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A PROPOSAL TO ABOLISH THE OFFICE OF UNITED STATES TRUSTEE

Peter C. Alexander*

In this Article, Professor Alexander reviews the creation and development of the Office of U.S. Trustee, an agency within the executive branch of the federal government, authorized to oversee the administration of all bankruptcy estates. Alexander asserts that the agency has expanded its scope beyond its original mission, becoming a huge bureaucracy that is widely criticized. By contrast, Alexander also discusses the Bankruptcy Administrator Program, a bankruptcy oversight system that exists within the federal districts in Alabama and North Carolina. He presents the positive and negative comments about that program and concludes that it is a more efficient system than the U.S. Trustee Program. Lastly, Alexander proposes his own model for bankruptcy case oversight, one that combines private trustees and a decentralized management structure, as a substitute for either the U.S. Trustee Program or the Bankruptcy Administrator Program.

INTRODUCTION

In 1986, as part of an extensive bankruptcy reform statute, Congress passed the Bankruptcy, Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (the Act).¹ The Act implemented nationwide the United States Trustee Program (the UST Program), which had existed until that time as an experimental program in eighteen federal judicial districts.² The

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1. See Pub. L. No. 99-554, §§ 111, 301-311, 100 Stat. 3088, 3090, 3118 (1986) (codified as amended at 28 U.S.C. §§ 581-586 (1994)).

2. The 18 pilot districts were the Central District of California, the Eastern District of Virginia, the Southern District of New York, the Northern Districts of Alabama, Illinois, and Texas, and the Districts of Colorado, Delaware, District of Columbia, Kansas, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, North Dakota, Rhode Island, and South Dakota. See 1 COLLIER ON BANKRUPTCY ¶ 6.02, at 6-25 to 6-26 (15th ed. 1979 & Supp. 1995).

Act authorized the Office of the United States Trustee (the UST) to oversee the administration of all bankruptcy estates in all federal courts except those in Alabama and North Carolina.³ The UST exists within the U.S. Department of Justice (DOJ) and exercises oversight authority, empowered to take "such actions as [it] deems to be appropriate to prevent undue delay"⁴ in the administration of a bankrupt estate.⁵

Since 1986, the UST has grown into a massive bureaucracy.⁶ The UST Program contains twenty-one regions,⁷ with a U.S. Trustee leading each region.⁸ In the past decade, the UST has broadened its scope of authority to include issues such as

3. The Act excepted the six federal districts in Alabama and North Carolina from the U.S. Trustee Program. 28 U.S.C. § 581. These districts comprise the Bankruptcy Administrator Program (the BA Program). *See* NATIONAL ACADEMY OF PUB. ADMIN., *ALTERNATIVE STRUCTURES FOR THE UNITED STATES TRUSTEE PROGRAM* 8 (1995) [hereinafter *NAPA REPORT*]. Operating similarly to the UST Program, the BA provides independent oversight of the bankruptcy system. *See generally* MANUAL FOR BANKRUPTCY ADMINISTRATORS: JUDICIAL CONFERENCE REGULATIONS AND DIRECTOR'S GUIDELINES FOR BANKRUPTCY ADMINISTRATORS II-1 to II-3 (1993) [hereinafter *JUDICIAL CONFERENCE REGULATIONS*]. The BA Program pre-existed the U.S. Trustee Program (the UST Program) and the BA jurisdictions may delay entry into the UST Program until 2002. *See* 28 U.S.C. § 581.

4. 28 U.S.C. § 586(a)(3)(G).

5. The current Mission Statement of the Office of the United States Trustee (the UST) states:

The United States Trustee Program acts in the public interest to promote the efficiency and to protect and preserve the integrity of the bankruptcy system. It works to secure the just, speedy and economical resolution of bankruptcy cases; monitors the conduct of parties and takes action to ensure compliance with applicable laws and procedures; identifies and investigates bankruptcy fraud and abuse; and oversees administrative functions in bankruptcy cases.

NAPA REPORT, *supra* note 3, at 5.

6. As of 1995, the UST encompassed 94 judicial districts, with offices in 48 states. *See id.* at 1. A central office, known as the Executive Office for United States Trustees, directs all of the activities. *See id.* at 11. The Executive Office consists of three organizational units. The first, the Office of Administration, is responsible for budgeting, personnel, procurement, facilities, automation, and management matters. The second, the Office of Review and Oversight, is responsible for overseeing internal and external program operations. This department audits various segments of the UST Program and reviews outside audits and reports in an attempt to train trustees, to resolve problems that may arise involving private trustees, and to evaluate the performances of regional and field offices. The third divisional office, the Office of General Counsel, oversees the UST's litigation activities and provides in-house counsel to the UST Program. *See id.* at 11-12.

7. The regions vary greatly both in geographic and caseload size. *See id.* at 26 n.2.

8. *See* 28 U.S.C. § 581 (providing that each U.S. Trustee serves a five-year term at the pleasure of the Attorney General). Additionally, the regions are subdivided further into field offices. Assistant U.S. Trustees head most of the 93 field offices. The 21 regional offices each employ a staff of about 100, while the typical field office has approximately 10 employees. *See NAPA REPORT*, *supra* note 3, at 11-13.

detecting criminal activity within the bankruptcy system,⁹ ensuring debtor compliance with the Bankruptcy Code¹⁰ and Bankruptcy Rules,¹¹ and managing private trustees. As the UST's scope has increased, however, so has its bureaucratic red tape. Nothing illustrates this expansion more than the many inflexible Guidelines that require parties in a bankruptcy, particularly debtors in Chapter 11 business reorganizations, to undertake many time-consuming and expensive ministerial tasks.¹²

This Article explores the UST Program's bureaucratic expansion, concluding that the program does not fulfill its congressional mandate adequately. Part I reviews the program's evolution since its creation. This Part also presents and examines a competing system, the Bankruptcy Administrator Program (the BA Program), which currently oversees the bankruptcy system within the Alabama and North Carolina federal districts.¹³ Part II reviews court challenges to the UST Program. Part III introduces reform proposals for the UST Program and concludes that the BA Program—although not the optimal system—is preferable to the UST Program. Finally, in Part III, the Article proposes as an alternative to both systems a hybrid trustee model, which pairs case administrators similar to trustees in a Chapter 12 farm reorganizations with judicial officers who select, monitor, and audit the case trustee.

9. See generally NAPA REPORT, *supra* note 3, at 1 (noting that the UST's mission is to ensure the bankruptcy system's integrity). Title 18 of the United States Code classifies a variety of acts as bankruptcy crimes. See 18 U.S.C. §§ 151–157 (1994) (naming as crimes the concealing of assets, making false oaths and claims, committing bribery, embezzling against the estate, entering into fixed fee agreements with a party in interest or with an attorney for a party in interest, knowingly disregarding bankruptcy law or rules, committing bankruptcy fraud, and an officer acting adversely against the debtor's estate). In addition, the UST must report such crimes to the U.S. Attorney. See 18 U.S.C. § 3057(a). Fulfilling this responsibility requires aggressive monitoring by the UST. The UST's responsibilities include imposing higher standards of accountability on private trustees, establishing a program to eradicate significant backlogs in Chapter 7 case administration, and developing management control systems to promote uniform and professional standards for all personnel overseen by the UST. See NAPA REPORT, *supra* note 3, at 28.

10. See 11 U.S.C. §§ 101-1330 (1994).

11. See FED. R. BANKR. P. 1001-9036.

12. See *infra* text accompanying notes 182–87, 202–04.

13. See *supra* note 3.

I. THE UST PROGRAM

A. Creation

Congress, as part of the historic 1978 bankruptcy amendments,¹⁴ created a pilot project known as the U.S. Trustee Program.¹⁵ Prior to the program's creation, bankruptcy judges performed many of the administrative tasks now performed by U.S. Trustees.¹⁶ Judges, in fact, played two roles: supervising the administration of bankrupt estates and resolving the substantive questions raised in each bankruptcy case.¹⁷ By creating a legion of autonomous federal officers, Congress hoped that the UST Program would remove the bankruptcy judge from the daily administration of bankruptcy estates, thereby allowing the bankruptcy judge to function as a neutral jurist.¹⁸

The UST Program has engendered controversy. Some in the bankruptcy field object that the program has become "unduly burdensome."¹⁹ One court has held that the UST acts as a regulatory body and violates federal law by failing to comply with various provisions of the Administrative Procedure Act.²⁰

14. Congress signed the Bankruptcy Code into law in 1978, but it did not become effective until October 1, 1979. See Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1994)).

15. See 28 U.S.C. §§ 581-586.

16. See DAVID L. BUCHBINDER, *A PRACTICAL GUIDE TO BANKRUPTCY* 105 (1990).

17. See *id.*

18. Congress took its first step toward reformulating the bankruptcy jurist's position in 1974, when it changed the title from bankruptcy referee to bankruptcy judge. Cf. *id.*; see Janet A. Flaccus, *Bankruptcy Trustees' Compensation: An Issue of Court Control*, 9 BANKR. DEV. J. 39, 41 (1992) (explaining that the trustees are independent and autonomous from the courts); Lloyd D. George, *From Orphan to Maturity: The Development of the Bankruptcy System During L. Ralph Mecham's Tenure as Director of the Administrative Office of the United States Courts*, 44 AM. U. L. REV. 1491, 1492-94 (1995) (observing that the 1978 Act created bankruptcy judges and expanded their power beyond administrative tasks); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995) (detailing the evolution of the bankruptcy judge's role); see also *In re Plaza de Diego Shopping Ctr., Inc.*, 911 F.2d 820, 827 (1st Cir. 1990) (noting that the legislative history of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 indicates that Congress created the UST expressly for assuming the ministerial and administrative duties of bankruptcy judges).

19. NAPA REPORT, *supra* note 3, at 32.

20. See *In re Gold Standard Banking, Inc.*, 179 B.R. 98, 105-06 (Bankr. N.D. Ill. 1995) (holding that the UST's requirement that Chapter 11 debtors imprint their checks with "Debtor in Possession" did not constitute binding law as it was not promulgated in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 (1994)).

A former U.S. Trustee has even alleged that the program was created to curb judicial power.²¹ Some notable confrontations between UST staff, courts, and bankruptcy counsel have resulted from differences of opinion as to the limitations on the UST's authority.²²

B. Funding

Congress intended the UST to be self-funded through payment of filing fees.²³ Financial support for the program, however, comes from many different sources,²⁴ including congressional appropriation.²⁵ Notwithstanding the various funding sources, the UST's financial position has deteriorated in recent years.²⁶ The program has been plagued by revenue shortfalls due largely to a decrease in the number of bankruptcy filings, particularly Chapter 11 reorganizations.²⁷ As the National Academy of Public Administration (NAPA) Committee noted, "The program's financial position . . . has changed from a 'profit' of \$19.7 million in fiscal year 1993 to a projected 'loss' of about \$9 million in fiscal year 1996."²⁸

21. See John Ketzenberger, *Firstmark Bankruptcy Heats Up*, INDIANAPOLIS BUS. J., Dec. 12, 1988, at 20 (attributing to former U.S. Trustee Kevin McCarthy the belief that the UST was "created in 1978 as a check on judicial power").

22. Cf. *id.*

23. See 28 U.S.C. § 589(a) (1994) (creating a fund for the UST Program).

Some argue that resting the UST's funding on filing fees has placed bankruptcy beyond the financial reach of those debtors who cannot afford the required fees. See generally Karen Gross, *In Forma Pauperis In Bankruptcy: Reflecting On and Beyond United States v. Kras*, 2 AM. BANKR. INST. L. REV. 57 (1994) (suggesting that the requirement of a bankruptcy filing fee may remove bankruptcy from the financial reach of certain segments of the population).

24. Other sources of funding for the UST Program include increased filing fees in cases filed under Chapters 7, 11, 12, and 13; quarterly fees paid by debtors in Chapter 11 reorganizations; filing fees paid in connection with motions to convert cases to Chapter 11; and compensation earned by panel and standing trustees pursuant to 11 U.S.C. § 330(d) (1992). See 28 U.S.C. § 589(b); see also NAPA REPORT, *supra* note 3, at 20 (noting that the UST receives \$30 of the \$130 Chapter 7 filing fee, \$30 of the \$130 Chapter 13 filing fee, \$400 of the \$800 Chapter 11 filing fee, and \$100 of the \$200 Chapter 12 filing fee).

