example, under the statute, the bankruptcy courts could preside over jury trials, issue declaratory judgments, issue writs of habeas corpus, and issue and enforce orders, processes and judgments appropriate for enforcement of title 11 provisions. [*FN: Id.*] Finally, the *Marathon* court noted that bankruptcy courts were granted a deferential standard of review. [*FN:* Id .]

For "remov[ing] most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court," and vesting "those attributes in a non−Art. III adjunct," the Court concluded that the Bankruptcy Act of 1978 was unconstitutional in its entirety. [*FN:* Id . The Court avoided incredible confusion by deciding that its holding only applied prospectively. *Id.* at 88.]

D. The Constitutional "Fix"

Although facing the possibility that the current system of bankruptcy would collapse if it did not act, Congress was not quick to respond. [*FN:* See Collier, supra note 12, ¶ 1.02 [2], 1−16 (noting that Congress "finally enacted legislation" in 1984); Tabb, supra note 19, at 38 (stating "wholesale disaster" was avoided by court applying Marathon holding prospectively); see also Collier, supra note 12, ¶ 3.01 [2] [b], 3−8 (noting Congress gave opportunity to reconstitute bankruptcy courts but "[s]till Congress did not act"); Vern Countryman, Emergency Rule Compounds Emergency , 57 Am. Bankr. L.J. 1, 6 (1983) (" [I]t is clear that bankruptcy courts will lose all jurisdiction .. unless Congress acts.") (emphasis in original).] In fact, following two stays of the *Marathon* judgment, [*FN:* The Court wisely stayed its judgment for more than 3 months, to October 4, 1982, in order to allow Congress an "opportunity to reconstitute the bankruptcy courts." Marathon , 458 U.S. at 88. The stay was later extended until December 24, 1982. Marathon , 459 U.S. 813, 813 (1982).] eighteen months elapsed before Congress passed corrective legislation. [*FN:* See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No 98−353, 98 Stat. 333; see also Tabb, supra note 19, at 38 (Congress delayed response until July 1984).] In the interim, a surprising party stepped in to provide a temporary solution, the Judicial Conference. [*FN: Id.* (noting Judicial Conference stepped in by proposing "Emergency Rule"); Countryman, supra note 36, at 19 (same).]

Predicated on the grounds that Congress' "clear intent" was to "refer bankruptcy matters to bankruptcy judges" and recognizing the "specialized expertise necessary to . . . determin[e] bankruptcy matters" and the "administrative difficulty" that assumption of bankruptcy court case loads would place on district judges, the Judicial Conference [*FN:* White Motor Corp. v. Citibank, N.A., 704 F.2d 254, 265 (6th Cir. 1983).] adopted a resolution which required the Director of the Administrative Office of United States Courts to "provide each circuit with a proposed rule" that would "permit the bankruptcy system to continue without disruption in reliance on [valid] jurisdiction grants remaining" after the *Marathon* decision. [*FN:* Judicial Conference of the United States, Report of Proceedings 91 (Sept. 1982); see also Countryman, supra note 36, at 19 (noting Report of Proceedings).] As Professor Countryman recounts:

This resolution was a remarkable position for the Judicial Conference, a group of Article III judges, to take. . . . For one thing, its assumption that there were "jurisdictional grants remaining" after the *Northern Pipeline* decision ignored a holding of a majority of the Court that the "single statutory grant of jurisdiction" in bankruptcy was nonseverable. Second, it assumed that allocation of this remaining jurisdiction between district courts and bankruptcy courts was a proper function of courts rules, although the Supreme Court has never so regarded even its own rule−making function. Third, except for authority given the Judicial Conference to prescribe rules for handling complaints against individual federal judges, the Judicial Conference is given no bankruptcy rule−making authority, and the Administrative Office is given no authority to make rules affecting bankruptcy above the administrative level. [*FN:* Countryman, supra note 36, at 19−20 (citations omitted).]

Nonetheless, in accordance with the resolution−−and based on the first assumption that jurisdictional grants remained after *Marathon*−−the Administrative Office prepared an Emergency Rule (the "Rule") [*FN: Id.* at 20−21 (stating Emergency Rule was dispatched by Director of Administrative Office to circuit, district, and bankruptcy court judges); see also Tabb, supra note 19, at 38 (noting all United States District Courts adopted Emergency Rule).] which appears to have been modeled on the Federal Magistrates Act. [*FN:* See id. at 26.] The underlying premise behind adopting such an approach was that the impermissible portion of the Bankruptcy Code of 1978 mandated that bankruptcy courts exercise *all* the jurisdiction conferred on the district court by the bankruptcy statute. [*FN:* The Court in Marathon concluded that: "§ 241(a) of the Bankruptcy

Act of 1978 has impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non−Art. III adjunct." Northern Pipeline Constr. Co., 458 U.S. 50, 87 (1982). As Professor Countryman notes: "[t]he Administrative Office concludes that [Northern Pipeline] did not invalidate section 1471(a) and (b) of the Judicial Code, which vested the bankruptcy jurisdiction in the district courts. The unstated assumption was that Northern Pipeline had only invalidated section 1471(c), which directed the bankruptcy courts to exercise 'all' of that jurisdiction." Countryman, supra note 36, at 21 (citations omitted).] Therefore a corrective rule need only show that the exercise of "judicial" power in bankruptcy court was really by permission of the district court. [*FN:* Countryman, supra note 36, at 21. The focus of the underlying premise that allowed the Emergency Rule to be created was that Northern Pipeline did not invalidate the authority of bankruptcy courts to resolve even "core" matters, it only invalidated the provision that mandated bankruptcy courts to exercise all of the jurisdiction conferred on the district court. *Id.*]

The approach taken, then, was that, as with magistrates, work would be divided so as to retain the "judicial" power in the district court. [*FN: Id.* at 26 (stating transfer of Article III judicial power to magistrates was found to be permissible because: (1) subject matter was exclusively federal; (2) Article III judges appointed and had power to remove magistrates and had power to withdraw any matter from magistrates; and (3) magistrates' decisions were reviewed by Article III judges).] While this was done in the case of magistrates by having district judges refer very specific matters to magistrates who would then submit proposed findings and recommendations that the district court could adopt or reject, adopting a direct supervision approach to all bankruptcy matters was impractical. [*FN:* Countryman, supra note 94, at 12−15 (discussing unworkability of Emergency Rule).] A case by case referral method would require, for starters, no less than 300,000 referral orders a year just to keep up with the number of petitions being filed. Moreover, it was far from clear whether the district court would also have to review all the orders that a bankruptcy judge would issue within each case. [*FN: Id.* at 13−14.] Practicalities, therefore, appear to have mandated that the district courts issue a general order of reference of all bankruptcy matters to bankruptcy judges. Adopting the practical approach, however, meant that bankruptcy courts might appear to be exercising Article III power, thus jeopardizing the constitutionality of the bankruptcy system once again. [*FN:* See Countryman , supra note 94, at 6−12 (discussing tenuous nature of theories used to promulgate Emergency Rule); Collier, supra note 12, ¶ 3.01 [3], at 3−12 (noting that, as expected, constitutionality of Emergency Rule came under prompt attack); Tabb, supra note 19, at 38 (same).] The Rule, of course, needed to address these concerns.

Under the Rule, district courts could refer all matters to the bankruptcy court initially, but it then needed to demonstrate some kind of tie from the district court to the bankruptcy court which ensured that the district court was the one exercising the Article III power. [*FN:* See Tabb, supra note 19, at 38 (discussing bifurcated scheme of Emergency Rule, which gave core bankruptcy matters to bankruptcy judges by reference from district court and gave remaining matters to district court).] To satisfy these concerns, the Rule permitted a district court to remove reference at any time. [*FN:* See Collier, supra note 12, ¶ 3.01 [3], at 3−12 ("The reference to the bankruptcy judge could be withdrawn by the district court at any time").] Thus, although the Rule provided that orders and judgments of bankruptcy judges were to be made effective upon entry, unless stayed by the bankruptcy judge or a district judge, the district court could remove a matter from the bankruptcy judge at any time for any reason. [*FN:* See Countryman supra note 36, at 22 (quoting Revised Emergency Rule § (e)(2)(a)(i)−(ii)). The full text of the Revised Emergency Rule is reprinted in White Motor Corp. v. Citibank, 704 F.2d 254, 265 (6th Cir. 1983) and Collier , supra note 12, ¶ 3.01 [2] [b], at 3−9.] Additionally, the Rule separated "related proceedings" from normal bankruptcy proceedings by defining the former as matters which, "in the absence of a petition in bankruptcy, could have been brought in a district or a state court." [*FN:* Revised Emergency Rule (d)(3)(A).] If a matter fell into the "related" category, the bankruptcy judge could not enter a dispositive order unless the parties consented. [*FN: Id.* at (d)(3)(B).] Without consent, the bankruptcy judge was instructed to hear the matter and submit findings, conclusions, and a proposed judgment or order to a district judge who would then review these materials *de novo* and enter an appropriate judgment, [*FN: Id.*] much as he would with respect to a magistrate's report and recommendation. [*FN:* See Countryman, supra note 36, at 26 (noting similarities to Federal Magistrates' Act).] To further ensure the constitutionality of the Rule and to satisfy concerns raised in *Marathon*, the Rule prohibited bankruptcy judges from enjoining a court, punishing criminal contempt, hearing an appeal, or holding a jury trial. [*FN:* Revised Emergency Rule § (c)−(d).]

