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THE BANKRUPTCY REFORM ACT OF 1978—
AN ELEVATED JUDICIARY

The Honorable Robert L. Eisen*
David K. Smrtnik**

The Bankruptcy Reform Act of 1978 accomplishes a complete revision of bankruptcy practice. Included in this revision is the creation of a new, functionally independent United States Bankruptcy Court to administer the provisions of the Act. Judge Eisen and Mr. Smrtnik examine the new court's functions and explore the effect of the bankruptcy court's new elevated status on federal bankruptcy law.

One of the most important changes introduced by the Bankruptcy Reform Act of 1978¹ concerns the role of the bankruptcy court. Formerly, the bankruptcy court had been relegated to a dependent position, enjoying neither the autonomy nor the prestige necessary to adjudicate bankruptcy matters effectively. The Reform Act, however, establishes the bankruptcy court as an "adjunct to the district court"² boasting an independent judiciary,³ expansive jurisdiction,⁴ and a separation of judicial and administrative functions.⁵ These alterations reform and invigorate federal bankruptcy procedure.

In practice, the Bankruptcy Act of 1898⁶ had been rendered obsolete by social, legal, and economic permutation.⁷ This, in turn, created public relations problems. Those who were unaware of the bankruptcy policies involved viewed bankruptcy proceedings with suspicion because decisions appeared to be based on strained readings of the statute⁸ and mysterious

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³ See note 25 and accompanying text infra.
⁵ See notes 70-120 and accompanying text infra.
⁸ See, e.g., Segal v. Rochelle, 382 U.S. 375, 380 (1966) (a business' loss-carryback tax refund is "property" passing to the trustee's control under § 70a(5) of the Bankruptcy Act); In re
court-created rules. This suspicion was exacerbated by the presence of bankruptcy specialists who, because of their familiarity with bankruptcy proceedings, anticipated and utilized apparently baseless court logic to their client's advantage.

Although there had been several congressional attempts to cure the deficiencies of the Bankruptcy Act, the problems did not abate. Therefore, faced with an outmoded and constitutionally questionable bankruptcy system, Congress considered several alternatives to the existing Act. At one extreme was the possibility of placing federal bankruptcy in the control of a new administrative agency while using bankruptcy courts in a very limited administrative review capacity. A middle ground possibility was for the existing bankruptcy courts—subservient to the district courts and already required to perform substantial administrative duties—to assume the additional task of administering the substantive provisions of the Reform Act. At the other extreme, a separate and independent court could be established. The fact that Congress chose this final alternative indicates the crucial role that bankruptcy courts are expected to play in the success of the Reform Act.

This Article focuses on the specific provisions of the Reform Act establish-
ing the elevation of the bankruptcy courts. Specifically examined are those provisions creating an independent judiciary, expanding the court's jurisdiction, and providing for a delineation of judicial and administrative functions.

JUDICIAL AUTONOMY

Under the previous system, the bankruptcy court had nearly achieved "de facto" independence. Theoretically, district courts had been responsible for the supervision of bankruptcy courts through their powers to appoint and remove bankruptcy judges, review bankruptcy court decisions on appeal, and strictly control the contempt and injunctive powers of bankruptcy courts. Despite their theoretical control, however, the district courts effectively were removing themselves from the bankruptcy arena.

The district courts' surrender of control was the result of two factors. First, the high degree of specialization required for bankruptcy law caused district judges to feel uncomfortable when dealing with bankruptcy matters. Second, there was an explosive increase in the number of bankruptcy proceedings, which added to the already overcrowded dockets existing in the district courts. Thus, it was natural for district court judges to concentrate on matters other than bankruptcy. As a result, the district courts allowed and encouraged the bankruptcy courts' evolution toward independence.

In light of the previous bankruptcy court system of self-developed but effective independence, Congress chose, through the Reform Act, to enlarge

15. Id. at 9.
17. Id. § 39, as amended by Chandler Act § 39(c), 52 Stat. at 858 (11 U.S.C. § 67(c)).
20. For example, one of the most difficult determinations a court hearing a bankruptcy case must make involves judging when federal bankruptcy law displaces general state law. District courts, lacking the benefit of a routine familiarity with bankruptcy procedures, moved hesitantly when faced with this decision. Countryman, The Use of State Law in Bankruptcy Cases, 47 N.Y.U.L. REV. 407-76, 631-73 (1972).
21. At the time of the enactment of the Reform Act, there were approximately 250,000 bankruptcy cases pending. Senate Report, supra note 7, at 2; House Report, supra note 7, at 4.
22. In addition to this conduct by the district courts, action by both Congress and the Supreme Court contributed to the relative independence of bankruptcy courts under the old Act. In 1946, Congress amended the Bankruptcy Act to extend the terms of bankruptcy referees—as bankruptcy judges were then called—from two to six years. Act of June 28, 1946, ch. 512, § 2, 60 Stat. 323, 324. The security provided by this change in tenure allowed bankruptcy judges to remain more independent. In addition, the 1973 version of the Supreme Court
the degree of court autonomy. The Senate and the House of Representatives differed, however, on the degree of independence that should be granted. The House wanted the new bankruptcy courts to be completely independent. The Senate also wanted independence for the new courts, but only as "adjuncts to the United States district courts." The enacted compromise retained the Senate's structure and established the bankruptcy courts as district court adjuncts. Yet, the Reform Act also preserved the nearly total functional separation between bankruptcy courts and district courts that had existed under the old Act. Indeed, the only operational interaction remaining between the two courts occurs in the narrow areas of contempt and injunctive certification and perhaps appellate review.

