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I. INTRODUCTION

One of the unique institutions created by the Bankruptcy Reform Act of 1978[1] was the bankruptcy appellate panel system.[2] Although its legislative formulation was largely overshadowed by the debate which concurrently raged over the constitutional status of bankruptcy judges under the new law,[3] the appellate panel concept has already proven an important corollary to the expanded jurisdiction of the bankruptcy trial courts in two federal judicial circuits.[4] This Article will examine the forces that led to the creation of these panels and the problems that have been associated with their implementation. Additionally, it will examine the impact the appellate panels have had upon the administration of bankruptcy appeals in those circuits

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1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1980) (codified in title 11 U.S.C., and scattered sections in titles 2, 5, 7, 12, 18, 28, 45, and 46 U.S.C.; certain sections are still to be codified in 28 U.S.C.).

2. 28 U.S.C. §§ 160, 1293, 1482 (Supp. III 1979); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 405(c)(1)(A), 92 Stat. 2549, 2685 (1980) (permitting use of the bankruptcy appellate panels during the transition period from October 1, 1979, through March 30, 1984).

3. *See Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate*, 95th Cong., 1st Sess. 412-14 (1977) (statement on Hon. Ruggero J. Aldisert) [hereinafter cited as *Senate Hearings*]; *id.* at 442 (statement of Hon. David Kline). *See generally* H.R. REP. No. 595, 95th Cong., 1st Sess. 7 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963 [hereinafter cited as H.R. REP. No. 595]; S. REP. No. 989, 95th Cong., 2d Sess. 15-19, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5787 [hereinafter cited as S. REP. No. 989]; Broude, *Jurisdiction and Venue Under the Bankruptcy Act of 1973*, 48 AM. BANKR. L.J. 231 (1974); Cyr, *Structuring a New Bankruptcy Court: A Comparative Analysis*, 52 AM. BANKR. L.J. 141 (1978); King, *Bankruptcy Court—Specialized Court Supported*, 52 AM. BANKR. L.J. 193 (1978); Lee, *A Critical Comparison of the Commission Bill and the Judges' Bill for the Amendment of the Bankruptcy Act*, 49 AM. BANKR. L.J. 1 (1975); Rifkind, *Bankruptcy Code—Specialized Court Opposed*, 52 AM. BANKR L.J. 187 (1978).

4. At present, the bankruptcy appellate panels are being utilized in the First Circuit (except the District of Puerto Rico), and the Ninth Circuit, in Arizona, Nevada, and the four districts in California.

in which the panels have been utilized. Finally, a prognosis will be made of the possibility of expanding the use of bankruptcy appellate panels into districts and circuits where they have not yet been introduced.

II. The Historical Development of the Appellate Panel Concept

A. *The Necessity of a New Bankruptcy Appellate System*

One of the more troubling procedural problems facing the drafters of the 1978 Bankruptcy Code concerned the manner in which appeals would be handled under the new law.[5] Three aspects of this difficulty were significant. First, bankruptcy has long been envisioned as an expedited method for resolving all of the debt problems of a petitioning debtor.[6] When an appeal from a bankruptcy court decision is made to a district court, as was the practice under the old Bankruptcy Act, that court was forced either to set aside prior matters, in order to handle the bankruptcy appeal with a modicum of dispatch, or to delay the general bankruptcy proceeding during the pendency of that appeal.[7] Given the possibility of several appeals in the course of each general bankruptcy case, the potential burden on the district courts may be substantial.[8] In fact, by the mid-1970's,

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5. *See generally Senate Hearings, supra* note 3, at 414-18, 458-82 (testimony of Ad Hoc Committee on Bankruptcy Legislation of the Judicial Conference of the United States and of Hon. David Kline, Hon. Herbert Katz, Hon. Edward E. Davis, and Hon. Hugh M. Caldwell); H.R. Rep. No. 595, *supra* note 3, at 40-43; S. Rep. No. 989, *supra* note 3, at 18; Cyr, *supra* note 3, at 157-85.

6. Katchen v. Landy, 382 U.S. 323, 328 (1966); *Ex parte* The City Bank of New Orleans, 44 U.S. (3 How.) 292, 312 (1845). *See also* Report of the Commission on the Bankruptcy Laws of the United States, pt. 1, 93d Cong., 1st Sess. 81-82, 86, 89 (1973) [hereinafter cited as Commission Report]; D. Stanley & M. Girth, Bankruptcy 200 (1971).

7. One complaint made by a bankruptcy judge at the Senate Hearings on S. 2266 and H.R. 8200 related to criticism he had heard that "expedition [was] not the name of the game in the district court in many instances [and that bankruptcy appeals were] relegated to a position of less dignity than many other matters." In some areas it was "relegated . . . to nothing more than a law-in-motion matter." *Senate Hearings, supra* note 3, at 459 (statement of Hon. Herbert Katz).

However, this need for efficiency in the handling of bankruptcy appeals was also one argument made against direct appeals to the circuit courts of appeals. *See Senate Hearings, supra* note 3, at 534-35 (statement of Francis F. Quittner, Esq.) (proposing a permanent intermediate court of bankruptcy appeals).

8. Although most district judges spent about one percent of their time on bankruptcy matters under the old Bankruptcy Act, *see Senate Hearings, supra* note 3, at 435 (statement of Hon. James Lawrence King); *id.* at 439, 450, 460 (statement of Hon. David

bankruptcy appeals had become bothersome enough to the district courts that many district judges were joining bankruptcy judges in informally expressing the need for another means of processing these appeals.[9]

A second and similar problem facing the drafters of the Bankruptcy Reform Act has resulted from the specialized nature of bankruptcy law and procedure.[10] Although many bankruptcy court decisions involve nonbankruptcy law, a significant number of appellate matters deal with the statutory language of the Bankruptcy Act or with the procedural rules which were adopted by the United States Supreme Court in 1973 to supplant certain outdated parts of the Act.[11] Because they viewed

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Kline), the adversary proceedings and contested matters in a bankruptcy case had the potential of taking large portions of a district judge's working time. *See, e.g., Senate Hearings, supra* note 3, at 435 (statement of Hon. James Lawrence King) (referring to Judge Frank McGarr, United States District Judge, Northern District of Illinois, who had spent 10 months of the prior year on a reorganization case); *id.* at 461 (statement of Hon. Edward E. Davis) (one Chapter X case in the District of Arizona produced nine appeals to the district court, eight of which thereafter went to the circuit court of appeals).

9. One witness at the Senate Hearings on S. 2266 and H.R. 8200, a practicing attorney and former delegate to the Ninth Judicial Circuit Conference, noted:

> Over the course of years a tremendous number of District Court Judges constantly requested that the Committee of the Ninth Circuit take steps to recommend the elimination of Petitions for Review or Appeals from Orders of the Bankruptcy Judge (Referee) to the District Court. I am satisfied that this would represent the opinion of by far the greatest majority of U.S. District Judges.

Id. at 527 (statement of Francis F. Quittner, Esq.). *See also id.* at 415 (statement of Sen. Dennis DeConcini); *id.* at 461-62 (statements of Hon. Edward E. Davis and Hon. Hugh M. Caldwell). *But see id.* at 415-18 (statements of Hon. Wesley E. Brown, Hon. Thomas J. MacBride, and Hon. Edward Weinfeld) (stating that their own bankruptcy burden had not been excessive, but observing that there was a need for additional district judges to handle that and other judicial burdens).

10. *See generally id.* at 442 (statement of Hon. David Kline); H.R. REP. No. 595, *supra* note 3, at 18-21.

Indeed, one major complaint lodged against the federal bankruptcy system has been that it fosters a "bankruptcy ring" of bankruptcy specialists. *See Bankruptcy Act Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 94th Cong., 1st & 2d Sess., pt. 1, at 538 (1975-76) (statement of Harold Marsh, Jr.) [hereinafter cited as *House Hearings*]; H.R. REP No. 595, *supra* note 3, at 95-99; Aaron, *The Bankruptcy Reform Act of 1978: The Full-Employment-For-Lawyers Bill,* 1979 UTAH L. REV. 1, 20-21 & nn.159-161; Rifkind, *supra* note 3, at 188-89. *But see* King, *supra* note 3, at 195 (finding the "bankruptcy ring" concern to be a red herring).

11. *See House Hearings, supra* note 10, at 531 (testimony of Hon. Robert B. Morton) (discussing broad spectrum of cases handled by bankruptcy judges); *Senate Hearings, supra* note 3, at 438, 442 (statement of Hon. David Kline).

In fact, a substantial number of bankruptcy court decisions under the old Bank-

bankruptcy as a hypertechnical area of federal law, many district judges have been uneasy about reviewing the decisions of their resident bankruptcy *experts*.[12] This apparent unwillingness on the part of district judges to second-guess bankruptcy judges, coupled with the fact that a reviewing district judge may have been involved personally in the selection of the bankruptcy judge whose decision is under examination,[13] has led to a distrust by litigants and counsel of the impartiality of the district courts in hearing bankruptcy appeals.[14]

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ruptcy Act dealt solely with whether the court had jurisdiction to hear the matter "summarily." *See* COMMISSION REPORT, *supra* note 6, at 90; *Senate Hearings, supra* note 3, at 438, 442 (statement of Hon. David Kline); J. MACLACHLAN, BANKRUPTCY § 24, at 18-19 (1956); Note, *Scope of the Summary Jurisdiction of the Bankruptcy Court*, 40 COLUM. L. REV. 489, 489-90 & n.2 (1940). *See generally* Treister, *Bankruptcy Jurisdiction, Is It Too Summary?*, 39 S. CAL. L. REV. 78 (1966).

12. *See Senate Hearings, supra* note 3, at 461 (testimony of Hon. Edward E. Davis). *See also* H.R. REP. No. 595, *supra* note 3, at 16-17.

At the Senate Hearings on S. 2266 and H.R. 8200, District Judge Wesley E. Brown inadvertently acknowledged the "law clerk/bankruptcy specialist" role of the bankruptcy judges vis-à-vis the district courts:

> Mr. Feidler. You mentioned adequate personnel for the bankruptcy courts. Do you think a separate law clerk or clerk of court or reporter is needed for those courts?
>
> Judge Brown. I do not think they need a law clerk. *That is why they were appointed in the first place, because of their competence to do this. The district judges thought they would have the benefit of that competence, just like they did when they had a good lawyer appear before them, except it would be better because they do this work all the time.*

Senate Hearings, supra note 3, at 429 (statement of Hon. Wesley E. Brown) (emphasis added).

13. Section 34 of the Bankruptcy Act, ch. 541, 30 Stat. 544, 555 (1898) (as amended, repealed in 1978), established the following procedure for the appointment of referees (bankruptcy judges):

> The judges of the several courts of bankruptcy shall appoint referees. Where there is more than one judge of a court of bankruptcy, or where the territory to be served by a referee includes territory in more than one judicial district, the appointment, whether an original appointment or a reappointment, shall be by the concurrence of a majority of all the judges of such court or of the courts of bankruptcy of such judicial districts, and where there is no such concurrence, then by the chief judge. Except as otherwise provided in section 37 of this Act, each appointment and reappointment shall be for a term of six years. Upon the expiration of his term, a referee in bankruptcy shall continue to perform the duties of his office until his successor is appointed and qualifies provided the filling of the vacancy has been authorized as provided in subdivision b of section 43 of this Act.

Id.

14. *See* COMMISSION REPORT, *supra* note 6, at 96; H.R. REP. No. 595, *supra* note 3, at 16-17.

These misgivings were, in most cases, ill-founded. At the very least, the courts of appeals seem to have respected district court bankruptcy decisions (including both bank-

Finally, since the bankruptcy courts are to have a more independent status under the new Code, the system of district court review has seemed to many to be an anachronistic anomaly.[15] In this regard, the drafters of the new Bankruptcy Code felt that a totally new system for handling bankruptcy appeals was necessary—a system which recognized the new functional independence of the bankruptcy courts.[16]

B. The Creation of the New Bankruptcy Appellate System

Congress entertained a number of proposals concerning the handling of bankruptcy appeals under the new Code.[17] These suggestions frequently reflected the proposer's attitude toward the proper role of the bankruptcy courts in the federal judicial system. Those who most strongly advocated a fully independent bankruptcy bench—in particular, those who wanted a bankruptcy judiciary founded under article III of the Constitution[18]—pushed for an appellate mechanism detached from the

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ruptcy court reviews and original bankruptcy proceedings before the district courts). During the period July 1, 1973 through June 30, 1978, the average reversal rate for bankruptcy appeals from the district courts to the courts of appeals was 18.5%. For civil cases, this figure was 19.9%; for all appeals, 17.1%. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES HELD AT WASHINGTON, D.C. (Mar. 9-10, 1978 & Sept. 21-22, 1978) & ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 165, table 6 (1978); JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES HELD AT WASHINGTON, D.C. (Mar. 10-11, 1977 & Sept. 15-16, 1977) & ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 175, figure 2 (1977); JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES HELD AT ST. PAUL, MINNESOTA (Apr. 7, 1976) & WASHINGTON, D.C. (Sept. 22-23, 1976) & ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 162, table 8 (1976); JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES HELD AT WASHINGTON, D.C. (Mar. 6-7, 1975 & Sept. 25-26, 1975) & ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 183, table 8 (1975); JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES HELD AT WASHINGTON, D.C. (Mar. 7-8, 1974 & Sept. 19-20, 1974) & ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 193, table 34 (1974).

15. *See, e.g., House Hearings, supra* note 10, at 589 (statement of Harold Marsh, Jr.); COMMISSION REPORT, *supra* note 6, at 96; H.R. REP. No. 595, *supra* note 3, at 40-43.

16. *See, e.g.*, H.R. REP. No. 595, *supra* note 3, at 40-42; Cyr, *supra* note 3, at 146-51.

17. *See* H.R. REP. No. 595, *supra* note 3, at 40-43; Cyr, *supra* note 3, at 157-85.

18. The question of whether the newly expanded jurisdiction of the bankruptcy courts would require that the judges of these tribunals be given article III status was one of the more debated aspects of the Bankruptcy Reform Act. *See* H.R. REP. No. 595, *supra* note 3, at 7-87; S. REP. No. 989, *supra* note 3, at 15-16; 124 CONG. REC. S17403-04

influence of the district courts.[19] Among the adherents to this viewpoint, however, there existed a substantial variance in opinion as to which method would best adapt itself to the unique bankruptcy system that eventually would result from Congress' efforts. One position, taken by many bankruptcy judges and by a number of law professors and practitioners, advocated the creation of a new bankruptcy court of appeals.[20] The major argument in favor of this proposal was that it would avoid the imposition of bankruptcy appeals upon the already overcrowded dockets of the circuit courts of appeals.[21] Furthermore, it would create an additional layer of review by bankruptcy specialists before any appeal reached an appellate court of general jurisdiction, such as the circuit courts of appeals.[22] This would, it was

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(daily ed. Oct. 6, 1978) (remarks of Sen. Dennis DeConcini); 124 CONG. REC. 11089 (daily ed. Sept. 28, 1978) (remarks of Rep. Don Edwards).

Although the Senate prevailed in preventing life tenure for bankruptcy judges, the debate is not yet over. The United States Supreme Court has recently accepted review of a district court decision holding the expansion of bankruptcy court jurisdiction to be unconstitutional, because of the lack of article III bankruptcy judges to administer this jurisdiction. Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 12 Bankr. 946 (D. Minn. 1981), *prob. juris. noted*, 50 U.S.L.W. 3375 (1981). *See also* Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297 (1981); Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560 (1980).

Should the United States Supreme Court uphold the lower court decision in *Marathon Pipeline*, it is not at all clear whether Congress will ultimately elect to adopt the House proposal to give bankruptcy judges article III status or simply opt to return to the jurisdictional mandate employed under the old Bankruptcy Act.

