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The Bankruptcy Court under the New Bankruptcy Law: Its Structure, Jurisdiction, Venue, and Procedure Selected Articles on the Bankruptcy Reform Act of 1978.

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**THE BANKRUPTCY COURT UNDER THE NEW
BANKRUPTCY LAW: ITS STRUCTURE, JURISDICTION,
VENUE, AND PROCEDURE**

FRANK R. KENNEDY*

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I. THE NEED FOR REFORM

One of the fundamental reforms proposed by the Commission on Bankruptcy Laws of the United States was the establishment of bankruptcy courts of elevated prestige and vested with jurisdiction to determine all controversies arising from cases commenced under the Bankruptcy Act.¹ The Commission also recommended that these courts should be relieved of most of the administrative duties heretofore performed by the courts of bankruptcy.² Public Law No.

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1. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. No. 137, Pt. I, 93d Cong., 1st Sess. 6, 85 (1973) [hereinafter cited as COMMISSION REPORT I]. The Commission was established by Congress in 1970 and directed to "study, analyze, evaluate, and recommend changes" in the Bankruptcy Act. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468. The Commission's Report was published in three parts. Part I was a statement by the Commission of the problems of bankruptcy administration as seen by the Commission and of the solutions proposed by the Commission. Part II [hereinafter cited as COMMISSION REPORT II] was the draft of the Commission's proposed "Bankruptcy Act of 1973" with accompanying notes explanatory of the derivation and purpose of each section and subdivision. Part III contained a number of papers prepared at the request of the Commission.

2. COMMISSION REPORT I, *supra* note 1, at 5-6, 92-94.

95-598³ carries out the Commission's recommendations for courts of enhanced prestige and enlarged jurisdiction,⁴ but its recommendations for separation of judicial and administrative functions are in-substantially implemented.⁵ This article considers the creation of the new bankruptcy courts, the jurisdiction with which these courts are vested, provisions governing the venue of cases and controversies, and the allocation of responsibility for prescribing procedure in the bankruptcy courts.

The Commission's Report summarized the historical roles of the United States district judges and referees in respect to bankruptcy administration as follows:

In all prior bankruptcy legislation the direct responsibility for supervising the administration of bankruptcy cases has been reposed by Congress in district judges or their appointees. The assumption underlying the acts of 1867 and 1898 was that while the judges of the circuit and district courts were vested with jurisdiction over the administration of all cases filed and pending in their courts and of most of the controversies generated by them, the registers or referees should assume most of the burdens imposed by this class of cases. The judges were intended to exercise a supervisory role which was largely undefined but which was exemplified in the statutory provisions for appointment and removal of the registers or referees, the reference of cases to them, and the review of their orders.⁶

Successive amendments of the Bankruptcy Act of 1898 enhanced

3. Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2672 (1978) (to be codified as 11 U.S.C., in scattered sections of 28 U.S.C., and in scattered other titles). The Bankruptcy Reform Act is drafted in four titles. Title I, containing the substantive bankruptcy law, will become 11 U.S.C. Title II, which amends 28 U.S.C., establishes a new system of bankruptcy courts and grants them jurisdiction. Title III consists of amendments to various federal statutes as they pertain to bankruptcy cases. A period of transition to the new law is provided for in Title IV.

4. See discussion in Part II of this article *infra*.

5. The Commission proposed to confine the functions of the bankruptcy courts and judges to judicial functions with minor qualifications. See COMMISSION REPORT I, *supra* note 1, at 5-7, 92-94. Administrative functions performed by referees in bankruptcy under the Bankruptcy Act would be performed for the most part by the United States Bankruptcy Administration, an agency proposed to be established in the Executive Department. See COMMISSION REPORT I, *supra* note 1, at 7-8, 117.

The new law establishes the office of United States trustee in the Department of Justice as a pilot project for five years in 18 districts. See 11 U.S.C.A. §§ 15101-151326 (West Supp. 1979); 28 U.S.C.A. §§ 581-589 (West Supp. 1979). The United States trustee will perform a small portion of the duties that would have been assigned the United States Bankruptcy Administration by the Commission's proposed Bankruptcy Act of 1973.

6. COMMISSION REPORT I, *supra* note 1, at 94.

the status of the referee in bankruptcy as a judicial officer,⁷ and the powers of bankruptcy courts were significantly expanded by the Chandler Act⁸ and subsequent legislation.⁹ The tenor of the legislation was reinforced and extended by the Rules of Bankruptcy Procedure promulgated during 1973-1976.¹⁰ The new bankruptcy law accelerates significantly the progress of the bankruptcy judges toward a status comparable to that of the trial judges of constitutional courts.

Referees in bankruptcy have been appointed by United States district judges since 1898.¹¹ Until 1946, the term of office of a referee was two years,¹² and his compensation depended on fees and charges collected from the cases administered by the court in which he sat.¹³ By the Referees' Salary Act of 1946, the term of a referee was extended to six years,¹⁴ and he became a salaried judicial officer.¹⁵ The

7. See J. MACLACHLAN, *BANKRUPTCY* § 77 (1956). See generally Bankruptcy Act §§ 38, 39 (repealed 1978, previously codified as 11 U.S.C. §§ 66, 67).

8. Chandler Act, Pub. L. No. 696, 52 Stat. 840 (1938) (repealed 1978).

9. Notable changes made by the Chandler Act included explicit recognition in section 1(9) that "court" means the referee or the judge in which proceedings under the Act are pending; authorization for general reference of a bankruptcy case under sections 22 and 38a to a referee before as well as after adjudication; extension by section 38a(4) to the referee of jurisdiction to grant, deny, or revoke a discharge; and the vesting by section 38a(5) of authority to confirm or refuse to confirm a plan under Chapter XI, XII, or XIII and to set aside the confirmation of a plan under any of these chapters. See J. WEINSTEIN, *THE BANKRUPTCY LAW OF 1938* 2-3, 62, 79-81 (1938). Prior to 1938, the referee could act only as a special master before adjudication. That is to say, his determinations pursuant to a reference prior to adjudication were considered by a district judge in a report and became effective only when approved and incorporated in an order entered by the district judge. After adjudication the district judge had discretion to make a general or a specific and limited reference to a referee. See *id.* at 62.

The most significant subsequent extension of a referee's jurisdiction between 1938 and 1978 was made by the Act of Oct. 19, 1970, Pub. L. No. 91-467, 84 Stat. 990, which transferred a large part of the litigation concerning the effect of a discharge from state courts to bankruptcy courts. See generally Countryman, *The New Dischargeability Law*, 45 AM. BANKR. L.J. 1 (1971).

10. See COMMISSION REPORT I, *supra* note 1, at 94. The Rules of Bankruptcy Procedure were promulgated by the Supreme Court during the years 1973-76 pursuant to 28 U.S.C. § 2075 (1976) and were published in the United States Code immediately following Title 11. The Rules remain effective under the Bankruptcy Code to the extent not inconsistent with the Code until repealed or superseded by rules promulgated pursuant to the congressional enabling act as amended by Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 247, 92 Stat. 2672 (1978). The amendment eliminated a provision nullifying laws in conflict with rules promulgated under the enabling act. See also note 221 *infra* and accompanying text.

11. See Bankruptcy Act § 34 (repealed 1978, previously codified as 11 U.S.C. § 62); 2A COLLIER ON BANKRUPTCY ¶ 34.02 (14th ed. 1978).

12. 2A COLLIER ON BANKRUPTCY ¶ 34.03 (14th ed. 1978).

13. *Id.* ¶¶ 40.01[1]-[3], 40.05[1] (14th ed. 1978).

14. See Bankruptcy Act § 34a (repealed 1978, previously codified as 11 U.S.C. § 62(a)).

15. See *id.* § 40a (repealed 1978, previously codified as 11 U.S.C. § 68(a)).

Rules of Bankruptcy Procedure denominated the referee of a court of bankruptcy, or a district judge when acting in lieu of a referee in a bankruptcy case, as a "bankruptcy judge."¹⁶ An order of a referee has been subject to review by the district court on a petition for such review filed within ten days after the entry of the order.¹⁷ The Rules of Bankruptcy Procedure assimilated the review practice applicable to judgments and orders of the bankruptcy judge to the procedure and practices that pertain to review of district court judgments and orders by the court of appeals.¹⁸ District court decisions reviewing orders of the bankruptcy court have been reviewable by courts of appeals and ultimately, on certiorari or appeal, by the United States Supreme Court.¹⁹

II. BANKRUPTCY COURTS

Public Law No. 95-598, the Bankruptcy Reform Act,²⁰ reorganizes the provisions creating the bankruptcy courts and prescribing their jurisdiction, venue, and procedure by removing the provisions from Title 11 of the United States Code and placing them in Title 28 of the Code. A new Chapter 6 of Title 28, entitled "Bankruptcy Courts," contains ten sections creating bankruptcy courts, prescribing the method of appointment and perquisites of bankruptcy judges, regulating certain aspects of the conduct of the courts' business, and authorizing the creation of appellate panels of bankruptcy judges.²¹ A new Chapter 50, also entitled "Bankruptcy Courts," is inserted into Title 28 of the United States Code to provide for clerks,

16. See BANKR. PROC. R. 901(7). Congress adopted the title of "bankruptcy judge" to designate the judicial officer of the new bankruptcy court established by Pub. L. No. 95-598. See 28 U.S.C.A. § 151(b) (West Supp. 1979).

17. See Bankruptcy Act § 39c (repealed 1978, previously codified as 11 U.S.C. § 67(c)); BANKR. PROC. R. 802.

18. See generally BANKR. PROC. R. 801-14 and Advisory Committee's Notes.

19. See Bankruptcy Act § 24 (repealed 1978, previously codified as 11 U.S.C. § 47); FED. R. APP. P. 4(a), 6.

20. The term "Bankruptcy Code" is often used in connection with Title 11 of the United States Code as amended by Public Law No. 95-598. The numerous provisions of Public Law No. 95-598 that amend Title 28 of the United States Code have no common name or designation and will be referred to simply as sections or provisions of Public Law No. 95-598 or of the Bankruptcy Reform Act. The words "Bankruptcy Act" are used in this article exclusively to refer to the statutory provisions that are repealed by Public Law No. 95-598.

21. See 28 U.S.C.A. §§ 151-160 (West Supp. 1979). Chapter 6 does not become effective until April 1, 1984. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 402(b), 92 Stat. 2682 (1978). A transitional provision provides for the courts of bankruptcy created under section 2a of the Bankruptcy Act to continue as the courts of bankruptcy for the purposes of the new law until April 1, 1984. See *id.* sec. 404(a), 92 Stat. 2683.

necessary employees, including law clerks and secretaries, reporters, and the maintenance of court records.²²

22. This chapter is added by sec. 233 of Public Law No. 95-598. See 28 U.S.C.A. §§ 771-775 (West Supp. 1979). "The bill assures similar treatment by the administrative office of the U.S. courts concerning administrative personnel in bankruptcy courts and personnel serving in the U.S. district courts." 124 CONG. REC. H11107 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); 124 CONG. REC. S17424 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini) [the nearly identical statements by Congressman Edwards and Senator DeConcini made to the House and the Senate will hereinafter be cited as 124 CONG. REC.].

Chapter 50 does not become effective until April 1, 1984. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 402(b), 92 Stat. 2682 (1978). Sec. 404(e) of the Bankruptcy Reform Act provides, however, that during the transitional period from October 1, 1979, through March 31, 1984, the bankruptcy judges remaining in office may appoint officers and employees with the same rights, powers, functions, and duties as if the new Chapter 50 were in effect. *Id.* sec. 404(e), 92 Stat. 2684.

Section 771(a) of Title 28 authorizes the appointment of a clerk for each bankruptcy court, "[b]ased on need." Senator DeConcini declared in his statement that the need for separate clerks of bankruptcy courts "clearly exists at the present time." 124 CONG. REC. S17424 (daily ed. Oct. 6, 1978). Congressman Edwards was emphatic in a statement to the same effect in which he added:

Thus the language is not a limitation but is a statement of fact. . . . In certain limited circumstances, there may be no need for a separate clerk for each bankruptcy office, as where there are two bankruptcy offices within a single district and the bankruptcy court may have a clerk at one location and a deputy clerk at the other location.

Id. at H11866. Senator DeConcini pointed out that Congress had recently voted unanimously to establish separate clerks under the Bankruptcy Act, Pub. L. No. 95-383, 92 Stat. 729, enacted September 22, 1978, and he emphasized that it was the intent of Congress that separate clerks should continue. See 124 CONG. REC. S17424 (daily ed. Oct. 6, 1978).

Although it is provided in 28 U.S.C. § 151(a) that there shall be a bankruptcy court in each judicial district, Senator DeConcini declared that there should be only one clerk of the bankruptcy court when one bankruptcy judge serves in more than one judicial district. See 124 CONG. REC. at S17424. The statement presumably had reference to possible reorganization of the bankruptcy courts after April 1, 1984, in the light of a survey of needs of the system during the transitional period by the Director of the Administrative Office of the United States Courts. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 406(a)(1), 92 Stat. 2686 (1978). During the transitional period, the Judicial Conference is authorized to increase but not to decrease the number of bankruptcy judges "as the expeditious transaction of the business of the several courts of bankruptcy may require." *Id.* sec. 404(g), 92 Stat. 2684-85 (1978).

Senator DeConcini recommended in his statement that the Administrative Office of the United States Courts should make a study during the transitional period regarding the feasibility of the consolidation of the clerks' offices of the bankruptcy and the district courts. 124 CONG. REC. S17424 (daily ed. Oct. 6, 1978). He suggested that the addition of bankruptcy judges to the Judicial Conference should enable the Conference to make a better evaluation of the recommendations of such a study. *Id.* at S17424. With reference to the addition of bankruptcy judges to the Judicial Conference, see notes 64-65 *infra* and accompanying text. The parity in respect to the powers to appoint a clerk, other employees, including law clerks and secretaries, and court reporters established for bankruptcy and district judges by Chapter 6 of Title 28 is intended to be operative during the transitional period by virtue of sec. 404 of Title IV of the Bankruptcy Reform Act. 124 CONG. REC., *supra*, at H11109, S17426.

Section 151 of Title 28 establishes a bankruptcy court in each judicial district as an adjunct to the United States district court for such district.²³ Each bankruptcy court consists of the bankruptcy

23. See 28 U.S.C.A. § 151 (West Supp. 1979) While the original version of S. 2266, introduced on October 31, 1977, did not create a bankruptcy court but required, in a proposed 28 U.S.C. § 771(a), the judicial council of each circuit to appoint bankruptcy judges to serve in each district court of the circuit. The district courts were given exclusive jurisdiction of all cases and proceedings under Title 11 and nonexclusive jurisdiction of civil proceedings by or against a trustee or other representative of the estate by an amendment of 28 U.S.C. § 1334. Each bankruptcy judge was then given, by 28 U.S.C. § 775, the power to conduct all proceedings under Title 11 and, to the extent authorized by the district court, trials and other proceedings in actions under 28 U.S.C. § 1334(b). By an amended version, dated May 17, 1978, however, S. 2266 proposed, in a new 28 U.S.C. § 151(a), the establishment "as an adjunct to the United States district court for each judicial district, a court of record that shall be known as the bankruptcy court for such district." Exclusive jurisdiction was vested by 28 U.S.C. § 1334 in the district courts of all cases under Title 11 and nonexclusive jurisdiction of civil proceedings under Title 11 or arising under or related to cases under Title 11. A new 28 U.S.C. § 164 vested power in each bankruptcy judge to conduct all proceedings under Title 11 and trials and other proceedings in actions under 28 U.S.C. § 1334(b).

Senate Report 95-989, which accompanied S. 2266, explained that the adjunct relationship permitted broadened jurisdiction to be reposed in an Article III court while being delegated to non-tenured judges. See S. REP. No. 989, 95th Cong., 2d Sess. 16, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5787, 5802 [hereinafter cited as S. REP. No. 989]. The Report also declared that use of the adjunct relationship would minimize dislocations associated with evolution of an independent court, avoid fragmentation of federal court jurisdiction, and preserve the convenience and economy of district court appeals. *Id.* at 16, reprinted in [1978] U.S. CODE CONG. & AD. NEWS at 5802. The suggestion that such semantics can eliminate "constitutional impediments to the exercise of the judicial power of the United States" seems starkly conclusory, but the character of the constraints imposed by the relevant cases and the force of the experience of the last 80 years makes the comments of the Report entirely plausible.

Sec. 404(a) of the Bankruptcy Reform Act, referred to in note 21 *supra*, declares that "[e]ach of the courts of bankruptcy . . . continued [by the preceding sentence of the subsection] shall constitute a separate department of the district court that is such court of bankruptcy under the Bankruptcy Act." See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 404(a), 92 Stat. 2683 (1978). The significance of categorizing the court of bankruptcy created by section 2a of the Bankruptcy Act as a "separate department of the district court" is not explained in the legislative history and is not apparent from any judicial consideration of the nature of the court of bankruptcy under the Bankruptcy Act or any prior bankruptcy legislation. The label has no particular import in constitutional doctrine as developed to this date. It seems likely that the identification of the continued court of bankruptcy during the transitional period as "a separate department of the district court" is intended to disturb as little as possible existing administrative and logistical arrangements. The use of the adjective "separate" emphasizes, however, that the court of bankruptcy is not to lose its identity, personnel, and facilities pursuant to any reorganization of the district court or the Administrative Office of the United States Courts. See in this connection Senator DeConcini's statement in regard to the amendment of the Bankruptcy Act on the eve of the passage of the Bankruptcy Reform Act, summarized in note 22 *supra*, and SENATE COMM. ON THE JUDICIARY, CONSOLIDATED CLERKS OF COURT REVISION, S. REP. No. 984, 95th Cong., 2d Sess. 1-4 (1978).

"Courts of bankruptcy" were defined in section 1(10) of the Bankruptcy Act to "include

judge or judges for the district,²⁴ but the judicial power of the court

the United States district courts and the district courts of the Territories and possessions to which this Act is or may hereafter be applicable." "Court" was defined by section 1(9) of the Bankruptcy Act, however, to "mean the judge or the referee of the court of bankruptcy in which the proceedings are pending." While sections 1(10) and 2a seemed to treat "courts of bankruptcy" as indistinguishable from and an integral part of the district courts, the practice and understanding that prevailed under the Bankruptcy Act was that the court over which the referee presided was different in several respects from the court presided over by the district judge. Most importantly, of course, the referee exercised only summary jurisdiction of cases, proceedings, and matters that arose under the Bankruptcy Act, whereas the district judge exercised plenary jurisdiction of proceedings, both civil and criminal, that arose out of bankruptcy cases as well as jurisdiction having nothing to do with the Bankruptcy Act and that granted by Title 28 of the United States Code. In addition the district judge could exercise all the summary jurisdiction exercisable by the referee, but the Bankruptcy Act and later the Rules of Bankruptcy Procedure restricted the occasions when the district judge would act in lieu of the referee in the exercise of that kind of jurisdiction. See BANKR. PROC. R. 102, 901(7), 10-103, 11-5, 12-5, 13-102 and accompanying Advisory Committee Notes. Finally, there were certain proceedings arising in cases under the Bankruptcy Act which were reserved for the district judge, *viz.*, proceedings seeking an injunction of another court (Bankruptcy Act § 2a(15)), jury trials of issues arising in a contest of an involuntary petition (BANKR. PROC. R. 115(b)), contempt proceedings not involving minor contempts (BANKR. PROC. R. 920), and review of referees' orders and judgments (Bankruptcy Act § 39c).

Under sec. 403(a) of the Bankruptcy Reform Act the court of bankruptcy created by section 2a of the Bankruptcy Act continues to exist and is authorized to conduct and determine "all matters and proceedings in or relating to any . . . case" commenced before October 1, 1979. The amendment of section 62a(2) and (3) of the Bankruptcy Act by Public Law No. 95-393, approved September 22, 1978, assures each bankruptcy court existing on September 30, 1979, and in particular the referees in bankruptcy of each such court acting as bankruptcy judges under the Bankruptcy Rules of Procedure, the authority to employ necessary clerical, stenographic, and other assistants. There is no explicit authority in that legislation to employ law clerks, however. May a law clerk employed pursuant to 28 U.S.C. § 772, discussed in note 22 *supra*, be assigned to work on a matter in or relating to a case commenced before October 1, 1979?

24. 28 U.S.C.A. § 151(a) (West Supp. 1979). As observed in note 23 *supra*, the functions of the court of bankruptcy created by section 2a of the Bankruptcy Act have been performed principally by referees, redesignated as bankruptcy judges by Bankruptcy Rule 901(7). But as also pointed out in note 23, district judges also on occasion have acted as bankruptcy judges.