Indicia of the bankruptcy court's new position of elevated autonomy are prevalent throughout the Reform Act. The Act provides both procedural and substantive innovations that secure the independence of the bankruptcy system while retaining the protections inherent in an adjunctive relationship with the federal district courts. A number of these innovations characterize the Reform Act as a congressional sanction of the bankruptcy judiciary's independence.

One significant procedural change, which serves to elevate the bankruptcy court's power, autonomy, and prestige, establishes the new system of appellate review. Under the previous system, all appeals from final orders went directly to the federal district court. Indeed, the district court had become an appellate tribunal under the 1973 Supreme Court Rules of Bankruptcy Procedure. The previous procedural system was seriously deficient in that it necessitated an additional, expensive step for bankruptcy litigants before an appeal could be made to the court of appeals. In addition, by
providing for appellate review by a single district court judge, the old sys-
tem undermined the credibility and authority of the bankruptcy court.
Moreover, the previous appellate procedure added an unnecessary decisional
burden on district courts already confronted with burgeoning dockets.

The Reform Act provides that if the parties agree, appeals from final or-
ders of the bankruptcy court will go directly to the appropriate circuit court
of appeals.\(^{30}\) Only where the parties cannot agree will either an appellate
panel of three bankruptcy judges,\(^ {31}\) or a single district court judge,\(^ {32}\) review
a bankruptcy judge's order.\(^ {33}\) Therefore, the new system of appellate re-
view not only accomplishes elimination of the litigant's unnecessary financial
burden, but also provides both symbolic and actual procedural deference to
the bankruptcy judge consonant with the general substantive elevation of the
position.\(^ {34}\)

Despite the importance of this change in appellate review, the most sig-
nificant indicators of the elevation of the bankruptcy courts are those Reform
Act provisions conferring greater substantive powers upon bankruptcy
judges. For example, the Reform Act enhances the independent functioning
of the bankruptcy courts by providing them with the necessary power to
conduct and control their own housekeeping responsibilities. Specifically,
bankruptcy courts are now empowered to employ a clerk of the bankruptcy
court whose sole responsibility is the processing of bankruptcy cases.\(^ {35}\) In
addition, bankruptcy judges also are allowed to employ their own docket
clerks, law clerks, and secretaries.\(^ {36}\) Furthermore, funds have been made
available to secure new libraries for the bankruptcy courts.\(^ {37}\)

The provision for a "chief judge of the bankruptcy court" in all districts
having more than one judge\(^ {38}\) is a greater indication of the independence
bankruptcy courts have obtained through the Reform Act. The chief
judge—the senior bankruptcy judge of the district court under seventy years

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provides that panels designated under 28 U.S.C. § 160(a) shall have jurisdiction over appeals
from interlocutory judgments, orders, and decrees of bankruptcy courts. This jurisdiction,
however, is only extended by leave of the panel to which the appeal is taken.
31. Id. §§ 160(a), 1482.
32. Id. § 1334.
33. 28 U.S.C. § 332(d) (Supp. II 1978) provides that "[e]ach judicial council shall make all
necessary orders for the effective and expeditious administration of the business of the courts
within its circuit." Therefore, if the parties cannot agree as to the appropriate appellate tribunal,
the district judicial council should have the power to make such a decision.
34. The position of bankruptcy judge is elevated by the increase in substantive powers
granted the judiciary as well as the autonomy that the Reform Act both provides and protects.
Consonant with this is the obvious congressional intent to enhance the role of bankruptcy judge
with prestige. See House Report, supra note 7, at 4; Senate Report, supra note 7, at 15-16.
36. Id. § 772.
37. Senate Report, supra note 7, at 175.
of age—will be responsible for observance of the rules and orders of the court and for the division of business and assignment of cases. Under the previous system, the district court had provided the assignment of cases and the management of business. Now, however, bankruptcy judges are free to handle those important duties by themselves.

The Reform Act also gives bankruptcy judges greater autonomy through an increase of their tenure. Previously, bankruptcy judges held six year terms and could be removed by district court action. Under the Reform Act, judges will be appointed for a fourteen year term and their removal must be by a majority of the circuit judicial council for reasons of "incompetency, misconduct, neglect of duty, or physical or mental disability." The legislative history of the Reform Act indicates that Congress felt the change in tenure was necessary to attract more qualified judges to the bankruptcy bench. The tenure extension also was expected to protect the position from political pressures and strengthen the credibility of bankruptcy judges' decisions. Although the House of Representatives and the Senate differed as to the specific length of term to be adopted, the Reform Act represents

39. Id. § 156.
40. Sup. Ct. R. Bankr. P. 102(a). The rules provide for an automatic referral of a bankruptcy case to the bankruptcy judge by the clerk of the district court. Thus, the assignment is technically left to the clerk's office. The district court, however, retains the right to withdraw any case and hear it or assign it to another bankruptcy judge. Id. at R. 102(b). Assignment is usually accomplished by a local rule designating the chief judge of the district court as assignment supervisor. See, e.g., N. D. Ill. Bankr. R. 2.05-2.06.
43. Senate Report, supra note 7, at 17; House Report, supra note 7, at 22.
44. House Report, supra note 7, at 23.
45. This difference was based on whether the bankruptcy court should be an article III or an article I court. Article III courts derive their authority from § 1 of article III of the Constitution, which provides: "[T]he judicial power of the United States, shall be vested in one supreme court, and 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 ...."

