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CONTEMPT OF THE BANKRUPTCY COURT—A NEW LOOK

Laura B. Bartell*

With the passage of the Bankruptcy Reform Act of 1978, Congress worked a sweeping revision of the nation's bankruptcy laws. As part of this massive reform measure, Congress reinvented the role of the bankruptcy judge, granting the judge a host of new powers. Because these new powers were so substantial and because Congress elected to establish bankruptcy judges as Article I rather than Article III judges, the Supreme Court, in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., declared those portions of the Act delineating the powers and structure of the bankruptcy courts unconstitutional. Congress responded by passing the Bankruptcy Amendments and Federal Judgeship Act of 1984 to address the Court's constitutional concerns.

Despite the Court's decision in Marathon and Congress's response, the extent of a bankruptcy judge's power remains unclear, particularly as to whether a bankruptcy judge has the statutory or inherent power of contempt. In this article, Laura Bartell provides a thorough analysis of this issue and reaches the compelling conclusion that bankruptcy judges lack the contempt power and that to invest the non-Article III bankruptcy courts with such power would violate the Constitution.

The Supreme Court has called the power to punish for contempt of court “essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice.” The Court considers the contempt power so critical to the judicial function that it has characterized the authority as “inherent” or “implied” by the very nature of a court's existence.²

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Since the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*\(^\text{3}\) and the resulting reconstitution of the bankruptcy courts under the Bankruptcy Amendments and Federal Judgeship Act of 1984,\(^\text{4}\) courts and commentators have grappled with the issue of whether the reconfigured bankruptcy courts have the statutory or inherent power of contempt and, if so, whether the exercise of such power would infringe impermissibly on the protections afforded by Article III of the Constitution.\(^\text{5}\) Although one circuit court of appeals and several lower courts have held to the contrary,\(^\text{6}\) most courts have concluded that, at least with respect to civil...

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\(^{3}\) Hudson & Goodwin, the Court actually held that United States circuit courts lack common-law criminal jurisdiction, but in so holding, it stated:

Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others: and so far our courts, no doubt, possess powers not immediately derived from statute: but all exercise of criminal jurisdiction in common-law cases, we are of opinion, is not within their implied powers.

11 U.S. (7 Cranch) at 34. *Anderson v. Dunn* dealt not with the inherent contempt power of the courts, but that of the House of Representatives. In refusing to permit the plaintiff, who had been found guilty of contempt of the House, to sue the House Sergeant at Arms for assault and battery and false imprisonment, the Court first commented on the judicial contempt power:

On this principle it is, that courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum, in their presence, and submission to their lawful mandates, and as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.

It is true, that the courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power, without the aid of the statute, or in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered, only as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.

19 U.S. (6 Wheat.) at 227-28. Perhaps the most frequently cited case, *Ex parte Robinson*, began with a sweeping statement:

The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

86 U.S. (19 Wall.) at 510. However, the Court then interpreted the Act of Mar. 2, 1831, ch. 99, 4 Stat. 487, which it stated had “limited and defined” the contempt power, and found that no contemptuous conduct within the meaning of the statute had occurred. 86 U.S. (19 Wall.) at 512.

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\(^{3}\) 458 U.S. 50 (1982).


\(^{5}\) Section 1 of Article III provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, 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.

BANKRUPTCY'S CONTEMPT POWER

contempt, bankruptcy courts have the statutory and/or inherent power to issue final orders within their core jurisdiction and that the statutory scheme for appeal of those orders satisfies all requirements of the Constitution.⁷

This article suggests that those cases fail to apply the correct principles in analyzing the statutory and constitutional issues involved, thereby threatening the very constitutional foundation of the bankruptcy system by chipping away at one of its cornerstones. The conclusions forced by precedent—rather than expediency—must be that a bankruptcy court has no independent contempt power and that any delegation of the district court’s contempt authority to the bankruptcy court would violate Article III of the Constitution.

I. THE CONTEMPT POWER BEFORE MARATHON

The Bankruptcy Act of 1898 (the 1898 Act)⁸ originally constituted bankruptcy courts not as separate juridical bodies but as preexisting United States district and territorial courts made “courts of bankruptcy” by the conferral of original jurisdiction in bankruptcy proceedings.⁹ The ability of these “bankruptcy courts” to exercise contempt power was recognized early¹⁰ and consistently¹¹ after their legislative creation.¹² The source of such power was the inherent power of United States courts to enforce their orders,¹³ the power of contempt conferred on United States courts by section 725 of the Re-

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⁹ See id. § 1a(8), 30 Stat. at 544 (defining “courts of bankruptcy”); id. § 2, 30 Stat. at 545 (creating courts of bankruptcy and their jurisdiction).

¹⁰ See Boyd v. Glucklich, 116 F. 131, 135 (Bankr. 8th Cir. 1902).


¹² The Chandler Act of 1938, ch. 575, 52 Stat. 840 (repealed 1979), substantially amended the Bankruptcy Act of 1898, but the amendments did not affect the jurisdiction of the bankruptcy courts.

¹³ See cases cited supra note 2.
vised Statutes of the United States, and the power of the courts of bankruptcy under sections 2(13), (15) and (16) of the 1898 Act.

The courts of bankruptcy had the power to appoint referees for terms of two years, to exercise certain limited jurisdiction, and to perform specified duties. Referees were not "courts of bankruptcy" or "judges" within the statutory language, and they had no independent power to cite parties for contempt. Instead, the Act required referees to "certify the facts to the judge, if any person shall [engage in contemptuous behavior]" and directed the judge to hear evidence and punish the conduct "in the same manner and to the same extent as for a contempt committed before the court of bankruptcy." 

14. Section 725 of the Revised Statutes of the United States, based on § 17 of the Judiciary Act of 1789, 1 Stat. 73, 83, was the predecessor to the current criminal contempt statute, 18 U.S.C. § 401 (1994). Section 725 provided that all courts of the United States "shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority."

15. Section 2 of the Bankruptcy Act of 1898 (later redesignated as section 2a) vested the courts of bankruptcy with jurisdiction to, among other things:

- (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment;
- (16) punish persons for contempts committed before referees...

Act of July 1, 1898, ch. 541, § 2, 30 Stat. 544, 546 (as amended) (repealed 1979).

16. Id. § 34, 30 Stat. at 555 (appointment of referees).
17. Id. § 38, 30 Stat. at 555 (jurisdiction of referees).
18. Id. § 39, 30 Stat. at 555-56 (duties of referees).
19. Id. § 41b, 30 Stat. at 556. Section 41 read in full:

a. A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or [after] having taken the oath, refuse to be examined according to law: Provided, That [no] a person other than a bankrupt or, where the bankrupt is a corporation, its officers, or the members of its board of directors or trustees or of other similar controlling bodies, shall not be required to attend as a witness before a referee at a place [outside of the State of his residence, and] more than one hundred miles from such person's place of residence[, and only in case] or unless his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

b. The referee shall forthwith certify the facts to the judge, if any person shall do any of the things forbidden in this section, and he may serve or cause to be served upon such person an order requiring such person to appear before the judge upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of[,,] and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before [the court of bankruptcy] him, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of[,] the court of bankruptcy or in the presence of[,] the [court] judge.

Id. § 41, 30 Stat. at 556 (bracketed material was deleted and underscored language added by the Chandler Act of 1938, ch. 575, § 41, 52 Stat. 840, 859-60).
In 1973, the United States Supreme Court adopted\textsuperscript{20} the Bankruptcy Rules and Official Bankruptcy Forms.\textsuperscript{21} Over the dissent of Justice Douglas,\textsuperscript{22} Rule 920 provided bankruptcy referees with new contempt power, allowing them to cite and punish for civil and criminal contempt by imposing fines of up to $250.\textsuperscript{23}

With the enactment of the Bankruptcy Reform Act of 1978 (the Code),\textsuperscript{24} the bankruptcy court became a "court of the United

21. 28 U.S.C. § 2075 (1988 & Supp. V 1993) (enacted as Pub. L. No. 88-623, 78 Stat. 1001 (1964)) gave the Supreme Court "the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure" under the Bankruptcy Act. The statute further provided that "all laws in conflict with such rules shall be of no further force or effect" after the rules became effective; the rules were not, however, to "abridge, enlarge, or modify any substantive right." \textit{Id.} The statute was amended in 1978 to substitute the words "in cases under title 11" for "under the Bankruptcy Act" and to delete the language providing for bankruptcy rules to overrule inconsistent legislation. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 1930(b), 92 Stat. 2549, 2672.
22. Justice Douglas stated that "it is for me alarming to vest appointees of [the] bankruptcy courts with the power to punish for contempt .... Extension of the contempt power to administrative arms of the bankruptcy court is not consistent with close confinement of the contempt power." 411 U.S. at 993-94 (Douglas, J., dissenting).
23. Former Rule 920 of the Bankruptcy Rules read as follows:

\textbf{Rule 920. Contempt Proceedings.}

(a) Contempt committed in proceedings before referee.

(1) Summary disposition by referee—Misbehavior prohibited by § 41a (2) of the Act may be punished summarily by the referee as contempt if he saw or heard the conduct constituting the contempt and it was committed in his actual presence. The order of contempt shall recite the facts and shall be signed by the referee and entered of record.

(2) Disposition by referee upon notice and hearing—Any other conduct prohibited by § 41a of the Act may be punished by the referee only after hearing on notice. The notice shall be in writing and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged and whether the contempt is criminal or civil or both. The notice may be given on the referee's own initiative or on motion by a party, by the United States attorney, or by an attorney appointed by the referee for that purpose. If the contempt charged involves disrespect to or criticism of the referee, he is disqualified from presiding at the hearing except with the consent of the person charged.

(3) Limits on punishment by referee—A referee shall not order imprisonment nor impose a fine of more than $250 as punishment for any contempt, civil or criminal.

(4) Certification to district judge—If it appears to a referee that conduct prohibited by § 41a of the Act may warrant punishment by imprisonment or by a fine of more than $250, he may certify the facts to the district judge. On such certification the judge shall proceed as for a contempt not committed in his presence.

(b) Contempt committed in proceedings before district judge—Any contempt committed in proceedings before a district judge while acting as a bankruptcy judge shall be prosecuted as any other contempt of the district court.

(c) Right to jury trial—Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

States” with jurisdiction over “all cases under title 11” and “all civil proceedings arising under title 11 or arising in or related to cases under title 11.” Congress conferred on the bankruptcy courts all “powers of a court of equity, law and admiralty,” with the qualification that they could not enjoin another court or punish an act of criminal contempt not committed in their presence or punishable by imprisonment. Congress perpetuated the residual grant of authority previously contained in section 2(15) of the 1898 Act in section 105(a) of the Code which permits bankruptcy courts to issue “any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”

The original structure of the new bankruptcy courts rendered self-evident the conclusion that they could exercise civil and criminal contempt power. First, Congress created them as independent courts—“adjuncts” to the district courts; therefore, they had the inherent power vested in any “court” to enforce its orders. Second, they were not only “courts” but also “courts of the United States”; thus, they had statutory contempt power. Third, Congress explicitly granted them the “powers of a court of equity, law and admiralty.” These powers must have included the contempt power, or the limitation on that power, excluding criminal contempts not committed in the court’s presence or punishable by imprisonment, would be mean-

26. Id. § 241(a), 92 Stat. at 2668 (codified at 28 U.S.C. § 1471). Subsections (a) through (c) of section 1471 read as follows:
   (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
   (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.
   (c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.
   Id. (omitted by 28 U.S.C. § 1471).
27. Id. § 241(a), 92 Stat. at 2671 (codified at 28 U.S.C. § 1481). Section 1481 provided that “[a] bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment.”
28. Id. § 105(a), 92 Stat. at 2555 (current version at 11 U.S.C. § 105(a) (1994)).
29. 28 U.S.C. § 151 (“There shall be in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district.”).
30. The pertinent section provides that:
   A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
   (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
   (2) Misbehavior of any of its officers in their official transactions;
   (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.
ingless. Finally, the new bankruptcy courts could rely on the residual authority granted by section 105(a) of the Code which some courts concluded authorized contempt orders as a “necessary or appropriate” means to carry out their functions. 32

II. THE SUPREME COURT’S DECISION IN MARATHON

The Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* 33 found that the broad jurisdictional grant to bankruptcy courts set forth in § 1471 of Title 28 of the United States Code violated Article III of the United States Constitution. 34 A four-judge plurality of the Court, in an opinion by Justice Brennan, reasoned that neither of the two grounds urged by the appellants could justify the adjudicative powers conferred by Congress on the non-Article III bankruptcy courts.

The Court first found that Congress did not constitute the bankruptcy courts as Article I “legislative” courts, nor could the precedents for the creation of such courts (territorial courts, the courts of the District of Columbia, courts of court-martial, and administrative agencies adjudicating cases involving “public rights”) support the broad grant of jurisdiction to the bankruptcy courts. 35 The Court declined to adopt a new rationale for the creation of non-Article III bankruptcy courts based on the power of Congress to establish “uniform Laws on


34. *Id.* at 87 (plurality opinion); *id.* at 91-92 (concurring opinion).

35. *Id.* at 63. The plurality noted that congressional control over territories and the District of Columbia rested on the absence of a state government in these geographical areas. Article IV, thus, empowers Congress to exercise the “complete power of government” in these locations. *Id.* at 64-65. Congress has the authority to provide for courts of court-martial under Article I, Section 8, Clause 14 of the Constitution which gives Congress the power to “make Rules for the Government and Regulation of the land and naval Forces.” *Id.* at 66. Although the plurality noted that “[t]he distinction between public rights and private rights has not been definitively explained in our precedents,” *id.* at 69, it concluded that the right to recover contract damages, which was at issue in *Marathon*, involved “the adjudication of state-created private rights,” rather than “the restructuring of debtor-creditor relations.” *Id.* at 71. Thus, bankruptcy court jurisdiction over such a right could not be justified by cases involving adjudication of public rights by legislative courts or administrative agencies.
the subject of Bankruptcies throughout the United States,”36 noting that such a rationale would permit Congress, acting pursuant to its Article I powers, to “create courts free of Art. III’s requirements whenever it finds that course expedient.”\footnote{36. Id. at 72 (quoting U.S. CONST. art. I, § 8, cl. 4).}

Second, the Court concluded that the bankruptcy courts, as configured under § 1471 of Title 28 of the United States Code, were not mere “adjuncts” of the district court whose authority could be analogized to that of administrative agencies and magistrates acting in that capacity. While recognizing that “Congress possesses broad discretion to assign factfinding functions to an adjunct created to aid in the adjudication of congressionally created statutory rights,” the Court ruled that Congress does not have the same degree of discretion with respect to rights not created by it.\footnote{37. Id. at 73.} Comparing the powers of a bankruptcy court, on which Congress purported to confer jurisdiction of state-created rights, with the powers of the administrative agency challenged in \textit{Crowell v. Benson}\footnote{38. 285 U.S. 22 (1932).} and the powers of U.S. magistrates considered in \textit{United States v. Raddatz},\footnote{39. 447 U.S. 667 (1980).} the plurality concluded that the bankruptcy courts were exercising far greater powers than those constitutional adjuncts; thus, the grant of such powers violated Article III.\footnote{40. 458 U.S. at 86-87.}

The causes of action whose delegation to the bankruptcy court the Court found to violate the constitutional protections of separation of powers—claims for breach of contract and warranty, misrepresentation, coercion, and duress—were all state law claims which were “the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.”\footnote{41. Id. at 90 (Rehnquist, J., concurring).} In a concurring opinion, Justice Rehnquist, joined by Justice O’Connor, agreed with the plurality that the bankruptcy courts were not “adjuncts” of an Article III court.\footnote{42. Id. at 91 (Rehnquist, J., concurring).} However, he declined to endorse the plurality’s analysis of Congress’s Article I powers, especially with respect to the “public rights” doctrine, concluding only that, whatever the scope of that doctrine, it could not support adjudication of the causes of action at issue in \textit{Marathon}.

