

PRIVATE TRUSTEE REFORM ACT OF 1997

JULY 31, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GEKAS, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 2592]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2592) to amend title 11 of the United States Code to provide private trustees the right to seek judicial review of United States trustee actions related to trustee expenses and trustee removal, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SUSPENSION AND TERMINATION OF PANEL TRUSTEES AND STANDING TRUSTEES.

Section 586(d) of title 28, United States Code, is amended—

(1) by inserting “(1)” after “(d)”, and

(2) by adding at the end the following:

“(2) A trustee whose appointment to the panel or as a standing trustee is terminated or who ceases to be assigned to cases filed under title 11 may obtain judicial review of the final agency decision by commencing an action in the United States district court for the district in which the panel member or standing trustee resides, after first exhausting all available administrative remedies, which if the trustee so elects, shall also include an administrative hearing on the record. Unless the trustee elects to have an administrative hearing on the record, the trustee shall be deemed to have exhausted all administrative remedies for purposes of this section if the agency fails to make a final agency decision within 90 days after the trustee requests administrative remedies. The Attorney General shall prescribe procedures to implement this paragraph.”

SEC. 2. EXPENSES OF STANDING TRUSTEES.

Section 586(e) of title 28, United States Code, is amended by adding at the end the following:

“(3) After first exhausting all available administrative remedies, an individual appointed under subsection (b) of this section may obtain judicial review of final agency action to deny a claim of actual, necessary expenses under this paragraph by commencing an action in the United States district court in the district where the individual resides.

“(4) The Attorney General shall prescribe procedures to implement this subsection.”

SEC. 3. PROCEDURES FOR AND STANDARD OF REVIEW.

Section 157 of title 28, United States Code, is amended—

(1) by redesignating subsections (d) and (e) as subsections (e) and (f), respectively, and

(2) by inserting after subsection (c) the following:

“(d) In conducting judicial review under section 586(d)(2) or section 586(e)(3) of this title, the district court shall determine whether to retain the case or to refer the case to a bankruptcy judge or magistrate judge in the district: *Provided, however,* That in any district where fewer than 3 bankruptcy judges have been appointed under section 152(a) of this title, a referral shall only be made to a United States magistrate judge in the district. Any bankruptcy judge or magistrate judge to whom a case is referred shall submit a recommendation for disposition to the district court based solely on a review of the administrative record before the agency, and a final order or judgment shall be entered by the district court after considering the bankruptcy judge’s or magistrate judge’s recommendation, and after reviewing those matters to which any party has timely and specifically objected. The decision of the agency shall be affirmed unless it is unreasonable and without cause based upon the administrative record before the agency.”

PURPOSE AND SUMMARY

H.R. 2592, as amended by an amendment in the nature of a substitute, creates a procedural mechanism for administrative and judicial review of certain decisions made by United States trustees with regard to their supervision of bankruptcy trustees, fiduciaries who administer bankruptcy cases. The bill permits an individual whose appointment to the trustee panel or as a standing trustee is terminated by the United States trustee or who ceases to be assigned cases by the United States trustee to obtain administrative review of such action, including an administrative hearing on the record, and review by the district court of a final agency decision. It also allows a standing trustee, after exhausting all available administrative remedies, to obtain district court review of a final

agency action denying a claim of actual, necessary expenses by such trustee. In addition, H.R. 2592 specifies the standard of judicial review and authorizes a district court to refer these matters for a recommendation to a bankruptcy judge or a magistrate judge in districts with at least three bankruptcy judges or to a magistrate judge in districts with less than three bankruptcy judges. Further, the bill directs the Attorney General to promulgate rules implementing its provisions concerning the suspension and termination of panel and standing trustees as well as its provisions concerning the expenses of standing trustees.

BACKGROUND AND NEED FOR THE LEGISLATION

BACKGROUND

The United States Trustee Program, a component of the Department of Justice, is charged with the administrative oversight of bankruptcy cases.¹ Created by Congress on a pilot basis in 1978,² the Program was thereafter expanded nationwide in 1986,³ with the exception of two states.⁴ Under the former Bankruptcy Act of 1898,⁵ bankruptcy judges—or referees as they were called prior to 1973—performed various administrative duties in addition to their judicial responsibilities. Included among their administrative responsibilities was the duty to appoint individuals to serve as trustees in bankruptcy cases and to award compensation to such individuals for their work as trustees.⁶ Based on their dual administrative and judicial roles, bankruptcy judges, under the former system, were often required to determine issues involving their appointed trustees. The necessarily close working relationship between the bankruptcy bench and trustees led to a widespread perception of cronyism and insider influence.⁷

¹28 U.S.C. § 586.

²Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

³Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (1986). Organizationally, the Program functions through 21 regions, each of which is headed by a United States trustee who is appointed by the Attorney General to serve a five-year term. 28 U.S.C. § 581.

⁴The nationwide expansion of the United States Trustee Program was not made effective in the judicial districts for the States of North Carolina and Alabama for a period of six years, unless such districts elected to make it effective prior thereto. Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986 § 302(d)(3), Pub. L. No. 99-554, 100 Stat. 3088, 3121 (1986). The period was extended pursuant to the Judicial Improvements Act of 1990 § 317(a), Pub. L. No. 101-650, 104 Stat. 5089, 5115 (1990).

⁵30 Stat. 544 (1898 as amended) (repealed 1978).

⁶*See, e.g.*, Bankruptcy Act of 1898 § 2(17), 11 U.S.C. § 11(17) (repealed 1978) (authorizing bankruptcy judges to appoint and remove trustees); former Fed. Bankr. R. 13-205(a)(1) (authorizing bankruptcy judges to appoint standing trustees and to terminate such appointments “at any time”); former Fed. Bankr. R. 13-209(b) (authorizing the bankruptcy judge to fix compensation of standing and other trustees). Bankruptcy judges under the former Bankruptcy Act were advised as follows:

Referees should carefully review expenses of Chapter XIII trustees to the end that such expenses shall be reasonable and necessary and exclude such items as bar association dues, association membership dues, travel and subsistence expenses incident to attending meetings of professional associations, entertainment, purchase of law books, subscriptions to publications, and the like. Referees should likewise periodically review the compensation allowance of the trustee to the end that it will be reasonable and not in excess of the maximum compensation of a full-time referee.

Manual for Bankruptcy Judges, Guideline Procedures for Chapter XIII Operations 1001.19 (Administrative Office of the U.S. Courts 3rd ed. 1974).

⁷*See, e.g.*, H.R. REP. NO. 95-595, at 91 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6052 (“As the administrator of bankruptcy cases, and the individual responsible for the supervision of the

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Congress responded to this problem by transferring the administrative responsibilities for bankruptcy cases to United States trustees,⁸ “to serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena.”⁹ As one of its “core functions,”¹⁰ the United States trustees were specifically given the authority to appoint trustees in bankruptcy cases and to supervise these individuals.¹¹

A bankruptcy trustee is a fiduciary who is “held to the highest standards of honesty.”¹² As the “representative” of a bankruptcy estate,¹³ a trustee can sue and be sued.¹⁴ The trustee must comply with any applicable State law in his or her administration of the bankruptcy case and is subject to all applicable Federal, State and local taxes.¹⁵

For consumer bankruptcy cases, there are two types of trustees. One type consists of individuals appointed by the United States trustee to serve on a “panel of private trustees” who are responsible for administering cases filed under chapter 7 of the Bankruptcy Code (a form of bankruptcy relief in which the debtor’s non-exempt assets are liquidated and distributed to the debtor’s credi-

trustee or debtor in possession, it is an easy matter for a bankruptcy judge to feel personally responsible for the success or failure of a case. . . . The institutional bias thus generated magnifies the likelihood of unfair decisions in the bankruptcy court[.]”); Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, at 93 (1973) (“When the referee has appointed, or approved the appointment of, a trustee to take charge of the property of the estate, has supervised and perhaps instructed the trustee in the performance of his duties, and has approved the trustee’s choice of counsel and the initiation of an action, the referee may not appear to the trustee’s adversary as one fitting the model of judicial objectivity. . . . [T]he Commission believes that making an individual responsible for conduct of both administrative and judicial aspects of a bankruptcy case is incompatible with the proper performance of the judicial function.”). As the Director of the Executive Office for United States Trustees explained at the hearing on H.R. 2592 before the Subcommittee on Commercial and Administrative Law:

The combination of the administrative and the judicial functions in bankruptcy court produced perceptions of improprieties and charges of cronyism, since trustees were considered court favorites and bankruptcy insiders. Those perceptions, those charges, plagued and diminished the system, and it diminished as well the bench and the bar who worked in bankruptcy law.

* * *

The structural separation of the judicial from the administrative work of the bankruptcy court is the foundation, the basic structural reason for much of the great progress made in preventing and eliminating cronyism and insiderism claims of the past.

Private Trustee Reform Act of 1997: Hearing on H.R. 2592 and Review of Post-Confirmation Fees in Chapter 11 Cases Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 105th Cong. 62 (1997) (statement of Joseph Patchan, Director, Executive Office for United States Trustees) [hereinafter “Hearing”].