The terms of all referees in bankruptcy serving on November 6, 1978, were extended through March 31, 1984, by sec. 404(b) of the Bankruptcy Reform Act, but a strict reading of the same subsection confers that title of "United States bankruptcy judge" only on a referee whose "appointed term as referee" has expired and who has not been found "not qualified" by the chief judge of the court of appeals of the circuit in which the referee has been serving. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 404(b), 92 Stat. 2683 (1978). The chief judge is to make his finding respecting the referee's qualifications on the basis of a screening process prescribed by sec. 404(b). If a referee whose term is thus extended dies in office, it is inferable from sec. 404(d) that his successor is to be appointed for the balance of the term through March 31, 1984, by the judges of the court of bankruptcy pursuant to section 34a of the Bankruptcy Act. The successor must also pass a screening test, but his test is administered by the committee that only advises the chief judge of the circuit in respect to referees in office on November 6, 1978, who are candidates for extended terms

under sec. 404(b). *But cf.* 124 CONG. REC., *supra* note 22, at H11109, S17426 (indicating that screening committee has final authority to disqualify an incumbent referee). The language of sec. 404(b) is susceptible of an interpretation that only a referee who has become a "United States bankruptcy judge" under that subsection can serve in the court of bankruptcy continued under sec. 404(a). Such an interpretation would lead to the absurdity that there would have been no bankruptcy judges capable of acting after October 1, 1979, except in those districts where the original terms of referees in office on November 6, 1978, had expired and extensions of terms had occurred. Congressman Edwards explained on the floor of the House that the provisions in sec. 404(b) that involved the chief judge of the circuit in passing on the qualifications of incumbent bankruptcy judges and the use of the title "bankruptcy judge" were inadvertent insertions on the Senate side that were accepted by the House because of the lateness of the session and its concern with insuring passage of this much-needed legislation. 124 CONG. REC., *supra* note 22, at H11966. Pointing out that the Rules of Bankruptcy Procedure confer the title "bankruptcy judge" upon a referee in bankruptcy, he declared the congressional intent that "the use of this title will not be affected by this legislation." 124 CONG. REC., *supra* note 22, at H11966. Senate Bill 658, pending in the 96th Congress, would delete from sec. 404(b)'s second sentence the language that postpones the conferring of the title of a "United States bankruptcy judge" on a referee in bankruptcy until "the expiration of his appointed term as referee."

The United States bankruptcy judges authorized to serve in the continued courts of bankruptcy include not only successors appointed pursuant to section 34 of the Bankruptcy Act but also bankruptcy judges appointed to fill newly authorized positions under sec. 404(g) of the Bankruptcy Reform Act and part-time referees converted to full-time service pursuant to the same subsection.

May United States district judges who were authorized to serve in the courts of bankruptcy under the section of the Bankruptcy Act and the Rules of Bankruptcy Procedure cited in note 23 *supra*, also serve in the continued court of bankruptcy continued by sec. 404(a)? Categorization of the court of bankruptcy as "a separate department of the district court" tends to support an affirmative answer to the question. Moreover, sec. 405(a) of the Bankruptcy Reform Act excepts from the jurisdiction and powers of the continued court of bankruptcy (1) a proceeding to enjoin a court, (2) a proceeding to punish certain criminal contempts, and (3) an appeal from a judicial determination of a United States bankruptcy judge. The first two exceptions correspond to limitations on the power of the bankruptcy court imposed by 28 U.S.C. § 1481. The third exception simply recognizes the inappropriateness of a review of a determination of a referee, now designated a "United States bankruptcy judge," by another referee, now designated a "United States bankruptcy judge." Sec. 405(a)(2) recognizes that there may be a proceeding in a court of bankruptcy that is not before a United States bankruptcy judge; in that event the proceeding "shall be before the judge of the court of bankruptcy for the district in which such case is pending." An example of such a proceeding includes a proceeding to enjoin a court.

Does a proceeding to punish a criminal contempt lie within the jurisdiction of either the bankruptcy court or the United States district court? Since 28 U.S.C. § 1471 purports to confer jurisdiction on the United States district court only over "cases under title 11" and "civil proceedings arising under title 11 or arising in or related to cases under title 11," it may be questioned whether the jurisdictional grants of 28 U.S.C. § 1471 embrace criminal contempt proceedings. The implication of 28 U.S.C. § 1481, however, is that the bankruptcy court does have the power to punish a criminal contempt committed in the presence of the judge of the court or one warranting a punishment by fine. It is submitted that the United States district court has jurisdiction to punish a criminal contempt not committed in the presence of the judge of the bankruptcy court or to punish any criminal contempt by imprisonment. Even a court with only civil jurisdiction has inherent power to protect its processes against acts that interfere with its ability to carry out its judicial functions, and it is unnecessary for a statute to grant jurisdiction to a court of civil jurisdiction to protect itself by holding persons in criminal contempt. *Ex parte Terry*, 128 U.S. 289, 302-04 (1888); *United States v.*

may be exercised by a single bankruptcy judge.²⁵ Subsection (b) includes the following sentence: "Justices or judges designated and assigned shall be competent to sit as judges of the bankruptcy court."²⁶ The implications of this subsection are better postponed

Hudson, 11 U.S. (7 Cranch) 32, 34 (1812); *Merchants' Stock & Grain Co. v. Board of Trade*, 201 F. 20, 27 (5th Cir. 1912). In any event it appears clear that the jurisdiction of the district court under 18 U.S.C. §§ 401, 402 remains adequate to enable the district court to punish a criminal contempt committed in connection with a case or civil proceeding arising under Title 11 or arising in or related to a case under Title 11.

Finally section 43c of the Bankruptcy Act, which continues to govern United States bankruptcy judges during the transitional period under sec. 404(d), authorizes the district judge to act "[w]henver the office of a referee is vacant or its occupant is temporarily absent or disqualified to act, or whenever the expeditious transaction of the business of the court or courts of bankruptcy may require" See Bankruptcy Act § 43c (repealed 1978, previously codified as 11 U.S.C. § 71). It may be suggested that, at least after the expiration of his appointed term, a referee is no longer a referee under sec. 404(a), but that argument would prove too much. It would nullify the provisions of sec. 404(d) making the rules set forth in sections 34, 35, 36, 40a, 40b, 40d, 41, and 43 of the Bankruptcy Act applicable to United States bankruptcy judges; all of these sections refer almost exclusively to referees. Another route to the same conclusion as to the continuing authority of the district judge to act as a bankruptcy judge is Bankruptcy Rule 102, containing provisions substantially identical to those in Bankruptcy Act section 43c regarding this matter. Since there is no inconsistency between these provisions in Rule 102 and those of the Bankruptcy Reform Act that apply during the transitional period, the rule remains effective for that period under sec. 405(d) of the Reform Act.

If a proceeding in a court of bankruptcy continued pursuant to sec. 404(a) results in a judgment or order by a district judge, what statute or rule governs review? The same question may arise after April 1, 1984, when a proceeding to enjoin a court or to punish a serious contempt comes before and is determined by a United States district judge. Nothing in the Bankruptcy Reform Act appears to bear on this point, and the courts are likely to regard 28 U.S.C. §§ 1291-1294, the statutes generally governing review of United States district court judgments as applicable.

25. See 28 U.S.C.A. § 151(c) (West Supp. 1979).

26. As enacted, subsections (b) and (c) of section 151 were unchanged from the versions that appeared in both H.R. 8200 and S. 2266, the bankruptcy bills reported to the House and Senate of the 94th Congress by their respective Judiciary Committees, with a single exception. The exception was the omission by the Senate bill of the second sentence of section 151(b), which is quoted in the text. The other sentences of subsections (b) and (c) make clear that the bankruptcy court consists of its judges but that one judge can exercise all the court's judicial power "[e]xcept as otherwise provided by law, or rule or order of court." See 28 U.S.C.A. § 151(b), (c) (West Supp. 1979).

Rule 102(a) of the Federal Rules of Bankruptcy Procedure has provided that "[u]pon the filing of a petition the clerk shall refer the case forthwith to a referee or, if a local rule so provides, to more than one referee concurrently." The Advisory Committee's Note explained that the rule simply recognized as proper the practice of concurrent reference to two or more referees that had developed in some districts under Bankruptcy Act § 22a (repealed 1978, previously codified as 11 U.S.C. § 45(a)). Concurrent reference did not contemplate joint exercise of judicial power by the referees involved but flexibility in the exercise by any one of them acting severally. There is no need for any reference, or any rule dealing with it, under the Bankruptcy Reform Act. Section 151(c) should permit continuation of the practice that has prevailed under the Bankruptcy Act and the Rules of Bankruptcy Procedure respecting

until after the features of sections 152, 153, and 154 of Title 28 have been considered.

Section 152 requires bankruptcy judges to be appointed by the President, by and with the advice and consent of the Senate.²⁷ A sentence added at a very late stage in the process of enactment of Public Law No. 95-598 requires the President "[i]n each instance" to "give due consideration to the recommended nominee or nominees of the Judicial Council of the Circuit within which an appointment is to be made."²⁸ This provision reflects a compromise between the House and Senate.²⁹ Senate Bill 2266, as introduced in the Senate of the 95th Congress, had provided for appointment of bankruptcy judges by the judicial council of each circuit.³⁰ The provision

the exercise of judicial power by a single bankruptcy judge. While 28 U.S.C. § 151(c) does not become effective under sec. 402(b) of the Bankruptcy Reform Act until April 1, 1984, the lack of any explicit authorization for a single United States bankruptcy judge to exercise the judicial power of the continued court of bankruptcy is not likely to give rise to any serious difficulty. *See generally* Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 402(b), 92 Stat. 2682(1978).

27. 28 U.S.C.A. § 152 (West Supp. 1979). This provision carries out the recommendation of the Commission on Bankruptcy Laws. *See* COMMISSION REPORT II, *supra* note 1, at 15. The first sentence of section 152 is patterned on 28 U.S.C. § 133, which governs the appointment of district judges. *See* H.R. REP. No. 595, 95th Cong., 1st Sess. 432, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5963, 6387 [hereinafter cited as H.R. REP. No. 595]. The House Report, which accompanied H.R. 8200, the bankruptcy bill reported to the House of the 95th Congress, included the following statement: "This appointment process is mandated by the Appointments Clause of the Constitution, article II, section 2." *Id.* at 432. The foregoing quotation, however, was made in reference to the appointment of bankruptcy judges as members of a constitutional court proposed by H.R. 8200 to be established pursuant to Article III. It is not so clear that the Constitution mandates an appointment by the President with the consent of the Senate to a court that is only an adjunct of the United States district courts. The bankruptcy courts established by section 2a of the Bankruptcy Act were arguably adjuncts to the United States district courts. *See* S. REP. No. 989, *supra* note 23, at 16; *The Constitutionality of Trial of Minor Offenses by U.S. Magistrates: Hearings on S. 3475 and S. 945 Before the Staff of the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. and 90th Cong., 1st Sess. 246-48 (1966-1967). In any event appointment of bankruptcy judges by the President by and with the advice and consent of the Senate is appropriate, whether the bankruptcy courts are constitutional or legislative courts.

Section 152 of Title 28 does not become effective until April 1, 1984. Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 402(b), 92 Stat. 2682 (1978). As pointed out in note 24 *supra*, United States bankruptcy judges will have been or will be appointed by United States district judges to serve during the transitional period prior to April 1, 1984.

28. 28 U.S.C.A. § 152 (West Supp. 1979).

29. 124 CONG. REC. H11866 (daily ed. Oct. 6, 1978)(statement of Rep. Edwards).

30. This provision appeared in S. 2266, 95th Cong., 1st Sess. sec. 201, as introduced on October 31, 1977. This proposal created constitutional difficulties, since Article II, section 2, of the Constitution authorizes appointment of "Officers of the United States" by the President, by and with the advice and consent of the Senate, but Congress is authorized to "vest

requiring the President to consider recommendations of the judicial council restores the council to a role in the appointment process, albeit a less significant one than had been sought for it by the National Conference of Bankruptcy Judges.³¹

Section 153 of Title 28 provides for a term of 14 years for each bankruptcy judge.³² The Commission had recommended a 15-year term.³³ H.R. 8200, the House bankruptcy bill, had provided tenure during good behavior,³⁴ whereas S. 2266, the Senate bill, provided for a 12-year term.³⁵ The 14-year term is thus a compromise between the House and Senate bills on this matter. The fact that bankruptcy judges do not have tenure during good behavior may be viewed as a strong if not conclusive indicium that the bankruptcy court is an Article I court, like the Tax Court, rather than an Article III court, whose judges are assured tenure in office during good behavior.³⁶ As suggested elsewhere in this article,³⁷ however, the matter is not so simply resolved. The House Report accompanying H.R. 8200 de-

the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." See SUBCOMM. ON CIVIL & CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., REPORT ON BANKRUPTCY COURTS 6-7 (Comm. Print 1978). See also Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 494-99 (1930). S. 2266 was amended later to authorize appointment of bankruptcy judges by the circuit courts.

31. Section 2-102(a) of the bills sponsored by the National Conference of Bankruptcy Judges provided for appointment of bankruptcy judges by the judicial council of each circuit. See H.R. 16643, 93d Cong., 2d Sess. (1974); S. 4060, 93d Cong., 2d Sess. (1974); H.R. 32, 94th Cong., 1st Sess. (1974); S. 235, 94th Cong., 1st Sess. (1974). The Bankruptcy Judges believed "that lodging the appointive power in judicial councils was more likely to result in appointments based on merit." 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, 4(1975).

32. 28 U.S.C.A. § 153 (West Supp. 1979).

33. COMMISSION REPORT II, *supra* note 1, at 15-17. This term was the same as that prescribed for judges of the Tax Court under 26 U.S.C. § 7443(e) (1970) and 2.5 times the term of the referee in bankruptcy under section 34a of the Bankruptcy Act. The Commission had pointed out that a 15-year term is long enough to relieve most prospective appointees of concern about the risk of being required to search for new employment at the close of a term on the court." COMMISSION REPORT II, *supra* note 1, at 17.

34. See H.R. 8200, sec. 201(a), 95th Cong., 1st Sess. (1977) (proposed 28 U.S.C. § 153(a)).

35. See S. 2266, sec. 201(a), 95th Cong., 2d Sess. (1978) (proposed 28 U.S.C. § 771(c)).

36. Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws—Tax Procedures*, 88 HARV. L. REV. 1360, 1458 (1975). But see Bondurant, *The Bankruptcy Court as a Constitutional Court*, 45 AM. BANKR. L.J. 235, 239, 247 (1971) (contending that referees in bankruptcy may be entitled to tenure during good behavior by virtue of the congressional grant to bankruptcy courts of Article III judicial power).

37. See text accompanying notes 59-61 and 76-79 *infra*.

clared that "[s]ound bankruptcy and judicial policy dictate the creation of [bankruptcy] courts with the full grant of powers and protections provided under Article III of the Constitution."³⁸ The Report further explained that the principal reason for the establishment of such a court was the need to attract highly qualified judges by assuring them life tenure.³⁹ Congress resolved this matter, much as the Commission did,⁴⁰ by recognizing that a 14-year term provided sufficient assurance of extended tenure to attract qualified candidates without creating another corps of lifetime judges, an alternative eschewed by most Senators and many Congressmen.

A bankruptcy judge is removable by the judicial council of the circuit in which the bankruptcy judge serves.⁴¹ Grounds for removal are "incompetency, misconduct, neglect of duty, or physical or mental disability."⁴²

The salary of a bankruptcy judge is fixed at \$50,000 per annum,⁴³ subject to adjustment under the Federal Salary Act of 1967⁴⁴ and 28 U.S.C. § 461.⁴⁵ The \$50,000 salary for a bankruptcy judge became

38. H.R. REP. NO. 595, *supra* note 27, at 7

39. H.R. REP. NO. 595, *supra* note 27, at 22-23.

40. See text accompanying note 33 *supra*.

41. 28 U.S.C.A. § 153(b) (West Supp. 1979). This subsection is an adaptation of section 2-102(e) of the Commission's proposed Bankruptcy Act of 1973. COMMISSION REPORT II, *supra* note 1, at 16. The Commission proposed that a three-judge commission appointed by the Chief Justice should determine whether a bankruptcy judge should be removed. The determination would be reviewable in the same manner as a judgment of the United States district court. Removal pursuant to 28 U.S.C. § 153(b) as enacted requires majority vote of all judges of the judicial council of the circuit and is not reviewable.

A referee was removable under section 34b of the Bankruptcy Act by the judge or a majority of the judges of the judicial district in which the referee served. This provision will govern the removal of a United States bankruptcy judge serving in a court of bankruptcy during the transitional period. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 404(d), 92 Stat. 2684 (1978).

42. 28 U.S.C.A. § 153(b) (West Supp. 1979). A full-time referee could be removed during his term under section 34b of the Bankruptcy Act "only for incompetency, misconduct, or neglect of duty." A part-time referee could be removed for such a cause or for the reason that his services were not needed. As pointed out in note 41 *supra*, the provisions of section 34b govern the removal of United States bankruptcy judges during the transition until April 1, 1984. *But see* 124 CONG. REC. S17432 (daily ed. Oct. 6, 1978) (remarks of Sen. Thurmond, indicating incumbent bankruptcy judges would be subject to removal on same grounds as provided in 28 U.S.C. § 153(b) and as determined by judicial council of circuit).

43. 28 U.S.C.A. § 154 (West Supp. 1979).

44. 2 U.S.C. §§ 351-361 (1976).

45. This section, added by the Act of Aug. 9, 1975, Pub. L. No. 94-82, 89 Stat. 422, requires annual adjustments of salaries of justices and judges of courts of the United States. The adjustments are keyed to the annual review of salaries in the Executive Branch mandated by the Federal Salary Act of 1967 and related legislation. See 7B MOORE'S FEDERAL PRACTICE § 461 (2d ed. 1979).

immediately effective for each incumbent referee by virtue of an amendment of the Bankruptcy Act.⁴⁶

As noted earlier,⁴⁷ section 151(b) of Title 28 provides that justices or judges designated and assigned shall be competent to sit on the bankruptcy court.⁴⁸ Provisions in Chapter 13 of Title 28 governing the designation and assignment of district and circuit judges to serve in district courts and courts of appeals other than those where they usually sit have been amended to authorize their assignment to bankruptcy courts.⁴⁹ Section 293 of Title 28, which governs the assignment and designation of judges of specialized constitutional courts, has also been amended⁵⁰ to authorize designation and assignment of a bankruptcy judge to serve on any other bankruptcy

46. Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 411, 92 Stat. 2688 (1978) (amending Bankruptcy Act § 40a, 11 U.S.C. § 68(a), by striking out \$37,800 and inserting \$50,000). The salary of part-time referees was also increased from \$18,900 to \$25,000. This provision became effective on the date of the enactment of this Act under sec. 402(d) of Public Law No. 95-598. There is no authorization for part-time bankruptcy judges under the court system that becomes operative on April 1, 1984.

47. See text accompanying note 26 *supra*.

48. Section 151(b) does not become effective until April 1, 1984. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 402(b), 92 Stat. 2682 (1978). Whether justices and judges may be designated and assigned to the court of bankruptcy continued during the transitional period depends on the construction of provisions of Title 28 discussed in note 49 and the text accompanying note 52 *infra*.

49. See Bankruptcy Reform Act, Pub. L. No. 95-598, secs. 202-204, 207, 92 Stat. 2660 (1978) (amending 28 U.S.C. §§ 291(c), 292(b), (d), 295). These amendments of Title 28 do not become effective until April 1, 1984. See *id.* sec. 402(b), 92 Stat. 2682. Since the amended provisions now authorize the designation and assignment of district and circuit judges for service on district courts, however, and since the continued court of bankruptcy is a department of a district court under Bankruptcy Reform Act sec. 404(a), there is no reason why a district or circuit judge may not be designated and assigned to a court of bankruptcy during the transitional period. The argument would be particularly persuasive when the district court is exercising jurisdiction in a proceeding under 28 U.S.C. § 1471(a) or (b) that is not authorized by sec. 405(a)(1) to be before a bankruptcy judge. See note 114 *infra*. When a bankruptcy judge is sitting in the continued court of bankruptcy during the transitional period, the court is not a court of the United States under 28 U.S.C. § 451, as amended, but that fact should present no constitutional or statutory obstacle to assignment of a circuit or district judge to the court of bankruptcy. See generally 28 U.S.C. § 451, as amended by Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 213, 92 Stat. 2661 (1978).

50. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 205, 92 Stat. 2660 (1978) (amending 28 U.S.C. § 293). The amendment does not become effective until April 1, 1984. *Id.* sec. 402(b), 92 Stat. 2682. Nevertheless, sec. 404(d) of the new law continues the applicability of section 43 of the Bankruptcy Act to United States bankruptcy judges during the transitional period. On the assumption made in note 24 *supra*, that all referees not found disqualified are to be treated as United States bankruptcy judges throughout the transitional period, they are assignable to any other court of bankruptcy during that period in the same way that bankruptcy judges will be assignable to any bankruptcy court after April 1, 1984. The amendments of 28 U.S.C. § 293 are derived from section 43 of the Bankruptcy Act.

court.⁵¹ There is no grant of authority to assign a bankruptcy judge in active service to sit on a court other than a bankruptcy court. Section 294 of Title 28, which governs the assignment of retired justices of the Supreme Court and retired judges of the United States, has, however, been amended⁵² to authorize assignment of retired bankruptcy judges to perform such judicial duties as they are willing and able to undertake. The section does not in terms limit the authority of the designating and assigning judge, and appears to permit any retired justice or retired judge of the United States, including a bankruptcy judge, to be appointed to serve on any court of appeals, district court, bankruptcy court, or perhaps any other court of the United States except the Supreme Court.⁵³ While the possibility of the assignment of a retired justice of the Supreme Court to the bankruptcy court is not explicitly acknowledged in the

51. Designation and assignment to a court outside the circuit can be made only by the Chief Justice under 28 U.S.C. § 293(e)(1) and section 43c of the Bankruptcy Act, but within the circuit the designation and assignment may be made by the chief judge of the circuit under 28 U.S.C. § 293(e)(2) and section 43c of the Bankruptcy Act. Within the court for which a bankruptcy judge is appointed, the assignments are to be governed by the rules and orders of the court itself after April 1, 1984. See 28 U.S.C.A. § 156 (West Supp. 1979). Since the bankruptcy judges continue to be governed by section 43 of the Bankruptcy Act during the transitional period, according to sec. 404(d) of Public Law No. 95-598, the Chief Justice, the chief judge of the circuit, or the district judge or chief judge of the district apparently retains authority to designate and assign temporarily any referee to act.

52. Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 206, 92 Stat. 2660 (1978) (amending 28 U.S.C. § 294).

53. The last sentence of section 294(d) precludes any designation or assignment of a retired judge to the Supreme Court. Only the Chief Justice can assign retired circuit, district, and bankruptcy judges to courts outside their own circuits and "other retired judges of the United States" to courts other than their own. 28 U.S.C. § 294(d) (1976), *as amended by* Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 206(2), 92 Stat. 2660 (1978). The chief judge or judicial council of a circuit may, however, assign a retired circuit, district, or bankruptcy judge to perform "such judicial duties within the circuit as he is willing and able to undertake." *Id.* § 294(c), *as amended by* Bankruptcy Reform Act, sec. 206(1), Pub. L. No. 95-598, 92 Stat. 2660 (1978). Constitutional difficulties presented by a liberal construction of the statutory authorizations provided by 28 U.S.C. § 294 are discussed in the text accompanying notes 54-63 *infra*.

The amendment of 28 U.S.C. § 294(d) does not become effective until April 1, 1984, under sec. 402(b) of the Bankruptcy Reform Act, but the existing authority for designating and assigning a retired circuit or district judge to any court of the United States except the Supreme Court is not changed by the amendment. During the transitional period the authority to designate and assign a retired referee or bankruptcy judge is governed by section 40d(2) of the Bankruptcy Act. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 404(d), 92 Stat. 2684 (1978). That paragraph authorizes any district judge to call upon a referee to perform such duties of a referee or special master "within the jurisdiction of the court, as he may be able and willing to undertake." There appears to be no authority during the transitional period to assign a retired referee or bankruptcy judge to another court of any kind.

House Report accompanying H.R. 8200, section 151(b) of Title 28 accommodates such a designation and assignment, if the Chief Justice should choose to exercise that authority under 28 U.S.C. § 294.

Does the Constitution impose constraints on the assignment of justices and judges of courts to serve on bankruptcy courts and on the assignment of bankruptcy judges to sit on constitutional courts?⁵⁴ In *Glidden Co. v. Zdanok*⁵⁵ the Supreme Court considered challenges to the constitutionality of assigning a judge of the Court of Claims to a United States court of appeals and a judge of the Court of Customs and Patent Appeals to a United States district court. The challenge was based on the contention that judges of legislative courts, *i.e.*, those courts created pursuant to Article I of the Constitution, cannot serve on constitutional courts, *i.e.*, those courts created pursuant to Article III. Since a majority of the Court ruled that the judges assigned had been appointed to constitutional courts, the challenge failed. Congress had explicitly declared that the Court of Claims⁵⁶ and the Court of Customs and Patent Appeals⁵⁷ were constitutional courts, though only two of the five-man majority thought the congressional categorization to be determinative.⁵⁸ Since there is no comparable declaration of Congress that the bankruptcy courts are "constitutional" and since the judges of these courts are not given tenure during good behavior, the constitutionality of assigning bankruptcy judges to constitutional courts is doubtful. It is even more doubtful that the Chief Justice or the chief

54. Constitutional courts are those courts created by Congress pursuant to Article III of the Constitution and are distinguished from legislative courts created by Congress pursuant to Article I. Article III courts can be given only judicial power of the United States, *i.e.*, jurisdiction to determine "cases" or "controversies" within nine categories designated in Article III. Legislative courts are not so restricted in the jurisdiction that may be conferred upon them. The judges of constitutional courts hold their offices during good behavior, and their compensation cannot be diminished during their tenure in office. Judges of legislative courts are not protected by these constitutional guaranties. For general discussion, see 1 MOORE'S FEDERAL PRACTICE ¶ 0.4 (2d ed. 1979). See also note 36 *supra*, notes 67-70 *infra* and accompanying text.

55. 370 U.S. 530 (1962).

56. 28 U.S.C. § 171 (1976).

57. *Id.* § 211.

58. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 585 (1962). The Chief Justice and Mr. Justice Clark did not regard a congressional "ipse dixit" conclusive on the Supreme Court in resolving the ultimate issue as to the status of the courts but viewed the congressional declarations conclusive as to the congressional intent. See *id.* at 585 (Clark, J., concurring). Justices Harlan, Stewart, and Brennan regarded the congressional declarations as "persuasive evidence" only. *Id.* at 541-43. Justices Douglas and Black dissented. *Id.* at 589-606 (Douglas, J., dissenting).

judge of any circuit is going to test the question by making such an assignment.

The constitutionality of assigning a retired justice of the Supreme Court or a circuit or district judge to a bankruptcy court is considerably less doubtful. In the first place there is no decision or doctrine that forbids an assignment of a justice or judge of a constitutional court to a legislative court. Secondly, there is a plausible rationale for assigning a judge or justice of a constitutional court to the bankruptcy court and, during the transitional period, to the court of bankruptcy. The bankruptcy court is an adjunct of the United States district court, and during the transitional period prior to April 1, 1984, the court of bankruptcy is a department of the district court. The district court's status as a constitutional court is unimpaired during or after the transitional period. The constitutional status of the bankruptcy court after April 1, 1984, and of the court of bankruptcy during the transitional period prior to that date under Public Law No. 95-598, is arguably indistinguishable from the status of the court of bankruptcy under the Bankruptcy Act.⁵⁹ That status has frequently been debated⁶⁰ and never finally or authoritatively determined,⁶¹ but for 80 years the court has performed the

59. The transfer of the power of appointment of bankruptcy judges from the district judges to the President and the Senate, discussed in the text accompanying notes 27-31 *supra*, and the provision for appeals from the bankruptcy court to a panel of bankruptcy judges or the court of appeals as well as to the district court, discussed in Part V of the text *infra*, arguably diminish the closeness of the bankruptcy court to the district court. The presidential power of appointment does not become operative until April 1, 1984, under Public Law No. 95-598, sec. 402(b), and the United States bankruptcy judges serving during the transitional period have been or will have been originally appointed by district judges under Public Law No. 95-598, secs. 404(b) & (d). As pointed out in note 24 *supra*, the involvement of the district judges in the conduct of proceedings in the continued court of bankruptcy may be comparable to its involvement under the Bankruptcy Act. Both before and after April 1, 1984, appeals go to constitutional courts, either a district court or a court of appeals, unless the circuit council of the circuit has opted to establish an appellate panel of bankruptcy judges. See text accompanying notes 159-161 *infra*. At least during the transitional period, the differences between the court of bankruptcy under the Bankruptcy Act and the court under the Bankruptcy Code do not seem consequential enough to warrant a difference of result on the question of constitutionality. As pointed out in the text accompanying note 61 *infra*, however, the constitutionality of the bankruptcy system under the Bankruptcy Act was never authoritatively determined.

60. See note 79 *infra*.

61. The constitutionality of the exercise of jurisdiction by a bankruptcy judge in determining a bankrupt's right to a discharge was challenged in *Brown v. Covey* (*In re Brown*), Bankruptcy No. P-Bk-70-246 and Civil No. P-Civ.-72-30 (S.D. Ill. 1972), and Bankruptcy Judge Stephen Covey supported the challenge. District Judge Morgan rejected the challenge in unpublished rulings. The court's opinion denying a motion to revoke a reference and a

important judicial functions assigned it. District judges have frequently served as bankruptcy judges throughout that period, though not generally denominated as bankruptcy judges.⁶² If it has been compatible with their status as constitutional judges for district judges to sit on the bankruptcy courts under the Bankruptcy Act through all those years, it can hardly be contended that assigning them to the bankruptcy courts established as departments or adjuncts of the district courts under Public Law No. 95-598 involves any new constitutional problem or danger to the independence and integrity of the federal judiciary. The enhanced dignity of the bankruptcy court and its enlarged jurisdiction make it all the more appropriate for a constitutional judge to be assigned to the court. Since jurisdiction of all cases under Title 11 and of all civil proceedings arising under Title 11 or in or related to cases under Title 11 is expressly granted to the district courts by section 1471, only conceptualistic difficulties could deter a court from allowing a circuit or district judge, or even a retired justice of the Supreme Court, to sit in a bankruptcy case or a civil proceeding of a kind described in section 1471(b) of Title 28. The mandatory imposition of jurisdiction on the bankruptcy court by section 1471(c) of Title 28 is subject to the court's power to abstain under subsection (d) of the same section to permit the district court to exercise the jurisdiction granted by subsections (a) and (b).⁶³

A matter of great concern to incumbent bankruptcy judges has been their lack of representation on the Judicial Conference of the

transcript of a hearing on a motion to dismiss the bankrupt's objection to the referee's jurisdiction and a counterclaim filed by the referee are on file in the Administrative Office of the United States Courts.

62. The term "bankruptcy judge" was introduced by the Rules of Bankruptcy Procedure in 1973. Bankruptcy Rule 901(7) defines "bankruptcy judge" as "the referee of the court of bankruptcy in which a bankruptcy case is pending, or the district judge of that court when issuing an injunction under § 2a(15) of the Act and when acting in lieu of a referee under § 43c of the Act or under Rule 102." Congressman Edwards declared that the applicability of the title to incumbent referees was intended not to be affected by the Bankruptcy Reform Act. See note 24 *supra*. "Suggested Interim Bankruptcy Rules" published by the Advisory Committee on Bankruptcy Rules on August 15, 1979, "to guide bankruptcy courts" pending the formulation of new Rules of Bankruptcy Procedure, pursuant to 28 U.S.C. § 2075, as amended, include the following Rule 1001(a)(8): "'Referee' or 'referee in bankruptcy' means 'bankruptcy judge.'"

63. Although 28 U.S.C. § 1471 does not become effective until April 1, 1984, see Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 402(b), 92 Stat. 2682 (1978), the United States bankruptcy judges of the courts of bankruptcy continued during the transitional period to that date may exercise the same jurisdiction granted by section 1471. See *id.* secs. 405(a)(1), (b), 92 Stat. 2685 (1978).

United States. Section 331 of 28 U.S.C. is amended to authorize two bankruptcy judges to sit as members of the Judicial Conference.⁶⁴ The two representatives are to be "chosen at large." Reports accompanying H.R. 8200 and S. 2266 had charged the Judicial Conference with ignoring the needs of bankruptcy administration.⁶⁵ Although the provision for the addition of bankruptcy judges to the Judicial Conference does not take effect until April 1, 1984,⁶⁶ Congress strongly recommended that during the transition period at least one-third of the members of any committee of the Conference concerned with administration of the bankruptcy system be chosen from among United States bankruptcy judges.⁶⁷ A similar recommendation was also made that at least one member of any committee of the Conference concerned with "court administration, supporting personnel, or bankruptcy court rules" should be chosen from

64. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 208, 92 Stat. 2660(1978). House Bill 8200 originally proposed that a bankruptcy judge be summoned from each judicial circuit to sit on the Judicial Conference. See H.R. REP. No. 595, *supra* note 27, at 475. The proposal would have given the bankruptcy judges and district judges the same number of representatives on the Conference. Senate Bill 2266, however, proposed the addition of only one bankruptcy judge to the Judicial Conference, the same number as represent the Court of Claims and the Court of Customs and Patent Appeals. See S. REP. No. 989, *supra* note 23, at 149. Until a fairly late stage in the process of reconciling H.R. 8200 and S. 2266 the bankruptcy judges were allocated three representatives on the Judicial Conference. See 124 CONG. REC., *supra* note 22, at H11108, S17424.

65. H.R. REP. No. 595, *supra* note 27, at 436; S. REP. No. 989, *supra* note 23, at 149. The Senate Report added:

During the past decade the number of bankruptcy cases and controversies arising within bankruptcy cases handled by bankruptcy judges has far exceeded the combined number of civil and criminal cases filed in the district courts. The failure of the Judicial Conference to adapt to this phenomenon is indicated by the fact that bankruptcy judges have been systematically excluded from membership on the Bankruptcy Committee of the Judicial Conference.

S. REP. No. 989, *supra* note 23, at 149. See also 124 CONG. REC., *supra* note 22, at S17424-25; Cyr, *Structuring a New Bankruptcy Court: A Comparative Analysis*, 52 AM. BANKR. L.J. 141, 162(1978).

66. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 402(b), 92 Stat. 2682 (1978).

67. See *id.* sec. 407(b), 92 Stat. 2686 (1978). The statements of Congressman Edwards and Senator DeConcini put the matter more bluntly: "Bankruptcy judges are also to be placed on committees of the Judiciary Conference . . ." 124 CONG. REC., *supra* note 22, at H11109, S17426. Another transitional provision requires the Director of the Administrative Office of the United States Courts to appoint a committee of at least seven United States bankruptcy judges to advise the Director with respect to matters that arise during the transition period or that are relevant to its purposes. Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 407(a), 92 Stat. 2686 (1978). As in other transitional provisions, the term "United States bankruptcy judges" cannot be given meaningful effect if limited to those whose appointed terms have expired, as apparently required by sec. 404(b). See notes 24, 62 *supra*.

among the United States bankruptcy judges.⁶⁸

Title 28 is further amended to require participation in the judicial conferences of the circuits by the bankruptcy judges,⁶⁹ and to add a bankruptcy judge to the membership of the Board of the Federal Judicial Center.⁷⁰

III. ORIGINAL JURISDICTION

Jurisdiction is governed by Chapter 90 of Title 28, a new chapter introduced into the Judicial Code by Public Law No. 95-598.⁷¹ Jurisdiction is conferred on bankruptcy courts by a two-step process:

(1) Subsection (a) of 28 U.S.C. § 1471 first declares that "the district courts shall have original and exclusive jurisdiction of all cases under title 11," except as provided in subsection (b). Subsection (b) further provides that "the district court 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." Subsections (a) and (b) together thus confer comprehensive jurisdiction on the district courts of all cases under Title 11 and civil proceedings that arise in connection with such cases. The exception in subsection (a) simply allows for concurrent jurisdiction of civil proceedings, as distinguished from the exclusive jurisdiction of cases that arise under Title 11.

(2) The second step is taken in subsection (c) of section 1471, which declares that the bankruptcy court in which a case is commenced "shall exercise all the jurisdiction conferred by this section on the district courts." Although subsection (c) does not contain an

68. Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 407(b), 92 Stat. 2686 (1978).

69. 28 U.S.C. § 333, *as amended by* Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 210, 92 Stat. 2661 (1978). Unlike most amendments of Title 28, this amendment became effective on October 1, 1979, according to sec. 402(c) of Public Law No. 95-598. A provision of S. 658, introduced in the 96th Cong., 1st Sess., would have postponed the effective date of this amendment to April 1, 1984, but the proposal was withdrawn. The amendment of 28 U.S.C. § 333 does make superfluous, however, a transitional provision in sec. 407(c) of Public Law No. 95-598 requiring each chief judge of a circuit to summon at least one bankruptcy judge to the circuit judicial conference held under 28 U.S.C. § 333 (erroneously referred to as section 332).

70. 28 U.S.C. § 621, *as amended by* Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 228, 92 Stat. 2665 (1978). This provision becomes effective on October 1, 1979. Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 402(c), 92 Stat. 2682 (1978). House Bill 8200, as originally introduced, provided for the addition of two active bankruptcy judges to membership on the Board of the Federal Judicial Center. The Board has six other members, including the Chief Justice, two active judges of the courts of appeals, and three active judges of the district courts.

71. Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 241, 92 Stat. 2668 (1978).

exception, its mandate is qualified by section 1481 of Title 28, which prohibits a bankruptcy court from enjoining another court and restricts its power to punish a criminal contempt.⁷²

The reason for granting jurisdiction in the first instance to the district courts and then requiring the bankruptcy court to exercise all of the jurisdiction conferred on the district courts is not self-evident, and the legislative history is of only limited help in explaining the resort to the two-step process. The Senate Report accompanying S. 2266 said that the grant of jurisdiction of cases and proceedings to the district court in its proposed amendment of section 1334 of Title 28⁷³ was "[i]n deference to concern over the splintering of the jurisdiction of the district courts."⁷⁴ The rationale for requiring nearly "the totality of this jurisdiction" to be exercised by the bankruptcy court was not elaborated, however.

The natural query that arises on confronting the circumlocution in section 1471 of Title 28 leads us back to section 151 of Title 28, which creates the bankruptcy courts. It will be recalled that this section makes the bankruptcy court an adjunct to the district court.⁷⁵ It will also be recalled that the House Report accompanying H.R. 8200 took the position that there were constitutional reasons for establishing bankruptcy courts as courts under Article III.⁷⁶ The House Report indicated that the perquisites of a judge of an Article III court were essential to attract the highly qualified judges needed for a sound bankruptcy system,⁷⁷ and that only an Article III court could be vested with the jurisdiction and powers needed by a bankruptcy court to carry out its proper functions.⁷⁸ It is inferable that Congress concluded, as had the Commission on Bankruptcy Laws,⁷⁹

72. See discussion accompanying notes 114-119 *infra*.

73. See note 23 *supra*.

74. S. REP. No. 989, *supra* note 23, at 153. The statement in the Senate Report is relevant because it purports to explain an allocation of jurisdiction very close to that finally provided in 28 U.S.C. § 1471. The House Report contained no helpful comment in this connection because H.R. 8200, which it accompanied, made direct grants of comprehensive jurisdiction to the bankruptcy courts. See H.R. REP. No. 595, *supra* note 27, at 445-46.

75. See note 23 *supra* and accompanying text.

76. See text accompanying note 38 *supra*.

77. H.R. REP. No. 595, *supra* note 27, at 22-23.

78. H.R. REP. No. 595, *supra* note 27, at 39.

79. Going over the same ground, the Commission on Bankruptcy Laws concluded that neither Supreme Court opinions nor authoritative commentary permitted any categorical or confident statement in regard to the powers that can be conferred on the bankruptcy courts created under Article I of the Constitution. See COMMISSION REPORT I, *supra* note 1, at 97. The Commission noted the extended debate and discussion concerning the issue whether courts of bankruptcy under the Bankruptcy Act constituted Article III or Article I courts.

that it was desirable to create a court with comprehensive jurisdiction of bankruptcy cases and of civil proceedings incidental and related thereto. It was also recognized as desirable to give the bankruptcy courts a degree of independence of the district courts by vesting the power of appointment of the bankruptcy judges elsewhere than in district judges. On the other hand, Congress did not deem it necessary or desirable that the judges of the bankruptcy court should have tenure during good behavior. What Congress has opted for in the new bankruptcy law is the establishment of bankruptcy courts with greater independence and enlarged jurisdiction, exercised by bankruptcy judges who are attracted by better perquisites of office yet not assured the lifetime tenure of judges directly appointed to constitutional courts. The grant to the bankruptcy court of the statutory status of "an adjunct to the district court" and the grant of jurisdiction to the district court but subject to an automatic delegation of jurisdiction to the bankruptcy court are legislative techniques to blunt and, it is hoped, overcome challenges to the constitutionality of the allocation of jurisdiction made in section 1471 of Title 28.⁸⁰ If Congress were writing on a clean slate, the

See COMMISSION REPORT I, *supra* note 1, at 97, 101 n.60, citing as references Bondurant, *The Bankruptcy Court as a Constitutional Court*, 45 AM. BANKR. L.J. 235 (1971); Broude, *The Referee in Bankruptcy as an Article I Judge: A Reply to Mr. Bondurant*, 46 AM. BANKR. L.J. 39 (1972); cf. Staff of the Subcommittee on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, *The Constitutionality of Trial of Minor Offenses by U.S. Magistrates, Hearings on S. 3475 and S. 945*, 89th Cong., 2d Sess. & 90th Cong., 1st Sess. 246-56 (1966-1967); Note, *The Federal Magistrates Act—An Exercise in Article III Constitutionality*, 17 WAYNE L. REV. 1483, 1486-97 (1971). The Commission observed that challenges to the constitutionality of congressional enactments grounded on alleged limitations inhering in Article I and Article III have resulted in court determinations in favor of the constitutionality of the challenged enactments. See COMMISSION REPORT I, *supra* note 1, at 98. The Commission concluded that it was not necessary to attempt to categorize the court it proposed to create as an Article I, Article III, or hybrid court, and stated its opinion that "[t]he constitutional power of the Congress to create the proposed court is sufficiently clear." COMMISSION REPORT I, *supra* note 1, at 98. The debate is continued in 1 COLLIER ON BANKRUPTCY ¶ 201[1][b],[c] (15th ed. 1979).

