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In December 1988, Chief Justice Rehnquist appointed the Federal Courts Study Committee to examine the structure and operation of the federal judicial system and to make recommendations for change.[1] One of the Committee's proposals is that Congress require all circuits to establish Bankruptcy Appellate Panels.[2] A Bankruptcy Appellate Panel (BAP) is a specialized appellate tribunal composed of bankruptcy judges sitting in three-judge panels. These panels review judgments and orders entered by bankruptcy judges at the trial-court level. Although all circuits are authorized to establish BAPs, only the Ninth Circuit has a BAP at this time. In all other circuits, first-level bankruptcy appeals are heard by district courts.[3]

The purpose of this article is to present the case for BAPs in more detail than that offered in the Federal Court Study Committee report.[4] Part I traces the history of BAPs, including the effect of the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[5] which invalidated the statute under which the bankruptcy courts were organized. Additionally, Part I discusses the Bankruptcy Amendments and Federal Judgeship Act of 1984, which restructured the bankruptcy courts and BAPs in response to *Northern Pipeline*.

Part II discusses the benefits and costs of BAPs. One bene-

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1. *See* Posner, *Introduction*, 1990 B.Y.U. L. REV. 1 for a discussion of the Federal Courts Study Committee.

2. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 74-76 (1990) [hereinafter FCSC REPORT].

3. Decisions of the BAP or the district court regarding bankruptcy appeals may be further appealed to a United States court of appeals. 28 U.S.C. §§ 158(d), 1291 (1982 & Supp. V 1987).

4. The subject matter of this article is similar to a paper submitted to the Federal Courts Study Committee by a specially formed committee of the National Conference of Bankruptcy Judges. This article, however, does not represent the official views of the National Conference of Bankruptcy Judges.

5. 458 U.S. 50 (1982).

fit of BAPs is the high quality of decisions they render as a result of the expertise in bankruptcy law that BAP judges acquire from their experience as bankruptcy court trial judges. A second benefit of BAPs is their ability to develop coherent bankruptcy case law. A third benefit is that BAPs reduce the workload of article III courts. The major cost of BAPs is the additional workload they impose on bankruptcy judges by shifting work from district courts to the bankruptcy judges sitting on the BAPs. Another concern is that BAPs' subject-matter specialization deviates from the federal court norm of generalist judges.

Part III discusses two issues regarding the implementation of BAPs. The first issue is whether BAPs should have jurisdiction only with the consent of the parties and, if so, whether such consent may be implied from a failure to object to a BAP's exercise of jurisdiction. The second issue concerns the difficulty of establishing BAPs in small circuits where there are not enough bankruptcy judges to form the requisite three-judge panels.

I. History of Bankruptcy Appellate Panels

A. *Appellate Structure Under the 1978 Bankruptcy Act*

In 1978, Congress enacted a comprehensive revision of the federal bankruptcy laws. In addition to making wholesale revisions in substantive law, the Bankruptcy Reform Act of 1978 (1978 Act)[6] greatly expanded both the subject-matter jurisdiction of the bankruptcy courts and the powers bankruptcy judges exercise over proceedings within their jurisdiction. One of the procedural innovations wrought by the 1978 Act was the establishment of Bankruptcy Appellate Panels. BAPs are three-judge panels of bankruptcy judges who hear appeals from judgments and orders entered at the trial-court level by bankruptcy judges. Under the 1978 Act, appeals from bankruptcy judges' decisions could be handled in three different ways. First, the general rule was that appeals were to be heard by a district judge.[7] Second, if the circuit had established a BAP, all bankruptcy appeals were

6. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1980) (codified in 11 U.S.C. and scattered sections of titles 2, 5, 7, 12, 18, 28, 45 & 46 U.S.C.).

7. Section 1334(a) of 28 U.S.C. provided: "The district courts for districts for which panels have not been ordered appointed under section 160 of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts." 28 U.S.C. § 1334(a) (1982) (repealed 1984).

to be heard by the BAP, rather than the district court.[8] Appellate decisions of either the district court or the BAP could be further appealed to the court of appeals.[9] Third, if all parties so stipulated, an appeal could be taken directly to the court of appeals instead of to the district court or to the BAP.[10]

Only two circuits established BAPs. The First Circuit established a BAP in 1980 to hear appeals from all districts in the circuit, with the exception of the District of Puerto Rico. The Ninth Circuit established a BAP in 1979 to hear appeals from two of the 13 districts in that circuit. In 1980, the Ninth Circuit expanded its BAP to include four additional districts.[11]

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8. Section 160 of 28 U.S.C. provided:

> (a) If 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. Except as provided in section 293(b) 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.
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> (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.
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> (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.

Id. § 160 (repealed 1984).

Section 1482 of 28 U.S.C. provided:

> (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.

Id. § 1482 (repealed 1984).

The legislative history regarding Congress' decision to authorize the establishment of BAPs in the 1978 Act is discussed at length in George, *The Bankruptcy Appellate Panels: An Unfinished Experiment*, 1982 B.Y.U. L. REV. 205.

9. Section 1293(a) of 28 U.S.C. provided: "The courts of appeals shall have jurisdiction of appeals from all final decisions of panels designated under section 160(a) of this title." 28 U.S.C. § 1293(a) (1982) (repealed 1984).

10. Section 1293(b) of 28 U.S.C. provided:

> 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.

Id. § 1293(b) (repealed 1984).

11. The history and internal operation of BAPs in the First and Ninth Circuits is described in detail in George, *supra* note 8; Bermant & Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 ARIZ. ST. L.J. 181, 184-88 (1989).

B. Northern Pipeline *and the Emergency Rule*

In 1982, the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[12] disrupted the operation of both the First Circuit and Ninth Circuit BAPs. In *Northern Pipeline*, the Court held that article III of the Constitution prohibited bankruptcy judges from entering final judgments in at least some of the proceedings added to their jurisdiction through the 1978 Act. Article III provides that "[t]he judicial Power of the United States" shall be exercised by judges who "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[13] The Court concluded that the entry of a final judgment in the *Northern Pipeline* lawsuit constituted an exercise of "[t]he judicial Power of the United States." The Court found that such exercise violated article III because, under the 1978 Act, bankruptcy judges were not appointed for life and were not protected against salary reduction.

1. The Northern Pipeline *decision*

In *Northern Pipeline*, plaintiff Northern entered into a contract with defendant Marathon. Later, Northern filed a petition under chapter 11 of the Bankruptcy Code. Northern also filed suit against Marathon in the bankruptcy court alleging breach of contract, misrepresentation, and duress. Marathon had not filed a claim against Northern in the bankruptcy case and objected to the bankruptcy court's exercise of jurisdiction over Northern's lawsuit. Marathon had thus neither explicitly nor implicitly consented to the bankruptcy court's entering final judgment in that lawsuit.[14] Because the lawsuit did not concern property already within the possession or constructive possession of the bankruptcy trustee, the bankruptcy court would not have had jurisdiction over the lawsuit under pre-1978 law.[15] Under the 1978 Act, however, the bankruptcy court had jurisdiction over the lawsuit because it was a civil action "related to" the bankruptcy

12. 458 U.S. 50 (1982).
13. U.S. CONST. art. III, § 1.
14. 458 U.S. at 56-57.
15. *Id.* at 79 n.31.

case filed by Northern.[16] The rule of decision for Northern's lawsuit was supplied by state law.[17]

Justice Brennan, writing for a plurality of four justices, first concluded that the Northern lawsuit could not be assigned to an article I "legislative" court independent from the article III courts. He noted that the purpose of the article III tenure and salary protections was to ensure that federal judges remain " 'free from potential domination by other branches of government.' "[18] He therefore concluded that Congress could establish article I courts to adjudicate only those subject matters "in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers."[19]

The Supreme Court had previously upheld the establishment of article I courts in only three narrowly limited circumstances. Article I courts could be established: (1) in the territories of the United States and the District of Columbia; (2) to adjudicate military offenses; and (3) to adjudicate controversies involving "public rights" derived from the federal government.[20] Only the "public rights" exception even arguably applied to the Northern lawsuit. Public rights controversies include those involving governmental benefits and licenses, the collection of taxes, and various other controversies arising under federal regulatory schemes. Such actions may be adjudicated outside article III courts because, at the time the Constitution was adopted, they were not thought to be "inherently judicial" in character.[21]

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16. *Id.* at 54, 91. Section 1471(b) of 28 U.S.C. provided: "Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1471(b) (1982) (repealed 1984).