⁸For example, United States trustees have the following responsibilities with regard to consumer bankruptcy cases:

- supervising the administration of these cases and monitoring their progress, 28 U.S.C. § 586(a)(3)(G);
- reviewing applications for compensation and reimbursement of expenses by professionals, including trustees, 28 U.S.C. § 586(a)(3)(A);
- notifying the United States Attorney about any criminal matters and assisting the United States Attorney in the prosecution of such matters, 28 U.S.C. § 586(a)(3)(F); and
- ensuring that monetary assets in a bankruptcy estate are properly secured and invested, 11 U.S.C. § 345, 28 U.S.C. § 586(a)(4).

⁹H.R. REP. NO. 95-595, at 88 (1977).

¹⁰*Hearing, supra* note 7, at 64 (prepared statement of Joseph Patchan, Director, Executive Office for United States Trustees).

¹¹28 U.S.C. § 586(a)(1), (3), (b).

¹²*Hearing, supra* note 7, at 64 (prepared statement of Joseph Patchan, Director, Executive Office for United States Trustees).

¹³11 U.S.C. § 323(a). This has been interpreted to mean that a trustee “represents all the creditors of the estate generally and is entitled to administer the property of the estate wherever located.” 3 COLLIER ON BANKRUPTCY ¶ 323.02[1], at 323-3 (Lawrence P. King *et al.* eds. 15th ed. rev. 1997).

¹⁴11 U.S.C. § 323(b), 28 U.S.C. § 959(a).

¹⁵28 U.S.C. § 959(b).

tors).¹⁶ Qualifications for panel membership are specified by regulation.¹⁷ Upon appointment to a panel, a trustee is assigned chapter 7 cases by the United States trustee to administer.¹⁸ Panel trustees are appointed for a one-year term, subject to renewal.¹⁹ As of 1997, there were approximately 1,200 panel trustees.²⁰

Another type of trustee consists of individuals appointed to administer chapter 13 (individual debt reorganization) and chapter 12 (family farmer) cases.²¹ In addition to performing many of the same duties as private trustees, these individuals, known as “standing trustees,” are responsible for collecting payments due under the debtor’s repayment plan and distributing these payments to the debtor’s creditors.²² A standing trustee’s compensation and expenses attributable to the trusteeship are fixed by the Attorney General.²³ These expenses are not case-specific, but relate

¹⁶ 28 U.S.C. § 586(a)(1); Authorization To Establish Panels of Private Trustees, 28 C.F.R. § 58.1 (1998).

¹⁷ Qualification for Membership on Panels of Private Trustees, 28 C.F.R. § 58.3 (1998).

¹⁸ 28 U.S.C. § 586(a)(1). The Bankruptcy Code specifies a chapter 7 trustee’s administrative duties:

- (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;
- (2) be accountable for all property received;
- (3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;
- (4) investigate the financial affairs of the debtor;
- (5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;
- (6) if advisable, oppose the discharge of the debtor;
- (7) unless the court orders otherwise, furnish such information concerning the estate and the estate’s administration as is requested by a party in interest;
- (8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and
- (9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

¹¹ U.S.C. § 704.

¹⁹ *Hearing, supra* note 7, at 98 (prepared statement of W. Steve Smith, President, National Association of Bankruptcy Trustees).

²⁰ *Hearing, supra* note 7, at 95 (testimony of Kevyn D. Orr, Deputy Director, Executive Office for United States Trustees).

²¹ 28 U.S.C. § 586(b). Qualifications for appointment are specified by regulation. Qualifications for Appointment as Standing Trustee and Fiduciary Standards, 28 C.F.R. § 58.4 (1998).

²² 11 U.S.C. § 1302 (b), (c).

²³ 28 U.S.C. § 586(e). Under this statutory scheme, a standing chapter 13 trustee, for example, is required to collect a “percentage fee” of up to ten percent from payments made by debtors pursuant to their repayment plans in cases that the trustee administers. 28 U.S.C. § 586(e)(1)(B)(i), (2). Out of this fee, the trustee is authorized to receive annual compensation in a specified amount as well as “actual, necessary expenses incurred by such individual as standing trustee.” 28 U.S.C. § 586(e)(1), (2)(B)(ii).

In the two states not included in the United States Trustee Program, the standing trustee is required to submit a budget report by a prescribed date to the Bankruptcy Administrator, who then must make a recommendation to the bankruptcy judge regarding the “setting of percentage fees, annual compensation, and other relevant expenditure requests.” Guidelines of the Director of the Administrative Office for United States Courts Relating to the Administration of the Bankruptcy Administrator Program, at II-V-6 (Mar. 1993).

to the operation of the trusteeship.²⁴ As of 1997, there were approximately 200 standing trustees.²⁵