25. See NAPA REPORT, *supra* note 3, at 13.

26. See *id.* at 30 (noting that revenue shortfalls have become an urgent concern).

27. See *id.*

28. *Id.*

C. Duties

Because of the many different types of bankruptcies,²⁹ the UST's specific duties vary depending upon the Bankruptcy Code chapter under which a person seeks relief. In Chapter 7 and Chapter 13 cases—the most common bankruptcy filings³⁰—the UST performs primarily an oversight function supervising the officers (known as “panel trustees” in Chapter 7 cases and “standing trustees” in Chapter 13 litigation) managing those cases.³¹ In Chapter 12 and 13 cases, the UST is also responsible for monitoring debtors' reorganization plans.³² In Chapter 11 cases, the UST's role is substantially different because the debtor, usually a “debtor in possession,”³³ does not have a panel or standing trustee monitoring its daily activities. Instead, the debtor in possession is left to direct its own financial affairs, as well as its compliance with the Bankruptcy Code and Rules;³⁴ the debtor in possession must report regularly to the UST.³⁵ In addition, in Chapter 11 cases the UST has the power to appoint committees to assist the debtor's reorganization effort.³⁶ The

29. There are five different types of bankruptcy filings: Chapter 7 (straight bankruptcy or liquidation); Chapter 9 (debt reorganization for municipalities); Chapter 11 (reorganization for business debtors or individuals with large amounts of debt); Chapter 12 (reorganization for family farmers); and Chapter 13 (wage-earner reorganization plan). See 1 DAVID G. EPSTEIN ET AL., BANKRUPTCY §§ 1-3, 1-5 (1992); see also NAPA REPORT, *supra* note 3, at 14 (describing the organization of the Bankruptcy Code into chapters).

30. See NAPA REPORT, *supra* note 3, at 14 (noting that of the 845,257 bankruptcy cases filed from July 1993 to June 1994 about 70% were filed under Chapter 7, fewer than 30% under Chapter 13, and about 2% under Chapter 11).

31. See 28 U.S.C. § 586(a) (1994); see also Dan J. Schulman, *Issues in Litigation*, 4 J. BANKR. L. & PRAC. 319, 319–20 (1995) (noting that U.S. Trustees are responsible for administrative matters including selecting panel trustees in Chapter 7 cases and standing trustees in Chapter 13 cases). Nationwide, approximately two thousand private panel trustees supervise bankruptcy filings. See *United States Trustee Program in Bankruptcy: Hearing Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 102nd Cong. 35 (1991) [hereinafter *House Hearing*] (statement of John E. Logan, Director, Executive Office of the United States Trustee).

32. See 28 U.S.C. § 586(a)(3)(C).

33. 11 U.S.C. § 1107 (1994).

34. See *id.*

35. See 28 U.S.C. § 586(a)(3)(D).

36. See 11 U.S.C. § 1102(a)(1) (1994). Such committees must include, but are not limited to, unsecured creditors' committees. The UST may appoint additional committees of creditors or equity security holders' committees as deemed appropriate. See *id.*; see also Ericka Palmer Rogers, *United States Trustee System*, NEV. LAW., Mar. 1994, at 16, 18 (discussing the appointment of committees by the UST).

Code does not authorize the UST to involve itself in Chapter 9 bankruptcies³⁷ which involve municipal reorganizations.³⁸

The UST and its trustees undertake many other duties. Commentator David L. Buchbinder refers to the broad list of trustee responsibilities as the four "ates:" investigate, liquidate, litigate, and administrate.³⁹ "Investigate" involves determining whether a bankruptcy estate has any assets from which the creditors can expect payment.⁴⁰ "Liquidate" refers to the process of converting reachable assets into cash in those bankruptcies where such activity is appropriate.⁴¹ "Litigate" obviously refers to court proceedings.⁴² "Administrate" refers not only to the general requirement to follow the provisions of the Bankruptcy Code and Rules but also to the specific obligation to maintain and to distribute the cash within the bankruptcy estate.⁴³

The House Report accompanying the Act outlined broad responsibilities for the UST. The office is to

monitor applications for compensation and reimbursement; . . . monitor plans and disclosure statements in chapter 11 cases; . . . monitor plans in chapter 13 cases; . . . make sure that all reports, schedules, and fees required to be filed by debtors (including the new filing fees due each quarter in chapter 11 cases) are in fact filed; . . . monitor the functioning of creditors' committees; . . . notify the U.S. Attorney of possible crimes uncovered and cooperate with the U.S. Attorney in subsequent prosecutions; . . . monitor progress of bankruptcies and keep cases moving; and, . . . monitor the employment of professional persons in bankruptcy cases.⁴⁴

37. Cases filed under Chapter 9 of the Bankruptcy Code are reserved for municipalities. See 11 U.S.C. § 109(c) (1994).

38. See *id.* § 926(a) (giving the bankruptcy court, not the UST, the power to appoint a trustee upon the request of a creditor and in very limited circumstances).

39. BUCHBINDER, *supra* note 16, at 106.

40. *Id.* at 107.

41. *Id.*

42. *Id.* As an example, Buchbinder suggests that one form of litigation that could arise in the course of a bankruptcy is collecting accounts receivable which third parties owe the debtor. *Id.*

43. *Id.*

44. *In re Columbia Gas Sys., Inc.*, 33 F.3d 294, 296 (3rd Cir. 1994), citing H.R. REP. NO. 99-764, at 24 (1986), reprinted in 1986 U.S.C.A.N. 5227, 5237.

Although the UST's duties appear well delineated, the role of the trustee in bankruptcy is rather difficult to define neatly. Over the years, a trustee has been regarded as a representative of both the creditors and the debtor. In his guide for trustees, Judge Alexander Paskay discusses the role of the trustee as varied yet riddled with potential conflicts of interest. See ALEXANDER L. PASKAY, HANDBOOK FOR TRUSTEES AND RECEIVERS

Generally, the UST has served a monitoring function, opposing breaches of fiduciary duty and eliminating corruption in the bankruptcy system. Some courts, however, have described the mission of the UST as more expansive than just acting as a monitor: the UST is the representative of the public interest, ensuring that the letter and spirit of the law are followed in all bankruptcy cases.⁴⁵ Accordingly, the UST has intervened in Chapter 11 reorganizations with appointed creditors' committees, even though the debtor, the creditors, and the equity security holders had not objected to the proposed action.⁴⁶

IN BANKRUPTCY § 7.001, at 222-23 (1978). Regarding the trustee's relationship to creditors, Judge Paskay writes:

The trustee is the statutory representative of all the creditors, and he holds the assets of the estate in trust for their benefit. He represents all creditors, not only the majority, however great that may be. He must be an impartial administrator whose duty is to administer the estate for the benefit of each and every one of the creditors.

In administering the estate, he cannot yield his judgment to that of the majority of the creditors merely because they are the majority, without breach of his trust. Of course, it is entirely proper for a trustee to consult with creditors about important matters and get the benefit of their knowledge and experience. He is duty bound to work in harmony with the creditors and follow their reasonable suggestions, but he is not subject to their dictation and should follow his own best judgment.

The trustee's office is one of personal confidence, and the duties imposed upon him are his and his alone. He cannot delegate his duties to others, and ultimately he is responsible for all actions taken during the administration of the estate which affect the interest of creditors. Moreover, he is responsible for actions not taken when they are called for.

Id. Regarding the trustee's relationship to debtors, he writes:

In addition to representing the unsecured creditors, the trustee also represents the bankrupt, in certain respects. He succeeds to the interest of the bankrupt, and he is vested with the right, title, and power of the bankrupt as of the date of adjudication. . . .

In a rare case where there is a surplus, that is, funds remaining after a full satisfaction of all claims proven and allowed, he holds such surplus for the benefit of the bankrupt.

Id. at 223.

45. See *In re Columbia Gas Sys., Inc.*, 33 F.3d at 296 (noting that Congress has stated that U.S. Trustees are responsible for protecting the public interest); *In re Clark*, 927 F.2d 793, 795 (4th Cir. 1991) (labeling the U.S. Trustee a "watchdog" who must see that the bankruptcy laws are enforced); *In re Plaza de Diego Shopping Ctr., Inc.*, 911 F.2d 820, 824 (1st Cir. 1990) (noting the U.S. Trustee's statutory responsibility to represent and to protect the public); *In re Revco D.S., Inc.*, 898 F.2d 498, 500 (6th Cir. 1990) (opining that the U.S. Trustees protect the public interest just as watchdogs guard the interests of those for whom they watch).

46. See *United States Trustee v. Price Waterhouse*, 19 F.3d 138, 140-42 (3rd Cir. 1994) (detailing the U.S. Trustee's successful objection to employment of creditor accounting firm where debtor requested use of the firm); cf. NAPA REPORT, *supra* note

D. Comparing the Bankruptcy Administrator Program

The UST does not oversee the bankruptcy system in the six federal judicial districts within Alabama and North Carolina.⁴⁷ Instead, those jurisdictions participate in the BA Program.⁴⁸

Within the BA Program, a licensed attorney,⁴⁹ the Bankruptcy Administrator, serves as a non-judicial officer of the judiciary.⁵⁰ The Circuit Courts of Appeals, following public notice and review by merit selection panels, appoint Administrators⁵¹ to serve terms of five years.⁵² An Administrator may be reappointed for additional five-year terms⁵³ and may be removed only for "incompetence, misconduct, neglect of duty, or physical or mental disability."⁵⁴ Like a U.S. Trustee, a Bankruptcy Administrator is completely independent of the bankruptcy courts as well as the district courts and the court clerks.⁵⁵ Administrators, like Trustees, have been granted statutory standing to raise any issue in any case or proceeding under the Bankruptcy Code.⁵⁶ Both Administrators and Trustees provide oversight to the

3, at 62 (noting that some observers believe the UST should be involved only when there is no active creditors' committee); *infra* note 238.

47. See Schulman, *supra* note 31, at 321; see also *supra* note 3. Congress originally provided that the UST Program would not become effective in Alabama or North Carolina until the earlier of the following: the election of the districts within those states to participate in the program, or October 1, 1992. See Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 NEB. L. REV. 91, 93 n.8 (1995). The 1992 date subsequently was extended to October 1, 2002. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 317(a), 104 Stat. 5089, 5115 (1990).

48. See Schulman, *supra* note 31, at 321. Discussions with bankruptcy judges and officials of the BA in Alabama and North Carolina reveal that the districts in those two states preferred the BA because of "extreme dissatisfaction with the operation of the UST pilot program in the Northern District of Alabama." See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-92-133, BANKRUPTCY ADMINISTRATION: JUSTIFICATION LACKING FOR CONTINUING TWO PARALLEL PROGRAMS 14 (1993) [hereinafter GAO REPORT].

49. See JUDICIAL CONFERENCE REGULATIONS, *supra* note 3, at I-9.

50. See *id.* at I-2.

51. See *id.* at I-3.

52. See *id.* at I-10 to I-12.

53. See *id.* at I-13 to I-14.

54. *Id.* at I-3.

55. See THE BANKRUPTCY ADMINISTRATOR PROGRAM: QUESTIONS? ANSWERS question 3 [hereinafter BA PAMPHLET].

56. See JUDICIAL CONFERENCE REGULATIONS, *supra* note 3, at I-1.

fiduciaries who administer bankrupt estates;⁵⁷ and the primary goal of both the Administrator and the Trustee is to make sure that creditors receive fair treatment in bankruptcy while granting the debtor the opportunity to have a fresh start.⁵⁸

The primary distinction between the BA and the UST Program is that the former operates under the auspices of the judicial rather than the executive branch of the federal government.⁵⁹ Because the BA Program is under the control of the judicial branch, Bankruptcy Administrators are not restricted by federal guidelines as are U.S. Trustees. The philosophy of decentralized authority that pervades the judiciary allows the Bankruptcy Administrator to consider the unique conditions that exist in each BA district without worrying about predetermined federal guidelines.⁶⁰ Bankruptcy Administrators are also able to maintain a more cooperative relationship with bankruptcy judges within their district.⁶¹ Cooperation results in a more efficient resolution of bankruptcy petitions in many cases with both creditors and debtors emerging winners.⁶² This difference

57. A Bankruptcy Administrator's duties include:

supervising all bankruptcy trustees; supervising all chapter 11 debtors-in-possession; referring criminal investigations to the U.S. Attorney and the F.B.I.; appearing in bankruptcy, district and circuit courts on issues in bankruptcy cases; auditing all chapter 7 cases for closing; reviewing . . . all requests for professional fees; reviewing, and moving to dismiss if necessary, all cases abusing the bankruptcy system.