It should perhaps be noted that neither the National Bankruptcy Conference nor the drafters of the "Judges' Bill," *see infra* note 24, initially raised the concept of article III bankruptcy courts. *See Senate Hearings, supra* note 3, at 478 (testimony of Hon. David Kline); H.R. 32, 94th Cong., 1st Sess § 2-102 (1975). This concept seems to have been introduced by the House subcommittee which drafted H.R. 6 (later H.R. 8200, 95th Cong., 1st Sess. (1977)). *Senate Hearings, supra* note 3, at 479 (testimony of Hon. Conrad K. Cyr). Naturally, however, no opposition to this idea was subsequently expressed by the bankruptcy judges. *See, e.g., Senate Hearings, supra* note 3, at 438, 442 (statement of Hon. David Kline) (noting that the "strongest kind of case" had been made by the House subcommittee in support of article III status for bankruptcy judges).

19. *See, e.g., Senate Hearings, supra* note 3, at 438-39, 442-50, 460 (statement of Hon. David Kline); *id.* at 458-60 (testimony of Hon. Herbert Katz); Cyr, *supra* note 3.

20. *See, e.g., Senate Hearings, supra* note 3, at 526-36 (statement of Francis F. Quittner, Esq.); *House Hearings, supra* note 10, at 592, 624-25 (statement of George M. Treister, Esq.); *id.* at 356-65 (statement of Marjorie Girth and David T. Stanley); Cyr, *supra* note 3, at 151-53, 157-62, 175-85.

21. *See House Hearings, supra* note 10, at 518, 536, 565 (statement of Hon. Robert B. Morton); *Senate Hearings, supra* note 3, at 527-36 (statement of Francis F. Quittner, Esq.).

22. This was the position taken by George M. Treister, Vice-Chairman of the Na-

hoped, provide greater uniformity, expedition, and economy to bankruptcy appellate decisions.[23]

In contrast, other commentators agreed that the new bankruptcy appellate process ought to reflect the new independence of the bankruptcy courts, but felt that it should not represent a departure from the existing structure of the federal appellate system. Instead, bankruptcy appeals should parallel district court appeals, going directly to the circuit level.[24] This viewpoint was eventually adopted by the House of Representatives, which had initially set about to make the bankruptcy courts article III equals of the district courts.[25]

Neither the idea of an article III bankruptcy court nor that of direct appeal in bankruptcy cases to the courts of appeals sat well with opponents of the specialized bankruptcy court concept.[26] A number of circuit court judges were also dissatisfied with the possibility of entertaining direct bankruptcy appeals in their courts. These circuit judges principally feared that the influx of bankruptcy appeals under this system would further

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tional Bankruptcy Conference. *House Hearings, supra* note 10, at 624-25 (statement of George M. Treister, Esq.):

> The National Bankruptcy Conference, however, felt that giving two appeals, two ordinary appeals, in bankruptcy cases was just too much. It would slow the process. Everybody would have an extra appeal. It would delay. You do not violate any fundamental due process concepts if you do not get an appeal at all. One fair trial is pretty good. We have traditionally given at least one appeal, but it does not have to be as easy a first appeal as section 39(c) of the present Bankruptcy Act.

Id. at 625.

23. *See Senate Hearings, supra* note 3, at 526-36 (statement of Francis F. Quittner, Esq.); Cyr, *supra* note 3, at 158-61. *But see House Hearings, supra* note 10, at 625 (statement of George M. Treister, Esq.) (position of the National Bankruptcy Conference was that this intermediate step would result in added delays in the bankruptcy appellate process).

24. This was the position taken by the National Bankruptcy Conference, *House Hearings, supra* note 10, at 592, 625 (testimony of George M. Treister, Esq.), and the appellate scheme of the "Judges' Bill," H.R. 32, 94th Cong., 1st Sess. § 2-209(a) (1975). *See also* H.R. REP. No. 595, *supra* note 3, at 42-43.

The so-called "Judge's Bill," H.R. 32, 94th Cong., 1st Sess. (1975), was introduced on behalf of the National Conference of Bankruptcy Judges as an alternative to the bill proposed by the Commission on the Bankruptcy Laws of the United States, H.R. 31, 94th Cong., 1st Sess. (1975). For a discussion of the various bankruptcy reform bills forming a basis for the 1978 Bankruptcy Reform Act, see 1 L. KING, COLLIER ON BANKRUPTCY ¶ 1.03 (15th ed. 1981).

25. H.R. 8200, 95th Cong., 1st Sess. § 237 (1977). *See also* H.R. REP. No. 595, *supra* note 3, at 40-43.

26. *See Senate Hearings, supra* note 3, at 412, 415 (statement of Hon. Ruggero J. Aldisert); *id.* at 424-25 (statement of Hon. Wesley E. Brown); Letter from Hon. Shirley M. Hufstedler to Rep. Charles Wiggins (June 27, 1977); Rifkind, *supra* note 3.

strain their already overloaded dockets.[27]

Those who rejected both specialized bankruptcy appellate courts and direct access to the courts of appeals generally favored a retention of the practice of district court review.[28] The views of these persons eventually gained an ascendancy in the Senate.[29] The Senate, which had also rejected the House's decision to grant independent article III status to bankruptcy trial courts,[30] ultimately included the existing district court review mechanism in its version of the Bankruptcy Reform Act.[31]

The compromise with respect to the bankruptcy judiciary finally reached by the House and Senate generally followed the more conservative lines drawn by the Senate.[32] The bankruptcy courts were organized as article I adjuncts of the district courts,[33] but they were given expanded jurisdiction to hear all cases under title 11 of the United States Code, all proceedings arising in or related to cases under title 11, and all actions con-

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27. *Senate Hearings, supra* note 3, at 414-15 (statement of Hon. Ruggero J. Aldisert); Letter from Hon. Shirley M. Hufstedler to Rep. Charles Wiggins (June 27, 1977).

The Commission on the Bankruptcy Laws of the United States had similarly been concerned with a potential increase in the number of bankruptcy appeals heard by the courts of appeals. COMMISSION REPORT, *supra* note 6, at 97 (noting, however, that the remoteness of the courts of appeals would deter a number of appeals). The House, on the other hand, rejected the notion that the number of direct bankruptcy appeals to the courts of appeals would represent an unmanageable burden, finding that the actual increase would be "negligible." H.R. REP. No. 595, *supra* note 3, at 41. *See also* Letter from Rep. Don Edwards to Hon. Shirley M. Hufstedler (July 26, 1977).

28. *See, e.g., Senate Hearings, supra* note 3, at 412-18 (statements of Hon. Ruggero J. Aldisert, Hon. Wesley E. Brown, Hon. Thomas J. MacBride, Hon. Morley L. Sear, Hon. Edward Weinfeld, and Hon. James Lawrence King); Letter from Hon. Shirley M. Hufstedler to Rep. Charles Wiggins (June 27, 1977); Rifkind, *supra* note 3.

This had also been the suggestion of the Commission on the Bankruptcy Laws of the United States. COMMISSION REPORT, *supra* note 6, 96-97 (the cost of appeals and the circuit courts' potential increase in caseload were cited as the bases for this recommendation).

29. *See* S. 2266, 95th Cong., 2d Sess. §§ 201, 216 (1978); S. REP. No. 989, *supra* note 3, at 18 (1978).

30. *See* S. 2266, 95th Cong., 2d Sess. § 201 (1978); S. REP. No. 989, *supra* note 3, at 15-16; 124 CONG. REC. S14719 (daily ed. Sept. 7, 1978) (remarks of Sen. Malcolm Wallop).

31. S. 2266, 95th Cong., 2d Sess. §§ 201, 216 (1978).

32. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 201, 236-241, 92 Stat. 2549, 2659, 2667-68, 2671 (1980); 124 CONG. REC. H11047-89 (daily ed. Sept. 28, 1978) (remarks of Rep. Don Edwards); 124 CONG. REC. S17403-04 (daily ed. Oct. 6, 1978) (remarks of Sen. Dennis DeConcini).

33. *See* 28 U.S.C. § 151 (Supp. III 1979). *See also* S. REP. No. 989, *supra* note 3, at 16; 124 CONG. REC. S17403-04 (daily ed. Oct. 6, 1978) (remarks of Sen. Dennis DeConcini).

cerning the property of a bankruptcy estate.[34] Similarly, although the bankruptcy courts were free of any direct district court control,[35] the district courts were still required, in most instances, to hear appeals from bankruptcy court decisions.[36] Nevertheless, before the legislation was signed by President Carter, a significant addition had been made to the language governing bankruptcy appeals.

Although many of the provisions in the House bill dealing with the structure of the new bankruptcy courts had been aban-

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34. 28 U.S.C. § 1471 (Supp. III 1979). *See also* 124 CONG. REC. S14718-19 (daily ed. Sept. 7, 1978) (remarks of Sen. Malcolm Wallop).

35. The severance of the bankruptcy courts from the control of district courts under the 1978 Bankruptcy Reform Act has four principal facets:

(1) After April 1, 1984, the bankruptcy judges are to be appointed by the President, by and with the advice and consent of the Senate, rather than by the district judges of their respective districts. *Compare* 28 U.S.C. § 152 (Supp. III 1979) *with* section 34 of the Bankruptcy Act, ch. 541, 30 Stat. 544, 555 (1898) (as amended, repealed 1978). During the transition period, a merit screening committee is to examine each candidate for bankruptcy judge before the district judges may fill a position on the bankruptcy bench. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 404(c), 92 Stat. 2549, 2684 (1980). Although the district judges need not follow the merit screening committee's recommendations, they may not appoint a candidate who is found to be unqualified by the committee. *Id.* § 404(d), 92 Stat. 2549, 2684.

(2) During the transition and thereafter, bankruptcy judges may appoint their own clerks, including law clerks, and other court personnel. 28 U.S.C. §§ 771-775 (Supp. III 1979); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 404(e), 92 Stat. 2549, 2684 (1980).

(3) Bankruptcy judges are now to have their own representative on the Board of the Federal Judicial Center, 28 U.S.C. § 621(a)(2) (Supp. III 1979) (effective October 1, 1979), two representatives on the Judicial Conference of the United States, 28 U.S.C. § 331 (as amended by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 208, 402(b), 92 Stat. 2549, 2660-61, 2682 (1980) (effective April 1, 1984)), and they are to attend circuit judicial conferences. 28 U.S.C. § 333 (Supp. III 1979) (apparently effective October 1, 1979, *but see* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 407(c), 92 Stat. 2549, 2686 (1980) (requiring only that "at least one" bankruptcy judge be summoned to each circuit's judicial conference during the transition period)). Section 407(b) of title IV of the 1978 Bankruptcy Reform Act further provides:

> During the transition period, the Congress strongly recommends at least one-third of the members of any committee of the Judicial Conference of the United States that is concerned with the administration of the bankruptcy system shall be chosen from among the United States bankruptcy judges, and at least one member of any committee of the Judicial Conference that is concerned with the court administration, supporting personnel, or bankruptcy court rules shall be chosen from among the United States Bankruptcy judges.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 407(b), 92 Stat. 2549, 2686 (1980).

(4) Appeals from bankruptcy court decisions may now be taken directly to the courts of appeals, when the parties so agree, 28 U.S.C. §§ 1293(b), 1334(a) (Supp. III 1979), or to the bankruptcy appellate panels, when the use of such panels is authorized by the council of that circuit, 28 U.S.C. §§ 160, 1482 (Supp. III 1979).

36. 28 U.S.C. §§ 1334, 1408 (Supp. III 1979) (effective April 1, 1984).

doned in the course of the compromise,[37] many members of the House undoubtedly remained cognizant of the deficiencies of the system of appeals to the district courts under the old Bankruptcy Act. Moreover, it was not at all apparent that the increased autonomy of the bankruptcy courts would ameliorate the effect of these shortcomings. Hence, the concern remained that the modicum of independence obtained by the bankruptcy courts in this new legislation would be jeopardized by the practical effect of district court review of bankruptcy decisions.[38]

In working out some of the final matters of the compromise between the House and Senate, the concept of appeal to an ad hoc panel of bankruptcy judges was resurrected and introduced into the composite bill.[39] This idea had originally been suggested in a July 1975 resolution proposed by the Bankruptcy Committee of the Ninth Judicial Circuit Conference.[40] Subsequently, the idea was presented, in a modified form, during the 1975 House Hearings, by United States Bankruptcy Judge Robert B. Morton.[41] Nevertheless, the idea, along with other independent bankruptcy appellate court proposals, had been rejected by the House Subcommittee on Civil and Constitutional Rights as "anomalous" to the existing federal appellate court system.[42] However, in a final effort to break the bond between the bankruptcy and district courts, the bankruptcy appellate panel con-

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37. *See* 124 CONG. REC. S17403 (daily ed. Oct. 6, 1978) (remarks of Sen. Dennis DeConcini); 124 CONG. REC. H11089 (daily ed. Sept. 28, 1978) (remarks of Rep. Don Edwards); 124 CONG. REC. H11088-89 (daily ed. Sept. 28, 1978) (remarks of Rep. M. Caldwell Butler).

38. *See generally* H.R. REP. No. 595, *supra* note 3, at 42. *See also* Levin, *Bankruptcy Appeals*, 58 N.C.L. REV. 967, 969-70 (1980).

39. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 201(a), 236(a), 241(a), 92 Stat. 2549, 2659-60, 2667, 2671 (1980) (codified at 28 U.S.C. §§ 160, 1293, 1482 (Supp. III 1979)). *See also* 124 CONG. REC. H11107 (daily ed. Sept. 28, 1978) (remarks of Rep. Don Edwards); 124 CONG. REC. S17424 (daily ed. Oct. 6, 1978) (remarks of Sen. Dennis DeConcini).

40. *Senate Hearings, supra* note 3, at 526, 532 (statement of Francis F. Quittner, Esq.). That proposed resolution, however, was rejected by the Ninth Judicial Circuit Conference. *Id.* at 527, 532. Instead, a resolution was passed supporting the concept of a permanent and independent bankruptcy court of appeals. *Id.*

41. *House Hearings, supra* note 10, at 518, 536, 565 (statement of Hon. Robert B. Morton). Judge Morton suggested that "rotating panels made up of two bankruptcy judges and one circuit court of appeals judge serve as a bankruptcy appellate court." *Id.* at 518 (footnotes omitted). The bankruptcy judges were to be taken from outside the district from which the appeal arose. *Id.* at 536.

42. *See House Hearings, supra* note 10, at 575 (statement of Harold Marsh, Jr.) (referring to such proposals as "gimmicks"); H.R. REP. No. 595, *supra* note 3, at 42-43.

cept was revived and inserted, as an experimental project,[43] into the final version of the Bankruptcy Reform Act.[44]

The choice to make the appellate panel program only an "experimental" part of the Code reflected the paucity of congressional study that had originally gone into the formulation of the bankruptcy appellate panel system. There is no evidence that the House reconsidered the bankruptcy appellate panel concept after its initial presentation by Judge Morton until it appeared that the Senate appellate court proposals would prevail. As will be noted later,[45] this lack of meaningful theoretical examination into the potential form and functions of the panels has resulted in the appearance of certain serious contradictions in the actual operation of the panels.

