Office of the Attorney General
Washington, D. C. 20530

September 5, 1984

Honorable George Bush
President of the Senate
United States Senate
Washington, D.C. 20510

Dear Mr. President:

Section 205 of Public Law No. 98-166, 97 Stat. 1086, by continuing the authorities contained in § 21 of Public Law No. 96-132, 93 Stat. 1049-50, requires that the Attorney General "transmit a report to each House of the Congress" in any case in which the Attorney General determines that the Department of Justice "will refrain from defending . . . any provision of law enacted by the Congress in any proceeding before any court of the United States, or in any administrative or other proceeding, because of the position of the Department of Justice that such provision of law is not constitutional." This letter is submitted consistent with the notification requirement continued under Public Law No. 98-166.

Sections 106 and 121(e) (the "appointment provisions") of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (the "1984 Act"), purport to appoint to the new offices created under the 1984 Act all the bankruptcy judges who were in office at the time that the transition provisions of the Bankruptcy Reform Act of 1978, as amended (the "1978 Act"), expired on June 27, 1984. The validity of the appointment provisions is at issue in the case of In re Alexander Benny, Civ. No. 84-120 MISC RHS Bky. No. 3-82-00972 LK (N.D. Cal.). The court has asked for the views of the United States on the constitutionality of these provisions, and I have authorized the Solicitor General to intervene in the proceeding for the purpose of presenting argument to the court on the constitutional issues.

I believe that these provisions are unconstitutional and that they present one of those rare cases in which the Executive Branch may justifiably refrain from defending in court the constitutionality of legislation enacted by Congress because that legislation infringes on the constitutional power of the Executive. I have also determined, however, that the unconstitutional provisions are severable from the remainder of the 1984 Act. Accordingly, I have concluded that, although the Department will generally defend the constitutionality of the 1984 Act, we will refrain from the defense of the appointment provisions.

In reaching the decision not to defend the appointment provisions, we relied specifically on the Appointments Clause of the Constitution, which provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2. The Supreme Court has specifically held that this Clause prevents Congress from designating, by statute, who will serve as an officer of the United States. See Buckley v. Valeo, 424 U.S. 1, 127 (1976).

The 1984 Act was intended to restructure the bankruptcy system established by the 1978 Act which had been held unconstitutional by the Supreme Court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). The 1984 Act creates a new bankruptcy system and vests the power to appoint bankruptcy judges under the new system in the Judiciary. As an interim device, however, § 121(e) of the 1984 Act purports to appoint as bankruptcy judges those persons who were serving in that capacity on June 27, 1984. Under § 106, the term of office of each such individual was "extended to and expires four years after the date such bankruptcy judge was last appointed to such office or on October 1, 1986, whichever is later."

The interim appointment mechanism chosen by Congress is not consistent with the Appointments Clause as interpreted by the Supreme Court. It is, rather, an attempt by Congress to appoint to the new judgeships created by the 1984 Act the bankruptcy judges whose terms had already expired, and, thus, in practical effect and for constitutional purposes, to exercise the appointment power by Act of Congress. The 1984 Act was not passed by both Houses of Congress until June 29, 1984; it was not presented to the President until July 6, 1984; and it was not signed by the President until July 10, 1984. When the 1978 Act expired, however, the terms of office and the offices held by the judges who were previously appointed as bankruptcy judges both expired. In short, as of June 28, 1984, these judges no longer held positions as bankruptcy judges. Thus, §§ 106 and

121(e) operate as new appointments of these former judges to the new positions under the 1984 Act. That they do so is clear from a number of Supreme Court cases which have considered the effect of attempted presidential reappointments. In Mimmack v. United States, 97 U.S. 426, 437 (1878), the Court held that an attempt by the President to revoke his acceptance of a resignation by an Army captain was not effective because the captain ceased to be an officer after being notified that his resignation was accepted, and "nothing could reinstate him in the office short of a new nomination and confirmation." See also United States v. Corson, 114 U.S. 619 (1885) (attempt to revoke order of dismissal of officer; same result); Blake v. United States, 103 U.S. 227 (1880) (person who ceased to be an officer in the Army could not again become an officer except upon a new appointment, by and with the advice and consent of the Senate). The appointment of officers of the United States by Congress through the appointment provisions of the 1984 Act contravenes the clear prohibition against such congressional appointments. See Buckley v. Valeo, 424 U.S. at 127; cf. United States v. Will, 449 U.S. 200, 225 n.29 (1980) (retroactivity of the effective date and time of legislative enactments).

The President noted his reservations about the appointment provisions in his statement upon signing the bill into law. The President stated that he had been informed by the Department of Justice that the provisions in the bill seeking to continue in office all existing bankruptcy judges are inconsistent with the Appointments Clause of the Constitution. The President also noted that the Administrative Office of the U.S. Courts had reached the same conclusion. He stated that he signed the bill after having received assurances from the Administrative Office that bankruptcy cases could be handled without reliance on the invalid provisions. The President urged Congress "immediately to repeal the unconstitutional provisions in order to eliminate any confusion that might remain with respect to the operation of the new bankruptcy system." See 20 Weekly Comp. Pres. Doc. 1010, 1011 (July 10, 1984).

My determination that the Department will refrain from the defense of the appointment provisions reflects the President's statements regarding the unconstitutionality of those provisions. Moreover, consistent with the President's statement that bankruptcy cases may be handled by the courts without reliance on the invalid provisions, I have determined that the unconstitutional provisions are severable from the remainder of the 1984 Act. The Supreme Court's most recent statement of the principles for determining whether an unconstitutional provision can be severed from the remainder

of a statute appears in Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983). In Chadha, the Court identified three factors favoring a finding of severability: first, the absence of any clear indications that Congress would have intended additional sections, or the entirety of an act, to fall because of the invalidity of a single provision; second, the inclusion of a severability clause; and third, that what remains after severance is "fully operative as a law." See id. at 2774-75, quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932).

Under these principles, I have concluded that the appointment provisions of the 1984 Act are severable from the remainder of the 1984 Act. First, we have been unable to locate anything in the language of the 1984 Act or in the legislative history that would overcome the presumption of severability that normally applies. Second, the Act does contain a severability clause. Finally, there is no doubt that the remaining provisions of the 1984 Act would be "fully operative as a law" without the operation of the appointment provisions. Under § 104 of the 1984 Act, bankruptcy judges are to be appointed, after the transition period during which the appointment provisions were to have been effective, by the courts of appeals for the circuits in which the judgeships are located. If, as I believe, the appointment provisions are invalid, this appointment procedure may be implemented immediately, and new bankruptcy judges may be appointed by the courts of appeals. Thus, the 1984 Act can operate fully without the appointment provisions.

Our position relative to the defense of the appointment provisions of the 1984 Act is consistent with the historic practice of the Department of Justice. Although the Department will, in general, defend the constitutionality of a statute which has been challenged in litigation, there are certain rare instances in which it will refrain from that defense. In a letter to Senators Thurmond and Biden, dated April 6, 1981, I reiterated this preexisting policy:

> The Department appropriately refuses to defend an Act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid.

I believe that the appointment provisions of the 1984 Act fit within the first of these two narrow categories. Although the operation of these particular provisions most directly

impinges upon the appointment power of the courts of appeals, the principle of congressional appointment of officers of the United States that these provisions would establish would ultimately have a serious impact on the Executive. In most instances, the power to appoint officers of the United States is lodged in the President or his subordinates. Because of the potential effect on the President's powers of this enactment, I have determined that the Department will refrain from defending the constitutionality of the appointment provisions.

Sincerely,

William French Smith
Attorney General