On the other hand, article I courts—so-called legislative courts—are established because Congress, in the exercise of its powers under article I, gives the authority to a court to hear cases and controversies involving those over whom Congress' power may be asserted. See, e.g., Palmore v. United States, 411 U.S. 389 (1973) (District of Columbia criminal courts); Crowell v. Benson, 285 U.S. 22 (1932) (judicial procedures of an administrative agency); Ex parte Bakelite, 279 U.S. 438 (1929) (customs court); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) (territorial courts). It has been stated that while article III courts are established when laws of national applicability and affairs of national concern are at stake, article I courts exist when Congress is legislating "with respect to specialized areas having particularized needs and warranting distinctive treatment." Palmore v. United States, 411 U.S. 389, 407-08 (1973).

The House saw the new bankruptcy laws as "laws of national applicability" requiring article III courts to administer them. House Report, supra note 7, at 32, quoting Palmore v. United
congressional agreement that a tenurial increase was necessary to secure and protect judicial independence.\textsuperscript{46}

In summary, the Reform Act establishes and secures the independent functioning of the bankruptcy courts. Provisions for both procedural and

States, 411 U.S. at 408. In addition, the House concluded that article I legislative courts were precluded by the broad jurisdiction and powers being invested in the new bankruptcy courts. \textit{Id.} at 29-30.

The Senate's view of the type of court required was contrary to that of the House. To the Senate, bankruptcy was a specialized area "having particularized needs and warranting distinctive treatment." Palmore v. United States, 411 U.S. at 408. Under this view, the new bankruptcy courts would be article I legislative courts created under Congress' power to establish uniform laws on the subject of bankruptcies. As to the House's conclusion that the new courts would exercise too much jurisdiction and power to pass the test of an article I court, the Senate felt the problem could be eliminated by limiting certain powers of the bankruptcy courts. \textit{Senate Report, supra} note 7, at 15-16. These limitations included establishing the new bankruptcy courts as adjuncts of the district court, reposing all bankruptcy jurisdiction initially in the district courts and then delegating all bankruptcy jurisdiction to the bankruptcy courts, and limiting the bankruptcy courts' injunctive power against state courts. \textit{Id.}

In the Senate's view, article III guarantees, including life-tenure, were not essential. The Senate recognized the need for an independent bankruptcy court, but felt that a twelve-year term would suffice. \textit{Id.} at 15-17. At this point, the House yielded the necessity of an article III court, and, in exchange for a term of fourteen rather than twelve years, permitted the use of an article I legislative court.

Despite the Senate's assertion to the contrary and the House's acquiescence to the Senate view, the constitutionality of the article I courts is questionable. The new bankruptcy courts will exercise jurisdiction far exceeding that of their predecessor bankruptcy courts. Because bankruptcy laws are laws of "national applicability," and because they will be uniformly administered in each and every state, lack of article III guarantees may be fatal. \textit{Plumb, The Tax Recommendations of the Commission on Bankruptcy Laws—Tax Procedures,} 88 \textit{Harv. L. Rev.} 1360, 1468 (1975). Should the Supreme Court be faced with these issues, the validity of those provisions of the Reform Act establishing the bankruptcy courts may be in jeopardy.

46. The Reform Act also provides for the appointment of bankruptcy judges by the President with the advice and consent of the Senate and with "due consideration" to the recommendations of the circuit judicial council. 28 U.S.C. § 152 (Supp. II 1978). This marks a radical change because under the old Act the bankruptcy judges had been appointed by the district judges sitting within the same federal district. Bankruptcy Act of 1898, ch. 541, § 34, 30 Stat. 555 (1897-99), as amended by Chandler Act, ch. 575, § 34, 52 Stat. 857 (1938) \textit{and} Act of June 28, 1946, ch. 512, § 34, 60 Stat. 324 (formerly codified in 11 U.S.C. § 62a (1976)) (repealed 1979). This practice had been highly criticized because it increased the dependency of the bankruptcy court on the district court and decreased the image of bankruptcy judges. \textit{See Senate Report, supra} note 7, at 16. \textit{See also The Bankruptcy Reform Act: Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Committee on the Judiciary,} 95th Cong., 1st Sess., part I, 832 (1975) (statement of Charles A. Horsky, Chairman, National Bankruptcy Conference). Presidential appointment was provided to remove the impropriety of appointment by the district courts and to increase the prestige of the new courts. \textit{See Senate Report, supra} note 7, at 16.

The Reform Act also sets the annual salaries of bankruptcy judges at a figure only slightly less than that received by district court judges. \textit{Compare} 28 U.S.C. § 358 (Supp. II 1978) (district court judges receive $54,000 annual compensation) \textit{with} 28 U.S.C. § 154 (Supp. II 1978) (bankruptcy court judges receive $50,000 annual compensation). Again, this provision is one which reflects the general elevation in prestige which the Reform Act accords the bankruptcy judiciary.
substantive increases in judicial power ensure the ability of bankruptcy judges to achieve independent status.