80. As pointed out in note 23 *supra*, the courts of bankruptcy created by section 2a of the Bankruptcy Act are continued by sec. 404(a) of the Bankruptcy Reform Act as separate departments of the district courts. As suggested in the same note, it is doubtful that there is any constitutional significance to be attributed to calling each court of bankruptcy continued during the transitional period a separate department of a district court, and each bankruptcy court that commences to act on April 1, 1984, an adjunct to a district court. There may be a judicial tolerance for a transitional temporary departure from strict constitutional standards, which would permit the continued court of bankruptcy to survive constitutional attack without necessarily countenancing the newly created bankruptcy court. Temporary constitutionality is an uneasy and unsatisfactory base on which to rest a grant of judicial jurisdiction, however, and it seems far easier to accept the view that both the new bankruptcy court and

legislative strategem might be subject to more serious doubt. The courts of bankruptcy created by the Bankruptcy Act have been functioning for more than 80 years, making determinations of law and fact in adversary proceedings that, unless and until reversed on review, are as binding on the parties as are the determinations of any court established pursuant to Article III of the Constitution.⁸¹ Yet typically and increasingly during the course of those 80 years these determinations have been made by referees in bankruptcy, whose terms of judicial office are limited to a number of years. True, the cases and controversies in which the referees have been acting with such judicial finality have been those that meet certain criteria prescribed by Congress, the Supreme Court, and other federal courts.⁸² Notably they have included controversies that involve the property in the custody of the bankrupt at the time of the filing of the petition and controversies which have been determined by the court of bankruptcy by the consent, express or implied, of the parties in interest.⁸³ The jurisdiction of the courts of bankruptcy, presided over by judges of limited tenure, has embraced most of the litigation that has arisen out of and in connection with the cases filed under Title 11 of the United States Code. These judges' determinations have finally disposed of competing claims to many millions of dollars. If Congress cannot legitimately do what it has undertaken to do in Public Law No. 95-598, how can the system and practice that have developed under the Bankruptcy Act be explained? It comes late in the day, and relies on far-from-compelling logic and a discriminatory reading of relevant Supreme Court opinions, to contend that the bankruptcy system cannot constitutionally be improved or modified by eliminating possession and consent as linchpins of jurisdiction of bankruptcy courts whose judges do not have tenure during good behavior.⁸⁴ It seems unlikely

the continued court of bankruptcy may be constitutionally authorized to exercise a jurisdiction that exceeds the jurisdiction of the court of bankruptcy under the Bankruptcy Act primarily by eliminating consent of the defendant as a condition for jurisdiction of certain controversies. Cf. Cyr, *Structuring a New Bankruptcy Court: A Comparative Analysis*, 52 AM. BANKR. L.J. 141, 152 (1978) ("as a practical matter referees in bankruptcy have been exercising almost all the powers of the United States district courts in bankruptcy cases for forty years").

81. 2A COLLIER ON BANKRUPTCY ¶ 30.28 (14th ed. 1978); 1B MOORE'S FEDERAL PRACTICE ¶-0.419 [3.—2] (2d ed. 1974).

82. 2 COLLIER ON BANKRUPTCY ¶¶ 23.03-23.11 (14th ed. 1976).

83. *Id.* ¶¶ 23.05, 23.08.

84. The argument against the constitutionality of granting comprehensive jurisdiction of cases and controversies arising under Title 11 to a "nontenured bankruptcy court" is most

fully elaborated in Chapter 1 of H.R. REP. NO. 595, *supra* note 27, at 7-87. See also 1 COLLIER ON BANKRUPTCY ¶ 2.01[1][b], [c] (15th ed. 1979); Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws—Tax Procedures*, 89 HARV. L. REV. 1360, 1457-69 (1975). Mr. Plumb states that to the extent the courts of bankruptcy have rendered judgments against debtors of the bankrupt or adverse possessors of his property, the court's powers "have been exercised by constitutional district judges enjoying protected tenure and compensation, except when the defendant consented to trial before the referee." Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws—Tax Procedures*, 89 HARV. L. REV. 1360, 1465 (1975). The statement ignores the many cases where the referee in bankruptcy has exercised the powers granted under sections 2a(21), 57g, 60d, 67a(4), and 70a(8) of the Bankruptcy Act. See *Katchen v. Landy*, 382 U.S. 323, 331-35 (1966) (§ 57g); *Conrad v. Pender*, 289 U.S. 472, 474-75 (1933) (§ 60d); *In re Wood & Henderson*, 210 U.S. 246, 250-51, 253-54, 258 (1908) (§ 60d); *Abramson v. Gardner*, 253 F.2d 518, 521 (9th Cir. 1958) (§ 67a(4)); *Aldrich Shoe Co. v. Kagan*, 173 F.2d 457, 460 (1st Cir. 1949) (§ 67a(4)). A similar misapprehension appears in Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1036 n.77 (1979) ("trustee suits against persons holding property of the bankrupt are heard by the bankruptcy judge only on consent").

Collier seems most impressed by the following conclusion in Mr. Plumb's article:

Where Federal law does not create the right of action, but merely appoints an administrator of private assets which include a preexisting non-federal cause of action, and provides the forum in which such action may be litigated, it goes beyond any existing precedent, relating either to administrative agencies or to legislative courts, to say that the nonconsenting defendant must submit to a federal trial in a court not established under Article III.

1 COLLIER ON BANKRUPTCY 2-25 (15th ed. 1979), *citing and quoting* Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Law—Tax Procedures*, 89 HARV. L. REV. 1360, 1468 (1975). The statement ignores the jurisdiction exercised by referees in bankruptcy to determine issues respecting property in the possession of the bankruptcy court, including the enforcement of prepetition, nonfederal causes of action by the trustee as successor to the debtor and, in respect to the avoidance of transfers, to the creditors of the debtor. See, e.g., *Heath v. Helmick*, 173 F.2d 157, 160 (9th Cir. 1949) (avoidance under § 70e); *Davidson v. Scofield*, 153 F.2d 7, 9 (10th Cir. 1946) (proceeding against claimant to interest in oil property in possession of bankrupt at time of filing of petitions); *Kendrick v. Watkins*, 121 F.2d 287, 288 (4th Cir. 1941) (avoidance under § 70e).

Mr. Plumb's statement does not seem to question the grant to and exercise by the bankruptcy court of jurisdiction respecting federal causes of action, such as those created by sections 545 (avoidance of certain statutory liens), 547 (voidable preferences), and 548 (voidable fraudulent transfers and obligations) of Title 11. While the Bankruptcy Reform Act authorizes a trustee appointed under the Act to sue an adversary on a nonfederal prepetition cause of action, the rights of the trustee may exceed those of the party whose cause of action is being sued on. Consider, for example, *Moore v. Bay*, 284 U.S. 4 (1931). Under Mr. Plumb's analysis would a trustee's action under 11 U.S.C. § 544(b) fall within the bankruptcy court's constitutional jurisdiction only if the trustee sought to assert a federal measure of recovery predicated on *Moore v. Bay*, or perhaps joined a claim based on section 544(b) with one based on section 548? The bankruptcy court's power to determine a preexisting nonfederal cause of action against a nonconsenting defendant got fairly hospitable treatment in *Katchen v. Landy*, 382 U.S. 323 (1966). While the defendant's act in filing a claim in the bankruptcy court was a factor of significance in the case, that act was hardly an exercise of free will, and the Court refrained from predicated jurisdiction on consent. *Id.* at 333 n.9. The Bankruptcy Reform Act admittedly provides for unprecedented extensions of jurisdiction to the bankruptcy court and the continued court of bankruptcy, but they are relatively narrow extensions

that the Supreme Court will, at this late date, find such a limitation in the Constitution.⁸⁵

Section 1471 of Title 28 distinguishes between "cases under title 11" and "civil proceedings arising under title 11 or arising in or related to cases under title 11." The district courts, and the bankruptcy courts as their adjuncts,⁸⁶ have exclusive jurisdiction of the former and "original but not exclusive" jurisdiction of the latter. Neither the word "case" nor "civil proceeding" is defined in the new legislation, but the meaning of "case" is indicated by sections 301, 302, 303, and 304 of Title 11. These sections make it clear that a case is commenced by the filing with the bankruptcy court of a petition under one of the chapters of Title 11. This usage is consistent with that adopted in the Rules of Bankruptcy Procedure.⁸⁷ The grant of "original and exclusive jurisdiction of all cases under title 11" is intended to continue the exclusiveness of the grant heretofore conferred on district courts and bankruptcy courts as their adjuncts under 28 U.S.C. § 1334. This exclusiveness has extended to all such matters and proceedings as the following: determination of issues arising on a petition and pleadings and motions directed thereto; the appointment of a trustee and other functionaries to perform duties of administration; the conduct of meetings of creditors; the allowance and disallowance of claims; the allowance and disallowance of exemptions; the distribution of proceeds of estates; the granting of denial of discharge; the confirmation of plans; the con-

and are well warranted by the need to relieve bankruptcy administration of the inordinate burden of cost, delay, and loss of assets resulting from fractionation of jurisdiction.

85. Cf. Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1037 n.77 (1979) ("Since bankruptcy matters have long dwarfed other federal cases in sheer number, their return to the district judges is now inconceivable").

86. As noted in the text accompanying note 23 *supra*, each bankruptcy court is an adjunct of the district court for the district in which both are sitting on and after April 1, 1984. During the transitional period between October 1, 1979, and April 1, 1984, each court of bankruptcy created by section 2a of the Bankruptcy Act is continued as a separate department of the district court. Since subsections (a) and (b) of sec. 405 of the Bankruptcy Reform Act make the jurisdictional grants of 28 U.S.C. § 1471 applicable to the courts of bankruptcy so continued, the statement in the text applies equally to the courts of bankruptcy as departments of the district courts during the transitional period.

It is also noteworthy that the courts of bankruptcy created by section 2a of the Bankruptcy Act will continue to function as if the new law had not been enacted in regard to "all matter and proceedings in or relating to any . . . case" commenced under the Bankruptcy Act before October 1, 1979. Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 403(a), 92 Stat. 2683 (1978).

87. See BANKR. PROC. R. 101 and accompanying Advisory Committee's Note. This rule is rendered superfluous by 11 U.S.C. §§ 301-303.

duct of sales of property of the estate; the allowance of fees and expenses payable out of estates; and, the closing and reopening of cases.⁸⁸ These matters and proceedings have been governed by the Rules in Parts I, II, III, and IV of the Rules of Bankruptcy Procedure and Rule 606 of the Rules of Bankruptcy Procedure.

Civil proceedings arising under Title 11 or arising in or related to cases under Title 11 include both adversary proceedings that would have fallen within the summary jurisdiction of the bankruptcy court under the Bankruptcy Act and controversies that could have been determined only in plenary proceedings in state or federal district courts under the Bankruptcy Act.⁸⁹ This grant of jurisdiction thus eliminates the distinction between summary and plenary proceedings and accomplishes one of the most important reforms that had been recommended by the Commission on Bankruptcy Laws.⁹⁰

In addition to matters of administration referred to in the preceding paragraph, there were at least five categories of proceedings embraced by the bankruptcy court's summary jurisdiction in liquidation cases: determination of all disputes affecting property in the custody of the court;⁹¹ determination of all controversies arising in the course of administration in which adverse parties consented or waived objection to the court's jurisdiction;⁹² determination of controversies where the objector to jurisdiction had no substantial adverse interest;⁹³ proceedings where jurisdiction is expressly granted by provisions of the Bankruptcy Act;⁹⁴ and, proceedings in which jurisdiction has been deemed to have been impliedly granted to the bankruptcy court by the Bankruptcy Act.⁹⁵ Grants of exclusive jurisdiction of the debtor and the debtor's property to the bankruptcy

88. See COMMISSION REPORT I, *supra* note 1, at 88.

89. See H.R. REP. NO. 595, *supra* note 27, at 445.

90. See COMMISSION REPORT I, *supra* note 1, at 88-92.

91. See 2 COLLIER ON BANKRUPTCY ¶ 23.05 (14th ed. 1976); J. MACLACHLAN, BANKRUPTCY 205 (1956).

92. See Bankruptcy Act § 2a(7)(repealed 1978, previously codified as 11 U.S.C. § 11(a)(7)); J. MACLACHLAN, BANKRUPTCY 209-10 (1956).

93. See 2 COLLIER ON BANKRUPTCY ¶ 23.07[2] (14th ed. 1976); J. MACLACHLAN, BANKRUPTCY 207 (1956).

94. Bankruptcy Act §§ 2a(12) & (21), 17c, 50n, 57l, 67a(4), 69d, 70a(8)(repealed 1978, previously codified as 11 U.S.C. §§ 11(a)(12) & (21), 35(c), 78(n), 93(l), 107(a)(4), 109(d), 110(a)(8)); see 1 COLLIER ON BANKRUPTCY ¶ 2.78 (14th ed. 1974); 1A *id.* ¶ 17.28A[2] & [3] (14th ed. 1978); 2 *id.* ¶ 23.04 (14th ed. 1976); 2A *id.* ¶ 50.15 (14th ed. 1978); 4 *id.* ¶ 67.18 (14th ed. 1978); J. MACLACHLAN, BANKRUPTCY 205 (1956) (discussing § 67a).

95. See *Katchen v. Landy*, 382 U.S. 323, 330-31 (1966)(construing § 57g); *In re Wood & Henderson*, 210 U.S. 246, 251 (1908) (construing § 60d).

court in chapter cases have extended the scope of the court's summary jurisdiction of civil proceedings arising in or related to such proceedings, but the scope of the jurisdiction has been a frequent source of litigation and debate in legal literature.⁹⁶ The court of bankruptcy has been held to have plenary jurisdiction of civil proceedings arising out of or related to Chapter X cases by virtue of a provision in that chapter eliminating a limitation generally applicable to the bankruptcy court's jurisdiction.⁹⁷ The result has been an enormously complex and proliferating body of law governing the jurisdiction of bankruptcy courts.⁹⁸ While a substantial portion of civil proceedings arising in or related to cases brought under the Bankruptcy Act has fallen within the ambit of the court's jurisdiction, a not insignificant part had to be initiated in some court other than the bankruptcy court.

The division of jurisdiction of the judicial business arising out of or related to cases commenced under the Bankruptcy Act has had deplorable effects on bankruptcy administration. The necessity of litigating some controversies that arise out of a bankruptcy case in a nonbankruptcy court is productive of delay. Dockets of nonbankruptcy courts are likely to be more crowded than those of bankruptcy courts, and the pace of nonbankruptcy litigation is likely to be slower than that of bankruptcy courts. Delay is likely to be particularly prejudicial in reorganization cases, but even in liquidation cases, delay is practically certain to aggravate the deterioration of asset values that is a concomitant of bankruptcy.⁹⁹ A second objection to division of jurisdiction into summary and plenary categories

96. See 5 COLLIER ON BANKRUPTCY ¶ 77.11 (14th ed. 1978); 6 *id.* ¶ 3.05 (14th ed. 1978); 8 *id.* ¶ 3.02 (14th ed. 1978); 9 *id.* ¶ 3.01[2] (14th ed. 1978); Suskin & Swing, *Ownership as a Basis for Summary Jurisdiction in Chapter XI Arrangements*, 31 U. MIAMI L. REV. 307 (1977); Comment, *Summary Jurisdiction Under Chapter XI of the Bankruptcy Act: Collier v. Remington*, 59 GEO. L.J. 1395 (1971).

97. See *Williams v. Austrian*, 331 U.S. 642, 662 (1947); 6 COLLIER ON BANKRUPTCY ¶ 3.20 (14th ed. 1978); J. MACLACHLAN, BANKRUPTCY 213-14, 247-49 (1956). An explicit grant of jurisdiction to courts of bankruptcy of plenary proceedings to avoid transfers under sections 60, 67, and 70e of the Bankruptcy Act has been construed as an allocation of jurisdiction to the United States district courts. See *Weidhorn v. Levy*, 253 U.S. 268, 272-73 (1920); J. MACLACHLAN, BANKRUPTCY 204, 248-49 (1956).

98. See 1 COLLIER ON BANKRUPTCY 147-99 (14th ed. 1974); 2 *id.* 433-645 (14th ed. 1976). See generally COPENHAVER, *Summary Jurisdiction in BANKRUPTCY AND THE CHAPTER PROCEEDINGS* 71-93 (G. Holmes ed. 1976); Seidman, *Summary or Plenary Jurisdiction*, 77 COM. L.J. 73 (1972); Note, *Scope of the Summary Jurisdiction of the Bankruptcy Court*, 40 COLUM. L. REV. 489 (1940).

99. See COMMISSION REPORT I, *supra* note 1, at 89.

is that the necessity of suing in a nonbankruptcy court increases administrative expense and not infrequently deters the trustee from seeking to enforce rights of recovery. The delay and expense resulting from the division of jurisdiction are aggravated by the "frequent, time-consuming and expensive litigation" of jurisdictional issues.¹⁰⁰ Delay obtainable by litigating the jurisdictional issue has often been the equivalent of winning on the jurisdictional issue, because the litigation itself has afforded time and bargaining leverage to the adversary as against the trustee.

The comprehensive grant of jurisdiction to the bankruptcy courts by section 1471 of Title 28 greatly diminishes, if it does not entirely eliminate, the basis for litigation of jurisdictional issues which consumes so much time, money, and energy.¹⁰¹ Neither custody of property nor consent by the adversary is a relevant factor for the exercise of jurisdiction by the bankruptcy court under the Bankruptcy Reform Act.¹⁰² At the same time jurisdictional litigation is being minimized, the grant of comprehensive jurisdiction to bankruptcy courts also will foster the development of a more uniform, cohesive body of substantive and procedural law applicable to the administration of estates under Title 11.¹⁰³

The House Report accompanying H.R. 8200 suggested that the term "civil proceeding" as used in section 1471 of Title 28 would encompass what have been called "contested matters, adversary proceedings, and plenary actions under the current bankruptcy law," as well as "disputes related to administrative matters in a bankruptcy case."¹⁰⁴ It will ordinarily make no difference whether a particular proceeding would have been denominated a "contested matter," an "adversary proceeding," or a "plenary action" under the Bankruptcy Act, since it will clearly come within the jurisdiction of the new bankruptcy court.¹⁰⁵ There is, however, a provision

100. COMMISSION REPORT I, *supra* note 1, at 90.

101. COMMISSION REPORT I, *supra* note 1, at 90. Litigation of jurisdictional issues would not be eliminated since it would always be a potential issue that a particular civil proceeding did not arise under or was not sufficiently related to a case under Title 11 to come within the grant of jurisdiction by 28 U.S.C. § 1471.

102. This observation also applies to the exercise of jurisdiction by the continued court of bankruptcy during the transitional period pursuant to sec. 405 (a) and (b) of the Bankruptcy Reform Act. Custody and consent will continue to play an important role in defining the jurisdiction exercisable by the bankruptcy court in respect to proceedings arising in or related to cases commenced before October 1, 1979. See note 86 *supra*.

103. COMMISSION REPORT I, *supra* note 1, at 90.

104. H.R. REP. No. 595, *supra* note 27, at 445.

105. The old distinction between a matter or proceeding within the summary jurisdiction

in section 1471(d) permitting the bankruptcy court to abstain from hearing a particular proceeding arising under Title 11 or arising in or related to a case under Title 11. May the bankruptcy court abstain from exercising its jurisdiction in any matter that falls within the exclusive jurisdiction of the bankruptcy court under section 1471(a)? The House Report accompanying H.R. 8200 suggested that "[t]he bankruptcy courts will not abstain, however, when no other court . . . has jurisdiction over the proceeding in question," since "[t]hat clearly would not be in the interest of justice."¹⁰⁶ The court's decision to abstain or not to abstain is not reviewable by appeal or otherwise,¹⁰⁷ but a bankruptcy court is not likely to abdicate its duty to determine all matters and issues that cannot be referred to any other tribunal.

of the court of bankruptcy and a plenary action may become relevant, however, in determining whether a party has a right to jury trial under section 1480(a) of Title 28. This subsection preserves the right to jury trial "in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979." 28 U.S.C.A. § 1480(a) (West Supp. 1979). Generally there is no right to a jury trial in any proceeding that would have fallen within the summary jurisdiction of a court of bankruptcy on that date. See *Katchen v. Landy*, 382 U.S. 323, 336-40 (1966); 5 MOORE'S FEDERAL PRACTICE ¶ 38.30[3] (2d ed. 1979). On September 30, 1979, however, section 17c(5) of the Bankruptcy Act, still in effect, entitled a debtor to a jury trial of the issues of liability on a nondischargeable claim and the amount thereof in an adversary proceeding instituted in a court of bankruptcy to determine dischargeability. See *Merrill v. Walter E. Heller & Co.*, 594 F.2d 1064, 1067-68 (5th Cir. 1979). This right to jury trial undoubtedly continues in any proceeding instituted under new 11 U.S.C. § 523(c) to obtain a determination of dischargeability under the Bankruptcy Reform Act.

In a plenary action by the trustee seeking legal rather than equitable relief, the right to jury trial was generally recognized on September 30, 1979. See 5 MOORE'S FEDERAL PRACTICE ¶ 38.30[4] (2d ed. 1979). Although it is doubtful that the right to a jury trial in such a proceeding could be said to have been provided by statute, and although arguably no constitutional guaranty of a jury trial can be invoked in a bankruptcy court, it comports best with the manifest congressional intent to accord a jury trial to a party timely demanding it in such a proceeding. See H.R. REP. NO. 595, *supra* note 27, at 448 ("Subsection (a) [of 28 U.S.C. § 148] continues any current right of litigants in bankruptcy cases, and cases related to bankruptcy cases, such as plenary actions, to a jury trial"). Of course, if the seventh amendment's guaranty of a right to a jury trial extends to any proceeding arising under Title 11, or arising in or related to a case under Title 11, nothing in 28 U.S.C. § 1480 affects that right. For a recent critical discussion of the Supreme Court's interpretation of the seventh amendment, see generally KIRST, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281 (1978).

The proper venue of certain proceedings may also be affected by factors that formerly affected the jurisdiction of the bankruptcy court. See note 208 *infra*. There are liberal provisions governing transfer of proceedings from one district or division to another and assuring that jurisdiction will not be impaired by failure of a party to interpose a timely and sufficient objection to venue. 28 U.S.C.A. §§ 1475, 1477 (West Supp. 1979).

106. H.R. REP. NO. 595, *supra* note 27, at 446.

107. 28 U.S.C. § 1471(d) (West Supp. 1979).