17. *Northern Pipeline*, 458 U.S. at 71, 90.

18. *Id.* at 58 (quoting United States v. Will, 449 U.S. 200, 218 (1980)).

19. *Id.* at 64.

20. *Id.* at 64-67.

21. Regarding the public rights doctrine, Justice Brennan also stated:

> This doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued. But the public-rights doctrine also draws upon the principle of separation of powers, and an historical understanding that certain prerogatives were reserved to the political branches of government. . . . The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to non-

Justice Brennan, however, concluded for the following reasons that the Northern lawsuit did not involve public rights. First, it did not involve congressionally created rights because the rule of decision was created by state law.[22] Second, the government was not a party to the controversy.[23] Finally, the lawsuit was not integrally connected to a federal regulatory scheme: it did not involve the discharge of claims against the debtor or the administration of the bankruptcy estate and, thus, did not involve the "restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power."[24]

Justice Brennan next concluded that the bankruptcy courts were not properly established as "adjuncts" of article III courts. Under a proper adjunct system, article III courts, rather than the adjuncts, are to retain " 'the essential attributes of the judicial power.' "[25] The breadth of power that an adjunct may properly exercise depends upon whether the adjunct is adjudicating congressionally-created rights or rights established by the Constitution or state law. With respect to congressionally-created rights, Congress may confer broad powers on the adjunct because, "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges."[26] Because Northern's lawsuit involved state-created rights, however, Congress' power to assign adjudicatory powers to adjuncts "plainly must be deemed at a minimum."[27]

In this context, Justice Brennan concluded that the 1978 Act left the article III courts with too little control over the bankruptcy court's conduct of Northern's lawsuit. In reaching this conclusion, Justice Brennan relied most heavily upon the fact that the bankruptcy court's findings of fact could be set aside only if they were clearly erroneous.[28] He further noted that

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judicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency.

Id. at 67-68 (citations omitted).

22. *Id.* at 71-72.

23. *Id.* at 68-69, 71-72.

24. *Id.* at 71.

25. *Id.* at 77 (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)).

26. *Id.* at 80.

27. *Id.* at 84.

28. *Id.* at 79 n.31.

bankruptcy courts functioned wholly independent of article III courts. Bankruptcy judges were neither appointed by, nor were they removable by, article III courts. Moreover, article III courts lacked the power to withhold proceedings from the bankruptcy courts and the power to recall proceedings once assigned to the bankruptcy courts.[29]

Justice Brennan determined that no portion of the statutory scheme could be saved. He found that the bankruptcy court's power to adjudicate Northern's state-law suit could not reasonably be severed from its power to adjudicate other types of claims. He reached this conclusion because the powers of the bankruptcy courts were contained in a single statutory provision, and because the Court could not determine whether Congress would have intended to restrict bankruptcy judges' powers or grant them article III status.[30] He also determined, however, that the judgment in *Northern Pipeline* should not be applied retroactively. Rather, the judgment of the Court should be stayed until October 4, 1982,[31] to afford Congress time to reform the bankruptcy courts without unduly disrupting the administration of the bankruptcy laws.[32]

Justice Rehnquist's concurring opinion declined to adopt Justice Brennan's broad statements regarding the requirements of article III. He noted that prior decisions regarding non-article III courts "do not admit of easy synthesis."[33] With respect to whether or not the Northern lawsuit could properly be adjudicated by an independent article I court, Justice Rehnquist stated only that "[n]one of the cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected against its will under the provisions of the 1978 Act."[34] Justice Rehnquist also concluded that the bankruptcy courts were not properly constituted as adjuncts of either the district courts or the courts of appeals. He so concluded because the rule of decision was supplied by state law and because bankruptcy courts were afforded power to decide all matters of fact and law subject only to traditional appellate review.[35] He agreed with the

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29. *Id.*
30. *Id.* at 87 n.40.
31. The decision in *Northern Pipeline* was issued on June 28, 1982. *Id.* at 50.
32. *Id.* at 88.
33. *Id.* at 91.
34. *Id.*
35. *Id.*

plurality opinion that the offending powers could not be severed from the remaining powers afforded bankruptcy courts and that the judgment should be stayed.[36]

2. *The Emergency Rule*

Congress did not restructure the bankruptcy courts by the expiration date of the stay. Upon application of the Justice Department, the Supreme Court extended the stay from October 4, 1982, until December 24, 1982.[37] The Court allowed the decision to go into effect, however, when Congress did not act by the extended deadline.[38] Shortly after the Supreme Court's initial decision in *Northern Pipeline*, the Judicial Conference of the United States began developing a plan for the operation of the bankruptcy courts in the event Congress did not act. The plan, known as the Emergency Rule, was put into effect December 24, 1982.

The Emergency Rule was based on the premise that the Supreme Court had not invalidated district courts' jurisdiction over bankruptcy proceedings—it had only invalidated the statute allowing the bankruptcy courts to exercise that jurisdiction. The Emergency Rule was based on the additional premise that the district courts had inherent power to refer bankruptcy proceedings to bankruptcy judges as special masters. Thus, the Emergency Rule referred all bankruptcy proceedings to bankruptcy judges as special masters and also defined the powers bankruptcy judges could exercise in that role.

Under the Emergency Rule, bankruptcy judges' powers were restricted to conform to the requirements of article III as set forth in *Northern Pipeline*. Bankruptcy judges were not permitted to enter binding judgments in state-law actions of the type involved in *Northern Pipeline*. Rather, they were to prepare proposed findings of fact and conclusions of law subject to *de novo* review by the district court. In all other types of bankruptcy proceedings, bankruptcy judges were authorized to enter binding orders. Those orders, however, were also subject to *de novo* review by the district court with respect to questions of

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36. *Id.* at 91-92.

37. United States v. Marathon Pipe Line Co., 459 U.S. 813 (1982) (order extending stay of judgment).

38. United States v. Marathon Pipe Line Co., 459 U.S. 1094 (1982) (further extension of stay of judgment denied).

both fact and law. In addition, the district courts were authorized to recall bankruptcy proceedings from bankruptcy judges at any time.[39]

C. *BAPs Under the Emergency Rule*

Northern Pipeline and the Emergency Rule disrupted the operation of the BAPs in two ways. First, *Northern Pipeline* called into question the power of non-article III bankruptcy judges to hear appeals from judgments and orders entered by other bankruptcy judges. Second, *Northern Pipeline* disrupted the flow of cases to the BAPs. The BAPs' statutory jurisdiction was to review decisions of bankruptcy judges entered pursuant to 28 U.S.C. section 1471(c), which was invalidated by *Northern Pipeline*.[40] Under the Emergency Rule, bankruptcy judges could not enter binding final orders in noncore proceedings.[41] In core proceedings, bankruptcy judges could enter final orders, but that authority came from the Emergency Rule itself, not from 28 U.S.C. section 1471(c). Moreover, under the terms of the Emergency Rule, orders and judgments entered by bankruptcy judges were subject to review only by district judges.