BA PAMPHLET, *supra* note 55, at question 8. The duties of a U.S. Trustee are similar. See *supra* notes 29-44 and accompanying text.

58. See GAO REPORT, *supra* note 48, at 2 (articulating the bankruptcy system's basic objectives).

59. The Judicial Conference of the United States administers the BA. See BA PAMPHLET, *supra* note 55, at question 4. The UST is an executive branch agency. See 28 U.S.C. § 581 (1994).

60. Telephone Interview with Marjorie K. Lynch, Bankruptcy Administrator, Eastern District of North Carolina (Nov. 20, 1995).

61. Cf. JUDICIAL CONFERENCE REGULATIONS, *supra* note 3, at 1-2 (noting that bankruptcy administrators must implement estate administration procedures consistent with the court's management of cases and proceedings). Judges may also hold positive feelings about the BA because the Judicial Conference Regulations appear to be comprehensive, obviating the need for judicial intervention in the BA's daily affairs. Compare *In re Butler Indus., Inc.*, 101 B.R. 194, 197 (Bankr. C.D. Cal. 1989), *aff'd*, 114 B.R. 695 (Bankr. C.D. Cal. 1990) (holding that when a panel trustee seeks to hire his own law firm to perform UST tasks, he must "show 'cause'" to justify the trustee's own law firm serving as counsel for the trustee), with JUDICIAL CONFERENCE REGULATIONS, *supra* note 13, at II-I-11 (providing clear instructions for BA officers regarding applications for the employment of professionals).

62. See Telephone Interview with Marjorie K. Lynch, *supra* note 60.

in administrative philosophy may account for the significant differences in efficiency that exist between the two programs.⁶³

An important distinction between the UST and the BA programs is the method of funding under which each operates. Both systems collect fees from debtors. The BA Program deposits those fees with the U.S. Treasury Department and then operates with appropriated funds.⁶⁴ By way of contrast, the UST deposits its fees in an independent UST Program fund.⁶⁵ Additionally, while debtors in both UST and BA districts pay the same fees when filing for bankruptcy, Chapter 11 debtors in BA districts are not subject to the additional quarterly fees levied in UST districts.⁶⁶ The additional funding which the UST garners through these quarterly fees allows the UST to operate as a financially self-sufficient program⁶⁷ while the BA districts fall just short of self-sufficiency.⁶⁸ A General Accounting Office (GAO) report concluded, however, that if the quarterly fees for Chapter 11 debtors were in effect in BA districts, the BA districts would also be financially self-sufficient.⁶⁹

In 1992, the GAO reviewed four BA and four UST districts of similar size and concluded that the UST Program was twenty-two percent more expensive to operate than the BA Program.⁷⁰ The gap in the efficiency of the two systems might have been much greater had the GAO considered the additional operational and support costs associated with the UST Program as a result of direct personnel support from other executive branch offices.⁷¹ Relying on the GAO's conclusions, advocates of the BA Program claim that a nationwide BA

63. Cf. NAPA REPORT, *supra* note 3, at 33 ("Many observers have noted that a large segment of the bankruptcy community—including judges, trustees, and practitioners—is reluctant to accept intervention by the USTP [U.S. Trustee Program]."); Schulman, *supra* note 47, at 125 ("The Administrative Office disagrees . . . that the [UST] program should survive. Rather, the Administrative Office . . . believes that the [BA] program is superior and should supplant the [UST] program.").

64. See GAO REPORT, *supra* note 48, at 11.

65. See *id.*; see also 28 U.S.C. § 589(a) (1994) (establishing the U.S. Trustee fund).

66. See GAO REPORT, *supra* note 48, at 11.

67. See *id.* at 12 (noting that the additional quarterly fees supplement income from filing fees and interest on invested funds).

68. See *id.* at 11–12 (noting that, in 1990, BA Program costs exceeded collected fees by about \$290,000).

69. See *id.*

70. See *id.* at 6–7.

71. Cf. *id.* at 7 (noting that the cost measurement did not include administrative and legal support that the UST provided to district offices nor did it include support that the Administrative Office of the U.S. Courts provided to BA districts).

Program would cost eighteen to twenty-four million dollars less per year to operate than a nationwide UST system.⁷²

E. Evaluation of the UST Program's Performance

1. *Evaluation Studies*—When Congress established the UST pilot, it called upon the Attorney General to evaluate the pilot program. On January 3, 1984, the Attorney General issued a “generally favorable report.”⁷³ The National Bankruptcy Conference (the NBC) also reviewed the UST’s operations and ultimately recommended that Congress expand the program nationwide.⁷⁴ Congress had requested that the GAO “compare relative efficiencies, costs, and results achieved in comparable districts administered by U.S. Trustees and Bankruptcy Administrators.”⁷⁵ The GAO report concluded that the BA Program should be incorporated into the UST Program to make “bankruptcy administration consistent across the country,”⁷⁶ but noted that “the U.S. Trustee programs were on average 22 percent more expensive to operate than comparable Bankruptcy Administrator programs.”⁷⁷ The GAO reasoned that the BA should be incorporated into the UST rather than vice versa because the legislative history clearly indicated that Congress, in establishing the UST, intended to place the administrative duties in bankruptcy matters within the executive branch in order to separate completely the administrative and judicial aspects of bankruptcy oversight.⁷⁸ The GAO report also found that, despite differences in administrative costs, the two

72. See BA PAMPHLET, *supra* note 55, at question 9.

73. Schulman, *supra* note 31, at 320. The Report acknowledged that the Northern District of Alabama—the only district in which both the UST and the BA systems had been implemented—rejected the UST in favor of the BA. See *id.* at 321 & n.20.

74. See *Bankruptcy Judgeship Authorization and A General Overview of the Bankruptcy Code: Hearing Before the Subcomm. on Courts and Administrative Practice of the Senate Judiciary Comm.*, 102nd Cong. 62 (1991) [hereinafter *Senate Hearing*] (statement of Leonard Rosen, Chairman, National Bankruptcy Conference).

75. GAO REPORT, *supra* note 48, at 1. The request was made by Senator Sam Nunn. See Schulman, *supra* note 31, at 321. The GAO selected the four BA districts responsible for 80% of the bankruptcy filings and matched them with four UST districts on the basis of “distribution of filings and qualitative factors, such as regional economy, local demographics, and multiple offices.” GAO REPORT, *supra* note 48, at 5.

76. Schulman, *supra* note 31, at 322.

77. *Id.*

78. See GAO REPORT, *supra* note 48, at 14.

programs attained comparable results in that Chapter 7 creditors in the BA and UST districts surveyed obtained similar distributions of funds after the trustee liquidated the debtor's assets.⁷⁹

More recently, the DOJ requested that the NAPA evaluate the UST Program.⁸⁰ The purpose of NAPA's investigation was to "identify the Program's strengths and weaknesses in the context of developing options for alternative structures and, if appropriate, to recommend alternatives."⁸¹ NAPA's findings, issued in May 1995, resulted from interviews and a review of pertinent books, records, financial documents, and literature.⁸²

2. *Findings*:—*a. Local Legal Culture*—In his 1991 statement before the Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice, Leonard Rosen, then chair of the NBC, stated that variations in practice within each bankruptcy court may contribute to the UST's ineffectiveness.⁸³ His point may be well taken. Most federal district courts have local rules,⁸⁴ and many jurisdictions have rules that apply only to bankruptcy courts.⁸⁵ Yet, rather than respond to local

79. See *id.* at 7. The GAO Report concluded that Chapter 7 creditors (priority, secured, and unsecured) obtained similar distributions in BA and UST districts, but unsecured creditors received 21% of the funds in UST districts and only 14% in BA districts. UST districts were also able to process Chapter 7 cases slightly faster than BA districts. No such conclusion could be reached regarding Chapter 11 cases. See *id.* at 7-9.

80. See Marcia B. Pine & David R. Weinstein, *The NAPA Report—The Push for Privatization of the U.S. Trustee Program*, AM. BANKR. INST. J., Sept. 1995, at 12.

81. *Id.* Pine and Weinstein suggest that the investigation was also a response to congressional pressure to review governmental agencies to determine which offices could be scaled back, eliminated, or privatized. See *id.*

82. See *id.* The study, however, was not exhaustive inasmuch as it did not address the topic raised in this Article, namely whether to return UST-type oversight of the bankruptcy system to the judiciary. The NAPA study instead focused on the Department of Justice mandate to identify "alternative structures that would rely on greater involvement of the private sector in USTP activities." See NAPA REPORT, *supra* note 3, at 2.

83. See *Senate Hearing*, *supra* note 74, at 62 (statement of Leonard Rosen, Chairman, National Bankruptcy Conference) ("Many of the members participating in our project believe that the U.S. Trustee system has been and is deficient, and that local practice has seriously undermined the goal of a uniform administration of a uniform bankruptcy law.")

84. For an illustration of variations in local rules see, LOCAL R. U.S. D. CT. (C.D. Ill.); LOCAL R. U.S. D. CT. (S.D. Ind.); LOCAL R. U.S. D. CT. (E.D. Mich.); and LOCAL R. U.S. D. CT. (E. & S.D.N.Y.).

85. See generally NORMAN L. PERNICK, BANKRUPTCY DEADLINE CHECKLIST 89 n.4 (1993) (referring to the General Orders/Local Rules for the U.S. Bankruptcy Courts for the District of Delaware).

In some jurisdictions, a court may prefer resolving bankruptcy disputes through court-supervised negotiation rather than litigation. See, e.g., Lisa A. Lomax, *Alternative*

practices and procedures, the UST thus far has preferred uniform national guidelines to localized policies.⁸⁶ In some instances, however, national procedures may not be the best remedy. Indeed, the NAPA report suggests:

The USTs should exercise limited discretion to vary national requirements and to create regional policies when local conditions demand it. . . . [The UST Program] should recognize that the burdens imposed by policy initiatives are more disruptive in some districts than in others, and should permit flexibility in implementing national and regional directives where appropriate.⁸⁷

In most jurisdictions, the bankruptcy bar is relatively small, and judges and practitioners may have simplified local customs. In the Central District of California, panel trustees have not had to seek court approval to pay trustee expenses; instead they have "freely deducted expenses from estates at their own discretion, obtaining court approval only at the end of the case."⁸⁸ The U.S. Trustee responsible for the Central District noted the unique practice but stated that her office, in conjunction with the local bankruptcy court, was reviewing the practice and should "shortly issue a directive substantially curtailing this practice."⁸⁹ She reasons that establishing uniform "standards and ensuring adherence requires infringing, to a degree, on local practice."⁹⁰

b. Effectiveness of the Office—In all of the studies concerning the UST, great attention has been directed at the question of

Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Programs, 68 AM. BANKR. L.J. 55, 70–71 (1994) (citing the recent establishment of court-annexed mediation programs in the bankruptcy courts for the Southern District of California, Middle District of Florida, Eastern District of Virginia, and the District of Oregon). In other jurisdictions, the bankruptcy bar may be so small that many formal procedures are dispensed with in favor of judicial efficiency.

For example, in the Middle District of Pennsylvania, Chief Judge Woodside prefers having counsel meet in his chambers to resolve as many disputes as possible before going into the courtroom to make the official record. This practice apparently has saved many hours of trial. Telephone Interview with John Kelly, Law Clerk to Chief Judge Robert J. Woodside (Oct. 10, 1996).

86. But see NAPA REPORT, *supra* note 3, at 35 (arguing that clear national policies should be developed to ensure uniformity).

87. *Id.* at 35.

88. Marcy J.K. Tiffany, *A Time of Change—A Two-Year Retrospective on the Office of the United States Trustee*, 21 CAL. BANKR. J. 13, 25 (1993).

89. *Id.*

90. *Id.* at 26.