Although the plurality opinion in \textit{Marathon} did not directly address the authority of a bankruptcy court to exercise contempt power, Justice Brennan distinguished the bankruptcy courts from the administrative agency involved in \textit{Crowell v. Benson} by emphasizing that “[t]he agency did not possess the power to enforce any of its compensation orders: On the contrary, every compensation order was appeal-
able to the appropriate federal district court, which had the sole power to enforce it or set it aside. . . .”\textsuperscript{45} The bankruptcy court, on the other hand, could “exercise all ordinary powers of district courts, including the power to preside over jury trials, . . . and the power to issue any order, process, or judgment appropriate for the enforcement of the provisions of Title 11 . . . .”\textsuperscript{46} As a result, the Court concluded that the Code “vests all ‘essential attributes’ of the judicial power of the United States in the ‘adjunct’ bankruptcy court.”\textsuperscript{47}

III. Rule-making and Legislation After Marathon

In August 1982, less than two months after the Marathon decision, the Advisory Committee on Bankruptcy Rules transmitted to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed rules and forms for practice under the Code. The Supreme Court adopted the new Bankruptcy Rules on April 25, 1983, and transmitted them to Congress, which permitted them to become effective ninety days thereafter.\textsuperscript{48} Bankruptcy Rule 9020 modified former Bankruptcy Rule 920 to include the limitations of § 1481 of Title 28 of the United States Code on the power of the bankruptcy court to punish criminal contempt not committed in the presence of the bankruptcy judge or warranting a punishment of imprisonment. Rule 9020 provided procedures for punishment of those criminal contempts within the jurisdiction of the bankruptcy court under § 1481, while permitting the judge to certify the facts to the district court in cases beyond the bankruptcy court’s jurisdiction.\textsuperscript{49}

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\textsuperscript{45} Id. at 78. The plurality repeatedly emphasized the absence of the power of the Compensation Commission (the administrative agency whose jurisdiction was at issue in Crowell) to enforce its orders. See id. at 85 (“[T]he agency in Crowell possessed only a limited power to issue compensation orders pursuant to specialized procedures, and its orders could be enforced only by order of the district court . . . . [T]he agency in Crowell was required by law to seek enforcement of its compensation orders in the district court.”); id. at 86 n.38 (“Although the entry of an enforcement order is in some respects merely formal, it has long been recognized that ‘[t]he award of execution. . . . is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment in the legal sense of the term, without it.’” (citations omitted)).

\textsuperscript{46} Id. at 85.

\textsuperscript{47} Id. at 84-85 (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)).

\textsuperscript{48} See 9 COLLMR ON BANKRUPTCY § 9020 (Lawrence P. King et al. eds., 15th ed. Supp. 1995).

\textsuperscript{49} Bankruptcy Rule 9020, as adopted in 1983, read as follows:

**CRIMINAL CONTEMPT PROCEDURES**

(a) Procedure

(1) Summary Disposition. Criminal contempt which may be punished by a bankruptcy judge acting pursuant to 28 U.S.C. § 1481 may be punished summarily by a bankruptcy judge if he saw or heard the conduct constituting the contempt and if it was committed in his actual presence. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(2) Disposition After a Hearing. Criminal contempt which may be punished by a bankruptcy judge acting pursuant to 28 U.S.C. § 1481, except when determined as provided in paragraph (1) of this subdivision, may be punished by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting
Because the Federal Rules of Criminal Procedure did not purport to deal with civil contempt, Rule 9020 similarly did not address it, and courts were directed instead to “[t]he decisional law governing the procedure for imposition of civil sanctions by the district courts . . . .”  

The Supreme Court stayed the effective date of its Marathon judgment first to October 4, 1982, and then to December 24, 1982, in order to provide Congress an opportunity to respond to the decision. When Congress failed to do so by the latter deadline, the Judicial Conference of the United States proposed a draft “Emergency Rule” to be adopted by the district courts which it thought would enable the bankruptcy court system to continue to operate in a constitutional fashion. The Emergency Rule referred to the bankruptcy courts “[a]ll cases under title 11 and all civil proceedings arising under title 11 or arising in or related to cases under title 11,” but permitted the district court to withdraw the reference at any time. The Emergency Rule gave the bankruptcy courts authority to perform “all acts and duties necessary” to handle referred cases and proceedings, but it barred them from conducting (i) proceedings to enjoin a court, (ii) proceedings to punish criminal contempt not committed in the actual presence of the bankruptcy judge or warranting a punishment of imprisonment, (iii) appeals from a decision of a bankruptcy judge, or (iv) jury trials. In “related proceedings,” the bankruptcy court could not, without the consent of the parties, enter a judgment or dispositive

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The criminal contempt charged and describe the contempt as criminal and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court’s own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.

(3) Certification to District Court. If it appears to a bankruptcy judge that criminal contempt has occurred, but the court is without power under 28 U.S.C. § 1481, to punish or to impose the appropriate punishment for the criminal contempt the judge may certify the facts to the district court.

(b) Right to Jury Trial. Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

FED. R. BANKR. P. 9020.

50. Federal Rule of Criminal Procedure 42 provides procedural rules for courts of the United States with respect to criminal contempt. FED. R. CRIM. P. 42.

51. FED. R. BANKR. P. 9020 advisory committee’s note, reprinted in 9 COLLIER ON BANKRUPTCY, supra note 48, ¶ 9020.01.


54. The Emergency Rule is set out in full as an appendix to White Motor Corp. v. Citibank, N.A., 704 F.2d 254 (6th Cir. 1983). In the section dealing with “Powers of Bankruptcy Judges,” the Rule precluded bankruptcy judges from conducting, among other things, “a proceeding to punish a criminal contempt—(i) not committed in the bankruptcy judge’s actual presence; or (ii) warranting a punishment of imprisonment . . . .” Id. at 266.

55. Id. at 265-66.

56. Id. at 266.

57. Id. (defining “related proceedings” to be “those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court”).
order, but could only submit findings and a proposed judgment or order to the district court.\(^{58}\) In other proceedings, the bankruptcy court's orders and judgments were final, subject to \textit{de novo} review by the district court.\(^{59}\) The district court was authorized to "give no deference to the findings of the bankruptcy judge," even in proceedings that were not "related proceedings."\(^{60}\)

In the Bankruptcy Amendments and Federal Judgeship Act of 1984,\(^{61}\) Congress adopted, with some modifications, the jurisdictional structure of the Emergency Rule, after rejecting proposals that would have given bankruptcy courts Article III status.\(^{62}\) BAFJA designates bankruptcy judges as a "unit of the district court to be known as the bankruptcy court for that district,"\(^{63}\) to serve as "judicial officers of the United States district court established under Article III of the Constitution."\(^{64}\) It authorizes the courts of appeals to appoint bankruptcy judges to fourteen-year terms\(^ {65}\) and states that a bankruptcy judge can be removed during that term "only for incompetence, misconduct, neglect of duty, or physical or mental disability."\(^ {66}\) BAFJA permits the district courts to refer "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" to the bankruptcy judges.\(^ {67}\) Bankruptcy judges can "hear and determine" all cases and "core proceedings"\(^ {68}\) arising

\begin{itemize}
\item \(^{58}\) Id.
\item \(^{59}\) Id. at 266-67.
\item \(^{60}\) Id.
\item \(^{62}\) See generally Legislative History of the Bankruptcy Amendments and Federal Judgeship Act of 1984, \textit{reprinted in} 4 \textit{App. COLLIER ON BANKRUPTCY, supra} note 48, at xx1-xx93.
\item \(^{63}\) BAFJA \$ 104(a), 98 Stat. 333, 336 (1984) (current version at 28 U.S.C. \$ 151 (1988)).
\item \(^{64}\) 28 U.S.C. \$ 152(a)(1).
\item \(^{65}\) Id.
\item \(^{66}\) Id. \$ 152(e).
\item \(^{67}\) Id. \$ 157(a).
\item \(^{68}\) "Core proceedings" are defined as follows:
\begin{itemize}
\item \(\text{Core proceedings include, but are not limited to—}\)
\item \(\text{(A) matters concerning the administration of the estate;}\)
\item \(\text{(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interest for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;}\)
\item \(\text{(C) counterclaims by the estate against persons filing claims against the estate;}\)
\item \(\text{(D) orders in respect to obtaining credit;}\)
\item \(\text{(E) orders to turn over property of the estate;}\)
\item \(\text{(F) proceedings to determine, avoid, or recover preferences;}\)
\item \(\text{(G) motions to terminate, annul, or modify the automatic stay;}\)
\item \(\text{(H) proceedings to determine, avoid, or recover fraudulent conveyances;}\)
\item \(\text{(I) determinations as to the dischargeability of particular debts;}\)
\item \(\text{(J) objections to discharges;}\)
\item \(\text{(K) determinations of the validity, extent, or priority of liens;}\)
\item \(\text{(L) confirmations of plans;}\)
\item \(\text{(M) orders approving the use or lease of property, including the use of cash collateral;}\)
\item \(\text{(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;}\)
\end{itemize}
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under Title 11 or arising in a case under Title 11, but they can only “hear” a proceeding that is not a “core proceeding” but that is “otherwise related to a case under title 11” and submit proposed findings of fact and conclusions of law to the district court, unless the parties consent to the jurisdiction of the bankruptcy court in such related proceedings. The district court may withdraw the reference to the bankruptcy court, in whole or in part, “for cause shown.” Although appeals from final bankruptcy court orders are taken to the district court “in the same manner as appeals in civil proceedings generally,” the district court must review de novo proposed findings of fact and conclusions of law to which a party has objected in a related proceeding.

Congress amended Title 28 to vest “original and exclusive jurisdiction of all cases under title 11” and “original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11” in the district courts. This amendment effectively repealed the broad grant of jurisdiction to the bankruptcy courts previously contained in Title 28.

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

Id. § 157(b)(2).

69. Id. § 157(b)(1).

70. Id. § 157(c)(1).

71. Id. § 157(c)(2).

72. Id. § 157(d).

73. Id. § 158(c).

74. Id. § 157(c)(1).

75. BAFJA § 101, 98 Stat. at 333 (current version at 28 U.S.C. § 1334). Amended § 1334 replaces 28 U.S.C. § 1471 which granted the same jurisdiction to the district courts but provided that the bankruptcy courts could exercise all jurisdiction conferred on the district courts.


BAFJA also amended § 105 of the Code. The reference to the “bankruptcy court” in clause (a) was replaced with a reference to the “court” and a new clause (c) clarified that § 105 did not provide an independent basis for bankruptcy court jurisdiction apart from Title 28 of the United States Code.

In 1986, the Advisory Committee on Bankruptcy Rules transmitted to the Judicial Conference the Bankruptcy Rule amendments required by BAFJA. Among those changes, which became effective August 1, 1987, were revisions to Bankruptcy Rule 9020. Although the preliminary draft of revised Rule 9020 would have required that all motions for contempt be filed in the district court and would have limited a bankruptcy judge to certifying the facts of a contempt to the district court for hearing and determination, the final rules provided for the initial determination of contempt to be made by the bankruptcy judge, even though “[t]he Advisory Committee recognized that bankruptcy judges may . . . not have the power to punish for contempt.” Under revised Rule 9020, a bankruptcy judge has the power

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78. Clause (a), as amended, reads: “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).
79. The new clause (c) reads, in its entirety:

The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

Id. § 105(c).
81. Letter from Morey L. Sear, on behalf of Advisory Committee on Bankruptcy Rules, to Edward T. Gignoux, Chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (June 13, 1986) in Preface to 1995-2 COLLIER PAMPHLET EDITION BANKRUPTCY RULES at lxxxvii-lxxxviii (Lawrence P. King et al. eds.). The Advisory Committee Note to the amended Rule 9020 reads:

The United States Bankruptcy Courts, as constituted under the Bankruptcy Reform Act of 1978, were courts of law, equity and admiralty with an inherent contempt power, but former 28 U.S.C. § 1481 restricted the criminal contempt power of bankruptcy judges. Under the 1984 amendments, bankruptcy judges are judicial officers of the district court, 28 U.S.C. §§ 151, 152(a)(1). There are no decisions by the courts of appeals concerning the authority of bankruptcy judges to punish for either civil or criminal contempt under the 1984 amendments. This rule, as amended, recognizes that bankruptcy judges may not have the power to punish for contempt.

Sound judicial administration requires that the initial determination of whether contempt has been committed should be made by the bankruptcy judge. If timely objections are not filed to the bankruptcy judge’s order, the order has the same force and effect as an order of the district court. If objections are filed within 10 days of service of the order, the district court conducts a de novo review pursuant to Rule 9033 and any order of contempt is
summarily to punish contempt committed in his or her presence. A bankruptcy judge may determine other contempt after notice and a hearing. If the party found in contempt does not object to the bankruptcy court's order of contempt within ten days after service of the order, the order has the same force and effect as a district court order. If objections are filed, the district court reviews the order as provided in Rule 9033(b).

At the same time that the Bankruptcy Rules were being amended, Congress enacted the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986. The purpose of the law was to provide for the appointment of additional bankruptcy judges and to implement the United States trustee program of bankruptcy administration on a nationwide basis. In Subtitle A of Title II of that Act, entitled “Activities of United States Trustees,” Congress amended § 105(a) of the Code to include the following sentence:

No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination neces-

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entered by the district court on completion of the court's review of the bankruptcy judge's order.


82. Rule 9020, as amended in 1987 (and further amended in 1991 in a nonsubstantive way), states:

Contempt Proceedings

(a) Contempt Committed in Presence of Bankruptcy Judge. Contempt committed in the presence of a bankruptcy judge may be determined summarily by a bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.

(b) Other Contempt. Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivision (a) of this rule, may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.

(c) Service and Effective Date of Order; Review. The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day period, the entity named therein serves and files objections prepared in the manner provided in Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033.

(d) Right to Jury Trial. Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

FED. R. BANKR. P. 9020.

83. FED. R. BANKR. P. 9033(b) (specifying the procedures for review of proposed findings of fact and conclusions of law in noncore proceedings).


BANKRUPTCY'S CONTEMPT POWER

sary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process. 86

This amendment, like all of Subtitle A of Title II of the Act, became effective for particular judicial districts as those districts entered the permanent United States Trustee system. 87

IV. FINDING CONTEMPT POWER—A PRAGMATIC ANALYSIS

BAFJA's elimination of both § 1481 and the amendment to § 451, which generally had been thought to provide the primary statutory basis for the contempt powers of the bankruptcy court, left unresolved the issue of whether bankruptcy courts could exercise contempt power. The amended Bankruptcy Code no longer mentioned the word "contempt."