These disruptions had divergent effects on the BAPs operating at that time. The First Circuit BAP ceased to operate shortly after the *Northern Pipeline* decision. The court of appeals in that circuit avoided the question whether BAPs were unconstitutional under *Northern Pipeline* by concluding that the adoption of the Emergency Rule implicitly revoked the circuit's authorization for the BAP.[42] The Ninth Circuit BAP never ceased operating. Shortly after the *Northern Pipeline* decision, the circuit promulgated an order providing that the BAP could continue to hear appeals from orders and judgments entered by the bankruptcy courts before the effective date of *Northern Pipeline*.[43] Shortly thereafter, the Ninth Circuit held that the continued operation of the BAPs was not unconstitutional under

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39. The Emergency Rule is explained in detail in White Motor Corp. v. Citibank, 704 F.2d 254, 256-67 (6th Cir. 1983). *See also* 1 L. KING, COLLIER ON BANKRUPTCY ¶ 3.01(1)(b)(v)-(vi), at 3-14 to 3-19 (15th ed. 1984).

40. 28 U.S.C. § 1482 (1982) (repealed 1984), quoted *supra* note 8.

41. Noncore and core proceedings are defined and discussed further at *infra* notes 46-49 and accompanying text.

42. *See* Massachusetts v. Dartmouth House Nursing Home, 726 F.2d 26, 29 (1st Cir. 1984).

43. Bermant & Sloan, *supra* note 11, at 190.

Northern Pipeline, even when parties objected to the BAP's exercise of jurisdiction.[44]

D. BAPs Under the 1984 Amendments

Congress restructured the bankruptcy courts in the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the 1984 Amendments).[45] The 1984 Amendments limit the trial-court powers of bankruptcy judges in the type of state-law actions brought by the bankruptcy estate that were at issue in *Northern Pipeline*. In these cases, which have come to be known as "noncore proceedings," a bankruptcy judge may enter only recommended findings of fact and conclusions of law. Those recommendations are then subject to *de novo* review by the district court.[46] Bankruptcy judges may also enter binding orders in noncore proceedings with the parties' consent.[47]

Core proceedings, in contrast to the relatively infrequent noncore proceedings, consist of virtually all proceedings commonly arising in the bankruptcy courts, other than state-law actions by the bankruptcy estate.[48] In core proceedings, bank-

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44. *In re* Burley, 738 F.2d 981 (9th Cir. 1984). The *Burley* decision is described in greater detail in the discussion regarding consent. *See infra* text accompanying notes 120-22.

45. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

46. Section 157(c)(1) of 28 U.S.C. provides:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

28 U.S.C. § 157(c)(1) (Supp. V 1987).

47. Section 157(c)(2) of 28 U.S.C. provides:

> Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

Id. § 157(c)(2).

48. Section 157(b)(2)(A)-(O) of 28 U.S.C. provides:

> Core proceedings include, but are not limited to—
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> (A) matters concerning the administration of the estate;
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> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or

ruptcy judges may enter binding judgments subject to traditional appellate review.[49]

The 1984 Amendments also increase the article III courts' control over bankruptcy courts. Bankruptcy judges are to be appointed by the courts of appeals rather than by the President.[50] District courts are given discretion whether to refer bankruptcy cases and proceedings to the bankruptcy courts[51] and may recall any case or proceeding after it is referred.[52]

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wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

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

Id. § 157(b)(2).

49. Section 157(b)(1) of 28 U.S.C. provides:

> Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

Id. § 157(b)(1).

50. *Compare id.* § 152(a)(1) (appointed by court of appeals) *with* 28 U.S.C. § 152 (1982) (repealed 1984) (appointed by president).

51. Section 157(a) of 28 U.S.C. provides: "Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a) (Supp. V 1987).

52. Section 157(d) of 28 U.S.C. provides:

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

Id. § 157(d).

The 1984 Amendments left the provisions governing appeals from orders entered by bankruptcy judges largely unchanged. Each circuit retained discretion to establish a BAP.[53] In those circuits that do not establish a BAP, first-level appeals are heard by the district courts.[54] Appeals from both BAP and district court decisions are still heard by the court of appeals.[55]

The major change regarding appeals made by the 1984 Amendments is that a BAP may hear an appeal only if all parties consent.[56] Under the 1978 Act, parties' consent was not required.[57] The new statute does not specify whether the parties' consent must be express or whether consent may be implied. A second significant change is that BAPs no longer hear appeals from "*Northern Pipeline*-type" (noncore) proceedings unless the parties have consented to the bankruptcy judge's entering final judgment. In noncore proceedings, the bankruptcy judge does not enter a binding judgment, but makes recommendations to the district court, which enters the binding judgment.[58] The district court judgment is appealable to the court of appeals.[59]

The 1984 Amendments also effected three less significant changes regarding bankruptcy appeals. First, a BAP may hear an appeal only if the judges of the district court from which the appeal arose have voted to permit bankruptcy appeals to go to the BAP.[60] Second, parties may no longer stipulate to have an

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53. Section 158(b)(1) of 28 U.S.C. provides: "The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section." *Id.* § 158(b)(1).

54. Section 158(a) of 28 U.S.C. provides:

> The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

Id. § 158(a).

55. Section 158(d) of 28 U.S.C. provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." *Id.* § 158(d).

56. *Id.* § 158(b)(1), quoted *supra* note 53.

57. 28 U.S.C. § 1482 (1982) (repealed 1984), quoted *supra* note 8.

58. *See* 28 U.S.C. § 157(c)(2) (Supp. V 1987), quoted *supra* note 47.

59. *See* 28 U.S.C. § 1291 (1982).

60. Section 158(b)(2) of 28 U.S.C. provides: "No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district." 28 U.S.C. § 158(b)(2) (Supp. V 1987).

appeal from a decision of the bankruptcy court heard immediately by the court of appeals.[61] Finally, a BAP judge may not participate in an appeal originating from his or her own district.[62]

At present, only the Ninth Circuit has a BAP.[63] The First Circuit elected not to reinstate its BAP after the enactment of the 1984 Amendments. To date, none of the other circuits has experimented with BAPs, either before or after the 1984 Amendments.[64]

Following the enactment of the 1984 Amendments, the biggest question arising out of the operation of the Ninth Circuit BAP was whether parties' consent to having their appeal heard by the BAP must be express or whether it may be implied. In August 1984, the circuit adopted a rule requiring all parties to expressly consent or "opt in."[65] In May 1985, the circuit determined that too few appeals were going to the BAP solely because of party inertia. Consequently, the circuit adopted a rule of implied consent, which required parties to "opt out" of the BAP.[66] In August 1987, Bankruptcy Rule 8001(e) became effective. The rule provides that each circuit may prescribe by local rule what constitutes a party's consent to having its case heard by the BAP and legitimizes the Ninth Circuit's implied consent rule.[67]

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61. *Id.* § 158(d), quoted *supra* note 55.