EXPANDED JURISDICTION

Jurisdiction under the Bankruptcy Act was described in such mystical terms as "summary," 47 "concurrent," 48 or "exclusive," 49 and was conceptually rooted in traditional notions of in rem and quasi-in-rem jurisdiction. Thus, in order for the bankruptcy court to have jurisdiction in any particular case, the asset or party involved was required to have some connection with the bankruptcy forum. In general, jurisdiction was extended to cover the following: 50 (1) administrative matters; (2) disputes over property in "custody" of the court, i.e., in the possession of a bankrupt or in the name of a reorganization debtor; (3) disputes arising during the course of administration when adverse parties either had waived objections or consented to the court's jurisdiction; (4) proceedings in which jurisdiction was statutorily conferred; and (5) examinations of transactions between attorney and bankrupt in order to avoid unreasonable charges or payments. If litigation could not be categorized as one of the above, it was necessary to bring such action in either a state or federal non-bankruptcy court. 51

The problems with bankruptcy court jurisdiction under the previous system became obvious to even the most objective observer. First, frequent and wasteful litigation addressing the sufficiency of the court's jurisdiction caused great delay and expense. 52 Under a system in which cost and time

48. Id. §§ 67(e), 70(e) 30 Stat. at 564, 566, 52 Stat. at 878, 882 (11 U.S.C. §§ 107(e), 110(e)).
49. Id. §§ 111, 311, 411, 611, as added by Chandler Act, §§ 111, 311, 411, 611, 52 Stat. at 884, 906, 917, 931 (11 U.S.C §§ 511, 711, 811, 1011). See generally Pepper v. Litton, 308 U.S. 295 (1939), in which the Supreme Court held that:

Among the [bankruptcy court's] granted powers are the allowance and disallowance of claims; the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto; the rejection in whole or in part "according to the equities of the case" of claims previously allowed and the entering of such judgments "as may be necessary for the enforcement of the provisions" of the Act. In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts.

Id. at 304 (emphasis added).

50. These areas of jurisdiction were delineated by the Commission on Bankruptcy Laws established by Congress in 1970. See COMMISSION REPORT, supra note 13, at 88-89.
51. Even in those cases in which the courts of bankruptcy were given "concurrent" jurisdiction with local courts, see note 48 supra, uniform construction had prohibited the trustee from bringing actions in bankruptcy court unless some other jurisdictional basis existed. 2 COLLIER ON BANKRUPTCY ¶ 23.15, at 605, 622-23 (14th ed. 1976).
52. COMMISSION REPORT, supra note 13, part I, at 58-92. See Note, Scope of Summary Jurisdiction of the Bankruptcy Court, 40 COLUM. L. REV. 489, 490 n.2 (1940), in which it is noted that the issue of whether the court had summary jurisdiction had been litigated in every volume of the Federal Reporter and Federal Supplement from 1898 to 1940.
factors represent basic considerations, the anomaly of litigation over jurisdiction became completely antithetical to the goal of bankruptcy—speedy and efficient resolution of financial crisis. 53

Second, the credibility of the bankruptcy court was greatly undermined by certain practices which had developed under the jurisdictional requirements of the old system. For example, there existed a practice known in bankruptcy circles as "jurisdiction by ambush." 54 This occurred when the debtor, bankrupt, or trustee notified a creditor that an action would be taken on a particular date in a bankruptcy court. Because the creditor often lacked familiarity with federal bankruptcy law, he or she usually would appear, although not required to do so, and fail to object to jurisdiction. Under the Rules of Bankruptcy Procedure, such failure to object constituted consent to bankruptcy court jurisdiction. 55

Given the jurisdictional problems under the Bankruptcy Act, the House and Senate agreed on the necessity of expansive jurisdiction for the bankruptcy courts. 56 Indeed, Congress intended the Reform Act to invest the bankruptcy courts with "broad and complete jurisdiction over all matters . . . that arise in connection with bankruptcy cases." 57 Specifically, section 1471 of title 28 of the United States Code now will give the bankruptcy court original and exclusive jurisdiction over all cases under the Reform Act. 58 This is the basic grant of jurisdiction equipping the bankruptcy courts with the jurisdictional power necessary to handle the essential aspects of bankruptcy cases. 59 Furthermore, title 28 was amended to give bankruptcy courts original but not exclusive jurisdiction over all civil proceedings arising under the Reform Act or arising in, or related to, cases under the

54. HOUSE REPORT, supra note 7, at 43.
55. SUP. CT. R. BANKR. P. 915(a). The bankruptcy court’s credibility was also diminished by the former system’s arbitrary jurisdictional limitations. See, e.g., In re Kirchoff Frozen Foods, Inc., 375 F. Supp. 156 (D. Ariz. 1972), aff’d, 496 F.2d 84, 87 (9th Cir. 1974) (property in the hands of officers of a bankrupt corporation could not be summarily disposed of in the bankruptcy court even though creditors had alleged the property was obtained by fraudulent conveyances).
56. HOUSE REPORT, supra note 7, at 48; SENATE REPORT, supra note 7, at 17-18.
57. HOUSE REPORT, supra note 7, at 48; SENATE REPORT, supra note 7, at 17-18.
59. The House stated that this grant of jurisdiction is "the broadest grant of jurisdiction to dispose of proceedings that arise under the bankruptcy code. The idea of possession or consent as the sole basis for jurisdiction is eliminated. The bankruptcy court is given in personam jurisdiction as well as in rem jurisdiction to handle everything that arises in a bankruptcy case." HOUSE REPORT, supra note 7, at 445.
Reform Act.\textsuperscript{60} The well-defined phrase "arising under" was borrowed from other jurisdictional contexts and was intended to "leave no doubt as to the scope of the bankruptcy court jurisdiction."\textsuperscript{61} Thus, bankruptcy court jurisdiction now includes bankruptcy litigation in its entirety—adversary proceedings, plenary actions, determination of reaffirmation validity, and claims of exemption and/or discrimination.\textsuperscript{62}