The United States trustee is responsible for supervising a trustee's performance.²⁶ To this end, the United States Trustee Program has promulgated "initiatives" imposing stringent standards of accountability for these fiduciaries²⁷ who, in turn, are entrusted with the responsibility to administer billions of dollars in bankruptcy estate assets.²⁸ A trustee determined to be derelict in discharging his or her administrative or fiduciary duties may be suspended by the United States trustee from active case assignment until the problem is rectified.²⁹ In addition, the United States trustee may decline to reappoint a panel trustee upon the expiration of his or her one-year appointment.³⁰ These actions, however, only relate to the assignment of *future* cases. In contrast, a trustee may be removed from *pending* bankruptcy cases in which he or she is serving only by the court "for cause," after notice and hearing.³¹

NEED FOR THE LEGISLATION

H.R. 2592 was introduced on October 1, 1997 as the "Private Trustee Reform Act of 1997" by Representatives Bob Goodlatte (R-Va) (for himself and Representatives Lamar Smith (R-Tex.) and Bob Barr (R-Ga.)). At the subsequent hearing on this bill, Mr. Goodlatte explained that the legislation was intended "to restore fairness to a system in which the U.S. Trustee has unfettered dis-

²⁴Typical chapter 13 trustee budget expense items include, for example, office rent, employees' salaries and benefits, equipment purchases and maintenance (e.g., computers, photocopiers, postage meters), utility services (e.g., telephone, electricity), training, and travel. *Hearing, supra* note 7, at 77-78 (prepared statement of Ellen B. Vergos, United States Trustee—Region 8), 161 (response of Laurence P. Morin, President, Association of Bankruptcy Professionals, to Rep. Lamar Smith's questions for the record). Depending on the number of cases administered by a chapter 13 trustee, such trustee's annual expense budget can range from \$20,000 to \$2.7 million. *Id.* at 77-78.

²⁵*Hearing, supra* note 7, at 95 (remarks of Kevyn D. Orr, Deputy Director, Executive Office for United States Trustees).

²⁶28 U.S.C. § 586(a)(1), (3), (b).

²⁷As the result of one initiative, for example, the number of chapter 7 cases ten years old or more in 1992 was reduced from 4,000 to 171 as of 1997. *Hearing, supra* note 7, at 68 (statement of W. Clarkson McDow, Jr., United States Trustee—Region 4).

²⁸In 1996, for example, chapter 7, 12 and 13 trustees administered \$3.9 billion in estate assets. *Hearing, supra* note 7, at 64 (prepared statement of Joseph Patchan, Director, Executive Office for United States Trustees).

²⁹*See* Procedures for Suspension and Removal of Panel Trustees and Standing Trustees, 28 C.F.R. § 58.6 (1998). Reasons warranting suspension—as viewed by the United States Trustees—include the pendency of a criminal investigation concerning a trustee, failure to administer estate assets, an audit of the trustee's bankruptcy estate administrative operations indicating certain inadequacies, and excessive delay in closing cases, among other administrative reasons. *Hearing, supra* note 7, at 71 (statement of W. Clarkson McDow, Jr., United States Trustee—Region 4).

³⁰*See* Procedures for Suspension and Removal of Panel Trustees and Standing Trustees, 28 C.F.R. § 58.6 (1998). For example, a United States trustee may decide not to reappoint a panel trustee solely for managerial necessity, such as the need to reduce the size of a panel, given prevailing case filing rates. *See, e.g.*, Authorization To Establish Panels of Private Trustees, 28 C.F.R. § 58.1(b) (1998).

³¹11 U.S.C. § 324(a). Although the Bankruptcy Code does not define "for cause," the courts have interpreted this term to imply some degree of malfeasance. As COLLIER notes:

Causes for removal include situations in which the trustee is found to be incompetent or unwilling to perform the duties of a trustee; the trustee is not disinterested or holds an interest adverse to the estate; the trustee violates the fiduciary duty to the estate; and where the trustee is guilty of misconduct in office or personal misconduct.

Generally, the courts will not remove a trustee absent actual fraud or injury. A trustee will not be removed for mistakes in judgment where the judgment is discretionary and reasonable under the circumstances.

³ COLLIER ON BANKRUPTCY ¶ 324.02, at 324-3-4 (Lawrence P. King *et al.* eds. 15th ed. rev. 1997).

cretion to not only judge the appropriateness of expenses incurred by private trustees, but also . . . to cease assigning cases in the future” to such trustees.³² He noted, for example, that “[i]n many instances, private trustees are required to devote 100 percent of their time to their duties as trustees” and that when a United States trustee “decides to cease assigning cases to a private trustee, that private trustee is being deprived of his or her livelihood.”³³ Accordingly, these decisions, he observed, “should not be made lightly” and should be subject to judicial review.³⁴

Judicial Review of United States Trustee Decisions Regarding Future Case Assignments and Reappointment. Prior to the issuance of a regulation last year specifying the procedures for the suspension and termination of a trustee’s appointment,³⁵ the courts generally recognized that the United States trustee’s discretion with regard to future case assignments and reappointment decisions was not subject to judicial review.³⁶ Upon the promulgation of this rule, however, these decisions are now generally viewed as being subject to judicial review³⁷ in accordance with the Administrative Procedure Act.³⁸ Thus, they can be set aside if found to be arbitrary, capricious or an abuse of discretion, among other reasons.³⁹ *De novo* review, however, is not available.⁴⁰

At the October 9, 1997 hearing before the Subcommittee, various trustee representatives testified that neither the current law nor the recently promulgated rule protected their interests.⁴¹ As one

³²Hearing, *supra* note 7, at 9.