UST effectiveness.⁹¹ The conclusions have varied. The GAO Report⁹² proclaimed that the UST and BA programs were equally effective in obtaining distributions to creditors, with the UST Program slightly more effective in obtaining dividends for unsecured creditors and the BA Program slightly better for secured creditors and priority creditors.⁹³ That same report also concluded that the two systems processed cases with virtually the same speed.⁹⁴ The former chair of the NBC, however, has suggested that the UST is not as effective as it should be.⁹⁵ The chair of the ABA Business Bankruptcy Committee testified at Senate hearings that much criticism of the UST results from "poor judgment exercised by relatively junior persons [within the UST Program] who lack experience in large reorganization[s]."⁹⁶

By most accounts, the UST's charge, in its broadest sense, is to uphold the integrity of the bankruptcy system.⁹⁷ That should involve, among other things, prosecuting bankruptcy fraud.⁹⁸ The UST's vigilance in prosecution, however, appears subject to question. In California's Central District for example, critics have complained that too many people were permitted to file bogus bankruptcy petitions. One newspaper reporter concluded that those "who know the system concede that there are few checks against cheating in consumer bankruptcy, even though statements on bankruptcy filings are made under oath. It is like the IRS trying to enforce honesty in the tax code with no threat of an audit."⁹⁹ A former FBI agent observed, "The chances of being caught for a bankruptcy crime are very slim."¹⁰⁰ Likewise,

91. See *House Hearing*, *supra* note 31 (conducting an oversight hearing on the U.S. Trustee Program).

92. See *supra* text accompanying note 75.

93. See GAO REPORT, *supra* note 48, at 7-9 & tbl.3.

94. See *id.* at 9.

95. See *Senate Hearing*, *supra* note 74, at 62 (statement of Leonard Rosen, Chairman, National Bankruptcy Conference) (commenting that the UST Program will not succeed unless it is well financed and adequately staffed).

96. *Id.* at 107 (statement of Herbert P. Minkel, Jr., Chairman, Legislation Subcommittee of the ABA Business Bankruptcy Committee). Minkel further commented: "No one will be able to satisfy all of the members of the private bar concerning the operations of the U.S. Trustee program. Any time discretion must be exercised by hundreds of government officials concerning . . . sensitive issues [related to reorganization] . . . there will be some disaffected individuals." *Id.* at 108.

97. See *supra* notes 5, 44-45 and accompanying text.

98. See *supra* note 9 and accompanying text.

99. Tom Furlong, *Swamped by Debtors and Abuse*, L.A. TIMES, Jan. 12, 1992, at A1.

100. *Id.* (quoting former FBI Agent William Atherton).

in Seattle, "bankruptcy fraud was a crime that was not usually prosecuted locally" until the U.S. Attorney assigned a special prosecutor to that region to begin filing charges against suspected defrauders.¹⁰¹

Concomitantly, many believe that the UST's bureaucratic growth¹⁰² has not improved significantly the bankruptcy system's integrity.¹⁰³ Consider a 1993 law journal article, authored by then-U.S. Trustee Marcy Tiffany.¹⁰⁴ Reflecting on two years as a U.S. Trustee, she noted one of the more stinging observations made about the UST:

[The UST] Program, which was originally intended to be regionally autonomous in much the way United States Attorneys function, has become increasingly centralized when it comes to policies and procedures. There has, [critics of the UST] lament, been "an over-proliferation of procedures, 'guidelines' and policy manuals, leaning toward the bureaucratic style that Congress wished to avoid."¹⁰⁵

Other critics of the UST, and there are many, suggest that the program was flawed at its inception because Congress "vastly overstated the problems of the former system."¹⁰⁶ A 1992 Federal Judicial Center survey of United States judges revealed that sixteen percent of circuit judges and approximately fifty percent of the bankruptcy judges favor eliminating the UST and returning the agency to the judiciary.¹⁰⁷

Telling comments, however, came from L. Ralph Mecham, Director of the Administrative Office of the United States Courts, in his response to a draft of the GAO report on the UST and the BA programs. Mr. Mecham wrote, "The Judicial Conference of the United States has consistently opposed placement

101. Peter Lewis, *Helmsley-Prosecution Team Member to Zero in on Bankruptcy Fraud Here*, SEATTLE TIMES, May 26, 1992, at B1.

102. See *supra* note 6 and accompanying text.

103. See NAPA REPORT, *supra* note 3, at 60.

104. Tiffany, *supra* note 88.

105. *Id.* at 26. One example of the "overproliferation of procedures," according to some is the UST's practice of reviewing all pleadings in Chapter 7 and Chapter 11 cases. See generally NAPA REPORT, *supra* note 3, at 32 (criticizing trustee oversight as "unduly burdensome" and "overly bureaucratic"). Certain Chapter 7 panel trustees criticize the procedure, arguing that because they are already charged with this function in Chapter 7 cases, for the UST to do the same thing is redundant. See *id.* at 62.

106. NAPA REPORT, *supra* note 3, at 33.

107. See *id.* at 33-34, 37 & n.7.

of oversight of the administration of bankruptcy estates under the Department of Justice. In fact, until 1986 the Department of Justice itself also opposed placement of a permanent nationwide UST program in the Department."¹⁰⁸ Bankruptcy expert Lawrence A. Beck proffered the following criticism in testimony before the House Subcommittee on Economic and Commercial Law:

Notwithstanding the valiant and praiseworthy efforts of the first several United States Trustees in Chicago and New York under the Pilot Program, the UST is not doing its job. Although there are some bright spots, my opinion is that the UST conceives its role to be protector of the lowly, underpaid panel trustee. But, its role is to oversee and regulate the panel trustee. And, panel trustees and their attorneys eventually become some of the wealthiest members of the bankruptcy bar.¹⁰⁹

II. COURT CHALLENGES TO THE UST PROGRAM

In addition to several investigations conducted by the government's legislative and executive branches, the courts have reviewed the UST's activities. In a number of reported decisions, parties (usually Chapter 11 debtors in possession) have challenged the UST's authority to impose guidelines on the debtor or to involve itself in particular disputes within certain bankruptcy cases. These challenges generally concern three broad areas: (1) the UST's inflexible bureaucracy, (2) the UST's efficiency, and (3) the UST's rule-making authority. Additionally, in one recent case, *St. Angelo v. Victoria Farms, Inc.*,¹¹⁰ the debtor raised a constitutional challenge to the collection of fees to support the UST.¹¹¹

108. Letter from L. Ralph Mecham, Director, Administrative Office of the U.S. Courts, to Richard L. Fogel, Assistant Comptroller General, U.S. General Accounting Office 1 (July 15, 1992), reprinted in GAO REPORT, *supra* note 48, at 39.

109. *House Hearing, supra* note 31, at 91 (statement of Lawrence A. Beck, Attorney).

110. 38 F.3d 1525 (9th Cir. 1994), *modified*, 46 F.3d 969 (9th Cir. 1995).

111. *See id.*

A. Constitutional Challenge

In *St. Angelo*, the U.S. Court of Appeals for the Ninth Circuit considered the constitutionality of requiring debtors in UST jurisdictions to pay quarterly administrative fees.¹¹² Specifically, Victoria Farms, Inc., filed a Chapter 11 reorganization and sought to avoid paying the quarterly fee of more than \$4000 to the UST. Victoria argued that because the UST was not present in every federal district (i.e., not in the federal courts in Alabama or North Carolina), the bankruptcy oversight scheme was not uniform.¹¹³ Therefore, Victoria Farms argued, the UST with its added requirement of quarterly fees violated the Uniformity Clause.¹¹⁴ In an interesting decision, the court accepted the debtor's novel argument but rejected the debtor's conclusion. The Ninth Circuit agreed that the existence of two parallel systems did violate the Uniformity Clause.¹¹⁵ Yet, the court did not hold that uniformity could be established by relieving the debtor from paying the UST fees, as Victoria Farms had requested.¹¹⁶ Rather, the court declared the BA Program invalid.¹¹⁷ Relying on *Railway Labor Executives Association v. Gibbons*,¹¹⁸ the court stated: "Congress may enact non-uniform laws to deal with geographically isolated problems as long as the law operates uniformly upon a given class of creditors and debtors."¹¹⁹ Explaining why the BA and the UST provisions do not operate uniformly, the court stated:

It is clear that this is not a provision which has different effects within North Carolina and Alabama due to differences

112. Chapter 11 debtors are required to pay quarterly fees (based on disbursements) to support the UST Program. See 28 U.S.C. § 1930(a)(6) (1994). Originally, the fees were to be collected until the debtor's plan of reorganization was confirmed; effective January 27, 1996, however, the fees are to be paid past the confirmation date until the case is converted or dismissed. 28 U.S.C. § 1930(a).

113. See *St. Angelo*, 38 F.3d at 1529.

114. See *id.* at 1533; see also U.S. CONST. art. I, § 8, cl. 4 (providing, in relevant part, that Congress has the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States").

115. See *St. Angelo*, 38 F.3d at 1531 (noting that the U.S. Trustee Program and its supporting fee structure have not been implemented in Alabama and North Carolina).

116. See *id.* at 1532.

117. See *id.* at 1531-32.

118. 455 U.S. 457, 473 (1982) (noting that enacting a law to govern a particular region is acceptable provided that the law applies "uniformly to a defined class of debtors").

119. *St. Angelo*, 38 F.3d at 1531.

in the laws of these two states. North Carolina and Alabama are the only states given the option to vote to adopt the U.S. Trustee system before the end of the implementation period, and these two states are the only ones that need not implement the system until October 1, 2002. It is federal law, rather than state law, that causes creditors and debtors to be treated differently in North Carolina and Alabama.

. . . .

In this case, however, Congress has provided no indication that the exemption in question was intended to deal with a problem specific to North Carolina and Alabama, nor can we discern such a purpose in the structure of the statute [extending North Carolina's and Alabama's opt out period] or the legislative history of the amendment. Indeed, because creditors and debtors in states other than North Carolina and Alabama are governed by a different, more costly system for resolving bankruptcy disputes, it is clear that [the law] . . . does not apply uniformly to a defined class of debtors.¹²⁰

The Ninth Circuit opinion actually struck down the statutory provisions that enabled the federal courts in Alabama and North Carolina to opt out of the UST Program, even though such a ruling has no binding effect in those federal districts.¹²¹

The practical effect of the Ninth Circuit's decision in *St. Angelo* is that the UST and the BA Programs will continue to operate until a similar challenge is mounted in the Fourth Circuit (containing North Carolina) or the Eleventh Circuit (containing Alabama). Such a challenge is unlikely since the confrontation in *St. Angelo* was over the extra fees that debtors in UST jurisdictions have to pay.¹²² No reasonable debtor in North Carolina or Alabama will object to paying less money to a Bankruptcy Administrator than the debtors in the other forty-eight states pay to a U.S. Trustee.

120. *Id.* at 1531-32 (citation omitted).

121. *See id.* at 1533; *see also* Schulman, *supra* note 31, at 328-29 (questioning whether the Ninth Circuit's action comports with the doctrine of judicial restraint and suggesting that the *St. Angelo* ruling will give rise to litigation within the circuits that do have the BA Program).

122. *See St. Angelo*, 38 F.3d at 1530-31.

The real question is why the *St. Angelo* court chose to involve itself in the UST/BA controversy in the first place.¹²³ Indeed, the dissent remarks:

I do not deny that the issue might have merit for some litigant in some court. Instead, I question the wisdom of a Ninth Circuit panel deciding a constitutional issue which has no effect on the review of the controversy before it, but which will undoubtedly spawn litigation in the federal courts for the districts [in North Carolina and Alabama], and which may result in an intercircuit conflict between the Fourth, Ninth, and Eleventh Circuits. Such a decision is especially unwise where the litigation and conflict engendered may go unresolved for the eight years remaining under Section 317(a) until North Carolina and Alabama finally get United States Trustees.¹²⁴

The answer to this question may lie with the majority concern about the lack of legislative history explaining why Alabama and North Carolina were permitted to opt out of the UST Program and, further, about Congress' failure to acknowledge the separate provisions for Alabama and North Carolina when legislation was passed to expand the UST Program from its pilot status to its present configuration.¹²⁵ In fact, the *St. Angelo* court correctly notes that the only official explanation for the parallel systems appears as anecdotal evidence contained within the GAO report,¹²⁶ which was produced after Congress extended the deadline for Alabama and North Carolina to implement the UST system.¹²⁷

123. Curiously, the *St. Angelo* court chose to consider the constitutional challenge even though the debtor had not raised the issue in the lower courts. See *id.* at 1529 (noting that the issue was "purely a question of law" and within the court's discretion to address). This decision was clearly incongruous with the Ninth Circuit's rule that the court will not consider issues raised for the first time on appeal. See *id.* at 1535 (Poole, J., concurring and dissenting) (citing *Crane v. Arizona Republic*, 972 F.2d 1511, 1520 (9th Cir. 1992), *aff'd*, 1996 U.S. App. LEXIS 33153 (9th Cir. Dec. 16, 1996); *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985)). Moreover, at least one commentator has criticized this opinion as not comporting with traditional notions of judicial restraint. See Schulman, *supra* note 31, at 329 (calling the decision "judicial activism, not judicial restraint").