Courts confronting the contempt issue in the post-BAFJA era have faced the following questions. First, do the bankruptcy courts continue to have statutory authority to exercise civil or criminal contempt power? If not, do they have inherent power to do so? If they have statutory and/or inherent power, would the exercise of such power violate Article III of the Constitution as interpreted in *Marathon*? Most courts which have threaded their way through this thicket of issues have come to the pragmatic, 88 but intellectually unsatisfying, conclusion that bankruptcy courts have the power to cite for civil contempt, but not for criminal contempt.

A. Legislative Authority for the Contempt Power

Although courts continued to rely on § 1481 of Title 28 of the United States Code as the basis for contempt orders even after the *Marathon* decision, 89 the BAFJA amendments necessitated a new


87. Id. § 302(d), 100 Stat. at 3119-20 (amended 1990). Section 302 was amended by § 317 of the Judicial Improvement Act of 1990, Pub. L. No. 101-650, § 317, 104 Stat. 5089, 5115-16, to make the amendment to § 105(a) "effective as of the date of the enactment of the Federal Courts Study Committee Implementation Act of 1990 [the name given to Title II of the Judicial Improvement Act by section 301 thereof]."

88. For example; in expressing puzzlement at the conclusion of some courts that bankruptcy judges lack contempt power, one bankruptcy judge said that "the consequences of such decisions on the workload of the U.S. District Court and the litigation delays necessarily involved mean that the result [of such decisions] will be more serious than merely puzzling." *In re Taylor*, 59 B.R. 197, 200 (Bankr. M.D. La. 1986).

analysis of the power's source. The circuit court that first confronted the issue concluded that after BAFJA bankruptcy courts lacked statutory authority to exercise the power of contempt. In *Plastiras v. Idell (In re Sequoia Auto Brokers, Ltd.)*, 90 the Ninth Circuit initially noted the absence of an express statutory provision granting contempt powers to bankruptcy courts. It then considered whether such powers could be inferred from § 105 of Title 11 and § 157 of Title 28 of the United States Code. 91 After reviewing the history of the contempt power in bankruptcy courts, the court turned to the definition of "core proceedings" in § 157(b)(2). It found no indication that a contempt proceeding fell within the definition of a core proceeding, nor could the court find implicit jurisdiction based on the grant of power over the core proceeding out of which the contempt arose. 92 Dismissing the argument that § 105 provided an independent source for the contempt power, the court noted that the jurisdictional limits of § 105 are set forth in Title 28. Moreover, the Ninth Circuit thought it unlikely that Congress would have granted to bankruptcy courts contempt powers that were less limited in scope than those exercised by Article I courts, Article III courts, and Congress itself. 93 Concluding that "[i]f Congress had intended that bankruptcy judges should possess such power, it well knew how to confer it," 94 the court held that the bankruptcy court had no statutory authority to issue the contempt order before it. 95

90. 827 F.2d 1281, 1284 (9th Cir. 1987).
91. Id. at 1284. The court noted that Rule 9020, jurisdictionally based on repealed § 1481, could not be construed as authority for the exercise of contempt powers. Id. at 1288-89.
92. Id. at 1289; see also United States v. Richardson (In re Richardson), 85 B.R. 1008, 1022 n.29 (Bankr. W.D. Mo. 1988) (dictum); United States v. Dowell (In re Dowell), 82 B.R. 998, 1006 n.15 (Bankr. W.D. Mo. 1987), remanded, 95 B.R. 690 (W.D. Mo. 1988) (clarifying that a bankruptcy court has the authority initially to render independent factual and legal decisions relative to contempt); Omega Equip. Corp. v. John C. Louis Co., Inc. (In re Omega Equip. Corp.), 51 B.R. 569, 574 (Bankr. D.D.C. 1985) (finding a contempt proceeding in bankruptcy to be a "related" proceeding); Wesley Medical Ctr. v. Wallace (In re Wallace), 46 B.R. 802, 806 (Bankr. W.D. Mo. 1984) (civil contempt is a related proceeding in bankruptcy); cf. I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F.2d 1541, 1548 n.8 (11th Cir. 1986) (assuming arguendo for purposes of appeal that contempt proceeding is core and thus has res judicata and collateral estoppel effect, but noting that courts have disagreed on issue). See generally Jon C. Sogn, Comment, In re Krisle: Civil Contempt Power of the Bankruptcy Court, 31 S.D. L. REV. 273 (1986) (arguing that civil contempt must be considered part of the main cause, a core proceeding).
94. 827 F.2d at 1290.
Those courts that continued to find civil contempt power in the bankruptcy courts nonetheless derived that power from § 105 and § 157. Immediately after its amendment in BAFJA, § 105(a) of the Code authorized a bankruptcy court to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of the Code. In 1986, Congress again amended the section to add a second sentence making reference to actions “necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.”¹⁹⁶ The Fourth Circuit, in the leading case of Burd v. Walters (In re Walters),¹⁹⁷ found that the “plain meaning” of § 105(a) conferred the power to hold a party in civil contempt.¹⁹⁸

Similarly, the Tenth Circuit in Mountain America Credit Union v. Skinner (In re Skinner)¹⁹⁹ determined that the language of § 105(a) was unambiguous. It concluded, based on the “plain language of the Section,” that Congress conferred civil contempt power on bankruptcy courts.¹⁰⁰ However, unlike the Fourth Circuit, the court in Skinner recognized that the powers of the bankruptcy court under § 105(a) are limited by the jurisdictional grant of § 157.¹⁰¹ Citing the decisions of a number of other courts which had so held, the court

rientation that BAFJA eliminated statutory contempt power for bankruptcy courts). But see Johnson Envtl. Corp. v. Knight (In re Goodman), 991 F.2d 613, 619 (9th Cir. 1993) (citing with approval language in Maritime Asbestosis Legal Clinic v. LTV Steel Co., Inc. (In re Chateaugay Corp.), 920 F.2d 183, 187 (2d Cir. 1990) (stating that bankruptcy courts may cite violators of automatic stay for civil contempt)); Wagner v. Piper Indus., Inc. (In re Wagner), 87 B.R. 612, 616 (Bankr. C.D. Cal. 1988) (interpreting Sequoia to permit compliance with Rule 9020 procedure); but cf. United States v. Arkinson (In re Cascade Rds., Inc.), 34 F.3d 756, 767 (9th Cir. 1994) (remanding for reconsideration of civil contempt by bankruptcy court, but expressing “no opinion at this time on the way in which the bankruptcy court, if it chooses to do so, could impose such sanctions”); Chugach Timber Corp. v. Northern Stevedoring & Handling Corp. (In re Chugach Forest Prods., Inc.), 23 F.3d 241, 244 n.4 (9th Cir. 1994) (remanding to permit bankruptcy court to exercise discretion with respect to “damages” as a “sanction for willful violations of the stay”); Havelock v. Taxel (In re Pace), 159 B.R. 890, 904 (Bankr. 9th Cir. 1993) (finding power to award sanctions, as opposed to citing for contempt, under § 105), aff’d in part and vacated in part, 56 F.3d 1170 (9th Cir.); amended on reh’g, 67 F.3d 187 (9th Cir. 1995); Costa v. Welch (In re Costa), 172 B.R. 954, 963 n.15 (Bankr. E.D. Cal. 1994) (“The tea leaves say that bankruptcy judges have muscle in contempt matters even if their orders might not be final.”).

¹⁹⁶. 11 U.S.C. § 105(a) (1994); see also supra notes 84-87 and accompanying text.
¹⁹⁷. 868 F.2d 665 (4th Cir. 1989).
¹⁹⁸. Id. at 669. Walters interpreted § 105 as it existed prior to its 1986 amendment.
¹⁹⁹. 917 F.2d 444 (10th Cir. 1990).
²⁰¹. 917 F.2d at 447-48; see supra note 79 and accompanying text.
concluded that a civil contempt proceeding arising out of a core matter is itself a core matter within the meaning of § 157 and, therefore, is within the jurisdiction of a bankruptcy court.\textsuperscript{102}

Most cases following \textit{Walters} and \textit{Skinner} or their predecessors add little to the statutory analysis.\textsuperscript{103} Those that have moved beyond the circuit courts have found additional authority for the imposition of civil contempt sanctions in Bankruptcy Rule 9020, explicitly or implicitly concluding that its approval by Congress evidenced congressional intent that bankruptcy courts have the powers described therein.\textsuperscript{104}

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Other courts, even if they are inclined to follow Walters and Skinner, simply certify the facts of contempt to the district court rather than raise an issue as to their authority. Still others have held parties in contempt either without citing any statutory authority or merely citing Rule 9020.

With respect to criminal contempt, courts have reached more consistent conclusions. Perhaps motivated by a desire to avoid adopting an interpretation that might be subject to constitutional challenge, courts have held that, because a criminal contempt charge is


108. See Griffith v. Oles (In re Hipp, Inc.), 895 F.2d 1503, 1509 (5th Cir. 1990) ("[O]ur conclusion is nevertheless influenced by the perception that the constitutionality of the contrary position is subject to substantial question").
not a “core proceeding” within the meaning of § 157, a bankruptcy court cannot enter a final order.¹¹⁰

B. Inherent Power to Punish for Contempt

Although unnecessary to their holdings, most courts that have found implicit statutory authority in § 105 and § 157 for a bankruptcy court’s exercise of the civil contempt power also have invoked the “inherent power” of the bankruptcy court to enforce compliance with its orders.¹¹¹ These courts find such inherent authority in any “court,”


¹¹¹. The major controversy with respect to criminal contempt revolves around whether the bankruptcy court can, consistent with amended Rule 9020, hold a hearing and issue an order which, in the absence of objections, becomes final, or whether the bankruptcy court must certify the facts to the district court for a hearing in that venue. Under the 1983 version of Rule 9020, see supra note 49, it was clear that certification of all criminal contempt outside the bankruptcy court’s jurisdiction under 28 U.S.C. § 1481 was required. See, e.g., In re Industrial Tool Distribrs., Inc., 55 B.R. at 750; Craig v. Clifford (In re Crabtree), 47 B.R. 150, 153 (Bankr. E.D. Tenn. 1985). Although the procedures provided in the current version of Rule 9020, see supra note 82, have been approved by several courts as statutorily authorized, see, e.g., Brown v. Ramsay (In re Ragar), 3 F.3d 1174, 1178-80 (8th Cir. 1993); United States v. Revie, 834 F.2d 1198, 1206 (5th Cir. 1987), cert. denied, 487 U.S. 1205 (1988); In re Brown, 94 B.R. 526, 534 (Bankr. N.D. Ill. 1988); Midwest Properties No. Two v. Big Hill Inv. Co., 93 B.R. 357, 365-66 (N.D. Tex. 1988), in Griffith v. Oles (In re Hipp, Inc.), 895 F.2d 1503, 1519-20 (5th Cir. 1990), the Fifth Circuit concluded that Rule 9020 prescribed procedures only for contempt matters over which bankruptcy courts otherwise had jurisdiction and (because they had no jurisdiction over criminal contempt matters) criminal contempt must be heard by the district court. See also Arkos Installations, Inc. v. Grand Nat’l Bank (In re Arkos Installations, Inc.), 834 F.2d 1526, 1527 n.1 (9th Cir. 1987) (“[T]he bankruptcy judge must certify the facts to the district court to determine whether to issue the order.”); In re Lawrence, 164 B.R. 73, 76 (W.D. Mich. 1993) (stating that bankruptcy court had no jurisdiction to conduct criminal contempt hearing and enter order under Rule 9020); In re Sasson Jeans, Inc., 80 B.R. 289, 295 & n.6 (Bankr. S.D.N.Y. 1987) (certifying proposed findings of fact and conclusions of law to the district court “is in accord with accepted procedure”); certification set aside, 104 B.R. 600 (S.D.N.Y. 1989).

whether created as an Article III court or not, concluding, as one court put it, that “judicial power to issue an order carries with it the power to enforce such order.”\textsuperscript{112}

Rejecting this analysis, the Ninth Circuit in \textit{Sequoia}\textsuperscript{113} found that the source of the inherent power of contempt lies in Article III of the Constitution. Bankruptcy courts, created “pursuant to [Congress’s] substantive authority over bankruptcies” in Article I, section 8, of the Constitution, cannot derive inherent contempt power from Article

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\item \textit{let-Buick-Oldsmobile, Inc. v. Richie} (\textit{In re Jim Nolker Chevrolet-Buick-Oldsmobile, Inc.}), 121 B.R. 20, 22 n.5 (Bankr. W.D. Mo. 1990) (“[T]he Supreme Court has noted on numerous occasions that the power to punish for contempt is inherent in all courts.”);
\item \textit{In re Galvez}, 119 B.R. 849, 850 (Bankr. M.D. Fla. 1990) (“This Court . . . is satisfied that non-Article III courts have inherent power to enforce the lawful court orders issued in a proceeding over which the court had jurisdiction, even absent specific statutory authorization . . . . However . . . this Court . . . finds such authority in § 105 of the Bankruptcy Code.”);
\item \textit{In re Esposito}, 119 B.R. 305, 307 (Bankr. M.D. Fla. 1990) (“[T]his Court is satisfied that it has the inherent power and an implied statutory power pursuant to § 105 of the Bankruptcy Code to find one in civil contempt.”);
\item \textit{In re Cordova Gonzalez}, 99 B.R. 188, 191 (Bankr. D.P.R. 1989) (noting that “[t]he judiciary has the inherent power to punish contempt to vindicate its own authority” within jurisdiction of 28 U.S.C. § 157);
\item \textit{In re Miller}, 81 B.R. 669, 676 (Bankr. M.D. Fla. 1988) (“it is fair to conclude that all courts, whether created pursuant to Article I or Article III of the Constitution, do have inherent civil contempt power to enforce compliance with their lawful judicial orders, and no specific statute is required to invest a court with civil contempt power,” but finding “ample authority to exercise civil contempt power based on section 105 of the Bankruptcy Code, albeit by implication”);
\item \textit{In re Derryberry}, 72 B.R. 874, 884 (Bankr. N.D. Ohio 1987) (finding that the court has inherent contempt powers in addition to power under § 105);
\item \textit{In re McLean Indus., Inc.}, 68 B.R. 690, 695 (Bankr. S.D.N.Y. 1986) (“[T]he power of the bankruptcy court to issue an order of civil contempt is derived from three sources: the inherent power of a court, including an Article I court, the reference of the inherent power of the district court, and the statutory grant contained in 11 U.S.C. § 105.”);
\item \textit{In re Shafer}, 63 B.R. 194, 197 (Bankr. D. Kan. 1986) (“The contempt power is inherent in all courts . . . . Title 11 U.S.C. § 105(a) codifies the contempt powers of bankruptcy courts.”);
\item \textit{In re L.H. & A. Realty, Inc.}, 62 B.R. 910, 912 (Bankr. D. Vt. 1986) (“The power of civil contempt inherent in the judicial responsibilities of the bankruptcy judge is recognized by statute, 11 U.S.C. section 105(a), by rule, Bankruptcy Rule 9020, and has been acknowledged or simply assumed to subsist in various non-Article III tribunals.”) (footnote omitted); cf. \textit{In re Silver}, 46 B.R. 772, 774 n.2 (D. Colo. 1985) (finding that a bankruptcy court had inherent power to award fees for contempt; no authority cited); \textit{Goodman v. NLRB} (\textit{In re Goodman}), 81 B.R. 786, 794 (Bankr. W.D.N.Y.), \textit{aff’d in part and rev’d in part}, 90 B.R. 56 (W.D.N.Y. 1988), \textit{aff’d in part and rev’d in part}, 873 F.2d 598 (2d Cir. 1989) (stating that “bankruptcy courts are possessed with inherent contempt powers to enforce compliance with their orders”);
\item \textit{In re Kennedy}, 80 B.R. 673 (Bankr. D. Del. 1987) (relying on inherent powers, finding “no specific statute is required to give a court that civil contempt power”);
\item \textit{In re Bloomer-Fiske Indus., Inc.}, 77 B.R. 658, 661 n.2 (Bankr. N.D. Ill. 1987) (“this Court is of the opinion that the Bankruptcy court has the inherent power to issue civil contempt orders”; no statutory authority found); \textit{American Bank & Trust Co. v. Morgan} (\textit{In re Moyer}), 51 B.R. 302, 308 (Bankr. D. Utah 1985) (“The contempt sanction is the most prominent of the Court’s inherent powers,” citing \textit{Fed. R. Civ. P. 37}).
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\textsuperscript{113} Plastiras v. Idell (\textit{In re Sequoia Auto Brokers, Ltd.}), 827 F.2d 1281 (9th Cir. 1987).
Absent statutory authority for the contempt power (which the court did not find), the Ninth Circuit concluded that bankruptcy courts lacked jurisdiction to exercise such power.\textsuperscript{115} As in the case of statutory authority, all courts agree that bankruptcy courts lack inherent criminal contempt power.\textsuperscript{116}

### C. Constitutionality of the Contempt Power

Having concluded that a bankruptcy court has no statutory or inherent authority to exercise the civil contempt power, the Ninth Circuit in \textit{Sequoia} expressly declined to decide the constitutional issue of whether the exercise of such power would be constitutional.\textsuperscript{117} However, other courts have confronted the issue, either because they concluded that Congress has conferred the power pursuant to § 105 and § 157 (or had recognized the preexisting inherent power of the bankruptcy court to cite for contempt) or because the constitutional issue informed their statutory analysis, leading them to conclude that no legislative authority existed.