The Rule thus allowed bankruptcy courts to entertain all "core" matters (even though resolution of many of these proceedings required the application of state law) in much the same was as they had before *Marathon*. [*FN:* See Weintraub & Resnick , supra note 44, at 6−8−6−9 (stating that Emergency Rule allowed bankruptcy judges to hear all matters it could have under the 1978 Act); Collier , supra note 12, ¶ 3.01 [2] [b], at 3−9 (stating that Emergency Rule preserved 1978 legislation with one exception).] Only the "related to" matters were handled differently following a procedure akin to the constitutionally safer practice in use for matters handled by magistrates. [*FN:* See Collier , supra note 12, ¶ 3.01 [2] [b], at 3−9.] All district courts, with minor variation, promptly adopted the Emergency Rule. [*FN:* See Countryman, supra note 36, at 23 (noting that all

circuit councils and district courts adapted Emergency Rule); Collier , supra note 12, ¶ 3.01 [2] [b], at 3−9.]

In Congress, meanwhile, the long awaited sequel to the debate over Article III status for bankruptcy judges was being played out. After the district court decision in *Northern Pipeline*, the House Judiciary Committee introduced a bill to make bankruptcy judges Article III judges. [*FN:* H.R. 6109, 97th Cong., 2d Sess., 128 Cong. Rec. H1501 (daily ed. Apr. 20, 1982); see also H.R. Rep. No. 97−807 (1982) (accompanying H.R. 6978).] At its September 1982 meeting, the Judicial Conference once again opposed this solution and "proposed instead that bankruptcy judges should remain Article I judges and exercise 'all' of the bankruptcy jurisdiction." [*FN:* See Countryman , supra note 36, at 29 (citing Judicial Conference of the United States, Report of Proceedings (Sept. 1982)).] They argued for this approach, in part, on the grounds that the creation of so many Article III bankruptcy judges would dilute the prestige of the federal district judges. [*FN:* See Collier , supra note 12, at App. Pt. 6−97.] Following continued debate over Article III status in both the House and Senate, [*FN:* See Countryman, supra note 36, at 30−32; Collier , supra note 12, at App. Pt. 6(b), App. Pt. 6−96 − 6−114.] the House and Senate passed bills incorporating the bifurcation of cases established by the Emergency Rule and rejected Article III status. [*FN:* See 130 Cong. Rec . H1853 (daily ed. March 21, 1984) (House bill); 130 Cong. Rec . S7625 (daily ed. June 19, 1984) (Senate bill); H. R. Rep. No 98−882 (1984); see also H.R. Rep . No . 98−882 (1984) (conference committee report); 130 Cong. Rec . S8900, H7500 (daily ed. June 29, 1984) (bill signed by President).] The bill took effect as the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA)". [*FN:* Pub. L. No. 98−353, 1984 U.S.C.C.A.N. (98 Stat.) 333.]

BAFJA effectively codified the emergency rule's bifurcation of cases. [*FN:* Pub. L. No. 98−353, § 104 (codified at 28 11 U.S.C. § 157), 98 Stat. 333 (1984); see also Countryman, supra note 36, at 35 (stating that balance of new section 157 is similar to Emergency Rule).] In attempting to fix the constitutional infirmity, BAFJA created a methodology whereby all federal jurisdiction over bankruptcy matters was first assigned to district court, [*FN:* See 28 U.S.C. § 1334.] then apportioned the exercise of that jurisdiction [*FN:* See id. § 157.] "into 'core' proceedings, over which the bankruptcy courts exercise full judicial power−−and 'otherwise related' or 'non−core' proceedings−−over which the bankruptcy courts exercise[d] only limited power." [*FN:* Wood v. Wood (*In re* Wood), 825 F.2d 90, 91 (5th. Cir. 1987). "Core" matters were those in which the bankruptcy court could enter a final order and for "non−core" matters, the bankruptcy court had to submit proposed findings of fact and conclusions of law to the district court. Pub. L. No. 98−353, § 104 (codified at 28 U.S.C. § 157), 98 Stat. 333 (1984).]

The Act also authorized the circuit courts of appeal for each circuit to appoint "judicial officers of the United States district court" to serve as bankruptcy judges. [*FN:* Section 104 (codified at 28 U.S.C. § 152(a)(1)).] Those appointed to the bankruptcy bench could be removed only by the judicial council of the circuit where the judge's official duty station was located for "incompetence, misconduct, neglect of duty, or physical or mental disability." [*FN: Id.* (codified at 28 U.S.C. § 152(e)).] Additionally, a specific provision allowed bankruptcy judges to hire their own support staff, [*FN:* See 28 U.S.C. § 156(a) (1994) (providing for appointment of secretary, law clerk, and additional assistants as may be deemed necessary by Administrative Office of U.S. Courts). This provision closely paralleled sections 771−775 of Title 28, which were enacted as part of the Bankruptcy Reform Act of 1978. These earlier provisions, however, assumed a free−standing bankruptcy court , a concept abolished by BAFJA. The sections were thus repealed, though their sense and effect, reflecting Congress' continued commitment to an independent bankruptcy judiciary were preserved in new section 156.] and provided bankruptcy judges in each district with the right to appoint their own clerk of court if the appropriate circuit judicial council certified that the number of proceedings warranted such a step. [*FN:* See 28 U.S.C. § 156 (b). Concerned that district courts were shifting needed resources away from the bankruptcy clerk's office to district court, the House Judicial Committee's Report (1977) indicated that the consolidation of the clerks offices was a problem that any new bankruptcy law needed to address.]

Continued independent administration of bankruptcy courts was an evident priority for Congress because, not long after the 1984 Act was passed, an amendment to the jurisdictional statute prohibited the re−consolidation of any bankruptcy clerk's office back into the district clerk's office without the approval of both the Judicial Conference and Congress. [*FN:* See 28 U.S.C. §156(d).]

The continuing evolution of the bankruptcy court system, then, reflects a growing concern that the judicial officers charged with hearing and deciding bankruptcy matters enjoy an ever greater degree of independence and "prestige." [*FN:* To the extent the word "prestige" connotes respect from the bar, other federal and judicial officers, and the public at large.] Congress had come to believe, by 1978, that the bankruptcy laws served a sufficiently important role in the larger economic life of the nation that the bankruptcy system ought to work efficiently and effectively. [*FN:* See Tabb supra note 19, at 32 (stating that Congress created bankruptcy review commission in 1970 so that 1898 bankruptcy Act could be changed to reflect needs of present technical, financial, and commercial activities) (quoting Pub. L. No. 91−354, §1, 84 Stat. 468 (1970)); Collier , supra note 12, ¶ 1.01 [2], at 1−9 ("The directive to the Commission was to make a study and submit recommendations to Congress considering the changed social

and economic conditions in the United States since enactment of the 1898 Act.")] These goals could only be achieved if, *inter alia*, [*FN:* We say, "among other things," because the other device employed to attain this goal was the centralization of all bankruptcy and bankruptcy−−related matters in a single forum, doing away with the "summary/plenary" bifurcation of bankruptcy jurisdiction that was viewed as a principle contributor to the inefficiency of the bankruptcy laws under the Bankruptcy Act. Of course, this very centralization of jurisdiction made it even more important that the judges assigned that jurisdiction have sufficient judicial power to exercise it.] the courts charged with adjudicating bankruptcy laws had both adequate judicial power and adequate credibility to lend their orders certainty, predictability, respectability, and authority to their orders. The judicial system that the House had proposed in 1977 [*FN:* H.R. Rep. No. 95−595 (1977), reprinted in 1978 U.S.C.C.A.N. 5963.] would have achieved those ends without debate, as it would have entrusted the adjudicatory function to courts having the same judicial attributes as U.S. district judges. [*FN:* Making bankruptcy judges Article III judges would have quelled the concern over non−article III bankruptcy judges acting in derogation of constitutional judicial authority and it would have given an enhanced status to the bankruptcy bench. Tabb, supra note 19, at 34.]

Political and policy barriers prevented the House proposal from coming to fruition, [*FN:* See Countryman, supra note 36, at 7−9 (discussing Judicial Conference's opposition to Article III status for bankruptcy judges).] and necessitated the creation of a judicial scheme designed to foster the goals of independence and respect, while bowing to the pressures brought to bear by those who opposed the creation of a "specialist" Article III judiciary (or who simply opposed the notion of bankruptcy referees becoming "just like us," as it were). The resulting compromise exposed the system's greatest flaw −− this much centralized and pervasive judicial power, the very power necessary to achieve Congress' intentions, simply could not be constitutionally exercised by a judge lacking the attributes prescribed by Article III of the Constitution. The evolution of the bankruptcy judiciary has thus run into barriers that led to steps back instead of steps forward.