A provision inserted as subsection (e) of 28 U.S.C. § 1471 at a late stage in the legislative process declares that the bankruptcy court in which a case under Title 11 is commenced has exclusive jurisdiction of the debtor's property wherever located. This provision is derived from sections of the debtor relief chapters of the Bankruptcy Act.¹⁰⁸ The jurisdiction thus granted would have been more appropriately vested in the court in which a case is pending, since 28 U.S.C. § 1475 authorizes a change of venue. If the jurisdiction of the property remains in the court where the original petition was filed, there may be awkwardness and unnecessary difficulties when orders and judgments of the court to which the case was transferred are challenged on the ground of lack of jurisdiction to affect property within the exclusive jurisdiction of the court of original venue. Another unnecessary and avoidable difficulty is created by the fact that subsection (e) extends jurisdiction only to the debtor's property but not the property of the estate. Such potential difficulties will presumably be ironed out by technical amendments of the subsection at an early date.¹⁰⁹

Section 1471 of Title 28 is not the only relevant provision defining the scope of the powers of the bankruptcy court. Section 105(a) of Title 11 empowers the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."¹¹⁰ Additionally, section 1481 of Title 28¹¹¹ endows the bankruptcy court with "the powers of a court of equity, law, and admiralty."¹¹² Section 105(b) of Title 11 contains a nega-

108. See Bankruptcy Act §§ 77(a), 82(a), 111, 311, 411, 611 (repealed 1978, previously codified as 11 U.S.C. §§ 205(a), 402(a), 511, 711, 811, 1011).

109. Such amendments were proposed in S. 658, introduced in the Senate of the 96th Congress, 1st Session, March 14, 1979.

110. Bankruptcy Reform Act § 105(a) is derived from Bankruptcy Act § 2a(15) (repealed 1978, previously codified as 11 U.S.C. § 11(a)(15)). The new provision became effective on October 1, 1979, under sec. 402(a) of Public Law No. 95-598, and since the bankruptcy court created by 28 U.S.C. § 151(a) does not come into existence under sec. 402(b) of Public Law No. 95-598 until April 1, 1984, there appears to be no statutory recognition of the power of the court of bankruptcy continued through the transitional period by Public Law No. 95-598, sec. 404(a), to "issue any necessary order, process, or judgment." Subsections (a)(1) and (b) of sec. 405, however, authorize the bankruptcy judges of the continued court of bankruptcy to exercise the jurisdiction and powers of the bankruptcy courts created by 28 U.S.C. § 151, and those powers surely include the power granted by 11 U.S.C. § 151(a). But see note 113 *infra*. Moreover, the court of bankruptcy continued by sec. 402(a) retains the power to issue all necessary writs under 28 U.S.C. § 1651. See note 122 *infra* and accompanying text.

111. One of the twelve new sections of Chapter 90 added to Title 28 of the United States Code by sec. 241 of Public Law No. 95-598.

112. This was recommended in section 2-208 of the Bankruptcy Act of 1973 proposed by

tion of the power of the bankruptcy court to appoint a receiver in a case under Title 11. The point of this prohibition is to prevent a circumvention of the provisions prescribing the procedure that governs the appointment of trustees in cases under Title 11.¹¹³

Section 1481 of Title 28 also contains two limitations on the authority of the bankruptcy court: (1) the bankruptcy court may not enjoin another court; and (2) the bankruptcy court may not punish a criminal contempt that is not committed in the presence of the bankruptcy judge or that warrants a punishment of imprisonment.¹¹⁴ The first of these limitations is derived from the proviso of

the Commission on Bankruptcy Laws. See COMMISSION REPORT II, *supra* note 1, at 46-47. As the Commission's note to its proposed section 2-208 pointed out, "[t]he explicit grant of admiralty jurisdiction cures an omission in the [Bankruptcy] Act that is probably explicable as a concession to the admiralty bar." See Landers, *The Shipowner Becomes a Bankrupt*, 39 U. CHI. L. REV. 490, 491-509 (1972); cf. 1 COLLIER ON BANKRUPTCY ¶ 2.10 (14th ed. 1974). The powers conferred by 28 U.S.C. § 1481 are exercisable under Pub. L. No. 95-598, sec. 405(a) (1) by the courts of bankruptcy continued by sec. 404(a).

113. H.R. REP. NO. 595, *supra* note 27, at 316. This limitation is apparently operative with respect to the court of bankruptcy during the transitional period under Public Law No. 95-598, sec. 402(a). See note 110 *supra*. This conclusion rests on the reasoning that sec. 405(a)(1) of Public Law No. 95-598 incorporates the limitation on, as well as the grant of, the power to the bankruptcy court made by 11 U.S.C. § 105. This conclusion, however, makes superfluous the limitations on the power of the court of bankruptcy set out in subparagraphs (A), (B), and (C) of sec. 405(a)(1) of Public Law No. 95-598, discussed in note 114 *infra*. If a court of bankruptcy should nevertheless appoint a receiver in a case commenced after October 1, 1979, there would be no statutory provision applicable to such an officer. Rules of Bankruptcy Procedure that authorize and govern the appointment of receivers under the Bankruptcy Act are plainly inconsistent with the Bankruptcy Reform Act.

114. The grant of powers made by 28 U.S.C. § 1481 applies only to the bankruptcy court that comes into existence on April 1, 1984, but as pointed out in note 112 *supra*, the powers so granted are exercisable during the transitional period by the courts of bankruptcy continued by Public Law No. 95-598, sec. 404(a). It seems clear that the court of bankruptcy so continued may not enjoin a court or punish a criminal contempt not committed in the presence of the bankruptcy judge or by imprisonment, since the limitations of 28 U.S.C. § 1481 are surely as binding on the court of bankruptcy as they are on the bankruptcy court. Thus a violation of an automatic stay would not be punishable as a criminal contempt by the court of bankruptcy, although there would be no limitation on the power of that court to impose a sanction for civil contempt. Cf. *Fidelity Mortgage Investors v. Camelia Builders Inc.*, 550 F.2d 47, 50-52 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977), *discussed in Kennedy, The Automatic Stay in Bankruptcy*, 11 U. MICH. J. L. REV. 175, 259-66 (1978). A substantial pecuniary liability was imposed on counsel and clients in this case, apparently for civil rather than criminal contempt. Nonetheless, a proceeding to enjoin a court or to punish a criminal contempt committed outside the presence of the court or by imprisonment is explicitly excluded from the proceedings required to be before a bankruptcy judge during the transitional period under sec. 405(a)(1)(A) and (B) of Public Law No. 95-598. At first glance these paragraphs appear to be superfluous, as does subparagraph (C), which also excludes an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge. As suggested earlier, however, these paragraphs serve the purpose of clarifying the role

section 2a(15) of the Bankruptcy Act. Unlike this proviso, however, section 1481 does not affirmatively grant the power to restrain another court to the district court in a case arising under Title 11 or in civil proceedings arising in or related to a case under Title 11.¹¹⁵

of district judges in the continued court of bankruptcy during the transitional period. See note 49 *supra*. The grants by 28 U.S.C. § 1471 of jurisdiction to district courts of all cases under Title 11 and of all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 apply to the continued courts of bankruptcy, and it is thus clear that in those instances where the proceedings within the scope of that grant are not required to be before the bankruptcy judges, the district judges are authorized to entertain the proceedings. While sec. 404(a)(1) of the Bankruptcy Reform Act does not require these proceedings to be before the district judges, sec. 405(b), by making the prohibitions of 28 U.S.C. § 1481 applicable to the courts of bankruptcy during the transitional period, leaves no alternative. As pointed out in note 24 *supra*, an argument may be made that the district court does not have jurisdiction of a proceeding to punish a criminal contempt committed in connection with a civil proceeding arising under Title 11 or arising in or related to a case under Title 11. If that is so, it may be necessary to argue for invocation of the jurisdiction of the United States district court under 18 U.S.C. §§ 401, 402. Section 401 of Title 18 confers the power to punish a contempt by fine or imprisonment on a "court of the United States." Although the court of bankruptcy continued by sec. 404(a) of the Bankruptcy Reform Act is not made a court of the United States for the purposes of Title 28 by secs. 213 and 402(b) of that Act, it does not appear that the power to punish for criminal contempt is restricted by the definition of a court of the United States in Title 28. See note 24 *supra*.

Subparagraph (C) of sec. 405(a)(1) nevertheless remains an anomaly. Without the subparagraph there would have been no basis for supposing that a bankruptcy judge might exercise the authority to review another bankruptcy judge's ruling; except when sitting as a member of an appellate panel pursuant to 28 U.S.C. § 160(a). With it there is an implication that the district judge may review a bankruptcy judge's judgment, order, decree, or decision during the transitional period as a judge of the continued court of bankruptcy rather than simply as a judge of the district court under sec. 405(c) of the Bankruptcy Reform Act. The implication thus raises the question whether this mode of review survives during the transitional period notwithstanding the establishment of an appellate panel of bankruptcy judges for the district pursuant to 28 U.S.C. § 160 and whether, notwithstanding 28 U.S.C. § 1334(b), a party may appeal without leave an interlocutory ruling of a bankruptcy judge to a district judge during the transitional period. Sec. 405(a)(1)(C) of the Bankruptcy Reform Act is not mentioned in any of the legislative history of the Act.

115. The statute thus leaves the question whether the district court may enjoin another court to be answered by inference. The grant to district courts by 28 U.S.C. § 1471(b) of jurisdiction of all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 is broad enough to comprehend a civil action seeking an injunction against another court. The lack of an affirmative grant of power to enjoin another court, however, coupled with the prohibition in 28 U.S.C. § 2283 on the grant of any "injunction to stay proceedings in a State court except as expressly authorized by Act of Congress," may embarrass a district court requested to issue such an injunction. Section 2283, nevertheless, contains two qualifications of its own, permitting an injunction of state court proceedings "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Moreover, the power of bankruptcy courts to enjoin state court proceedings notwithstanding 28 U.S.C. § 2283 has long been recognized. 1 COLLIER ON BANKRUPTCY ¶ 2.61, at 325-26 (14th ed. 1974). The legislative reports accompanying the bills and the enacted statute contain no intimation that the injunctive power of the bankruptcy court was intended to be reduced. See H.R. REP. NO. 595, *supra* note 27, at 342. See also 124 CONG. REC., *supra* note 22, at H11108, S17424.

The second limitation in section 1481 continues a restriction on the power of a bankruptcy court to punish a criminal contempt now embodied in Rule 920 of the Rules of Bankruptcy Procedure.¹¹⁶ Both limitations imposed on the bankruptcy court are more regrettable from a symbolic point of view than they are from a practical standpoint. Since the bankruptcy court can enjoin parties in litigation in other courts,¹¹⁷ the disability to enjoin other courts does not augur any serious difficulty. The requirement that punishment for criminal contempt be imposed by another court reflects good practice insofar as it separates the judge involved in the contemptuous conduct from the trial of the issues raised by the prosecution.¹¹⁸ It is to be noted that this second limitation does not purport to limit the power of the court in dealing with civil contempt.¹¹⁹ Also to be noted is that the All Writs Statute, authorizing "all courts established by Act of Congress" to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the uses and principles of law"¹²⁰ is available to the bankruptcy court established by

116. Rule 920(a)(4) of the Rules of Bankruptcy Procedure requires certification of the facts by a bankruptcy judge to a district judge when contemptuous conduct warrants punishment by imprisonment. The restrictions on the bankruptcy court's contempt power imposed by 28 U.S.C. § 1481 are less stringent than those imposed by Rule 920 insofar as the bankruptcy court may punish a criminal contempt committed in the presence of the judge by a fine without any statutory limit on its amount and is not subject to any limitation on its power to impose sanctions for civil contempt. Rule 920(a)(4) restricted the punishment that could be imposed by a referee to a fine of not more than \$250, whether the contempt was civil or criminal. The prohibition by 28 U.S.C. § 1481 of any punishment of a criminal contempt committed outside the presence of the judge is more restrictive than Rule 920, which required any contempt committed outside the presence of the referee to be punished only after hearing on notice but permitted the referee to conduct the hearing and impose punishment of as much as a \$250 fine.

117. *Cf.* 1 COLLIER ON BANKRUPTCY ¶ 2.64 (14th ed. 1974) (discussing power of referee to enjoin parties to litigation under section 2a(15) of Bankruptcy Act).

118. *Cf.* FED. R. CRIM. P. 42(b) (requiring disqualification of a judge from presiding at trial or hearing when contempt charged involves disrespect to or criticism of a judge). See also BANKR. PROC. R. 920(a) (4) (discussed *supra* note 116). It is to be noted that the Rule does not prohibit a bankruptcy court from hearing and determining the issues that arise on a charge of criminal contempt but only from punishing the contempt. *Cf.* Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F.2d 47, 52-53 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977), discussed in Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. MICH. J. L. REF. 175, 262-65 (1978).

119. The distinction between the two kinds of contempt is often difficult to make. See *United States v. United Mine Workers*, 330 U.S. 258, 298 (1947). See generally Comment, *Civil and Criminal Contempt in the Federal Courts*, 57 YALE L.J. 83 (1947).

120. All Writs Statute, 28 U.S.C. § 1651 (1976).

the Bankruptcy Reform Act,¹²¹ as it has been to the court of bankruptcy established by the Bankruptcy Act.¹²²

IV. REMOVAL

What happens to an action pending by or against a debtor in a nonbankruptcy court when a petition is filed concerning such a person under Title 11? Section 1478(a) of Title 28 authorizes a party to remove any claim or cause of action in a civil action, with two exceptions, to the bankruptcy court for the district in which the civil action is pending if the bankruptcy courts have jurisdiction over it.¹²³

The first proceeding excepted from removability is a proceeding before the United States Tax Court. Since the automatic stay operates against continuation of a proceeding in the Tax Court concerning the debtor,¹²⁴ the statute appears to require a stalemate when a debtor is litigating his tax liability in the Tax Court. The legislative history is devoid of any discussion of the exception to the removability of a Tax Court proceeding. The explanation for nonremovability lies in the intricate provisions that govern the jurisdiction of the Tax Court and of the bankruptcy court to determine the liability of the debtor and the estate for taxes. Section 505 of Title 11 generally reserves jurisdiction of the bankruptcy court to determine the legal-

121. 124 CONG. REC., *supra* note 22, at H11108, S17424. See also H.R. REP. No. 595, *supra* note 27, at 342, 448. The House Report here was referring to the Article III court proposed to be created by H.R. 8200, but the applicability of the All Writs Statute is not restricted to such courts. See note 114 *infra*. The bankruptcy courts are expressly included in the term "court of the United States" by Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 213, 92 Stat. 2661 (1978) (amending 28 U.S.C. § 451), but this amendment does not become effective until April 1, 1984. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 402(b), 92 Stat. 2682 (1978). Moreover, the term is made applicable to bankruptcy courts the judges of which are entitled to 14-year appointments. During the transitional period the court of bankruptcy continued by sec. 404(a) is nevertheless entitled to exercise all the jurisdiction and powers granted the United States district court and the bankruptcy court by 28 U.S.C. §§ 1471, 1481. Cf. 18 U.S.C. § 6001(4) (1976), as amended by Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 314(b)(1), 92 Stat. 2678 (1978) (defining "court of the United States" to include "a United States bankruptcy court established under chapter 6, title 28, United States Code" for purpose of the federal immunity statute).

122. See *Schokbeton Indus., Inc. v. Schokbeton Prods. Corp.*, 466 F.2d 171, 174 (5th Cir. 1972).

123. Section 1478 of 28 U.S.C. becomes effective under Public Law No. 95-598, sec. 402(b), on April 1, 1984, but the section applies nonetheless during the transition period from October 1, 1979, to April 1, 1984, to the courts of bankruptcy continued pursuant to sec. 404(a). Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 405(b), 92 Stat. 2685 (1978).

124. 11 U.S.C.A. § 362(a)(8) (West Supp. 1979).

ity and amount of taxes, notwithstanding the pendency of a contest of the tax in a competent tribunal at the time of the filing of the petition.¹²⁵ Statements of the floor managers of the bankruptcy bills indicate that the purpose of keeping a Tax Court proceeding in a pending status is to give the trustee an opportunity to determine whether he wishes to invoke the bankruptcy court's jurisdiction or to intervene in the Tax Court proceeding for a determination of the debtor's tax liability.¹²⁶ If the latter option is pursued, the trustee will seek relief from the stay of the Tax Court proceeding. The Tax Court may then determine the debtor's liability for nondischargeable taxes as well as the estate's liability on the tax claim.¹²⁷ The debtor may likewise request relief from the stay of a pending Tax Court proceeding if the debtor wishes to proceed in that tribunal to obtain determination of tax liability. The trustee may resist the debtor's request for relief from the stay, but if he fails in that effort and the Tax Court rules first on the tax liability of the debtor, the statements of the floor managers in the Congressional Record explain that the ruling binds the bankruptcy court with respect to the tax liability of the estate as well as the debtor.¹²⁸ The bankruptcy court, by virtue of its authority to lift the stay of a Tax Court proceeding, can thus determine which court will determine the tax liability of both the debtor and the debtor's estate. If the stay of the Tax Court proceeding is continued, the bankruptcy court can determine the liability of the estate on a tax claim duly filed, but that determination would not bind the debtor as to his individual liability. The bankruptcy court can determine the dischargeability of a debtor's taxes only on a petition filed by or against him, but, as earlier noted, the Tax Court's prior ruling may bind the bankruptcy court and the parties.¹²⁹ If neither the debtor nor the Internal Revenue Service files a claim against the estate or a request for determination of dischargeability, and if no relief is obtained from the stay of a Tax Court proceeding that was pending when the petition was

125. The reservation of jurisdiction, derived from section 2a(2A) of the Bankruptcy Act, contains two qualifications. The first recognizes the binding effect of a prepetition adjudication by a competent tribunal rendered after a contest. The second protects the relevant governmental unit's right to make an initial determination of the estate's right to a tax refund unless the governmental unit has failed to respond within 120 days to a request by the trustee for a refund.

126. 124 CONG. REC., *supra* note 22, at H11110, S17427.

127. 124 CONG. REC., *supra* note 22, at H11111, S17427.

128. 124 CONG. REC., *supra* note 22, at H11111, S17427.

129. See text accompanying note 127.

filed, the stay would terminate on the closing of the case.¹³⁰ The Tax Court proceeding may then continue for the purpose of determining the debtor's personal liability for nondischargeable taxes.¹³¹

The second proceeding excepted from removability is a civil action by a governmental unit to enforce its police or regulatory power. Such an action is also one of the few civil proceedings not subject to the automatic stay that is triggered by the filing of a petition under Title 11.¹³² Although an action to collect alimony, maintenance, or support from property that is not property of the estate is not subject to the automatic stay,¹³³ such an action is removable.

The provision for removal carries out a recommendation of the Commission on Bankruptcy Laws.¹³⁴ The Commission's proposal authorized the removal of a civil action only to the extent that it involves a separate controversy or matter of which the bankruptcy court has jurisdiction,¹³⁵ and, in consonance with the Judicial Code provisions governing removal of ordinary civil litigation,¹³⁶ the Commission proposed a fairly detailed set of procedural provisions.¹³⁷ Section 1478 of Title 28, however, leaves the procedure for effecting removal and for requesting remand to be prescribed by Rules of Bankruptcy Procedure¹³⁸ and simply authorizes removal of a "claim or cause of action . . . if the bankruptcy courts have jurisdiction over such claim or cause of action."¹³⁹ Either the plaintiff or the

130. 11 U.S.C.A. § 362(c)(2)(A) (West Supp. 1979).

131. 124 CONG. REC., *supra* note 22, at H11111, S17428. A discharged individual debtor is protected under 11 U.S.C. § 524(a)(2) against the continuation of an action "to collect, recover or offset" any discharged debt as a personal liability of the debtor. The Tax Court proceeding would not be subject to the injunction insofar as it sought only a determination of the amount of nondischargeable taxes.

132. 11 U.S.C.A. § 362(b)(4) (West Supp. 1979). A criminal action is likewise neither subject to the automatic stay under 11 U.S.C. § 362(b)(1) nor removable under 28 U.S.C. § 1478(a). An administrative or arbitration proceeding against the debtor may be subject to the stay but is not removable.

133. *Id.* § 362(b)(2).

134. See COMMISSION REPORT II, *supra* note 1, § 2-202, at 33.

135. COMMISSION REPORT II, *supra* note 1, § 2-202(a), at 33.

136. See 28 U.S.C. §§ 1446-1450 (1976). There are no Federal Rules of Civil Procedure particularly applicable to removal.

137. See COMMISSION REPORT II, *supra* note 1, § 2-202(b),(c), at 33-35.

138. See H.R. REP. No. 595, *supra* note 27, at 307.

139. Suggested Interim Bankruptcy Rule 7004, issued by the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States, speaks of removal of a "civil action or proceeding" or of "the case" to the bankruptcy court. The interim rule simply employs the language of 28 U.S.C. § 1441 without noting the different language of 28 U.S.C. § 1478. Unlike section 1441, section 1478 apparently contemplates removal of only part of the civil action in the nonbankruptcy court, namely, "any claim or cause of action . . . if the

defendant may remove a claim or cause of action, as the Commission had explicitly recommended,¹⁴⁰ but it is not clear whether a coplaintiff or codefendant of the debtor is or may be brought along with the removal of a claim or cause of action.¹⁴¹

This question of course raises the more basic issue of how far the newly expanded jurisdiction of the bankruptcy court¹⁴² embraces civil proceedings in which the debtor is a coplaintiff, a codefendant, or one of the multiple parties with divergent interests but in which joinder is sanctioned by applicable rules governing joinder of parties and claims.¹⁴³ An inquiry into the scope of the bankruptcy court's

bankruptcy courts have jurisdiction over such claim or cause of action." A "separate and independent claim or cause of action" that would be removable if sued on alone may afford a basis for removal under 28 U.S.C. § 1441(c), but the whole case comes along on removal, including otherwise nonremovable claims or causes of action. The district court may retain or remand the claims or causes of action that could not have been sued on originally in that court. Where a claim or cause of action is not within the bankruptcy court's original jurisdiction, it is not removable under 28 U.S.C. § 1478 and is therefore not an appropriate subject for remand or retention.