62. The prior statute provided only that a BAP judge could not hear an appeal from one of his or her own decisions. 28 U.S.C. § 160 (1982) (repealed 1984). Both the First and Ninth Circuit BAPs adopted an informal prohibition against a BAP judge hearing an appeal arising from that judge's district. *See* George, *supra* note 8, at 218.

63. Bermant & Sloan, *supra* note 11, at 187-90.

64. *Id.* at 187-88.

65. *See id.* at 192-93.

66. Between August 1984 and May 1985, all parties affirmatively "opted in" to the BAP in approximately 30% of the bankruptcy appeals filed during that period. Since adoption of the implied consent rule, one or more parties have "opted out" of the BAP by filing a timely objection in the following proportion of cases:

1986: 32.3 percent
1987: 30.3 percent
1988: 29.6 percent

1988 ANNUAL REPORT OF THE NINTH CIRCUIT 77 [hereinafter 1988 REPORT] (available from the Librarian's Office, U.S. Court of Appeals for the Ninth Circuit; there are at least two versions of this report—the version cited herein has "United States Courts" as opposed to "United States Judicial Council" in the emblem on the cover). Thus, the percentage of appeals heard by the BAP rose from 30% to approximately 66% with the adoption of the opt-out rule.

67. *See* BANKRUPTCY R. 8001(e) and 1987 Advisory Committee Note.

The Ninth Circuit BAP now hears appeals from all districts in the circuit. The BAP consists of seven bankruptcy judges from six different districts. Those judges also continue to sit as trial judges in their home districts. At present, the Ninth Circuit has not authorized other bankruptcy judges to sit on the BAP by designation. In calendar years 1987, 1988, and 1989, the Ninth Circuit BAP disposed of 717, 664, and 542 appeals, respectively.[68]

II. Advantages and Disadvantages of BAPs

In order to understand the bases for the Federal Courts Study Committee's recommendation that all circuits establish BAPs, one must understand the advantages and disadvantages of BAPs. There are three major benefits of BAPs. First, the expertise in bankruptcy law that BAP judges acquire from their experience as bankruptcy court trial judges allow BAPs to render high-quality decisions. Second, BAPs are better able to develop coherent bankruptcy case law. Third, BAPs reduce the workload of article III courts.

There are three potential drawbacks to establishing BAPs. First, the shift of appeals from article III courts to a BAP imposes a greater workload on bankruptcy judges. Second, the establishment of BAPs reduces district court supervision of bankruptcy courts. Third, the BAP's specialized subject matter means that BAPs deviate from the federal court norm of generalist judges. As will become apparent, however, these disadvantages are not significant and are far outweighed by the advantages.

A. BAP Advantages

1. Quality of decisions

Attorneys who have practiced before the Ninth Circuit BAP believe that the BAP produces high-quality decisions. A survey of attorneys conducted by the Federal Judicial Center as part of a comprehensive study of the Ninth Circuit BAP yielded the following information:

(a) By more than 2 to 1, attorneys believe the BAP gives

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68. Telephone interview with Jed Weintraub, Clerk for the Ninth Circuit BAP (Jan. 24, 1990).

bankruptcy appeals closer study than the district courts.

(b) By more than 2 to 1, attorneys believe the BAP is more likely than the district court to decide a complex case correctly.

(c) By 3 to 2, attorneys believe BAP opinions are "better products" than district court decisions in bankruptcy appeals.

(d) By 2 to 1, attorneys surveyed prefer to litigate bankruptcy appeals before the BAP.

(e) By 7 to 1, attorneys believe the BAP should be continued in the Ninth Circuit.[69]

The results of the attorney survey should not be seen as a challenge to the competence of the district courts, but rather as a recognition that the heavy workloads of the district courts do not allow district judges to devote adequate time to the highly specialized issues involved in bankruptcy appeals. The Federal Bankruptcy Code rivals the Internal Revenue Code in complexity. District court judges already must develop expertise in numerous specialized areas of the law including criminal law and procedure, social security appeals, civil rights actions, and federal antitrust law. It is simply infeasible for the most diligent district judges to acquire the same expertise in bankruptcy matters that BAP judges obtain through their service as trial judges in the bankruptcy courts.

2. Development of bankruptcy case law

The establishment of BAPs also contributes substantially to the development of a predictable and coherent body of bankruptcy law. Two characteristics of BAPs are particularly instrumental in creating rational bankruptcy law. First, the BAP is a small, collegial court that can remain familiar with developing doctrines of law. At present, the Ninth Circuit BAP is composed of seven judges who sit on three-judge panels in every case. These seven judges hear appeals from sixty-eight bankruptcy judges. The BAP thus conforms to the pyramid shape typical of the appellate structure in the federal judiciary. Generally, a federal appellate tribunal contains fewer judges than the courts it reviews.[70] Because there are a limited number of BAP judges

69. *See* Bermant & Sloan, *supra* note 11, at 212-16.

70. The federal district courts, whose decisions the courts of appeals review, contain

and those judges possess substantial expertise in bankruptcy law, the BAP is able to remain familiar with decided cases and identify important undecided issues that warrant published opinions.

The plight of district judges hearing bankruptcy appeals is very different. There are approximately eighty-four active district judges in the Ninth Circuit who hear bankruptcy appeals.[71] This number is greater than the number of bankruptcy judges from whom they hear appeals, and twelve times the number of BAP judges. Designating district judges to hear bankruptcy appeals thus creates an inverse pyramid structure. Furthermore, district judges do not sit on three-judge panels when hearing bankruptcy appeals: each district judge sits alone. Given the large number of appellate decision makers, their limited expertise in bankruptcy law, and the relatively small number of bankruptcy appeals each district judge hears each year, district courts are clearly not as well suited as BAPs to create a coherent body of bankruptcy law.

The second reason that BAPs contribute more than district courts to the development of coherent case law is that BAPs publish their decisions more frequently than district courts. In calendar years 1987 and 1988, the Ninth Circuit BAP was 2.5 times more likely to issue a published opinion in a given bankruptcy appeal than a district court in the Ninth Circuit.[72] Too few published opinions prevents parties from planning their out-of-court conduct and deprives litigants and bankruptcy courts of guidance at the trial-court level.

3. *Reduction of article III courts' workload*

BAPs clearly reduce the workload of district court judges. Every appeal decided by a BAP need not be decided by a dis-

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563 authorized judgeships. 28 U.S.C. § 133 (Supp. V 1987). The federal courts of appeals have a combined total of 168 authorized judgeships. *Id.* § 414. The Supreme Court contains nine Justices and reviews the decisions of the 168 courts of appeals judges. *Id.* § 1.

71. *See Id.* § 133.