124. *St. Angelo*, 38 F.3d at 1535-36 (Poole, J., concurring and dissenting).

125. See *id.* at 1529.

126. See GAO REPORT, *supra* note 48.

127. See *id.* at 1529-30.

The real reasons Alabama and North Carolina are not currently participating in the UST Program may never be known. Speculation runs from "dissatisfaction with the operation of the [UST] pilot program in the Northern District of Alabama,"¹²⁸ to pure politics. In any event, the issue of whether the BA is unconstitutional (or, perhaps, whether the UST is unconstitutional) will most likely languish until a debtor in a BA jurisdiction complains that it is paying too little to the bankruptcy system—an unlikely complaint.

B. UST's Inflexible Bureaucracy

A criticism frequently levied against the UST is that it is an inflexible bureaucracy, preferring form over substance.¹²⁹ The NAPA report observed that the UST has become "overly bureaucratic and paperwork-intensive."¹³⁰ The NBC has recommended that the duties and responsibilities of U.S. Trustees be further defined and limited to matters of bankruptcy administration as some U.S. Trustees "have overstepped their role in some cases."¹³¹ One bankruptcy court, in criticizing the UST guidelines regarding reorganization, opined that "[r]ather than assisting debtors in reorganizing as Congress intended, unchecked United States Trustee requirements could frustrate Congressional intentions by torpedoing reorganization efforts with onerous paperwork."¹³²

128. GAO REPORT, *supra* note 48, at 14 (quoting Harold A. Valentine, Associate Director, Administration of Justice Issues); see also *St. Angelo*, 38 F.3d at 1530.

129. In certain instances, however, the UST's hard-line position is warranted. In *In re Interco Inc.*, 130 B.R. 301 (Bankr. E.D. Mo. 1991), the UST objected to the request of Chapter 11 debtors seeking a partial exemption from the requirements of § 345(b) of the Bankruptcy Code, which requires a debtor to provide a bond or security for estate funds not deposited or invested with an institution "insured or guaranteed by the United States or by a department, agency, or instrumentality of the United States." 11 U.S.C. § 345(b) (1994). The UST objected that deposits of money placed with institutions not insured or guaranteed as banks do not comply with § 345(b) and, thus, do not constitute appropriate substitutes for a bond. See *In re Interco Inc.*, 130 B.R. at 303. The UST argued for literal compliance with the statute. The court noted that other courts had interpreted § 345(b) as giving debtors some flexibility, but ultimately rejected the debtors' request. See *id.* at 303.

130. NAPA REPORT, *supra* note 3, at 32.

131. NATIONAL BANKR. CONFERENCE'S CODE REVIEW PROJECT, NATIONAL BANKR. CONFERENCE, REFORMING THE BANKRUPTCY CODE: FINAL REPORT 240-42 (1994) [hereinafter NBC FINAL REPORT].

132. *In re Crosby*, 93 B.R. 798, 805 (Bankr. S.D. Ga. 1988).

The UST is, at times, regarded as an interloper. In *In re Howard Insurance Agency, Inc.*,¹³³ the UST objected to the final account of a panel trustee, alleging that "it was unable to find proper authorization for the [trustee's] disbursements and that the case pleadings, being complicated and voluminous, did not reveal orders of the Court authorizing said disbursements."¹³⁴ In a terse opinion, the court stated: "Being unable to find the orders authorizing the disbursements because of the pleadings being voluminous is a poor, unacceptable reason for such an allegation. It is not the duty of the [panel] Trustee to do the work of the Office of the United States Trustee."¹³⁵ The court denied the UST's objection, chastising the UST for its obvious "lack of communication and/or consideration" for the panel trustee.¹³⁶ Continuing its lambast, the court wrote:

The internal regulation or procedure of the United States Trustee in preventing an individual access to the courts is repugnant to this Court and violates the most fundamental right of any individual to seek access to the Courts. In addition, *this procedure or regulation transcends and supersedes the statutory duties of a Trustee* as set forth in Congressional Acts and Bankruptcy Rules having the force and effect of statutes. The Trustee is not an employee of the United States Trustee's Office but is an officer of the court, an independent entity with responsibilities to creditors and equity security holders.¹³⁷

By way of comparison, the author could not locate a single case wherein a judge or a debtor criticized the BA. In fact, the GAO report comparing the two systems contains many positive references to the BA.¹³⁸

133. 109 B.R. 445 (Bankr. N.D. Okla. 1989).

134. *Id.* at 446.

135. *Id.* at 447.

136. *Id.* at 446-47.

137. *Id.* at 446 (emphasis added). The court relented somewhat in a footnote, acknowledging "the substantial workload of the Office of the United States Trustee" and "their lack of ability to discharge their statutory duties." *Id.* at 447 n.1.

138. See generally GAO REPORT, *supra* note 48, at 6-7 (reporting that the UST was 22% more expensive to operate than the BA); *id.* at 11 (reporting that debtors in BA districts are not subject to the quarterly fees that debtors in UST districts must pay); Schulman, *supra* note 31, at 321 (noting that Alabama and North Carolina bankruptcy judges opted for the BA as an alternative to the UST pilot program in northern Alabama with which they were dissatisfied).

C. UST Efficiency

Some criticize the UST not for its inflexibility; rather they argue that it wastefully expends energy in the pursuit of an illusory principle or ideal.¹³⁹ Despite having offices in almost every federal judicial district, staffed with personnel available to oversee all consumer and business bankruptcies filed therein, the UST has been criticized for its failure to distribute its workload efficiently and to monitor the bankruptcy process appropriately.¹⁴⁰ In fact, the NAPA report found that the "distribution of caseload by staff position varies significantly among UST [field] offices."¹⁴¹

*In re Revco D.S., Inc.*¹⁴² illustrates the inefficient use of UST resources. In this case, the court entered an administrative order, detailing the procedures to be followed for the allowance and payment of interim fees and expenses. The order required all applicants seeking fees to comply with the *Memorandum Regarding Allowance of Compensation for the Bankruptcy Courts of the Northern District of Ohio*.¹⁴³ Several professionals complied with the court's directive, including the law firm of Baker & Hostetler (Baker). Baker submitted an application for interim compensation that detailed more than 11,000 hours of services rendered in the bankruptcy and included documentation of all expenses over twenty-five dollars.¹⁴⁴ The UST objected to Baker's application.¹⁴⁵ Baker moved for sanctions against the UST pursuant to Bankruptcy Rule 9011.¹⁴⁶ The motion was dismissed without prejudice and Baker refiled after the bankruptcy court approved its fee petition.¹⁴⁷ The UST moved to dismiss the renewed motion for sanctions.¹⁴⁸ The bankruptcy court held that the UST, as a represented party, could be sanctioned under Rule

139. Cf. NAPA REPORT, *supra* note 3, at 35.

140. *See id.* at 30-31.

141. *Id.* at 30 (footnote omitted). The NAPA report notes that 13 UST offices oversee 25 or fewer Chapter 11 cases per staff position while 9 offices oversee 100 or more Chapter 11 cases per position. *See id.* The Report goes on to state that the Chapter 7 workload is equally disparate. *See id.*

142. 126 B.R. 741 (Bankr. N.D. Ohio 1991).

143. *See id.* at 743.

144. *See id.*

145. *See id.*

146. *See id.*

147. *See id.*

148. *See id.* at 744.

9011,¹⁴⁹ but the court further held that, in deference to the UST's workload and staffing situation, Rule 9011 sanctions were not appropriate.¹⁵⁰ The court stated,

At the time of the hearing, the UST's office employed three staff attorneys and three paralegals. The three staff attorneys were responsible for reviewing the case load of the Northern District of Ohio. . . . The responsibilities of the UST staff attorneys include reviewing the pleadings in each case sent to the UST's office; reviewing disclosure statements and plans of reorganization and filing comments thereon; reviewing monthly operating reports; generally reviewing the administration of the cases; and reviewing fee applications.¹⁵¹

A more egregious situation existed in *In re Nathurst*,¹⁵² where a Chapter 7 debtor was awarded sanctions against a Chapter 7 trustee and the trustee's attorney for inappropriate actions on the part of the panel trustee.¹⁵³ In *Nathurst*, the debtor was out of state and requested that a scheduled examination (pursuant to Bankruptcy Rule 2004)¹⁵⁴ be postponed.¹⁵⁵ The record indicates that although the examination was canceled, the trustee filed a motion to have the debtor arrested and held based on his failure to appear for examination.¹⁵⁶ The parties reached a compromise by agreeing to reschedule the Rule 2004 examination prior to the court's ruling on the trustee's motion. The trustee moved for apprehension of the debtor (for failing to

149. See *id.* at 747.

150. See *id.* at 749. The UST admitted that it had not reviewed the fee applications in the case on a regular basis; the court found, however, that it was short-staffed, overworked, and had done its best under the circumstances. See *id.*

151. *Id.* (citation omitted).

152. 176 B.R. 599 (Bankr. M.D. Fla. 1994).

153. See *id.* at 601. The sanctions were imposed under FED. R. BANKR. P. 9011, which resembles FED. R. CIV. P. 11.

154. A "2004 examination" is a bankruptcy discovery device, akin to a deposition. FED. R. BANKR. P. 2004 permits the UST or a creditor to inquire into the debtor's financial affairs beyond the questions asked at the first meeting of creditors under section 341 of the Bankruptcy Code.

155. See *In re Nathurst*, 176 B.R. at 600. The *Nathurst* debtor had been interviewed on a previous occasion for more than six hours. *Id.*

156. See *id.* The trustee's affidavit in support of her motion stated that the trustee appeared for the (cancelled) 2004 hearing, notwithstanding the fact that the trustee was clearly aware that the debtor was out of state and notwithstanding the fact that the debtor's counsel requested a continuance. See *id.*

appear at the examination), and the court allowed this motion.¹⁵⁷ Five days before the rescheduled Rule 2004 examination was to take place, the trustee had the debtor placed in custody (out of state) by the U.S. Marshal pursuant to the bankruptcy court's order.¹⁵⁸ Subsequently, the debtor moved to vacate the Order of Apprehension; the request was granted.¹⁵⁹ The continued examination took place, and the debtor sought sanctions against the trustee and trustee's attorney.¹⁶⁰ The court agreed and assessed the trustee and her counsel a \$5000 fine.¹⁶¹

From the reported facts, the UST does not appear to have played *any* role in this trustee's activities, either supportive or critical. Why the UST did not intervene in *Nathurst* is hard to imagine.¹⁶² If someone within the UST had been reviewing the pleadings in *Nathurst*, it seems that she might have informed the trustee that a six-hour creditors' meeting, a Rule 2004 hearing, and a motion to arrest a debtor would not have been necessary. Even if the procedures had been necessary, they would have been causes for concern by the UST as the normal Chapter 7 debtor inquiry consists of one creditors' meeting in which the panel trustee asks four or five basic questions.¹⁶³ *Nathurst* demonstrates that if the UST had executed its watchdog function efficiently not only the debtor but also the bankruptcy system as a whole would have benefited.

In what may be the most disconcerting case, *In re Sharon Steel Corp.*,¹⁶⁴ the UST's intervention had questionable practical implications. There, Sharon Steel, Sharon Specialty Steel, and Monessen, Inc., the debtor, filed reorganizations.¹⁶⁵ The cases were administered jointly and, shortly after the filing, the debtor sought to employ Price Waterhouse as an accountant and financial advisor for the debtor.¹⁶⁶ Price Waterhouse was owed almost \$876,000 for pre-petition services; yet, the bankruptcy court—concerned with the practicalities of facilitating the reorganization—authorized the employment nunc pro tunc to the

157. *See id.*

158. *See id.*

159. *See id.* at 601.

160. *See id.* at 599.

161. *See id.* at 601.

162. *See* NAPA REPORT, *supra* note 3, at 12.

163. *See* 11 U.S.C. § 341 (1994); *see also* BUCHBINDER, *supra* note 16, at 74–75.

164. 152 B.R. 447 (Bankr. W.D. Pa.), *aff'd*, 154 B.R. 53 (Bankr. W.D. Pa. 1993), *rev'd sub nom.* United States Trustee v. Price Waterhouse, 19 F.3d 138 (3d Cir. 1994).

165. *See id.* at 448.