140. See COMMISSION REPORT II, *supra* note 1, § 2-202(a), at 33. As the Commission's Note accompanying its proposed § 2-202 explained, the plaintiff may have had no choice of forum when he commenced the action in the nonbankruptcy court. Accordingly he should not be precluded from opting for removal to the bankruptcy court when that forum becomes available. *Id.* at 35 n.2.

141. The general removal statute, 28 U.S.C. § 1446(a), has been construed to require all defendants ordinarily to join in a request for removal. 1A MOORE'S FEDERAL PRACTICE ¶ 110.168 [3.—2], at 447 (2d ed. 1979). Accordingly a codefendant may not only resist being dragged involuntarily into the district court but may prevent removal of any part of the civil action by a defendant or defendants who, but for the joinder of the reluctant codefendant, could have removed. Nominal or formal parties, unknown defendants, fraudulently joined defendants, and nonresident defendants not served are disregarded, however. *Id.* at 448-52. If removal is sought under 28 U.S.C. § 1441(c), on the other hand, a separate and independent claim may be removed at the request of the defendant or defendants to the claim, and their request may be the basis for dragging parties to an otherwise nonremovable claim or cause of action into the federal court. *Id.* at 290-94, 453-54. Suggested Interim Rule 7004, issued by the Advisory Committee on Bankruptcy Rules, apparently contemplates that only the party desiring removal need apply.

142. It is to be noted that 28 U.S.C. § 1478 ignores the fact that jurisdiction of civil proceedings is actually granted to the district courts by section 1471(b), and that bankruptcy courts are empowered by section 1472(c) to exercise that jurisdiction.

143. A party joined with the debtor in a civil proceeding may be a joint obligee or a joint obligor; or another party may be aligned with the debtor as an indispensable, necessary, or proper party to an action on a single claim or cause of action. The bankruptcy court is not required by 28 U.S.C. § 1478 to deny removal of a claim or cause of action because of such joinder, even though the debtor's coplaintiff or codefendant may have no other interest in the debtor's case. The original jurisdiction of the district court exercisable by the bankruptcy court is certainly comprehensive enough under 28 U.S.C. § 1471 to embrace any civil action on a claim or cause of action by or against the debtor, although another party is joined as a coplaintiff or codefendant. The bankruptcy court is authorized by section 1478(b) to remand

jurisdiction requires a consideration of the potential reach of a concept or doctrine of ancillary jurisdiction.¹⁴⁴ Except for the two exclusions noted above,¹⁴⁵ as an original matter it would seem that the scope of the bankruptcy court's jurisdiction of civil proceedings on removal would not be greater or less than its original jurisdiction,¹⁴⁶ but that conclusion is not ineluctable.¹⁴⁷ The scope of the district court's jurisdiction on removal has never been identical to its jurisdiction of litigation commenced originally in that court.¹⁴⁸ There is in fact a considerable difference of opinion among commentators as to the extent of the district court's jurisdiction under 28 U.S.C. § 1441.¹⁴⁹ The courts have generally resolved doubts under this statute and thereby minimized litigation by denying removal or requiring remand.¹⁵⁰ This approach is feasible under 28 U.S.C. § 1478, but the best interests of the creditors and the debtor will often dictate removal even when difficult questions arise as to the impact of the removal on other parties.¹⁵¹ To reject or remand for trial in the nonbankruptcy court all parties and issues not directly involved in the administration of the Title 11 case may result in duplicative litigation and uneconomical use of judicial resources. Congress has manifested a purpose to accommodate an expansive exercise of

a claim or cause of action on any equitable ground. Query, whether that authorization precludes the remand of separable issues involving parties other than the debtor?

144. Under the concept of "ancillary jurisdiction," a district court of the United States can determine an issue because of its connection with a controversy within its jurisdiction although the issue could not have been decided by the court if it had come before the court independently. C. WRIGHT, *LAW OF FEDERAL COURTS* § 9 (3d ed. 1976). The concept, which is largely judge-made, is frequently justified and limited by reference to considerations of necessity. *Id.* § 9. Such a justification is surely available to some extent to the bankruptcy courts under 28 U.S.C. §§ 1471, 1478.

145. The exceptions concern a proceeding in the United States Tax Court and a civil proceeding to enforce a governmental unit's police or regulatory power. See notes 124-132 *supra* and accompanying text.

146. A claim or cause of action is removable under 28 U.S.C. § 1478(a) only "if the bankruptcy courts have jurisdiction over such claim or cause of action."

147. Thus it is conceivable that removal of a "claim or cause of action" under 28 U.S.C. § 1478(a) cannot bring along parties, issues, and claims that may nonetheless be embraced within the jurisdiction exercisable originally under 28 U.S.C. § 1471.

148. See 1A MOORE'S *FEDERAL PRACTICE* ¶ 0.163[3], at 250-51 (2d ed. 1979).

149. See *id.* ¶ 0.163[3]-[4] (2d ed. 1979); C. WRIGHT, *LAW OF FEDERAL COURTS* 158-59 (3d ed. 1976); Lewin, *The Federal Courts' Hospitable Back Door—Removal of "Separate and Independent" Non-Federal Causes of Action*, 66 HARV. L. REV. 423, 441 (1953).

150. See 1A MOORE'S *FEDERAL PRACTICE* 32 (2d ed. 1979); C. WRIGHT, *LAW OF FEDERAL COURTS* 156 (2d ed. 1976).

151. *Cf. Texas Employers Ins. Ass'n v. Felt*, 150 F.2d 227, 234-35 (5th Cir. 1945); 1A MOORE'S *FEDERAL PRACTICE* 292 (2d ed. 1979).

jurisdiction by the bankruptcy court of "all civil proceedings arising under title 11 or arising in or related to cases under title 11,"¹⁵² subject to two minor qualifications.¹⁵³ While a claim or cause of action that would not be subject to the court's original jurisdiction cannot be removed there under 28 U.S.C. § 1478(a), that jurisdiction may be predicated on the relation to the case under Title 11 of the proceeding in which the claim or cause of action is being litigated.¹⁵⁴ The nature and degree of that relationship must be left to case-by-case development. It is not a matter amenable to elaboration by rules.

If a party seeking removal, either inadvertently or deliberately, includes in his removal request a claim or cause of action that is not removable because not within the jurisdiction of the bankruptcy court, presumably the bankruptcy court is obliged to deny the removal. Is the bankruptcy court's decision to accept or deny removal on jurisdictional grounds appealable? Neither the statute nor any pertinent legislative history is clear. Section 1478(b) declares that "[a]n order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise."¹⁵⁵ This provision, however, is part of a subsection that authorizes the bankruptcy court to remand a removed claim or cause of action "on any equitable ground." It is at least arguable that the restriction on reviewability does not apply to a nonremovable claim or cause of action,¹⁵⁶ and that only the court's exercise of

152. 28 U.S.C.A. § 1471(b),(c) (West Supp. 1979). Subsection (b) confers jurisdiction comprehensively on the district courts, and subsection (c) empowers and, indeed, requires the bankruptcy court for each district to exercise all the jurisdiction conferred by the section on district courts. See discussion in Part III *supra*.

153. The qualifications relate to the injunction of a court and the punishment for criminal contempt. See 28 U.S.C.A. § 1481 (West Supp. 1979) (discussed in text accompanying notes 114-119 *supra*).

154. See *id.* §§ 1471(b),(c), 1478(a).

155. *Id.* § 1478(b).

156. An order remanding a case under the general removal statute is nonreviewable by appeal or otherwise by 28 U.S.C. § 1447(d), but an order denying remand is reviewable. 1A MOORE'S FEDERAL PRACTICE ¶ 0.169[2.—1], [2.—3] (2d ed. 1979).

The statute does not indicate how or when removal is accomplished. The Commission's draft of section 2-202(b)(5) of its proposed Bankruptcy Act of 1973 provided that removal would be effected on compliance by the applicant for removal with the procedural steps prescribed in the removal section, and the nonbankruptcy court receiving a copy of the application was prohibited from proceeding further unless and until the action was remanded. This provision was adapted from 28 U.S.C. § 1446(e)(1976). As noted in the text accompanying note 132 *supra*, most civil proceedings against the debtor are subject to the automatic stay prescribed by 11 U.S.C. § 362(a), irrespective of whether a request for removal is filed.

discretion with respect to a removable claim or cause of action is beyond review. In any event, if a ruling on a challenge to removal predicated on a jurisdictional ground remains reviewable, the ruling, whether approving or denying removal, would be interlocutory and thus presumably not appealable to the court of appeals.¹⁵⁷

A request addressed to the bankruptcy court to remand a claim or cause of action removed to it will presumably be made by motion, subject to much the same rules and considerations as apply when a case has been removed from a state court to a United States district court.¹⁵⁸

V. APPEALS

Appeals under Public Law No. 95-598 are enormously complicated. There are three alternative courses for appeals to take from orders and judgments of the bankruptcy court, and there are at least six relevant provisions scattered through Title 28.

Section 160 of Title 28 directs the chief judge of each circuit, on authorization from the circuit council, to designate panels of three bankruptcy judges each to hear appeals from judgments, orders, and decrees of the bankruptcy court for any district within the circuit.¹⁵⁹ The panel must be composed of bankruptcy judges for

Interim Rule 7004(c), suggested by the Advisory Committee on Bankruptcy Rules, provides that removal shall be effected by the applicant's giving written notice of the application for removal to all adverse parties and filing a copy of the application with the clerk of the court from which the "civil action or proceeding" was removed. The suggested rule then forbids the parties to proceed further in that court unless and until the case is remanded.

157. See notes 167-171 *infra* and accompanying text. An order of remand is interlocutory even though it sends the matter out of the federal court. 1A MOORE'S FEDERAL PRACTICE 562 (2d ed. 1979).

158. Interim Rule 7004, like FED. R. CIV. P. 81(c), leaves unspecified the procedure for seeking remand of a removed action. The filing of a motion in accordance with FED. R. CIV. P. 7(b) has been regarded as a proper mode of seeking remand from a district court to a state court though the district court may also act *sua sponte*. 1A MOORE'S FEDERAL PRACTICE ¶ 0.168[4.—1], at 524-30 (2d ed. 1979). Rule 707 of the Rules of Bankruptcy Procedure presumably applies to a motion to remand a claim or cause of action from the bankruptcy court (or court of bankruptcy) to a nonbankruptcy court.

159. See 28 U.S.C.A. § 160 (West Supp. 1979). The literal requirement of the first sentence of section 160 that each of the chief judges of the eleven circuits designate panels when a single circuit council orders application of section 160 to one district within its circuit cannot be taken seriously. While the sentence apparently contemplates that the council should, or at least may, order application of the section to each district severally, a single panel may hear appeals from more than one district, or conceivably, from all districts within the circuit. The chief judge is required, however, to designate enough panels to permit expeditious hearing and disposition of appeals. No panelist, of course, can review his own judicial

districts located within the circuit in which the appeal arises, though inferentially a bankruptcy judge assigned from outside the circuit by the Chief Justice may serve on an appellate panel during such an assignment.¹⁶⁰ Jurisdiction of both final and interlocutory judgments, orders, and decrees of bankruptcy courts is granted to the panels by section 1482 of Title 28, but leave of the panel is required for an appeal from an interlocutory ruling.¹⁶¹

If panels have not been established under section 160, jurisdiction of appeals from bankruptcy courts is vested in the district courts.¹⁶² Appeals from interlocutory determinations are authorized only on leave of the district court to which the appeal is taken.¹⁶³ Section

acts, section 160(b), and the panel must sit at a place convenient to the parties of the appeal, section 160(c).

Section 160 of Title 28 does not become effective until April 1, 1984, under Public Law No. 95-598, sec. 402(b), but under sec. 405(c)(1)(A), an appeal from a judgment, order, or decree of a United States bankruptcy judge during the transitional period shall be to a panel of three bankruptcy judges if so ordered by the circuit council of the bankruptcy judge's circuit. The panel is to be appointed in the manner prescribed by 28 U.S.C. § 160.

160. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 205, 92 Stat. 2660 (1978)(amending 28 U.S.C. § 293(e)). Section 293(e) authorizes the Chief Justice to make such an assignment, and section 160(a) excepts the provision in section 293(e) from the requirement that bankruptcy judges on appellate panels be composed of judges from districts within the circuit. The amendment, 28 U.S.C. § 293, authorizing assignment of bankruptcy judges across circuit lines by the Chief Justice, does not become effective until April 1, 1984, under Public Law No. 95-598, sec. 402(b), but section 43c of the Bankruptcy Act, which governs the assignment of bankruptcy judges during the transitional period, authorizes assignments by the Chief Justice of the United States across circuit lines.

161. See 28 U.S.C.A. § 1482 (West Supp. 1979). While section 1482 does not become effective under Public Law No. 95-598, sec. 402(b), until April 1, 1984, a panel of bankruptcy judges appointed pursuant to Public Law No. 95-598, sec. 405(c)(1), is given the same jurisdiction by sec. 405(c)(2) as one appointed pursuant to 28 U.S.C. § 160.

162. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 238(a), 92 Stat. 2667-68 (1978) (amending 28 U.S.C. § 1334). Section 1408 of Title 28 requires an appeal under section 1334 to be brought in the judicial district in which the bankruptcy court is located. See *id.* sec. 240(a), 92 Stat. 2668. Sections 1334 and 1408 of Title 28 do not become effective until April 1, 1984, under Public Law No. 95-598, sec. 402(b), but sec. 405(c) requires an appeal during the transitional period to go to the district court for the district where the bankruptcy judge sits if no panel of bankruptcy judges has been established as described in the text accompanying notes 160 and 161 *supra*, and if the parties do not agree to a direct appeal to the court of appeals.

163. Section 1334(b) of Title 28 authorizes appeals only from interlocutory orders and decrees, whereas 28 U.S.C. § 1482 authorizes appeals from interlocutory judgments, orders, and decrees.

Sec. 405(c) of Public Law No. 95-598, which governs appeals during the transitional period, does not differentiate between final and interlocutory judgments, orders, and decrees but the congressional intent is clear in sec. 405(c) that interlocutory appeals shall be allowed during the transitional period on leave of the district court having jurisdiction in accordance with the practice prescribed for the post-transitional period.

1334(c) prohibits reference of an appeal under the section to a magistrate or to a special master.¹⁶⁴

Finally, parties may agree to a direct appeal from final judgments, orders, and decrees of the bankruptcy court to the court of appeals under section 1293(b) of Title 28.¹⁶⁵ The courts of appeals also have jurisdiction of appeals from all final decisions of panels established under section 160¹⁶⁶ and from final judgments, orders, and decrees of district courts.¹⁶⁷ Whether appeals to the court of appeals from the United States district court after it has reviewed an order, judgment, or decree of a bankruptcy court may also be

164. Although 28 U.S.C. § 1334(c) does not become effective until April 1, 1984, under Public Law No. 95-598, sec. 402(b), reference to a magistrate or special master during the transitional period would manifestly conflict with the policy underlying the prohibition of section 1334(c).

165. See 28 U.S.C.A. § 1293(b) (West Supp. 1979). Section 1293(b) does not become effective until April 1, 1984, under Public Law No. 95-598, sec. 402(b), but sec. 405(c) of Public Law No. 95-598 authorizes an appeal from a judgment, order, or decree of a United States bankruptcy judge during the transitional period to go directly to the court of appeals for the circuit in which the bankruptcy judge sits if the parties agree to that course. The transitional provision makes no differentiating reference to a final or interlocutory determination, and arguably the parties can by agreement impose a mandatory jurisdiction of an appeal from an interlocutory as well as a final judgment, order, or decree on the court of appeals. The courts of appeals are unlikely to accept that view of the effect of sec. 405(c)(1)(B). The jurisdiction of interlocutory appeals to the court of appeals during the transitional period is assimilated by Public Law No. 95-598, sec. 405(c)(2), to the jurisdiction of such appeals in the post-transitional period, but it is unclear what that is. See notes 167-171 *infra* and accompanying text.

166. Two overlapping provisions authorize the courts of appeals to take jurisdiction of appeals from appellate panels. Section 1293(a) grants jurisdiction of such appeals from "all final decisions" of the panels, and section 1293(b) grants jurisdiction of such appeal from a "final judgment, order, or decree of an appellate panel." Section 1293(a) of Title 28 appears to be a superfluous provision. The "final decisions" it refers to presumably includes no more than every "final judgment, order, or decree" referred to in 28 U.S.C. § 1293(b). It has been suggested, however, that a final decision of a panel may include a ruling on an appeal to the panel from an interlocutory order of the bankruptcy court under 28 U.S.C. § 1482(b) and that such a decision is not necessarily a judgment, order, or decree. See 1 COLLIER ON BANKRUPTCY 3-310 (15th ed. 1979). Section 1293(a) speaks of "panels designated under section 160(a)," whereas section 1293(b) refers to an appellate panel created under section 160, but the intended reference is clearly the same in each subsection. Neither subsection (a) nor (b) of 28 U.S.C. § 1293 becomes effective under Public Law No. 95-598, sec. 402(b), until April 1, 1984, but during the transitional period the jurisdiction of a court of appeals to hear appeals is the same as that granted by 28 U.S.C. § 1293 and other provisions of Title 28 enacted for the post-transitional period. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 405(c)(2), 92 Stat. 2685 (1978).

167. There is no grant of jurisdiction to the court of appeals by the new law respecting an interlocutory judgment, order, or decree of the district court, an appellate panel of bankruptcy judges, or the bankruptcy court. As to whether an interlocutory judgment, order, or decree of a district court may be appealed pursuant to prior law, see notes 170-171 *infra* and accompanying text.

taken pursuant to sections 1291 and 1292 of Title 28 is debatable.¹⁶⁸ These sections are not amended by Public Law No. 95-598, and section 1292 at least has had a limited application to appeals from district court judgments in proceedings in bankruptcy and controversies arising in proceedings in bankruptcy.¹⁶⁹ In view of the elaborateness of the provisions governing appeals to the court of appeals in Public Law No. 95-598, it is arguable that Congress intended these provisions to be exclusive of other pathways to the appellate court. It is more realistic to recognize that continuing applicability of section 1292 was probably not considered and was therefore neither accepted nor rejected. The considerations that have led appellate courts to grant interlocutory appeals from district court judgments in bankruptcy cases under the Bankruptcy Act may persuade them to continue to do so under the new law.¹⁷⁰ There is otherwise no authority for review by the court of appeals of any interlocutory

168. Section 1291 of Title 28 reads as follows:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts 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, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1291 (1976). Section 1292 of Title 28 confers jurisdiction on the courts of appeals of specified interlocutory orders of the district courts listed in section 1291, including orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." *Id.* § 1292. In addition, a district judge may state in writing that an appeal from an order not otherwise appealable may materially advance the ultimate termination of a civil action, and the court of appeals may, in its discretion, permit an appeal to be taken from such order.

169. See *Ingram v. Martrac Farms, Inc. (In re W.F. Hurley, Inc.)*, 553 F.2d 1096, 1101 (8th Cir. 1977)(injunction by bankruptcy court entered against proceedings in another bankruptcy court held reviewable under section 1292(a)(1)); *Citron Inv. Corp. v. Emrich*, 493 F.2d 561, 562 (9th Cir. 1974)(interlocutory appeal from order denying motion to dismiss application for determination of dischargeability of claim allowed under 28 U.S.C. § 1292(b), no reference made to section 24 of Bankruptcy Act); *Hirsch v. Wharton*, 344 F.2d 90, 91 (2d Cir. 1965)(injunction requiring money due lenders be deposited in interest bearing account *pendente lite* held appealable under section 1292(a)(1)); *McAvoy v. United States*, 178 F.2d 353, 355 (2d Cir. 1949)(section 1292(a)(1) held to authorize appeal from interlocutory injunction entered in controversy arising in bankruptcy proceedings). It has sometimes been stated that appeals from district courts to courts of appeals in proceedings in bankruptcy and controversies arising in proceedings in bankruptcy are governed by section 24a of the Bankruptcy Act rather than provisions in Title 28. See 2 COLLIER ON BANKRUPTCY ¶ 24.05 (14th ed. 1976); 7B MOORE'S FEDERAL PRACTICE JC-405 (2d ed. 1979). These authorities do not, however, question the rulings cited in this note *supra*. See 2 COLLIER ON BANKRUPTCY ¶ 24.27[2.1] (14th ed. 1976); 9 MOORE'S FEDERAL PRACTICE ¶ 110.19[5] (2d ed. 1975). See also 16 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3926, at 107 (1977).

170. See generally Note, *Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. § 1292*, 67 GEO. L.J. 1025 (1979)(arguing for flexibility in application of final judgment rule).

judgment, order, or decree in a case under Title 11 or in a civil proceeding arising under Title 11 or arising in or related to a case under Title 11.¹⁷¹

The Supreme Court's jurisdiction over appeals and petitions for certiorari under section 1254 of Title 28 remains unaffected by Public Law No. 95-598. If a state court is allowed to exercise jurisdiction of a civil proceeding arising under Title 11 or arising in or related to a case under Title 11, the jurisdiction of the Supreme Court to review the state court judgment or decree under section 1257 of Title 28 is unaffected by Public Law No. 95-598.

171. Since 28 U.S.C. § 1292(a)(1) has afforded a party enjoined or denied injunctive relief by a district court access to the court of appeals by an interlocutory appeal, a court of appeals may be disinclined to leave a litigant similarly enjoined or denied injunctive relief by a bankruptcy court without access to a court of appeals. If a panel of bankruptcy judges has been designated in the circuit, however, there is no provision authorizing any interlocutory appeal from the panel to the court of appeals, and no direct interlocutory appeal from the bankruptcy court to the court of appeals by agreement of the parties is authorized by 28 U.S.C. § 1293(b). The All Writs Statute, 28 U.S.C. § 1651 (1976), remains available when there is "usurpation of judicial power or a clear abuse of discretion." 7B MOORE'S FEDERAL PRACTICE JC-304 (2d ed. 1979).