72. In calendar years 1987 and 1988, the BAP heard approximately 66% of the bankruptcy appeals in the Ninth Circuit; district courts heard the remaining 34%. *See* 1988 REPORT, *supra* note 66, at 77. A computer survey of published decisions for those two years, however, reveals that the BAP issued 83.4% of the published decisions in first-level bankruptcy appeals, while the district courts issued only 16.6% of the published decisions. (Data is based on personal research of the author.) Extrapolation from this data indicates that the BAP was approximately 2.5 times more likely to publish in any given case.

trict court judge.[73] In calendar years 1987, 1988, and 1989, the Ninth Circuit BAP handled 717, 664, and 542 bankruptcy appeals, respectively.[74] The district judges in the Ninth Circuit view the BAP as a substantial benefit to them and to the federal judicial system. In a 1982 survey, sixty-seven percent of district judges in districts covered by the BAP stated they believed the BAP reduced their workload.[75] None of the judges believed the BAP increased their workload, and only three percent of the judges believed the BAP had no effect on their workload.[76]

The Ninth Circuit BAP also probably reduces the number of bankruptcy appeals the court of appeals must decide. The Federal Judicial Center study noted that twenty-five percent of the decisions of district courts in bankruptcy appeals are appealed further to the court of appeals, while only ten percent of BAP decisions are appealed further.[77] The Federal Judicial Center study thus concludes that for calendar year 1987, the existence of the BAP may have reduced by 135 the number of bankruptcy appeals taken to the Ninth Circuit.[78] The experience in calendar year 1988 was similar. Although almost two-thirds of bankruptcy appeals were decided by the BAP, only seventy-seven BAP decisions were appealed further to the Ninth Circuit. While only one-third of bankruptcy appeals are decided by the district courts, further appeals were taken in 142 of those cases.[79] These data suggest that district court decisions were three times as likely as BAP decisions to be further appealed in calendar year 1988.

Attorney confidence in the thoroughness and quality of

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73. The establishment of BAPs does not, however, reduce the workload of the district courts arising from the district courts' duty to review proposed findings of fact and conclusions of law entered by bankruptcy judges in noncore proceedings. *See* 28 U.S.C. § 157(c)(1) (Supp. V 1987); quoted *supra* note 46. The National Conference of Bankruptcy Judges, in its submission to the Federal Courts Study Committee, estimates that less than five percent of the proceedings coming before the bankruptcy courts are noncore proceedings.

74. Telephone interview with Jed Weintraub, Clerk for the Ninth Circuit BAP (Jan. 24, 1990).

75. Office of the Ninth Circuit Executive, Unpublished Results of a Survey of District Judges in the Ninth Circuit (May 1982) (available from the Ninth Circuit Court of Appeals).

76. *Id.* Seventy-five percent of the judges believed the BAP should be expanded to other districts. Eighty-five percent said the BAP should be continued. The remaining 15% expressed no opinion. *Id. See also* Bermant & Sloan, *supra* note 11, at 211-12.

77. Bermant & Sloan, *supra* note 11, at 209.

78. *Id.*

79. *See* 1988 REPORT, *supra* note 66, at 76.

BAP decisions is likely the most important reason the Ninth Circuit BAP reduced the number of appeals taken to the court of appeals.[80] Attorneys who have confidence in the quality of decision of the first-level appellate court undoubtedly feel less need to pursue a second-level appeal.[81]

The reduction in the workload of district judges effected by the establishment of a BAP is, of course, not without cost. Because the district courts' workload is merely shifted to the BAP, the major non-monetary cost of BAPs is the additional workload imposed on bankruptcy judges.[82] The BAP judges are sitting bankruptcy judges who perform their BAP duties in addition to their trial-court duties. To the extent the trial court caseload of the BAP judges is reduced, the burden of the BAP caseload shifts to other bankruptcy judges. To date, the Ninth Circuit has not sought additional bankruptcy judgeships because of the BAP workload. Bankruptcy judges have simply assumed the additional burden voluntarily, partly because they view BAP work as being prestigious. The Federal Judicial Center study noted:

> [C]onversations with the Panel judges leave us no doubt that

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80. As noted above, the Federal Judicial Center study indicated that a great majority of attorneys who have practiced before the Ninth Circuit BAP believe its decisions are more likely to be well studied and correct than district court decisions in bankruptcy appeals. *See supra* text accompanying note 69.

81. The likelihood of reducing second-level appeals to the courts of appeals was one of the major reasons that circuits were authorized to establish BAPs in the 1978 Act.

> [O]ne 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. 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. . . .
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> . . . 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.

George, *supra* note 8, at 244 (footnotes omitted).

82. The major monetary costs of BAPs are the costs of BAP staff, extra law clerks for BAP judges, and additional travel expenses of BAP judges. The Ninth Circuit BAP hired its own clerk and a small supporting staff. BAP judges are permitted to hire one additional law clerk to help with the additional workload they carry by sitting as both trial judges and BAP judges. Finally, because BAP judges cannot hear cases from their own districts and must sit in panels of three, the establishment of BAPs creates travel expenses that are not incurred by district judges hearing bankruptcy appeals. *See* Bermant & Sloan, *supra* note 11, at 186-87, 211.

> working on the Panels is perceived by them as an honor and an opportunity to serve, for which they are willing to shoulder considerable additional burdens of work. . . . To the extent that a judge's participation on the Panels causes an additional burden on the judge's colleagues on the bankruptcy bench, all of these judges are performing additional work to bring improved judicial service to the litigants.[83]

Even if the shift of the workload from the district courts to BAPs caused the BAP judges' workload to be unmanageable and Congress were forced to create new bankruptcy judgeships, BAPs would still increase the efficiency of the federal court system. This is so because article III district judges are a scarcer judicial resource than non-article III bankruptcy judges. One of the arguments raised against establishing the bankruptcy courts under article III following the *Northern Pipeline* decision was that the number of article III judges should be limited. An obvious corollary of this principle is that district judges should generally not do work that can be performed competently and constitutionally by non-article III judicial officers.[84]

Practical considerations also favor broad use of non-article III judicial officers. It is difficult to persuade Congress to create an adequate number of new district court judgeships when Congress and the Executive are controlled by different political parties. It is easier to secure congressional authorization for an adequate number of bankruptcy court judgeships, because those appointments are not made by the Executive[85] and because bankruptcy judges do not have life tenure.[86]

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83. *Id.* at 218.

84. This is clearly the approach of the Federal Courts Study Committee. Its report concludes that the number of article III judges should be limited because

> [t]he independence secured to federal judges by Article III is compatible with responsible and efficient performance of judicial duties only if federal judges are carefully selected from a pool of competent and eager applicants and only if they are sufficiently few in number to feel a personal stake in the consequences of their actions. Neither condition can be satisfied if there are thousands of federal judges.

FCSC REPORT, *supra* note 2, at 7. The FCSC also recommends greater use of specialized non-article III tribunals for the express purpose of limiting the number of article III judges needed. *Id.* at 17-21.

85. Bankruptcy judges are appointed by the courts of appeals. *See* 28 U.S.C. § 152(a)(1) (Supp. V 1987).

86. Bankruptcy judges serve 14-year terms. *Id.*

B. Potential Drawbacks of BAPS

There are two potential drawbacks of BAPs. First, BAP subject-matter specialization is a departure from the federal court norm of generalist judges. Second, the establishment of BAPs decreases district court supervision of bankruptcy courts. Neither of these facts is a basis for genuine concern.

1. Subject-matter specialization of BAPs

The federal judicial system is largely made up of generalist courts, each of which handles the full spectrum of legal issues within federal court jurisdiction. Bankruptcy courts constitute an exception to this principle because they have jurisdiction over only bankruptcy cases and civil proceedings related to bankruptcy cases. BAPs continue this subject-matter specialization through the first level of appeal. Thus, one might argue that the flip side of BAP judges' high level of expertise in bankruptcy law poses the potential danger that BAP judges lack the broad perspective on legal problems developed by generalist judges.