At the same time Congress included the appellate panel idea in the Bankruptcy Reform Act, it also introduced an amendment to title 28 of the United States Code permitting direct appeal to the circuit level.[46] In order to douse complaints about the potential cost of such appeals to less affluent litigants, Congress made the use of this procedure dependent upon the stipulation of all parties.[47] Given the probability that in actual practice such agreements would not be reached, it was felt that this procedure would not significantly add to the caseload of the courts of appeals.[48] It would, however, provide a potential ave-

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43. Although the ad hoc nature of the panels and the permissive manner of their implementation in each circuit would indicate that the panels are experimental, *see* Levin, *supra* note 38, at 970, Congress failed to provide a termination date for this "experiment" and to set forth a manner in which a circuit council might end its use of the panels. *See* 28 U.S.C. § 160(a) (Supp. III 1979). *See also* 1 L. KING, *supra* note 24, ¶ 3.03[1][c][i] (15th ed. 1981). Compare this incomplete formulation with the more detailed manner in which the United States Trustee experiment was established. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 101, 224(a), 402(c), 408, 92 Stat. 2549, 2651-57, 2662-64, 2682 (1980) (codified, in part, at 11 U.S.C. §§ 1501-1513 (Supp. IV 1980)); 28 U.S.C. §§ 581-589 (Supp. III 1979).

44. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 201(a), 236(a), 241(a), 92 Stat. 2549, 2659-60, 2667, 2671 (1980) (codified at 28 U.S.C. §§ 160, 1293, 1482 (Supp. III 1979)).

45. *See infra* notes 50-110 and accompanying text.

46. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 236(a), 92 Stat. 2549, 2667 (1980) (codified at 28 U.S.C. § 1293(b) (Supp. III 1979)).

47. 28 U.S.C. § 1293(b) (Supp. III 1979). *See* Levin, *supra* note 38, at 971.

48. *See* Levin, *supra* note 38, at 971 & n.40.

The House did not believe that direct appeal to the courts of appeals in *all* cases would materially add to the caseloads of these courts. H.R. REP. No. 595, *supra* note 3, at 41-42. *But see* Letter from Hon. Shirley M. Hufstedler to Rep. Charles Wiggins (June 27, 1977) (claiming that direct bankruptcy appeals would have a significant impact upon the dockets of the courts of appeals).

nue for expedited appeal in those cases in which both sides stood to benefit from a rapid ascent through the bankruptcy appellate system.[49]

III. The (Incomplete) Implementation of the Bankruptcy Appellate Panel Concept

Because the bankruptcy appellate panel concept was the result of a compromise among markedly disparate views on the fundamental nature and role of the new bankruptcy courts, the language creating and directly controlling the appellate panels is quite sketchy.[50] It places the decision of whether to use the

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49. *See* Levin, *supra* note 38, at 971-72.

50. Section 160 of title 28 of the United States Code creates the United States Bankruptcy Appellate Panels with the following language:

> (a) If the circuit council of a circuit orders application of this section to a district court within such circuit, the chief judge of each circuit shall designate panels of three bankruptcy judges to hear appeals from judgments, orders, and decrees of the bankruptcy court of the United States for such district. Except as provided in section 293(e) of this title, a panel shall be composed only of bankruptcy judges for districts located in the circuit in which the appeal arises. The chief judge shall designate a sufficient number of such panels so that appeals may be heard and disposed of expeditiously.
>
> (b) A panel designated under subsection (a) of this section may not hear an appeal from a judgment, order or decree entered by a member of the panel.
>
> (c) When hearing an appeal, a panel designated under subsection (a) of this section shall sit at a place convenient to the parties to the appeal.

28 U.S.C. § 160 (Supp. III 1979).

Section 1482 of title 28 defines the appellate jurisdiction of the bankruptcy appellate panels:

> (a) Panels designated under section 160(a) of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.
>
> (b) Panels designated under section 160(a) of this title shall have jurisdiction of appeals from interlocutory judgments, orders, and decrees of bankruptcy courts, but only by leave of the panel to which the appeal is taken.

28 U.S.C. § 1482 (Supp. III 1979).

Section 1293 of title 28 sets forth the manner in which appeals are taken from panel decisions:

> (a) The courts of appeals shall have jurisdiction of appeals from all final decisions of panels designated under section 160(a) of this title.
>
> (b) Notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of an appellate panel created under section 160 or a District court of the United States or from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.

28 U.S.C. § 1293 (Supp. III 1979).

For a discussion of several of the ambiguities found in the language creating the bankruptcy appellate panels, see 1 L. King, *supra* note 24, ¶ 3.03[1][c][i].

panels in the hands of the circuit council of each federal appellate circuit.[51] The designation of individual judges to sit on the panels is the responsibility of the chief judge of that circuit.[52] The only limitations placed upon the chief judge are that a bankruptcy judge may not sit on appeals from his own decisions[53] and that designated judges must come from districts within that circuit, unless a special designation and assignment has been otherwise made by the Chief Justice of the United States.[54]

Judicial tribunals, however, are not governed solely by the limits set in their implementing statutes. They are also regulated by a myriad of general judicial statutes and uncodified principles and practices established by common law, equity, and custom. Congress was only partially able to integrate the appellate panel concept and these ancillary "rules of conduct" into the overall operational scheme of the federal courts.

Three major weaknesses in the bankruptcy appellate panel experiment, as originally envisioned by Congress, have been instrumental in preventing a complete integration of the panels into the federal court system. These are (1) the utilization of article I trial judges as appellate judges, (2) the failure of Congress to designate the appellate panels as "courts of the United States," and (3) the resulting lack of a separate identity for the panel judges as a group.

A. The Use of Article I Trial Judges as Appellate Judges

The use of article I trial judges as appellate judges was the source of some serious early misgivings among the panel judges, as they attempted to define the extent of their individual and collective powers. The judges were primarily disturbed by their knowledge that Congress had ultimately overcome its fears about giving the bankruptcy courts both article I status and broadly expanded jurisdiction by shuttling the jurisdictional mandate through the article III district courts.[55] As adjuncts of the district courts, the bankruptcy courts partook of a derivative authority from their "mentors."[56] Although Congress recognized

51. 28 U.S.C. § 160(a) (Supp. III 1979).
52. *Id.*
53. *Id.*
54. *Id.*
55. *See* S. REP. No. 989, *supra* note 3, at 16.
56. *See* 28 U.S.C. §§ 1471(a)-(c) (Supp. III 1979).

that the new Bankruptcy Code greatly increased the bankruptcy courts' isolation from the district courts,[57] it was able to justify its article I formulation by the belief that some sort of a supervisory link—albeit a very weak link—had been maintained between the bankruptcy judges and the life-tenured district judges.[58] However, the introduction of the appellate panel idea into this theoretical construct severed the most essential control mechanism left to the district courts—appellate review.[59]

Aside from these concerns of constitutional propriety, the panel judges were also aware, at an early point, of the frictions inherent in reviewing their peers' work. To defuse this potentially disruptive factor, the judges of both the First and the Ninth Circuit panels early adopted the practice of precluding judges from reviewing matters appealed from their own districts.[60] These rules went well beyond the statutory preclusion against panel judges reviewing their own decisions.[61] Nevertheless, the panel judges felt the broader preclusion practice would foster better daily working relationships with the judges in their respective districts.

Potentially more irritating to the panel judges was the review of their own decisions by fellow panel members. Still, no practical or statutory means existed to shunt the review of such decisions into alternative appellate channels. Moreover, in light of the possible implementation of the panel concept throughout each participating circuit, it was foreseeable that the review of all of the panel judges' own decisions would, necessarily, have to be handled through the appellate panel system. For this reason, and since the program was still in the experimental stage, it was important that the panel judges begin immediately to submit their own opinions to each other's scrutiny. Hence, no serious consideration of alternative ways of handling such appeals was

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57. Both the House and the Senate were in agreement that the bankruptcy courts should have substantially greater independence from the district courts under the new Act. 124 CONG. REC. H11088 (daily ed. Sept. 28, 1978) (remarks of Rep. M. Caldwell Butler) (at the time of these remarks, the compromise reached by the House and the Senate apparently made the bankruptcy courts adjuncts of the Courts of Appeals).

58. *See* S. REP. No. 989, *supra* note 3, at 16; Cyr, *supra* note 3, at 149.

59. Indeed, without the power to review bankruptcy cases, the district courts maintain no actual contact with the bankruptcy courts. *See supra* note 35.

60. No formal rule prevents a panel judge in either circuit from hearing an appeal from the decision of a judge in his own district. This is merely a customary practice. Telephone conversation with Hon. Conrad K. Cyr, United States District Judge, District of Maine (formerly United States Bankruptcy Judge, District of Maine) (Aug. 14, 1981).

61. 28 U.S.C. § 160(b) (Supp. III 1979).

ever deemed necessary by the panel judges and circuit councils implementing the bankruptcy appellate panel system.

B. The Appellate Panels as Non-Courts

In patterning themselves after the courts of appeals which governed them, the judges on the early panels sought to adopt many of the procedural rules of those appellate courts. Among these was Rule 27(c) of the Federal Rules of Appellate Procedure.[62] This rule allows a single judge of a court of appeals to grant relief on motions, other than motions to dismiss or to determine the merits of an appeal or other proceeding.[63] Despite the eminent practicality of this rule, the practice it sanctions has been questioned from time to time as being in contradiction to the statutory authority of the circuit courts as multiple-judge tribunals.[64]

Nonetheless, because the single-judge rule does provide the multiple-judge system with a certain flexibility it would otherwise lack,[65] this practice has been sustained whenever called into

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62. Federal Rule of Appellate Procedure 27(c) provides:

> In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

FED. R. APP. P. 27(c).

63. Of course, even a preliminary grant or denial of relief may render moot the principal issues of an appeal. *See, e.g., Application of* President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964) (order by single court of appeals judge resulted in Jehovah's Witness receiving blood transfusion; appeal of First Amendment issue rendered moot).

64. *See, e.g., Application of* President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); Woods v. Wright, 8 RACE REL. L. REP. 445 (5th Cir. May 22, 1963); Aaron v. Cooper, 261 F.2d 97 (8th Cir.), *aff'd*, 358 U.S. 1 (1958); Note, *Emergency Writ Issued Authorizing Blood Transfusions Against Adult Patient's Will*, 39 N.Y.U. L. REV. 706 (1964); Note, *The All Writs Statute and the Injunctive Power of a Single Appellate Judge*, 64 MICH. L. REV. 324 (1965).

65. Indeed, it is arguable that this rule opens the way for too "flexible" an approach in the handling of emergency motions. In *Application of* President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964), for example, physicians became concerned that a patient's death would imminently result from a failure to give her a blood transfusion. The patient and her husband, both Jehovah's Witnesses, had earlier expressed their desire that no transfusion be given. Nevertheless, an oral application was made to the federal district court for an order allowing them to proceed with the transfusion. After this application was denied, and without filing a notice of appeal from the district court's order, counsel made application, in

question.[66] The principal statutory support cited on behalf of this rule has been subsection (b) of the All Writs Statute.[67] This statute provides that "[a]n alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction." Putting to one side the argument that this statutory mandate was intentionally restricted to alternative writs and rules nisi,[68] one still notes that it relates only to a justice or judge of a *court*.[69]

Traditionally, the "bankruptcy court" was an alter ego of the district court.[70] The referee was only a subordinate judicial officer of this specialized function of the district court.[71] Owing

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chambers, for a similar order from Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia. Judge Wright, after telephoning the patient's attending physician and then discussing the matter informally with the patient and her husband, and with other physicians, ordered that the transfusion be given. *See Georgetown College*, 331 F.2d at 1006-07; Note, *Emergency Writ Issued Authorizing Blood Transfusions Against Adult Patient's Will*, 39 N.Y.U. L. REV. 706, 706 (1964). At no time was any formal written action taken to raise a case or controversy or to bring this matter clearly within the original jurisdiction of the district court or the appellate jurisdiction of the United States Court of Appeals for the District of Columbia. *See Georgetown College*, 331 F.2d at 1011-15 (Miller, J., dissenting). Most disturbing about this highly informal proceeding was the suggestion of one judge of the District of Columbia Circuit that the power to rehear the action of a single judge ought to be "sparingly exercised." *Id.* at 1010-11 (Washington, J., concurring).

66. *See, e.g., Application of* President & Directors of Georgetown College, Inc., 331 F.2d at 1010-15 (note that none of the circuit judges who would have reheard and reversed Judge Wright's actions in *Georgetown College* questioned his power to act as a single court of appeals judge); Woods v. Wright, 8 RACE REL. L. REP. 445 (5th Cir. May 22, 1963); Aaron v. Cooper, 261 F.2d 97 (8th Cir.), *aff'd*, 358 U.S. 1 (1958).

67. 28 U.S.C. § 1651 (1976). *See, e.g., Application of* President & Directors of Georgetown College, Inc., 331 F.2d at 1004-06; Woods v. Wright, 8 RACE REL. L. REP. at 446; Aaron v. Cooper, 261 F.2d at 101 n.1. *But see* Note, *The All Writs Statute and the Injunctive Power of a Single Appellate Judge*, 64 MICH. L. REV. 324 (1965) (questioning the basis for single-judge actions).

The All Writs Statute, codified at 28 U.S.C. § 1651 (1976), provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Id.

68. *See* Note, *The All Writs Statute and the Injunctive Power of a Single Appellate Judge*, 64 MICH. L. REV. 324 (1965).

69. 28 U.S.C. § 1651(b) (1976).

70. Bankruptcy Act, ch. 541, § 1(8), 30 Stat. 544 (1898) (as amended, repealed 1978). *See also* 1 L. KING, *supra* note 24, ¶ 1.02[1].

71. The referee was deemed a "court" under the old Bankruptcy Act, but not a "judge." Bankruptcy Act, ch. 541, §§ 1(7), (16), 30 Stat. 544, 544 (1898) (as amended, repealed 1978). *See also* 1. L. KING, *supra* note 24, ¶ 1.02[2].

to this dual nature of the district court, the powers of the referee, as opposed to those of the district judge acting in his general judicial capacity, were more strictly limited by the grant of authority provided in the federal bankruptcy statutes.[72] In particular, the bankruptcy courts were omitted from the statutory definition of "courts of the United States," and the referees were not included among the statutory list of "judges of the United States."[73] This arguably precluded reliance upon a large amount of legislation, such as the All Writs Statute, which was restricted, by its own terms, to "courts" and "judges of courts."[74]

To clarify in part, this ambiguity in the old Bankruptcy Act, the draftsmen of the Bankruptcy Reform Act added to the definition of "courts of the United States," "bankruptcy courts, the judges of which are entitled to hold office for a term of 14 years."[75] The definition of "judge of the United States" was sim-

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72. The jurisdiction of the "courts of bankruptcy" did not extend to the hearing of "plenary" proceedings, Bankruptcy Act, ch. 541, § 23, 30 Stat. 544, 552 (1898) (as amended, repealed 1978), although the district court may have had additional authority to do so under some other federal jurisdictional basis. Furthermore, the jurisdiction of the referee was limited beyond that of the "judge" and the "Court of Bankruptcy" by section 38 of the Bankruptcy Act. *Id.* § 38 at 555. Note, however, that subsection (4) of section 38, later amended by Act of June 22, 1938, ch. 575, § 1, 52 Stat. 840, 857-58, allows the referee to "perform such of the duties as are by this Act conferred on courts of bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided." *Id.*

73. Act of June 25, 1948, ch. 646, 5451, 62 Stat. 869, 907 (list unchanged by later amendments until Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 213, 92 Stat. 2549, 2661 (1980)).

74. *See,* 1 L. KING, *supra* note 24, ¶ 3.01[7].