166. *See id.*

filing date and continuing for one additional month.¹⁶⁷ At the continued hearing, only the UST filed an objection to Price Waterhouse's employment, arguing that Price Waterhouse was not disinterested.¹⁶⁸ In fact, the unsecured creditors committee supported the retention of Price Waterhouse and "[b]oth the Committee and the secured lenders acknowledge[d] the difficulty and the prohibitive cost of replacing Price Waterhouse."¹⁶⁹ The court overruled the UST objection.¹⁷⁰

In a thoughtful decision, the bankruptcy court acknowledged that § 327(a) of the Bankruptcy Code requires an accounting firm to be disinterested; the court stated, however, that it must use "common sense when interpreting statutes."¹⁷¹ Judge Bentz wrote:

The Debtor is a fully integrated steel company with annual prepetition sales of \$485,000,000. Price Waterhouse has served as the Debtor's independent auditor since 1991. In connection with their work prior to the bankruptcy filing, Price Waterhouse became intimately familiar with the Debtor's accounting systems, cost structure, inventories, management information systems, and employee benefit plans. . . . [The total] unsecured claims against this Debtor will far exceed \$100 million.

. . . .

Price Waterhouse has stated by affidavit that it will not participate as an unsecured creditor in the Debtor's Chapter 11 case nor will it vote its claim in connection with the confirmation of any plan of reorganization.

. . . .

While some courts do interpret § 327(a) literally, we believe that a more practical view is required which considers the

167. *See id.*

168. *See id.* All professionals hired to provide services for a Chapter 11 debtor must be disinterested. *See* 11 U.S.C. § 327(a) (1994) (requiring that a debtor in possession's ability to choose professionals to assist the debtor be limited to disinterested entities that do not hold or represent any interest adverse to the estate).

169. *In re Sharon Steel Corp.*, 152 B.R. at 448.

170. *See id.* at 450.

171. *Id.* at 449 (quoting *In re Federated Dep't Stores, Inc.*, 114 B.R. 501, 504 (Bankr. S.D. Ohio 1990)).

economic realities of the case and the overriding purposes of Chapter 11 of the Bankruptcy Code. As the Supreme Court stated in *NLRB v. Bildisco & Bildisco*, "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with the attendant loss of jobs and possible misuse of economic resources."

....

The Debtor has no cash to pay a retainer to a new firm and it is unlikely that a new firm could be engaged without a retainer given the serious possibility that this estate will have no funds with which to pay administrative expenses. Further, the Debtor is under tight time constraints to complete its work and present it to the Court.¹⁷²

The court's "practical view" apparently was lost on the UST, which appealed the Bankruptcy Court's decision.¹⁷³ The district court affirmed the bankruptcy court;¹⁷⁴ but the Court of Appeals reversed,¹⁷⁵ employing a strict constructionist reading of § 327(a) of the Bankruptcy Code.¹⁷⁶

The subsequent procedural posture of the *In re Sharon Steel Corp.* case begs an obvious question: What was gained by the UST's action? One may conclude that the successor accounting firm actually cost the bankruptcy estate more money because of its obvious unfamiliarity with the corporations and the joint reorganization.

The bankruptcy judge, the debtor, and the interested creditors in *Sharon Steel Corp.* seemingly had a better understanding of the realities of reorganization practice than the UST. Replacing an accounting firm in a complicated Chapter 11 filing is costly, and the debtor in possession did not have much money. Likewise, replacing an accounting firm takes time, which the debtor, like all reorganizing debtors, lacked as well. Without a doubt, the UST ultimately was vindicated by the Third Circuit, but the

172. *Id.* at 448-50 (citation omitted).

173. *See In re Sharon Steel Corp.*, 154 B.R. 53 (Bankr. W.D. Pa. 1993).

174. *See id.* at 56.

175. *See United States Trustee v. Price Waterhouse*, 19 F.3d 138 (3d Cir. 1994).

176. In reversing the district court, the court of appeals stated, "As the Supreme Court and our court have repeated many times in recent years, when statutory language is clear and unambiguous it ordinarily must be followed. Here, the relevant statutory provisions are clear and unambiguous." *Id.* at 141 (citations omitted).

UST's action did little to "protect and preserve the integrity of the bankruptcy system."¹⁷⁷ The UST's objection, particularly in the absence of other opposition, required the expenditure of precious time and money, which stands in stark contrast to its obligation to promote a "just, speedy and economical resolution."¹⁷⁸

D. The UST's Rule-Making Authority

By far, the greatest number of reported judicial decisions concern the UST's ability to promulgate and to enforce administrative rules in Chapter 11 reorganizations. The UST provides these rules, known as Operating Guidelines and Reporting Requirements for Debtors in Possession and Trustees (Guidelines), to panel or standing trustees and to Chapter 11 debtors in possession¹⁷⁹ at the start of a case.¹⁸⁰ The Guidelines provide a list of specific requirements imposed on all trustees and debtors in possession and their counsel.¹⁸¹ The requirements range from simple (providing a list of the twenty largest unsecured creditors,¹⁸² suggesting a meeting with a UST representative prior to the first meeting of creditors,¹⁸³ and providing copies of the debtor's most recently audited and unaudited financial reports¹⁸⁴) to complex (providing complicated monthly operating reports in a specified form¹⁸⁵ and writing a "Business Planning Statement" containing a narrative of how the debtor's financial affairs deteriorated and of the debtor's expectations of the future¹⁸⁶) to burdensome (closing all banking accounts and opening new ones with "debtor in possession" imprinted on all

177. See Mission Statement of the Office of the UST, *reprinted in* NAPA REPORT, *supra* note 3, at 5.

178. See *id.*

179. In Chapter 11 cases where no trustee has been appointed, the debtor in possession remains in control of the estate and is given most of the rights, powers, and duties of a trustee. See 11 U.S.C. § 1107 (1994).

180. See *In re Crosby*, 93 B.R. 798, 807-22 (Bankr. S.D. Ga. 1988) for an example of the UST's Operating Guidelines and Reporting Requirements for Debtors in Possession and Trustees (Guidelines).

181. See *id.*

182. See *id.* at 807.

183. See *id.*

184. See *id.* at 809.

185. See *id.* at 808.

186. See *id.* at 810.

checks¹⁸⁷). Moreover, these Guidelines do not differentiate between large corporate reorganizations and small mom and pop reorganizations.¹⁸⁸

Predictably, debtors in possession and other interested parties have challenged the UST's authority to involve itself in some aspects of bankruptcy administration.¹⁸⁹ In some cases, courts have sided with the debtors, thus limiting UST authority.¹⁹⁰

The UST maintains that the Guidelines are mandatory and that deviations therefrom are acceptable only when the UST gives advance approval upon written application.¹⁹¹ The courts, however, do not necessarily share this view.¹⁹² In *In re Gold Standard Banking, Inc.*,¹⁹³ for example, the court held that the Bankruptcy Code provisions imposing reporting requirements do not authorize specifically the Guideline requirement that all debtor in possession checks bear the designation "Debtor In Possession."¹⁹⁴ The court held additionally that, pursuant to the Administrative Procedure Act,¹⁹⁵ the UST had not issued the check-modification requirement properly and that the requirement, therefore, did not bind the court.¹⁹⁶ The court opined that

as a result of the absence of either an express or implied statutory duty . . . on the Debtor to imprint its checks, or a correlative enabling statute or rule, and in the absence of a federal regulation authorizing the UST to so require, the

187. *See id.* at 808.

188. The Guidelines make no allowance for businesses with smaller workforces, fewer resources, and less sophistication. For example, the Guidelines require complicated financial documents to be filed with the UST regularly and in a particular format. *See id.* at 807-22 (appending the Guidelines in effect in Georgia). Yet, small businesses often lack in-house accountants and computer programs to present the financial statements in a format acceptable to the UST, thereby requiring the businesses to incur the costs of new software, new personnel training, or outside assistance. *See* Leif M. Clark, *Chapter 11—Does One Size Fit All?*, 4 AM. BANKR. INST. L. REV. 167, 176-77 (1996) (citing a proposal to reduce the financial costs and wasted time of small debtors by streamlining small business reorganizations).

189. *See, e.g., infra* notes 198-210 and accompanying text.

190. *See generally In re Crosby*, 93 B.R. at 802 (providing a particularly stinging rebuke of the UST's position regarding its Guidelines).

191. *See id.* at 807.

192. *See, e.g., In re Johnson*, 106 B.R. 623, 624 (Bankr. D. Neb. 1989) (denying the UST's request to require debtor in possession to imprint checks with "Debtor In Possession," and holding that the UST Guidelines did not carry the force or effect of law and were therefore not legally binding upon the debtor).

193. 179 B.R. 98 (Bankr. N.D. Ill. 1995).

194. *See id.* at 102.

195. *See* 5 U.S.C. § 551 (1988).

196. *In re Gold Standard Banking*, 179 B.R. at 105-06.

Court concludes that the requirement . . . lacks the binding effect of law to be enforceable.¹⁹⁷

Another example of a UST and debtor in possession dispute appears in *In re Crosby*.¹⁹⁸ In this case, the UST moved to convert a Chapter 11 case to a Chapter 7 liquidation because the debtor did not comply with the UST's requirements.¹⁹⁹ Specifically, the UST alleged that the debtor, the owner of a mom and pop retail pharmacy, failed to maintain bank accounts, failed to provide proof of insurance, failed to file an inventory with the UST, failed to file a real estate questionnaire or a "Business Planning Statement," and had not filed monthly operating reports until the morning of the hearing on the motion to convert.²⁰⁰

The court acknowledged that the failure to file monthly reports until the morning of the hearing constituted grounds for dismissal, but declined to dismiss the case so early in the reorganization on that ground alone.²⁰¹ The court then looked at the reasonableness of the UST requirements and stated that they were burdensome and unnecessary in the case of this small operation.²⁰² Continuing, the court held that the requirements

have not obtained the blessing of this or any other court as mandatory, court ordered or approved requirements. While they may be extremely useful to the United States Trustee, the Debtor, and creditors in the case, and while debtors may voluntarily comply with them, the determination of whether a failure to comply carries with it any penalty is a matter solely for judicial determination.²⁰³

197. *Id.* The debtor argued that the UST's requirement lacked statutory authority under 11 U.S.C. § 586(a) (1994) (governing U.S. Trustee duties). *See In re Gold Standard Banking*, 179 B.R. at 101. The court was persuaded, in part, because no Department of Justice regulations governed the operations of debtors in possession in Chapter 11 cases. *See id.* at 101-02 (citing 28 C.F.R. §§ 58.1-5 (1994)). The court went on to describe the more typical procedure followed by federal agencies seeking to bind the public with regulations that have the force of law, stating that the agencies, "normally must promulgate 'legislative rules' made in accordance with the notice and comment procedures specified by Section 553 of the Administrative Procedure Act." *Id.* at 105 (footnote and citation omitted).

198. 93 B.R. 798 (Bankr. S.D. Ga. 1988).

199. *See id.* at 800.

200. *See id.* at 805.

201. *See id.* at 805-06. The court did, however, order the debtor to fulfill that obligation in a timely fashion. *See id.*

202. *See id.* at 804-05.

203. *Id.* at 802.

The court refused to approve identical UST requirements in all cases and likened such a carte blanche approval to an abdication of judicial responsibility, especially in reorganization cases involving small businesses.²⁰⁴

In *In re HSSI, Inc.*,²⁰⁵ the UST claimed that the Chapter 11 debtor underpaid its UST fees.²⁰⁶ The debtor disagreed, challenging the UST's definition of "disbursement," upon which trustee's fees are calculated.²⁰⁷ At the hearing, the UST argued that the court "must defer to its [the UST's] interpretation of 'disbursement' in 28 U.S.C. § 1930 because the UST is responsible for administering the assessment of statutory fees under that section."²⁰⁸ The court declined to adopt the UST's interpretation, stating that it was not required to adopt the UST's definition of a term simply because the agency is responsible for administering bankruptcy statutes and regulations.²⁰⁹ The court ruled in favor of the debtor, finding the UST's definition overly burdensome to the debtor.²¹⁰

In some instances, the UST's actions appear nothing more than overzealous safeguarding of the bankruptcy system's integrity. Other times, however, the UST's staff members appear to have been so bound by either the Guidelines or by the precise words of a Bankruptcy Code that they have forgotten that the bankruptcy court is a court of equity²¹¹ often preferring flexibility and efficiency over formality.