³³*Id.* at 8.

³⁴*Id.* at 9.

³⁵Procedures for Suspension and Removal of Panel Trustees and Standing Trustees, 28 C.F.R. § 58.6 (1998).

³⁶*See, e.g., Joelson v. United States*, 86 F.3d 1413, 1419 (6th Cir. 1996) (“Decisions regarding the discharge of private panel trustees from future case assignments are . . . committed to the discretion of the U.S. Trustees.”); *Richman v. Straley*, 48 F.3d 1139, 1143 (10th Cir. 1995) (“Because the standing trustee serves no definite term and Congress made no explicit provision to the contrary, the party with the power of appointment may terminate that appointment at any time by refusing to assign new cases to the standing trustee.”); *Shaltry v. United States*, 182 B.R. 836, 841 (D. Ariz. 1995) (noting that the statutory and legislative history indicated that “Congress intended to delegate decisions as to panel membership to the individual U.S. Trustees”), *aff’d*, 87 F.3d 1322 (9th Cir. 1996). Collier observes that panel membership “is not a property right or liberty interest” and, thus, the “due process clause of the Fifth Amendment does not apply when the United States trustee removes a trustee from a chapter 7 panel.” 1 COLLIER ON BANKRUPTCY ¶ 324.01 n. 2 (Lawrence P. King et al. eds. 15th ed. rev. 1997).

Procedures in effect in those states that are not included in the United States Trustee Program similarly provide that panel trustees who are not reappointed by a Bankruptcy Administrator have “no right to a hearing.” Practice and Procedures for Chapter 7 Trustees in Bankruptcy Administrator Districts, III-7 (Administrative Office of the United States Courts Jan. 1997).

³⁷Hearing, *supra* note 7, at 54–55 (statement of Professor Jeffrey Lubbers, Washington College of Law, American University, and former Research Director, Administrative Conference of the United States).

³⁸Pub. L. No. 89-554, 80 Stat. 381 (1966) (codified as amended in scattered sections of 5 U.S.C.).

³⁹5 U.S.C. § 706.

⁴⁰Hearing, *supra* note 7, at 94 (testimony of Joseph Patchan, Director, Executive Office for United States Trustees).

⁴¹*See, e.g., id.* at 97–98 (statement of W. Steve Smith, President, National Association of Bankruptcy Trustees), 127 (statement of Henry E. Hildebrand, III, National Association of Chapter 13 Trustees). One trustee explained:

The reasons we oppose this rule may be summarized as follows:

1. it does nothing more than “rubber stamp” lower level agency decisions;
2. the agency has uncontrolled authority for its decisions as to case termination having immediate affect [sic];
3. the criteria for termination are highly subjective and subject to arbitrary interpretation and abuse;

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trustee explained, “[P]anel trustees have become justifiably concerned with being removed from rotation, denied reappointment to the panel or otherwise denied cases without being afforded the opportunity to challenge the action being taken against them by the UST.”⁴² These representatives cited instances where the United States trustee abused its discretion in this area and intimidated trustees.⁴³ The United States trustee’s decisions in these matters were described as “far-reaching” as they threaten a trustee’s livelihood and present “a serious stigma of incompetence or wrongdoing.”⁴⁴ The trustee representatives also stated that the scope of judicial review, largely premised on determining whether the action was an “abuse of discretion,” was not “meaningful review.”⁴⁵ *Chapter 13 Trustee Expenses*. The Subcommittee heard testimony from trustees at its October 9, 1997 hearing on H.R. 2592 that United States trustees micromanage standing trustees’ budgets, substitute their judgment for that of the standing trustees,⁴⁶ and thereby restrict the ability of standing trustees to function and adversely impacts the bankruptcy system.⁴⁷ Examples of the types of disputes that can arise include the following:

the proper proration of expenses between the operation of the trusteeship (e.g., rent, use of a photocopier) and other activities that occur at that same location, such as the operation of the trustee’s law firm;

the amount of salary and benefit payments that should be paid to an employee of the trustee; and

4. the burden of proof is on the trustee to prove that the U.S. Trustee’s actions and opinions are unwarranted—in other words, the “accused” has to prove that he or she should neither be accused nor found “guilty”;

5. there is no meaningful, timely, affordable judicial review.