It is important to note, however, that the language of the All Writs Statute does not refer to "courts of the United States," but to "courts" and "courts established by Act of Congress." Section 1(7) of the Bankruptcy Act, ch. 541, 30 Stat. 544, 544 (1898) (as amended by Act of June 22, 1938, ch. 575, 52 Stat. 840, 841), defines "court," for purposes of the Bankruptcy Act, to mean "the *judge or the referee* of the court of bankruptcy in which the proceedings are pending." *Id.* (emphasis added). Using the premise that the terms "court" or "court established by Act of Congress" can be interpreted more broadly than can the language "court of the United States," *see* Noyd v. Bond, 395 U.S. 683 (1969) (court of military appeals has All Writs powers, even though it is not one of the listed "courts of the United States"), it is reasonable to believe that the referees under the old Bankruptcy Act did possess general writ powers, pursuant to 28 U.S.C. § 1651(a) (1976). Nevertheless, it must also be observed that section 1(16) of the Bankruptcy Act, ch. 541, 30 Stat. 544, 544 (1898) (as amended, repealed 1978), specifically excludes the referee from the Bankruptcy Act's definition of "judge." This arguably limited a referee's access to the authority grant of 28 U.S.C. § 1651(b) (1976).

75. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 213, 92 Stat. 2549, 2661 (1980) (to be codified at 28 U.S.C. § 451 (Supp. III 1979)).

ilarly modified.[76] This provision is to become effective on April 1, 1984,[77] and is not to have any effect during the transition period established under title IV of the Reform Act.[78]

No effort, however, was ever made to include the bankruptcy appellate panels within this statutory definition.[79] Moreover, the ad hoc organization and experimental nature of the bankruptcy appellate panels suggests that Congress did not deem these tribunals to be fully-constituted "courts," for purposes of the provisions of title 28 of the United States Code. Thus, since the panels have never been designated or otherwise implied to be one of the "courts" which are mentioned in the All Writs Statute, it can be argued that the panels are without authority to issue writs pursuant to this statute. Specifically, subsection (b) of the All Writs Statute, which is said to permit single-judge action, is thus inapplicable to the panels and their member judges.

Of course, it may be argued that bankruptcy judges who serve as panel members bring with them a certain amount of the authority they exercise as bankruptcy trial judges.[80] This argu-

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76. *Id.*

77. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 402, 405(b), 92 Stat. 2549, 2682, 2685 (1980).

78. *Id.* § 405, 92 Stat. at 2685.

Care should be taken in determining the effective dates of the various sections of the Bankruptcy Reform Act of 1978. Section 402 of title IV of the Reform Act generally establishes the dates on which the several sections of the Act will be implemented, as part of the *new* bankruptcy process. However, section 405 provides that a number of Bankruptcy Reform Act sections will apply to the old "courts of bankruptcy" continued in effect under section 404(a), during the transition period, October 1, 1979, through March 31, 1984.

79. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 213, 92 Stat. 2549, 2661 (1980). *But see* S. 863, 97th Cong., 1st Sess. § 208(1) (1981) (proposing to include the appellate panels among the "courts of the United States" found at 28 U.S.C. § 451; note, however, that the House Technical Corrections Act, H.R. 3705, 97th Cong., 1st Sess. (1981), does not contain a counterpart to this provision).

80. Even recognizing that the referees of the "courts of bankruptcy" will not be deemed "courts of the United States" until April 1, 1984, *see supra* notes 77 and 78 and accompanying text, and arguing that they may thus be denied certain writ powers, *see supra* note 74, the transition period bankruptcy judges still have substantial injunctive and other equitable powers under 11 U.S.C. § 105(a) (Supp. IV 1980) and 28 U.S.C. § 1481 (Supp. III 1979). Indeed, one bankruptcy court has maintained that the power of a bankruptcy judge under 11 U.S.C. § 105(a) is "arguably more extensive than that contained in [the] All Writs Statute . . . ." *In re* Howell, 4 Bankr. 102, 105 (Bankr. M.D. Tenn. 1980). 11 U.S.C. § 105 (Supp. IV 1980) provides:

> (a) The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provision of this title.
>
> (b) Notwithstanding subsection (a) of this section, a bankruptcy court may

ment, however, only highlights the failure of Congress to give the panels any legal status of their own.[81] Moreover, subsection (b) clearly limits its effect to "a justice or judge of a court *which has jurisdiction.*"[82] It is in his capacity as a panel judge, not a bankruptcy trial court judge, that a panel member must have jurisdiction to issue the type of injunctive relief pending appeal which is contemplated by Rule 27(c) of the Federal Rules of Appellate Procedure. As a bankruptcy trial judge, a panel member would act under questionable authority in granting equitable relief in a proceeding under the direction of a bankruptcy court located in a district other than his own.[83] Therefore, the jurisdiction under which a single panel member may presume to act must derive from the panel's own grant of powers. In this regard, however, no explicit power exists for a single judge to grant relief at the appellate panel level.[84]

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not appoint a receiver in a case under this title.

Id.

28 U.S.C. § 1481 (Supp. III 1979) allows as follows:

> 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.

Id.

81. In many ways, the bankruptcy appellate panels are an adjunct of the courts of appeals. Certainly each circuit council determines the use of the panels within its geographic boundaries. 28 U.S.C. § 160(a) (Supp. III 1979). Nevertheless, the 1978 Bankruptcy Reform Act never defined the general nature of the relationship between these two appellate "entities" nor the degree to which the panels would derive their authority from the courts of appeals. Similarly, Congress never explained the collective nature of the panels and their constituent bankruptcy judges. *See infra* notes 104-10 and accompanying text.

82. 28 U.S.C. § 1651(b) (1976) (emphasis added).

83. *See generally* Annot., 20 A.L.R. FED. 13 (1974).

28 U.S.C. § 1477 (Supp. III 1979), however, permits a bankruptcy court without venue to hear proceedings in cases commenced and pending in other districts "in the interest of justice and for the convenience of the parties." This would perhaps allow a bankruptcy court to grant relief from an automatic stay arising in a case filed in another district. *See, e.g., In re* Coleman American, Inc., 6 Bankr. 915 (Bankr. D. Colo. 1980) (allowing complaint to lift automatic stay to be filed in court lacking proper venue). *But see In re* Coleman American Co., 8 Bankr. 384 (Bankr. D. Kan. 1981) (holding creditor in contempt for having filed a complaint to lift automatic stay in another district); *In re* Burley, 11 Bankr. 369 (C.D. Cal. 1981) (refusing to set aside discharge entered despite pendency of complaint objecting to discharge and to determine the dischargeability of a debt in another district).

But see S. 863, 97th Cong., 1st Sess. § 205(b) (1981) (proposing to add the following to 28 U.S.C. § 160: "(d) A panel may exercise the powers of a bankruptcy court;" note, however, that the House Technical Corrections Bill, H.R. 3705, 97th Cong., 1st Sess. (1981), does not contain a counterpart to this provision).

84. *See* 28 U.S.C. §§ 160, 1293, 1482 (Supp. III 1979) (which contain the panels' full

Following a prolonged consideration of this significant theoretical difficulty, the panel judges of both the First and the Ninth Circuits nevertheless adopted rules which gave single panel members the ability to entertain emergency motions, when no alternative means of dealing with a situation was practical.[85] Efficiency once again prevailed over theoretical purity. Although only time and the creativity of future litigants will establish the wisdom of this decision, the single-judge rule presently remains an uncertain, though useful tool in the panel's collection of powers. The uncertainty of this authority, however, remains a regrettable legacy of the haste and incompleteness with which the appellate panel concept was legislatively developed and implemented.

In the same vein, Congress' failure to make the panels "courts of the United States," or to conceptualize them as "courts" of any kind, raises an important question as to the right of the panels to use any of the additional writ powers granted under subsection (a) of the All Writs Statute.[86] In the past, the writs of mandamus and prohibition have proven especially useful in augmenting the statutory authority of appellate courts.[87] Although neither of these writs is a substitute for the appellate process itself,[88] access to each allows an appellate court the flexibility it needs to avoid the sometimes unnecessary and excessive delays involved in the appellate process.[89]

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statutory grant of authority). *But see* S. 863, 97th Cong., 1st Sess. § 205(b) (1981) (proposing to add the following language to 28 U.S.C. § 160: "(c) A single judge of a panel may enter an order if irreparable damage will result if such order is not entered. Such order shall remain in force only until the hearing and determination by the panel of three judges;" note, however, that the House Technical Corrections Bill, H.R. 3705, 97th Cong., 1st Sess. (1981) does not contain a counterpart to this provision).

85. FIRST CIRCUIT RULES GOVERNING APPEALS FROM BANKRUPTCY JUDGES TO DISTRICT COURTS, APPELLATE PANELS AND COURT OF APPEALS [hereinafter cited as 1ST CIR. PANEL R.] 27(c); LOCAL PROVISIONS, RULES OF THE UNITED STATES BANKRUPTCY APPELLATE PANELS OF THE NINTH CIRCUIT [hereinafter cited as 9TH CIR. PANEL R.] 6(e).

86. *See* 28 U.S.C. § 1651(a) (1976); and *supra* notes 73-79 and accompanying text.

87. *See generally* Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 113-16 (1975); Annot., 57 L.Ed. 2d 1203 (1979); Comment, *The Use of Extraordinary Writs For Interlocutory Appeals*, 44 TENN. L. REV. 137 (1976); Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973).

88. Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964); Parr v. United States, 351 U.S. 513, 520-21 (1955); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 382-83 (1953); *Ex parte* Fahey, 332 U.S. 258, 259-60 (1947); *In re* Pollitz, 206 U.S. 323, 331 (1907).

89. In examining the customary role of mandamus, one commentator has observed:

> Traditionally, the writ of mandamus was issued to confine an inferior court to its prescribed jurisdiction or to compel it to exercise its lawful author-

Likewise, habeas corpus is a very important writ in the bankruptcy setting. The failure of a debtor to pay certain obligations may subject him to confinement for contempt. Similarly, at times imprisonment or the threat of imprisonment are used to coerce a debtor to make an immediate repayment of debts otherwise dischargeable or the subject of a Chapter 11 or 13 plan of arrangement.[90] In such cases, the use of habeas corpus is essential to the maintenance of the integrity of the federal bankruptcy process.[91] However, should a bankruptcy trial court refuse to use its habeas corpus powers to free such a debtor,[92] the

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ity when it had a duty to do so. Mandamus was not issued as a substitute for an appeal, but the writ was justified if review after final judgment would have been otherwise frustrated. Even in these circumstances issuance of the writ was within the sound discretion of the court. Furthermore, since mandamus was viewed as a remedy of last resort, that discretion was exercised only sparingly. Thus, if another legal remedy existed, such as review after final judgment, or if mere error or hardship resulting from delayed or needless trial was alleged, an extraordinary remedy was deemed inappropriate.

Comment, *The Use of Extraordinary Writs for Interlocutory Appeals*, 44 TENN. L. REV. 137, 141-42 (1976) (footnotes omitted).

In recent years, the use of mandamus has expanded to include a number of "supervisory" functions. *See, e.g.*, Schlagenhauf v. Holder, 379 U.S. 104 (1964) (use of mandamus appropriate to prevent physical and mental examinations during discovery; court noted the "first impression" nature of the issues being raised by the writ request); LaBuy v. Howes Leather Co., 352 U.S. 249 (1957) (mandamus used to preclude district judge from improperly appointing special master; judge had history of abusing this device). *See also* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973). *But see* Will v. United States, 389 U.S. 90, 95 (1967) (restricting use of mandamus to exceptional circumstances "amounting to judicial usurpation of power") (quoting De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945)).

The United States Court of Appeals for the District of Columbia Circuit has expanded upon the *Schlagenhauf* holding to find the use of mandamus to be appropriate when (1) the case presents an issue of first impression, (2) "there is an undeniable need to forestall future error and uncertainty," and (3) "resolution of [the] issue . . . may be significant to the particular case under review." Colonial Times, Inc. v. Gasch, 509 F.2d 517, 525 (D.C. Cir. 1975).

90. *See, e.g., In re* Reid, 9 Bankr. 830 (Bankr. M.D. Ala. 1981); *In re* James, 10 Bankr. 2 (Bankr. W.D.N.C. 1980); *In re* Caldwell, 5 Bankr. 740 (W.D. Va. 1980); *In re* Barth, 4 Bankr. 141 (W.D. Mo. 1980).

91. *See* H.R. REP. No. 595, *supra* note 3, at 450; S. REP. No. 989, *supra* note 3, at 158.

92. The bankruptcy trial courts obtain their habeas corpus powers from 28 U.S.C. § 2256 (Supp. III 1979), which provides:

A Bankruptcy Court may issue a writ of habeas corpus—

(1) when appropriate to bring a person before the court—

(A) for examination;

(B) to testify; or

(C) to perform a duty imposed on such person under this title;

or

(2) ordering the release of a debtor in a case under title 11 in custody

panels appear to be without the statutory authority to issue their own writ pending an appeal of the lower court's decision. Since a writ of mandamus would also be unavailable to force the trial court's hand, the delays inherent in the typical review process could leave the debtor stranded in unlawful confinement for a considerable period of time.[93]

Congress' decision to permit the district courts and the appellate panels to hear, by leave, appeals from many types of interlocutory judgments, orders, and decrees has ameliorated some of the problems associated with the panels' possible lack of effective writ powers.[94] In this regard, the use of writs has become

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under the judgment of a Federal or State court if—

(A) Such debtor was arrested or imprisoned on process in any civil action;

(B) Such process was issued for the collection of a debt—

(i) dischargeable under title 11; or

(ii) that is or will be provided for in a plan under chapter 11 or 13 of title 11; and

(C) before the issuance of such writ, notice and hearing have been afforded the adverse party of such debtor in custody to contest the issuance of such writ.

Id.

Section 9(2) of the old Bankruptcy Act, ch. 541, 30 Stat. 544, 549 (1898) (as amended by Act of June 22, 1938, ch. 575, 52 Stat. 840, 848 (1938)) merely stated that

[a] bankrupt shall be exempt from arrest upon civil process except in the following cases: . . . (2) when issued from a State court having jurisdiction, and when served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

Id.

Federal Rule of Bankruptcy Procedure 913 modified the habeas corpus grant given the pre-October 1, 1979, bankruptcy trial courts with the following language:

(a) . . . The Bankruptcy judge may issue a writ of habeas corpus when appropriate to bring a person before the court for examination or to testify or to perform a duty imposed upon him under the Act.

(b) . . . If the bankrupt is arrested or imprisoned on process in any civil action, the bankruptcy judge may issue a writ of habeas corpus and, after hearing on notice to the adverse party in such action, may order the bankrupt's release if the process is found to have been issued for the collection of a dischargeable debt.

FED. R. BANKR. P. 913.

For examinations of the habeas corpus practice of the bankruptcy trial courts under the old Bankruptcy Act, see 1 L. KING, *supra* note 24, ¶ 3.01[6][a]; 1A J. MOORE & L. KING, COLLIER ON BANKRUPTCY ¶ 9.04, 94 (14th ed. 1978).

93. *See supra* notes 86-89 and accompanying text.

94. *See* 28 U.S.C. §§ 1334(b), 1482(b) (Supp. III 1979). *See also* H.R. REP. No. 595, *supra* note 3, at 444 (which envisions review by the courts of appeals and only makes certain interlocutory orders of bankruptcy courts appealable); S. REP. No. 989, *supra* note 3, at 154-55 (which envisions district court review). *Cf.* Comment, *supra* note 87

one means of bypassing the "final judgment" requirement imposed on other appellate courts.[95] Nonetheless, even when appeals are interlocutory in nature, the rules governing them are generally geared less for expediency than are the customary methods for obtaining extraordinary writs.[96] Hence, the increased flexibility provided by the interlocutory appeals procedure does not entirely replace the lack of writ powers in the bankruptcy appellate panels.