What Congress ultimately crafted in 1984 [*FN:* Pub. L. No. 98−353, 98 stat. 333 (1984).] was an odd hybrid indeed. On the one hand, Congress ended up choosing the "easy solution" offered by the Judicial Conference in the Emergency Rule: the creation of a new kind of judge, with greater powers and greater independence than magistrate judges, but with the entire source of their jurisdiction derived in essentially the same fashion as that exercised by magistrate judges. They were no longer a "court," *per se*, [*FN:* The various "courts" of the United States are described in Part I of Title 28. 28 U.S.C. §§ 1−251 (1994). Chapter 6 of that title had described the "bankruptcy courts," immediately following the "district courts" and immediately preceding the "court of federal claims." After BAFJA, this chapter was redesignated "bankruptcy judges." 28 U.S.C. § 151. New section 151 defined these judges as "a unit of the district court to be know as the bankruptcy court for that district" who would act "as a judicial officer of the district court." 28 U.S.C. § 151.] yet neither were they simply "court officers and employees" as were magistrate judges. [*FN:* Magistrate judges are created by legislation contained in Part III of title 28, "Court Officers and Employees." 28 U.S.C. §§ 601−991. Chapter 43, entitled "United States Magistrates" immediately follows sections creating the Administrative Office and the Federal Judicial Center, and immediately precedes the section authorizing arbitration procedures and sections authorizing the creation of a clerk of the district court and a clerk of the circuit court. 28 U.S.C. § 631. Although it is common in many jurisdictions to refer to these officers as "magistrate judges," the statute itself does not, and they are not denominated as "judicial officers." *Id.* The statue states: "United States Magistrates." See id .] Doubt remains today whether this hybrid survives constitutional muster, [*FN:* See, e.g., Ralph E. Avery, Article III and Title 11: A Constitutional Collision , 12 Bankr. Dev. J. 397, 399 (1996) (discussing that case law to date has upheld BAFJA, but its constitutionality is debatable); Susan Block−Lieb, The Case Against Supplemental Jurisdiction: A Constitutional, Statutory, Policy Analysis , 62 Fordham L. Rev. 721, 757, 791 (1994) (discussing constitutionality of bankruptcy jurisdiction); Lawrence P. King, Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984 , 38 Vand. L. Rev. 675, 676 (1985) (stating that Congress did not eliminate constitutional defects of 1978 Act with 1984 amendments).] yet little doubt can be had about what Congress tried to end up with−−a bankruptcy "court" retaining sufficient authority and independence to preside over what has become a significant portion of the federal judiciary's case load. [*FN:* See R eport of Administrative Office of the United States Courts, annual report (1997) (reporting that, in 1996, 1,178,555 bankruptcy cases were commenced whereas 263,336 civil cases were commenced in United States District courts throughout country).] In essence, every aspect of the current law reflects Congress' commitment to cloak the bankruptcy courts with substantial autonomy, both adjudicative and administrative, in an effort to preserve as much of the design of the original Bankruptcy Reform Act of 1978 while avoiding (to the extent possible) constitutional vulnerability.

II. Methods of Correcting Misconduct

Recognizing Congress' intent to create a largely independent body of bankruptcy judges serves as a logical and important segue into the next phase of this paper. For the judiciary uses different methods for regulating the conduct (or misconduct) of its judicial officers than it employs for other court officers and employees. The rationale is

obvious, judicial officers must continue to enjoy the respect that the public (especially the practicing bar) attaches to the judiciary if they are to be effective in their positions. [*FN:* Indeed, it was the need to increase the level of respect that bankruptcy judges needed to have in order to function successfully that was one of the important factors cited by the House Judiciary Committee in its 1977 Report. See H.R. Rep. No. 95−595, at 8 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 5968.] That respect is eroded in direct proportion to their perceived independence.

Yet judges, like everyone else, are not perfect. In addition to committing legal error of the sort reviewable via the ordinary appellate process, judges may also engage in other behavior deemed inimical to their role and to the reputation of the judiciary in general. Methods must, of necessity, be developed to regulate judicial misconduct, yet those methods must also preserve the independence of the judiciary, and must not be such as to demean their status as judicial officers.

Bankruptcy judges, like magistrates, do not enjoy the protections of life tenure and salary protection that their Article III colleagues do, making them somewhat easier "targets" for regulation when an example of judicial misconduct arises. The statute authorizing their appointment itself provides that these judges may be removed before the conclusion of their term "only for incompetence, misconduct, neglect of duty, or physical or mental disability, and only by the judicial council of the circuit in which the judge's official duty station is located." [*FN:* 28 U.S.C. § 152(e) (1994).] In addition, however, other "ready tools" for disciplining a wayward bankruptcy judge are also available, though some may be more appropriate to that purpose than others. We have noted at the start of this paper the notions of the district court in Delaware, modified the general order of reference, thereby removing (or at least controlling) a portion of the bankruptcy judges' case load in that district. [*FN:* See Report, supra note 1, at III−8.] That is one "tool" that might conceivably be employed, one that is more readily available in the case of bankruptcy judges, whose "flow" of case assignments is directly tied to the general order of reference issued pursuant to section 157(a) of title 28. [*FN:* 28 U.S.C. § 157(a). See also Leake v. Chandler, 54 B.R 942, 943 (Bankr. W.D. Va. 1985), aff'd , 798 F.2d 1408 (4th Cir. 1986) (stating District Court's power to refer all Title 11 cases to current Bankruptcy Courts comes from § 157(a); Phar−Mor Inc. v. Coopers & Lybrand, 22 F.3d 1228, 1234 (3rd Cir. 1994) (finding District Court can refer both core and non−core proceedings to bankruptcy judge pursuant to § 157 would come within federal bankruptcy jurisdiction).] Such a device is not available, of course, for disciplining a wayward district judge.

There are other methods for judicial discipline, however, which apply equally to all judicial officers, including both bankruptcy judges and district judges. It is to a closer examination of these devices that we now turn. In the process, we will also seek to evaluate the propriety of employing one device over another, including those devices not directly designed for regulating judicial misconduct.

A. Formal Methods of Reviewing Judicial Misconduct

In 1981, Congress passed the Judicial Councils Reform and Judicial Conduct and Discipline Act (the "Discipline Act") to assure some public accountability for federal judges and to provide a formal and effective supplement to the impeachment process. [*FN:* Report of the National Commission on Judicial Discipline & Removal at 3−4 [hereinafter Report on Judicial Discipline] ; see also S. Rep. No. 96−362 at 1 (1972), reprinted in 1980 U.S.C.C.A.N . 4315 .] Although the impetus for the Discipline Act appears to have been Article III judge misconduct, it is expressly applicable to non−Article III bankruptcy judges and magistrates. [*FN:* Even though the Magistrate Act fails to define magistrates as judicial officers, there has been a gradual evolution in that direction for a number of years now. The Judicial Conduct and Discipline Act of 1981 is but one example of this evolution. Other examples of this trend include the increasing importance of matters assigned to magistrates (including the trial, by consent, of various civil jury matters), the automatic reappointment of magistrates, the use of the title "magistrate judge," the tendency at various circuit judicial conferences to treat magistrates as judicial officers, and, not insignificantly, the passage of the 1990 Federal Judicial Improvements Act, which placed the salary and retirement benefits on a parity with bankruptcy judges.]

The Act provides:

[a]ny person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. [*FN:* 28 U.S.C. § 372 (1994).]

The Discipline Act's stated purpose, according to the statute itself, is to ensure "the effective and expeditious administration of the business of the courts." [*FN: Id.* § 372(c)(1).]

The initial gatekeeper for all complaints brought under section 372(c) is the chief judge of the circuit. [*FN:* Id . §§ 372(c)(2) & (3).] After reviewing the complaint, the chief judge may summarily dismiss the complaint if: (a) the complaint is frivolous; (b) the complaint is not within the jurisdiction of the Act; (c) the complaint is directly related to the merits of a decision or procedural ruling; (d) corrective action has cured the problem; or (e) intervening events have mooted the complaint. [*FN: Id.* § 372(c)(3); see also Report on Judicial Discipline , supra note 150, at 84 (listing reasons for dismissal); Victor Williams, Third Branch Independence and Integrity Threatened by Political Branch Irresponsibility: Reviewing the Report of the National Commission on Judicial Discipline and Removal , 5 Seton Hall Const. L.J . 851, 895 (1995) (same).] A chief judge's power to conclude a proceeding "if he finds that appropriate corrective action has been taken" [*FN:* 28 U.S.C. §372(c)(3)(B)] appears to formally acknowledge the efficiency of informal procedures already available to circuit chief judges. According to one study, [*FN:* See Report on Judicial Discipline , supra note 150.] this power is a "boon" to negotiated resolutions. [*FN:* See id. at 104.]