The evidence, however, suggests that bankruptcy judges who serve on the BAP are not narrow specialists. A large proportion of matters tried by bankruptcy judges involve non-bankruptcy law. Bankruptcy courts determine the amount and the validity of claims against the bankruptcy debtor's estate and try the estate's actions against other parties. These proceedings generally arise under state law or non-bankruptcy federal law. As a result, bankruptcy judges frequently try matters involving torts, contracts, real and personal property security interests, commercial paper, truth-in-lending, and domestic relations. Thus, while bankruptcy judges' jurisdiction does not extend to criminal matters, bankruptcy judges do exercise jurisdiction over a broad range of civil matters. As Professor Kramer's article in this issue proposing creation of a single court to resolve all federal tax appeals concludes, not all "specialist" courts are confined to overly narrow subject matters or peopled by judges who lack broad legal experience.[87]

More important, attorneys who practice before the Ninth Circuit BAP do not perceive any type of narrowness or bias in BAP decisions and do not believe the quality of BAP decisions suffers from the fact that the judges are not complete general-

87. Kramer, *Jurisdiction over Civil Tax Cases*, 1990 B.Y.U. L. REV. 443, 456-57.

ists.[88] The Federal Judicial Center study also found that attorneys who practice before the BAP believe its decisions are not biased in favor of either debtors or creditors.[89]

The subject-matter specialization embodied in BAPs is limited and appropriate. First, the subject matter is complex—the Bankruptcy Code rivals the Internal Revenue Code in complexity. Because many bankruptcy appeals concern questions of pure bankruptcy law, the creation of BAPs is supported by the same considerations that supported the creation of the United States Tax Court. Second, controversies before BAPs generally relate to the payment of commercial debts which is neither political nor highly controversial. BAPs do not handle questions of criminal law, civil rights, or civil liberties. Third, there is adequate review by generalist courts. Final decisions of the BAPs are subject to *de novo* review by the courts of appeals. Fourth, any party may cause an appeal to be heard by the district court rather than the BAP by filing an objection promptly after the notice of appeal.

2. *Concern over proper supervision of bankruptcy courts*

Another potential drawback of BAPs is that establishing BAPs nationwide may lessen district courts' ability to supervise bankruptcy courts. Any such concern is misplaced, however, because district court supervision over the bankruptcy courts is not an independent goal. Congress established the bankruptcy courts as wholly independent courts under the Bankruptcy Reform Act of 1978.[90] In so doing, Congress determined that the benefits of independence to the stature and morale of the bankruptcy courts outweighed the benefits of close district court supervision. This system of independent bankruptcy courts was altered in 1984 only to address the constitutional problems created by the *Northern Pipeline* decision.

Northern Pipeline requires article III courts to exercise close supervision over bankruptcy courts while proceedings are at the *trial-court level.* Because under traditional standards of appellate review, a trial court's findings of fact can be set aside

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88. As noted *supra* text accompanying note 69, the Federal Judicial Center study found that attorneys believe that BAPs produce better quality decisions than the district courts.

89. *See* Bermant & Sloan, *supra* note 11, at 215-16.

90. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 79 n.31 (1982).

only if they are clearly erroneous,[91] an appellate court cannot fully undo what a trial court has done. Appellate review of bankruptcy court decisions by an article III court therefore does not by itself ensure that all the "essential attributes" of the judicial power of the United States will be exercised by article III judges because an appellate court cannot freely substitute its judgment for that of the bankruptcy court. The Supreme Court stated in *Northern Pipeline*:

> Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it had been shaped at the trial level. . . . "[W]herever fundamental rights depend, as not infrequently they do depend, upon the facts . . . finality as to facts becomes in effect finality in law."[92]

In response to *Northern Pipeline*, the 1984 Amendments accord article III judges substantial control over the trial-court functions of bankruptcy judges.[93]

The question of supervision does not arise regarding BAPs, however, because both BAPs and the courts of appeals are appellate courts which review decisions of trial courts under the same standard of review. Because the courts of appeals give no deference to BAP decisions, they can freely substitute their judgment for that of the BAP.[94] Thus, the courts of appeals can

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91. FED. R. CIV. P. 52(a); BANKRUPTCY R. 7052.

92. 458 U.S. at 86 n.39 (quoting Crowell v. Benson, 285 U.S. 22, 57 (1932)).

93. The 1984 Amendments accord article III courts the following controls over bankruptcy judges:

(1) The district court may decide not to refer bankruptcy cases and proceedings to bankruptcy judges (28 U.S.C. § 157(a) (Supp. V 1987)).

(2) The district court may withdraw any proceeding from a bankruptcy judge at any time (*id.* § 157(d)).

(3) In noncore proceedings, the bankruptcy judge may make only proposed findings of fact and conclusions of law, unless the parties consent to the bankruptcy judge entering final judgment subject only to traditional appellate review. The district court must review the proposed findings and conclusions of the bankruptcy judge *de novo* and enter any final judgment (*id.* § 157(a)).

(4) The courts of appeal appoint bankruptcy judges (*id.* § 152(a)). Bankruptcy judges may be removed for cause by the judicial council of the circuit (*id.* § 152(c)).

94. *In re* Burley, 738 F.2d 981, 985-87 (9th Cir. 1984). The *Burley* decision is described in greater detail in the discussion regarding consent. *See infra* text accompanying notes 120-22.

fully and adequately perform the function of article III appellate review after the BAP has ruled.

III. Issues Regarding Implementation of BAPs

Two issues have arisen from the experience of the First and Ninth Circuits that must be addressed if BAPs are to be established nationwide. The first issue concerns whether BAPs should have jurisdiction only where the parties consent and, if so, whether such consent must be express or implied. The second issue concerns the use of multi-circuit BAPs in small circuits where there may not be enough eligible bankruptcy judges to form three-judge panels.

A. Consent of the Parties

The Bankruptcy Reform Act of 1978, which first authorized the establishment of BAPs, contained no consent requirement.[95] The *Northern Pipeline* decision, however, raises concerns as to whether the Constitution permits non-article III judges to perform appellate review of bankruptcy court decisions without the parties' consent. As previously noted, the relevant statute currently provides that consent of the parties is required, and the Bankruptcy Rules permit a circuit establishing a BAP to adopt an implied consent rule.[96] In order to understand the issue of consent, we must first discuss why consent is important, and second, the justifications for an implied consent rule. Then, we will look at how the Federal Courts Study Committee proposes to resolve these issues.

1. Necessity of consent

It is well settled that non-article III judicial officers may adjudicate all types of civil proceedings with the parties' consent. All twelve courts of appeals to address the issue have upheld the statute that permits United States Magistrates, who are not appointed under article III, to conduct civil trials with the consent of the parties.[97] The leading decision on this question is the *en*

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95. 28 U.S.C. § 1482 (1982) (repealed 1984), quoted *supra* note 8.

96. *See* 28 U.S.C. § 158(b)(1) (Supp. V 1987), quoted *supra* note 53; Bankruptcy R. 8001(e) and Advisory Committee Notes to 1987 Amendments.