The legal effect of the Guidelines notwithstanding, courts occasionally do rely on a failure to comply with the Guidelines as a basis on which to dismiss or to convert a particular case.²¹² Reliance on the Guidelines in this fashion, however, is the subject of some confusion. Sometimes the relationship between

204. See *id.* at 805.

205. 176 B.R. 809 (Bankr. N.D. Ill. 1995), *rev'd on other grounds*, 193 B.R. 851 (N.D. Ill. 1996).

206. See 28 U.S.C. § 1930(a)(6) (1994).

207. See *In re HSSI*, 176 B.R. at 810.

208. *Id.* at 813.

209. See *id.* (noting that several qualifications limit the deference a court must give to an agency's interpretation of a statute that the agency is responsible for administering).

210. See *id.* at 815. On appeal, after adopting a definition of "disbursement" different from that of the Bankruptcy Court or the UST, the district court reversed on separate grounds. See *In re HSSI, Inc.*, 193 B.R. 851 (N.D. Ill. 1996).

211. See *Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1498 (1995) (noting that bankruptcy courts have the power to issue equitable decrees); *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) (referring to the bankruptcy court's "equitable power").

212. See, e.g., *In re McClure*, 69 B.R. 282, 290 (granting motion for dismissal); *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 986 (granting motion to convert).

the failure to adhere to the Guidelines and the court action is clear; occasionally, one is left to speculate as to the true reason. For example, in *In re Wilkins Investment Group, Inc.*,²¹³ the bankruptcy judge dismissed a Chapter 11 reorganization where the debtor failed to file monthly operating reports, even though the applicable Code section did not specifically mention the failure to file operating reports as cause for dismissal.²¹⁴ In *In re Roma Group, Inc.*,²¹⁵ the Southern District of New York held that the debtor in possession's failure to file monthly operating statements as the local rules and the Guidelines required "undermines the Chapter 11 process and constitutes cause for dismissal or conversion of Chapter 11 proceedings."²¹⁶ But upon a close reading of *Roma Group, Inc.*, the promulgation of a local rule concerning monthly operating statements—actually not the Guidelines—appears to have given rise to the threat of conversion or dismissal.²¹⁷

The foregoing cases suggest that, on occasion, the Guidelines themselves will suffice as a basis for sanctioning a debtor. At other times, however, courts seem to give local rules and standing orders bearing on the same or related issues greater weight. As a result, the UST not only should have clearly defined standards, but also should provide information to debtors and

213. 171 B.R. 194 (Bankr. M.D. Pa. 1994).

214. The relevant statute provides 10 facts that entitle a U.S. Trustee to convert or dismiss a case for cause. See 11 U.S.C. § 1112(b) (1994). Section 1112(b) constitutes a non-exclusive list, which stresses the particular importance of the monthly reports to the creditors. See *In re Wilkins Inv. Group*, 171 B.R. at 196-97; see also *In re Berryhill*, 127 B.R. 427, 430 (Bankr. N.D. Ind. 1991) (dismissing case because debtors failed to comply with court order requiring them to complete a reorganization plan, to file federal tax returns, and to file monthly reports); *In re McClure*, 69 B.R. 282, 289 (Bankr. N.D. Ind. 1987) (dismissing case because debtor failed to cooperate with secured creditors, to file a reorganization plan, and to file monthly statements); *In re Modern Office Supply, Inc.*, 28 B.R. 943, 945 (Bankr. W.D. Okla. 1983) (converting case for failure to provide financial data required by court order).

215. 165 B.R. 779 (S.D.N.Y. 1994).

216. *Id.* at 780.

217. Likewise, in *In re Cohoes Indus. Terminal, Inc.*, 65 B.R. 918 (Bankr. S.D.N.Y. 1986), the court held that debtor's failure to comply with the Guidelines was sufficient cause for the appointment of a trustee rather than conversion. See *id.* at 922. In addition to failure to follow the Guidelines, however, several other factors supported the appointment of a trustee—including failure to file schedules of assets and liabilities, failure to obtain insurance, failure to pay rents as they became due, and failure to propose a plan of reorganization. See *id.* at 921. Numerous conflicts of interest affected the case, as the debtor, its lessor, and the mortgagee of the debtor's real estate were all related entities. See *id.* at 920. The debtor also failed to make any "real progress" during the five-month period between the filing and the petition giving rise to the instant decision. See *id.* at 919.

to other interested parties enabling them to understand which Guidelines are mandatory and which are precatory.

III. THE UST'S FUTURE

A. Reforming the UST: Proposals

In 1988, the NBC undertook a comprehensive review of the Bankruptcy Code's first ten years of operation.²¹⁸ The NBC's Review Project issued a final report in 1994 recommending the following improvements for the UST Program: (1) the Attorney General should establish a national policy for the administration of bankruptcy cases; (2) the UST's duties and responsibilities should be further defined and limited to restrict its involvement to matters of bankruptcy administration; (3) the UST should be required to serve as case trustee in Chapter 7 cases in which a private trustee willing to serve cannot be found; (4) the fees of Chapter 7 trustees should be increased; and (5) section 327(d) of the Bankruptcy Code should be amended to permit a trustee to act as his own attorney but not to hire the law firm for which he works.²¹⁹

Most of NBC's recommended changes have received little attention and have not been adopted.²²⁰ Even if adopted, it is doubtful that the suggested changes would affect the UST's operating costs. Arguably, the NBC's changes actually could increase the overall cost of the UST because of the suggested increase in fees for the private trustees.

Joseph Patchan, Director, Executive Office of the United States Trustee, has also addressed the issue of UST reform. He said that—as a result of the studies referenced in this article²²¹—the UST would be “thinning out some of [its] audit

218. See NBC FINAL REPORT, *supra* note 131.

219. See *id.* at 239–48.

220. As of October 22, 1995, the Chapter 7 filing fee increased from \$160 to \$175. See 28 U.S.C. § 1930(a) (1995). Congress also authorized the Judicial Conference to raise funds through fees prescribed for notices of appearance, fees to be charged against distribution in existing cases, and fees of the kind prescribed under 28 U.S.C. § 1914(b) (1994). See generally A.B.A., THE BANKRUPTCY REFORM ACT OF 1994: WHAT YOU NEED TO KNOW NOW! 33–34 (1994).

221. See *supra* Part I.E.1.

functions.”²²² He has reported that the UST “will be testing the privatizing of some of [its] work”²²³ and stated that he will recommend to the Bankruptcy Commission²²⁴ and to Congress that the UST regions be expanded to conform to the geographical boundaries of the United States Courts of Appeals, thereby reducing the number of U.S. Trustees from twenty-one to eleven.²²⁵

The Director’s comments regarding the UST’s privatization are interesting in light of the fact that an express purpose of the NAPA report was to study the feasibility of privatizing the UST.²²⁶ The NAPA report rejects total privatization in favor of either streamlining the organization and keeping it within the DOJ or converting the program to a government corporation with greater administrative flexibility and limited private contracts.²²⁷ Moreover, the study recommends privatizing a minimal number of functions.²²⁸ The NAPA reforms not only include partially privatizing some administrative functions of the UST but also address some substantive concerns. The NAPA report calls for changes in the focus of the program, and the study recommends that the UST “implement a number of streamlining measures both to its organization and its operations, including eliminating the regional layer [of administration] and consolidating field

222. Joseph Patchan, Director, Executive Office of the UST, Address at the Tri-State Bankruptcy Symposium 6 (Nov. 10, 1995) (transcript on file with the *University of Michigan Journal of Law Reform*) [hereinafter *Patchan Address*].

223. *Id.*

224. Congress established the Bankruptcy Review Commission as part of the Bankruptcy Reform Act of 1994. Pub. L. No. 103-394, § 601, 108 Stat. 4107, 4147 (1994) (codified as amended at 11 U.S.C. § 101 (1994)). The duties of the Bankruptcy Review Commission are:

- (1) to investigate and study issues and problems relating to title 11, United States Code (commonly known as the “Bankruptcy Code”);
- (2) to evaluate the advisability of proposals and current arrangements with respect to such issues and problems;
- (3) to prepare and submit to the Congress, the Chief Justice, and the President a report [not later than 2 years after the date of its first meeting]; and
- (4) to solicit divergent views of all parties concerned with the operation of the bankruptcy system.

Id. at 4147.

225. See *Patchan Address*, *supra* note 222, at 6.

226. See NAPA REPORT, *supra* note 3, at ix.

227. See *id.* at 53.

228. See *id.* at 59–60 (suggesting the debt collection and financial monitoring functions could be contracted out to private firms).

offices. In addition, the panel believes some program functions can be . . . reduced in scope."²²⁹

B. Expanded Bankruptcy Administrator Program

Although the NAPA report did not undertake a comparison of the UST and the BA programs, enough other information exists to speculate on the success of an expanded BA Program.²³⁰ Notwithstanding that the *St. Angelo* court declared unconstitutional the extension of time for the federal courts in Alabama and North Carolina to join the UST system,²³¹ one could argue that the Ninth Circuit should have struck down the UST and required that the BA be expanded nationwide. The BA Program is more popular among its constituents than the UST Program is among its constituents.²³² Moreover, the BA is arguably the more cost-efficient program.²³³ *St. Angelo* held that the BA Program was unconstitutional under the Uniformity Clause because Congress created it without providing any indication that the special treatment reserved for the federal districts in Alabama and North Carolina was intended to deal with a problem specific to those two states.²³⁴ The court's analysis may have stopped too soon. Creating a new system because of a belief that the existing system is not effective, or at least is not as effective as it could be, is certainly not inappropriate. That is exactly why the BA Program was created. The legislative history of the act creating the program indicates that the BA was established to respond to the dissatisfaction of certain Alabama bankruptcy

229. *Id.* at 53.

230. See, e.g., GAO REPORT, *supra* note 48, at 4-16; Schulman, *supra* note 31, at 319-24.

231. See *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1532 (9th Cir. 1994), *modified*, 46 F.3d 969 (9th Cir. 1995); see also *supra* notes 112-24 and accompanying text.

232. Cf. NAPA REPORT, *supra* note 3, at 35 (noting that a large segment of the bankruptcy community is reluctant to accept intervention by the UST); Schulman, *supra* note 31, at 321 n.20 (characterizing George S. Wright, Chief Bankruptcy Judge for the Northern District of Alabama, as an ardent supporter of the BA).

233. See *St. Angelo*, 38 F.3d at 1531-32 (referring to the UST as a "more costly system for resolving bankruptcy disputes"). The Administrative Office of U.S. Courts estimates that the BA is more efficient than the UST and would save \$18 million to \$22 million annually. See Schulman, *supra* note 31, at 323.

234. See *St. Angelo*, 38 F.3d at 1531-32.

judges and others who had operated under the UST when it was a pilot program within that state.²³⁵

The solution should not be to strike down the BA Program; it works well and, by most accounts, remedies the problems of the UST. Rather, the solution should be to strike down the disfavored, more expensive system. The record laid out in this Article clearly indicates that the BA is the better system²³⁶ and that the UST Program should be eliminated.

The *St. Angelo* court erred in declaring the BA unconstitutional; rather, it should have found the UST Program unconstitutional.²³⁷ As an alternative, the court could have stayed a decision regarding the constitutionality of either system until Congress had a reasonable opportunity to decide which program to require in all federal districts.

One explanation for the BA's superior efficiency is that it is part of the government's judicial branch. Placing the agency charged with overseeing the bankruptcy system within the judiciary seems logical. From a practical perspective, doing so would avoid the currently duplicative efforts of the UST Program and the judiciary with regard to case management²³⁸ as

235. See Schulman, *supra* note 31, at 321 & n.21.

236. Cf. *id.* at 320 (commenting that the Attorney General's report concerning the UST was only "generally favorable,"); Letter from L. Ralph Mecham, Director, Administrative Office of U.S. Courts, to Richard L. Fogel, Assistant Comptroller General, U.S. General Accounting Office (July 15, 1992), reprinted in GAO REPORT, *supra* note 48, at 40 (opining that the BA was superior to the UST Program and calling for the BA to be expanded into UST districts).

237. The practical effect of the Ninth Circuit decision, however, is minimal as the BA does not exist in any federal court within the Ninth Circuit.

238. The National Bankruptcy Conference recommends that either Title 11 or Title 28 of the U.S. Code be amended to limit the role of the UST, especially in those instances where private trustees or creditors' committees exist. See NBC FINAL REPORT, *supra* note 131, at 240-41.