One final weakness in the panel system resulting from the non-court status of these ad hoc tribunals, is the inapplicability of 28 U.S.C. § 1252 to appellate panel decisions.[97] This statute allows direct appeal to the United States Supreme Court from an interlocutory or final decision of "any court of the United States" which holds an act of Congress unconstitutional, in a civil suit in which the United States or one of its agencies is a

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(discussing use of extraordinary writs where interlocutory appeals from district court orders are not possible under 28 U.S.C. § 1292 (1976)).

95. *See* Redish, *supra* note 87, at 113-16; Comment, *supra* note 87, at 139-40. *See generally* Note, *supra* note 87; 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶¶ 110.26-.30 (2d ed. 1980).

96. Federal Rule of Appellate Procedure 21(b) provides that a proceeding to obtain a writ of mandamus or prohibition "shall be given preference over ordinary civil cases."

Aside from the extra delays which may result from the handling of an application for leave to appeal (*see* 1ST CIR. PANEL R. 2(a)(2), *supra* note 85; and 9TH CIR. PANEL R., Gen. Provisions, 8004, *supra* note 85), most interlocutory appeals follow the usual appellate panel procedures for briefing, oral argument, and decision. Occasionally, the panels have permitted the expedited handling of appeals from both final and interlocutory determinations. *See* GENERAL ORDERS OF THE UNITED STATES BANKRUPTCY APPELLATE PANELS OF THE NINTH CIRCUIT [hereinafter cited as 9TH CIR. GEN. ORDERS] 3.3(a). This procedure, however, is used sparingly, so as to avoid a general resort to the practice by appellants. Certain immediate problems may also be resolved, at least by the Ninth Circuit panels, through emergency motions, during the pendency of an interlocutory appeal. *See* 9TH CIR. PANEL R., Local Provisions, 6(d), *supra* note 85. And, the emergency handling of motions by single judges is, of course, possible among the panels of both circuits. *See* 1ST CIR. PANEL R. 27(c), *supra* note 85; and 9TH CIR. PANEL R., Local Provisions, 6(e), *supra* note 85. *But see supra* notes 86-89 and accompanying text.

97. 28 U.S.C. § 1252 (1976) provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record in Puerto Rico, holding an Act of Congress unconstitutional in any civil acion, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other cours prior to such notice shall be treated as taken directly to the Supreme Court.

Id.

party.[98] Born of President Franklin D. Roosevelt's attempt to "pack" the United States Supreme Court,[99] this provision was intended to prevent the lower courts of appeals from hampering new federal legislation during the pendency of the full appellate process.[100] Its less political goal and impact has been to provide greater uniformity and certainty in the enforcement of federal laws.[101] Moreover, it may be noted, in light of recent attacks upon the constitutionality of the expansive jurisdiction of the bankruptcy courts,[102] that direct appeal to the Supreme Court has become an accepted part of the bankruptcy court system in at least one district.[103] In those districts which are serviced by the appellate panels, however, this avenue of appeal apparently remains unavailable at this time.

C. *The Lack of a Separate Identity*

Perhaps the most troubling weakness of the experimental panel system is found in Congress' decision to deny the panels a separate group identity. This decision is reflected primarily in (1) the ad hoc method by which panel judges are designated under 28 U.S.C. § 160(a), and (2) the failure of Congress to provide the panels with either basic statutory guidelines for operation or any authority to administer their own staffs and internal affairs[104] or promulgate their own rules of procedure.[105]

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98. *Id.*

99. 12 J. MOORE, H. BENDIX & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶¶ 411.02-.04, at 5-12, 5-18 (2d ed. 1981).

100. *Id.*

101. *See id.* at 5-18.

102. *See* Marathon Pipeline Co. v. Northern Pipeline Constr. Co., 12 Bankr. 946 (Bankr. D. Minn. 1981); Krattenmaker, *supra* note 18; Note, *supra* note 18. *See also* H.R. REP. No. 595, *supra* note 3, at 23-39 (originally questioning the constitutionality of any article I formulation which also expanded the independence and subject-matter jurisdiction of the bankruptcy courts).

103. In the District of Minnesota, for example, United States District Judge Miles W. Lord has dismissed an adversary proceeding in bankruptcy because "the delegation of authority in 28 U.S.C. § 1471 to the Bankruptcy Judges empowering them to try cases which are otherwise relegated under the Constitution to Article III judges is an unconstitutional delegation of authority." Marathon Pipeline Co. v. Northern Pipeline Constr. Co., 12 Bankr. 946, 947 (Bankr. D. Minn. 1981). At least until Judge Lord's decision is reviewed by the Supreme Court, and perhaps for some time thereafter, the extent of the bankruptcy courts' jurisdiction over adversary proceedings will stand in doubt.

104. Compare this with 28 U.S.C. §§ 771-775 (Supp. III 1979) (bankruptcy courts now have their own clerks and staff). The problem of control over their own staffs was one of the major complaints of the bankruptcy judges under the old Bankruptcy Act. *See Senate Hearings, supra* note 3, at 476-77 (testimony of Hon. David Kline, Hon. Conrad K. Cyr, Hon. Edward E. Davis, and Hon. Herbert Katz). *Cf. House Hearings, supra* note

These weaknesses have become most apparent when the panels have sought to follow the procedural patterns utilized by the Courts of Appeals. For example, in defining the stare decisis effect of one panel's opinion upon a later panel, the Ninth Circuit appellate panel judges first endeavored to adopt the practice of the court of appeals for that circuit: The decision of a prior panel is always followed, unless it is overruled by the judges of the entire court meeting en banc.[106]

The bankruptcy appellate panels, however, have never been authorized to meet en banc.[107] Indeed, the language of 28 U.S.C. § 160(a) suggests that no formal *banc* of panel judges need exist.[108] Although Ninth Circuit Chief Judge James R. Browning has opted to designate five bankruptcy judges to handle all of the appeals from those districts affected by the apellate panel program, he is not required to maintain such a pattern.[109]

10, at 565 (statement of Hon. Robert B. Morton) (one advantage of ad hoc bankruptcy appellate panels would be the savings generated by not requiring additional clerical personnel or new court facilities).

105. No statute authorizes the bankruptcy appellate panels to prescribe their own rules of procedure. *Cf.* 28 U.S.C. § 2075 (Supp. II 1978) (giving the United States Supreme Court authority to make general rules to govern practice and procedure in cases and proceedings under title 11); 28 U.S.C. § 2071 (1976) (which gives "[t]he Supreme Court and all *courts* established by Act of Congress" the right to "prescribe rules for the conduct of their business" (emphasis added)); 28 U.S.C. § 2072 (1976) (giving the United States Supreme Court the authority to promulgate rules of civil procedure for the district courts and courts of appeals); 28 U.S.C. § 2076 (1976) (allowing the United States Supreme Court to promulgate the Federal Rules of Evidence).

106. No formal rule requires that panel decisions be overruled by an en banc majority of the judges of the United States Court of Appeals for the Ninth Circuit. This is merely a customary practice to avoid the existence of conflicting authority from the circuit on important issues. Telephone conversation with Richard Wieking, Assistant Ninth Circuit Executive (Feb. 25, 1982).

107. *Cf.* 28 U.S.C. § 46(c)-(d) (1976 & Supp. II 1978) (authorizing the courts of appeals to meet en banc). *See also* 1ST CIR. PANEL R. 35, *supra* note 85 (establishing en banc procedure only as to circuit judges).

108. In this regard, 28 U.S.C. § 160(a) (Supp. II 1978) provides that

> [i]f the circuit council of a circuit orders application of this section to a district within such circuit, the chief judge of each circuit shall designate panels of three bankruptcy judges to hear appeals from judgments, orders, and decrees of the bankruptcy court of the United States for such district.

Id.

A plain reading of this section indicates that after the circuit council has made its initial determination to utilize the panels in a district, the chief judge of the circuit merely selects bankruptcy judges on an ad hoc basis to hear appeals from that district, as appeals arise. The fact that each of the circuits now using the panels has predesignated certain bankruptcy judges to sit on the panels is more a matter of wise caseload management than an assertion of authority under section 160(a) to create a bankruptcy appellate "court."

109. *See supra* note 52 and accompanying text.

Rather, he may designate any bankruptcy judge in his circuit to sit on a particular appeal.[110] The Ninth Circuit focal group of five judges has no special status apart from the individual roles played by its members as acting bankruptcy judges. If anything, the whole body of bankruptcy judges sitting in a circuit is the *banc* which may potentially serve on appellate panels. Still, this body has no actual power to determine appellate matters, unless the chief judge of their circuit designates them to so act.

At present, the problem of stare decisis among the bankruptcy appellate panels has not been resolved. It would appear that only further action by Congress can provide a workable means for balancing the need for predictability in panel decisions with the requirement of flexibility in the handling of appeals in this poorly defined area of the law.

IV. Practice Before the Bankruptcy Appellate Panels

A. *The Administration of Bankruptcy Appellate Panel Cases*

Moving from the theoretical to the more mundane areas of panel operation, one observes that no statute exists which permits the panels of a circuit to draft their own local rules,[111] or to employ their own clerk and staff.[112] Fortunately, the existing panels have been able to tap the authority given their respective court of the courts of appeals to overcome both of these handicaps.[113] In the First Circuit, the panels simply utilize the clerk

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110. *See supra* note 53 and accompanying text.

111. *See supra* note 105.

112. *See supra* note 104 and accompanying text.

113. The Preamble to the Rules of the United States Bankruptcy Appellate Panels of the Ninth Circuit states that "[t]hese rules . . . are promulgated under the authority of 28 U.S.C. § 1482." This citation, however, is merely to the bankruptcy appellate panels' jurisdictional grant. It would be in contradiction to the pattern established by Congress in 28 U.S.C. §§ 2071, 2072, 2075, 2076 (1976 & Supp. II 1978) to assume that a statutory grant of jurisdiction supplies courts or other quasi-judicial entities with the authority to prescribe their own procedural rules.

It should be noted, in this regard, that the Ninth Circuit panels worked closely with the Clerk of the United States Court of Appeals for the Ninth Circuit in drafting their local rules of procedure and that these rules were informally approved by the circuit before promulgation. Thus, it can be argued that these rules were ultimately prescribed pursuant to the authority granted the courts of appeals under 28 U.S.C. § 2071 (1976). Similarly, under Rule 8018 of the "Proposed New Bankruptcy Rules and Official Forms," recently presented by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *see infra* note 121, the circuit councils, not the Bankruptcy Appellate Panels' judges, are authorized to make and amend the local rules gov-

and staff of the court of appeals to administer their caseload.[114] In the Ninth Circuit, which has a considerably greater number of appellate panel cases,[115] the panel has its own clerk and clerical staff.[116] These positions were, however, created and filled under the authority granted the Clerk of the United States Court of Appeals for the Ninth Circuit.[117]

Given the close relationship between the panels and the courts of appeals which direct them, it is understandable that panel administrative practices largely parallel the procedures of these higher courts. For example, one bankruptcy appellate panel judge is chosen in each circuit to assign cases to particular panel judges and to handle other caseload management duties. In the First Circuit, this duty is performed by the senior active panel judge.[118] In the Ninth Circuit, the position of administrative judge is filled by appointment from the chief judge of the circuit.[119] Once the administrative judge of the panels takes over, the chief judge is only indirectly responsible for the designation of panel judges to hear individual appeals and for the

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erning the panels.

In a like vein, 28 U.S.C. § 711(a)-(b) (1976) provides:

> (a) Each court of appeals may appoint a clerk who shall be subject to removal by the court.
>
> (b) The clerk, with the approval of the court, may appoint necessary deputies, clerical assistants and employees in such number as may be approved by the Director of the Administrative Office of the United States Courts. Such deputies, clerical assistants and employees shall be subject to removal by the clerk with the approval of the court.

Id.

Pursuant to this authority, it was possible for the Clerk of the United States Court of Appeals for the First Circuit to organize his staff to handle bankruptcy appellate panels matters and for the Clerk of the United States Court of Appeals for the Ninth Circuit to appoint a special deputy to act as Clerk of the United States Bankruptcy Appellate Panels of the Ninth Circuit. The degree of autonomy which the latter clerk exercises is the result of an administrative policy decision of the Ninth Circuit Clerk, not of any statutory authority favoring such independence.

114. 1ST CIR. PANEL R. 1(2), *supra* note 85.

115. During the period July 1980 through September 1981, some forty-seven appeals were taken to the United States Bankruptcy Appellate Panels of the First Circuit. During that same period, 215 appeals were filed with the Ninth Circuit Bankruptcy Appellate Panels. Letter from Charles D. Gentry, Chief, Non-Criminal Branch, Administrative Office of the United States Courts, to Hon. Ruggero J. Aldisert, Chairman, Bankruptcy Rules Committee, Judicial Conference of the United States (Dec. 9, 1981) [hereinafter cited as Letter].

116. *See* 9TH CIR. PANEL R., Gen. Provisions, 8002(a)-(b), *supra* note 85; *id.*, Local Provisions, 1-2.

117. *See* 28 U.S.C. § 711(a)-(b) (1976). *See also supra* note 113.

118. 1ST CIR. PANEL R. 9(a), *supra* note 85.

119. 9TH CIR. GEN. ORDERS 1.12, *supra* note 96.

ongoing management of the panels.

The actual processing of appeals is largely governed by internal guidelines established by the panel clerks or by the various local and national rules promulgated with respect to bankruptcy appeals.[120] Only the latter procedural rules have enough of an impact upon members of the bankruptcy bar to be considered in this Article.

B. The Rules Governing Bankruptcy Appellate Panel Procedures

In the Ninth Circuit, the bankruptcy appellate panels have adopted a rather intricate tripartite system of rules to govern their appeals.[121] The First Circuit, on the other hand, has established a uniform body of rules to govern all bankruptcy appeals, no matter which appellate forum is utilized.[122] To a great extent, the rules of both circuits are patterned after the Federal Rules

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120. *See infra* notes 121-122 and accompanying text.

121. The first level of these rules consists of the 800-series of the Federal Rules of Bankruptcy Procedure which controlled appeals under the old Bankruptcy Act. Unless inconsistent with the provisions of the new Bankruptcy Code, the pre-October 1, 1979, federal bankruptcy rules are still effective. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 405(d), 92 Stat. 2685. These 800-series rules are supplemented by the 8000-series of the Suggested Interim Bankruptcy Rules drafted by the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States. This latter set of rules has been included as "General Provisions" in the Rules of the United States Bankruptcy Appellate Panels of the Ninth Circuit. Completing these panel rules are certain "Local Provisions," which were patterned after the Rules of the United States Court of Appeals for the Ninth Circuit.

As a safety net, any potential gap in this ornate regulatory system is filled by Rule 5 of the "Local Provisions" of the Ninth Circuit panel rules, which states:

> In cases where these rules are silent, a bankruptcy appellate panel may apply the Rules of Bankruptcy Procedure, the Local Rules of the United States Court of Appeals for the Ninth Circuit, the Federal Rules of Appellate Procedure or any relevant rule of the Supreme Court of the United States.

9TH CIR. PANEL R., Local Provisions, 5, *supra* note 85.

Additionally, the Ninth Circuit Bankruptcy Appellate Panels control their internal functions by way of General Orders.

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has just issued its "Proposed New Bankruptcy Rules and Official Forms." The degree to which these new rules, once promulgated, will impact upon the local rules of the bankruptcy appellate panels of both the First and the Ninth Circuits has yet to be ascertained.

122. The First Circuit has simply taken the old 800-series of the Federal Rules of Bankruptcy Procedure and supplemented it with the 8000-series of the Interim Rules of Bankruptcy Procedure and with certain additional provisions. This set of rules governs bankruptcy appeals taken to the United States District Court of the District of Puerto Rico, to the bankruptcy appellate panels, and to the court of appeals.

of Appelate Procedure and the local rules governing civil appeals in their circuit. For that very reason, the differences found among these procedural formats create potential pitfalls for the uninitiated or negligent practitioner.