In the event that the complaint is not dismissed, the chief judge must promptly appoint a special committee to investigate the matter. [*FN:* See 28 U.S.C. § 372(c)(4)(A).] The committee then must issue a written report to the circuit judicial conference which, at its discretion, conduct a separate investigation or, take immediate action on the complaint. [*FN:* See id . §§ 372(c)(5) & (6). The Act provides a generous appeal process, allowing a complainant to appeal a chief judges dismissal to the judicial council and allowing a judge or magistrate to appeal the judicial council's finding to the Judicial Conference of the United States. See id. § 372(c)(10).]

Despite the formal structure of the complaint process, it is not open to public review. Section 372(c)(14) provides that, subject to a few exceptions, matters that are investigated by the judicial council are confidential. [*FN:* 28 U.S.C. § 372(c)(14). The cloak of confidentiality can be removed if: (1) the judicial council of the circuit decides to release a copy of the report to the complainant and the targeted judge or magistrate, § 372(c)(14)(A); (2) the judicial council of the circuit, the Judicial Conference, the Senate or the House of Representative adopts a resolution to release materials that it believes are necessary for an impeachment investigation, § 372(c)(14)(B); (3) the judge or magistrate targeted by the complaint authorizes disclosure and the chief judge concurs, § 372(c)(14)(C); and (4) the Judicial Conference votes to recommend that the House of Representatives consider impeachment or other "necessary" action against a judge. 28 U.S.C. § 372(c)(8)(A); see also John P. Sahl, Secret Discipline in the Federal Courts−−Democratic Values and Judicial Integrity at Stake , 70 Notre Dame L. Rev. 193, 219−20 (1994) (discussing instances when general rule of confidentiality is disregarded).] While confidentiality is expressly limited to "special committee investigations," most chief judges have interpreted the provision to apply to every stage of any complaint. [*FN:* See Sahl, supra note 161, at 218−19; see also, Twentieth Century Fund Task Force on Federal Judicial Responsibility, The Good Judge at 106 (1989) (applying rule of confidentiality to cover complaint at any stage).]

All indications suggest that the formal complaint process is successful. A 1993 Federal Judicial Center study found that approximately 2,400 complaints were filed between 1980 and 1991. [*FN:* See id. (discussing disincentive to file complaint)] Of these, the study reported that 2,300 complaints were dismissed by the chief judge without any further review, [*FN:* See id.] and only 40 of the 2,405 complaints filed between the time of the Act's implementation and 1991 resulted in the appointment of a special committee by the chief judge of the circuit. [*FN:* See id.] (This low number may be attributed, in part, to the fact that the existence and purposes of the Act have never been publicized. [*FN:* Report on Judicial Discipline , supra note 150, at 99−100.] Additionally, the party most likely to recognize judicial misconduct under the Act, namely, lawyers before the "target" judge, have a strong disincentive to bring such a complaint when due process requires that the judge be informed of the identity of the complainant.) [*FN:* See Collins T. Fitzpatrick, Misconduct and Disability of Federal Judges: the Unreported Informal Responses , 71 Judicature 282, (1988) (noting reluctance to file complaint stems from fear judge will be prejudiced against current or future clients); Report on Judicial Discipline , supra note 150, at 100−01; Charles Gardener Geyh, Informal Methods of Judicial Discipline , 142 U. Pa. L. Rev. 243, 257− 58 (1993) (noting attorneys do not want to alienate judge by filing complaint).] After the appropriate circuit judicial council reviewed the special committees reports, only thirteen of the 40 claims were not summarily dismissed. [*FN:* See Report on Judicial Discipline , supra note 150, at 87.] Further, all of the complaints resulted in only seven reprimands, three voluntary retirements, one termination of a magistrate judge, and one impeachment and removal of a judge. [*FN:* See id.]

For present purposes, it is important to note that since 1990, chief circuit judges have had the authority to "identify" complaints and to initiate section 372(c) proceedings on the basis of information that has been brought to their attention informally. [*FN:* Judicial Discipline and Removal Act of 1990, Pub. L. No. 101−650, § 402(a), 104 Stat. 5122, 5122 (1990)

(codified as amended at 28 U.S.C. § 372 (c)(1)); see also supra note 153 and accompanying text (discussing § 372(c)(1)).] It has been reported that informal notice of problems is often received from lawyers, a source that is not likely to use the formal complaint process while practicing before the target judge [*FN:* See Jeffrey N. Barr & Thomas E. Willging, Decentralized Self−Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980 , 142 U. Pa. L. Rev. 25, 134 (1993) (noting four of six circuit executives stated they receive informal complaints, generally from lawyers).] as well as chief district judges, chief bankruptcy judges, and other judges throughout the district. [*FN:* See id. at 134.]

Another method of formal review is ordinary appellate review. Appellate review, including the writ of mandamus, has been used to check abuse within the judiciary. [*FN:* For example, the Federal Judicial Center study provided the example of a judge who violated the constitutional rights of parties who were not even parties in the case. On mandamus, the 8th Circuit criticized the judge's actions and then ordering the judge's remarks stricken. See Report on Judicial Discipline , supra note 150, at 112−13; see also Geyh, supra note 167 (discussing appellate review and mandamus as measure of discipline).] According to one judge, "writs of mandamus and direct reversal are constant specters over judges; they may function as a de facto reprimand for judicial mistake." [*FN:* See Harry T. Edwards, Regulating Judicial Misconduct and Diving 'Good Behavior' for Federal Judges , 87 Mich. L. Rev. 765, 793−94 (1989); see generally Geyh, supra note 167, at 285−304 (discussing mandamus as tool for review of judicial misconduct).] Traditionally, however, a mandamus has been used only when a judge took action that she did not have the power to take or failed to take an action which she was required to take. [*FN:* See Geyh, supra note 167, at 288; Edwards, supra note 174, at 793 (discussing use of mandamus); see also Brent D. Ward, Can the Federal Courts Keep Order in their Own House? Appellate Supervision Through Mandamus and Orders of Judicial Counsels , 1980 B.Y.U. L. Rev . 233, 238−47 (stating mandamus is used mainly to counter "honest error" that does not call for punishment).]

B. Informal Methods of Reviewing Judicial Misconduct

In addition to the formal methods of regulating judicial improprieties, informal methods of review exist. Although no explicit statutory grant provides for them, the Illustrative Rules Governing Complaints of Judicial Misconduct and Disability [*FN:* See Illustrative Rules Governing Complaints of Judicial Misconduct and Disability, reprinted in 71 Judicature 23−28 (1987).] "expresses the generally accepted view that section 332 authorizes the council, through the chief judge, to employ 'informal methods of resolving problems.'" [*FN:* Geyh, supra note 167, at 278 (quoting Memorandum from the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States to the Chief Judges of the United States Courts of Appeals, the United States Court of International Trade, and the United States Claims Court 11 & 62 (Aug. 15, 1991)).] In fact, according to one commentator, there is ample evidence to suggest that the chief judge investigates and acts upon reports of misconduct and disability without a complaint and without ever consulting the judicial council. [*FN:* Geyh, supra note 167, at 278 (stating thirty chief judges undertook total of 141 to 152 investigations in response to informal complaints and only consulted counsel in 53 to 56 cases).] This assertion is supported by at least one Chief Judge who claimed that "the most serious complaints never hit the complaint process." [*FN:* Barr & Willging, supra note 171, at 131 (quoting chief judge who stated "there are more remedial actions taking place outside the complaint process than following formal complaints); see also Geyh, supra note 167, at 280 (noting informal action is judiciary's most common response to judicial misconduct); 126 Cong. Rec. 28,092 (1980) (statement of Sen. DeConcini) (stating that it is rare to invoke formal statutory procedures and sanctions).]

The informality of the process itself provides the Chief Judge with a wide panoply of options to rein in an errant judge. [*FN:* See Geyh, supra note 167, at 281−82 (discussing approaches available to chief judge to deal with misconduct of judges); see also Fitzpatrick, supra note 167, at 283 (noting available means for chief judges to handle misconduct).] He or she may simply forward a copy of a report on the problem and notify the errant judge that the report is being taken seriously, or the judge can threaten to publicize a matter if cooperation is not forthcoming. [*FN:* See Geyh, supra note 167, at 281; see also Steven Flanders & John T. McDermott, Operation of the Federal Judicial Councils 32−33 (1978) (noting that no further action needed after chief judge explained seriousness of bar complaints); Peter G. Fish, The Politics of Federal Judicial Administration 162 (1973) (noting if complaint made public, peer−group ostracision would do the rest).] The Chief Judge may also rely on his or her own interpersonal skills. [*FN:* Geyh, supra note 167, at 281−82; see also Fish , supra note, 181 at 413−14 (noting chief judge may appeal to flattery and institutional loyalty).] According to commentators, these methods are almost always successful because, by and large, judges are good men and women who "want to do what is right." [*FN:* See Geyh, supra note 167, at 283; Fish , supra note, 181 at 161.] As one Chief Circuit Judge noted,

A judge . . . does not look forward to serious admonition from colleagues. Admonition may call into question one's fairness, honesty, intelligence, judgment, wisdom, or commitment−−the precise characteristics that mark a distinguished career on the bench. It is the height of humiliation to be graded poorly in these areas, or to be accused by one's own peers of demeaning the dignity of the office, especially pursuant to a charge of misconduct. The threat of

peer condemnation tempers even the most arrogant judge, so we can be sure that individual independence does not insulate a judge from effective peer regulation. [*FN:* Edwards, supra note 167, at 795; see Sahl, supra note 161, at 231−32.]