In conjunction with providing expanded jurisdiction to bankruptcy courts, the Reform Act establishes procedural changes enabling the parties to exercise more control over forum selection. Under the Reform Act, a party may remove any civil action to the bankruptcy court of the district wherein the action is pending if that bankruptcy court has jurisdiction.\textsuperscript{63} In addition, the bankruptcy court may remand a case back to the original court "on any equitable ground."\textsuperscript{64} These provisions enable bankruptcy removal to serve the same purpose that the normal removal statute serves in other federal courts by giving a "defendant who has been sued in a state court of competent jurisdiction the right to substitute a forum of his or her own choosing for that originally selected by the plaintiff...."\textsuperscript{65} Unlike the normal removal statute, bankruptcy removal rights will not be limited to defendants. Plaintiffs who are also debtors in bankruptcy proceedings or trustees in bankruptcy may choose to transfer actions to bankruptcy court from the state or federal court in which their suit is filed.\textsuperscript{67}

\textsuperscript{60} 28 U.S.C. § 1471(b) (Supp. II 1978).
\textsuperscript{61}  HOUSE REPORT, supra note 7, at 445.
\textsuperscript{62} Id. at 445-46. Although Congress intended to bring all matters relating to a bankruptcy case into the bankruptcy forum, it was recognized that there is an occasional need for abstention by the bankruptcy court. Id. at 446; SENATE REPORT, supra note 7, at 54. For example, in Thompson v. Magnolia Petroleum, 309 U.S. 478 (1940), the Supreme Court directed a trustee to proceed in state court for determination of an unsettled question of state property law. Id. at 483-84. The Court explained:

A court of bankruptcy has an exclusive and non-delegable control over the administration of an estate in its possession. But the proper exercise of that control may, where the interests of the estate and the parties will best be served, lead the bankruptcy court to consent to submission to state courts of particular controversies involving unsettled questions of state property law and arising in the course of bankruptcy administration.

Id. at 483. Section 1471(d) of title 28 is consistent with this logic. This section permits a bankruptcy court to abstain "in the interest of justice," and provides that a decision to abstain or proceed will not be reviewable on appeal. 28 U.S.C. § 1471(d) (Supp. II 1978). See 11 U.S.C. app. § 305 (Supp. II 1978).
\textsuperscript{63} 28 U.S.C. § 1478(a) (Supp. II 1978). The only exceptions to this provision involve those actions brought before either the United States Tax Court or a governmental unit enforcing its police or regulatory power. Id.
\textsuperscript{64} Id. § 1478(b). 28 U.S.C. app. § 1478(b) (Supp. II 1978) states that such a removal or remand is not appealable.
\textsuperscript{65}  C. WRIGHT, A. MILLER & E. COOPER, 14 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3721, at 514 (1976).
\textsuperscript{67} Id. § 1478.
Finally, it should be noted that while the Reform Act generously expands the jurisdiction of the bankruptcy courts, there are certain jurisdictional provisions, such as the provisions addressing the power to issue a writ of habeas corpus, which remain as they appeared in the Bankruptcy Act. The venue provision also remains unchanged. In short, however, the Reform Act’s expansion of jurisdiction brings bankruptcy court proceedings in line with the current insistence on procedural due process and the modern trend toward relaxed jurisdiction.

SEPARATION OF ADMINISTRATIVE AND JUDICIAL FUNCTION

In addition to their judicial duties, bankruptcy judges under the Bankruptcy Act were required to perform clerical tasks. Reasons for this dual role include:

68. Compare 28 U.S.C. § 2256 (Supp. II 1978) with Sup. Ct. R. Bankr. P. 913. Under the Reform Act, the bankruptcy court may have an imprisoned debtor produced for two purposes. First, the prisoner may be ordered brought before the court for examination, testimony, or performance of duties imposed under title 11. Second, the prisoner may be ordered released if arrested or imprisoned through civil process issued for collection of a debt dischargeable under title 11 or to be provided for in a chapter 11 or chapter 13 plan. 28 U.S.C. § 2256 (Supp. II 1978). Given the infrequency of imprisonment for debts today, these provisions are probably of small value. See V. Countryman, Cases and Materials on Debtor and Creditor 81-86 (2d ed. 1974).

69. Compare Sup. Ct. R. Bankr. P. 116 with 28 U.S.C. § 1472 (Supp. II 1978). For cases strictly under the Bankruptcy Code, proper venue will be in the district of longest domicile, residence, or principal place of business for the six months immediately preceding the filing of the case. 28 U.S.C. § 1472 (Supp. II 1978). In those cases in which the debtor has an affiliate, partner, or partnership already in a pending bankruptcy case, proper venue will lie in the district of the pending case. Id.

However, the Reform Act’s provisions for proceedings arising under or related to cases arising under title 11 are entirely new. Venue in such cases will be proper in the bankruptcy court where the original case is pending. 28 U.S.C. §§ 1472-1475 (Supp. II 1978). There are, however, four exceptions to this rule. First, the trustee may only bring collection proceedings involving less than one thousand dollars, or less than five thousand dollars in the case of consumer debt, in the district of the defendant’s residence. Id. § 1473(b). Second, when a trustee statutorily succeeds to the debtor or the creditors under the provisions of title 11, the trustee may bring a bankruptcy court action only in the district in which the debtor or the creditors could have proceeded. Id. § 1473(c). Third, a trustee operating the business of the debtor after the commencement of a bankruptcy proceeding may sue on a claim arising out of operation only in the bankruptcy court for the district where the suit normally could have been brought. Id. § 1473(d). Finally, a suit against a debtor-in-possession or a trustee, arising out of operation of the business after commencement of a bankruptcy proceeding, may, at the complainant’s option, be brought in the bankruptcy court of the district where the case is pending or where the action could have been brought if not for the bankruptcy. Id. § 1473(e).