Id. at 165 (response of Laurence P. Morin, President, Association of Bankruptcy Professionals, to Rep. Lamar Smith’s questions for the record).

⁴²*Id.* at 98 (prepared statement of W. Steve Smith, President, National Association of Bankruptcy Trustees).

⁴³A poll conducted by the National Association of Bankruptcy Trustees indicated that 74 percent of the respondents “feared removal or non-reappointment if they opposed a UST directive, and nearly one-third felt they had been instructed to take a position that conflicted with their independent business judgment.” *Id.* at 98 (statement of W. Steve Smith, President, National Association of Bankruptcy Trustees). A standing trustee recounted instances of “de facto removals” where the United States trustee ceased assigning cases to trustees. *Id.* at 164–66 (responses of Laurence P. Morin, President, Association of Bankruptcy Professionals, to Rep. Lamar Smith’s questions for the record).

⁴⁴*Id.* at 99 (prepared statement of W. Steve Smith, President, National Association of Bankruptcy Trustees); *see id.* at 105 (prepared statement of Laurence P. Morin, President, National Association of Bankruptcy Trustees) (“The lifeblood of a trustee’s business is the assignment of new cases.”).

⁴⁵*Id.* at 101 (prepared statement of W. Steve Smith, President, National Association of Bankruptcy Trustees).

⁴⁶As one standing trustee observed:

[T]he U.S. Trustee has developed a practice of not supervising, but of imposing the agency’s judgment over expenses to be incurred by the standing trustee, for example:

(1.) rental of office space, including but not limited to the location, type of property, number of square feet per case, per employee, or both;

(2.) personnel decisions such as: who should be hired to serve as an employee, what qualifications are too much or not enough, how much employees should be paid, what type(s) and amounts of benefits should be provided, job descriptions and training requirements[.]

Id. at 106 (prepared statement of Laurence P. Morin, President, Association of Bankruptcy Professionals).

⁴⁷*See, e.g., id.*, 129 (prepared statement of Henry E. Hildebrand, III, National Association of Chapter 13 Trustees).

whether the trustee's provision of certain services not specifically related to his or her statutory duties is a proper expense item that should be compensated.⁴⁸

While the United States trustee representatives testified at the Subcommittee hearing that these disputes were typically handled within the United States Trustee Program through an informal dispute resolution process,⁴⁹ the trustees did not concur that the Program had such procedures.⁵⁰

Amendment in the Nature of a Substitute to H.R. 2592. As introduced, H.R. 2592 consisted of two substantive components. First, the bill would have allowed a private trustee to obtain administrative review of a decision by a United States trustee to cease assigning cases to such trustee and, after an opportunity for an administrative hearing on the record, to obtain judicial review by a bankruptcy court of the final administrative disposition. Second, the bill would have permitted a standing trustee, after an administrative hearing on the record, to have a bankruptcy court determine the actual, necessary expenses of such trustee.

The Amendment in the nature of a substitute to H.R. 2592 reflects a compromise between the private trustees and the United States trustees that resolves some of the most contentious issues with respect to the assignment of future cases and expense requests of standing trustees. It establishes a procedural mechanism for administrative and judicial review that balances the parties respective interests. In addition, it allows interstitial details concerning the Amendment's implementation to be defined through the promulgation of rules by the Attorney General.

HEARINGS

On October 9, 1997, the Committee's Subcommittee on Commercial and Administrative Law held a hearing on H.R. 2592 in conjunction with a review of postconfirmation fees in chapter 11 cases. In connection with H.R. 2592, 12 witnesses testified: Congressman Bob Goodlatte, Representative from the State of Virginia; Ford Elsaesser, Vice President for Research, American Bankruptcy Institute; Henry R. Hildebrand, III, National Association of Chapter 13 Trustees; United States Bankruptcy Judge Frank W. Koger, President, National Conference of Bankruptcy Judges; Professor Jeffrey Lubbers of Washington College of Law, American University; W. Clarkson McDow, Jr., United States Trustee for Region 4; Laurence P. Morin, President, Association of Bankruptcy Professionals; Professor Jeffrey W. Morris, University of Dayton Law School, on behalf of the National Bankruptcy Conference; Kevyn D. Orr, Deputy

⁴⁸ See, e.g., Administrative Oversight in the Bankruptcy System: Who Should Guard the Hen House? 106-110 (American Bankruptcy Institute 1995).

⁴⁹ See, e.g., *Hearing, supra* note 7, at 80-86 (prepared statement of Ellen B. Vergos, United States Trustee—Region 8).