Sections 24, 250, and 498 of the Bankruptcy Act, which have governed appeals in proceedings and controversies in proceedings in bankruptcy to the court of appeals, have been repealed. Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 401(a), 92 Stat. 2682 (1978). These provisions nevertheless remain operative with respect to appeals in cases commenced before October 1, 1979, and in all matters and proceedings in or relating to such cases. *Id.* sec. 403(a), 92 Stat. 2683. Changes made in Rules 4 and 6 of the Federal Rules of Appellate Procedure, which became effective on August 1, 1979, apply to appeals in such cases, matters, and proceedings.

The Federal Rules of Appellate Procedure have been promulgated pursuant to 28 U.S.C. §§ 2072, 2075 and 18 U.S.C. §§ 3771, 3772. See 9 MOORE'S FEDERAL PRACTICE ¶ 201.06 (2d ed. 1975). The first of these sections and the last two grant rulemaking authority that is not constrained by the necessity of conforming to prior congressional legislation, whereas 28 U.S.C. § 2075, as amended by sec. 247 of Public Law No. 95-598, requires consistency with such legislation. It will, of course, be a judicial question whether a particular rule of the Federal Rules of Appellate Procedure exceeds the terms of the court's rulemaking authority, but Congress presumably retains the prerogative of repealing or modifying any court-promulgated rule. See note 234 *infra*.

Rules promulgated under 28 U.S.C. § 2075 and in effect on September 30, 1979, are applicable to cases under Title 11 commenced after that date to the extent not inconsistent with Public Law No. 95-598. These rules may be superseded by rules prescribed under 28 U.S.C. § 2075 as amended by Public Law No. 95-598. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 405(d), 92 Stat. 2685 (1978). Suggested Interim Rules 8001-8007, issued under the imprimatur of the Advisory Committee on Bankruptcy Rules, provide guidelines for appeals to the district courts and appellate panels of bankruptcy judges. Direct appeals to the court of appeals pursuant to 28 U.S.C. § 1293(b) are supposed to be governed by 28 U.S.C. § 2107 and the Federal Rules of Appellate Procedure, according to a note to Interim Rule 8002. Nothing in the Bankruptcy Reform Act speaks to the applicability of rules promulgated under any statutes other than 28 U.S.C. § 2075.

Is a judgment, decree, or order of a bankruptcy court holding an act of Congress unconstitutional directly reviewable by the Supreme Court under 28 U.S.C. § 1252? That section, which is not amended by Public Law No. 95-598, authorizes a direct appeal from any "judgment, decree, or order of any court of the United States." The term, "court of the United States," to which section 1252 refers, is defined in section 451 of Title 28 to include as a "court of the United States" "bankruptcy courts, the judges of which are entitled to hold office for a term of 14 years."¹⁷² That definition excludes the bankruptcy courts during the transitional period but includes them after April 1, 1984.¹⁷³ Until that date, presumably any determination by a bankruptcy court that an act of Congress is unconstitutional can be appealed only to the district court, the appellate panel established under 28 U.S.C. § 160, or, by consent of the parties, to the court of appeals.¹⁷⁴

While the diversity of paths up the appellate ladder is a complication of the appellate process, it is a substantial and welcome reform to eliminate the horrendous complexity and confusion engendered by section 24 of the Bankruptcy Act.¹⁷⁵ Interlocutory appeals under section 24 were permitted only in "proceedings arising in bank-

172. See Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 213, 92 Stat. 2661 (1978)(amending 28 U.S.C. § 451).

173. See 7B MOORE'S FEDERAL PRACTICE JC-355 (2d ed. 1979). This construction raises the question whether the Supreme Court may entertain appeals from a court whose judges are not accorded tenure during good behavior and the other perquisites of Article III judges. The question has been answered affirmatively when the issues presented are justiciable. See *DeGroot v. United States*, 72 U.S. (5 Wall.) 419, 427 (1866)(review of judgment of Court of Claims); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 540 (1828)(review of judgment of a territorial court); C. WRIGHT, *LAW OF FEDERAL COURTS* 31 (3d ed. 1976).

174. If the bankruptcy court's determination of unconstitutionality is appealed during the transitional period to the district court, that court's judgment of affirmance may then be reviewed directly by the Supreme Court pursuant to 28 U.S.C. § 1252. If an appeal is to a panel of bankruptcy judges, there is no provision establishing the panel as a court of the United States either during or after the termination of the transitional period, and so a judgment by a panel that a congressional act is unconstitutional would not be directly reviewable by the Supreme Court. A judgment by a court of appeals that a congressional act is unconstitutional is reviewable by the Supreme Court pursuant to 28 U.S.C. § 1254. After termination of the transitional period, a bankruptcy court's or a district court's determination of unconstitutionality of a congressional act may go directly to the Supreme Court, but review of such a determination by an appellate panel of bankruptcy judges must be routed first to a court of appeals. Of course, 28 U.S.C. § 1252 may itself be repealed or substantially modified before 1984.

175. See generally 2 COLLIER ON BANKRUPTCY ¶¶ 24.11-.36 (14th ed. 1976); J. MACLACHLAN, *BANKRUPTCY* 215-16, 431-33 (1956); 9 MOORE'S FEDERAL PRACTICE ¶ 110.19[5] (2d ed. 1975); 16 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3926 (1977).

ruptcy," not "controversies arising in proceedings in bankruptcy," but the case law construing this section and applying the destruction defies analysis.¹⁷⁶ The new law eliminates the terms and the need for distinguishing between them. It also eliminates any limitation comparable to the proviso of section 24 of the Bankruptcy Act which permitted an appeal from an order, decree, or judgment involving less than \$500 only upon allowance of the appellate court. The new law subjects the right of appeal to leave granted by an appellate tribunal only when the order, judgment, or decree appealed from is interlocutory and the appeal is to an appellate panel of bankruptcy judges or to the district court.¹⁷⁷

VI. VENUE AND PROCESS

The law of venue for cases under Title 11 and for civil proceedings arising in or related to cases under Title 11 is clarified and elaborated in the Bankruptcy Reform Act. Clarification has been facilitated by the fact that the new law vests comprehensive jurisdiction of both cases and civil proceedings that arise under Title 11 in the district courts and the bankruptcy courts as their adjuncts, whereas under the Bankruptcy Act jurisdiction was fractionated among bankruptcy courts and other courts. It will be helpful to discuss first the venue for cases under Title 11 and thereafter the venue for civil proceedings that arise under Title 11 or arise in or are related to cases under Title 11.

A. Venue of Cases Under Title 11

The Bankruptcy Act as enacted in 1898 and amended in 1938 prescribed venue for cases in section 2a(1) by authorizing a court of bankruptcy to exercise jurisdiction only if a debtor's domicile, residence, principal place of business, or property was located in the district where the petition was filed.¹⁷⁸ Congress amended section 32

176. See note 154 *supra*. See generally Annot., *Appealability of Interlocutory Orders in Proceedings in Bankruptcy*, 33 A.L.R.2d 1337 (1954). Appeals under 28 U.S.C. § 1292 were not limited to those from interlocutory orders and decrees in proceedings in bankruptcy.

177. See 28 U.S.C.A. §§ 1334(b), 1482(b) (West Supp. 1979). See also note 171 *supra* and accompanying text.

178. Section 2a(1) described venue in jurisdictional terms as follows:

The courts of the United States hereinbefore defined as courts of bankruptcy are hereby . . . invested . . . with such jurisdiction . . . to — (1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a

of the Bankruptcy Act in 1952 to authorize transfer of a case filed "in the wrong court of bankruptcy" to another court and the transfer of a case filed in a proper venue "to a court of bankruptcy in any other district, regardless of the location of the principal assets of the bankrupt, or his principal place of business, or his residence."¹⁷⁹ It became clear under that amendment that section 2a(1) was primarily a venue provision.¹⁸⁰ There was implicit in section 2a(1), however, a jurisdictional limitation: Unless a debtor had a principal place of business, residence, domicile, or property within a judicial district of the United States, no bankruptcy court would have jurisdiction of a case concerning such a debtor.¹⁸¹ Such a jurisdictional limitation is now explicit in section 109(a) of Title 11: "Notwithstanding any other provision of this section [defining who may be a debtor], only a person that resides in the United States, or has a domicile, place of business, or property in the United States, or a municipality,¹⁸² may be a debtor under this title."¹⁸³ Treating venue as a matter of procedure,¹⁸⁴ the Rules of Bankruptcy Procedure superseded section 2a(1) and other provisions of the Bankruptcy Act prescribing the courts where petitions could be filed.¹⁸⁵

longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or in any cases transferred to them pursuant to this Act.

Bankruptcy Act § 2a (repealed 1978, previously codified as 11 U.S.C. § 11(a)). The last eleven words were added in 1952 at the same time as the amendment of section 32, referred to in note 179 *infra*. See Act of July 7, 1952, Pub. L. No. 456, 66 Stat. 420.

179. See Act of July 7, 1952, Pub. L. No. 456, 66 Stat. 424.

180. See BANKR. PROC. R. 116(a) (Advisory Committee Note).

181. Cf. Comment, *Bankruptcy—International Jurisdictional Problems Arising Between the United States and Canada*, 35 N.C. L. REV. 476, 477-78 (1957).

182. 11 U.S.C.A. § 101(29) (West Supp. 1979). A municipality is defined as a "political subdivision or public agency or instrumentality of a state." *Id.*

183. *Id.* § 109(a).

184. The Advisory Committee's view of the Supreme Court's authority to deal with venue has been questioned. See Landers, *The New Bankruptcy Rules: Relics of the Past as Fixtures of the Future*, 57 MINN. L. REV. 827, 840 (1973).

185. The Rules of Bankruptcy Procedure governing venue are as follows: Rule 116, superseding sections 2a(1) and 5d, which governed the filing of petitions in straight bankruptcy; Rule 8-112, superseding parts of the second and tenth sentences of section 77(a) of the Bankruptcy Act, which prescribed venue for section 77 petitions; Rule 9-12, superseding section 85(c) of the Act, which prescribed venue for petitions under Chapter IX; Rule 10-114, superseding sections 128 and 129 of the Act, which prescribed venue for Chapter IX petitions; Rule 12-13, superseding sections 2a(1) and 5d, which prescribed venue for Chapter XII petitions, and Rule 13-110, superseding sections 2a(1) and 622 of the Bankruptcy Act, which prescribed venue for Chapter XIII petitions. These rules also superseded the provi-

Sections 301, 302, 303, and 304 of Title 11 require a petition to be filed with the bankruptcy court. The bankruptcy court in which a petition may be properly filed is specified in 28 U.S.C. §§ 1472 & 1474.¹⁸⁶ Paragraph (1) of section 1472 specifies as the proper place the bankruptcy court for a district "in which the domicile, residence, principal place of business, in the United States, or principal assets, in the United States," of the debtor have been located.¹⁸⁷ The insertion of "in the United States" after "principal place of business" and "principal assets" makes clear that the fact that the debtor's principal place of business or principal assets are located in another country is irrelevant for the purposes of identifying the proper venue for the filing of a petition under Title 11. That paragraph follows prior law in specifying venue where a debtor has moved or changed location of its assets within the 180 days immediately preceding the commencement of the case: In such a case, the proper place is the district in which the domicile, residence, principal place of business, or principal assets of the debtor have been located during the prepetition period of 180 days longer than in any other district. Paragraph (2) of section 1472 adopts a feature of the venue provisions of the Rules of Bankruptcy Procedure in authorizing a petition to be filed in any district in which there is pending a case under Title 11 concerning the debtor's affiliate, general partner, or partnership.¹⁸⁸

Section 1474 of Title 28 is a special statute governing venue for cases ancillary to foreign proceedings¹⁸⁹ commenced under section 304. When the purpose of the commencement of the case is to enjoin an action or proceeding for the enforcement of a judgment, the proper venue is the bankruptcy court for the district in which the

sions of section 32 insofar as they governed the transfer of the cases under the Bankruptcy Act.

186. Sections 1472 and 1474 of Title 28 do not become effective until April 1, 1984, under Public Law No. 95-598, sec. 402(b), but under sec. 405(a)(2) of Public Law No. 95-598 these sections apply during the transitional period to the courts of bankruptcy continued by Public Law No. 95-598, sec. 404(a), in the same way they will apply after April 1, 1984, to the bankruptcy courts established by 28 U.S.C. § 151.

187. 28 U.S.C.A. § 1472(1) (West Supp. 1979).

188. See *BANKR. PROC. R.* 116(a)(3), (4), 8-112(a)(2), 10-114(a)(2), 11-13(a)(2),(3), 12-13(a)(2),(3).

189. A "foreign proceeding" is defined in 11 U.S.C. § 101(19) as one "in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located," commenced "for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization." 11 U.S.C.A. § 101(19) (West Supp. 1979).

action or proceeding to be enjoined is pending.¹⁹⁰ If the purpose of the commencement of the case is to enjoin lien enforcement against property or to require turnover of property, the proper venue is the district in which the property is located.¹⁹¹ Any other case commenced under section 304 may be commenced only in the bankruptcy court for the district in which is located the principal assets in the United States of the estate that is the subject of the case.

As under the Rules of Bankruptcy Procedure,¹⁹² the bankruptcy court may transfer a case under Title 11 to a bankruptcy court for another district, in the interest of justice and for the convenience of the parties.¹⁹³ Like the Rules of Bankruptcy Procedure governing transfer,¹⁹⁴ the statute authorizes retention of a case in the wrong district in the interest of justice and for the convenience of the parties.¹⁹⁵ Section 1477(b) of Title 28 declares that nothing in Chapter 90 of Title 28 impairs the jurisdiction of a court of bankruptcy of any matter involving a party who makes no timely and sufficient objection to venue. The subsection seems to suggest that a "timely and sufficient objection to venue" raises a jurisdictional issue. The undoubted purpose of the provision, however, is to clarify the congressional intent that although an involuntary case is commenced in a wrong venue, the court has jurisdiction to proceed in the case if the debtor defaults or makes no timely venue objection. There is no recognition in the statute of the possibility of a dismissal for improper venue.¹⁹⁶ Rules of Bankruptcy Procedure presently authorize transfer on the court's own initiative under certain circumstances, and such rules are not inconsistent with 28 U.S.C. § 1475.¹⁹⁷ The statute does not contain any provision comparable

190. The case to be commenced for such a purpose is governed by 11 U.S.C. § 304(b)(1).

191. 28 U.S.C.A. § 1474(b) (West Supp. 1979).

192. See BANKR. PROC. R. 116(b), 8-112(b), 9-12(b), 10-114(b), 11-13(b), 12-13(b), 13-110(b). While these rules are generally consistent with the Bankruptcy Reform Act, and the Rules of Bankruptcy Procedure apply to cases under Title 11 to the extent they are not inconsistent, the statute supersedes the rules insofar as it prescribes a single, uniform provision applicable to the transfer of a case pending under any chapter.

193. 28 U.S.C.A. § 1475 (West Supp. 1979). Like 28 U.S.C. §§ 1472, 1474, discussed in the text accompanying notes 186-191 *supra*, 28 U.S.C. § 1475 applies during the transitional period as well as thereafter. Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 405(b), 92 Stat. 2685 (1978).

194. See note 192 *supra*.

195. 28 U.S.C.A. § 1477(a) (West Supp. 1979). This provision applies during and after the transitional period under Public Law No. 95-598, sec. 405(b).

196. Cf. BANKR. PROC. R. 116(b)(2) (authorizing dismissal as an alternative available to court on filing of petition in wrong district). This provision of the rules is presumably inoperative under the Bankruptcy Reform Act.

197. See note 193 *supra* and accompanying text.

to Rule 116(c) and similar provisions of the Rules of Bankruptcy Procedure, which prescribe the procedure to be followed when petitions involving the same debtor or related debtors are filed in different courts,¹⁹⁸ but such rules are likewise not inconsistent with the new statute.¹⁹⁹

B. *Process in Cases Under Title 11*

Service of the petition and process in an involuntary case has been governed under the Bankruptcy Act by Rules 111, 8-109, and 10-111, which in turn incorporated Rule 704. Rule 704 permits service by mail, personal service, service by publication under some circumstances, or, if service in a foreign country is necessary, by any mode of service prescribed by the law of the foreign country involved.²⁰⁰ There are no territorial limits on the service authorized by the Rules of Bankruptcy Procedure. There must, of course, be a basis for jurisdiction of the debtor in order for the court to administer the estate.²⁰¹ The new bankruptcy law contemplates that service and process will be governed by Rules of Bankruptcy Procedure,²⁰² and Rules 111, 8-109, 10-111, and 704 appear to be applicable to cases commenced after October 1, 1979, with minor modifications necessary to make them fully compatible with the statute.

C. *Venue of Proceedings Arising in or Related to Cases Under Title 11*

The law governing venue in adversary proceedings and contested matters under the Bankruptcy Act is not well developed. It has been frequently assumed that if the bankruptcy court has summary jurisdiction of a proceeding or matter, the proper venue is the district in which the case is pending. Bankruptcy Rule 782, however, has authorized any adversary proceeding, upon notice and hearing afforded the parties, to be transferred by the court of bankruptcy to any other district "in the interest of justice and for the convenience of the parties." When a plenary proceeding was instituted in a non-

198. See BANKR. PROC. R. 116(c), 8-112(c), 10-114(c), 11-13(c), 12-13(c), 13-110(c).

199. These rules are therefore believed to be of continuing applicability under Public Law No. 95-598, sec. 405(d), subject to minor adaptations necessary to eliminate inconsistencies.

200. BANKR. PROC. R. 704(b), (c), (d), (i).

201. See BANKR. PROC. R. 116 (Advisory Committee Note). See also note 181 *supra* and accompanying text.

202. See H.R. REP. No. 595, *supra* note 27, at 307.

bankruptcy court, nonbankruptcy law rather than any provision of the Bankruptcy Act or the Rules of Bankruptcy Procedure has governed venue.²⁰³ The vesting of comprehensive jurisdiction in district courts and bankruptcy courts as their adjuncts dictates a clarification and elaboration of provisions governing venue for proceedings that arise in or are related to cases under Title 11. Such an elaboration is undertaken in 28 U.S.C. § 1473.²⁰⁴

The general rule applicable to a civil proceeding that arises in or are related to a case under Title 11 is that it may be commenced in the bankruptcy court in which the case is pending.²⁰⁵ It is to be recalled that the jurisdiction of "all civil proceedings arising under Title 11 or arising in or related to cases under Title 11" is granted originally but not exclusively to the district courts, whereas the jurisdiction of "all cases under Title 11" is granted exclusively to the district courts.²⁰⁶ In either case, the bankruptcy court "shall exercise all of the jurisdiction conferred by this section on the district courts." The venue for all matters embraced by the term "cases under Title 11" is the court in which the case is pending. That is the same venue as is provided in section 1473(a) respecting "a proceeding arising in or related to a case under Title 11," but it is not intended that any provision in section 1473 of Title 28 should apply to nondelegable matters of administration.²⁰⁷

There are two exceptions to the general rule that a proceeding must be commenced in the home court where the case is pending. The first exception relates to small claims of the estate: Section 1473(b) of Title 11 requires a proceeding to recover a money judgment of less than \$1,000, property worth less than that amount, or a consumer debt of less than \$5,000 to be commenced only in the bankruptcy court for the district in which the defendant resides. The second exception relates to claims of the estate arising after the commencement of the case from the operation of the business of the

203. The law governing venue and process in plenary actions filed in federal courts to enforce rights created by the Bankruptcy Act has not been free from doubt, however. See COMMISSION REPORT II, *supra* note 1, at 39 n.6.

204. 28 U.S.C.A. § 1473 (West Supp. 1979). Section 1473, like 28 U.S.C. §§ 1472, 1474, applies to courts of bankruptcy, continued under Public Law No. 95-598, sec. 404(a), during the transitional period under sec. 405(b).

205. See 28 U.S.C.A. § 1473(a) (West Supp. 1979). The grant of jurisdiction in section 1471(b) speaks of "civil proceedings arising under title 11," but neither 28 U.S.C. § 1473 nor any other section makes any provision for the venue of "a proceeding arising under title 11."

206. *Id.* § 1471(a),(b),(c) (discussed in Part III *supra*).

207. H.R. REP. No. 595, *supra* note 27, at 446.

debtor: Under subsection (d) of 28 U.S.C. § 1473, the trustee may sue wherever the debtor might have sued under applicable non-bankruptcy venue provisions.

Subsection (c) of 28 U.S.C. § 1473 prescribes the venue for a proceeding by the trustee on a cause of action belonging to him as a statutory successor to the debtor under section 541 of Title 11 or to creditors under section 544(b) of Title 11.²⁰⁸ Unless the action is on one of the small claims coming within subsection (b),²⁰⁹ the trustee may sue wherever the debtor or a creditor could have commenced the action under nonbankruptcy law. Subsection (c) provides the trustee an option, however, since it is not a limitation on the option of the trustee under subsection (a) to commence the action in the bankruptcy court where the case is pending.