Those courts finding statutory authority for the contempt power are, not surprisingly, most likely to find the exercise of such authority consistent with the requirements of Article III of the Constitution, as interpreted in \textit{Marathon}. They have reached that conclusion in three different ways. Some courts read \textit{Marathon} narrowly, noting that it merely precluded the bankruptcy courts from exercising jurisdiction over certain state-law claims.\textsuperscript{118} These courts find, as one stated, that the enforcement of bankruptcy court orders are "at the core of the federal bankruptcy power and therefore . . . of a 'public rights' nature."\textsuperscript{119}

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  \item \textsuperscript{114} \textit{Id.} at 1284; see also Griffith v. Oles (In re Hipp, Inc.), 895 F.2d 1503, 1513 (5th Cir. 1990) (agreeing with the Ninth Circuit that Article III is the source of inherent power to punish contempt).
  \item \textsuperscript{115} 827 F.2d at 1284; see also Gonzales v. Parks, 830 F.2d 1033, 1036 n.7 (9th Cir. 1987) ("[C]ontempt power is inherent in Article III courts, but must be expressly granted to Article I courts."); United States v. Jenkins (In re Richardson), 52 B.R. 527, 533 (Bankr. W.D. Mo. 1985) ("[T]here is no such inherent contempt power residing in the bankruptcy court.").
  \item \textsuperscript{116} See, e.g., \textit{In re Hipp}, 895 F.2d at 1511 ("[B]ankruptcy courts do not have inherent criminal contempt powers, at least with respect to the criminal contempts not committed in (or near) their presence.") (citation omitted); Tele-Wire Supply Corp. v. Presidential Fin. Corp. (In re Industrial Tool Distrib., Inc.), 55 B.R. 746, 750 n.8 (N.D. Ga. 1985) ("[T]he court does not believe that the Bankruptcy Court has inherent criminal contempt powers."); \textit{In re Kennedy}, 80 B.R. 673, 674 (Bankr. D. Del. 1987) ("This court has no criminal jurisdiction.").
  \item \textsuperscript{117} 827 F.2d at 1289-90 n.15.
  \item \textsuperscript{118} See supra notes 33-47 and accompanying text.
  \item \textsuperscript{119} Gibbons v. Haddad (In re Haddad), 68 B.R. 944, 951 (Bankr. D. Mass. 1987); see also Burd v. Walters (In re Walters), 868 F.2d 665, 670 (4th Cir. 1989) (determination of contempt "does not involve private rights under non-bankruptcy law"); \textit{In re Schatz}, 122 B.R. 327, 330 (N.D. Ill. 1990) (stating that the right to discharge is "created by federal statute" and is "not a private, or state-created right like that in issue in \textit{Marathon};" if a court can order discharge, it can decide if party is in contempt of that order); Kellogg v. Chester, 71 B.R. 36, 38 (N.D. Tex. 1987) (determination of contempt "would involve no determination of private rights under non-bankruptcy law"); Better Homes of Va., Inc. v. Budget Serv. Co. (In re Better Homes of Va.,
In a similar vein, some courts assume that BAFJA solved any constitutional concerns about bankruptcy court jurisdiction and that bankruptcy courts constitutionally can exercise power over "core" proceedings. Having determined that the statutory basis for the contempt power is § 157 and that contempt proceedings are "core," these courts conclude that bankruptcy court jurisdiction over contempt proceedings is constitutional.\(^{120}\)

Finally, some courts conclude that the 1987 version of Rule 9020 "adequately address[es]" the constitutional concerns.\(^{121}\) Thus, any contempt proceedings conducted in accordance with the Rule pass constitutional muster.\(^{122}\)

Those courts reaching the contrary conclusion generally have followed the leading case of Lindsey v. Cryts (In re Cox Cotton Co.),\(^{123}\) which was reversed on other grounds by the Eighth Circuit.\(^{124}\) In an opinion characterized by the court of appeals as "thorough" and "analytical,"\(^{125}\) Chief District Judge Eisele concluded that Congress cannot freely confer the contempt power because it flows with the "judicial power of the United States" under Article III of the Constitution.\(^{126}\) Thus, if a court is not established pursuant to Article III, "it could not possess the contempt power."\(^{127}\) To find otherwise, Judge Eisele concluded, would "conflict with the doctrine of separation of powers, disregard the awesome nature of the contempt power itself, subvert its inherently judicial character, and seriously undermine the fundamental policies which underlie Article III."\(^{128}\)

With respect to separation of powers, Judge Eisele noted that the contempt power is inherently judicial in nature.\(^{129}\) "If Congress could

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120. See, e.g., In re L.H. & A. Realty, Inc., 62 B.R. 910, 916 (Bankr. D. Vt. 1986) (civil contempt order was "issue of purely federal law," and "did not concern a right independent of, or antecedent to the debtor's bankruptcy").


125. Id. at 623.


127. Id. at 946.

128. Id. at 947-48.

129. Id. at 948, 950.
vest the contempt power freely in any body it so chose, the judicial nature of the power would clearly be abrogated and the judicial branch of the government would likewise be subverted." The "onerous" nature of contempt and the need to protect parties from abuse or oppressive conduct also justify reserving the contempt power to the judicial branch. \(130\) Finally, the court noted that Article III not only insures the independence and integrity of the federal judiciary by protecting it from "improper influences" \(132\) but also guarantees an individual "the right to have a controversy resolved or a punishment imposed by an Article III judge." \(133\) To allow a bankruptcy judge to exercise the contempt power would undermine these Article III principles. \(134\)

In order to avoid finding that Congress had conferred Article III powers upon bankruptcy courts in violation of the Constitution, those courts persuaded by the reasoning in \textit{Cox} found that a contempt hearing is not a core proceeding within the meaning of § 157; thus, the bankruptcy court could not enter a final order. \(135\) Nevertheless, one court reached the conclusion that a civil contempt order, resulting from the failure of a party to comply with an order of the bankruptcy court in a core proceeding, is itself within the statutory power of the court under § 157, but the court held that this legislative delegation to the bankruptcy court is unconstitutional. \(136\)

\section*{V. \textbf{CIVIL CONTEMPT—A NEW ANALYSIS}}

As indicated in the discussion in section IV, the overwhelming majority of courts considering the issue have found that bankruptcy courts have statutory and/or inherent power to cite parties for civil contempt and that the exercise of such power is consistent with constitutional constraints. Their analysis, however, misapprehends the nature of the so-called bankruptcy courts after the BAFJA amendments, misreads statutory language and history in such a way as unnecessarily to engender a constitutional issue, and ignores the cautions of \textit{Mara-}

\begin{itemize}
  \item \(130\). \textit{Id.} at 948.
  \item \(131\). \textit{Id.} at 949.
  \item \(132\). \textit{Id.} at 950.
  \item \(133\). \textit{Id.} at 951.
  \item \(134\). \textit{Id.} at 952; \textit{see also} \textit{R&M Porter Farms, Inc. v. Green Hills Prods. Credit Ass'n (In re R & M Porter Farms, Inc.)}, 38 B.R. 88, 91-92 (Bankr. W.D. Mo. 1984) (following \textit{Cox}).
\end{itemize}
A. Distinguishing Article I Courts from Adjuncts

The initial flaw in the analysis for most courts looking at the contempt power of the bankruptcy court is that they begin with an incorrect premise—that a “court” (called the “bankruptcy court”) exists whose powers they are attempting to discern, over which a “judge” (called the “bankruptcy judge”) presides. Because Congress invoked the terminology of judicial administration (not to mention that used in Article III of the Constitution), these courts not surprisingly find that the talismanic properties of the labels include certain “inherent” rights and that those rights must be found in the statutory language, if not explicitly, then by reference.

As discussed in section I, until 1978, the label “courts of bankruptcy” was merely the name given to the district and territorial courts of the United States when exercising their bankruptcy jurisdiction. Although the 1898 Act had a definition of “court” which “may include the referee,” the Act separately granted jurisdiction to “courts of bankruptcy” and to “referees,” not to “courts.” It defined “judge” as “a judge of a court of bankruptcy, not including the referee” and granted referees, the predecessors of today’s bankruptcy “judges,” jurisdiction over most bankruptcy matters, “subject always to a review by the judge.”

The Bankruptcy Rules and Official Bankruptcy Forms of 1973, when referring to the person performing the judicial and administrative functions relating to a bankruptcy case (usually a referee but sometimes the district court judge) employed a new definition, “bankruptcy judge,” a useful drafting term to avoid the laborious

137. See supra text accompanying notes 8-19.
139. Id. § 1(a)(7), 30 Stat. at 544.
140. Id. § 2, 30 Stat. at 545.
141. Id. § 38, 30 Stat. at 555.
142. Id. § 1(a)(16), 30 Stat. at 544.
143. Id. § 38, 30 Stat. at 555.
145. Bankruptcy cases automatically were referred to a referee, subject to withdrawal of the reference, in whole or in part, by the district judge “at any time, for the convenience of parties or other cause.” Rule 102, 411 U.S. at 1003. In addition, the referee generally could not preside over certain proceedings, including jury trials (Rules 115(b), 411 U.S. at 1011-12, and 409(c), 411 U.S. at 1053-54), contempt proceedings (Rule 920, 411 U.S. at 1100-01) and injunctions to restrain a court (§ 2a(15) of the 1898 Act, § 2, 30 Stat. at 545).
146. 411 U.S. at 1092 (Bankruptcy Rule 901(7)). The Advisory Committee Note to Rule 901 commented on the new definition as follows: Since Rule 102 requires all bankruptcy cases to be referred, the judicial and administrative functions assigned the court by the Act and these rules will be performed by a referee in all but a few instances. The term “bankruptcy judge” has been employed throughout the rules as a useful designation of the referee of the court in which a case is pending or the district judge when he acts in lieu of a referee. The term applies to the referee or the judge when
repetition of a phrase such as “the referee or the district judge, as the case may be.” This drafting convention in the 1973 Bankruptcy Rules, however, did not purport to change the statutory appellation of “referee.” In fact, the Rules themselves were replete with references to the “referee.”147

Congress and the courts consistently misinterpreted this new definition as a change in the title of the office from “referee” to “bankruptcy judge.”148 However, that change in nomenclature actually did not occur until the enactment of the Code in 1978. In section 404(b) of the Code,149 the term of the referees in bankruptcy serving at the time of enactment of the Code was extended at least to the end of the transition period (March 31, 1984), and they were thereafter to serve as, and be given the title of, “United States bankruptcy judges.”150

The bankruptcy courts created by the Code were, despite their label as “adjuncts to the district court,”151 truly independent courts,
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statutorily denominated “courts of the United States,”152 with judges appointed by the President with the advice and consent of the Senate.153 The Code allowed them to exercise all jurisdiction over bankruptcy matters conferred by Congress on the district courts.154 Moreover, Congress intended that these new bankruptcy courts “have the powers of a court of equity, law, and admiralty,” with limited exceptions.155

It was this very independence of the bankruptcy courts that the Supreme Court found unconstitutional in Marathon. Both the plurality and concurring Justices agreed that the bankruptcy courts created by the Code were not “adjuncts” in the sense of being constitutionally able to exercise delegated authority of an Article III court.156 One of the goals of Congress in enacting BAFJA was to attempt to remake the bankruptcy courts as true “adjuncts” of the district court whose authority would survive constitutional challenge.

Congress retained the labels “bankruptcy courts” and “bankruptcy judges,” but it changed their meanings. “Bankruptcy courts,” instead of being “courts of record” which were “adjuncts” to the district court, now became simply a word for “the bankruptcy judges in regular active service,” constituting “a unit of the district court.”157 The “bankruptcy judge,” while enjoying a judicial title, is merely “a judicial officer of the district court” exercising jurisdiction “conferred under this chapter,”158 and appointed by the United States court of appeals covering the applicable district.159 With the repeal of section 241 of the 1978 version of the Code,160 no grant of jurisdiction to the bankruptcy courts still exists. Instead, district courts have jurisdiction over bankruptcy cases and proceedings.161 In a section headed “Procedures,” the district courts are authorized to refer such cases and proceedings to the bankruptcy judges (not to the “bankruptcy courts”) for hearing and determination (for “cases under Title 11 and all core proceedings”) or for hearing only (for noncore proceedings “otherwise related to a case under Title 11”).162

In sum, just like “magistrate judges” on whom Congress conferred the title of “judge” in 1990,163 bankruptcy judges are administrative functionaries, wearing black robes and bearing an exalted title,
but functionaries nevertheless. Despite the fact that many judges repeatedly mislabel bankruptcy courts as “Article I courts,” as the Fifth Circuit has mused, “we are unsure even that today’s bankruptcy courts are ‘courts’ in a generic sense not defined strictly by Article III.” In a remarkable burst of self-effacing candor, one bankruptcy judge wrote:

One will search in vain in the statutes for the conferring of bankruptcy jurisdiction on any distinct entity comprising an Article I court. I may “be known as” a bankruptcy court but that doesn’t mean that there actually is some separate jurisprudential entity involved—anymore than Congress can make a “pink rock-candy mountain” actually exist just by saying so. . . . I am, and remain, a humble servant and officer of an Article III court, although by custom and practice I make bold to refer to myself as “this Court” or “the Court” from time to time.