⁵⁰ A standing trustee explained:

Please do not be misled by any representations by the U.S. Trustee that there are procedures to resolve disputes. . . . [T]he current process necessitates that the private trustee . . . capitulate to the decision of the U.S. Trustee or the requested expense item will be disallowed. In many instances, even if the expense was necessary for the trustee operation or reasonable by criteria other than those applied by the U.S. Trustee, the private trustees have been required to pay the expense from personal funds.

Id. at 162 (response of Laurence P. Morin, President, Association of Bankruptcy Professionals, to Rep. Lamar Smith's questions for the record).

Director, Executive Office for United States Trustees; Joseph Patchan, Director, Executive Office for United States Trustees; W. Steve Smith, President, National Association of Bankruptcy Trustees; and Ellen B. Vergos, United States Trustee for Region 8.

COMMITTEE CONSIDERATION

On April 30, 1998, the Subcommittee on Commercial and Administrative Law met in open session and ordered reported favorably the bill H.R. 2592, without amendment, by voice vote, a quorum being present. Thereafter, the Committee met in open session on July 21, 1998 and ordered reported favorably the bill, with an amendment in the nature of a substitute, by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

There were no recorded votes.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2592, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 27, 1998.

Hon. HENRY J. HYDE,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2592, the Private Trustee Reform Act of 1997.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman, who can be reached at 226–2860.

Sincerely,

JUNE E. O'NEILL, *Director*.

Enclosure.

cc: Hon. John Conyers, Jr.,
Ranking Minority Member.

H.R. 2592—Private Trustee Reform Act of 1997

CBO estimates that implementing H.R. 2592 would result in no significant impact on the federal budget. Because this bill could affect direct spending, pay-as-you-go procedures would apply, but CBO expects that any such effects would be negligible. H.R. 2592 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would have no impact on the budgets of state, local, or tribal governments.

The Executive Office for United States Trustees (U.S. Trustees) is responsible for administering and supervising private trustees. H.R. 2592 would enable private trustees to seek judicial review when disputes arise over actions taken by the executive office with regard to expenses of trustees and their assignment to and removal from cases. Based on information from the U.S. Trustees, CBO estimates that fewer than 20 cases involving such disputes would occur each year and that only a few such cases would eventually lead to judicial review. Thus, CBO estimates that enacting H.R. 2592 would not impose any significant additional costs on the federal court system and the U.S. Trustees.

Expenses associated with private trustees are paid through bankruptcy fees, and any fees not used by the private trustees are paid to the U.S. Trustee System Fund as offsetting collections. To the extent that access to the judicial process provided by this bill might enable private trustees to prevail in disputes regarding expenses, the U.S. Trustee System Fund could receive fewer offsetting collections. This potential loss of collections would reduce the amounts available for spending by the U.S. Trustees, but would result in no net change in outlays from direct spending. Furthermore, CBO expects that any loss of offsetting collections would not be significant because so few cases would reach judicial review each year.

The staff contact for this estimate is Susanne S. Mehlman, who can be reached at 226–2860. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to Rule XI, clause 2(1)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8, clause 4 and Article III, section 2, clause 1 of the Constitution.

SECTION-BY-SECTION ANALYSIS

Section 1. Suspension and Termination of Panel Trustees and Standing Trustees. Section 1 adds a provision to section 586(d) of

title 28 of the United States Code permitting a panel or standing trustee to obtain administrative and judicial review of United States trustee actions terminating such trustee's appointment or the assignment of cases to such trustee. The intent of this section is to trigger, where applicable, provisions of the Administrative Procedure Act ("APA").⁵¹

With regard to the trustee's administrative remedies, this provision allows the trustee to require the agency to hold an administrative hearing on the record.⁵² Where the trustee does not elect to have an administrative hearing on the record, such trustee will be deemed to have exhausted all administrative remedies if the agency fails to make a final agency decision within 90 days after the trustee requests administrative review.

Upon exhaustion of his or her administrative remedies, the trustee may commence an action in the United States district court where the trustee resides. The applicable procedures and standard of review are specified in section 3 of the bill.

This section also requires the Attorney General to prescribe procedures to implement its provisions.

Section 2. Expenses of Standing Trustees. Section 2 amends section 586(e) of title 28 of the United States Code to allow a standing trustee to obtain administrative and judicial review of a decision by the United States trustee denying such trustee's request for actual, necessary expenses. The intent of this section is to trigger, where applicable, provisions of the APA. Upon exhaustion of all available administrative remedies, the trustee may obtain judicial review of the final agency action by commencing an action in a United States district court located in the district where the trustee resides. Section 3 of the bill prescribes the applicable procedures and standard of review for this action.

This section also requires the Attorney General to prescribe procedures to implement its provisions.