An additional benefit to informal review is that it is frequently more effective because the "target" judge takes informal criticism as an educational process, rather than a disciplinary one. Thus, according to one Chief Judge, real corrective action is forthcoming, not grudging acquiescence. [*FN:* See Barr & Willging, supra note 171, at 137.]

The effectiveness of the informal process is well documented. One commentator's general survey of confidential, informal reprimands against judicial officers found that at least some of the federal judicial officers retired over a several year period after a judicial complaint was filed or foreshadowed. [*FN:* See Fitzpatrick, supra note 167, at 283; see also Geyh, supra note 167, at 284 (noting chief judges surveyed stated three judges retired in response to informal allegations of misconduct).] Another commentator recounted two situations involving the possible removal of a bankruptcy judge pursuant to section 152(e). In the first instance, "the bankruptcy judge was persuaded not to apply for renewal; in [the second], the circuit executive treated a serious informal complaint as a reason for collecting information that would be relevant to renewal." [*FN:* See Barr & Willging, supra note 171, at 137.] Overall, the success of the informal approach, reported the Federal Judicial Center study, "is due in large part to the system of decentralized self−regulation that long antedated . . . the [Discipline] Act." [*FN:* Report on Judicial Discipline , supra note 150, at 113.]

Informal review does not, however, take place in a vacuum. Instead, the formal mechanisms of the Act and the informal process appear to "operate synergistically" to reinforce one another. [*FN:* Geyh, supra note 167, at 306 (noting Act has strengthened informal process); see also Fitzpatrick, supra note 167, at 282 (same).] The Federal Judicial Center report claimed that, "[t]he Act itself is regarded by some chief judges as an invitation to informal resolution, and more than 70 complaints filed resulted in conclusions of the proceeding as a result of corrective action taken." [*FN:* Report on Judicial Discipline , supra note 150, at 113.] Similarly, after doing an exhaustive study on informal remedies for federal judicial misconduct, Professor Charles Geyh found that, "the formal process serves as a 'shotgun behind the door' that encourages responsiveness to the informal disciplinary process." [*FN:* See Geyh, supra note 167, at 306.]

The last informal remedy available to protect against judicial misconduct is peer pressure. Prior to passage of the Disciplinary Act, Judge Irving Kaufman found peer pressure to be a potent tool which "should not be underestimated because it neither is exposed to public view nor enshrined in law." [*FN:* See Irving R. Kaufman, Chilling Judicial Independence , 88 Yale L.J. 681, 709 (1979); see also Sahl, supra note 160, at 208 (noting without formal disciplinary mechanisms peer influence played key role in deterring misconduct); see also Geyh, supra note 167, at 243, 245, 258 (indicating peer pressure which existed before Act is still thriving).] In more recent times, the use of peer pressure has been identified by chief circuit judges as the third most frequently used disciplinary device. [*FN:* See Geyh, supra note 167, at 305 (discussing peer pressure).] Judges appear especially likely to turn to this method to deal with delay problems and with problems of judicial disability. [*FN:* See id . at 304; Kaufman, supra note 192, at 708−09.]

A series of important mechanisms are available for disciplining bankruptcy judges in particular, devices that grow out of the appointment statute for these judges. Section 152 states that bankruptcy judges serve for a term of 14 years and are to be reappointed automatically only with the concurrence of the judicial council for the district in which the bankruptcy judge sits. [*FN:* 28 U.S.C. § 152(a) (1994).] A wayward bankruptcy judge (even one whose conduct has not sunk so low as to trigger any of the provisions of the Discipline Act) must thus face the real prospect of not being reappointed unless she conforms her behavior to the standards demanded by the judicial council. In addition, the statute permits the judicial council to remove a bankruptcy judge before the end of his term upon a finding of incompetence, misconduct, neglect of duty, or physical or mental disability. [*FN:* See id .; see also 28 U.S.C. § 372(c)(6)(vii) (allowing removal of bankruptcy judge and magistrate after investigation so long as comply with relevant provisions); 28 U.S.C. § 631(i) (allowing removal of magistrate for "incompetency, misconduct, neglect of duty, or physical or mental disability" by a majority of district court judges in judicial district where magistrate serves). Because senior district court judges and senior circuit judges sit by designation, their judicial career can also be ended by removal; the chief judge or the circuit's judicial council simply revokes or fails to issue designation for that judge. See 28 U.S.C. § 294. In contrast, Article III judges "hold their Offices during good Behavior" and cannot have their compensation "diminished during their Continuance in Office." U.S. Const. art. III, § 1. To the extent formal accountability exists at all for Article III judges, it is through the constitutional provision in Article II that, as "civil Officers of the United States," judges could "be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." *Id.* art. II, § 4. It is interesting to note that it does not appear that Congress has ever succeeded in removing an Article III judge because it disagreed with a judge's decision. The acquittal in 1805 of Samual Chase, "the controversial Federalist justice, appears to have inclined Congress and the country away from

regarding impeachments as a general political check on the substantive exercise of judicial power." Report on Judicial Discipline , supra note 118, at 11 (citing William H. Rehnquist , Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson (1992)); see also Edwards, supra note 174, at 773 (noting while impeachment standard is difficult to define, history demonstrates Congress rarely, if ever, has abused its power). But see Reno Blasts Bid to Unseat Judge in S.A. , San Antonio Express News, March 14, 1997 (discussing drive by Congressman, Tom Delay, to impeach several district judges for being "activist" decision makers).] This latter power may be (and has been) employed in conjunction with the Discipline Act or with the more informal procedures discussed earlier to bring appropriate pressure to bear on an errant bankruptcy judge. On occasion, it has been used, as written, to force the resignation of a given judge. This last provision appears to have been intended as the last resort to be used if all else fails and appropriately focuses attention not on the bankruptcy court *per se* but, rather, on the particular judicial officer whose conduct has violated the express standards of the appointment statute.

C. Modifying or Terminating the Order of Reference

Modifying or terminating the Order of Reference, at least in the case of bankruptcy judges, is also, as previously stated another method of exercising control over judicial misconduct. It appears to have only been used the one time in Delaware.

As previously explored, it appears to be undoubted that the district court has total discretion whether to exercise termination or modification of the general order of reference for any reason. After all, perhaps the key component to the 1984 effort to cure the constitutional problem with the structure of the bankruptcy system was the creation of a mechanism that *allowed, but did not mandate* the district court to refer bankruptcy matters to bankruptcy courts.

The procedural rule applicable here states:

Each district court *may provide* that any or all cases under title 11 *and any or all* proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges in the district. [*FN:* 28 U.S.C. § 157(a).]

There is nothing in the statute to suggest that anything but unfettered control on the part of the district court with regard to the delegation of its bankruptcy jurisdiction to the bankruptcy courts of its district.

It was the delegation by statute of all of the district court's bankruptcy jurisdiction that triggered the Supreme Court's concern in *Marathon.* BAFJA addressed the problem by the use of a device borrowed from the Magistrates Act, the referral (not by statute but by the district judge) of a given matter or class of matters, exercised in the sole discretion of the judicial officer having original jurisdiction over the matter. In that way it could be argued that the essential attributes of judicial power were reserved in the Article III court, because the court could choose not to enter any referral order at all, or to make the referral order less than general in any way that it so desired. In addition, BAFJA granted the district court the additional authority to *withdraw* any matter previously referred, again at any time and for any reason. [*FN:* See 28 U.S.C. § 157(d) (stating district court may withdraw proceeding if determines that resolution requires consideration of both title 11 and other laws of United States regulating interstate commerce).]