97. Gairola v. Virginia Dep't of Gen. Servs., 753 F.2d 1281 (4th Cir. 1985); K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985); United States v. Dobey, 751 F.2d 1140 (10th Cir.), *cert. denied*, 474 U.S. 818 (1985); D.L. Auld Co. v. Chroma Graphics

banc decision of the Ninth Circuit in *Pacemaker Diagnostic Clinic v. Instromedix*,[98] written by then circuit judge Anthony Kennedy. In *Pacemaker*, the Ninth Circuit recognized that there is an institutional component of the article III requirements that cannot be waived. The court noted that the trial-by-consent provision enables article III courts to delegate their powers, and that such a delegation would be impermissible if it "substantially impairs performance by the [Judiciary] of its essential role in the constitutional system."[99] The court concluded, however, that article III courts retained sufficient control over magistrates to satisfy the institutional concerns underlying article III. The court so concluded because magistrates are appointed by and subject to removal by the district courts, and because the district courts can decline to refer matters to a magistrate and can recall any matter referred.[100]

In *Commodity Futures Trading Commission v. Schor*,[101] the Supreme Court recently upheld a statute that authorizes a federal administrative agency to adjudicate a traditional state-law action with the consent of the parties. The statute at issue permitted the agency to adjudicate a commodities broker's action to recover unpaid commissions from a customer if the customer consented to trial of the action before the agency.[102] The Court concluded that the broker's action involved state-created "private rights," similar to those at issue in *Northern Pipeline*.[103] The Court also concluded, however, that "Article III's guarantee of an impartial and independent federal adjudication is subject to waiver . . . ."[104] Although the Court noted that article III also serves an institutional function that cannot be waived, it

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Corp., 753 F.2d 1029 (Fed. Cir.), *cert. denied* 474 U.S. 825 (1985); Fields v. Washington Metro. Area Transit Auth., 743 F.2d 890 (D.C. Cir. 1984); Goldstein v. Kelleher, 728 F.2d 32 (1st Cir.), *cert. denied*, 469 U.S. 852 (1984); Collins v. Foreman, 729 F.2d 108 (2d Cir.), *cert. denied*, 469 U.S. 870 (1984); Puryear v. Ede's, Ltd., 731 F.2d 1153 (5th Cir. 1984); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984); Lehman Bros. Kuhn Loeb Inc. v. Clark Oil & Ref. Corp., 739 F.2d 1313, 1314-16 (8th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); Pacemaker Diagnostic Clinic v. Instromedix, 725 F.2d 537 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984); Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983).

98. 725 F.2d 537 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

99. *Id.* at 544.

100. *Id.* at 544-45.

101. 478 U.S. 833 (1986).

102. *Id.* at 842-43.

103. *Id.* at 853.

104. *Id.* at 848.

concluded that the statute in question did not "impermissibly intrude on the province of the judiciary."[105] In so concluding, the Court noted that the jurisdiction of the agency was limited to a narrow type of proceeding in which the agency had expertise,[106] that the determinations of the agency were subject to review by the district courts,[107] that the agency was "relatively immune from political pressures,"[108] and that the parties could always choose to litigate the matter in the district court.[109]

In summary, there is little reason to doubt that with the parties' consent, BAPs may decide bankruptcy appeals. The statutes authorizing BAPs contain safeguards against intrusions into the proper role of the judiciary similar to those present in *Pacemaker* and *Schor*. First, bankruptcy judges sitting on BAPs are appointed by, and subject to removal by, article III courts.[110] Second, BAPs have jurisdiction over limited subject matters in which they have substantial expertise. Third, BAP decisions can be freely set aside by a court of appeals.[111]

2. *Implied consent*

The next issue is whether a party's consent may be implied. In *Jennings v. Coblentz*,[112] the Ninth Circuit's rule requiring parties to opt out of the BAP was upheld against a constitutional challenge. The court noted that parties can waive the right to have a matter heard by an article III judge, analogizing to well-established rules permitting waiver of other constitutional protections, such as the right to jury trial, the right to be free from unreasonable searches, and the right against self-incrimination.[113] The court then held that a waiver of the right to be heard by an article III judge could properly be implied from the parties' failure to make a timely objection to referral of the appeal to the BAP.

> Automatic waiver of a personal Constitutional right is not

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105. *Id.* at 851-52.
106. *Id.* at 855-56.
107. *Id.* at 853.
108. *Id.* at 855.
109. *Id.*
110. 28 U.S.C. § 151(a)-(e) (Supp. V 1987).
111. As noted, the courts of appeals review all aspects of a BAP decision *de novo*. *See supra* text accompanying note 94.
112. 83 Bankr. 752 (D. Nev. 1988).
113. *Id.* at 760 & n.18.

> a novel concept. The Seventh Amendment guarantees a right to jury trial. However, Rule 38(d) of the Federal Rules of Civil Procedure provides for automatic waiver of the jury trial right if a party does not make a timely written demand for a jury trial. This is analogous to the [Ninth Circuit] Order's provision for automatic waiver of the personal right to an Article III adjudication. Also, in *Thomas v. Arn*, the U.S. Supreme Court held that failure to file objections to a magistrate's report waives the right to appeal the District Court's judgment. These two examples indicate that by failing to act within a specified time a party may automatically waive either a Constitutional right or a statutory right to appeal.
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> This court holds that the [Ninth Circuit] Order's "deemed consent" provision is an appropriate means of waiving either a personal Constitutional right or a statutory right.[114]

The Supreme Court has recently employed the doctrine of implied consent in two analogous post-*Northern Pipeline* decisions involving the right to be heard by an article III judge. In *Thomas v. Arn*,[115] the Court held that a party waived the right to appellate review of a magistrate's report by not filing an objection to that report within ten days, as required by local rule. The Court expressly held that the rule did not violate either article III or the due process clause:

> Petitioner was notified in unambiguous terms of the consequences of a failure to file, and deliberately failed to file nevertheless. . . . Litigants subject to the Sixth Circuit's rule are afforded " 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner' " to obtain a hearing by the Court of Appeals.[116]

In *Commodity Futures Trading Commission v. Schor*,[117] the Court upheld an implied consent provision in a statute permitting an administrative agency to hear certain state-law actions. The rules of the agency provided that if a customer initiated a proceeding in the agency against a commodities broker based on the broker's alleged violation of agency regulations, the agency could also determine the broker's counterclaim against the cus-

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114. *Id.* at 762-63 (citations omitted).

115. 474 U.S. 140 (1985).

116. *Id.* at 155 (citation omitted) (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982)).

117. 478 U.S. 833 (1986).

tomer to recover any unpaid commissions.[118] In holding that the agency's determination of the broker's state-law counterclaim did not violate the customer's right to have that action heard by an article III judge, the Court held that the customer implicitly consented to the agency's determination of the state-law counterclaim by filing a complaint with the agency. The Court stated:

> Even were there no evidence of an express waiver here, Schor's election to forgo his right to proceed in state or federal court on his claim and his decision to seek relief instead in a CFTC reparations proceeding constituted an effective waiver. . . . [A]t the time Schor decided to seek relief before the CFTC rather than in the federal courts, the CFTC's regulations made clear that it was empowered to adjudicate all counterclaims "aris[ing] out of the same transaction or occurrence or series of transactions or occurrences set forth in the complaint." Thus, Schor had the option of having the common law counterclaim against him adjudicated in a federal Article III court, but, with full knowledge that the CFTC would exercise jurisdiction over that claim, chose to avail himself of the quicker and less expensive procedure Congress had provided him. In such circumstances, it is clear that Schor effectively agreed to an adjudication by the CFTC of the entire controversy by seeking relief in this alternative forum.[119]

A strong argument could be made that a BAP may hear an appeal without having either the express or implied consent of the parties. The only court of appeals decision on point suggests that consent is not constitutionally required in this context. *In re Burley*[120] involved an appeal decided by the Ninth Circuit BAP after *Northern Pipeline* was decided but before the consent requirement of the 1984 Amendments went into effect.[121] The Ninth Circuit held that the BAP could decide the appeal, even if the parties objected, because review by an article III court was ultimately available before the court of appeals. The

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118. *Id.* at 842-43.