The last subsection of section 1473 governs the venue of a proceeding arising in or related to a case under Title 11 that is based on a claim arising out of the operation of the business of the debtor in which the trustee or other representative of the estate is the defendant. The adversary in such an action may choose whatever venue would have been available to him if the bankruptcy case were not pending, or he may exercise the option provided by subsection (a) of suing in the bankruptcy court in which the case is pending.²¹⁰

The operation of 28 U.S.C. § 1473 can best be understood by considering hypothetical situations:

208. The proceedings included in 28 U.S.C. § 1473(c) are those formerly based on sections 70a and 70e of the Bankruptcy Act. Absent consent of the adversary or possession by the debtor or the trustee of the property being sought by the trustee, such a proceeding was required to be plenary, and venue had to satisfy the nonbankruptcy laws of the forum where the proceeding was commenced. 2 COLLIER ON BANKRUPTCY ¶ 23.15[1] (14th ed. 1976); 4B *id.* ¶ 70.91[1] (1978). The option afforded the trustee by 28 U.S.C. § 1473(c) to proceed in the district where the debtor or creditors might have commenced an action under nonbankruptcy law thus conformed to what he could have done under prior law when a plenary proceeding was necessary. When consent or possession enabled the bankruptcy court to exercise summary jurisdiction, the venue was generally assumed to be the district where the case was pending. That option is also available under 28 U.S.C. § 1473(a), irrespective of whether the adversary consents or the debtor or trustee has possession.

209. As noted in the preceding paragraph of the text, in an action to recover a money judgment or property involving less than \$1,000 or a consumer debt of less than \$5,000, the trustee must sue in the bankruptcy court for the district of the defendant.

210. The reference to "representative of the estate" in this subsection makes clear that a debtor in possession may be sued in any district authorized by this subsection. See H.R. REP. No. 595, *supra* note 27, at 447. A debtor in possession in a Chapter 11 case has all the rights and powers and is required to perform all the functions and duties of a trustee serving in a case under the chapter. See 11 U.S.C.A. § 1107 (West Supp. 1979).

Westland, Inc., a Pennsylvania corporation headquartered in Philadelphia with a plant in Austin, Texas, files a petition under Chapter 11 in the bankruptcy court for the Eastern District of Pennsylvania. It had, at the time the petition was filed, claims against the following persons:

(1) a claim for \$750,000 against Polar, Inc., of Detroit, Michigan, for breach of contract to provide and install air conditioning equipment in the Austin plant;

(2) a claim for \$750 against Orleans Supply Co., a Louisiana corporation, located in New Orleans, for overpayment on a supplies purchase contract;

(3) a claim for \$2500 against Davis, a citizen of Missouri residing in St. Louis, for the purchase price of an electronic game sold by mail.

The trustee of Westland wishes to avoid the following prepetition transfers:

(4) a payment of \$10,000 to Smothers Bros., a partnership located and doing business in Austin, Texas, for services rendered, the payment being voidable as a preference as against Smothers Bros. and as against Miller, a Pennsylvania citizen residing in Philadelphia and President of Westland, who had guaranteed payment of the debt; and

(5) a purchase of Westland stock from Tyler (for \$5,000) and Moore (for \$50,000), citizens of New York residing in New York City, which were made within a year before the filing of the petition while the debtor was insolvent. During the operation of the business of Westland,

(6) the trustee acquired a \$5,000 claim for merchandise sold and delivered to Outlet, Inc., of Camden, New Jersey; and

(7) an employee of the trustee negligently drove a truck used in the business of the debtor into Ramos, a Mexican national living in San Antonio, and seriously injured him.

Where can the litigation arising out of these seven situations be commenced under 28 U.S.C. section 1473? Assume that service of process can continue to be made nationwide as under Rule 704.²¹¹

211. See text accompanying notes 189-191 *supra*.

(1) The action may be brought by the trustee on the first claim in the venue described by subsection (a) or subsection (c) of 28 U.S.C. § 1473—*i.e.*, in the bankruptcy court for the Eastern District of Pennsylvania, where the case is pending, or the bankruptcy court in the Eastern District of Michigan, where the debtor might have sued the defendant. Polar, Inc., might have also been able to sue in courts in other districts under nonbankruptcy venue provisions.

(2) The only proper venue for the second action under subsection (b) of 28 U.S.C. § 1473 is the Eastern District of Louisiana, if it is assumed that the Orleans Supply Co. has a “residence” in New Orleans. While “residence” is not defined in Public Law No. 95-598, it is inferable that “residence” is used in the same sense in which it is used in venue provisions of the Judicial Code.²¹²

(3) Action on the claim for the consumer debt against Davis is likewise governed by section 1473(b) of Title 28 and can be commenced only in the bankruptcy court in the Eastern District of Missouri.

(5) The claims against Smothers Brothers and Miller, based on section 547 of Title 11, can be commenced in the bankruptcy court in the Eastern District of Pennsylvania, the venue permitted by subsection (a) of 28 U.S.C. § 1473.

(5) The venue for the actions against Tyler and Moore is governed by subsection (a) or (c) of 28 U.S.C. § 1473, depending upon the theory of the trustee’s action. If the action is predicated on section 548 of Title 11, it may be commenced in the Eastern District of Pennsylvania under subsection (a) of 28 U.S.C. § 1473. If the action is predicated on section 544(b) of Title 11, the action can still be brought in the Eastern District of Pennsylvania under subsection (a) of 28 U.S.C. § 1473 or, at the trustee’s option, in the Southern District of New York, where creditors of Westland could have sued these defendants. Moore could probably also have been sued on the ground of diversity of citizenship by creditors of Westland, and that possibility would enable the trustee to sue under 28 U.S.C. § 1391(a) where any of the creditors reside or where the claim arose.

212. *Cf.* 28 U.S.C. § 1391(c)(1976) (“A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.”).

(6) Venue for the action against Outlet would be governed by section 1473(d) of Title 28, *i.e.*, the District of New Jersey or wherever else Westland might have been able to satisfy venue requirements of state law.

(7) Finally, the proper venue for an action commenced by Ramos would be the venue provided by section 1473(e) of Title 28, *viz.*, the bankruptcy court for the Western District of Texas (Austin or San Antonio Division), or under subsection (a), the Eastern District of Pennsylvania.

Section 1475 of Title 28 of the United States Code authorizes the bankruptcy court to transfer any of the proceedings in the foregoing hypothetical situations to any other bankruptcy court in the interest of justice and for the convenience of the parties, and section 1477(a) of Title 28 authorizes retention of a civil proceeding notwithstanding its having been commenced in a wrong venue.

D. Process in Proceedings Arising in or Related to Cases Under Title 11

Service of process in proceedings arising or related to cases under Title 11 is governed by Rule 704 of the Rules of Bankruptcy Procedure until this rule is superseded by a rule or rules promulgated under 28 U.S.C. § 2075 as amended by the Bankruptcy Reform Act.²¹³ This rule, which imposes no territorial limits, provides for service by mail, personal service, or, if service in a foreign country is necessary, by a mode conformable to the law of the foreign country where the service is to be effected.²¹⁴

VII. RULES OF BANKRUPTCY PROCEDURE

A factor of significance in providing impetus for bankruptcy reform was the fact that to a considerable extent the Bankruptcy Act came to include many obsolete provisions as a result of the promulgation of the Rules of Bankruptcy Procedure during the years 1973-76. Prior to 1964, the Supreme Court's rule-making authority in the area of bankruptcy was a limited one, conferred by former section 30 of the Bankruptcy Act. Under that section, the Supreme Court

213. Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 405(d), 92 Stat. 2685 (1978). The statement in the text is predicated on the view that there is nothing inconsistent in Rule 704 with Public Law No. 95-598. See also discussion accompanying notes 200-202 *supra*.

214. See note 200 *supra*.

had promulgated General Orders and Official Forms in Bankruptcy.²¹⁵ These General Orders and Official Forms, however, were required to be consistent with the provisions of the Bankruptcy Act itself.

There were decisions invalidating General Orders and Official Forms promulgated by the Supreme Court, because they were found to be inconsistent with the Bankruptcy Act.²¹⁶ When in 1960 the Judicial Conference established an Advisory Committee on Bankruptcy Rules pursuant to its statutory charge to carry on a continuous study of the operation and effect of general rules of practice and procedure and to recommend desirable changes,²¹⁷ the Advisory Committee called to the attention of the Conference the limitations imposed by the extensive procedural provisions in the Bankruptcy Act. The Committee recommended to the Conference that rule-making for bankruptcy and debtor rehabilitation cases be freed of the constraints imposed by the Bankruptcy Act. The proposal was to place the scope of the rule-making authority of the Supreme Court in the bankruptcy area coordinate with that Congress had previously granted to the Supreme Court in civil procedure generally. Congress acceded to that request by enacting section 2075 to Title 28 of the United States Code.²¹⁸ The Supreme Court exercised the powers granted it by that enabling legislation in the Rules of Bankruptcy Procedure promulgated during the years 1973-76.²¹⁹ As a result a very large part of the Bankruptcy Act came to be superseded, since the Act bristled with procedural provisions in practically every section and subdivision.²²⁰

Although the Commission on Bankruptcy Laws proposed no change in the grant of rule-making authority to the Supreme Court by 28 U.S.C. § 2075, the new law significantly restricts the Court's power to deal with practice and procedure in cases and controversies

215. At the time of the enactment of 28 U.S.C. § 2075, there were 52 General Orders and 69 Official Forms.

216. See *Meek v. Centre County Banking Co.*, 268 U.S. 426, 434 (1925); *Damon v. Damon*, 283 F.2d 571, 572 (1st Cir. 1960).

217. Pursuant to 28 U.S.C. § 331.

218. Act of Oct. 3, 1964, Pub. L. No. 88-623, 78 Stat. 1001.

219. The Rules are published in 11 U.S.C. (1976) following section 1103.

220. 28 U.S.C. § 2075 (1976)(enabling legislation). The last sentence of the enabling legislation provided that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." *Id.* Even when there was perfect congruence between a rule and a statutory provision, as there was in respect to many matters of procedure and practice, it was the rule that governed rather than the statute.

in the bankruptcy courts. The enabling statute has been amended by deleting the sentence that enabled the Court to promulgate rules inconsistent with the laws enacted by Congress.²²¹ The Court retains rule-making authority respecting "practice and procedure in cases under title 11,"²²² and the draftsmen of Public Law No. 95-598 have been careful to avoid elaborating procedural detail in both Title 11 and Title 28.²²³ The withdrawal from the Supreme Court of the power to modify any procedural provision of the statute is nevertheless a serious defect of the new law.²²⁴

221. Bankruptcy Reform Act, Pub. L. No. 95-598, sec. 247, 92 Stat. 2672 (1978).

222. The reference to "cases under title 11" is subject to the criticism that it arguably limits the Supreme Court's authority to promulgation of rules governing practice and procedure only in respect to the matters that are within the exclusive jurisdiction granted the district courts by 28 U.S.C. § 1471(a). So restricted an authority would leave large areas of practice and procedure, either subject to no rules or to be governed by local rules. The House Report accompanying H.R. 8200 listed 322 matters "that will be dealt with by the Rules of Bankruptcy Procedure or by local rules of court." H.R. REP. No. 595, *supra* note 27, at 293-308. Many of these matters will arise only in civil proceedings that are no part of the case falling within the exclusive jurisdiction of the district courts. *See, e.g.*, H.R. REP. No. 595, *supra* note 27, at 298 ("Procedure for trustee or debtor in possession to exercise any of the various avoiding powers"). Senate Bill 658, introduced in the 96th Congress, 1st Session, on March 14, 1979, would amend 28 U.S.C. § 2075 to add "and civil proceedings arising under title 11 or arising in or related to cases under title 11."

223. The House Report accompanying H.R. 8200 explained: "With the extensive revision and modernization of the bankruptcy law proposed by this bill, in which nearly all procedural matters have been removed and left to the Rules of Bankruptcy Procedure, the need that currently may exist to permit the Supreme Court's rules to supersede the statute disappears." H.R. REP. No. 595, *supra* note 27, at 449. *See also id.* at 292-93; S. REP. No. 989, *supra* note 23, at 158.

224. To a considerable extent, though not entirely, the amendment of the rulemaking grant represents a regression to the law under which the old General Orders were promulgated by the Supreme Court. When Congress was finally persuaded in the early thirties to vest authority in the Supreme Court to make rules for civil procedure in the federal district courts, Act of June 19, 1934, Pub. L. No. 415, ch. 651, 48 Stat. 1064, it was recognized that significant procedural reform would not be accomplished if the Court was not freed from the constraints imposed by the procedural law in the statute books. Accordingly the enabling acts under which the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Admiralty Procedure were promulgated contained provisions nullifying all statutory and other laws in conflict with the rules. *See* 2 MOORE'S FEDERAL PRACTICE ¶ 1.02[5] (2d ed. 1979). When Congress was persuaded to enact a comparable rulemaking grant for practice and procedure under the Bankruptcy Act in 1964, the Court's limited authority under former section 30 of the Bankruptcy Act was superseded by section 2075 of Title 28 with a provision giving the same paramount effect to the Rules of Bankruptcy Procedure *vis-a-vis* laws in conflict as are given to the Federal Rules of Civil Procedure. The amendment of section 2075 of Title 28 effected by the pending bills does not restore the law that prevailed under former section 30 of the Bankruptcy Act, because the Bankruptcy Act was replete with procedural provisions in nearly every section and subdivision. As indicated in the preceding note, the draftsmen of the new law left more room for the exercise of the Court's rulemaking authority.

The House Report accompanying H.R. 8200 declared that "[s]ince the Rules [of Bankruptcy Procedure] have become effective, there has been continual controversy."²²⁵ If so, the controversy has been little noted in published commentaries.²²⁶ While the House Report asserted that the "Rules' authors interpreted that grant [of rulemaking authority] very liberally,"²²⁷ the most extended critique of the Rules found the greater fault to be the narrowness of the authors' construction of the scope of their authority.²²⁸ A Staff Report of the Securities and Exchange Commission criticized a preliminary draft of the Chapter X Rules for their numerous departures from the Act and noted that many of the rules dealt with matters of administration quite different from the kinds of procedure and practice found in the Federal Rules of Procedure and other rules promulgated by the Supreme Court under the several enabling acts.²²⁹ The body of rules formulated and promulgated under each congressional grant has distinctive characteristics, but that fact may be acknowledged without conceding that only rules that follow the familiar mold of previously promulgated rules of procedure are valid. The House Report notes that several of the Rules have been challenged in the courts, and that "some have been declared beyond the scope of the rulemaking authority."²³⁰ The correctness of these

225. H.R. REP. No. 595, *supra* note 27, at 292.

226. There has been a plethora of recent commentary regarding the rulemaking process as exercised by the Supreme Court pursuant to congressional enabling acts. See, e.g., Joiner *et al.*, *Rules and Rule Making*, 79 F.R.D. 474 (1978); Burger, *The State of the Federal Judiciary—1979*, 65 A.B.A. J. 358, 360 (1979); Weinstein, *Reform of the Federal Court Rule-making Procedures*, 76 COLUM. L. REV. 905, 919 (1976). In none of them is there any indication that controversy has arisen in regard to the Rules of Bankruptcy Procedure.

227. H.R. REP. No. 595, *supra* note 27, at 292.

228. Landers, *The New Bankruptcy Rules: Relics of the Past as Fixtures of the Future*, 57 MINN. L. REV. 827, 835-38, 867-72 (1973). See also Girth, *The Bankruptcy Reform Process: Maximizing Judicial Control in Wage Earners' Plans*, 11 U. MICH. J. L. REF. 51, 61 (1977). Notwithstanding the main thrust of Professor Landers' critique of the Rules, it is cited in 1 COLLIER ON BANKRUPTCY 3-329 n.25 (15th ed. 1979), as the sole support for the following statement: "Many commentators were of the opinion that some of the rules promulgated under 28 U.S.C. § 2075 in fact achieved substantive change in the provisions of the Bankruptcy Act."

229. SEC STAFF REPORT ON PRELIMINARY DRAFT OF PROPOSED CHAPTER X RULES 2-5 (1972). This report was referred to in *Bankruptcy Act Revision, Hearings on H.R. 31 and H.R. 32 before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 2162, 2205-06 (1976) (statement of Philip A. Loomis, Jr., Commissioner of the SEC and Report of the SEC on Proposed Bankruptcy Legislation).

230. H.R. REP. No. 595, *supra* note 27, at 292, citing only *In re Moralez*, 1 BANKR. CT. DEC. 1210 (N.D. Cal. 1975). This ruling by Bankruptcy Judge Hughes was later affirmed by the district court. See *Wolff v. Wells Fargo Bank*, 400 F. Supp. 1352, 1355 (N.D. Cal. 1975).

rulings need not be debated here. The Rules have been generally accorded a cordial reception and application by the courts.²³¹ A hyperbolic reference is made in the House Report to a raging controversy "on the issue of the propriety of the Supreme Court action undoing Acts of Congress, on the objectivity of the Supreme Court should it be required to rule on the validity of a Rule that it promulgated, and over the confusion for practitioners resulting from inconsistent laws and Rules."²³² The enabling legislation explicitly reserves to Congress the opportunity to review any rules before they become effective,²³³ and its power to veto or repeal any rule that it finds objectionable is generally conceded.²³⁴ So long as any rule-

See also In re Derryberry, 4 COLLIER BANKR. CAS. 492 (1974), also decided by Bankruptcy Judge Hughes. Bankruptcy Judge Hughes' rulings in the *Derryberry* and *Moralez* cases are criticized, and the validity of Bankruptcy Rule 13-307(d) is convincingly supported, by Countryman, *Partially Secured Creditors Under Chapter XIII*, 50 AM. BANKR. L.J. 269, 274-77 (1976). Cases contra to *Moralez* include *In re Wall*, 403 F. Supp. 357, 358 (E.D. Ark. 1975); *In re Garcia*, 396 F. Supp. 518, 520 (C.D. Cal. 1974).

231. The case law construing the Rules is already extensive. Six volumes of COLLIER ON BANKRUPTCY are devoted exclusively to the Rules of Bankruptcy Procedure (Volumes 12, 13, 13A, 14, 14A, and 15). Most of the cases appearing in the 19 volumes of Collier Bankruptcy Cases, which commenced publication in 1974, involve an application of one or more of the Rules of Bankruptcy Procedure.

232. H.R. REP. No. 595, *supra* note 27, at 292.

233. Rules proposed for promulgation by the Supreme Court must be reported to Congress not later than the first day of May of the year in which they are to become effective and generally cannot become effective until the expiration of 90 days after being reported to Congress. 28 U.S.C. §§ 2072, 2075 (1976). The waiting period for amendments to the Federal Rules of Evidence is 180 days after being reported, and any amendment dealing with a privilege must be approved by Congress before it becomes effective. 28 U.S.C. § 2076 (1976).

234. *See* J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 104 (1977); C. WRIGHT, LAWS OF FEDERAL COURTS 291 (3d ed. 1976). *See also* Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951).

The power of Congress to veto or repeal any rule promulgated by the Supreme Court has recently been questioned when the rule is one that is primarily adjudicative—one that establishes procedures necessary for adjudication of particular cases. Note, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule-Making Power*, 76 MICH. L. REV. 1177, 1196-97 (1978). There would be at least two difficulties presented by an argument that Rules of Bankruptcy Procedure promulgated by the Supreme Court pursuant to 28 U.S.C. § 2075, as amended, cannot be nullified by Congress. The first difficulty is that it is not clear that the Supreme Court is endowed by the Constitution with the power to prescribe primarily adjudicative rules for the bankruptcy courts created by 28 U.S.C. § 151. The second difficulty is that many of the Rules of Bankruptcy Procedure promulgated by the Court are likely to be more administrative in nature than adjudicatory in nature, and thus their promulgation is not easily defended as the exercise of judicial power vested in the Court by Article III of the Constitution. Doubts raised as to the constitutional power of the Court to promulgate administrative rules may, however, also raise the question whether Congress has the power to delegate to the Court the authority to promulgate such rules. *See id.* at

making authority is vouchsafed to the Supreme Court,²³⁵ questions may arise as to its objectivity in interpreting or ruling on the validity of its own rules.²³⁶ It is regrettable that Congress has set in concrete many features of practice and procedure in the bankruptcy courts.²³⁷

1187. The position taken in this article is that Congress acted within its powers in granting and limiting rulemaking authority in 28 U.S.C. § 2075 but that it unwisely precluded the Court from departing from the statute in prescribing procedural rules.

235. As the House Report made clear, the Supreme Court's rulemaking authority is made extensive under the new law by virtue of the deliberate effort of the draftsmen to restrict the number of procedural provisions in the new law. See note 223 *supra*.

236. See J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 96-104 (1977).

237. The House hearing on proposals for bankruptcy act revision included objections by the Department of Justice to retention of 28 U.S.C. § 2075 in its present form. See *House Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 2107 (1977). The objections were based on three considerations: (1) The justification for allowing the Rules of Bankruptcy Procedure to supersede provisions of the present Bankruptcy Act was that "a comprehensive revision to harmonize provisions of the statute in the light of three quarters of a century of experience had not been accomplished. With the enactment of a new bankruptcy statute this justification disappears." (2) There is "need for one primary source for the law. Creditors and the bar should not have to read the statute and wonder if it has been repealed or modified by an obscure court rule." (3) "Statutes should not be superseded by mere court rule." *Id.* at 2107.

The first objection ignores the fact that notwithstanding the extensive overhaul of the Bankruptcy Act by Congress in 1938 and numerous amendments before and since that date, Congress has not in the past given procedural improvement the kind of attention it constantly requires and is unlikely to do so in the future. The second objection gratuitously and erroneously assumes that the Rules of Bankruptcy Procedure are any less accessible or more obscure than the provisions of bankruptcy legislation. The third objection is a rejection of the role of the courts as an innovator of procedural reform. "It cannot be doubted that legislative regulation [of procedure] is less satisfactory than regulation by court-made rules." C. WRIGHT, LAW OF FEDERAL COURTS 291 (3d ed. 1976).