Section 3. Procedures for and Standard of Review. Section 3 amends section 157 of title 28 of the United States Code to specify the procedures for judicial review as provided under sections 1 and 2 of the bill. This section permits a district court to retain an action described in sections 1 or 2 of the bill or to refer it to a bankruptcy or magistrate judge,⁵³ if there are three or more bankruptcy judges serving in the district. If there are less than three bankruptcy judges serving in the district, the district court may retain the action or refer it to a magistrate judge. Upon referral, the bankruptcy or magistrate judge must submit a recommendation for disposition to the district court that is based solely on a review of the agency's administrative record. The district court is required to enter a final order or judgment after considering the referring judge's rec-

⁵¹Pub. L. No. 89-554, 80 Stat. 381 (1966) (codified as amended in scattered sections of 5 U.S.C.).

⁵²An agency decision determined on the record after opportunity for an agency hearing, 5 U.S.C. § 554(a), triggers a trial-type hearing that must be conducted by the agency, agency members or an administrative law judge, 5 U.S.C. § 556(b). Other procedural safeguards include certain notice requirements, 5 U.S.C. § 554(b); the opportunity to supplement the agency's hearing record, 5 U.S.C. § 554(c); prohibition of *ex parte* communications, 5 U.S.C. § 554(d); opportunity to be represented by counsel, 5 U.S.C. § 555(b); and other trial-type protections (e.g., depositions, subpoenas, alternative dispute resolution, official transcript), 5 U.S.C. §§ 555, 556.

⁵³The Committee contemplates that in most instances these matters will be referred to a bankruptcy judge, unless the district court determines such referral to be inappropriate.

ommendation and any matters to which a party has specifically objected.

With regard to the standard of review, Section 3 requires the final agency decision to be affirmed unless it is (1) unreasonable and (2) without cause based upon the agency’s administrative record.⁵⁴ It is not the intent of the Committee that courts, in reviewing final agency decisions, should be restricted to interpretations of similar language in the Bankruptcy Code in applying this standard. The standard also is not intended to be synonymous with the arbitrary and capricious standard under the APA.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

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PART I—ORGANIZATION OF COURTS

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CHAPTER 6—BANKRUPTCY JUDGES

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§ 157. Procedures

(a) * * *

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(d) In conducting judicial review under section 586(d)(2) or section 586(e)(3) of this title, the district court shall determine whether to retain the case or to refer the case to a bankruptcy judge or magistrate judge in the district: Provided, however, That in any district where fewer than 3 bankruptcy judges have been appointed under section 152(a) of this title, a referral shall only be made to a United States magistrate judge in the district. Any bankruptcy judge or magistrate judge to whom a case is referred shall submit a recommendation for disposition to the district court based solely on a review of the administrative record before the agency, and a final order or judgment shall be entered by the district court after considering the bankruptcy judge’s or magistrate judge’s recommendation, and after reviewing those matters to which any party has timely and specifically objected. The decision of the agency shall be affirmed unless it is unreasonable and without cause based upon the administrative record before the agency.

⁵⁴As originally introduced, H.R. 2592’s standard of judicial review for case assignment decisions was whether the United States trustee “acted unreasonably or without cause.”

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

[(e)] (f) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

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PART II—DEPARTMENT OF JUSTICE

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CHAPTER 39—UNITED STATES TRUSTEES

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§ 586. Duties; supervision by Attorney General

(a) * * *

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(d)(1) The Attorney General shall prescribe by rule qualifications for membership on the panels established by United States trustees under paragraph (a)(1) of this section, and qualifications for appointment under subsection (b) of this section to serve as standing trustee in cases under chapter 12 or 13 of title 11. The Attorney General may not require that an individual be an attorney in order to qualify for appointment under subsection (b) of this section to serve as standing trustee in cases under chapter 12 or 13 of title 11.

(2) *A trustee whose appointment to the panel or as a standing trustee is terminated or who ceases to be assigned to cases filed under title 11 may obtain judicial review of the final agency decision by commencing an action in the United States district court for the district in which the panel member or standing trustee resides, after first exhausting all available administrative remedies, which if the trustee so elects, shall also include an administrative hearing on the record. Unless the trustee elects to have an administrative hearing on the record, the trustee shall be deemed to have exhausted all administrative remedies for purposes of this section if the agency fails to make a final agency decision within 90 days after the trustee requests administrative remedies. The Attorney General shall prescribe procedures to implement this paragraph.*

(e)(1) * * *

* * * * *

(3) *After first exhausting all available administrative remedies, an individual appointed under subsection (b) of this section may obtain judicial review of final agency action to deny a claim of actual, necessary expenses under this paragraph by commencing an action*

in the United States district court in the district where the individual resides.

(4) The Attorney General shall prescribe procedures to implement this subsection.

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