70. The Commission Report lists matters of administration as:
1. determining all issues arising in connection with bankruptcy petitions;
2. selecting officers, attorneys, accountants, etc.;
3. conducting creditors’ meetings and examinations;
4. determining exemptions and claims;
5. selling of the assets;
role were twofold. First, administrative duties historically had been imposed on the bankruptcy judiciary. The role of the bankruptcy judge evolved from that of the referee, which had originated as the administrative arm of the district court. Referees, as fee officers of the district court, handled the liquidation and distribution of estates and reported back to the district court. Gradually, however, the position of referee began to include more judicial duties. Thus, prior to the passage of the Reform Act, the overlap of judicial and administrative functions had been established.

The second factor contributing to the development of the dual role was the administrative failure of the Bankruptcy Act. Originally, administration of the Bankruptcy Act was intended to be creditor-controlled: creditors elected a trustee and negotiated with the bankrupt while the referee or judge was left to perform judicial functions. However, because creditors were often geographically scattered, ill-represented, and generally unwilling to press their interests in bankruptcy when there was little or no chance for recovery of costs, creditor control proved to be a myth.

6. distributing proceeds of estates;
7. granting or denying discharges and confirmation of plans;
8. allowing fees and expenses payable out of the estate.

Although a survey of bankruptcy judges indicated that they spent only twenty-two percent of their time on administrative matters, Commission Report, supra note 13, part I, at 5, this still represents a large diversion from judicial duties. The Commission discounted the low percentage the survey revealed on the grounds of improper classification of duties. Id. But see Cyr, supra note 7, at 122 (the Commission had no basis for its explanation).

For example, the Chandler Act outlined specific duties of the referee-in-bankruptcy. These included giving notice to creditors and other parties-in-interest; examining and causing to be corrected any incomplete or defective schedules of property or lists of creditors; preserving evidence taken for use on appeal; and preparing the record for review. Chandler Act, ch. 575, § 39a(1)-(3), (8), 52 Stat. 858 (1938) (repealed 1979).

Concurrent with this increase in judicial responsibilities, some of the referee’s administrative duties were transferred into the hands of the trustee and the clerk. Chandler Act, ch. 575, § 39a(9)-(10), 52 Stat. 858 (1938) (repealed 1979). In 1966, provisions were adopted prohibiting referees from serving as trustees or receivers. Act of May 10, 1966, Pub. L. No. 89-44, 80 Stat. 135. Finally, with the adoption of the 1973 Rules of Bankruptcy Procedure, the judicial role of the bankruptcy judge was emphasized and extended. See Sup. Ct. R. Bankr. P. 506 (the referee judge may delegate any ministerial function to an assistant employed in the court’s office or to any person employed in the office of the clerk of the district court); id. R. 507 (the clerk of the district court is required to keep the bankruptcy docket book and an index of all the cases filed, and is also required to present the referee (judge) with all paper pertinent to the case before him or her).

Creditors’ notions that credit losses are merely a cost of doing business have made creditor interest the exception rather than the rule in modern bankruptcy practice (based on the
Therefore, given both the historic imposition of administrative duties upon the judiciary and the failure of other sources to provide the supervision essential to the proper functioning of bankruptcy procedures, the bankruptcy court was forced to fill the void. Consequently, the bankruptcy judiciary became hopelessly enmeshed in supervisory functions.

The bankruptcy court's problems with its dual role were vividly apparent. Primarily, the performance of administrative functions diverted judicial attention from judicial matters. Additionally, an appearance of impropriety was created by the close working relationship that developed between judges and trustees. Finally, the dual role created the opportunity for biased litigation. Indeed, the bankruptcy court's role as factfinder and adjudicator was threatened by the judge's mandatory attendance at informal hearings likely to expose him or her to highly prejudicial evidence not admissible later at more formal proceedings. Maintaining a neutral judicial perspective in such a situation was difficult.

The congressional solution to these problems was to give as many clerical and supervisory functions as possible to the Clerk of the Bankruptcy Court, to the United States Trustee, and to the panel of private trustees. Indeed, the intent is to give the bankruptcy court a more "passive role" with respect to administrative duties. The expectation is that the problems resulting from the combination of judicial and administrative roles will be eliminated.

The primary method of separating judicial and administrative functions under the Reform Act is to expand the role of the United States Trustees to that of the "principal administrative officers of the bankruptcy system." This provision is pursuant to a "pilot program" that "self-destructs" in 1984 if not congressionally renewed. This program is intended to remove
supervisory responsibility from the judges while still providing a non-centralized bankruptcy administration. It is not intended, however, to replace the existing private trustee system and will exist in only certain selected judicial districts.