Most of these obstacles appear at the very outset of the appellate process.[123] For example, the initial determination any attorney must make in contemplation of an appeal is whether the judgment, order, or decree he is appealing is final or interlocutory.[124] In the bankruptcy setting, the appellate panels and the district courts are empowered to entertain, upon application, interlocutory appeals;[125] the courts of appeals are not.[126] The procedure for making application for leave to appeal is quite different from that for filing a notice of appeal.[127]

In the Ninth Circuit, the application is made directly to the appellate panels.[128] Then, after the proposed appellee has been given an opportunity to respond, the panel assigned to hear the matter either grants or denies leave to appeal.[129] No further notice of appeal need be filed.[130] To guard against the ambiguities in the legal distinctions between interlocutory and final orders,[131] the Ninth Circuit rules provide that if a notice of appeal

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123. This is primarily because the procedures which invoke the jurisdiction of the appellate body are generally accomplished at the outset of the appeal. Being jurisdictional in nature, therefore, shortcomings in adherence to these designated procedures are usually treated more harshly than are mistakes at later stages in the appellate process. *See, e.g.*, Browder v. Director, Ill. Dep't of Corrections, 434 U.S. 257, 264 (1978) (the thirty-day civil appeals filing period set forth in Rule 4(a) of the Federal Rules of Appellate Procedure is "mandatory and jurisdictional"). *But see* 9 J. MOORE, B. WARD & J. LUCAS, *supra* note 95, ¶ 204.02[2] (questioning the "jurisdictional" nature of failure to file timely notice of appeal).

124. *See supra* notes 94-96 and accompanying text.

125. 28 U.S.C. §§ 1334(b), 1482(b) (Supp. II 1978). *See supra* notes 94-96 and accompanying text.

126. 28 U.S.C. § 1293(b) (Supp. II 1978).

127. *See infra* notes 128-138 and accompanying text.

128. 9TH CIR. PANEL R., Gen. Provisions, 8004(a), *supra* note 85.

129. *Id.* at 8004(b)-(d).

130. *Id.* at 8004(c).

131. *See* Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 516-17 & n.1 (1950) (Black, J., dissenting). *See also* Redish, *supra* note 87, at 90.

In bankruptcy, this ambiguity is heightened by the ongoing nature of the bankruptcy "case" itself. As one commentator has observed:

> In bankruptcy cases, the only "final order," if the order closing the case can meaningfully be called a final order, is relatively unimportant. All the decisions made in the course of administration of the case, however, are final in the sense that they cannot later be undone. Waiting until the close of the case would effectively deny the right of appeal in important matters . . . . Disputes

is filed when the proper document would be an application for leave to appeal, the filing of the notice of appeal will be sufficient.[132] The panel can then either grant or deny the appeal, or require that a full application be submitted.[133] Unfortunately, this rule does not deal with those situations in which an attorney erroneously files an application for leave to appeal, without filing a timely notice of appeal with the trial court.[134]

When uncertainty exists as to the final or interlocutory nature of an order, an attorney would probably be well advised, as a matter of precaution, to file both a notice of appeal with the trial court and an application for leave to appeal with the appellate panels. Although this may provide some confusion for the panels' clerks in docketing such appeals, the appeal will not be lost by technical default. The First Circuit has solved this problem for counsel by requiring that both a notice of appeal and an application for leave to appeal be filed as to appeals from interlocutory judgments, orders, or decrees.[135]

Both circuits have also retained an inherent trap still found

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relating to selection of a trustee, relief from the automatic stay, sales or use of property, allowance of claims, and many other issues are mooted unless challenged and overturned before the case proceeds. Decisions in these disputes are not "merged" into the final order, and any appeal to correct them at the final order stage is largely meaningless.

Levin, *supra* note 38, at 983 (footnotes omitted).

In many ways, even the money judgments issued in those adversary proceedings which could have been heard outside bankruptcy court, *e.g.*, contract or tort judgments, are interlocutory, in the sense that they give rise to choate claims against an estate.

132. 9TH CIR. PANEL R., Gen. Provisions, 8004(d), *supra* note 85.

133. *Id.*

134. *See id.*

135. First Circuit Panel Rule 2(a)(2) provides:

> The notice of appeal from an interlocutory judgment, order, or decree of a bankruptcy judge under 28 U.S.C. § 1334(b) or § 1482(b) shall be accompanied by a motion for leave to appeal with proof of service by the applicant in accordance with Rule 12. The motion shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; and a statement of the reasons why leave to appeal should be granted. Within 10 days after service of the motion an adverse party may file a statement in opposition. The appeal shall not proceed further unless leave is granted and the time for complying with Rules 7 and 8 shall not begin to run until leave is granted. The bankruptcy clerk shall forthwith certify the motion and any opposing statements and transmit them to the appellate clerk. The motion and opposing statements shall be submitted without oral argument unless otherwise ordered by the appellate court.

8001(b) of the "Proposed Bankruptcy Rules and Official Forms," *see supra* note 121, follows this practice of the First Circuit.

1ST CIR. PANEL R. 2(a)(2), *supra* note 85.

in the Federal Rules of Bankruptcy Procedure. Those accustomed to the better known thirty-day civil appeal period, with its thirty-day possible extension period,[136] are often caught unaware of the shorter ten-day/twenty-day format used in bankruptcy.[137] And, since the unexcused late filing of an appeal is generally deemed to be a jurisdictional defect,[138] judicial leni-

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136. FED. R. APP. P. 4(a).

137. FED. R. BANKR. P. 802(a), (c).

138. *See supra* note 123 and accompanying text.

Moreover, the strict language of Rule 802(c) of the Federal Rules of Bankruptcy Procedure would imply that after the twenty-day extension period no further extension is possible, no matter how excusable the neglect of the would-be appellant. Nevertheless, the courts have not always been so strict in construing the purpose and effect of Rule 802(c). At least one bankruptcy court, for example, has held that so long as the motion for an extension of time based upon excusable neglect is filed within the maximum period, the notice of appeal will be considered timely-filed, even though its actual filing comes after the twenty-day extension date has passed. *In re* Fetherston, 2 BANKR. CT. DEC. (CRR) 122, 123 (Bankr. W.D. Wis. 1976). In *Fetherston,* the bankruptcy court relied on the reasoning of the Second Circuit decision in C-Thru Products, Inc. v. Uniflex, Inc., 397 F.2d 952 (2d Cir. 1968), which involved a Federal Rule of Civil Procedure 73(a) determination of excusable neglect and which noted that unless the filing of the notice of appeal were to be permitted after the maximum date, when the motion for an extension preceded that date, the trial court would have to act "hastily and perhaps inadvisedly" in its response. *In re* Fetherston, 2 BANKR. CT. DEC. (CRR) 122, 123 (Bankr. W.D. Wis. 1976). *Cf.* Maryland Casualty Co. v. Conner, 382 F.2d 13, 15-16 (10th Cir. 1967) (expressing in dicta the doubt that such a late filing of a notice of appeal would be possible under Federal Rule of Civil Procedure 73(a)).

The United States Court of Appeals for the Ninth Circuit has apparently adopted, without citation, the reasoning of the *Featherston* case, but in a much more limited fashion. In *In re* Estate of Butler's Tire & Battery Co., 592 F.2d 1028 (9th Cir. 1979), an erstwhile appellant filed a motion for extension due to excusable neglect some twenty days after the entry of the bankruptcy court's judgment. The bankruptcy court, in turn, set the time for the hearing of the motion for a date twenty-one days later. At that hearing, the appellant's motion was granted and his notice of appeal was filed immediately thereafter. The district court, however, refused to hear the appeal for lack of jurisdiction, because the notice of appeal had been filed some eleven days after the maximum thirty-day period had expired. *In re* Butler's Tire & Battery Co., 2 BANKR. CT. DEC. (CRR) 654 (D. Or. 1976).

On appeal to the United States Court of Appeals for the Ninth Circuit, the latter court found that Rule 802(c) had been derived from Federal Rule of Appellate Procedure 4(a) which, in turn, had been taken from Federal Rule of Civil Procedure 73(a). The court then applied the rationale of Thompson v. Immigration & Naturalization Serv., 375 U.S. 384 (1964), which had interpreted Rule 73(a) as permitting technically untimely appellate filings under "unique circumstances." *Butler's Tire,* 592 F.2d at 1031. The "unique circumstances" in the *Thompson* case were that the Government had not objected to the timelines of a prior motion for a new trial, the filing of which had caused the appellant to wait in filing his notice of appeal, believing that the date of the denial of this motion was the starting point for the running of his appellate filing period. 375 U.S. at 386-87.

Relying on the *Thompson* holding, the United States Court of Appeals for the Ninth Circuit found that similar "unique circumstances" existed in *Butler's Tire* because of the

ency is seldom extended to tardy would-be appellants. More than a few bankruptcy appellants have forfeited possibly viable appeals by ignoring the specialized rules governing bankruptcy appeals.

One critical stage in bankruptcy appeals that is often not considered by counsel until the problem is thrust upon them is the obtaining of a stay of proceedings pending appeal.[139] Contrary to the belief of many creditors, the bankruptcy process was, in fact, designed with expediency in mind.[140] The "fresh start" of both the debtor and his creditors is dependent upon the rapid resolution of the legal problems which stand in the way of discharge or the operation of a plan of arrangement. Thus, the federal bankruptcy rules do not automatically favor a stay of proceedings, as do the Federal Rules of Civil Procedure. Rather, a stay pending appeal must be requested of the trial court, which may deny this relief when it would unnecessarily hamper the procesing of the general bankruptcy case.[141]

The appellate panels or district court may, in turn, entertain a motion to stay the lower court proceedings only when the bankruptcy trial judge is unavailable[142] or when he has refused

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bankruptcy court's action in setting the hearing on the appellant's application for a date after the full thirty-day period was to expire. *Butler's Tire,* 592 F.2d at 1032.

139. *See* FED. R. BANKR. P. 805.

140. *See supra* notes 6-7 and accompanying text. *See also* COMMISSION REPORT, *supra* note 6, at 81-82 (outlining efficiency goals to be achieved through the creation of a new bankruptcy system).

141. *Compare* FED. R. BANKR. P. 805 *with* FED. R. CIV. P. 62(d). *See also* 13 J. MOORE & L. KING, *supra* note 92, ¶ 805.05.

142. Federal Rule of Bankruptcy Procedure 805 provides, in pertinent part:

> A motion for a stay of the judgment or order of a referee, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be made in the first instance to the referee. . . . A motion for such relief, or for modification or termination of relief granted by the referee, may be made to the district court, but the motion shall show why the relief, modification, or termination was not obtained from the referee. The district court may condition the relief it grants under this rule upon the filing of a bond or other appropriate security with the referee.

FED. R. BANKR. P. 805. The Collier treatise explains the purpose of this language as follows:

> Relief under this rule can usually be obtained more effectively and more speedily by motion to the Referee since he is already familiar with the case and may be more accessible. It is desirable that the relief be sought from the Referee in the first instance because the decision to grant or deny the relief often will involve a delicate balancing of the equities that only the Court familiar with the case is able to make.
>
> But the Referee may be unavailable or it may be obvious to the appellant that from the nature of what occurred in the Referee's court, relief from the

the appellant's request for a stay.[143] When the trial judge is unavailable, the panel should normally consider the same factors as would the trial court in determining the need for a stay.[144] In situations in which the panel is reviewing the denial or conditional grant of a stay pending appeal, the trial court's decision will normally be upheld absent a finding of an abuse of discretion.[145]

In seeking an emergency stay from a panel, counsel should be prepared to explain why the trial court could not grant the stay and, when the bankruptcy court has actually denied the stay, to establish the basis for an abuse of discretion holding.[146] It should be remembered that if a stay is not obtained by an appellant, a good possibility exists that his appeal will be rendered moot by the ongoing activities of a bankruptcy court intent upon the efficient disposition of the debtor's general bankruptcy case.[147]

A final hazard facing an attorney considering a bankruptcy appeal is found in the rules governing direct appeals to the cir-

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Referee is improbable.

13 J. MOORE & L. KING, *supra* note 92, ¶ 805.08 (footnotes omitted). *But see In re* Wymer, 5 Bankr. 802, (Bankr. 9th Cir. 1980) (the power of an appellate court to modify a trial court's bond order, despite the absence of the trial judge, was not supported).

143. Additionally, when it is clear from the circumstances of the trial below that the lower court would not honor a request for a stay pending appeal, the appellant may go directly to the district court or appellate panels for relief. *See* 13 J. MOORE & L. KING, *supra* note 92, ¶ 805.08.

144. In this regard, Federal Rule of Bankruptcy Procedure 805 allows that "[n]otwithstanding Rule 762 but subject to the power of the district court reserved hereinafter, the referee may suspend or order the continuation of proceedings or make any other appropriate order during the pendency of an appeal *upon such terms as will protect the rights of all parties in interest.*" FED. R. BANKR. P. 805 (emphasis added). It is clear from this passage that the principal concern of the bankruptcy trial court, in exercising its discretion as to whether to allow a stay pending appeal, is the protection of the rights of the various parties. In those cases where the imposition or denial of a stay pending appeal would result in a waste of the debtor's estate or would destroy an interest in property, such a factor would seem very nearly dispositive of the issue.

145. *In re* Wymer, 5 Bankr. 802, 807-08 (Bankr. 9th Cir. 1980).

146. *See id.* at 807.

147. In this regard, Federal Rule of Bankruptcy Procedure 805 also provides:

> Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal.

FED. R. BANKR. P. 805. *See also In re* Combined Metals Reduction Co., 557 F.2d 179, 187-89 (9th Cir. 1977).

cuit level.[148] At times, after a regular notice of appeal has been filed, parties may seek to exercise their right to appeal directly to the circuit court of appeals.[149] Rule 8007 of the "General Provisions" of the Ninth Circuit Bankruptcy Appellate Panels Rules provides for the automatic dismissal of prior appeals to the panels upon the filing of an appeal to the Ninth Circuit.[150] This automatic dismissal can be devastating to appellants, however, when the circuit court of appeals subsequently rules that the judgment or order appealed from was interlocutory, and thus not appealable to the circuit level.[151] Since no saving provision exists under the Ninth Circuit Bankruptcy Appellate Panels Rules, the appellant is then left without any recourse to further review.[152] Once again, the First Circuit has come to the aid of hapless appellants with a reinstatement clause that applies when the dismissal of an appeal by the circuit court is due to the interlocutory nature of the lower court's action.[153]

Not all of the changes wrought by the Ninth Circuit Bankruptcy Appellate Panels Rules have created this sort of confusion, however. Indeed, some of these newer rules have corrected obvious shortcomings in the old 800-series of the federal bankruptcy rules.[154] For example, under Federal Rule of Bankruptcy Procedure 801, the bankruptcy trial court could only dismiss ap-

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148. *See* 1ST CIR. PANEL R. 2(c), 23, *supra* note 85; 9TH CIR. PANEL R., Gen. Provisions, 8007, *supra* note 85; Rule 13(a)(1)(A)(viii), Rules of the United States Court of Appeals for the Ninth Circuit [hereinafter cited as 9TH CIR. R.].

149. 28 U.S.C. § 1293(b) (Supp. II 1978) allows that "a court of appeals shall have jurisdiction of an appeal . . . from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals."

150. Ninth Circuit Panel Rules, General Provisions, 8007 states:

> The filing of a direct appeal by agreement in the court of appeals under 28 U.S.C. § 1293(b) shall have the effect of a stipulation of dismissal of any appeal to another appellate court from the same order, judgment or decree. The appeal shall thereafter be dismissed in accordance with Rule 802(b).