It was presumed that this allocation of judicial power was essential to the preservation of the constitutionality of the bankruptcy court structure. By the same token, however, no court ever actually exercised the power until the recent events in Delaware. Instead, every district in the nation entered a general order of reference, referring *all* bankruptcy matters to the bankruptcy court of that district, relying on the withdrawal provisions of section 157(d) to recall those cases that required disposition by the district court, usually for constitutional reasons. [*FN:* See, e.g.,*In re* Clay, 35 F.3d 190, 193 (5th Cir. 1994) (holding Bankruptcy Code should not permit bankruptcy judges to hold jury trials without consent of parties); Growers Packing Co. v. Community Bank of Homestead, 134 B.R. 438, 444 (S.D. Fla. 1991) (holding removal correct because bankruptcy court lacks statutory authority to conduct jury trial). In addition, on occasion the district court has withdrawn entire bankruptcy cases because of the novelty or complexity of the issues involved. See Ackles v. A.H. Robins Co. (*In re* A.H. Robins Co.), 59 B.R. 99, 105−107 (1986).] The rationale seems to have been obvious. Every district nationwide recognized Congress' intent in BAFJA to preserve as much of the original structure of the Bankruptcy Reform Act of 1978 as possible and to accord the bankruptcy judges the maximum independence and authority permissible under the Constitution. They also correctly realized that an efficacious bankruptcy system in their own district, one which involved a minimum of delay and a maximum of both credibility and predictability, demanded that matters continue to be centralized in the bankruptcy courts created for

that purpose.

Thus, while the reference statute, in theory, affords district courts substantial power to regulate not only adjudicatory authority over bankruptcy matters but also administrative authority over perceived judicial misconduct, no district to date, save for Delaware, has so employed it. Modifying the reference is thus a process on which no one appears to have commented, insofar as its use as a remedy for judicial misconduct. The most obvious problems with adopting this device for that purpose are nonetheless readily apparent. Such a resolution publicly undermines the independence of bankruptcy judges while failing to solve the problem of an errant bankruptcy judge. What will the Delaware district court do, for example, when it eventually decides that it has enough work without the added burden of part of the bankruptcy court's docket? Will it then issue a new order referring all bankruptcy matters to the bankruptcy judges in the district, including the judge with whom the district appears to have had a problem? In sum, while taking away a bankruptcy judge's docket, either in whole or in part, would certainly indicate to a bankruptcy judge that the district court is unhappy with something he is doing, it failing to solve the problem at hand.

III. A Review of Delaware

It is a basic recognition within the federal court system that courts should not only be independent of outside interference, but also of pressures from other courts except on adjudicative review. [*FN:* See Chandler v. Judicial Council, 398 U.S. 76, 140 (Douglas, J. dissenting) (arguing federal judges should never be allowed "to ride herd on other federal judges" because it is 'hazing' which has no place under Constitution); Edwards, supra note 39, at 780−81 (noting all federal judges pay great creed to notion of judicial independence, even from brethren judges); see also 28 U.S.C. § 137 (1994) (stating judicial councils may make orders for district judges).] This tradition has been so well ingrained, that at one point, circuit councils who had been granted greater administrative power to, in part, [*FN:* See Administrative Office Act, ch. 501, §§ 306−07, 53 Stat. 1223, 1224−25 (codified as amended at 28 U.S.C. § 332) (transferring administrative power to judicial councils for each circuit); see generally, Michael J. Remington, Circuit Council Reform: A Boat Hook for Judges and Court Administrators , 1981 B.Y.U. L. Rev. 695, 707−712 (1981) (tracing development of administrative structure of federal courts in this century).] create a better mechanism to discipline federal judges, [*FN:* See Remington, supra note 201, at 713 (noting subsequent acts further enhanced power of the councils to ensure they could regulate judges' behavior); Sahl, supra note 161, at 209−210 (noting judicial council is central governing body within the circuit). Today, judicial councils can make "all necessary orders for the effective and expeditious administration of justice" including any "general order relating to practice and procedure." 28 U.S.C. § 332(d)(1) (1994).] were largely unwilling to exercise that power because of their concern that such interference would threaten judicial independence. [*FN:* See Sahl, supra note 161, at 210.] That concern was recorded in a 1974 Report of the Judicial Conference, where it was stated, "[i]t is vital that the independence of individual members of the judiciary to decide cases before them and to articulate their views freely be not infringed by action of a judicial council." [*FN:* See Geyh, supra note 167, at 265 (quoting Director of the Administrative Office of the U.S. Courts , Reports of the Proceedings of the Judicial Conference 8 (1974)). Similarly, at one point the 9th Circuit Judicial Council formally resolved not to "'take any action which might be construed by the district judges as an effort to crack the whip over them,' so as to ensure that the judge did not think herself 'just another employee taking orders from a judicial council acting as a quasi board of directors.'" *Id.* at 267 (quoting Peter G. Fish, The Politics of Federal Judicial Administration (1973) (quoting 1959 resolution of the 9th Circuit Judicial Council)). The circuit council's lack of motivation to interfere with judicial problems has become so legendary that one noted scholar designated the collective councils the "pillars of passivity." Remington, supra note 201, at 714−15 (quoting Peter G. Fish, The Politics of Federal Judicial Administration (1973)).] Relevant congressional history indicates that this notion of court independence in the federal system applies equally to bankruptcy courts. [*FN:* See discussion supra Part I.]

Adopting a more traditional method of discipline preserves independence while providing several advantages to all parties. For instance, it allows the judiciary, at least at the initial stage, to resolve problems without the necessity of publicizing the matter. [*FN:* See Barr & Willging, supra note 171, at 29 (noting importance of self−regulation of judicial branch); see also Robert W. Kastenmeier and Michael J. Remington, Judicial Discipline: A Legislative Perspective , 76 KY. L. J. 763, 765 (1987 / 1988) (discussing internal regulation of judiciary).] This is important to a system that's continued vitality depends, in large part, on public confidence. [*FN:* See Edwards, supra note 174, at 781; see also Richard L. Marcus, Who Should Discipline Federal Judges, and How? , 149 F.R.D. 375, 427 n.175 (noting airing judicial problems to the public diminishes respect for the judicial system). But see Anthony D'Amato, Self−Regulation of Judicial Misconduct Could be Mis−Regulation , 89 Mich. L. Rev. 609 (1990) (noting no matter what profession is under attack, the general operating rule is "cover it up"; in order to reform judicial system, as has occurred with police and doctors, judges need honest disclosure); Bryan E. Keyt, Reconciling the Need for Confidentiality in Judicial Disciplinary Proceedings with the First Amendment: A Justification Based Analysis , 7 Geo. J. Legal Ethics 959, 964 (1994) (arguing confidentiality provisions may damage reputation of judiciary, rather than preserve it). There is also some concern that complaints against federal judges are likely to make front page news while the retraction will not. See Sahl, supra note 161, at 225. See generally Keyt, supra note 207, at 964 (exploring and refuting

reasons put forth to justify confidentiality).] Adopting this approach also allows judges who make minor mistakes to be dealt with in a more humane manner. One Chief Judge, noting that judges should be handled delicately, suggested that, "formal orders issuing as lofty commands from Olympus should be a remedy of last resort." [*FN:* Geyh, supra note 167, at 268 (quoting Federal Judges and Courts: Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 411 (1969) (statement of Clement F. Haynsworth, Jr., Chief Judge of the 4th Circuit)).] We subscribe to this view, not because judges *qua* judges should receive some special treatment, but because it recognizes that people make some mistakes. The first step, depending on the severity of the mistake, should be a discussion with the "target" judge and a subsequent opportunity for the remedy of minor problems. Taking a more traditional approach also appears to be the route that Congress and the circuits expect to be used for cases of misconduct in bankruptcy courts.

Perhaps most importantly, other tools available to deal with an errant bankruptcy judge are seemingly more readily suited to the task of judicial discipline. In fact, all of those tools share two distinct virtues, absent from the employment of the reference statute, as a means of regulating judicial misconduct. Firstly, all of the other devices are aimed at the offending judge, rather than at the entire bankruptcy court in a given district. [*FN:* See 28 U.S.C. § 332(d)(2) (1994) (stating judicial counsel may institute contempt proceeding against single judicial officer). But see id. §372(c)(1) (1994) (stating person may allege prejudicial conduct by an entire circuit or district); Carol T. Rieger, The Judiical Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges? , 37 Emory L. J. 45, 48 (1988) (stating Judicial Conduct and Disability Act allows charges that a circuit or district engaged in egregious conduct); Drew E. Edwards, Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act , 75 Calif. L. Rev. 1071, 1077 (1987) (noting under Judicial Councils Reform and Judicial Conduct and Disability Act, any person may allege a circuit or district has engaged in prejudicial conduct to the court system).] Even the extraordinary remedy of removal leaves the remaining bankruptcy judges in the district (other than the few one judge districts around the country) capable of continuing to perform their roles relatively unaffected by the process. [*FN:* We say relatively because the formal removal process, though not formally public, will rarely go unnoticed by the practicing bar, and may even trigger the attention of the media.] Secondly, all of the other procedures are designed to preserve, to the extent possible, the dignity of the judicial office, not only for the offending judge but also for those other judges in the district who are not the target of review.