Those courts that, after BAFJA, continue to search for the contempt power of the bankruptcy court, as if that entity were some congressionally created judicial body, are misled by titles and ignore the reality of the amendments wrought by BAFJA. The “bankruptcy court” is no longer a separate court. It has no existence independent of the Article III district court and cannot have powers, statutory or inherent, that are not derivative of the court of which it is a unit. Therefore, if it can exercise contempt powers, it exercises not powers of its own, but powers of the district court otherwise delegated to it as part of the reference. In essence, the bankruptcy judge wielding the contempt power is a sheep in wolf’s clothing, a “judicial officer of the district court” exercising the authority of an Article III judge.

B. Delegation to Adjuncts Under Article III

The authority of borrowed robes is not necessarily unconstitutional authority. As the analysis of the Supreme Court in Marathon


167. See, e.g., In re Depew, 51 B.R. 1010, 1012 (Bankr. E.D. Tenn. 1985) (district court may refer its inherent contempt power to bankruptcy court under 28 U.S.C. § 157); cf. United States v. Guariglia, 962 F.2d 160, 163 (2d Cir. 1992) (order of bankruptcy court is considered order of a “unit” of the district court; district court has authority to punish for contempt of “its” order).
made clear, "adjuncts" to Article III courts may operate within constitutional bounds.

The Supreme Court's decisions dealing with Article III adjuncts indicate that one must examine three elements to determine whether a delegation of powers by an Article III court to an "adjunct" is permissible. First, does clear statutory authorization for (or prohibition of) the delegation exist? If the statute precludes the delegation, the analysis ends. If the statute clearly authorizes the delegation or is susceptible of either interpretation, has the adjunct inappropriately assumed the functions of an Article III court? Finally, if a constitutional issue otherwise would loom as a result of the delegation, have the affected parties waived their right to adjudication by an Article III court by consenting or failing timely to object to the delegation? Increasingly, the presence of consent has been critical to any constitutional analysis of delegation of Article III power to non-Article III adjuncts.

1. Statutory Authorization

Judicial analysis inevitably begins with statutory interpretation. Although the courts' analysis of the specific language of other statutes is not particularly relevant to interpretation of the Code, the precepts applied by courts in their statutory interpretation have general applicability. The Supreme Court repeatedly has emphasized that "[i]t is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."¹⁶⁸ Moreover, a court should interpret the statute in "the context of the overall statutory scheme."¹⁶⁹ As the Supreme Court has explained, "[w]hen a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties."¹⁷⁰

Applying these general principles, courts have found statutory authority for the delegation of various powers to magistrate judge adjuncts and others.¹⁷¹ Where courts have found legislative authoriza-

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¹⁶⁹. Gomez, 490 U.S. at 864; see also McCarthy v. Bronson, 500 U.S. 136, 139 (1991) (quoting K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of [a statute], the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); Crandon v. United States, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.").

¹⁷⁰. Gomez, 490 U.S. at 864.

tion to be lacking, the basis for such a decision has been either clear statutory language to the contrary\textsuperscript{172} or the policy of constitutional avoidance described above.\textsuperscript{173}

Before the Bankruptcy Reform Act of 1994 amended § 157 to allow a bankruptcy judge to conduct jury trials if so authorized by the district court and with the express consent of all parties,\textsuperscript{174} courts hotly debated the statutory power of a bankruptcy judge to preside over a jury trial in a core proceeding. Five courts of appeals found no legislative provision permitting the exercise of such power and, to avoid creating a constitutional issue, declined to find implied power under § 157 or otherwise.\textsuperscript{175} Only one found statutory (and constitutional) authorization.\textsuperscript{176} However, the prevailing approach with re-


\textsuperscript{174} See Gomez v. United States, 490 U.S. 858 (1989) (nonconsensual jury selection in felony trial); TPO, Inc. v. McMillen, 460 F.2d 348 (7th Cir. 1972) (motions to dismiss or for summary judgment).

\textsuperscript{175} Section 112 of Bankruptcy Reform Act of 1994 amended the Code to read:

\begin{quote}
(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.
\end{quote}


spect to contempt power—for which no explicit statutory authority exists and for which the analysis therefore should have been identical prior to the 1994 amendment—has differed dramatically, even when considered by the same court that found jury trials so problematic.

As discussed in section IV.A, those courts finding contempt power in the bankruptcy courts conclude that Congress has statutorily granted the power in § 105(a) and § 157.177 While such an interpretation undoubtedly furthers the general statutory scheme of bankruptcy jurisdiction, it undermines the policy of avoiding constitutional issues where possible.

Since the amendments effected by BAFJA, the Code itself no longer contains any language relating to the contempt power. The very absence of such language might be viewed as significant. For example, the Federal Magistrates Act,178 which provides for the appointment and jurisdiction of magistrate judges, explicitly denies magistrate judges the power to cite a party for contempt occurring in proceedings before them. Pursuant to § 636(e) of Title 28 of the United States Code,179 if any act or conduct constituting contempt occurs before a magistrate judge, the magistrate judge must "certify the facts to a judge of the district court" and may issue an order to show cause requiring the alleged contemnor to appear before the district court for a contempt hearing. Only the district court may hear the evidence and punish the contempt.180 The language of § 636(e) is nearly identical to

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177. See supra notes 96-107 and accompanying text.
179. That section provides in full:
In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpoenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.
180. See, e.g., Taberer v. Armstrong World Indus., Inc., 954 F.2d 888, 901-08 (3d Cir. 1992) (reversing contempt judgment entered by district court because magistrate judge held contempt trial and district court relied on record of that trial instead of holding de novo hearing); see also United States v. Ritte, 558 F.2d 926, 927 (9th Cir. 1977) (magistrate had no jurisdiction to adjudicate contempt); NLFC, Inc. v. Devcom Mid-America, Inc., 93-C-0609, 1994 U.S. Dist. LEXIS 6245, at *8 (N.D. Ill. May 11, 1994) (district court must conduct de novo hearing, not merely make de novo determination as under § 636(b)(1)(C)); cf. Stotts v. Quinlan, 139 F.R.D. 321, 324
that of former section 41, which specified procedures for contempt occurring before bankruptcy referees.\footnote{See supra note 19 and accompanying text. The Senate Report discussing § 636 at the time of its enactment noted that the definition of contempt was the same as under the 1898 Act. See S. Rep. No. 371, 90th Cong., 1st Sess. 28 (1967).}

Some have suggested that Congress looked to the Federal Magistrates Act and the pre-Code bankruptcy referee system in crafting its response to Marathon in the BAFJA amendments, at least with respect to its noncore jurisdiction.\footnote{See, e.g., Production Steel, Inc. v. Bethlehem Steel Corp. (In re Production Steel, Inc.), 48 B.R. 841, 844 (M.D. Tenn. 1985).} If that is so, the absence in the amended Code of provisions comparable to those set forth in sections 636(e) and 41 can be interpreted to support or negate the argument that Congress intended to confer contempt powers on the bankruptcy judges. On the one hand, those precedents demonstrate that Congress knew well how to deal with the contempt power when it intended to deny it to Article III adjuncts. Its failure to include a similar provision in the Code, especially in light of the inclusion of a limitation on the contempt power in the Emergency Rule,\footnote{184. 11 U.S.C. § 105(c) (1994); see, e.g., Plastiras v. Idell (In re Sequoia Auto Brokers, Ltd.), 827 F.2d 1281 (9th Cir. 1987); In re Sea Span Publications, Inc., 126 B.R. 622, 625 (Bankr. M.D. Fla. 1991).} could indicate that Congress intended no limitation on the contempt power. On the other hand, Congress expressly repealed those sections of the 1978 version of the Code that it viewed as the jurisdictional basis for the exercise of the contempt power. Thus, the absence of any provision like section 636(e) simply may reflect the obvious conclusion that a limitation on a power is not necessary unless the power is granted.

If the absence of language specifically dealing with contempt does not inform the controversy, does the language included in the Code implicitly authorize the exercise of the contempt power by bankruptcy judges? Searching for such authorization in § 105(a), as many courts have done, is fruitless for several reasons. First, as the language of § 105(c) makes clear, the extent to which bankruptcy judges (as opposed to the district court) can exercise the powers referred to in § 105(a) “shall be determined by reference to the provisions relating to such judge . . . set forth in title 28.”\footnote{See supra note 54 and accompanying text.} In other words, § 105(a) does not itself grant any jurisdiction on the bankruptcy judges; it merely enables them to perform certain functions within their Title 28-conferrered jurisdiction.
Second, the history of § 105(a) indicates that it never intended to confer contempt power on anyone. The original language of § 105(a) was based on section 2(15) of the 1898 Act.\textsuperscript{185} However, the 1898 Act also included specific authorization to the courts of bankruptcy both to “enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment,”\textsuperscript{186} and to “punish persons for contempts committed before referees.”\textsuperscript{187} Congress could not have intended that section 2(15), later transformed into § 105(a), cover the same subject as these other more specific sections.

Moreover, the 1978 Code also had more specific sections conferring jurisdiction on bankruptcy courts, including § 1481, which specifically dealt with contempt power.\textsuperscript{188} If § 105(a) was intended to convey contempt power, Congress would have included the exclusion for punishment of criminal contempts not committed in the presence of the judge or warranting imprisonment in both § 105(a) and § 1481.

The addition of the second sentence to § 105(a) in 1986 does not change this analysis.\textsuperscript{189} Nothing in the language of the amendment itself or in the legislative history indicates an intention to confer contempt power on the bankruptcy judges. Indeed, the amendment’s inclusion in a portion of the law dealing with United States trustees and their activities suggests that Congress intended to negate the implication that the divestiture of administrative functions from bankruptcy judges to trustees barred bankruptcy judges from \textit{sua sponte} taking actions that the new trustees now would more likely propose.\textsuperscript{190} The relationship between the amendment and the United States trustee system is confirmed by the provisions dealing with the effective date of the amendment, which made the amendment effective for particu-

\begin{footnotesize}
\begin{enumerate}
\item Section 2(15) of the 1898 Act, previously codified at 11 U.S.C. § 11(a)(15), authorized courts of bankruptcy to “make such orders, issue such process, and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act.” Section 105(a) authorized bankruptcy courts to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”
\item Act of July 1, 1898, ch. 541, § 2(13), 30 Stat. 544, 546 (as amended) (repealed 1979).
\item Id. § 2(16), 30 Stat. at 546.
\item See supra note 27 and accompanying text.
\item See supra notes 84-87 and accompanying text. See generally William S. Parkinson, \textit{The Contempt Power of the Bankruptcy Court Fact or Fiction: The Debate Continues}, 65 AM. BANKR. L.J. 591, 613-19 (1991) (arguing that § 105(a) cannot provide legislative authority for contempt power).
\item The controversy over whether a bankruptcy judge could take action without a motion by a party had been a contentious issue prior to the amendment. \textit{Compare In re Moog}, 774 F.2d 1073 (11th Cir. 1985) and \textit{Gusam Restaurant Corp. v. Speciner (In re Gusam Restaurant Corp.)}, 737 F.2d 274 (2d Cir. 1984) (court could not \textit{sua sponte} convert case to Chapter 7 under 11 U.S.C. § 1112(b)) with \textit{Hayes v. Production Credit Ass’n of the Midlands}, No. 87-2171, 1992 U.S. App. LEXIS 3329, at *7 (10th Cir. Feb. 10, 1992) and \textit{In re Bayou Self, Inc.}, 73 B.R. 682, 683 (Bankr. W.D. La. 1987) (bankruptcy court could dismiss \textit{sua sponte} a Chapter 11 case even before amendment to § 105(a)).
\end{enumerate}
\end{footnotesize}
lar districts only as those districts became part of the permanent United States Trustee system. 191

Rule 9020, often cited by courts as additional legislative support for the contempt power, 192 cannot provide statutory authorization. Bankruptcy rules are promulgated under the aegis of the Rules Enabling Act, 193 which explicitly provides that the rules may not "abridge, enlarge, or modify any substantive right." If Rule 9020 were intended to create contempt power in the bankruptcy courts without substantive statutory authorization, it would itself be invalid.

If § 105(a) and Rule 9020 cannot serve as statutory authorization of the contempt power, can § 157(a) provide the basis for such a grant? Section 157(a) authorizes district courts to refer "any or all proceedings arising under title 11 or arising in or related to a case under title 11" to the bankruptcy judges, and it gives bankruptcy judges the authority to "hear and determine" core proceedings and "hear" noncore proceedings. 194

As an initial point, all matters over which bankruptcy judges have jurisdiction are either core or noncore matters. If they are core, the bankruptcy judge is authorized to issue a final order which is then subject to appeal "in the same manner as appeals in court proceedings generally." 195 If they are noncore, the bankruptcy judge has authority only to "submit proposed findings of fact and conclusions of law to the district court, and any final order or judgement shall be entered by the district court" after a de novo review of matters to which any party has objected. 196 Section 157 does not authorize a bankruptcy judge to enter an order in a noncore matter which becomes final if no objection is filed; if civil contempt proceedings are noncore, the provisions of Rule 9020 violate the requirements of § 157. 197

191. But see In re Daily Corp., 72 B.R. 489, 493-95 (Bankr. E.D. Pa. 1987) (holding that Congress made a technical error in linking the effective date of the § 105(a) amendment to the trustee program, and finding that § 105(a) amendment was intended to overrule court decisions concluding that a bankruptcy court was not a party in interest and, thus, could not act sua sponte). The provisions relating to the effective date were later amended to make the amendment to § 105 effective for those districts without trustee systems. See supra note 87 and accompanying text.