9TH CIR. PANEL R., Gen. Provisions, 8007, *supra* note 85.

151. *Compare* 28 U.S.C. §§ 1334(b), 1482(b) (Supp. II 1978) *with* 28 U.S.C. § 1293(b) (Supp. II 1978). *See also* Levin, *supra* note 38, at 974.

152. *See* Levin, *supra* note 38, at 974.

153. 1ST CIR. PANEL R. 2(c), *supra* note 85.

Rule 8001(d)(3) of the "Proposed Bankruptcy Rules and Official Forms," *see supra* note 121, permits an additional ten-day appellate period following the dismissal of a direct appeal to the circuit court level based upon the interlocutory nature of the underlying judgment, order, or decree.

154. Part VIII of the Federal Rules of Bankruptcy Procedure, Rules 801-14, which govern bankruptcy appeals generally, are commonly referred to as the "800-series rules."

peals when the dismissal was voluntary.[155] All other grounds for dismissal had to be handled by the district court.[156] Federal Rule of Bankruptcy Procedure 807, in turn, required transmission of the trial record to the district court "within 30 days after the filing of the statement of the issues," unless a different time were set by the district court.[157] Moreover, this duty of transmission was placed upon the bankruptcy court, not on the appellant.[158]

If a party properly filed a notice of appeal and then failed to file a statement of issues, and if no party moved the district court for a dismissal of the appeal, the matter could remain in limbo indefinitely. The record could not be transmitted and the bankruptcy court could not dismiss the appeal sua sponte.[159] Even when a motion for dismissal for failure to prosecute the appeal was made to the district court, the matter was often not processed because the district court clerk had no formal mechanism under the rules to docket the motion without the trial re-

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155. Federal Rules of Bankruptcy Procedure, Rule 801 provides, in pertinent part:

> (a) An appeal from a judgment or order of a referee to a district court shall be taken by filing a notice of appeal with the referee within the time allowed by Rule 802. Failure of an appellant to take any step other than that specified in the first sentence does not affect the validity of the appeal, but is ground only for such action as the district court deems appropriate, which may include dismissal of appeal.
>
> (b) If an appeal has not been docketed, the appeal may be dismissed by the referee upon the filing with him of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant. If the parties to an appeal shall sign and file with the clerk of the district court an agreement that the appeal be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may also be dismissed upon motion of the appellant upon terms agreed upon by the parties or fixed by the court.

FED. R. BANKR. P. 801.

156. *See* 13 J. MOORE & L. KING, *supra* note 92, ¶ 801.08. *See also* 9 J. MOORE, B. WARD & J. LUCAS, *supra* note 95, ¶ 203.11 (after the notice of appeal is filed, the trial court may not, by dismissal, deny the appellate court its authority to determine its own jurisdicton).

Nevertheless, when a defect in a notice of appeal or the manner of its filing raises a question of whether jurisdiction has ever passed to the appellate court, the trial court may ignore the appeal. In such a case, the burden then falls upon the erstwhile appellant to obtain a writ of prohibition from the appellate court, to prevent further action by the trial court pending appeal. Ruby v. Secretary of United States Navy, 365 F.2d 385, 389 (9th Cir. 1966). *But see supra* notes 86-89 and accompanying text (bankruptcy appellate panel *may* not be able to grant such writs).

157. FED. R. BANKR. P. 807.

158. *Id.*

159. *See supra* notes 155-56 and accompanying text.

cord and file.

Rule 11 of the Local Provisions of the Ninth Circuit Bankruptcy Appellate Panels Rules, however, clearly places the burden of perfecting an appeal upon the appellant.[160] When the appellant fails to properly perfect an appeal, the panel clerk is directed to dismiss the matter upon notification of the parties.[161]

Further emphasizing the continuing control of the Ninth Circuit panels over individual appeals is the use of a new procedural device known as the "status conference."[162] This is an informal mechanism not unlike the civil pre-trial conference. Following the timely filing of a notice of appeal or the approval of an application for leave to appeal, the litigants meet with the panel clerk to discuss the nature of the appeal, the issues to be raised, problems relating to preparation for oral argument, and, of course, the possibilities of a settlement of the matter.[163] This conference gives the parties a further opportunity to reassess their positions and serves to discourage frivolous or predictably fruitless appeals.

After the status conference, briefing and oral argument proceed in accordance with Local Provisions 3 and 9 of the Rules of the Bankruptcy Appellate Panels of the Ninth Circuit.[164] Early in the formation of the panels, some discussion took place over the propriety of the panels dispensing with oral argument, even in cases where this practice seemed unnecessary. It was felt that the experimental nature of the panels mandated that, at least in

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160. Ninth Circuit Panel Rules, Local Provisions, 11 provides:

(a) It is the duty of counsel representing an appellant to see that the appeal is perfected in the manner and within the times prescribed in these rules, and to prosecute the appeal with diligence. Failure of counsel to perform the duties prescribed in these rules, where applicable, will be grounds for referral to the United States Court of Appeals for the Ninth Circuit for discipline under Rule 46, Federal Rules of Appellate Procedure.

Changes in the address of counsel or his client must be reported by counsel to the panels clerk immediately and in writing.

(b) When an appellant fails to file an opening brief timely, or otherwise comply with rules requiring processing the appeal to hearing, the panels clerk after notice shall enter an order dismissing the appeal.

9TH CIR. PANEL R., Local Provisions, 11, *supra* note 85.

161. *Id.* Rule 11(b).

162. *See* Office of the Clerk, Bankruptcy Appellate Panels of the Ninth Circuit, *How to Appeal From the Bankruptcy Court to the Bankruptcy Appellate Panels of the Ninth Circuit:* A MANUAL FOR LITIGANTS AND THEIR ATTORNEYS 3-4 (Nov. 1980).

163. *See id.*

164. For the details of the Ninth Circuit Bankruptcy Appellant Panels procedures for oral argument and briefing, see 9TH CIR. PANEL R., Local Provisions, 3 & 9, *supra* note 85.

the beginning, every appellate procedure be exercised so as to provide a complete picture of how the panels would operate in the future. However, in the end, judicial expendiency once again won out; oral argument is not required in all cases.

Nevertheless, before they can proceed without oral argument, the panels must make a unanimous, specific finding that (1) the appeal is frivolous, (2) the dispositive issues have been recently authoritatively decided, or (3) the facts and law are adequately set forth in the briefs, so that oral argument would not significantly aid the decisional process.[165] This requirement is apparently effective even when the parties stipulate to forego oral argument.

Decisions by the panels are made in much the same way as they are by the courts of appeals. Similarly, the rules governing the publication of opinions are taken directly from the Rules of the United States Court of Appeals for the Ninth Circuit.[166] A litigant dissatisfied with the result obtained from the panels may take a further appeal to the circuit level.[167]

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165. Ninth Circuit Panel Rules, Local Provisions, 3(a) deals with the classes of cases which may be submitted without oral argument:

> Pursuant to Rule 34(a), Federal Rules of Appellate Procedure, there is hereby established a class of cases to be submitted without oral argument. There may be placed in this class any appeal in which a three-judge bankruptcy appellate panel of this court is of the unanimous opinion that:
>
> (1) the appeal is frivolous; or
>
> (2) the dispositive issue or set of issues has been recently authoritatively decided; or
>
> (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.
>
> Oral argument will be allowed in each case absent a specific finding pursuant to this rule that oral argument is not needed.
>
> When a case has been classified by a panel for submission without oral argument, the panels clerk shall give the parties notice in writing of such action. The parties shall have seven days from the date of the panels clerk's letter in which to file a statement setting forth the reasons why, in the opinion of the parties, oral argument should be heard.

9TH CIR. PANEL R., Local Provisions, 3(a), *supra* note 85.

First Circuit Panel Rule 15, on the other hand, simply allows that "[u]nless otherwise provided by these rules or order of the appellate court, the parties shall be given an opportunity to be heard on oral argument." 1ST CIR. PANEL R. 15, *supra* note 85. This rule is also subject to suspension under First Circuit Panel Rule 22 when, "[i]n the interest of expediting decision or for other good cause," the appellate court so orders. 1ST CIR. PANEL R. 22, *supra* note 85.

166. *Compare* 9TH CIR. PANEL R., Local Provisions, 12, *supra* note 85, *with* 9TH CIR. R. 21, *supra* note 148.

167. 23 U.S.C. § 1293 (Supp. II 1978). Still, it is not entirely clear whether an appeal from an appellate panel or district court decision dealing with an interlocutory judgment,

C. *Direct Review by the Circuit Courts of Appeals*

As was mentioned earlier,[168] some pressure was exerted upon Congress to allow for direct appeal to the various circuit courts of appeals. In part, this sentiment resulted from the delays which were faced by major litigants in having matters of substantial importance tied up for extended periods of time in multiple layers of appellate proceedings.[169] In such situations, appeals to the highest possible court, if permitted, would ordinarily be requested by litigants hoping that the sooner the matter could be resolved, the quicker they could begin planning their next tactical move.

The new 28 U.S.C. § 1293(b) provides, in pertinent part, that "a court of appeals shall have jurisdiction of an appeal . . . from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals."[170] Appeal to the panels and to the district courts was established as the dominant form of initial bankruptcy review largely because of its lower cost to litigants.[171] By making direct appeal to the circuit courts dependent upon the consent of all parties, more affluent litigants were prevented from "upping the ante" of an appeal beyond the financial capacity of a smaller opponent. This need for mutual assent, however, makes it incumbent upon counsel not to be lulled into a sense of security with respect to the longer thirty-day filing period which applies to direct appeals to the circuit courts.[172] Counsel should not allow the usual ten-day bankruptcy appellate period[173] to pass without either filing a protective notice of appeal to the panels or district court or previously obtaining a stipulation for direct appeal. And, again, care should

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order, or decree of a bankruptcy court may be taken to a court of appeals. *See* Kennedy, *The Bankruptcy Court Under the New Bankruptcy Law: Its Structure, Jurisdiction, Venue, and Procedure*, 11 ST. MARY'S L.J. 251, 291-93 (1979); Levin, *supra* note 38 at 987-90.

168. *See supra* notes 24-27 and accompanying text.

169. *See House Hearings, supra* note 10, at 625 (testimony of George M. Treister, Esq.) (this was one of the concerns of the National Bankruptcy Conference which led to its recommendation of direct recourse to the courts of appeals).

170. 28 U.S.C. § 1293(b) (Supp. II 1978).

171. *See* S. REP. No. 989, *supra* note 3, at 18 (listing lower cost to litigants as one factor in directing bankruptcy appeals to the district courts, rather than to the courts of appeals).

172. *See* FED. R. APP. P. 4(a).

173. *See* FED. R. BANKR. P. 802(a).

be taken in the Ninth Circuit not to file a direct appeal from an interlocutory judgment, order, or decree.[174]

V. The Future Development of the Panels

A. *Prognosis Throughout the Country*

Given the experimental nature of the bankruptcy appellate panels, their future will be determined, to a large extent, by the manner in which they function in those circuits which have adopted the principle. Should the existing panels prove successful, their proliferation may follow one of two courses. First, Congress could eventually amend the relevant portions of title 28 of the United States Code to utilize the panel method in every district in the country. However, in light of the monumental changes which have been wrought so recently by the 1978 Bankruptcy Reform Act[175] and the Bankruptcy Tax Act of 1980,[176] and which have been proposed in the differing technical corrections bills,[177] it is doubtful that Congress will again turn its attention to major bankruptcy changes in the near future.

Nevertheless, since no time limit is set on the panel experiment,[178] it is conceivable that a number of additional circuits will opt to use the panels under the existing legislation. Still, this process will be fraught with many of the same political pressures that precluded full implementation of the panel concept in the first place.[179] Additionally, in the minds of many circuit councils, practical success by the existing panels may still be overshadowed by the theoretical shortcomings indicated previously.[180] Without congressional promulgation of a complete and fully integrated bankruptcy appellate panel system, a number of circuit councils will undoubtedly opt to retain district court re-

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174. *See* 28 U.S.C. § 1293(b) (Supp. II 1978). *See also supra* notes 148-53 and accompanying text.

175. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2549-2688 (codified as 11 U.S.C., in scattered sections of 28 U.S.C., and in scattered other titles; certain sections are still to be codified in 28 U.S.C.).

176. Bankruptcy Tax Act of 1980, Pub. L. No. 96-489, 94 Stat. 3389, 3389-3413 (codified in scattered sections throughout 26 U.S.C., and scattered sections of 11 U.S.C.).

177. Currently S. 863, 97th Cong., 1st Sess. (1981); H.R. 3705, 97th Cong., 1st Sess. (1981).

For a discussion of the various bankruptcy technical corrections bills which have been introduced since 1978, see 9 Bankr. L. Ed. § 81.6, at 5-7 (Supp. 1982).

178. *See supra* note 43.

179. *See supra* notes 5-110 and accompanying text.

180. *See supra* notes 50-110 and accompanying text.

view, regardless of the success experienced by the participating circuits.

Looking at the performance of the existing panels, one obtains a generally positive impression. For instance, one of the principal arguments against retaining the old system of district court review under the 1978 Reform Act dealt with attorney perceptions of the alleged bias inherent in that appellate procedure. Many attorneys, it was believed, saw the district court as little more than a "rubber stamp" of its bankruptcy adjunct.[181] Hence, it was argued that a significant number of appeals were taken from district court affirmances simply because counsel felt that only an appeal to the circuit level would offer them an impartial review of the bankruptcy court's decision. Thus, it was observed that approximately one-third of the bankruptcy appeals to the district courts, under the old Bankruptcy Act, were subsequently appealed to the courts of appeals.[182]

Because of additional costs, mandatory direct appeal to the circuit level would cut down the overall number of appeals to the federal courts, but would, in itself, substantially increase the circuit court caseload.[183] Review by ad hoc panels of three ostensibly unbiased bankruptcy "experts" would, it was no doubt felt, both allay the fairness concerns of counsel and shield the circuit courts from additional bankruptcy appeals. Additionally, it was probably hoped that the activities of the panels could be organized in such a way as to accomplish the above ends with lower costs and travel demands for litigants, as opposed to those involved in direct appeals to the circuit courts.[184]

The experiences of both the First and the Ninth Circuits have tentatively—but only very tentatively—indicated the wis-

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181. *See supra* notes 10-14 and accompanying text.

182. H.R. REP. No. 595, *supra* note 3, at 41. This estimate came from information supplied the House Judiciary Committee by Berkeley Wright, Chief of the Bankruptcy Division of the Administrative Office of the United States Courts. *House Hearings, supra* note 10, at 19 (testimony of Berkeley Wright). Actually, for the years 1971-75 (1975 projected), an average of 757 appeals were taken each year from the decisions of bankruptcy judges to the district courts. *Id.* For that same period, an average of 297 appeals, or 39% of the total bankruptcy cases reviewed by the district courts, were subsequently taken to the courts of appeals. *Id.* at 11, 19.

183. *See* COMMISSION REPORT, *supra* note 6, at 96-97. *See also Senate Hearings, supra* note 3, at 414-15 (statement of Hon. Ruggero J. Aldisert); Letter from Hon. Shirley M. Hufstedler to Rep. Charles Wiggins (June 27, 1977) (expressing concern for increase in court of appeals workload).