The reference statute, by contrast, was not specifically designed as a device for regulating judicial misconduct. Its principal function was the reservation of final *adjudicatory* authority in the district court to preserve the constitutionality of the bankruptcy judicial structure. [*FN:* See discussion supra Part I.] Section 151 designates a "bankruptcy court" consisting of the bankruptcy judges who serve as units of the district court, and it is to that *court* that the reference is then made under section 157(a). [*FN:* See 28 U.S.C. § 151 (designating bankruptcy courts).] The referral statute does not contemplate reference of particular matters to particular judges. [*FN:* The precise language of § 157(a) can be read to confer precisely such authority on the district court, as it reads " . . . shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a) (emphasis added). However, read in context, it appears the import of the statute strongly suggests the reading set out in the text above. First, "the bankruptcy judges for the district" is consistent with the designation provisions in § 151, which states "the bankruptcy judges . . . shall constitute a unit of the district court to be known as the bankruptcy court for that district." 28 U.S.C. § 151. Second, § 157(a) contemplates the referral being accomplished by the district court , as distinguished from the referral mechanism for magistrates, which states that it is the district judge who designates a magistrate to hear matters. See 28 U.S.C. § 636(b)(1) (emphasis added). The district court acts as a unit defined by statute, consisting of the judges for the district. See 28 U.S.C. § 132(b) (emphasis added). The district court may govern itself as it sees fit, per statute, but it is the court , qua court, which exercises the reference power in § 157(a), and not any one judge, qua judge. These provisions, taken together, seem to indicate that reference of bankruptcy matters is made by the district court to its bankruptcy unit, the bankruptcy court, consisting of its bankruptcy judges.] Indeed the provision for a clerk of the bankruptcy court, set out in section 156, seems to confirm Congress' intention that the bankruptcy judges separately administer, among themselves, the delegation of matters referred to the "bankruptcy court" among the various judges. [*FN:* The Bankruptcy Rules support this conclusion, with its provision for a bankruptcy clerk whose duties include the maintenance of a docket, and specify that the place for filing of all papers related to a bankruptcy case, including the original petition, is the bankruptcy clerk. See Fed. R. Bankr. P . 1001, 1003, 5003, 5005. By the same token, the Rules do not define the term "clerk," leading to the conclusion that, in cases in which the general order of reference has been modified or withdrawn, the word ought to be read to mean clerk of the district court. See Norton Bankr. L. & Pract. 2d, Bankr. Rules , Editors' Comment to Rule 5005, at 330 (Clark, Boardman, Callaghan 1996).] Matters may, of course, be *withdrawn* from reference, but the statute authorizing withdrawal of the reference focuses not on the *judge* but rather on the *matter*. [*FN:* See 28 U.S.C. § 157(d) (1994) (stating district court may withdraw " any case or proceeding referred under this section") (emphasis added).] In sum, the reference provisions do not, by their terms, appear to strike at any one judge, but rather serve to regulate (at least in theory) the flow of bankruptcy matters to the *entire bankruptcy court* in a given district.

Of course, given the broad language employed in the statute, [*FN:* We emphasize that this breadth appears to have been mandated by the concern that the district court's "control" over the case be deemed sufficiently strong to withstand constitutional scrutiny. So long as the authority is present in theory, but is not used in practice, the courts can continue to walk the tightrope between constitutionality on the one hand and a strong, independent bankruptcy court for efficient administration of bankruptcy cases on the other.] the general order of reference could be drafted in any way the district court deemed appropriate, without violating its letter (though to do so might well violate its spirit). Thus, a district court could conceivably punish (or at least isolate) an errant bankruptcy judge by simply drafting the order of reference to explicitly exclude referral of any matters to that particular judge. [*FN:* See 28 U.S.C. §157 (stating district court will refer cases under title 11 to bankruptcy judges of the district, but not requiring an even disbursement of cases to all judges).] That approach would rather seriously undermine both the authority and the independence of the entire bankruptcy court, however, because such a move lacks any of the protections that are normally associated with the other regimens for handling judicial misconduct such as affording the offending judge an opportunity to respond to specific allegations of misconduct being the principal protection. [*FN:* See 28 U.S.C. § 372 (c)(9)(B)(10) (stating judge may petition judicial counsel for review of final order); see generally Geyh, supra note 167 at 286 (noting appellate courts can address disciplinary rulings under §372).] The public perception of such an extraordinary step would be that the district court could as easily choose to exclude from reference a judge whose decisions the district court disliked, or whose personality did not readily mesh with those of the district judges, or who had simply disagreed with some policy or procedure favored by the district court. [*FN:* Indeed, one of the fears expressed in the wake of the decision of the Delaware district court was that district judges with so−called "consolidated clerk's offices" might employ this device to dissuade their bankruptcy judges from seeking to "deconsolidate" their clerk's operation from the district clerk. There are three districts currently whose clerks' operations are still consolidated: the Southern District of Texas, District of Idaho and the Western District of Missouri.] The resulting plunge in respect for the authority of the bankruptcy judges in such a district would likely have an adverse impact on the ability of the bankruptcy judges to effectively manage their cases. [*FN:* While it is probably unnecessary to set out a "parade of horribles" to illustrate the point, suffice it to say that the author has been witness to just such an erosion in the Western District of Texas some thirteen years ago, though that erosion did arise directly from an effort to narrowly draft the order of reference.]

Alternatively, the district court could simply modify the reference order without reference to any one judge. However, this too has its dangers, for such a modification "punishes" all bankruptcy judges, not simply the errant judge. It also undermines the independence of that court, in derogation of congressional intent [*FN:* See H.R. Rep. No. 95−595 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 5974 (describing independence of district and bankruptcy courts).] and to the ultimate detriment of the district court itself, which must assume an ever−increasing responsibility for the day−to−day management of the bankruptcy case load.

Thus, as a device for addressing judicial misconduct, the modification or elimination of the general order of reference seems to be ill−suited. However, one advantage over the previously discussed methods may explain its being used in Delaware. That advantage is speed. And perhaps it was this advantage which outweighed all of the disadvantages in Delaware.

In Delaware, the district court's receipt of the Report from the Federal Judicial Center may well have been the impetus for the court's subsequent modification of the general order of reference. Few observers willingly accept the district court's proffered justification for its entry of the modified order, noting the more−than−coincidental timing between the two events, and also noting the disturbing disclosures contained in the Report itself regarding the practices then in use in the bankruptcy court. [*FN:* See discussion supra notes 5−11 and accompanying text.] If the district court *was* indeed reacting to perceived improprieties in the handling of matters by the bankruptcy court, then we can correctly classify the modification of the general order of reference as a response to perceived judicial misconduct. Of all the devices that could have been employed, this one certainly had the most immediacy in terms of its impact. A complaint filed pursuant to the Discipline Act would have taken weeks or even months to resolve, as the target judge would have an opportunity to respond to the allegations. [*FN:* See 28 U.S.C. § 372(c)(ii)(B) (stating target judge has opportunity to be heard, and present evidence on his/her behalf); see also Williams v. Mercer (*In re* Certain Complaints Under Investigation by an Investigating Comm. of Judicial Council of the 11th Circuit), 783 F.2d 1488, 1514 (11th Cir. 1986) (noting judge being investigated can appear before committee and present argument); supra note 218.] Any investigation of charges by a committee appointed by the judicial council would also take a similar amount of time. Even the informal methods of regulation may take time, because, although the chief judge of the circuit can make the call to the target judge almost immediately, only the passage of time will confirm whether the admonitions have been taken to heart by the target judge. The unilateral modification of the general reference order, by contrast, took effect immediately upon the entry of the order, without the necessity of awaiting any committee investigation, or of awaiting a response from the target judge.

Yet Delaware also demonstrates why this method ought to be the last of last resorts for regulating judicial misconduct. There have been no findings of any sort, formal or informal, regarding whether any judicial misconduct has in fact taken place, save the Federal Judicial Center's Report. [*FN:* See supra note 1 and accompanying text. The Chief Bankruptcy Judge ratified the findings of the Report, suggesting that the process used by the Federal Judicial Center might well be analogized to the investigative committee that a judicial council might employ. However, at the time the Report was being developed and written, it is doubtful that the bankruptcy court had notification that the Report might later be used by the district court to justify a modification of the general order of reference, so the analogy to the procedures outlined in the Discipline Act quickly breaks down.] The public is thus left to speculate about what might have motivated the district court to act as it did. Such speculation only serves to undermine the credibility of the bankruptcy court. [*FN:* See supra notes 207−08 and accompanying text.]