192. See supra note 104.


194. See supra notes 68-74 and accompanying text.


196. Id. § 157(c)(1).

197. See supra notes 80-83 and accompanying text. If contempt proceedings are core, Rule 9020 also fails to comply with 28 U.S.C. § 157(b)(1) because it does not permit a bankruptcy judge to enter a final order subject to normal appellate review. However, by affording parties more scrutiny by an Article III judge than they would otherwise obtain, Rule 9020 would not have any constitutional infirmity if contempt proceedings were core. Cf. Monarch Life Ins. Co. v. Ropes & Gray (In re Monarch Capital Corp.), 173 B.R. 31, 37 (Bankr. D. Mass. 1994) (finding Rule 9020 inapplicable to "core" contempt proceedings), aff'd, 65 F.3d 973 (1st Cir. 1995).
“Core proceedings” are defined in § 157(b)(2).198 None of the specifically itemized subjects in clauses (B)-(N) is applicable to contempt. The issue is whether contempt proceedings can be characterized as “matters concerning the administration of the estate”199 or “other proceedings affecting the liquidation of the estate or the adjustment of the debtor-creditor or the equity security holder relationship.”200 These “catch-all” clauses have been a source of controversy for courts since their enactment. Some courts have taken the view that they should be read narrowly and that no claim that is not enumerated elsewhere in § 157(b)(2) should be included within the “catch-all” provisions; these courts fear that to hold otherwise might exceed the constitutional limits on bankruptcy court jurisdiction established by Marathon.201 Other courts believe that the grant of jurisdiction established by § 157 should be read broadly and that the “catch-all” provisions encompass everything, except those state law claims specifically excluded from bankruptcy court jurisdiction in Marathon.202 Still other courts adopt a functional approach, looking to whether the claim invokes a substantive right created by bankruptcy law and whether it is one which exists independent of bankruptcy law and the bankruptcy case.203

If the first approach is adopted, the question regarding the contempt power is answered; the claim must be considered noncore, and bankruptcy courts have no statutory authority to enter final orders. The functional approach should lead to the same conclusion. Although a charge of contempt is neither a preexisting claim nor a

198. See supra note 68.
200. Id. § 157(b)(2)(O).
203. See, e.g., Johnston Envtl. Corp. v. Knight (In re Goodman), 991 F.2d 613, 617 (9th Cir. 1993); Sanders Confectionery Prods., Inc. v. Heller Fin., Inc., 973 F.2d 474, 483 (6th Cir. 1992), cert. denied, 506 U.S. 1079 (1993); In re Marcus Hook Dev. Park, Inc., 943 F.2d 261, 267 (3d Cir. 1991); Taxel v. Electronic Sports Research (In re Cinematronics, Inc.), 916 F.2d 1444, 1450 n.5 (9th Cir. 1990); Gardner v. United States (In re Gardner), 913 F.2d 1515, 1518 (10th Cir. 1990); Wood v. Wood (In re Wood), 825 F.2d 90, 97 (5th Cir. 1987); Hoffman v. Ramirez (In re Astroline Communications Co.), 161 B.R. 874, 878 (Bankr. D. Conn. 1993).
claim based on state law, it exists completely independent of the bankruptcy case. The claim involves noncompliance with the exercise of judicial power. The fact that the power allegedly flouted is that of a bankruptcy judge does not change the nature of the offense any more than the murder of a bankruptcy judge would make the perpetrator subject to core jurisdiction.

If the expansive approach is correct, the question regarding the contempt power simply is reframed as follows: If Congress intended § 157(a) to confer on bankruptcy judges jurisdiction over all proceedings within its constitutional power, is the contempt power within the exclusive purview of an Article III court, or can Congress constitutionally delegate it to an adjunct? Because this formulation of the question makes the statutory interpretation issue coextensive with the constitutional analysis (thus violating the general principle of interpreting statutes to avoid constitutional issues where possible), it moves us to the next step: the respective functions of an Article III court and an adjunct to that court.

2. Functions of Adjunct and Article III Courts

If statutory authorization is clear or ambiguous, the courts have examined the respective functions of the adjunct and the delegating Article III judge to determine if each continues to play a constitutional role in adjudication. Two concepts appear to be touchstones in this analysis. First, are the involved claims the type adjudication of which Congress may delegate to a non-Article III body? Second, if not, have the "essential attributes of the judicial power" been retained by the Article III court, including the ultimate decision-making authority?

a. Public Rights Doctrine

In declaring the bankruptcy courts as established by the 1978 version of the Code unconstitutional, the Supreme Court in Marathon found inapplicable those cases upholding, against constitutional challenge, "legislative courts and administrative agencies" created to adjudicate matters involving "public rights." The plurality concluded that causes of action involving liability of one individual to another,

204. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989) (stating that if a statutory cause of action "is not a 'public right' for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking 'the essential attributes of the judicial power').


207. 458 U.S. at 67-72. The "public rights" doctrine was first described in Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856), as follows:
such as those at issue in the state law claims entrusted by the 1978 Code to bankruptcy courts, are matters of "private rights" which "lie at the core of the historically recognized judicial power." Thus, Congress cannot delegate their resolution to legislative courts or administrative agencies.\textsuperscript{208}

However, the plurality opinion did not foreclose the argument that the "public rights" doctrine might justify certain aspects of bankruptcy jurisdiction. In an oft-quoted aside, Justice Brennan wrote:

But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not.\textsuperscript{209}

Although the concurring opinion in \textit{Marathon} did not endorse the plurality's "public rights" analysis\textsuperscript{210} and the Supreme Court subsequently seemed to back away from the doctrine,\textsuperscript{211} the "public rights" doctrine has been revived in the bankruptcy field by the Seventh Amendment. In \textit{Granfinanciera, S.A. v. Nordberg},\textsuperscript{212} the Supreme Court concluded that Congress, consistent with the Seventh Amendment, may provide for resolution of claims without a jury trial, even if the claims are of the sort tried by courts of law in eighteenth-century England and even if the claimants seek a remedy that is legal in nature, if the claims constitute "public rights." The Court added that the analyses of the public rights doctrine under Article III and under the Seventh Amendment are coextensive.\textsuperscript{213}

\begin{quote}
[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.
\end{quote}

\textit{Id.} at 284.

\textsuperscript{208}. \textit{Marathon}, 458 U.S. at 70.

\textsuperscript{209}. \textit{Id.} at 71.

\textsuperscript{210}. \textit{Id.} at 91 (Rehnquist, J., concurring).

\textsuperscript{211}. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853 (1986) ("this Court has rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights"); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 585-86 (1985) ("This theory that the public rights/private rights dichotomy ... provides a bright-line test for determining the requirements of Article III did not command a majority of the Court in \textit{Northern Pipeline}.").

\textsuperscript{212}. 492 U.S. 33 (1989).

\textsuperscript{213}. \textit{Id.} at 53-54. The Supreme Court relied on cases that clearly involved administrative agencies rather than Article III adjuncts. See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977) (administrative agency administering OSHA); Block v. Hirsh, 256 U.S. 135 (1921) (District of Columbia rent control commission); cf. Pernell v. Southhall Realty, 416 U.S. 363, 383 (1974) (contrasting District of Columbia local courts with "administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication").

Arguably, the congressional reconstitution of the bankruptcy courts as Article III adjuncts rather than legislative courts should have made the "public rights" doctrine inapplicable. \textit{See} 98 CONG. REC. H6046 (daily ed. Mar. 20, 1984) (remarks of Hon. Robert W. Kastenmeier) ("It is
The plurality opinion in *Marathon* acknowledged that precedent had not established definitively the boundaries of the public rights doctrine, but it suggested that the doctrine "extends only to matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,' . . . and only to matters that historically could have been determined exclusively by those departments." The plurality further stated that "a matter of public rights must at a minimum arise 'between the government and others.'" The doctrine received a more functional interpretation by the Supreme Court in later cases. The Court has indicated, for example, that the public rights doctrine "reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." The Court rejected the notion that the federal government's presence or absence as a party of record determines whether a case involves "public rights" or "private rights." Instead, where the government is not a party, the relevant inquiry is whether "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' not important that bankruptcy proceedings do not involve 'public rights.' Jurisdiction must be confined to public rights only where Congress attempts to create a separate article I court. My amendment establishes bankruptcy judges as adjuncts to the district court."). However, Congress apparently sought to rely on these Article I cases to justify the powers conferred on bankruptcy judges within their "core" jurisdiction. See *In re Production Steel, Inc.*, 48 B.R. 841, 846 (M.D. Tenn. 1985) ("In this Court's view, Congress has created a system of bankruptcy courts with two distinguishable bases of authority. First, each court is a 'legislative court' with the authority to make final judgments on matters that are at the core of the federal bankruptcy power. Second, each court is also an adjunct to the district court in matters that are merely related to bankruptcy proceedings."); *In re Rheuban*, 128 B.R. 551, 563-64 (Bankr. C.D. Cal. 1991) ("In drafting the 1984 Amendments, Congress, however, apparently adopted a 'belt and suspenders' approach; i.e., in addition to fashioning a grant of judicial power that would fall within the adjunct exception, it also attempted to place a majority of the disputes commonly heard by bankruptcy judges within the 'public rights' doctrine.").


215. *Id.* at 69. The plurality also stated that "the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.'" *Id.* at 69 n.23. The doctrine was described in similar terms by the Court in *Atlas Roofing Co.*, where the Court provided as an example of cases involving "public rights" those "in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact." *Atlas Roofing Co.*, 430 U.S. at 450.


217. *Thomas*, 473 U.S. at 586, 598-99 (Brennan, J., concurring); *Granfinanciera*, 492 U.S. at 54. Justice Scalia, concurring in the judgment, wrote separately in *Granfinanciera* to express his view that the plurality opinion in *Marathon* correctly defined the public rights doctrine and that matters involving such rights must arise "between the government and others." 492 U.S. at 65 (Scalia, J., concurring) (quoting *Marathon*, 458 U.S. at 69).
right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution." 218

The applicability of the "public rights" doctrine to bankruptcy jurisdiction is not self-evident. The Marathon plurality's suggestion that the restructuring of debtor-creditor relations may be a "public right" 219 has been soundly criticized, 220 and the majority opinion in Granfinanciera disclaimed it. 221 Granfinanciera, which involved a fraudulent conveyance claim, made clear that the characterization of a claim as a "core proceeding" under the Code does not determine whether such claim is a "public right." 222 Furthermore, cases subsequent to Granfinanciera have read the "public rights" doctrine narrowly in the Seventh Amendment context. 223

218. Granfinanciera, 492 U.S. at 54 (quoting Thomas, 473 U.S. at 593-94); see also Simpson v. Office of Thrift Supervision, 29 F.3d 1418, 1423 (9th Cir. 1994) (holding that the Office of Thrift Supervision serves a "public purpose" of the sort that Congress envisioned in providing for administrative adjudication), cert. denied, 115 S. Ct. 1096 (1995).


220. See, e.g., David P. Currie, Bankruptcy Judges and the Independent Judiciary, 16 Creighton L. Rev. 441, 452 (1983); S. Elizabeth Gibson, Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment, 72 Minn. L. Rev. 967, 1040-41 n.347 (1988); see also Parklane Hosiery Co. v. Parklane/Atlanta Venture (In re Parklane/Atlanta Joint Venture), 927 F.2d 532, 537 n.8 (11th Cir. 1991) (noting that "certain aspects of the administration of a bankruptcy estate do not conform easily to the Northern Pipeline plurality's definition of public rights"); Duck v. Munn (In re Mankin), 823 F.2d 1296, 1307 (9th Cir. 1987) (stating that "the rights determined in connection with a discharge in bankruptcy do not fit easily with the Northern Pipeline plurality's definition of the public rights doctrine"), cert. denied, 485 U.S. 1006 (1988).

221. Granfinanciera, 492 U.S. at 56 n.11 ("We do not suggest that the restructuring of debtor-creditor relations is in fact a public right. This thesis has met with substantial scholarly criticism . . ., and we need not and do not seek to defend it here.") (citations omitted). This footnote produced special criticism from Justice White in dissent, suggesting that the views of legal scholars should not be the basis for rejecting "otherwise viable strains in our case law." Id. at 90 n.13 (White, J., dissenting).

222. Id. at 61; see also Germain v. Connecticut Nat'l Bank, 988 F.2d 1323, 1326-27 (2d Cir. 1993) (stating that the mere designation of a proceeding as "core" does not control whether an action may be tried before a jury).

Can bankruptcy court jurisdiction over contempt proceedings be justified as an adjudication of “public rights”? Those cases that have answered this question in the affirmative, either explicitly or by distinguishing contempt proceedings from the state-created “private rights” involved in Marathon, have reached that conclusion without the benefit of the Court’s analysis in Granfinanciera. Indeed, most courts which have found civil contempt within the constitutional power of the bankruptcy court have so concluded simply on the basis that they deemed the matter “core,” although the Court now has made clear that Congress cannot affect a constitutional right “merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.”

Application of the most recent Supreme Court formulation of the “public rights” doctrine must lead to the conclusion that a contempt proceeding falls outside its parameters, despite the fact that contempt does not involve a Marathon-like state-created cause of action. Civil contempt certainly does not “arise ‘between the government and others,’” the exclusive characterization of the doctrine endorsed by the plurality in Marathon and by Justice Scalia’s concurrence in Granfinanciera. Civil contempt is initiated by a private party, and the remedy is compensation to that party.


226. The only case to analyze the contempt power of a bankruptcy court under the “public rights” doctrine as elucidated in Granfinanciera did so in the context of criminal, not civil, contempt and noted that “to the extent that the constitutional boundary of bankruptcy court jurisdiction is dependent upon the public rights doctrine, which it appears to be, . . . that doctrine has never encompassed criminal matters.” Griffith v. Oles (In re Hipp, Inc.), 895 F.2d 1503, 1510-11 (5th Cir. 1990) (footnote and citations omitted).

227. See supra note 120 and accompanying text.
230. Granfinanciera, 492 U.S. at 65 (Scalia, J., concurring).
231. See infra notes 297-300 and accompanying text. Civil contempt in a bankruptcy court case, thus, is distinguishable from contempt proceedings in the Tax Court, where the government is always a party to the action. The Tax Court, an Article I court, has the power to punish contempt of its authority pursuant to 26 U.S.C. § 7456(c) (1988 & Supp. V 1993) as an exercise of “judicial power,” but not Article III judicial power. See Freytag v. Commissioner, 501 U.S.
Because the government is not a party to the action, the functional inquiry endorsed by the Supreme Court would look to whether Congress, acting for a valid legislative purpose pursuant to its Article I powers, has created a cause of action for civil contempt that, while not "between the government and others," is "so closely integrated into a public regulatory scheme as to be a matter appropriate for [non-Article III] resolution." This definition of the public rights doctrine fails to encompass a civil contempt proceeding for three reasons. First, Congress has not created the cause of action for civil contempt. It exists in an Article III court by virtue of inherent power, and Congress has not explicitly conferred it on bankruptcy judges. Second, the Code does not represent a "public regulatory scheme" in the same sense as "the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." Rather, the regulation of debtor-creditor relations "alters and often abrogates pre-existing, legally cognizable property rights" of creditors, rights that have never been exclusively vested in the legislative or executive branches of government. Finally, civil contempt is not so "closely integrated" a part of the Code as to necessitate its resolution by the bankruptcy court. Indeed, as mentioned above, contempt is not part of the statutory provisions of the Code at all. Even were it included as a legislative matter, the determination of contempt motions easily could be allotted to the Article III district courts without doing violence to any other provision of the statutory scheme, as the Federal Magistrate Act has demonstrated. This analysis leads to the conclusion that contempt proceedings do not involve matters of "public rights." If Congress constitutionally may confer jurisdiction over such actions on bankruptcy judges, it must be justified on other grounds.

b. Essential Attributes of Judicial Power

The second factor considered by courts analyzing the constitutionality of the exercise of power by an adjunct is whether the "essential attributes of the judicial power" have been retained by the

232. See supra notes 216-18 and accompanying text.
234. See supra note 2 and accompanying text.
235. See supra notes 89-110 and accompanying text.
238. See supra notes 178-81 and accompanying text.
Article III court,\textsuperscript{240} including in particular control over the adjunct and ultimate decision-making authority.\textsuperscript{241} Discerning the "essential attributes of judicial power" is no simple task. The term is probably not susceptible of exhaustive definition, other than by the unhelpful suggestion that it describes those functions which an Article III court constitutionally cannot delegate. However, an examination of the functions of those adjuncts whose roles the Supreme Court has upheld or struck down reveals certain common threads.

The Supreme Court's analysis of adjuncts under Article III can be broken down into five categories: subject matter jurisdiction, role of adjunct, power to enforce orders, power to conduct jury trials, and standard of review. A comparison of these categories can perhaps best be appreciated by viewing them in tabular form.