An examination of the Reform Act indicates that many supervisory duties previously relegated to bankruptcy judges are now assumed by the United States Trustees. One significant change is that the general supervision of cases covered by chapters 7, 11, and 13 is now placed primarily in the hands of the United States Trustee. This relieves the judiciary of a number of administrative duties and enables it to focus upon those issues appropriate to its office. Also, final reports, accounts, and fee applications of standing and private trustees will be filed with both the bankruptcy court and the United States Trustee. Therefore, although the court continues to rule on fees, the burden of discovering administrative incongruities and unreasonable fees has been removed from the court's shoulders. Furthermore, monies received from the administration of an estate by a private trustee or the United States Trustee will be safely invested by the United States Trustee during the pendency of a proceeding. Formerly, such an investment required a court order and court supervision. Finally, under chapter 11, the United States Trustee may appoint a committee of unsecured creditors. If a party in interest requests the court to appoint additional creditors' committees, and

the administration of the United States Attorney program, supervision of the trustees is to be provided by the United States Attorney General. 28 U.S.C. § 586 (Supp. II 1978). Trustees will be appointed by the Attorney General for a seven year term. Id. § 581. The Attorney General retains the right to remove for cause and the right to fix salaries at not more than $44,676. Id. §§ 581, 587. See also 5 U.S.C. § 5332 (Schedule 1) (West Supp. 1979). Also, provisions have been made for the appointment of assistant trustees and other staff as well as for the reimbursement of necessary expenses. 28 U.S.C. §§ 582, 588-589 (Supp. II 1978).

89. HOUSE REPORT, supra note 7, at 101.


92. 11 U.S.C. app. §§ 330(a) (fee applications), 15103(f) (modifying § 704(b)), 15704 (final reports and accounts) (Supp. II 1978).

93. Id. § 15345(b). The private trustee now may also make safe investments to gain a maximum yield for the estate. Id. § 345(a).


the court concludes that the appointment is necessary to “assure adequate representation,” the United States Trustee will appoint such committees. 96

Other administrative duties have been transferred from the bankruptcy court without specific imposition on the United States Trustees. One of the most drastic of these changes is that the bankruptcy judge is no longer permitted to preside at the first meeting of creditors. 97 Private or standing trustees and the United States Trustee, however, may attend the meeting and examine the debtor. 98

Finally, in addition to transferring certain administrative duties away from the judges, the Reform Act also eliminates some administrative steps. Under a “notice-and-hearing” 99 concept of administration, certain judicial administrative duties normally involving unopposed decisions are eliminated. 100 This procedure is justified by the logic that some matters have become so routine that the bankruptcy judge need not be concerned with them. 101 For example, when requests for administrative expenses are presented, notice and a hearing will be provided to interested creditors if any creditors appear to contest the allowance. 102 If no such objection occurs, administrative expenses are allowed as requested. 103

The Reform Act has gone even further. Certain administrative duties have been eliminated without providing for “notice and a hearing” to interested creditors. Under these provisions, trustees may now use, sell, and lease property of the estate in the ordinary course of business, without either notice or a hearing, if they have been authorized to operate the debtor’s business by the court under chapters 7, 11, or 13. 104 This marks a signifi-

97. Id. § 341(c). But see S. 305, 96th Cong., 1st Sess. § 111(b) (1979), which would require the bankruptcy court to preside at any election of the trustee. Under the new procedure, the court must call a meeting of the creditors not less than 20 nor more than 40 days after the order for relief. The clerk of the court is to preside unless a trustee is elected by the creditors. If a trustee is elected, the creditors vote on the amount of the trustee’s bond. In addition, an electronic recording will be made of the proceedings. The court is insulated from this meeting because the clerk of the court may not disclose the proceedings to the court. This rule applies in all chapter 7 cases where a trustee is elected. In that case, the court only will be informed of the trustee’s name and address. Interim Rules, supra note 9, Rule 2003.
98. Id. §§ 343, 15343.
100. House Report, supra note 7, at 108.
103. Correlative with the concept of “notice and a hearing,” proof of claims continue to be allowed when filed unless objected to by a party-in-interest. 11 U.S.C. app. § 502(a) (Supp. II 1978). If an objection is registered, the bankruptcy court is required to determine the proper amount of such a claim. Id. § 502(b). Such a determination, however, generally will require a judicial hearing rather than an administrative approval.
104. Id. § 363(c). The trustee may enter into transactions outside the ordinary course of business, but only after notice and a hearing on any objectives. Id. § 363(b).
cant departure from previous law, which had provided that continuation of the business always required court approval.105

Despite Congress' ambitious attempts with the Reform Act, many of the bankruptcy court's duties will continue to be "administrative" in nature. Indeed, in those jurisdictions where United States Trustees will not be appointed, the bankruptcy judge's supervisory role often will remain as administrative as it has always been. Even in those jurisdictions in which a United States Trustee will be appointed, the court will retain many of its administrative duties. One area in which the court maintains administrative duties is fees. For example, the court will continue to control compensation of United States Trustees in chapters 7 and 11 cases, and in chapter 13 cases when a private trustee is elected.106 In addition, the court will be required to approve the employment and compensation of attorneys and other professionals whose services are necessary for the administration of the estate.107 Finally, the court will continue to examine a debtor's transactions with his attorney and to cancel any fees which the court finds excessive.108

A second area of continued judicial administration involves the securing of credit by trustees or debtors-in-possession. Although the new provisions for obtaining credit are much broader than those under the Bankruptcy Act, the bankruptcy court still is required to supervise such transactions.109 Moreover, assumption and rejection of executory leases or unexpired leases require judicial supervision of the trustee's decision.110 The only exception in this area is for unsecured credit in the ordinary course of business when the trustee or debtor is already operating the business under court approval.111


108. Id. § 329(b). Congress clearly has indicated that an attorney or professional is entitled to a normal fee for bankruptcy services, rather than a bargain fee "based on notions of conservation of the estate and judicial economy," as was previously the case. HOUSE REPORT, supra note 7, at 329-30. The relaxation of the standard may result in the bankruptcy court not being as vigilant in examining professional and attorney compensation.