184. *Cf.* S. REP. No. 989, *supra* note 3, at 18 (lauding these benefits of district court review).

dom of this position. During the period from July 1980 through September 1981, some 215 appeals were taken to the United States Bankruptcy Appellate Panels of the Ninth Circuit.[185] Only nine of these cases were thereafter appealed to the United States Court of Appeals for the Ninth Circuit.[186] In the First Circuit, during the same period, forty-seven appeals were entertained by the bankruptcy appellate panels.[187] Only one appeal has been taken to the United States Court of Appeals for the First Circuit from an appellate panel determination.[188] These figures correspond with 98 and 252 bankruptcy appeals being taken, during this period, to the district courts of the First and Ninth Circuits, respectively,[189] and with fourteen and eighty-three bankruptcy appeals from district court decisions going to the United States Courts of Appeals for the First and the Ninth Circuits, respectively.[190]

Given the newness of the panels, however, these figures probably do not accurately indicate the ongoing effectiveness of the bankruptcy appellate panel system.[191] To date, only a small proportion of the appeals filed to the panels have been decided, as compared with the greater proportion of bankruptcy appeals dealt with by the district courts during the same period.[192] As the panels continue to operate and more decisons are handed down, the percentage of appeals from panel decisions to the courts of appeals, as related to the total number of panel appeals, will probably rise. In the end, time alone will demonstrate whether bankruptcy appellate panel review better precludes the need for post-intermediate appeal than does the district court bankruptcy appeals system. Moreover, any final analysis on the

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185. Letter, *supra* note 115.

186. Letter from Charles D. Gentry, Chief, Non-Criminal Branch, Administrative Office of the United States Courts, to Hon. Ruggero J. Aldisert, Chairman, Bankruptcy Rules Committee, Judicial Conference of the United States (Dec. 7, 1981) [hereinafter cited as Letter].

187. Letter, *supra* note 115.

188. Letter, *supra* note 186.

189. Letter, *supra* note 115.

190. Letter, *supra* note 186.

191. *See* Memorandum from Hon. Robert L. Hughes, Administrative Judge, United States Bankruptcy Appellate Panels of the Ninth Circuit, to Judges of the United States Bankruptcy Appellate Panels of the Ninth Circuit (Dec. 21, 1981) (responding to Letter from Hon. Herbert Katz, Judge, United States Bankruptcy Appellate Panels of the Ninth Circuit, to Hon. James R. Browning, Chief Judge, United States Court of Appeals for the Ninth Circuit (Dec. 17, 1981)).

192. *See id.*

point will require a study beyond the simple examination of caseload statistics. Rather, a more in-depth investigation of the actual feelings of counsel toward the bankruptcy appellate panels will be necessary to predict the long term performance of the panels.

From a different angle, the panels seem to have overcome any reservations about the ability of diversely situated trial judges to coordinate their schedules to handle matters relating to appeals and, especially, to deal with emergency procedures. The problem of physical distance between the judges and the situs of each appeal has largely been surmounted by the use of telephone conferences and flexible case assignment procedures. With respect to the latter, although the initial assignment of appellate cases occurs not long after the appeal has been filed (upon the calendaring of the appeal for oral argument[193]) changes can be made fairly easily when it appears that one judge will be in a better position than another to attend oral argument or to prepare an opinion disposing of an appeal.[194] Thus, differ-

193. The selection of a panel to hear the merits of an appeal takes place at the time of the calendaring of the oral argument in the appeal. 9TH CIR. GEN. ORDER 3.2(a), *supra* note 96. At one time, the panels were assigned immediately upon the docketing of the appeal, so as to permit the judges so assigned to handle all the motions made during the course of the appeal. This procedure, however, made it difficult to allocate caseload burdens. Under a recent change in the Ninth Circuit General Orders, a motions panel is assigned each motion to hear "all motions, emergency motions, and applications for leave to appeal, with the exception of motions arising in cases assigned to a disposition panel and those matters that are properly disposed of by the Appellate Panels Clerk." *Id.* at 5.3.

194. Hence, Ninth Circuit General Orders 3.2(b)-(f) provide:

> (b) To the extent possible, each member of the U.S. Bankruptcy Appellate Panels should sit with every other such member approximately the same number of times each year.
>
> (c) Insofar as possible, the wishes of each member of the U.S. Bankruptcy Appellate Panels with regard to sitting during particular months and on particular days during any calendar shall be accommodated.
>
> (d) Each member of the U.S. Bankruptcy Appellate Panels should inform the Bankruptcy Panels Clerk as far in advance as possible of his or her unavailability for assignment to a calendar.
>
> (e) In the event that a member of a panel is disqualified or is excused from a case, or is otherwise unavailable to serve on a panel, the clerk shall specify, through the lottery system, another member of the U.S. Bankruptcy Appellate Panels to replace that judge. If no other member of the U.S. Bankruptcy Appellate panels is available, the clerk shall request the Chief Judge to name a visiting judge to replace the unavailable judge.
>
> (f) If a member of the U.S. Bankruptcy Appellate Panels falls far behind in preparing dispositions, he or she may make such arrangements with the Chief Judge through the Administrative Judge as may be necessary to alleviate the workload. Arrangements may include the assignment to fewer panels until

ences in both scheduling and trial caseload have been handled with relatively little difficulty.

For the benefit of the litigants, the panels have been very conscious of their need to hold hearings at places "convenient to the parties."[195] Fortunately, given the large degree of urbanization in the areas in which most bankruptcy trial courts sit, it has not been a problem for the panels to hold most of their hearings for oral argument in a small handful of locations each month.

Not enough time has passed to judge the efficiency of the panels in terms of the time taken to make a decision from the time the case is submitted. As of July 1981, only twenty-one decisions had been issued by the panels.[196] In these cases, an average of 3.26 months passed between the submission date and the date the decision was handed down.[197] Of course, as the caseload of the panels grows, it will be unusual if the panels do not take somewhat longer to deal with each appeal. Whether the final average decisional time is greater or less than that of the district courts remains to be seen.[198] It is hoped that the specialization of these appellate bodies will eventually allow them to deal more

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the judge becomes more current. A delay of over six months may warrant the Administrative Judge advising the Chief Judge that no further calendar assignments should be given such judge until the delayed disposition has been prepared and circulated or reassigned.

9TH CIR. GEN. ORDERS 3.2(b)-(f), *supra* note 96.

195. 28 U.S.C. § 160(c) (Supp. II 1978).

196. Memorandum from Hon. Robert L. Hughes, Administrative Judge, United States Bankruptcy Appellate Panels of the Ninth Circuit to Hon. Warren J. Ferguson, George M. Treister, Esq., and Judges of the United States Bankruptcy Appellate Panels of the Ninth Circuit (Aug. 5, 1981).

197. *Id.* The average time from the date of the filing of the notice of appeal and the filing of the disposition in these 21 cases was 6.69 months. Of the 32 appeals under submission as of July 31, 1981, the average time under submission was 1.97 months and the average time since the filing of the notice of appeal was 5.73 months. *Id.*

198. Unfortunately, no statistics exist on the average time taken by district courts in handling bankruptcy appeals. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR: 1981, at A-32, table C5A (1981) (covering time intervals between the filing and disposition of general district court civil cases). During the twelve-month period ending June 30, 1981, the courts of appeals averaged 8.8 months from the filing of the notice of appeal in a bankruptcy proceeding to the date of the disposition of the matter and 2.1 months from the submission of the matter of final argument and the court's disposition. *Id.* at A-11, table B4. For the United States Court of Appeals for the Ninth Circuit, these figures are 19.3 months and 1.8 months, respectively. *Id.*

Given the full-time appellate function of the courts of appeals and the paring of issues which occurs during the initial appellate process, however, no great significance should attach to the latter figures, as compared with the Ninth Circuit Bankruptcy Appellate Panels' numbers.

efficiently with the research and conceptual elements of their determinations. Of course, weighing against this possibility are the substantial and increasing trial docket burdens concurrently sustained by most of the panel judges.[199] Only time and experience will tell how important each of these factors will be in measurably affecting the success of the existing bankruptcy appellate panels.

Should the panels of the First and the Ninth Circuits eventually obtain recognition as representing a successful mechanism for handling bankruptcy appeals, it is probable that a number of other circuit councils will consider adoption of the system. Still, legitimate conceptual concerns and less rational "political" restraints may prevent many circuit councils from embracing the bankruptcy appellate panel system, even after seeing the practical benefits that can be obtained from their use. It is therefore hoped that Congress will soon modify the theoretical difficulties that have prevented the full impelmentation of the panels. The various circuit councils would thus be free to grapple with the "political" repercussions of utilizing the panels.

B. Prognosis in the First and Ninth Circuits

Neither of the circuits now using the bankruptcy appellate panels has made this system operative in all of its districts. In the First Circuit, the only district not now subject to the panels' jurisdiction is Puerto Rico; yet it is improbable that the appel-

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199. In the districts from which judges were selected to serve on the bankruptcy appellate panels, there were 55,288 bankruptcy cases filed during the twelve-month period ending June 30, 1981. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 201, at A-118 to -119, table F-1. During the twelve month period ending June 30, 1980, 43,569 bankruptcy cases were filed in these districts. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR: 1980, at A-120 to -123, tables F-1 & F-1BC (1980). This represents a 27% increase in bankruptcy case filings in these districts. (The actual increase in this workload is even greater than is here indicated. When a husband and wife now file jointly, 11 U.S.C. § 302 (Supp. II 1978), both cases are reported as one filing. Although a joint filing was allowed under the old Bankruptcy Act, FED. R. BANKR. P. 117(b), 11-14, 12-14, 13-111, it was reported as two separate case filings, for statistical purposes.)

On June 30, 1981, 10,805 adversary proceedings were pending in these districts (except New Hampshire, for which no 1980 figure is available), up 181% from the 3,839 adversary proceedings pending on July 1, 1980. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR: 1981, at A-120 to -121, table F-1AP (1981).

In the larger districts, the brunt of these increases may have been taken up by non-panel bankruptcy judges. In the smaller districts, this luxury was probably not afforded the panel members.

late panels will ever be used in that district. The spectre of greatly increased judicial travel expenses and the unique nature of the Puerto Rican federal judicial experience favor a retention of the district court appellate pattern in that district.

On the other hand, in the Ninth Circuit, panel use has already expanded into four additional districts. The number of panel judges, however, did not grow with this geographical expansion. If the five existing panels judges prove themselves able to assume this increased burden without undue hardship, it is likely that the experiment will again be expanded, perhaps with the addition of another judge or two. Still, it is not improbable that the Circuit Council of the Ninth Circuit will refrain from expanding the panels system into the districts of Alaska and Hawaii. As is true in Puerto Rico, physical distance makes the continuation of the present method of directing bankruptcy appeals to the local district court a highly attractive option.

One practical factor working in favor of the retention and expansion of the panels in the Ninth Circuit has been the development there of a judicial and clerical system functionally independent of the circuit court's own machinery.[200] As long as this system continues to operate without any major problems, principles of administrative inertia will weigh heavily against any disruption of an already effective program. To no small extent, the maintenance and proliferation of any governmental entity is dependent upon the ability of such a body to sustain a sense of mystical purpose in the eyes of those who directly control its existence and destiny. As is often the case in other aspects of life, "organizational mystique" is most often destroyed by excessive familiarity. With respect to the bankruptcy appellate panels, the effect of these rules of behavior is enhanced by the fact that any significant abandonment of this system has the potential of materially adding to the burden of those who must choose whether to retain or retire this program. Panel expansion will only reduce that burden.

Since the First Circuit panels utilize the circuit court clerk and his staff, they lack the above advantage. Nevertheless, with the District of Puerto Rico excepted from the First Circuit appellate panel experiment, the geographical compactness of this circuit[201] and its relatively small number of bankruptcy judges[202]

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200. *See supra* notes 115-17 and accompanying text.

201. The First Circuit consists of the Districts of Maine, Massachusetts, New

have created a situation highly favorable to the use of this multi-judge appellate device.

In the First Circuit, all of the full-time bankruptcy judges may be called to sit on the appellate panels, in order to avoid a judge having to sit on his own appeal or on that of a too-closely situated fellow judge.[203] Since these full-time judges, in turn, probably provide the vast majority of the judgments, orders, and decrees from which appeals may be taken, the average appellate caseload of each bankruptcy judge in the First Circuit is relatively small.[204] In the same vein, because of relative distances, the time and expense of traveling to adjoining districts to hear oral arguments are also undoubtedly much less than would be required if the Ninth Circuit were to fully implement the panels. Thus, a much less cogent argument can be made in the First Circuit for the benefits to be derived from review by a single local district judge.

A good guess would be that the First and Ninth Circuit panels will, at the very least, continue to function as they have in the past. In neither circuit does there appear to be any significant movement to do away with the panels. It is improbable, however, that the panels will be expanded in the First Circuit beyond their present utilization area. In the Ninth Circuit, there is some possibility of expansion into the rest of the districts located in the continental United States. Use of the panels in Alaska and Hawaii, however, will probably depend more upon budgetary concerns than upon the continuing performance of the present panels. Given the current popularity of frugality in government, one must suspect that the cost of transporting

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Hampshire, Puerto Rico, and Rhode Island.

202. There are currently seven full-time and one part-time bankruptcy judges in the districts of the First Circuit now serviced by the bankruptcy appellate panels. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, UNITED STATES COURT DIRECTORY 161, 168, 201, 268 (Sept. 1, 1981). Of these, all of the full-time bankruptcy judges may sit on appeals. Telephone conversation with Hon. Conrad K. Cyr, United States District Judge, District of Maine (formerly United States Bankruptcy Judge, District of Maine) (Aug. 14, 1981).

203. Telephone conversation with Hon. Conrad K. Cyr, United States District Judge, District of Maine (formerly United States Bankruptcy Judge, District of Maine) (Aug. 14, 1981). *See also supra* notes 60-61 and accompanying text.

204. Each potential panel judge in the First Circuit averaged 6.71 appellate filings during the period July 1, 1980, through September 30, 1981. Estimated from statistics found in Letter, *supra* note 115, and the number of full-time bankruptcy judges in the districts of the First Circuit serviced by the bankruptcy appellate panels. Compare this with the average of 43 filings per Ninth Circuit panel member during this same period. *Id.*

three bankruptcy judges to Honolulu or Anchorage every other month will weight the balance strongly against disposing with the district court review method in these distant districts.

VI Conclusion

The complexity of the varying appellate mechanisms provided under the Bankruptcy Reform Act of 1978 results largely from the Congress' ambivalent attitude toward the independence of the new bankruptcy courts. As a belated compromise between those supporting and those disfavoring a continuation of review by the district courts, the appellate panel mechanism was never completely integrated into the existing federal court system. Instead, the panels have been left to correlate and perform many of their functions by analogy to the practices of other appellate bodies. In some cases, this has involved the unilateral assumption of powers not clearly granted the panels under any specific statutory mandate. However disquieting this may be from a theoretical perspective, the practical results have not been entirely unsatisfactory. Indeed, the panels seem to be handling bankruptcy appeals with both expedition and an encouraging degree of finality.

Nevertheless, only time will tell whether the precarious statutory foundation upon which the panels operate can withstand the challenges of litigants naturally more interested in their own personal ends than in the ongoing integrity of the appellate system through which they must pass. Already, serious attacks have been made upon the jurisdictional scope and the independence of the new bankruptcy courts as article I tribunals. As aggregations of similarly situated article I judges, which further lack any well defined identity as courts of the United States, the bankruptcy appellate panels undoubtedly face even greater complaints from theoretical purists.

In the meantime, however, it can be expected that the bankruptcy appellate panels will continue to function effectively in those circuits which have opted to use this system. Moreover, a distinct possibility exists that utilization of the panels will eventually be expanded in the Ninth Circuit, at least to the limits of geographical and budgetary practicality. In any instance, those who handle bankruptcy cases in the First and the Ninth Circuits should take the time to acquaint themselves fully with the rules and practices of the bankruptcy appellate panels of their respective circuits. For the time being, at least, their understanding of

this system will be essential to the competent representation of their clients in the bankruptcy system.