<table>
<thead>
<tr>
<th>Adjunct</th>
<th>United States Employees' Compensation Commission\textsuperscript{242}</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subject Matter Jurisdiction</td>
<td>Compensation for injury upon navigable waters of U.S. if workers' compensation not available under state law.\textsuperscript{243}</td>
</tr>
<tr>
<td>Role of Adjunct</td>
<td>Determining all questions of fact and law in respect of claim.\textsuperscript{244}</td>
</tr>
<tr>
<td>Power to Enforce Orders and Punish for Contempts</td>
<td>No. Commissioners cannot punish for contempt or enforce compensation orders.\textsuperscript{245}</td>
</tr>
<tr>
<td>Power to Conduct Jury Trials</td>
<td>No. Claims are within admiralty jurisdiction and there is no right to jury trial.\textsuperscript{246}</td>
</tr>
<tr>
<td>Standard of Review</td>
<td>Compensation order may be set aside if &quot;not in accordance with law&quot; upon institution of injunction proceedings.\textsuperscript{247} Findings of fact (except &quot;jurisdictional facts&quot;) are final if supported by the evidence.\textsuperscript{248}</td>
</tr>
</tbody>
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\textsuperscript{242} See Crowell, 285 U.S. 22.

\textsuperscript{243} See id. at 37-38.

\textsuperscript{244} See id. at 43.

\textsuperscript{245} See id. at 43, 45.

\textsuperscript{246} See id. at 45.

\textsuperscript{247} See id. at 44.

\textsuperscript{248} See id. at 46.
<table>
<thead>
<tr>
<th>Adjunct</th>
<th>Magistrate Judges\textsuperscript{249}</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subject Matter Jurisdiction</td>
<td>Jurisdiction same as that of the district court.</td>
</tr>
<tr>
<td>Role of Adjunct</td>
<td>Hear and determine most pretrial matters,\textsuperscript{250} hear post-trial applications for relief,\textsuperscript{251} serve as special master,\textsuperscript{252} additional duties delegated by district court,\textsuperscript{253} and consensual civil trials.\textsuperscript{254}</td>
</tr>
<tr>
<td>Power to Enforce Orders and Punish for Contempt</td>
<td>Magistrate judge may only certify facts to district court.\textsuperscript{255}</td>
</tr>
<tr>
<td>Power to Conduct Jury Trials</td>
<td>Only with consent of parties, in civil cases,\textsuperscript{256} and criminal misdemeanor cases.\textsuperscript{257}</td>
</tr>
<tr>
<td>Standard of Review</td>
<td>In cases of nonconsensual reference of dispositive motions, magistrate judge is limited to making recommendations to district court which conducts \textit{de novo} determination on request.\textsuperscript{258} For nondispositive motions, magistrate’s order is reviewed under “clearly erroneous or contrary to law” standard.\textsuperscript{259} Consensual reference for civil or misdemeanor trial is subject to usual appellate review.\textsuperscript{260}</td>
</tr>
</tbody>
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\textsuperscript{251} Id. § 636(b)(1)(B).

\textsuperscript{252} Id. § 636(b)(2).

\textsuperscript{253} Id. § 636(b)(3).

\textsuperscript{254} Id. § 636(c) (1988 & Supp. V 1993).

\textsuperscript{255} Id. § 636(e) (1988).

\textsuperscript{256} Id. § 636(c)(1).


\textsuperscript{258} 28 U.S.C. § 636(a), (b)(1), (b)(1)(C).

\textsuperscript{259} Id. § 636(b)(1)(A).

\textsuperscript{260} Id. § 636(c)(3)-(6); 18 U.S.C. § 3402.
<table>
<thead>
<tr>
<th>Adjunct</th>
<th>Pre-BAFJA Bankruptcy Courts&lt;sup&gt;261&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subject Matter Jurisdiction</td>
<td>All civil proceedings arising under Title 11 or arising in or related to cases under Title 11.&lt;sup&gt;262&lt;/sup&gt;</td>
</tr>
<tr>
<td>Role of Adjunct</td>
<td>Exercising all of the jurisdiction conferred by Code.&lt;sup&gt;263&lt;/sup&gt;</td>
</tr>
<tr>
<td>Power to Enforce Orders and Punish for Contempts</td>
<td>Yes. Could exercise “all ordinary powers of district courts” including power to issue final, enforceable orders, and orders appropriate for enforcement of provisions of Title 11, but could not enjoin another court or punish criminal contempts not committed in presence of judge or warranting imprisonment.&lt;sup&gt;264&lt;/sup&gt;</td>
</tr>
<tr>
<td>Power to Conduct Jury Trials</td>
<td>Could preside over jury trials.&lt;sup&gt;265&lt;/sup&gt;</td>
</tr>
<tr>
<td>Standard of Review</td>
<td>Normal appellate review, “clearly erroneous” standard.&lt;sup&gt;266&lt;/sup&gt;</td>
</tr>
</tbody>
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<tr>
<th>Adjunct</th>
<th>Commodities Futures Trading Commission&lt;sup&gt;267&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subject Matter Jurisdiction</td>
<td>Commodity Exchange Act, including administration of reparations procedure and common law counterclaims.&lt;sup&gt;268&lt;/sup&gt;</td>
</tr>
<tr>
<td>Role of Adjunct</td>
<td>Holding a hearing and entering reparations order.&lt;sup&gt;269&lt;/sup&gt;</td>
</tr>
<tr>
<td>Power to Enforce Orders and Punish for Contempts</td>
<td>No. Order directing payment of reparations could be enforced only in federal district court.&lt;sup&gt;270&lt;/sup&gt;</td>
</tr>
<tr>
<td>Power to Conduct Jury Trials</td>
<td>No.&lt;sup&gt;271&lt;/sup&gt;</td>
</tr>
<tr>
<td>Standard of Review</td>
<td>Orders reviewable under “weight of the evidence standard,” with legal determinations subject to de novo review.&lt;sup&gt;272&lt;/sup&gt;</td>
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<sup>263</sup> Id. (repealed 1984).
<sup>264</sup> See Marathon, 458 U.S. at 85 & n.37.
<sup>266</sup> See Marathon, 458 U.S. at 55 n.5.
<sup>268</sup> See id. at 836.
<sup>269</sup> See id.
<sup>270</sup> Id. at 836, 853.
<sup>271</sup> See id. at 853.
<sup>272</sup> See id.
Table 1—Continued

<table>
<thead>
<tr>
<th>Adjunct</th>
<th>Arbitrators Under Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)²⁷³</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subject Matter Jurisdiction</td>
<td>FIFRA compensation disputes regarding use of data submitted to support pesticide registrations.²⁷⁴</td>
</tr>
<tr>
<td>Role of Adjunct</td>
<td>Binding arbitration over compensation disputes.²⁷⁵</td>
</tr>
<tr>
<td>Power to Enforce Orders and Punish for Contempts</td>
<td>No. Can impose sanctions of canceling new registration or denying compensation. Not clear whether judicial enforcement could be sought.²⁷⁶</td>
</tr>
<tr>
<td>Power to Conduct Jury Trials</td>
<td>No.</td>
</tr>
<tr>
<td>Standard of Review</td>
<td>Subject to review for “fraud, misrepresentation, or other misconduct.”²⁷⁷</td>
</tr>
</tbody>
</table>

One might draw the following conclusions from this tabular summary: (1) the broader the subject matter jurisdiction conferred on the adjunct (especially if that jurisdiction includes rights that Congress did not create), the less likely that the delegation will be upheld; (2) the more the adjunct performs tasks that are traditionally undertaken by Article III judges (as opposed to limited fact-finding), the more suspect the delegation; (3) an adjunct that is not an Article I court but has the power to enforce its own orders (other than through administrative sanctions) has not yet been held constitutional;²⁷⁸ (4) an adjunct that can conduct a jury trial without the consent of the parties has not yet been found constitutional; and (5) the less deferential the review afforded to adjunct determinations, the more likely the adjunct’s role will be upheld.

Whether the “essential attributes of judicial power” must be examined as a package or on an item-by-item basis is unclear. Are certain attributes (such as the power to enforce orders and punish for contempt or the power to conduct a jury trial) so intrinsically judicial in nature that any effort to confer them on non-Article III entities, absent the consent of the parties, must fail constitutional challenge, even if the Article III court retains other attributes of judicial power?

The Supreme Court’s Marathon opinion, the only Supreme Court opinion to reach the Article III issue in the bankruptcy context, provides little guidance. In Marathon, the Court contrasted the pre-BAFJA Code with the administrative scheme upheld in Crowell, stating that the Code “vests all ‘essential attributes’ of the judicial power

²⁷⁴. See id. at 572-73.
²⁷⁵. See id. at 573.
²⁷⁶. See id. at 574-75, 591.
²⁷⁷. See id. at 573-74.
of the United States in the ‘adjunct’ bankruptcy court.” The Court continued:

First, the agency in Crowell made only specialized, narrowly confined factual determinations regarding a particularized area of law. In contrast, the subject-matter jurisdiction of the bankruptcy courts encompasses not only traditional matters of bankruptcy, but also “all civil proceedings arising under title 11 or arising in or related to cases under title 11.” Second, while the agency in Crowell engaged in statutorily channeled factfinding functions, the bankruptcy courts exercise “all of the jurisdiction” conferred by the Act on the district courts . . . . Third, the agency in Crowell possessed only a limited power to issue compensation orders pursuant to specialized procedures, and its orders could be enforced only by order of the district court. By contrast, the bankruptcy courts exercise all ordinary powers of district courts, including the power to preside over jury trials, . . . the power to issue writs of habeas corpus, . . . and the power to issue any order, process, or judgment appropriate for the enforcement of the provisions of Title 11 . . . . Fourth, while orders issued by the agency in Crowell were to be set aside if “not supported by the evidence,” the judgments of the bankruptcy courts are apparently subject to review only under the more deferential “clearly erroneous” standard . . . . Finally, the agency in Crowell was required by law to seek enforcement of its compensation orders in the district court. In contrast, the bankruptcy courts issue final judgments, which are binding and enforceable even in the absence of an appeal. In short, the “adjunct” bankruptcy courts created by the Act exercise jurisdiction behind the facade of a grant to the district courts, and are exercising powers far greater than those lodged in the adjucnts approved in either Crowell or Raddatz.

Judicial interpretation of this language has occurred primarily in analyzing the power of a bankruptcy court to hold jury trials in core proceedings. Although most courts that have found no such authority have done so on statutory grounds, those that have reached the constitutional issue read the language of Marathon with respect to

279. Marathon, 458 U.S. at 84-85.
280. Id. at 85-86 (citations omitted).
281. Courts are in general agreement that a nonconsensual jury trial in a noncore bankruptcy proceeding would be unconstitutional under the Seventh Amendment. See, e.g., Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095 (2d Cir. 1993), cert. dismissed, 114 S. Ct. 1418 (1994); Taxel v. Electronic Sports Research (In re Cinematics, Inc.), 916 F.2d 1444 (9th Cir. 1990); Beard v. Braunstein, 914 F.2d 434 (3d Cir. 1990); and cases cited supra note 175. See generally Gibson, supra note 220, at 1043-48.
“essential attributes of judicial power” as a definition of the words, concluding that each of the itemized traits is an “essential attribute” and cannot be vested in a non-Article III decision maker.\textsuperscript{283} By contrast, those courts upholding the authority of bankruptcy courts to conduct jury trials in core proceedings view the \textit{Marathon} list of powers as a package, no one of which is itself inseparable from an Article III court but which, as a whole, cannot be delegated.\textsuperscript{284}

These cases all predate the Supreme Court’s decision in \textit{Freytag v. Commissioner},\textsuperscript{285} in which the Court upheld the power of the Chief Judge of the Tax Court to assign complex cases to a special trial judge consistent with the Appointments Clause of the Constitution.\textsuperscript{286} In holding that the Tax Court, as an Article I court, constituted a “Court of Law” within the meaning of Article II of the Constitution, the Supreme Court concluded that non-Article III tribunals “exercise the judicial power of the United States,”\textsuperscript{287} albeit not the judicial power defined by Article III of the Constitution. Among those attributes of judicial power exercised by the Tax Court and noted by the Supreme Court in \textit{Freytag} were the authority “to punish contempts by fine or imprisonment . . . ; to grant certain injunctive relief . . . ; to order the Secretary of the Treasury to refund an overpayment determined by the court . . . ; and to subpoena and examine witnesses, order production of documents, and administer oaths . . . ”\textsuperscript{288}

\textit{Freytag} did not seek to define Article III judicial power, and it never referred to the “essential attributes” of such power discussed in

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\textsuperscript{286} Article II of the Constitution allows Congress to vest the appointment of inferior officers “in the President alone, in the Courts of Law, or in the Heads of Departments,” U.S. CONST. art. II, § 2, cl. 2.
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\textsuperscript{287} 501 U.S. at 889.
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\textsuperscript{288} \textit{Id.} at 891.
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However, the decision does indicate that the contempt power is not so inextricably linked to Article III judicial power as to be incapable of conferral on a non-Article III body. Thus, while contempt may be an essential attribute of judicial power under Article III, its exercise by an Article I court (or other non-Article III body) would not necessarily render that body constitutionally flawed. However, even if the correct approach to the Marathon checklist is to weigh all factors as a group to ascertain whether too many judicial attributes have been delegated, the bankruptcy courts remain constitutionally suspect.

Looking at the other categories summarized in Table 1, bankruptcy judges—like United States magistrate judges—exercise broad subject matter jurisdiction over all proceedings arising in or related to a bankruptcy case. This contrasts with other adjuncts or agencies whose jurisdiction is limited to a specialized area of the law. The duties of the bankruptcy judge are more extensive than those of a magistrate judge. The bankruptcy judge may “hear and determine” all “core proceedings” and “hear” all related proceedings, exercising the same role as an Article III judge except with respect to the finality of his or her decision in related proceedings. The power of a bankruptcy judge to conduct a jury trial without the consent of the parties is unsettled, but of the adjuncts analyzed by the Supreme Court, only magistrate judges can conduct jury trials, and then only with the consent of the parties. Finally, the standard of review for bankruptcy judge determinations is deferential with respect to core matters, but subject to de novo review in related proceedings, a bifurcated structure with no precedential parallel. With respect to core proceedings, “the ultimate decision is made” by the bankruptcy judge, not the district court.

Even without the contempt power, the bankruptcy courts are near (if not over) the boundary of permissible constitutional delegation of judicial attributes. Every factor militates in favor of the conclusion that the bankruptcy courts have abrogated too many of the functions and powers of Article III judges to be constitutional adjuncts. The power of contempt would push the bankruptcy courts over that constitutional line. Perhaps more than any other judicial attribute, the contempt power has been singled out by courts as the determinative factor in distinguishing Article III judges from non-Article III judges.
[t]he vesting of this [contempt] power exclusively in the hands of Article III judicial officers would seem, for present purposes at least, to provide an adequate distinction between such judges and non-Article III officers. This clear line also serves to limit the ultimate exercise of judicial power to persons enjoying the constitutional guarantee of independence.

Thus, while the Supreme Court's decision in Freytag suggests that the exercise of the contempt power would not be unconstitutional were the bankruptcy courts Article I courts rather than Article III adjuncts, the plurality opinion in Marathon seems to foreclose this rationale.