111. Id. § 364(a).
Finally, the administrative duty of closing and reopening cases remains almost exactly as it was under the Bankruptcy Act. The court continues to "close the case" after it has been "fully administered" and to reopen the case "to administer assets, to accord relief to the debtor, or for other cause."  

In addition to performing many administrative duties for which it had been responsible under the Bankruptcy Act, the bankruptcy court under the Reform Act is required to perform at least one entirely new administrative function. The Reform Act requires that the court administer the holding of a discharge hearing. At such a hearing, the court must inform the debtor whether a discharge has been granted. If a discharge has been granted, the court must then examine any reaffirmation agreements entered into by the debtor. Subsequently, the task of policing reaffirmations also falls to the judiciary. This task includes: (1) instructing the debtor that reaffirmation is not required under either bankruptcy or non-bankruptcy law; (2) informing the debtor of the legal effects and consequences of reaffirmation; (3) clarifying the thirty day recission period provided by the Reform Act; and (4) determining the validity of a reaffirmation under the strict limitations imposed by the Reform Act.

114. Id. § 524(d).
115. Id. § 524(c)-(d). Reaffirmation is a promise, binding under state contract law, in which a debtor manifests an intent to become totally or partially liable for a debt dischargeable in bankruptcy. See W. Laube, W. Hill & L. King, Collier Bankruptcy Manual ¶ 17.12, at 219.13–14 (2d ed., 1976). In consideration for a debtor’s reaffirmation, the creditor agrees to return assets seized before bankruptcy or demanded during bankruptcy either pursuant to a security agreement or lien or to supply cash. Reaffirmations generally are made only by individual debtors. Businesses or corporations undergoing straight bankruptcy are dissolved or abandoned after liquidation and therefore usually have little reason to reaffirm.
116. 11 U.S.C. app. § 524(c)-(d) (Supp. II 1978). Congress felt such supervision necessary based on its conclusion that consumer debtors are often coerced into reaffirming through high-pressure creditor tactics. House Report, supra note 7, at 162-64; Senate Report, supra note 7, at 80.
118. Id. § 524(d)(1)(B).
119. Id. § 524(d)(2). Because immediate entry of discharge may inhibit a debtor’s right to enter into reaffirmation agreements (as where the same date is fixed for filing objections to a discharge and dischargeability complaints), the court, upon application of the debtor, shall grant a delay of 45 days of the order granting discharge and may, at its discretion, grant further delays. Interim Rules, supra note 9, Rule 4002. Reaffirmation validity requires that the agreement be made before a discharge is granted. This requirement allows the court sufficient time to examine the agreement and to estimate its effects, 11 U.S.C. app. § 524(c)(1) (Supp. II 1978). The court may then approve the agreement if it is satisfied that the agreement does not impose an "undue hardship on the debtor" and "in the best interest of the debtor." Id. § 524(c)(4)(A). If an agreement is in settlement of litigation over a debtor’s discharge, the court may approve the reaffirmation if settlement was "entered into in good faith." Id. § 524(c)(4)(B).
To summarize, while the Reform Act makes significant changes which serve to separate the administrative and judicial functions of the bankruptcy court, it does not provide total delineation. Indeed, while the court is released from some administrative duties, entirely new supervisory duties are also placed upon it. In retrospect, all streamlining of the new court's administrative duties was done primarily in areas involving matters of general administrative efficiency and creditor-control. Some of the additional administrative duties imposed by the Reform Act were created to benefit consumer debtors.\(^\text{120}\) Congress' action here was quite competent, given the serious problem of protecting consumer debtors from the potentially oppressive effects of reaffirmation agreements.

**CONCLUSION**

The Reform Act represents a significant congressional attempt to invigorate federal bankruptcy law. Although it may fail to accomplish all that it set out to achieve,\(^\text{121}\) the Reform Act undoubtedly will succeed in establishing an elevated and more independent bankruptcy judiciary. This accomplishment will enable the court to deal with the commercial realities of a contemporary society in a manner beneficial to those who rely upon the court to resolve financial conflicts expeditiously. Therefore, the Reform Act can only be viewed as "coming of age" in the twentieth century. Insofar as "coming of age" usually necessitates the growing pains of maturation, the Reform Act may be expected to fall short of resolving all the problems existent within the bankruptcy system. Insofar as "coming of age" represents a new beginning, however, the Bankruptcy Reform Act of 1978 signifies a positive change.

Because creditors often sue without actual grounds for a denial of discharge and because debtors often settle merely to avoid the aggravation that accompanies litigation, the court's function is to deter reaffirmation settlements based on groundless suits. See id. § 523(d) (litigation costs charged to creditor where dischargeability determination occurs at creditor's request and discharge is granted).

\(^\text{120}\) See notes 115-19 and accompanying text supra.

\(^\text{121}\) It may be that the bankruptcy judge will now be deluged with more formal matters. For example, the bankruptcy judge may now be required to deal with a variety of contested litigational matters from creditors and debtors seeking a hearing or "review" of trustee determinations. See, e.g., INTERM RULES, supra note 9, R. 2003(d). Such disputes would never arise if a judicial officer originally presided.