The UST's involvement in matters other than bankruptcy administration cannot be explained reasonably when creditors' committees and/or private trustees are present in a case. One could argue that, even in the face of acquiescence by all of the other interested parties, the UST has an independent duty to safeguard the bankruptcy system. If, however, the parties (who are supervised by a judge) receive a pleading and choose not to oppose the requested action, the system is not harmed. Rather, the system works as it was designed to work: all parties involved in a dispute receive notice and an opportunity to be heard regarding the subject matter. Those parties who rest on their rights will likely have the matter in question resolved against them, but that does not harm the bankruptcy system. Consequently, in these cases where the interests at stake are adequately represented should be curtailed. Cf. *United States Trustee v. Price Waterhouse*, 19 F.3d 138, 140 (3d Cir. 1994) (where the UST was the only party objecting to the alleged bias of the debtor's accountant, ultimately costing the estate considerable time and money to replace said accountant).

well as information gathering and storage.²³⁹ From a more theoretical perspective, doing so would eliminate separation of powers issues²⁴⁰ and avoid conflicts of interest in cases where the DOJ represents the United States as a creditor in bankruptcies.²⁴¹

The BA is not, however, without drawbacks. The Judicial Conference Regulations give each Administrator the power to hire as many secretarial, clerical, or other assistants as necessary²⁴²—thereby creating the potential for an unwieldy bureaucracy similar to that currently encumbering the UST program. Moreover, just like the UST Program, the BA Program requires copies of nearly every pleading filed in every bankruptcy case, including pleadings that are not always necessary for monitoring the debtor's case and that are always available from the clerk of the court.²⁴³ These two facts alone give reason to believe that the BA's destiny is that of a lumbering bureaucracy.

239. Currently, debtors and other interested parties are required to provide not only the Clerk of the Court with copies of pleadings (for the court and for the private trustees) but also the UST because the UST maintains separate files and storage facilities. Many of the documents currently provided to the UST could be eliminated if the agency were part of the judicial branch. Similarly, incorporating the UST into the judicial branch could eliminate the need for duplicative information storage systems, thereby reducing the staff necessary to gather, docket, and store files, further reducing the agency's operation costs. Additionally, the courts and the UST maintain duplicative automations systems, which, if consolidated, could save approximately \$1.4 million per year. See NAPA REPORT, *supra* note 3, at 63. The NAPA noted that a poor working relationship between the UST and the courts "affects data and information sharing, generates duplicate analysis of trustee reports, and breeds distrust in a number of districts". *Id.* at 34. Arguably, if both the UST and the courts existed within the judicial branch, this relationship would improve.

240. See *id.* at 34; see, e.g., *United States v. Wood*, 161 B.R. 17, 20-21 (D.N.J. 1993) (considering whether the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, which took away from the courts the power to appoint trustees, also removed the power of the bankruptcy court to review the fees set by the Attorney General for private trustees); cf. *In re Marriott*, 156 B.R. 803, 805 (noting that Congress vested the executive branch with authority to set trustees fees and "thereby eliminated the judiciary's role in overseeing compensation for such trustees").

241. See NAPA REPORT, *supra* note 3, at 34. In its present form, the UST is an agency within the Department of Justice. See *id.* at 1. Consequently, the Department of Justice (through the UST which is supposed to be a neutral party within bankruptcy) oversees cases in which the United States is a creditor and represented by the U.S. Attorney's Office (also within Department).

242. See JUDICIAL CONFERENCE REGULATIONS, *supra* note 3, at I-14.

243. See *id.* at II-I-2.

C. Another Model: The Private Trustee

Notwithstanding the foregoing proposals for replacing the UST, there is, perhaps, another model that could provide case oversight of Chapter 11 bankruptcies without the current level of bureaucracy.

Consider Chapter 12 farm reorganizations: here a private trustee with limited authority is responsible for receiving and disbursing the debtor's plan payments, but she does not assume responsibility for operating the family farm.²⁴⁴ Because Chapter 12 is a hybrid of Chapters 11 and 13, the duties of the trustee are unique: the trustee monitors the debtor's progress (as the UST or BA would do in Chapter 11) and the trustee pays the creditors pursuant to the debtor's plan (as a standing trustee would in Chapter 13).²⁴⁵ There is every reason to believe that such an officer could assist the court and uphold the integrity of the bankruptcy system in a Chapter 11 reorganization.

These trustees would have no responsibility to manage the debtor's affairs unless appointed by the court,²⁴⁶ but they would be charged with reporting oversight. More accurately, each trustee's function would be to maintain regularized communication with the debtor in possession and the creditors' committee(s) to ensure compliance with filing deadlines and court orders, and to work consistently toward a successful reorganization.

Specifically, the private trustee assigned to a reorganization would conduct the first meeting of creditors pursuant to section 341 of the Bankruptcy Code (but not be required to pay the debtor's creditors),²⁴⁷ meet regularly with the debtor in possession to chart the debtor's financial progress, and mediate disputes between the debtor in possession and the creditors,

244. See BUCHBINDER, *supra* note 16, at 324; see also BRIAN A. BLUM, BANKRUPTCY AND DEBTOR/CREDITOR: EXAMPLES AND EXPLANATIONS 153-54 (1993) (explaining that the trustee is concerned with investigating the debtor's affairs and making recommendations on the debtor's plan while the debtor continues farming operations under the trustee's supervision).

245. See BUCHBINDER, *supra* note 16, at 324.

246. The court would appoint a trustee pursuant to the Bankruptcy Code. See 11 U.S.C. § 1104 (1994) (detailing the reasons for and process of appointing a trustee).

247. In cases filed under Chapters 7, 12, and 13 of the Bankruptcy Code, private trustees currently conduct the section 341 meetings. The UST or the BA conducts them in cases filed under Chapter 11. See NAPA REPORT, *supra* note 3, at 14-16.

especially those serving on the unsecured creditors' committee.²⁴⁸ She would be responsible for making sure that all deadlines are met and for bringing to the court's attention any irregularities or impediments to confirming a plan that might exist. The debtor, however, would still be responsible for operating its business, complying with the requirements of the court and the Bankruptcy Code, and carrying out the terms of its confirmed plan of reorganization.

The infrastructure necessary to facilitate the use of private trustees in Chapter 11 cases would be far less complicated than that in either the UST or BA systems. Each judicial district could appoint one court administrator, whose responsibilities would include selecting all of the private and standing trustees, supervising their conduct, auditing their books and records periodically, appointing creditors' committees, and reporting to the chief bankruptcy judge of each district.²⁴⁹ Each district division would employ a reasonable number of staff persons to assist the court administrator. Employing dozens of analysts and assistants to review reams of paper from every Chapter 11 filed and to second-guess the actions of every debtor's counsel would be unnecessary. The private trustee appointed to a particular case would be responsible for day-to-day oversight,

248. The notion of a trustee being authorized to mediate a dispute may be novel; however, one suspects that panel and standing trustees involve themselves, informally, in disputes between debtors and creditors all of the time. Moreover, the Bankruptcy Rules provide a mechanism for approving compromises and for employing at least one form of alternative dispute resolution in a bankruptcy context:

(a) **Compromise.**

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

(b) **Authority to Compromise or Settle Controversies within Classes.**

After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.

(c) **Arbitration.**

On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.

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249. To avoid the resurrection of charges of bankruptcy judges exercising too much influence over the selection and supervision of trustees, courts of appeals could appoint the court administrators to serve for a specified number of years.

accommodating local practices, and tailoring the level of oversight to each division and to each case. Moreover, filing additional copies of pleadings with the court administrator would be unnecessary because the private trustee would have copies of all pleadings just as the private trustee does in cases filed under Chapters 7, 11, 12, and 13 of the Code. Extra document copies for the UST's analysis and/or auditors would no longer be necessary.

This "decentralized oversight" model addresses the concerns of those who criticize the UST for its lack of attention to variations in local practice, and might even reduce the total number of copies of petitions, motions, objections, etc. that are filed for the purpose of keeping the central office of the UST or the BA informed.²⁵⁰ In addition, the introduction of private trustees might be an asset to a reorganizing debtor, provided that the court administrator seeks to employ trustees who have some skill or expertise in the debtor's business area. For example, if the debtor in possession is a retail outfit, a trustee could be selected who has some experience with the operation of a retail business. That way, the trustee has some insight as to the debtor's operation and may be in a better position to anticipate problems than if the trustee had no such expertise.

The concept of using a court administrator to oversee Chapter 11 activity has not been studied; consequently, no data detail how expensive such a program would be to construct and operate.²⁵¹ Likewise, no studies have been conducted to estimate how much it would cost to dismantle the UST and BA programs, should a "court administrator" program be implemented. Such research is clearly necessary before serious efforts are made to institute a new program. Based on the studies conducted thus far, however, it would appear that a decentralized system of private trustees supervised by a court administrator in each judicial district would maintain the integrity of the bankruptcy system, improve efficiency of the administrative oversight in Chapter 11 cases, and reduce the mounting filing fees that currently subsidize the UST.²⁵²

250. See, e.g., JUDICIAL CONFERENCE REGULATIONS, *supra* note 3, app. A at I; NAPA REPORT, *supra* note 2, at 62.

251. Although exact funding sources would have to be ascertained, conceivably, the private trustees and the court administrator positions could be funded from the UST's portion of the Chapter 11 filing fee and some or all of the Chapter 11 quarterly fees that debtors in possession currently pay.

252. Cf. NAPA REPORT, *supra* note 3, at 53-59 (presenting an alternative structure that includes reducing management, contracting out debt collection services, and adjusting financial monitoring practices).

CONCLUSION

Congress created the UST Program for a respectable purpose: to rid the bankruptcy system of cronyism and "good ol' boy" networking and self-dealing.²⁵³ With the UST Program, Congress also hoped to remove from bankruptcy judges most of the administrative details with which they were embroiled prior to the UST's establishment.²⁵⁴ The idea was laudable, but the result has been to create a huge bureaucracy that is expensive to operate and which may not be as effective as everyone had hoped.²⁵⁵

Based, in part, on the experiences of those federal judicial districts participating in the pilot UST Program, the district courts in Alabama and North Carolina opted out of the UST Program.²⁵⁶ Instead, these districts implemented a competing program: the BA.²⁵⁷ The BA seems to work as effectively as the UST Program, and accomplishes the same goals. The BA Program, however, does so at lower cost.²⁵⁸ Yet, the BA Program is not without its detractors. Most notably, the Ninth Circuit has declared that the system is unconstitutional.²⁵⁹ Undaunted, the BA Program continues to operate within Alabama and North Carolina.

Perhaps it is time for Congress to take a closer look at the BA Program. The Ninth Circuit was correct in determining that having two competing agencies of bankruptcy oversight is unconstitutional under the Uniformity Clause of the U.S. Constitution.²⁶⁰ The court was incorrect, however, in declaring that the BA Program should be eliminated. The BA enjoys greater popularity among the judges, bankruptcy practitioners, and creditors subject to its authority, and it is less costly to operate. The BA, however, has the potential to become a massive bureaucracy like the UST.

As an alternative, expanding the use of private trustees in Chapter 11 cases, so as to mimic the role of private trustees in

253. See NAPA REPORT, *supra* note 3, at ix.

254. See *id.* at 1.

255. See *id.* at 29-35.

256. See *id.* at 1.

257. See GAO REPORT, *supra* note 48, at 1.

258. See Schulman, *supra* note 47, at 124.

259. See *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1529, 1531-32 (9th Cir. 1994), *modified*, 46 F.3d 969 (9th Cir. 1995); *supra* notes 115-21 and accompanying text.

260. See U.S. CONST. art. I, § 8.

Chapter 12 farm reorganizations, should be given serious thought. The private trustee could assist the debtor in possession in dealing with the court and creditors. The trustee, if chosen properly, might even provide the debtor with some substantive expertise to aid in the reorganization. Furthermore, the private trustee could continue to serve a watchdog function, requiring the debtor to adhere to all court deadlines and to abide by the terms of the plan of reorganization.

A streamlined office led by a court administrator could supervise the Chapter 11 trustee, as well as other trustees. This administrator would oversee assistants (who would be appointed in each division of every district), while selecting and monitoring the activities of all of the private trustees operating within the bankruptcy system.

Regardless of which model is proposed for the future, it appears that shifting emphasis away from the current UST Program could reduce noticeably the bankruptcy system's operating costs. This reduction in costs would yield a savings to debtors who operate within the system. This savings, ideally, would yield greater dividends to creditors.