The constitutional infirmity of any attempt to confer civil contempt power on bankruptcy courts is exacerbated by the difficulty in distinguishing between sanctions for civil contempt and punishment for criminal contempt, something clearly beyond the power of a bankruptcy court. Commentators have noted that the distinction between civil and criminal contempt is "conceptually unclear and exceedingly difficult to apply." In Gompers v. Bucks Stove & Range Co., the Supreme Court suggested the following definition:

It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.

294. 742 F.2d 1037, 1044 (7th Cir. 1984).
295. Id.; see also Collins v. Foreman, 729 F.2d 108, 117 (2d Cir.) (upholding the constitutionality of a statute authorizing magistrates to try civil cases and enter final judgments with the consent of the parties), cert. denied, 469 U.S. 870 (1984); Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 545 (9th Cir.) (en banc) (noting that sufficient protections exist against the erosion of judicial power to overcome constitutional objections to a magistrate hearing and entering judgments in civil cases), cert. denied, 469 U.S. 824 (1984); Kalaris v. Donovan, 697 F.2d 376, 388 & n.46 (D.C. Cir.) (explaining that the bankruptcy courts at issue in Northern Pipeline violated Article III of the Constitution because they "exercised all ordinary power of District Courts"), cert. denied, 462 U.S. 1119 (1983). But see Gibbons v. Haddad (In re Haddad), 68 B.R. 944, 953-54 (Bankr. D. Mass. 1987) (standard of review for civil contempt is sufficiently broad to satisfy "essential attributes" test).
296. See supra notes 108-10 and accompanying text.
298. 221 U.S. 418 (1911).
299. Id. at 441.
However, "[c]ommon sense would recognize that conduct can amount to both civil and criminal contempt. The same acts may justify a court in resorting to coercive and to punitive measures." 300

Recognizing the "heightened potential for abuse posed by the contempt power," 301 the Supreme Court has afforded those accused of contempt significant procedural protections. 302 In its most recent decision, United Mine Workers of America v. Bagwell, 303 the Court suggested that, in light of the "somewhat elusive distinction between civil and criminal contempt fines, ... [t]o the extent that such [civil] contempts take on a punitive character ... criminal procedural protections may be in order." 304 Although the actual holding in Bagwell was limited to a finding that the contempt sanctions at issue—characterized by the court below as civil in nature—were actually criminal and, therefore, could not be imposed without a jury trial, the opinion suggests that for contempt proceedings "involving out-of-court disobedience to complex injunctions," rather than "discrete, readily ascertainable acts, such as turning over a key or payment of a judgment," civil procedural protections may be insufficient. 305

A bankruptcy court is without jurisdiction to impose criminal contempt sanctions. Logically, it therefore should be incapable of affording an alleged civil contemnor in cases involving "complex injunctions," such as alleged violations of the automatic stay or the permanent injunction imposed at the conclusion of a bankruptcy case, the heightened procedural protections to which the Supreme Court has said the accused is entitled. In less complex cases, "[c]ourts traditionally have broad authority through means other than contempt—such as by striking pleadings, assessing costs, excluding evidence, and entering default judgment—to penalize a party's failure to comply with the rules of conduct governing the litigation process." 306 For all of these reasons, the power of contempt, one of the most essential

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304. Id. at 2559.
305. Id. at 2560.
306. Id.
attributes of judicial power, should not, and cannot, be conferred on bankruptcy judges without the consent of the parties.

3. Jurisdiction by Consent

Even when delegation of authority by an Article III judge to an adjunct otherwise would violate constitutional constraints, such authority may be exercised when the parties affected explicitly consent to the jurisdiction of the non-Article III adjunct. Thus, although a magistrate judge could not otherwise exercise “ultimate adjudicating or decision making,” the provisions of § 636(c)(1) which authorize magistrate judges to conduct trials and enter judgments in civil matters with the consent of the parties, have been upheld against constitutional challenge. Similarly, courts have upheld the consensual exercise of Article III powers by magistrate judges under the “catch-all” statutory authority of § 636(b).

307. TPO, Inc. v. McMillen, 460 F.2d 348, 359 (7th Cir. 1972) (footnote omitted).
308. Section 636(c)(1) provides as follows:
(c) Notwithstanding any provision of law to the contrary —
(1) Upon the consent of the parties, a full-time United States magistrate . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.
310. Section 636(b)(3) currently provides as follows: “(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.” 28 U.S.C. § 636(b)(3). A prior version of § 636(b) authorized district courts to establish rules pursuant to which such additional duties could be assigned to magistrate judges. Under both versions of the statute, consensual references (including those to which the parties made no objection) have been upheld. See, e.g., Clark v. Poulton, 963 F.2d 1361 (10th Cir.), cert. denied, 506 U.S. 1014 (1992); United States v. Arnold, 947 F.2d 1120 (4th Cir. 1991), cert. denied, 503 U.S. 983 (1992); United States v. Martinez-Torres, 944 F.2d 51 (1st Cir. 1991) (en banc); Virgin Islands v. Williams, 892 F.2d 305 (3d Cir. 1989), cert. denied, 495 U.S. 949 (1990); Muhich v. Allen, 603 F.2d 1247 (7th Cir. 1979); Turner v. Japan Lines, Ltd., 562 F. Supp. 348 (D. Or. 1983); cf. Hill v. Jenkins, 603 F.2d 1256 (7th Cir. 1979) (noting that no local rule permitted a magistrate to preside over a civil trial); DeCosta v. Columbia Broadcasting Sys., Inc., 520 F.2d 499 (1st Cir. 1975) (finding that an order submitting factual disputes to a magistrate for a hearing did not warrant a conclusion that the parties consented to have the magistrate rule on issues of law), cert. denied, 423 U.S. 1073 (1976). But cf. In re Elcona Homes Corp., 810 F.2d 136 (7th Cir. 1987).
The rationale for these decisions was perhaps most succinctly stated by the Ninth Circuit in its *en banc* decision in *Pacemaker Diagonistic Clinic of America, Inc. v. Instromedix, Inc.* 311

The Supreme Court has allowed criminal defendants to waive even fundamental rights: the right to be free from self-incrimination, . . . the right to counsel, . . . the right to be free from unreasonable searches and seizures, . . . the right to a speedy trial, . . . the right to a jury trial, . . . and even, by pleading guilty, the right to trial itself. . . . We refuse to reach the anomalous result of forbidding waiver in a civil case of the personal right to an Article III judge. 312

Other cases have agreed with this characterization of the right to an Article III judge as "personal" or "individual" and, thus, subject to "waiver" without violating any constitutional limit on the subject matter jurisdiction of federal courts. 313 To the extent that there are institutional (i.e., nonpersonal) interests at stake in preserving Article III powers in Article III judges, the control exercised by Article III judges over magistrate judges meets those concerns. 314

In applying the Article III consent-to-jurisdiction doctrine to bankruptcy cases, courts have garbled the theory past recognition. The analysis began, as with all other constitutional analyses of bankruptcy court jurisdiction, with the Supreme Court’s decision in *Marathon.* 315 In his concurring opinion, Justice Rehnquist, who along with Justice O’Connor provided the deciding votes, stated that he would "hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern’s lawsuit over Marathon’s objection to be violative of Article III of the United States Constitution." 316 Chief Justice Burger, in his dissent, echoed this characterization of the holding, describing it as “limited to the proposition . . . that a ‘traditional’ state common-law action, not made sub-

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1987) (finding no statutory authority to refer appeal from final judgment of bankruptcy court to magistrate judge, even with consent).

311. 725 F.2d 537 (9th Cir.), cert. denied, 469 U.S. 824 (1984).

312. Id. at 543 (citations omitted).


316. Id. at 91 (Rehnquist, J., concurring) (emphasis added).
ject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, *absent the consent of the litigants*, be heard by an ‘Art[icle] III court’. . .”

This notion of consent as an intentional act by a litigant waiving a right to an Article III judge and vesting decision-making power in the bankruptcy court was on a collision course with the historical notion of the equity jurisdiction of bankruptcy judges. As described by the Supreme Court in *Katchen v. Landy*, a bankruptcy court had “summary jurisdiction” acting as a court of equity to deal with a preference claim against a creditor who had filed a claim in the bankruptcy proceeding, because the preference claim then became part of the process of allowance or disallowance of claims. The Court saw this conclusion following from the general precept “that bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession.” Moreover, the 1898 Act precluded the allowance of a claim of a creditor who had received a preference unless the preference was disgorged. Therefore, if the trustee raised a preference claim, the creditor’s claim against the estate could not be allowed or disallowed until the preference matter was resolved, making the preference matter “part and parcel of the allowance process and [ ] subject to summary adjudication by the bankruptcy court.”

The Court found inapplicable a provision in the 1898 Act that precluded “suits by the trustee” in bankruptcy court “unless by consent of the proposed defendant,” concluding that the preference action was not a “suit” and that consent was therefore irrelevant even with respect to the trustee’s claim for disgorgement of the preference.

Although the plurality and concurring opinions in *Marathon* made no mention of *Katchen*, Justice White’s dissent made clear that if Marathon Pipe Line Co. had filed a claim against the bankrupt Northern Pipeline Construction Co., the result in *Katchen* would lead to the conclusion that “the trustee could have filed and the bank-

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317. *Id.* at 92 (Burger, C.J., dissenting) (emphasis added); *see also id.* at 95 (White, J., dissenting) (“Even if the Court is correct that such a state-law claim cannot be heard by a bankruptcy judge, there is no basis for doing more than declaring the section unconstitutional as applied to the claim against Marathon, leaving the section otherwise intact. In that event, cases such as these would have to be heard by Art. III judges or by state courts—*unless the defendant consents to suit before the bankruptcy judge*—just as they were before the 1978 Act was adopted.”) (emphasis added).
319. *Id.* at 329-30.
320. Act of July 1, 1898, ch. 541, § 57(g), 30 Stat. 544, 560 (as amended) (repealed 1979).
321. *Id.* at 330.
323. 382 U.S. at 332-33 n.9.
324. *Id.* at 333-34.
The Court reached the same conclusion in its majority opinion in *Granfinanciera.* While holding that a creditor which had not filed a claim against the bankrupt estate had a right to a jury trial when sued by the trustee for alleged fraudulent conveyances, the Court suggested that, consistent with *Katchen,* "a creditor's right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate . . . ." The Court distinguished its rationale from the notion of waiver because bankruptcy claimants have no "alternative forum to the bankruptcy court in which to pursue their claims." Rather, the Court viewed the central feature of *Katchen* as the in rem jurisdiction of the court over the bankruptcy estate in its possession and its power to adjudicate claims to that property.

In *Langenkamp v. Culp,* the Court took the next step, holding that creditors who submitted claims against a bankrupt estate were not entitled to a jury trial on the trustee's preference claims against them. By filing claims, the creditors triggered the claims-allowance process which, the Court held, is within the equitable jurisdiction of the bankruptcy court.

Although the *Langenkamp* Court never used the words "waiver" or "consent," and the *Granfinanciera* Court explicitly rejected the notion that a bankruptcy court's equitable jurisdiction could be premised on a claimant's "waiver," subsequent decisions have found the distinction between voluntary submission to a bankruptcy court's equitable jurisdiction and involuntary invocation of the equitable claims-allowance process difficult to discern. Thus, courts gradually have expanded the *Granfinanciera/Langenkamp* rationale in two directions. First, they have found that the filing of a claim against the bankrupt estate effectively brings within the bankruptcy court's equitable jurisdiction not only preference and fraudulent conveyance claims (of which the Code requires resolution as part of the claims-allowance process), but also an assortment of other claims that the trustee or debtor might bring against the claimant, even if unrelated to

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327. Id. at 58.
328. Id. at 59 n.14.
329. Id. at 57.
331. Id. at 44-45.
332. See supra note 328.
333. See cases cited infra notes 334-39.
the filed claim. 336 Second, they have extrapolated from the “voluntary” act of filing a claim in bankruptcy to find that other actions by creditors—such as seeking court approval of a postpetition transaction 337 or filing a counterclaim to the trustee’s suit 338—and even actions by the debtor in voluntarily seeking bankruptcy protection 339 also resulted in a relinquishment of the right to a jury trial.

Can the concept of waiver or submission to the equitable jurisdiction of the bankruptcy court serve as a constitutional basis for exercise of the contempt power by a bankruptcy judge? Returning to the pure concept of consent to jurisdiction by a non-Article III judge, no constitutional impediment exists to parties in a bankruptcy case voluntarily agreeing that a bankruptcy judge may hear and determine a contempt proceeding. Congress has utilized this approach in the Article III context not only for magistrate judges, but also to permit bankruptcy judges to conduct jury trials with the consent of all parties. 340 However, the likelihood of an alleged contemnor agreeing to such a hearing and determination seems remote.

Does the expansive concept of submission to the equitable jurisdiction of the bankruptcy court by affirmative act of the creditor justify the exercise of jurisdiction over a contempt proceeding? Even if one were to accept the proposition embraced by the Supreme Court in *Katchen*, *Granfinanciera*, and *Langenkamp* that certain causes of action are so inextricably bound up with the allowance and disallowance of claims that their assertion should always fall within the equitable jurisdiction of the bankruptcy court (a proposition which is difficult to reconcile with the Court’s holding in *Marathon*, despite the efforts in *Granfinanciera* to do so), such a principle cannot legitimize bankruptcy court jurisdiction over contempt. Civil contempt, although not characterized as a separate proceeding in the same way criminal contempt is identified, 341 has no relationship to any claim against the 

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tate. Indeed, its only connection to the estate is that a conclusion adverse to the creditor or third party may augment the estate, a characterization that can be made of any cause of action asserted by a debtor or trustee on behalf of the bankrupt. If a creditor "voluntarily" asserts a claim against a bankrupt estate, that act should not strip the creditor of its constitutional right to resolution by an Article III judge of any contempt proceeding against it. Any other conclusion necessarily would mean that as a practical matter Langenkamp had limited Marathon to cases involving noncreditors of bankrupt estates or creditors who are willing to forego not only their claims but also any defense to claims against them. The Supreme Court cannot have intended to go so far.

VI. Conclusion

The Supreme Court has characterized a contempt proceeding as "sui generis."\(^{342}\) Whatever its other unique attributes, contempt certainly holds a central place in defining the exercise of judicial power. The bankruptcy courts, as reestablished by the BAFJA amendments, exercise (through the adjunct bankruptcy judges) certain judicial powers delegated by the Article III district courts. Such delegation is circumscribed by statutory and constitutional constraints. In reaching out to conclude that the powers so delegated include the power to hear and determine contempt proceedings, courts have misread the language and statutory history of the Bankruptcy Code, ignored the import of Marathon, and insidiously undermined whatever constitutional foundation may exist for the jurisdiction of the bankruptcy courts after BAFJA. Expediency cannot be the only guide of constitutional analysis. Article III was not drafted to construct the most efficient judicial system imaginable. But a system that requires an Article III judge to rule on motions for contempt in bankruptcy cases (in the same manner such judges resolve matters of contempt before magistrate judges) is certainly not unworkable. A little inconvenience is a small enough price to pay to protect the constitutional vesting of the judicial power of the United States in Article III courts.