Modifying the reference order also permits the district court to move immediately to a remedy, without having to await an examination of the facts or a response from the target judge. [*FN:* See 28 U.S.C. § 157(d) (1994) (stating district court may withdraw case on its own motion) (emphasis added).] This process does not conform to the carefully delineated procedures of the Disciplinary Act. [*FN:* See id. § 372(c) (allowing opportunity to be heard and providing of witnesses and evidence by target judge); see also supra notes 218 and 226 and accompanying text (discussing judge's rights to present argument when under investigation).] The intent of that Act is clearly to subject the conduct of all federal judicial officers to a modicum of regulation, but to do so in a way that preserves respect for the judicial office and avoids impinging on the independence of the judge. That intent is subverted when the general order of reference is used as the means for such regulation, because it dispenses with giving the target judge an opportunity to respond and does not require any justification for its employment. Its use as a means for judicial discipline effectively relegates the bankruptcy judge to the status of employee rather than judicial officer, in rather gross derogation of the intentions of congress expressed in both BAFJA and the Disciplinary Act. [*FN:* See supra notes 126−29 and accompanying text. Indeed, even employees in the federal judiciary are entitled to be given notice of any alleged misconduct in advance of any remedial action being taken against them.]

Perhaps it was for this reason that the district court in Delaware expressly stated that its intentions were to respond to the extraordinary chapter 11 case load then being experienced by the bankruptcy judges. Denominating its actions as a response to judicial misconduct would allow the entire process to take on the quality of a Star Chamber proceeding, in which findings are made unilaterally without the necessity of confronting the accused and judgment is summarily rendered without notice or due process. [*FN:* See 28 U.S.C. § 157(d) (allowing no contest by bankruptcy judge because of withdrawal).] Yet the more sanguine justification offered by the district court does little to save the process employed from criticism, for *any* withdrawal of case assignment from a judge, regardless of the proffered explanation, will always be construed as a comment on the ability of the judge to effectively handle her case load. [*FN:* See supra note 9 and accompanying text.] After all, it was not the bankruptcy judges who were *asking* for assistance. It was the district court presuming they *needed* assistance. Thus, even the rationale offered on the face of the order is inevitably a "slap in the face" of the bankruptcy court.

There is another, perhaps more insidious, difficulty with the district court's employment of this process as a means of discipline. Virtually every other device for regulating judicial misconduct is entrusted not to the district court but to the *circuit's* judicial council and the chief judge of the circuit. [*FN:* See 28 U.S.C. § 332(d)(2) (stating judicial council will be appointed to insatiate contempt proceeding against judge); see also id. § 372(c)(i) (stating chief judge identifies the complaint against judge).] The Disciplinary Act vests its authority in those two actors, and those two alone. [*FN:* See 28 U.S.C. § 332(d)(2); see also id. § 372(c)(i).] What is more, the appointments statute for bankruptcy judges vests the responsibility for the review of misconduct on the part of a bankruptcy judge solely in the circuit's judicial council and not in the district court. [*FN:* See id. § 152(c) (stating only judicial council may remove bankruptcy judge).] That body also has sole say in whether a given bankruptcy judge's appointment will be renewed for a new term. [*FN:* See id. § 152(a)(1) (stating approval of judicial council needed to extend term of bankruptcy judge).] None of these provisions give the district court any direct role in regulating conduct of bankruptcy judges. If the district court employs the general order of reference for that purpose, then, it subverts the overall scheme for the regulation of bankruptcy judges' misconduct, abrogating to itself an authority clearly not intended (if even conferred) by Congress when it enacted section 157(a).

However, surely there will be times when a speedy response is so essential that even this highly inappropriate device ought to be employed. One might imagine any number of horrific scenarios, each more shocking than the last, until finally a sufficiently extreme situation compels a grudging agreement, but one that really misses the point. The reality is that no similar ready device is available for the regulation of district judges, although their conduct may be as egregious and thus, easily justify an extraordinary response. [*FN:* Indeed, there have been a number of glaring examples of

egregious misconduct on the part of district judges that make a far stronger case for a summary remedy such as the unilateral withdrawal of case assignments than do any of even the most scurrilous allegations regarding recent events in Delaware. Take, for example, Robert Collins, former District Judge of the Eastern District of Louisiana. Judge Collins not only accepted a bribe, he sought out (through an intermediary) a criminal defendant in a drug smuggling case and offered the defendant leniency in return for payment of $100,000. Williams, supra note 155, at 908. Although a portion of the bribe money was found in the judge's credenza and on his person, and although the judge had been monitored meeting with a defendant he was about to sentence at a public tavern, Judge Collins insisted that he was innocent. *Id.* at 910−12. Not until long after he had been convicted did an official request that the House Judiciary Committee begin an impeachment proceeding push Judge Collins to offer his resignation from his life−tenured post. Until that time, two years after his arrest, Judge Collins had continued to receive his federal salary. *Id.* at 915. Similarly, the behavior of District Judge Robert Aguilar of the Northern District of California constituted the very definition of misconduct, and yet justice was far from swift. It appears that, on behalf of a relative, Judge Aguilar tried to influence a fellow judge's decision, notified a relative of an FBI wiretap, and was recorded telling an attorney how to lie to a grand jury to cover up his relationship with the judge. *Id.* at 918−19. (Judge Aguilar, however, always denied having any relationship with the attorney. *Id.* at 919.) After being convicted for illegally disclosing a wiretap and attempting to obstruct a grand jury investigation, an en banc appeal reversed the conviction on the grounds that the wiretap had already expired when Judge Aguilar had disclosed its existence to his relative. *Id.* at 922. Judge Aguilar remained on the bench, although his case load did not include criminal matters or civil matters involving the government, until he retired (with full benefits) in 1996, seven years after his indictment. *Id.* See also David Dietz, No Retrial But No Job for Aguilar, Judge Resigns to Get Last Charge Dropped , San Francisco Chronicle , June 25, 1996.] We shrink from XXX the device of unilateral withdrawal of case assignment as a method for regulating judicial misconduct by district judges because it can be so easily abused, and because it so thoroughly demeans the prestige and respect that the judiciary ought to enjoy, no matter the conduct of any particular judge. Instead, the judiciary should confine itself to the admittedly less immediate methods described in the Disciplinary Act, and the informal means of persuasion and peer pressure. [*FN:* See 28 U.S.C. § 372(c)(1) (1994) (stating discipline methods); see also Kaufman, supra note 192, at 709 (noting power of peer pressure); Sahl, supra note 160, at 208 (describing key role peer pressure played in preventing misconduct).] The choice ought to be no different with regard to the conduct of any federal judicial officer, given that the same considerations are at work regardless of the title of the judge or whether the judge enjoys life tenure. [*FN:* By the same token, judicial independence has commensurately greater value in the context of Article III judges, because excessive regulation of judicial conduct by the judiciary might well violate the structure of Article III itself, which permits the termination of such judges on grounds of "misbehavior" only via the impeachment process. Similarly, excessive regulation of judges not appointed pursuant to Article III would not raise this constitutional problem, but the same policy considerations of preserving independence and prestige are triggered.]

Conclusion

The general order of reference simply ought never be employed as a device for regulating the conduct of bankruptcy judges. The danger of abuse, the threat to the independence and consequent effectiveness of bankruptcy judges, the insidious way in which it undermines the confidence of the bar and the public in the bankruptcy court and the abrogation of a responsibility assigned by congress not to the district court but to the circuit judicial council all confirm that section 157(a) was never intended by congress to be employed in the manner in which it was apparently employed by the district court in Delaware.

Yet the statute's express language places no constraints on its abuse either. There are no sanctions for the misuse of section 157(a) and its broad terms permit great latitude in the district court's discretion that, at least as a matter of literal law, "abuse" of that discretion is well nigh oxymoronic. As we have earlier noted, the breadth of the statute owes its origins to the concern that the delegation of judicial power to the bankruptcy court would otherwise not be constitutional. *Adjudicatory* authority must, of necessity, be retained by the Article III tribunal to satisfy constitutional questions that might be raised about *delegation* of that adjudicatory authority to a tribunal not appointed under Article III. Only the absolute right to refer or not refer that authority could assure that the appropriate modicum of adjudicatory authority was reserved in the district court. [*FN:* See discussion supra Part III.] Should the district court ever become concerned that all or any of the matters being adjudicated by the bankruptcy court require determination in an Article III tribunal, then certainly the general order of reference would be the proper place to make that determination. [*FN:* Alternatively, the district court could make such a determination on a case−by−case basis (as many now do) via the withdrawal of reference procedures in § 157(d). 28 U.S.C. § 157(d).] Were district courts to confine themselves to employing section 157(a) in this fashion only, they would at least be acting in a fashion consistent with congressional intent. They suffer no penalty, however, if they choose to exceed that level of self−restraint.

The Delaware experience thus exposes one of the major flaws with the structure that BAFJA created in response to *Marathon*. Even if we were to accept the proposition that BAFJA successfully resolved the constitutionality of the

bankruptcy court structure, BAFJA has also fostered a system that relies for its effectiveness on the voluntary good will and consent of district judges nationwide. If, in a given district, the judges of the court decide to withdraw that good will, for good reasons, bad reasons, or no reasons at all, the bankruptcy court can be crippled or even destroyed. No judicial system, especially one now charged with presiding over hundreds of billions of dollars worth of claims and assets, ought to be premised on so slim and insubstantial a foundation. After Delaware, the first ugly cracks have now begun to appear.