119. *Id.* at 849-50 (citation omitted) (quoting 41 Fed. Reg. 3995 (1976)).

120. 738 F.2d 981 (9th Cir. 1984).

121. The trial-court decision of the bankruptcy judge at issue in *Burley* was not invalid under *Northern Pipeline*, because it had been entered before the effective date of the *Northern Pipeline* decision, and because the Supreme Court ruled that *Northern Pipeline* would not be retroactive. Both the BAP and the Ninth Circuit decided the appeal in *Burley* before the consent requirement went into effect through the 1984 Amendments. The Ninth Circuit thus directly addressed whether the reasoning of *Northern Pipeline* required that BAPs hear appeals only where the parties consented. *Id.* at 985-87.

court noted that review by the court of appeals provided sufficient opportunity for review by an article III court, because the court of appeals reviewed the decision of the BAP *de novo* and could freely substitute its judgment for that of the BAP on all questions.

> [*Northern Pipeline*] stated that non-Article III officers may constitutionally perform judicial functions so long as an Article III judge retains the "essential attributes of the judicial power." *See* 458 U.S. at 80-81, 102 S.Ct. at 2876-2877. The role of the BAP in the appellate process is constitutional because the court of appeals retains those "essential attributes. . . ."
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> . . . .
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> . . . Because the court of appeals and the BAP apply the same standard of review to the underlying judgment, the court of appeals effectively reviews the decisions of the BAP *de novo*. *See In re Mistura*, 705 F.2d 1496, 1497 (9th Cir. 1983). This close review contrasts sharply with the deference for bankruptcy judges' findings of fact that [*Northern Pipeline*] found fatal.
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> . . . .
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> . . . Thus, we conclude that the continued functioning of the BAP is consistent with Article III and the [*Northern Pipeline*] decision.[122]

In essence, the Ninth Circuit held that merely delaying article III review by requiring the BAP to hear the first-level appeal does not conflict with *Northern Pipeline*.

3. *Federal Courts Study Committee proposals*

The Federal Courts Study Committee recommends that the consent requirement be retained and that the Ninth Circuit rule of implied consent be adopted by statute.[123] Thus, a party would be deemed to have consented to the BAP hearing its appeal unless that party files a written objection promptly after the notice of appeal is filed. There are three reasons why adoption of the implied consent rule is a sound compromise that preserves most of the advantages of BAPs, while minimizing the concerns raised by the establishment of BAPs.

First, the implied consent rule eliminates concerns regard-

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122. *Id.*

123. FCSC REPORT, *supra* note 2 at 74. At the time of publication of this article, Part III of the FCSC Report, which contains the language of the proposed statutory amendments, had not yet been released.

ing the constitutionality of the BAP. While a strong argument can be made that consent is not required, the issue is still unsettled. There can be little doubt, however, after *Thomas v. Arn* and *Commodity Futures Trading Commission v. Schor* that an implied waiver of the article III protections is valid.

Second, the implied consent rule is fair to litigants. The implied consent rule steers to the BAP only those parties who express no preference regarding appellate forum to the BAP. Such steering is appropriate given the great advantages of the BAP. At the same time, any party to an appeal may exercise the right to have the district court hear its appeal merely by filing a timely demand.

Third, BAPs will provide substantial benefits under an implied consent rule. If experience in other circuits follows that in the Ninth Circuit, parties will opt out of the BAP in only a small proportion of bankruptcy appeals.[124] Even if the district courts continue to decide some bankruptcy appeals, however, many of the benefits of the BAPs can be achieved. BAPs will reduce the workload of the district courts, and parties who do not opt out of the BAP will receive expert decisions in their individual cases. Under an implied consent rule, BAPs will receive a sufficient number of cases to perform the function of creating clear lines of precedent for bankruptcy courts and litigants.

B. The Problem of Small Circuits

If BAPs are to be implemented nationwide, a solution must be found for the problem posed by small circuits dominated by a single district. This problem arises most acutely in the First Circuit, and to a lesser extent in the Second and Third Circuits,[125] due to the small number of bankruptcy judges in those circuits

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124. In the Ninth Circuit, one or both parties "opt out" of the BAP by filing a timely objection in approximately one-third of bankruptcy appeals. *See supra* note 66.

125. The number of bankruptcy judges in each district in the First, Second, and Third Circuits are as follows:

First Circuit		Second Circuit		Third Circuit	
Mass.	4	N.D.N.Y.	2	N.J.	7
Me.	2	S.D.N.Y.	7	E.D. Pa.	3
N.H.	1	E.D.N.Y.	6	M.D. Pa.	2
R.I.	1	W.D.N.Y.	3	W.D. Pa.	4
P.R.	2*	Conn.	2	Del.	1
		Vt.	1		

See 28 U.S.C. § 152(a)(2) (Supp. V 1987).

*Not realistically available for BAP duty because of geographical distance.

and the statutory rule providing that a BAP judge may not hear an appeal arising from his or her own district.[126] In a small circuit dominated by a single district, a substantial proportion of bankruptcy appeals may arise from one district, and, thus, many of the bankruptcy judges in the circuit may be disqualified from hearing those appeals. Under these circumstances, virtually all the judges from other districts would have to sit on the BAP to create a three-judge panel eligible to hear appeals from the dominant district.

This problem could be resolved in four different ways: (1) the "same-district rule" could be eliminated; (2) the First, Second, and Third Circuits could be excused from establishing BAPs; (3) two or more circuits could be permitted to create a single BAP; or (4) judges could be appointed to sit only on the BAP.

The Federal Courts Study Committee has selected the third approach and recommends that two or more circuits be permitted to form a consolidated BAP.[127] Their recommendation is sound. The "same-district rule" is important to preserve the confidence of the litigants in the integrity of the appellate process, to preserve smooth working relations among the judges of a district, and to permit those judges to discuss pending cases freely. At the same time, the smaller circuits should not be excused from establishing BAPs because litigants in those circuits should not be denied the advantages BAPs provide. The major cost of a multi-circuit BAP would be increased travel costs. Because the First, Second, and Third Circuits are geographically so close together, however, those costs should be limited. Appointing a sufficient number of separate BAP judges to solve the problem of the "same-district rule" would be far more costly than the additional travel costs of a multi-circuit BAP.[128]

IV. Conclusion

Eight years ago, the Honorable Lloyd D. George published an article in this journal describing BAPs as an "unfinished experiment."[129] In light of the success of the Ninth Circuit BAP

126. *Id.* § 158(b)(3).

127. *See* FCSC Report, *supra* note 2, at 74.

128. The decision to create a multi-district BAP should be left to the Judicial Conference of the United States.

129. George, *supra* note 8.

over the past ten years, it is no longer appropriate to refer to BAPs as experimental. BAPs are an unqualified success. They reduce the workload of the scarcest commodity in the federal judicial system—article III judges. BAPs reduce the workload of the courts of appeals in part because further appeals are taken less frequently from BAP decisions than from district court decisions. And, because BAPs produce high decisions, they afford this relief to the article III courts without sacrificing the quality of justice provided litigants. Moreover, litigants who wish to be heard by an article III court may do so by "opting out" of the BAP and litigating before a district court. This system of implied consent puts BAPs on a sound constitutional footing, while encouraging their use. For these reasons, the quality of justice will be improved if Congress heeds the Federal Courts Study Committee's advice and requires each circuit to establish a BAP.